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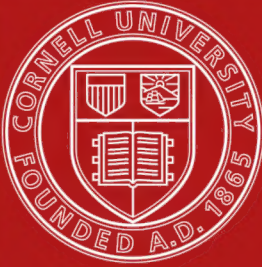
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SUPPLEMENT  
TO THE  
AMERICAN AND ENGLISH  
ENCYCLOPÆDIA OF LAW  
(SECOND EDITION)

EDITED BY  
DAVID S. GARLAND AND CHARLES PORTERFIELD  
UNDER THE SUPERVISION OF  
JAMES COCKCROFT

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VOLUME I.

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## HOW TO USE THE SUPPLEMENT.

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THE titles of the articles and defined words and phrases are repeated in the order in which they are to be found in the AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW, Second Edition. At the top of each page are given the name of the subject and the pages thereof which are supplemented by reference to and statement of the late cases. Thus :

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**956-961**

*AGENCY.*

Vol. I.

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at the top of a page signifies that pages 956 to 961 of the article "Agency" in the first volume of the Second Edition are supplemented.

In both text and notes the catch lines which appear in the Second Edition are here repeated in connection with new cases, thereby denoting that such new cases support the statement of law made in the text or notes of the Second Edition under the corresponding catch line.

The large heavy-faced figures refer to the pages of the volume of the Second Edition. The smaller figure following the page number in the notes refers to the original note numbered by that same figure on that page. Thus, a note numbered **950. 2.**, with cases cited, indicates that those cases support the proposition to which the cases in note 2 on page 950 were cited.

In some instances the new cases have necessitated the writing of new text, and the fact that such text is new is indicated by inclosing it with brackets. In the notes great freedom has been indulged in stating new illustrations and applications.

The omission of a title that appeared in the Second Edition implies that no new cases on that subject have been found.





# SUPPLEMENT

TO THE

## American and English Encyclopædia of Law

(SECOND EDITION.)

1. **A.** — See note 1.

**ABANDON.** — See note 2.

2. See note 1.

1. 1. **Used as an Equivalent of "The."** — See *Wastl v. Montana Union R. Co.*, 24 Mont. 159.

**"A Marriage."** — In an action for annulment of marriage it was contended that "*a* marriage," as used in Civ. Code Cal., § 82, providing that *a* marriage may be annulled for certain causes, meant only that for one of those causes a marriage ceremony may be annulled, but that, if a plaintiff admits the existence of marriage without the *a*, he cannot invoke the remedy provided by that section. The court said: "We see no such distinction in the code. Marriage means, generally, a certain existing relation or status, and *a* marriage can mean nothing more than this same status as existing between two particular persons." *Linebaugh v. Linebaugh*, 137 Cal. 26.

**"A Judge."** — The adjective *a*, commonly called the "indefinite article," because it does not define any particular person or thing, is entirely too indefinite, when used in a state constitution providing that "the state shall be divided into convenient circuits, each circuit to be made up of contiguous counties, for each of which circuits *a* judge shall be elected," to define or limit the number of judges which the legislative wisdom may provide for the judicial circuits of the state. *State v. Martin*, 60 Ark. 343.

1 Supp of L.—1

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2. **Abandonment of Goods in Bonded Warehouse.** — *Anglo-California Bank v. Secretary of Treasury*, (C. C. A.) 76 Fed. Rep. 749.

2. 1. *Barnett v. Dickinson*, 93 Md. 267, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1, 2; *Canton Co. v. Baltimore, etc.*, R. Co., 99 Md. 202; *Cassell v. Crothers*, 193 Pa. St. 363, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1, 2; *Scott v. Moore*, 98 Va. 687, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1, 2. See also *Nichols v. Lantz*, 9 Colo. App. 1; *Hough v. Brown*, 104 Mich. 113; *Merchants' Nat. Bank v. Greenhood*, 16 Mont. 395.

**Intent — Questions of Law and Fact.** — *Kansas City, etc., R. Co. v. Wagand*, 134 Ala. 392; *Gassert v. Noyes*, 18 Mont. 216; *Farmers' Irrigation Dist. v. Frank*, (Neb. 1904) 100 N. W. Rep. 286; *Lockhart v. Wills*, 9 N. Mex. 344.

**Abandonment Distinguished from Gift, or Barter, or Surrender.** — *Burdick v. Cameron*, 10 N. Y. App. Div. 589.

**Abandonment of Children.** — *Gay v. State*, 105 Ga. 599.

**Abandonment in the Sense of Desertion.** — *Simon v. Simon*, (N. Y. Super. Ct. Eq. T.) 15 Misc. (N. Y.) 515.

**Personal Property.** — *Kansas City, etc., R. Co. v. Wagand*, 134 Ala. 392, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 2.



# ABANDONMENT AND TOTAL LOSS

## (IN MARINE INSURANCE).

BY E. C. ELLSBREE.

**5. I. DEFINITION.** — See note 2.

**6. III. TOTAL LOSS — 1. Divisions of the Subject.** — See note 2.

**2. Actual Total Loss — a. DEFINITION.** — See note 3.

**b. DESTRUCTION OF OBJECT INSURED — (1) General Principles.** —

See notes 5, 7.

**7. c. TOTAL LOSS TO INSURED — (1) General Principles.** — See note 2.

**8. (2) Sale by Necessity.** — See note 2.

**9. (4) Particular Cases — (a) Memorandum Articles.** — See note 1.

**10.** See note 2.

**11. (c) Freight.** — See note 2.

**12. (d) Total Loss Only.** — See note 2.

**d. TOTAL LOSS WITH BENEFIT OF SALVAGE.** — See note 6.

**13. 3. Constructive Total Loss — a. DEFINITION.** — See note 1.

**b. CRITERIA — (2) Quantum of Damage — (a) English Rule.** — See note 2.

**(b) American Rule.** — See note 3.

**5. 2.** The C. F. Bielman, 108 Fed. Rep. 878, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 5.

**6. 2.** Western Assur. Co. v. Poole, (1903) 1 K. B. 376.

**3.** Soelberg v. Western Assur. Co., 119 Fed. Rep. 23, 55 C. C. A. 601.

**Notice of Abandonment Not Required in Case of Actual Total Loss.** — The Livingstone, 122 Fed. Rep. 278.

**The Sinking of a Ship** constitutes an actual total loss, and such total loss is not converted into a partial loss by the subsequent raising of the ship by the underwriter. *Sailing Ship Blairmore Co. v. Macredie*, (1898) A. C. 593.

**5. When Subject-matter Loses Its Form and Species.** — *Asfar v. Blundell*, (1896) 1 Q. B. 123.

**7. Cargo.** — If the thing insured is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss. *Asfar v. Blundell*, (1896) 1 Q. B. 123.

**7. 2. Illustrations — Loss of Cargo.** — Where a portion of the cargo is recovered in a condition to be transhipped, and suitable for the purposes for which it was originally intended, although not so suitable as it would have been if it had not been submerged in the sea, there is no absolute total loss. *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 106 Fed. Rep. 116.

**Capture.** — A ship abandoned on the high seas was picked up and towed to Brazil, where she was placed in the hands of the court for the enforcement of salvage claims. These claims were paid by the underwriters. The Brazilian court thereupon sold both ship and cargo, and the underwriters were held liable for a total

loss without any allowance for the amount paid for salvage. *Buchanan v. London, etc., Marine Ins. Co.*, 65 L. J. Q. B. 92.

**8. 2.** Nova Scotia Marine Ins. Co. v. Churchill, 26 Can. Sup. Ct. 65.

**9. 1.** Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, affirming 106 Fed. Rep. 116, (C. C. A.) 82 Fed. Rep. 296; *Devitt v. Providence Washington Ins. Co.*, 173 N. Y. 17.

**10. 2.** Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, affirming 106 Fed. Rep. 116, (C. C. A.) 82 Fed. Rep. 296.

**11. 2.** Trinder v. Thames, etc., Marine Ins. Co., (1898) 2 Q. B. 114, 78 L. T. N. S. 485.

**12. 2.** Insurance Co. of North America v. Canada Sugar-Refining Co., (C. C. A.) 87 Fed. Rep. 491, reversed on another point 175 U. S. 609.

**6.** Louisville Ins. Co. v. Monarch, 99 Ky. 578.

**13. 1.** Insurance Co. of North America v. Canada Sugar-Refining Co., (C. C. A.) 87 Fed. Rep. 491, reversed on another point 175 U. S. 609; *Soelberg v. Western Assur. Co.*, 119 Fed. Rep. 23, 55 C. C. A. 601; *Devitt v. Providence Washington Ins. Co.*, 61 N. Y. App. Div. 390; *McLain v. British, etc., Marine Ins. Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 336.

**Necessity of Notice of Abandonment.** — There can be no constructive total loss where no notice of abandonment is given. *Western Assur. Co. v. Poole*, (1903) 1 K. B. 383; *Nova Scotia Marine Ins. Co. v. Churchill*, 26 Can. Sup. Ct. 65.

**2. Ship.** — See *Trinder v. Thames, etc., Marine Ins. Co.*, (1898) 2 Q. B. 114, 78 L. T. N. S. 485; *Sailing Ship Blairmore Co. v. Macredie*, (1898) A. C. 593.

**3. One-half Loss to Ship.** — *Jones v. Western*

**14.** (3) *Imminence of Peril*. — See note 1.

**16.** (4) *Loss of Adventure — Inability to Repair*. — See note 1.

**17.** *c.* COMPUTATION — (2) *Expense of Repairs and Transshipment*. — See note 3.

**19.** IV. RIGHT OF ABANDONMENT — 1. Election to Abandon. — See notes 2, 3.

**20.** 2. Limitations of the Right — *b.* PERIL WITHIN POLICY. — See note 1.

**21.** *c.* DEPENDS ON STATE OF FACTS. — See note 3.

*d.* RIGHT OF INSURER TO REPAIR. — See note 4.

**23.** 3. When Abandonment Is Justified — *a.* GENERAL PRINCIPLES. — See note 1.

**24.** *b.* PARTICULAR CASES — (1) *Capture, Embargo, and Blockade* — (a) In General. — See note 1.

**25.** (2) *Loss and Retardation of Voyage*. — See note 4.

Assur. Co., 198 Pa. St. 206; Insurance Co. of North America v. Canada Sugar-Refining Co., (C. C. A.) 87 Fed. Rep. 491, reversed on another point 175 U. S. 609.

**Cargo.** — Devitt v. Providence Washington Ins. Co., 61 N. Y. App. Div. 390; Insurance Co. of North America v. Canada Sugar-Refining Co., (C. C. A.) 87 Fed. Rep. 491, reversed on another point 175 U. S. 609; Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1.

**14.** 1. Test of the Prudent Owner. — Sailing Ship Blairmore Co. v. Macredie, (1898) A. C. 593; Angel v. Merchants Marine Ins. Co., (1903) 1 K. B. 811. See also Cunningham v. Maritime Ins. Co., (1899) 2 Ir. 257, distinguishing Roux v. Salvador, 3 Bing. N. Cas. 266, 32 E. C. L. 110.

**16.** 1. Sea damage which cannot be repaired at a port within two thousand miles, and then only at a cost which exceeds the value of the ship, justifies an abandonment. Trinder v. Thames, etc., Marine Ins. Co., (1898) 2 Q. B. 114, 78 L. T. N. S. 485.

The frustration of the undertaking insured justifies an abandonment. Musgrave v. Mannheim Ins. Co., 32 Nova Scotia 405.

**An Exception in a Policy** that the insurer shall be free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise, includes a case where the object of the voyage is frustrated by the combined effect of the breaking of a shaft, which is a peril of the sea, and the loss of time consequent thereon. Bensusan v. Thames, etc., Marine Ins. Co., (1897) 1 Q. B. 29.

**17.** 3. Expenses Incurred on Account of Cargo. — Where a policy provided that in determining the amount of loss "expenses incurred on account of the cargo or any part thereof" should be excluded, expenses incurred in removing part of the cargo, that the vessel might float, were for the benefit of the vessel as well as the cargo, and they should not be excluded. Harvey v. Detroit F. & M. Ins. Co., 120 Mich. 601.

**19.** 2. Western Assur. Co. v. Poole, (1903) 1 K. B. 376.

**In Case of Undervalued Policy.** — Abandonment must be the voluntary act of the assured. The demand and receipt of the full amount of the policy value on a policy undervaluing the ship does not of itself import any abandonment. In such a case the owner may repair and retain his ship, and recover of the insurers for the repairs up to the full policy valuation. This

rule is of great importance on largely undervalued policies, since otherwise on partial losses the assured would often be unable to recover his full insurance without a sacrifice of the ship. The St. Johns, 101 Fed. Rep. 469.

**3. Exception to Rule.** — Where a policy provided that there could be no abandonment except in case of absolute total loss, it was not necessary, in case of constructive total loss, to prove abandonment. McLain v. British, etc., Marine Ins. Co., (Supm. Ct. App. T.) 16 Misc. (N. Y.) 336; Devitt v. Providence Washington Ins. Co., 61 N. Y. App. Div. 390, affirmed 173 N. Y. 17.

**Where Abandonment of No Benefit to Insurer.** — An abandonment is indispensable in all cases of constructive total loss, except in those where it could not possibly be of any benefit to the insurer. Insurance Co. of North America v. Canada Sugar-Refining Co., (C. C. A.) 87 Fed. Rep. 491, reversed on another point 175 U. S. 609.

**20.** 1. Soelberg v. Western Assur. Co., 119 Fed. Rep. 23, 55 C. C. A. 601.

**21.** 3. Sailing Ship Blairmore Co. v. Macredie, (1898) A. C. 593, 79 L. T. N. S. 217.

**4. Right of Underwriter to Repair.** — In England it has been held that, where a vessel has sunk and notice of abandonment has been given, the insurer cannot reduce a total loss to a partial loss by raising and repairing such vessel. Sailing Ship Blairmore Co. v. Macredie, (1898) A. C. 593, 79 L. T. N. S. 217.

**23.** 1. Where the cost of repairs exceeds one-half of the value of the boat, and hence, under the provisions of the policy, there is a total loss, the insured is justified in abandoning the boat, and in claiming the full amount of the policy. Jones v. Western Assur. Co., 198 Pa. St. 206.

**24.** 1. Valid Abandonment Not Defeated by Subsequent Restoration. — Ruys v. Royal Exch. Assur. Corp., (1897) 2 Q. B. 135, 77 L. T. N. S. 23.

**25.** 4. Insurance on Cargo for Voyage. — Musgrave v. Mannheim Ins. Co., 32 Nova Scotia 405.

A constructive total loss of cargo may arise by the loss of the ship under circumstances amounting to the destruction of the contemplated adventure, when no part of the cargo can be forwarded by a substituted ship except at a cost beyond the value of the goods. In-

- 26.** (3) *Stranding and Submersion*. — See note 3.  
**27.** (4) *Sale by Necessity*. — See notes 2, 3.  
 (5) *Freight*. — See note 4.  
**29.** (6) *Profits*. — See notes 1, 2.  
 (8) *Total Loss of Part of Cargo*. — See note 5.  
**31.** 4. *Notice of Abandonment* — *c.* FORM AND SUFFICIENCY. — See note 1.  
**32.** *d.* TIME OF NOTICE. — See notes 2, 3.  
**35.** 5. *Acceptance* — *b.* WHAT AMOUNTS TO ACCEPTANCE. — See note 2.  
**36.** 6. *Effect of Abandonment* — *a.* GENERAL PRINCIPLES. — See note 4.

insurance Co. of North America *v.* Canada Sugar-Refining Co., (C. C. A.) 87 Fed. Rep. 491, *reversed* on another point in 175 U. S. 609.

**26.** 3. *Submerged Vessel Raised*. — See *Sailing Ship Blairmore Co. v. Macredie*, (1898) A. C. 593, 67 L. J. P. C. 96, 79 L. T. N. S. 217.

**Attempt to Recover Cargo Abandoned**. — Where the insurers determined to try to recover the cargo of a sunken vessel, but afterwards abandoned the project, and its situation was such that there was no reasonable probability that it could be recovered after the company withdrew the men and means provided for the purpose, the insured was justified in abandoning the property then submerged. *Louisville Ins. Co. v. Monarch*, 99 Ky. 578.

**Vessel Stranded Six Months**. — Under a rule of a marine insurance company providing that a stranded vessel which is not saved within six months may be considered as a constructive total loss, the fact that the vessel might be saved at a future date does not prevent the operation of the rule. *Rowland, etc., Steamship Co. v. Maritime Ins. Co.*, 6 Com. Cas. (Eng.) 160.

**27.** 2. *Nova Scotia Marine Ins. Co. v. Churchill*, 26 Can. Sup. Ct. 65.

**3. Impossibility of Obtaining Means of Repair at Point of Distress**. — *Nova Scotia Marine Ins. Co. v. Churchill*, 26 Can. Sup. Ct. 65. See also *Angel v. Merchant's Marine Ins. Co.*, (1903) 1 K. B. 811.

**4. Vessel Disabled — Cargo Delivered in Another Vessel**. — Where the disabling of a vessel necessitates the transshipment of the cargo, it being of a perishable nature, a constructive total loss of freight results. *Musgrave v. Mannheim Ins. Co.*, 32 Nova Scotia 405.

**29.** 1. The fact that a portion of the cargo was delivered to the insured, not in the ordinary course of the voyage, but by the insurer of the cargo, after a practical abandonment, and through a settlement as upon a total loss, in which such portion was received in part payment, will not prevent a recovery for a total loss of profits. *Canada Sugar Refining Co. v. Insurance Co. of North America*, 175 U. S. 609, *reversing* (C. C. A.) 87 Fed. Rep. 491.

**2. When Abandonment Necessary**. — In case of total loss of insurance on profits no abandonment is necessary. *Canada Sugar-Refining Co. v. Insurance Co. of North America*, 82 Fed. Rep. 757, 175 U. S. 609.

An actual partial loss of profits cannot be made total by abandonment. *Insurance Co. of North America v. Canada Sugar-Refining Co.*, (C. C. A.) 87 Fed. Rep. 491, *reversed* on another point 175 U. S. 609.

**5. Canton Ins. Office v. Woodside, (C. C. A.) 90 Fed. Rep. 301.**

**Articles Separately Valued**. — There may be a loss of a portion of goods of the same species, shipped in separate packages and separately valued. *Singer Mfg. Co. v. Western Assur. Co.*, 10 Quebec Super. Ct. 379.

**Effect of Agreement**. — The parties may modify the terms of their contract of insurance by agreeing that an entire loss or destruction of part of the goods, of the same species, shipped and insured in bulk, shall be treated as a total loss, and be recoverable for as a total loss. *Mowat v. Boston Marine Ins. Co.*, 26 Can. Sup. Ct. 47.

**31.** 1. *Must Be Absolute and Explicit*. — *Insurance Co. of North America v. Johnson*, 70 Fed. Rep. 794, 37 U. S. App. 413.

**Statement of Interest Conveyed**. — It is not necessary that an abandonment should state with mathematical exactness the interest conveyed. *Insurance Co. of North America v. Johnson*, 70 Fed. Rep. 794, 37 U. S. App. 413.

**Waiver of Objection to Form of Abandonment**. — *Insurance Co. of North America v. Johnson*, 70 Fed. Rep. 794, 37 U. S. App. 413.

**32.** 2. *Excusable Delay*. — The act of the insurer in ignoring an informal tender of abandonment and disclaiming any liability whatever sufficiently excuses any more formal tender at the time. *De Farconnet v. Western Ins. Co.*, 110 Fed. Rep. 405.

**3. Further Authorities**. — *Harvey v. Detroit F. & M. Ins. Co.*, 120 Mich. 601.

**35.** 2. *When Evidence Sufficient*. — Where the insurer refuses to accept abandonment, and there is no ambiguity in its attitude, and what is done is no more than it has a right to do under the sue and labor clause of the policy without incurring liability, such acts cannot be construed as an acceptance of abandonment. *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, *affirming* (C. C. A.) 82 Fed. Rep. 296. See also *Soelberg v. Western Assur. Co.*, 119 Fed. Rep. 23, 55 C. C. A. 601.

**Repairing**. — Where the underwriters take possession of a ship, incompletely repair her, and then allow her to be sold for the cost of those repairs, there is a sufficient acceptance of an abandonment. If these acts are not an acceptance they constitute a conversion of the ship, and this latter precludes a claim of non-acceptance. *McLeod v. Insurance Co. of North America*, 34 Nova Scotia 88.

**36.** 4. *The Red Sea*, (1896) P. 20; *Mason v. Marine Ins. Co.*, 110 Fed. Rep. 452, 49 C. C. A. 106, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36.



**37.** See note 1.

**38.** See notes 1, 2.

**39.** See note 1.

**40.** *b.* APPORTIONMENT OF FREIGHT. — See note 1.

**37. 1. Rights to Which Insurer Succeeds — Compensation from Tortfeasor.** — *Mason v. Marine Ins. Co.*, 110 Fed. Rep. 452, 49 C. C. A. 106, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36.

*Rights of Action.* — *The Livingstone*, 122 Fed. Rep. 278.

**38. 1.** *Mason v. Marine Ins. Co.*, 110 Fed. Rep. 452, 49 C. C. A. 106, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36.

**Coinsurer's Liability.** — *Gilchrist v. Chicago Ins. Co.*, (C. C. A.) 104 Fed. Rep. 566.

**2.** *The Red Sea*, (1896) P. 20; *Mason v. Marine Ins. Co.*, 110 Fed. Rep. 452, 49 C. C. A. 106, *quoting* 1 AM. AND ENG. ENCYC. OF LAW, (2d ed.) 36; *Gilchrist v. Chicago Ins. Co.*, (C. C. A.) 104 Fed. Rep. 566.

**39. 1.** *Mason v. Marine Ins. Co.*, 110 Fed. Rep. 452, 49 C. C. A. 106.

**Contra.** — *Harvey v. Detroit F. & M. Ins. Co.*, 120 Mich. 601.

**40. 1. English Rule as to Freight.** — See *The Red Sea*, (1896) P. 20.

# ABATEMENT OF LEGACIES.

By P. B. MCKENZIE.

**42. I. DEFINITION.** — See note 1.

**II. RESIDUARY LEGACIES** — General Rule. — See note 2.

**43. Annuity Takes Precedence.** — See note 1.

**45. III. GENERAL LEGACIES** — 1. The General Rule. — See note 3.

**46. 2. Circumstances Influencing Application of Doctrine** — *a.* BOUNTY. — See notes 1, 2.

**48. [Bequest to Brother.** — See note 1*a.*]

*b.* CONSIDERATION. — See note 7.

**50. [Relinquishment of Interest in Land a Sufficient Consideration.** — See note 1*a.*]

**51. Rights Must Subsist at Time of Testator's Death.** — See note 2.

*c.* INTENT — Intent to Create Priority Must Be Clear. — See note 6.

**42. 1.** See *Golder v. Chandler*, 87 Me. 63; *Martin*, Petitioner, 25 R. I. 1.

Where the testatrix had only a power of appointment over a fund it will not be abated to supply a deficiency of her estate to pay legacies. *White v. Massachusetts Institute of Technology*, 171 Mass. 84.

**2. No Abatement of General and Specific Legacies in Favor of Residuary Legacies** — *England.* — *In re Bawden*, (1894) 1 Ch. 693.

*Iowa.* — *Newcomb v. Fitch*, 98 Iowa 175.

*Kentucky.* — *Louisville Presb. Theological Seminary v. Fidelity Trust, etc., Vault Co.*, 113 Ky. 336.

*Massachusetts.* — *Porter v. Howe*, 173 Mass. 521.

*Pennsylvania.* — *In re Howell*, 16 Montg. Co. Rep. (Pa.) 89; *Barrett's Estate*, 22 Pa. Super. Ct. 74.

*Rhode Island.* — *Lyon v. Brown University*, 20 R. I. 53; *Martin*, Petitioner, 25 R. I. 1.

**43. 1. Priority of Annuities.** — *Porter v. Howe*, 173 Mass. 521, to same effect as *In re Tootal*, 2 Ch. D. 628, cited in original note.

**45. 3. Loring v. Thompson**, 184 Mass. 103; *Matter of Bialostosky*, (Surrogate Ct.) 27 Misc. (N. Y.) 716; *Matter of Hinman*, (Surrogate Ct.) 32 Misc. (N. Y.) 536; *Lyons v. Steinhardt*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 628; *Matter of Merritt*, 86 N. Y. App. Div. 179, affirmed 176 N. Y. 608; *Heath v. McLaughlin*, 115 N. Car. 398; *Nickerson v. Bragg*, 21 R. I. 296, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 45.

**Illustrations.** — A bequest was made to a city to provide for keeping up a cemetery lot, and it was held to be a general legacy, and subject to abatement. *Ellis v. Aldrich*, 70 N. H. 219. But see *infra*, 51. 2. *Consideration Arising After Testator's Death.*

**In Case of a Deficiency of Assets to Pay Debts.** — *In re Hooven*, 15 Montg. Co. Rep. (Pa.) 200.

**Annuity Abates Proportionately with Other General Legacies.** — *Matter of Hinman*, (Surrogate Ct.) 32 Misc. (N. Y.) 536.

**46. 1. Where Bequest a Mere Bounty.** — *Porter v. Howe*, 173 Mass. 521; *Matter of*

*Hinman*, (Surrogate Ct.) 32 Misc. (N. Y.) 536; *Lyons v. Steinhardt*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 628; *Matter of Merritt*, 86 N. Y. App. Div. 179, affirmed 176 N. Y. 608.

**2. Effect of Near Relationship, Dependence, Etc.** — *Matter of Bialostosky*, (Surrogate Ct.) 27 Misc. (N. Y.) 716; *Bixenstein's Estate*, 6 Pa. Dist. 19.

**48. 1*a.* Bequest to Brother.** — *Matter of Hinman*, (Surrogate Ct.) 32 Misc. (N. Y.) 536.

**7. To Wife in Lieu of Dower.** — *Ellis v. Aldrich*, 70 N. H. 219; *Dunning v. Dunning*, 82 Hun (N. Y.) 462; *Forepaugh's Estate*, 199 Pa. St. 484; *Bailey's Estate*, 23 Pa. Co. Ct. 139.

**Where the Widow Elects.** — *Collins v. Cloyd*, (Ky. 1895) 29 S. W. Rep. 735; *Baptist Female University v. Borden*, 132 N. Car. 476; *Latta v. Brown*, 96 Tenn. 343.

**50. 1*a.* Henry's Estate**, 20 Pa. Co. Ct. 415.

**51. 2. Consideration Arising After Testator's Death.** — A bequest to a cemetery providing for the care of lots will not be abated. *Matter of Hinman*, (Surrogate Ct.) 32 Misc. (N. Y.) 536. But see *supra*, 45. 3. *Illustrations.*

A bequest for the saying of masses will not be abated. *Sherman v. Baker*, 20 R. I. 613, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 51.

**6. California.** — *Matter of Ross*, 140 Cal. 282. *Delaware.* — *Hoffecker v. Clark*, 6 Del. Ch. 125.

*Illinois.* — *Rexford v. Bacon*, 195 Ill. 70.

*Louisiana.* — *Shaffer's Succession*, 50 La. Ann. 601.

*Maryland.* — *Chester County Hospital v. Hayden*, 83 Md. 104; *Sykes v. Van Bibber*, 88 Md. 98.

*Montana.* — *In re Phillip*, 18 Mont. 311.

*New York.* — *Matter of Bialostosky*, (Surrogate Ct.) 27 Misc. (N. Y.) 716; *Morse v. Tilden*, 74 N. Y. App. Div. 132, modifying (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 560; *Matter of Brown*, (Surrogate Ct.) 42 Misc. (N. Y.) 444.

*Pennsylvania.* — *In re Howell*, 16 Montg. Co. Rep. (Pa.) 89.

*Rhode Island.* — *Martin*, Petitioner, 25 R. I. 1.

*Canada.* — *Re Dunn*, 7 Ont. L. Rep. 560.

**Presumption of Intended Equality.** — *Porter v.*

**52.** Burden of Proof. — See note 1.

Use of Certain Terms. — See note 2.

**53.** Testator Supposing There Will Be Sufficiency. — See notes 3, 4.

**54.** 3. Annuities — Annuity Charged on Personalty. — See note 3.

**55.** See note 4.

**56.** IV. SPECIFIC AND DEMONSTRATIVE LEGACIES — 1. In General. — See note 3.

**57.** See note 1.

**58.** See note 1.

**59.** See note 1.

2. Specific Bequest of All the Testator's Personal Property. — See note 2.

3. Fund Given in Fractional Parts. — See note 3.

Howe, 173 Mass. 521, to same effect as *Richardson v. Hall*, 124 Mass. 228, cited in original note.

**52.** 1. Burden of Proof upon Party Seeking Preference. — *Re Waddell*, 29 Nova Scotia 19.

2. Use of the Word "Imprimis" and the Like. — *Lindsay v. Waldbrook*, 24 Ont. App. 604.

**53.** 3. Shaffer's Succession, 50 La. Ann. 601; *Chester County Hospital v. Hayden*, 83 Md. 104.

**4.** Where Testator Constitutes Two Residues. — A bequest of a specific amount was made to a legatee payable on his attaining a certain age, with proviso that if he died before attaining that age the legacy was to be divided among five others — four to receive specific amounts, the fifth the residue. A subsequent clause of the will gave one-half of the residue of the estate to the same legatee on the same terms. The legatee died without issue before attaining the specified age, and it was held that the specific sums bequeathed the four out of the first fund should be paid in full and prior to any payment to the fifth. *Sykes v. Van Bibber*, 88 Md. 98.

**54.** 3. Annuity Charged on Personalty a General Legacy. — *In re Baum*, 15 Montg. Co. Rep. (Pa.) 58.

**55.** 4. But see *In re Metcalf*, (1903) 2 Ch. 424.

**56.** 3. General Legacies Abate Before Specific. — *Angus v. Noble*, 73 Conn. 56; *Porter v. Howe*, 173 Mass. 521; *Nowack v. Berger*, 133 Mo. 24, 54 Am. St. Rep. 663; *Moore's Estate*, 6 Pa. Dist. 245; *Jervis v. Ferris*, 23 Pa. Co. Ct. 142.

General Legacies Abate Before Demonstrative Legacies. — *Baptist Female University v. Borden*, 132 N. Car. 476.

Demonstrative Legacies Abate Before Specific Legacies. — *Dunn v. Renick*, 40 W. Va. 349.

**57.** 1. *In re Maddock*, (1902) 2 Ch. 220, 71 L. J. Ch. 567; *In re Roberts*, (1902) 2 Ch. 834.

Specific devisees and legatees. — *In re Bawden*, (1894) 1 Ch. 693, to same effect as *Maybury v. Grady*, 67 Ala. 147, cited in the original note.

"It is a general rule that specific legacies do not abate with or contribute to general legacies. There are exceptions, as where the whole estate is given in specific legacies and then a pecuniary legacy is given, or where an intention that the specific legacies shall abate appears in the will." *Heath v. McLaughlin*, 115 N. Car. 398.

Testatrix took, without adoption, a two-year-old child, cared for him and received the fruits of his labor during minority, lived with him a number of years in a home he had built partly with money loaned by her and which loan was evidenced by a bond secured by mortgage on the house. She bequeathed the bond and mortgage to this quasi-adopted son, and certain bank deposits to relatives, and it was held that the bequest to the son did not abate. *Matter of Brown*, (Surrogate Ct.) 42 Misc. (N. Y.) 444.

Devise in Lieu of Dower. — *Dunning v. Dunning*, 82 Hun (N. Y.) 462.

**58.** 1. *Hibler v. Hibler*, 104 Mich. 274; *Coapland v. Lake*, 9 Tex. Civ. App. 39; *Dunford v. Jackson*, (Va. 1895) 22 S. E. Rep. 853.

**59.** 1. *Matter of Warner*, (Surrogate Ct.) 39 Misc. (N. Y.) 432.

2. *White v. Massachusetts Institute of Technology*, 171 Mass. 84.

3. *Shaffer's Succession*, 50 La. Ann. 601; *M. E. Church v. Hebard*, 28 N. Y. App. Div. 548; *Barrett's Estate*, 22 Pa. Super. Ct. 74.

# ABATEMENT OF NUISANCES.

BY O. D. ESTEE.

**64. II. ABATEMENT BY PROCESS OF LAW**—1. Civil Proceedings—*b. SUIT IN EQUITY*—(1) *When Equity Will Interfere*.—See note 5.

**65.** See note 1.

**66.** See note 2.

**68.** Must Be Substantial Injury. — See note 1.

**69.** Injunction — When Granted. — See notes 2, 3.

**64. 5. Equitable Relief.**—*United States*.—*Robinson v. Baltimore, etc., R. Co., (C. C. A.)* 129 Fed. Rep. 753.

*Alabama*.—*Hundley v. Harrison*, 123 Ala. 292. *Louisiana*.—*Board of Aldermen v. Norman*, 51 La. Ann. 736, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 65; *State v. King*, 105 La. 731.

*Maryland*.—*Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441.

*Michigan*.—*Mt. Clemens v. Mt. Clemens Sanitarium Co.*, 127 Mich. 115.

*Missouri*.—*Zugg v. Arnold*, 75 Mo. App. 68.

*New Jersey*.—*Seastream v. New Jersey Exhibition Co., (N. J. 1904)* 58 Atl. Rep. 532.

*New York*.—*Rosenheimer v. Standard Gas Light Co.*, 39 N. Y. App. Div. 482.

*Tennessee*.—*Weakley v. Page*, 102 Tenn. 178.

*Texas*.—*Hockaday v. Wortham*, 22 Tex. Civ. App. 419.

*Wisconsin*.—*Rude v. St. Marie*, 121 Wis. 634.

**Statutory Remedy at Law and Remedy in Equity Concurrent.**—*Hill v. McBurney Oil, etc., Co.*, 112 Ga. 788.

**Pesthouse.**—Equity will enjoin the erection of a pesthouse near a public school. *Youngstown Tp. v. Youngstown*, 25 Ohio Cir. Ct. 518.

**65. 1. Private Nuisances.**—*Peek v. Roe*, 110 Mich. 52.

**Privy.**—*Radican v. Buckley*, 138 Ind. 582; *Finkelstein v. Huner*, 77 N. Y. App. Div. 424.

**Noise.**—Where a glass factory was erected beside a hotel, rendering its rooms untenable on account of the deafening noise and the smoke, it was held that this constituted a continuing private nuisance which equity would abate. *Leeds v. Bohemian Art Glass Works*, 63 N. J. Eq. 619.

In *Feeney v. Bartoldo*, (N. J. 1895) 30 Atl. Rep. 1101, an injunction was granted to restrain the playing of a piano in a saloon after nine p. m., as the music and singing in the late hours of the night disturbed the sleep of the occupants of an adjoining dwelling.

**Sewerage.**—*Waycross v. Houk*, 113 Ga. 963; *Winchell v. Waukesha*, 110 Wis. 101, 84 Am. St. Rep. 902.

**Smoke, Steam, Cinders, Etc.**—*McMarran v. Fitzgerald*, 106 Mich. 649; *McClung v. North Bend Coal, etc., Co.*, 6 Ohio Cir. Dec. 243, 9 Ohio Cir. Ct. 259; *Sullivan v. Jones, etc., Steel Co.*, 208 Pa. St. 540; *Faulkenbury v. Wells*, 28 Tex. Civ. App. 621.

The plaintiff owned an ice field and brought an action to restrain the defendants, who operated a cement factory near by, from so conducting their business as to cast cinders and soot

upon his ice field and so destroying the ice. It was held that the injunction should be granted. *American Ice Co. v. Catskill Cement Co., (Supm. Ct. Spec. T.)* 43 Misc. (N. Y.) 221.

**Dam.**—*Masonic Temple Assoc. v. Banks*, 94 Va. 695.

**Oyster Bed.**—In *Powell v. Wilson*, 85 Md. 347, equity took jurisdiction of a suit to compel the defendant to remove his oyster bed from the plaintiff's land.

**Cemetery.**—In the case of *Lowe v. Prospect Hill Cemetery Assoc.*, 58 Neb. 94, it was held that equity would enjoin the location of a cemetery in close proximity to private dwellings where it would contaminate the water in the wells. Compare *Elliott v. Ferguson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 56.

**Obstruction of Private Way.**—*Reese v. Wright*, 98 Md. 272.

**Hospital.**—*Deaconess Home, etc., v. Bontjes*, 207 Ill. 553.

**66. 2. Establishment of Right at Law.**—*Deaconess Home, etc., v. Bontjes*, 104 Ill. App. 484; *McWethy v. Aurora Electric Light, etc., Co.*, 202 Ill. 218; *Flood v. Consumers Co.*, 105 Ill. App. 559; *Sterling v. Littlefield*, 97 Me. 479; *Read v. Edna Cotton Mills*, 136 N. Car. 342; *Shaw v. Queen City Forging Co.*, 10 Ohio Dec. 107, 7 Ohio N. P. 254.

**68. 1. Must Be Substantial Injury**—*Massachusetts*.—*Downing v. Elliott*, 182 Mass. 28.

*Missouri*.—*Tanner v. Wallbrunn*, 77 Mo. App. 262.

*New Jersey*.—*H. B. Anthony Shoe Co. v. West Jersey R. Co.*, 57 N. J. Eq. 607.

*New York*.—*Farrell v. New York Steam Co., (Supm. Ct. Spec. T.)* 23 Misc. (N. Y.) 726; *Smith v. Ingersoll-Sergeant Rock Drill Co., (C. Pl. Gen. T.)* 12 Misc. (N. Y.) 5.

*Ohio*.—*Shaw v. Queen City Forging Co.*, 10 Ohio Dec. 107, 7 Ohio N. P. 254.

*Oklahoma*.—*West v. Ponca City Milling Co.*, 14 Okla. 646.

*Pennsylvania*.—*Miller v. Schindle*, 15 Pa. Co. Ct. 341; *Scott v. Houpt*, 8 Kulp (Pa.) 42.

*Wisconsin*.—*Ryan v. Schwartz*, 94 Wis. 403.

**69. 2. Shroyer v. Campbell, 31 Ind. App. 83; *State v. King*, 105 La. 731.**

**3. Legal Remedy Must Be Inadequate**—*District of Columbia*.—*Johnson v. Baltimore, etc., R. Co.*, 4 App. Cas. (D. C.) 491.

*Illinois*.—*Nelson v. Milligan*, 151 Ill. 462; *Chicago, etc., R. Co. v. Gardner*, 66 Ill. App. 44.

*Maine*.—*Tracy v. Le Blanc*, 89 Me. 304.

*Nebraska*.—*Lowe v. Prospect Hill Cemetery Assoc.*, 58 Neb. 94.

**70.** See notes 1, 2, 3.

**71.** See note 1.

(2) *Who May Maintain a Bill.* — See notes 3, 4.

*North Carolina.* — *Reyburn v. Sawyer*, 135 N. Car. 328, 102 Am. St. Rep. 555.

*Ohio.* — *Cline v. Kirkbride*, 12 Ohio Cir. Dec. 517, 22 Ohio Cir. Ct. 527.

*Pennsylvania.* — *O'Neil v. McKeesport*, 201 Pa. St. 386.

*Wisconsin.* — *Ryan v. Schwartz*, 94 Wis. 403.

In *State v. Ohio Oil Co.*, 150 Ind. 21, it was held that the mere fact that the state could prosecute the defendant at law and recover fines for the maintenance of a public nuisance did not deprive equity of power to abate the nuisance.

**An Occupation of Land by Gypsies and Other Persons** who cause a nuisance to the neighborhood has been held sufficient to cause an injunction to be granted restraining the owner of the land from allowing it to be so occupied. *Atty.-Gen. v. Stone*, 60 J. P. 168.

**Foul Odors.** — In *Lefrois v. Monroe County*, 24 N. Y. App. Div. 421, it was held that equity would enjoin the defendant from fertilizing a farm by using the sewage of its almshouse, as the sewage polluted the air and also the waters of a stream that the plaintiff used.

**Gambling House.** — In *State v. Patterson*, 14 Tex. Civ. App. 465, it was held that equity would not restrain the running of a gambling house, even though it was a public nuisance, because there was an adequate remedy at law.

**70.** 1. *England.* — *Bartlett v. Marshall*, 44 W. R. 251, 60 J. P. 104.

*Alabama.* — *Dennis v. Mobile, etc., R. Co.*, 137 Ala. 649, 97 Am. St. Rep. 69.

*Georgia.* — *Hill v. McBurney Oil, etc., Co.*, 112 Ga. 788.

*Kansas.* — *Douglass v. Leavenworth*, 6 Kan. App. 96.

*Kentucky.* — *Palestine Bldg. Assoc. v. Minor*, (Ky. 1905) 86 S. W. Rep. 695.

*Maine.* — *Sterling v. Littlefield*, 97 Me. 479.

*Maryland.* — *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441; *Reese v. Wright*, 98 Md. 272.

*Missouri.* — *Scheurich v. Southwest Missouri Light Co.*, (Mo. App. 1905) 84 S. W. Rep. 1003.

*New York.* — *Friedman v. Columbia Machine Works, etc.*, 99 N. Y. App. Div. 504; *Warren v. Parkhurst*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 466.

*North Carolina.* — See *Read v. Edna Cotton Mills*, 136 N. Car. 342.

*Pennsylvania.* — *Sullivan v. Jones, etc., Steel Co.*, 208 Pa. St. 540.

*South Carolina.* — *Threatt v. Brewer Min. Co.*, 49 S. Car. 95.

*Tennessee.* — *Pierce v. Gibson County*, 107 Tenn. 224, 89 Am. St. Rep. 946.

In *England* an injunction has been granted restraining horse races on Sunday where the noise and disturbance continually interfered with the peace and quiet of residents and worshipers in the neighborhood. *Dewar v. City, etc., Racecourse Co.*, (1899) 1 Ir. 345.

**Frequent Recurrence of Injury as Ground for Equity Jurisdiction.** — *Ecton v. Lexington, etc., R. Co.*, (Ky. 1899) 53 S. W. Rep. 523.

**2. Quantum of Damage.** — *Ryan v. Schwartz*, 94 Wis. 403.

**Actual Structural Damages** to property are not essential to the issuance of an injunction where it is shown that, as a result of the nuisance, the property is frequently rendered almost uninhabitable, and that the comfort and health of the occupants are at all times materially interfered with. *Hopkin v. Hamilton Electric Light, etc., Co.*, 2 Ont. L. Rep. 240, affirmed 4 Ont. L. Rep. 258.

**Actual Injury or Danger to Health** need not be shown as a prerequisite to the issuance of an injunction to restrain the continuance of a nuisance causing serious annoyance to persons in the neighborhood. *Atty.-Gen. v. Keymer Brick, etc., Co.*, 67 J. P. 434.

**3. Balancing Conveniences.** — *Riedeman v. Mt. Morris Electric Light Co.*, 56 N. Y. App. Div. 23; *Madison v. Duckstown Sulphur, etc., Co.*, (Tenn. 1904) 83 S. W. Rep. 658.

**71.** 1. *Shaw v. Queen City Forging Co.*, 10 Ohio Dec. 107, 7 Ohio N. P. 254.

**3. Private Nuisance.** — *Waycross v. Houk*, 113 Ga. 963.

**4. Public Nuisance** — *California.* — *Siskiyou Lumber, etc., Co. v. Rostel*, 121 Cal. 511.

*District of Columbia.* — *Dewey Hotel Co. v. U. S. Electric Lighting Co.*, 17 App. Cas. (D. C.) 356.

*Georgia.* — *Savannah, etc., R. Co. v. Gill*, 118 Ga. 737; *Coker v. Atlantic, etc., R. Co.*, 51 S. E. Rep. 481.

*Illinois.* — *Chicago Gen. R. Co. v. Chicago, etc., R. Co.*, 181 Ill. 605; *Crane Co. v. Stammers*, 83 Ill. App. 329; *Kuhn v. Illinois Cent. R. Co.*, 111 Ill. App. 323.

*Indiana.* — *State v. Ohio Oil Co.*, 150 Ind. 21.

*Iowa.* — *Millhiser v. Willard*, 96 Iowa 327.

*Kansas.* — *Douglass v. Leavenworth*, 6 Kan. App. 96.

*Kentucky.* — *Beckham v. Brown*, (Ky. 1897) 40 S. W. Rep. 684.

*Michigan.* — *Water Com'rs v. Detroit*, 117 Mich. 458.

*Mississippi.* — *Pascagoula Boom Co. v. Dixon*, 77 Miss. 587, 78 Am. St. Rep. 537.

*Missouri.* — *Baker v. McDaniel*, 178 Mo. 447.

*New York.* — *Dimon v. Shewan*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 72; *Old Forge Co. v. Webb*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 316; *Black v. Brooklyn Heights R. Co.*, 32 N. Y. App. Div. 468; *Jencks v. Miller*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 461.

*North Carolina.* — *Reyburn v. Sawyer*, 135 N. Car. 328, 102 Am. St. Rep. 555.

*Pennsylvania.* — *Christian v. Dunn*, 8 Kulp (Pa.) 320.

*Utah.* — *Stockdale v. Rio Grande Western R. Co.*, (Utah 1904) 77 Pac. Rep. 849.

*Washington.* — *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821; *Smith v. Mitchell*, 21 Wash. 536, 75 Am. St. Rep. 858.

*Wisconsin.* — *State v. Milwaukee*, 102 Wis. 509.

*Canada.* — *Adami v. Montreal*, 25 Quebec Super. Ct. 1.



**73.** See note 1.

**75.** (3) *Delay and Acquiescence.* — See notes 1, 2, 3.

**76.** (4) *Decree Must Not Be Too Broad.* — See note 2.

In England the attorney-general, or a person suffering particular damage, may maintain a bill for an injunction restraining the continuance of the nuisance. *Atty.-Gen. v. Heatley*, (1897) 1 Ch. 560, 76 L. T. N. S. 174; *Tottenham Urban Dist. Council v. Williamson*, (1896) 2 Q. B. 353, 75 L. T. N. S. 238; *Wallasey Local Board v. Gracey*, 36 Ch. D. 593.

**Obstruction of Vested Right.** — Where a public nuisance results in the obstruction of a vested right, the owner may maintain a bill to abate it. *Ryan v. Schwartz*, 94 Wis. 403.

**Loud Noises and Offensive Odors.** — *Fisher v. Zumwalt*, 128 Cal. 493; *Hill v. McBurney Oil, etc., Co.*, 112 Ga. 788; *Percival v. Yousling*, 120 Iowa 451.

**Erection of Dam.** — A dam was erected across a stream and this produced an outbreak of malaria in the family of the complainant. This was held to be such a special injury as would enable him to maintain a bill to have the nuisance abated. *Richards v. Daugherty*, 133 Ala. 569.

**Where a Stagnant Pool of Water Causes Sickness** in a man's family it is a special injury which will enable him to maintain an action to have it abated. *Savannah, etc., R. Co. v. Parish*, 117 Ga. 893.

**Obstructions on Highways** — *Alabama.* — *Whaley v. Wilson*, 112 Ala. 627.

*Indiana.* — *Martin v. Marks*, 154 Ind. 549; *O'Brien v. Central Iron, etc., Co.*, 158 Ind. 218, 92 Am. St. Rep. 305.

*Maryland.* — *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441.

*New Jersey.* — *Cronin v. Bloembecke*, 58 N. J. Eq. 313.

*New York.* — *Eldert v. Long Island Electric R. Co.*, 28 N. Y. App. Div. 451; *Finegan v. Eckerson*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 574; *Van Siclen v. New York*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 403.

*Tennessee.* — *Richi v. Chattanooga Brewing Co.*, 105 Tenn. 651.

**Beer Garden.** — *Kissell v. Lewis*, 156 Ind. 233.  
**House of Ill Fame.** — *Weakley v. Page*, 102 Tenn. 178; *Blagen v. Smith*, 34 Oregon 394; *Ingersoll v. Rousseau*, 35 Wash. 92.

**Concert Saloon.** — Equity will enjoin the operation of a concert saloon conducted in a noisy and offensive manner, at the suit of parties affected thereby. *Koehl v. Schoenhausen*, 47 La. Ann. 1316.

**Sunday Ball Game.** — In *Gilbough v. West Side Amusement Co.*, 64 N. J. Eq. 27, it was held that the noise attendant upon a Sunday baseball game was a public nuisance and inflicted such special injury upon one living near by as to enable him to maintain an action for its abatement.

**73. 1. Nuisances Purely Public** — *England.* — *Atty.-Gen. v. Heatley*, (1897) 1 Ch. 560.

*United States.* — *U. S. v. Debs*, 64 Fed. Rep. 724; *Lowndale v. Gray's Harbor Boom Co.*, 117 Fed. Rep. 983.

*California.* — *People v. Truckee Lumber Co.*,

116 Cal. 397, 58 Am. St. Rep. 183; *Fisher v. Zumwalt*, 128 Cal. 493.

*District of Columbia.* — See *Johnson v. Baltimore, etc., R. Co.*, 4 App. Cas. (D. C.) 491.

*Georgia.* — *Cannon v. Merry*, 116 Ga. 291.

*Indiana.* — *State v. Ohio Oil Co.*, 150 Ind.

21; *Martin v. Marks*, 154 Ind. 549.

*Kansas.* — See *State v. Missouri Pac. R. Co.*, (Kan. 1905) 81 Pac. Rep. 212.

*Kentucky.* — *Dulaney v. Louisville, etc., R. Co.*, 100 Ky. 628.

*New Jersey.* — *H. B. Anthony Shoe Co. v. West Jersey R. Co.*, 57 N. J. Eq. 607.

*New York.* — *Gallagher v. Keating*, 40 N. Y. App. Div. 81.

*Washington.* — *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821.

*West Virginia.* — *Wees v. Coal, etc., R. Co.*, 54 W. Va. 421.

*Wisconsin.* — *State v. Milwaukee*, 102 Wis. 509.

**Suit Brought by Municipal Corporation.** — *San Francisco v. Buckman*, 111 Cal. 25; *Coast Co. v. Spring Lake*, 56 N. J. Eq. 615, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 73, 74; *Hempstead v. Ball Electric Light Co.*, 9 N. Y. App. Div. 48; *Belton v. Central Hotel Co.*, (Tex. Civ. App. 1895) 33 S. W. Rep. 297; *Belton v. Baylor Female College*, (Tex. Civ. App. 1896) 33 S. W. Rep. 680.

**Suit Not Maintainable by Individual in Absence of Special Injury** — *California.* — *Spring Valley Water Works v. Fifield*, 136 Cal. 14.

*Illinois.* — *Guttery v. Glenn*, 201 Ill. 275.

*Kansas.* — *Jones v. Chanute*, 63 Kan. 243.

*Massachusetts.* — *Winthrop v. New England Chocolate Co.*, 180 Mass. 464.

*Minnesota.* — *Gundlach v. Hamm*, 62 Minn. 42.

*Nebraska.* — *Hill v. Pierson*, 45 Neb. 503.

*New Jersey.* — *Humphreys v. Eastlack*, 63 N. J. Eq. 136.

*Ohio.* — *Mondle v. Toledo Plow Co.*, 9 Ohio Dec. 281, 6 Ohio N. P. 294.

*Pennsylvania.* — *Rhymer v. Fretz*, 206 Pa. St. 230, 98 Am. St. Rep. 777.

*Utah.* — *Stockdale v. Rio Grande Western R. Co.*, (Utah 1904) 77 Pac. Rep. 849.

**75. 1. Cloverdale v. Smith**, 128 Cal. 230; *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441; *Faulsenbury v. Wells*, 28 Tex. Civ. App. 621.

**2. Delay Accompanied with Acquiescence.** — *Louisville, etc., R. Co. v. Daugherty*, (Ky. 1896) 36 S. W. Rep. 5.

**3. Expensive Erections.** — *Madison v. Duckstown Sulphur, etc., Co.*, (Tenn. 1904) 83 S. W. Rep. 658.

**76. 2. Decree and Action Thereunder.** — *Cronin v. Bloembecke*, 58 N. J. Eq. 313; *Schaub v. Perkinson Bros. Constr. Co.*, (Mo. App. 1904) 82 S. W. Rep. 1094; *Pierce v. Gibson County*, 107 Tenn. 224, 89 Am. St. Rep. 946; *McGregor v. Camden*, 47 W. Va. 193.

**Injunction Against Manner of Carrying on Business.** — *Miller v. Edison Electric Illuminating Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N.

- 76.** 2. Criminal Proceedings — *a.* GENERALLY. — See note 3.  
**78.** *b.* EXTENT OF ABATEMENT. — See note 3.  
**79.** III. ABATEMENT WITHOUT PROCESS OF LAW — 1. By Private Individuals  
 — *b.* WHO MAY ABATE — A Private Nuisance. — See notes 3, 4.  
**80.** See note 1.  
**83.** *c.* LIMITATIONS UPON RIGHT OF ABATEMENT. — See note 1.  
**85.** See note 1.  
**86.** See note 3.  
**87.** 2. By Municipal Corporations — *a.* SOURCE OF POWER. — See notes 1, 3.  
**88.** *b.* EXTENT OF POWER. — See note 1.  
**89.** See note 1.  
**92.** See notes 1, 2.  
**93.** *c.* METHOD OF ABATEMENT. — See notes 2, 3.  
**94.** Notice. — See note 2.  
**95.** See note 1.  
*d.* LIABILITY OF MUNICIPALITY. — See notes 2, 3.  
**96.** See note 1.

Y.) 664; *Chamberlain v. Douglas*, 24 N. Y. App. Div. 582; *Shaw v. Queen City Forging Co.*, 10 Ohio Dec. 107, 7 Ohio N. P. 254.

**76.** 3. Judgment — What May Embrace. — *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415; *People v. Pelton*, 36 N. Y. App. Div. 450.

**78.** 3. Gambling Paraphernalia may be destroyed by the state in order to abate a public nuisance. *Woods v. Cottrell*, 55 W. Va. 476.

**79.** 3. Private Nuisance Abatable by Person Aggrieved. — *McKeesport Sawmill Co. v. Pennsylvania Co.*, 122 Fed. Rep. 184.

**4.** *People v. Severance*, 125 Mich. 556; *Chillicothe v. Bryan*, 103 Mo. App. 409; *Priewe v. Fitzsimons, etc., Co.*, 117 Wis. 497.

**80.** 1. Public Nuisance from Which One Sustains Special Injury. — *People v. Severance*, 125 Mich. 556.

**83.** 1. *People v. Severance*, 125 Mich. 556.

**85.** 1. Abatement Must Not Be Excessive. — *Chillicothe v. Bryan*, 103 Mo. App. 409.

**86.** 3. Public Peace Must Not Be Disturbed. — *People v. Severance*, 125 Mich. 556.

**87.** 1. Source of Municipal Power over Nuisances. — *Rund v. Fowler*, 142 Ind. 214; *Sprigg v. Garrett Park*, 89 Md. 406; *Cartwright v. Cohoes*, 39 N. Y. App. Div. 69; *Lorimier v. Beaudoin*, 9 Quebec Super. Ct. 222.

**3.** When Implied. — *Board of Aldermen v. Norman*, 51 La. Ann. 736.

**88.** 1. Extent of Municipal Control. — *Red Wing v. Guptil*, 72 Minn. 259, 71 Am. St. Rep. 485.

**89.** 1. *Board of Aldermen v. Norman*, 51 La. Ann. 736.

**92.** 1. *Haigh v. Bell*, 41 W. Va. 19, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 90, 91.

**2.** Nuisances Per Se. — *Sprigg v. Garrett Park*, 89 Md. 406, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92.

**93.** 2. Summary Abatement. — *Gaines v. Waters*, 64 Ark. 609; *Red Wing v. Guptil*, 72 Minn. 259, 71 Am. St. Rep. 485; *Cartwright v. Cohoes*, 39 N. Y. App. Div. 69; *Davis v. Davis*, 40 W. Va. 464.

**3.** *Dzik v. Bigelow*, 27 Pittsb. Leg. J. N. S. (Pa.) 360; *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983.

**Destruction of Buildings.** — In *Nazworthy v. Sullivan*, 55 Ill. App. 48, it was held that the city had authority to tear down an old building that was frequented by tramps.

**Cesspool.** — In *Philadelphia v. Goudey*, 36 W. N. C. (Pa.) 246, a cesspool that was situated on private premises became a nuisance, and it was held that the city had authority to close it.

**94.** 2. Notice. — *Western, etc., R. Co. v. Atlanta*, 113 Ga. 537; *Shannon v. Omaha*, (Neb. 1904) 100 N. W. Rep. 298; *Eckhardt v. Buffalo*, 19 N. Y. App. Div. 1.

**Statutory Form of Notice Must Be Strictly Complied with.** — *St. Louis v. Flynn*, 128 Mo. 413.

**95.** 1. Order for Removal. — *Dzik v. Bigelow*, 27 Pittsb. Leg. J. N. S. (Pa.) 360; *Davis v. Davis*, 40 W. Va. 464.

**On Whom Order Served.** — A person who collects the rents of property may be served with the notice requiring an abatement of a nuisance on the premises. *Broadbent v. Shepherd*, (1901) 2 K. B. 274, 83 L. T. N. S. 504, 84 L. T. N. S. 844.

**2.** Neglect in Matter of Nuisances. — *Muncie v. Hey*, (Ind. 1905) 74 N. E. Rep. 250.

**3.** *Gaines v. Waters*, 64 Ark. 609; *Corey v. Edgewood*, 18 Pa. Super. Ct. 216.

**Municipal Corporation Not Liable.** — Where the health officers of a municipal corporation destroyed private property without cause under the mistaken impression that it was infected with a contagious disease, the municipal corporation is not liable, as it is merely performing a governmental duty, but the owner of the property can maintain a suit for damages against the health officers. *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983. See also *Prichard v. Morganton*, 126 N. Car. 908, 78 Am. St. Rep. 679.

**96.** 1. Power to Be Reasonably Exercised. — *Eckhardt v. Buffalo*, 19 N. Y. App. Div. 1.

Water collected in the plaintiff's cellar, constituting a nuisance, and to abate it, the city filled the cellar with earth. But it was held that the city had no right to do this if it could have abated the nuisance by draining the cellar. *Waggoner v. South Gorin*, 88 Mo. App. 25.

## ABBREVIATIONS.

- 97.** **II. IN GENERAL.** — See note 2.  
**98.** **III. JUDICIAL NOTICE.** — See note 3.  
**99.** **Time.** — See note 2.  
**IV. PAROL EVIDENCE.** — See note 3.  
**100.** **See note 9.**  
**Usage.** — See note 2.

**97.** **2. "&" for "And."** — *Stewart v. State*, 137 Ala. 40, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97.

**"L. S." for "Seal."** — *McLaughlin v. Braddy*, 63 S. Car. 433, 90 Am. St. Rep. 681.

**98.** **3. Matter of Lakemeyer**, 135 Cal. 28, 87 Am. St. Rep. 96, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98; *McChesney v. Chicago*, 173 Ill. 75.

**"Acct." for "Account."** — The court will take judicial notice that the abbreviation "acct." stands for "account." *Heaton v. Ainley*, 108 Iowa 112, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97 [98].

**99.** **2. "Nov. 22, /97," for "November 22,**

**1897."** — *Matter of Lakemeyer*, 135 Cal. 28, 87 Am. St. Rep. 96, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 99.

**3. Admissibility of Parol Evidence.** — *Cameron v. Fellows*, 109 Iowa 534, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 99; *Penn Tobacco Co. v. Leman*, 109 Ga. 428; *McChesney v. Chicago*, 173 Ill. 75, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 99.

**100.** **9. Cameron v. Fellows**, 109 Iowa 534.

**2. Cameron v. Fellows**, 109 Iowa 534.

**Sufficient Descriptions.** — "Sec. 23, 38, 14," for section 23, township 38, range 14. *McChesney v. Chicago*, 173 Ill. 75, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 100.

## ABDUCTION.

By H. D. PATTON.

**163.** **I. DEFINITION.** — See note 1.

**II. ABDUCTION OF WIFE — 1. Rights of Husband — General Rule.** —

See note 2.

**164.** **2. Gist of the Action.** — See note 1.

**3. When Action Does Not Lie.** — See note 2.

**165.** **See notes 1, 2.**

**163.** **1. Definition.** — *Baumgartner v. Eigenbrot*, (Md. 1905) 60 Atl. Rep. 601, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163.

In *Humphrey v. Pope*, 122 Cal. 253, the court said: "The word 'abduct' is from the Latin *abduco*, to lead away. Abduction is the taking away a wife, child, or ward by fraud and persuasion or open violence. *Carpenter v. People*, 8 Barb. (N. Y.) 606; *State v. George*, 93 N. Car. 570. In private or civil law it is the act of taking away a man's wife by violence or persuasion. 3 Steph. Com. 536."

**"Abduction" and "Taking Away" Equivalent Expressions.** — *Humphrey v. Pope*, 122 Cal. 253.

**2. As to actions for the alienation of the wife's affections, see the title HUSBAND AND WIFE, 862 et seq.**

**Motive Not Material.** — Intentional persuasion of the wife to leave her husband creates a cause of action in favor of the husband regardless of

the motive underlying such persuasion. *Hartpence v. Rogers*, 143 Mo. 623.

**164.** **1. Loss of Wife's Society Gist of Action.** — See the title HUSBAND AND WIFE, 862. 6.

**2. Notice by Husband Not to Harbor Wife.** — *Compare Powell v. Benthall*, 136 N. Car. 145.

**A Sister and Brother-in-law** who harbor the wife are not liable in damages where they have not been instrumental in bringing about the separation and have not counseled its continuance. Their relationship to the wife is relevant and material on the question of motive; and the burden is not upon the defendants to show justification, but upon the plaintiff to show enticement or persuasion. *Powell v. Benthall*, 136 N. Car. 145.

**165.** **1. See Yowell v. Vaughn**, 85 Mo. App. 206.

**2. Malice Must Be Proved.** — *Oakman v. Belden*, 94 Me. 280, 80 Am. St. Rep. 396.

**165.** 4. Remedy by Habeas Corpus. — See note 3.

**166.** III. ABDUCTION OF HUSBAND — 1. Remedies of Wife — Common-law Rule. — See note 1.

2. Modern Decisions. — See note 2.

**167.** 3. Gist of the Action. — See note 1.

4. When Action Does Not Lie. — See note 2.

5. Wife's Right to Habeas Corpus. — See note 3.

IV. ABDUCTION OF CHILD — 1. Rights of Parents — General Rule. —

See note 4.

**171.** V. MEASURE OF DAMAGES — 1. In Action by Husband. — See note 1.

**172.** 2. In Action by Wife. — See note 1.

**173.** VI. ABDUCTION AS A CRIME — 2. Under the Statutes — *a.* IN GENERAL. — See note 3.

**165.** 3. Habeas Corpus. — See the title HABEAS CORPUS, 181. 3.

**166.** 1. See *Humphrey v. Pope*, 122 Cal. 253; *Hodge v. Wetzler*, 69 N. J. L. 490; *Smith v. Smith*, 98 Tenn. 101, 60 Am. St. Rep. 838.

2. *California*. — *Humphrey v. Pope*, 122 Cal. 253, holding that the wife has a right of action regardless of whether the husband was forcibly abducted or merely enticed away from her; and the fact that the damages recovered would be community property does not affect the right of action.

*Illinois*. — *Betser v. Betser*, 87 Ill. App. 399, affirmed 186 Ill. 537, 78 Am. St. Rep. 303.

*Kansas*. — *Nevins v. Nevins*, 68 Kan. 410.

*Kentucky*. — *Deitzman v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390.

*Minnesota*. — *Lockwood v. Lockwood*, 67 Minn. 476.

*Missouri*. — *Nichols v. Nichols*, 134 Mo. 187, 147 Mo. 387.

*Nebraska*. — *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 47 Am. St. Rep. 759.

*New York*. — *Romaine v. Decker*, 11 N. Y. App. Div. 20; *Wilson v. Coulter*, 29 N. Y. App. Div. 85; *Kuhn v. Hemmann*, 43 N. Y. App. Div. 108; *Van Olinda v. Hall*, 88 Hun (N. Y.) 452.

*Pennsylvania*. — *Gerner v. Gerner*, 185 Pa. St. 233, 64 Am. St. Rep. 646, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 166.

And see the title HUSBAND AND WIFE, 864 *et seq.*

**No Right of Action in New Jersey.** — *Hodge v. Wetzler*, 69 N. J. L. 490.

**In Tennessee** it seems that the wife is not entitled to maintain such an action except in a case where the cause of action arises after she has been abandoned by her husband. *Smith v. Smith*, 98 Tenn. 101, 60 Am. St. Rep. 838.

**In Wisconsin** it is held that the wife has no right of action either at common law or by statute. *Lonstorf v. Lonstorf*, 118 Wis. 159, *reaffirming Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79, cited in the original note.

**167.** 1. *Deitzman v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390; *Neville v. Gile*, 174 Mass. 305; *Buchanan v. Foster*, 23 N. Y. App. Div. 542; *Kuhn v. Hemmann*, 43 N. Y. App. Div. 108.

2. Where the Husband Had No Affection for his wife at the time of the acts alleged to have

induced him to abandon her, it was held that she could not recover. *Servis v. Servis*, 172 N. Y. 438, *reversing* 64 N. Y. App. Div. 612.

**The Attempt to Entice Must Have Been Successful.** — *Van Olinda v. Hall*, 88 Hun (N. Y.) 452.

**It Is a Question of Fact for the Jury** to decide whether the allowance of sexual intercourse by the defendant to the plaintiff's husband was an enticement which caused him to abandon the plaintiff. The court said: "The carnal intercourse may be — nay, generally is, — the greatest of enticements and allurements." *Romaine v. Decker*, 11 N. Y. App. Div. 20.

3. Right of Wife to Writ of Habeas Corpus. — See the title HABEAS CORPUS, 181 *et seq.*

4. Right of Father in Case of Abduction of Child. — *Wheeler v. Price*, 21 R. I. 99.

**171.** 1. Damages Recoverable. — See the title HUSBAND AND WIFE, 863.

**Punitive Damages.** — See *Hartpence v. Rogers*, 143 Mo. 623.

**Excessive Damages.** — See *Hartpence v. Rogers*, 143 Mo. 623.

**172.** 1. Principle upon Which Damages Estimated. — Exemplary damages may be allowed where malice and oppression are involved; and damages may be recovered for mental anguish, mortification, and injury to the feelings. *Nevins v. Nevins*, 68 Kan. 410.

See generally the title HUSBAND AND WIFE, 866, and the following cases: *Lockwood v. Lockwood*, 67 Minn. 476; *Nichols v. Nichols*, 147 Mo. 387; *Love v. Love*, 98 Mo. App. 562; *Wilson v. Coulter*, 29 N. Y. App. Div. 85.

**Excessive Damages.** — In *Van Olinda v. Hall*, 88 Hun (N. Y.) 452, a verdict for two thousand dollars was held excessive, it appearing that the relations between the husband and wife were not cordial and that the husband did not provide for his family, and the evidence of enticement being very unsatisfactory.

**173.** 3. *Kentucky* — "Woman" Includes Girl of Twelve. — The Kentucky statute uses the word "woman" in the generic sense, and applies as well to a child of twelve years as to a woman of mature years. *Couch v. Com.*, (Ky. 1895) 29 S. W. Rep. 29.

**England.** — To support an indictment under the statute 25 Vict., c. 100, § 56, it is not necessary to prove that the fraud of the prisoner was practised upon the child itself. *Reg. v. Bellis*, 17 Cox C. C. 660, 5 Reports 492.

**174. b. THE TAKING**—(1) *What Constitutes*—Force or Violence Unnecessary.— See note 1.

But Active Influence for the Illicit Purpose Necessary.— See note 2.

**175.** (2) *Gist of the Offense*.— See note 1.

**176.** (3) *When Offense Complete*.— See note 2.

**177.** (5) *Purpose of the Taking Must Be Proved*.— See note 2.

**178.** See note 1.

**3. Defenses**—*b. WHAT ARE NOT*—(1) *Consent of Female*.— See note 6.

**179.** (2) *Ignorance of Age*.— See note 1.

(3) *Previous Unchastity*.— See note 2.

**174. 1. Persuasion, Enticement, or Device Sufficient; Force Unnecessary.**— *Rex v. Jarvis*, 20 Cox C. C. 249; *State v. Bussey*, 58 Kan. 679.

**2. Instances.**— The defendant invited the prosecutrix to get into his buggy and go with him to her sister's house, some miles distant; the prosecutrix consented; while on the way, the defendant had sexual intercourse with the prosecutrix once; there was no evidence that the defendant ever had any sexual intercourse with the prosecutrix afterward. It was held that this evidence was insufficient to establish a taking away for promiscuous prostitution within the meaning of Rev. Stat. Mo. (1899), § 1842. *State v. Rorebeck*, 158 Mo. 130.

An active participation, by inducement or otherwise, on the part of the defendant in causing the girl to leave home, must be shown in order to support a charge of taking a girl under sixteen years of age out of the parents' possession and against their will. A mere passive yielding to the girl's suggestion is not sufficient. *Rex v. Jarvis*, 20 Cox C. C. 249.

**Where No Active Part Is Taken by the Defendant**, who merely yields to the suggestion of the female, there is no abduction by such defendant. *Rex v. Jarvis*, 20 Cox C. C. 249.

**Must Be Unlawful and Against Woman's Will.**— *State v. Hromadko*, 123 Iowa 665.

**175. 1. What Amounts to a Taking.**— Where the evidence showed that the defendant went to the bed of the prosecutrix while she was asleep, and awoke her by placing his hand on her hip and tried to unbutton her drawers, against her will, it was held to constitute a taking within the meaning of the statute making it unlawful to take and detain a woman against her will with intent to have carnal knowledge of her; and that the evidence was sufficient to sustain a conviction. *Couch v. Com.*, (Ky. 1895) 29 S. W. Rep. 29.

**176. 2. When the Offense Is Complete.**— Under Pen. Code Cal., the gravamen of the offense is the purpose or intent. Where, therefore, the defendant obtained a parent's consent to take his daughter from B county, in which she lived, into A county, for the ostensible purpose of procuring her legitimate employment, but, when once in A county, he decided to place the girl in a house of prostitution, it was held that, as the intent first manifested itself in A county, the crime must be held to have been committed there. *People v. Lewis*, 141 Cal. 543.

It is not necessary, in a prosecution for taking away from a parent a female under the

age of eighteen years, for the purpose of concubinage, that the taking away should have been accompanied by sexual intercourse; the offense was complete when the defendant took her for that purpose. *State v. Bobbst*, 131 Mo. 328.

**177. 2. Prostitution.**—Prostitution is a word of general meaning and need not be defined. *Tres v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 880.

The Act of June 7, 1887, relative to the detention of any female in any room, against her will, for the purpose of prostitution, or with intent to cause such female to become a prostitute, does not apply to a man holding sexual intercourse with his stepdaughter, in his own house. *Bunfill v. People*, 154 Ill. 640.

**Concubinage.**— *South v. State*, 97 Tenn. 501, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178, 179.

A long-continued illicit intercourse is not necessary to constitute the relation of concubinage. When a man and woman not married agree to cohabit with each other as though the marriage relation existed between them, without fixing any limit as to duration, she becomes his concubine as soon as cohabitation begins. *State v. Bussey*, 58 Kan. 679.

Under the *Missouri* statute, one who persuades a girl to leave her home and live with him for a number of days, at different places, as man and wife, is guilty of taking her away for the purpose of concubinage, even though he intended to marry the girl. *State v. Adams*, 179 Mo. 334.

**178. 1. Chastity of the Woman.**— The burden of proving the chastity of the woman is not on the state; but the want of chastity is a matter of defense. *Griffin v. State*, 109 Tenn. 17; *Bradshaw v. People*, 153 Ill. 156.

**6. Consent of Female.**— *State v. Bobbst*, 131 Mo. 328; *South v. State*, 97 Tenn. 496; *Griffin v. State*, 109 Tenn. 17, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178. See also *Bradshaw v. People*, 153 Ill. 156.

**179. 1. Ignorance of Age of Female.**— *Riley v. State*, (Miss. 1895) 18 So. Rep. 117; *Tres v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 880.

**2. Previous Unchastity of Woman.**— *State v. Bobbst*, 131 Mo. 328.

The fact that the girl had had sexual intercourse with the defendant prior to the commission of the crime charged, is no defense if it appears, beyond a reasonable doubt, that the girl was living with her parents a chaste life



**179. VII. EVIDENCE — 1. On Abduction of Wife — a. STATEMENTS OF WIFE.** — See note 5.

**180. 2. On Abduction of Husband.** — See note 5.

**3. On Abduction of Child — a. AGE OF CHILD.** — See note 6.

**181. d. OF FEMALE'S MORAL CHARACTER.** — See note 4.

**4. Evidence of Intent and Motive.** — See note 7.

**182. 5. Statements and Acts of Defendant.** — See notes 1, 2.

**6. Corroborative Evidence.** — See note 3.

**183. ABIDE.** — See note 5.

**184. ABIDING CONVICTION.** — See note 1.

**185. ABLE.** — See note 3.

towards all except the defendant, and that the defendant wilfully took her from her father without his consent for the purpose of prostituting her. *South v. State*, 97 Tenn. 496.

**179. 5.** As to evidence in actions for alienating the wife's affections, see the title **HUSBAND AND WIFE**, **863, 864**.

**180. 5.** As to the admissibility and sufficiency of evidence in such actions, see the title **HUSBAND AND WIFE**, **866**, and the following cases: *Tucker v. Tucker*, 74 Miss. 93; *Nichols v. Nichols*, 147 Mo. 387; *Strode v. Abbott*, 102 Mo. App. 169; *Wilson v. Coulter*, 29 N. Y. App. Div. 85; *Rubenstein v. Rubenstein*, 60 N. Y. App. Div. 238.

**6. The Dress and Appearance** of the child on the stand, and the absence of documents in the possession of the prosecution tending to show her age, may be considered by the jury on the question of age. *People v. Ragone*, 54 N. Y. App. Div. 498.

**Inscription on Tombstone.** — Where a witness testified that the girl was born the same year that a brother of his, who was then dead, was born, but that he could not recollect the year his brother was born, but the inscription on his dead brother's tombstone read that he was born in April, 1884, it was held that the evidence was admissible for the purpose of establishing the girl's age. *Boyett v. State*, 130 Ala. 77, 89 Am. St. Rep. 19.

**181. 4. Evidence of Previous Unchastity.** — A new trial will be ordered on a verdict obtained upon the testimony of an abandoned and criminal girl, actuated by revenge, and supported by the testimony of the keeper of a bawdy house, where it appears that the defendant, a policeman, directed the girl to a house of prostitution, thinking she would go there as a domestic. *People v. Masterson*, 96 N. Y. App. Div. 610.

Evidence tending to fortify the presumption of the girl's previous chastity is admissible. *Bradshaw v. People*, 153 Ill. 156.

**7. State v. Savant**, 38 So. Rep. 974.

**Question of Parent's Consent for the Jury.** — *People v. Cerami*, 101 N. Y. App. Div. 366.

**182. 1. Letters.** — Letters written to the defendant by the girl, and obtained from his custody, were permitted in evidence as explaining the relations of the parties and their feelings and conduct toward each other. *South v. State*, 97 Tenn. 496.

**2. Evidence of Previous Marriage of Defendant Inadmissible.** — *People v. Cerami*, 101 N. Y. App. Div. 366.

**3. People v. Miller**, 70 N. Y. App. Div. 592.

**The Testimony of a Person Abducted by the Same Parties** at the same time is sufficient corroboration. *People v. Panyko*, 71 N. Y. App. Div. 324.

**Evidence Is Not Corroborative** unless it tends to prove to some extent the guilt of the accused by connecting him with the crime charged. *People v. Swasey*, 77 N. Y. App. Div. 185.

**A Medical Examination** of a young girl twelve days after the commission of the offense, which shows that the girl had had sexual intercourse, but no time is fixed, is not corroborative where the girl testifies that at various times prior to the commission of the offense, she had had sexual intercourse. *People v. Swasey*, 77 N. Y. App. Div. 185.

**183. 5. Abide the Judgment.** — *Harris v. Kansas Elevator Co.*, 66 Kan. 372.

**184. 1.** It is error to instruct that an "*abiding conviction* of the guilt" of the defendant, or full satisfaction of his guilt, is the equivalent of belief beyond a reasonable doubt. *Williams v. State*, 73 Miss. 823.

**185. 3. If Able.** — Under a *Maine* statute providing that the local board of health may remove a person infected with any disease dangerous to public health to a separate house and there care for him at his charge "if *able*," the phrase "if *able*" relates to the pecuniary ability of the party at the time the expenses were incurred. *Greenville v. Beauto*, (Me. 1904) 58 Atl. Rep. 1026.

# ABORTION.

By G. W. WALSH.

**186. I. DEFINITION.** — See note 1.

**187. II. THE OFFENSE — HOW REGARDED** — 1. At Common Law — With Consent of Woman and Before Quickening. — See note 1.

**188. 2. By Statute.** — See note 2.

**III. ELEMENTS OF THE OFFENSE** — 1. Pregnancy — Quick with Child. — See notes 3, 4.

2. Intent. — See note 5.

How Shown. — See note 7.

**189. 3. Means.** — See notes 2, 3.

**190.** See notes 1, 2.

4. Results — Death of Mother — Death of Child — By Statute. — See note 4.

Death of Child. — See note 5.

**186. 1.** *State v. Magnell*, 3 Penn. (Del.) 307.

**187. 1. Abortion with Mother's Consent and Before Quickening.** — *Eggart v. State*, 40 Fla. 527; *State v. Alcorn*, 7 Idaho 599, 97 Am. St. Rep. 252.

**188. 2.** See *People v. Abbott*, 116 Mich. 263.

Consent of Woman Immaterial. — *Barrow v. State*, 121 Ga. 187.

3. Stage of Pregnancy Immaterial. — *State v. Carey*, 76 Conn. 342; *Eggart v. State*, 40 Fla. 527; *State v. Alcorn*, 7 Idaho 599, 97 Am. St. Rep. 252; *Com. v. Surles*, 165 Mass. 59.

4. The Word "Child," as used in section 81 of the *Georgia Penal Code*, means a living child; that is to say, an unborn child so far developed as to be ordinarily called "quick," and which is still alive when the alleged unlawful means are employed to produce the miscarriage or abortion. *Taylor v. State*, 105 Ga. 846; *Sullivan v. State*, 121 Ga. 183; *Barrow v. State*, 121 Ga. 187.

5. Intent the Gravamen of Offense. — *State v. Magnell*, 3 Penn. (Del.) 307; *State v. Jones*, 4 Penn. (Del.) 109; *State v. Crews*, 128 N. Car. 581.

Criminal Intent Extends to Consequences of Act. — *Barrow v. State*, 121 Ga. 187.

7. Circumstances. — The intent of the accused is to be gathered from his acts, considered in connection with, and in the light of, the surrounding conditions and circumstances. *State v. Alcorn*, 7 Idaho 599, 97 Am. St. Rep. 252.

Evidence of Intention. — In *State v. Jones*, 4 Penn. (Del.) 109, the court said: "The specific intent here is the intent to produce the miscarriage, and the act or advice must relate to that intent. But that intent may be proved either by direct and positive testimony, such as the admission of the defendant, or other direct evidence of the fact, or by all the circumstances surrounding the case; and you may gather the intent from the entire case."

**189. 2. Administering.** — *McCaughy v.*

*State*, 156 Ind. 41; *State v. Moothart*, 109 Iowa 130.

As used in the statute the word "administer" means to give, and it is not necessary for the state to prove that the woman was compelled to take the medicine. *State v. Jones*, 4 Penn. (Del.) 109.

Under Rev. Stat. Fla. (1892), § 2618, if a party simply advises or prescribes the taking of any medicine, drug, or other noxious thing, unlawfully, and with criminal intent, the inhibited crime is complete whether the advice be followed or the prescription taken or not. *Eggart v. State*, 40 Fla. 527.

3. Character of Medicine. — The law does not require any particular kind, quantity, or quality of medicine to be alleged, nor would it be necessary to prove such kind, quantity, or quality on trial. *State v. Dean*, 85 Mo. App. 473, citing *State v. Van Houten*, 37 Mo. 357.

**190. 1. Mode of Accomplishment Not Material.** — A person uses an instrument or other means when he furnishes them to be applied to the forbidden purpose; it is not necessary that he must have performed an operation in person. *State v. Moothart*, 109 Iowa 130.

Means Need Not Be Effectual. — *State v. Crews*, 128 N. Car. 581. But see *contra*, under the *Ohio* statute, *State v. Springer*, 4 Ohio Dec. 169, 3 Ohio N. P. 120.

2. Texas Statute. — *Fretwell v. State*, 43 Tex. Crim. 501.

4. Under Statute. — *State v. Alcorn*, 7 Idaho 599, 97 Am. St. Rep. 252; *People v. Abbott*, 116 Mich. 263; *State v. Dean*, 85 Mo. App. 473.

In *New Jersey*, under the Crimes Act, 1898, the crime of abortion is designated as a high misdemeanor, but for such offense when death results a severer penalty is provided by the section defining the crime. *State v. Meyer*, 65 N. J. L. 237, 86 Am. St. Rep. 634, reversing 64 N. J. L. 382.

5. At Common Law. — *State v. Alcorn*, 7 Idaho 599, 97 Am. St. Rep. 252; *State v. Pryde*, 76 Miss. 543.

**191.** See note 1.

**IV. WHO MAY BE CRIMINALLY LIABLE — 1. As Principals — a. THE WOMAN HERSELF.** — See notes 3, 4.

*b.* OTHERS AS PRINCIPALS. — See note 5.

**192. 2. As Accessories and Accomplices — a. THE WOMAN HERSELF.** — See notes 1, 2, 3.

*b.* OTHERS AS ACCESSORIES AND ACCOMPLICES. — See notes 4, 5.

**193. V. ATTEMPTS.** — See notes 1, 2.

**VI. EVIDENCE — The Woman.** — See note 3.

**Dying Declarations.** — See note 4.

**Res Gestæ.** — See note 6.

**194. Death of the Woman.** — See note 2.

**191. 1.** In *Missouri*, under Rev. Stat. (1899), § 1853, it is a misdemeanor. *State v. Dean*, 85 Mo. App. 473.

**3. Generally Woman Not Criminally Liable.** — *State v. Smith*, 99 Iowa 26, 61 Am. St. Rep. 219; *State v. Prude*, 76 Miss. 543; *Smartt v. State*, (Tenn. 1904) 80 S. W. Rep. 586; *Moore v. State*, 37 Tex. Crim. 552.

**4. The Connecticut statute makes it a crime for a woman to procure her own miscarriage.** *State v. Carey*, 76 Conn. 342.

**5. Seifert v. State**, 160 Ind. 464, 98 Am. St. Rep. 340; *Moore v. State*, 37 Tex. Crim. 552; *State v. Lilly*, 47 W. Va. 496.

The *Nebraska* statute (Crim. Code, §§ 1, 2) defining accessories is declaratory of the common law; one who is present when the crime is committed, aiding and assisting therein, is, notwithstanding these sections, a principal, although his hand was not the instrument through which the crime was perpetrated. *Dixon v. State*, 46 Neb. 298.

**A Person Sending, and Directing the Use of, medicine for producing an abortion is a principal.** *Burris v. State*, (Ark. 1904) 84 S. W. Rep. 723.

**192. 1. Woman Not an Accomplice — Connecticut.** — *State v. Carey*, 76 Conn. 342. — *Iowa.* — *State v. Smith*, 99 Iowa 26, 61 Am. St. Rep. 219.

*Pennsylvania.* — *Com. v. Bell*, 4 Pa. Super. Ct. 187.

*Tennessee.* — *Smartt v. State*, (Tenn. 1904) 80 S. W. Rep. 589, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 191.

*Texas.* — *Miller v. State*, 37 Tex. Crim. 579, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 192; *Moore v. State*, 37 Tex. Crim. 552; *Hunter v. State*, 38 Tex. Crim. 61.

**2. Corroboration Not Necessary.** — *State v. Smith*, 99 Iowa 26, 61 Am. St. Rep. 219; *Com. v. Bell*, 4 Pa. Super. Ct. 187; *Smartt v. State*, (Tenn. 1904) 80 S. W. Rep. 589, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 192; *Miller v. State*, 37 Tex. Crim. 579, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 192.

**3. Weight of Testimony Question for Jury.** — *State v. Carey*, 76 Conn. 342; *Seifert v. State*, 160 Ind. 464, 98 Am. St. Rep. 340; *Smartt v. State*, (Tenn. 1904) 80 S. W. Rep. 589, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 192.

**4. Third Persons as Accessories and Accessories.** — In those states in which a woman is not guilty of a crime in procuring her own miscarriage, a third person who furnishes her

with the means or appliances is chargeable as a principal only. He cannot be charged as an accessory or accomplice in such a case, for want of a principal. Such third person can be an accessory or accomplice only when he aids a person other than the woman in procuring the abortion. *Moore v. State*, 37 Tex. Crim. 552.

**5. Knowledge of the Object in View Necessary.** — *Moore v. State*, 37 Tex. Crim. 552.

**193. 1. Failure of Attempt Immaterial.** — *State v. Magnell*, 3 Penn. (Del.) 307; *Eggart v. State*, 40 Fla. 527; *State v. Moothart*, 109 Iowa 130; *People v. Conrad*, 102 N. Y. App. Div. 566.

**The Use of a Harmless Substance** by a woman, who believes she is taking a noxious drug, with the intent to commit an abortion, renders such woman guilty of an attempt to commit an abortion. *Reg. v. Brown*, 63 J. P. 790.

**In Ohio** there is no such crime as attempting to procure an abortion. *State v. Springer*, 4 Ohio Dec. 169, 3 Ohio N. P. 120.

**2. Evidence that Medicine Is Intended for Procuring Abortion.** — The mere fact that a medicine is labeled, "Caution — ladies are warned against using these tablets during pregnancy," is not sufficient evidence that such medicine is intended or represented as a means of causing an abortion. *Rex v. Karn*, 5 Can. Crim. Cas. 543.

**3. Woman upon Whom the Abortion Is Committed as a Witness.** — *State v. Carey*, 76 Conn. 342; *Com. v. Bell*, 4 Pa. Super. Ct. 187.

**In Texas** a woman cannot testify against her husband in a case in which he committed an abortion on her before they were married. *Miller v. State*, 37 Tex. Crim. 575.

**4. Admissibility of Dying Declarations.** — *Dunn v. People*, 172 Ill. 582; *State v. Meyer*, 65 N. J. L. 237, 86 Am. St. Rep. 634, reversing 64 N. J. L. 382.

**Dying Declarations of Woman Held Admissible.** — *Seifert v. State*, 160 Ind. 464, 98 Am. St. Rep. 340; *Com. v. Keene*, 7 Pa. Super. Ct. 293.

**6. Res Gestæ.** — *State v. Alcorn*, 7 Idaho 599, 97 Am. St. Rep. 252.

**Narrative of Past Transaction.** — *State v. Young*, 55 Kan. 349.

**194. 2. Corpus Delicti.** — *Seifert v. State*, 160 Ind. 464, 98 Am. St. Rep. 340.

The *corpus delicti* may be proved by declarations and circumstances, but the order in which evidence proving the different material facts is introduced is not material. *State v. Alcorn*, 7 Idaho 599, 97 Am. St. Rep. 252.

**194.** Experts. — See note 4.

Medical Books. — See note 5.

Instruments. — See note 6.

**195.** Circumstances. — See note 1.

Burden of Proof — As to Necessity of Abortion. — See note 2.

[Hearsay. — See note 2a.]

**VII. DEFENSES.** — See note 4.

**196.** ABOUT. — See note 3.

**199.** See note 1.

**201.** ABSCOND — ABSCONDING DEBTOR. — See note 3.

**203.** ABSENT — ABSENCE, ETC. — See note 1.

**194. 4. Expert Testimony.** — *Cook v. People*, 177 Ill. 146.

It is competent for a physician testifying as an expert to give as his opinion, from an examination of the body after death, and from his previous knowledge of the deceased, that it was not necessary to produce an abortion in order to save the life of the deceased. *State v. McCoy*, 15 Utah 136.

Evidence of Physician Based on Statement of Woman Inadmissible. — *Stevens v. People*, (Ill. 1905) 74 N. E. Rep. 786.

**5. Admissibility of Medical Books.** — *Clark v. Com.*, 111 Ky. 443. See also the title DOCUMENTARY EVIDENCE.

The general rule that medical books are not admissible in evidence is subject to the exception that specified books may be introduced in rebuttal to contradict a witness who has testified to having derived therefrom teaching that they do not contain, or whose teachings are substantially different from that testified to. *Eggart v. State*, 40 Fla. 527.

**6. Instruments.** — It is not necessary to show the character of the instrument. *State v. Lilly*, 47 W. Va. 496.

**195. 1. Evidence Ordinarily Circumstantial.** — *State v. Lilly*, 47 W. Va. 498, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 195.

Advertising Cards in Defendant's Possession. — *Com. v. Barrows*, 176 Mass. 17.

Evidence of Other Abortions Held Inadmissible. — *State v. Crofford*, 121 Iowa 395.

Evidence of Independent Acts Admissible to Show Motive or Intent. — *Clark v. Com.*, 111 Ky. 443. See also *People v. Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326.

**2. Necessity of Abortion — Proof Of.** — *State v. Schuerman*, 70 Mo. App. 518; *State v. Aiken*, 109 Iowa 643.

Presumption Against Necessity. — *State v. Lee*, 69 Conn. 186.

**2a. Hearsay.** — Testimony of the person who performed the criminal operation that she was in the habit of performing such operations for the purpose of abortion, describing the method adopted, is hearsay and inadmissible against the defendant. *People v. Abbott*, 116 Mich. 263.

**4. Necessity a Defense.** — *State v. Lee*, 69 Conn. 186.

**196. 3. Charter-party.** — *Sanders v. Munson*, (C. C. A.) 74 Fed. Rep. 649, affirming *The Alert*, 61 Fed. Rep. 504.

Pleading. — *Simpson v. New York*, etc., R. Co., (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 613. See also *Knight v. Denman*, 64 Neb. 814.

Descriptions of Land. — Maryland Constr. Co. v. Kuper, 90 Md. 548, following *Baltimore Permanent Bldg.*, etc., Soc. v. Smith, 54 Md. 187, and citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 196; *Mt. Pleasant Coal Co. v. Delaware*, etc., R. Co., 200 Pa. St. 448. See also *Iverson v. Swan*, 169 Mass. 582.

A petition for opening a road, describing it as beginning *about* one hundred and fifty yards from a dwelling, insufficiently describes the place of beginning under the Oregon statute. *Sime v. Spencer*, 30 Oregon 340.

**Time — Offense Committed About the Time.** — The word *about* is a very comprehensive term. It may cover a considerable length of time. Under the evidence rule that other offenses committed at the same time may be shown, a distinct offense committed "*about* the time" of the offense for which defendant was on trial does not show such other offense to have been committed at the same time. *James v. State*, 40 Tex. Crim. 195.

**Taxation.** — The word *about* is equivalent to the word "substantial," when employed in framing a state statute providing that a county board may set forth by an order substantially the amount of excess taxation required. *Peoria*, etc., Union R. Co. v. People, 198 Ill. 318.

"About to Sign." — The statement in a journal entry that the speaker was "*about* to sign" bills means that he was at that time engaged in signing bills. *State v. Cahill*, (Wyo. 1904) 75 Pac. Rep. 433.

**199. 1. Executory Contract of Sale — Contracts to Furnish "About So Much."** — *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 113 Ga. 1142, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 199; *Rib River Lumber Co. v. Ogilvie*, 113 Wis. 487, following the first rule of the text stated and *Maine Red Granite Co. v. York*, 89 Me. 58; *Pine River Logging*, etc., Co. v. U. S., 186 U. S. 279, following the second rule of the text stated; *Wolff v. Wells*, (C. C. A.) 115 Fed. Rep. 36, following the third rule laid down in the text.

**201. 3. Attachment.** — *McMorran v. Moore*, 113 Mich. 101; *Smith v. Johnson*, 43 Neb. 760; *Stafford v. Mills*, 57 N. J. L. 574.

**Not Leaving State.** — *Stafford v. Mills*, 57 N. J. L. 574.

**203. 1. Insurance Policy.** — In *Stone v. Granite State F. Ins. Co.*, 69 N. H. 441, the court said: "While we think that to an ordinary mind the terms *absence* and 'removal,' when applied to the occupant of a dwelling house, do not convey the same but a widely

**205. ABSOLUTE.** — See note 2.

**208. ABSOLUTELY.** — See note 1.

[**ABSORBED.** — See note 1*a*.]

**209. ABSTRACT.** — See note 2.

different meaning, and that according to the common understanding persons leaving their houses on visits, excursions, or other temporary occasions, do not remove from or cease to occupy them, it is sufficient for the present purpose to say that, as matter of law, in order to avoid the defendants' policy by reason of the condition therein against vacancy, the insured premises must not only have been vacant for more than thirty days without their assent, but the vacancy must have been occasioned 'by the removal of the \* \* \* occupant' therefrom."

**205. 2.** *Columbia Water Power Co. v. Columbia Electric St. R., etc., Co.*, 172 U. S. 475.

**Insurance — Absolute Interest.** — *Germania F. Ins. Co. v. Stewart*, 13 Ind. App. 637.

**Whether in Conveyances the Term "Absolute" Carries the Fee.** — The word *absolute*, used in connection with a gift or grant of personal or real property, has been interpreted to carry a fee. *Truax v. Gregory*, 196 Ill. 83; *Watkins v. Bigelow*, (Minn. 1904) 100 N. W. Rep. 1104; *Cooper v. Cooper*, 56 N. J. Eq. 55; *Fackler v. Berry*, 93 Va. 565.

But by a devise of a right of way "to be his absolutely" the devisee takes only an easement. *Truax v. Gregory*, 196 Ill. 83.

**Absolute Ownership of Personal Property.** — *Matter of Howland*, 75 N. Y. App. Div. 209; *Steinway v. Steinway*, (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 563.

**Absolute Predestination** means that "God foreknew and predestined all things whatsoever that may come to pass, whether with reference to the material universe or the salvation of

souls," — that is, God predestinated all things which happen. *Bennett v. Morgan*, 112 Ky. 512.

**Absolute Assignment.** — An instrument passing the whole right of an assignor in the moneys payable under a building contract to the assignees by way of security is an *absolute* assignment (not purporting to be by way of charge only), within the meaning of the Judicature Act, 1873, § 25, subs. 6. *Hughes v. Pump House Hotel Co.*, (1902) 2 K. B. 190, *distinguishing* *Mercantile Bank v. Evans*, (1899) 2 Q. B. 613.

**A Contingent Claim Does Not Become Absolute** within the meaning of the Decedents' Act until it becomes a claim proper to be presented to the County Court for final adjudication as a claim against the estate. *Hazlett v. Blakely*, (Neb. 1903) 97 N. W. Rep. 808.

**208. 1.** *Kratz v. Kratz*, 189 Ill. 276; *Underwood v. Cave*, 176 Mo. 1; *Fenton v. Fenton*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 479; *Thompson's Estate*, 182 Pa. St. 343.

**1*a*. In a Policy of Accident Insurance** providing that the policy does not cover injuries from poison or anything accidentally or otherwise *absorbed* or inhaled, the word *absorbed* manifestly has reference only to the process of absorption by sucking up or imbibing through the pores of the body, and does not apply to death by asphyxiation. *Fidelity, etc., Co. v. Waterman*, 161 Ill. 632.

**209. 2.** *Scott v. Black*, 96 Mo. App. 472.

**Embezzlement — Abstracting.** — See *U. S. v. Youtsey*, 91 Fed. Rep. 867; *State v. Breese*, 131 Fed. Rep. 915.

# ABSTRACT OF TITLE.

By G. W. WALSH.

## 211. I. DEFINITION. — See note 1.

[Abstract Books Not Subject to Taxation. — See note 1a.]

[Abstract Books Subject to Execution. — See note 1b.]

III. CONTENTS AND SUFFICIENCY — 1. In General — Summary of Grants, Patents, Conveyances, Incumbrances, Etc. — See note 4.

212. 3. Period for Which Title Shown — a. ENGLISH RULE. — See note 4.

IV. WHO MUST FURNISH THE ABSTRACT — 1. In England. — See notes 6, 7.

213. 2. In the United States. — See note 1.

Caveat Emptor. — See note 2.

214. V. TIME OF DELIVERING THE ABSTRACT — Rule at Law. — See note 1.

VI. SHOWING THE TITLE BY THE ABSTRACT — 1. General Principles. — See note 7.

215. 2. VENDEE'S OBJECTIONS. — See note 1.

To Be Made in Reasonable Time. — See note 2.

211. 1. *Hollifield v. Landrum*, 31 Tex. Civ. App. 187, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211.

"An abstract is defined to be 'that which comprises or concentrates in itself the essential qualities of a larger thing or of several things; an abridgment, compendium, epitome, or synopsis'" *Hess v. Draffen*, 99 Mo. App. 580.

1a. Abstract Books Not Subject to Taxation. — In *Loomis v. Jackson*, 130 Mich. 594, following *Perry v. Big Rapids*, 67 Mich. 146, 11 Am. St. Rep. 570, it was held that abstract books used in furnishing abstracts of title to land were not subject to taxation, though they were by statute made subject to levy under execution. Compare *Leon Loan, etc., Co. v. Equalization Board*, 86 Iowa 127, 41 Am. St. Rep. 486.

1b. Abstract Books Subject to Execution. — *Loomis v. Jackson*, 130 Mich. 594. This case was decided under Pub. Acts Mich. 1899, p. 308, it having been theretofore held (*Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544) that abstract books referring to land titles, being unpublished manuscript, were not leviable property.

4. *Harriman Imp. Co. v. McNutt*, (Tenn. Ch. 1896) 37 S. W. Rep. 396, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211.

All Documents Forming Part of the Title should be abstracted in chief; the introduction of such documents merely as recitals in other abstracted instruments is insufficient. In *re Stamford, etc., Banking Co.*, (1900) 1 Ch. 287, 81 L. T. N. S. 708.

212. 4. Modern English Rule. — In *re Stamford, etc., Banking Co.*, (1900) 1 Ch. 287, 81 L. T. N. S. 708.

6. An Agreement to Take a Free Conveyance

does not waive the delivery of an abstract of title. *Re Pelly*, 80 L. T. N. S. 45.

7. English Rule: Vendor Furnishes Abstract. — In *re Stamford, etc., Banking Co.*, (1900) 1 Ch. 287, 81 L. T. N. S. 708; *Re Halifax Commercial Banking Co.*, 79 L. T. N. S. 183.

213. 1. In Illinois the vendor must furnish evidence of his title, which by usage is an abstract. *Brewer v. Fox*, 62 Ill. App. 609.

2. Purchaser Must Examine for Himself. — *Symms v. Cutter*, 9 Kan. App. 210. See also *Webster Realty Co. v. Thomas*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 916.

214. 1. Delay in Furnishing Abstract Waived by Making Payment under Contract. — *McAlpine v. Reicheneker*, 56 Kan. 100.

7. Perfect Title. — Where the contract was that the vendor furnish an abstract showing a complete or perfect title, the vendee was held entitled to rescind the sale on the failure of the vendor to furnish such an abstract. *Loring v. Oxford*, 18 Tex. Civ. App. 415.

Good and Marketable Title. — A contract for an abstract showing a perfect title requires that the abstract show a good and marketable title. *Gates v. Parmly*, 93 Wis. 294.

A Defect in an Abstract of Title Which Is Not Insisted on by the purchaser as the reason for refusing the deed is not available as a defense to a suit against him for specific performance where the vendor would have been able to cure the defect and offered to do so. *Wold v. Newgard*, (Iowa 1903) 94 N. W. Rep. 859.

215. 1. *Lessenich v. Sellers*, 119 Iowa 314, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 215.

Vendee Entitled to Verification of Abstract. — See *Re Halifax Commercial Banking Co.*, 79 L. T. N. S. 183.

2. *Lessenich v. Sellers*, 119 Iowa 314.



**216. VII. PREPARING THE ABSTRACT — 2. Searching — b. PUBLIC RECORDS — DUTY OF OFFICIALS.** — See notes 2, 3.

**217. c. EFFECT OF OFFICIAL SEARCH.** — See note 2.

**219. 3. Arrangement and Form — b. ABSTRACTING DOCUMENTS — (7) Miscellaneous.** — See note 6.

**VIII. ABSTRACTS AS EVIDENCE — 1. Of Lost Deeds.** — See note 7.

**220. 2. Miscellaneous — Tax Sales.** — See note 1.

[See note 1a.]

**IX. LIABILITY OF EXAMINERS OF TITLES — 1. General Rule as to Degree of Care and Skill.** — See note 3.

**221. 2. When Enforced.** — See note 2.

**Actual Damage Necessary.** — See notes 4, 5.

**3. Who May Enforce.** — See notes 6, 7.

**216. 2. Right of Access to Public Records.** — Bell *v.* Commonwealth Title Ins., etc., Co., 189 U. S. 131.

**Rule in Other States.** — In *Georgia* it is held that persons wishing to make copies of, or abstracts from, the records of land titles for the purpose of compiling abstracts of titles to be used in a private abstract and land title business are not entitled to do so without obtaining the consent and paying the fees of the custodian of such records. Land Title Warranty, etc., Co. *v.* Tanner, 99 Ga. 470.

The *Kansas* statute confers on abstractors the right of access to the public records for the purpose of carrying on their business. Allen *v.* Hopkins, 62 Kan. 175.

**3. The Mississippi** statute requires the boards of county supervisors to make abstracts of land titles for their respective counties, and to keep them up to date at all times, and provides for compensation to be paid by the landowners. Yazoo, etc., Valley R. Co. *v.* Edwards, 78 Miss. 950.

**217. 2. Glawatz v. People's Guaranty Search Co.**, 49 N. Y. App. Div. 465.

**219. 6. Usage.** — In *Eberhardt v. Miller*, 71 Ill. App. 215, the court said: "We suppose it is the usual practice in making abstracts of title to manifest such facts by the affidavits of persons cognizant thereof, and while such affidavits are not legal proof of the matters therein set forth they are usually accepted as sufficient for the purpose."

**7. Under the Illinois** statute an abstract of title is admissible in evidence only when it is stated on oath that the original deeds or other instruments "are lost or destroyed, or not within the power of the party to produce the same, and that the records thereof are destroyed by fire or otherwise." Walton *v.* Follansbee, 165 Ill. 480.

**220. 1. Texas — In Trespass to Try Title.** — See *Robbins v. Ginnocchio*, (Tex. Civ. App. 1898) 45 S. W. Rep. 34; *Stokes v. Riley*, (Tex. Civ. App. 1902) 68 S. W. Rep. 703.

Under the *Texas* statute documentary evidence of title not contained in the abstract is not admissible. Parker *v.* Cockrell, (Tex. Civ. App. 1895) 31 S. W. Rep. 221.

**1a. The Nebraska** statute (Laws 1887, p. 565) provides that when any abstractor shall have filed his bond an abstract of title certified to and issued by him shall "be received in all courts as *prima facie* evidence of the existence

of the record of deeds, mortgages, and other instruments, conveyances, or liens affecting the real estate mentioned in such abstract, and that such record is as described in said abstract of title." Gate City Abstract Co. *v.* Post, 55 Neb. 742.

**3. Degree of Care and Skill Required.** — Brown *v.* Sims, 22 Ind. App. 317, 72 Am. St. Rep. 308; Young *v.* Lohr, 118 Iowa 624; Humboldt Bldg. Assoc. Co. *v.* Ducker, (Ky. 1904) 82 S. W. Rep. 969; Economy Bldg., etc., Assoc. *v.* West Jersey Title, etc., Co., 64 N. J. L. 27; Byrnes *v.* Palmer, 18 N. Y. App. Div. 1; American Trust Invest. Co. *v.* Nashville Abstract Co., (Tenn. Ch. 1896) 39 S. W. Rep. 877. See also *Western Loan, etc., Co. v. Silver Bow Abstract Co.*, (Mont. 1904) 78 Pac. Rep. 774; *Puckett v. Waco Abstract, etc., Co.*, 16 Tex. Civ. App. 329.

**Contract, Not Tort.** — Thomas *v.* Carson, 46 Neb. 765; *Glawatz v. People's Guaranty Search Co.*, 49 N. Y. App. Div. 465.

**Abstractors Required to Give Bond.** — In some states abstractors are required to give bond with sureties, payable to the state, on which they are liable to persons injured by their negligence or want of skill; but this provision does not constitute them public officers. Allen *v.* Hopkins, 62 Kan. 175.

**221. 2. Measure of Damages.** — *Keuthan v. St. Louis Trust Co.*, 101 Mo. App. 1. See also *Security Abstract of Title Co. v. Longacre*, 56 Neb. 469.

**4. Williams v. Hanly**, 16 Ind. App. 464.

**5. Failure to note a judgment lien** does not render the abstractor liable where the purchaser loses the land by the enforcement of an unrecorded mortgage executed before the rendition of the judgment, because the loss in such case is not the result of the failure of the abstract to show the judgment lien; and a claim that the purchaser would not have taken the land if the judgment lien had appeared in the abstract of title is too remote. *Denton v. Nashville Title Co.*, (Tenn. 1904) 79 S. W. Rep. 799.

**Statute of Limitations.** — *Provident Loan Trust Co. v. Wolcott*, 5 Kan. App. 473; *Schade v. Gehner*, 133 Mo. 252.

**6. Talpey v. Wright**, 61 Ark. 275, 54 Am. St. Rep. 206; *Schade v. Gehner*, 133 Mo. 252; *Zweigardt v. Birdseye*, 57 Mo. App. 462; *Western Loan, etc., Co. v. Silver Bow Abstract Co.*, (Mont. 1904) 78 Pac. Rep. 774; *Economy*

**222. ABUSE AND MISUSE.** — See note 1.

Bldg., etc., *Assoc. v. West Jersey Title, etc., Co.*, 64 N. J. L. 27.

The *Kansas* statute provides that abstractors shall give a bond, and that they "shall be liable on said bond to any person or persons for whom he or they may compile, make, or furnish abstracts of title, to the amount of damage done to said person or persons by any incompleteness, imperfection, or error" in such abstract. *Allen v. Hopkins*, 62 Kan. 175.

**Abstractor Employed by Agent of Undisclosed Principal** is liable for damages to the undisclosed principal. *Young v. Lohr*, 118 Iowa 624.

**221.** 7. *Brown v. Sims*, 22 Ind. App. 317, 72 Am. St. Rep. 308; *Symms v. Cutter*, 9 Kan. App. 210, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 221; *Denton v. Nashville Title Co.*, (Tenn. 1904) 79 S. W. Rep. 799. See also *Thomas v. Carson*, 46 Neb. 765; *Glawatz v. People's Guaranty Search Co.*, 49 N. Y. App. Div. 465.

The statute relating to bonded abstractors (Comp. Stat. Neb. (1897), §§ 65-69) was intended to extend the liability of abstractors beyond the limits fixed by the common law, and one who purchases real estate on the faith of a certificate of title furnished to his vendor by a bonded abstractor may maintain an action for

damages grounded on the failure of the abstractor to make the proper search and true certificate. *Gate City Abstract Co. v. Post*, 55 Neb. 742.

**222.** 1. *Kline v. Hibbard*, 80 Hun (N. Y.) 50.

**Abuse of Discretion.** — *Stewart v. Stewart*, 28 Ind. App. 378; *Citizens St. R. Co. v. Heath*, 29 Ind. App. 406. As ground for a new trial, see *Stroup v. Raymond*, 183 Pa. St. 279.

**Abuse a Woman or Child.** — *Chambers v. State*, 46 Neb. 447, following *Palin v. State*, 38 Neb. 867.

The term *abusing* is equivalent to carnally knowing in a statute punishing the rape of a female child. "The *abusing*, construed with the carnally knowing, means the imposing upon, deflowering, degrading, ill-treating, debauching, and ruining socially, as well as morally, perhaps, of the virgin of such tender years, who, when yielding willingly, does so in ignorance of the consequences, and of her right and power to resist. \* \* \* To have injured the organs in some way other than by endeavoring to penetrate with his person, if done with her consent, though it would be *abusing* her, would not be a crime, because there was no act of carnal knowledge." *State v. Monds*, 130 N. Car. 697.

# ABUTTING OWNERS.

BY G. W. WALSH

**225. III. RIGHTS OF ABUTTERS — 1. Use and Enjoyment of Property in Respect to the Street — a. EASEMENT OF ACCESS — (1) In General.** — See notes 3, 4.

**226. The Right a Species of Private Property.** — See notes 1, 2.

**225. 3. Right of Access Absolute** — *United States*. — *Donovan v. Pennsylvania Co.*, (C. C. A.) 120 Fed. Rep. 219, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225.

*California*. — *Brown v. San Francisco*, 124 Cal. 274.

*Indiana*. — *Cincinnati, etc., R. Co. v. Miller*, (Ind. 1904) 72 N. E. Rep. 827.

*Kansas*. — *Highbarger v. Milford*, (Kan. 1905) 80 Pac. Rep. 633.

*Massachusetts*. — *Atty.-Gen. v. Collins*, (Mass. 1904) 71 N. E. Rep. 574.

*Michigan*. — *Wilkinson v. Dunkley-Williams Co.*, (Mich. 1905) 103 N. W. Rep. 170.

*Mississippi*. — *Hazlehurst v. Mayes*, (Miss. 1904) 36 So. Rep. 33.

*Missouri*. — *Corby v. Chicago, etc., R. Co.*, 150 Mo. 457; *Dries v. St. Joseph*, 98 Mo. App. 611; *De Geofroy v. Merchants' Bridge Terminal R. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524.

*Ohio*. — *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 87 Am. St. Rep. 600, reversing 12 Ohio Cir. Dec. 68, 21 Ohio Cir. Ct. 384.

*Pennsylvania*. — *Philadelphia, etc., R. Co. v. Philadelphia, etc., Pass. R. Co.*, 6 Pa. Dist. 487.

*Tennessee*. — *Hill v. Hoffman*, (Tenn. Ch. 1899) 58 S. W. Rep. 929; *Hamilton County v. Rape*, 101 Tenn. 222; *Tennessee Brewing Co. v. Union R. Co.*, (Tenn. 1905) 85 S. W. Rep. 864.

*Texas*. — *San Antonio Rapid Transit St. R. Co. v. Limburger*, 88 Tex. 79, 53 Am. St. Rep. 730.

*Wisconsin*. — *Davis v. Appleton*, 109 Wis. 580.

But the law does not require cities and towns to construct approaches from the houses or lots of adjacent owners to the traveled part of the way, or to grade and construct the way up to the lines of the lots. *Atty.-Gen. v. Collins*, (Mass. 1904) 71 N. E. Rep. 574, following *Metcalf v. Boston*, 158 Mass. 284.

**Extent of Right.** — The absolute right to ingress and egress is limited to a street or highway which is the only means of access to the property. Therefore the owner of abutting property cannot enjoin the obstruction or closing of a street or highway if he has other reasonable means of access. *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 283, 87 Am. St. Rep. 600.

The extent of the abutting proprietor's rights is that the street, including roadway and sidewalk, shall not be closed or obstructed so as to impair ingress to or egress from his lot by himself and those whom he invites there for trade or other purposes. *Hester v. Durham Traction Co.*, (N. Car. 1905) 50 S. E. Rep. 711.

**4. Question of Ownership of Fee.** — *Pennsylvania Co. v. Chicago*, 181 Ill. 311, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225; *Illinois Cent. R. Co. v. Davis*, 71 Ill. App. 99; *Hazlehurst v. Mayes*, (Miss. 1904) 36 So. Rep. 33; *De Geofroy v. Merchants' Bridge Terminal R. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524; *Egerer v. New York Cent., etc., R. Co.*, 70 N. Y. App. Div. 421; *Philadelphia, etc., R. Co. v. Philadelphia, etc., Pass. R. Co.*, 6 Pa. Dist. 487; *State v. Superior Ct.*, 26 Wash. 278; *Chicago, etc., R. Co. v. Milwaukee, etc., Electric R. Co.*, 95 Wis. 561, 60 Am. St. Rep. 137.

**226. 1. Due Compensation** — *California*. — *Brown v. San Francisco*, 124 Cal. 274.

*Georgia*. — *Macon v. Wing*, 113 Ga. 90.

*Illinois*. — *Pennsylvania Co. v. Chicago*, 181 Ill. 311, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225 [226]; *Bloomington v. Winslow*, 71 Ill. App. 340; *Illinois Cent. R. Co. v. Wolf*, 95 Ill. App. 74.

*Kentucky*. — *Chesapeake, etc., R. Co. v. Rice*, (Ky. 1899) 50 S. W. Rep. 541.

*Louisiana*. — *Walker v. Vicksburg, etc., R. Co.*, 52 La. Ann. 2036.

*Maryland*. — *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441.

*Massachusetts*. — *Putnam v. Boston, etc., R. Corp.*, 182 Mass. 351.

*Mississippi*. — *Laurel Imp. Co. v. Rowell*, (Miss. 1904) 36 So. Rep. 543.

*Missouri*. — *De Geofroy v. Merchants' Bridge Terminal R. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524; *Farrar v. Midland Electric R. Co.*, 101 Mo. App. 140.

*New York*. — *Egerer v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 652, 70 N. Y. App. Div. 421.

*North Dakota*. — *Donovan v. Allert*, 11 N. Dak. 289, 95 Am. St. Rep. 720.

*Ohio*. — *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 87 Am. St. Rep. 600.

*Texas*. — *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488.

*Washington*. — *State v. Superior Ct.*, 30 Wash. 219.

*West Virginia*. — *Pence v. Bryant*, 54 W. Va. 266.

**2. Injunction to Enforce Right** — *United States*. — *Donovan v. Pennsylvania Co.*, (C. C. A.) 120 Fed. Rep. 219, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225 [226].

*Illinois*. — *Pennsylvania Co. v. Chicago*, 181 Ill. 311, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 226.

*Indiana*. — *Strunk v. Pritchett*, 27 Ind. App. 582; *Richmond v. Smith*, 148 Ind. 294.

**226.** Interference with Right — Obstructions. — See notes 3, 6, 7.

**227.** (2) Access Obstructed by Semi-public Improvements — Steam Railroads. — See note 2.

Street Railways. — See note 3.

*Louisiana.* — Walker v. Vicksburg, etc., R. Co., 52 La. Ann. 2036.

*Maryland.* — Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441; Brauer v. Baltimore Refrigerating, etc., Co., (Md. 1904) 58 Atl. Rep. 21.

*Missouri.* — Longworth v. Sedevic, 165 Mo. 221.

*New York.* — Finegan v. Eckerson, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 574.

*North Dakota.* — Donovan v. Allert, 11 N. Dak. 289, 95 Am. St. Rep. 720.

*Ohio.* — Caller v. Columbus Edison Electric Light Co., 66 Ohio St. 166; Wilder v. Cincinnati, 4 Ohio Dec. 104, 1 Ohio N. P. 347; Madden v. Pennsylvania R. Co., 11 Ohio Cir. Dec. 571, 21 Ohio Cir. Ct. 73.

*Tennessee.* — Perkins v. Ross, (Tenn. Ch. 1896) 42 S. W. Rep. 61, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225 [226].

*Texas.* — Kalteyer v. Sullivan, 18 Tex. Civ. App. 488.

*Washington.* — Swope v. Seattle, 35 Wash. 69; State v. Superior Ct., 26 Wash. 278.

*West Virginia.* — Pence v. Bryant, 54 W. Va. 266, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224 [226].

*Wisconsin.* — Zehren v. Milwaukee Electric R., etc., Co., 99 Wis. 83, 67 Am. St. Rep. 844.

**226. 3. Ordinance Authorizing the Stationing of Coaches in Front of Abutting Premises.** — Pennsylvania Co. v. Donovan, 116 Fed. Rep. 907.

**6. Appropriating Streets for Market Purposes.** — Richmond v. Smith, 148 Ind. 294.

**7. Bridges and Viaducts Constructed by Public Authority.** — Chicago v. LeMoine, (C. C. A.) 119 Fed. Rep. 662; Atchison, etc., R. Co. v. Pratt, 53 Ill. App. 263; Chicago v. Webb, 102 Ill. App. 322; Dairy v. Iowa Cent. R. Co., 113 Iowa 716.

**227. 2. Damages Allowed for Obstruction by Steam Railroad.** — *Alabama.* — Birmingham Traction Co. v. Birmingham R., etc., Co., 119 Ala. 137.

*Connecticut.* — McKeon v. New York, etc., R. Co., 75 Conn. 343.

*Illinois.* — Chicago, etc., R. Co. v. West Chicago St. R. Co., 156 Ill. 255; Bond v. Pennsylvania Co., 171 Ill. 508.

*Kentucky.* — Maysville, etc., R. Co. v. Ingram, (Ky. 1895) 30 S. W. Rep. 8; Louisville Southern R. Co. v. Hooe, (Ky. 1896) 35 S. W. Rep. 266.

*Maryland.* — Lake Roland El. R. Co. v. Webster, 81 Md. 529; Baltimore Belt R. Co. v. McColgan, 83 Md. 650.

*Missouri.* — Stevenson v. Missouri Pac. R. Co., (Mo. 1895) 31 S. W. Rep. 793.

*Nebraska.* — Chicago, etc., R. Co. v. Sturey, 55 Neb. 137.

*New York.* — Peck v. Schenectady R. Co., 170 N. Y. 298.

*Tennessee.* — Brumit v. Virginia, etc., R. Co., 106 Tenn. 124; Tennessee Brewing Co. v. Union R. Co., (Tenn. 1905) 85 S. W. Rep. 864.

*Texas.* — Ft. Worth, etc., R. Co. v. Daniels, (Tex. Civ. App. 1894) 29 S. W. Rep. 695.

*Washington.* — Kaufman v. Tacoma, etc., R. Co., 11 Wash. 632.

Compare the following cases: Baltimore, etc., R. Co. v. Fitzgerald, 2 App. Cas. (D. C.) 501; Baltimore, etc., R. Co. v. Walker, 2 App. Cas. (D. C.) 521; Illinois Cent. R. Co. v. Turner, 97 Ill. App. 219, affirmed 194 Ill. 575; Stephenson v. Missouri Pac. R. Co., 68 Mo. App. 642; Schaaf v. Cleveland, etc., R. Co., 66 Ohio St. 215.

**3. Electrical Railways.** — *Alabama.* — Baker v. Selma St., etc., R. Co., 130 Ala. 474; Baker v. Selma St., etc., R. Co., 135 Ala. 552, 93 Am. St. Rep. 42; Birmingham Traction Co. v. Birmingham R., etc., Co., 119 Ala. 137.

*Delaware.* — Philadelphia, etc., R. Co. v. Wilmington City R. Co., (Del. Ch. 1897) 38 Atl. Rep. 1067.

*Georgia.* — Southern R. Co. v. Atlanta R., etc., Co., 111 Ga. 679.

*Illinois.* — Chicago, etc., R. Co. v. General Electric R. Co., 79 Ill. App. 569; Chicago, etc., R. Co. v. West Chicago St. R. Co., 156 Ill. 255, affirming 54 Ill. App. 273.

*Indiana.* — Mordhurst v. Ft. Wayne, etc., Traction Co., (Ind. 1904) 71 N. E. Rep. 642.

*Iowa.* — Snyder v. Ft. Madison St. R. Co., 105 Iowa 284.

*Kentucky.* — Ashland, etc., St. R. Co. v. Faulkner, 106 Ky. 332.

*Maine.* — Taylor v. Portsmouth, etc., St. R. Co., 91 Me. 193, 64 Am. St. Rep. 216; Milbridge, etc., Electric R. Co., Appellants, 96 Me. 110.

*Massachusetts.* — Baker v. Boston El. R. Co., 183 Mass. 178; Eustis v. Milton St. R. Co., 183 Mass. 586.

*New Jersey.* — Montclair Military Academy v. North Jersey St. R. Co., 70 N. J. L. 229.

*Ohio.* — Parrish v. Hamilton, etc., Traction Co., 23 Ohio Cir. Ct. 527.

*Pennsylvania.* — Osborne v. Delaware County, etc., Electric R. Co., 9 Pa. Super. Ct. 632; Patterson v. Pittston, 8 Kulp (Pa.) 530.

*Texas.* — San Antonio Rapid Transit St. R. Co. v. Limburger, 88 Tex. 79, 53 Am. St. Rep. 730.

*Wisconsin.* — La Crosse City R. Co. v. Higbee, 107 Wis. 389; Linden Land Co. v. Milwaukee Electric R., etc., Co., 107 Wis. 493.

But if the railroad is so constructed as to interfere with the abutter's access to his property he is entitled to compensation. Jaynes v. Omaha St. R. Co., 53 Neb. 631.

**Carrier of Goods.** — A street railway, used as a commercial railway for the carriage of freight, imposes an additional servitude on the street. Rische v. Texas Transp. Co., 27 Tex. Civ. App. 33.

**Embankments — Change of Grade.** — In constructing the roadbed upon a highway the grade or level of the street must be conformed to. If embankments are raised to place the

**228.** See notes 1, 2.

**Telegraph and Telephone Poles and Wires.** — See notes 4, 5.  
**Pipe Lines.** — See note 6.

**b. ENJOYMENT OF LIGHT AND AIR.** — See note 8.

**229.** In *New York*. — See note 1.

In *Minnesota*. — See note 2.

**c. PRESERVATION OF PROPERTY — (1) In General — Lateral and Subjacent Support.** — See note 4.

road above the level of the street the abutting owners are entitled to damages for the obstruction of access to their property. *Farrar v. Midland Electric R. Co.*, 101 Mo. App. 140. And the same was held when the street was graded down. *Zehren v. Milwaukee Electric R., etc., Co.*, 99 Wis. 83, 67 Am. St. Rep. 844.

**Country Roads.** — Electric street railways have been held not to be an additional burden on country roads. *Ranken v. St. Louis, etc., Suburban R. Co.*, 98 Fed. Rep. 479; *Lonaconing Midland, etc., R. Co. v. Consolidation Coal Co.*, 95 Md. 630; *Austin v. Detroit, etc., R. Co.*, 134 Mich. 149, 10 Detroit Leg. N. 421; *Ehret v. Camden, etc., R. Co.*, 61 N. J. Eq. 171; *Akron, etc., R. Co. v. Keck*, 23 Ohio Cir. Ct. 57.

**Contra.** — In *Zehren v. Milwaukee Electric R., etc., Co.*, 99 Wis. 83, 67 Am. St. Rep. 844, the court very fully discussed the distinction between a country highway and a city street, and decided that an electric railway on a country road is an additional burden upon the highway. To the same effect, see *Chicago, etc., R. Co. v. Milwaukee, etc., Electric R. Co.*, 95 Wis. 561, 60 Am. St. Rep. 137.

**Question Unsettled in New Jersey.** — The contention that the construction of an electric railway upon a country road imposes a servitude in addition to that charged upon the lands by the original taking for a public highway, entitling the owner of the fee to additional compensation to be first made, was said to be an unsettled question in New Jersey. *Ehret v. Camden, etc., R. Co.*, 60 N. J. Eq. 246.

**228. 1. Horse Railways.** — *Chicago, etc., R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255; *Magee v. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 358; *Taylor v. Portsmouth, etc., St. R. Co.*, 91 Me. 193, 64 Am. St. Rep. 216; *Patterson v. Pittston*, 8 Kulp (Pa.) 530; *Zehren v. Milwaukee Electric R., etc., Co.*, 99 Wis. 83, 67 Am. St. Rep. 844.

In *Massachusetts* the laying of a private horse railway for the carrying of stone from a quarry was held not to be an additional burden which would entitle the abutting owner to damages. *White v. Blanchard Bros. Granite Co.*, 178 Mass. 363.

**2.** *Taylor v. Portsmouth, etc., St. R. Co.*, 91 Mo. 193, 64 Am. St. Rep. 216. See also *Case v. Cayuga County*, 88 Hun (N. Y.) 59; *Rische v. Texas Transp. Co.*, 27 Tex. Civ. App. 33.

**4. Telegraph and Telephone Companies — Illinois.** — *Chicago, etc., R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255; *Doane v. Lake St. El. R. Co.*, 165 Ill. 519, 56 Am. St. Rep. 265; *Union Electric Telephone, etc., Co. v. Applequist*, 104 Ill. App. 517.

*Kentucky.* — *East Tennessee Telephone Co. v. Russellville*, 106 Ky. 667.

*Maine.* — *Taylor v. Portsmouth, etc., St. R. Co.*, 91 Me. 193, 64 Am. St. Rep. 216.

*Mississippi.* — *Hazlehurst v. Mayes*, (Miss. 1904) 36 So. Rep. 33.

*Nebraska.* — *Bronson v. Albion Tel. Co.*, (Neb. 1903) 93 N. W. Rep. 201.

*North Dakota.* — *Donovan v. Allert*, 11 N. Dak. 289, 95 Am. St. Rep. 720.

*Ohio.* — *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166.

*West Virginia.* — *Maxwell v. Central Dist., etc., Tel. Co.*, 51 W. Va. 121.

*Wisconsin.* — *Krueger v. Wisconsin Telephone Co.*, 106 Wis. 96.

**5.** *Richmond v. Smith*, 148 Ind. 294; *Magee v. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 358; *Loeber v. Butte Gen. Electric Co.*, 16 Mont. 1, 50 Am. St. Rep. 468; *Auerbach v. Cuyahoga Telephone Co.*, 9 Ohio Dec. 389.

**6. Pipe Lines in Street.** — *Huddleston v. Eugene*, 34 Oregon 343.

**Conduit for Telephone Wires.** — *Coburn v. New Telephone Co.*, 156 Ind. 90.

**8. Light and Air.** — *Montgomery First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46; *Brown v. San Francisco*, 124 Cal. 274; *John Anisfield Co. v. Grossman*, 98 Ill. App. 180; *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441.

**229. 1. Elevated Railroad Cases.** — *Lewis v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 13; *Rorke v. Kings County El. R. Co.*, 22 N. Y. App. Div. 511; *Auchincloss v. Metropolitan El. R. Co.*, 69 N. Y. App. Div. 63; *Roberts v. New York El. R. Co.*, 155 N. Y. 31. Compare *Metropolitan West Side El. R. Co. v. Goll*, 100 Ill. App. 323; *Metropolitan West Side El. R. Co. v. Springer*, 171 Ill. 170; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520.

In *Missouri* the same doctrine has been followed in elevated railroad cases. See *De Geofroy v. Merchant's Bridge Terminal R. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524.

**2. Extension of Doctrine to Ordinary Steam Railroads in Certain Cases.** — In *Kentucky* the same doctrine has been adopted. *Chesapeake, etc., R. Co. v. Gross*, (Ky. 1897) 43 S. W. Rep. 203.

**4. Lateral Support of Land.** — *Edinburgh, etc., Trustees v. Clippens Oil Co., Sc. Ct. of Sess.* 3 F. 156. See also the following cases:

*Illinois.* — *Schroeder v. Joliet*, 189 Ill. 48.

*Michigan.* — *Hemsworth v. Cushing*, 115 Mich. 92.

*Missouri.* — *Eads v. Gains*, 58 Mo. App. 586.

*New York.* — *Finegan v. Eckerson*, 32 N. Y. App. Div. 233; *White v. Tebo*, 43 N. Y. App. Div. 418; *Gillies v. Eckerson*, 97 N. Y. App. Div. 153.

*Oregon.* — *Mosier v. Oregon R., etc., Co.*, 39

**230.** See note 1.

Rule as to Acquired Easement of Support. — See note 2.

**231.** (2) *Compensation for Indirect Impairment in Value by Public Improvements* — Common-law Rule. — See note 3.

**233.** Under Constitutions and Statutes. — See note 2.

Oregon 258, 87 Am. St. Rep. 652, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 229.

Pennsylvania. — Jones v. Greenfield, 25 Pa. Super. Ct. 315.

South Carolina. — Bailey v. Gray, 53 S. Car. 503.

**230.** 1. Schroeder v. Joliet, 189 Ill. 48; Joliet v. Schroeder, 92 Ill. App. 68; Cabot v. Kingman, 166 Mass. 403; Abrey v. Detroit, 127 Mich. 374, 8 Detroit Leg. N. 311; Eads v. Gains, 58 Mo. App. 586.

In Finegan v. Eckerson, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 574, the court said: "The right to lateral support between adjoining owners does not include the right to the support of an artificial structure, [but] that doctrine has no application to the case of a highway. Milburn v. Fowler, 27 Hun (N. Y.) 568. The plaintiff is entitled to the lateral support of the highway for her building as against a wrongdoer, and as any unlawful obstruction or interference with a highway is, *per se*, a nuisance, negligence in the digging need not be shown."

**2. Buildings and Additional Burdens** — Georgia.

— Bass v. West, 110 Ga. 698.

Maryland. — Serio v. Murphy, (Md. 1904) 58 Atl. Rep. 435.

Missouri. — Obert v. Dunn, 140 Mo. 476.

New York. — Gillies v. Eckerson, 97 N. Y. App. Div. 153; Finegan v. Eckerson, 32 N. Y. App. Div. 233; White v. Tebo, 43 N. Y. App. Div. 418.

Pennsylvania. — Spohn v. Dives, 174 Pa. St. 474; Jones v. Greenfield, 25 Pa. Super. Ct. 315.

South Dakota. — Novotny v. Danforth, 9 S. Dak. 301.

In New York the adjoining owner must protect at his own expense a wall on or near the boundary line if he intends to excavate to a depth of more than ten feet (Laws 1855, c. 6, p. 11). Korn v. Weir, (Supm. Ct. App. T.) 88 N. Y. Supp. 976.

**Lateral Support of Adjoining Building.** — Where two houses do not have a common origin the owner of one cannot claim an easement of support unless the owner of the other house knew or was in a position to know that his house was thus serving as a lateral support. Gately v. Martin, (1900) 2 Ir. 269.

**231. 3. No Common-law Right to Compensation** — Illinois. — Chicago Office Bldg. v. Lake St. El. R. Co., 87 Ill. App. 594.

Indiana. — Hirth v. Indianapolis, 18 Ind. App. 673.

Maryland. — Baltimore v. Cowen, 88 Md. 447, 71 Am. St. Rep. 433; Offutt v. Montgomery County, 94 Md. 115.

Massachusetts. — Underwood v. Worcester, 177 Mass. 173.

Montana. — Less v. Butte, 28 Mont. 27, 98 Am. St. Rep. 545.

New York. — Ehrsam v. Utica, 37 N. Y. App. Div. 272.

Wisconsin. — Zehren v. Milwaukee Electric R., etc., Co., 99 Wis. 83, 67 Am. St. Rep. 844.

**233. 2. Damages Allowed by Constitution or Statute** — United States. — Chicago v. Baker, (C. C. A.) 86 Fed. Rep. 753; Chicago v. Le Moyne, (C. C. A.) 119 Fed. Rep. 662.

California. — Eachus v. Los Angeles, 130 Cal. 492.

Colorado. — Denver v. Bonesteel, 30 Colo. 107.

Connecticut. — McKeon v. New York, etc., R. Co., 75 Conn. 343.

Illinois. — Kotz v. Chicago, etc., R. Co., 70 Ill. App. 284; Illinois Cent. R. Co. v. Davis, 71 Ill. App. 99; Marshall v. Chicago, 77 Ill. App. 351; Chicago Office Bldg. v. Lake St. El. R. Co., 87 Ill. App. 594; Joliet v. Schroeder, 189 Ill. 48, affirming 92 Ill. App. 68; Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323; Chicago v. McShane, 102 Ill. App. 239; Joliet v. Blower, 155 Ill. 414; Chicago v. Jackson, 196 Ill. 496.

Kentucky. — Henderson v. McClain, 102 Ky. 402; Ludlow v. Detweller, (Ky. 1898) 47 S. W. Rep. 881; Louisville v. Hegan, (Ky. 1899) 49 S. W. Rep. 532; Layman v. Beeler, 113 Ky. 221; Board of Councilmen v. Edelen, 82 S. W. Rep. 279, 26 Ky. L. Rep. 601.

Minnesota. — Dickerman v. Duluth, 88 Minn. 288.

Mississippi. — Rainey v. Hinds County, 78 Miss. 308.

Missouri. — Hulett v. Missouri, etc., R. Co., 80 Mo. App. 87.

Montana. — Less v. Butte, 28 Mont. 27, 98 Am. St. Rep. 545.

Nebraska. — Jaynes v. Omaha St. R. Co., 53 Neb. 631.

New Jersey. — Clark v. Elizabeth, 61 N. J. L. 565.

New York. — Matter of Andersen, 178 N. Y. 416. Compare Fries v. New York, etc., R. Co., 169 N. Y. 270.

Ohio. — Toledo Bending Co. v. Manufacturers' R. Co., 3 Ohio Dec. 430, 2 Ohio N. P. 317.

Oregon. — Mosier v. Oregon R., etc., Co., 39 Oregon 256, 87 Am. St. Rep. 652.

Pennsylvania. — Lafean v. York County, 20 Pa. Super. Ct. 573; *In re* Walnut St. Bridge, 191 Pa. St. 153.

South Carolina. — Paris Mountain Water Co. v. Greenville, 53 S. Car. 82; Garraux v. Greenville, 53 S. Car. 575.

South Dakota. — Searle v. Lead, 10 S. Dak. 312; Whittaker v. Deadwood, 12 S. Dak. 608.

Tennessee. — Knoxville v. Harth, 105 Tenn. 436, 80 Am. St. Rep. 901.

Texas. — Rische v. Texas Transp. Co., 27 Tex. Civ. App. 33.

Washington. — State v. Superior Ct., 26 Wash. 278; Seattle Transfer Co. v. Seattle, 27 Wash. 520; Swope v. Seattle, 35 Wash. 69.

But see Hirth v. Indianapolis, 18 Ind. App. 673.

In Aicher v. Denver, 10 Colo. App. 413, it

**234. 2. Right of Abutting Owners to Use of Streets — a. FOR PURPOSES OF DEPOSIT, ETC. — Building Materials. —** See note 2.

**235. Deposit of Goods by Tradesmen. —** See note 1.

Use Must Be Reasonable. — See note 2.

Considerations Determining the Question of Reasonableness. — See note 3.

Obstructing Street Cars. — See note 4.

*b. PROJECTIONS, EXCAVATIONS, ETC. — Certain Projections as Nuisances.* — See notes 5, 6, 10, 11, 12.

**236. Right of Municipality to Forbid Excavations. —** See notes 4, 5.

Permission as to Projections and Excavations Revocable Without Compensation. — See note 8.

**3. Abutters upon Rural Roads — a. RESTRICTIONS UPON RIGHTS OF PUBLIC IN RURAL ROADS — Rural and Urban Highways Distinguished. —** See note 11.

**237. See note 1.**

Rights of Rural Abutter at Common Law. — See note 2.

**238. See note 1.**

was held that the making of public improvements under direct and positive legislative authority, although it may cause damage to abutting owners by its indirect consequences, does not constitute a taking within the constitutional provision which forbids the taking of private property for public purposes without just compensation.

The public may regulate by law the use of its public ways in such manner as the legislature may think will best serve the public interest. The kind of use that may be permitted is of no consequence to the abutting landowner. He has been paid his damages for the creation of the way, so the public controls its use, and he must take his chances, with the rest of the community in which he lives, of any inconvenience suffered by reason of the use that the public may see fit to permit. *Taylor v. Portsmouth, etc., St. R. Co.*, 91 Me. 193, 64 Am. St. Rep. 216.

In Oregon, under the constitution, the abutting owner is not entitled to compensation for damages resulting from the change of grade of a street. *Brand v. Multnomah County*, 38 Oregon 79, 84 Am. St. Rep. 772.

**234. 2. Right of Abutter to Deposit Building Materials. —** *McKeon v. New York, etc., R. Co.*, 75 Conn. 343; *Martin v. Chicago, etc., R. Co.*, 87 Ill. App. 208; *Perry v. Castner*, 124 Iowa 386; *Strauss v. Louisville*, 108 Ky. 155; *Brauer v. Baltimore Refrigerating, etc., Co.*, (Md. 1904) 58 Atl. Rep. 21; *Richmond v. Smith*, 101 Va. 161.

**235. 1. Merchants Loading and Unloading Goods. —** *Atty.-Gen. v. Brighton, etc., Co-operative Supply Assoc.*, (1900) 1 Ch. 276, 69 L. J. Ch. 204; *Brauer v. Baltimore Refrigerating, etc., Co.*, (Md. 1904) 58 Atl. Rep. 21; *Richmond v. Smith*, 101 Va. 161.

**2. Use Must Be Temporary Only — England. —** *Atty.-Gen. v. Brighton, etc., Co-operative Supply Assoc.*, (1900) 1 Ch. 276, 69 L. J. Ch. 204. *Illinois. — Martin v. Chicago, etc., R. Co.*, 87 Ill. App. 208.

*Iowa. — Perry v. Castner*, 124 Iowa 386.

*Maryland. — Brauer v. Baltimore Refrigerating, etc., Co.*, (Md. 1904) 58 Atl. Rep. 21.

*Missouri. — Corby v. Chicago, etc., R. Co.*, 150 Mo. 457.

*Virginia. — Richmond v. Smith*, 101 Va. 161.

**3. Question of Reasonableness — Upon What Dependent. —** *Brauer v. Baltimore Refrigerating, etc., Co.*, (Md. 1904) 58 Atl. Rep. 21; *Morris v. Whipple*, 183 Mass. 27.

**4. Drays and Trucks Obstructing Street Cars. —** See *Patterson v. Pittston*, 8 Kulp (Pa.) 530.

**5. Bay Window. —** *People v. Harris*, 203 Ill. 272, 96 Am. St. Rep. 304; *John Anisfield Co. v. Grossman*, 98 Ill. App. 180; *Forbes v. Detroit*, (Mich. 1905) 102 N. W. Rep. 740; *State v. Kean*, 69 N. H. 122.

**6. Passageway. —** *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441; *Beecher v. Newark*, 64 N. J. L. 475, affirmed 65 N. J. L. 307.

**10. Awnings. —** *Hibbard v. Chicago*, 173 Ill. 91; *Ivins v. Trenton*, 68 N. J. L. 501.

**11. Forbes v. Detroit, (Mich. 1905) 102 N. W. Rep. 740.**

**12. Hay Scales. —** *Tell City v. Bielefeld*, 20 Ind. App. 1.

**236. 4. See Dell Rapids Mercantile Co. v. Dell Rapids, 11 S. Dak. 116, 74 Am. St. Rep. 783.**

**5. Heineck v. Grosse, 99 Ill. App. 441; *Perry v. Castner*, 124 Iowa 386; *Deshong v. New York*, 74 N. Y. App. Div. 234.**

**8. See Tell City v. Bielefeld, 20 Ind. App. 1.**

**11. Rural Highways Distinguished from Urban. —** *Palmer v. Larchmont Electric Co.*, 6 N. Y. App. Div. 12; *Auerbach v. Cuyahoga Telephone Co.*, 9 Ohio Dec. 389.

**237. 1. Rights of Rural Abutter the More Extensive. —** *Magee v. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 358; *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, reversing 6 N. Y. App. Div. 12.

**2. Rural Abutter as Proprietor. —** *Huffman v. State*, 21 Ind. App. 449, 69 Am. St. Rep. 368; *Denver v. U. S. Telephone Co.*, 10 Ohio Dec. 273; *Clay v. Hart*, (County Ct.) 25 Misc. (N. Y.) 110; *Krueger v. Wisconsin Telephone Co.*, 106 Wis. 96.

**238. 1. Postal Tel.-Cable Co. v. Eaton, 170 Ill. 513, 62 Am. St. Rep. 390; *Blennerhassett v. Forest City*, 117 Iowa 680; *Poole v. Falls Road Electric R. Co.*, 88 Md. 533; *Callen v.***



**238.** Public Have Only Easement of Passage. — See note 2.

**239.** Pipe Lines. — See note 4.

**240.** Poles. — See note 2.

**241.** See note 1.

**242.** *b.* EXTENT OF ABUTTERS' RIGHTS IN RURAL ROADS — Soil of Highway, Minerals, Etc. — See note 3.

Trees — Grass — Herbage. — See note 4.

**243.** See note 1.

How These Rights May Be Protected. — See notes 2, 3, 4.

Construction of Underground Passageway. — See note 5.

Fencing up Part of Highway. — See note 6.

**IV. LIABILITIES OF ABUTTING OWNERS** — Defects in Highway; General Rule. — See note 7.

**244.** When Defect Is Occasioned by Abutter. — See note 2.

Columbus Edison Electric Light Co., 66 Ohio St. 166. See also Milbridge, etc., Electric R. Co., Appellants, 96 Me. 110.

**238. 2. Public Right Restricted to Easement of Passage.** — *Donovan v. Pennsylvania Co.*, (C. C. A.) 120 Fed. Rep. 215, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 238; *Huffman v. State*, 21 Ind. App. 449, 69 Am. St. Rep. 368; *Glencoe v. Reed*, 93 Minn. 518; *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166.

**239. 4. Pipe Lines in Rural Highways.** — *Huffman v. State*, 21 Ind. App. 449, 69 Am. St. Rep. 368; *Ward v. Triple State Natural Gas, etc.*, Co., 115 Ky. 723; *Biddle v. Wayne Waterworks Co.*, 7 Del. Co. Rep. (Pa.) 373.

**240. 2. Poles in Highway** — *Prevailing Doctrine.* — *Kester v. Western Union Tel. Co.*, 108 Fed. Rep. 926; *Goddard v. Chicago, etc.*, R. Co., 104 Ill. App. 533; *Postal Tel.-Cable Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390; *Gray v. New York State Telephone Co.*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 108; *Denver v. U. S. Telephone Co.*, 10 Ohio Dec. 273.

**241. 1. Doctrine that Poles Are Not an Additional Burden.** — *McCann v. Johnson County Telephone Co.*, (Kan. 1904) 76 Pac. Rep. 870; *Cater v. Northwestern Telephone Exch. Co.*, 60 Minn. 539, 51 Am. St. Rep. 543. See also *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, reversing 6 N. Y. App. Div. 12.

**242. 3. Rights of Rural Abutter to Soil of Highway, Mines, Pasturage, Etc.** — *Wright v. Austin*, 143 Cal. 236, 101 Am. St. Rep. 97; *Glencoe v. Reed*, 93 Minn. 518; *Platt v. Ontario*, 88 N. Y. App. Div. 192; *Clutter v. Davis*, 25 Tex. Civ. App. 532.

The Digging of Wells for the purpose of furnishing water to persons and animals passing over the highway is not a right incidental to the use of the land as a highway. *Clutter v. Davis*, 25 Tex. Civ. App. 532.

**4. Trees Growing in Highway.** — *Clutter v. Davis*, 25 Tex. Civ. App. 532.

**243. 1. Herbage.** — *Palmer v. Larchmont Electric Co.*, 6 N. Y. App. Div. 12.

**2.** *Huffman v. State*, 21 Ind. App. 449, 69 Am. St. Rep. 368.

**3.** *Postal Tel.-Cable Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390.

**4.** *Wright v. Austin*, 143 Cal. 236, 101 Am. St. Rep. 97; *Bond v. Pennsylvania Co.*, 171 Ill. 508; *Schaaf v. Cleveland, etc.*, R. Co., 66 Ohio St. 215.

**5.** *Clay v. Hart*, (County Ct.) 25 Misc. (N. Y.) 110.

**6.** *Atlantic City v. Snee*, 68 N. J. L. 39; *Winslow v. Cincinnati*, 9 Ohio Dec. 89, 6 Ohio N. P. 47.

**7. Nonliability of Abutters for Mere Defects in Highway.** — *Rupp v. Burgess*, 70 N. J. L. 7; *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 352, 96 Am. St. Rep. 552; *Independence v. Missouri Pac. R. Co.*, 86 Mo. App. 585; *Beck v. Ferd Heim Brewing Co.*, 167 Mo. 195; *Lincoln v. Janesch*, 63 Neb. 707, 93 Am. St. Rep. 478; *Watson v. Webb*, 28 Wash. 580; *Cooper v. Waterloo*, 88 Wis. 433; *Fife v. Oshkosh*, 89 Wis. 540. Compare *Devine v. Fon du Lac*, 113 Wis. 61.

**244. 2. Abutters' Liabilities for Defects in Highway Caused by Them** — *Illinois.* — *Nelson v. Fehd*, 104 Ill. App. 114, affirmed 203 Ill. 120.

*Massachusetts.* — *Davis v. Rich*, 180 Mass. 235.

*New Jersey.* — *Rupp v. Burgess*, 70 N. J. L. 7; *O'Malley v. Gerth*, 67 N. J. L. 610.

*New York.* — *Devine v. National Wall Paper Co.*, 95 N. Y. App. Div. 194; *Tremblay v. Harmony Mills*, 171 N. Y. 598.

*Pennsylvania.* — *Brown v. White*, 202 Pa. St. 297.

*Rhode Island.* — *Reynolds v. Garst*, 25 R. I. 83.

*Wisconsin.* — *Cooper v. Waterloo*, 88 Wis. 433; *Busse v. Rogers*, 120 Wis. 443.

## ACCESSION.

By W. B. ROBINSON.

**249. III. APPLICATION OF THE DOCTRINE TO PERSONALTY — 1. Labor Performed upon, or Materials Added to, Property Without Owner's Consent —**  
*a. UNDER A BONA FIDE MISTAKE AS TO OWNERSHIP. — See note 3.*

**251.** *Test as to Value. — See note 1.*

**252.** *c. LIABILITY OF OWNER FOR COMPENSATION — Wilful Wrongdoer. — See note 3.*

**253.** *When No Liability Exists, Though There Is Honest Mistake. — See note 1.*

*d. WHAT CONSTITUTES A CHANGE OF SPECIES. — See note 2.*

**254.** *2. Mortgages of Personalty — Live Stock. — See note 3.*

**255. IV. APPLICATION OF THE DOCTRINE TO PERSONALTY WHEN ANNEXED TO REALTY — General Rule. — See notes 1, 2.**

**256.** *Qualification. — See note 1.*

**249. 3. Trees Made into Ties.** — The owner of trees made into ties by an innocent trespasser is entitled to a judgment for the delivery of such ties, or, if delivery be impossible, to a judgment for the value of the ties, less the value of the labor expended thereon. *Eaton v. Langley*, 65 Ark. 448.

**251. 1.** See *Eaton v. Langley*, 65 Ark. 448.

**252. 3.** *Finnell v. Million*, 99 Mo. App. 552, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252.

**253. 1.** See *Eaton v. Langley*, 65 Ark. 448.

**2. Change of Identity.** — See *Swoop v. St. Martin*, 110 La. 237.

**254. 3.** *Northwestern Nat. Bank v. Freeman*, 171 U. S. 620; *Cumberland Bank v. Baker*, 57 N. J. Eq. 569.

**255. 1. Crops.** — See *Winkler v. Gibson*, 2 Kan. App. 621.

**2.** *Pomeroy v. Bell*, 118 Cal. 635; *Wright v. Du Bignon*, 114 Ga. 765; *Ebersol v. Trainor*, 81 Ill. App. 645; *Swoop v. St. Martin*, 110 La. 237; *Fortescue v. Bowler*, 55 N. J. Eq. 741. See also *Bemis v. First Nat. Bank*, 63 Ark. 625; *Merchants' Nat. Bank v. Stanton*, 59 Minn. 532; *Capehart v. Foster*, 61 Minn. 132, 52 Am. St. Rep. 582; *Quimby v. Straw*, 71 N. H. 160; *Bridges v. Thomas*, 8 Okla. 620; *Menger v. Ward*, (Tex. Civ. App. 1894) 28 S. W. Rep. 821; *Stack v. T. Eaton Co.*, 4 Ont. L. Rep. 335. And see the title **FIXTURES**, vol. 13, p. 594.

**Manure Made upon a Farm.** — *Taylor v. New-*

*comb*, 123 Mich. 637; *Collier v. Jenks*, 19 R. I. 137, 61 Am. St. Rep. 741. See also the title **LEASES**.

**256. 1. Agreement that House Shall Remain Personalty.** — *Peaks v. Hutchinson*, 96 Me. 530. See also *Hershberger v. Johnson*, 37 Oregon 109; *Wright v. MacDonnell*, 88 Tex. 140; and see the title **FIXTURES**, vol. 13, p. 622.

**Agreement for Tenant to Remove House Within Limited Time.** — See *Sampson v. Camperdown Cotton Mills*, 64 Fed. Rep. 939.

**Subsequent Purchaser; How Affected by Such Agreements.** — Where the defendant affixed personalty to the realty under an agreement with the owner to remove it at any time, it was held that the subsequent grantee, in the absence of notice, was not bound by the agreement. *St. Louis, etc., R. Co. v. Beadle*, 6 Kan. App. 922, 50 Pac. Rep. 988; *Jones v. Cooley*, 106 Iowa 165; *Thomson v. Smith*, 111 Iowa 718, 82 Am. St. Rep. 541; *Landigan v. Mayer*, 32 Oregon 245, 67 Am. St. Rep. 521. See also *Trask v. Little*, 182 Mass. 8; *Union Cent. L. Ins. Co. v. Tillery*, 152 Mo. 421. But see *Peaks v. Hutchinson*, 96 Me. 530; *W. T. Adams Mach. Co. v. Interstate Building & Loan Ass'n*, 119 Ala. 97.

**Consent of Owner of Land to Erection of House.** — See *Salley v. Robinson*, 96 Me. 474.

**Intention.** — *Dutton v. Ensley*, 21 Ind. App. 46, 69 Am. St. Rep. 340.

# ACCESSORY.

By L. C. BOEHM.

**257. I. DEFINITIONS — Accessory Generally.** — See note 1.

**258. Accessory Before the Fact.** — See note 1.

**Accessory After the Fact.** — See note 2.

**II. ACCESSORY DISTINGUISHED FROM PRINCIPAL.** — See note 3.

**1. Constructive Presence.** — See notes 4, 5, 6.

**259. 2. Actors in a Common Criminal Design.** — See note 1.

**260. III. WHO MAY BE AN ACCESSORY.** — See note 3.

**IV. OFFENSES WHICH ADMIT OF ACCESSORIES — Common-law Felony.** —

See note 4.

**257. 1.** *Komrs v. People*, 31 Colo. 214 citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 257; *State v. Berger*, 121 Iowa 585, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 257; *State v. Roberts*, 50 W. Va. 422; *Reg. v. Campbell*, 2 Can. Crim. Cas. (Quebec) 357, 8 Quebec Q. B. 322.

Mansf. Dig. Ark., § 1505, defines an accessory as one "who stands by, aids, abets, or assists," in the execution of a crime. Under the common law one so indicted would be a principal, and so his guilt would not be dependent upon the guilt of the principal in the first degree. *Williams v. U. S.*, 1 Indian Ter. 560.

By the *Texas* statute (Pen. Code 1895, art. 86) an accessory is defined as "one who knowing that an offense has been committed conceals the offender, or gives him any other aid in order that he may evade an arrest or trial or the execution of his sentence." *Street v. State*, 39 Tex. Crim. 134.

**A Mere Spectator Is Not an Accessory** under the *Illinois* code making those who are present aiding and abetting accessories and punishable as principals. *Jones v. People*, 166 Ill. 264.

**258. 1.** *Riggins v. State*, 116 Ga. 592; *Begley v. Com.*, (Ky. 1904) 82 S. W. Rep. 285; *Pearce v. Territory*, 11 Okla. 438; *State v. Roberts*, 50 W. Va. 422. See also *Lamb v. State*, (Neb. 1903) 95 N. W. Rep. 1050.

*Crim. Code Neb.*, §§ 1, 2, defining accessories, is in accord with the common law, and so one who aids and abets, being present, is a principal and not an accessory. *Dixon v. State*, 46 Neb. 298; *Casey v. State*, 49 Neb. 403.

**2.** *People v. Garnett*, 129 Cal. 364; *Anderson v. State*, 39 Tex. Crim. 83; *Robertson v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1000.

**Some Overt Active Assistance**, such as furnishing the person who has committed the principal crime with a horse to flee on, or giving him a gun with the view of resisting arrest, is necessary to make one an accessory after the fact. *Chenault v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 971.

**3. Principal and Accessory Before the Fact Distinguished.** — *Grimsinger v. State*, 44 Tex. Crim. 21, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 258. See also *Wilkerson v. State*, (Tex.

*Crim.* 1899) 57 S. W. Rep. 956; *Mitchell v. State*, 44 Tex. Crim. 228.

**4. Absence Necessary to Constitute an Accessory.** — *Hill v. State*, 42 Neb. 503; *State v. Roberts*, 50 W. Va. 422.

**How Modified by Some of the Criminal Codes.** — See *Jones v. People*, 166 Ill. 264.

**5. Under the Colorado Statute** "an accessory during the fact is a person who stands by, without interfering or giving such help as may be in his or her power to prevent a criminal offense from being committed." *Farrell v. People*, 8 Colo. App. 524.

**6.** *State v. Roberts*, 50 W. Va. 422.

**259. 1. When All the Participants Are Principals — Accomplices and Principals Distinguished.** — *People v. Repke*, 103 Mich. 459; *State v. Paxton*, 126 Mo. 500; *Pryor v. State*, 40 Tex. Crim. 643; *Williamson v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 470; *English v. State*, 34 Tex. Crim. 190; *Winnard v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 555; *Tittle v. State*, (Tex. Crim. 1895) 31 S. W. Rep. 677; *McDonald v. State*, 34 Tex. Crim. 556; *Isaacs v. State*, 36 Tex. Crim. 505; *Colter v. State*, 37 Tex. Crim. 284; *Barnett v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1013.

In order that confederates in crime may be guilty as principals, "the statute requires either their presence and participancy, or if the parties were not actually present, then those not actually present must be doing some act in furtherance of the common design, or they must be engaged in procuring aid or arms or means of some kind to assist in the commission of the offense while the others are executing the unlawful act." *Wright v. State*, 40 Tex. Crim. 45.

**260. 3.** *State v. Rowe*, 104 Iowa 323; *State v. Elliott*, 61 Kan. 523, both cases citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 260.

A man may be guilty of raping his wife by aiding and abetting another man to violate her person, even though he could not be guilty of the actual doing of the offense. *State v. Haines*, 51 La. Ann. 731.

**4.** *Lay v. State*, 12 Ind. App. 362; *Wagner v. State*, 43 Neb. 1.

**Murder in the Third Degree** is a crime to which

**260.** Statutory Felony. — See notes 5, 6.

**261.** Misdemeanor. — See note 1.

**263.** V. DEPENDENCE OF ACCESSORY ON PRINCIPAL — 1. At Common Law — In What Manner Distinct. — See note 1.

In What Manner Dependent. — See note 3.

2. As Modified by Statute — Accessory Before the Fact. — See notes 5, 6.

there may be accessories. *Mathis v. State*, (Fla. 1903) 34 So. Rep. 287.

**260.** 5. Murder in Second Degree. — *Hewitt v. State*, 43 Fla. 194.

6. Attempt to Commit Arson. — Under section 136 of the Georgia Penal Code one who aids another in "the wilful and malicious burning, or setting fire to, or attempting to burn," etc., may be an accessory to the attempt to commit arson. *Howard v. State*, 109 Ga. 137.

**261.** 1. Misdemeanors — *United States*. — *Gallot v. U. S.*, (C. C. A.) 87 Fed. Rep. 446.

*Alabama*. — *Bowen v. State*, 131 Ala. 39.

*Georgia*. — *Slaughter v. State*, 113 Ga. 284, 84 Am. St. Rep. 242.

*Indiana*. — *Lay v. State*, 12 Ind. App. 362.

*Kansas*. — *State v. Stark*, 63 Kan. 529, 88 Am. St. Rep. 251.

*Missouri*. — *State v. McLain*, 92 Mo. App. 456.

*Nebraska*. — *Wagner v. State*, 43 Neb. 1; *Casey v. State*, 49 Neb. 403.

*New York*. — *People v. City Prison*, (Supm. Ct. Spec. T.) 89 N. Y. Supp. 322.

*North Carolina*. — *State v. De Boy*, 117 N. Car. 702.

*Texas*. — *Winnard v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 555; *Caudle v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 545.

*Canada*. — *Walsh v. Trebilcock*, 23 Can. Sup. Ct. 695.

**Illustrations** — *Assault and Battery*. — *East-erlin v. State*, 43 Fla. 565.

*Betting on Election*. — *Schwartz v. State*, 38 Tex. Crim. 26.

*Keeping Gaming House*. — *Atkins v. State*, 95 Tenn. 474.

*Selling of Liquor Without License*. — *Bonds v. State*, 130 Ala. 117, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 62 [261]; *Bolton v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 984.

*Making Counterfeit Money*. — *Bliss v. U. S.*, (C. C. A.) 105 Fed. Rep. 508.

*Illegal Disposition of a Dead Body*. — *Thompson v. State*, 105 Tenn. 177, 80 Am. St. Rep. 875.

*Selling Lottery Tickets*. — *Kaufman v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 771.

**263.** 1. *Riggins v. State*, 116 Ga. 592; *Oerter v. State*, 57 Neb. 135; *Casey v. State*, 49 Neb. 403; *State v. Roberts*, 50 W. Va. 422.

3. *Brooks v. State*, 103 Ga. 50; *Williams v. U. S.*, 1 Indian Ter. 560; *Strait v. State*, 77 Miss. 693; *Com. v. House*, 10 Pa. Super. Ct. 259; *Kingsbury v. State*, 37 Tex. Crim. 259. See also *Begley v. Com.*, (Ky. 1904) 82 S. W. Rep. 285.

Under Penal Code Cal., § 32, providing for the punishment of accessories to a "person charged" with a felony, it is necessary first that the criminal should be indicted and charged, or an information filed against him. *People v. Garnett*, 129 Cal. 364.

Penal Code Tex., art. 90, provides for the trial of an accessory before the principal when the principal has escaped. The principal if caught must be tried first, and if acquitted the accessory must be freed; also, a brother cannot be accessory to a principal. Therefore an accessory must be discharged upon the death of his principal unconvicted. *Moore v. State*, 40 Tex. Crim. 389.

One Who Counsels, Advises, and Procures the Commission of a Crime may be convicted of a higher degree of the offense than the one who perpetrates the crime. *State v. Gray*, 55 Kan. 135.

5. *State v. Jones*, 115 Iowa 113; *State v. Rowe*, 104 Iowa 323; *Com. v. Bradley*, 16 Pa. Super. Ct. 561; *State v. Roberts*, 50 W. Va. 422.

The Texas Penal Code provides for the trial and indictment of an accessory, before that of the principal, when the principal has escaped. Under this statute a judgment against an accessory is evidence against the principal. *Dent v. State*, 43 Tex. Crim. 126.

6. Accessory Before the Fact Regarded as Substantive Offender — *United States*. — *Pearce v. Oklahoma*, (C. C. A.) 118 Fed. Rep. 425.

*Alabama*. — *Ferguson v. State*, 134 Ala. 63.

*Arkansas*. — *Greene v. State*, (Ark. 1902) 70 S. W. Rep. 1038.

*California*. — *People v. Ruiz*, 144 Cal. 251; *People v. Chin Yuen*, 144 Cal. xvii, 77 Pac. Rep. 954; *People v. Collum*, 122 Cal. 186.

*Colorado*. — *Noble v. People*, 23 Colo. 9; *Komrs v. People*, 31 Colo. 214.

*Connecticut*. — *State v. Kaplan*, 72 Conn. 635.

*Delaware*. — *State v. Pullen*, 3 Penn. (Del.) 184; *State v. Mills*, 3 Penn. (Del.) 508.

*Idaho*. — *State v. Bland*, (Idaho 1904) 76 Pac. Rep. 780.

*Illinois*. — *Fixmer v. People*, 153 Ill. 123; *McCracken v. People*, 209 Ill. 215; *Jones v. People*, 166 Ill. 264.

*Iowa*. — *State v. Berger*, 121 Iowa 585; *State v. Smith*, 100 Iowa 1; *State v. Rowe*, 104 Iowa 323; *State v. Jones*, 115 Iowa 113.

*Kentucky*. — *Com. v. Hicks*, (Ky. 1904) 82 S. W. Rep. 265; *Begley v. Com.*, 82 S. W. Rep. 285, 26 Ky. L. Rep. 598.

*Missouri*. — *State v. Schuchmann*, 133 Mo. 125, affirming 133 Mo. 114; *State v. Edgen*, 181 Mo. 582.

*Montana*. — *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655; *State v. Dotson*, 26 Mont. 305; *State v. Geddes*, 22 Mont. 68.

*Nebraska*. — *Oerter v. State*, 57 Neb. 135; *Casey v. State*, 49 Neb. 403.

*New York*. — *People v. Mills*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 195; *People v. Winant*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 361; *People v. Wilson*, 145 N. Y. 628.

*North Dakota*. — *State v. Kent*, 4 N. Dak. 577.

*Ohio*. — *State v. Snell*, 5 Ohio Dec. 670;

**264.** Accessory After the Fact. — See note 1.

**265.** VI. ACCESSORY BEFORE THE FACT — 2. Intent. — See note 2.

3. Relation Between Crime and Incitement — In What Guilt Consists. —

See note 4.

**266.** When a Different Crime Is Committed. — See note 1.

**267.** VII. ACCESSORY AFTER THE FACT — 3. Accessory's Knowledge of Felony. — See note 1.

4. Accessory's Act of Assistance. — See notes 2, 3.

**268.** See notes 2, 3, 4, 5.

*Wilson v. State*, 1 Ohio Cir. Dec. 350; *Jones v. State*, 7 Ohio Cir. Dec. 305, 14 Ohio Cir. Ct. 35.

*Oklahoma*. — *Pearce v. Territory*, 11 Okla. 438.

*Oregon*. — *State v. Steeves*, 29 Oregon 85; *State v. Branton*, 33 Oregon 533; *State v. Hinkle*, 33 Oregon 93.

*Pennsylvania*. — *Com. v. Bradley*, 16 Pa. Super. Ct. 561.

*Texas*. — *Red v. State*, 39 Tex. Crim. 667, 73 Am. St. Rep. 965.

*Washington*. — *State v. Gifford*, 19 Wash. 464; *State v. Golden*, 11 Wash. 422.

An accessory before the fact may be convicted of a higher offense than the person who actually committed the crime. *State v. Gray*, 55 Kan. 135.

**264.** 1. *State v. Hinkle*, 33 Oregon 93.

**265.** 2. Knowledge and Concealment of Fact that Crime Is to Be Committed. — *State v. Snell*, 5 Ohio Dec. 670.

An Overt Act Is Necessary to Constitute an Offense. — *Anderson v. State*, 39 Tex. Crim. 83.

4. Parties are responsible for crimes resultant from the general design but are not accomplices to crimes that are independent and due to individual malice of the perpetrator. *Alston v. State*, 109 Ala. 51.

Soliciting and Inciting. — See *Lamb v. State*, (Neb. 1903) 95 N. W. Rep. 1050.

**266.** 1. When Crime Committed a Probable Consequence of the Advice. — Co-conspirators are not criminally liable as accessories before the fact, unless the crime was in furtherance of the conspiracy and a probable or necessary result of the objects contemplated. *Powers v. Com.*, 110 Ky. 386.

**267.** 1. Knowledge of Accessory Requisite. — *Whorley v. State*, (Fla. 1903) 33 So. Rep. 849; *State v. Miller*, 182 Mo. 370; *People v. Weisenberger*, 73 N. Y. App. Div. 428; *Robbins v. State*, 33 Tex. Crim. 573.

Parties Ignorant of Crime Who Render Aid After They Discover the Crime. — Those who begin to aid a thief to carry away stolen property not knowing it was stolen, but who learn the fact and continue to aid in the asportation, are guilty as principals. *Green v. State*, 114 Ga. 918.

2. Accessory Rendering Assistance. — *Street v. State*, 39 Tex. Crim. 134; *Caylor v. State*, 44 Tex. Crim. 118.

Receiving Stolen Goods immediately after the commission of the crime renders one liable for aiding and abetting even though the goods be returned to the thief. *Reg. v. Campbell*, 8 Quebec Q. B. 322.

Under the Connecticut statutes one who re-

ceives stolen goods is an accessory and his liability is independent of that of the principal. *State v. Kaplan*, 72 Conn. 635.

In construing Penal Code Ga., §§ 171, 172, the judge uses the following language: "In this state, receiving stolen goods, knowing the same to have been stolen, is indictable and punishable as an offense separate and distinct from the larceny itself, although the offender's connection with the latter crime is recognized to be that of an accessory after the fact, and it is provided that he 'shall receive the same punishment as would be inflicted on the person convicted of having stolen or feloniously taken the property.'" *Springer v. State*, 102 Ga. 447.

Penal Code N. Y., § 550, providing for the offense of receiving stolen property, was construed to apply to a defendant who had allowed stolen money to be placed to his credit in bank. *People v. Ammon*, 92 N. Y. App. Div. 205.

And see the title RECEIVING STOLEN GOODS.

3. What Constitutes an Accessory After the Fact. — *Chitister v. State*, 33 Tex. Crim. 635.

One who, knowing that a crime has been committed, makes an offer to the perpetrator that he will not prosecute if the latter will pay him what he owes him, which offer is not accepted, is not an accessory after the fact. *Robertson v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1000.

It is not essential that the aid rendered shall be of a character to enable the criminal to effect his personal escape or concealment, but it is sufficient if it enables him to evade present arrest and prosecution. *Gatlin v. State*, 40 Tex. Crim. 116.

Illustration. — See *Hearn v. State*, 43 Fla. 151.

**268.** 2. Mere Inaction or Omission Not Sufficient. — *State v. Doty*, 57 Kan. 840, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 269 [268].

There must be some affirmative act taken with a view to the concealment of the crime, in order to constitute one an accessory. *People v. Garnett*, 129 Cal. 364.

One who is merely present at the commission of a crime and who fails to report it is guilty of no offense. *Monroe v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 726.

An Agreement Not to Prosecute is in violation of Penal Code Tex. 1895, art. 291, and makes those so agreeing accessories after the fact. *Gatlin v. State*, 40 Tex. Crim. 116.

3. *Chitister v. State*, 33 Tex. Crim. 635.

A mother who advises her daughter to say that some one other than her stepfather is the father of an illegitimate child born to the daughter, is not an accessory after the fact, *State v. Doty*, 57 Kan. 835.

**268.** 5. Harboring Wife or Kindred. — See note 7.

**269.** IX. EVIDENCE — Accessory's Guilt Dependent upon That of Principal. — See note 3.

Statutory Modifications — See note 6.

**270.** Record of Principal's Conviction as Evidence. — See note 1.

Corroboration of Evidence of Accessory After the Fact. — See note 2.

X. PUNISHMENT. — See note 4.

**271.** XI. JURISDICTION. — See note 2.

**272.** ACCIDENT. — See note 1.

**273.** See note 2.

**276.** See note 1.

**268.** 4. *Miller v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 996. See also *Robertson v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1000.

5. *Hearn v. State*, 43 Fla. 151.

7. Statutory Exemptions. — See *Adcock v. State*, 41 Tex. Crim. 288, construing Penal Code Tex. 87. See *Crim. Code Ala.*, § 4309, for exemption of relatives from liability for harboring a criminal. *Ferguson v. State*, 134 Ala. 63.

Florida. — Rev. Stat. Fla., § 2356, reads: "Whoever not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother, or sister, by consanguinity or affinity to the offender, etc." *Hearn v. State*, 43 Fla. 151.

**269.** 3. *State v. Lilly*, 47 W. Va. 497, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 269.

6. Under Some Statutes Acquittal of Principal No Bar to Conviction of Accessory. — *State v. Smith*, 100 Iowa 4, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 269; *State v. Edgen*, 181 Mo. 582.

**270.** 1. Record of Principal's Conviction Prima Facie Evidence. — *Dent v. State*, 43 Tex. Crim. 126, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 270. See also *Tuttle v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 82.

2. Corroboration of Testimony of Accessory After

the Fact Held Necessary. — *Gatlin v. State*, 40 Tex. Crim. 116.

4. When the principal is convicted of murder in the second degree an accessory before the fact may be convicted of manslaughter. *State v. Steeves*, 29 Oregon 85.

**271.** 2. The *South Carolina* statute (now *Crim. Code S. Car.*, § 637) provides that the accessory after the fact may be convicted in any court that has jurisdiction of the principal, "either in the county where such person became an accessory or in the county where the principal felony was committed." *State v. Burbage*, 51 S. Car. 284.

**272.** 1. *Baltimore City Pass. R. Co. v. Nugent*, 86 Md. 358, citing 1 AM. AND ENG. ENCYC. OF LAW 272; *Raiford v. Wilmington*, etc., R. Co., 130 N. Car. 597.

Accident and Injury. — As to a state of facts warranting the use of the term *accident* as the synonym of injury, see *Smith v. Erie R. Co.*, 67 N. J. L. 636.

**273.** 2. *Baltimore City Pass. R. Co. v. Nugent*, 86 Md. 358, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 273.

**276.** 1. *Rogers v. Meyerson Printing Co.*, 103 Mo. App. 683.

## ACCIDENT (IN EQUITY).

**277.** I. DEFINITION — Popular Sense. — See note 1.

In Equity. — See note 3.

**278.** Accident — Surprise. — See note 2.

II. ORIGIN AND RATIONALE OF THE EQUITABLE JURISDICTION. — See

note 4.

**280.** III. IN WHAT CASES EQUITY WILL INTERPOSE — 2. Judgments — General Rule. — See note 2.

**277.** 1. See *Conner v. Citizens' St. R. Co.*, 146 Ind. 437, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 277.

3. *Slingluff v. Gainer*, 49 W. Va. 10, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 277.

Other Definitions. — See *Magann v. Segal*, (C. A.) 92 Fed. Rep. 252.

**278.** 2. *Zimmerer v. Fremont Nat. Bank*, 59 Neb. 661.

4. *Slingluff v. Gainer*, 49 W. Va. 10, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 278.

**280.** 2. *L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co.*, (C. C. A.) 116 Fed. Rep. 1; *West Chicago St. R. Co. v. Stoltzenfeldt*, 100 Ill. App. 142; *Prussian Nat. Ins. Co. v. Chiochoky*, 94 Ill. App. 168.

# ACCIDENT INSURANCE.

BY H. N. ELDRIDGE.

**286. II. THE APPLICATION** — Application Not Made Part of the Contract. — See note 4.

General Rule of Construction. — See note 7.

**288. III. PAYMENT OF PREMIUMS** — 1. In General. — See note 1.

**291. V. CONSIDERATION OF THE TERMS OF THE POLICY** — 1. Accidents and Injuries Usually Insured Against — *a*. ACCIDENTAL INJURIES IN GENERAL — Accident Defined. — See note 6.

**292.** See note 2.

**293.** See note 1.

**286. 4.** See *Price v. Standard L., etc., Ins. Co.*, 90 Minn. 264.

In Maryland, by statute, misrepresentations which are not material to the risk do not affect the policy. *Maryland Casualty Co. v. Gehrman*, 96 Md. 634.

**7. Contract Construed Liberally in Favor of Insured.** — *Fidelity, etc., Co. v. Chambers*, 93 Va. 138, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 286.

**288. 1.** See *Gainor v. St. Lawrence L. Assoc.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 27.

**291. 6. United States.** — *Western Commercial Travelers' Assoc. v. Smith*, (C. C. A.) 85 Fed. Rep. 401; *Ætna L. Ins. Co. v. Vandecar*, (C. C. A.) 86 Fed. Rep. 282.

*Iowa.* — *Carnes v. Iowa State Traveling Men's Assoc.*, 106 Iowa 281, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 291; *Feder v. Iowa State Traveling Men's Assoc.*, 107 Iowa 538; *Smouse v. Iowa State Traveling Men's Assoc.*, 118 Iowa 436; *Payne v. Fraternal Acc. Assoc.*, 119 Iowa 342.

*Louisiana.* — *Konrad v. Union Casualty, etc., Co.*, 49 La. Ann. 636.

*Maine.* — *Matson v. Travellers Ins. Co.*, 93 Me. 469.

*Missouri.* — *Loesch v. Union Casualty, etc., Co.*, 176 Mo. 654.

*Nebraska.* — *Railway Officials, etc., Acc. Assoc. v. Drummond*, 56 Neb. 235; *Western Travelers' Acc. Assoc. v. Holbrook*, 65 Neb. 475, affirming 65 Neb. 469.

*Pennsylvania.* — *Rose v. Commercial Mut. Acc. Co.*, 12 Pa. Super. Ct. 394.

*Washington.* — *Horsfall v. Pacific Mut. L. Ins. Co.*, 32 Wash. 132, 98 Am. St. Rep. 846.

*Canada.* — See *Fowle v. Ocean Acc., etc., Corp.*, 4 Ont. L. Rep. 146, affirming 33 Can. Sup. Ct. 253.

**292. 2. Sunstroke Not Accidental Injury.** — See *Railway Officials, etc., Acc. Assoc. v. Johnson*, 109 Ky. 261, 95 Am. St. Rep. 370.

**Rupture of Blood Vessel Due to Lifting Heavy Weight** was held not accidental, in view of the fact that insured was suffering at the time with arterial sclerosis. *Niskern v. United Brotherhood, etc.*, 93 N. Y. App. Div. 364.

**Death Resulting from Rupture of Artery** as insured reached out to close a window was held not accidental, where nothing unforeseen occurred except the rupture. *Feder v. Iowa State Traveling Men's Assoc.*, 107 Iowa 538. Compare *Standard L., etc., Ins. Co. v. Schmaltz*, 66 Ark. 588.

**Appendicitis Caused by Bicycle Ride**, during which the muscles used in operating the machine rubbed against the appendix and inflamed it, was held not to be accidental. *Appel v. Ætna L. Ins. Co.*, 86 N. Y. App. Div. 83.

**293. 1. Atlanta Acc. Assoc. v. Alexander**, 104 Ga. 709; *Bailey v. Interstate Casualty Co.*, 8 N. Y. App. Div. 127, affirming 158 N. Y. 723.

**Disease Caused by Accident.** — Death from complication of diseases caused by injury to liver as result of accident. *Woodmen Acc. Assoc. v. Hamilton*, (Neb. 1903) 96 N. W. Rep. 989.

Strains caused by stooping or lifting. *Horsfall v. Pacific Mut. L. Ins. Co.*, 32 Wash. 132, 98 Am. St. Rep. 846.

Blood poisoning resulting from cut made by insured with a knife while trimming corn. *Nax v. Travelers' Ins. Co.*, 130 Fed. Rep. 985; or from abrasion of the skin of the foot, such abrasion resulting from the wearing of a new shoe, *Western Commercial Travelers' Assoc. v. Smith*, (C. C. A.) 85 Fed. Rep. 401; or from receiving wound on finger, *Delaney v. Modern Acc. Club*, 121 Iowa 528.

Kidney disease caused by handling infected rags. *Columbia Paper Stock Co. v. Fidelity, etc., Co.*, 104 Mo. App. 157.

Death from rheumatism caused by falling from vehicle. *Travelers Ins. Co. v. Hunter*, 30 Tex. Civ. App. 489.

**Accident Caused by Disease.** — Injury resulting from vertigo. *Interstate Casualty Co. v. Bird*, 10 Ohio Cir. Dec. 211.

**Drowning.** — *Peele v. Provident Fund Soc.*, 147 Ind. 543; *De Van v. Commercial Travelers Mut. Acc. Assoc.*, 92 Hun (N. Y.) 256, affirming 157 N. Y. 690; *U. S. Mutual Acc. Assoc. v. Hubbell*, 56 Ohio St. 516.

**Fighting.** — See *Union Casualty, etc., Co. v. Harroll*, 98 Tenn. 591, 60 Am. St. Rep. 873.

But death resulting from a quarrel in which

**294.** Negligence — Intention. — See notes 1, 2.

*b.* EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS. — See note 3.

**295.** See note 1.

External or Visible Sign of Injury. — See note 2.

**296.** See note 1.

*c.* TOTAL DISABILITY — Total Disability a Relative Term. — See note 3.

**298.** To Transact Any and Every Kind of Business Pertaining to One's Occupation. — See note 3.

**299.** See note 1.

insured was the aggressor and attacked his opponent with a pistol, using at the same time violent language, is not death by accident. *Taliaferro v. Travelers' Protective Assoc.*, (C. C. A.) 80 Fed. Rep. 368.

**Sting of Insect.** — *Omberg v. U. S. Mutual Acc. Assoc.*, 101 Ky. 305, 72 Am. St. Rep. 413.

**Overdose of Morphine.** — Death caused by an overdose of morphine taken to abate pain is death from an accidental cause. *Dezell v. Fidelity, etc., Co.*, 176 Mo. 253.

In *Carnes v. Iowa State Traveling Men's Assoc.*, 106 Iowa 281, it is held that death caused by the taking of morphine is death from an accidental cause if deceased took more than he intended; but it is not death from an accidental cause if he knew how much he was taking, but did not know that that amount would cause death.

**Rupture of Blood Vessel** due to sudden, unusual and involuntary movement of the body. *Standard L., etc., Ins. Co. v. Schmaltz*, 66 Ark. 588. Compare *Feder v. Iowa State Traveling Men's Assoc.*, 107 Iowa 538; *Niskern v. United Brotherhood, etc.*, 93 N. Y. App. Div. 364, cited in the next preceding note. Or the rupture of a blood vessel due to a fall, *Taylor v. General Acc. Assur. Corp.*, 208 Pa. St. 439; or to being thrown against a chair, *Fetter v. Fidelity, etc., Co.*, 174 Mo. 256, 97 Am. St. Rep. 560.

**294. 1.** *Travelers Ins. Co. v. Randolph*, (C. C. A.) 78 Fed. Rep. 754; *Payne v. Fraternal Acc. Assoc.*, 119 Iowa 342; *Maryland Casualty Co. v. Gehrmann*, 96 Md. 634; *Etna L. Ins. Co. v. Hicks*, 23 Tex. Civ. App. 74; *Shevlin v. American Mut. Acc. Assoc.*, 94 Wis. 180. See *Robinson v. U. S. Benevolent Soc.*, 132 Mich. 695.

**2.** *Travelers Ins. Co. v. Wyness*, 107 Ga. 589, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 294; *American Acc. Co. v. Carson*, 99 Ky. 441, 59 Am. St. Rep. 473; *Campbell v. Fidelity, etc., Co.*, 109 Ky. 661; *Furbush v. Maryland Casualty Co.*, 131 Mich. 234; *Collins v. Fidelity, etc., Co.*, 63 Mo. App. 253; *Button v. American Mut. Acc. Assoc.*, 92 Wis. 83, 53 Am. St. Rep. 900.

**Insured Intentionally Shot by Another.** — *Robinson v. U. S. Mutual Acc. Assoc.*, 68 Fed. Rep. 825. See also *American Acc. Co. v. Carson*, 99 Ky. 441, 59 Am. St. Rep. 473.

**3.** *Dezell v. Fidelity, etc., Co.*, 176 Mo. 289, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 294; *Miller v. Fidelity, etc., Co.*, 97 Fed. Rep. 836.

**Construction of Clause** in policy making insurer liable only for death resulting from "bodily injuries \* \* \* through external, violent, and accidental means \* \* \* inde-

pendently of all other causes." *Hubbard v. Travelers' Ins. Co.*, 98 Fed. Rep. 932.

**295. 1.** See *Westmoreland v. Preferred Acc. Ins. Co.*, 75 Fed. Rep. 244.

**2.** See *Union Casualty, etc., Co. v. Mondy*, 18 Colo. App. 395; *Stephens v. Railway Officials, etc., Acc. Assoc.*, 75 Miss. 84.

**External and Visible Marks.** — A clause in a policy which declares that the policy "does not insure against death or disablement \* \* \* from accidents that shall bear no external and visible marks," when fairly construed indicates that its purpose was to provide that a case of death or injury should not be regarded as within the policy, unless there was some external or visible evidence which indicated that it was accidental. *Menneiley v. Employers' Liability Assur. Corp.*, 148 N. Y. 596, 51 Am. St. Rep. 716, reversing 72 Hun (N. Y.) 477.

**296. 1.** *Union Casualty, etc., Co. v. Mondy*, 18 Colo. App. 395. See *Root v. London Guarantee, etc., Co.*, 92 N. Y. App. Div. 578; *Horsfall v. Pacific Mut. L. Ins. Co.*, 32 Wash. 132, 98 Am. St. Rep. 846.

**Discoloration of Arm and Shoulder** Is a "visible mark upon the body." It need not be a bruise, contusion, laceration, or broken limb, but may be any visible evidence of an internal strain. *Thayer v. Standard L., etc., Ins. Co.*, 68 N. H. 577.

**3.** *Lobdill v. Laboring Men's Mut. Aid Assoc.*, 69 Minn. 14, 65 Am. St. Rep. 542.

**Question for Jury.** — Whether an injury constitutes a total disability is ordinarily a question for the jury. *Grand Lodge, etc. v. Orrell*, 109 Ill. App. 422; *Smith v. Supreme Lodge, etc.*, 62 Kan. 75.

**Words "Immediately, Continuously, and Wholly Disable"** Construed and Cases Reviewed. — See *Brendon v. Traders, etc., Acc. Co.*, 84 N. Y. App. Div. 530.

**Confined to House.** — Where the policy provides that the insured must be totally disabled and confined to the house in order to recover on the policy, the fact that the insured is able to go to the office of the physician in a car does not prevent a recovery on the policy if he is incapacitated for work or business. The clause must receive a reasonable interpretation. *Mutual Ben. Assoc. v. Nancarrow*, 18 Colo. App. 274.

**298. 3.** See *McKinley v. Bankers Acc. Ins. Co.*, 106 Iowa 81; *Travelers' Ins. Co. v. Durall*, (Ky. 1903) 74 S. W. Rep. 740; *Turner v. Fidelity, etc., Co.*, 112 Mich. 425; *Coad v. Travelers' Ins. Co.*, 61 Neb. 563; *Bylow v. Union Casualty, etc., Co.*, 72 Vt. 325.

**299. 1.** See *Hohn v. Inter-State Casualty*



**301. d. LOSS OF CERTAIN MEMBERS OF THE BODY — Feet and Hands.** — See note 1.

Loss by Severance. — See note 2.

**302. e. ACCIDENTS TO INSURED IN SPECIAL OCCUPATIONS — (1) Description of Occupation.** — See note 2.

Provisions Against Other or More Hazardous Occupations. — See note 6.

**303. (2) Occupation Defined — Refers to Profession, Not Acts.** — See note 2.

Change of Occupation Question for Jury. — See note 3.

**304. (3) Risks Classified by the Company — Injuries Received in More Hazardous Occupation.** — See note 2.

**305. f. INJURIES TO PASSENGERS BY PUBLIC OR PRIVATE CONVEYANCE — Injury Received While Changing Conveyance.** — See note 1.

**306. g. INJURIES RECEIVED IN THE DISCHARGE OF DUTY — Railroad Employees.** — See note 2.

**2. Accidents and Injuries Usually Excepted — a. GENERAL RULE OF CONSTRUCTION — Construed Most Strongly Against Insurer.** — See notes 4, 5.

Co., 115 Mich. 79; Thayer v. Standard L., etc., Ins. Co., 68 N. H. 577.

**301. 1. Supreme Ct. of Honor v. Turner,** 99 Ill. App. 310.

**One Entire Hand and One Entire Foot.** — Where insurer agrees to pay a certain amount in case the insured loses "one entire hand and one entire foot," he is not liable unless both are lost. The loss of one creates no liability. Gentry v. Standard L., etc., Ins. Co., 6 Ohio Dec. 114, 5 Ohio N. P. 331.

**2. Fuller v. Locomotive Engineers' Mut. L., etc., Ins. Assoc.,** 122 Mich. 552, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301.

**Amputation of the Arm** a little below the elbow is "the loss of an arm" within the common acceptance of those words. Garcelon v. Commercial Travelers Eastern Acc. Assoc., 184 Mass. 8.

**302. 2. Richards v. Travelers' Ins. Co.,** (S. Dak. 1904) 100 N. W. 428.

**6. Employers' Liability Assur. Corp. v. Back,** (C. C. A.) 102 Fed. Rep. 229; Yancey v. Aetna L. Ins. Co., 108 Ga. 349; Loesch v. Union Casualty, etc., Co., 176 Mo. 654; Canadian R. Acc. Ins. Co. v. McNevin, 32 Can. Sup. Ct. 194.

**303. 2. Eaton v. Atlas Acc. Ins. Co.,** 89 Me. 570; Thomas v. Masons Fraternal Acc. Assoc., 64 N. Y. App. Div. 22; Comstock v. Fraternal Acc. Assoc., 116 Wis. 382. See Union Casualty, etc., Co. v. Goddard, (Ky. 1903) 76 S. W. Rep. 832.

**Single Acts Not Change of Occupation — Grocer Injured While Hunting.** — Kentucky L., etc., Ins. Co. v. Franklin, 102 Ky. 512.

**Barber Injured While Hunting.** — Wildey Casualty Co. v. Sheppard, 61 Kan. 351.

**Bookkeeper Shot While Hunting.** — Holiday v. American Mut. Acc. Assoc., 103 Iowa 178.

**Mining Expert Riding on Locomotive.** — Berliner v. Travelers' Ins. Co., 121 Cal. 458.

**Undertaker Riding Bicycle for Pleasure.** — Baldwin v. Fraternal Acc. Assoc., (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 124.

**Coupling of Cars by Baggage-man.** — Canadian R. Acc. Ins. Co. v. McNevin, 32 Can. Sup. Ct. 194.

**Banker Operating a Saw to Cut Pieces for Cabinet.** — Hess v. Preferred Masonic Mut. Acc. Assoc., 112 Mich. 196.

**3. Fox v. Masons' Fraternal Acc. Assoc.,** 96

Wis. 390. See Standard L., etc., Ins. Co. v. Taylor, 12 Tex. Civ. App. 386.

**Single Acts Not Change of Occupation.** — Hoffman v. Standard L., etc., Co., 127 N. Car. 337.

**304. 2. What Constitutes Change of Occupation.** — The defense of change of occupation is not maintainable where a person insured as a lawyer was drowned while *en route* to Alaska for the purpose of prospecting for mines. Aetna L. Ins. Co. v. Frierson, (C. C. A.) 114 Fed. Rep. 56.

**305. 1. Riding Construed.** — Standing on the platform of a railroad car is not riding "in" a passenger conveyance within the meaning of a policy providing that double the sum specified should be paid, if the insured should be injured "while riding as a passenger in a passenger conveyance." Aetna L. Ins. Co. v. Vandecar, (C. C. A.) 86 Fed. Rep. 282, Thayer, J., *dissenting*. See also Van Bokkelen v. Travelers Ins. Co., 34 N. Y. App. Div. 399, *affirmed* 167 N. Y. 590.

But a person entering a public conveyance after having got upon the step is "riding as a passenger in a public conveyance" even though the conveyance has not moved. Powis v. Ontario Acc. Ins. Co., 1 Ont. L. Rep. 54.

**306. 2. See Pacific Mut. L. Ins. Co. v. Howell,** 13 Ind. App. 519.

**A Shock Caused by Fright** sustained by insured in the discharge of his duty, and incapacitating him from employment, is an accident within the meaning of a policy which provides for a weekly indemnity in case insured is "incapacitated from employment by reason of accident sustained in the discharge of his duty." Pugh v. London, etc., R. Co., (1896) 2 Q. B. 248, 65 L. J. Q. B. 521.

**4. Union Casualty, etc., Co. v. Mondy,** 18 Colo. App. 395; Terwilliger v. National Masonic Acc. Assoc., 197 Ill. 9, *reversing* 98 Ill. App. 237; Columbia Paper Stock Co. v. Fidelity, etc., Co., 104 Mo. App. 157; Marshall v. Commercial Travelers Mut. Acc. Assoc., 170 N. Y. 434; Brendon v. Traders', etc., Acc. Co., 84 N. Y. App. Div. 530; Coles v. New York Casualty Co., 87 N. Y. App. Div. 41; Maryland Casualty Co. v. Hudgins, 97 Tex. 124; Grimes v. Fidelity, etc., Co., (Tex. Civ. App. 1903) 76 S. W. Rep. 811.

**306. b. VOLUNTARY EXPOSURE TO UNNECESSARY DANGER — (1) In General — Usual Form of Modern Policy. —** See note 6.

**307. Effect of Negligence Where Such Provision Not Inserted. —** See note 1.

(2) *What Is a Voluntary Exposure — Implies Conscious Intentional Exposure. —* See notes 5, 6.

**308. See notes 1, 2, 3, 4.**

**The Rule Applies as Well to Benefit Associations as to Ordinary Companies — United States. —** Commercial Travelers' Mut. Acc. Assoc. v. Fulton, 79 Fed. Rep. 423; Lowenstein v. Fidelity, etc., Co., 88 Fed. Rep. 474.

*California. —* Berliner v. Travelers' Ins. Co., 121 Cal. 458.

*Georgia. —* Yancey v. Ætna L. Ins. Co., 108 Ga. 349.

*Illinois. —* Travelers Ins. Co. v. Dunlap, 160 Ill. 642; Globe Acc. Ins. Co. v. Gerisch, 163 Ill. 625, reversing 61 Ill. App. 140.

*Indiana. —* Conboy v. Railway Officials, etc., Acc. Assoc., 17 Ind. App. 62.

*Iowa. —* Matthes v. Imperial Acc. Assoc., 110 Iowa 222.

*Michigan. —* Grand Rapids Electric Light, etc., Co. v. Fidelity, etc., Co., 111 Mich. 148.

*Minnesota. —* Cook v. Benefit League, 76 Minn. 382.

*Mississippi. —* Stephens v. Railway Officials, etc., Acc. Assoc., 75 Miss. 84.

*New York. —* Meechan v. Traders, etc., Acc. Co., (Supm. Ct. App. T.) 34 Misc. (N. Y.) 158.

*Texas. —* Ætna L. Ins. Co. v. Hicks, 23 Tex. Civ. App. 74.

*Wisconsin. —* Button v. American Mut. Acc. Assoc., 92 Wis. 83, 53 Am. St. Rep. 900.

*Canada. —* Shera v. Ocean Acc., etc., Corp., 32 Ont. 411.

**306. 5. Dezell v. Fidelity, etc., Co., 176 Mo. 253; Woodmen Acc. Assoc. v. Pratt, 62 Neb. 673, 89 Am. St. Rep. 777; Shera v. Ocean Acc., etc., Corp., 32 Ont. 411.**

**Forfeiture Clause Construed. —** See Martin v. Manufacturers Acc. Indemnity Co., 151 N. Y. 94.

**6. Standard Ins. Co. v. Langston, 60 Ark. 381.**

**307. 1. Commercial Travelers Mut. Acc. Assoc. v. Springsteen, 23 Ind. App. 657; Payne v. Fraternal Acc. Assoc., 119 Iowa 342; Thomas v. Masons' Fraternal Acc. Assoc., 64 N. Y. App. Div. 22; Union Casualty, etc., Co. v. Harroll, 98 Tenn. 598, 60 Am. St. Rep. 873, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 307; Fidelity, etc., Co. v. Chambers, 93 Va. 138.**

**5. Travelers' Ins. Co. v. Randolph, (C. C. A.) 78 Fed. Rep. 754; Ashenfelter v. Employers' Liability Assur. Corp., (C. C. A.) 87 Fed. Rep. 682; North American Acc. Ins. Co. v. Gulick, 25 Ohio Cir. Ct. 395; De Loy v. Travelers Ins. Co., 171 Pa. St. 1; Union Casualty, etc., Co. v. Harroll, 98 Tenn. 591, 60 Am. St. Rep. 873; Fidelity, etc., Co. v. Chambers, 93 Va. 138, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 307.**

**6. Travelers' Protective Assoc. v. Small, 115 Ga. 455; Payne v. Fraternal Acc. Assoc., 119 Iowa 342. See Union Casualty, etc., Co. v. Goddard, (Ky. 1903) 76 S. W. Rep. 832.**

**308. 1. Employers' Liability Assur. Corp.**

**v. Anderson, 5 Kan. App. 18; Ætna L. Ins. Co. v. Hicks, 23 Tex. Civ. App. 74.**

**2. Preferred Acc. Ins. Co. v. Muir, (C. C. A.) 126 Fed. Rep. 926; U. S. Mutual Acc. Assoc. v. Hubbell, 56 Ohio St. 516; Jamison v. Continental Casualty Co., 104 Mo. App. 306. See Shevlin v. American Mut. Acc. Assoc., 94 Wis. 180.**

**Carelessly Stepping on Railroad Track without noticing approaching train is not a "voluntary exposure." Lehman v. Great Eastern Casualty, etc., Co., 7 N. Y. App. Div. 424, affirmed 158 N. Y. 689.**

**3. United States. — Traders', etc., Acc. Co. v. Wagley, (C. C. A.) 74 Fed. Rep. 457; Travelers' Ins. Co. v. Randolph, (C. C. A.) 78 Fed. Rep. 754; Ashenfelter v. Employers' Liability Assur. Corp., (C. C. A.) 87 Fed. Rep. 682.**

**Indiana. — Conboy v. Railway Officials, etc., Acc. Assoc., (Ind. App. 1896) 43 N. E. Rep. 1017.**

**New York. — Keeffe v. National Acc. Soc., 4 N. Y. App. Div. 392; Johanns v. National Acc. Soc., 16 N. Y. App. Div. 104.**

**Tennessee. — Union Casualty, etc. Co. v. Harroll, 98 Tenn. 591, 60 Am. St. Rep. 873.**

**Virginia. — Fidelity, etc., Co. v. Chambers, 93 Va. 138, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 308.**

**4. Circumstances Which Show Voluntary Exposure — Boarding Moving Cars. — Small v. Travelers Protective Assoc., 118 Ga. 900.**

**Crossing Tracks in Railroad Yard for Purpose of Taking Train. — Glass v. Masons' Fraternal Acc. Assoc., 112 Fed. Rep. 495.**

**Placing Wrist in Front of Nozzle of Gun Which Is Loaded and Cocked. — Sargent v. Central Acc. Ins. Co., 112 Wis. 29.**

**Going on Platform of Car Approaching Station. — Overbeck v. Travelers Ins. Co., 94 Mo. App. 453.**

**Sitting on Railroad Track. — Metropolitan Acc. Assoc. v. Taylor, 71 Ill. App. 132, affirmed 172 Ill. 511. But see Fidelity, etc., Co. v. Chambers, 93 Va. 138.**

**Crossing Track Between Cars of Freight Train About to Move. — Willard v. Masonic Equitable Acc. Assoc., 169 Mass. 288.**

**Steeplechase riding. — Smith v. Ætna L. Ins. Co., 185 Mass. 74.**

**Circumstances Which Do Not Show Voluntary Exposure — Getting Pigeons in Cupola of Barn. — Matthes v. Imperial Acc. Assoc., 110 Iowa 222.**

**Insured Killed While Fighting. — Campbell v. Fidelity, etc., Co., 109 Ky. 661.**

**Boarding Slowly-Moving Street Car. — Johanns v. National Acc. Soc., 16 N. Y. App. Div. 104.**

**Scaling Bank with Loaded Gun While Hunting. — Cornwell v. Fraternal Acc. Assoc., 6 N. Dak. 201, 66 Am. St. Rep. 601.**

**309.** Voluntary Act and Voluntary Exposure Distinguished. — See note 1.

**310.** *c.* WANT OF DUE DILIGENCE. — See note 1.

**311.** *d.* WALKING OR BEING ON RAILROAD. — See note 4.

**312.** See notes 1, 2.

Meaning of Roadbed. — See note 4.

*e.* RIDING ON PLATFORM OF OR GETTING ON OR OFF A RAILROAD

CAR. — See note 5.

**313.** *f.* NONCOMPLIANCE WITH RULES AND REGULATIONS OF CARRIER OR CORPORATION. — See note 3.

*g.* SUICIDE OR SELF-INFLICTED INJURIES — Refers to Voluntary Conscious Act. — See note 6.

**314.** *h.* TAKING POISON. — See note 3.

*Coupling Cars.* — It is not "voluntary exposure to unnecessary danger" for a baggage-man to couple cars, he being accustomed to such work. *Canadian R. Acc. Ins. Co. v. McNevin*, 32 Can. Sup. Ct. 194.

**309.** 1. *Collins v. Bankers Acc. Ins. Co.*, 96 Iowa 216; *Payne v. Fraternal Acc. Assoc.*, 119 Iowa 342; *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 95 Am. St. Rep. 374; *Collins v. Fidelity, etc., Co.*, 63 Mo. App. 253; *Cornwell v. Fraternal Acc. Assoc.*, 6 N. Dak. 201, 66 Am. St. Rep. 601, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 309; *De Loy v. Travelers Ins. Co.*, 171 Pa. St. 1.

**310.** 1. *Payne v. Fraternal Acc. Assoc.*, 119 Iowa 342, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 310; *Kentucky L., etc., Ins. Co. v. Franklin*, 102 Ky. 512.

**311.** 4. See *Pacific Mut. L. Ins. Co. v. Howell*, 13 Ind. App. 519.

**312.** 1. *Weinschenk v. Aetna L. Ins. Co.*, 183 Mass. 312.

"Walking" on Roadbed includes using the roadbed as and for a footpath, and even stopping on it in the course of such use — as to tie a shoe, talk with another, or rest for a time, standing or sitting, but intending to pursue the journey thereon when the occasion for such suspension is passed. *Metropolitan Acc. Assoc. v. Taylor*, 71 Ill. App. 132, *affirmed* 172 Ill. 511.

2. *Traders', etc., Acc. Co. v. Wagley*, (C. C. A.) 74 Fed. Rep. 457; *Payne v. Fraternal Acc. Assoc.*, 119 Iowa 342; *Keene v. New England Mut. Acc. Assoc.*, 164 Mass. 170.

4. Entire Right of Way is not included within the term "roadbed," nor is that part of it which is leveled off and constructed for the purpose of putting in another track. *De Loy v. Travelers Ins. Co.*, 171 Pa. St. 1.

5. *Travelers Ins. Co. v. Randolph*, (C. C. A.) 78 Fed. Rep. 754; *Preferred Acc. Ins. Co. v. Muir*, (C. C. A.) 126 Fed. Rep. 926; *Berliner v. Travelers' Ins. Co.*, 121 Cal. 458; *Huston v. Traveler's Ins. Co.*, 66 Ohio St. 246.

Riding in a Street Car Includes Alighting Therefrom. — *King v. Travelers Ins. Co.*, 101 Ga. 64, 65 Am. St. Rep. 288.

Riding on Platform. — Where the insured is on the car platform for a temporary and necessary purpose, he is not riding on the platform within the meaning of an exception in an insurance policy. *Standard L., etc., Ins. Co. v. Thornton*, (C. C. A.) 100 Fed. Rep. 582.

Entering Moving Conveyance. — A provision exempting insurer from liability, if insured was

injured while entering a moving conveyance using steam, does not apply where insured is injured while attempting to board a train which is standing still when the attempt is first made, but moves while the attempt is still being made. *Terwilliger v. National Masonic Acc. Assoc.*, 197 Ill. 9, *reversing* 98 Ill. App. 237. See *Travelers' Ins. Co. v. Brookover*, 71 Ark. 123.

**313.** 3. *Travelers' Ins. Co. v. Randolph*, (C. C. A.) 78 Fed. Rep. 754.

6. See *Berger v. Pacific Mut. L. Ins. Co.*, 88 Fed. Rep. 241.

Voluntarily Taking Carbolic Acid to Frighten Wife into Giving Money, but without intent to cause death, is not suicide within the meaning of a suicide clause in a policy. *Courtemanche v. Supreme Ct.*, (Mich. 1904) 98 N. W. Rep. 749.

**314.** 3. Accidental Poisoning Not Within Exception. — *Dezell v. Fidelity, etc., Co.*, 176 Mo. 290, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 314; *McGlothter v. Provident Mut. Acc. Co.*, (C. C. A.) 89 Fed. Rep. 685; *Early v. Standard L., etc., Ins. Co.*, 113 Mich. 58, 67 Am. St. Rep. 445. See *Kasten v. Interstate Casualty Co.*, 99 Wis. 73.

Accidental Poisoning Within Exception. — *Preferred Acc. Ins. Co. v. Robinson*, (Fla. 1903) 33 So. Rep. 1005; *Travelers Ins. Co. v. Dunlap*, 160 Ill. 642; *Metropolitan Acc. Assoc. v. Froiland*, 161 Ill. 30, *affirming* 59 Ill. App. 522; *Fidelity, etc., Co. v. Waterman*, 161 Ill. 632, *affirming* 59 Ill. App. 297.

"Voluntary or Involuntary Taking of Poison." — A clause in a policy which excepts accident or death resulting wholly or partially from the voluntary or involuntary taking of poison, includes the accidental taking of an overdose of a poisonous medicine. *Kennedy v. Aetna L. Ins. Co.*, 31 Tex. Civ. App. 509.

"Poison in Any Form or Manner." — Death from blood poisoning due to the sting of an insect is not comprehended within the provisions of a policy excepting death resulting from "poison in any form or manner" or "contact with poisonous substances." *Omberg v. U. S. Mutual Acc. Assoc.*, 101 Ky. 305, 72 Am. St. Rep. 413.

"Contact with Poisonous Substance." — Under a policy exempting insurer from liability for "injuries fatal or otherwise resulting directly or indirectly from or in any wise contributed to by \* \* \* poison, in any form or manner, or contact with poisonous substances," the insurer is not liable for injuries caused by car-

**315.** *i.* INHALATION OF GAS. — See note 4.

*j.* DEATH CAUSED BY DISEASE — Where Disease Not Proximate Cause of Death. — See note 5.

**317.** See note 2.

**318.** Exceptions to Special Diseases. — See notes 1, 2.

*k.* SURGICAL OPERATION OR MEDICAL TREATMENT. — See note 4.

*l.* INTOXICATION. — See note 5.

**319.** Evidence of Intoxication. — See note 5.

*m.* LIFTING OR OVER-EXERTION. — See note 6.

*n.* VIOLATION OF LAW. — See note 8.

**320.** Causal Connection Between Violation and Injury. — See note 1.

**321.** While Violating the Law. — See note 1.

*q.* INJURIES RECEIVED WHILE FIGHTING. — See note 4.

**322.** *r.* INTENTIONAL INJURIES — Intentional Injury Inflicted by Another. — See notes 2, 4.

bolic acid thrown by a woman in the face of the insured. *Meehan v. Traders, etc., Acc. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 158.

**315.** 4. *Lowenstein v. Fidelity, etc., Co.*, 88 Fed. Rep. 474.

**Death Arising from Anything Accidentally Inhaled** has reference to cases where something has been voluntarily and intentionally, although mistakenly, inhaled, and does not apply to cases where death results from involuntarily and accidentally breathing escaped illuminating gas. *Menneiley v. Employer's Liability Assur. Corp.*, 148 N. Y. 596, 51 Am. St. Rep. 716, reversing 72 Hun (N. Y.) 477.

5. *Western Commercial Travelers' Assoc. v. Smith*, (C. C. A.) 85 Fed. Rep. 401; *Bailey v. Interstate Casualty Co.*, 8 N. Y. App. Div. 127 [affirmed 158 N. Y. 723], citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 315; *Ætna L. Ins. Co. v. Hicks*, 23 Tex. Civ. App. 74. See *Mardorf v. Accident Ins. Co.*, (1903) 1 K. B. 584, 72 L. J. K. B. 362; *Commercial Travelers' Mut. Acc. Assoc. v. Fulton*, (C. C. A.) 79 Fed. Rep. 423; *Preferred Acc. Ins. Co. v. Muir*, (C. C. A.) 126 Fed. Rep. 926.

**Stipulation Excepting Death Caused by Disease.** — *Ætna L. Ins. Co. v. Dorney*, 68 Ohio St. 151.

**317.** 2. *Thornton v. Travelers Ins. Co.*, 116 Ga. 126, 94 Am. St. Rep. 99, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 315 *et seq.*; *Carr v. Pacific Mut. L. Ins. Co.*, 100 Mo. App. 602.

**318.** 1. *Hernia.* — *Atlanta Acc. Assoc. v. Alexander*, 104 Ga. 709, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318; *Thornton v. Travelers Ins. Co.*, 116 Ga. 126, 94 Am. St. Rep. 99, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318; *Summers v. Fidelity Mut. Aid Assoc.*, 84 Mo. App. 605; *Miner v. Travelers' Ins. Co.*, 3 Ohio Dec. 289.

2. *Accident Caused by Fits or Vertigo.* — *Meyer v. Fidelity, etc., Co.*, 96 Iowa 378.

4. See *Westmoreland v. Preferred Acc. Ins. Co.*, 75 Fed. Rep. 244.

5. *Pyne v. Mutual Acc. Co.*, 2 Dauphin Co. Rep. (Pa.) 110. See *Campbell v. Fidelity, etc., Co.*, 109 Ky. 661; *Flint v. Travelers' Ins. Co.*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1079.

**319.** 5. *Johanns v. National Acc. Soc.*, 16 N. Y. App. Div. 104; *De Van v. Commercial Travelers Mut. Acc. Assoc.*, 92 Hun (N. Y.) 256, affirmed 157 N. Y. 690.

6. See *Standard L., etc., Ins. Co. v. Schmaltz*, 66 Ark. 588; *Metropolitan Acc. Assoc. v. Bristol*, 69 Ill. App. 492; *Rustin v. Standard L., etc., Ins. Co.*, 58 Neb. 792, 76 Am. St. Rep. 136; *Rose v. Commercial Mut. Acc. Co.*, 12 Pa. Super. Ct. 394.

8. *Lehman v. Great Eastern Casualty, etc., Co.*, 7 N. Y. App. Div. 424, affirmed 158 N. Y. 689.

**Riding Bicycle to Funeral on Sunday** is no violation of statute relating to Lord's Day. *Eaton v. Atlas Acc. Ins. Co.*, 89 Me. 570.

**320.** 1. *Standard L., etc., Ins. Co. v. Fraser*, (C. C. A.) 76 Fed. Rep. 705; *Cornwell v. Fraternal Acc. Assoc.*, 6 N. Dak. 201, 66 Am. St. Rep. 601.

**Natural and Reasonable Consequence of Violating Law Must Be to Increase Risk.** — *Conboy v. Railway Officials, etc., Acc. Assoc.*, (Ind. App. 1896) 43 N. E. Rep. 1017.

**321.** 1. *Contra.* — *Prudential Ins. Co. v. Haley*, 91 Ill. App. 370 [affirmed 189 Ill. 317], citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321, and *disapproving Griffin v. Western Mut. Benev. Assoc.*, 20 Neb. 620, 57 Am. Rep. 848.

4. *Coles v. New York Casualty Co.*, 87 N. Y. App. Div. 41.

**322.** 2. *Orr v. Travelers Ins. Co.*, 120 Ala. 647; *Travelers Ins. Co. v. Wyness*, 107 Ga. 584; *Railway Officials, etc., Acc. Assoc. v. McCabe*, 61 Ill. App. 565; *Matson v. Travellers Ins. Co.*, 93 Me. 469; *Ging v. Travelers Ins. Co.*, 74 Minn. 505; *Railway Officials, etc., Acc. Assoc. v. Drummond*, 56 Neb. 235; *Fidelity, etc., Co. v. Smith*, 31 Tex. Civ. App. 111; *Grimes v. Fidelity, etc., Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 811.

Where a policy insuring against death or injury by "external, violent, or accidental means" further provides that it shall not "extend to or cover intentional injuries inflicted by the insured or any other person," a recovery may be had where the insured was killed by a third person without any provocation on the part of the insured. The exception in the policy refers only to injuries not resulting in death. *American Acc. Co. v. Carson*, 99 Ky. 441, 59 Am. St. Rep. 473, *distinguishing Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300, 12 Am. St. Rep. 484.

**Where the Insured Was Murdered his rep-**

**322.** Death Inflicted by Insane Person. — See note 5.

**323.** Intentional Injuries Inflicted by Insured. — See note 1.

**3.** Stipulations as to Notice and Preliminary Proof, Time of Instituting Suit, Arbitration — *a.* NOTICE AND PROOF OF INJURY — (1) *In General* — Condition Precedent. — See note 2.

When Compliance Impossible. — See note 3.

Notice in Case of Disability — No Disablement at the Time, but Death Ensues. — See note 5.

Immediate Notice. — See note 6.

**324.** And What Is a Reasonable Time. — See note 1.

Examination of Body. — See note 2.

**325.** (2) *Waiver* — Failure to Give Notice. — See note 3.

Refusal of Agent to Recognize Claim. — See note 4.

*b.* TIME OF INSTITUTING SUIT. — See note 7.

representative cannot recover on a policy excepting death resulting from intentional injuries. *Travelers' Protective Assoc. v. Langholz*, (C. C. A.) 86 Fed. Rep. 60; *Brown v. U. S. Casualty Co.*, 88 Fed. Rep. 38; *Johnson v. Travelers' Ins. Co.*, 15 Tex. Civ. App. 314.

**322.** 4. *Butero v. Travelers' Acc. Ins. Co.*, 96 Wis. 536, 65 Am. St. Rep. 61.

5. *Berger v. Pacific Mut. L. Ins. Co.*, 88 Fed. Rep. 241; *Corley v. Travelers' Protective Assoc.*, (C. C. A.) 105 Fed. Rep. 854; *Stevens v. Continental Casualty Co.*, 12 N. Dak. 463.

**323.** 1. See *Button v. American Mut. Acc. Assoc.*, 92 Wis. 83, 53 Am. St. Rep. 900.

2. *In re Williams, etc.*, Acc. Ins. Co., 51 W. R. 222; *Employers' Liability Assur. Corp. v. Taylor*, 29 Can. Sup. Ct. 104; *London Guarantee, etc., Co. v. Siwy*, (Ind. App. 1903) 66 N. E. Rep. 481; *Simons v. Iowa State Traveling Men's Assoc.*, 102 Iowa 267; *Woodmen Acc. Assoc. v. Pratt*, 62 Neb. 673, 89 Am. St. Rep. 777; *Hagadorn v. Masonic Equitable Acc. Assoc.*, 59 N. Y. App. Div. 321; *Braymer v. Commercial Mut. Acc. Co.*, 199 Pa. St. 259; *Underwood Veneer Co. v. London Guarantee, etc., Co.* 100 Wis. 378. See *Dezell v. Fidelity, etc., Co.*, 176 Mo. 253; *Shera v. Ocean Acc., etc., Corp.*, 32 Ont. 411.

**Sufficiency of Particulars.** — *Ætna L. Ins. Co. v. Milward*, (Ky. 1904) 82 S. W. Rep. 364; *Root v. London Guarantee, etc., Co.*, 92 N. Y. App. Div. 578.

3. *Peele v. Provident Fund Soc.*, 147 Ind. 543, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 323; *Mandell v. Fidelity, etc., Co.*, 170 Mass. 173; *Woodmen Acc. Assoc. v. Pratt*, 62 Neb. 673, 89 Am. St. Rep. 777; *Comstock v. Fraternal Acc. Assoc.*, 116 Wis. 382.

5. *Odd Fellows Fraternal Acc. Assoc. v. Earl*, (C. C. A.) 70 Fed. Rep. 16; *Rorick v. Railway Officials', etc., Acc. Assoc.*, (C. C. A.) 119 Fed. Rep. 63. See *Phillips v. U. S. Benevolent Soc.*, 120 Mich. 142.

6. "Immediate" Notice — *Colorado*. — *Union Casualty, etc., Co. v. Mondy*, 18 Colo. App. 395. *Illinois*. — *Sun Acc. Assoc. v. Olson*, 59 Ill. App. 217; *Fidelity, etc., Co. v. Weise*, 80 Ill. App. 499.

*Indiana*. — *Pacific Mut. L. Ins. Co. v. Branham*, (Ind. App. 1904) 70 N. E. Rep. 174.

*Massachusetts*. — *Smith, etc., Mfg. Co. v. Travelers Ins. Co.*, 171 Mass. 357; *National Constr. Co. v. Travelers Ins. Co.*, 176 Mass.

121; *Rooney v. Maryland Casualty Co.*, 184 Mass. 26.

*Missouri*. — *Dezell v. Fidelity, etc., Co.*, 176 Mo. 253; *Hayes v. Continental Casualty Co.*, 98 Mo. App. 410; *Columbia Paper Stock Co. v. Fidelity, etc., Co.*, 104 Mo. App. 157.

*New Hampshire*. — *Ward v. Maryland Casualty Co.*, 71 N. H. 262, 93 Am. St. Rep. 514.

*New York*. — *Ewing v. Commercial Travelers Mut. Acc. Assoc.*, 55 N. Y. App. Div. 241, affirmed 170 N. Y. 590; *Woolverton v. Fidelity, etc., Co.*, 96 N. Y. App. Div. 275.

*Ohio*. — *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529; *Crane v. Standard L., etc., Ins. Co.*, 6 Ohio Dec. 118, 3 Ohio N. P. 318.

*Pennsylvania*. — *Van Eman v. Fidelity, etc., Co.*, 201 Pa. St. 537.

*Washington*. — *Deer Trail Consol. Min. Co. v. Maryland Casualty Co.*, (Wash. 1904) 78 Pac. Rep. 135.

*Wisconsin*. — *Foster v. Fidelity, etc., Co.*, 99 Wis. 447; *Underwood Veneer Co. v. London Guarantee, etc., Co.*, 100 Wis. 378.

**324.** 1. *When Question for Jury and When for Court.* — *American Acc. Co. v. Card*, 7 Ohio Cir. Dec. 504, 13 Ohio Cir. Ct. 154; *Horsfall v. Pacific Mut. L. Ins. Co.*, 32 Wash. 132, 98 Am. St. Rep. 846.

2. *Sudduth v. Travelers' Ins. Co.*, 106 Fed. Rep. 822; *Ewing v. Commercial Travelers Mut. Acc. Assoc.*, 55 N. Y. App. Div. 241, affirmed 170 N. Y. 590; *Root v. London Guarantee, etc., Co.*, 92 N. Y. App. Div. 578.

**325.** 3. *Pacific Mut. L. Ins. Co. v. Branham*, (Ind. App. 1904) 70 N. E. Rep. 174; *National Masonic Acc. Assoc. v. McBride*, 162 Ind. 379; *Moore v. Wildey Casualty Co.*, 176 Mass. 418; *Rooney v. Maryland Casualty Co.*, 184 Mass. 26; *Foster v. Fidelity, etc., Co.*, 99 Wis. 447. See *Dezell v. Fidelity, etc., Co.*, 176 Mo. 253.

4. *Metropolitan Acc. Assoc. v. Froiland*, 161 Ill. 30, affirming 59 Ill. App. 522; *Hayes v. Continental Casualty Co.*, 98 Mo. App. 410. See *Crenshaw v. Pacific Mut. L. Ins. Co.*, 71 Mo. App. 42.

**Refusal Must Be Within Time** provided for the giving of the notice and proof in order to constitute a waiver. *Employer's Liability Assur. Corp. v. Rochelle*, 13 Tex. Civ. App. 232.

7. *Denison v. Masons Fraternal Acc. Assoc.*, 59 N. Y. App. Div. 294.

**327. VI. PROXIMATE CAUSE.** — See note 4.

**328. VII. AGENTS — 2. Power of Agent to Waive Conditions and Forfeitures.** — See note 4.

**329. 3. Knowledge of Agent Imputed to Insurer.** — See note 3.

**330. VIII. EVIDENCE — 1. Proof of Death by Violent, External, and Accidental Means.** — See note 1.

Direct and Positive Proof. — See note 2.

**331. Declarations of the Insured as to Accident and Physical Condition.** — See note 1. Evidence of Physician. — See note 4.

2. Presumptions — Against Suicide. — See notes 5, 6.

**332. Against Intentional Injury.** — See note 1.

3. Establishing Proviso Limiting the Insurer's Liability. — See note 2.

**IX. AMOUNT OF RECOVERY — Money Value of Time.** — See note 4.

**333. [ACCION.** — See note 3a.]

Provision as to Time Waived. — See Turner v. Fidelity, etc., Co., 112 Mich. 425.

**327. 4. Meyer v. Fidelity, etc., Co.,** 96 Iowa 378.

Special Provision inserted in policy that accident must be the proximate and sole cause of death. See Hubbard v. Mutual Acc. Assoc., 98 Fed. Rep. 930; Martin v. Manufacturers Acc. Indemnity Co., 151 N. Y. 94.

**328. 4. No Agent Has Power to Waive Condition,** however, if the policy states that he shall not. Thornton v. Travelers Ins. Co., 116 Ga. 121, 94 Am. St. Rep. 99.

**329. 3. Knowledge of Agent as to Other Insurance.** — Herbert v. Standard L., etc., Ins. Co., 23 Ohio Cir. Ct. 225.

**330. 1. Westmoreland v. Preferred Acc. Ins. Co.,** 75 Fed. Rep. 244; Travelers Ins. Co. v. Wyness, 107 Ga. 584; Furbush v. Maryland Casualty Co., 133 Mich. 479; Summers v. Fidelity Mut. Aid Assoc., 84 Mo. App. 605. See Ætna L. Ins. Co. v. Vandecar, (C. C. A.) 86 Fed. Rep. 282; Laessig v. Travelers' Protective Assoc., 169 Mo. 272.

2. See Laessig v. Travelers' Protective Assoc., 169 Mo. 272.

**331. 1. Union Casualty, etc., Co. v. Mondy,** 18 Colo. App. 395. See Van Eman v. Fidelity, etc., Co., 201 Pa. St. 537.

**Declarations Made to Physician Admissible.** — Omberg v. U. S. Mutual Acc. Assoc., 101 Ky. 305, 72 Am. St. Rep. 413.

4. **Opinions of Physician** based upon facts not stated, as to whether death was occasioned by injuries received, held not admissible. Foster v. Fidelity, etc., Co., 99 Wis. 447.

5. **Standard L., etc., Ins. Co. v. Thornton,** (C. C. A.) 100 Fed. Rep. 582; Star Acc. Co. v. Sibley, 57 Ill. App. 315; Knights Templars, etc., L. Indemnity Co. v. Crayton, 110 Ill. App. 648, affirmed 209 Ill. 550; Carnes v. Iowa State Traveling Men's Assoc., 106 Iowa 281, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 331; Ætna L. Ins. Co. v. Milward, (Ky. 1904) 82 S. W. Rep. 364; Union Casualty, etc., Co. v. Goddard, (Ky. 1903) 76 S. W. Rep. 832; Furbush v. Maryland Casualty Co., 131 Mich. 234; Laessig v. Travelers' Protective Assoc., 169 Mo. 272; De Van v. Commercial Travelers' Mut. Acc. Assoc., 92 Hun (N. Y.) 256, affirmed 157 N. Y. 690.

6. **Presumption Against Suicide.** — Furbush v. Maryland Casualty Co., 133 Mich. 479. See

Fowlie v. Ocean Acc., etc., Corp., 4 Ont. L. Rep. 146, affirmed 33 Can. Sup. Ct. 253.

**332. 1. Stevens v. Continental Casualty Co.,** 12 N. Dak. 463; Butero v. Travelers' Acc. Ins. Co., 96 Wis. 536, 65 Am. St. Rep. 61.

2. **United States.** — Standard L., etc., Ins. Co. v. Thornton, (C. C. A.) 100 Fed. Rep. 582; Employers' Liability Assur. Corp. v. Back, (C. C. A.) 102 Fed. Rep. 229.

Georgia. — Travelers Ins. Co. v. Wyness, 107 Ga. 590, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 332; Thornton v. Travelers Ins. Co., 116 Ga. 121, 94 Am. St. Rep. 99.

Iowa. — Carnes v. Iowa State Traveling Men's Assoc., 106 Iowa 281; Payne v. Fraternal Acc. Assoc., 119 Iowa 342.

Kentucky. — Ætna L. Ins. Co. v. Milward, (Ky. 1904) 82 S. W. Rep. 364.

Massachusetts. — Weinschenk v. Ætna L. Ins. Co., 183 Mass. 312.

Michigan. — Hess v. Preferred Masonic Mut. Acc. Assoc., 112 Mich. 196.

Missouri. — Hester v. Fidelity, etc., Co., 69 Mo. App. 186; Crenshaw v. Pacific Mut. L. Ins. Co., 71 Mo. App. 42; Jamison v. Continental Casualty Co., 104 Mo. App. 306.

Nebraska. — Railway Officials, etc., Acc. Assoc. v. Drummond, 56 Neb. 235.

New York. — Bailey v. Interstate Casualty Co., 8 N. Y. App. Div. 130 [affirmed 158 N. Y. 723], citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 332.

North Dakota. — Stevens v. Continental Casualty Co., 12 N. Dak. 463.

Ohio. — Interstate Casualty Co. v. Bird, 10 Ohio Cir. Dec. 211.

Texas. — Employer's Liability Assur. Corp. v. Rochelle, 13 Tex. Civ. App. 232.

Canada. — Canadian R. Acc. Ins. Co. v. McNevin, 32 Can. Sup. Ct. 194.

4. **Wages Allowed During Time Insured Was Incapacitated.** — Globe Acc. Ins. Co. v. Helwig, 13 Ind. App. 539.

**333. 3a. The Word "Accion" in the Spanish Law of Property** has been defined as "the right to demand anything; and the method of judicial procedure which we have for the recovery of that which is ours, or which another owes us." The result is that all choses in action owned by either of the consorts before marriage remain the separate property of such consort. Welder v. Lambert, 91 Tex. 510.

# ACCOMMODATION PAPER.

By O. D. ESTEE.

**335.** 1. DEFINITIONS — 1. Accommodation Paper. — See note 1.

**336.** 2. Accommodation Party. — See notes 2, 3.

**337.** II. NATURE AND ESSENTIALS OF ACCOMMODATION PAPER — 2. Consideration — *a.* GENERAL PRINCIPLES — Accommodation Party Holding Security or Interested in Proceeds. — See note 1.

Credit to Party Accommodated as Consideration. — See note 3.

Consideration for Accommodation Indorser After Delivery. — See note 4.

**338.** *b.* CROSS BILLS OR NOTES — Not Accommodation Paper. — See note 1.

**339.** 3. Party Accommodated — Who Is — Incidental Benefit. — See note 1.  
Need Not Be Party to Instrument. — See note 2.

**340.** 4. Inception of the Contract — *a.* INOPERATIVE UNTIL NEGOTIATED.  
— See note 3.

*b.* REVOCATION — (1) *Generally.* — See note 4.

**341.** (2) *By Death.* — See notes 4, 5.

**343.** 6. Parol Evidence to Prove Character of Instrument. — See notes 1, 2.

**345.** III. ACCOMMODATION PAPER OF PARTICULAR PARTIES — 1. Partners —  
One Partner Has No Power to Issue. — See note 8.

**348.** 2. Corporations — No Implied Power to Execute Accommodation Paper. — See notes 2, 3, 4.

**335.** 1. *United States.* — *Greenway v. William D. Orthwein Grain Co.*, (C. C. A.) 85 Fed. Rep. 536.

*Illinois.* — *Bouton v. Cameron*, 99 Ill. App. 600.

*Minnesota.* — *Rea v. McDonald*, 68 Minn. 187.

*Missouri.* — *Chicago Title, etc., Co. v. Brady*, 165 Mo. 197, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 335.

*Nebraska.* — *Peoria Mfg. Co. v. Huff*, 45 Neb. 7.

*Pennsylvania.* — *Peale v. Addicks*, 174 Pa. St. 543, affirmed 190 Pa. St. 585.

*Texas.* — *Vitkovitch v. Kleinecke*, (Tex. Civ. App. 1903) 75 S. W. Rep. 544.

**336.** 2. *Black v. Westminster First Nat. Bank*, 96 Md. 399.

**3.** A Benefit Accruing to the Person Accommodated is a sufficient consideration to sustain the liability of the accommodation maker or indorser. *St. Cloud First Nat. Bank v. Lang*, (Minn. 1905) 102 N. W. Rep. 700.

**337.** 1. *Farley Nat. Bank v. Henderson*, 118 Ala. 441, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 337.

**3.** *Maffat v. Greene*, 149 Mo. 48. See also *Creelman v. Stewart*, 28 Nova Scotia 185.

**4.** Accommodation Maker Signing After Execution and Delivery. — See *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801, 93 Am. St. Rep. 484.

**338.** 1. *State Bank v. Hayes*, 16 S. Dak. 365, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 338; *Farley Nat. Bank v. Henderson*, 118 Ala. 441, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 338.

Note Exchanged Proving Worthless. — *Farber v. National Forge, etc., Co.*, 140 Ind. 54.

**339.** 1. Mere Incidental Benefit. — A was indebted to B, and B requested C to give A

his promissory note in order to enable A to pay the debt. It was held that C loaned his credit to A, and that B was not the party accommodated. *Thom v. Kibbee*, 62 N. J. L. 753.

**2.** *Rea v. McDonald*, 68 Minn. 187.

**340.** 3. *Evans v. Speer Hardware Co.*, 65 Ark. 204, 67 Am. St. Rep. 919, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 340.

**4.** Revocable by Accommodation Party until Negotiated. — *Markowitz v. Greenwall Theatrical Circuit Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 74.

**341.** 4. *Edwards v. McClave*, 55 N. J. Eq. 151, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 341.

**5.** Death of Accommodation Indorser Prevents Recovery When Holders Knew of the Accommodation. — *Edwards v. McClave*, 55 N. J. Eq. 151, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 341.

**343.** 1. *Hoffman v. Habighorst*, 38 Oregon 261, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343; *Pantal v. Spears*, 29 Pa. Co. Ct. 102, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343; *Faulkner v. Thomas*, 48 W. Va. 148, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343.

To Show Who Is the Accommodation Party. — *Bliss v. Plummer*, 103 Mich. 181.

**2.** *Hitchcock v. Frackelton*, 116 Mich. 487, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343; *Hoffman v. Habighorst*, 38 Oregon 261, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343.

**345.** 8. *Talmage v. Millikin*, 119 Ala. 40; *Smith v. Weston*, 88 Hun (N. Y.) 25.

What Amounts to Notice of Character of Paper. — *Harrington v. Baker*, 173 Mass. 488.

**348.** 2. *Lyon v. Sioux City First Nat.*

**349.** *Bona Fide Purchaser.* — See note 1.

*Notice of Accommodation Character.* — See note 2.

**350.** *4. Married Women.* — See notes 2, 3.

#### IV. RIGHTS AND LIABILITIES OF PARTIES TO ACCOMMODATION PAPER

— **1. General Obligations of Parties** — *Accommodation Party.* — See note 5.

**351.** *2. Position of Party Accommodated* — *No Right of Action.* — See notes 1, 2.

**3. Rights of Accommodation Party After Payment** — *a. AGAINST PARTY ACCOMMODATED* — (1) *Indemnity* — *Generally.* — See note 4.

**356.** *4. Successive Accommodation Parties* — *a. RIGHTS AND LIABILITIES GENERALLY* — *Liable in Order of Names.* — See notes 2, 3.

**357.** *b. WHEN COSURETIES* — *CONTRIBUTION.* — See note 3.

**358.** See note 3.

**360.** *5. Holders of Accommodation Paper* — *a. RIGHTS OF BONA FIDE HOLDERS* — (1) *General Statement.* — See note 5.

(2) *Transferee Before Maturity* — (a) *Generally.* — See note 6.

*Bank, (C. C. A.) 85 Fed. Rep. 120; Steiner v. Steiner Land, etc., Co., 120 Ala. 128; Jacobs Pharmacy Co. v. Southern Banking, etc., Co., 97 Ga. 573, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 348; Pick v. Ellinger, 66 Ill. App. 570; Bacon v. Farmers' Bank, 79 Mo. App. 411, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 348.*

**Estoppel.** — Where all the stockholders and directors assent and the rights of creditors are not involved, a private corporation is estopped from asserting that its act in issuing accommodation paper is *ultra vires*. *Murphy v. Arkansas, etc., Land, etc., Co., 97 Fed. Rep. 723.*

**348.** *3. Bacon v. Farmers' Bank, 79 Mo. App. 411, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 348. See also Oppenheim v. Simon Reigel Cigar Co., (Supm. Ct. App. T.) 90 N. Y. Supp. 355.*

**4. Steiner v. Steiner Land, etc., Co., 120 Ala. 128; American Trust, etc., Bank v. Gluck, 68 Minn. 129; Bacon v. Farmers' Bank, 79 Mo. App. 411, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 348; Pelton v. Spider Lake Sawmill, etc., Co., 117 Wis. 569, 98 Am. St. Rep. 946.**

**Power to Execute Business Paper Does Not Imply Power to Execute Accommodation Paper.** — *Usher v. Raymond Skate Co., 163 Mass. 1.*

**349.** *1. Florence R., etc., Co. v. Chase Nat. Bank, 106 Ala. 364; Jacobs Pharmacy Co. v. Southern Banking, etc., Co., 97 Ga. 573, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 349; Pick v. Ellinger, 66 Ill. App. 570; American Trust, etc., Bank v. Gluck, 68 Minn. 129, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 349.*

**2. Pelton v. Spider Lake Sawmill, etc., Co., 117 Wis. 569, 98 Am. St. Rep. 946.**

**350.** *2. John C. Groub Co. v. Smith, 31 Ind. App. 685.*

**3. Vliet v. Eastburn, 64 N. J. L. 627.** See also the title *SEPARATE PROPERTY OF MARRIED WOMEN.*

**5. Evans v. Speer Hardware Co., 65 Ark. 204, 67 Am. St. Rep. 919, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 350.**

**351.** *1. Israel v. Gale, (C. C. A.) 77 Fed. Rep. 532; Levy, etc., Mule Co. v. Kauffman, (C. C. A.) 114 Fed. Rep. 170; Greenway v. William D. Orthwein Grain Co., (C. C. A.) 85*

*Fed. Rep. 536; Chicago Title, etc., Co. v. Brady, 165 Mo. 197; Baker v. Union Stock Yards Nat. Bank, 63 Neb. 801, 93 Am. St. Rep. 484; Woodward v. Bixby, 68 N. H. 219; Peale v. Addicks, 174 Pa. St. 543, affirmed 190 Pa. St. 585.*

**2. Chicago Title, etc., Co. v. Brady, 165 Mo. 197, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 351.** See also the title *BILLS OF EXCHANGE AND PROMISSORY NOTES, 196, 2.*

**4. Peale v. Addicks, 174 Pa. St. 543, affirmed 190 Pa. St. 585.**

**356.** *2. Moynihan v. McKeon, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 343, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356.*

**3. Moore v. Cushing, 162 Mass. 594, 44 Am. St. Rep. 393; Lewis v. Monahan, 173 Mass. 122; Maffat v. Greene, 149 Mo. 48; Moynihan v. McKeon, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 343, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356.**

**A Prior Accommodation Indorser** who is compelled to meet the obligation has no recourse against subsequent accommodation indorsers. *Poisson v. Bourgeois, 17 Quebec Super. Ct. 94.*

**Right to Collateral Security.** — An accommodation indorser of a note, having paid it, may sue the accommodation maker without first exhausting collateral securities received from the accommodated party, and it is immaterial that such indorser lives in a different state from the maker. Such accommodation maker can obtain the benefit of the collateral security only by subrogation after payment of the note. *Maffat v. Greene, 149 Mo. 48.*

**357.** *3. Hanish v. Kennedy, 106 Mich. 455; Moynihan v. McKeon, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 343, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 357. Compare In re Boutin, 12 Quebec Super. Ct. 186.*

**358.** *3. English Rule.* — *Stacey v. Stayner, 7 Ont. L. Rep. 684, discussing Macdonald v. Whitfield, 8 App. Cas. 733.*

**360.** *5. Rea v. McDonald, 68 Minn. 187, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 360; Metropolitan Printing Co. v. Springer, (Supm. Ct. App. T.) 90 N. Y. Supp. 376.*

**6. United States.** — *Murphy v. Arkansas, etc., Land, etc., Co., 97 Fed. Rep. 723, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 360;*



**362.** (b) Contrast with Business Paper. — See note 2.

(3) *Transferee After Maturity* — (b) Purchaser from Holder for Value. — See note 4.

**363.** See note 2.

**364.** (c)\* *Transferee from Accommodated Party After Maturity* — *bb.* UNITED STATES RULE — Cannot Enforce Instrument. — See note 2.

**365.** *b.* WHO IS BONA FIDE HOLDER — (2) *Pledgee* — (a) For Antecedent Debt. — See note 3.

**367.** *c.* WHEN CHARGEABLE WITH NOTICE OF ACCOMMODATION CHARACTER OF INSTRUMENT — *Indorsed Note in Hands of Maker.* — See note 3.

**369.** *d.* BURDEN OF PROOF — *Paper Fraudulently Circulated.* — See note 1.

*e.* AMOUNT OF RECOVERY AGAINST ACCOMMODATION ACCEPTOR OR MAKER — *Pledgees.* — See note 5.

**371.** V. ACCOMMODATION PARTY AS SURETY — 1. As Between the Party Accommodated and the Accommodation Party — *b.* SUBROGATION TO CREDITOR'S SECURITIES. — See note 3.

**374.** *c.* SUBROGATION TO DEFENSES AGAINST HOLDER — *Set-off.* — See note 2.

2. As to Third Parties — *a.* HOLDERS WITHOUT NOTICE. — See note 3.

*Israel v. Gale*, 45 U. S. App. 219, 77 Fed. Rep. 532; *Greenway v. William D. Orthwein Grain Co.*, (C. C. A.) 85 Fed. Rep. 536; *Levy, etc.*, *Mule Co. v. Kauffman*, (C. C. A.) 114 Fed. Rep. 170.

*Alabama.* — *Steiner v. Jeffries*, 118 Ala. 573.

*Arkansas.* — *Evans v. Speer Hardware Co.*, 65 Ark. 204, 67 Am. St. Rep. 919, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 360.

*Delaware.* — *Maher v. Moore*, (Del. 1898) 42 Atl. Rep. 721.

*District of Columbia.* — *Willard v. Crook*, 21 App. Cas. (D. C.) 237.

*Georgia.* — *Mayer v. Thomas*, 97 Ga. 772.

*Iowa.* — *Bankers Iowa State Bank v. Mason Hand Lathe Co.*, 121 Iowa 570.

*Kentucky.* — *Moreland v. Citizens' Sav. Bank*, 97 Ky. 211.

*Maryland.* — *Schwartz v. Wilmer*, 90 Md. 136; *Black v. Westminster First Nat. Bank*, 96 Md. 399.

*Minnesota.* — *Rea v. McDonald*, 68 Minn. 187, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 360; *St. Cloud First Nat. Bank v. Lang*, (Minn. 1905) 102 N. W. Rep. 700.

*Missouri.* — *Maffat v. Greene*, 149 Mo. 48.

*Nebraska.* — *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801, 93 Am. St. Rep. 484.

*New Hampshire.* — *Woodward v. Bixby*, 68 N. H. 219.

*New Jersey.* — *Honeyman v. Van Nest*, 4 N. J. L. J. 151.

*New York.* — *Packard v. Windholz*, (County Ct.) 40 Misc. (N. Y.) 347, *affirmed* 88 N. Y. App. Div. 365; *Beall v. General Electric Co.*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 611; *Lincoln Nat. Bank v. Butler*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 566; *National Bank of North America v. White*, 19 N. Y. App. Div. 390; *Packard v. Windholz*, 88 N. Y. App. Div. 365, *affirmed* 73 N. E. Rep. 1129.

*Pennsylvania.* — *Mahanoy City First Nat. Bank v. Dick*, 22 Pa. Super. Ct. 445; *Penn Safe Deposit, etc., Co. v. Kennedy*, 175 Pa. St.

160; *Philler v. Patterson*, 168 Pa. St. 468, 47 Am. St. Rep. 896; *Peale v. Addicks*, 174 Pa. St. 543, *affirmed* 190 Pa. St. 585; *Liebig Mfg. Co. v. Hill*, 9 Pa. Super. Ct. 469.

*Texas.* — *King v. Parks*, 26 Tex. Civ. App. 95.

*Vermont.* — *Rutland Provision Co. v. Hall*, 71 Vt. 208.

**Right of Set-off.** — The maker of an accommodation note cannot interpose any counterclaim against an innocent purchaser for value though such counterclaim might have been available to him against the payee. *Carothers v. Richards*, (Ky. 1895) 30 S. W. Rep. 211.

**362.** 2. *Maffat v. Greene*, 149 Mo. 48.

4. *Beall v. General Electric Co.*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 611.

**363.** 2. *Mersick v. Alderman*, (Conn. 1905) 60 Atl. Rep. 109.

**364.** 2. *Peale v. Addicks*, 174 Pa. St. 549.

**365.** 3. *Moreland v. Citizen's Sav. Bank*, 97 Ky. 211.

**367.** 3. *Evans v. Speer Hardware Co.*, 65 Ark. 204, 67 Am. St. Rep. 919, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 367; *Oppenheim v. Simon Reigel Cigar Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 355.

**Indorsing for the Accommodation of the Maker Before Indorsement by the Payee** entitles the accommodation indorser to set up illegality or want of consideration. *Leonard v. Draper*, (Mass. 1905) 73 N. E. Rep. 644.

**369.** 1. *Benton County Sav. Bank v. Bodicker*, 105 Iowa 548, 67 Am. St. Rep. 310, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369.

5. *Forstall v. Fussell*, 50 La. Ann. 249.

**371.** 3. *Price County Bank v. McKenzie*, 91 Wis. 658.

**374.** 2. *Greer v. Bently*, (Ky. 1897) 43 S. W. Rep. 219.

3. *Merchants Trust, etc., Co. v. Jones*, 95 Me. 335, 85 Am. St. Rep. 412; *Agawam Nat. Bank v. Downing*, 169 Mass. 297.

**377.** *b. HOLDERS WITH NOTICE — (2) Discharge by Dealings with Principal — (b) United States Authorities — Accommodation Acceptor and Maker — Conflict.* — See notes 1, 2.

**378.** *Accommodation Comaker Discharged.* — See note 1.

**379.** *(3) Discharge by Breach of Condition — (b) Diversion — aa. Use of ACCOMMODATION PAPER GENERALLY — Prima Facie Unrestricted.* — See note 3.

**380.** *bb. WHAT AMOUNTS TO A DIVERSION — Variation in Method of Use Immaterial.* — See notes 3, 4.

**381.** See note 1.

**382.** *Misuse of Proceeds.* — See note 1.

**383.** *cc. EFFECT OF DIVERSION — Transferee with Notice.* — See note 2.

**384.** *Transferee Without Notice.* — See note 2.

**385.** *VI. PRESENTMENT AND NOTICE — Accommodation Drawer or Indorser Entitled to Notice.* — See note 1.

*Accommodated Party Not Entitled to Notice.* — See note 2.

**386.** *VII. EXTINGUISHMENT — Payment by Accommodated Party Is Extinguishment.* — See note 4.

**388.** *Part Payment by Party Accommodated.* — See note 2.

[**ACCOMMODATION TRAIN.** — See note 2a.]

**377.** *1. Accommodation Acceptor Not Discharged by Indulgence to Drawer.* — Delaware County Trust, etc., Ins. Co. v. Haser, 199 Pa. St. 17, 85 Am. St. Rep. 763.

**2. Accommodation Acceptor or Maker Discharged as Surety. — Schuff v. Germania Safety-Vault, etc., Co., (Ky. 1897) 43 S. W. Rep. 229; Merchants' Trust, etc., Co. v. Jones, 95 Me. 335, 85 Am. St. Rep. 412; Hoffman v. Habighorst, 38 Oregon 261.**

**378.** *1. Surrender of Security.* — See Gotzian v. Heine, 87 Minn. 429.

**379.** *3. Farley Nat. Bank v. Henderson,* 118 Ala. 441.

**380.** *3. Farley Nat. Bank v. Henderson,* 118 Ala. 441, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 380.

**4. Evans v. Speer Hardware Co.,** 65 Ark. 204, 67 Am. St. Rep. 919, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 380.

**381.** *1. Evans v. Speer Hardware Co.,* 65 Ark. 204, 67 Am. St. Rep. 919, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 381.

**382.** *1. Misuse of Proceeds.* — Farley Nat. Bank v. Henderson, 118 Ala. 441, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 382; Evans v. Speer Hardware Co., 65 Ark. 204, 67 Am. St. Rep. 919.

**383.** *2. Farley Nat. Bank v. Henderson,* 118 Ala. 441, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 383; Sutherland v. Mead, 80 N. Y. App. Div. 103.

**384.** *2. Tollman v. Quincy,* 129 Fed. Rep.

974; Moreland v. Citizens' Sav. Bank, 97 Ky. 211.

**385.** *1. In re Edson,* 119 Fed. Rep. 487. But see Mayer v. Thomas, 97 Ga. 772.

*Waiver of Notice by Partner.* — See Schwartz v. Wilmer, 90 Md. 136.

*Failure to Protest Note May Be Waived by an Accommodation Indorser.* — Bankers Iowa State Bank v. Mason Hand Lathe Co., 121 Iowa 570.

**2. People's Nat. Bank v. Winton,** 13 Ind. App. 110.

**386.** *4. An Accommodation Acceptor for a Third Party is not discharged by a payment made by the drawer.* Dill v. Wheatley, 34 Nova Scotia 526.

**388.** *2. Dill v. Wheatley,* 34 Nova Scotia 526.

**388.** *2a.* "The meaning of a term in such common use as an *accommodation train* is generally, if not universally, known. Webster defines it to be 'one running at moderate speed, and stopping at all, or nearly all, stations.' Passenger travel is partly local, from station to station and for different distances along the route, as well as to the destination of the train. Through trains and limited trains do not meet the demands of such travel, and, in the general understanding, an *accommodation train* is one designed to accommodate the public in that respect, and arranged to stop at most of the stations to effect that object." Gray v. Chicago, etc., R. Co., 189 Ill. 400.

# ACCOMPLICES.

By L. C. BOEHM.

**389. I. DEFINITION.** — See note 1.

**390. II. WHO IS AN ACCOMPLICE** — General Test. — See notes 2, 3.

Abortion. — See note 4.

**389. 1.** *Springer v. State*, 102 Ga. 447, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389; *Giles v. State*, 43 Tex. Crim. 563, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389; *Anderson v. State*, 39 Tex. Crim. 83; *Winfield v. State*, 44 Tex. Crim. 475; *Dever v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 1071.

**Other Definitions.** — *People v. Balkwell*, 143 Cal. 259; *State v. Kuhlman*, 152 Mo. 100, 75 Am. St. Rep. 438; *State v. Kellar*, 8 N. Dak. 563, 73 Am. St. Rep. 776; *Shelly v. State*, 95 Tenn. 152, 49 Am. St. Rep. 926.

"An accomplice is one who aids, abets, and assists in the commission of the crime, or, not being present, has advised and encouraged its commission." *People v. Collum*, 122 Cal. 186.

In *Aston v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 385, the court said: "An 'accomplice,' as we understand it, is one who is implicated in the crime, either as a principal, an accessory, or as an accomplice; that is, he must be connected with the crime by some unlawful act or omission on his part transpiring either before, at the time of, or after the commission of, the offense."

**Must Have Acted in Concert.** — To make a witness an accomplice "the testimony must tend at least to show that he was acting in concert with the party on trial against whom he testified." *Giles v. State*, 43 Tex. Crim. 563, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389.

**390. 2.** *Keller v. State*, 102 Ga. 511, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390; *State v. Jones*, 115 Iowa 113; *People v. Zucker*, 20 N. Y. App. Div. 363; *Robertson v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1000. See also *Redd v. State*, 63 Ark. 457; *State v. Boysen*, 30 Wash. 338.

**The Fact that the Witness Is Jointly Indicted.** — *Walker v. State*, 118 Ga. 758.

**Seduction.** — The person seduced is not an accomplice of her seducer so as to require corroboration of her testimony. *Keller v. State*, 102 Ga. 506.

A person who learns that a woman has been seduced, and by means of his knowledge compels her to have intercourse with him, is not an accomplice of the seducer. *Anderson v. State*, 39 Tex. Crim. 83.

**Incest.** — *Solomon v. State*, 113 Ga. 192, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390; *State v. Kellar*, 8 N. Dak. 563, 73 Am. St. Rep. 776; *Shelly v. State*, 95 Tenn. 152, 49 Am. St. Rep. 926; *Stewart v. State*, 35 Tex. Crim. 174.

A prosecutrix who has been forced is not an accomplice, and her evidence does not re-

quire corroboration, nor will the fact that the crime amounts to rape bring it within the rule requiring corroboration of the evidence given by the woman raped. *State v. Kouhns*, 103 Iowa 720.

To the same effect, see *Smith v. State*, 108 Ala. 1, 54 Am. St. Rep. 140.

**Adultery.** — One who admits participation in adultery is an accomplice. *State v. Scott*, 28 Oregon 331.

**Rape.** — The prosecutrix in a rape case is held not to be an accomplice. *Hamilton v. State*, 36 Tex. Crim. 372.

A woman who agrees not to inform on the man who raped her, but to shield him from the consequences of his crime, is not an accomplice of the man. *Miller v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 996.

**Statutory Rape.** — A girl under the age of consent, although consenting to the act, is not an accomplice of the man who commits the offense of statutory rape upon her. *State v. Hilberg*, 22 Utah 39; *Bond v. State*, 63 Ark. 504, 58 Am. St. Rep. 129; *Smith v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 401.

**Accomplices in Other Similar Crimes.** — A witness who did not participate in the crime for which the defendant is on trial is not an accomplice, although he may have been his accomplice in other distinct offenses of the same nature. *People v. Sternberg*, 111 Cal. 3.

**Mere Associates of Criminals** are not accomplices. *St. Louis v. Roche*, 128 Mo. 541.

**False Swearing.** — Where the defendant was prosecuted for false swearing as to the age of a girl with whom he eloped she was held to be an accomplice whose testimony required corroboration. *Smith v. State*, 37 Tex. Crim. 488.

**One Who Advises the burning of a barn** is an accomplice under the *Texas* statute. *Dawson v. State*, 38 Tex. Crim. 50.

**One Who Forges a Deed Is an Accomplice of Him Who Utters It.** — *Preston v. State*, 40 Tex. Crim. 72.

**Employer of Detective.** — A person who employs a detective to ferret out violations of a local option law is not an accomplice of a violator of such law, even though the detective be an accomplice. *Aston v. State* (Tex. Crim. 1899) 49 S. W. Rep. 385.

**Thief Not Accomplice of Receiver of Stolen Goods.** — *Springer v. State*, 102 Ga. 447; *State v. Rachman*, 68 N. J. L. 120.

**3.** *Springer v. State*, 102 Ga. 447, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390; *State v. Hilberg*, 22 Utah 39, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390.

**4. Georgia.** — *Keller v. State*, 102 Ga. 511,

**390.** Purchasing Articles the Sale of Which Is Forbidden. — See note 5.

**391.** Bribery. — See note 2.

Criminal Intent. — See note 3.

Mere Spectators. — See note 4.

Duress. — See notes 5, 6.

**392.** Feigned Accomplices. — See note 1.

Gaming. — See notes 3, 4.

**393.** Accessory After the Fact. — See note 1.

Question for Jury. — See note 2.

citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390.

*Iowa.* — State *v.* Smith, 99 Iowa 26, 61 Am. St. Rep. 219.

*Minnesota.* — State *v.* Sargent, 71 Minn. 31, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390.

*Pennsylvania.* — Com. *v.* Bell, 4 Pa. Super. Ct. 187, 40 W. N. C. (Pa.) 496.

*Tennessee.* — Ferguson *v.* Moore, 98 Tenn. 342.

*Texas.* — Miller *v.* State, 37 Tex. Crim. 575; Hunter *v.* State, 38 Tex. Crim. 61.

**The Woman Not Being a Principal**, the person who performs the abortion cannot be regarded as her accomplice but is a principal. Moore *v.* State, 37 Tex. Crim. 552. See the title ABORTION, *ante*, p. 16.

**A Woman Who Advises Against an Abortion**, and who accompanies the defendant to the doctor's office but who is not present at the commission of the crime, is not an accomplice. Her evidence needs no corroboration. People *v.* Balkwell, 143 Cal. 259.

**390.** 5. Sears *v.* State, 35 Tex. Crim. 442; Terry *v.* State, 44 Tex. Crim. 411; Walker *v.* State, (Tex. Crim. 1903) 72 S. W. Rep. 401.

**A Physician Illegally Prescribing Liquor Is an Accomplice.** — McLain *v.* State, 43 Tex. Crim. 213.

**391.** 2. **The One Who Gives a Bribe** is an accomplice, and his testimony requires corroboration. People *v.* Bissert, 71 N. Y. App. Div. 118, affirmed 172 N. Y. 643; Ruffin *v.* State, 36 Tex. Crim. 565; Collins *v.* State, (Tex. Crim. 1899) 51 S. W. Rep. 216. But see State *v.* Sargent, 71 Minn. 28.

**A Juror Who Accepts a Bribe** is an accomplice of him who gives the bribe. People *v.* Winant, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 361.

**An Officer Who Takes a Bribe Is an Accomplice.** — Morawietz *v.* State, (Tex. Crim. 1904) 80 S. W. Rep. 997.

3. Springer *v.* State, 102 Ga. 447, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 391; Walker *v.* State, 118 Ga. 752, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 391; State *v.* Levers, 12 S. Dak. 265, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 391; People *v.* Zucker, 20 N. Y. App. Div. 363.

**One Who Merely Conceals a Crime Is Not an Accomplice.** — Prewett *v.* State, 41 Tex. Crim. 262.

**Witnesses for the People** who were engaged in procuring evidence against the defendants had no intent to commit a crime and could not be deemed accomplices. People *v.* Leroy, 72 N. Y. App. Div. 55.

4. Schriebe *v.* State, (Tex. Crim. 1896) 35 S. W. Rep. 375.

**Mere Knowledge that a Crime Is to Be Committed.** — Garza *v.* State, (Tex. Crim. 1899) 49 S. W. Rep. 103.

**Failure to Report a Crime.** — A spectator who was merely present and who neglected to report a crime to the authorities is guilty of no offense. Monroe *v.* State, (Tex. Crim. 1904) 8. S. W. Rep. 726.

**Mere Failure to Inform that Homicide Has Been Committed** does not make one, who knew of the crime, an accomplice. Bird *v.* U. S., 187 U. S. 118.

Children who were present when their mother and grandfather killed their father and who thereafter concealed the crime were not accomplices, so far as the credibility of their testimony was concerned. Martin *v.* State, 44 Tex. Crim. 279.

5. Schwartz *v.* State, 65 Neb. 196.

6. McFalls *v.* State, 66 Ark. 16.

**392.** 1. People *v.* Hilfman, 61 N. Y. App. Div. 541; Backenstoe *v.* State, 10 Ohio Cir. Dec. 688, 19 Ohio Cir. Ct. 568; Terry *v.* State, (Tex. Crim. 1904) 79 S. W. Rep. 320. But see Dever *v.* State, (Tex. Crim. 1895) 30 S. W. Rep. 1071.

3. Com. *v.* Bossie, 100 Ky. 151, holding that each one engaged in the game (at cards) was guilty of an individual offense.

**4. A Stakeholder Is Not an Accomplice.** — Schwartz *v.* State, 38 Tex. Crim. 26.

**393.** 1. **Accessory After Fact as Accomplice** — A sister of a burglar was an accomplice when she helped to hide the stolen goods. McDaniel *v.* State, (Tex. Crim. 1904) 81 S. W. Rep. 301.

**Contra.** — Springer *v.* State, 102 Ga. 447, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393; Walker *v.* State, 118 Ga. 758; Birdsong *v.* State, 120 Ga. 854; State *v.* Jones, 115 Iowa 113. See also People *v.* Collum, 122 Cal. 186; People *v.* Ammon, 92 N. Y. App. Div. 205.

**A Receiver of Stolen Goods.** — Walker *v.* State, (Tex. Crim. 1896) 37 S. W. Rep. 423. *Contra*, State *v.* Kuhlman, 152 Mo. 100, 75 Am. St. Rep. 438.

2. *California.* — People *v.* Compton, 123 Cal. 403; People *v.* Creegan, 121 Cal. 554.

*Iowa.* — State *v.* Smith, 102 Iowa 656.

*Massachusetts.* — Com. *v.* Clune, 162 Mass. 206.

*New York.* — People *v.* Zucker, 20 N. Y. App. Div. 363.

*North Dakota.* — State *v.* Kellar, 8 N. Dak. 563, 73 Am. St. Rep. 776.

*Texas.* — Dill *v.* State, (Tex. Crim. 1894) 28 S. W. Rep. 950; Delavan *v.* State, (Tex. Crim. 1895) 29 S. W. Rep. 385; Ballew *v.* State, (Tex. Crim. 1896) 34 S. W. Rep. 616; Wil-

**393.** III. ACCOMPLICE AS WITNESS — 1. Competency. — See note 4.

**394.** See note 1.

Promise of Reward. — See note 2.

**395.** Joint Indictment — Infamy. — See note 1.

**397.** 2. When Admitted as Witness — Discretion of Court or Prosecuting Officer. —

See note 3.

**398.** See note 1.

3. Credibility — At Common Law, Question for Jury. — See note 2.

Evidence to Be Received with Caution. — See note 3.

**399.** See note 1.

*lhamson v. State*, 37 Tex. Crim. 437; *Herring v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 301; *Hankins v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 992; *Bell v. State*, 39 Tex. Crim. 677; *Rios v. State*, (Tex. Crim. 1898) 48 S. W. Rep. 505; *Preston v. State*, 40 Tex. Crim. 72; *Preston v. State*, 41 Tex. Crim. 307, rehearing denied 41 Tex. Crim. 313; *Brooks v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 924; *White v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 749; *Mosely v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 103.

*Wisconsin*. — *Porath v. State*, 90 Wis. 527, 48 Am. St. Rep. 954.

When There Is No Conflict of Evidence the question whether one is an accomplice is one of law for the court and not one of fact for the jury. *State v. Carr*, 28 Oregon 389.

Even Though It Be an Unquestioned Fact that the witness is an accomplice, it is not error for the court not to instruct to that effect and to submit it as an issue of fact. *Carroll v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 1061.

**393.** 4. *United States*. — *Wolfson v. U. S.*, (C. C. A.) 101 Fed. Rep. 430, (C. C. A.) 102 Fed. Rep. 134; *Wiborg v. U. S.*, 163 U. S. 632.

*Alabama*. — *State v. Smith*, 138 Ala. 114, 100 Am. St. Rep. 26, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393; *Rhodes v. State*, (Ala. 1904) 37 So. Rep. 365.

*Kentucky*. — *Murray v. Com.*, (Ky. 1894) 28 S. W. Rep. 480.

*Louisiana*. — *State v. Hauser*, 112 La. 313.

*Missouri*. — *State v. Riney*, 137 Mo. 102; *State v. Tobie*, 141 Mo. 547; *State v. Stewart*, 142 Mo. 412; *State v. Black*, 143 Mo. 166; *State v. Young*, 153 Mo. 445.

*Montana*. — *State v. Geddes*, 22 Mont. 68.

*New York*. — *People v. McKane*, 143 N. Y. 455.

*North Dakota*. — *State v. Kent*, 4 N. Dak. 577.

*Oregon*. — *State v. Magone*, 32 Oregon 206.

*Pennsylvania*. — *Com. v. Yingst*, 18 Pa. Co. Ct. 647.

*South Dakota*. — *State v. Hicks*, 6 S. Dak. 325; *State v. Smith*, 8 S. Dak. 547.

*Texas*. — *Cline v. State*, 34 Tex. Crim. 347; *Atkinson v. State*, 34 Tex. Crim. 424; *Rape v. State*, 34 Tex. Crim. 615; *Underwood v. State*, 38 Tex. Crim. 193; *Caudle v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 545.

*Washington*. — *State v. Payne*, 10 Wash. 545.

**394.** 1. *Kidwell v. Com.*, 97 Ky. 538. See also *Looney v. People*, 81 Ill. App. 370.

2. *Barr v. People*, 30 Colo. 522; *State v. Magone*, 32 Oregon 206.

**395.** 1. When Tried Jointly. — *State v. Angel*, 52 La. Ann. 485.

When Tried Separately — Competency for State — *Wolfson v. U. S.*, (C. C. A.) 101 Fed. Rep. 430; *Barr v. People*, 30 Colo. 522; *Bishop v. State*, 41 Fla. 522; *Williams v. State*, 42 Fla. 205; *State v. Asbury*, 49 La. Ann. 1741.

Tried Separately — Competency for One Another. — *McGinness v. State*, 4 Wyo. 115.

**397.** 3. In Discretion of Court or Prosecuting Officer. — *State v. Smith*, 138 Ala. 114, 100 Am. St. Rep. 26, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 397.

In Texas the court alone is authorized to allow such testimony. *Ex p. Greenhaw*, 41 Tex. Crim. 283, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 397.

**398.** 1. *State v. Payne*, 10 Wash. 545.

2. *United States*. — *U. S. v. Van Leuven*, 65 Fed. Rep. 78.

*California*. — *People v. Barker*, 114 Cal. 617; *People v. Compton*, 123 Cal. 403.

*Delaware*. — *State v. Horner*, 1 Marv. (Del.) 504.

*Georgia*. — *Cochran v. State*, 113 Ga. 726.

*Louisiana*. — *State v. Hauser*, 112 La. 313; *State v. De Hart*, 109 La. 570; *State v. Thompson*, 48 La. Ann. 1597.

*Michigan*. — *People v. Nunn*, 120 Mich. 530.

*Missouri*. — *State v. Black*, 143 Mo. 166; *State v. Kuhlman*, 152 Mo. 100, 75 Am. St. Rep. 438.

*New York*. — *People v. O'Farrell*, 175 N. Y. 323; *People v. Sullivan*, 173 N. Y. 122, 93 Am. St. Rep. 582.

*Oregon*. — *State v. Branton*, 33 Oregon 533. *Pennsylvania*. — *Com. v. Craig*, 19 Pa. Super. Ct. 81.

*South Carolina*. — *State v. Green*, 48 S. Car. 136.

*Washington*. — *State v. Harras*, 25 Wash. 416; *State v. Concannon*, 25 Wash. 327.

Judge Should Not Assume that Accomplice's Testimony Is True. — "In every case where an accomplice testifies, the judge should be careful not to assume in any manner the truth of the accomplice's testimony, but leave the truth of that, as well as all other evidence, to be found by the jury." *Bell v. State*, 39 Tex. Crim. 677.

3. *Hanley v. U. S.*, (C. C. A.) 123 Fed. Rep. 849; *State v. Smith*, 138 Ala. 114, 100 Am. St. Rep. 26, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 398; *People v. Ruiz*, 144 Cal. 251; *Myers v. State*, 43 Fla. 500; *State v. Hopper*, (Ga. 1905) 38 So. Rep. 452; *Winfield v. State*, 44 Tex. Crim. 475.

**399.** 1. Failure to Charge as to Caution Held Error. — *State v. Meysenburg*, 171 Mo. 1,

**399.** Testifying under Promise of Leniency. — See note 2.

Full Cross-examination Should Be Allowed. — See note 3.

**4.** Corroboration — *a.* AT COMMON LAW — See note 4.**400.** See note 1.**401.** See note 1.*b.* BY STATUTE. — See note 3.**399.** 2. *State v. Riney*, 137 Mo. 102.3. *State v. Kennedy*, 154 Mo. 268; *State v. Kent*, 4 N. Dak. 577.4. *Delaware*. — *State v. Horner*, 1 Marv. (Del.) 504; *State v. Freedman*, 3 Penn. (Del.) 403.*Louisiana*. — *State v. De Hart*, 109 La. 570; *State v. Thompson*, 47 La. Ann. 1597.*Michigan*. — *People v. Nunn*, 120 Mich. 530.*Missouri*. — *State v. Sprague*, 149 Mo. 409; *State v. Donnelly*, 130 Mo. 642; *State v. Tobie*, 141 Mo. 547; *State v. Black*, 143 Mo. 166; *State v. Koplan*, 167 Mo. 298; *State v. Kennedy*, 154 Mo. 268; *State v. Kuhlman*, 152 Mo. 100, 75 Am. St. Rep. 438.*New Jersey*. — *State v. Lyons*, 70 N. J. L. 635.*Pennsylvania*. — *Com. v. Sayars*, 21 Pa. Super. Ct. 75.*South Carolina*. — *State v. Green*, 48 S. Car. 136.*Wisconsin*. — *Porath v. State*, 90 Wis. 527, 48 Am. St. Rep. 954.**Contra.** — *Shelly v. State*, 95 Tenn. 152, 49 Am. St. Rep. 926; *State v. Concannon*, 25 Wash. 327. And see *State v. Harras*, 25 Wash. 416, wherein the jury was held to have been sufficiently instructed not to convict unless there was corroboration.**400.** 1. *United States*. — *Hanley v. U. S.*, (C. C. A.) 123 Fed. Rep. 849.*Alabama*. — *State v. Smith*, 138 Ala. 114, 100 Am. St. Rep. 26, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400.*Delaware*. — *State v. Horner*, 1 Marv. (Del.) 504; *State v. Freedman*, 3 Penn. (Del.) 403.*Louisiana*. — See *State v. Callahan*, 47 La. Ann. 444.*Missouri*. — *State v. Donnelly*, 130 Mo. 642; *State v. Sprague*, 149 Mo. 409; *State v. Kuhlman*, 152 Mo. 100, 75 Am. St. Rep. 438; *State v. Koplan*, 167 Mo. 298.*Pennsylvania*. — *Com. v. Sayars*, 21 Pa. Super. Ct. 75.*Wisconsin*. — *Porath v. State*, 90 Wis. 527, 48 Am. St. Rep. 954.**What Is Meant by "Corroboration"** must be stated in the instruction. *State v. Sprague*, 149 Mo. 409.**401.** 1. *Com. v. Clune*, 162 Mass. 206 (citing *Com. v. Wilson*, 152 Mass. 12); *State v. Simon*, (N. J. 1904) 58 Atl. Rep. 107.**Where There Is Corroborative Testimony** it is unnecessary to instruct that the jury should not convict on the uncorroborated testimony of an accomplice. *State v. Koplan*, 167 Mo. 298.**Sufficient Instruction.** — Where there is no statute on the subject, an instruction, cautioning the jury that accomplice testimony should be viewed with suspicion and carefully scrutinized, but that full credit might be giventhereto if the jury concluded that it was corroborated, is not open to objection. *Hanley v. U. S.*, (C. C. A.) 123 Fed. Rep. 849.3. *Alabama*. — *Jefferson v. State*, 110 Ala. 89; *State v. Smith*, 138 Ala. 111, 100 Am. St. Rep. 26.*Arkansas*. — *Bond v. State*, 63 Ark. 504, 58 Am. St. Rep. 129; *Scott v. State*, 63 Ark. 310.*California*. — *People v. Sternberg*, 111 Cal. 3; *People v. Barker*, 114 Cal. 617; *People v. Armstrong*, 114 Cal. 570; *People v. Creegan*, 121 Cal. 554; *People v. Lynch*, 122 Cal. 501; *People v. Compton*, 123 Cal. 403; *People v. Solomon*, 125 Cal. xix, 58 Pac. Rep. 55; *People v. Ardell*, 135 Cal. xix, 66 Pac. Rep. 970; *People v. Davis*, 135 Cal. 162; *People v. Hoagland*, 138 Cal. 338; *People v. Morton*, 139 Cal. 719; *People v. Sullivan*, 144 Cal. 471.*Georgia*. — *Phipps v. State*, 99 Ga. 195; *McCrorry v. State*, 101 Ga. 779; *Springer v. State*, 102 Ga. 447; *Keller v. State*, 102 Ga. 506; *Taylor v. State*, 110 Ga. 150; *Solomon v. State*, 113 Ga. 192; *Coker v. State*, 115 Ga. 210; *Dixon v. State*, 116 Ga. 186.*Iowa*. — *State v. Smith*, 102 Iowa 656; *State v. Smith*, 106 Iowa 701.*Kentucky*. — *Murray v. Com.*, (Ky. 1894) 28 S. W. Rep. 480; *Gilbert v. Com.*, 106 Ky. 919; *Howard v. Com.*, 110 Ky. 356.*Louisiana*. — *State v. Hauser*, 112 La. 313.*Montana*. — *State v. Welch*, 22 Mont. 92; *State v. Geddes*, 22 Mont. 68; *State v. Spotted Hawk*, 22 Mont. 33; *State v. Calder*, 23 Mont. 504.*New York*. — *People v. Mayhew*, 150 N. Y. 346; *People v. O'Farrell*, 175 N. Y. 323; *People v. Reilly*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 45; *People v. Winant*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 361; *People v. Fielding*, 36 N. Y. App. Div. 401; *People v. Bissert*, 71 N. Y. App. Div. 118, affirmed 172 N. Y. 643; *People v. Weisenberger*, 73 N. Y. App. Div. 428; *People v. Finucan*, 80 N. Y. App. Div. 407.*North Dakota*. — *State v. Kent*, 4 N. Dak. 577, 5 N. Dak. 516; *State v. Coudotte*, 7 N. Dak. 109; *State v. Kellar*, 8 N. Dak. 563, 73 Am. St. Rep. 776.*Oregon*. — *State v. Carr*, 28 Oregon 389; *State v. Scott*, 28 Oregon 331.*South Dakota*. — *State v. Levers*, 12 S. Dak. 269.*Texas*. — *Delavan v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 385; *Stewart v. State*, 35 Tex. Crim. 174; *Johnson v. State*, (Tex. Crim. 1895) 32 S. W. Rep. 1041; *Williamson v. State*, 37 Tex. Crim. 437; *Smith v. State*, 37 Tex. Crim. 488; *Johnson v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 327; *Walker v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 423; *Smith v. State*, (Tex. Crim. 1896) 38 S. W. Rep. 200; *Sessions v. State*, 37 Tex. Crim. 62; *Wright v. State*,

**402.** See note 1.

*c.* WHEN SUFFICIENT — (1) *Generally* — Not Necessary upon Every

Fact. — See note 2.

Need Not Be Direct. — See note 3.

**403.** Must Be upon Material Point and Connect Prisoner with Crime. — See notes 1, 2.

**405.** See note 1.

One Accomplice Corroborating Another. — See note 2.

**407.** 5. Right to Pardon of Accomplice Testifying for Prosecution — Right Equitable Only. — See note 1.

Immunity Does Not Extend to Other Crimes. — See note 3.

[ACCOMPLISH. — See note 3*a.*]

(Tex. Crim. 1898) 44 S. W. Rep. 151; Chambers *v.* State, (Tex. Crim. 1898) 44 S. W. Rep. 495; Hankins *v.* State, (Tex. Crim. 1898) 47 S. W. Rep. 992; Bell *v.* State, 39 Tex. Crim. 677; Rios *v.* State, (Tex. Crim. 1898) 48 S. W. Rep. 505; Preston *v.* State, 40 Tex. Crim. 72; Gatlin *v.* State, 40 Tex. Crim. 116; Stevens *v.* State, (Tex. Crim. 1899) 49 S. W. Rep. 105; Aston *v.* State, (Tex. Crim. 1899) 49 S. W. Rep. 385; O'Quinn *v.* State, (Tex. Crim. 1899) 53 S. W. Rep. 110; Lattimore *v.* State, (Tex. Crim. 1900) 57 S. W. Rep. 644; Wilkerson *v.* State, (Tex. Crim. 1899) 57 S. W. Rep. 956; Price *v.* State, (Tex. Crim. 1900) 58 S. W. Rep. 83; Smith *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 186; Smith *v.* State, 44 Tex. Crim. 53; Ezell *v.* State, (Tex. Crim. 1902) 71 S. W. Rep. 283; Truelove *v.* State, 44 Tex. Crim. 386; Bismarck *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 965; Robertson *v.* State, (Tex. Crim. 1904) 80 S. W. Rep. 1000. *Utah.* — State *v.* Spencer, 15 Utah 149; State *v.* Collett, 20 Utah 291.

**Whether There Is Any Corroborating Evidence.** — Com. *v.* Parker, 108 Ky. 673; Clapp *v.* State, 94 Tenn. 186.

**United States Courts.** — See Hanley *v.* U. S., (C. C. A.) 123 Fed. Rep. 849, wherein it is said that such state statutes do not regulate proceedings in the federal courts, and that the rules of the common law apply therein.

**On a Preliminary Examination** of a prisoner the uncorroborated evidence of an accomplice is not sufficient to warrant his commitment. State *v.* Smith, 138 Ala. 111, 100 Am. St. Rep. 26.

**Where the Accomplice Testifies in Favor of the Accused** corroboration is not necessary to justify the jury in acquitting, since the *Texas* statute refers only to testimony against the accused. And an instruction that corroboration is necessary in such case is error. Josef *v.* State, 34 Tex. Crim. 446.

**402.** 1. Parr *v.* State, 36 Tex. Crim. 493; Campbell *v.* State, 42 Tex. Crim. 27; Brace *v.* State, 43 Tex. Crim. 48. And see the cases cited in the next preceding note.

2. State *v.* Hall, 97 Iowa 400; State *v.* Blain, 118 Iowa 466; State *v.* Hicks, 6 S. Dak. 325.

3. People *v.* Sternberg, 111 Cal. 3; State *v.* Hall, 97 Iowa 400; State *v.* Jones, 115 Iowa 113; People *v.* Baker, 27 N. Y. App. Div. 597; State *v.* Hicks, 6 S. Dak. 325; Tave *v.* State, (Tex. Crim. 1898) 44 S. W. Rep. 178; Preston *v.* State, 41 Tex. Crim. 300; Ceasar *v.* State,

(Tex. Crim. 1895) 29 S. W. Rep. 785; Unsell *v.* State, (Tex. Crim. 1898) 45 S. W. Rep. 902; Locklin *v.* State, (Tex. Crim. 1903) 75 S. W. Rep. 305.

**403.** 1. Com. *v.* Goldberg, 4 Pa. Super. Ct. 142; People *v.* Patrick, 182 N. Y. 131.

**When the Corroborative Evidence Was Slight in a Close Case** the judge should have charged that the evidence was as consistent with innocence as guilt, and failure so to charge was error. People *v.* Butler, 62 N. Y. App. Div. 508.

2. Crittenden *v.* State, 134 Ala. 145; Rhodes *v.* State, (Ala. 1904) 37 So. Rep. 365; People *v.* Balkwell, 143 Cal. 259; State *v.* Jones, 115 Iowa 113; People *v.* Ammon, 92 N. Y. App. Div. 205; People *v.* Strauss, 94 N. Y. App. Div. 453. See also People *v.* Patrick, 182 N. Y. 131; State *v.* Kent, 4 N. Dak. 577; Com. *v.* Goldberg, 4 Pa. Super. Ct. 142; State *v.* Hicks, 6 S. Dak. 325; State *v.* Levers, 12 S. Dak. 269; Looman *v.* State, 37 Tex. Crim. 276; Short *v.* State, (Tex. Crim. 1902) 67 S. W. Rep. 114; Barber *v.* State, (Tex. Crim. 1902) 70 S. W. Rep. 210; Loessin *v.* State, (Tex. Crim. 1904) 81 S. W. Rep. 715.

**405.** 1. Solomon *v.* State, 113 Ga. 192; Josef *v.* State, 34 Tex. Crim. 446.

2. People *v.* Creegan, 121 Cal. 554; People *v.* Sternberg, 111 Cal. 3; Howard *v.* Com., 110 Ky. 356; State *v.* Spotted Hawk, 22 Mont. 33; Preston *v.* State, 40 Tex. Crim. 72; Gatlin *v.* State, 40 Tex. Crim. 116.

**It Is for the Jury** to decide whether or not the corroborating witness is also an accomplice; and a verdict of guilty raises a presumption that they found him not to be an accomplice. But if incompetent testimony is admitted to show that the witness is not an accomplice, the verdict will be set aside. People *v.* Creegan, 121 Cal. 554.

**407.** 1. *Ex p.* Greenhaw, 41 Tex. Crim. 283, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 407.

**3. Where Pardoning Power Cannot Act Till After Conviction.** — Martin *v.* State, 136 Ala. 35, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 406.

**3*a.* Distinguished from Accompanied.** — Between *accomplished* and *accompanied* a clear distinction in meaning exists. Therefore, under a statute providing that in robbery the taking must be *accomplished* by means of force or fear, an instruction that the taking must be *accompanied* by force or fear is erroneous. State *v.* Johnson, 26 Mont. 10.

# ACCORD AND SATISFACTION.

BY O. D. ESTEE.

**408. I. DEFINITION AND GENERAL PRINCIPLES** — Definition. — See note 1.

**409.** Effect — Rescission. — See note 1.

**410. II. THE AGREEMENT OF ACCORD** — 1. Subject-matter of the Accord. — See note 2.

**412. 3. Consideration of the Accord** — *a. GENERALLY* — Must Be of Benefit to the Creditor. — See notes 3, 4.

**413. b. PART PAYMENT OF LIQUIDATED DEBT OR DEMAND** — (1) *Common-law Rule* — Part Payment No Satisfaction. — See note 1.

**408. 1.** *Hennessy v. St. Paul City R. Co.*, 65 Minn. 13; *Lestienne v. Ernst*, 5 N. Y. App. Div. 378, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 408.

**Other Definitions.** — An accord is "an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled." *Rued v. Cooper*, 119 Cal. 463; *Arnett v. Smith*, 11 N. Dak. 55.

"An accord and satisfaction is the substitution, by agreement of the parties, of something else in place of the original claim; and, when executed, its effect is to extinguish the antecedent liability." *Boston Newmarket Gold Min. Co. v. Orme*, 18 Colo. App. 359. To the same effect see *Continental Nat. Bank v. McGeoch*, 92 Wis. 286; *Rettinghouse v. Ashland*, 106 Wis. 595.

Receiving payment in a different medium from that called for in the contract is an accord and satisfaction. *San Juan v. St. John's Gas Co.*, 195 U. S. 510.

**The Minds of the Parties Must Meet** in making the agreement. See *Harby v. Henes*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 366.

**409. 1.** See *Boston Newmarket Gold Min. Co. v. Orme*, 18 Colo. App. 359; *Arnett v. Smith*, 11 N. Dak. 55.

**410. 2.** *Dornan v. Allan*, Sc. Ct. of Sess., 3 F. 112.

**Personal Injuries.** — Where a person becomes totally blind from injuries after acceptance of a payment in full satisfaction and discharge of all claims, it has been held that he may maintain an action despite such payment, it being a question for the jury whether he has by his conduct debarred himself from suing for damages. *Ellen v. Great Northern R. Co.*, 49 W. R. 395.

Where the plaintiff accepts a sum of money from the defendant in settlement of his claim for personal injuries, the plaintiff cannot, in the absence of fraud, retain the money and sue the defendant on the theory that the agreement was invalid. *Drahan v. Lake Shore, etc., R. Co.*, 162 Mass. 435.

**412. 3.** *Chicago, etc., R. Co. v. Clark*, (C. C. A.) 92 Fed. Rep. 968, 178 U. S. 353; *Harrison v. Henderson*, 67 Kan. 194, 100 Am. St. Rep. 386; *Nassoiv v. Tomlinson*, 148 N. Y.

326, 51 Am. St. Rep. 695; *Weinberg v. Novick*, (Supm. Ct. App. T.) 88 N. Y. Supp. 168; *Howe v. Robinson*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 256; *Carpenter v. Chicago, etc., R. Co.*, 7 S. Dak. 584.

**A Resumption of Cohabitation** subsequent to the accruing of instalments under a deed of separation between a husband and wife does not operate as an accord and satisfaction of a cause of action the wife may have for the default of the husband in paying such instalments. *Macan v. Macan*, 70 L. J. K. B. 90.

**4. Adequacy of Consideration.** — "The adequacy of the consideration will not be gone into by the court if it be what is known to the law as a 'valuable consideration.'" *Chicago, etc., R. Co. v. Clark*, (C. C. A.) 92 Fed. Rep. 968, *reversed* on other points in 178 U. S. 353.

**Waiver of Right to Appeal.** — The waiving of the right to appeal by a judgment debtor is sufficient consideration to support an agreement to discharge a judgment by the payment of a smaller sum than the amount due. *Williams v. Blumenthal*, 27 Wash. 24.

**413. 1. United States.** — *Lincoln Sav. Bank, etc., Co. v. Allen*, (C. C. A.) 82 Fed. Rep. 148. *Compare* *San Juan v. St. John's Gas Co.*, 195 U. S. 510.

*Delaware.* — *Wood v. Bangs*, 2 Penn. (Del.) 435.

*Illinois.* — *Pusheck v. Frances E. Willard N. T. H. Assoc.*, 94 Ill. App. 192; *Ostrander v. Scott*, 161 Ill. 339; *De Kalb Implement Works v. White*, 59 Ill. App. 171; *Flaningham v. Hogue*, 59 Ill. App. 315, *affirmed* 162 Ill. 129; *Heintz v. Pratt*, 54 Ill. App. 616.

*Indiana.* — *Hodges v. Truax*, 19 Ind. App. 651, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 413; *Little v. Koerner*, 28 Ind. App. 625; *Swope v. Bier*, 10 Ind. App. 613; *Meyer v. Green*, 21 Ind. App. 138.

*Iowa.* — *Marshall v. Bullard*, 114 Iowa 462; *Keller v. Strong*, 104 Iowa 585.

*Kentucky.* — *Cox v. Adelsdorf*, (Ky. 1899) 51 S. W. Rep. 616; *Mannakee v. McCloskey*, (Ky. 1901) 63 S. W. Rep. 482; *Huff v. Logan*, (Ky. 1901) 60 S. W. Rep. 483.

*Maryland.* — *Commercial, etc., Nat. Bank v. McCormick*, 97 Md. 703; *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144.



*Massachusetts.*—*Specialty Glass Co. v. Daley*, 172 Mass. 460.

*Michigan.*—*Tanner v. Merrill*, 108 Mich. 58, 62 Am. St. Rep. 687.

*Minnesota.*—*Marion v. Heimbach*, 62 Minn. 214; *Rice v. London, etc., Mortg. Co.*, 70 Minn. 77; *Hoidale v. Wood*, (Minn. 1904) 100 N. W. Rep. 1100.

*Missouri.*—*Goodson v. National Masonic Acc. Assoc.*, 91 Mo. App. 339; *Wetmore v. Crouch*, 150 Mo. 671; *C. H. Brown Banking Co. v. Barker*, 99 Mo. App. 660; *Reinhold v. Kerrigan*, 85 Mo. App. 256; *Griffith v. Creighton*, 1 Mo. App. 295; *Tucker v. Dolan*, 109 Mo. App. 442.

*Nebraska.*—*Treat v. Price*, 47 Neb. 875; *Sheibley v. Dixon County*, 61 Neb. 409; *McIntosh v. Johnson*, 51 Neb. 33; *Fremont Foundry, etc., Co. v. Norton*, (Neb. 1902) 92 N. W. Rep. 1058.

*New Jersey.*—*Chambers v. Niagara F. Ins. Co.*, 58 N. J. L. 216.

*New York.*—*Mintzer v. Supreme Council, etc.*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 512; *Whitaker v. Eilenberg*, 70 N. Y. App. Div. 489; *Meeker v. Requa*, 94 N. Y. App. Div. 300; *Nassoiv v. Tomlinson*, 148 N. Y. 326, 51 Am. St. Rep. 695; *Lewis v. Donohue*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 514; *Laroe v. Sugar Loaf Dairy Co.*, 180 N. Y. 367, reversing 87 N. Y. App. Div. 585.

*Ohio.*—*Toledo v. Sanwald*, 7 Ohio Cir. Dec. 116.

*Pennsylvania.*—*Mt. Holly Water Co. v. Mt. Holly Springs*, 10 Pa. Super. Ct. 162; *Re Rhoades*, 29 Pittsb. Leg. J. N. S. (Pa.) 38, 46.

*South Carolina.*—*Riggs v. Home Mut. F. Protection Assoc.*, 61 S. Car. 448.

*Wisconsin.*—*Prairie Grove Cheese Mfg. Co. v. Luder*, 115 Wis. 20.

**Comment on Common-law Rule.**—The common-law rule is not looked upon with favor and is confined strictly to those cases that fall within it. *Chicago, etc., R. Co. v. Clark*, 178 U. S. 353, reversing (C. C. A.) 92 Fed. Rep. 968; *Jackson v. Volkening*, 81 N. Y. App. Div. 36.

**Insolvency of Debtor.**—Where the debtor was insolvent and made an agreement with his creditor that he would not go through bankruptcy if the creditor would accept part payment of the debt in satisfaction thereof, and the debtor was forced to borrow the money to make the part payment, there was a sufficient consideration to support the accord and satisfaction. *Rotan Grocery Co. v. Noble*, (Tex. Civ. App. 1904) 81 S. W. Rep. 586.

Where a judgment debtor has no property subject to execution, but agrees to pay a smaller amount in satisfaction of the whole judgment by paying monthly instalments out of his salary which is exempt from execution, the payment of the amount agreed upon and the giving of the satisfaction piece to the debtor constitute an accord and satisfaction. *Meeker v. Requa*, 94 N. Y. App. Div. 300.

Payment before maturity by an insolvent debtor, of a part of the debt, out of a fund that his creditors could not reach is a good consideration for the discharge of the whole debt. *Dalrymple v. Craig*, 149 Mo. 345.

**Receipt under Protest.**—*Hodges v. Tennessee Implement Co.*, 123 Ala. 572; *Jennings v. Durlinger*, 23 Ind. App. 673; *Pease v. Saginaw*, 126 Mich. 436; *Levenson v. Gillen Pub. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 454.

Receiving a check under protest, that is tendered in full settlement of the claim, does not make an accord and satisfaction. *Robinson v. Leatherbee Tie, etc., Co.*, 120 Ga. 901.

**Rule Changed by Statute in Some States.**—*Chicago, etc., R. Co. v. Clark*, 178 U. S. 366, citing the statutes of *Alabama, California, Georgia, Maine, North Carolina, Tennessee, and Virginia*; *Ebert v. Johns*, 206 Pa. St. 395, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 414.

**Mississippi Rule.**—In Mississippi a liquidated claim may be satisfied by the payment of a small amount. The courts criticise severely the rule of the common law. *Clayton v. Clark*, 74 Miss. 499, 60 Am. St. Rep. 521.

**North Carolina Rule.**—Code Civ. Pro. N. Car., § 574, permits the compromise of a liquidated claim by the payment of a smaller sum than the amount due. *Wittkowsky v. Baruch*, 127 N. Car. 313.

**Virginia Rule.**—Civ. Code Va., § 2858, provides that "part performance of an obligation, promise, or undertaking, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, and rendered in pursuance of an agreement for that purpose, though without any new consideration, shall extinguish such obligation, promise, or undertaking." *Standard Sewing Mach. Co. v. Gunter*, 102 Va. 568.

**Payment of Liquidated Demand Is No Consideration for Release of Unliquidated Demand.**—*Walston v. F. D. Calkins Co.*, 119 Iowa 150.

Where the plaintiff was paid a sum of money that was admittedly due him, and gave a receipt in full settlement of all claims including an unliquidated claim arising out of a breach of contract, there was no consideration for the accord and satisfaction, and the agreement was void. *Ness v. Minnesota, etc., Co.*, 87 Minn. 413.

In *Chicago, etc., R. Co. v. Clark*, 178 U. S. 353, reversing (C. C. A.) 92 Fed. Rep. 968, the debt consisted of two items, one of which was liquidated and the other unliquidated, and it was held that the payment of so much as was liquidated, which payment was made and accepted in satisfaction of the entire indebtedness, constituted a good accord and satisfaction. In this decision the court applied the rule that the general doctrine as to the effect of part payment of a debt in satisfaction of the whole should be confined strictly to cases within it.

**Acceptance of Part Payment in Full Settlement of Claim.**—The acceptance of part payment in full settlement of a liquidated claim does not operate as an accord and satisfaction. *Abelson v. Gordon*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 812.

**Retention of Check Given Conditionally.**—The maker of a note, which had become due, requested a renewal of part of the note and inclosed his check, stating that it was for the discount of the renewal. The check was cashed and the amount thereof credited to the maker of the note. Renewal of the note was refused,

**415.** See note 2.

Release. — See note 3.

Receipt. — See note 4.

(2) *Variant Mode of Payment* — (a) Generally. — See note 5.**416.** (b) Payment at Earlier Date or Different Place. — See note 1.

(c) Payment by a Stranger. — See note 2.

(d) Payment by Negotiable Note of Debtor. — See note 3.

**417.** (e) Payment by Note of Third Person. — See note 1.

and it was held that the retention of the check did not amount to an accord and satisfaction, as the claim was liquidated. *Kelley v. Lawrence*, 78 N. Y. App. Div. 484.

**An Agreement to Satisfy a Judgment** by accepting certificates of indebtedness which the judgment debtor holds against the judgment creditor is without consideration and void where the face value of the certificates of indebtedness is much smaller than the judgment. *Russell v. Meek*, (Ky. 1900) 58 S. W. Rep. 373.

**415.** 2. *Storch v. Dewey*, 57 Kan. 370, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 415.

3. *Wood v. Bangs*, 2 Penn. (Del.) 435; *Flaningham v. Hogue*, 59 Ill. App. 315; *Commercial, etc., Nat. Bank v. McCormick*, 97 Md. 703; *Girard F. & M. Ins. Co. v. Canan*, 195 Pa. St. 589. See also *Uvalde Asphalt Paving Co. v. New York*, 99 N. Y. App. Div. 327.

4. *Georgia*. — *Armour v. Ross*, 110 Ga. 403. *Kentucky*. — *Louisville, etc., R. Co. v. Helm*, 109 Ky. 388.

*Minnesota*. — *Johnson v. Simmons*, 76 Minn. 34.

*New York*. — *Komp v. Raymond*, 175 N. Y. 102; *Ahrens v. United Growers Co.*, (N. Y. City Ct. Gen. T.) 11 Misc. (N. Y.) 108; *Jones v. Rice*, (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 357; *Forest v. Davis*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 1; *Segal v. Heuer*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 601; *Bloomington Min. Co. v. Brooklyn Hygienic Ice Co.*, 58 N. Y. App. Div. 66; *Randall v. Broadhead*, 60 N. Y. App. Div. 567; *Evers v. Ostheimer*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 163; *Simons v. Supreme Council, etc.*, 82 N. Y. App. Div. 617.

*Pennsylvania*. — *In re Watson*, 189 Pa. St. 150; *Girard F. & M. Ins. Co. v. Canan*, 195 Pa. St. 589.

And see *infra*, this title, **419. 2.**

**Estoppel.** — Where a debtor, who had paid less than the full amount of a liquidated claim, was given a receipt in full by the creditor, and a third party on the strength of this receipt assumed all the debtor's liabilities, the creditor was estopped from setting up the fact that there was no consideration for the release of the rest of the liquidated claim. *Ebert v. Johns*, 206 Pa. St. 395.

5. *United States*. — *Chicago, etc., R. Co. v. Clark*, (C. C. A.) 92 Fed. Rep. 968.

*Arkansas*. — *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215.

*Illinois*. — *Kemmerer v. Kokendifer*, 65 Ill. App. 31.

*Iowa*. — *Marshall v. Bullard*, 114 Iowa 462, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 415.

*Massachusetts*. — *Saunders v. Whitcomb*, 177 Mass. 457, quoting with approval 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 415.

*Pennsylvania*. — *Ebert v. Johns*, 206 Pa. St. 395.

**When Defendant Pays Part and also Surrenders Claims.** — Where a tenant surrendered an unexpired lease it was held that this was a sufficient consideration to support an agreement with the landlord to accept a part payment of the rent that was due in satisfaction of the whole amount. *Lewis v. Donohue*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 514.

**Payment to Different Party.** — A agreed with the owner of certain real estate to pay off the mortgage on the property. It was held that the payment of a smaller sum directly to the owner himself was a sufficient consideration for the owner's agreement to release A from the payment of the mortgage. *Lee v. Timken*, 23 N. Y. App. Div. 349.

**416.** 1. *Little v. Koerner*, 28 Ind. App. 625; *Marshall v. Bullard*, 114 Iowa 462, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 416; *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144; *Weiss v. Marks*, 206 Pa. St. 513.

2. *Marshall v. Bullard*, 114 Iowa 462; *Jackson v. Pennsylvania R. Co.*, 66 N. J. L. 319.

"It is well settled that an accord, even between the plaintiff and a third party as to the subject-matter of suit, and a satisfaction moving from such third party to the plaintiff and accepted by him, are available in bar of the action, if the defendant has either authorized or ratified the settlement." *Chicago, etc., R. Co. v. Brown*, (Neb. 1904) 97 N. W. Rep. 1038.

3. **Payment by Check or Note.** — *Lapp v. Smith*, 183 Ill. 179; *Hodges v. Truax*, 19 Ind. App. 651, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 416; *Little v. Koerner*, 28 Ind. App. 625; *Wells v. Morrison*, 91 Ind. 51.

And see *infra*, this title, **419. 2.**

**Check or Note for Less than Amount of Liquidated Claim Held Not a Good Accord and Satisfaction.** — *Nathan v. Smith*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 374; *Shanley v. Koehler*, 80 N. Y. App. Div. 566; *Frank v. Gump*, (Va. 1905) 51 S. E. Rep. 358.

Thus in *Forest v. Davis*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 1, an agreement was made whereby a debt should be satisfied at sixty cents on the dollar, by the debtor's giving to the creditor his three checks payable in the future. It was held that this furnished no consideration for an accord and satisfaction.

**417.** 1. *Lincoln Sav. Bank, etc., Co. v. Allen*, (C. C. A.) 82 Fed. Rep. 148; *Wiperman v. Hardy*, 17 Ind. App. 142. Compare *Mannakee v. McCloskey*, (Ky. 1901) 63 S. W. Rep. 482.

**417.** (f) *Payment in Property.* — See note 2.

**419.** c. *UNLIQUIDATED OR CONTINGENT DEMAND.* — See note 2.

**417. 2.** *In re Freeman*, 117 Fed. Rep. 680; *Marshall v. Bullard*, 114 Iowa 462, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 417; *Griffith v. Creighton*, 1 Mo. App. Rep. 295. See also *Pither v. Manley*, 9 British Columbia 257.

**419. 2.** *United States.* — *Brice v. U. S.*, 32 Ct. Cl. 23.

*Arkansas.* — *St. Louis Southwestern R. Co. v. Selman*, 62 Ark. 342.

*Colorado.* — *Rio Grande County v. Hobkirk*, 13 Colo. App. 180.

*Illinois.* — *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 419; *Bingham v. Browning*, 197 Ill. 122; *Harland v. Staples*, 79 Ill. App. 72; *Kingsville Preserving Co. v. Frank*, 87 Ill. App. 586; *Miller v. Mutual Reserve Fund L. Assoc.*, 113 Ill. App. 481.

*Indiana.* — *Little v. Koerner*, 28 Ind. App. 625; *Talbott v. English*, 156 Ind. 299.

*Michigan.* — *Tanner v. Merrill*, 108 Mich. 58, 62 Am. St. Rep. 687.

*Minnesota.* — *Rice v. London, etc., Mortg. Co.*, 70 Minn. 77; *Marion v. Heimbach*, 62 Minn. 214; *Hillestad v. Lee*, 91 Minn. 335. See also *Webber v. Ramsey County*, 93 Minn. 320.

*Missouri.* — *Lightfoot v. Hurd*, (Mo. 1905) 88 S. W. Rep. 128.

*Nebraska.* — *Fremont Foundry, etc., Co. v. Norton*, (Neb. 1902) 92 N. W. Rep. 1058; *Treat v. Price*, 47 Neb. 875.

*New York.* — *Bloomington Min. Co. v. Brooklyn Hygienic Ice Co.*, 58 N. Y. App. Div. 66; *Abelson v. Gordon*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 812; *Bernard v. Henry Werner Co.*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 173; *Lestienne v. Ernest*, 5 N. Y. App. Div. 373; *Goss v. Rishel*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1045; *Kelly v. Bullock*, (Supm. Ct. App. T.) 94 N. Y. Supp. 517.

*North Carolina.* — *Kerr v. Sanders*, 122 N. Car. 635.

*Ohio.* — *Brown-Ketcham Iron Works v. Hazen*, 24 Ohio Cir. Ct. 681.

*Pennsylvania.* — *Harlow v. Wilkinsburg*, 189 Pa. St. 443.

*Virginia.* — *American Manganese Co. v. Virginia Manganese Co.*, 91 Va. 272.

Where the salary of a public clerk is reduced and he accepts payment of the salary thus reduced, without protest, on the understanding that it is in full settlement of his claims, there is an accord and satisfaction which will prevent him from maintaining a suit at law to recover the balance due under the old rate. *Wilson v. New York*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 693.

*Loss under Fire Insurance Policy.* — *Riggs v. Home Mut. F. Protection Assoc.*, 61 S. Car. 448.

*Tender and Acceptance of Check in Full Settlement of Unliquidated Claim.* — *California.* — *Creighton v. Gregory*, 142 Cal. 34.

*Illinois.* — *Michigan Leather Co. v. Foyer*, 104 Ill. App. 268; *Ostrander v. Scott*, 161 Ill. 339.

*Iowa.* — *Greenlee v. Mosnat*, 116 Iowa 535.

*Kansas.* — *Neely v. Thompson*, 68 Kan. 193.

*Missouri.* — *Andrews v. W. R. Stubbs Contracting Co.*, 100 Mo. App. 599.

*New York.* — *Nassoij v. Tomlinson*, 148 N. Y. 326, 51 Am. St. Rep. 695; *Brown v. Symes*, 83 Hun (N. Y.) 159; *Reynolds v. Empire Lumber Co.*, 85 Hun (N. Y.) 470; *Freiberg v. Moffett*, 91 Hun (N. Y.) 17; *Logan v. Davidson*, 18 N. Y. App. Div. 353; *Wisner v. Schopp*, 34 N. Y. App. Div. 199, 6 N. Y. Annot. Cas. 285; *Vorhis v. Elias*, 54 N. Y. App. Div. 412; *Komp v. Raymond*, 42 N. Y. App. Div. 32; *Sutton v. Corning*, 59 N. Y. App. Div. 589; *Lewinson v. Montauk Theatre Co.*, 60 N. Y. App. Div. 572; *Cleveland v. Toby*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 319; *Whitaker v. Eilenberg*, 70 N. Y. App. Div. 489; *Genung v. Waverly*, 75 N. Y. App. Div. 610; *Jackson v. Volkening*, 81 N. Y. App. Div. 36; *Jones v. Keeler*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 221; *Laroe v. Sugar Loaf Dairy Co.*, 87 N. Y. App. Div. 585; *De Lovenzo v. Hughes*, (Supm. Ct. App. T.) 84 N. Y. Supp. 857.

*Rhode Island.* — *Hull v. Johnson*, 22 R. I. 66.

*Tennessee.* — *Hussey v. Crass*, (Tenn. Ch. 1899) 53 S. W. Rep. 986.

*Vermont.* — *Connecticut River Lumber Co. v. Brown*, 68 Vt. 239.

"To constitute an accord and satisfaction it is necessary that the money or check, or whatever is offered, should be offered in full satisfaction of the demand, and should be offered in such a manner or accompanied by such acts or declarations as amount to a condition that if the party to whom it is offered takes it he does so in satisfaction of his demand. If the offer is made in such a manner, and it is accepted, the acceptance will satisfy the demand, although the creditor protests at the time that the amount received is not all that is due or that he does not accept it in full satisfaction of his claim. The creditor has no alternative except to accept what is offered with the condition upon which it is offered, or to refuse it; and if he accepts, the acceptance includes the condition, notwithstanding any protest he may make to the contrary." *Canton Coal Co. v. Parlin, etc., Co.*, 215 Ill. 244, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 419. See also *U. S. Bobbin, etc., Co. v. Thissell*, (C. C. A.) 137 Fed. Rep. 1; *Cornelius v. Rosen*, (Mo. 1905) 86 S. W. Rep. 500.

*Evidence that Debt or Claim Is Disputed* should be submitted to the jury. *McCormick v. Shea*, (Supm. Ct. App. T.) 94 N. Y. Supp. 485.

Where the creditor cashed a check sent by the debtor in full settlement of an unliquidated claim, it was strong evidence of an accord and satisfaction, notwithstanding the creditor's assertion that he merely accepted the check as a payment on account. *King v. Dorman*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 133.

*Intention of Parties.* — In order for a payment of a sum of money to be an accord and satisfaction of an unliquidated claim the parties must intend the payment to have that effect. *Snow v. Reichman*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 234.

**420. III. THE EXECUTION OF THE ACCORD — SATISFACTION — 1. Generally.**

— See note 2.

**421.** [Acceptance. — See note 2.]

**422.** Accord Without Satisfaction. — See note 1.

**423.** 2. Promise Accepted in Satisfaction. — See note 2.

**427. IV. JOINT PARTIES — Joint Debtors.** — See note 3.

**428.** Joint Creditors. — See note 2.

Joint Tortfeasor. — See note 3.

**Receipt in Full Settlement of Claim.** — Where there was a valid dispute as to the amount due a working woman and she accepted the amount paid and gave a receipt in full, there was an accord and satisfaction which would bar an action at law to recover the balance. *Dean v. Gilmore*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 783. See also *Jordan v. Great Northern R. Co.*, 80 Minn. 405; *Cooper v. Yazoo, etc.*, Valley R. Co., 82 Miss. 634.

**420. 2. United States.** — *Chicago, etc., R. Co. v. Clark*, (C. C. A.) 92 Fed. Rep. 968; *Arkansas City First Nat. Bank v. Leech*, (C. C. A.) 94 Fed. Rep. 310.

*Alabama.* — *Crass v. Scruggs*, 115 Ala. 258, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420.

*Kentucky.* — *Hale v. Grogan*, 99 Ky. 170, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420.

*Missouri.* — *Barton v. Hunter*, 59 Mo. App. 610.

*New Hampshire.* — *Gowing v. Thomas*, 67 N. H. 399.

*New York.* — *Smith v. Cranford*, 84 Hun (N. Y.) 318; *Nassoiy v. Tomlinson*, 148 N. Y. 326, 51 Am. St. Rep. 695; *Kruger v. Geer*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 772; *Bandman v. Finn*, 103 N. Y. App. Div. 322, setting aside 43 Misc. (N. Y.) 516.

*North Dakota.* — *Arnett v. Smith*, 11 N. Dak. 55.

*Pennsylvania.* — *Erie Forge Co. v. Pennsylvania Iron Works Co.*, 22 Pa. Super. Ct. 550; *Langhead v. H. C. Frick Coke Co.*, 209 Pa. St. 368.

*South Dakota.* — *Carpenter v. Chicago, etc., R. Co.*, 7 S. Dak. 584.

*Texas.* — *Southern Nat. Bank v. Curtis*, (Tex. Civ. App. 1896) 36 S. W. Rep. 911.

**Full, Perfect, and Complete Satisfaction.** — *Gerhart Realty Co. v. Northern Assur. Co.*, 94 Mo. App. 356.

**Waiver of Execution of Accord.** — *Watson v. Tanner*, (R. I. 1897) 36 Atl. Rep. 715.

**Performance Impossible.** — *Field v. Aldrich*, 162 Mass. 587.

**421. 2. A Check Must Be Both Given and Received as Satisfaction** in order to constitute an accord and satisfaction. *Schermerhorn v. Gardener*, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 280.

**Failure to Respond to an Offer** to be accepted in lieu of damages for injuries received will not be construed as an accord and satisfaction. *Hensler v. Stix*, (Mo. App. 1905) 88 S. W. Rep. 108.

**A Minor** has been held to be incapable of entering into an accord and satisfaction. *Hensler v. Stix*, (Mo. App. 1905) 88 S. W. Rep. 108.

**Acceptance and Retention of a Check** for an amount less than that demanded may constitute a complete accord and satisfaction of a disputed claim. *Le Page v. Lalance, etc.*, Mfg. Co., 98 N. Y. App. Div. 179.

**422. 1. United States.** — *Crow v. Kimball, Lumber Co.*, (C. C. A.) 69 Fed. Rep. 61.

*Alabama.* — *Crass v. Scruggs*, 115 Ala. 258, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 422.

*Arkansas.* — *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215.

*Georgia.* — *Long v. Scanlan*, 105 Ga. 424.

*Massachusetts.* — *Prest v. Cole*, 183 Mass. 283.

*Missouri.* — *Slover v. Rock*, 96 Mo. App. 335.

*North Dakota.* — *Arnett v. Smith*, 11 N. Dak. 55.

*Utah.* — *Whitney v. Richards*, 17 Utah 226.

**Composition Agreement.** — There was an agreement to release the liability of indorsers of certain promissory notes on their paying twenty-five per cent. of the face value of the notes. Composition notes for the twenty-five per cent. were given, but were not paid at maturity. These notes were not extended, but certain payments were made and accepted on them after maturity. However, it was held that this did not bar a suit to enforce the original liability of the indorsers, as there was no satisfaction. *Cincinnati Third Nat. Bank v. Humphreys*, 66 Fed. Rep. 872.

**Failure to Perform Agreement to Arbitrate.** — An agreement was made to submit a controversy to arbitration, but the agreement was never carried out. It was held that an action at law over the matter was not barred by the failure to arbitrate the dispute. *Welch v. Miller*, 70 Vt. 108.

**423. 2. Alabama.** — *Smith v. Elrod*, (Ala. 1898) 24 So. Rep. 994, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 423.

*Missouri.* — *Gerhart Realty Co. v. Northern Assur. Co.*, 94 Mo. App. 356; *Worden v. Houston*, 92 Mo. App. 371.

*New Hampshire.* — *Gowing v. Thomas*, 67 N. H. 399.

*New York.* — *Nassoiy v. Tomlinson*, 148 N. Y. 326, 51 Am. St. Rep. 695.

*Pennsylvania.* — *Langhead v. H. C. Frick Coke Co.*, 209 Pa. St. 368.

*Utah.* — *Whitney v. Richards*, 17 Utah 226.

*Canada.* — *Maguire v. Carr*, 28 Nova Scotia 431.

**427. 3. In re E. W. A.**, (1901) 2 K. B. 642, 85 L. T. N. S. 31. See also *Le Page v. Lalance, etc.*, Mfg. Co., 98 N. Y. App. Div. 179.

**428. 2. Ely v. Ely**, 70 N. J. L. 31.

**3. Jones v. Chism**, (Ark. 1904) 83 S. W. Rep. 315; *Donaldson v. Carmichael*, 102 Ga. 40;

**428. V. EFFECT OF FRAUD, IGNORANCE, OR MISTAKE.** — See note 4.

**429.** See note 1.

**430. ACCORDING.** — See note 2.

**ACCORDING TO LAW.** — See note 4.

*Stoney Creek Woolen Co. v. Smalley*, 111 Mich. 321, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 428; *Snyder v. Witt*, 99 Tenn. 618, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 428; *Robertson v. Trammell*, (Tex. Civ. App. 1904) 83 S. W. Rep. 258, *writ of error denied* (Tex. 1904) 83 S. W. Rep. 1098.

**428. 4.** *Wolfe v. Parkersburg Second Nat. Bank*, 54 W. Va. 689, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 428. See also *Bandman v. Finn*, 103 N. Y. App. Div. 322, *setting aside* 43 Misc. (N. Y.) 516.

**May Be Set Aside in Action at Law.** — *Brundige v. Nashville, etc., R. Co.*, (Tenn. 1904) 81 S. W. Rep. 1248.

**429. 1.** *State Sav. Bank v. Buhl*, 129 Mich. 193, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 429; *Wolfe v. Parkersburg Sec-*

*ond Nat. Bank*, 54 W. Va. 689, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 429.

**Essential Error.** — Accord and satisfaction has been held valid where it is based upon the mutual mistake of the parties regarding the length of the period necessary to elapse before the injured party can resume his work. The facts in this case did not show that there was an essential error. *Dornan v. Allan*, Sc. Ct. of Sess. 3 F. 112.

**430. 2. According to Pitch.** — Where land was laid out for a burial place "*according to pitch*," the expression in this connection means according to a previous selection. *Easton v. Drake*, 182 Mass. 283.

**4. Devise.** — *Buzby v. Roberts*, 53 N. J. Eq. 572, *following* *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. 32.

# ACCOUNTS.

BY W. H. CROW.

**434. I. DEFINITION** — **Accounts** — **Generally.** — See note 2.

**435.** See note 2.

**II. VARIOUS KINDS OF ACCOUNTS** — **1. Open Accounts.** — See note 3.

**437. 8. Accounts Stated** — *a.* **DEFINITION.** — See note 1.

**Promise Implied.** — See note 2.

*b.* **PARTIES** — (1) **Generally.** — See note 3.

**438. Admissions to Third Persons.** — See note 1.

(4) **Married Women** — **Wife as Agent of Husband.** — See note 6.

**439. (5) Executors and Administrators.** — See note 1.

(6) **Partners.** — See notes 4, 5.

**440. c. PREVIOUS TRANSACTIONS** — (1) **Necessity of Previous Transactions of Monetary Character.** — See note 1.

**434. 2.** *Morrisette v. Wood*, 128 Ala. 505, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 424; *Turgeon v. Cote*, 88 Me. 108; *Madison County v. Collier*, 79 Miss. 220, 30 So. Rep. 610, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434.

**435. 2. Account and Balance of Account Distinguished.** — See *Turgeon v. Cote*, 88 Me. 108.

Whatever the form of the declaration, an action upon an open and mutual account current is, in effect, for the balance due. *Kingsley v. Delano*, 169 Mass. 285.

**3. "Continuous, Open, Current Account."** — *Hairston v. Sumner*, 106 Ala. 381. See also *Miller v. Armstrong*, 123 Iowa 86; *Matter of Gladke*, 45 N. Y. App. Div. 625; *Meehan v. Figliuolo*, (Supm. Ct. App. T.) 88 N. Y. Supp. 920.

**437. 1. United States.** — *Patillo v. Allen-West Commission Co.*, (C. C. A.) 108 Fed. Rep. 726, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437. See also *Columbia River Packing Co. v. Tallant*, 133 Fed. Rep. 990.

*Alabama.* — *Moore v. Holdoway*, 138 Ala. 448.

*Illinois.* — *King v. Machesney*, 88 Ill. App. 341, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437.

*Iowa.* — *Morse v. Minton*, 101 Iowa 605, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437.

*Kansas.* — *Harrison v. Henderson*, 67 Kan. 202.

*Missouri.* — *Davis v. Boswell*, 77 Mo. App. 294.

*Montana.* — *Noyes v. Young*, (Mont. 105) 79 Pac. Rep. 1063.

*Nebraska.* — *Jorgensen v. Kingsley*, 60 Neb. 44, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437.

*South Carolina.* — *Pope Mfg. Co. v. Charleston Cycle Co.*, 59 S. Car. 29, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437.

**An Account Which Has Never Been Rendered** is not an account stated. *Loeb v. Keyes*, 86 Hun (N. Y.) 353.

**2. Mine, etc., Supply Co. v. Parke, etc., Co.**, (C. C. A.) 107 Fed. Rep. 881; *Voigt v. Brooks*, 19 Mont. 374; *Stagg v. St. Jean*, 29 Mont. 288; *Noyes v. Young*, (Mont. 1905) 79 Pac. Rep. 1063; *Hendrix v. Kirkpatrick*, 48 Neb. 670.

**3. Accounts Stated by Agents.** — *Southwestern Tel., etc., Co. v. Benson*, 63 Ark. 283.

**Board of Directors of Corporation.** — Evidence that copies of the original account were examined and approved, and no objection made by the board of directors, is admissible under a declaration containing an account stated. *Jacksonville, etc., R., etc., Co. v. Warriner*, 35 Fla. 197.

**Tenants in Common.** — *Dunavant v. Fields*, 68 Ark. 534.

**438. 1.** *Bee v. Tierney*, 58 Ill. App. 552; *Kauffmann v. Judah*, 78 N. Y. App. Div. 632.

**6. A Note Given by a Husband** acting as agent of his wife in settlement of the wife's debts is an account stated and is admissible evidence against her in an action for amount due. *McCormick v. Altneave*, 73 Miss. 86.

**439. 1.** *McCarty v. Harris*, 93 Md. 741.

**4. An Admission by One Partner** of an account stated against the firm will not bind him individually. *Martyn v. Arnold*, 36 Fla. 446.

The doctrine as between debtor and creditor of an implied promise resulting from the preparation and rendition of an account by one party which is received and retained by the other in silence cannot reasonably be applied in a partnership account. *Hughes v. Smither*, 23 N. Y. App. Div. 590, affirmed 163 N. Y. 553.

**5.** See *Hughes v. Smither*, 23 N. Y. App. Div. 590.

**440. 1.** *Ivy Coal, etc., Co. v. Long*, 139 Ala. 535; *Daytona Bridge Co. v. Bond*, (Fla. 1904) 36 So. Rep. 445; *Callahan v. O'Rourke*, 17 N. Y. App. Div. 277; *Allen v. Somerset Hotel Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 944; *Moss v. Lindblomm*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 157; *Davis v. Seattle Nat. Bank*, 19 Wash. 65.

**Statement of Damage by Breach of Contract.** — The retention by the defendant of an account

**441.** Single or Cross Demands. — See note 1.

**442.** (2) *Original Debt Void*. — See note 1.

(3) *Original Indebtedness Not Recoverable* — Transaction Within the Statute of Frauds. — See note 3.

*d.* AGREEMENT AS TO CORRECTNESS OF ACCOUNTS — (1) *General Principles*. — See note 4.

**443.** Final Adjustment. — See note 1.

Agreement as to the Items and Balance. — See note 2.

**444.** Actual Examination or Admission of Correctness. — See note 1.

(2) *Assent of Party to Be Charged* — (a) Generally — Necessity of Assent — Form Immaterial. — See notes 2, 3.

**445.** See note 1.

**446.** (b) Admissions Must Be Unconditional. — See notes 1, 2.

stating the precise amount of damage resulting from a breach of contract does not constitute it a stated account. *Charnley v. Sibley*, (C. C. A.) 73 Fed. Rep. 980.

**441. 1. Account Stated with Reference to Single Item.** — *Moore v. Crosthwait*, 135 Ala. 272; *Powers v. New England F. Ins. Co.*, 68 Vt. 390.

*Debt Due upon Contingency.* — *Beltaire v. Rosenberg*, 129 Cal. 164.

**442. 1. Illegal or Immoral Consideration.** — *Wakefield v. Farnum*, 170 Mass. 422; *Jorgensen v. Kingsely*, 60 Neb. 44.

**3. Statute of Frauds.** — *Anderson v. Best*, 176 Pa. St. 498. See also *Converse v. Scott*, 137 Cal. 239.

**4.** *Shea v. Kerr*, 1 Penn. (Del.) 198; *Love v. Ramsey*, (Mich. 1905) 152 N. W. Rep. 279, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 442; *Hall v. New York Brick, etc., Co.*, 95 N. Y. App. Div. 371.

**443. 1. Must Be Understood as Final Settlement.** — *Beltaire v. Rosenberg*, 129 Cal. 164; *Wheeler v. Baker*, 132 Mich. 507, 9 Detroit Leg. N. 677; *Haish v. Dillon*, (Neb. 1904) 98 N. W. Rep. 818; *Tinney v. Pierrepont*, 18 N. Y. App. Div. 627; *Taylor v. Thwing*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 76; *Peirce v. Peirce*, 199 Pa. St. 4, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 443; *Tulley v. Felton*, 177 Pa. St. 344.

**2. Agreement as to Balance Struck.** — *Charlesworth v. Whitlow*, (Ark. 1905) 85 S. W. Rep. 423; *King v. Machesney*, 88 Ill. App. 341.

**444. 1. A Mutual Examination of Each Other's Items** must be made by the parties. *Charlesworth v. Whitlow*, (Ark. 1905) 85 S. W. Rep. 423.

"The minds of the parties must meet when an account is stated the same as when any other agreement is made; that is to say, it must be conceded by each that a certain sum is due from one to the other." *Patillo v. Allen-West Commission Co.*, (C. C. A.) 108 Fed. Rep. 726, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 444.

**Examination of Account on One Side Only.** — *McKay v. Myers*, 168 Mass. 312.

**2. General Rule — Writing Not Necessary.** — *Lallande v. Brown*, 121 Ala. 513; *National Cycle Mfg. Co. v. San Diego Cycle Co.*, 135 Cal. 335; *Converse v. Scott*, 137 Cal. 239; *Quinn v. White*, 26 Nev. 46, affirmed in 26 Nev. 49; *Delabarre v. McAlpin*, 101 N. Y. App. Div. 468.

**3. Need Not Be Signed.** — *Wonderly v. Christian*, 91 Mo. App. 158.

**445. 1. Assent Express or Implied.** — *Patillo v. Allen-West Commission Co.*, (C. C. A.) 108 Fed. Rep. 726, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 445; *Peterson v. Wachowski*, 86 Ill. App. 661; *Cahill-Swift Mfg. Co. v. Morrissey Plumbing Co.*, (Neb. 1903) 93 N. W. Rep. 204; *Coons v. Sanguinetti*, 90 N. Y. App. Div. 615; *Hatch v. Von Taube*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 30; (Supm. Ct. App. T.) 31 Misc. (N. Y.) 468; *Muller v. Aronson*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1006; *Frothingham v. Satterlee*, 70 N. Y. App. Div. 613; *Rand v. Whipple*, 71 N. Y. App. Div. 62; *Leiser v. McDowell*, 69 N. Y. App. Div. 444; *Spellman v. Muehlfeld*, 166 N. Y. 245, reversing 48 N. Y. App. Div. 265; *Forbes v. Wheeler*, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 538; *Delabarre v. McAlpin*, 101 N. Y. App. Div. 468; *Krueger v. Dodge*, 15 S. Dak. 159; *Knapp v. Smith*, 97 Wis. 111.

**Assent under Duress.** — See *Rochester Mach. Tool Works v. Weiss*, 108 Wis. 545.

**A Threat to Sue Civilly** is not such a compulsion as will avoid the agreement. *Atkinson v. Allen*, 36 U. S. App. 255, 71 Fed. Rep. 58.

**Evidence of Assent.** — That defendant appears to be satisfied with the settlement is a fact which can be given in evidence. *Plano Mfg. Co. v. Kautenberger*, 121 Iowa 213.

**446. 1. Tennessee Brewing Co. v. Hendricks**, 77 Miss. 491.

**Sufficient Admission.** — An offer to settle by giving a note for the balance of an account stated is a sufficient admission of the correctness. *Hollenbeck v. Ristine*, 105 Iowa 488, 67 Am. St. Rep. 306.

**2. Admissions Must Be Direct and Unconditional.** — *Columbia River Packing Co. v. Tallant*, 132 Fed. Rep. 271, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446. See also *Love v. Ramsey*, (Mich. 1905) 102 N. W. Rep. 279.

A memorandum appended to an account, stating that "the above account is subject to an attachment" to a certain amount in a designated action, does not alter the legal character of the account stated or qualify the implied promise, but operates merely as a notification that present payment was prevented by the debt being arrested on an attachment issued at the instance of a third person. *Halliburton v. Clapp*, 1 N. Y. App. Div. 71.

**446.** (c) Assent Implied from Conduct — *aa.* ACCOUNTS ADJUSTED IN THE PRESENCE OF BOTH PARTIES. — See note 3.

*bb.* PAYMENT OF BALANCE. — See note 4.

**447.** *dd.* GIVING EVIDENCE OF INDEBTEDNESS. — See note 2.

**448.** *gg.* PROMISING TO PAY AN ACCOUNT RECEIVED WITHOUT OBJECTION. — See note 1.

*hh.* RETAINING ACCOUNT RENDERED, WITHOUT OBJECTION — **General Principles** — Rule Stated. — See note 3.

**450.** In Other Jurisdictions Rule Applied to Business Men Generally. — See note 2.

**451.** Account Rendered by Post. — See notes 2, 3.

**446.** 3. See *Seal Lock Co. v. Chicago Mfg.*, etc., Co., 98 Ill. App. 637.

**4.** Payment as Admission of Correctness. — Payment by a debtor, of one of a series of notes, by offsetting credits in his favor, without reference to the whole indebtedness, to close which the notes were given, he having reserved the right to correct errors in the account, cannot be urged as such an acknowledgment of the correctness of the whole indebtedness as will preclude inquiry into the correctness of the original account. *Cannon v. Vaughn Lumber Co.*, 52 La. Ann. 757.

**447.** 2. Promissory Notes. — *Morse v. Minton*, 101 Iowa 605; *McCormick v. Interstate Consol. Rapid Transit R. Co.*, 154 Mo. 191; *Campbell Printing Press, etc., Co. v. Yorkston*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 340.

**Evidence of Settlement.** — If there was no account presented to the defendant, the giving of the note would not constitute the transaction an account stated. *Woodriff v. Hunter*, 65 N. Y. App. Div. 404.

**448.** 1. *Luetgert v. Volker*, 153 Ill. 385, affirming 54 Ill. App. 287. See also *Concord Apartment House Co. v. Alaska Refrigerator Co.*, 78 Ill. App. 682.

**3.** *United States.* — *Patillo v. Allen-West Commission Co.*, (C. C. A.) 131 Fed. Rep. 680; *Wittkowski v. Harris*, 64 Fed. Rep. 712; *Porter v. Price*, (C. C. A.) 80 Fed. Rep. 655; *McLaughlin v. U. S.*, 36 Ct. Cl. 138.

*Arkansas.* — *Atkinson v. Burt*, 65 Ark. 316. *California.* — *Mayberry v. Cook*, 121 Cal. 588.

*Illinois.* — *Peoria Grape Sugar Co. v. Turney*, 58 Ill. App. 563; *Lutcher, etc., Lumber Co. v. Eells*, 108 Ill. App. 156; *King v. Rhoads, etc.*, Co., 68 Ill. App. 441.

*Kentucky.* — *Phelps v. Plum*, (Ky. 1895) 32 S. W. Rep. 753.

*Minnesota.* — *I. L. Elwood Mfg. Co. v. Betcher*, 72 Minn. 103, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 410 [448].

*Missouri.* — *McKeen v. Boatmen's Bank*, 74 Mo. App. 281.

*Oregon.* — *Gorman v. McGowan*, 44 Oregon 597; *Nodine v. Union First Nat. Bank*, 41 Oregon 386; *Crawford v. Hutchinson*, 38 Oregon 578.

*Texas.* — *Garwood v. Schlichenmaier*, 25 Tex. Civ. App. 176.

*Virginia.* — *Goldsmith v. Latz*, 96 Va. 680. *West Virginia.* — *Shrewsbury v. Tufts*, 41 W. Va. 212.

**Merely Rendering an Account** does not make it an account stated. *McKenzie v. Poor-*

*man Silver Mines*, 60 U. S. App. 1, 88 Fed. Rep. 111; *Christian, etc., Grocery Co. v. Hill*, 122 Ala. 490; *Pratt v. Boody*, 55 N. J. Eq. 175; *Kellogg v. Rowland*, 40 N. Y. App. Div. 416; *Copland v. American De Forest Wireless Tel. Co.*, 136 N. Car. 11.

The rendition of an account and its retention without objection is but one circumstance to be submitted with all others to the trier of fact, to determine whether there has been an account stated. *Harrison v. Henderson*, 67 Kan. 202.

**Bank and Depositor.** — *Schoonover v. Osborne*, 108 Iowa 453; *Kenneth Invest. Co. v. National Bank of Republic*, 96 Mo. App. 125; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281; *Farry v. Farmers', etc., Bank*, (N. J. 1904) 58 Atl. Rep. 305; *Nodine v. Union First Nat. Bank*, 41 Oregon 386, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 449.

But this presumption of assent to the correctness of items in his bank book may be rebutted by other facts. *Dingley v. McDonald*, 124 Cal. 90.

**Administrators Excepted.** — The mere silence of an administrator, not being a party in his own right, or his failure to object to an account against his intestate, when it is presented to him, is not sufficient to establish an account stated. *Withers v. Sandlin*, 44 Fla. 253.

**No Evidence of an Account Stated.** — Evidence by the manager of a hotel to the effect that it was usual to bill guests weekly and that he never heard of the defendant objecting to such bills, was not sufficient to show an account stated. *Davis v. Fromme*, 23 N. Y. App. Div. 498.

**450.** 2. Regarded as Applicable to All Classes of Business Men. — See *Ault v. Interstate Sav., etc., Assoc.*, 15 Wash. 627.

**451.** 2. Accounts Sent by Mail. — See *Bee v. Tierney*, 58 Ill. App. 552.

In *Daytona Bridge Co. v. Bond*, (Fla. 1904) 36 So. Rep. 445, the court said: "Where the presentation of an account is by mail, the person sought to be charged must in terms be a party to the account, or the grounds upon which it is sought to hold him as a debtor should be clearly made known to him, and a demand for payment made; otherwise, no presumption arises from his silence in relation thereto."

**3. Presumption as to Receipt of Accounts Mailed.** — See *New York Cab Co. v. Crow*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 340.

**The Presumption Is Negated** by the testimony of the person to whom account is rendered that he never received the letter. *Ault v. Interstate Sav., etc., Assoc.*, 15 Wash. 627.



**451.** Reasonable Time. — See notes 4, 5.

**452.** See note 1.

**453.** Retention Not Conclusive. — See notes 1, 2, 3.

(d) Scope of Matters Covered. — See note 5.

**454.** See notes 1, 2.

e. ACCOUNT STATED, QUESTION OF LAW OR FACT. — See note 3.

**455.** f. PROMISE — (1) Generally — Express or Implied. — See notes 1, 2.

(2) Future or Conditional Promise. — See notes 3, 4.

(3) Consideration. — See note 5.

**456.** g. NATURE AND EFFECT OF ACCOUNT STATED — (1) As a New Promise — (a) Generally. — See note 2.

(b) Original Items Not Provable. — See note 4.

**451.** 4. *Daytona Bridge Co. v. Bond*, (Fla. 1904) 26 So. Rep. 445; *Martyn v. Arnold*, 36 Fla. 446.

**5. No General Test as to Reasonable Time for Retaining Account.** — See *Raub v. Nisbett*, 118 Mich. 248.

Retaining an account for five months before making an objection was held an unreasonable time. *McLaughlin v. U. S.*, 36 Ct. Cl. 138.

The retention of an account for forty-two days without objection was held to create an account stated. *Donald v. Gardner*, 44 N. Y. App. Div. 235.

From twenty to twenty-five days may not be an unreasonable time in view of all the circumstances. *Ault v. Interstate Sav., etc.*, Assoc., 15 Wash. 627.

**452.** 1. When a Question for Court and When for Jury. — *McLaughlin v. U. S.*, 37 Ct. Cl. 150; *Long-Bell Lumber Co. v. Stump*, (C. C. A.) 86 Fed. Rep. 574; *Daytona Bridge Co. v. Bond*, (Fla. 1904) 36 So. Rep. 445; *Martyn v. Arnold*, 36 Fla. 446; *Lewis v. Utah Constr. Co.*, (Idaho 1904) 77 Pac. Rep. 336; *Hendrix v. Kirkpatrick*, 48 Neb. 670; *Nodine v. Union First Nat. Bank*, 41 Oregon 386; *Crawford v. Hutchinson*, 38 Oregon 578.

**453.** 1. Presumption of Acquiescence Not Conclusive — Upon What Its Force Depends. — *Raub v. Nisbett*, 118 Mich. 250, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 452 (453); *Champion v. Recknagel*, 6 N. Y. App. Div. 151.

**2. Retention — How Explainable.** — *Peirce v. Peirce*, 199 Pa. St. 4, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 453.

**Account Retained in Ignorance of Facts.** — See *Vanuxem v. New York L. Ins. Co.*, 122 Fed. Rep. 107.

**3. Columbia River Packing Co. v. Tallant**, 133 Fed. Rep. 990; *Jacobs v. Cohn*, (Supm. Ct. App. T.) 91 N. Y. Supp. 339; *Benedict v. Jennings*, (Supm. Ct. App. T.) 93 N. Y. Supp. 464; *Goodhart v. Rastert*, 10 Ohio Dec. 40, 7 Ohio N. P. 534.

**5. Presumption as to Matters Included in the Settlement.** — *Raub v. Nisbett*, 118 Mich. 248, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 452 [453], note 5; *McDavid v. Ellis*, 78 Ill. App. 381.

**454.** 1. Effect of Not Including All Transactions Between the Parties. — See *De La Cuesta v. Montgomery*, 144 Cal. 115; *Hovey's Estate*, 108 Pa. St. 385.

**2. Counterclaims Not Deducted.** — *Howell v. Johnson*, 38 Oregon 571.

**3. When Facts Undisputed, a Question for the**

**Court — When Conflicting, for Jury.** — *Pick v. Slimmer*, 70 Ill. App. 358; *Dobbs v. Campbell*, 10 Kan. App. 185; *Spellman v. Muehlfeld*, 166 N. Y. 245, reversing 48 N. Y. App. Div. 265; *Heidenheimer v. Baumgarten*, 9 Tex. Civ. App. 94.

**455.** 1. *Delabarre v. McAlpin*, 101 N. Y. App. Div. 468.

**2. Promise Is Implied to Pay True Balance.** — *Mattingly v. Shortell*, (Ky. 1905) 85 S. W. Rep. 215; *Noyes v. Young*, (Mont. 1905) 79 Pac. Rep. 1063; *Heidenheimer v. Baumgarten*, 9 Tex. Civ. App. 94.

**3. Promise May Be to Pay in Future.** — *Quinn v. White*, 26 Nev. 46, affirmed in 26 Nev. 49.

**4. A Promise to Pay When Able** means payment at once. *Mattingly v. Shortell*, (Ky. 1905) 85 S. W. Rep. 215.

**5. The Original Transaction Between the Parties** has been held to be the consideration for the promise. *Delabarre v. McAlpin*, 101 N. Y. App. Div. 468. See also *Noyes v. Young*, (Mont. 1905) 79 Pac. Rep. 1063.

**456.** 2. *Gordon v. Frazer*, 13 App. Cas. (D. C.) 382, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 456; *American Brewing Co. v. Berner-Mayer Co.*, 83 Ill. App. 446; *Morse v. Minton*, 101 Iowa 605, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 456; *Delabarre v. McAlpin*, 101 N. Y. App. Div. 468.

**The Statute of Limitations** begins to run from the date of the account stated and not from the date of the last item. *Mayberry v. Cook*, 121 Cal. 588; *Porter v. Chicago, etc., R. Co.*, 99 Iowa 351; *King v. Davis*, 168 Mass. 133.

**Under Insolvent Act.** — Under an insolvent act providing that a debt resulting from a fiduciary relation shall not be discharged, the fact that the debt has become a stated account will not prevent an inquiry into its origin. *Mayberry v. Cook*, 121 Cal. 588.

**4. No Inquiry May Be Had as to Original Items.** — *Patillo v. Allen-West Commission Co.*, (C. C. A.) 131 Fed. Rep. 680; *Mincer v. Green*, (Supm. Ct. App. T.) 94 N. Y. Supp. 15. See also *Johnson v. Tyng*, 1 N. Y. App. Div. 610; *Noyes v. Young*, (Mont. 1905) 79 Pac. Rep. 1063.

**A Book from Which Items Were Taken** in preparing the account is admissible as in the nature of an admission, when it is shown that defendant examined such book and made no objection to its correctness. *Raub v. Nisbett*, 118 Mich. 248.

**Proof of Items Unnecessary.** — *Powers v. New England F. Ins. Co.*, 68 Vt. 390.

**457.** (e) *Balance Is Principal.* — See notes 1, 2.

**458.** (3) *How Far Conclusive* — (a) *Generally.* — See note 2.

**459.** See note 1.

(b) *Notes for Balance Settled.* — See notes 2, 3.

**460.** III. *IMPEACHING SETTLED OR STATED ACCOUNTS* — 1. *Generally.* — See note 1.

**461.** See note 1.

**463.** 2. *Opening Accounts De Novo.* — See note 1.

**Whether Suit Can Be Maintained on Original Items.** — A count on open account may be supported by proof of an account stated. *Sullivan Timber Co. v. Brushagel*, 111 Ala. 114.

**Unfounded Claim or Items.** — Though an account stated be proved, yet if it clearly appear that such account or particular items charged therein be wholly unfounded, no recovery can be had for the unfounded claim or items. *Hartsell v. Masterson*, 132 Ala. 275.

**457. 1. Balance of Account Stated Is Principal.** — *Peter's Estate*, 20 Pa. Super. Ct. 223.

**2. Interest Charges** in an account rendered and acquiesced in become part of the amount shown to be due, on which subsequent interest may be allowed. *Brodnax v. Steinhardt*, 48 La. Ann. 682.

**458. 2. Account Stated, in General, Not Conclusive.** — *Burrill v. Crossman*, (C. C. A.) 91 Fed. Rep. 543; *Chicago, etc., R. Co. v. Clark*, 35 C. C. A. 120, 92 Fed. Rep. 968; *McCarthy v. Mt. Tecarte Land, etc., Co.*, 110 Cal. 687; *Daytona Bridge Co. v. Bond*, (Fla. 1904) 36 So. Rep. 445; *Martyn v. Arnold*, 36 Fla. 446; *Poppers v. Schoenfeld*, 97 Ill. App. 477; *Gibson v. Smith*, 77 Mo. App. 233; *Clarke v. Kelsey*, 41 Neb. 766; *Campbell v. Blount*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 756; *Pope Mfg. Co. v. Charleston Cycle Co.*, 59 S. Car. 29.

**When Account Stated Conclusive — Estoppel.** — *Glennon v. Vatter*, 109 La. 942.

**459. 1. Strength of Presumption as to Correctness Dependent upon Circumstances.** — The presumption that all items are correct, after a general settlement, may be rebutted by proof that one of them consisted of a debt not due at the time of settlement. *Beebe v. Smith*, 194 Ill. 634.

**2. Party Setting up Matters Within His Knowledge at Time of Settlement.** — *Turner v. Pearson*, 93 Ga. 515; *McCormick v. Interstate Consol. Rapid Transit R. Co.*, 154 Mo. 191.

**3. Claiming Partial Failure of Consideration in Absence of Fraud or Mistake.** — *Gem Chemical Co. v. Youngblood*, 58 S. Car. 56.

**460. 1. England.** — *London, etc., United Bldg. Soc. v. Angell*, 65 L. J. Q. B. 194.

*United States.* — *Atkinson v. Allen*, 36 U. S. App. 255, 71 Fed. Rep. 58; *Porter v. Price*, (C. C. A.) 80 Fed. Rep. 655; *Charlotte Oil, etc., Co. v. Hartog*, 42 U. S. App. 716, 85 Fed. Rep. 150; *Long-Bell Lumber Co. v. Stump*, (C. C. A.) 86 Fed. Rep. 574; *Allen-West Commission Co. v. Patillo*, (C. C. A.) 90 Fed. Rep. 628; *Patillo v. Allen-West Commission Co.*, (C. C. A.) 131 Fed. Rep. 680.

*Alabama.* — *Hunt v. Stockton Lumber Co.*, 113 Ala. 387.

*Arkansas.* — *Lanier v. Union Mortg., etc., Co.*, 64 Ark. 39.

*California.* — *Downing v. Murray*, 113 Cal. 455. *District of Columbia.* — *Gordon v. Frazer*, 15 App. Cas. (D. C.) 382.

*Florida.* — *Martyn v. Arnold*, 36 Fla. 446.

*Illinois.* — *Pick v. Slimmer*, 70 Ill. App. 358; *Gottfried Brewing Co. v. Szarkowski*, 79 Ill. App. 583; *Campbell v. Greer*, 81 Ill. App. 103. *Kansas.* — *Manley v. Tufts*, 59 Kan. 660; *Dobbs v. Campbell*, 10 Kan. App. 185.

*Louisiana.* — *Comer v. Illinois Car, etc., Co.*, 108 La. 179, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 460.

*Missouri.* — *McCormick v. St. Louis*, 166 Mo. 315; *Wonderly v. Christian*, 91 Mo. App. 158.

*New York.* — *Rand v. Whipple*, 71 N. Y. App. Div. 62.

*North Dakota.* — *Montgomery v. Fritz*, 7 N. Dak. 348.

*Pennsylvania.* — *Anderson v. Best*, 176 Pa. St. 498; *Peter's Estate*, 20 Pa. Super. Ct. 223.

*South Dakota.* — *Hale v. Hale*, 14 S. Dak. 644; *Krueger v. Dodge*, 15 S. Dak. 159.

*Texas.* — *Cleveland v. Campbell*, (Tex. Civ. App. 1896), 38 S. W. Rep. 219.

*Virginia.* — *Camp v. Wilson*, 97 Va. 265.

*West Virginia.* — *Batson v. Findley*, 52 W. Va. 343; *Chapman v. Liverpool Salt, etc., Co.*, (W. Va. 1905) 50 S. E. Rep. 601.

*Wisconsin.* — *Aultman v. Connors*, (Wis. 1904) 99 N. W. Rep. 904.

**Negligence in Detecting Errors.** — *Porter v. Price*, (C. C. A.) 80 Fed. Rep. 655.

**Accounts Settled with Knowledge.** — *Stern v. Ladew*, 47 N. Y. App. Div. 331; *Davis v. Fowler*, 20 N. Y. App. Div. 633.

**Mistake in Law.** — *Louisville Banking Co. v. Asher*, 112 Ky. 138, rehearing denied 65 S. W. Rep. 831, 23 Ky. L. Rep. 1661.

**Bona Fide Holder of Note.** — A person giving a note in settlement of an account cannot afterwards set up fraud or mistake against the bona fide holder. *General Electric Co. v. Blacksburg Land, etc., Co.*, 46 S. Car. 75.

**461. 1. Burden on the Party Seeking to Impeach.** — *Daytona Bridge Co. v. Bond*, (Fla. 1904) 36 So. Rep. 445; *Concord Apartment House Co. v. Alaska Refrigerator Co.*, 78 Ill. App. 682; *Dobbs v. Campbell*, 10 Kan. App. 185; *Frothingham v. Satterlee*, 70 N. Y. App. Div. 613; *Montgomery v. Fritz*, 7 N. Dak. 348; *Fisk v. Basche*, 31 Oregon 178; *Gem Chemical Co. v. Youngblood*, 58 S. Car. 56; *Chapman v. Liverpool Salt, etc., Co.*, (W. Va. 1905) 50 S. E. Rep. 601.

**463. 1. Gross Fraud, Imposition, Mistake, or Error.** — *Conville v. Shook*, 144 N. Y. 686; *Bergen v. Hittings*, 22 N. Y. App. Div. 399; *Langer v. Berger*, 38 N. Y. App. Div. 619; *Mine, etc., Supply Co. v. Creel*, (Tex. Civ. App. 1904) 79 S. W. Rep. 67.

**464. 3. Surcharging and Falsifying** — *a. MEANING OF THE TERMS.* — See note 1.

*b. WHEN LEAVE GRANTED.* — See note 2.

**4. Lapse of Time.** — See note 4.

**466. 5. Usury.** — See note 1.

**Fraud Not Essential — Substantial Errors.** — Colorado Fuel, etc., Co. *v.* Chappell, 12 Colo. App. 385; Leidigh *v.* Keever, (Neb. 1902) 96 N. W. Rep. 106; Lawler *v.* Jennings, 18 Utah 35.

**464. 1.** See Bodkin *v.* Rollyson, 48 W. Va. 455, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464, 465.

**2. When the Fraud, Mistake, etc., Do Not Taint Entire Settlement.** — Conville *v.* Shook, 144 N. Y. 686; Hale *v.* Hale, 14 S. Dak. 644.

**4. F. J. Dewes Brewery Co. v. Kerwin,** 107 Ill. App. 620.

**Compound Interest.** — Porter *v.* Price, (C. C. A.) 80 Fed. Rep. 655.

**466. 1. Jorgensen v. Kingsley,** 60 Neb. 44. But see Dannenmann *v.* Charlton, 113 La. 275, where the court refused to go into the question of usurious interest, the settlement having been made more than one year prior to suit.

## ACCRETION.

By W. B. ROBINSON.

**467. I. DEFINITION.** — See notes 1, 2.

**468. Navigability of the Waters.** — See notes 1, 2.

**Result of Combination of Natural and Artificial Causes.** — See note 4.

**469. Meaning of Terms "Imperceptible," "Imperceptible Increase,"** — See note 1.

**II. PROPERTY IN ACCRETIONS — 1. In General.** — See note 3.

**467. 1. People v. Warner,** 116 Mich. 228, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 467; Sage *v.* New York, 154 N. Y. 61, 61 Am. St. Rep. 592, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 467.

**Accretion as a Source of Title.** — See Sapp *v.* Frazier, 51 La. Ann. 1718.

**2. Alluvion Defined.** — Sapp *v.* Frazier, 51 La. Ann. 1718; Freeland *v.* Pennsylvania R. Co., 197 Pa. St. 529, 80 Am. St. Rep. 850.

**Seaweed.** — Carr *v.* Carpenter, 22 R. I. 528. And see the title SEAWEEED.

**468. 1. Immaterial Whether Water Navigable or Not.** — See Carr *v.* Moore, 119 Iowa 152.

**2. Stockley v. Cissna,** (C. C. A.) 119 Fed. Rep. 812.

**4. Natural and Artificial Causes.** — Ockerhausen *v.* Tyson, 71 Conn. 31; Tatum *v.* St. Louis, 125 Mo. 647; Whyte *v.* St. Louis, 153 Mo. 80.

**Pier Wrongfully Built.** — See Sage *v.* New York, 154 N. Y. 61, 61 Am. St. Rep. 592.

**469. 1. Consideration of the Word "Imperceptible."** — Wallace *v.* Driver, 61 Ark. 429; Nix *v.* Pfeifer, (Ark. 1904) 83 S. W. Rep. 951.

**3. Rule as to Property in Accretions — United States.** — Smith *v.* Johnson, 71 Fed. Rep. 647; Brooks *v.* Roberts, 45 U. S. App. 395, 78 Fed. Rep. 411; Widdicomb *v.* Rosemiller, 118 Fed. Rep. 295; Stockley *v.* Cissna, (C. C. A.) 119 Fed. Rep. 812.

**Arkansas.** — Wallace *v.* Driver, 61 Ark. 429; Nix *v.* Pfeifer, (Ark. 1904) 83 S. W. Rep. 951.

**California.** — Glassell *v.* Hansen, 135 Cal. 547.

**Illinois.** — Fuller *v.* Shedd, 161 Ill. 462, 52 Am. St. Rep. 380; Revell *v.* People, 177 Ill. 468, 69 Am. St. Rep. 257.

**Iowa.** — Bennett *v.* National Starch Mfg. Co., 103 Iowa 207; Quinlin *v.* Bratley, (Iowa 1899) 80 N. W. Rep. 405; Stern *v.* Fountain, 112 Iowa 96.

**Kansas.** — McCamon *v.* Stagg, 2 Kan. App. 479; Peuker *v.* Canter, 62 Kan. 363.

**Kentucky.** — Hunter *v.* Witt, (Ky. 1899) 50 S. W. Rep. 985; Holcomb *v.* Blair, 76 S. W. Rep. 843, 25 Ky. L. Rep. 974.

**Louisiana.** — Newell *v.* Leathers, 50 La. Ann. 162.

**Michigan.** — People *v.* Warner, 116 Mich. 228.

**Minnesota.** — Shell *v.* Matteson, 81 Minn. 38, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 469.

**Missouri.** — Minton *v.* Steele, 125 Mo. 181; Tatum *v.* St. Louis, 125 Mo. 647; Cox *v.* Arnold, 129 Mo. 337, 50 Am. St. Rep. 450; Perkins *v.* Adams, 132 Mo. 131; Price *v.* Hallett, 138 Mo. 561; Benne *v.* Miller, 149 Mo. 228; McBaine *v.* Johnson, 155 Mo. 191; Moore *v.* Farmer, 156 Mo. 33, 79 Am. St. Rep. 504; Benecke *v.* Welch, 168 Mo. 267; Widdecombe *v.* Chiles, 173 Mo. 195, 96 Am. St. Rep. 507.

**Nebraska.** — De Long *v.* Olsen, 63 Neb. 327; Topping *v.* Cohn, (Neb. 1904) 99 N. W. Rep. 372.

**New Jersey.** — Ocean City Assoc. *v.* Shriver, 64 N. J. L. 550.

**Utah.** — Hinckley *v.* Peay, 22 Utah 21.

**Owner of Lands Bounded by Lakes.** — French-Glenn Live-Stock Co. *v.* Springer, 35 Oregon 312; Hinckley *v.* Peay, 22 Utah 21.

**Reason of the Rule.** — McCamon *v.* Stagg, 2 Kan. App. 479.

**Bar Formed Outside of One's Land.** — See Chinn *v.* Naylor, 182 Mo. 583.

**471.** See note 1.

**472.** See note 1.

Alluvion the Result of Encroachment. — See note 3.

**473.** Necessity of Title to Water Line. — See note 2.

2. Accretion and Reliction Compared. — See notes 3, 4.

**475.** 3. Reappearance of Land After Submergence. — See note 1.

**Increase Must Be Imperceptible or Gradual** — *United States*. — *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812.

*Arkansas*. — *Wallace v. Driver*, 61 Ark. 429. *Iowa*. — *Noyes v. Harrison County*, 104 Iowa 174; *Quinlin v. Bratley*, (Iowa 1899) 80 N. W. Rep. 405; *Carr v. Moore*, 119 Iowa 152.

*Kentucky*. — *Holcomb v. Blair*, 76 S. W. Rep. 843, 25 Ky. L. Rep. 974.

*Michigan*. — *People v. Warner*, 116 Mich. 228.

*Missouri*. — *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450; *Perkins v. Adams*, 132 Mo. 131; *Hahn v. Dawson*, 134 Mo. 581; *Moore v. Farmer*, 156 Mo. 33, 79 Am. St. Rep. 504; *De Lassus v. Faherty*, 164 Mo. 361.

*New York*. — *Sage v. New York*, 154 N. Y. 61, 61 Am. St. Rep. 592.

**Sudden Formation — Avulsion**. — *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812; *Coulthard v. Davis*, 101 Iowa 625. See also *Sweatman v. Holbrook*, (Ky. 1897) 38 S. W. Rep. 691; *People v. Warner*, 116 Mich. 228; *Rodriguez v. Hernandez*, (Tex. Civ. App. 1904) 79 S. W. Rep. 343.

Land adjoining on one side of a river was carried by unusual freshets into the river, and when the freshets subsided an equal amount appeared added to the other side. Such addition was declared to be the result of an avulsion. *Nix v. Dickerson*, 81 Miss. 632.

Notwithstanding the fact that owing to the swiftness of the current of the Missouri river and the softness of its banks, the changes of the latter are more rapid and extensive than on most other streams, the law of alluvion has been held to apply. *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269; *De Long v. Olsen*, 63 Neb. 327.

**471. 1. Future Accretions** are the inherent and essential attribute of the original property and the right to them is a vested right. *Freeland v. Pennsylvania R. Co.*, 197 Pa. St. 529, 80 Am. St. Rep. 850. See also *Bradley v. McPherson*, (N. J. 1904) 58 Atl. Rep. 105.

**472. 1.** *Crill v. Hudson*, 71 Ark. 390; *Towell v. Etter*, 69 Ark. 34; *Benne v. Miller*, 149 Mo. 228; *Topping v. Cohn*, (Neb. 1904) 99 N. W. Rep. 372.

**Adverse Possession of Original Tract**. — The title by adverse possession to the accretions, however recent, relates back to and follows the title of the mainland. *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269; *Benne v. Miller*, 149 Mo. 228.

**3. Purpresture**. — See *Revell v. People*, 177 Ill. 468, 69 Am. St. Rep. 257.

**473. 2.** A certain lot, at the time of its conveyance was bounded by a street running along the ocean front, and a strip of land intervened between the street and the ocean. Subsequently the ocean washed away the street and the water line came up to the lot. There-

after the ocean receded. It was declared that the accretions belonged to the owner of the strip and not to the owner of the lot. *Ocean City Assoc. v. Shriver*, 64 N. J. L. 550. See also *Bradley v. McPherson*, (N. J. 1904) 58 Atl. Rep. 105; *Hinckley v. Peay*, 22 Utah 21, *per Baskin, J., dissenting*.

**Right to Accretions as Dependent on Contiguity**. — *Sweringen v. St. Louis*, 151 Mo. 348, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 473, note 2; *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812; *Widdicombe v. Chiles*, 173 Mo. 195, 96 Am. St. Rep. 507.

In *Crandall v. Smith*, 134 Mo. 633, *Gantt, J.*, said: "There is nothing saltatory about accretion."

**3. Reliction Defined** as derelict land or land left dry by the retirement of the sea. *Ocean City Assoc. v. Shriver*, 64 N. J. L. 550.

**Periodic Subsidence** of the waters, occasioned by the seasons, does not constitute dereliction. *Sapp v. Frazier*, 51 La. Ann. 1718.

**4. Recession Must Be Slow, Gradual, and Imperceptible**. — *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812; *Wallace v. Driver*, 61 Ark. 429; *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380; *Noyes v. Collins*, 92 Iowa 566; *Carr v. Moore*, 119 Iowa 152; *Victoria v. Schott*, 9 Tex. Civ. App. 332. See also *Olson v. Huntamer*, 6 S. Dak. 364.

**Reliction Takes Place Must Frequently in Lakes and Ponds**. — *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380; *Olson v. Huntamer*, 6 S. Dak. 364.

**Reclamation of Soil**. — In *New Jersey* the owner of lands at high-water mark has the right to reclaim lands of the state lying under tide water in front of his ownership. *Simpson v. Moorhead*, 65 N. J. Eq. 623. See *Sage v. New York*, 10 N. Y. App. Div. 294.

**475. 1. Reappearance After Submergence**. — *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812; *Widdicombe v. Rosemiller*, 118 Fed. Rep. 295; *Hughes v. Birney*, 107 La. 664; *Ocean City Assoc. v. Shriver*, 64 N. J. L. 550; *Simpson v. Moorhead*, 65 N. J. Eq. 623. See also *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450.

**When Portions of the Mainland, etc.** — *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812.

**When an Island** is washed away by the action of the waters and gives place to the channel of the river, and thereafter land appears in its place owing either to reliction or elevation by alluvial deposits, proprietorship thereof returns to the original owner of the island. *Widdicombe v. Rosemiller*, 118 Fed. Rep. 295. But see *Vogelsmeier v. Prendergast*, 137 Mo. 271.

**Duration of Submergence**. — *Hughes v. Birney*, 107 La. 664; *Simpson v. Moorhead*, 65 N. J. Eq. 623.

**Where Identity Is Lost**. — *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812; *Widdicombe v.*

**475.** 4. Doctrine of Accretion and Reliction as Applicable to Islands. — See notes 2, 3.

**476.** See note 1.

**III. RATIONALE OF RULE AS TO PROPERTY IN ACCRETIONS — 2. De Minimis Non Curat Lex.** — See note 2.

3. Considerations of Public Policy. — See note 3.

**477.** 4. As a Compensation for Risk of Loss. — See note 1.

**IV. APPORTIONMENT OF ACCRETIONS — 1. In General.** — See note 2.

**478.** 2. Islands in Private Waters. — See note 1.

**479. ACCRUE — ACCRUED — ACCRUING.** — See notes 1, 2, 3.

Rosemiller, 118 Fed. Rep. 295. See Simpson v. Moorhead, 65 N. J. Eq. 623.

**475. 2. Islands Formed by Accretion or Reliction.** — Glassell v. Hansen, 135 Cal. 547; Griffin v. Johnson, 161 Ill. 377; Kaskaskia v. McClure, 167 Ill. 23; Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 426, 72 Am. St. Rep. 269; Holman v. Hodges, 112 Iowa 714; East Omaha Land Co. v. Hanson, 117 Iowa 96; People v. Warner, 116 Mich. 228; McBaine v. Johnson, 155 Mo. 191; Victoria v. Schott, 9 Tex. Civ. App. 332.

Thus, the owner of land bounded by the Missouri river does not become the owner of an island which forms in front of his property, because he does not own any part of the bed of the stream but only to the water's edge. Perkins v. Adams, 132 Mo. 131; Hahn v. Dawson, 134 Mo. 581; Moore v. Farmer, 156 Mo. 33, 79 Am. St. Rep. 504. See also Cox v. Arnold, 129 Mo. 337, 50 Am. St. Rep. 450.

**3. Islands in Public Waters.** — Glassell v. Hansen, 135 Cal. 547; People v. Warner, 116 Mich. 228. See also Sherwood v. State Land Office Com'rs, 113 Mich. 227; Franzini v. Layland, 120 Wis. 72.

**476. 1. Islands in Private Waters.** — Victoria v. Schott, 9 Tex. Civ. App. 332.

**Where a River Changes Its Course.** — Stockley v. Cissna, (C. C. A.) 119 Fed. Rep. 812; Sweatman v. Holbrook, (Ky. 1897) 38 S. W. Rep. 691; De Lassus v. Faherty, 164 Mo. 361.

**2. Blackstone's Reason of the Rule.** — See Peuker v. Canter, 62 Kan. 363.

**3. Public Policy.** — Wallace v. Driver, 61 Ark. 429.

**477. 1. Consideration of Natural Justice.** — Wallace v. Driver, 61 Ark. 429; Glassell v. Hansen, 135 Cal. 547; Peuker v. Canter, 62 Kan. 363; Sweringen v. St. Louis, 151 Mo. 348; Moore v. Farmer, 156 Mo. 33, 79 Am. St. Rep. 504; Ocean City Assoc. v. Shriver, 64 N. J. L. 550, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 477; French-Glenn Live-Stock Co. v. Springer, 35 Oregon 312; Hinckley v. Peay, 22 Utah 21.

**Cogent Reason for the Rule.** — "It preserves the fundamental riparian rights, which often constitute the principal value of the land, of access to the water." French-Glenn Live-Stock Co. v. Springer, 35 Oregon 312.

**2. Principles of Division — Rules Given.** — Stockley v. Cissna, (C. C. A.) 119 Fed. Rep. 812; Nauman v. Burch, 91 Ill. App. 48; Newell v. Leathers, 50 La. Ann. 162, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 477; Benne v. Miller, 149 Mo. 228. See also De Lassus v. Faherty, 164 Mo. 361,

Where a tract is bounded by north and south survey lines, and on the east by a river, the method of apportionment is to extend such lines, and accretions formed beyond the extended lines belong to the adjacent owners. Smith v. Johnson, 71 Fed. Rep. 647.

Where contiguous properties lie upon the upper bank of a river flowing southeasterly and are separated by a north and south section line, the accretions are to be divided by extending the section line. McCamon v. Staggs, 2 Kan. App. 479. See also Gorton v. Rice, 153 Mo. 676.

Where a lake has dried up imperceptibly "the title of the shore owner extends to the centre of the lake, the boundary line of his tract extending from the shore or meandered line, on lines converging to a point in the centre of the lake bed." Shell v. Matteson, 81 Minn. 38.

**Modification of Rules of Apportionment.** — There is no fixed and universal rule to be applied without modification to every instance of accretions in determining the rights of coterminous owners therein. Smith v. Johnson, 71 Fed. Rep. 647; Gorton v. Rice, 153 Mo. 676.

**478. 1. Victoria v. Schott,** 9 Tex. Civ. App. 332.

**479. 1. Anderson v. Richards,** 99 Ky. 661.

**2. Moyer v. Badger Lumber Co.,** 10 Kan. App. 142; Allen v. Armstrong, 58 N. Y. App. Div. 429.

**Accrued Not Equivalent to Due.** — Under an Iowa statute providing that "the executor of a tenant for life who leases real estate so held, and dies on or before the day on which the rent is payable, \* \* \* may recover the proportion of rent which had *accrued* at the time of his death," rent would not become payable before due, and the word *accrued* must be construed to mean an apportionment of the rent between the executor and reversioner *pro rata* as to time, because, if *accrued* is held to mean "due," then the statute is deprived of all vitality. Gudgel v. Southerland, 117 Iowa 309.

**3. Cause of Action.** — Weiser v. McDowell, 93 Iowa 772. See Barnes v. Brooklyn, 22 N. Y. App. Div. 522.

**Accrue in Sense of Arise.** — See Union Cent. L. Ins. Co. v. Skipper, (C. C. A.) 115 Fed. Rep. 72.

**The Phrase "Accrued Claims,"** in a statute providing that the emergency fund of an assessment insurance company shall be used first in the payment of *accrued* claims, means claims which become *accrued* through the death of

**481. ACCUSED.** — See note 3.

**482.** See note 1.

**ACCUSTOMED.** — See note 2.

**[ACETANILID.** — See note 2*a*.]

**ACKNOWLEDGE.** — See note 4.

the person insured. *Atty.-Gen. v. Massachusetts Ben. L. Assoc.*, 171 Mass. 194.

**481. 3.** *People v. Frey*, 112 Mich. 251, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 481; *Reg. v. Kempel*, 31 Ont. 633, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 481.

**Accusation.** — "The term *accusation* is a broad term; it includes indictment, presentment, information, and any other form in which a charge of a crime or an offense can be made against an individual. The term, as used in our law in reference to trials in courts having jurisdiction in misdemeanor cases, is but the equivalent of an information at common law." *Per Cobb, J.*, in *Gordon v. State*, 102 Ga. 679. See also *Wright v. Davis*, 120 Ga. 670.

**Accusation — Accused.** — In *Brannan v. State*, 44 Tex. Crim. 399, the court said: "A person is said to be *accused* of an offense from the time that any 'criminal action' shall have been commenced against him. A legal arrest without warrant; a complaint to a magistrate; a warrant legally issued; an indictment, or an information, are all examples of *accusation*, and a person proceeded against by either of these is said to be *accused*. As we understand an *accusation* under our statute, it

applies to a pending prosecution, and when that prosecution has been terminated in a conviction it ceases to be an *accusation*."

**482. 1.** *Reg. v. Kempel*, 31 Ont. 633.

**2. Accustomed Equivalent to Usual** in an instruction defining ordinary care. *St. Louis S. W. R. Co. v. Smith*, 30 Tex. Civ. App. 336. See also *St. Louis Southwestern R. Co. v. Brown*, 30 Tex. Civ. App. 57.

**2*a*. Acetanilid** has been defined as a chemical compound prepared from aniline oil, a product of coal tar, by treatment with carboic acid. It derives its characteristics purely from coal tar, and is properly classified under the Customs Duties Act under a paragraph providing for preparations of coal tar, not colors or dyes not specially provided for, rather than under paragraphs providing for medicinal compounds, or all chemical compounds not specially provided for. *U. S. v. Roessler, etc., Chemical Co., (C. C. A.)* 79 Fed. Rep. 313; and see the title **REVENUE LAWS**.

**4. Acknowledged.** — As to the meaning of *acknowledged* the relation of parent under the New York Collateral Inheritance Tax Law, see *Matter of Birdsall, (Surrogate Ct.)* 22 Misc. (N. Y.) 180.

# ACKNOWLEDGMENTS.

By L. C. BOEHM.

**484. I. DEFINITION AND OBJECT** — Definition. — See note 1.  
Object. — See note 2.

**487. II. NATURE OF THE ACT** — WHETHER MINISTERIAL OR JUDICIAL. —  
See notes 1, 2.

**488. III. ORIGIN AND NECESSITY** — 1. Of Statutory Origin. — See note 2.  
2. How Far Necessary to Validity of Deed. — See notes 3, 4.

**484. 1. What Not Acknowledgment.** — Where an officer, authorized to take acknowledgments, happened to be present and to overhear a dispute in which the maker of an agreement admitted making it, but denied its binding effect, and the officer did not address the maker or disclose his official character, it was held that this was not an acknowledgment before the officer in contemplation of law. *Riddle v. Keller*, 61 N. J. Eq. 513.

**2 Twofold Object of Acknowledgment.** — *Solt v. Anderson*, (Neb. 1904) 99 N. W. Rep. 678; *Whalon v. North Platte Canal, etc., Co.*, 11 Wyo. 349.

**Acknowledgment Not Necessary for Recording When Execution Otherwise Proved** — California. — *Whittle v. Vanderbilt Min., etc., Co.*, 83 Fed. Rep. 48.

**A Deed with a Defective Certificate of Acknowledgment**, or without any acknowledgment at all, may be introduced in evidence. *Rullman v. Barr*, 54 Kan. 643.

**Acknowledgment of Instrument Not Required to Be Recorded Not Proof of Execution.** — *Rutherford v. Rutherford*, (W. Va. 1904) 47 S. E. Rep. 240. And see the title RECORDING ACTS, 141.

**487. 1. California.** — *Woodland Bank v. Oberhaus*, 125 Cal. 320.

*Kansas.* — *Heaton v. Norton County State Bank*, 59 Kan. 281.

*Montana.* — *Mahoney v. Dixon*, (Mont. 1904) 77 Pac. Rep. 519.

**Taking Acknowledgments Held Ministerial** — *Nebraska.* — *Horbach v. Tyrrell*, 48 Neb. 514, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487, 488.

*New Jersey.* — *Morrow v. Cole*, 58 N. J. Eq. 203.

*New York.* — *Albany County Sav. Bank v. McCarty*, 149 N. Y. 82, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487.

*Ohio.* — *Read v. Toledo Loan Co.*, 68 Ohio St. 280; *Read v. Toledo Loan Co.*, 23 Ohio Cir. Ct. 25.

*Tennessee.* — *Cooper v. Hamilton Perpetual Bldg., etc., Assoc.*, 97 Tenn. 287, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487; *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487.

**2 Taking Acknowledgments Held to Be a Judicial Act.** — *Cheney v. Nathan*, 110 Ala. 254, 55 Am. St. Rep. 26; *Holden v. Brimage*, 72 Miss. 228; *Horbach v. Tyrrell*, 48 Neb. 514, citing 1

AM. AND ENG. ENCYC. OF LAW (2d ed.) 487, 488; *Riddle v. Keller*, 61 N. J. Eq. 513; *Nimocks v. McIntyre*, 120 N. Car. 325; *Cochran v. Linville Imp. Co.*, 127 N. Car. 393. See also *Cooper v. Hamilton Perpetual Bldg., etc., Assoc.*, 97 Tenn. 285, 56 Am. St. Rep. 795.

**488. 2. Origin of the Practice of Taking Acknowledgments.** — *Swett v. Large*, 122 Iowa 267; *Finley v. Babb*, 173 Mo. 257; *Read v. Toledo Loan Co.*, 68 Ohio St. 280.

**3. Acknowledgment No Part of Deed.** — *Linton v. National L. Ins. Co.*, 104 Fed. Rep. 584, 44 C. C. A. 54; *Bennett v. Knowles*, 66 Minn. 4; *Holden v. Brimage*, 72 Miss. 228; *Hess v. Trigg*, 8 Okla. 286.

**4. Unacknowledged Deed Good as Between Parties** — *United States.* — *Linton v. National L. Ins. Co.*, 104 Fed. Rep. 584, 44 C. C. A. 54. *California.* — *Rosenthal v. Merced Bank*, 110 Cal. 198.

*Colorado.* — *Morse v. Morrison*, 16 Colo. App. 449; *Edinger v. Grace*, 8 Colo. App. 21.

*Florida.* — *Marsh v. Bennett*, (Fla. 1905) 38 So. Rep. 237.

*Illinois.* — *Weill v. Zacher*, 92 Ill. App. 296; *Ogden Bldg., etc., Assoc. v. Mensch*, 96 Ill. 554, 89 Am. St. Rep. 330, affirming 99 Ill. App. 67.

*Iowa.* — *Slaterry v. Slaterry*, 120 Iowa 717; *Kruger v. Walker*, 94 Iowa 506.

*Kansas.* — *Rullman v. Barr*, 54 Kan. 643; *Heaton v. Norton County State Bank*, 59 Kan. 281.

*Michigan.* — *Fulton v. Priddy*, 123 Mich. 298, 81 Am. St. Rep. 201; *Schwartz v. Woodruff*, 132 Mich. 513, 9 Detroit Leg. N. 696.

*Missouri.* — *Finley v. Babb*, 173 Mo. 257; *Brim v. Fleming*, 135 Mo. 597; *Staples v. Shackleford*, 150 Mo. 471; *Brown v. Koenig*, 99 Mo. App. 653.

*Nebraska.* — *Horbach v. Tyrrell*, 48 Neb. 514; *Holmes v. Hull*, 50 Neb. 556; *Galligher v. Connell*, 46 Neb. 372; *Solt v. Anderson*, (Neb. 1904) 99 N. W. Rep. 678; *Linton v. Cooper*, 53 Neb. 400.

*New Hampshire.* — *Roberts v. Rice*, 69 N. H. 472.

*North Carolina.* — *Barrett v. Barrett*, 120 N. Car. 127.

*Ohio.* — *Jay v. Squire*, 5 Ohio Dec. 318.

*Oklahoma.* — *Hess v. Trigg*, 8 Okla. 286.

*Pennsylvania.* — *Kaiser's Estate*, 199 Pa. St. 269.

*Tennessee.* — *McGuire v. Gallagher*, 95 Tenn. 349.

*Texas.* — *Southwestern Mfg. Co. v. Hughes*,

**490.** As Against Persons Without Notice. — See note 1.

**492.** Exceptions to General Rule — Married Woman's Deed. — See note 1.

**493.** IV. WHO MAY TAKE ACKNOWLEDGMENTS — 1. In General — *b*. CIRCUMSTANCES AFFECTING QUALIFICATION OF OFFICER — (1) *Interest*. — See note 1.

24 Tex. Civ. App. 637; *Derrett v. Britton*, (Tex. Civ. App. 1904) 80 S. W. Rep. 562.

*Utah*. — *Murray v. Beal*, 23 Utah 548.

*Washington*. — *Bloomington v. Weil*, 29 Wash. 611.

*Wyoming*. — *Whalon v. North Platte Canal, etc., Co.*, 11 Wyo. 349, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488, 489.

**Acknowledgments Intended to Protect Purchasers and Creditors.** — See *Talcott v. Hurlbert*, 143 Cal. 4.

**Necessity of Acknowledgment — Miscellaneous Instrument.** — *An Acknowledged Tax Deed* gives color of title which may be strengthened by possession. *Reddick v. Long*, 124 Ala. 260.

*An Assignment of a Tax Deed Must Be Acknowledged.* — *Mattocks v. McLain Land, etc., Co.*, 11 Okla. 433.

**Homestead.** — An acknowledgment is an essential in a conveyance of the homestead. *Horbach v. Tyrrell*, 48 Neb. 514. See the title **HOMESTEAD**, **681**.

**490.** 1. Registration Without Acknowledgment Is Not Notice — *Arkansas*. — *Muense v. Harper*, 70 Ark. 309.

*Georgia*. — *Crummey v. Bentley*, 114 Ga. 746.

*Indiana*. — *Kothe v. Krag-Reynolds Co.*, 20 Ind. App. 293.

*Iowa*. — *Bardsley v. German-American Bank*, 113 Iowa 216.

*Missouri*. — *Staples v. Shackelford*, 150 Mo. 471; *Williams v. Butterfield*, 182 Mo. 181.

*North Carolina*. — *Blanton v. Bostic*, 126 N. Car. 421.

*Pennsylvania*. — *Lancaster v. Flowers*, 198 Pa. St. 614.

*Texas*. — *Daugherty v. Yates*, 13 Tex. Civ. App. 646.

*Virginia*. — *Nicholson v. Gloucester Charity School*, 93 Va. 101.

See also the title **RECORDING ACTS**, **101**, **142**.

**Chattel Mortgage — Illinois.** — *Chicago First Nat. Bank v. Baker*, 62 Ill. App. 154.

**Mortgage of Exempt Chattels.** — Under the *Missouri* statute which provides that a mortgage of chattels exempt from execution against the owner as the head of a family must be concurred in and signed by both husband and wife, it is not necessary for the wife to acknowledge such a mortgage. *Brown v. Koenig*, 99 Mo. App. 653.

**A Latent Defect in the acknowledgment will not prevent the record from operating as constructive notice.** *Ogden Bldg., etc., Assoc. v. Mensch*, 196 Ill. 554, 39 Am. St. Rep. 330, affirming 99 Ill. App. 67; *Morrow v. Cole*, 58 N. J. Eq. 203; *Pennsylvania Trust Co. v. Kline*, 192 Pa. St. 1; *Forbes v. Thomas*, (Tex. Civ. App. 1899) 51 S. W. Rep. 1097. And see the title **RECORDING ACTS**, **103**.

**A Defect Due to Surplusage does not prevent the record from giving notice.** *Martin v. Heilman Mach. Works*, 89 Ill. App. 159.

**Lapse of Time Confers No Presumption of Regu-**

larity so as to legalize the record of an insufficient acknowledgment. *Heintz v. O'Donnell*, 17 Tex. Civ. App. 21.

**492.** 1. Acknowledgment Held Essential to Pass Title. — *Watson v. Herring*, 115 Ala. 271; *Branch v. Smith*, 114 Ala. 463.

**493.** 1. An Officer Who Is Grantee or Mortgagee — *California*. — *Lee v. Murphy*, 119 Cal. 364; *Murray v. Tulare Irrigation Co.*, 120 Cal. 311.

*Florida*. — *Florida Sav. Bank, etc., Exch. v. Rivers*, 36 Fla. 575.

*Iowa*. — *Smith v. Clark*, 100 Iowa 610, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493.

*Nebraska*. — *Banking House v. Stewart*, (Neb. 1904) 98 N. W. Rep. 34; *Wilson v. Griess*, 64 Neb. 792.

*New Jersey*. — *Morrow v. Cole*, 58 N. J. Eq. 203.

*New York*. — *Armstrong v. Combs*, 15 N. Y. App. Div. 246, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493.

*North Carolina*. — *Lance v. Tainter*, (N. Car. 1904) 49 S. E. Rep. 211.

*Ohio*. — *Amick v. Woodworth*, 58 Ohio St. 86.

*Pennsylvania*. — *Gans v. Drum*, 24 Pa. Co. Ct. 481.

*Virginia*. — *Hunton v. Wood*, 101 Va. 54; *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493.

In a collateral attack on an acknowledgment the fact that the grantee took the acknowledgment cannot be introduced. *Fearn v. Beirne*, 129 Ala. 435.

**An Officer Who Is Trustee in a Deed of Trust.** — *Steger v. Traveling Men's Bldg., etc., Assoc.*, 208 Ill. 236, 100 Am. St. Rep. 225; *Fugman v. Jiri Washington Bldg., etc., Assoc.*, 209 Ill. 176; *Russell v. Bosworth*, 106 Ill. App. 314; *Holden v. Brimage*, 72 Miss. 228; *Williams v. Moniteau Nat. Bank*, 72 Mo. 292; *Weidman v. Templeton*, (Tenn. Ch. 1900) 61 S. W. Rep. 102.

**Officer Who Is Grantor.** — *Muense v. Harper*, 70 Ark. 309; *Morrow v. Cole*, 58 N. J. Eq. 203.

**Identity of Names of the mortgagee and the officer who took the acknowledgment is prima facie evidence that they are one and the same.** *Lee v. Murphy*, 119 Cal. 364. *Contra*, *Bell v. Wood*, 94 Va. 677, holding that it was not to be presumed that the officer was guilty of improper conduct.

**An Officer Who Is Attorney or Agent of a Party to the instrument is not on that account disqualified to take the acknowledgment.** *Have-meyer v. Dahn*, 48 Neb. 536, 58 Am. St. Rep. 706; *Holmes v. Hull*, 50 Neb. 656.

A notary is not disqualified to take the acknowledgment of a mortgage by the fact that he is an officer of a corporation which acted as agent for the mortgagor. *Gilbert v. Garber*, (Neb. 1903) 95 N. W. Rep. 1030.

The selling agent of the vendor is not neces-



**494.** (2) *Relationship*. — See note 1.

**495.** (4) *De Facto and Ex Officio Officers*. — See note 2.

**496.** (5) *Deputy*. — See note 1.

**497.** See note 1.

**498.** c. EXTRATERRITORIAL AUTHORITY OF OFFICER. — See note 1.

sarily so interested in the sale as to disqualify him from taking the acknowledgment of the vendee. *National Cash Register Co. v. Lesko*, (Conn. 1904) 58 Atl. Rep. 967.

A notary public who is the agent of the mortgagor and represents him in negotiating the loan is competent to attest the mortgage deed. *Austin v. Southern Home Bldg., etc., Assoc.*, (Ga. 1905) 50 S. E. Rep. 382.

**Mortgage to Firm, Acknowledged before Partner.** *Farmers's, etc., Bank v. Stockdale*, 121 Iowa 748.

**An Officer Who Is a Party to the Instrument** cannot properly take an acknowledgment. *Muense v. Harper*, 70 Ark. 309; *Meckel Bros. Co. v. De Witt*, 23 Ohio Cir. Ct. 174; *Hedblom v. Pierson*, (Neb. 1902) 90 N. W. Rep. 218; *Leftwich v. Richmond*, 100 Va. 164, 4 Va. Sup. Ct. 128.

**An Officer Who Is in Any Way Interested** should not take an acknowledgment, and all such are either voidable or absolutely void. *Cooper v. Hamilton Perpetual Bldg., etc., Assoc.*, 97 Tenn. 285, 56 Am. St. Rep. 795, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493, 494; *Havemeyer v. Dahn*, 48 Neb. 536, 58 Am. St. Rep. 706.

**An Officer Having a Pecuniary Interest** is disqualified thereby to take an acknowledgment. *Watkins v. Youll*, (Neb. 1903) 96 N. W. Rep. 1042.

**An Officer Having Interests the Same as the Grantor's** cannot take an acknowledgment. *Schwartz v. Woodruff*, 132 Mich. 513, 9 Detroit Leg. N. 696.

**An Acknowledgment by an Officer Who Is a Beneficiary of a Trust Assignment** is not invalid but merely irregular. *Reed Fertilizer Co. v. Thomas*, 97 Tenn. 478.

**An Officer Who Is Attorney for the Beneficiary in a Trust Deed** is not qualified to take an acknowledgment to the trust deed, but the deed is good between the parties. *Southwestern Mfg. Co. v. Hughes*, 24 Tex. Civ. App. 637.

**An Officer Who Is a Surety on a Deed of Trust** is not a proper party to take an acknowledgment. *Blanton v. Bostic*, 126 N. Car. 421, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493.

**A Stockholder in a Corporation** is by the weight of authority held to be disqualified to take the acknowledgment of an instrument to which the corporation is a party. *Hayes v. Southern Home Bldg., etc., Assoc.*, 124 Ala. 663, 82 Am. St. Rep. 216; *National Bldg., etc., Assoc. v. Cunningham*, 130 Ala. 539; *Jenkins v. Jonas Schwab Co.*, 138 Ala. 664; *Ogden Bldg., etc., Assoc. v. Mensch*, 196 Ill. 563, 89 Am. St. Rep. 339, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493; *Kothe v. Krag-Reynolds Co.*, 20 Ind. App. 293; *Chadron Loan, etc., Assoc. v. O'Linn*, (Neb. 1901) 95 N. W. Rep. 368; *Miles v. Kelley*, 16 Tex. Civ. App. 147; *Bexar Bldg., etc., Assoc. v. Heady*, 21 Tex. Civ. App. 154; *Workman's Mut. Acc. Assoc. v. Monroe*, (Tex.

Civ. App. 1899) 53 S. W. Rep. 1029; *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493.

**Contra.** — *Read v. Toledo Loan Co.*, 68 Ohio St. 280; *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572.

**An Officer of a Corporation**, if not a stockholder, may take the acknowledgment of an instrument to which the corporation is a party. *Ogden Bldg., etc., Assoc. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493; *Woodland Bank v. Oberhaus*, 125 Cal. 320; *Bardsley v. German-American Bank*, 113 Iowa 216; *Horbach v. Tyrrell*, 48 Neb. 514; *Wachovia Nat. Bank v. Ireland*, 122 N. Car. 571; *Home Bldg., etc., Assoc. v. Evans*, (Tenn. Ch. 1899) 53 S. W. Rep. 1164.

**Collateral Attack.** — The objection that the officer taking the acknowledgment was disqualified cannot be taken advantage of on collateral attack. *Monroe v. Arthur*, 126 Ala. 362, 85 Am. St. Rep. 36; *Fearn v. Beirne*, 129 Ala. 435; *National Bldg., etc., Assoc. v. Cunningham*, 130 Ala. 539, *distinguishing* *Hayes v. Southern Home Bldg., etc., Assoc.*, 124 Ala. 663, 82 Am. St. Rep. 216.

**494. 1. Acknowledgment before Officer Related to Parties.** — *McAllister v. Purcell*, 124 N. Car. 262; *Cooper v. Hamilton Perpetual Bldg., etc., Assoc.*, 97 Tenn. 285, 56 Am. St. Rep. 795; *Silcock v. Baker*, 25 Tex. Civ. App. 508. *Compare* *Nixon v. Post*, 13 Wash. 181, to same effect as *Kimball v. Johnson*, 14 Wis. 674, cited in the fourth paragraph of the original note.

**495. 2. De Facto Officer May Take Acknowledgment.** — See *Crutchfield v. Hewett*, 2 App. Cas. (D. C.) 373; *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

**A Female Notary**, although not properly a notary, is a *de facto* notary, and acknowledgments taken by her are valid. *Stokes v. Acklen*, (Tenn. Ch. 1898) 46 S. W. Rep. 316.

**Acknowledgment before an Officer After the Expiration of His Term.** — An acknowledgment taken two years after expiration of the term, where none was taken in the interim, is void. *Hughes v. Long*, 119 N. Car. 52.

**496. 1. Acknowledgment Taken by Deputy.** — *Wilkerson v. Dennison*, (Tenn. Ch. 1904) 80 S. W. Rep. 765; *Gate City v. Richmond*, 97 Va. 337.

**Deputy's Certificate — Forgery.** — Where a husband forges his wife's acknowledgment and signs it in the name of a deputy clerk, the clerk who certifies to its genuineness is liable to the party injured. *Samuels v. Brand*, (Ky. 1904) 82 S. W. Rep. 977.

**497. 1. Pioneer Sav., etc., Co. v. Barclay, 108 Ala. 155; *Wilkerson v. Dennison*, (Tenn. 1904) 80 S. W. Rep. 765.**

**498. 1. Such Acknowledgments Held Invalid.** — *Evans v. Dickenson*, 114 Fed. Rep. 284, 53

- 500.** 2. Within the State. — See notes 1, 2, 3, 4.  
**501.** 3. In Other States — By Officers of Other States. — See note 2.  
**503.** By Commissioners of the State Where the Property Is Situated. — See note 1.  
**504.** Formalities Required. — See note 1.  
**506.** 4. In Foreign Countries. — See note 1.  
**507.** V. WHO MAY MAKE ACKNOWLEDGMENTS — 1. Generally. — See note 1.  
**508.** 2. Agent or Attorney. — See note 2.  
**509.** 3. Partners. — See note 1.  
**510.** See note 1.  
 4. Corporations. — See notes 2, 3, 4.

C. C. A. 170; *In re Henschel*, 109 Fed. Rep. 861; *New England Mortg. Security Co. v. Payne*, 107 Ala. 578; *Middlecoff v. Hemstreet*, 135 Cal. 173; *Bostick v. Haynie*, (Tenn. Ch. 1896) 36 S. W. Rep. 856.

**500.** 1. Acknowledgments under United States Statutes. — A Consul of the United States has no authority to take acknowledgments in the states. *McCandless v. Yorkshire Guarantee, etc., Corp.*, 101 Ga. 180.

A United States Commissioner Has No Authority to take acknowledgments to conveyances of real estate in *Nebraska*. *Interstate Sav., etc., Assoc. v. Strine*, 58 Neb. 133.

A Commissioner of Deeds of the city of New York has power to take acknowledgments in any of the boroughs of the city without regard to the county in which the borough lies. *People v. Haggerty*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 296.

In *North Carolina* the chairman of the Courts of Pleas and Quarter Sessions is authorized to take privy examination of married women in conveyances of land. An acknowledgment taken when the court is not in session is valid. *Spivey v. Rose*, 120 N. Car. 163.

2. Under the *Tennessee* statute giving notaries public the same authority as county court clerks in respect to taking acknowledgments of deeds and other instruments, a notary public may take the privy examination of a married woman conveying real estate. *Daly v. Hamilton Perpetual Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 48 S. W. Rep. 114.

Under the *Michigan* statute a notary public of one county may take acknowledgments in other counties. *Lamb v. Lamb*, (Mich. 1905) 102 N. W. Rep. 645.

3. Under the *Georgia* statute providing that acknowledgments may be taken by a "justice of any court in this state," a judge of the Superior Court may take acknowledgments. The word "justice" is used as synonymous with "judge." *Strauss v. Maddox*, 109 Ga. 223.

4. Clerks of Probate Courts. — The *Alabama* statute authorizes the clerks of the probate courts to take acknowledgments in the name of the probate judge when he is absent. *Pioneer Sav., etc., Co. v. Barclay*, 108 Ala. 155.

**501.** 2. Acknowledgment before Officers of Other States — *Alabama*. — *Hayes v. Banks*, 132 Ala. 354.

*Georgia*. — *Crummey v. Bentley*, 114 Ga. 746.  
*Illinois*. — *Esker v. Heffernan*, 159 Ill. 38;  
*Hewitt v. General Electric Co.*, 164 Ill. 420;  
*Ramsay v. People*, 197 Ill. 594; *Hewitt v. Watertown Steam Engine Co.*, 65 Ill. App. 153.

*Iowa*. — *Kruger v. Walker*, 94 Iowa 506.

*Nebraska*. — *Dorsey v. Conrad*, 49 Neb. 443.  
*New York* — *Johnston v. Granger*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 54.

*North Carolina*. — *Barcello v. Hapgood*, 118 N. Car. 712.

*Tennessee*. — *Huff v. Glenn*, 101 Tenn. 112.

Under the *California* Statute, when a deed is executed out of the state but within the United States, the acknowledgment or proof of its execution must be made before a notary public or justice of the peace having an official seal. *Norris v. Billingsley*, (Fla. 1904) 37 So. Rep. 564.

**503.** 1. Acknowledgments before Commissioners of Deeds. — *Fisk v. Hopping*, 169 Ill. 105.

**504.** 1. Validity of Acknowledgment Determined by *Lex Loci Rei Sitæ*. — *Walling v. Christian, etc., Grocery Co.*, 41 Fla. 479.

**506.** 1. Consular Officers May Take Acknowledgments. — *Long v. Powell*, 120 Ga. 621; *Morris v. Linton*, 61 Neb. 537; *Jordan v. Underhill*, 91 N. Y. App. Div. 124; *Stewart v. Linton*, 204 Pa. St. 207.

Foreign Corporations. — The code of *Alabama* making provision for acknowledgments in foreign countries applies to corporations as well as to individuals. *Jinwright v. Nelson*, 105 Ala. 399.

**507.** 1. Acknowledgment Must Be by Grantor. — *Pasch. Dig. Tex.*, art. 5007, requires that an acknowledgment must be in writing and made by the grantor. *Schultz v. Tonty Lumber Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 353.

When Acknowledgment by One of Several Grantors Valid. — Where a husband is not named as a grantor in a deed of his wife's real estate, but joins in the testimonium clause in token of his release of all right to curtesy, he is in effect a grantor in the deed, and therefore the acknowledgment of the deed by him alone is sufficient to entitle it to record. *Hayden v. Peirce*, 165 Mass. 359.

Acknowledgment of a Chattel Mortgage Must Be by Mortgagor. — *Chicago First Nat. Bank v. Baker*, 62 Ill. App. 154.

**508.** 2. *Cochran v. Linville Imp. Co.*, 127 N. Car. 393, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508.

**509.** 1. By Firm of Attorneys. — An acknowledgment in the firm name is proper, and may be made by one of the firm. *McCulloch County Land, etc., Co. v. Whitefort*, 21 Tex. Civ. App. 314.

**510.** 1. In *Barrow v. Conlee*, 89 Ill. App. 625, it was held that an acknowledgment in the firm name was good though it did not show the name of the partner making the acknowl-

**512. 5. Married Women — a. GENERALLY — Acknowledgment Essential Part of Married Woman's Deed.** — See note 2.

**514. b. REFUSAL TO ACKNOWLEDGE — POWER OF COURT TO ORDER.** — See notes 2, 3.

**c. SEPARATE EXAMINATION — (1) In General.** — See note 4.

edgment. The ground on which this decision was placed was that the acknowledgment by the grantor is all that is required, and it may be by either or both of the partners.

**510. 2. Bennett v. Knowles**, 66 Minn. 4.

**No Special Form Required in New York.** — An acknowledgment by the secretary stating the genuineness of the president's signature and of the seal is sufficient. *Pruyne v. Adams Furniture, etc., Co.*, 92 Hun (N. Y.) 214.

**Acknowledgment by Individuals Is Void.** —

The acknowledgment must be by the corporation acting through its authorized officers, and an acknowledgment by officers in their individual capacity is void. *Bernhardt v. Brown*, 122 N. Car. 587, 65 Am. St. Rep. 725.

**3. Acknowledgment by Officer Affixing Seal.** — *Bennett v. Knowles*, 66 Minn. 4.

**4. Acknowledgment by Officers of Corporation — Alabama.** — *Jinwright v. Nelson*, 105 Ala. 399.

*Georgia.* — *Dodge v. American Freehold Land Mortg. Co.*, 109 Ga. 394.

*Illinois.* — *Chicago First Nat. Bank v. Baker*, 62 Ill. App. 154.

*New York.* — *Matter of Hulbert*, 38 N. Y. App. Div. 323.

*South Dakota.* — *Holt v. Metropolitan Trust Co.*, 11 S. Dak. 456.

*Texas.* — *Zimpleman v. Stamps*, 21 Tex. Civ. App. 129.

*Virginia.* — *Banner v. Rosser*, 96 Va. 238.

*West Virginia.* — *Abney v. Ohio Lumber, etc., Co.*, 45 W. Va. 446.

**512. 2. Acknowledgment Essential to Validity of Deed of Married Woman — United States.** — *Hill v. Hite*, 79 Fed. Rep. 826.

*Alabama.* — *Hayes v. Southern Home Bldg., etc., Assoc.*, 124 Ala. 663, 82 Am. St. Rep. 216; *Burrows v. Pickens*, 129 Ala. 648; *Slappy v. Hanners*, 137 Ala. 199.

*California.* — *Loupe v. Smith*, 123 Cal. 491.

*Florida.* — *Walling v. Christian, etc., Grocery Co.*, 41 Fla. 479; *Durham v. Stephenson*, 41 Fla. 112.

*Illinois.* — *Roberson v. Tippie*, 209 Ill. 38, 101 Am. St. Rep. 217.

*Missouri.* — *Springfield Engine, etc., Co. v. Donovan*, 147 Mo. 622.

*Montana.* — *American Sav., etc., Assoc. v. Burghardt*, 19 Mont. 323, 61 Am. St. Rep. 507.

*Nebraska.* — *Hedblom v. Pierson*, (Neb. 1902) 90 N. W. Rep. 218; *Interstate Sav., etc., Assoc. v. Strine*, 58 Neb. 133; *Havemeyer v. Dahn*, 48 Neb. 536, 58 Am. St. Rep. 706; *Solt v. Anderson*, (Neb. 1904) 99 N. W. Rep. 678; *Linton v. Cooper*, 53 Neb. 400.

*New Jersey.* — *Goldstein v. Curtis*, 63 N. J. Eq. 454; *Ten Eyck v. Saville*, 64 N. J. Eq. 611.

*Texas.* — *Breneman v. Mayer*, 24 Tex. Civ. App. 164; *Silcock v. Baker*, 25 Tex. Civ. App. 508; *Gilbough v. Stahl Bldg. Co.*, 16 Tex. Civ. App. 448; *Wheelock v. Cavitt*, 91 Tex. 679, 66 Am. St. Rep. 920; *Black v. Garner*, (Tex. Civ. App. 1901) 63 S. W. Rep. 918, affirmed 95 Tex. 125; *Hurst v. Finley*, 22 Tex.

Civ. App. 605; *Simpson v. Edens*, 14 Tex. Civ. App. 235.

*West Virginia.* — *Bennett v. Pierce*, 45 W. Va. 654; *Hanley v. National Loan, etc., Co.*, 44 W. Va. 450.

*Wyoming.* — *Adams v. Smith*, 11 Wyo. 200; *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925.

**Certificate of Acknowledgment Not Essential.** — Under the *Nebraska* statutes the acknowledgment is no longer an essential part of a married woman's deed except where the instrument involves her dower or her homestead. *Linton v. National L. Ins. Co.*, (C. C. A.) 104 Fed. Rep. 584.

**In West Virginia** a deed of husband and wife must be executed by the husband before the acknowledgment of the wife, in order to bind her. The law intends that the selfsame instrument shall be executed by both, a joint act, working a joint and common effect in law. *Cecil v. Clark*, 44 W. Va. 659.

**Deed from Wife to Husband.** — Under the law as it existed in *New York* in 1858, an ordinary, simple form of acknowledgment, making no reference to the fact that the grantor was a married woman, was sufficient. *Hulse v. Bacon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 455, affirmed 167 N. Y. 599.

**A Married Woman May Not Waive** the requirements necessary to a valid acknowledgment. *Hayes v. Southern Home Bldg., etc., Assoc.*, 124 Ala. 663, 82 Am. St. Rep. 216.

**Who Can Take Advantage of Defects.** — A defective acknowledgment by a married woman can be objected to only by her or those claiming under her, and not by an adverse claimant. *Literer v. Huddleston*, (Tenn. Ch. 1898) 52 S. W. Rep. 1003.

**514. 2. Specific Performance** of a married woman's contract to convey land will not be decreed where she refuses to make the acknowledgment. *Corby v. Drew*, 55 N. J. Eq. 387; *Schwarz v. Regan*, 64 N. J. Eq. 139.

And a subsequent purchaser from the married woman, taking with notice of such contract, cannot be compelled to convey to the purchaser under the contract. *Ten Eyck v. Saville*, 64 N. J. Eq. 611.

**Where the Wife Acknowledged a Contract** for the sale of land the court will decree specific performance. *Goldstein v. Curtis*, 63 N. J. Eq. 454.

**3. A Deed Made in Pursuance of a Decree** is valid and sufficient to convey the married woman's property and bar her dower right. *Fee v. Sharkey*, 59 N. J. Eq. 284, affirmed 60 N. J. Eq. 446.

**4. Alabama.** — *Jinwright v. Nelson*, 105 Ala. 399; *Burrows v. Pickens*, 129 Ala. 648.

*Florida.* — *Walling v. Christian, etc., Grocery Co.*, 41 Fla. 479.

*Idaho.* — *Co-operative Sav., etc., Assoc. v. Green*, 5 Idaho 660; *Hailey First Nat. Bank v. Glenn*, (Idaho 1904) 77 Pac. Rep. 623.

**516.** (2) *Origin and Object of the Practice.* — See note 2.

**517.** See note 1.

(3) *General Requirements* — (a) *Certification.* — See note 2.

**518.** (b) *Explanation of Contents.* — See note 1.

**519.** *When Explanation Unnecessary.* — See note 4.

**520.** *Whether Certificate Must Show Explanation.* — See note 2.

(c) *Act Free from Compulsion.* — See notes 3, 4.

*Kentucky.* — *Godsey v. Virginia Iron, etc., Co.*, 82 S. W. Rep. 386, 26 Ky. L. Rep. 657.

*New Jersey.* — *Goldstein v. Curtis*, 63 N. J. Eq. 454.

*North Carolina.* — *Spivey v. Rose*, 120 N. Car. 163; *Barrett v. Barrett*, 120 N. Car. 127; *McCaskill v. McKinnon*, 121 N. Car. 214; *Wachovia Nat. Bank v. Ireland*, 122 N. Car. 571; *Marsh v. Griffin*, 136 N. Car. 333.

*Pennsylvania.* — *Erdelyi v. Bernat*, 27 Pittsb. Leg. J. N. S. (Pa.) 172.

*South Carolina.* — *McKenzie v. Sifford*, 52 S. Car. 104.

*Tennessee.* — *Roulston v. Darby*, (Tenn. Ch. 1898) 52 S. W. Rep. 318; *Daly v. Hamilton Perpetual Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 48 S. W. Rep. 114; *Huff v. Glenn*, 101 Tenn. 112; *Brothers v. Harrison*, (Tenn. Ch. 1897) 45 S. W. Rep. 446; *Thomason v. Hays*, (Tenn. Ch. 1901) 62 S. W. Rep. 336; *Davis v. Bowman*, (Tenn. Ch. 1898) 46 S. W. Rep. 1039.

*Texas.* — *Minor v. Powers*, (Tex. Civ. App. 1896) 38 S. W. Rep. 400; *Adams v. Pardue*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1015; *Runge v. Sabin*, (Tex. Civ. App. 1895) 30 S. W. Rep. 568; *Clark v. Groce*, 16 Tex. Civ. App. 453; *Breitling v. Chester*, 88 Tex. 586, *reversing* (Tex. Civ. App. 1895) 30 S. W. Rep. 464; *Silcock v. Baker*, 25 Tex. Civ. App. 508; *Tippett v. Brooks*, 28 Tex. Civ. App. 107, *writ of error denied* 95 Tex. 335; *Estes v. Turner*, 30 Tex. Civ. App. 365.

*Virginia.* — *Geil v. Geil*, 101 Va. 773.

*Wyoming.* — *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925.

**Privy Examination Is Not Essential** to the validity of a wife's agreement for the partition of lands partly owned by her. *Betts v. Simons*, (Tex. Civ. App. 1896) 35 S. W. Rep. 50.

**516. 2. Origin of Separate Examination.** — *Sassenberg v. Huseman*, 182 Ill. 341; *Solt v. Anderson*, (Neb. 1904) 99 N. W. Rep. 678.

**517. 1. Object of Separate Acknowledgment.** — *Northwestern, etc., Hypotheek Bank v. Berry*, 89 Fed. Rep. 408; *Northwestern, etc., Hypotheek Bank v. Rauch*, 5 Idaho 752; *Gray v. Law*, 6 Idaho 559, 96 Am. St. Rep. 280; *Adams v. Pardue*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1015; *Geil v. Geil*, 101 Va. 773.

**2. Fact of Separate Examination Must Appear in Certificate.** — *Co-operative Sav., etc., Assoc. v. Green*, 5 Idaho 660; *Benedict v. Jones*, 129 N. Car. 470.

**Where a "Private" Examination Is Required**, an officer's certificate which certifies to a "separate" examination is sufficient. *Timber v. Desparois*, (S. Dak. 1904) 101 N. W. Rep. 879.

**518. 1. It Must Appear that the Contents of the Deed Were Explained** — *Alabama.* — *Davidson v. Alabama Iron, etc., Co.*, 109 Ala. 383.

*Kentucky.* — *McCormick v. Yeiser*, 63 S. W. Rep. 38, 23 Ky. L. Rep. 400.

*Texas.* — *Estes v. Turner*, 30 Tex. Civ. App. 365; *Clark v. Groce*, 16 Tex. Civ. App. 453; *Adams v. Pardue*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1015.

*Virginia.* — See *Geil v. Geil*, 101 Va. 773.

*West Virginia.* — *Bennett v. Pierce*, 45 W. Va. 654.

*Wyoming.* — *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925.

**Explanation of an Instrument Referred to in the Deed Not Necessary.** — *Andrews v. Bonham*, 19 Tex. Civ. App. 179.

**The Showing of the Deed to the Woman** need not appear in the certificate. *Breneman v. Mayer*, 24 Tex. Civ. App. 164.

**Proof that a Deed Was Not Explained** to the wife, as between the parties, overcomes a certificate regular on its face. *Lowen's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 275.

**519. 4. No Explanation Required Where Wife Is Already Informed.** — See *McCormick v. Yeiser*, 63 S. W. Rep. 38, 23 Ky. L. Rep. 400; *Kaufmann v. Rowan*, 189 Pa. St. 121; *Ronner v. Welcker*, 99 Tenn. 623.

Where a mortgage covers several parcels of real estate, one of which is a homestead, its validity as to the homestead cannot be impugned by the testimony of the mortgagor's wife that she thought it did not cover the homestead, where the mortgagee acted in good faith, and the notary by whom her acknowledgment was taken testified that he either read the mortgage to her or was told by her that she understood it. *German Bank v. Muth*, 96 Wis. 342.

**520. 2. Certificate Must Show that Wife Understood.** — *Roulston v. Darby*, (Tenn. Ch. 1898) 52 S. W. Rep. 318.

**3. It Must Appear that It Was Her Voluntary Act and Deed** — *United States.* — *Northwestern, etc., Hypotheek Bank v. Berry*, 89 Fed. Rep. 408.

*Alabama.* — *Davidson v. Alabama Iron, etc., Co.*, 109 Ala. 383; *Marx v. Threet*, 131 Ala. 340.

*Florida.* — *Durham v. Stephenson*, 41 Fla. 112; *Walling v. Christian, etc., Grocery Co.*, 41 Fla. 479.

*New Jersey.* — *Goldstein v. Curtis*, 63 N. J. Eq. 454.

*North Carolina.* — See Acts 1889, c. 389, and the following case for the construction thereof: *Benedict v. Jones*, 129 N. Car. 470.

*Texas.* — *McAnulty v. Ellison*, (Tex. Civ. App. 1903) 71 S. W. Rep. 670; *Black v. Garner*, (Tex. Civ. App. 1901) 63 S. W. Rep. 918, *affirmed* 95 Tex. 125.

**Duress** cannot be pleaded with success by a wife, as against a *bona fide* grantee. *Springfield Engine, etc., Co. v. Donovan*, 147 Mo. 622.

**4. Statement that She Does Not Wish to Retract**

- 521.** (a) **Examination Apart from Husband.** — See note 1.  
 (4) **Exceptions and Qualifications of Rule** — (a) **Estoppel.** — See note 4.  
 (b) **Separation, Abandonment, Divorce.** — See note 5.

**522.** *d.* **UNDER RECENT STATUTES.** — See note 3.

**523.** See notes 2, 3.

**525.** **VI. TIME WHEN ACKNOWLEDGMENT MUST BE MADE.** — See note 1.

**526.** **VII. THE CERTIFICATE** — 1. **Generally** — *a.* **REQUIREMENTS STATUTORY.** — See note 5.

*b.* **CERTAIN PROVISIONS CONSIDERED** — (1) *Place of the Certificate.* — See note 6.

**527.** (3) *Venue.* — See note 4.

**528.** See note 1.

**Venue Supplied by Extrinsic Evidence.** — See note 4.

**Presumption of Venue.** — See note 5.

**529.** (4) *Date.* — See note 2.

**Certificate Dated Earlier than Deed.** — See note 4.

— *Adams v. Pardue*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1015; *Estes v. Turner*, 30 Tex. Civ. App. 365; *Geil v. Geil*, 101 Va. 773.

**521.** 1. **What Constitutes a Separate Examination.** — See *Tippett v. Brooks*, 28 Tex. Civ. App. 107, writ of error denied 95 Tex. 335.

4. See *Linton v. National L. Ins. Co.*, 104 Fed. Rep. 584, 44 C. C. A. 54.

5. **What Certificate Must Show.** — In *West Virginia* the certificate in such case must state that it has been proven to the satisfaction of the officer that the land is the separate property of the woman and that she is living separate and apart from her husband. *Bennett v. Pierce*, 45 W. Va. 654.

**522.** 3. **Kansas.** — *Heaton v. Norton County State Bank*, 59 Kan. 281.

**New York.** — *Hulse v. Bacon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 455, 40 N. Y. App. Div. 89.

**Tennessee.** — See *Daly v. Hamilton Perpetual Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 48 S. W. Rep. 114.

**523.** 2. **Acknowledgment Not Essential to Validity of Deed.** — *Hayden v. Peirce*, 165 Mass. 359; *Linton v. Cooper*, 53 Neb. 400.

3. **Present Statutes Requiring Separate Examination** — *Tennessee.* — See *Huff v. Glenn*, 101 Tenn. 112.

**525.** 1. **Time of Making Acknowledgment Immaterial.** — *Wetterer v. Soubirous*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 739, following *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616, cited in the original note.

**Acknowledgment Before Completion of Deed.** — *Henke v. Stacy*, 25 Tex. Civ. App. 272.

**An Acknowledgment by a Wife Prior to Any Proof of Execution by the Husband does not entitle a deed to probate.** *Barrett v. Barrett*, 120 N. Car. 127.

**An Acknowledgment by the Wife After the Husband's Death of an instrument executed during the coverture gives it validity.** *Breitling v. Chester*, 88 Tex. 586, reversing (Tex. Civ. App. 1895) 30 S. W. Rep. 464.

**526.** 5. **An Acknowledgment of a Tax Deed must be substantially in the usual form.** *Smith v. Watson*, 124 Ala. 339.

6. **Certificate Should Be Indorsed on Deed.** — See *Solt v. Anderson*, (Neb. 1904) 99 N. W.

Rep. 678; *Goldstein v. Curtis*, 63 N. J. Eq. 454; *Read v. Toledo Loan Co.*, 68 Ohio St. 280; *Adams v. Smith*, 11 Wyo. 200.

**Two Instruments — One Acknowledgment.** — Two contracts, one amendatory of the other, are properly acknowledged by one certificate referring to them both as the foregoing writing. *Fouse v. Gilfillan*, 45 W. Va. 213.

**527.** 4. **Certificate Must Show Where Acknowledgment Was Made.** — *In re Henschel*, 109 Fed. Rep. 861.

**Mistake of Venue.** — Where the venue is misstated parol evidence is admissible to prove that the venue was correct in fact. *Rogers v. Pell*, 47 N. Y. App. Div. 240, affirmed 168 N. Y. 587.

**528.** 1. **Venue Supplied by Signature.** — A signature to a certificate, designating the officer taking the acknowledgment as justice of the peace of the town of South Chicago, will cure the failure to place a caption on the acknowledgment. *Gilbert v. National Cash Register Co.*, 176 Ill. 288.

4. **Locality May Be Shown by Extrinsic Evidence.** — *Gilbert v. National Cash Register Co.*, 67 Ill. App. 606.

5. **Presumption of Venue.** — *In re Henschel*, 113 Fed. Rep. 443, 51 C. C. A. 277; *McCarver v. Herzberg*, 120 Ala. 523; *Nacogdoches First Nat. Bank v. Hicks*, 24 Tex. Civ. App. 269.

In *McCandless v. Yorkshire Guarantee, etc., Corp.*, 101 Ga. 180, a deed began with the words "state of New York, county of New York," and recited that it was the deed of a certain corporation "by its president (naming him) and directors (naming two persons) of the state and county aforesaid." The deed was attested by two witnesses, one of whom added after his name the words "consul of the United States of America at Huddersfield, England." There was no evidence of where the deed was actually executed, and it was held that from the caption and the recitals in the deed it would be presumed that it was signed and attested in the county of New York, and therefore the attestation by such counsel was unauthorized and of no effect..

**529.** 2. **Omissions Supplied from the Deed.** — *Dahlem's Estate*, 175 Pa. St. 454, 52 Am. St. Rep. 848.

4. *Merrill v. Sybert*, 65 Ark. 51.

**529.** (5) *Signature*. — See note 8.

**530.** See note 1.

(6) *Official Character of Officer* — (a) *General Rule* — Should Appear from Certificate. — See note 6.

**531.** See note 3.

**532.** (b) *Surplusage in Description*. — See note 2.

(7) *Seal*. — See note 3.

**534.** See note 1.

*Seal Need Not Be Copied into Record*. — See note 5.

**535.** c. *CERTIFICATE OF MAGISTRACY AND CONFORMITY*. — See note 1.

**537.** See note 1.

**538.** 2. *What It Must Certify* — a. *COMPLIANCE WITH STATUTE*. — See note 1.

*Strict or Substantial Compliance*. — See note 2.

**529.** 8. *Certificate Must Be Signed*. — *Tweto v. Horton*, 90 Minn. 451; *Solt v. Anderson*, (Neb. 1904) 99 N. W. Rep. 678; *Goldstein v. Curtis*, 63 N. J. Eq. 454; *Read v. Toledo Loan Co.*, 68 Ohio St. 280.

**530.** 1. *Signing the Name of a Justice of the Peace by a Deputy Clerk* does not invalidate a certificate where the clerk is authorized to do the act. *Herrin v. Franklin*, 1 Tenn. Ch. App. 95.

6. *Certificate Must Show Official Character of Officer*. — *Riviere v. Wilkens*, 31 Tex. Civ. App. 454.

**531.** 3. *Leech v. Karthaus*, (Ala. 1904) 37 So. Rep. 696.

*Official Character Shown in Signature Alone*. — The certificate is sufficient if the official character is stated after the signature, though not recited in the body of the certificate. *Smith v. Sherman*, 113 Iowa 601.

**532.** 2. *Wilson v. Braden*, 56 W. Va. 372.

3. *Seal Necessary*. — *Ramsay v. People*, 197 Ill. 594; *Koch v. West*, 118 Iowa 468; *Tweto v. Horton*, 90 Minn. 451; *Bratton v. Burris*, 51 S. Car. 45; *Daugherty v. Yates*, 13 Tex. Civ. App. 646.

**534.** 1. *Seal Unnecessary unless Required by Statute*. — *Fisk v. Hopping*, 169 Ill. 105. See also *Johnson v. Duvall*, 135 N. Car. 642; *Riviere v. Wilkens*, 31 Tex. Civ. App. 454.

*Battle's Revisal N. Car.*, c. 35, § 14, applies only to deeds of married women and does not require a seal in the case of a deed by an unmarried man. *Westfeldt v. Adams*, 135 N. Car. 591.

5. *Recording Officer Need Not Copy Seal*. — See *Rullman v. Barr*, 54 Kan. 643.

**535.** 1. *Double Certificate for Acknowledgment Out of State* — *Georgia*. — *Crummey v. Bentley*, 114 Ga. 746; *Cunningham v. Barker*, 109 Ga. 613; *Dodge v. American Freehold Land Mortg. Co.*, 109 Ga. 394.

*Missouri*. — *Robinson v. Nolan*, 152 Mo. 560. *New York*. — *Goddard v. Schmoll*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 381.

*Certificate Authenticating Officer's Signature*. — See *Freedman v. Oppenheim*, 80 N. Y. App. Div. 487.

*Unless Required by Statute*, the second certificate is not necessary. *Ramsay v. People*, 197 Ill. 594.

A *Commissioner of Deeds in New York* needs no

certificate of the county clerk to validate acknowledgments taken before him in the jurisdiction for which he is appointed. *People v. Haggerty*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 296.

A *Commissioner Acting Out of His Own State* needs no certificate of magistracy and conformity to complete the validity of an acknowledgment taken before him. *Fisk v. Hopping*, 169 Ill. 105.

**537.** 1. In *North Dakota* there is no necessity for a second certificate where the acknowledgment is taken by a notary and authenticated by his seal. *Grandin v. Emmons*, 10 N. Dak. 223, 88 Am. St. Rep. 684.

A *Sealed Acknowledgment* taken in *Iowa* is presumed correct where the certificate itself is correct in form. *Dorsey v. Conrad*, 49 Neb. 443.

**538.** 1. *Certificate Must Show Every Material Fact*. — *Bennett v. Pierce*, 45 W. Va. 657, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 538.

2. *Certificate Must Show Substantial Compliance with Statute* — *United States*. — *Northwestern, etc., Hypotheek Bank v. Berry*, 89 Fed. Rep. 408.

*Alabama*. — *Frederick v. Wilcox*, 119 Ala. 355, 72 Am. St. Rep. 925; *Hayes v. Southern Home Bldg., etc., Assoc.*, 124 Ala. 663, 82 Am. St. Rep. 216.

*Idaho*. — *Curtis v. Bunnell, etc., Invest. Co.*, 6 Idaho 298; *Christensen v. Hollingsworth*, 6 Idaho 87, 96 Am. St. Rep. 256; *Co-operative Sav., etc., Assoc. v. Green*, 5 Idaho 660; *Northwestern, etc., Hypotheek Bank v. Rauch*, 5 Idaho 752; *Wilson v. Wilson*, 6 Idaho 597; *Gray v. Law*, 6 Idaho 559, 96 Am. St. Rep. 280.

*Minnesota*. — *Bennett v. Knowles*, 66 Minn. 4. *Missouri*. — *Linville v. Greer*, 165 Mo. 380.

*Nebraska*. — *Havemeyer v. Dahn*, 48 Neb. 536, 58 Am. St. Rep. 706.

*New York*. — *Rogers v. Pell*, 47 N. Y. App. Div. 240, affirmed *Hodgskin v. Pell*, 168 N. Y. 587; *Jordan v. Underhill*, 91 N. Y. App. Div. 124.

*North Dakota*. — *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729.

*Oklahoma*. — *Garton v. Hudson-Kimberly Pub. Co.*, 8 Okla. 631; *Mosier v. Momsen*, 13 Okla. 41.

**541.** *b.* FACT OF ACKNOWLEDGMENT. — See note 1.

**542.** *c.* NAME AND IDENTITY OF GRANTOR. — See note 6.

**544.** See note 1.

**545.** See note 2.

**546.** See notes 2, 3.

**3. Errors and Omissions — a. GENERALLY.** — See note 5.

**547.** *b.* CLERICAL ERRORS, TECHNICAL OMISSIONS. — See notes 1, 2.

*Pennsylvania.* — Dahlem's Estate, 175 Pa. St. 454, 52 Am. St. Rep. 848.

*South Dakota.* — Holt v. Metropolitan Trust Co., 11 S. Dak. 456; State v. Coughran, (S. Dak. 1905) 103 N. W. Rep. 31. Compare Erickson v. Conniff, (S. Dak. 1904) 101 N. W. Rep. 1104.

*Tennessee.* — Hughes v. Powers, 99 Tenn. 480; Roulston v. Darby, (Tenn. Ch. 1898) 52 S. W. Rep. 318.

*Texas.* — Clark v. Groce, 16 Tex. Civ. App. 453; Beitel v. Wagner, 11 Tex. Civ. App. 365; Hays v. Tilson, 18 Tex. Civ. App. 610; Zimpleman v. Stamps, 21 Tex. Civ. App. 129; Adams v. Pardue, (Tex. Civ. App. 1896) 36 S. W. Rep. 1015; Tiemann v. Cobb, (Tex. Civ. App. 1904) 80 S. W. Rep. 250; Johnson v. Thompson, (Tex. Civ. App. 1898) 50 S. W. Rep. 1055; Nacogdoches First Nat. Bank v. Hicks, 24 Tex. Civ. App. 269; Lindley v. Lindley, 92 Tex. 446; Arnall v. Newcomb, 29 Tex. Civ. App. 521.

*Utah.* — Deseret Nat. Bank v. Kidman, 25 Utah 379, 95 Am. St. Rep. 856.

*Virginia.* — Hurst v. Leckie, 97 Va. 550, 75 Am. St. Rep. 798.

*Washington.* — Griffin v. Catlin, 25 Wash. 474, 87 Am. St. Rep. 782.

**541. 1. Fact of Acknowledgment Must Be Shown.** — Chicago First Nat. Bank v. Baker, 62 Ill. App. 154; Bennett v. Knowles, 66 Minn. 4; Riddle v. Keller, 61 N. J. Eq. 513; Heintz v. O'Donnell, 17 Tex. Civ. App. 21.

*Illustrations.* — The *Tennessee* statute requires the certificate of acknowledgment by a married woman to recite that the deed was executed "for the purposes therein expressed," and also that she executed it "understandingly." The omission of either of these recitals is a fatal defect. *Literer v. Huddleston*, (Tenn. Ch. 1898) 52 S. W. Rep. 1003.

Under the *Texas* statute the certificate of acknowledgment to a married woman's conveyance of the homestead must state that she executed the instrument for the purposes and consideration therein stated, or use equivalent expressions. *Hurst v. Finley*, 22 Tex. Civ. App. 605.

**Adoption of Signature by Acknowledgment.** — *Godsey v. Virginia Iron, etc., Co.*, 82 S. W. Rep. 386, 26 Ky. L. Rep. 657.

**Contents Known.** — The certificate must certify that the grantor has been informed of the purpose and contents of the instrument. *Stampill v. Bullen*, 121 Ala. 250.

**542. 6. Place for Name of Grantor Left Blank.** — *Larson v. Elsner*, 93 Minn. 303; *Bennett v. Pierce*, 45 W. Va. 654.

**544. 1. Certificate Must Show that Grantor Was Known to Officer** — *Alabama.* — *Penny v. British, etc., Mortg. Co.*, 132 Ala. 357; *Davidson v. Alabama Iron, etc., Co.*, 109 Ala. 383.

*Illinois.* — *Martin v. Hargardine*, 46 Ill. 322.

*Minnesota.* — *Cone v. Nimocks*, 78 Minn. 249; *Bennett v. Knowles*, 66 Minn. 4.

*Missouri.* — *State v. Ryland*, 163 Mo. 280; *Riehl v. Noel*, 89 Mo. App. 178.

*New York.* — *Johnston v. Granger*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 54; *Freedman v. Oppenheim*, 80 N. Y. App. Div. 487; *Paolillo v. Faber*, 56 N. Y. App. Div. 241; *Goddard v. Schmoll*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 381.

*South Dakota.* — *Holt v. Metropolitan Trust Co.*, 11 S. Dak. 456.

*Tennessee.* — *Powers v. Goins*, (Tenn. Ch. 1895) 35 S. W. Rep. 902.

*Texas.* — *Beitell v. Wagner*, 11 Tex. Civ. App. 365; *Lindley v. Lindley*, 92 Tex. 446; *Hines v. Lumpkin*, 19 Tex. Civ. App. 556; *Hurst v. Finley*, 22 Tex. Civ. App. 605; *Davidson v. Wallingford*, 88 Tex. 619; *Adams v. Pardue*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1015; *McAnulty v. Ellison*, (Tex. Civ. App. 1903) 71 S. W. Rep. 670.

*Utah.* — *Deseret Nat. Bank v. Kidman*, 25 Utah 379, 95 Am. St. Rep. 856.

**Identity May Be Gotten by Comparison of Deed and Certificate.** — *Frederick v. Wilcox*, 119 Ala. 355, 72 Am. St. Rep. 925.

**Where the Officer of a Corporation Is a Trustee** in whom is vested the legal title to the corporate property, the certificate need not show that the certifying officer knows such person to be the officer described. It is sufficient that he knows him to be the person executing the instrument. *Thomas v. Wilcox*, (S. Dak. 1904) 101 N. W. Rep. 1072.

**545. 2. Personal Acquaintance Shown by Implication.** — *Deseret Nat. Bank v. Kidman*, 25 Utah 379, 95 Am. St. Rep. 856.

**546. 2. Recital that Officer Is "Satisfied" as to Identity of Grantor.** — *Riehl v. Noel*, 89 Mo. App. 178; *Rogers v. Pell*, 47 N. Y. App. Div. 240, affirmed 168 N. Y. 587.

**3. What Amounts to Personal Acquaintance.** — See *Bidwell v. Sullivan*, (Supm. Ct. App. Div.) 4 N. Y. Annot. Cas. 161.

**5. Deed May Be Read to Supply Deficiencies in Certificate.** — *Frederick v. Wilcox*, 119 Ala. 355, 72 Am. St. Rep. 925; *Bennett v. Knowles*, 66 Minn. 4; *Mosier v. Momsen*, 13 Okla. 41; *Dahlem's Estate*, 175 Pa. St. 454, 52 Am. St. Rep. 848; *Banner v. Rosser*, 96 Va. 238.

**547. 1. Obvious Clerical Errors Will Not Invalidate Certificate.** — *Rogers v. Pell*, 47 N. Y. App. Div. 240, affirmed 168 N. Y. 587; *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729; *Garton v. Hudson-Kimberly Pub. Co.*, 8 Okla. 631, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 547. See also *Geil v. Geil*, 101 Va. 773.

**Immaterial Mistakes.** — "John B." for "James B." was an immaterial clerical error. *Kentucky Land, etc., Co. v. Crabtree*, 113 Ky. 922.

**550.** See note 1.

**551.** *c.* PAROL EVIDENCE NOT ADMISSIBLE. — See note 1.

**552.** *d.* SURPLUSAGE. — See note 2.

**553.** 4. Amendment — *a.* BY THE OFFICER. — See note 1.

**554.** See note 1.

*b.* BY THE COURT. — See notes 2, 4.

**555.** 5. Liability of Officer for False Certificate. — See note 1.

6. Certificate as Evidence — *a.* GENERALLY — Evidence of Execution and Acknowledgment of Deed. — See note 2.

"Restraint" instead of "constraint" does not prevent probate. *Mullens v. Big Creek Gap Coal, etc., Co.*, (Tenn. Ch. 1895) 35 S. W. Rep. 439.

"The severally executed" for "they severally executed," and the omission of "it" after "retract," are immaterial. *Montgomery v. Hornberger*, 16 Tex. Civ. App. 28.

**547.** 2. Omissions Not Fatal. — "She does not wish to retract said execution," when omitted, is not fatal where there is substantial compliance. *Northwestern, etc., Hypotheek Bank v. Berry*, 89 Fed. Rep. 408.

"They" being omitted before "executed the same" does not invalidate the certificate. *Tew v. Henderson*, 116 Ala. 545.

Omission of the name of the person acknowledging the certificate is not fatal. *Larson v. Elsner*, 93 Minn. 303.

"Residing within the country" when omitted did not invalidate an acknowledgment. *Jordan v. Underhill*, 91 N. Y. App. Div. 124.

"Their" before "free and voluntary act" is not a fatal omission. *Garton v. Hudson-Kimberly Pub. Co.*, 8 Okla. 631.

"Voluntary." See *Mosier v. Momsen*, 13 Okla. 41.

"She" was omitted before "had executed" and was not a fatal omission. *Johnson v. Thompson*, (Tex. Civ. App. 1898) 50 S. W. Rep. 1055.

The first name of the wife being omitted will not vitiate the acknowledgment where it appears that she was the wife. *Noel v. Clark*, 25 Tex. Civ. App. 136.

"And acknowledged the same to be her act" was omitted but was not fatal. *Geil v. Geil*, 101 Va. 773.

"Separate and apart from her husband" being omitted did not vitiate the acknowledgment. *Adams v. Smith*, 11 Wyo. 200.

**Fatal Omissions.** — The following omissions are fatal: "Understandingly," "and for the purposes therein expressed." *Roulston v. Darby*, (Tenn. Ch. 1898) 52 S. W. Rep. 318.

**550.** 1. Expressions Not Equivalent. — "Without fear or compulsion from any person," will not do instead of "without constraint from her husband and for the purposes therein expressed." *Cox v. Railway Bldg., etc., Assoc.*, 101 Tenn. 490.

**551.** 1. Defective Certificates Cannot Be Aided by Parol. — *Solt v. Anderson*, (Neb. 1904) 99 N. W. Rep. 678. Compare *Rogers v. Pell*, 47 N. Y. App. Div. 240, affirmed 168 N. Y. 587.

**552.** 2. Surplusage May Be Rejected. — *Adams v. Pardue*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1015; *Lindley v. Lindley*, (Tex. Civ. App. 1899) 50 S. W. Rep. 159.

**553.** 1. In Delaware it is held that, where

there is no bad faith, the officer has a perfect right to supply any clerical omission, such as a statement that the parties were personally known to him. *Hanson v. Cochran*, 9 Houst. (Del.) 184.

**554.** 1. Requirement Mandatory. — The requirement of Code Tenn., § 2082, that the officer shall make "oath in open court to the truth of such correction" is mandatory, and the burden of showing compliance therewith is on those who seek the benefit of the corrected certificate. Therefore a finding of court in regard to such a correction, which fails to show that the oath was made "in open court" and that the officer swore "to the truth of the correction," does not show a compliance with the statute. *Madden v. Mason*, 106 Tenn. 194.

2. *Bexar Bldg., etc., Assoc. v. Heady*, 21 Tex. Civ. App. 154.

4. *Idaho.* — Civ. Code Idaho, title 6 of chapter 3, empowers the District Court to amend an instrument when the certificate is defective and the acknowledgment itself was good. *Bunnell, etc., Invest. Co. v. Curtis*, 5 Idaho 652.

**555.** 1. *Samuels v. Brand*, 82 S. W. Rep. 977, 26 Ky. L. Rep. 943.

**Notary Liable for False Certificate.** — *State v. Ryland*, 163 Mo. 280; *State v. Balmer*, 77 Mo. App. 463.

**Duty to Know Truth of Facts Certified.** — See *State v. Grundon*, 90 Mo. App. 266.

**Deputy's Certificate a Forgery.** — A clerk is liable for certifying to a forged certificate purporting to have been taken before his deputy. *Samuels v. Brand*, (Ky. 1904) 82 S. W. Rep. 977.

**If an Officer Wilfully Certifies Falsely He Is Guilty of Felony.** — *Albany County Sav. Bank v. McCarty*, 149 N. Y. 82.

2. **Certificate Evidence of Execution of Deed** — *Alabama.* — *Jones v. State*, 113 Ala. 95; *McClendon v. Equitable Mortg. Co.*, 122 Ala. 384.

*Georgia.* — *Long v. Powell*, 120 Ga. 621.

*Idaho.* — *Hailey First Nat. Bank v. Glenn*, (Idaho 1904) 77 Pac. Rep. 623.

*Illinois.* — *Hawes v. Hawes*, 177 Ill. 409; *Ramsay v. People*, 197 Ill. 594.

*Iowa.* — *Swett v. Large*, 122 Iowa 267.

*Kansas.* — *Andrews v. Reed*, (Kan. 1897) 48 Pac. Rep. 29.

*Michigan.* — *Shelden v. Freeman*, 116 Mich. 646.

*Minnesota.* — *Bennett v. Knowles*, 66 Minn. 4.

*Nebraska.* — *Horbach v. Tyrrell*, 48 Neb. 514.

*New York.* — *Albany County Sav. Bank v. McCarty*, 149 N. Y. 82.

**Acknowledgment of an Instrument Not Required to Be Recorded** is no evidence of execution. *Rutherford v. Rutherford*, (W. Va. 1904) 47 S. E. Rep. 240. And see the title RECORDING ACTS, 141.



**556.** *b. HOW FAR CONCLUSIVE — (2) View that Certificate Is Prima Facie Evidence Only.* — See note 2.

**557.** (3) *View that Certificate Is Conclusive in Absence of Fraud.* — See note 1.

**559.** (4) *Showing Want of Acknowledgment or Jurisdiction.* — See note 1.

**560.** See note 1.

(5) *Impeachment — Nature of Evidence Required.* — See note 2.

**561.** See notes 1, 3.

**Where Officer Not Authorized to Take Acknowledgment.** — An acknowledgment taken before an officer who has no authority to take it is without probative force. *Oppenheimer v. Giershofer*, 54 Ill. App. 38.

**556. 2. Certificate Prima Facie Evidence — Kansas.** — *Heaton v. Norton County State Bank*, 59 Kan. 281.

*Minnesota.* — *Bennett v. Knowles*, 66 Minn. 4; *Lennon v. White*, 61 Minn. 150.

*Missouri.* — *State v. Thompson*, 81 Mo. App. 549. *New York.* — *Bidwell v. Sullivan*, (Supm. Ct. App. Div.) 4 N. Y. Annot. Cas. 161; *Albany County Sav. Bank v. McCarty*, 149 N. Y. 82; *Kranichfelt v. Slattery*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 96.

*North Dakota.* — *Grandin v. Emmons*, 10 N. Dak. 223, 88 Am. St. Rep. 684.

**Missouri—Acknowledgments of Married Women.** — *Springfield Engine, etc., Co. v. Donovan*, 147 Mo. 622.

**557. 1. Certificate Conclusive in Absence of Fraud.** — *American Freehold Land Mortg. Co. v. Thornton*, 108 Ala. 258, 54 Am. St. Rep. 148; *Brady v. Cole*, 164 Ill. 116; *Lemmon v. Hutchins*, 1 Ohio Cir. Dec. 217; *Carr v. H. C. Frick Coke Co.*, 170 Pa. St. 62; *Brand v. Colorado Salt Co.*, 30 Tex. Civ. App. 458.

*Kentucky.* — *Hall v. Hall*, 82 S. W. Rep. 269, 26 Ky. L. Rep. 553; *Godsey v. Virginia Iron, etc., Co.*, 82 S. W. Rep. 386, 26 Ky. L. Rep. 657.

**North Carolina — When Not Voidable for Fraud.** — Under Laws N. Car., 1889, p. 383, c. 389, a married woman's acknowledgment cannot be avoided on the ground of its procurement by fraud, duress, or undue influence, unless the grantee had notice of or participated in the same. *Marsh v. Griffin*, 136 N. Car. 333.

*Tennessee.* — *Burem v. Winstead*, 103 Tenn. 285.

**559. 1. Want of Acknowledgment May Be Shown.** — *Marden v. Dorthy*, 12 N. Y. App. Div. 195, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 558.

**Wife Denying Execution of Deed.** — See *Spivey v. Rose*, 120 N. Car. 163.

**Estoppel—Married Women.** — A married woman who signed a conveyance under duress, but who appeared and properly acknowledged, may not plead that she acknowledged under duress. *Hall v. Hall*, 82 S. W. Rep. 269, 26 Ky. L. Rep. 553.

**560. 1. Want of Jurisdiction.** — Where an officer had no jurisdiction, the fact may be shown by parol. *Cheney v. Nathan*, 110 Ala. 254, 55 Am. St. Rep. 26.

A certificate correct on its face may be impeached by parol evidence of want of jurisdiction. *New England Mortg. Security Co. v. Payne*, 107 Ala. 578.

**2. Evidence to Impeach Certificate Must Be Clear**

**and Convincing — Idaho.** — *Northwestern, etc., Hypotheek Bank v. Rauch*, 5 Idaho 752, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 560; *Gray v. Law*, 6 Idaho 559, 96 Am. St. Rep. 280.

*Illinois.* — *Brady v. Cole*, 164 Ill. 116; *Dickerson v. Gritten*, 103 Ill. App. 351, affirmed *Gritten v. Dickerson*, 202 Ill. 372.

*Michigan.* — *Saginaw Bldg., etc., Assoc. v. Tennant*, 111 Mich. 515.

*Missouri.* — *Springfield Engine, etc., Co. v. Donovan*, 147 Mo. 622.

*Nebraska.* — *Council Bluffs Sav. Bank v. Smith*, 59 Neb. 90, 80 Am. St. Rep. 669; *Davis v. Kelly*, 62 Neb. 642; *Banking House v. Stewart*, (Neb. 1904) 98 N. W. Rep. 34; *McGuire v. Wilson*, (Neb. 1904) 99 N. W. Rep. 244; *Marden v. Dorthy*, 12 N. Y. App. Div. 188, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 560.

*New York.* — *Bennett v. Edgar*, (County Ct.) 46 Misc. (N. Y.) 231.

*North Carolina.* — *Nimocks v. McIntyre*, 120 N. Car. 325; *Spivey v. Rose*, 120 N. Car. 163.

*Ohio.* — *Eagles v. Tanner*, 11 Ohio Cir. Dec. 172, 20 Ohio Cir. Ct. 86.

*Pennsylvania.* — *Lowen's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 275.

*South Dakota.* — *Northwestern Loan, etc., Co. v. Jonasen*, 11 S. Dak. 566.

*Tennessee.* — *Ronner v. Welcker*, 99 Tenn. 627, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 560; *Thompson v. Southern Bldg., etc., Assoc.*, (Tenn. Ch. 1896) 37 S. W. Rep. 704.

*Wisconsin.* — *German Bank v. Muth*, 96 Wis. 342.

*Wyoming.* — *Adams v. Smith*, 11 Wyo. 200, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 560.

**561. 1. Mere Preponderance of Evidence Insufficient to Impeach Certificate.** — *Gritten v. Dickerson*, 202 Ill. 378, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 560-561; *Boldt v. Becker*, (Neb. 1901) 95 N. W. Rep. 509; *McGuire v. Wilson*, (Neb. 1904) 99 N. W. Rep. 244; *Bennett v. Edgar*, (County Ct.) 46 Misc. (N. Y.) 231; *Northwestern Loan, etc., Co. v. Jonasen*, 11 S. Dak. 566.

**3. Certificate Will Stand Against Unsupported Testimony of Grantor — Alabama.** — *Read v. Rowan*, 107 Ala. 366.

*Florida.* — *Holland v. Webster*, 43 Fla. 85.

*Idaho.* — *Gray v. Law*, 6 Idaho 559, 96 Am. St. Rep. 280.

*Illinois.* — *Dickerson v. Gritten*, 103 Ill. App. 351, affirmed 202 Ill. 372; *Sassenberg v. Huseman*, 182 Ill. 341; *Fisher v. Stiefel*, 62 Ill. App. 580; *O'Donnell v. Kelliher*, 62 Ill. App. 641; *Tuschinski v. Metropolitan West Side El. R. Co.*, 176 Ill. 420; *Davis v. Howard*, 172 Ill. 340.

*Minnesota.* — *Goulet v. Dubreuil*, 84 Minn. 76, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 561.

**561.** Burden of Proof. — See notes 4, 5.

**562.** Officer as Witness. — See notes 1, 2, 3.

**VIII. CURING DEFECTIVE ACKNOWLEDGMENTS — 1. By Subsequent Acknowledgment — a. IN GENERAL.** — See note 4.

**563.** See notes 2, 3.

**b. RATIFICATION BY WIDOW.** — See notes 5, 8.

**564.** **c. FRAUDULENT ACKNOWLEDGMENT.** — See note 1.

**2. By Statute — a. GENERALLY.** — See note 2.

*Nebraska.* — Council Bluffs Sav. Bank v. Smith, 59 Neb. 90, 80 Am. St. Rep. 669; Morris v. Linton, 61 Neb. 537.

*North Dakota.* — McCardia v. Billings, 10 N. Dak. 380, 88 Am. St. Rep. 729, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 561.

*Tennessee.* — Shell v. Holston Nat. Bldg., etc., Assoc., (Tenn. Ch. 1899) 52 S. W. Rep. 909; Ronner v. Welcker, 99 Tenn. 623; Kennedy v. Security Bldg., etc., Assoc., (Tenn. Ch. 1900) 57 S. W. Rep. 388; Thompson v. Southern Bldg., etc., Assoc., (Tenn. Ch. 1896) 37 S. W. Rep. 704.

*Texas.* — Henke v. Stacy, 25 Tex. Civ. App. 272; Atkinson v. Reed, (Tex. Civ. App. 1898) 49 S. W. Rep. 260; Summers v. Sheern, (Tex. Civ. App. 1896) 37 S. W. Rep. 246.

*Washington.* — Western Loan, etc., Co. v. Waisman, 32 Wash. 644.

*Wyoming.* — Adams v. Smith, 11 Wyo. 200, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 561.

**Slight Corroboration Is Not Sufficient.** — Brady v. Cole, 164 Ill. 116.

**561. 4. Certificate Presumed Correct.** — Cochran v. Linville Imp. Co., 127 N. Car. 393; Summers v. Sheern, (Tex. Civ. App. 1896) 37 S. W. Rep. 246; Linton v. National L. Ins. Co., 104 Fed. Rep. 584, 44 C. C. A. 54.

**5. Burden of Proof.** — People v. Cogswell, 113 Cal. 129; Langenbeck v. Louis, 110 Cal. 406; Lennon v. White, 61 Minn. 150; McCardia v. Billings, 10 N. Dak. 373, 88 Am. St. Rep. 729; Northwestern Loan, etc., Co. v. Jonases, 11 S. Dak. 566; Adams v. Smith, 11 Wyo. 200.

**562. 1. Officer as Witness.** — Hailey First Nat. Bank v. Glenn, (Idaho 1904) 77 Pac. Rep. 623; Northwestern, etc., Hypotheek Bank v. Rauch, 5 Idaho 752; Holden v. Brimage, 72 Miss. 228. But an officer's statements made out of court may be used to impeach the validity of a certificate. Kranichfelt v. Slattery, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 96.

**Deputy's Certificate — Forgery.** — A clerk may not impeach his own certificate that a forged acknowledgment purporting to have been taken before his deputy is genuine. Samuels v. Brand, (Ky. 1904) 82 S. W. Rep. 977.

**2. McCurley v. Pitner,** 65 Ill. App. 17; Heaton v. Norton County State Bank, 59 Kan. 281; Ronner v. Welcker, 99 Tenn. 623.

**3. Officer May Testify in Favor of Certificate.** — Northwestern, etc., Hypotheek Bank v. Rauch, 5 Idaho 752; Brady v. Cole, 164 Ill. 116; Brooks v. Hunt, 82 S. W. Rep. 296, 26 Ky. L. Rep. 608; Interstate Bldg., etc., Assoc. v. Goforth, 94 Tex. 259; Cassidy v. Scottish-American Mortg. Co., 27 Tex. Civ. App. 211.

**4. Defective Acknowledgment Cured by Reacknowledgment.** — Brady v. Cole, 164 Ill. 116;

Masterson v. Harris, (Tex. Civ. App. 1904) 83 S. W. Rep. 428.

**Effect of Second Mortgage with Correct Acknowledgment.** — Where a second mortgage, properly acknowledged, was given by husband and wife to secure the same debt as a previous mortgage, the acknowledgment of which was fatally defective as to the wife, it was held that the defect in the first mortgage did not affect the validity of the second. Brothers v. Harrison, (Tenn. Ch. 1897) 45 S. W. Rep. 446.

**563. 2. Defective Acknowledgment Cured by Separate Instrument.** — A defective acknowledgment of a mechanic's lien is not cured by a subsequent deed of trust reciting the inability of the grantors to pay off such lien, and that the lien was duly executed, acknowledged, and recorded, and stating that the deed of trust was given in consideration of an extension of time. In order for the deed of trust to cure the defective acknowledgment of the mechanic's lien it would be necessary for it to have such correction as its purpose and to purport to make such correction. Starnes v. Beitel, 20 Tex. Civ. App. 524.

**Where a Deed Is Corrected by a Decree of Court,** no reacknowledgment is necessary. Denison v. Gambill, 81 Ill. App. 170.

**3. An Instrument with a Forged Acknowledgment** cannot be ratified so as to defeat intervening rights. Finley v. Babb, 144 Mo. 403.

**5. Breitling v. Chester,** 88 Tex. 586, reversing (Tex. Civ. App. 1895) 30 S. W. Rep. 464, cited in the original note.

**8. Defective Acknowledgment Cured by Lapse of Time.** — See Cochran v. Linville Imp. Co., 127 N. Car. 393.

**564. 1. Fraudulent Acknowledgment Cannot Be Ratified.** — Finley v. Babb, 144 Mo. 403.

**2. Defective Acknowledgments Cured by Statute — United States.** — Evans v. Dickenson, 114 Fed. Rep. 284, 52 C. C. A. 170; Gratz v. Land, etc., Imp. Co., 82 Fed. Rep. 381, 53 U. S. App. 499.

*Arkansas.* — Williamson v. Lazarus, 66 Ark. 226; Bryan v. Bryan, 62 Ark. 79; Farmers' Sav., etc., Assoc. v. Berger, 70 Ark. 613, 69 S. W. Rep. 57; Seawell v. Dirst, 70 Ark. 166; Shirey v. Heath, 67 Ark. 617, 56 S. W. Rep. 1067; Muense v. Harper, 70 Ark. 309; Steers v. Kinsey, 68 Ark. 360.

*District of Columbia.* — Hevner v. Matthews, 4 App. Cas. (D. C.) 380.

*Indian Territory.* — McFadden v. Blocker, 2 Indian Ter. 272, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 564.

*Missouri.* — Williams v. Butterfield, 182 Mo. 181.

*North Carolina.* — Barrett v. Barrett, 120 N. Car. 127; McAllister v. Purcell, 124 N. Car. 262.

- 566.** See note 1.  
*b.* HOW FAR RETROACTIVE. — See note 2.  
*After Judgment.* — See note 4.  
**567.** *c.* CONSTITUTIONALITY OF CURING ACTS. — See notes 2, 3.  
**568.** See note 1.  
*d.* CURING ACTS CONSTRUED LIBERALLY. — See note 4  
**569.** 3. Proof by Subscribing Witnesses. — See note 1.  
**570.** ACQUIESCENCE. — See note 2.  
**571.** ACQUIRED. — See note 1.  
**572.** ACQUITTAL. — See note 1.  
**573.** ACQUITTED. — See note 1.  
**574.** ACROSS. — See note 2.  
**575.** ACT. — See note 2.

*Pennsylvania.* — New York, etc., Land Co. v. Weidner, 169 Pa. St. 359; Stewart v. Dampman, 4 Pa. Super. Ct. 540, 40 W. N. C. (Pa.) 227; Stewart v. Linton, 204 Pa. St. 207.

*Texas.* — Riviere v. Wilkens, 31 Tex. Civ. App. 454.

**566.** 1. McCelvey v. Cryer, 8 Tex. Civ. App. 437.

**2. Curing Acts Operate Retrospectively.** — McFadden v. Blocker, 2 Indian Ter. 272, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 566; Steger v. Traveling Men's Bldg., etc., Assoc., 208 Ill. 236, 100 Am. St. Rep. 225.

**4. Defects Cannot Be Cured After Judgment.** — Wright v. Graham, 42 Ark. 140.

**567.** 2. Curing Acts Constitutional. — Barrett v. Barrett, 120 N. Car. 127.

**3. Curing Acts Affect Mode of Proof Only.** — McFadden v. Blocker, 2 Indian Ter. 272, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 567.

**568.** 1. Curing Acts Void as to Vested Rights. — Fugman v. Jiri Washington Bldg., etc., Assoc., 209 Ill. 179, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 568; Aiken v. State, (Tex. Crim. 1901) 64 S. W. Rep. 57, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 568; Stewart v. Dampman, 4 Pa. Super. Ct. 540, 40 W. N. C. (Pa.) 227.

**4. Curing Acts Should Be Liberally Construed.** — Hevner v. Matthews, 4 App. Cas. (D. C.) 380; McCelvey v. Cryer, 8 Tex. Civ. App. 437.

**569.** 1. Proof Must Be Before County Clerk, Not Before a Notary. — McGuire v. Gallagher, 95 Tenn. 349.

**Proof — By Whom.** — Proof should be made by one or more of the subscribing witnesses. Schultz v. Tonty Lumber Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 353.

**570.** 2. Other Definitions. — See Cass County v. Blotner, 149 Ind. 116; New York L. Ins., etc., Co. v. Kane, 17 N. Y. App. Div. 542.

**Acquiescence Distinguished from Laches.** — De Hereu v. Hereu, (Ariz. 1899) 56 Pac. Rep. 871; Kenyon v. National L. Assoc., 39 N. Y. App. Div. 204.

**571.** 1. Land Obtained by Descent. — See Leflore County v. Allen, 80 Miss. 298.

**Acquired Jurisdiction.** — See U. S. v. Lee, 84 Fed. Rep. 626.

**Property Acquired in Business.** — Under a Mississippi statute providing that where a person transacts business without disclosing the name of his principal all the property *acquired*

shall be liable for debts, etc., the word *acquired* means "obtain," "procure," "to get as one's own," and covers the proceeds of an insurance policy on goods. Meridian Land, etc., Co. v. Ormond, 82 Miss. 758.

**572.** 1. People v. Lyman, 53 N. Y. App. Div. 473, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 572.

**573.** 1. People v. Lyman, 53 N. Y. App. Div. 473, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 573.

**574.** 2. In construing a state statute allowing the construction of a channel *across*, along, through, or upon the waters of a bay, the court said: "*Across* the waters of any bay would seem to warrant the locating of a channel in and through any bay in any direction. '*Across*, through, or upon' the waters of any bay certainly warrants a channel in any direction." Davis v. Port Arthur Channel, etc., Co., (C. C. A.) 87 Fed. Rep. 512.

**Under an Ordinance Prohibiting Trains from Remaining Across a Street** longer than a certain time it was held that a train the head end of which reached slightly into the street but did not obstruct travel thereon was not *across* the street within the ordinance. Crowley v. Chicago, etc., R. Co., (Wis. 1904) 99 N. W. Rep. 1016.

**575.** 2. "**An Act** is defined as 'that which is done or doing; the exercise of power, or the effect of which power exerted is the cause; a performance; a deed.' Webster. 'Something done or established.' Bouvier. \* \* \* This being true, when the indictment alleged that the persons accused prevented the sheriff from removing a prisoner from jail it alleged that such persons had committed an act; and, therefore, the demurrer, which simply raised the point that the indictment did not charge that an act had been committed, was not well taken." Green v. State, 109 Ga. 540.

**Whether "Act" Implies Intention.** — "In common usage and understanding the word *act* signifies something done voluntarily, or, in other words, the result of an exercise of the will." Per Justice Shiras in dissenting opinion, Wilson v. Nelson, 183 U. S. 191.

**"Act" Referring to Section of Statute — Synonymous with Article.** — See Owensboro Deposit Bank v. Daviess County, 102 Ky. 174.

**Act of Sale.** — By the civil law, in force in Louisiana, the common mode of making such conveyances was by an "*act of sale*," so called,

**577. ACTING.**— See note 1.

**ACTION.**— See notes 3, 4.

**578.** See notes 1, 2.

**579.** See note 1.

**583. [ACTIVE SERVICE.**— See note *a*.]

**ACTIVE TRUST.**— See note 1.

done before a notary, who wrote down in a record kept by him the agreement of the parties attested by witnesses. The record remained with him, but upon request he gave out authenticated copies thereof to the parties. Upon request, also, the notary delivered the record of the act of sale to the parish recorder to be recorded in his office. *Hodge v. Palms*, (C. C. A.) 117 Fed. Rep. 396.

**Act of Bankruptcy—Act of Insolvency.**— For definition of these phrases see the title INSOLVENCY AND BANKRUPTCY.

**577. 1. Acting Ticket Agent.**— A ticket agent in a union station was held an *acting* ticket agent within a statute providing for service of process on railroads. The court said: "The word *acting* must have been used in the statute for a purpose, and it seems to us that the essential thing under the statute is not the existence of a contract of service, but the actual performance of the duties of ticket agent for the railroad company." *Hillary v. Great Northern R. Co.*, 64 Minn. 361.

**3. Kennebec Water Dist. v. Waterville**, 96 Me. 234; *White v. Rio Grande Western R. Co.*, 25 Utah 348.

**4. Porter v. Ritch**, 70 Conn. 235; *Citizens St. R. Co. v. Shepherd*, 29 Ind. App. 412.

**Other Definitions.**— *Frost v. Witter*, 132 Cal. 426, quoting Bracton's definition given in one of the notes under this heading in original; *Berry v. Berry*, 147 Ind. 176, laying down definition set out from *People v. Judge*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 398, in original note.

*New York.*— *Matter of Atty.-Gen.*, 22 N. Y. App. Div. 285; *Newville First Nat. Bank v. Yates*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 373; *Losey v. Stanley*, 83 Hun (N. Y.) 420.

*California.*— *Matter of Joseph*, 118 Cal. 660.

*Ohio.*— *Missionary Soc. v. Ely*, 56 Ohio St. 405.

*South Carolina.*— *South Carolina, etc., R. Co. v. American Telephone, etc., Co.*, 63 S. Car. 199.

**578. 1. Lamson v. Hutchings**, (C. C. A.) 118 Fed. Rep. 321; *Frost v. Witter*, 132 Cal. 426; *Nylan v. Renhard*, 10 Colo. App. 46; *Kennebec Water Dist. v. Waterville*, 96 Me. 234; *Niantic Mills Co. v. Riverside, etc., Mills*, 19 R. I. 34; *Webb v. Allen*, 15 Tex. Civ. App. 605.

**2. Tilden v. Aitkin**, 37 N. Y. App. Div. 28; *Niantic Mills Co. v. Riverside, etc., Mills*, 19 R. I. 34.

**After Judgment—Execution.**— See *Ex p. Smith*, 134 N. Car. 495.

**Equity Proceedings.**— *Lamson v. Hutchings*, (C. C. A.) 118 Fed. Rep. 321; *Warren v. Providence Tool Co.*, 19 R. I. 657; *Dawes v. New York, etc., R. Co.*, 96 Va. 736.

**579. 1. An Application by an Executor or Administrator** for license to sell real property is not an "*action* in equity" within the purview of Code Civ. Pro. Neb., § 675. *Poessnecker v. Entenmann*, 64 Neb. 409.

**Arbitration.**— A proceeding in arbitration held an action. *Waterbury Blank Book Mfg. Co. v. Hurlburt*, 73 Conn. 715.

**Attachment.**— *Gibson v. Sidney*, 50 Neb. 12.

**Attorney's Lien.**— The phrase "*action* or proceeding" in which an attorney's lien is given is broad enough to include the prosecution of a claim before a county board. *Maloney v. Douglas County*, (Neb. 1902) 89 N. W. Rep. 248.

**Eminent Domain.**— *Kennebec Water Dist. v. Waterville*, 96 Me. 234; *South Carolina, etc., R. Co. v. American Telephone, etc., Co.*, 63 S. Car. 199. Compare *State v. Rowe*, 69 Ark. 642.

**Habeas Corpus.**— See *State v. Huegin*, 110 Wis. 189.

**Mandamus.**— *People v. Board of Trade*, 193 Ill. 577; *State v. Board of Trustees*, 121 Wis. 44.

**Mechanic's Lien.**— *Gee v. Torrey*, 77 Hun (N. Y.) 23.

**Petition for Location of Highway.**— *Grand Trunk R. Co. v. Cumberland County*, 88 Me. 225.

**Probate.**— A contract to revoke the probate of a will is not an action. *Matter of Joseph*, 118 Cal. 660. And see *Clough v. Clough*, 10 Colo. App. 433. But a demand for an allowance in probate is in the nature of an action at law and not reviewable. *MacDonald v. Tittmann*, 96 Mo. App. 536.

**Scire Facias** is not an action. *Sutton v. Cole*, 155 Mo. 206; *Bick v. Tanzey*, 181 Mo. 515.

**Foreclosure of Mortgage** not an action, see *Stevens v. Osgood*, (S. Dak. 1904) 100 N. W. Rep. 161.

**583. a. Militia ordered into active service** for military instruction in camp are not in *active service* within the meaning of a *Kentucky* statute providing that commissioned officers shall be entitled to certain pay when employed in *active service*. *Bryant v. Brown*, 98 Ky. 211.

**1. Flaherty v. O'Connor**, 24 R. I. 587.

# ACT OF GOD.

By J. E. BRADY.

**584. I. DEFINITIONS** — Lord Mansfield's Definition. — See note 3.

**585.** Other Definitions. — See note 1.

**586.** See note 1.

**587.** [Act of God an Affirmative Defense. — See note 1a.]

**588. II. THE EXPRESSIONS "INEVITABLE ACCIDENT" AND "PERILS OR DANGERS OF THE SEA OR RIVER" CONSIDERED** — "Perils of the Sea" and "Act of God" Distinguished. — See note 1.

## III. ACT OF GOD AS AFFECTING THE PERFORMANCE OF CONTRACTS —

1. Obligation Imposed by Express Contract — a. IN GENERAL. — See note 2.

**589.** Destruction of Premises — Covenant to Repair. — See note 2.

**584. 3. Occurrences Which Might Have Been Anticipated** — *Flood*. — Mississippi River Logging Co. v. Robson, 69 Fed. Rep. 773, 32 U. S. App. 520.

*Low Water*. — Smith v. North American Transp., etc., Co., 20 Wash. 580.

*Ice*. — That the course of a vessel was blocked by ice cannot be regarded as an act of God. Bullock v. White Star Steamship Co., 30 Wash. 448.

*Snowstorm*. — Jones v. Minneapolis, etc., R. Co., 91 Minn. 229; International, etc., R. Co. v. Bergman, (Tex. Civ. App. 1901) 64 S. W. Rep. 999; Herring v. Chesapeake, etc., R. Co., 101 Va. 778.

**585. 1.** Wald v. Pittsburg, etc., R. Co., 162 Ill. 545.

**Chancellor Kent's Definition**. — The act of God means "inevitable accident, without the intervention of man and public enemies." The *Majestic*, 166 U. S. 375; Sonneborn v. Southern R. Co., 65 S. Car. 502.

**A Fall of Dew**, causing delay in the running of a train on which cattle had been shipped, is not such an act of God as to relieve the carrier from liability for delay in transportation. Missouri, etc., R. Co. v. Truskett, 2 Indian Ter. 633.

**586. 1. Unusual Wind Storm**. — See Olsen v. Meyer, 46 Neb. 240.

**Whirlwind**. — A whirlwind was held to be an act of God, where a storm of similar nature had never before occurred in the particular locality of the accident. Gulf, etc., R. Co. v. Compton, (Tex. Civ. App. 1896) 38 S. W. Rep. 220.

**Damage by the Elements** is construed as synonymous with the term "act of God." Pope v. Farmers' Union, etc., Co., 130 Cal. 139.

**The Johnstown Flood** was held properly described as an act of God. Wald v. Pittsburg, etc., R. Co., 162 Ill. 545.

**587. 1a. Act of God an Affirmative Defense**. — "Act of God" is a defense to an action, and must be pleaded as such. Orient Ins. Co. v. Northern Pac. R. Co., (Mont. 1905) 78 Pac. Rep. 1036.

**588. 1. "Perils of the Sea** denote natural accidents peculiar to that element, which do not

happen by the intervention of man, nor are to be prevented by human prudence." The *Majestic*, 166 U. S. 375.

**2. No Defense in Case of Express Contract** — *England*. — Hayward v. Daniel, 91 L. T. N. S. 319.

*United States*. — Phoenix Bridge Co. v. U. S., 38 Ct. Cl. 492.

*Indiana*. — Krause v. Crothersville, 162 Ind. 278, 102 Am. St. Rep. 203.

*Michigan*. — Mason v. Wierengo, 113 Mich. 152, 67 Am. St. Rep. 461, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 588.

*Minnesota*. — Dow v. State Bank, 88 Minn. 363.

*Mississippi*. — Cox v. Martin, 75 Miss. 229, 65 Am. St. Rep. 604.

*New Jersey*. — Middlesex Water Co. v. Knappmann Whiting Co., 64 N. J. L. 251, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 588.

*Oregon*. — Anderson v. Adams, 43 Oregon 630, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 588.

*Pennsylvania*. — Dixon v. Breon, 22 Pa. Super. Ct. 340.

*Texas*. — Gulf, etc., R. Co. v. Darby, 28 Tex. Civ. App. 229.

*Washington*. — "An act of God, to relieve from performance of a contract, must be such as reasonable prudence and foresight could not have guarded against." Bullock v. White Star Steamship Co., 30 Wash. 448.

*Wisconsin*. — Comstock v. Fraternal Accident Assoc., 116 Wis. 382, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 382; Newell v. New Holstein Canning Co., 119 Wis. 641.

**Where the Defendant Is Guilty of a Breach of His Contract** and his performance would have avoided any loss, the fact that the loss was due to the act of God is no defense. Holt Mfg. Co. v. Thornton, 136 Cal. 232.

**589. 2. Violent Rain Storm**. — Where the premises were damaged by an unusually terrific tempest the landlord was not liable for the damage done to the plaintiff's goods, it not being shown that notice of the damage was given and that the defendant negligently failed to make the proper repairs. Brunswick Grocery Co. v. Spencer, 97 Ga. 764.

**590. One of Two Alternative Obligations.** — See note 1.

Reason of Rule. — See notes 2, 3, 4.

*b. WHERE THE CONTRACT HAS REFERENCE TO THE CONTINUED EXISTENCE OF A PARTICULAR PERSON OR THING* — Rule Stated — Subsequent Death of Person or Destruction of Thing Discharges Obligation. — See note 5.

**591.** To Illustrate. — See note 1.**592.** 2. Obligation Implied by Law. — See note 4:

**593. IV. ACT OF GOD AS AFFECTING THE LIABILITY OF COMMON CARRIERS** — 1. Upon Their Contracts as Insurers — *a. IN GENERAL* — Rule Stated. — See note 1.

**594.** Act of God Must Be Proximate Cause. — See note 1.**595.** When Act of God the Remote or Indirect Cause. — See note 2.

Act of God Only One of Several Causes. — See note 3.

*b. NEGLIGENCE OF CARRIER AS A CO-OPERATIVE CAUSE* — Carrier Not Exempted. — See note 4.

**590.** 1. See *Board of Education v. Townsend*, 63 Ohio St. 525.

2. *Middlesex Water Co. v. Knappmann Whitting Co.*, 64 N. J. L. 251, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590; *Newell v. New Holstein Canning Co.*, 119 Wis. 641.

3. *Middlesex Water Co. v. Knappmann Whitting Co.*, 64 N. J. L. 251, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590.

4. *Middlesex Water Co. v. Knappmann Whitting Co.*, 64 N. J. L. 251; *Newell v. New Holstein Canning Co.*, 119 Wis. 641, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590.

5. *Contract Dependent upon Continued Existence of Subject-matter* — *England*. — *Nickoll v. Ashton*, (1901) 2 K. B. 126.

*Illinois*. — *Mecartney v. Carbine*, 108 Ill. App. 286, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590; *Siegel v. Eaton, etc., Co.*, 165 Ill. 550.

*Indiana*. — *Krause v. Crothersville*, 162 Ind. 278, 102 Am. St. Rep. 203.

*Michigan*. — *Mason v. Wierengo*, 113 Mich. 152, 67 Am. St. Rep. 461, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 588-592.

*Minnesota*. — *Dow v. State Bank*, 88 Minn. 363, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590.

*Mississippi*. — See *Cox v. Martin*, 75 Miss. 229, 65 Am. St. Rep. 604.

*Ohio*. — *Board of Education v. Townsend*, 63 Ohio St. 525, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590; *Board of Education v. Townsend*, 8 Ohio Cir. Dec. 732, 15 Ohio Cir. Ct. 674.

*Oregon*. — *Anderson v. Adams*, 43 Oregon 630.

*Pennsylvania*. — *Dixon v. Breon*, 22 Pa. Super. Ct. 348, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590.

**591.** 1. See *Krause v. Crothersville*, 162 Ind. 278, 102 Am. St. Rep. 203.

**592.** 4. *Phoenix Bridge Co. v. U. S.*, 38 Ct. Cl. 492; *Sharp v. Cincinnati*, 26 Ohio Cir. Ct. 59, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 592.

**593.** 1. *Carrier Exonerated When Loss Results from Act of God*. — *Wald v. Pittsburg, etc., R. Co.*, 162 Ill. 545, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 592; *Jones v. Minneapolis, etc., R. Co.*, 91 Minn. 229; *Sonneborn v. Southern R. Co.*, 65 S. Car. 502; *Gulf, etc.,*

*R. Co. v. Compton*, (Tex. Civ. App. 1896) 38 S. W. Rep. 220; *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778; *Smith v. North American Transp., etc., Co.*, 20 Wash. 580. See also *Reed v. Wilmington Steamboat Co.*, 1 Marv. (Del.) 193; *Farley v. Lavery*, 107 Ky. 523; *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665.

**Sufficient Excuse.** — To liberate a railroad company from its obligation to pay for goods damaged or lost in transit from a flood it must appear that the flood was unprecedented. It is not sufficient that it was of an extraordinary or unusual character. *Missouri, etc., R. Co. v. Davidson*, 25 Tex. Civ. App. 134.

**What Constitutes an Act of God** — A Question of Law. — *Southern Pac. R. Co. v. Schoer*, 114 Fed. Rep. 466, 52 C. C. A. 268.

**594.** 1. *Carrier Exonerated Only When Loss Is Due Directly to Act of God*. — *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778.

In Texas it was held that a carrier was not liable for the loss of goods in a storm properly defined as an act of God, although the property could have been delivered before the storm began. The injury was not shown to have been the proximate result of the delay to deliver. *International, etc., R. Co. v. Bergman*, (Tex. Civ. App. 1901) 64 S. W. Rep. 999; *Gulf, etc., R. Co. v. Darby*, 28 Tex. Civ. App. 229.

**595.** 2. See *Wald v. Pittsburg, etc., R. Co.*, 162 Ill. 545.

3. **Failure to Exercise Due Diligence.** — Where the injury to the plaintiff resulted from a collision caused by freight cars being driven by a violent storm from a side track on the main line, and it is shown that the accident might have been averted by the use of proper diligence in flagging the train on which the plaintiff was a passenger, the company cannot defend on the ground that injury was due to an act of God. *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579.

4. *Southern Pac. R. Co. v. Schoer*, 114 Fed. Rep. 466, 52 C. C. A. 268; *Savannah, etc., R. Co. v. Commercial Guano Co.*, 103 Ga. 590; *Jones v. Minneapolis, etc., R. Co.*, 91 Minn. 229; *Sonneborn v. Southern R. Co.*, 65 S. Car. 502; *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579; *Smith v. North American Transp., etc., Co.*, 20 Wash. 580.

**596.** See note 1.

**597.** Qualification of Rule. — See note 1.

*c.* BURDEN OF PROOF — Burden upon Carrier to Show that Loss Was Occasioned by Act of God. — See note 2.

Whether Carrier Must Show Affirmatively the Absence of Negligence. — See note 3.

**598.** 2. Upon Their Contracts to Deliver Within a Reasonable Time — Law Implies Promise to Deliver Within Reasonable Time. — See note 2.

**599.** How Excused by Act of God. — See note 1.

IV. ACT OF GOD AS AFFECTING THE PERFORMANCE OF CONDITIONS —

1. Conditions Precedent. — See note 4.

**601. ACT OF INSOLVENCY.** — See note 1.

**ACTUAL — ACTUALLY.** — See note 2.

**596.** 1. Delay as Co-operative Negligence. — *Wald v. Pittsburg, etc.*, R. Co., 162 Ill. 545, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 596; *Savannah, etc.*, R. Co. *v.* Commercial Guano Co., 103 Ga. 590.

**597.** 1. See *Wald v. Pittsburg, etc.*, R. Co., 162 Ill. 545.

2. The Majestic, 166 U. S. 375; *Sonneborn v. Southern R. Co.*, 65 S. Car. 502; *Nashville, etc.*, R. Co. *v.* Stone, (Tenn. 1904) 79 S. W. Rep. 1031.

3. *Jones v. Minneapolis, etc.*, R. Co., 91 Minn. 229.

**598.** 2. *International, etc.*, R. Co. *v.* Bergman, (Tex. Civ. App. 1901) 64 S. W. Rep. 999.

**599.** 1. See *International, etc.*, R. Co. *v.* Bergman, (Tex. Civ. App. 1901) 64 S. W. Rep. 999.

Delay Caused by Fall of Dew is not excusable as being the result of an act of God. *Missouri, etc.*, R. Co. *v.* Truskett, 2 Indian Ter. 633.

4. Implied Condition. — Where there is an implied condition that the parties to a contract shall meet for the purpose of assessing the value of the subject-matter of the contract, the contract is terminated by the death of one of the parties rendering the valuation impossible. *Preston v. Smith*, 67 Ill. App. 613.

**601.** 1. *National Bank Act.* — *Hayden v. Chemical Nat. Bank*, (C. C. A.) 84 Fed. Rep. 876.

2. *Appleby v. Horseley Co.*, (1899) 2 Q. B. 526; *Kelly v. Supreme Council, etc.*, 46 N. Y. App. Div. 79.

**Actual Agency.** — "Agency is *actual* when the agent is really employed by the principal." *Rev. Codes N. Dak.*, § 4307; *Fargo First Nat. Bank v. Minneapolis, etc.*, *Elevator Co.*, 11 N. Dak. 280.

**Actual Bias.** — *Huntley v. Territory*, 7 Okla. 60; *State v. Haworth*, 24 Utah 398; *State v. Stentz*, 30 Wash. 134.

**Actual Change of Possession.** — *Walters v. Ratliff*, 10 Okla. 262; *Swartzburg v. Dickerson*, 12 Okla. 566.

*In Chattel Mortgages.* — See *Randolph v. Brown*, 21 Tex. Civ. App. 617.

**Actual Cost — Altering Grade Crossings.** — *Actual* cost means real cost as distinguished, amongst other things, from estimated cost. *Newton, Petitioner*, 172 Mass. 10. See also *Old Colony R. Co., Petitioner*, 185 Mass. 160.

**Actual Damages.** — See *Osborn v. Leach*, 135 N. Car. 634, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 602.

**Actual Damages** are such as are compensatory only. *Lord v. Wood*, 120 Iowa 303. And see *Western Union Tel. Co. v. Lawson*, 66 Kan. 660; *Oliver v. Columbia, etc.*, R. Co., 65 S. Car. 1; *Gatzow v. Buening*, 106 Wis. 1.

**Actual Eviction.** — See the title *EVICTON*.

**Actual Fraud.** — "Fraud" is a word of serious import in the law, but, where the word *actual* is placed in conjunction with it, it is far more serious. *Singleton v. Singleton*, 60 S. Car. 231; *Brown v. Newell*, 64 S. Car. 27.

**Distinguished from Constructive Fraud.** — See *Massachusetts Ben. L. Assoc. v. Robinson*, 104 Ga. 256; *Forker v. Brown*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 161.

**Actual Malice.** — See the titles *LIBEL AND SLANDER*; *MALICE*.

**Actual Notice.** — *Schnavely v. Bishop*, 8 Kan. App. 301; *Spinney v. Spinney*, 87 Me. 484; *Hurley v. Bowdoinham*, 88 Me. 293; *Thomas v. Flint*, 123 Mich. 10; *Johnson v. Fluetsch*, 176 Mo. 452; *Clark v. Lambert*, (W. Va. 1894) 47 S. E. Rep. 312; *Henry C. Werner Co. v. Calhoun*, (W. Va. 1894) 55 W. Va. 246.

**Actual Notice and Actual Knowledge — Distinguished in Bankruptcy Proceedings.** — See *Jones v. Walter*, 115 Ky. 556; *Fields v. Rust*, (Tex. Civ. App. 1904) 82 S. W. Rep. 331.

**Actual Occupancy.** — *Cutting v. Patterson*, 82 Minn. 375; *People v. Kelsey*, 96 N. Y. App. Div. 148.

- *Actual Occupation.* — *Edwards v. Begole*, (C. C. A.) 121 Fed. Rep. 1.

**Actual Residence Distinguished from Legal Residence.** — *Ludlow v. Szold*, 90 Iowa 175.

**Actual Seizin.** — *Carr v. Anderson*, 6 N. Y. App. Div. 10.

**Actually in Session.** — See *dissenting* op nion in *U. S. v. Finnell*, 185 U. S. 246.

**Actual Settler — Purchaser of School Land.** — *Hardman v. Crawford*, 95 Tex. 193, *following* *Busk v. Lowrie*, 86 Tex. 128.

**Actual Value.** — *People v. Feitner*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 204.

**Actual Cash Value — Insurance.** — *Conness v. Indiana, etc.*, R. Co., 193 Ill. 464.

**Actual Market Value.** — See *Francis v. Milion*, (Ky. 1904) 80 S. W. Rep. 486.

**Actual Use.** — *Philadelphia v. Barber*, 160 Pa. St. 123.

**608. ADD.** — See note 1.

**ADDITION — ADDITIONAL.** — See note 2.

**609. ADDRESS OF LETTERS.** — See note 1.

**Actual Use or Occupation — English Factory and Workshop Act.** — See *Weavings v. Kirk*, (1904) 1 K. B. 213; *Bartell v. Gray*, (1902) 1 K. B. 225.

**608. 1. Added** used in sense of subjoined or appended in delinquent tax law. *California L. & T. Co. v. Weis*, 118 Cal. 496.

**2. Additions Attached — In Policy of Insurance.** — *Maisel v. Fire Assoc.*, 59 N. Y. App. Div. 461.

**Structural Additions.** — The word *additions* in section 13, subd. 11, of the Settled Land Act 1890, means structural *additions*; and, therefore, an electric lighting installation for the improvement of a mansion house is not an *addition* to buildings within the meaning of the section. *In re Blagrove*, (1903) 1 Ch. 560, *ap-*

*proving In re Clarke*, (1902) 2 Ch. 327, and *distinguishing In re Freake*, (1902) 1 Ch. 97.

**Additional Servitude.** — As to whether telegraph or telephone lines in a street are an *additional* servitude entitling abutting owners to compensation, see *Magee v. Overshiner*, 150 Ind. 127; *Kirby v. Citizens Telephone Co.*, (S. Dak. 1903) 97 N. W. Rep. 3. And see the title TELEGRAPHS AND TELEPHONES.

**609. 1.** "The Century Dictionary defines *address* to be 'a direction for guidance, as to a person's abode; hence, the place at which a person resides, or the name or place of destination, with any other details, necessary for the direction of a letter or package. Syn., residence, superscription." *San Diego Sav. Bank v. Goodsell*, 137 Cal. 427.



# ADEMPTION OF LEGACIES.

By J. E. BRADY.

**611. II. DEFINITION.** — See note 2.

Confined to Legacies. — See note 4.

**613. IV. MODES OF ADEMPTION** — 1. By Portions, on the Analogy of Advancements — *a.* BY PERSONS IN LOCO PARENTIS — (1) *The Doctrine Stated Generally.* — See note 2.

The Reasons for the Rule. — See note 3.

**614.** The Presumption. — See note 1.

**616.** (2) *The Doctrine Analyzed and Its Qualifications Discussed* —

(c) **Advanced Portion Must Be a Gift.** — See note 3.

**617.** (e) **Legacy Must Be Certain as to Amount and Time of Accrual.** — See note 1.

Early Rule Prevails in Some Jurisdictions. — See note 4.

(f) **Gift Must Be of Substantial Amount.** — See note 6.

**618.** (g) **Advanced Portion Must Be Ejusdem Generis.** — See note 2.

**619.** **Intention of Testator Controlling.** — See note 4.

**Accomplishment by Testator of Purpose for Which Legacy Is Given.** — See note 5.

**620.** (i) **No Direction in Testament Necessary.** — See note 5.

(j) **Advanced Portion Only Presumed to Be Intended to Adeem; Rebuttal of the Presumption.** — See note 8.

**621.** **Presumption May Be Rebutted by Parol.** — See note 1.

**622.** (k) **Adeemption Operates Pro Tanto Only.** — See note 11.

**611. 2.** *Tanton v. Keller*, 167 Ill. 139.

**4. Adeemption Not Predicable of Devises.** — *Fisher v. Keithley*, 142 Mo. 244, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 611. See also *Carmichael v. Lathrop*, 108 Mich. 473.

**613. 2. Adeemption by Advanced Payments.** — *Wilson v. Smith*, 117 Fed. Rep. 707, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 613; *Davis v. Close*, 104 Iowa 261; *Carmichael v. Lathrop*, 108 Mich. 473; *Wilson v. Smith*, 11 Pa. Dist. 665, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 613; *Tuckett-Lawry v. Lamoureux*, 1 Ont. L. Rep. 364.

**Kentucky Statute.** — The common-law rule of adeemption has by statute been made to apply to all legatees irrespective of the relation they bear to the testator. *Swinebroad v. Bright*, 110 Ky. 616.

**3. Reason for the Rule.** — *Carmichael v. Lathrop*, 108 Mich. 473; *Fisher v. Keithley*, 142 Mo. 244.

**614. 1.** *Stine's Estate*, 16 Pa. Super. Ct. 12.

**616. 3.** *Fisher v. Keithley*, 142 Mo. 244, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 616.

**617. 1.** *Davis v. Close*, 104 Iowa 261.

**4. Bequest of Residue of Estate.** — *Carmichael v. Lathrop*, 108 Mich. 473.

**6.** *Tanton v. Keller*, 167 Ill. 142, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 617.

**618. 2.** *Swinebroad v. Bright*, 110 Ky. 616; *Carmichael v. Lathrop*, 108 Mich. 473.

**Surrender of Notes.** — A bequest of one thousand dollars to the testator's son, "to be paid by deducting the same from the amount he

owes me, as evidenced by notes I hold on him," was adeemed by a subsequent surrender by the testator to his son of notes amounting to a thousand dollars. *Davis v. Close*, 104 Iowa 261. •

**Discharge of Mortgage.** — A pecuniary legacy to be paid by the discharge of a mortgage held by the testator on the legatee's land was adeemed by a discharge of the mortgage in the testator's lifetime. *Wheeler v. Wood*, 104 Mich. 414.

**619. 4. A Conveyance of Real Estate** will adeem a legacy where such is clearly the intention of the testator. *Carmichael v. Lathrop*, 108 Mich. 473.

**5. Bequest for Specific Purposes.** — *Tanton v. Keller*, 167 Ill. 140, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619; *Hershey's Estate*, 17 Lanc. L. Rev. 389.

**620. 5.** *Tuckett-Lawry v. Lamoureux*, 1 Ont. L. Rep. 364.

**8. Intent of Testator Controls.** — *Wilson v. Smith*, 117 Fed. Rep. 707, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620; *Wilson v. Smith*, 11 Pa. Dist. 665, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620.

**621. 1.** *Wilson v. Smith*, 117 Fed. Rep. 707; *Wilson v. Smith*, 11 Pa. Dist. 665.

**In Kentucky** it has been enacted by statute that the person wishing to show that a legacy has been adeemed must assume the burden of proving that such was the intention of the testator. *Swinebroad v. Bright*, 110 Ky. 616.

**622. 11. Pro Tanto Rule Prevails.** — *Tanton v. Keller*, 61 Ill. App. 625, 167 Ill. 129.

**623.** (3) *The Doctrine Criticised.* — See note 1.

*b.* ADVANCES TO STRANGERS — No Presumption of Intention to Reduce the Legacy. — See notes 4, 5.

**2. By Alienation** — *a.* SALES AND GIFTS — General Rule as to Existence of Subject of Bequest. — See note 6.

**624.** Sale of Property Bequeathed. — See note 1.

**625.** Doctrine Operates Pro Tanto Only. — See note 1.

United States Rule. — See note 5.

**626.** Doctrine Not Applicable to General or Demonstrative Legacies. — See notes 1, 2.

*b.* CONVEYANCES OF REAL ESTATE — SURRENDER OF LEASES — Subsequent Conveyances. — See note 6.

**627.** *c.* PLEDGES AND MORTGAGES. — See note 1.

*d.* LOSS, DESTRUCTION, ETC. — Ademption Not Confined to Cases of Voluntary Disposition of Property. — See note 5.

**3. By Transformation, Alteration, and Conversion** — General Rule. — See note 9.

**628.** Conversion Without Knowledge of Testator. — See note 5.

**629.** **4. By Removal** — When the Element of Locality Is Unimportant. — See note 8.

**630.** **5 By Acquisition** — General Rule. — See note 1.

Collection of Promissory Note. — See note 2.

**623.** 1. *Carmichael v. Lathrop*, 108 Mich. 473.

**4. No Presumption Where Bequest Is to a Stranger.** — *Re Smythies*, 87 L. T. N. S. 742; *Wilson v. Smith*, 117 Fed. Rep. 707, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623; *Wilson v. Smith*, 11 Pa. Dist. 665, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

Strangers as well as children are, by section 4840, Ky. Stat., included within the rule of ademption of legacies. However, an intention to reduce the legacy is not to be presumed from the fact that a gift has passed between the testator and legatee. Such intention must be shown to have existed. *Swinebroad v. Bright*, 110 Ky. 616.

5. See *Ritter's Estate*, 10 Pa. Super. Ct. 352.

6. *Re Vickers*, 81 L. T. N. S. 719; *Tanton v. Keller*, 167 Ill. 140; *Hosea v. Skinner*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 653; *Ametrano v. Downs*, 62 N. Y. App. Div. 405; *In re Tillinghast*, 23 R. I. 121; *Rogers v. Rogers*, 67 S. Car. 174, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

**624.** 1. **Ademption by Sale of Property.** — *Re Moses*, 85 L. T. N. S. 596; *In re Dowsett*, (1901) 1 Ch. 398; *Douglass v. Douglass*, 13 App. Cas. (D. C.) 21; *Tanton v. Keller*, 167 Ill. 140; *New Albany Trust Co. v. Powell*, 29 Ind. App. 494; *In re Frahm*, 120 Iowa 85; *Hosea v. Skinner*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 653; *State v. Morris*, 67 S. Car. 153; *In re Tillinghast*, 23 R. I. 121.

Where the Legacy Is Not Specific it is not adeemed by a sale. *Mahoney v. Holt*, 19 R. I. 660.

**625.** 1. **Ademption Pro Tanto.** — *New Albany Trust Co. v. Powell*, 29 Ind. App. 494, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625.

5. *Joynes v. Hamilton*, 98 Md. 665. See also *Gardner v. Gardner*, 72 N. H. 257.

**626.** 1. *Tanton v. Keller*, 167 Ill. 139, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 626; *In re Frahm*, 120 Iowa 85; *Ametrano v. Downs*, 62 N. Y. App. Div. 405; *State v. Morris*, 67 S. Car. 153.

**2. Rule Restricted to Specific Legacies.** — *Tanton v. Keller*, 167 Ill. 139, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 626; *In re Frahm*, 120 Iowa 85.

6. **Revocation by Subsequent Conveyances.** — *Connecticut Trust, etc., Co. v. Chase*, 75 Conn. 683; *Sharp v. McPherson*, 10 Ohio Cir. Ct. 181, 6 Ohio Cir. Dec. 634, 3 Ohio Dec. 468.

Where a Legacy Consists of the Proceeds to Be Derived from the Sale of Real Estate, the sale of the property by the testator does not operate as an ademption. *Miller v. Malone*, 109 Ky. 133.

Where the Property Bequeathed Was Taken by Eminent Domain it was held that the devise was adeemed. *Ametrano v. Downs*, 62 N. Y. App. Div. 405.

**627.** 1. **Pledge of Property Bequeathed.** — *Connecticut Trust, etc., Co. v. Chase*, 75 Conn. 683.

5. Where the Testatrix Uses Part of the Bequeathed Property the legacy is *pro tanto* adeemed. *In re Tillinghast*, 23 R. I. 121.

9. *Tanton v. Keller*, 167 Ill. 139; *In re Tillinghast*, 23 R. I. 121; *Rogers v. Rogers*, 67 S. Car. 174, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 627.

A Slight Alteration of the subject of the legacy does not constitute an ademption. See *In re Frahm*, 120 Iowa 85.

**Kentucky Statute.** — Stat. Ky., § 2068, provides that "the conversion in whole or in part of money or property or the proceeds of property advanced to one of the testator's heirs into other property or thing, with or without the assent of testator, shall not be an ademption unless a contrary intention on the part of the testator appear from the will, or by parol or other evidence." *Franck v. Franck*, 72 S. W. Rep. 275, 24 Ky. L. Rep. 1790.

**628.** 5. See *Re Moses*, 85 L. T. N. S. 596.

**629.** 8. *Prendregast v. Walsh*, 58 N. J. Eq. 149; *In re Tillinghast*, 23 R. I. 121.

**630.** 1. **General Rule in Case of Ademption by Acquisition.** — *Tanton v. Keller*, 167 Ill. 139.

2. *Batchelor's Succession*, 48 La. Ann. 278.

**630.** Doctrine Confined to Specific Legacies. — See note 7.

**631.** Distinction Between Cases of Enforced and Voluntary Payments. — See note 1.

**V. REVIVAL OF ADEEMED LEGACIES** — Subsequent Codicil Confirming the Will. — See note 5.

**632.** ADEQUATE. — See note 2.

**633.** [AD HOC. — See note 2a.]

ADJACENT. — See note 4.

**635.** ADJOINING. — See note 1.

**638.** ADJOURN — ADJOURNMENT. — See note 1.

**640.** ADJUDGED. — See note 1.

**641.** ADJUDICATE — ADJUDICATION. — See note 1.

ADJUST — ADJUSTMENT. — See note 3.

**642.** ADMINISTER. — See note 2.

**643.** ADMINISTRATION. — See note 3.

**644.** ADMINISTRATIVE. — See note 1.

**630.** 7. *In re Bradley*, 73 Vt. 253, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 630.

**631.** 1. *Tanton v. Keller*, 167 Ill. 139.

5. *Tanton v. Keller*, 167 Ill. 139. See *Wilson v. Smith*, 117 Fed. Rep. 707.

**632.** 2. Adequate Clause — Texas Code. — *Gardner v. State*, 40 Tex. Crim. 19; *Farrar v. State*, 29 Tex. App. 250.

**633.** 2a. Ad Hoc. — The translation "special" instead of the original *ad hoc* in relation to a curator has very much the same meaning, and in the decisions the two words are used indifferently. *Sallier v. Rosteet*, 108 La. 378.

4. *Hanifen v. Armitage*, 117 Fed. Rep. 845; *Yuba County v. Kate Hayes Min. Co.*, 141 Cal. 360; *People v. Keechler*, 194 Ill. 235, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 633; *Hanover F. Ins. Co. v. Stoddard*, 52 Neb. 745.

**Adjacent in the Sense of Adjoining or Contiguous** — "Adjacent to Each Other" — School Districts. — *People v. Keechler*, 194 Ill. 235.

**Adjacent to Railroad Line** — Dependent on Facts of Case. — *Denver, etc., R. Co. v. U. S.*, (C. C. A.) 124 Fed. Rep. 156; *Stone v. U. S.*, 167 U. S. 178, affirming (C. C. A.) 64 Fed. Rep. 667; *U. S. v. St. Anthony R. Co.*, 192 U. S. 524; *U. S. v. Bachelder*, 9 N. Mex. 16, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 634.

**Adjacent Districts.** — Section 219 of the New Zealand Municipal Corporations Act, 1900, empowers the construction of bridges by municipal councils, and provides that in certain circumstances the local authority of an *adjacent* district should contribute to the cost. It was held that the word *adjacent* is not a word of precise and uniform meaning, and the degree of proximity denoted is a question of circumstances. The court below having decided that the appellant city was *adjacent* to the respondent borough, although there was a distance of over six miles between their boundaries and three other local divisions intervened, its discretion was not interfered with. *Wellington v. Lower Hutt*, (1904) A. C. 773.

**635.** 1. *Lewis v. Johnson*, 90 Fed. Rep.

674, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 635.

**Distinguished from Adjacent.** — *Matthews v. Kimball*, 70 Ark. 451; *Hennessy v. Douglas County*, 99 Wis. 129.

**Same** — Local Assessments. — See *Matthews v. Kimball*, 70 Ark. 451, holding that the property to be *adjoining* need not touch.

**Same** — Separated by Private Way. — *Lehmer v. Horton*, (Neb. 1903) 93 N. W. Rep. 964.

**Synonymous with Contiguous.** — *Bent v. Glaeuzer*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 569.

**Adjoining and Communicating.** — A fire insurance policy on a "frame mill building and all additions thereto *adjoining* and communicating, occupied by the assured as a pail shop," covers a dry-house and engine-house connected therewith by a movable bridge, where such intention can be gathered from the language of the policy. *Marsh v. Concord Mut. F. Ins. Co.*, 71 N. H. 253, affirming 70 N. H. 590.

**638.** 1. **Adjournment** — Power of Court. — *Kingsley v. Bagby*, 2 Kan. App. 23.

**640.** 1. **Synonymous with Adjudicate.** — *Western Assur. Co. v. Klein*, 48 Neb. 904.

**641.** 1. **Sans v.** New York, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 559.

**Adjudication of Property** — Louisiana Law. — See *Burguières' Succession*, 104 La. 46.

3. *Ruthven v. American F. Ins. Co.*, 102 Iowa 563, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 641; *Miller v. Consolidated Patrons, etc., Mut. Ins. Co.*, 113 Iowa 211.

**Insurance Adjuster.** — *Roberts v. Insurance Co. of America*, 94 Mo. App. 142.

**642.** 2. *State v. Jones*, 4 Penn. (Del.) 109.

**643.** 3. **Distinguished from Curatorship.** — *State v. Greer*, 101 Mo. App. 669.

**644.** 1. In *People v. Salsbury*, 134 Mich. 537, the court said: "Anderson's Law Dictionary defines *administer* to mean, to dispense, direct the application of; as, to administer the law, justice. Bouvier speaks of *administrative* as synonymous with executive; a ministerial duty—one in which nothing is left to the discretion."

# ADMIRALTY JURISDICTION.

BY A. W. VARIAN.

**647.** III. COURTS OF ADMIRALTY IN THE UNITED STATES — 1. District Courts. — See notes 1, 2.

**648.** 3. State Courts — Common-law Remedies. — See notes 5, 7, 8.

**649.** IV. JURISDICTION — 2. Waters Within the Jurisdiction — *b.* NAVIGABLE WATERS — (1) *General Rule* — Waters Navigable by Vessels Used in Commerce. — See note 6.

**651.** See note 1.

Canals Connecting Navigable Waters. — See note 2.

(2) *Internal Rivers and Waters.* — See note 3.

**652.** 3. Persons Subject to the Jurisdiction — *General Rule.* — See note 3.

Not Bound to Interfere in Controversies Between Foreigners. — See note 4.

**653.** See note 2.

**654.** Controversies Between Foreign Seamen. — See note 1.

When Differences Adjusted by Consuls. — See note 4.

Distribution of Proceeds of Sale of Foreign Vessel. — See note 6.

Consideration that Should Influence Court in Exercising Jurisdiction or Not. — See note 7.

**647.** 1. Constitutional Grant. — The Neck, 138 Fed. Rep. 144.

The constitutional grant of power to the courts of admiralty cannot be enlarged by Congress. The Blackheath, 195 U. S. 361. Nor by the state legislatures. The Mary F. Chisholm, 129 Fed. Rep. 814. See also Reliance Lumber Co. v. Rothschild, 127 Fed. Rep. 745; The Falls of Keltie, 114 Fed. Rep. 357.

2. The Robert W. Parsons, 191 U. S. 17; Knapp v. McCaffrey, 177 U. S. 638; The Glide, 167 U. S. 606; The Falls of Keltie, 114 Fed. Rep. 357; Scatcherd Lumber Co. v. Rike, 113 Ala. 555, 59 Am. St. Rep. 147.

**648.** 5. Conrad v. De Montcourt, 138 Mo. 311; Ransberry v. North American Transp., etc., Co., 22 Wash. 476; Gill v. North American T. & T. Co., (Wash. 1905) 79 Pac. Rep. 778; Reynolds v. Nielson, 116 Wis. 483; Meunier Gun Co. v. Lehigh Valley Transp. Co., (Wis. 1904) 101 N. W. Rep. 386.

**Court of Equity.** — The common-law remedy saved to suitors may be had in a court of equity, and the suitor is not limited to a common-law court. Knapp v. McCaffrey, 177 U. S. 638.

7. U. S. Mail Line Co. v. McCracken, (Ky. 1895) 33 S. W. Rep. 82.

8. The Glide, 167 U. S. 606.

**649.** 6. Kling v. St. Louis, etc., Packet Co., 101 Tenn. 99, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650; The Robert W. Parsons, 191 U. S. 17.

**651.** 1. Scatcherd Lumber Co. v. Rike, 113 Ala. 555, 59 Am. St. Rep. 147.

2. The Robert W. Parsons, 191 U. S. 17.

**3. Waters Wholly Within a State or Only Navigable Therein.** — Kling v. St. Louis, etc., Packet Co., 101 Tenn. 99, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 651.

**652.** 3. The admiralty courts of the

United States will take jurisdiction in case of an injury to a seaman inflicted at sea on board a foreign ship, which has come within the jurisdiction of the court. Even if the libellant were an alien, it would be the duty of the admiralty court, which, for such cases, is a court of the world, to administer justice. Bolden v. Jensen, 70 Fed. Rep. 505.

American seamen on a foreign vessel may maintain an action for wages in a court of admiralty. The Alnwick, 132 Fed. Rep. 117.

A citizen of the United States who is a party to a suit of admiralty and maritime jurisdiction cannot be deprived of the right to have such a suit adjudicated by a court upon which admiralty jurisdiction has been conferred pursuant to the Constitution. The Neck, 138 Fed. Rep. 144.

**4. Discretion in Exercising Jurisdiction in Matters Between Foreigners.** — The Troop, (C. C. A.) 128 Fed. Rep. 856; Fairgrieve v. Marine Ins. Co., (C. C. A.) 94 Fed. Rep. 686; Poupirt v. Elder Dempster Shipping Co., 122 Fed. Rep. 983, affirmed (C. C. A.) 125 Fed. Rep. 732. See also The Neck, 138 Fed. Rep. 144.

**653.** 2. Special Ground Should Appear to Induce Court to Decline to Act. — Panama R. Co. v. Napier Shipping Co., 166 U. S. 280.

**654.** 1. Foreign Seamen. — Where one of the seamen is a citizen, the court will adjudicate the rights of other seamen similarly situated. The Falls of Keltie, 114 Fed. Rep. 357.

**4. Where One of the Seamen Is a Citizen,** the fact that the consul of the country of the ship's flag has adjudicated a cause adversely to the seamen, will not prevent the court from taking jurisdiction. The Falls of Keltie, 114 Fed. Rep. 357; The Alnwick, 132 Fed. Rep. 117.

6. See The St. Johns, 101 Fed. Rep. 469. But see The Lady Furness, 84 Fed. Rep. 679.

7. See Fairgrieve v. Marine Ins. Co., (C. C.

**655.** 4. What Vessels Are Within the Jurisdiction — What Is a Vessel. — See note 1.

Instances. — See notes 2, 4, 8, 13.

**656.** 5. Subject-matter of Jurisdiction — *a.* MARITIME TORTS — (1) *In General* — The Test of Jurisdiction in Tort. — See note 2.

**657.** See note 3.

**658.** Injury to Vessel by Bridge or Draw. — See note 1.

(2) *Death by Wrongful Act.* — See note 6.

**659.** Where There Are State Statutes. — See note 2.

Libel — Statute Creating Lien. — See note 3.

**660.** See note 2.

*b.* MARITIME CONTRACTS — (1) *General Principles* — Subject-matter Controls. — See note 3.

A.) 94 Fed. Rep. 686; *The Lady Furness*, 84 Fed. Rep. 679; *Goldman v. Furness*, 101 Fed. Rep. 467.

In *The Alnwick*, 132 Fed. Rep. 117, the court said: "The assumption of jurisdiction against foreign ships has been always a matter of discretion with the court, even when the seamen are foreign also (*The Troop*, (C. C. A.) 128 Fed. Rep. 862), and this seems to be an instance for its exercise in the libelants' favor, they being American seamen and making a strong case for immediate relief."

**655.** 1. The True Criterion. — The Robert W. Parsons, 191 U. S. 17.

**A Pile Driver Is a Vessel.** — *Lawrence v. Flatboat*, 84 Fed. Rep. 200, *affirmed* *Southern Log Cart, etc., Co. v. Lawrence*, (C. C. A.) 86 Fed. Rep. 907.

**Contra.** — *Pile Driver E. O. A.*, 69 Fed. Rep. 1005.

**A House Boat** is a subject of admiralty jurisdiction. *A Scow Without a Name*, 80 Fed. Rep. 736.

**2. Dredge.** — *McRae v. Bowers Dredging Co.*, 86 Fed. Rep. 344, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655; *McMaster v. One Dredge*, 95 Fed. Rep. 832.

**4. Raft.** — See *Knapp v. McCaffrey*, 177 U. S. 638, *affirming* 178 Ill. 107.

**8. Canal-boat.** — The Robert W. Parsons, 191 U. S. 17.

**13. Boat in Unfinished Condition.** — *McRae v. Bowers Dredging Co.*, 86 Fed. Rep. 344, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655.

From the moment the keel of a vessel touches the water she becomes the subject of admiralty jurisdiction. *Tucker v. Alexandroff*, 183 U. S. 424.

Admiralty jurisdiction "does not extend to ships merely because they are ships, but to commerce and navigation, and to ships only because they are, and while they are, used in commerce and navigation." *Olsen v. Birch*, 133 Cal. 479.

**656.** 2. Locality of Tort the Criterion. — The Haxby, 95 Fed. Rep. 171, *affirming* 94 Fed. Rep. 1016; *Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406; *Dailey v. New York*, 128 Fed. Rep. 796; *The Strabo*, 90 Fed. Rep. 110, *affirmed* (C. C. A.) 98 Fed. Rep. 998; *The Albion*, 123 Fed. Rep. 189.

**Locality Is Not the Sole Test** of jurisdiction, in cases of tort, but in conjunction therewith the

tort must be committed by or against a vessel, or its owners, officers, or crew. *Campbell v. Hackfeld*, (C. C. A.) 125 Fed. Rep. 696.

**A Beacon Attached to the Soil.** — The admiralty has jurisdiction over a suit by the government against a vessel for an injury, commenced and consummated upon navigable water, to a beacon built on piles driven firmly into the bottom. *The Blackheath*, 195 U. S. 361, *reversing* 122 Fed. Rep. 112.

**657.** 3. The *Strabo*, 90 Fed. Rep. 110; *Hermann v. Port Blakely Mill Co.*, 69 Fed. Rep. 646.

Nor does it affect such jurisdiction that the libellant's right to redress was founded upon a contract, a part of which was to be performed on land. *The Willamette Valley*, 71 Fed. Rep. 712.

But see *The Blackheath*, 195 U. S. 361, where it is said that there appears to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was.

**658.** 1. The Test Is the Locality of the Thing Injured. — *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280.

**6.** The *Harrisburg*, *followed* in *Rundell v. La Compagnie Générale Transatlantique*, 94 Fed. Rep. 366, (C. C. A.) 100 Fed. Rep. 655; *The Glendale*, (C. C. A.) 81 Fed. Rep. 633; *Middleton v. La Compagnie Générale Transatlantique*, (C. C. A.) 100 Fed. Rep. 866.

**659.** 2. Right of Action Conferred by State Statute. — *The Northern Queen*, 117 Fed. Rep. 906; *The Glendale*, 77 Fed. Rep. 906, *affirmed* (C. C. A.) 81 Fed. Rep. 633; *Stern v. La Compagnie Générale Transatlantique*, 110 Fed. Rep. 996.

**3.** *McRae v. Bowers Dredging Co.*, 86 Fed. Rep. 344, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 658, 659; *The Glendale*, 77 Fed. Rep. 906; *The Oregon*, 73 Fed. Rep. 846.

**660.** 2. The *Oregon*, 73 Fed. Rep. 846; *The Glendale*, (C. C. A.) 81 Fed. Rep. 633.

**3. Subject-matter of Contract Determines Jurisdiction.** — *Graham v. Oregon R. and Nav. Co.*, 134 Fed. Rep. 454, 135 Fed. Rep. 608; *Dailey v. New York*, 128 Fed. Rep. 796; *The Mary F. Chisholm*, 129 Fed. Rep. 814; *Boutin v. Rudd*, (C. C. A.) 82 Fed. Rep. 685; *Pacific Coast Steamship Co. v. Ferguson*, (C. C. A.) 76 Fed. Rep. 993; *Pacific Coast Steamship Co. v. Moore*, 70 Fed. Rep. 870.

- 661.** To Give a Maritime Character to Services. — See note 1.  
 Contract Must, in Its Essence, Be Maritime. — See note 2.  
 Preliminary Contracts. — See notes 3, 4.  
 An Additional Agreement Not a Maritime Contract. — See note 6.  
 Cases of Licitation or Sale. — See note 9.

Bottomry, Charter-parties, Maritime Insurance, Salvage, Pilotage, Wharfage, Towage Demurrage. — See notes 10, 11.

- 662.** See notes 1, 2, 3, 4, 6, 7, 8.

- 663.** Storage of Grain in Ship. — See note 1.

The Claim of a Stevedore. — See note 2.

(2) *Building Contracts*. — See note 3.

- 664.** Building Materials and Supplies. — See notes 2, 3, 5.

**Executory Contract.** — Where the subject-matter of the contract is maritime a court of admiralty has jurisdiction notwithstanding the contract is wholly executory. *Patterson v. Baltimore Steam-Packet Co.*, 106 Fed. Rep. 957.

**Fisherman.** — A contract for services as a fisherman, including work to be performed in a canning factory on shore, is cognizable in the admiralty. *Domenico v. Alaska Packers' Assoc.*, 112 Fed. Rep. 554.

- 661.** 1. *The Harvey*, (C. C. A.) 86 Fed. Rep. 656.

2. See *Skinner v. Harris*, 98 Fed. Rep. 442.

3. *Brown v. West Hartlepool Steam Nav. Co.*, (C. C. A.) 112 Fed. Rep. 1018; *Taylor v. Weir*, 110 Fed. Rep. 1005.

**An Agreement to Solicit Business** for a vessel is not cognizable in the admiralty. *The Humboldt*, 86 Fed. Rep. 351; *The Harvey*, (C. C. A.) 86 Fed. Rep. 656. Nor a suit to recover compensation for effecting a contract of affreightment. *Richard v. Hogarth*, 94 Fed. Rep. 684. But services performed by a shipping agent in procuring a crew for a vessel and furnishing them with board at the request of the master, may be recovered for in the admiralty, *in personam*, although the seamen are discharged before ever going aboard the vessel. *Haveron v. Goelet*, 88 Fed. Rep. 301.

4. *Reliance Lumber Co. v. Rothschild*, 127 Fed. Rep. 745; *The City of Clarksville*, 94 Fed. Rep. 201; *The Harvey*, (C. C. A.) 86 Fed. Rep. 656.

6. *Gow v. William W. Brauer Steamship Co.*, 113 Fed. Rep. 672; *The Ripon City*, (C. C. A.) 102 Fed. Rep. 176.

9. Where the Interests Are Not Equal the admiralty has no jurisdiction or authority to compel a sale of the vessel and a division of the proceeds. *Reynolds v. Nielson*, 116 Wis. 483, 96 Am. St. Rep. 1000.

10. **A Hypothecation of the Freight Moneys** given by a steamship line in its home port to secure the payment of money advanced to permit the line to pay its obligations in foreign countries and prevent detention, is a maritime contract within the admiralty jurisdiction. *The Advance*, (C. C. A.) 72 Fed. Rep. 793.

11. **Affreightment.** — *Baltimore Steam-Packet Co. v. Patterson*, (C. C. A.) 106 Fed. Rep. 736. See also *Meunier Gun Co. v. Lehigh Valley Transp. Co.*, (Wis. 1904) 101 N. W. Rep. 386.

**An Executory Contract for the Hire of Space** upon a vessel unnamed but run by an established line of steamers is cognizable in the

admiralty. *Patterson v. Baltimore Steam-Packet Co.*, 106 Fed. Rep. 957.

- 662.** 1. **Transportation of Passengers.** — *The Eugene*, 83 Fed. Rep. 222, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 661, 662.

**As to Passengers' Baggage.** — *The Priscilla*, 106 Fed. Rep. 739.

2. **Charter-Party.** — *Dunbar v. Weston*, 93 Fed. Rep. 472; *The Harvey*, (C. C. A.) 86 Fed. Rep. 656.

But an agreement, contained in a charter-party, to pay commissions for procuring the charter, is not cognizable in admiralty. *Richard v. Holman*, 123 Fed. Rep. 734.

3. **Maritime Insurance.** — *New Zealand Ins. Co. v. Earnmoor Steamship Co.*, (C. C. A.) 79 Fed. Rep. 368; *The City of Clarksville*, 94 Fed. Rep. 201.

4. **Salvage.** — *Gilchrist v. Godman*, 79 Fed. Rep. 970.

6. **Wharfage.** — *Braisted v. Denton*, 115 Fed. Rep. 428.

But the admiralty has no jurisdiction over a contract for the "rent of a wharf." *The James T. Furber*, 129 Fed. Rep. 808.

7. **Towage.** — *Knapp v. McCaffrey*, 177 U. S. 638; *Boutin v. Rudd*, (C. C. A.) 82 Fed. Rep. 685; *A Scow Without a Name*, 80 Fed. Rep. 736.

8. **Demurrage.** — *Warehouse, etc., Supply Co. v. Galvin*, 96 Wis. 523, 65 Am. St. Rep. 57.

- 663.** 1. *The Richard Winslow*, (C. C. A.) 71 Fed. Rep. 426; *McRae v. Bowers Dredging Co.*, 86 Fed. Rep. 344.

2. **Nature of Stevedore's Services Considered.** — *The Allerton*, 93 Fed. Rep. 219.

3. *Scatcherd Lumber Co. v. Rike*, 113 Ala. 555, 59 Am. St. Rep. 147; *Olsen v. Birch*, 133 Cal. 479; *The William Windom*, 73 Fed. Rep. 496.

**Completed in Water.** — See *Tucker v. Alexandroff*, 183 U. S. 424.

- 664.** 2. *The John B. Ketcham*, (C. C. A.) 97 Fed. Rep. 872.

**Converting Scow into Dredge.** — A contract for work and material in converting a scow into a dredge is a contract for building, over which the admiralty has no jurisdiction. *McMaster v. One Dredge*, 95 Fed. Rep. 832.

3. **Contracts for Repairs and Supplies Furnished at the Home Port** of a vessel are not maritime contracts and are not enforceable in a court of admiralty. *Scatcherd Lumber Co. v. Rike*, 113 Ala. 555, 59 Am. St. Rep. 147.

5. *The Glide*, 167 U. S. 606; *The Electron*, (C. C. A.) 74 Fed. Rep. 689.

- 664.** **A Contract to Repair on Land.** — See note 6.  
**Liens Created by Local Law.** — See note 7.  
 (3) *Mortgages.* — See note 8.
- 665.** See note 2.  
*c.* **PETITORY AND POSSESSORY ACTIONS.** — See note 5.
- 666.** **Equitable Title.** — See note 1.  
*d.* **PRIZE CAUSES.** — See note 4.
- 668.** *e.* **CRIMES — Offenses Within a State.** — See note 3.

Where a state statute gives a lien upon a vessel it is enforceable only in a court of admiralty. *The Iris*, (C. C. A.) 100 Fed. Rep. 104.

**664. 6. Contra.** — *The Robert W. Parsons*, 191 U. S. 17.

**7.** *Knapp v. McCaffrey*, 177 U. S. 638; *McMaster v. One Dredge*, 95 Fed. Rep. 832. See also *The Robert W. Parsons*, 191 U. S. 17.

**A Lien Given by a State Statute** for supplies and materials furnished in the construction of a vessel is enforceable in the state courts. *The John B. Ketcham*, (C. C. A.) 97 Fed. Rep. 872.

**8.** *The Gordon Campbell*, 131 Fed. Rep. 963; *The Humboldt*, 86 Fed. Rep. 351.

**665. 2.** *The Gordon Campbell*, 131 Fed. Rep. 963.

**5. Replevin.** — An action to replevy goods on board a vessel is a common-law remedy saved to suitors in the Judiciary Act of 1789. *Warehouse, etc., Supply Co. v. Galvin*, 96 Wis. 523, 65 Am. St. Rep. 57.

**666. 1.** *The Robert R. Kirkland*, 92 Fed. Rep. 407.

**4. On What Jurisdiction Depends.** — The jurisdiction of a District Court to adjudicate a prize and the rights of the captors to bounty depends upon its designation by the secretary of the navy as the court in which the proceedings shall be brought, or the possession of some portion of the proceeds of the *res*, or both. *The Santo Domingo*, 115 Fed. Rep. 446.

**668. 3.** *Ex p. Ballinger*, 88 Fed. Rep. 781.

# ADMISSIONS.

By P. B. McKENZIE.

**671. I. DEFINITION AND CHARACTER.** — See notes 1, 2, 4.

**672.** See note 1.

**671. 1. Qualified and Complex Admissions.** — In *Canada* it has been said that an avowant may either admit the contract alleged against him, with modifications or conditions, which may be called a qualified admission, or he may admit the contract purely and simply, alleging at the same time some other matter which will avoid his responsibility, and this may be called a complex admission. *Cox v. Pacaud*, 23 Quebec Super. Ct. 9.

**2. Incidental Admissions.** — *Chicago, etc., R. Co. v. Eaton*, 194 Ill. 441, 88 Am. St. Rep. 161, affirming 96 Ill. App. 570; *Com. v. Bunnell*, 20 Pa. Super. Ct. 51.

**4. Admissions Implied from Conduct** — *United States*. — *Farnsworth v. Nevada Co.*, 102 Fed. Rep. 578, 42 C. C. A. 509; *Conyngham v. Baldwin*, 120 Fed. Rep. 500, 56 C. C. A. 650.

*Colorado*. — *Farrer v. Caster*, 17 Colo. App. 41.

*Iowa*. — *Nodle v. Hawthorn*, 107 Iowa 380.

*Louisiana*. — *Upton v. Adeline Sugar Factory Co.*, 109 La. 670.

*Massachusetts*. — *Com. v. Devaney*, 182 Mass. 33; *Com. v. Coughlin*, 182 Mass. 558.

*Missouri*. — *Campbell v. Missouri Pac. R. Co.*, 86 Mo. App. 67.

*New Jersey*. — *De Hart v. Creveling*, 57 N. J. L. 642.

*New York*. — *Sheldon v. Sheldon*, 84 Hun (N. Y.) 422; *Staples v. Hager*, 11 N. Y. App. Div. 631; *Del Piano v. Caponigri*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 541; *Prout v. Chisolm*, 21 N. Y. App. Div. 54; *Crouse v. Judson*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338.

*Texas*. — *Low v. Griffin*, (Tex. Civ. App. 1897) 41 S. W. Rep. 73; *Gilford v. State*, (Tex. Crim. 1903) 78 S. W. Rep. 692.

*Wisconsin*. — *Northern Electrical Mfg. Co. v. J. C. Wagner Co.*, 108 Wis. 584.

**An Attempt to Suborn Perjury.** — *People v. Salisbury*, 134 Mich. 537; *Nowack v. Metropolitan St. R. Co.*, 166 N. Y. 433, 82 Am. St. Rep. 691, reversing 54 N. Y. App. Div. 302; *Parks v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 301.

While an attempt to suborn perjury is an admission that the party's cause is weak, it is not conclusive. *Nowack v. Metropolitan St. R. Co.*, 166 N. Y. 433, 82 Am. St. Rep. 691, reversing 54 N. Y. App. Div. 302.

**The Suppression of Evidence** is an admission that it is against the interest of the party suppressing it, but is not an admission that his claim is unjust. *Harrison v. Harrison*, 124 Iowa 525.

**Requesting a Material Witness to Absent Himself from the Trial.** — *Baldwin v. Boulware*, 79 Mo. App. 5.

**Receiving Sick Benefits from an insurance**

company impliedly admits illness at the time for which the benefits are paid. *Seidenspinner v. Metropolitan L. Ins. Co.*, 175 N. Y. 95, reversing 70 N. Y. App. Div. 476.

**Settlement of a Doubtful Claim** is not a conclusive admission of liability. *Home Ins. Co. v. Atchison, etc., R. Co.*, 4 Kan. App. 60.

**Tender.** — A tender is evidence of an admission of indebtedness. *Insurance Co. v. Manchester F. Assur. Co.*, 77 Ill. App. 673; *La Salle County v. Hatheway*, 78 Ill. App. 95.

**Questioning Only One of Several Items** in an invoice and asking for an extension of time has been held to be an admission of the indebtedness. *Laporte v. Duplessis*, 20 Quebec Super. Ct. 244.

**672. 1. Admissions Implied from Silence or Acquiescence** — *England*. — *In re Benson*, (1899) 1 Ch. 39, 79 L. T. N. S. 590.

*United States*. — *Morris v. Norton*, 75 Fed. Rep. 912, 43 U. S. App. 739; *Cross Lake Logging Co. v. Joyce*, 83 Fed. Rep. 989, 55 U. S. App. 221; *In re Kersten*, 110 Fed. Rep. 929.

*Alabama*. — *Peck v. Ryan*, 110 Ala. 336; *Simmons v. State*, 129 Ala. 41.

*California*. — *Williams v. Harter*, 121 Cal. 47.

*Delaware*. — *Deputy v. Harris*, 1 Marv. (Del.) 100; *Grier v. Deputy*, 1 Marv. (Del.) 19.

*District of Columbia*. — *McUin v. U. S. 17 App. Cas. (D. C.) 323.*

*Georgia*. — *Holston v. Southern R. Co.*, 116 Ga. 656; *Clark v. State*, 117 Ga. 254; *Joiner v. State*, 119 Ga. 315.

*Indiana*. — *Masons' Union L. Ins. Assoc. v. Brockman*, 26 Ind. App. 182; *Pritchett v. Sheridan*, 29 Ind. App. 81.

*Iowa*. — *Iowa State Bank v. Novak*, 97 Iowa 270; *Owen v. Christensen*, 106 Iowa 394; *State v. McIntosh*, 109 Iowa 209; *State v. Dexter*, 115 Iowa 678; *State v. Worthen*, 124 Iowa 408.

*Kansas*. — *Brown v. Brown*, 62 Kan. 666.

*Kentucky*. — *Phelps v. Plum*, (Ky. 1895) 32 S. W. Rep. 753; *Givens v. Providence Coal Co.*, 60 S. W. Rep. 304, 22 Ky. L. Rep. 1217; *Givens v. Louisville, etc., R. Co.*, 72 S. W. Rep. 320, 24 Ky. L. Rep. 1796.

*Massachusetts*. — *Smith v. Duncan*, 181 Mass. 435.

*Michigan*. — *Matthews v. Forslund*, 112 Mich. 591; *Raub v. Nisbett*, 118 Mich. 248.

*Minnesota*. — *Hulett v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419; *Bathke v. Krassin*, 82 Minn. 226.

*Missouri*. — *State v. Henderson*, 86 Mo. App. 482; *Hoffmann v. Hoffmann*, 126 Mo. 486.

*Nebraska*. — *Musfelt v. State*, 64 Neb. 445.

*Nevada*. — *Quinn v. White*, 26 Nev. 42.

*New Hampshire*. — *Roberts v. Rice*, 69 N. H. 472.



**673.** See note 1.

**674.** See note 2.

*New Jersey.*—Bird *v.* Magowan, (N. J. 1898) 43 Atl. Rep. 278; Scheurle *v.* Husbands, 65 N. J. L. 40, affirmed 65 N. J. L. 681.

*New York.*—Wilshusen *v.* Binns, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 547; Schulz *v.* Vogel, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 760; People *v.* Bushnell, 86 N. Y. App. Div. 5; People *v.* Wennerholm, 166 N. Y. 567; Stecher Lith. Co. *v.* Inman, 175 N. Y. 124, affirming 67 N. Y. App. Div. 625.

*North Carolina.*—Webb *v.* Atkinson, 124 N. Car. 447; Virginia-Carolina Chemical Co. *v.* Kirven, 130 N. Car. 161; Avery *v.* Stewart, 136 N. Car. 426.

*North Dakota.*—O. S. Paulson Mercantile Co. *v.* Seaver, 8 N. Dak. 215.

*Ohio.*—Geiger *v.* State, 25 Ohio Cir. Ct. 742. *Pennsylvania.*—Connolly *v.* Shannon, 3 Lack. Leg. N. (Pa.) 247.

*Tennessee.*—Low *v.* State, 108 Tenn. 127.

*Texas.*—Penner *v.* Britton, (Tex. Civ. App. 1896) 34 S. W. Rep. 301; Simonds *v.* Firemen's Fund Ins. Co., (Tex. Civ. App. 1896) 35 S. W. Rep. 300; Williford *v.* State, 36 Tex. Crim. 414; Shelburn *v.* McCrocklin, (Tex. Civ. App. 1897) 42 S. W. Rep. 329; Mitchell *v.* State, (Tex. Crim. 1901) 62 S. W. Rep. 572; Gilford *v.* State, (Tex. Crim. 1903) 78 S. W. Rep. 692.

*Utah.*—State *v.* Mortensen, 26 Utah 312, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 671-674; Burraston *v.* Nephi First Nat. Bank, 22 Utah 328.

*Vermont.*—Murray *v.* Mattison, 67 Vt. 553; State *v.* Magoon, 68 Vt. 289; Dover *v.* Winchester, 70 Vt. 418.

*Washington.*—State *v.* McCauley, 17 Wash. 88.

**Declarations of a Party Not in Interest—Alabama.**—Cade *v.* Floyd, 120 Ala. 484.

*California.*—Liebrandt *v.* Sorg, 133 Cal. 571; Bell *v.* Staacke, 141 Cal. 186.

*Colorado.*—Denver *v.* Cochran, 17 Colo. App. 72.

*Florida.*—Long *v.* State, 44 Fla. 134.

*Georgia.*—Whelchel *v.* Gainesville, etc., Electric R. Co., 116 Ga. 431.

*Indiana.*—Phenix Ins. Co. *v.* Jacobs, 23 Ind. App. 509.

*Kansas.*—Broughan *v.* Broughan, 62 Kan. 724.

*Kentucky.*—Barkley *v.* Bradford, 100 Ky. 304; Norfleet *v.* Logan, (Ky. 1900) 54 S. W. Rep. 713; Boltz *v.* Miller, 64 S. W. Rep. 630, 23 Ky. L. Rep. 991.

*Massachusetts.*—Graham *v.* Middleby, 185 Mass. 349.

*Michigan.*—Haines *v.* Gibson, 115 Mich. 131; National Lumberman's Bank *v.* Miller, 131 Mich. 564, 100 Am. St. Rep. 623, 9 Detroit Leg. N. 435.

*New York.*—Buchanan *v.* Foster, 23 N. Y. App. Div. 542; Whitman *v.* Egbert, 27 N. Y. App. Div. 374; Rose *v.* Wells, 36 N. Y. App. Div. 593; Rothchild *v.* Schwarz, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 521; Rutherford *v.* Krause, 45 N. Y. App. Div. 172; Shidlovsky *v.* Gorman, 51 N. Y. App. Div. 253; Kelly *v.* Theiss, 65 N. Y. App. Div. 146; Havens *v.* Gil-mour, 83 N. Y. App. Div. 84.

*Ohio.*—Aidt *v.* State, 1 Ohio Cir. Dec. 337. *Pennsylvania.*—Wonsetler *v.* Wonsetler, 23 Pa. Super. Ct. 321; Stewart's Estate, 3 Pa. Dist. 747.

*Tennessee.*—Shell *v.* Holston Nat. Bldg., etc., Assoc., (Tenn. Ch. 1899) 52 S. W. Rep. 909.

*Texas.*—McCallon *v.* Cohen, (Tex. Civ. App. 1897) 39 S. W. Rep. 973; Smith *v.* Merchants, etc., Nat. Bank, (Tex. Civ. App. 1897) 40 S. W. Rep. 1038; Kershner *v.* Latimer, (Tex. Civ. App. 1901) 64 S. W. Rep. 237.

*Utah.*—Ewing *v.* Keith, 16 Utah 312; Church of Jesus Christ *v.* Watson, 25 Utah 45; Jensen *v.* McCornick, 26 Utah 142.

*Washington.*—McNicol *v.* Collins, 30 Wash. 318.

*Wyoming.*—Hester *v.* Smith, 5 Wyo. 291.

**Where the Party Makes a Reply Wholly or Partially.**—State *v.* Burns, 124 Iowa 207 (to same effect as Com. *v.* Kenney, 12 Met. (Mass.) 237).

**The Possession of Documents.**—George A. Fuller Co. *v.* Doyle, 87 Fed. Rep. 687; Turner *v.* Turner, 98 Md. 22.

**Unanswered Letters.**—Packer *v.* U. S., 106 Fed. Rep. 906, 46 C. C. A. 35; Biggs *v.* Stueler, 93 Md. 100; Lee-Clark-Andreesen Hardware Co. *v.* Yankee, 9 Colo. App. 443; State Bank *v.* McCabe, (Mich. 1904) 98 N. W. Rep. 20, 10 Detroit Leg. N. 846; Hand *v.* Howell, 61 N. J. L. 142, affirmed 61 N. J. L. 694, 43 Atl. Rep. 1098; Healy *v.* Malcolm, 77 N. Y. App. Div. 69. Compare Wilmoth *v.* Hamilton, (C. C. A.) 127 Fed. Rep. 48; Murray *v.* East End Imp. Co., 60 S. W. Rep. 648, 22 Ky. L. Rep. 1477; White *v.* White, 20 N. Y. App. Div. 560.

There may be circumstances under which statements in unanswered letters are admissible as admissions. Morris *v.* Norton, 75 Fed. Rep. 912, 43 U. S. App. 739; St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665.

**673. 1. Essentials of Admissions Inferable from Silence and Acquiescence.**—Gowen *v.* Bush, 76 Fed. Rep. 349, 40 U. S. App. 349; Simmons *v.* State, 115 Ga. 574; Urdangen *v.* Doner, 122 Iowa 533; Thayer *v.* Usher, 98 Me. 468; Cheney *v.* Cheney, 162 Mass. 591; People *v.* Koerner, 154 N. Y. 355; Tinker *v.* New York, etc., R. Co., 92 Hun (N. Y.) 269; Metropolitan L. Ins. Co. *v.* Schaefer, (County Ct.) 16 Misc. (N. Y.) 625; Akers *v.* Overbeck, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 198; Schilling *v.* Union R. Co., 77 N. Y. App. Div. 74; Cabiness *v.* Holland, (Tex. Civ. App. 1895) 30 S. W. Rep. 63; State *v.* Epstein, 25 R. I. 131; Jackson *v.* Builders' Wood-Working Co., 91 Hun (N. Y.) 435; Josephi *v.* Furnish, 27 Oregon 260.

Defendant being hard of hearing, whether or not he heard the declarations made in his presence is a question for the jury. State *v.* Dexter, 115 Iowa 678.

**674. 2. Circumstances Must Call for Some Action—Alabama.**—Peck *v.* Ryan, 110 Ala. 336.

*California.*—People *v.* Amaya, 134 Cal. 531.

*Georgia.*—Chapman *v.* State, 109 Ga. 157, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 672-674. See also the following cases: Brantley *v.* State, 115 Ga. 229; Graham *v.* State, 118 Ga. 807.

**675. II. TO WHOM ADMISSIONS MAY BE MADE.** — See note 1.

**III. BY WHOM ADMISSIONS MAY BE MADE** — 1. Generally. — See note 3.

*Indiana.* — *Miller v. Dill*, 149 Ind. 326.

*Kentucky.* — *Porter v. Com.*, 61 S. W. Rep. 16, 22 Ky. L. Rep. 1657.

*Louisiana.* — *State v. Carter*, 106 La. 407.

*Maryland.* — *Turner v. Turner*, 98 Md. 22.

*Massachusetts.* — *Traders' Nat. Bank v. Rogers*, 167 Mass. 315.

*Missouri.* — *State v. Foley*, 144 Mo. 600.

*New York.* — *People v. Koerner*, 154 N. Y. 355; *Gerding v. Funk*, 169 N. Y. 572, *affirming* 48 N. Y. App. Div. 603; *People v. Bissert*, 71 N. Y. App. Div. 118, *affirmed* 172 N. Y. 643; *People v. Young*, 72 N. Y. App. Div. 9; *Putnam v. Lincoln Safe Deposit Co.*, 87 N. Y. App. Div. 13, *reversing* (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 738.

*Ohio.* — *State v. Iden*, 5 Ohio Dec. 627.

*Pennsylvania.* — *Huston's Estate*, 167 Pa. St. 217.

*Texas.* — *Orient Ins. Co. v. Moffatt*, 15 Tex. Civ. App. 385; *Guinn v. State*, 39 Tex. Crim. 257; *Funderburk v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 393; *Welch v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 50.

**Statement Made in the Course of Judicial Hearing.** — *Collier v. Dick*, 111 Ala. 263; *Thayer v. Usher*, 98 Me. 468; *Keith v. Marcus*, 181 Mass. 377; *Com. v. Burton*, 183 Mass. 461; *State v. Hale*, 156 Mo. 102; *Horan v. Byrnes*, 72 N. H. 93, 101 Am. St. Rep. 670; *Casaday v. Lindstrom*, 44 Oregon 309; *Com. v. Zorambo*, 205 Pa. St. 109. *Compare Connell v. McNett*, 109 Mich. 329.

If the defendant had the opportunity or the right to contradict such statements and failed to do so, they are admissible against him. *State v. Dexter*, 115 Iowa 678.

**Among Merchants, if an Account Current Be Sent.** — *Peoria Grape Sugar Co. v. Turney*, 58 Ill. App. 563; *Weigle v. Brautigam*, 74 Ill. App. 285; *Pabst Brewing Co. v. Lueders*, 107 Mich. 41; *Hendrix v. Kirkpatrick*, 48 Neb. 670.

**The Entries in a Book.** — *Osmun v. Winters*, 30 Oregon 177.

**Declarations by a Stranger.** — *People v. Koerner*, 154 N. Y. 355. See *Vaughn v. State*, 130 Ala. 18. *Contra*, *Kelly v. State*, 37 Tex. Crim. 641.

**Husband and Wife.** — Statements made by a husband against his wife's interest, to a third person in her presence, do not call for an answer. *Hoffmann v. Hoffmann*, 126 Mo. 486.

**675. 1.** *Brown v. Fowler*, 133 Ala. 310; *Geraghty v. Randall*, 18 Colo. App. 194; *Barwick v. Alderman*, (Fla. 1903) 35 So. Rep. 13; *Miller v. McDowell*, (Kan. 1904) 77 Pac. Rep. 101; *Beaudette v. Gagne*, 87 Me. 574; *Notara v. De Kamalaris*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 337; *Downey v. Taylor*, (Tex. Civ. App. 1898) 48 S. W. Rep. 541; *Knapp v. Wing*, 72 Vt. 334; *Jones v. Western Mfg. Co.*, 27 Wash. 136.

An admission of indebtedness made to a stranger is not evidence of an account stated, though it would be if made to the creditor. *Bee v. Tierney*, 58 Ill. App. 552.

Admissions made to a stranger by one who

had but recently attained her majority, relative to and in ratification of a deed made by her while a minor, were held inadmissible, in *Sayles v. Christie*, 187 Ill. 420.

**3. Admissions Against Interest** — *United States.* — *Hardy v. U. S.*, 186 U. S. 224; *St. Louis Fourth Nat. Bank v. Albaugh*, 188 U. S. 734, *affirming* 107 Fed. Rep. 819, 46 C. C. A. 655; *Zachry v. Nolan*, 66 Fed. Rep. 467, 30 U. S. App. 444; *The New Foundland*, 89 Fed. Rep. 510; *Farnsworth v. Nevada Co.*, 102 Fed. Rep. 578, 42 C. C. A. 509; *Westall v. Osborne*, (C. C. A.) 115 Fed. Rep. 282; *Dimmick v. U. S.*, (C. C. A.) 116 Fed. Rep. 825.

*Alabama.* — *Frank v. Thompson*, 105 Ala. 211; *Troy v. Rogers*, 113 Ala. 131; *McSwean v. State*, 113 Ala. 661, 21 So. Rep. 211; *Moore v. Heineke*, 119 Ala. 627; *Love v. State*, 124 Ala. 82; *King v. Franklin*, 132 Ala. 599; *Brown v. Fowler*, 133 Ala. 310; *Carter v. Fulgham*, 134 Ala. 238; *Mann v. State*, 134 Ala. 1; *Moore v. Crosthwait*, 135 Ala. 272; *Meadows v. State*, 136 Ala. 67; *Jones v. State*, 137 Ala. 12; *Thayer v. State*, 138 Ala. 39; *Thomas v. State*, 139 Ala. 80.

*Arkansas.* — *Graves v. Graves*, 70 Ark. 541.

*California.* — *People v. Knowlton*, 122 Cal. 357; *Macomber v. Bigelow*, 126 Cal. 9; *People v. Harlan*, 133 Cal. 16; *People v. Shears*, 133 Cal. 154; *People v. Joy*, 135 Cal. xix, 66 Pac. Rep. 964; *Keith v. Electrical Engineering Co.*, 136 Cal. 178; *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563; *People v. Farrington*, 140 Cal. 656; *People v. Scalamiro*, 143 Cal. 343; *People v. Moran*, 144 Cal. 48; *People v. Jan John*, 144 Cal. 284.

*Colorado.* — *Geraghty v. Randall*, 18 Colo. App. 194; *McIntire v. Schiffer*, 31 Colo. 246; *Everett v. Hart*, (Colo. App. 1904) 77 Pac. Rep. 254.

*Connecticut.* — *State v. Willis*, 71 Conn. 293; *Starr Burying Ground Assoc. v. North Lane Cemetery Assoc.*, (Conn. 1904) 58 Atl. Rep. 467.

*Delaware.* — *Sharp v. Swayne*, 1 Penn. (Del.) 210; *State v. Magnell*, 3 Penn. (Del.) 307.

*District of Columbia.* — *Sinclair v. District of Columbia*, 20 App. Cas. (D. C.) 336.

*Florida.* — *Brown v. State*, 42 Fla. 184; *Jones v. State*, 44 Fla. 74; *Anthony v. State*, 44 Fla. 1.

*Georgia.* — *Churchman v. Robinson*, 93 Ga. 731; *Munnerlyn v. Augusta Sav. Bank*, 94 Ga. 356; *Powell v. State*, 101 Ga. 9, 65 Am. St. Rep. 277; *Shaw v. State*, 102 Ga. 660; *Perryman v. Pope*, 102 Ga. 502; *Ernest v. Merritt*, 107 Ga. 61; *Ingram v. Hilton, etc., Lumber Co.*, 108 Ga. 194; *Georgia R., etc., Co. v. Fitzgerald*, 108 Ga. 507; *Howard v. State*, 109 Ga. 137; *Taylor v. State*, 110 Ga. 150; *Central of Georgia R. Co. v. Mosely*, 112 Ga. 914; *Sanders v. State*, 113 Ga. 267; *Dixon v. State*, 116 Ga. 186; *Bines v. State*, 118 Ga. 320.

*Idaho.* — *Work v. Kinney*, 8 Idaho 771.

*Illinois.* — *Miller v. Meers*, 155 Ill. 284; *German Ins. Co. v. Bartlett*, 188 Ill. 165, 80 Am. St. Rep. 172; *Lang v. Metzger*, 206 Ill. 475,

*affirming* 101 Ill. App. 380; *Gottschalk v. Jar-muth*, 69 Ill. App. 623; *Burke v. Hindman*, 70 Ill. App. 496; *Webster Mfg. Co. v. Schmidt*, 77 Ill. App. 49; *Salter v. Edward Hines Lumber Co.*, 77 Ill. App. 97; *Evanston v. Clark*, 77 Ill. App. 234; *Wabash R. Co. v. Farrell*, 79 Ill. App. 508; *Ellwood Mfg. Co. v. Faulkner*, 87 Ill. App. 294; *Clark v. Smith*, 87 Ill. App. 409; *German Ins. Co. v. Bartlett*, 89 Ill. App. 469; *Himrod Coal Co. v. Adack*, 94 Ill. App. 1; *Hansen v. Wayer*, 101 Ill. App. 212; *Second Bor-rows', etc., Bldg. Assoc. v. Cochrane*, 103 Ill. App. 29; *Deuterman v. Ruppel*, 103 Ill. App. 106.

*Indiana*. — *Keesling v. Powell*, 149 Ind. 372; *Fox v. Cox*, 20 Ind. App. 61; *Pritchett v. Sheri-dan*, 29 Ind. App. 81.

*Indian Territory*. — *Eddings v. Boner*, 1 In-dian Ter. 173.

*Iowa*. — *Nagle v. Fulmer*, 98 Iowa 585; *Smay v. Etnire*, 99 Iowa 149; *State v. Millmeier*, 102 Iowa 692; *Steele Smith Grocery Co. v. Potthast*, 109 Iowa 413; *Bartlett v. Falk*, 110 Iowa 346; *Bullard v. Bullard*, 112 Iowa 423; *Jamison v. Jamison*, 113 Iowa 720; *State v. Dexter*, 115 Iowa 678; *Butterfield v. Kirtley*, 115 Iowa 207; *Rounds v. Alece*, 116 Iowa 345; *Frick v. Ka-baker*, 116 Iowa 494; *Lundy v. Lundy*, 118 Iowa 445; *Wright v. Reed*, 118 Iowa 333; *State v. Phillips*, 118 Iowa 660; *Kuh, etc., Co. v. Gluck-lick*, 120 Iowa 504; *State v. Hasty*, 121 Iowa 507; *Leyner v. Leyner*, 123 Iowa 185; *State v. Worthen*, 124 Iowa 408.

*Kansas*. — *Pope v. Bowzer*, 1 Kan. App. 727; *Walker v. Brantner*, 59 Kan. 117; *Atchison, etc., R. Co. v. Potter*, 60 Kan. 808; *Brown v. Brown*, 62 Kan. 666; *Home-Riverside Coal Min. Co. v. Fores*, 64 Kan. 39; *Miller v. McDowell*, (Kan. 1904) 77 Pac. Rep. 101.

*Kentucky*. — *Jackson v. Com.*, 100 Ky. 239, 66 Am. St. Rep. 336; *Collins v. Wilson*, (Ky. 1897) 39 S. W. Rep. 33; *Gaines v. Deposit Bank*, (Ky. 1897) 39 S. W. Rep. 438; *Barclay v. Com.*, 76 S. W. Rep. 4, 25 Ky. L. Rep. 463; *Powers v. Powers*, 78 S. W. Rep. 152, 25 Ky. L. Rep. 1468; *Seaborn v. Com.*, (Ky. 1904) 80 S. W. Rep. 223.

*Louisiana*. — *State v. Picton*, 51 La. Ann. 624; *Trouilly's Succession*, 52 La. Ann. 276.

*Maryland*. — *Kirk v. Garrett*, 84 Md. 383; *Jarrell v. Felton*, 86 Md. 691.

*Massachusetts*. — *Com. v. Gay*, 162 Mass. 458; *Putnam v. Gunning*, 162 Mass. 552; *Rum-rill v. Ash*, 169 Mass. 341; *Com. v. Williams*, 171 Mass. 461; *Com. v. Chance*, 174 Mass. 245; *Saunders v. Dunn*, 175 Mass. 164; *Cooley v. Collins*, 186 Mass. 507.

*Michigan*. — *Reiser v. Portere*, 106 Mich. 102; *Ford v. Savage*, 111 Mich. 144; *Mead v. Randall*, 111 Mich. 268; *Baxter v. Reynolds*, 112 Mich. 471; *Sherrard v. Cudney*, 134 Mich. 200, 10 Detroit Leg. N. 437; *Rhode v. Metro-politan L. Ins. Co.*, 129 Mich. 112, 8 Detroit Leg. N. 888; *People v. Quimby*, 134 Mich. 625, 10 Detroit Leg. N. 618.

*Minnesota*. — *Couch v. Steele*, 63 Minn. 504; *Towle v. Sherer*, 70 Minn. 312; *Davis v. Ham-ilton*, 88 Minn. 64; *Dixon v. Union Iron-works*, 90 Minn. 492.

*Mississippi*. — *Bunckley v. State*, 77 Miss. 540; *Southern R. Co. v. McLellan*, 80 Miss. 700; *Myer, etc., Hardware Co. v. Spann*, (Miss. 1903) 35 So. Rep. 177.

*Missouri*. — *Bogges v. Bogges*, 127 Mo. 305; *Taliaferro v. Evans*, 160 Mo. 380; *Hoffmann v. Hoffmann*, 126 Mo. 486; *F. O. Sawyer Paper Co. v. Mangan*, 68 Mo. App. 1; *Jobe v. Weaver*, 77 Mo. App. 665; *State v. Dean*, 85 Mo. App. 473; *Waddell v. Waddell*, 87 Mo. App. 216; *Obuchon v. Boyd*, 92 Mo. App. 412.

*Montana*. — *Hughes v. Rowan*, 27 Mont. 500.

*Nebraska*. — *Lowe v. Vaughan*, 48 Neb. 651; *Aultman v. Martin*, 49 Neb. 103; *Zobel v. Bauer-sachs*, 55 Neb. 20; *Churchill v. White*, 58 Neb. 22, 76 Am. St. Rep. 64; *Miller v. Nicodemus*, 58 Neb. 352; *Allen v. Hall*, 64 Neb. 256; *Duna-foh v. Barber*, (Neb. 1902) 92 N. W. Rep. 198; *Seyfer v. Otoe County*, 66 Neb. 566; *Quinby v. Ayres*, (Neb. 1901) 95 N. W. Rep. 464; *Carlson v. Holm*, (Neb. 1901) 95 N. W. Rep. 1125.

*New Hampshire*. — *State v. Wright*, 68 N. H. 351.

*New Jersey*. — *De Hart v. Creveling*, 57 N. J. L. 642.

*New York*. — *Armour v. Gaffey*, 165 N. Y. 630, *affirming* 30 N. Y. App. Div. 121; *Card v. Moore*, 173 N. Y. 598, *affirming* 68 N. Y. App. Div. 327; *Barrett v. New York Cent., etc., R. Co.*, 157 N. Y. 663; *Terwilliger v. Industrial Ben. Assoc.*, 83 Hun (N. Y.) 320; *Swan v. Morgan*, 88 Hun (N. Y.) 378; *Newcombe v. Hyman*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 25; *Laidlaw v. Sage*, 2 N. Y. App. Div. 375; *Hoffman v. Hoffman*, 6 N. Y. App. Div. 84; *Reed v. McCord*, 18 N. Y. App. Div. 381; *Wolf v. Di Lorenzo*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 323; *Notara v. De Kamalaris*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 337; *Horowitz v. Pakas*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 520; *Eppens, etc., Co. v. Littlejohn*, 27 N. Y. App. Div. 22; *Merkle v. Beidleman*, 30 N. Y. App. Div. 14; *Cocheu v. Methodist Protestant Church*, 32 N. Y. App. Div. 239; *Cociancich v. Vazzoler*, 48 N. Y. App. Div. 462; *Weissbaum v. Solomon*, 54 N. Y. App. Div. 554; *Leary v. Corvin*, 63 N. Y. App. Div. 151; *Martin v. Farrell*, 66 N. Y. App. Div. 177; *Hicks v. Monarch Cycle Mfg. Co.*, 68 N. Y. App. Div. 134; *Matter of Woodward*, 69 N. Y. App. Div. 286; *Matter of Suess*, (Surrogate Ct.) 37 Misc. (N. Y.) 459; *Collins v. McGuire*, 76 N. Y. App. Div. 443; *Egyptian Flag Cigarette Co. v. Comisky*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 236; *People v. Bushnell*, 86 N. Y. App. Div. 5; *Maier v. Rebstock*, 92 N. Y. App. Div. 587.

*North Carolina*. — *Scarboro v. Scarboro*, 122 N. Car. 234; *State v. Utley*, 132 N. Car. 1022; *State v. Register*, 133 N. Car. 746.

*Ohio*. — *Neifeld v. State*, 23 Ohio Cir. Ct. 246.

*Oregon*. — *State v. Robinson*, 32 Oregon 43; *Anderson v. Adams*, 43 Oregon 621; *Good v. Smith*, 44 Oregon 578.

*Pennsylvania*. — *Davidson v. Young*, 167 Pa. St. 265; *McCarty v. Scanlon*, 187 Pa. St. 495; *Lynch v. Troxell*, 207 Pa. St. 162; *Humberston v. Detwiler*, 7 Pa. Super. Ct. 587; *Ravenswood Bank v. Reneker*, 18 Pa. Super. Ct. 192; *Com. v. Bunnell*, 20 Pa. Super. Ct. 51.

*Rhode Island*. — *Fay v. Feeley*, 18 R. I. 715; *State v. Mowry*, 21 R. I. 376.

*South Carolina*. — *McGahan v. Crawford*, 47 S. Car. 566; *State v. Wideman*, 68 S. Car. 119.

*South Dakota*. — *Commercial Bank v. Jack-son*, 9 S. Dak. 605.

*Tennessee.*—*Lee v. Johnson*, (Tenn. Ch. 1899) 53 S. W. Rep. 183; *Gardner v. Gardner*, 104 Tenn. 410.

*Texas.*—*Tuggle v. Hughes*, (Tex. Civ. App. 1894) 28 S. W. Rep. 61; *Branch v. Makeig*, 9 Tex. Civ. App. 399; *Smithael v. Smith*, 10 Tex. Civ. App. 446; *Barbee v. Spivey*, (Tex. Civ. App. 1895) 32 S. W. Rep. 345; *Waller v. Leonard*, (Tex. Civ. App. 1896) 34 S. W. Rep. 799, 89 Tex. 507; *Gaines v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 331; *St. Louis Southwestern R. Co. v. Bishop*, 14 Tex. Civ. App. 504; *Texas Cent. R. Co. v. Fisher*, 15 Tex. Civ. App. 63; *American F. Ins. Co. v. Stuart*, (Tex. Civ. App. 1896) 38 S. W. Rep. 395; *Simpson v. Edens*, 14 Tex. Civ. App. 235; *Harvey v. Harvey*, (Tex. Civ. App. 1897) 40 S. W. Rep. 185; *Shelburn v. McCrocklin*, (Tex. Civ. App. 1897) 42 S. W. Rep. 329; *Henry v. State*, 38 Tex. Crim. 306; *Smith v. State*, (Tex. Crim. 1897) 43 S. W. Rep. 794; *Russell v. State*, 38 Tex. Crim. 590; *Willis v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 826; *Fant v. Andrews*, (Tex. Civ. App. 1898) 46 S. W. Rep. 909; *Mathis v. State*, 39 Tex. Crim. 549; *Green v. Gresham*, 21 Tex. Civ. App. 601; *Roach v. Burgess*, (Tex. Civ. App. 1901) 62 S. W. Rep. 803; *Lord v. New York L. Ins. Co.*, 27 Tex. Civ. App. 139; *Spjars v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 533; *Merrell v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 979; *Over v. Missouri*, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 535; *Joy v. Liverpool*, etc., Ins. Co., 32 Tex. Civ. App. 433; *Smith v. International*, etc., R. Co., (Tex. Civ. App. 1904) 78 S. W. Rep. 556; *Nicks v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 35; *Crawford v. Abbey*, (Tex. Civ. App. 1904) 79 S. W. Rep. 346; *Consumers' Cotton Oil Co. v. Jonte*, (Tex. Civ. App. 1904) 80 S. W. Rep. 847; *Pecos*, etc., R. Co. v. *Lovelady*, (Tex. Civ. App. 1904) 80 S. W. Rep. 867; *Matthews v. Eppstein*, (Tex. Civ. App. 1904) 80 S. W. Rep. 882; *Huling v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1006.

*Utah.*—*State v. Neel*, 32 Utah 541; *Boyle v. Ogden City*, 24 Utah 443.

*Virginia.*—*Henderson v. Com.*, 98 Va. 794.

*Vermont.*—*Hubbard v. Moore*, 67 Vt. 532; *Burnham v. Courser*, 69 Vt. 183; *Dover v. Winchester*, 70 Vt. 418; *Knapp v. Wing*, 72 Vt. 334.

*Washington.*—*Hart v. Pratt*, 19 Wash. 560.

*West Virginia.*—*Crothers v. Crothers*, 40 W. Va. 169; *State v. Sheppard*, 49 W. Va. 582; *State v. Prater*, 52 W. Va. 132.

*Wisconsin.*—*Klatt v. N. C. Foster Lumber Co.*, 92 Wis. 622; *McGowan v. Supreme Ct.*, etc., 104 Wis. 173; *State v. McDonald*, 108 Wis. 8, 81 Am. St. Rep. 878; *Northern Electrical Mfg. Co. v. J. C. Wagner Co.*, 108 Wis. 584; *Bell v. Gund*, 110 Wis. 271; *Collins v. State*, 115 Wis. 596; *Voelkel v. Supreme Tent*, etc., 116 Wis. 202, 92 N. W. Rep. 1135.

**Thus Declarations in Disparagement of a Person's Title.**—*Diel v. Stegner*, 56 Mo. App. 535; *State v. Henderson*, 86 Mo. App. 482; *New Jersey Zinc*, etc., Co. v. *Lehigh Zinc*, etc., Co., 59 N. J. L. 189. See also *Long v. Moore*, 19 Tex. Civ. App. 363.

Where the statute of limitations has perfected the title of an adverse holder of land, his subsequent admissions that he was not holding

adversely are not competent evidence against him. *Baty v. Elrod*, 66 Neb. 735.

**Advancements — Gifts.**—*Garner v. Taylor*, (Tenn. Ch. 1900) 58 S. W. Rep. 758.

**Declarations by a Tenant for Life.**—A widow holding land as a part of her dower cannot make admissions with respect to the title which will bind the heirs or their grantees. *Maranvan v. Troutman*, 71 S. W. Rep. 861, 24 Ky. L. Rep. 1539.

Where a woman's second husband, surviving her, brings suit for partition of lands devised by her first husband to her for life with remainder to his children, alleging that she did not accept the will, her declarations made at the time of the execution of the will and the probate thereof, and before and after her second marriage, were held admissible against him. *Cook v. Lawson*, 63 Kan. 854.

**They Must Be Against Interest at the Time.**—*Farrow v. Nashville*, etc., R. Co., 109 Ala. 448; *Ikard v. Minter*, (Indian Ter. 1902) 69 S. W. Rep. 852; *Johnson v. Cole*, 76 N. Y. App. Div. 606.

**Marriage.**—*Com. v. Haylow*, 17 Pa. Super. Ct. 541; *Perrine v. Kohr*, 20 Pa. Super. Ct. 36.

**Divorce.**—In a suit for slander by an abandoned wife against her husband, his declaration that he had procured a divorce in another state was held admissible against him. *State v. Misenheimer*, 123 N. Car. 758.

**Infants** cannot make admissions against their interest which are binding on them, or authorize others to make such admissions. *Knights Templars', etc., L. Indemnity Co. v. Crayton*, 209 Ill. 550.

**Insane Persons.**—The admissions of a party are not necessarily incompetent by reason of the fact that she is under guardianship as insane. *Hart v. Miller*, 29 Ind. App. 222.

**Time and Place Need Not Be Specified** in order to render admissions against interest admissible. *Teller v. Ferguson*, 24 Colo. 432.

**Self-serving Declarations; Res Gestæ — England.**—*Hudson v. The Barge Swiftsure*, 82 L. T. N. S. 389.

*United States.*—*North American Acc. Assoc. v. Woodson*, 64 Fed. Rep. 689, 24 U. S. App. 364; *Delaware*, etc., R. Co. v. *Ashley*, 67 Fed. Rep. 209, 28 U. S. App. 375; *Gowen v. Bush*, 76 Fed. Rep. 349, 40 U. S. App. 349; *Cross Lake Logging Co. v. Joyce*, 83 Fed. Rep. 989, 55 U. S. App. 221; *Mutual L. Ins. Co. v. Logan*, (C. C. A.) 87 Fed. Rep. 637; *Kansas City Star Co. v. Carlisle*, 108 Fed. Rep. 344, 47 C. C. A. 384; *Lake County v. Keene Five-Cents Sav. Bank*, 108 Fed. Rep. 505, 47 C. C. A. 464; *Edwards v. Bates County*, 117 Fed. Rep. 526; *U. S. v. Gentry*, 119 Fed. Rep. 70, 55 C. C. A. 658.

*Alabama.*—*Larkin v. Baty*, 111 Ala. 303; *Guntersville Bank v. Webb*, 108 Ala. 132; *Moore v. Heineke*, 119 Ala. 627; *Linnehan v. State*, 120 Ala. 293; *Bodine v. State*, 129 Ala. 106; *Harkness v. State*, 129 Ala. 71; *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217; *Ferguson v. State*, 134 Ala. 63, 92 Am. St. Rep. 17; *Jernigan v. Clark*, 134 Ala. 313; *Holmes v. State*, 136 Ala. 80; *Moore v. Nashville*, etc., R. Co., 137 Ala. 495; *Sherrill v. State*, 138 Ala. 3; *Couch v. Couch*, (Ala. 1904) 37 So. Rep. 405; *Hartsell v. Masterson*, 132 Ala. 275.

- Arkansas*.—Bennett v. State, 70 Ark. 43.  
*California*.—Shamp v. White, 106 Cal. 220; Rogers v. Schulenburg, 111 Cal. 281; Frank v. Pennie, 117 Cal. 254; People v. Prather, 120 Cal. 660; Williams v. Casebeer, 126 Cal. 77; Smith v. Glenn, 129 Cal. xviii, 62 Pac. Rep. 180; Herd v. Tuohy, 133 Cal. 55; Ryan v. Pacific Axle Co., 136 Cal. xx, 68 Pac. Rep. 498; Rulofson v. Billings, 140 Cal. 452.  
*Colorado*.—Haines v. Christie, 28 Colo. 502; Union Casualty, etc., Co. v. Mondy, 18 Colo. App. 395.  
*Connecticut*.—Smith v. Phipps, 65 Conn. 302; McCarrick v. Kealy, 70 Conn. 642; Mechanic's Bank v. Woodward, 73 Conn. 470; Doolan v. Wilson, 73 Conn. 446.  
*District of Columbia*.—Richardson v. Van Auken, 5 App. Cas. (D. C.) 209.  
*Florida*.—Hood v. French, 37 Fla. 117; Fields v. State, (Fla. 1903) 35 So. Rep. 185.  
*Georgia*.—Birmingham, etc., Air-Line R., etc., Co. v. Walker, 101 Ga. 183; Cody v. Gainesville First Nat. Bank, 103 Ga. 789; Fraser v. State, 112 Ga. 13; Southern R. Co. v. Allison, 115 Ga. 635; Dixon v. State, 116 Ga. 186; Dozier v. McWhorter, 117 Ga. 786.  
*Illinois*.—Miller v. Meers, 155 Ill. 284; West Chicago St. R. Co. v. Kennelly, 170 Ill. 508; Lamb v. Manning, 171 Ill. 612; Meyer v. Meyer, 64 Ill. App. 175; First Nat. Bank v. Sanford, 83 Ill. App. 58; Cook v. American Luxfer Prism Co., 93 Ill. App. 299; Bishop v. Bishop, 95 Ill. App. 53; Stock v. Seegar, 99 Ill. App. 353; Frike v. Orr, 109 Ill. App. 200; Sanitary Dist. v. Pearce, 110 Ill. App. 592.  
*Indiana*.—Garr v. Shaffer, 139 Ind. 191; Douglass v. State, 18 Ind. App. 289; Ewing v. Bass, 149 Ind. 1; St. Joseph Hydraulic Co. v. Globe Tissue Paper Co., 156 Ind. 665.  
*Iowa*.—Smith v. Dawley, 92 Iowa 312; Corbel v. Beard, 92 Iowa 360; Allbright v. Hannah, 103 Iowa 98; Moehn v. Moehn, 105 Iowa 710; Owen v. Christensen, 106 Iowa 394; Iowa Leather, etc., Co. v. Hathaway, (Iowa 1899) 78 N. W. Rep. 193; Thilmany v. Iowa Paper Bag Co., 108 Iowa 357, 75 Am. St. Rep. 259; Creager v. Johnson, 114 Iowa 249; Luke v. Koenen, 120 Iowa 103; Gough v. Loomis, 123 Iowa 642.  
*Kansas*.—Topeka v. High, 6 Kan. App. 162; Broughan v. Broughan, 10 Kan. App. 575, 61 Pac. Rep. 874; State v. Gillespie, 62 Kan. 469; Broughan v. Broughan, 62 Kan. 724; Atchison, etc., R. Co. v. Logan, 65 Kan. 748.  
*Kentucky*.—Dixon v. Labry, (Ky. 1895) 29 S. W. Rep. 21; Eve v. Saylor, (Ky. 1898) 44 S. W. Rep. 355; Mann v. Cavanaugh, 110 Ky. 776; New York L. Ins. Co. v. Johnson, 72 S. W. Rep. 762, 24 Ky. L. Rep. 1867; Proctor v. Proctor, (Ky. 1904) 81 S. W. Rep. 272.  
*Louisiana*.—State v. Harris, 107 La. 196.  
*Maryland*.—Baltimore, etc., R. Co. v. State, 81 Md. 371; Johnson v. Johnson, 96 Md. 144.  
*Massachusetts*.—Thayer v. Lombard, 165 Mass. 174; Huebener v. Childs, 180 Mass. 483; Hutchinson v. Nay, 183 Mass. 355; Graham v. Middleby, 185 Mass. 349.  
*Michigan*.—Mead v. Randall, 111 Mich. 268; Schulz v. Schulz, 113 Mich. 502; Rose v. Lockerby, 116 Mich. 277; Supreme Tent, etc., v. Port Huron Sav. Bank, (Mich. 1904) 100 N. W. Rep. 898; Lord v. Detroit Sav. Bank, 132 Mich. 510, 9 Detroit Leg. N. 706.  
*Minnesota*.—Hulett v. Carey, 66 Minn. 327, 61 Am. St. Rep. 419.  
*Mississippi*.—Memphis Grocery Co. v. Valley Land Co., (Miss. 1895) 17 So. Rep. 232.  
*Missouri*.—Preston v. Hannibal, etc., R. Co., 132 Mo. 111; State v. Strong, 153 Mo. 548; Miller v. Quick, 158 Mo. 495; State v. Blitz, 171 Mo. 530; State v. Dunn, 179 Mo. 95; Diel v. Stegner, 56 Mo. App. 535; Blasland-Parcells-Jordon Shoe Co. v. Hicks, 70 Mo. App. 301; Bosard v. Powell, 79 Mo. App. 184; Waddell v. Waddell, 87 Mo. App. 216; Hall v. Jennings, 87 Mo. App. 627; American Valley Co. v. Wyman, 92 Mo. App. 294; Armstrong v. Johnson, 93 Mo. App. 492; Johnson v. Burks, 103 Mo. App. 221; Vermillion v. Parsons, 101 Mo. App. 602; Brown v. Pacific Mut. L. Ins. Co., (Mo. App. 1904) 82 S. W. Rep. 1122; Speer v. Burlingame, 1 Mo. App. Rep. 322; State v. Moore, 156 Mo. 204.  
*Nebraska*.—Zobel v. Bauersachs, 55 Neb. 20; Boice v. Palmer, 55 Neb. 389; Smith v. State, 61 Neb. 296; Bennett v. Taylor, (Neb. 1903) 96 N. W. Rep. 669.  
*New Hampshire*.—Murray v. Boston, etc., R. Co., 72 N. H. 32, 101 Am. St. Rep. 660.  
*New Jersey*.—Duysters v. Crawford, 69 N. J. L. 614.  
*New York*.—Wagner v. Grimm, 169 N. Y. 421, affirming Grimm v. Grimm, 53 N. Y. App. Div. 626; Scheir v. Quirin, 177 N. Y. 568, affirming 77 N. Y. App. Div. 624; Commercial Bank v. Bolton, 87 Hun (N. Y.) 547; Kelly v. Cohoes Knitting Co., 8 N. Y. App. Div. 156; Gilroy v. Loftus, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 317; Suffolk County v. Shaw, 21 N. Y. App. Div. 146; Levison v. Seybold Mach. Co., (Supm. Ct. App. T.) 22 Misc. (N. Y.) 327; White v. McNulty, 26 N. Y. App. Div. 173; Granger v. American Brewing Co., (Supm. Ct. App. T.) 25 Misc. (N. Y.) 701; Travis v. Stewart, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 240; Donohue v. Brooklyn, etc., R. Co., 53 N. Y. App. Div. 348; Toal v. New York, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 18; Healy v. Malcolm, 77 N. Y. App. Div. 69; Diamond v. Wheeler, 80 N. Y. App. Div. 58; Union Trust Co. v. Leighton, 83 N. Y. App. Div. 568; Mowbray v. Gould, 83 N. Y. App. Div. 255; Havens v. Gilmour, 83 N. Y. App. Div. 84; Grant v. Pratt, 87 N. Y. App. Div. 490; Griffin v. Train, 90 N. Y. App. Div. 16, affirming (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 290.  
*North Carolina*.—Pettiford v. Mayo, 117 N. Car. 27; Johnson v. Armfield, 130 N. Car. 575; Perkins v. Brinkley, 133 N. Car. 348; Jones v. Warren, 134 N. Car. 390.  
*Ohio*.—Atkinson v. Bond Hill, 2 Ohio Dec. 48, 1 Ohio N. P. 166.  
*Oregon*.—Ladd v. Hawkes, 41 Oregon 247; Tobin v. Portland Flouring Mills Co., 41 Oregon 269; State v. Smith, 43 Oregon 109; Goltra v. Penland, (Oregon 1904) 77 Pac. Rep. 129.  
*Pennsylvania*.—Keefer v. Pacific Mut. L. Ins. Co., 201 Pa. St. 448; Philadelphia v. Gowen, 202 Pa. St. 453; Thomas v. Miller, 165 Pa. St. 216; Dempsey v. Dobson, 174 Pa. St. 122, 52 Am. St. Rep. 816; Selig v. Rehfuß, 195 Pa. St. 200; Howe v. Howe, 16 Pa. Super. Ct. 193; Moulton v. O'Bryan, 17 Pa. Super. Ct.

593; Siebelist *v.* Metropolitan L. Ins. Co., 19 Pa. Super. Ct. 221; Sinsheimer *v.* Hartman, 19 Pa. Super. Ct. 494; Price *v.* Beach, 20 Pa. Super. Ct. 291.

*Rhode Island.*—White *v.* Berry, 24 R. I. 74; State *v.* Epstein, 25 R. I. 131; Bowen *v.* White, 26 R. I. 69.

*South Carolina.*—Greer *v.* Latimer, 47 S. Car. 176; State *v.* Green, 61 S. Car. 12.

*South Dakota.*—Aldous *v.* Olverson, (S. Dak. 1903) 95 N. W. Rep. 917.

*Tennessee.*—Colquit *v.* State, 107 Tenn. 381.

*Texas.*—Byers *v.* Wallace, 87 Tex. 503; Ætna Ins. Co. *v.* Eastman, 95 Tex. 34; Jamison *v.* Dooley, (Tex. 1904) 82 S. W. Rep. 780; Haley *v.* Johnson, (Tex. Civ. App. 1894) 28 S. W. Rep. 382; Boehringer *v.* A. B. Richards Medicine Co., 9 Tex. Civ. App. 284; Nix *v.* Cole, (Tex. Civ. App. 1895) 29 S. W. Rep. 561; Kohlberg *v.* Fett, (Tex. Civ. App. 1895) 29 S. W. Rep. 944; Ward *v.* Gibbs, 10 Tex. Civ. App. 287; Phillips *v.* Sherman, (Tex. Civ. App. 1897) 39 S. W. Rep. 187; Houston, etc., R. Co. *v.* Ritter, 16 Tex. Civ. App. 482; Schott *v.* Pellerim, (Tex. Civ. App. 1897) 43 S. W. Rep. 944; Henry *v.* Bounds, (Tex. Civ. App. 1898) 46 S. W. Rep. 120; Downey *v.* Taylor, (Tex. Civ. App. 1898) 48 S. W. Rep. 541; Chestnut *v.* Chism, 20 Tex. Civ. App. 23; City Nat. Bank *v.* Martin-Brown Co., 20 Tex. Civ. App. 52; Largent *v.* Beard, (Tex. Civ. App. 1899) 53 S. W. Rep. 90; Turner *v.* Sealock, 21 Tex. Civ. App. 594; Lewis *v.* Bergess, 22 Tex. Civ. App. 252; Hockaday *v.* Wortham, 22 Tex. Civ. App. 419; Morgan *v.* Butler, 23 Tex. Civ. App. 470; Lindsey *v.* White, (Tex. Civ. App. 1901) 61 S. W. Rep. 438; Cole *v.* Horton, (Tex. Civ. App. 1901) 61 S. W. Rep. 503; Galveston, etc., R. Co. *v.* Davis, 27 Tex. Civ. App. 279; Watts *v.* Dubois, (Tex. Civ. App. 1902) 66 S. W. Rep. 698; Murphy *v.* Magee, (Tex. Civ. App. 1902) 68 S. W. Rep. 1002; McCowen *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 46; Over *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 535; Tenzler *v.* Tyrrell, 32 Tex. Civ. App. 443; Missouri, etc., R. Co. *v.* Schilling, 32 Tex. Civ. App. 417; Missouri, etc., R. Co. *v.* Tarwater, (Tex. Civ. App. 1903) 75 S. W. Rep. 937; Donaldson *v.* Dobbs, (Tex. Civ. App. 1904) 80 S. W. Rep. 1084; Golin *v.* State, 37 Tex. Crim. 90; Bailey *v.* State, (Tex. Crim. 1897) 38 S. W. Rep. 992; Bratt *v.* State, (Tex. Crim. 1897) 41 S. W. Rep. 624; Merritt *v.* State, 40 Tex. Crim. 359; Padron *v.* State, 41 Tex. Crim. 548; Little *v.* State, 42 Tex. Crim. 551; Cox *v.* State, (Tex. Crim. 1902) 69 S. W. Rep. 145; Martin *v.* State, 44 Tex. Crim. 538; Foster *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 29; Smith *v.* State, (Tex. Crim. 1904) 81 S. W. Rep. 936; Chenault *v.* State, (Tex. Crim. 1904) 81 S. W. Rep. 971.

*Utah.*—Sullivan *v.* Salt Lake City, 13 Utah 122; White *v.* Pease, 15 Utah 170; Salt Lake City Brewing Co. *v.* Hawke, 24 Utah 199.

*Vermont.*—Hawkes *v.* Chester, 70 Vt. 271; State *v.* Buck, 74 Vt. 29.

*Virginia.*—Southern R. Co. *v.* Wilcox, 99 Va. 394; Repass *v.* Richmond, 99 Va. 508.

*Washington.*—Schlotfeldt *v.* Bull, 18 Wash. 64; Long *v.* Pierce County, 22 Wash. 330; State *v.* Gates, 28 Wash. 689.

*West Virginia.*—Crothers *v.* Crothers, 40 W. Va. 169; Dunlap *v.* Griffith, 146 Mo. 283; Lindsley *v.* McGrath, 62 N. J. Eq. 478; Porter *v.* State, (Tex. Crim. 1899) 50 S. W. Rep. 380; Henry *v.* Bounds, (Tex. Civ. App. 1898) 46 S. W. Rep. 120.

Declarations of the vendor that he had sold out to the vendee were held inadmissible in an action for conversion of property against a sheriff who had attached the property as that of the vendor. Lumm *v.* Howells, 27 Utah 80.

The declarations of a testator, made at or about the time of the giving of a note, to the effect that he had paid all his attorneys and he had a poor opinion of plaintiff, the payee in the note, were admitted in favor of the executors. Moore *v.* Palmer, 14 Wash. 134.

The president of a bank, being payee of a note given by the bank, indorsed it to plaintiff, and at the time made a statement as to the amount due on the note. This statement was held to have been inadmissible in a suit on the note against the bank. Love *v.* Anchor Raisin Vineyard Co., (Cal. 1896) 45 Pac. Rep. 1044.

A copy of a coroner's inquest showing suicide of the insured, and furnished by a subordinate lodge to, and as agent of, the executive council of a secret insurance order, was held to be self-serving and not admissible against the beneficiary. Cox *v.* Royal Tribe, 42 Oregon 365, 95 Am. St. Rep. 752.

**Payments Indorsed on a Note** by the obligee are self-serving declarations and not admissible to prove payments for the purpose of removing the bar of the statute of limitations. Gupton *v.* Hawkins, 126 N. Car. 81.

**Declarations and Expressions of Pain, Etc.,** made to an examining physician, are admissible as part of the *res gesta*. Jones *v.* Niagara Junction R. Co., 63 N. Y. App. Div. 607. And see generally the title *RES GESTÆ*.

**Gestures** may be admitted when part of the *res gesta*. State *v.* Maxey, 107 La. 799.

**Strangers**—*United States.*—Southern Pac. Co. *v.* Arnett, 111 Fed. Rep. 849, 50 C. C. A. 17; Judd *v.* New York, etc., Steamship Co., 128 Fed. Rep. 7, *affirming* on rehearing 117 Fed. Rep. 206, 54 C. C. A. 238.

*Alabama.*—Bunzel *v.* Maas, 116 Ala. 68.

*Arkansas.*—Tharp *v.* Page, 66 Ark. 129.

*California.*—California Bank *v.* J. L. Mott Iron Works, 113 Cal. 409.

*Connecticut.*—Budd *v.* Meriden Electric R. Co., 69 Conn. 272.

*Georgia.*—Churchman *v.* Robinson, 93 Ga. 731; Robinson *v.* Stevens, 93 Ga. 535; Morris *v.* Levering, 98 Ga. 33; First State Bank *v.* Carver, 111 Ga. 876; Scott *v.* Maddox, 113 Ga. 795, 84 Am. St. Rep. 263.

*Idaho.*—Axtell *v.* Northern Pac. R. Co., (Idaho 1903) 74 Pac. Rep. 1075.

*Illinois.*—Dowie *v.* Driscoll, 203 Ill. 480; Mann *v.* Sodakat, 66 Ill. App. 393; Himrod Coal Co. *v.* Adack, 94 Ill. App. 1.

*Indiana.*—Garr *v.* Shaffer, 139 Ind. 191.

*Iowa.*—Matter of Goldthorp, 94 Iowa 336, 58 Am. St. Rep. 400; Oxtoby *v.* Henley, 112 Iowa 697.

*Kansas.*—Holman *v.* Raynesford, 3 Kan. App. 676; Edwards *v.* Bricker, 66 Kan. 241.

*Kentucky.*—Bean *v.* Taylor, 61 S. W. Rep. 31, 22 Ky. L. Rep. 1665; Hays *v.* Earls, 77 S.

**677.** See note 1.

**678.** 2. Parties to the Record. — See note 3.

**679.** 3. Real Parties. — See note 1.

W. Rep. 706, 25 Ky. L. Rep. 1299; Marks v. Hardy, 78 S. W. Rep. 864, 1105, 25 Ky. L. Rep. 1770, 1909.

*Maryland.* — Johnson v. Johnson, 96 Md. 144. *Massachusetts.* — Blanchette v. Holyoke St. R. Co., 175 Mass. 51; Koplan v. Boston Gas Light Co., 177 Mass. 15.

*Michigan.* — Vyn v. Keppel, 108 Mich. 244; Moore v. Hazelton Tp., 118 Mich. 425; Seitz v. Starks, (Mich. 1904) 98 N. W. Rep. 852, 10 Detroit Leg. N. 978.

*Minnesota.* — Hahn v. Penney, 60 Minn. 487; Bathke v. Krassin, 82 Minn. 226; Whitney v. Wagener, 84 Minn. 211, 87 Am. St. Rep. 351.

*Missouri.* — George B. Loving Co. v. Hesperian Cattle Co., 176 Mo. 330; John Deere Plow Co. v. McCullough, 102 Mo. App. 458.

*Montana.* — Wiggin v. Fine, 17 Mont. 575. *Nebraska.* — Kyd v. Cook, 56 Neb. 71, 71 Am. St. Rep. 661; Runquist v. Anderson, 64 Neb. 755.

*New York.* — Buchanan v. Foster, 23 N. Y. App. Div. 542; Whitman v. Egbert, 27 N. Y. App. Div. 374; Dimon v. Keery, 54 N. Y. App. Div. 318.

*Oregon.* — Mattis v. Hosmer, 37 Oregon 523, affirmed 37 Oregon 533.

*Pennsylvania.* — Dosch v. Diem, 176 Pa. St. 603; Myerstown Bank v. Roessler, 186 Pa. St. 431; Shannon v. Castner, 21 Pa. Super. Ct. 294; Thomas v. Butler, 24 Pa. Super. Ct. 305; Abington Dairy Co. v. Reynolds, 24 Pa. Super. Ct. 632.

*South Carolina.* — Ragsdale v. Southern R. Co., 69 S. Car. 429.

*Tennessee.* — Willcox v. Hines, 100 Tenn. 524.

*Texas.* — Williams v. Pollard, (Tex. Civ. App. 1894) 28 S. W. Rep. 1020; Pumphrey v. St. Louis, etc., R. Co., 14 Tex. Civ. App. 455; Gulf, etc., R. Co. v. Irvine, (Tex. Civ. App. 1903) 73 S. W. Rep. 540.

*Washington.* — American Copper, etc., Works v. Galland-Burke Brewing, etc., Co., 30 Wash. 178.

A prosecuting witness is regarded as a stranger within this rule. State v. Deal, 43 Oregon 17.

In a suit by a wife against her father-in-law for damages for alienating her husband's affections, the declarations of the husband as to his separation from his wife are competent in her behalf. Nevins v. Nevins, 68 Kan. 410.

Cattle issued by the United States to an Indian woman, wife of a white man, being found in the possession of the husband, were levied upon and sold for the husband's debt, and the United States, the real owner, sued for the conversion, and it was held that declarations of the husband as to his possession and ownership, and statements by the wife tending to show ownership in the husband, were inadmissible. McKnight v. U. S., (C. C. A.) 130 Fed. Rep. 659.

**677.** 1. Illinois Cent. R. Co. v. Swisher, 61 Ill. App. 611; Mason Fruit-Jar Co. v. Paine, 166 Pa. St. 352; Morgan v. Butler, 23 Tex. Civ. App. 479.

**Evidence of a Conversation by Telephone.** — Where a witness testifies that he recognized the defendant's voice in a conversation over the telephone, he may testify as to the conversation. Lord Electric Co. v. Morrill, 178 Mass. 304. See also Lincoln Mill Co. v. Wissler, (Neb. 1903) 95 N. W. Rep. 857.

*Where the Party Insured Is Made a Joint Defendant with the Insurer* in an action by the person to whom the insurance is payable, admissions by the party insured are not admissible against the insurer. Herzog v. Palatine Ins. Co., 36 Wash. 611.

**678.** 3. Hall v. Clountz, 26 Tex. Civ. App. 348.

**Trustees.** — Unity Co. v. Equitable Trust Co., 204 Ill. 595, affirming 107 Ill. App. 449.

Where a holder of mortgage bonds sues to foreclose, alleging infidelity of the trustee under the mortgage, the admissions of the trustee were held not binding on the other bondholders. Belknap Sav. Bank v. Lamar Land, etc., Co., 28 Colo. 326.

**Guardian, Prochein Ami, Etc.** — Johnston v. Coney, 120 Ga. 767; Buck v. Maddock, 167 Ill. 219. See also Neal v. Lapline, 48 La. Ann. 424.

Guardians have no authority to make admissions against the interests of their wards. Knights Templars, etc., L. Indemnity Co. v. Crayton, 209 Ill. 550. See also Kidwell v. Ketter, (Cal. 1905) 79 Pac. Rep. 514; Stevens v. Continental Casualty Co., 12 N. Dak. 463.

But the admissions of a guardian made while acting as such, and on behalf of his ward, are admissible against him or his successor in office. Hart v. Miller, 29 Ind. App. 222.

Admissions made by a guardian *ad litem* in a verified complaint filed in a former suit are not admissible against the infant in a suit subsequently brought for the same cause of action in her own behalf. Schlotterer v. Brooklyn, etc., Ferry Co., 75 N. Y. App. Div. 330.

**Executors, Administrators, Etc.** — Horkan v. Benning, 111 Ga. 126; Pentz v. Pennsylvania F. Ins. Co., 92 Md. 444; Hadlock v. Brooks, 178 Mass. 425; Niskern v. Haydock, 23 N. Y. App. Div. 175; Spencer v. Hall, (County Ct.) 30 Misc. (N. Y.) 75, affirmed 51 N. Y. App. Div. 623; Matter of Suess, (Surrogate Ct.) 37 Misc. (N. Y.) 459; Williams v. Culver, 39 Oregon 337; Lindsey v. White, (Tex. Civ. App. 1901) 61 S. W. Rep. 438, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 679.

**The Admission of One of Two Administrators** is admissible against them to charge the estate. Crouse v. Judson, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338.

**Receivers.** — Where a receiver has authority to sue and defend, any admissions made by him are binding upon those interested in the estate. Bosworth v. St. Louis Terminal R. Assoc., 174 U. S. 182.

**679.** 1. Hart v. Miller, 29 Ind. App. 222; Brown v. Brown, 62 Kan. 666; Atchison, etc., R. Co. v. Ryan, 62 Kan. 682; Fidelity Mut. L. Assoc. v. Winn, 96 Tenn. 224.

**680. 4. Privies.** — See notes 3, 4.**680. 3. Admissions in Disparagement of Title**

— *Alabama*. — Beasley *v.* Howell, 117 Ala. 499.  
*Idaho*. — Daly *v.* Josslyn, 7 Idaho 657.

*Illinois*. — Crone *v.* Crone, 70 Ill. App. 294;  
 Oliver *v.* McDowell, 100 Ill. App. 45.

*Indiana*. — Smith *v.* McClain, 146 Ind. 77.

*Iowa*. — Davidson *v.* Thomas, (Iowa 1901)  
 86 N. W. Rep. 291; Finch *v.* Garrett, 102 Iowa  
 381.

*Kansas*. — Wiggins *v.* Foster, 8 Kan. App.  
 579.

*Kentucky*. — Mann *v.* Cavanaugh, 110 Ky.  
 776.

*Maine*. — Walsh *v.* Wheelwright, 96 Me. 174;  
 Phillips *v.* Laughlin, 99 Me. 26, quoting 1 AM.  
 AND ENG. ENCYC. OF LAW (2d ed.) 680.

*Minnesota*. — Nickerson *v.* Wells-Stone Mer-  
 cantile Co., 71 Minn. 230, citing 1 AM. AND  
 ENG. ENCYC. OF LAW (2d ed.) 680.

*Missouri*. — Kirkendall *v.* Hartsock, 58 Mo.  
 App. 234.

*New York*. — Kellum *v.* Mission of Immacu-  
 late Virgin, etc., 82 N. Y. App. Div. 523.

*North Carolina*. — Scarboro *v.* Scarboro, 122  
 N. Car. 234.

*South Dakota*. — Murphy *v.* Dafoe, (S. Dak.  
 1904) 99 N. W. Rep. 86.

*Tennessee*. — Harton *v.* Lyons, 97 Tenn. 180.

*Texas*. — Rogers *v.* Wallace, (Tex. Civ. App.  
 1894) 28 S. W. Rep. 246; Phillips *v.* Sherman,  
 (Tex. Civ. App. 1897) 39 S. W. Rep. 187.

*Utah*. — McCornick *v.* Sadler, 14 Utah 46.

**4. United States.** — St. Louis Fourth Nat.  
 Bank *v.* Albaugh, 107 Fed. Rep. 819, 46 C. C.  
 A. 655.

*Arkansas*. — Cribbs *v.* Walker, (Ark. 1905)  
 85 S. W. Rep. 244.

*California*. — Williams *v.* Harter, 121 Cal. 47.

*Georgia*. — Ogden *v.* Dodge County, 97 Ga.  
 461; Dozier *v.* McWhorter, 117 Ga. 786.

*Illinois*. — Gage *v.* Eddy, 179 Ill. 492.

*Indiana*. — McCurtain *v.* Grady, 1 Indian Ter.  
 107.

*Maine*. — Carter *v.* Clark, 92 Me. 225; Phil-  
 lips *v.* Loughlin, 99 Me. 26, quoting 1 AM. AND  
 ENG. ENCYC. OF LAW (2d ed.) 680.

*Missouri*. — Boynton *v.* Miller, 144 Mo. 681.

*New York*. — Knoch *v.* Von Bernuth, 145 N.  
 Y. 643; Marsh *v.* Ne-ha-sa-ne Park Assoc., 25  
 N. Y. App. Div. 34, reversing (Supm. Ct. Tr.  
 T.) 18 Misc. (N. Y.) 314.

*Pennsylvania*. — Caldwell *v.* Caldwell, 24 Pa.  
 Super. Ct. 230.

*West Virginia*. — High *v.* Pancake, 42 W. Va.  
 602.

Thus the Admissions of the Grantor of Land  
 are admissible against the grantee. Henderson  
*v.* Wanamaker, 79 Fed. Rep. 736, 49 U. S. App.  
 174; Wisdom *v.* Reeves, 110 Ala. 418; Nelson  
*v.* Howison, 122 Ala. 573; Costello *v.* Graham,  
 (Ariz. 1905) 80 Pac. Rep. 336; Lang *v.* Metzger,  
 206 Ill. 475, affirming 101 Ill. App. 380;  
 Walter *v.* Brown, 115 Iowa 360, citing 1 AM.  
 AND ENG. ENCYC. OF LAW (2d ed.) 680; Phillips  
*v.* Coburn, 28 Mont. 45; New Jersey Zinc, etc.,  
 Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189;  
 Aldous *v.* Olverson, 17 S. Dak. 190, citing 1  
 AM. AND ENG. ENCYC. OF LAW (2d ed.) 170;  
 Poundstone *v.* Jones, 182 Pa. St. 574; Stuart  
*v.* Line, 11 Pa. Super. Ct. 345; Campbell *v.*

Antis, 21 Tex. Civ. App. 161; Green *v.* Gresham,  
 21 Tex. Civ. App. 601; Oakman *v.* Walker, 69  
 Vt. 344.

**Declarations of the Locator of a Mining Claim.** —  
 See Lockhart *v.* Wills, 9 N. Mex. 263.

The declarations of the locator of a mining  
 claim, made against his interest during his  
 lifetime, are receivable against his adminis-  
 trator. Scott *v.* Crouch, 24 Utah 377.

Also, the Admissions of the Ancestor will be re-  
 ceived against the heir. Pittman *v.* Pittman,  
 124 Ala. 306; Donnelly *v.* Rees, 141 Cal. 56;  
 Studstill *v.* Willcox, 94 Ga. 690; Mann *v.* Cava-  
 naugh, 110 Ky. 776; O'Neal *v.* Fenwick, 64 S.  
 W. Rep. 952, 23 Ky. L. Rep. 1219; Roberts *v.*  
 Rice, 69 N. H. 472; Lee *v.* Johnson, (Tenn. Ch.  
 1899) 53 S. W. Rep. 183; Phillips *v.* Sherman,  
 (Tex. Civ. App. 1897) 39 S. W. Rep. 187; Shel-  
 burn *v.* McCrocklin, (Tex. Civ. App. 1897) 42  
 S. W. Rep. 329; Church of Jesus Christ *v.* Wat-  
 son, 25 Utah 45; Kreckeberg *v.* Leslie, 111 Wis.  
 462. *Contra*, Clawson *v.* Wallace, 16 Utah 300.

**In the Same Way the Admissions of the Testator**  
 are admissible against a legatee, Wonsetler *v.*  
 Wonsetler, 23 Pa. Super. Ct. 321; or against the  
 executor, Bonebrake *v.* Tauer, 67 Kan. 827;  
 Story *v.* Story, 61 S. W. Rep. 279, 22 Ky. L.  
 Rep. 1731, rehearing denied 62 S. W. Rep. 865,  
 22 Ky. L. Rep. 1869; Komitsch *v.* De Groot, 80  
 N. Y. App. Div. 376.

Under Gen. Stat. Conn., § 1094, the declara-  
 tions of the testator relative to the conveyance  
 of his land are admissible for and against the  
 devisees. Hurd *v.* Hotchkiss, 72 Conn. 472.

**Declarations of an Intestate** are receivable  
 against the administrator. Miller *v.* Miller,  
 (Ariz. 1901) 64 Pac. Rep. 415; Harp *v.* Harp,  
 136 Cal. 421; Allen *v.* Hartford L. Ins. Co., 72  
 Conn. 693; Brooks *v.* Holden, 175 Mass. 137;  
 Burns *v.* Smith, 21 Mont. 251, 69 Am. St. Rep.  
 653; Crouse *v.* Judson, (Supm. Ct. Tr. T.) 41  
 Misc. (N. Y.) 338; Nissley *v.* Brubaker, 192  
 Pa. St. 388; Redding *v.* Redding, 69 Vt. 500.

The declarations of an intestate are also ad-  
 missible against persons claiming under or  
 through him as heirs or otherwise. Matter of  
 Swade, 65 N. Y. App. Div. 592; Hughes *v.*  
 Delaware, etc., Canal Co., 176 Pa. St. 254.

The declarations of an intestate made at the  
 time of the execution and delivery of a deed,  
 to the effect that it did not pay half of his debt  
 to the grantee, are admissible in favor of the  
 grantee. Oakman *v.* Walker, 69 Vt. 344.

**The Declarations of a Deceased Husband** that  
 he held certain lands in trust for his wife, whose  
 money paid for them, are competent evidence  
 in her favor to support a deed subsequently  
 made by him to her, which is assailed by his  
 creditors. German Ins. Co. *v.* Bartlett, 188 Ill.  
 165, 80 Am. St. Rep. 172.

**Declarations of Mortgagee.** — Baird *v.* Baird,  
 145 N. Y. 659.

Where a mortgagee admits, while owning a  
 mortgage, that it was without consideration, the  
 admission is admissible against his subsequent  
 transferee. Anderson *v.* Lee, 73 Minn. 397.

Declarations of the assignor of a mortgage  
 as to the consideration are competent against  
 his assignee. Scheurer *v.* Brown, 67 N. Y. App.  
 Div. 567.



The mortgagee's declaration that he intended to release the mortgage is competent on behalf of the mortgagor to prove the release. *Fellows v. Fellows*, 69 N. H. 339.

**Judgment Debtor.**—*Myers v. Bernstein*, 102 Ga. 579. *Contra*, *Harrison v. Richardson*, 99 Ga. 763.

**By Statute in Georgia** the declarations of a debtor made while a suit is pending against him, or after judgment rendered, are not admissible in favor of or against the claimant of property levied on in the possession and as property of the debtor. (Code, § 3784.) *James v. Taylor*, 93 Ga. 275; *Tillman v. Fontaine*, 98 Ga. 672.

**The Statement of a Deceased Person.**—*Rives v. Lamar*, 94 Ga. 186; *Studdill v. Willcox*, 94 Ga. 690; *Richmond First Nat. Bank v. Holland*, 99 Va. 495, 86 Am. St. Rep. 898. See also *Chambers v. McCreery*, 106 Fed. Rep. 364, 45 C. C. A. 322; *Gross v. Smith*, 132 N. Car. 604; *Lord v. New York L. Ins. Co.*, 27 Tex. Civ. App. 139.

The statements of a deceased donor are admissible to prove his mental condition. *Sargent v. Burton*, 74 Vt. 24.

Where a father paid the purchase money for land conveyed to his son, and took the latter's note therefor, his subsequent declarations that he intended an advancement to the son were held inadmissible on the question of advancement. *Garner v. Taylor*, (Tenn. Ch. 1900) 58 S. W. Rep. 758.

**An Acknowledgment of a Trust** is admissible in evidence against himself and his heirs, *McClellan v. Grant*, 83 N. Y. App. Div. 599; *Kyte v. Kyte*, 8 Kulp (Pa.) 1; or his creditors, *German Ins. Co. v. Bartlett*, 89 Ill. App. 469; or his voluntary grantee, *Ratliff v. Ratliff*, 131 N. Car. 425.

**Boundaries.**—*Vogt v. Geyer*, (Tex. Civ. App. 1898) 48 S. W. Rep. 1100.

**Declarations Must Be Against Interest.**—*McLeod v. Bishop*, 110 Ala. 640; *Butler v. Butler*, 133 Ala. 377; *Bedell v. Scoggins*, (Cal. 1895) 40 Pac. Rep. 954; *Rowe v. Hibernia Sav., etc., Soc.*, 134 Cal. 403; *Bollinger v. Wright*, 143 Cal. 292; *Pleasanton v. Simmons*, 2 Penn. (Del.) 477; *Miller v. Meers*, 155 Ill. 284; *Moehn v. Moehn*, 105 Iowa 710; *Ellis v. Newell*, 120 Iowa 71; *High v. Pancake*, 42 W. Va. 602.

**Admissible to Show Character of Claim Asserted.**—*Wisdom v. Reeves*, 110 Ala. 418; *McLeod v. Bishop*, 110 Ala. 640; *Inglis v. Webb*, 117 Ala. 387; *Ogden v. Dodge County*, 97 Ga. 461; *Dozier v. McWhorter*, 117 Ga. 786; *Kotz v. Belz*, 178 Ill. 434; *Remy v. Lilly*, 22 Ind. App. 109; *Quick v. Cotman*, 124 Iowa 102; *Brown v. Kohout*, 61 Minn. 113; *Dunlap v. Griffith*, 146 Mo. 283; *Kansas City, etc., R. Co. v. Smith*, 156 Mo. 608; *Whitaker v. Whitaker*, 157 Mo. 342; *Whitaker v. Whitaker*, 175 Mo. 1; *Bagnell v. Chemical Bank*, 76 Mo. App. 121; *Vermillion v. Le Clare*, 89 Mo. App. 55; *Von Storch v. Von Storch*, 4 Lack. Leg. N. (Pa.) 25; *Siebert v. Lott*, 20 Tex. Civ. App. 191; *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470.

The owner of a parcel of land conveyed one acre of it by metes and bounds to E., and afterwards conveyed the entire parcel to C. C. put T. in possession of the parcel under a verbal contract of purchase, and T. paid the purchase money. It was held that the admissions of T.

that he did not own the acre which had been conveyed to E., were admissible in favor of the heirs of E. to show that the possession by C. and his successors in title was not adverse to E. and his heirs. *Walsh v. Wheelwright*, 96 Me. 174.

**Admissible to Show Character of Claim Asserted.**—*Ohde v. Hoffman*, (Iowa 1902) 90 N. W. Rep. 750; *Connors v. Chingren*, 111 Iowa 437; *Nodle v. Hawthorn*, 107 Iowa 380; *Coldwater Nat. Bank v. Buggie*, 117 Mich. 416.

Declarations of one in possession of property that he received it from and holds it for a third party are admissible against such third party. *Rosenberg v. Burnstein*, 60 Minn. 18. See also *Elwood v. Saterlie*, 68 Minn. 173.

And such declarations are admissible though made in the absence of an adverse claimant. *Rollofson v. Nash*, 75 Minn. 237.

But until there is proof that one was in possession of property at the time of declaring his ownership his declarations are not admissible. *Whitney v. Wagener*, 84 Minn. 211, 87 Am. St. Rep. 351.

**Declarations Against Interest Not to Be Contradicted by Declarations in Favor of Interest.**—*Ogden v. Dodge County*, 97 Ga. 461, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 684; *Carter v. Clark*, 92 Me. 225; *Ratliff v. Ratliff*, 131 N. Car. 425; *Wonsetler v. Wonsetler*, 23 Pa. Super. Ct. 321. Compare *Metz v. Metz*, 48 S. Car. 472.

Under the *Massachusetts* statute (Stat. 1896, c. 445) such contradictory statements by a deceased person are held admissible. *Brooks v. Holden*, 175 Mass. 137.

**Admissions of a Party in Possession Not Receivable Against One Holding by a Superior Title.**—*Sweeney v. Sweeney*, 119 Ga. 76; *Murphy v. Dafoe*, (S. Dak. 1904) 99 N. W. Rep. 86.

But the admissions of a life tenant are admissible in favor of the remaindermen. *Roberts v. Rice*, 69 N. H. 472.

Declarations of a tenant in possession that he holds under a certain person are admissible after the death of the tenant. *High v. Pancake*, 42 W. Va. 602.

**Admissions of Children.**—*Atchison, etc., R. Co. v. Phipps*, 125 Fed. Rep. 478, 60 C. C. A. 314; *Milwaukee Harvester Co. v. Tymich*, 68 Ark. 225.

Declarations of ownership by a son are not admissible against a father who sues to recover property claimed by the latter. *Morrison v. Bartholomew*, 9 Colo. App. 27.

Admissions of a son are incompetent against his mother suing on a right personal to her. *Van Alstine v. Kaniecki*, 109 Mich. 318.

**Admission as to Value of Property.**—Where a landowner sued a railroad to recover damages for land taken by it, his declarations as to the value of the land, his offering it at a certain price, and a sale of a portion of the land, were held admissible to show value. *Houston v. Western Washington R. Co.*, 204 Pa. St. 321.

**An Assessment of Property for Taxation** is not an admission as to the value of the property where the valuation was made by the tax assessor and not by the property owner. *Oldenburg v. Oregon Sugar Co.*, 39 Oregon 564.

**684.** Assignor and Assignee. — See note 1.

**686.** Admission Must Be Made While Title Is in the Party — Concurrence of Successor in Title — Fraud on Creditors. — See note 1.

The Admissions of a Deceased Executor are admissible against his administrator. *Lecour v. Importers', etc.*, Nat. Bank, 61 N. Y. App. Div. 163.

Declarations of a Promoter are admissible against the corporation formed by him. *Raegener v. Brockway*, 171 N. Y. 629, *affirming* 58 N. Y. App. Div. 166.

**684.** 1. Assignment of Chattel or Chose in Action. — *Cumbe v. Lovett*, 76 Minn. 227; *Squire v. Greene*, 168 N. Y. 659, *affirming* 47 N. Y. App. Div. 636; *Humphrey v. Smith*, 7 N. Y. App. Div. 442; *Sparling v. Wells*, 24 N. Y. App. Div. 584; *Westbury v. Simmons*, 57 N. Car. 467; *Anderson v. South Chicago Brewing Co.*, 173 Ill. 213; *Goldstein v. Morgan*, 122 Iowa 27; *Sears v. Moore*, 171 Mass. 514.

Admissions by the Assignor of a Mortgage as to the Assignment Bind the Mortgagor where the assignee files a bill against both the mortgagor and assignor. *Langley v. Andrews*, (Ala. 1905) 38 So. Rep. 238.

**Bona Fide Purchasers.** — *Teague v. Lindsey*, 106 Ala. 266; *Harris v. Little Rock Bank*, 107 Ga. 407; *Ward v. Johnson*, 66 Kan. 813; *Muncey v. Sun Ins. Office*, 109 Mich. 542; *Woods v. Faurot*, (Okla. 1904) 77 Pac. Rep. 346; *Merkle v. Beidleman*, 165 N. Y. 21, *reversing* 30 N. Y. App. Div. 14; *Tittle v. Van Valkenburg*, 75 N. Y. App. Div. 69; *Barnett v. Prudential Ins. Co.*, 91 N. Y. App. Div. 435; *Maddox v. Atlantic, etc.*, R. Co., 115 N. Car. 642.

Where the Assignment Is Merely Colorable. — *Banning v. Marleau*, 133 Cal. 485; *Continental Nat. Bank v. Moore*, 83 N. Y. App. Div. 419; *Frick v. Reynolds*, 6 Okla. 638; *Jones v. Western Mfg. Co.*, 27 Wash. 136.

The Admissions of a Former Holder of Negotiable Paper. — *German-American Bank v. Slade*, (Buffalo Super. Ct. Gen. T.) 15 Misc. (N. Y.) 287; *Hall v. Clountz*, 26 Tex. Civ. App. 348.

But It Has Been Held that the Admissions of the Assignor of a Promissory Note, etc. — *Anderson v. South Chicago Brewing Co.*, 173 Ill. 213.

Declarations of the Maker of a Note, made after its execution and delivery, are not admissible against an indorsee for value without notice. *Union Trust Co. v. Leighton*, 83 N. Y. App. Div. 568.

**686.** 1. Admissions Before Title Was Acquired. — *Farrow v. Nashville, etc.*, R. Co., 109 Ala. 448; *Tuttle v. Cone*, 108 Iowa 468; *Niskern v. Haydock*, 23 N. Y. App. Div. 175; *Reed v. Phillips*, (Tex. Civ. App. 1896) 33 S. W. Rep. 986; *Bell v. Preston*, 19 Tex. Civ. App. 375.

Admissions After Title Has Been Transferred — *United States*. — *West v. Houston Oil Co.*, (C. C. A.) 136 Fed. Rep. 343.

*Alabama*. — *Wisdom v. Reeves*, 110 Ala. 418; *Doe v. Edmondson*, 127 Ala. 445; *Butler v. Butler*, 133 Ala. 377; *Adair v. Craig*, 135 Ala. 332.

*Arizona*. — *Miller v. Miller*, (Ariz. 1901) 64 Pac. Rep. 415.

*California*. — *Hyde v. Buckner*, 108 Cal. 522; *Eppinger v. Scott*, 112 Cal. 369, 53 Am. St. Rep. 220.

*Georgia*. — *Bowden v. Achor*, 95 Ga. 243; *Ogden v. Dodge County*, 97 Ga. 461; *Thompson v. Cody*, 100 Ga. 771; *Daniel v. Hannah*, 106 Ga. 91.

*Illinois*. — *Shea v. Murphy*, 164 Ill. 614, 56 Am. St. Rep. 215; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269; *Lang v. Metzger*, 206 Ill. 475, *affirming* 101 Ill. App. 380; *Holton v. Dunker*, 198 Ill. 407; *McCartney v. Kraper*, 84 Ill. App. 266; *Oliver v. McDowell*, 100 Ill. App. 45; *Milling v. Hillenbrand*, 156 Ill. 310.

*Indiana*. — *Robbins v. Spencer*, 140 Ind. 483.

*Indian Territory*. — *Ikard v. Minter*, (Indian Ter. 1902) 69 S. W. Rep. 852.

*Iowa*. — *Thomas v. McDonald*, 102 Iowa 564; *Cedar Rapids Nat. Bank v. Lavery*, 110 Iowa 575, 80 Am. St. Rep. 325; *Reinecke v. Gruner*, 111 Iowa 731; *Urdangen v. Doner*, 122 Iowa 533. See also *Irwin Bank v. American Express Co.*, (Iowa 1905) 102 N. W. Rep. 107.

*Kansas*. — *Smith v. Wilson*, 5 Kan. App. 379.

*Kentucky*. — *Gish v. Nolen*, (Ky. 1898) 47 S. W. Rep. 757; *Fuqua v. Bogard*, 62 S. W. Rep. 480, 22 Ky. L. Rep. 1910.

*Louisiana*. — *Fitzpatrick v. Leake*, 47 La. Ann. 1643; *Burg v. Rivera*, 105 La. 144; *Robinson v. Atkins*, 105 La. 790.

*Minnesota*. — *Kurtz v. St. Paul, etc.*, R. Co., 61 Minn. 18; *Glaucke v. Gerlich*, 91 Minn. 282.

*Missouri*. — *Wall v. Beedy*, 161 Mo. 625; *Stam v. Smith*, 183 Mo. 464; *Mueller v. Weitz*, 56 Mo. App. 36; *Blasland-Parcels Jordan Shoe Co. v. Hicks*, 70 Mo. App. 301; *J. I. Case Plow Works v. Ross*, 74 Mo. App. 437; *Sammons v. O'Neill*, 60 Mo. App. 530, 1 Mo. App. Rep. 205.

*Nebraska*. — *Consolidated Tank Line Co. v. Pien*, 44 Neb. 887; *Kyd v. Cook*, 56 Neb. 71, 71 Am. St. Rep. 661.

*New York*. — *Gerding v. Funk*, 169 N. Y. 572, *affirming* 48 N. Y. App. Div. 603; *Pfeffer v. Kling*, 171 N. Y. 668, *affirming* 58 N. Y. App. Div. 179; *Kalish v. Higgins*, 175 N. Y. 495, *affirming* 70 N. Y. App. Div. 192; *Johnson v. Cole*, 178 N. Y. 364, *reversing* 76 N. Y. App. Div. 606; *Harlam v. Green*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 261, *affirming* (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 798; *Leary v. Corvin*, 63 N. Y. App. Div. 151; *Moravec v. Grell*, 78 N. Y. App. Div. 146; *Newgass v. Auburn Loan Co.*, 81 N. Y. App. Div. 411; *Conkling v. Weatherwax*, 90 N. Y. App. Div. 585; *Barnett v. Prudential Ins. Co.*, 91 N. Y. App. Div. 435; *Scheps v. Bowery Sav. Bank*, 97 N. Y. App. Div. 434.

*North Carolina*. — *Maddox v. Atlantic, etc.*, R. Co., 115 N. Car. 642; *Jarvis v. Vanderford*, 116 N. Car. 147.

*North Dakota*. — *Aldous v. Olverson*, 17 S. Dak. 190, *citing generally* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 670; *Leonard v. Fleming*, (N. Dak. 1905) 102 N. W. Rep. 308.

*Ohio*. — *Hedrick v. Gregg*, 10 Ohio Dec. 462, 8 Ohio N. P. 24; *Hall v. Geyer*, 7 Ohio Cir. Dec. 436, 14 Ohio Cir. Ct. 229.

*Pennsylvania*. — *Carr v. H. C. Frick Coke*

Co., 170 Pa. St. 62; McCullough v. Cumberland Valley R. Co., 186 Pa. St. 112; Baldwin v. Stier, 191 Pa. St. 432.

*Texas.*—Williams v. Pollard, (Tex. Civ. App. 1894) 28 S. W. Rep. 1020; Smith v. Dunman, 9 Tex. Civ. App. 319; Hilburn v. Harrell, (Tex. Civ. App. 1895) 29 S. W. Rep. 925; D'Arrigo v. Texas Produce Co., (Tex. Civ. App. 1895) 31 S. W. Rep. 713; Hale v. Hollon, 14 Tex. Civ. App. 96; Phillips v. Sherman, (Tex. Civ. App. 1897) 39 S. W. Rep. 187; Smith v. James, (Tex. Civ. App. 1897) 42 S. W. Rep. 792; Stephens v. Johnson, (Tex. Civ. App. 1898) 45 S. W. Rep. 328; Hatcher v. Stipe, (Tex. Civ. App. 1898) 45 S. W. Rep. 329; Burroughs v. Farmer, (Tex. Civ. App. 1898) 45 S. W. Rep. 846; Long v. Moore, 19 Tex. Civ. App. 363; Sanger v. Jesse French Piano, etc., Co., 21 Tex. Civ. App. 523; Schmitt v. Jacques, 26 Tex. Civ. App. 125; McKnight v. Reed, 30 Tex. Civ. App. 204; Wooley v. Bell, (Tex. Civ. App. 1903) 76 S. W. Rep. 797.

*Utah.*—Snow v. Rich, 22 Utah 123.

*Vermont.*—Davis v. Buchanan, 73 Vt. 67; Ellis v. Watkins, 73 Vt. 371.

*Virginia.*—Brock v. Brock, 92 Va. 173.

*West Virginia.*—Crothers v. Crothers, 40 W. Va. 169; Deck v. Tabler, 41 W. Va. 332, 56 Am. St. Rep. 837.

*Wisconsin.*—Matteson v. Hartmann, 91 Wis. 485; Small v. Champeny, 102 Wis. 61.

*Wyoming.*—Toms v. Whitmore, 6 Wyo. 220.

*Canada.*—Marshall v. May, 12 Manitoba 381.

Statements of a vendor as to how and to whom land was sold are not admissible against the grantee, when made after the transaction. Johnson v. Johnson, 96 Md. 144.

**Statements Explanatory of Possession.**—See Brooks v. Lowenstein, 95 Tenn. 262; Jones v. Hess, (Tex. Civ. App. 1898) 48 S. W. Rep. 46; High v. Pancake, 42 W. Va. 602.

But such statements are not admissible where neither party claims under the one making them. Oberholtzer v. Hazen, 101 Iowa 340.

Declarations of one in possession as to whether he holds as plaintiff's tenant or under a deed of trust through which defendants asserted title are admissible. Levi v. Gardner, 53 S. Car. 24.

**Admissions of Payee of Note After Parting with His Interest.**—National Bank v. Exchange Bank, 110 Ga. 692; Eyermann v. Piron, 151 Mo. 107; Zobel v. Bauersachs, 55 Neb. 20; Zimmerman v. Kearney County Bank, 57 Neb. 800; Pearce v. Strickler, 9 N. Mex. 467; Wangner v. Grimm, 169 N. Y. 421, affirming Grimm v. Grimm, 53 N. Y. App. Div. 626; Van Aernam v. Granger, 86 Hun (N. Y.) 476; Mitchell v. Baldwin, 88 N. Y. App. Div. 265; Ricker Nat. Bank v. Brown, (Tex. Civ. App. 1897) 43 S. W. Rep. 909.

Where the payee of a note could not recover on it in his own name, having obtained it from the maker by fraud, his declarations as to his ownership of the note at a time subsequent to its alleged transfer to the plaintiff are admissible in support of the defense that the plaintiff was not a bona fide holder, but that the transfer was made to enable him to recover for the use of the payee. Reeper v. Greevy, 5 Pa. Super. Ct. 316.

**Assignment for Benefit of Creditors.**—**Admissions of the Assignor** made after the assignment are not admissible to impeach the assignment. Brock v. Schradsky, 6 Colo. App. 402; Wilson v. Harris, 21 Mont. 374, reversing 19 Mont. 69; City Nat. Bank v. Bridgers, 128 N. Car. 322; Boltz v. Engelke, (Tex. Civ. App. 1901) 63 S. W. Rep. 899.

Or to prove that certain goods went into the possession of the assignee. Finance Co. v. Josephson, (Supm. Ct. App. T.) 88 N. Y. Supp. 707.

But his admissions made before assignment are competent. Armour v. Doig, (Fla. 1903) 34 So. Rep. 249.

If a conspiracy or combination had been entered into between the assignor and the assignee to effect a fraud on the creditors and such conspiracy or combination is made to appear *prima facie*, declarations made after the assignment are admissible. City Nat. Bank v. Bridgers, 128 N. Car. 322.

**Attachment Proceedings—Admissions of Debtor.**—Bentley v. Woolson Spice Co., (Neb. 1901) 95 N. W. Rep. 803.

**Insurance Policy—Admissions of Insured.**—The rule in regard to the admissions of the insured in a policy of life insurance is that they are not receivable against the beneficiary in the policy unless a part of the *res gestæ*, because the beneficiary claims in his own right and not as the representative of or through the insured. Goodwin v. Provident Sav. L. Assur. Assoc., 97 Iowa 226, 59 Am. St. Rep. 411; Sutcliffe v. Iowa State Traveling Men's Assoc., 119 Iowa 220, 97 Am. St. Rep. 298; Henn v. Metropolitan L. Ins. Co., 67 N. J. L. 310; Arnold v. Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 61; Thies v. Mutual L. Ins. Co., 13 Tex. Civ. App. 280. But see Atkins v. New York L. Ins. Co., (Tex. Civ. App. 1901) 62 S. W. Rep. 563. And in Manhattan L. Ins. Co. v. Myers, 109 Ky. 372, it was held that the acts and declarations of the insured in regard to the payment of the premium and his final conclusion not to pay it, but to let the policy lapse, were competent against the beneficiary, though she was the wife of the insured.

Within this rule, even an affidavit of the insured filed in a case pending before the insurance was applied for, stating the condition of his health, is not admissible against the beneficiary in a suit on the policy. Thompson v. Security Trust, etc., Co., 63 S. Car. 290.

But such admissions are always receivable against the beneficiary, if they constitute a part of the *res gestæ*. Thus, where the defense to an action on a policy was that the insured committed suicide, it was held that his statement that he shot himself, and his refusal to give any reason for the act, were properly admitted. Sutcliffe v. Iowa State Traveling Men's Assoc., 119 Iowa 220, 97 Am. St. Rep. 298.

A well-founded distinction exists, however, in the case of fraternal benefit insurance, where the beneficiary is named by the insured, and whom he may change at any time before death. In such case there is no vested interest in the beneficiary in the certificate until it becomes fixed by death, and, therefore, in such cases the admissions of the insured are receivable

**689.** See notes 1, 2.

**690.** 5. Agents—*a.* **GENERALLY**—Not Admissible to Prove Agency.—See note 1.

against the beneficiary. *Callies v. Modern Woodmen of America*, 98 Mo. App. 521; *Fox-hever v. Order of Red Cross*, 24 Ohio Cir. Ct. 56.

**Declarations of the Vendor of Chattels After Sale** are not admissible for or against the vendee unless for the purpose of impeaching the vendee as a witness, or unless made in the presence of the vendee and not contradicted by him. *Henderson v. Hart*, 122 Cal. 332; *Neeb v. McMillan*, 92 Iowa 200. See also *Newberry v. Norfolk*, etc., R. Co., 133 N. Car. 45, holding that such declarations are not admissible to show title in the vendor.

**Self-serving Declarations of the Grantor of Land**, as to what he conveyed, made after a deed is executed, are incompetent as against the grantee or the grantee's vendees. *Skidmore v. Smith*, (Ky. 1905) 84 S. W. Rep. 1163.

**689. 1. Effect of Concurrence of Successor in Title.**—*Harton v. Lyons*, 97 Tenn. 180.

**When the Admissions Relate to the Intentions.**—*La Clef v. Campbell*, 3 Kan. App. 756; *Kyd v. Cook*, 56 Neb. 71, 71 Am. St. Rep. 661. See also *Thomas v. McDonald*, 102 Iowa 564; *Beers v. Aylsworth*, 41 Oregon 251.

**2. Design to Defraud Creditors**—*Georgia*.—*Ernest v. Merritt*, 107 Ga. 61.

*Indian Territory*.—*Dorrance v. McAlester*, 1 Indian Ter. 473.

*Kansas*.—*Hood v. Gibson*, 8 Kan. App. 588; *Turner v. Tootle*, 9 Kan. App. 765.

*Kentucky*.—*Pullins v. Pullins*, 62 S. W. Rep. 865, 23 Ky. L. Rep. 333.

*Louisiana*.—*Unter v. Metropolitan Nat. Bank*, 48 La. Ann. 238.

*Missouri*.—*Taliaferro v. Evans*, 160 Mo. 380; *Gage v. Trawick*, 94 Mo. App. 307.

*Montana*.—*Pincus v. Reynolds*, 19 Mont. 564.

*Nebraska*.—*Bender v. Kingman*, 62 Neb. 469.

*New Jersey*.—*Cowen v. Bloomberg*, 69 N. J. L. 462.

*New York*.—*Vilas Nat. Bank v. Newton*, 25 N. Y. App. Div. 62; *Saugerties Bank v. Mack*, 34 N. Y. App. Div. 494; *Levy v. Hamilton*, 68 N. Y. App. Div. 277; *Avard v. Carpenter*, 72 N. Y. App. Div. 258; *Continental Nat. Bank v. Moore*, 83 N. Y. App. Div. 419.

*North Carolina*.—*Blair v. Brown*, 116 N. Car. 631.

*North Dakota*.—See *Leonard v. Fleming*, (N. Dak. 1905) 102 N. W. Rep. 308.

*Oregon*.—*Robson v. Hamilton*, 41 Oregon 239; *Walker v. Harold*, 44 Oregon 205.

*Pennsylvania*.—*Poundstone v. Jones*, 182 Pa. St. 574; *Boyer v. Weimer*, 204 Pa. St. 295.

*South Dakota*.—*Muller v. Flavin*, 13 S. Dak. 595.

*Texas*.—*Smitheal v. Smith*, 10 Tex. Civ. App. 446; *Thompson v. Rosenstein*, (Tex. Civ. App. 1902) 67 S. W. Rep. 439; *Moore v. Robinson*, (Tex. Civ. App. 1903) 75 S. W. Rep. 890.

**But Such Admissions Will Not Be Received** where there is no other evidence of the fraud.

*United States*.—*Orr, etc., Shoe Co. v. Needles*, (C. C. A.) 67 Fed. Rep. 990.

*California*.—*Banning v. Marleau*, 121 Cal. 240; *Roberts v. Burr*, (Cal. 1898) 54 Pac. Rep. 849.

*Colorado*.—*Jefferson County Bank v. Hummel*, 11 Colo. App. 337.

*Idaho*.—*Meyer v. Munro*, (Idaho 1903) 71 Pac. Rep. 969.

*Indiana*.—*Vansickle v. Sherk*, 150 Ind. 413; *Skelley v. Vail*, 27 Ind. App. 87.

*Iowa*.—*Neuffer v. Moehn*, 96 Iowa 731.

*Kentucky*.—*Boli v. Irwin*, (Ky. 1899) 51 S. W. Rep. 444; *Norfleet v. Logan*, (Ky. 1900) 54 S. W. Rep. 713; *Nelson v. Terry*, (Ky. 1900) 56 S. W. Rep. 672.

*Massachusetts*.—*Parry v. Libbey*, 166 Mass. 112.

*Michigan*.—*Vyn v. Keppel*, 108 Mich. 244.

*Mississippi*.—*Wilkerson v. Moffett-West Drug Co.*, (Miss. 1897) 21 So. Rep. 564.

*Missouri*.—*Torreyson v. Turnbaugh*, 105 Mo. App. 439; *Wall v. Beedy*, 161 Mo. 625.

*New Jersey*.—*Congleton v. Schreihofner*, (N. J. 1903) 54 Atl. Rep. 144.

*New York*.—*Lent v. Shear*, 160 N. Y. 462; *Strauss v. Murray*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 69.

*North Dakota*.—*O. S. Paulson Mercantile Co. v. Seaver*, 8 N. Dak. 215.

*Tennessee*.—*Green v. Huggins*, (Tenn. Ch. 1898) 52 S. W. Rep. 675.

**Where the Vendor Remained in Possession.**—*Eaton v. Sims*, 59 Ark. 611; *George Taylor Commission Co. v. Bell*, 62 Ark. 26; *Emmons v. Barton*, 109 Cal. 662; *Bush, etc., Co. v. Helbing*, 134 Cal. 676; *Tillman v. Fontaine*, 98 Ga. 672; *Higgins v. Spahr*, 145 Ind. 167; *Burlington Nat. Bank v. Beard*, 55 Kan. 773; *Lehmann v. Chapel*, 70 Minn. 496, 68 Am. St. Rep. 550; *Wall v. Beedy*, 161 Mo. 625; *Gallick v. Bordeaux*, 22 Mont. 470; *Armagoast v. Rising*, 54 Neb. 763; *Kyd v. Cook*, 56 Neb. 71, 71 Am. St. Rep. 661; *Perkins v. Brinkley*, 133 N. Car. 348; *Harton v. Lyons*, 97 Tenn. 180; *Cooper v. Friedman*, 23 Tex. Civ. App. 585. See also *Stam v. Smith*, 183 Mo. 464; *Jones v. Hess*, (Tex. Civ. App. 1898) 48 S. W. Rep. 46.

**690. 1. Not Admissible to Establish Fact of Agency**—*Alabama*.—*Learned-Letcher Lumber Co. v. Ohatchie Lumber Co.*, 111 Ala. 453; *Postal Tel. Cable Co. v. Lenoir*, 107 Ala. 640; *Postal Tel. Cable Co. v. Brantley*, 107 Ala. 683; *Foxworth v. Brown*, 120 Ala. 59.

*California*.—*Smith v. Liverpool, etc., Ins. Co.*, 107 Cal. 432; *Swinerton v. Argonaut Land, etc., Co.*, 112 Cal. 375; *Santa Cruz Butchers' Union v. I. X. L. Lime Co.*, (Cal. 1896) 46 Pac. Rep. 382; *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681; *McRae v. Argonaut Land, etc., Co.*, (Cal. 1898) 54 Pac. Rep. 743; *Ferris v. Baker*, 127 Cal. 520; *Pettersson v. Stockton, etc., R. Co.*, 134 Cal. 244.

*Colorado*.—*Fisher v. Denver Nat. Bank*, 22 Colo. 373; *Murphy v. Gumaer*, 12 Colo. App. 472; *Burson v. Bogart*, 18 Colo. App. 449; *Castner v. Rinne*, 31 Colo. 256.

*Connecticut.*—Barlow Bros. Co. *v.* Parsons, 73 Conn. 696.

*Florida.*—Orange Belt R. Co. *v.* Cox, 44 Fla. 645, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 690.

*Georgia.*—Abel *v.* Jarratt, 100 Ga. 732; Wynne *v.* Stevens, 101 Ga. 808; Alger *v.* Turner, 105 Ga. 178; Harris Loan Co. *v.* Elliott, etc., Book Typewriter Co., 110 Ga. 302; Grand Rapids School Furniture Co. *v.* Morel, 110 Ga. 321; Massillon Engine, etc., Co. *v.* Akerman, 110 Ga. 570; Jones *v.* Harrell, 110 Ga. 373; Armour *v.* Ross, 110 Ga. 403; Amicalola Marble, etc., Co. *v.* Coker, 111 Ga. 872; Almând *v.* Equitable Mortg. Co., 113 Ga. 983; Americus Oil Co. *v.* Gurr, 114 Ga. 624.

*Illinois.*—Singer, etc., Stone Co. *v.* Hutchinson, 184 Ill. 169; Mellor *v.* Carithers, 52 Ill. App. 86; Peter Schoenhofen Brewing Co. *v.* Wengler, 57 Ill. App. 184; Chicago, etc., R. Co. *v.* Willard, 68 Ill. App. 315; Cleveland, etc., R. Co. *v.* Jenkins, 75 Ill. App. 17; McClure *v.* Osborne, 86 Ill. App. 465; Currie *v.* Syndicate Des Cultivators, etc., 104 Ill. App. 165; Phillips *v.* Poulter, 111 Ill. App. 330.

*Indiana.*—International Bldg., etc., Assoc. *v.* Watson, 158 Ind. 508; Broadstreet *v.* Hall, 32 Ind. App. 122.

*Iowa.*—Whitman *v.* Dubuque, etc., R. Co., 96 Iowa 737; O'Leary *v.* German-American Ins. Co., 100 Iowa 390; Heusinkveld *v.* St. Paul F. & M. Ins. Co., 106 Iowa 229; Joseph Schlitz Brewing Co. *v.* Barlow, 107 Iowa 252; Mentzer *v.* Sargeant, 115 Iowa 527.

*Kansas.*—Clark *v.* Folscroft, 67 Kan. 446; Missouri Pac. R. Co. *v.* Johnson, 55 Kan. 344; St. Louis, etc., R. Co. *v.* Brown, 3 Kan. App. 260.

*Kentucky.*—Dieckman *v.* Weirich, 73 S. W. Rep. 1119, 24 Ky. L. Rep. 2340.

*Louisiana.*—State *v.* Harris, 51 La. Ann. 1105.

*Maine.*—Eaton *v.* Granite State Provident Assoc., 89 Me. 58; Bennett *v.* Talbot, 90 Me. 229.

*Massachusetts.*—Nowell *v.* Chipman, 170 Mass. 340.

*Michigan.*—Fontaine Crossing, etc., Co. *v.* Rauch, 117 Mich. 401; McPherson *v.* Pinch, 119 Mich. 362; Gore *v.* Canada L. Assur. Co., 119 Mich. 136.

*Missouri.*—Murphy *v.* Mechanics', etc., Town Mut. F. Ins. Co., 83 Mo. App. 481; Christian *v.* Smith, 85 Mo. App. 117; State *v.* Henderson, 86 Mo. App. 482; Peninsular Stove Co. *v.* Adams Hardware, etc., Co., 93 Mo. App. 237; Waters-Pierce Oil Co. *v.* Jackson Junior Zinc Co., 98 Mo. App. 324.

*Nebraska.*—Burke *v.* Frye, 44 Neb. 223; Richardson, etc., Co. *v.* School Dist. Number Eleven, 45 Neb. 777; Anheuser-Busch Brewing Assoc. *v.* Murray, 47 Neb. 627; Learn *v.* Upstill, 52 Neb. 271; C. F. Blanke Tea, etc., Co. *v.* Rees Printing Co., (Neb. 1903) 97 N. W. Rep. 627.

*New Jersey.*—Smith *v.* Delaware, etc., Tel., etc., Co., 64 N. J. Eq. 770, *affirming* 63 N. J. Eq. 93; Pederson *v.* Kiensel, (N. J. 1904) 58 Atl. Rep. 1088.

*New York.*—Buttling *v.* Hatton, 48 N. Y. App. Div. 577, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 690; Taylor *v.* Commercial

Bank, 174 N. Y. 181; McCluskey *v.* Minck, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 565; Lyon *v.* Brown, 31 N. Y. App. Div. 67; Reid *v.* Horn, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 523; Booth *v.* Newton, 46 N. Y. App. Div. 175; Moore *v.* Rankin, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 749; Le Valley *v.* Overacker, 64 N. Y. App. Div. 612; American Box Mach. Co. *v.* Balnick, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 765; Wise *v.* International Soc., (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 871; Leary *v.* Albany Brewing Co., 77 N. Y. App. Div. 6; Legnard *v.* Standard L., etc., Ins. Co., 81 N. Y. App. Div. 320; Wickham *v.* Lehigh Valley R. Co., 85 N. Y. App. Div. 182.

*North Carolina.*—Taylor *v.* Hunt, 118 N. Car. 168; Gates *v.* Max, 125 N. Car. 139; New Home Sewing Mach. Co. *v.* Seago, 128 N. Car. 158; Summerrow *v.* Baruch, 128 N. Car. 202; Parker *v.* Brown, 131 N. Car. 264.

*North Dakota.*—Q. W. Loverin-Browne Co. *v.* Buffalo Bank, 7 N. Dak. 569.

*Oregon.*—Connell *v.* McLoughlin, 28 Oregon 230; Wicktorwitz *v.* Farmers' Ins. Co., 31 Oregon 569.

*Pennsylvania.*—Harvey *v.* Schuylkill Trust Co., 199 Pa. St. 421.

*South Carolina.*—New England Mortg. Security Co. *v.* Baxley, 44 S. Car. 81; Ehrhardt *v.* Breeland, 57 S. Car. 142.

*Texas.*—White *v.* San Antonio Water Works Co., 9 Tex. Civ. App. 465; Brady *v.* Nagle, (Tex. Civ. App. 1895) 29 S. W. Rep. 943; Western Industrial Co. *v.* Chandler, (Tex. Civ. App. 1895) 31 S. W. Rep. 314; Page *v.* Cortez, (Tex. Civ. App. 1895) 31 S. W. Rep. 1071; Owen *v.* New York, etc., Land Co., 11 Tex. Civ. App. 284; Waller *v.* Leonard, (Tex. Civ. App. 1896) 34 S. W. Rep. 799, 89 Tex. 507; Ft. Worth Live-Stock Commission Co. *v.* Hitson, (Tex. Civ. App. 1898) 46 S. W. Rep. 915; Ehrenworth *v.* Putnam, (Tex. Civ. App. 1900) 55 N. W. Rep. 190; Cooper *v.* Sawyer, 31 Tex. Civ. App. 620; Dyer *v.* Winston, (Tex. Civ. App. 1903) 77 S. W. Rep. 227; Tabet *v.* Powell, (Tex. Civ. App. 1903) 78 S. W. Rep. 997; St. Louis Southwestern R. Co. *v.* McIntyre, (Tex. Civ. App. 1904) 82 S. W. Rep. 346.

*Vermont.*—Sias *v.* Consolidated Lighting Co., 73 Vt. 35, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 690.

*Virginia.*—Fisher *v.* White, 94 Va. 236; Hoge *v.* Turner, 96 Va. 624.

*Vermont.*—Dickerman *v.* Quincy Mut. F. Ins. Co., 67 Vt. 609.

*Washington.*—Gregory *v.* Loose, 19 Wash. 599.

*West Virginia.*—Rösendorf *v.* Poling, 48 W. Va. 621; Garber *v.* Blatchley, 51 W. Va. 147. And see the title AGENCY.

**Declarations Admissible to Support Other Evidence of Agency.**—Birmingham Mineral R. Co. *v.* Tennessee Coal, etc., Co., 127 Ala. 137.

**Statements of Another Agent as to Agency.**—Heusinkveld *v.* St. Paul F. & M. Ins. Co., 106 Iowa 229; Summerrow *v.* Baruch, 128 N. Car. 202.

The admission of a member of a lodge that another member has been appointed agent to sell the lodge's real estate is inadmissible to prove the authority of the alleged agent. *Castner v. Rinne*, 31 Colo. 256.

**691.** See note 1.**Declarations of Agent Acting Within His Authority. — See note 2.**

**Admissions of Alleged Agent Incompetent to Disprove Agency of Another.** — *Edinburgh American Land Mortg. Co. v. Briggs*, (Tex. Civ. App. 1897) 41 S. W. Rep. 1036.

**Declarations of an Agent Made in the Presence of Those Known to Be Agents** are competent to prove agency. *Southern Express Co. v. Platten*, (C. C. A.) 93 Fed. Rep. 936.

**Not Competent to Disprove Agency.** — Declarations of an agent are not competent to disprove his agency. *Johnson v. Cole*, 76 N. Y. App. Div. 606.

**Where Agency Is Not Denied by the Principal** the declarations of the agent are admissible to prove his agency. *Embree's Estate*, 18 Lanc. L. Rev. 57.

**691. 1. Not Admissible to Prove Extent of Agency — United States.** — *Union Guaranty, etc., Co. v. Robinson*, 79 Fed. Rep. 420, 49 U. S. App. 148.

*California.* — *Swinerton v. Argonaut Land, etc., Co.*, 112 Cal. 375.

*Colorado.* — *Extension Gold Min., etc., Co. v. Skinner*, 28 Colo. 237; *Benson v. Bogart*, 18 Colo. App. 449.

*Florida.* — *Lakeside Press, etc., Co. v. Campbell*, 39 Fla. 523.

*Illinois.* — *Mann v. Sodakat*, 66 Ill. App. 393; *Currie v. Syndicate Des Cultivators, etc.*, 104 Ill. App. 165.

*Iowa.* — *Grant v. Humerick*, 123 Iowa 571; *Osborne v. Ringland*, 122 Iowa 329.

*Louisiana.* — *LaFourche Transp. Co. v. Pugh*, 52 La. Ann. 1517.

*Massachusetts.* — *Baldwin v. Connecticut Mut. L. Ins. Co.*, 182 Mass. 389.

*Michigan.* — *Coldwater Nat. Bank v. Buggie*, 117 Mich. 416; *McPherson v. Pinch*, 119 Mich. 36.

*New Hampshire.* — *Bohanan v. Boston, etc., R. Co.*, 70 N. H. 526.

*New York.* — *New York Nat. Banking Assoc. Bank v. American Dock, etc., Co.*, 143 N. Y. 559; *Roberge v. Monheimer*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 491; *Simmon v. Bloomingdale*, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 847.

*North Carolina.* — *Smith v. Browne*, 132 N. Car. 365.

*Pennsylvania.* — *Slease v. Naysmith*, 14 Pa. Super. Ct. 134; *Bible v. Centre Hall*, 19 Pa. Super. Ct. 136.

*Rhode Island.* — *Paulton v. Keith*, 23 R. I. 164.

*South Dakota.* — *Christ v. Garretson State Bank*, 13 S. Dak. 23.

*Washington.* — *Western Security Co. v. Douglass*, 14 Wash. 215.

**2. Acting Within Authority — United States.** — *La Abra Silver Min. Co. v. U. S.*, 175 U. S. 423; *U. S. v. Choctaw Nation*, 179 U. S. 494; *Wabash Western R. Co. v. Brow*, 65 Fed. Rep. 941, 31 U. S. App. 192; *Nelson v. Kilmington First Nat. Bank*, 69 Fed. Rep. 798, 32 U. S. App. 554; *Gowen v. Bush*, 76 Fed. Rep. 349, 40 U. S. App. 349.

*Alabama.* — *Bailey v. Blacksher Co.*, (Ala. 1904) 37 So. Rep. 827.

*California.* — *Meyer v. Great Western Ins.*

*Co.*, 104 Cal. 381; *Stockton Combined Harvester, etc., Works v. Glens Falls Ins. Co.*, 121 Cal. 167; *Pettibone v. Lake View Town Co.*, 134 Cal. 227.

*Connecticut.* — *Carney v. Hennessey*, 74 Conn. 107, 92 Am. St. Rep. 199.

*Delaware.* — *Richardson v. Delaware Loan Assoc.*, 9 Houst. (Del.) 354; *Barnesville Mfg. Co. v. Love*, 3 Penn. (Del.) 569.

*Georgia.* — *Louisville, etc., R. Co. v. Tifft*, 100 Ga. 86; *People's Nat. Bank v. Harper*, 114 Ga. 603; *Sweeney v. Sweeney*, 119 Ga. 76.

*Illinois.* — *Mann v. Sodakat*, 66 Ill. App. 393; *Prussian Nat. Ins. Co. v. Empire Catering Co.*, 113 Ill. App. 67.

*Indian Territory.* — *Missouri, etc., R. Co. v. Byrne*, 3 Indian Ter. 740.

*Iowa.* — *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa 682, *citing 1 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 691 *et seq.*; *O'Leary v. German-American Ins. Co.*, 100 Iowa 390; *Medearis v. Anchor Mut. F. Ins. Co.*, 104 Iowa 88, 65 Am. St. Rep. 428; *Black v. Des Moines Mfg., etc., Co.*, (Iowa 1898) 77 N. W. Rep. 504; *Wray v. Warner*, 111 Iowa 64. See also *Harrison County v. State Sav. Bank*, (Iowa 1905) 103 N. W. Rep. 121.

*Massachusetts.* — *Copeland v. Boston Dairy Co.*, 184 Mass. 207.

*Michigan.* — *Hall v. Murdock*, 119 Mich. 389.

*Minnesota.* — *Rosted v. Great Northern R. Co.*, 76 Minn. 127, *citing 1 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 693, note; *Whitney v. Wagener*, 84 Minn. 211, 87 Am. St. Rep. 351.

*Missouri.* — *Pitts v. D. M. Steele Mercantile Co.*, 75 Mo. App. 221; *Hill v. Seneca Bank*, 100 Mo. App. 230.

*Nebraska.* — *Union L. Ins. Co. v. Haman*, 54 Neb. 599, *citing 1 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 691-694; *Stratton v. Dole*, 45 Neb. 472.

*New Jersey.* — *Callaway v. Equitable Trust Co.*, 67 N. J. L. 44; *Skidmore v. Johnson*, 70 N. J. L. 674.

*New York.* — *Rogers v. New York, etc., Bridge*, 159 N. Y. 556, *affirming 11 N. Y. App. Div. 141*; *Stecher Lith. Co. v. Inman*, 175 N. Y. 124, *affirming 67 N. Y. App. Div. 625*; *Miller v. King*, 84 Hun (N. Y.) 308; *Campbell v. Emslie*, 101 N. Y. App. Div. 369. See also *Hopkins v. Rodgers*, (Supm. Ct. App. T.) 91 N. Y. Supp. 749.

*North Carolina.* — *Holt v. Johnson*, 129 N. Car. 138.

*Oregon.* — *Patterson v. United Artisans*, 43 Oregon 333.

*Pennsylvania.* — *Ulysses Elgin Butter Co. v. Hartford F. Ins. Co.*, 20 Pa. Super. Ct. 384; *Haggart v. California*, 21 Pa. Super. Ct. 210.

*South Carolina.* — *Crawford v. Southern R. Co.*, 56 S. Car. 136.

*Texas.* — *Schram v. Strouse*, (Tex. Civ. App. 1894) 28 S. W. Rep. 262; *White v. San Antonio Water Works Co.*, 9 Tex. Civ. App. 465; *Barbee v. Spivey*, (Tex. Civ. App. 1895) 32 S. W. Rep. 345; *Cooper Grocer Co. v. Britton*, (Tex. Civ. App. 1903) 74 S. W. Rep. 91; *Texas, etc., Telephone Co. v. Prince*, (Tex. Civ. App. 1904) 82 S. W. Rep. 327; *St. Louis South-*

**693.** See note 1.

**694.** See note 1.

western R. Co. *v.* McIntyre, (Tex. Civ. App. 1904) 82 S. W. Rep. 346.

*Vermont.*—Terrill *v.* Tillison, 75 Vt. 193.

*Washington.*—Selber *v.* Springbrook Trout Farm, 19 Wash. 49; Hall *v.* Union Cent. L. Ins. Co., 23 Wash. 610, 83 Am. St. Rep. 844; Moran Bros. Co. *v.* Snoqualmis Falls Power Co., 29 Wash. 292.

*Wisconsin.*—McGowan *v.* Supreme Ct., etc., 104 Wis. 173.

*Wyoming.*—Kinney *v.* Rock Springs First Nat. Bank, 10 Wyo. 115, 98 Am. St. Rep. 972.

**Unauthorized Statements of an Agent** do not bind the principal. The Maurice, (C. C. A.) 135 Fed. Rep. 516; Klingaman *v.* Fish, etc., Co., (S. Dak. 1905) 102 N. W. Rep. 601; Manning *v.* School Dist., (Wis. 1905) 102 N. W. Rep. 356.

**Agent for Care and Custody of Goods.**—An agent in possession of his principal's goods, defending an action therefor in replevin in his own name, though acting without the scope of his authority, may make admissions binding on his principal. Willmot *v.* Lyon, 7 Ohio Cir. Dec. 394, 11 Ohio Cir. Ct. 238.

**An Admission of a Clerk** in a store as to the ownership of the goods therein, which were levied on by the sheriff, is not admissible in an action by the true owner for the conversion. Sharp *v.* Lamy, 37 N. Y. App. Div. 136.

**A Letter Written by the Vice-President of a Bank**, not in his official capacity, to an indorser of a note, is not admissible against the bank in a suit on the note. Utica City Nat. Bank *v.* Tallman, 172 N. Y. 642, affirming 63 N. Y. App. Div. 480.

**Corporation Agents and Employees.**—Griffen *v.* Sprague Electric Co., 115 Fed. Rep. 749; Southern Car, etc., Co. *v.* Adams, 131 Ala. 147; Pauly *v.* Pauly, 107 Cal. 8; Vincent *v.* Soper Lumber Co., 113 Ill. App. 463; Garretson *v.* Merchants, etc., Ins. Co., 92 Iowa 293; Amazon Irrigating Co. *v.* Briesen, 1 Kan. App. 758; Whitney *v.* Wagener, 84 Minn. 211, 87 Am. St. Rep. 351; Elkhorn Trading Co. *v.* Tacoma Min. Co., 16 Mont. 322; Paxton *v.* State, 59 Neb. 460, 80 Am. St. Rep. 689, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 691; Columbia Nat. Bank *v.* Rice, 48 Neb. 428; Vaughn Mach. Co. *v.* Quintard, 165 N. Y. 649, affirming 37 N. Y. App. Div. 368; Milbank *v.* De Riesthal, 82 Hun (N. Y.) 537; Hall *v.* Herter, 90 Hun (N. Y.) 280, affirmed 157 N. Y. 694; Pacific Export Lumber Co. *v.* North Pac. Lumber Co., (Oregon 1905) 80 Pac. Rep. 105; Lynchburg Telephone Co. *v.* Booker, 103 Va. 594; Blair *v.* Security Bank, 103 Va. 762; Jones *v.* Western Mfg. Co., 27 Wash. 136.

The deposition of an officer of a corporation is the deposition of the corporation, and admissible against it. Welsbach Incandescent Gas Lighting Co. *v.* New Sunlight Incandescent Co., (1900) 2 Ch. 1.

Testimony given by a cashier of a bank before a referee in bankruptcy is not admissible against the bank in an action to set aside a transfer of property to the bank. Schreyer *v.* Citizens' Nat. Bank, 74 N. Y. App. Div. 478.

Admissions by a bank cashier in an action in

which the bank is not a party are not admissible against the bank in a later action unless there are peculiar and exceptional circumstances. Harrison County *v.* State Sav. Bank, (Iowa 1905) 103 N. W. Rep. 121.

**The Admissions of a Vice-President** do not usually bind the corporation, but in the absence of the president such admissions may be binding. Vincent *v.* Soper Lumber Co., 113 Ill. App. 463.

**A Receiver of a Corporation** has no authority ordinarily to make admissions binding on the corporation. Ft. Payne Coal, etc., Co. *v.* Webster, 163 Mass. 134.

**Public Officers.**—Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. Rep. 720; Denver *v.* Cochran, 17 Colo. App. 72; Connecticut Insane Hospital *v.* Brookfield, 69 Conn. 1; Hofacre *v.* Monticello, (Iowa 1905) 103 N. W. Rep. 488; Foss *v.* Whitehouse, 94 Me. 491; Vandewater *v.* Wappinger, 69 N. Y. App. Div. 325; Knights of Pythias Benev. Assoc. *v.* Leadbetter, 2 Pa. Super. Ct. 461; Radichel *v.* Kendall, 121 Wis. 560.

A city is not bound by admissions of a councilman or a city collector having no express authority to make the admissions. Peters *v.* Davenport, 104 Iowa 625; Root *v.* Monroeville, 16 Ohio Cir. Ct. 457. And *a fortiori* the admissions of an ex-councilman are not admissible against a city, his agency having terminated. Adkins *v.* Monmouth, 41 Oregon 266, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 691.

**693. 1. During Continuance of Agency.**—Union Bank *v.* Wheat, 58 Mo. App. 11.

**After the Termination of an Agent's Authority** his admissions do not affect his former principal. Walker Mfg. Co. *v.* Knox, (C. C. A.) 136 Fed. Rep. 334.

**694. 1. Concerning Transactions then Depending.**—*United States.*—Peirce *v.* Van Dusen, 78 Fed. Rep. 693, 47 U. S. App. 339; Kansas City Southern R. Co. *v.* Moles, 121 Fed. Rep. 351, 58 C. C. A. 29; Pittsburgh Plate Glass Co. *v.* Kerlin Bros. Co., 122 Fed. Rep. 414, 58 C. C. A. 648; McKnight *v.* U. S., (C. C. A.) 130 Fed. Rep. 659.

*Alabama.*—Williamson *v.* Tyson, 105 Ala. 644; Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334; Worthington *v.* Gwin, 119 Ala. 44; Bibby *v.* Thomas, 131 Ala. 350; Southern Car, etc., Co. *v.* Adams, 131 Ala. 147; Louisville, etc., R. Co. *v.* Landers, 135 Ala. 504.

*Colorado.*—Chicago, etc., R. Co. *v.* Roberts, 10 Colo. App. 87; Kaufman *v.* Burchinell, 15 Colo. App. 520; Trumbull *v.* Donahue, 18 Colo. App. 460.

*Connecticut.*—Arnold *v.* Lane, 71 Conn. 61.

*Florida.*—Bacon *v.* Green, 36 Fla. 325.

*Illinois.*—Matzenbaugh *v.* People, 194 Ill. 108, 88 Am. St. Rep. 134, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 693, 694; Miles *v.* Andrews, 153 Ill. 262; Springfield Consol. R. Co. *v.* Welsch, 155 Ill. 511; Hoffman *v.* Chicago Title, etc., Co., 198 Ill. 452; Chicago, etc., R. Co. *v.* Flaherty, 202 Ill. 151; Chicago, etc., R. Co. *v.* Gore, 202 Ill. 188, 95 Am. St. Rep. 224; Baier *v.* Selke, 211 Ill. 512; Mellor *v.* Carithers,

52 Ill. App. 86; *East St. Louis Connecting R. Co. v. Allen*, 54 Ill. App. 27; *Gillingham v. Christen*, 55 Ill. App. 17; *Cheney v. Beatty*, 56 Ill. App. 90; *Union Nat. Bank v. Post*, 64 Ill. App. 404; *Cleveland, etc., R. Co. v. Jenkins*, 75 Ill. App. 17; *Chicago v. Waukesha Imperial Spring Brewing Co.*, 97 Ill. App. 583; *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265; *Tri-City R. Co. v. Brennan*, 108 Ill. App. 471.

*Indiana*.—*Wabash R. Co. v. Kelley*, 153 Ind. 119; *International Bldg., etc., Assoc. v. Watson*, 158 Ind. 508; *Krohn v. Anderson*, 29 Ind. App. 379.

*Iowa*.—*Murray v. Weber*, 92 Iowa 757; *Hannawalt v. Equitable L. Assur. Soc.*, 102 Iowa 667; *Bird v. Phillips*, 115 Iowa 703; *Alsever v. Minneapolis, etc., R. Co.*, 115 Iowa 338; *Osborne v. Ringland*, 122 Iowa 329.

*Kansas*.—*Concordia First Nat. Bank v. Marshall*, 56 Kan. 441; *Atchison, etc., R. Co. v. Consolidated Cattle Co.*, 59 Kan. 111; *Drummond v. Krebs*, 8 Kan. App. 180.

*Kentucky*.—*Plotz v. Miller*, (Ky. 1899) 51 S. W. Rep. 176; *Floyd v. Paducah R., etc., Co.*, 64 S. W. Rep. 653, 23 Ky. L. Rep. 1077; *Baldwin v. Tucker*, 75 S. W. Rep. 196, 25 Ky. L. Rep. 222; *Southern R. Co. v. Railey*, 80 S. W. Rep. 786, 26 Ky. L. Rep. 53.

*Massachusetts*.—*Allin v. Whittemore*, 171 Mass. 259; *Sanford v. Orient Ins. Co.*, 174 Mass. 416.

*Michigan*.—*Supreme Tent, etc., v. Port Huron Sav. Bank*, (Mich. 1904) 100 N. W. Rep. 898; *Rhode v. Metropolitan L. Ins. Co.*, 129 Mich. 112, 8 Detroit Leg. N. 888; *Ensley v. Detroit United R. Co.*, 134 Mich. 195, 10 Detroit Leg. N. 362; *Butters Salt, etc., Co. v. Vogel*, (Mich. 1904) 97 N. W. Rep. 757, 10 Detroit Leg. N. 807.

*Minnesota*.—*Cumbey v. Lovett*, 76 Minn. 227.

*Mississippi*.—*Yazoo, etc., Valley R. Co. v. Jones*, 73 Miss. 229; *Mobile, etc., R. Co. v. Stinson*, 74 Miss. 453.

*Missouri*.—*State v. Armour Packing Co.*, 173 Mo. 356, 96 Am. St. Rep. 515; *Thompson v. St. Louis, etc., R. Co.*, 59 Mo. App. 37; *Arnold v. Hartford F. Ins. Co.*, 55 Mo. App. 149; *Lamb v. Davidson*, 69 Mo. App. 107; *Henderson Woolen Mills v. Edwards*, 84 Mo. App. 448; *Clark v. Missouri Guarantee Sav., etc., Assoc.*, 85 Mo. App. 388; *Fowles v. Aetna Loan Co.*, 86 Mo. App. 103; *Roth v. Continental Wire Co.*, 94 Mo. App. 236; *Sisk v. American Cent. F. Ins. Co.*, 95 Mo. App. 695; *Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 445; *King v. Phoenix Ins. Co.*, 101 Mo. App. 163; *Turney v. Baker*, 103 Mo. App. 390; *Strode v. Conkey*, 105 Mo. App. 12.

*Nebraska*.—*Union Pac. R. Co. v. Elliott*, 54 Neb. 299.

*New Jersey*.—*Callaway v. Equitable Trust Co.*, 67 N. J. L. 44.

*New York*.—*Nowack v. Metropolitan St. R. Co.*, 166 N. Y. 433, 82 Am. St. Rep. 691, reversing 54 N. Y. App. Div. 302; *Meislahn v. Irving Nat. Bank*, 172 N. Y. 631, affirming 62 N. Y. App. Div. 231; *Morgan v. Short*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 279; *Tibbits v. Phipps*, 30 N. Y. App. Div. 274; *Davis v. Valley Electric Light Co.*, (Supm. Ct. App. Div.)

61 N. Y. Supp. 580; *Wiffler v. Murphy*, 52 N. Y. App. Div. 621; *Steinbach v. Prudential Ins. Co.*, 62 N. Y. App. Div. 133; *P. Cox Shoe Mfg. Co. v. Gorsline*, 63 N. Y. App. Div. 517.

*North Carolina*.—*Witsell v. West Asheville, etc., R. Co.*, 120 N. Car. 557.

*North Dakota*.—*O. S. Paulson Mercantile Co. v. Seaver*, 8 N. Dak. 215; *Balding v. Andrews*, 12 N. Dak. 267.

*Ohio*.—*Berdan v. J. M. Bour Co.*, 2 Ohio Dec. 295, 6 Ohio Cir. Dec. 154, 10 Ohio Cir. Ct. 127; *Tillyer v. Van Cleve Glass Co.*, 7 Ohio Cir. Dec. 209, 13 Ohio Cir. Ct. 99.

*Oregon*.—*North Pac. Lumber Co. v. Willamette Mill Co.*, 29 Oregon 219; *Hannan v. Greenfield*, 36 Oregon 97; *Pacific Livestock Co. v. Gentry*, 38 Oregon 275.

*Pennsylvania*.—*Shafer v. Lacock*, 168 Pa. St. 497; *Coll v. Eastern Transit Co.*, 180 Pa. St. 618; *Dicken v. Winters*, 169 Pa. St. 126; *Mellick v. Pennsylvania R. Co.*, 17 Pa. Super. Ct. 12; *Ruddy v. Repp*, 19 Pa. Super. Ct. 437.

*South Carolina*.—*Beckham v. Southern R. Co.*, 50 S. Car. 25; *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1; *Lipscomb v. South Bound R. Co.*, 65 S. Car. 148.

*Tennessee*.—*Memphis St. R. Co. v. Shaw*, 110 Tenn. 467; *Bowman v. Rector*, (Tenn. Ch. 1900) 59 S. W. Rep. 389.

*Texas*.—*San Antonio, etc., R. Co. v. Gray*, 95 Tex. 424, reversing (Tex. Civ. App. 1901) 66 S. W. Rep. 229; *Houston, etc., R. Co. v. Norris*, (Tex. Civ. App. 1897) 41 S. W. Rep. 708; *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551; *Henry v. Bounds*, (Tex. Civ. App. 1898) 46 S. W. Rep. 120; *Vogt v. Geyer*, (Tex. Civ. App. 1898) 48 S. W. Rep. 1100; *Weatherford First Nat. Bank v. Bruce*, (Tex. Civ. App. 1900) 55 S. W. Rep. 126; *San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498; *Salvini v. Legumazabel*, (Tex. Civ. App. 1902) 68 S. W. Rep. 183; *Western Union Tel. Co. v. Barefoot*, (Tex. Civ. App. 1903) 74 S. W. Rep. 560, reversed on other points 97 Tex. 159; *McCarty v. Hartford F. Ins. Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 934; *Standefor v. Aultman, etc., Machinery Co.*, (Tex. Civ. App. 1904) 78 S. W. Rep. 552; *St. Louis Southwestern R. Co. v. McIntyre*, (Tex. Civ. App. 1904) 82 S. W. Rep. 346.

*Utah*.—*Wilson v. Southern Pac. Co.*, 13 Utah 352, 57 Am. St. Rep. 766; *Marks v. Taylor*, 23 Utah 152.

*Vermont*.—*Blair v. Ritchie*, 72 Vt. 311.

*Virginia*.—*Lane v. Bauserman*, (Va. 1904) 48 S. E. Rep. 857.

*Washington*.—*Callihan v. Washington Water Power Co.*, 27 Wash. 154, 91 Am. St. Rep. 829; *Lambert v. La Conner Trading, etc., Co.*, 30 Wash. 346.

*West Virginia*.—*Sample v. Consolidated Light, etc., Co.*, 50 W. Va. 472.

*Wisconsin*.—*Robinson v. Superior Rapid Transit R. Co.*, 94 Wis. 345, 59 Am. St. Rep. 897; *Hupfer v. National Distilling Co.*, 119 Wis. 417.

**Sub-agent**.—A sub-agent, employed by an agent, may bind the principal by his admissions made concerning a transaction within the authority of the agent in chief, and depending at the time. *Bowman v. Lickey*, 86 Mo. App. 47.



**695. Special Instructions.** — See note 2.**Admissions Not Made at Time of Transaction.** — See note 3.

**695. 2.** *Hill v. Seneca Bank*, 100 Mo. App. 230.

**3. Admissions of Agent Not Made at Time of Transaction or Authorized by Principal** — *England*. — *Whitechurch v. Cavanagh*, (1902) A. C. 117, 71 L. J. K. B. 400.

*United States*. — *Brown v. Cranberry Iron, etc.*, Co., 72 Fed. Rep. 96, 25 U. S. App. 679; *Goddard v. Creffield Mills*, 75 Fed. Rep. 818, 45 U. S. App. 84; *Chicago, etc.*, R. Co. v. *Bellwith*, 83 Fed. Rep. 437, 55 U. S. App. 113; *Holmes v. Montauk Steamboat Co.*, 93 Fed. Rep. 731, 35 C. C. A. 556; *Fidelity, etc.*, Co. v. *Courtney*, 103 Fed. Rep. 599, 43 C. C. A. 331; *Fidelity, etc.*, Co. v. *Haines*, 111 Fed. Rep. 337, 49 C. C. A. 379; *Central Electric Co. v. Sprague Electric Co.*, 120 Fed. Rep. 925, 57 C. C. A. 197; *Marande v. Texas, etc.*, R. Co., (C. C. A.) 124 Fed. Rep. 42; *Meigs v. London Assur. Co.*, 126 Fed. Rep. 781.

*Alabama*. — *Commercial F. Ins. Co. v. Morris*, 105 Ala. 498; *Georgia Home Ins. Co. v. Warten*, 113 Ala. 479, 59 Am. St. Rep. 129; *Sullivan v. Louisville, etc.*, R. Co., 128 Ala. 77; *Stanton v. Baird Lumber Co.*, 132 Ala. 635.

*Arkansas*. — *St. Louis, etc.*, R. Co. v. *Kelley*, 61 Ark. 52; *Ames Iron Works v. Kalamazoo Pulley Co.*, 63 Ark. 87; *Pacific Mut. L. Ins. Co. v. Walker*, 67 Ark. 147; *Milwaukee Harvester Co. v. Tymich*, 68 Ark. 225.

*California*. — *Hewes v. Germain Fruit Co.*, 106 Cal. 441; *Mutter v. I. X. L. Lime Co.*, (Cal. 1895) 42 Pac. Rep. 1068; *Silveira v. Iversen*, 128 Cal. 187; *Williams v. Southern Pac. Co.*, 133 Cal. 550; *Riley v. Campbell*, 134 Cal. 175; *Boone v. Oakland Transit Co.*, 139 Cal. 490; *Peterson v. Mineral King Fruit Co.*, 140 Cal. 624; *Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700.

*Colorado*. — *T. & H. Pueblo Bldg. Co. v. Klein*, 5 Colo. App. 348; *Emerson v. Burnett*, 11 Colo. App. 86; *Baldwin v. Central Sav. Bank*, 17 Colo. App. 7; *Castner v. Rinne*, 31 Colo. 256.

*Connecticut*. — *C. & C. Electric Motor Co. v. Frisbie*, 66 Conn. 67; *Haywood v. Hamm*, (Conn. 1904) 58 Atl. Rep. 695.

*District of Columbia*. — *Hayzel v. Columbia R. Co.*, 19 App. Cas. (D. C.) 359.

*Georgia*. — *Lewis v. Equitable Mortg. Co.*, 94 Ga. 572; *Electric R. Co. v. Carson*, 98 Ga. 652; *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629; *Harris Loan Co. v. Elliott, etc.*, Book Type-writer Co., 110 Ga. 302; *Southern R. Co. v. Allison*, 115 Ga. 635; *Suttles v. Sewell*, 117 Ga. 214; *Childs v. Ponder*, 117 Ga. 553; *Columbus R. Co. v. Peddy*, 120 Ga. 589.

*Illinois*. — *Hodgerson v. St. Louis, etc.*, R. Co., 160 Ill. 430; *Pennsylvania Co. v. Kenwood Bridge Co.*, 170 Ill. 645; *Sibley Warehouse, etc.*, Co. v. *Durand, etc.*, Co., 200 Ill. 354; *Baier v. Selke*, 211 Ill. 512; *Cormack v. Marshall*, 211 Ill. 519; *McCarthy v. Muir*, 50 Ill. App. 510; *Delaware, etc.*, Canal Co. v. *Mitchell*, 92 Ill. App. 577; *Druecker v. Sandusky Portland Cement Co.*, 93 Ill. App. 406; *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265; *Chicago, etc.*, R. Co. v. *Keegan*, 112 Ill. App. 338.

*Indiana*. — *Treager v. Jackson Coal, etc.*, Co., 142 Ind. 164; *Alexandria Bldg. Co. v. McHugh*, 12 Ind. App. 282; *Broadstreet v. Hall*, 32 Ind. App. 122.

*Iowa*. — *Garretson v. Merchants', etc.*, Ins. Co., 92 Iowa 293; *Dubuque First Nat. Bank v. Booth*, 102 Iowa 333; *Schoep v. Bankers' Alliance Ins. Co.*, 104 Iowa 354; *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa 682; *O. S. Kelley Co. v. Chinn*, (Iowa 1898) 75 N. W. Rep. 315; *Lee v. Marion Sav. Bank*, 108 Iowa 716; *Haney-Campbell Co. v. Preston Creamery Assoc.*, 119 Iowa 188; *Vohs v. A. E. Shorthill Co.*, 124 Iowa 471.

*Kansas*. — *Cherokee, etc.*, Coal, etc., Co. v. *Dickson*, 55 Kan. 62; *Atchison, etc.*, R. Co. v. *Wilkinson*, 55 Kan. 83; *Atchison, etc.*, R. Co. v. *Osborn*, 58 Kan. 768; *Atchison, etc.*, R. Co. v. *Consolidated Cattle Co.*, 59 Kan. 111; *Walker v. O'Connell*, 59 Kan. 306; *Robins Min. Co. v. Murdock*, (Kan. 1904) 77 Pac. Rep. 596; *Acme Harvester Co. v. Madden*, 4 Kan. App. 598; *Missouri Pac. R. Co. v. Johnson*, 55 Kan. 344.

*Kentucky*. — *Louisville, etc.*, R. Co. v. *Ellis*, 97 Ky. 330; *Lexington, etc.*, Min. Co. v. *Huffman*, (Ky. 1895) 32 S. W. Rep. 611; *Wash v. Cary*, (Ky. 1896) 33 S. W. Rep. 728; *William Tarr Co. v. Kimbrough*, (Ky. 1896) 34 S. W. Rep. 528; *Louisville, etc.*, R. Co. v. *Webb*, 99 Ky. 332; *East Tennessee Telephone Co. v. Sims*, (Ky. 1896) 38 S. W. Rep. 131; *Chesapeake, etc.*, R. Co. v. *Smith*, 101 Ky. 104; *Graddy v. Western Union Tel. Co.*, (Ky. 1897) 43 S. W. Rep. 468; *Louisville, etc.*, R. Co. v. *Beauchamp*, 108 Ky. 47; *Cincinnati, etc.*, R. Co. v. *Cook*, 113 Ky. 161; *Early v. Louisville, etc.*, R. Co., 115 Ky. 13; *Standard L., etc.*, Ins. Co. v. *Holloway*, 72 S. W. Rep. 796, 24 Ky. L. Rep. 1856; *Wallingford v. Aitkins*, 72 S. W. Rep. 794, 24 Ky. L. Rep. 1995; *Parker v. Cumberland Telephone, etc.*, Co., 77 S. W. Rep. 1109, 25 Ky. L. Rep. 1391; *McFarland v. Harbison, etc.*, Co., 82 S. W. Rep. 430, 26 Ky. L. Rep. 746.

*Louisiana*. — *Sentell v. Hewitt*, 49 La. Ann. 1021.

*Maine*. — *Morrow v. Goodrich*, 92 Me. 393, 69 Am. St. Rep. 512.

*Maryland*. — *Baltimore v. Lobe*, 90 Md. 310.

*Massachusetts*. — *Geary v. Stevenson*, 169 Mass. 23; *Gilmore v. Mittineague Paper Co.*, 169 Mass. 471; *Koplan v. Boston Gas Light Co.*, 177 Mass. 15.

*Michigan*. — *Ablord v. Ft. Wayne, etc.*, R. Co., 104 Mich. 147; *Maxson v. Michigan Cent. R. Co.*, 117 Mich. 218; *Hall v. Murdock*, 119 Mich. 389; *Mott v. Detroit, etc.*, R. Co., 120 Mich. 127; *Beunk v. Valley City Desk Co.*, 128 Mich. 562, 8 Detroit Leg. N. 767; *Allington, etc.*, Mfg. Co. v. *Detroit Reduction Co.*, 133 Mich. 427, 10 Detroit Leg. N. 269; *Butler v. Detroit, etc.*, R. Co., (Mich. 1904) 101 N. W. Rep. 232.

*Minnesota*. — *Rosted v. Great Northern R. Co.*, 76 Minn. 127, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 697, note; *Matthews v. Hershey Lumber Co.*, 65 Minn. 372, 67 N. W. Rep. 1008; *Reem v. St. Paul City R. Co.*, 77

Minn. 503; *Jackson v. Mutual Ben. L. Ins. Co.*, 79 Minn. 44, rehearing denied 79 Minn. 49; *Parker v. Winona, etc.*, R. Co., 83 Minn. 212.

*Mississippi*.—*State v. Spengler*, (Miss. 1898) 23 So. Rep. 33.

*Missouri*.—*Rice v. St. Louis*, 165 Mo. 636, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 695; *Barker v. St. Louis, etc.*, R. Co., 126 Mo. 143, 47 Am. St. Rep. 646; *Kearney Bank v. Froman*, 129 Mo. 427, 30 Am. St. Rep. 456; *Pomeroy v. Fullerton*, 131 Mo. 581; *Bangs Milling Co. v. Burns*, 152 Mo. 350; *Ruschenberg v. Southern Electric R. Co.*, 161 Mo. 70; *Koenig v. Union Depot R. Co.*, 173 Mo. 698; *Clack v. Southern Electrical Supply Co.*, 72 Mo. App. 506; *Smith v. Little Pittsburg Coal Co.*, 75 Mo. App. 177; *National Bank of Commerce v. Fitze*, 76 Mo. App. 356; *Gotwald v. St. Louis Transit Co.*, 102 Mo. App. 492; *Huber Mfg. Co. v. Hunter*, 78 Mo. App. 82; *Wright Invest. Co. v. Fillingham*, 85 Mo. App. 534; *Harper v. Western Union Tel. Co.*, 92 Mo. App. 304; *Helm v. Missouri Pac. R. Co.*, 98 Mo. App. 419; *Holton v. Kansas City, etc.*, R. Co., 1 Mo. App. Rep. 358.

*Montana*.—*Wilson v. Harris*, 21 Mont. 374, reversing 19 Mont. 69; *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 75, denying rehearing 24 Mont. 65; *Hogan v. Kelly*, 29 Mont. 485.

*Nebraska*.—*Union L. Ins. Co. v. Haman*, 54 Neb. 599, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 695; *Columbia Nat. Bank v. Rice*, 48 Neb. 428; *Clancy v. Barker*, (Neb. 1904) 98 N. W. Rep. 440.

*New Hampshire*.—*Nebonne v. Concord R. Co.*, 67 N. H. 531; *Guerin v. New England Telephone, etc., Co.*, 70 N. H. 133.

*New Jersey*.—*West Jersey Traction Co. v. Camden Horse-R. Co.*, 53 N. J. Eq. 163; *Blackman v. West Jersey, etc.*, R. Co., 68 N. J. L. 1; *Huebner v. Erie R. Co.*, 67 N. J. L. 327; *King v. Atlantic City Gas, etc., Co.*, 70 N. J. L. 679.

*New York*.—*Kay v. Metropolitan St. R. Co.*, 163 N. Y. 447; *Taylor v. Commercial Bank*, 174 N. Y. 181; *National Bank v. Byrnes*, (N. Y. 1904) 70 N. E. Rep. 1103, affirming 84 N. Y. App. Div. 100; *Flour City Nat. Bank v. Grover*, 88 Hun (N. Y.) 4; *Niles Tool-Works Co. v. Reynolds*, 4 N. Y. App. Div. 24; *Congdon, etc., Co. v. Sheehan*, 11 N. Y. App. Div. 456; *Timm v. J. G. Rose Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 337; *Morris v. Brooklyn Heights R. Co.*, 20 N. Y. App. Div. 557; *Cosgray v. New England Piano Co.*, 22 N. Y. App. Div. 455; *Kelly v. Morehouse*, 25 N. Y. App. Div. 359; *Herrmann v. Sarles*, 42 N. Y. App. 268; *Ballard v. Beveridge*, 45 N. Y. App. 477; *Stevens v. Siegel-Cooper Co.*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 250; *Johnson v. Buffalo Homœopathic Hospital*, 53 N. Y. App. Div. 513; *Goetz v. Metropolitan St. R. Co.*, 54 N. Y. App. Div. 365; *Moore v. Rankin*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 749; *Smith v. Coe*, 57 N. Y. App. Div. 631, denying rehearing 55 N. Y. App. Div. 585; *Brown v. Dutchess County Mut. Ins. Co.*, 64 N. Y. App. Div. 9; *Leary v. Albany Brewing Co.*, 77 N. Y. App. Div. 6; *Rider, etc., Pub. Co. v. Rough Rider Horseshoe Co.*, 84 N. Y. App. Div. 283; *Rogers v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 974; *Patterson v. White Star*

*Towing Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 359; *Diehl v. Watson*, 89 N. Y. App. Div. 445; *Wimmer v. Metropolitan St. R. Co.*, 92 N. Y. App. Div. 258; *Burns v. Borden's Condensed Milk Co.*, 93 N. Y. App. Div. 566; *White v. Lewiston, etc.*, R. Co., 94 N. Y. App. Div. 4.

*North Carolina*.—*Egerton v. Wilmington, etc.*, R. Co., 115 N. Car. 645; *Craven v. Russell*, 118 N. Car. 564; *Willis v. Atlantic, etc.*, R. Co., 120 N. Car. 508; *Darlington v. Western Union Tel. Co.*, 127 N. Car. 448; *McEntyre v. Levi Cotton Mills Co.*, 132 N. Car. 598; *Lyman v. Southern R. Co.*, 132 N. Car. 721.

*North Dakota*.—*Balding v. Andrews*, 12 N. Dak. 267.

*Ohio*.—*Sloss Marblehead Lime Co. v. Smith*, 5 Ohio Cir. Dec. 79, 11 Ohio Cir. Ct. 213; *Gobrecht v. Sicking*, 9 Ohio Cir. Dec. 851, 18 Ohio Cir. Ct. 881.

*Oregon*.—*Wicktorwitz v. Farmers' Ins. Co.*, 31 Oregon 569; *Goltra v. Penland*, (Oregon 1904) 77 Pac. Rep. 129.

*Pennsylvania*.—*Briggs v. East Broad Top R., etc.*, Co., 206 Pa. St. 564; *Morris v. Guffey*, 188 Pa. St. 534; *Giberson v. Patterson Mills Co.*, 174 Pa. St. 369, 52 Am. St. Rep. 823; *Helping Hand Bldg., etc., Assoc. v. Buss*, 13 Pa. Super. Ct. 343.

*South Carolina*.—*Salley v. Manchester, etc.*, R. Co., 62 S. Car. 127.

*South Dakota*.—*Estey v. Birnbaum*, 9 S. Dak. 174; *Reagan v. McKibben*, 11 S. Dak. 270.

*Texas*.—*Atchison, etc.*, R. Co. v. *Bryan*, (Tex. Civ. App. 1894) 28 S. W. Rep. 98; *Laughlin v. Fidelity Mut. L. Assoc.*, 8 Tex. Civ. App. 448; *Lake Como Land, etc., Co. v. Coughlin*, 9 Tex. Civ. App. 340; *Gulf, etc.*, R. Co. v. *Southwick*, (Tex. Civ. App. 1895) 30 S. W. Rep. 592; *Missouri, etc.*, R. Co. v. *Murphy*, (Tex. Civ. App. 1896) 35 S. W. Rep. 66; *Breneman v. Kilgore*, (Tex. Civ. App. 1896) 35 S. W. Rep. 202; *Chicago, etc.*, R. Co. v. *Yarborough*, (Tex. Civ. App. 1896) 35 S. W. Rep. 422; *Houston, etc.*, R. Co. v. *Norris*, (Tex. Civ. App. 1897) 41 S. W. Rep. 708; *Pacific Express Co. v. Lothrop*, 20 Tex. Civ. App. 339; *Southwestern Tel., etc., Co. v. Gotcher*, 93 Tex. 114; *St. Louis, etc.*, R. Co. v. *Carlisle*, (Tex. Civ. App. 1904) 78 S. W. Rep. 553; *Continental Ins. Co. v. Cummings*, (Tex. 1904) 81 S. W. Rep. 705, reversing (Tex. Civ. App. 1903) 78 S. W. Rep. 378; *Waggoner v. Snody*, (Tex. 1905) 85 S. W. Rep. 1134, reversing (Tex. Civ. App. 1904) 82 S. W. Rep. 355.

*Utah*.—*Moyle v. Congregational Soc.*, 16 Utah 69.

*Vermont*.—*Hardwick Sav. Bank v. Drenan*, 72 Vt. 438.

*Virginia*.—*Reusch v. Roanoke Cold Storage Co.*, 91 Va. 534; *Jammison v. Chesapeake, etc.*, R. Co., 92 Va. 327, 53 Am. St. Rep. 813.

*Washington*.—*Cook v. Stimson Mill Co.*, (Wash. 1904) 78 Pac. Rep. 39.

*Wisconsin*.—*Kliegel v. Aitken*, 94 Wis. 432, 59 Am. St. Rep. 901; *Consolidated Milling Co. v. Fogo*, 104 Wis. 92; *Small v. McGovern*, 117 Wis. 608; *Kamp v. Cox*, (Wis. 1904) 99 N. W. Rep. 366.

**Under This Rule**, the statements of an elevator boy as to the cause of the falling of the elevator, made some minutes after the accident,

**698.** See note 1.

*b.* ATTORNEYS — Rule as to Agents Generally Applies. — See notes 3, 4. Admissions in Common Conversation. — See note 6.

Distinct and Formal Admissions. — See note 7.

**699.** When Receivable on Subsequent Trial. — See notes 2, 3.

were held inadmissible, being no part of the *res gesta*. *Lissak v. Crocker Estate Co.*, 119 Cal. 442.

In *Hopkins v. Boyd*, 18 Ind. App. 63, it was held that though such declarations are not admissible to prove the fact of negligence, they are admissible to show notice of conditions on the part of the railroad company.

**Where Special Authority to Admit Is Given.** — An agent may be authorized to make admissions about a matter outside of his ordinary authority. *Medearis v. Anchor Mut. F. Ins. Co.*, 104 Iowa 88, 65 Am. St. Rep. 428.

**Admissions by General Agents as to Past Transactions.** — *The Severn*, 113 Fed. Rep. 578; *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57; *Mt. Morris v. Kanode*, 98 Ill. App. 373; *Louisville Ins. Co. v. Monarch*, 99 Ky. 578; *Buffum v. York Mfg. Co.*, 175 Mass. 471; *Ward v. Tennessee Coal, etc., R. Co.*, (Tenn. Ch. 1900) 57 S. W. Rep. 193; *Texas Standard Cotton Oil Co. v. National Cotton Oil Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 159; *Cooper Grocer Co. v. Britton*, (Tex. Civ. App. 1903) 74 S. W. Rep. 91; *Consumers' Cotton Oil Co. v. Jonte*, (Tex. Civ. App. 1904) 80 S. W. Rep. 847; *Texas, etc., Telephone Co. v. Prince*, (Tex. Civ. App. 1904) 82 S. W. Rep. 327; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25.

**For Authorities Supporting the Opposite View.** — *Momence Stone Co. v. Groves*, 197 Ill. 88, affirming 100 Ill. App. 98; *Andrews v. Tamarack Min. Co.*, 114 Mich. 375; *Butters Salt, etc., Co. v. Vogel*, (Mich. 1904) 97 N. W. Rep. 757, 10 Detroit Leg. N. 807.

The admission of a receiver of a national bank of the receipt of a draft prior to his appointment was held inadmissible to charge the bank with negligence in reference to the draft. *Portland First Nat. Bank v. Linn County Nat. Bank*, 30 Oregon 296.

**698. 1.** *O'Toole v. Post Printing, etc., Co.*, 179 Pa. St. 271; *Coll v. Easton Transit Co.*, 180 Pa. St. 618; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25.

**3. Must Be Made Within Scope of Authority.** — *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152; *Chicago Gen. R. Co. v. Murray*, 174 Ill. 259; *Miller v. Palmer*, 25 Ind. App. 357, 81 Am. St. Rep. 107; *Dorrance v. McAlester*, 1 Indian Ter. 473; *Fletcher v. Chicago, etc., R. Co.*, 109 Mich. 363; *Stinesville, etc., Stone Co. v. White*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 135; *Lytte v. Crawford*, 69 N. Y. App. Div. 273; *People v. Mole*, 85 N. Y. App. Div. 33; *Murmuth v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 634; *Burraston v. Nephi First Nat. Bank*, 22 Utah 328; *Fosha v. O'Donnell*, 120 Wis. 336.

**An Unauthorized Letter by an Attorney** is not admissible against the client. *McGarry v. McGarry*, 9 Pa. Super. Ct. 71.

**But an Authorized Letter** or one written within the scope of his authority is admissible. *Tredwell v. Doncourt*, 18 N. Y. App. Div. 219.

**Affidavit by Attorney of Record.** — See *Gray v. Minnesota Tribune Co.*, 81 Minn. 333.

**4. Must Be Made During Agency.** — *Murray v. Sweasy*, 69 N. Y. App. Div. 45.

A statement made to one of the parties by his attorney in the presence of the agent or attorney of the other party, about a transaction then depending, is competent evidence. *King v. Franklin*, 132 Ala. 559. See also *Inman v. Schloss*, 122 Ala. 461.

**6. Admissions in Common Conversation Not Receivable.** — *Cramer v. Truitt*, 113 Ga. 967; *Cable Co. v. Parantha*, 118 Ga. 913; *Chicago City R. Co. v. McMeen*, 70 Ill. App. 220; *School Trustees v. Mitchell*, 73 Ill. App. 543; *Smith v. Bradhurst*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 546. See also *Hicks v. Naomi Falls Mfg. Co.*, (N. Car. 1905) 50 S. E. Rep. 703.

**7. Admissions Made for Purpose of Dispensing with Proof.** — *McKechney v. Columbian Powder Co.*, 86 Ill. App. 27; *Allen v. St. Louis, etc., R. Co.*, 137 Mo. 205; *National L. Ins. Co. v. Butler*, 61 Neb. 449, 87 Am. St. Rep. 462; *Gottlieb v. Alton Grain Co.*, 87 N. Y. App. Div. 380; *Brown v. Pechman*, 55 S. Car. 555, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 698; *Beard v. State*, 44 Tex. Crim. 402, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 698, note 7. See also *Thompson Foundry, etc., Co. v. Glass*, 136 Ala. 648; *Lake Erie, etc., R. Co. v. Rooker*, 13 Ind. App. 600; *Harvin v. Blackman*, 108 La. 426; *Sullivan v. Dunham*, 35 N. Y. App. Div. 342, affirmed 161 N. Y. 290; *Granger v. American Brewing Co.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 701; *Hicks v. Naomi Falls Mfg. Co.*, (N. Car. 1905) 50 S. E. Rep. 703; *Sanderson v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 1103. Compare *Pratt v. Conway*, 148 Mo. 291, 71 Am. St. Rep. 602.

A bill of particulars furnished voluntarily by an attorney may be admitted against his client. *American Copper, etc., Works v. Galland-Burke Brewing, etc., Co.*, 30 Wash. 178.

In *Goodman v. Mercantile Credit Guarantee Co.*, 17 N. Y. App. Div. 474, it was held that a formal admission of a fact made by counsel in the course of a trial could not be withdrawn except for cause shown.

Where an admission of a party forms the basis of an order of the Supreme Court, such order will not be set aside or modified by reason of any mental reservation of counsel making the admission. *Smith v. St. Paul*, 69 Minn. 276.

**699. 2. When Admissions May Be Proved on Subsequent Trial of the Cause.** — *Scaife v. Western North Carolina Land Co.*, (C. C. A.) 90 Fed. Rep. 238; *Missouri, etc., Telephone Co. v. Vandevort*, 67 Kan. 269; *Gallagher v. McBride*, 66 N. J. L. 360; *Virginia-Carolina Chemical Co. v. Kirven*, 130 N. Car. 161; *Brown v. Pechman*, 55 S. Car. 555.

**The Mere Opinion of an Attorney** on facts as reported to him is not admissible against the client on a subsequent trial. *Hicks v. Naomi*

**700.** The Admissions of an Attorney's Clerk. — See note 1.

*c.* HUSBAND AND WIFE — Husband's Admissions as to Wife's Separate Estate. — See note 2.

Wife's Admissions as Affecting Husband. — See note 3.

**702.** *d.* PARTIES REFERRED TO FOR INFORMATION — Rule Stated. — See note 1.

**6. Principal Against Surety — General Rule. — See note 3.**

Falls Mfg. Co., (N. Car. 1905) 50 S. E. Rep. 703.

**699.** 3. *Miller v. U. S.*, (C. C. A.) 133 Fed. Rep. 337.

**700.** 1. *Lord v. Wood*, 120 Iowa 303.

2. *Wife's Separate Estate — Husband's Admissions — United States.* — *Duncan v. Landis*, (C. C. A.) 106 Fed. Rep. 839.

*Alabama.* — *Pearce v. Smith*, 126 Ala. 116; *Pearson v. Adams*, 129 Ala. 157.

*Georgia.* — *Robinson v. Stevens*, 93 Ga. 535; *Jones v. Harrell*, 110 Ga. 373.

*Iowa.* — *Bird v. Phillips*, 115 Iowa 703; *Fowler Co. v. McDonnell*, 100 Iowa 536; *Montgomery v. Mann*, 120 Iowa 609.

*Kansas.* — *Van Zandt v. Shuyler*, 2 Kan. App. 118; *Stephens v. Gardner Creamery Co.*, 9 Kan. App. 883, 57 Pac. Rep. 1058.

*Kentucky.* — *Shields v. Lewis*, 70 S. W. Rep. 51, 24 Ky. L. Rep. 822.

*Massachusetts.* — *Barker v. Mackay*, 175 Mass. 485.

*Michigan.* — *Whelpley v. Stoughton*, 112 Mich. 594; *Carpenter v. Carpenter*, 126 Mich. 217.

*Missouri.* — *Lemmons v. McKinney*, 162 Mo. 525; *Vermillion v. Parsons*, 101 Mo. App. 602; *Vermillion v. Parsons*, 107 Mo. App. 192; *Newberry v. Durand*, 87 Mo. App. 290; *Fox v. Windes*, 127 Mo. 502, 48 Am. St. Rep. 648.

*Nebraska.* — *Baty v. Elrod*, 66 Neb. 735, affirmed on rehearing 66 Neb. 744, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 700.

*New York.* — *Bouton v. Welch*, 59 N. Y. App. Div. 288; *Storm v. McGrover*, 70 N. Y. App. Div. 33; *Winans v. Demarest*, (Supm. Ct. App. T.) 84 N. Y. Supp. 504.

*North Carolina.* — *Strother v. Aberdeen, etc.*, R. Co., 123 N. Car. 197; *Perkins v. Brinkley*, 133 N. Car. 348.

*Oregon.* — *Minard v. Stillman*, 35 Oregon 259; *Noblitt v. Durbin*, 41 Oregon 555.

*Pennsylvania.* — *Thomas v. Butler*, 24 Pa. Super. Ct. 305; *Sweigart v. Conrad*, 16 Lanc. L. Rev. 340.

*South Dakota.* — *Aldous v. Olverson*, (S. Dak. 1903) 95 N. W. Rep. 917.

*Texas.* — *La Master v. Dickson*, 91 Tex. 593, affirming 17 Tex. Civ. App. 473; *Owen v. New York, etc., Land Co.*, 11 Tex. Civ. App. 284; *Evans v. Purinton*, 12 Tex. Civ. App. 158; *Thompson v. Johnson*, (Tex. Civ. App. 1900) 56 S. W. Rep. 591; *Word v. Kennon*, (Tex. Civ. App. 1903) 75 S. W. Rep. 365.

Where husband and wife conspire to defraud his creditors his admissions are competent evidence against her. *Higgins v. Spahr*, 145 Ind. 167; *Pullins v. Pullins*, 62 S. W. Rep. 865, 23 Ky. L. Rep. 333; *Taliaferro v. Evans*, 160 Mo. 380; *Coburn v. Stover*, 67 N. H. 86; *Poundstone v. Jones*, 182 Pa. St. 574.

Where a woman, holding adverse possession

of land, marries, her husband's recognition of the title of the true owner stops the running of the statute of limitations in her favor. *Texas, etc., R. Co. v. Speights*, (Tex. Civ. App. 1900) 59 S. W. Rep. 572, affirmed 94 Tex. 350.

**Fraudulent Conveyance from Husband to Wife.** — Where a conveyance to the wife from the husband, who remains in possession of the land, is attacked by creditors for fraud, the declarations of the husband against the interest of the wife are admissible. *George Taylor Commission Co. v. Bell*, 62 Ark. 26.

**Homestead.** — Where the husband and wife executed a deed to the homestead, taking purchase-money notes and retaining a lien, it was held that in a suit by the indorsee of the notes to foreclose the lien, the affidavits of the husband and the grantee showing the *bona fides* of the sale were admissible against the wife. *Cooper v. Ford*, 29 Tex. Civ. App. 253.

3. *Wife's Admissions as Affecting the Husband.* — *Svetinich v. Sheehan*, 124 Cal. 216, 71 Am. St. Rep. 50; *Cedar Rapids Nat. Bank v. Lavery*, 110 Iowa 575, 80 Am. St. Rep. 325; *Stratton v. Edwards*, 174 Mass. 374; *Horan v. Byrnes*, 70 N. H. 531; *Meyer v. Jewell*, (Supm. Ct. App. T.) 88 N. Y. Supp. 972.

**702.** 1. *Party Referring Bound by Admissions of Referee.* — *Woods v. Jensen*, 130 Cal. 200; *Dorrance v. McAlester*, 1 Indian Ter. 473; *Jennings v. Haynes*, 1 Ohio Cir. Dec. 13; *Fiore v. Ladd*, 29 Oregon 528; *Equitable Mfg. Co. v. Cooley*, 69 S. Car. 332, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 701, 702.

The reference must be about some subject of dispute between the parties. *Robertson v. Hamilton*, 16 Ind. App. 328, 59 Am. St. Rep. 319.

**Where There Is No Intention to Be Bound — No Agency.** — Where the defendant, seeking credit of the plaintiff, represented that another would guarantee the payment of his accounts, and referred the plaintiff to such person, it was held that statements made to the plaintiff by such person were inadmissible in a suit against the defendant. *Lehman v. Frank*, 19 N. Y. App. Div. 442.

3. *General Rule as to Declarations of Principal.* — *Guarantee Co. v. Phenix Ins. Co.*, 124 Fed. Rep. 170, 59 C. C. A. 376; *Walling v. Morgan County*, 126 Ala. 326; *Thompson v. Commercial Union Assur. Co.*, (Colo. App. 1904) 78 Pac. Rep. 1073; *Bailey v. McAlpin*, (Ga. 1905) 50 S. E. Rep. 388; *Swift v. School Trustees*, 189 Ill. 584; *Bartlett v. Wheeler*, 195 Ill. 445, affirming 96 Ill. App. 342; *Guarantee Co. v. Mutual Bldg., etc., Assoc.*, 57 Ill. App. 254; *Knott v. Peterson*, (Iowa 1904) 101 N. W. Rep. 173; *Singer Mfg. Co. v. Reynolds*, 168 Mass. 588; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 64 Am. St. Rep. 475; *Hall v. U. S. Fidelity, etc., Co.*, 77 Minn. 24; *Vaughn Mach. Co. v.*

**703.** Declarations Before and After the Transaction. — See notes 1, 2.

**704.** 7. Persons Jointly Interested — *a.* GENERALLY — Rule Stated. — See note 1.

**705.** See note 1.

**706.** Joint Interest — Community of Interest. — See note 2.

**707.** See notes 1, 2, 3, 5, 6, 7, 8, 9.

Quintard, 165 N. Y. 649, *affirming* 37 N. Y. App. Div. 368; *Eichhold v. Tiffany*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 680; *Eichhold v. Tiffany*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 627; *Yates v. Thomas*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 552.

**State Treasurer.** — The entries on the books and records of his office made by a state treasurer, and his accounts filed with the state auditor, are admissible against him and the sureties on his official bond to show his defalcation. *State v. Paxton*, 65 Neb. 110.

**703.** 1. Admissions After the Transaction. — *Knott v. Peterson*, (Iowa 1904) 101 N. W. Rep. 173; *Barkley v. Bradford*, 100 Ky. 304; *Eichhold v. Tiffany*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 627; *Wieder v. Union Surety, etc., Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 499; *Nickols v. Jones*, 166 Pa. St. 599.

**Where Suit Is Against the Principal and Sureties Combined.** — *Finelite v. Sonberg*, 75 N. Y. App. Div. 455; *McFarlane v. Howell*, 16 Tex. Civ. App. 246.

**2. Admissions of a Trustee** made before his bond is executed are not admissible against his bondsmen. *Matter of Williams*, (Surrogate Ct.) 26 Misc. (N. Y.) 636.

**704.** 1. General Rule as to Admissions in Case of Persons Jointly Interested. — *Main v. Aukam*, 4 App. Cas. (D. C.) 51; *Seymour v. O. S. Richardson Fueling Co.*, 103 Ill. App. 625; *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801, 93 Am. St. Rep. 484; *Blymyer v. Meader*, 3 Ohio Dec. 52; *Pearsall v. Tennessee, etc., R. Co.*, 2 Tenn. Ch. App. 682; *Dover v. Winchester*, 70 Vt. 418; *Fey v. I. O. O. F. Mutual L. Ins. Soc.*, 120 Wis. 358.

**Answers in Chancery.** — *Turner v. Mitchell*, 61 S. W. Rep. 468, 22 Ky. L. Rep. 1784.

**Declaration in Declarant's Interest** are not admissible to fix liability on his associate. *Thyll v. New York, etc., R. Co.*, 92 N. Y. App. Div. 513, *modifying* (Supm. Ct. App. T.) 84 N. Y. Supp. 175.

**705.** 1. Joint Contractors. — *Bacon v. Green*, 36 Fla. 325. *Compare* *Matteson v. Palser*, 56 N. Y. App. Div. 91.

**706.** 2. *Dean v. Ross*, 105 Cal. 227; *Sunday v. Dietrich*, 16 Pa. Super. Ct. 640; *Shannon v. Castner*, 21 Pa. Super. Ct. 294; *Fisher v. White*, 94 Va. 236; *Wytheville Crystal Ice, etc., Co. v. Frick Co.*, 96 Va. 141.

Where two parties exchange property an admission of one of them, of liability of both to a broker for commissions for bringing about the trade, does not bind the other. *Randrup v. Schroeder*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 52.

**No Joint Interest Between Indorsers.** — *Brown v. Fowler*, 133 Ala. 310.

**Nor Between Executors and Heirs.** — *MERCHANTS' L. Assoc. v. Yoakum*, 98 Fed. Rep. 251, 39 C. C. A. 56.

**Nor a Tenant and an Alleged Landlord to Whom He Attorns.** — *Baxter v. Carroll*, (N. J. 1898) 41 Atl. Rep. 407.

**Insured and Beneficiary.** — See *Foxhever v. Order of Red Cross*, 24 Ohio Cir. Ct. 56.

**Joint Promisors.** — The admissions of one joint promisor will not bind the others. *Relley v. Campbell*, 134 Cal. 175.

**Contractor and Owner.** — The admission of service of notice of intention to file a lien by a contractor is not competent against the owner of the premises. *Hensel v. Johnson*, 94 Md. 729.

**707.** 1. Tenants in Common. — *Matter of Kennedy*, 167 N. Y. 163, *affirming* 53 N. Y. App. Div. 105; *Matter of Van Dawalker*, 63 N. Y. App. Div. 550; *Matter of Campbell*, 67 N. Y. App. Div. 418; *Naul v. Naul*, 75 N. Y. App. Div. 292.

**The Admissions of a Tenant in Common.** — Where a cotenant relies, for recovery in ejectment, upon the possession of his cotenant, the admissions of the latter, made while taking and holding possession, are admissible against the former. *Kellum v. Mission of Immaculate Virgin, etc.*, 82 N. Y. App. Div. 523.

**2. Tenant for Life and Remaindermen.** — *Downing v. Mayes*, 153 Ill. 330, 46 Am. St. Rep. 896.

**3.** See *Johnson v. Johnson*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1023.

**5. Devisees and Legatees.** — *Carpenter's Appeal*, 74 Conn. 431; *Matter of Hull*, 117 Iowa 738; *Roberts v. Bidwell*, (Mich. 1904) 98 N. W. Rep. 1000, 10 Detroit Leg. N. 1016; *Schierbaum v. Schemme*, 157 Mo. 1, 80 Am. St. Rep. 604; *Wood v. Carpenter*, 166 Mo. 465; *Stull v. Stull*, (Neb. 1901) 96 N. W. Rep. 196. *Contra*, *Wall v. Dimmitt*, 114 Ky. 923.

Where substantially the whole estate is bequeathed to one legatee, the admissions of such legatee are admissible. *Lundy v. Lundy*, 118 Iowa 445.

**But the Admission of One of Several Devisees**, while not to be regarded as an admission against all, may create a presumption against all. *Gibson v. Sutton*, 70 S. W. Rep. 188, 24 Ky. L. Rep. 868.

**6. An Executor** is not bound by his admissions made before he became executor. *Niskern v. Haydock*, 23 N. Y. App. Div. 175.

**7. Trustees.** — *Belding v. Archer*, 131 N. Car. 287.

**8. Corporation Officers.** — See *Bangs Milling Co. v. Burns*, 152 Mo. 350.

Declarations of officers that they are authorized to use the bonds of the corporation for their private purposes are not binding on the corporation. *Germania Safety-Vault, etc., Co. v. Boynton*, 71 Fed. Rep. 797, 37 U. S. App. 602.

**9. Stockholders.** — *Starr Burying Ground Assoc. v. North Lane Cemetery Assoc.*, (Conn. 1904) 58 Atl. Rep. 467; *Long v. Moore*, 19 Tex. Civ. App. 363.

**707.** [Receivers. — But there is such joint interest between co-receivers. See note 9a.]

**708.** Where Admission Is Competent Against Only One of Several Codefendants. — See note 1.

b. PARTNERS — Rule Stated. — See note 4.

**710.** See notes 1, 2.

Not Admissible to Prove the Partnership. — See note 3.

**711.** See note 1.

Partnership Provable by Successive Declarations of Members. — See note 2.

**707. 9a. Receivers.** — But there is such joint interest between co-receivers: *Shirk v. Brookfield*, 71 N. Y. App. Div. 295.

**708. 1. Alabama.** — *Brunson v. State*, 124 Ala. 37.

*Indiana.* — *Smith v. Meiser*, 11 Ind. App. 468.

*Iowa.* — *Allen v. Barrett*, 100 Iowa 16; *Connors v. Chingren*, 111 Iowa 437; *State v. Phillips*, 118 Iowa 660; *Chaslavka v. Mechalek*, 124 Iowa 69.

*Kentucky.* — *Cincinnati, etc., R. Co. v. Cook*, 113 Ky. 161.

*Massachusetts.* — *Broderick v. Higginson*, 169 Mass. 482; *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577; *Com. v. Rogers*, 181 Mass. 184.

*Michigan.* — *Carpenter v. Carpenter*, 126 Mich. 217.

*Missouri.* — *Carthage Marble, etc., Co. v. Bauman*, 55 Mo. App. 204; *Bruce v. Bornbeck*, 79 Mo. App. 231.

*Nebraska.* — *Cleland v. Anderson*, 66 Neb. 252.

*North Carolina.* — *State v. Williams*, 129 N. Car. 581.

*Oregon.* — *Bingham v. Lipman*, 40 Oregon 363.

*South Carolina.* — *State v. Adams*, 68 S. Car. 421.

*Texas.* — *St. Louis Southwestern R. Co. v. Bishop*, 14 Tex. Civ. App. 504; *Shelburn v. McCrocklin*, (Tex. Civ. App. 1897) 42 S. W. Rep. 329; *La Master v. Dickson*, 17 Tex. Civ. App. 473; *Mason v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 718; *Harrold v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 728.

*Wisconsin.* — *Collins v. State*, 115 Wis. 596.

Where incompetent evidence was admitted as to one defendant, but excluded as to his co-defendant, the latter's conviction will not be disturbed. *Willis v. State*, 67 Ark. 234.

**4. Must Be Made During the Continuance of Partnership.** — *Dennis v. Kolm*, 131 Cal. 91; *Sheldon v. Bigelow*, 118 Iowa 586; *Nickerson v. Russell*, 172 Mass. 584.

**Admissions Prior to Partnership.** — The issue being the existence of the partnership at the time of creating the debt, admissions of the existence of the partnership made after the debt was created do not bind the partner denying his membership at the time of the debt's creation. *Huyssen v. Lawson*, 90 Mo. App. 82.

**After Dissolution.** — *Wilson v. Whitten*, 99 Ill. App. 233; *Peoria Scrap Iron Co. v. Cohen*, 113 Ill. App. 30; *Boynton v. Hardin*, 9 Kan. App. 166; *Shakopee First Nat. Bank v. Strait*, 65 Minn. 162; *Moore v. Palmer*, 132 N. Car. 969; *Mackintosh v. Kimball*, 101 N. Y. App. Div. 494; *Cohen v. Adams*, 13 Tex. Civ. App. 118.

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**710. 1. Must Be Within Scope of Partnership.** — *Kindel v. Hall*, 8 Colo. App. 63; *Low v. Arnstein*, 73 Ill. App. 217; *Britton v. Britton*, 19 Ind. App. 638; *Taft v. Church*, 162 Mass. 527; *Robertson v. Blair*, 56 S. Car. 96; *Hester v. Smith*, 5 Wyo. 291.

In a criminal prosecution the defendant cannot be bound by admissions made by his partner in a legitimate business. *People v. McBride*, 120 Mich. 166.

In an action against a firm to recover for personal injuries alleged to have been caused by the negligence of one partner, a statement by one of the other partners, who did not have any personal knowledge of the accident or of the circumstances under which it happened, to the effect that the plaintiff ought to be paid and that he had always been willing to pay him, is not admissible. *Folk v. Schaeffer*, 180 Pa. St. 613.

*2. Grunenberg v. Smith*, 58 Ill. App. 281; *Lord v. Wood*, 120 Iowa 303; *Rudy v. Katz*, 66 S. W. Rep. 18, 23 Ky. L. Rep. 1697; *Carlson v. Holm*, (Neb. 1901) 95 N. W. Rep. 1125; *Albuquerque First Nat. Bank v. Lesser*, 9 N. Mex. 604; *Randall v. Knevals*, 27 N. Y. App. Div. 146, affirmed 161 N. Y. 632; *Tapp v. Dibrell*, 134 N. Car. 546; *Frick v. Reynolds*, 6 Okla. 638; *American F. Ins. Co. v. Stuart*, (Tex. Civ. App. 1896) 38 S. W. Rep. 395; *Muench v. Heinemann*, 119 Wis. 441.

**3. Not Competent to Prove Fact of Partnership.** — *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907; *Dennis v. Kolm*, 131 Cal. 91; *Barwick v. Alderman*, (Fla. 1903) 35 So. Rep. 13; *Thompson v. Mallory*, 108 Ga. 797; *Dodds v. Everett-Ridley-Ragan Co.*, 110 Ga. 303; *Parker v. Paine*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 768; *Pretzfelder v. Strobel*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 152; *Moore v. Williams*, 31 Tex. Civ. App. 287. See also *Baker v. Baer*, 59 Ark. 503.

Nor are such declarations competent when offered by a stranger to the partnership. *Coyne v. Sayre*, 54 N. J. Eq. 702.

But they may be received to prove the partnership where they are against the interest of the party making them. *Card v. Moore*, 68 N. Y. App. Div. 327.

**Inadmissible to Disprove Partnership.** — *Marks v. Hardy*, 78 S. W. Rep. 864, 1105, 25 Ky. L. Rep. 1770, 1909; *Gilroy v. Loftus*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 317.

**711. 1. Frank v. J. S. Brown Hardware Co.**, 10 Tex. Civ. App. 430.

*2. Barwick v. Alderman*, (Fla. 1903) 35 So. Rep. 13; *Chamberlain v. Fisher*, 117 Mich. 428, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 711.

**711.** *c.* CO-CONSPIRATORS. — See notes 3, 4.

**712.** See note 1.

**711. 3. Admissions Made During the Pendency of the Unlawful Enterprise.** — *Willis v. State*, 67 Ark. 234; *Graff v. People*, 208 Ill. 312; *Harrington v. Butte*, etc., Min. Co., 19 Mont. 411; *Borrego v. Territory*, 8 N. Mex. 446; *Lockhart v. Wills*, 9 N. Mex. 263; *Avard v. Carpenter*, 72 N. Y. App. Div. 258; *Pacific Livestock Co. v. Gentry*, 38 Oregon 275; *Com. v. Zuern*, 16 Pa. Super. Ct. 588; *Wright v. State*, 36 Tex. Crim. 427; *Smith v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 936.

**4.** *Ramsey v. Flowers*, (Ark. 1904) 80 S. W. Rep. 147; *State v. Corcoran*, 7 Idaho 220; *State v. Crofford*, 121 Iowa 395; *Nicolay v. Mallery*, 62 Minn. 119; *Farley v. Peebles*, 50 Neb. 723; *Voisin v. Commercial Mut. Ins. Co.*, 60 N. Y. App. Div. 139; *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118; *Wallace v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 966.

**712. 1. General Rule as to Admissions of Co-conspirators** — *United States*. — *Connecticut Mut. L. Ins. Co. v. Hillmon*, 188 U. S. 208; *U. S. v. Cassidy*, 67 Fed. Rep. 698; *Drake v. Stewart*, 76 Fed. Rep. 140, 40 U. S. App. 173.

*Alabama*. — *Coghill v. Kennedy*, 119 Ala. 641; *Wood v. State*, 128 Ala. 27, 86 Am. St. Rep. 71; *Thomas v. State*, 133 Ala. 139; *Stevens v. State*, 133 Ala. 28; *Crittenden v. State*, 134 Ala. 145; *Smith v. State*, 136 Ala. 1; *Collins v. State*, 138 Ala. 57.

*Arkansas*. — *Ramsey v. Flowers*, (Ark. 1904) 80 S. W. Rep. 147.

*California*. — *People v. Rodley*, 131 Cal. 240; *Banning v. Marleau*, 133 Cal. 485; *People v. Howard*, 135 Cal. 266.

*Colorado*. — *Porter v. People*, 31 Colo. 508.

*Connecticut*. — *State v. Carey*, 76 Conn. 342.

*Florida*. — *Mercer v. State*, 40 Fla. 216, 74 Am. St. Rep. 135; *Baldwin v. State*, (Fla. 1903) 35 So. Rep. 220.

*Georgia*. — *Carter v. State*, 106 Ga. 372, 71 Am. St. Rep. 262; *Ernest v. Merritt*, 107 Ga. 61; *Green v. State*, 109 Ga. 536; *Slaughter v. State*, 113 Ga. 284, 84 Am. St. Rep. 242.

*Illinois*. — *Lasher v. Littell*, 202 Ill. 551; *Miller v. John*, 208 Ill. 173.

*Indiana*. — *Musser v. State*, 157 Ind. 423.

*Iowa*. — *Connors v. Chingren*, 111 Iowa 437; *State v. Soper*, 118 Iowa 1.

*Kentucky*. — *Powers v. Com.*, 110 Ky. 386; *McIntosh v. Com.*, 64 S. W. Rep. 951, 23 Ky. L. Rep. 1222; *Shotwell v. Com.*, 65 S. W. Rep. 820, 23 Ky. L. Rep. 1649; *Powers v. Com.*, 114 Ky. 237, 276; *Standard Oil Co. v. Doyle*, (Ky. 1904) 82 S. W. Rep. 271.

*Massachusetts*. — *Com. v. Rogers*, 181 Mass. 184.

*Michigan*. — *Jansen v. McQueen*, 112 Mich. 254; *Sudworth v. Morton*, (Mich. 1904) 100 N. W. Rep. 769; *People v. McGarry*, (Mich. 1904) 99 N. W. Rep. 147, 11 Detroit Leg. N. 10.

*Minnesota*. — *State v. Palmer*, 79 Minn. 428; *State v. Evans*, 88 Minn. 262.

*Missouri*. — *State v. Kennedy*, 177 Mo. 98; *State v. Lewis*, (Mo. 1904) 79 S. W. Rep. 671; *Mosby v. McKee*, etc., *Commission Co.*, 91 Mo. App. 500.

*Montana*. — *Pincus v. Reynolds*, 19 Mont. 564; *State v. Stevenson*, 26 Mont. 332; *State*

*v. De Wolfe*, 29 Mont. 415; *Lane v. Bailey*, 29 Mont. 548.

*Nebraska*. — *Stratton v. Oldfield*, 41 Neb. 702; *Farley v. Peebles*, 50 Neb. 723; *Cleland v. Anderson*, 66 Neb. 252; *Lamb v. State*, (Neb. 1903) 95 N. W. Rep. 1050; *O'Brien v. State*, (Neb. 1903) 96 N. W. Rep. 649.

*New Hampshire*. — *Coburn v. Storer*, 67 N. H. 86.

*New York*. — *People v. Van Tassel*, 156 N. Y. 561; *People v. Hall*, 51 N. Y. App. Div. 57; *People v. Putnam*, 90 N. Y. App. Div. 125; *People v. Strauss*, 94 N. Y. App. Div. 453.

*North Carolina*. — *State v. Turner*, 119 N. Car. 841.

*Ohio*. — *State v. Jacobs*, 10 Ohio Dec. 252, 7 Ohio N. P. 261.

*Oregon*. — *State v. Tice*, 30 Oregon 457; *State v. Moore*, 32 Oregon 65.

*Pennsylvania*. — *Com. v. Bubnis*, 197 Pa. St. 542; *Com. v. Biddle*, 200 Pa. St. 640; *Com. v. Stambaugh*, 22 Pa. Super. Ct. 386.

*Texas*. — *Hughes v. Waples-Platter Grocer Co.*, 25 Tex. Civ. App. 212; *McCarty v. Hartford F. Ins. Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 934; *Small v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 790; *Brooks v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 924; *Hays v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 835; *Stevens v. State*, 42 Tex. Crim. 154; *Henry v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 882; *Hudson v. State*, 43 Tex. Crim. 420; *Yeary v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1106; *Chapman v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 477; *Kipper v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 611; *Baker v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 618; *Barnett v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1013.

*West Virginia*. — *State v. Prater*, 52 W. Va. 132.

**Admissible Though Made in Absence of Other Conspirators.** — *Hunter v. State*, 112 Ala. 77; *State v. Clark*, 9 Houst. (Del.) 536; *Van Eyck v. People*, 178 Ill. 199; *Graff v. People*, 208 Ill. 312; *Miller v. John*, 111 Ill. App. 56; *Freese v. State*, 159 Ind. 597; *Smithern v. Waddle*, (Ky. 1897) 43 S. W. Rep. 453; *Howard v. Com.*, 110 Ky. 356; *Chadwell v. Com.*, 69 S. W. Rep. 1082, 24 Ky. L. Rep. 818; *People v. McGarry*, (Mich. 1904) 99 N. W. Rep. 147, 11 Detroit Leg. N. 10; *Carson v. Hawley*, 82 Minn. 204; *State v. Gatlin*, 170 Mo. 354; *State v. Dotson*, 26 Mont. 305; *Cohn v. Saidel*, 71 N. H. 558; *Trevino v. State*, (Tex. Crim. 1897) 41 S. W. Rep. 609; *Segrest v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 845; *Nelson v. State*, 43 Tex. Crim. 553; *Barber v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 515.

**Made After Completion or Abandonment of Enterprise** — *United States*. — *Fitzpatrick v. U. S.*, 178 U. S. 304; *Connecticut Mut. L. Ins. Co. v. Hillmon*, 107 Fed. Rep. 834, 46 C. C. A. 668.

*Alabama*. — *James v. State*, 115 Ala. 83; *Everage v. State*, 113 Ala. 102; *Ferguson v. State*, 134 Ala. 63, 92 Am. St. Rep. 17.

*Arkansas*. — *Willis v. State*, 67 Ark. 234.

*California*. — *People v. Collum*, 122 Cal. 186; *People v. Opie*, 123 Cal. 294.

**713.** See note 1.

**714. IV. WHAT ADMISSIONS ARE RECEIVABLE — 1. Generally — Admissions Stated as Facts.** — See notes 1, 2.

**Admissions of Law.** — See note 3.

**Admissions for Sake of Compromise.** — See note 4.

*Connecticut.* — *Smith v. Brockett*, 69 Conn. 492.  
*Georgia.* — *Howard v. State*, 109 Ga. 137;  
*Suttlis v. Sewell*, 117 Ga. 214.

*Kansas.* — *State v. Rogers*, 54 Kan. 683.

*Kentucky.* — *Richards v. Com.*, 67 S. W. Rep. 818, 24 Ky. L. Rep. 14; *Frazier v. Com.*, 76 S. W. Rep. 28, 25 Ky. L. Rep. 461; *Standard Oil Co. v. Doyle*, 82 S. W. Rep. 271, 26 Ky. L. Rep. 544.

*Louisiana.* — *State v. Johnson*, 47 La. Ann. 1225.

*Massachusetts.* — *Com. v. Hunton*, 168 Mass. 130; *Com. v. Rogers*, 181 Mass. 184.

*Michigan.* — *Seitz v. Starks*, (Mich. 1904) 98 N. W. Rep. 852, 10 Detroit Leg. N. 978.

*Missouri.* — *State v. Kennedy*, 177 Mo. 98.

*New York.* — *Douglas v. McDermott*, 21 N. Y. App. Div. 8; *People v. Butler*, 62 N. Y. App. Div. 508; *Lederer v. Adler*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 564; *Breterman v. Adler*, (Supm. Ct. App. T.) 92 N. Y. Supp. 1117.

*Oregon.* — *State v. Tice*, 30 Oregon 457; *State v. Hinkle*, 33 Oregon 93; *State v. Aiken*, 41 Oregon 294.

*Pennsylvania.* — *Marshall v. Faddis*, 199 Pa. St. 397.

*Texas.* — *Joy v. Liverpool, etc., Ins. Co.*, 32 Tex. Civ. App. 433; *Sessions v. State*, 37 Tex. Crim. 62; *Price v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 596; *Dawson v. State*, 38 Tex. Crim. 9, 50; *McHenry v. State*, 42 Tex. Crim. 542; *Faulkner v. State*, 43 Tex. Crim. 311; *Nix v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 764.

*Vermont.* — *State v. Dyer*, 67 Vt. 690.

**Not Competent Against One Made Before His Connection with the Enterprise.** — *State v. Walker*, 124 Iowa 414; *Smith v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 936. *Contra*, *Com. v. Rogers*, 181 Mass. 184.

**713. 1. Foundation Must Be Laid Before Admissions Receivable — United States.** — *Kansas City Star Co. v. Carlisle*, 108 Fed. Rep. 344, 47 C. C. A. 384; *Morning Journal Assoc. v. Duke*, (C. C. A.) 128 Fed. Rep. 657, *affirming* 120 Fed. Rep. 860.

*Alabama.* — *Turner v. State*, 124 Ala. 59; *Langford v. State*, 130 Ala. 74.

*California.* — *People v. Kelly*, 133 Cal. 1.

*Iowa.* — *Hackett v. Freeman*, 103 Iowa 296; *Hertrich v. Hertrich*, 114 Iowa 643, 89 Am. St. Rep. 389.

*Kentucky.* — *Stovall v. Com.*, 62 S. W. Rep. 536, 23 Ky. L. Rep. 103; *Hines v. Com.*, 62 S. W. Rep. 732, 23 Ky. L. Rep. 119; *Strange v. Com.*, 64 S. W. Rep. 980, 23 Ky. L. Rep. 1234.

*Michigan.* — *Krementz v. Howard*, 109 Mich. 466; *Henrich v. Saier*, 124 Mich. 86.

*Minnesota.* — *Matthews v. Hershey Lumber Co.*, 65 Minn. 372.

*Missouri.* — *Wood v. Carpenter*, 166 Mo. 465; *State v. Kennedy*, 177 Mo. 98; *State v. Austin*, 183 Mo. 478; *J. I. Case Plow Works v. Ross*, 74 Mo. App. 437.

*Nebraska.* — *O'Brien v. State*, (Neb. 1903) 96 N. W. Rep. 649.

*New York.* — *Lent v. Shear*, 160 N. Y. 462; *People v. Smith*, 162 N. Y. 520; *Pfeffer v. Kling*, 171 N. Y. 668, *affirming* 58 N. Y. App. Div. 179; *Douglas v. McDermott*, 21 N. Y. App. Div. 8.

*Pennsylvania.* — *Marshall v. Faddis*, 199 Pa. St. 397.

*Texas.* — *Cranfill v. Hayden*, (Tex. 1904) 80 S. W. Rep. 609, *reversing* (Tex. Civ. App. 1903) 75 S. W. Rep. 573; *Phoenix Ins. Co. v. Padgett*, (Tex. Civ. App. 1897) 42 S. W. Rep. 800; *Ft. Worth Live-Stock Commission Co. v. Hitson*, (Tex. Civ. App. 1898) 46 S. W. Rep. 975; *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118; *Young v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 153; *Nix v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 764.

**What a Sufficient Foundation.** — *State v. Croford*, 121 Iowa 395; *State v. Walker*, 124 Iowa 414; *State v. Moore*, 32 Oregon 65.

**When Receivable Before Prima Facie Case Established.** — *Wright v. Stewart*, 130 Fed. Rep. 905; *People v. Donnolly*, 143 Cal. 394; *Freese v. State*, 159 Ind. 597; *People v. McGarry*, (Mich. 1904) 99 N. W. Rep. 147, 11 Detroit Leg. N. 10; *State v. Nell*, 79 Mo. App. 243; *Farley v. Peebles*, 50 Neb. 723. See also *State v. Prater*, 52 W. Va. 132.

**714. 1.** *Fitzgerald v. Coleman*, 114 Ill. App. 25.

**Mere Expressions of Opinion** resting upon no actual knowledge of any facts to sustain them are inadmissible as admissions. *Aschenbach v. Keene*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 600.

2. *Conkling v. Weatherwax*, 181 N. Y. 258.

3. *State v. Aloe*, 152 Mo. 466; *Rawlings v. Neal*, 122 N. Car. 173. See also *Keene v. Lowenthal*, 83 Miss. 204.

**Misapprehension of Legal Rights.** — *Fleming v. Lay*, 109 Fed. Rep. 952, 48 C. C. A. 748.

**4. Admissions with a View to a Compromise — United States.** — *Collins v. U. S.*, 35 Ct. Cl. 122.

*Alabama.* — *Fiebelman v. Manchester F. Assur. Co.*, 108 Ala. 180.

*Colorado.* — *Chicago, etc., R. Co. v. Roberts*, 26 Colo. 329, *reversing* 10 Colo. App. 87, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714; *Thomas v. Carey*, 26 Colo. 485; *Rankin v. Underwood*, 9 Colo. App. 158.

*Connecticut.* — *Fowles v. Allen*, 64 Conn. 350.

*Georgia.* — *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 94 Am. St. Rep. 99; *Kelly v. Strouse*, 116 Ga. 872.

*Idaho.* — *Kroetch v. Empire Mill Co.*, (Idaho 1903) 74 Pac. Rep. 868.

*Illinois.* — *Harrison v. Trickett*, 57 Ill. App. 515; *Grand Prairie Co-operative Grain Assoc. v. Riordan*, 61 Ill. App. 457; *Matthiessen, etc., Zinc Co. v. Ferris*, 72 Ill. App. 684; *Gehm v. People*, 87 Ill. App. 158; *American Ins. Co. v. Walston*, 111 Ill. App. 133.

*Indiana.* — *Halstead v. Coen*, 31 Ind. App. 302,



**715.** See note 1.

**716.** See note 1.

*Iowa.*—*Kassing v. Walter*, (Iowa 1896) 65 N. W. Rep. 832; *Hondeck v. Merchants'*, etc., Ins. Co., 102 Iowa 303; *Rudd v. Dewey*, 121 Iowa 454.

*Kansas.*—*Myers v. Goggerty*, 10 Kan. App. 190.

*Kentucky.*—*Illinois Cent. R. Co. v. Colly*, (Ky. 1905) 86 S. W. Rep. 536.

*Maine.*—*Beaudette v. Gagne*, 87 Me. 534.

*Maryland.*—*Pentz v. Pennsylvania F. Ins. Co.*, 92 Md. 444.

*Massachusetts.*—*Higgins v. Shepard*, 182 Mass. 364; *Hutchinson v. Nay*, 183 Mass. 355.

*Michigan.*—*Finlay Brewing Co. v. Prost*,

111 Mich. 635; *Fox v. Barrett*, 117 Mich. 162; *Musselman Grocer Co. v. Casler*, (Mich. 1904) 100 N. W. Rep. 997.

*Missouri.*—*Gorham v. Auerswald*, 59 Mo. App. 77; *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673, 1 Mo. App. Rep. 269.

*Nebraska.*—*Callen v. Rose*, 47 Neb. 638; *Wright v. Morse*, 53 Neb. 3; *Hanover F. Ins. Co. v. Stoddard*, 52 Neb. 745. See *Creighton v. Chicago*, etc., R. Co., (Neb. 1903) 94 N. W. Rep. 527.

*New Hampshire.*—*Greenfield v. Kennett*, 69 N. H. 419.

*New York.*—*Tennant v. Dudley*, 144 N. Y. 504; *Doyle v. Levy*, 89 Hun (N. Y.) 350; *Shiland v. Loeb*, 58 N. Y. App. Div. 565. *Compare Hopkins v. Rodgers*, (Supm. Ct. App. T.) 91 N. Y. Supp. 749.

*Pennsylvania.*—*Fisher v. Fidelity Mut. L. Assoc.*, 188 Pa. St. 1; *Green v. Bauer*, 15 Pa. Super. Ct. 372.

*South Carolina.*—*Gibbes v. McCraw*, 45 S. Car. 184; *Robertson v. Blair*, 56 S. Car. 96; *Norris v. Hartford F. Ins. Co.*, 57 S. Car. 358.

*South Dakota.*—*Reagan v. McKibben*, 11 S. Dak. 270.

*Texas.*—*San Antonio*, etc., R. Co. v. *Stone*, (Tex. Civ. App. 1901) 60 S. W. Rep. 461.

**Offers "Without Prejudice."**—*Bowers v. Hanna*, 101 Iowa, 660, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714.

In *Richardson v. International Pottery Co.*, 63 N. J. L. 248, it was held that the offer to compromise was admissible unless made without prejudice, or the party making it had been induced thereto by conduct of the other party.

**Negotiations to Effect Compromise Must Appear.**—*Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113; *Person v. Bowe*, 79 Minn. 238; *Ferguson v. Davidson*, 147 Mo. 664; *Hunter v. Helsley*, 98 Mo. App. 616; *Hughes v. Rowan*, 27 Mont. 500; *Aultman v. Martin*, 49 Neb. 103; *Cochran v. Baker*, 34 Oregon 555; *Draper v. Horton*, 22 R. I. 592.

**Admissions Subsequent to Negotiations.**—Admissions by a party to a third person, that he had offered the injured party a certain amount as damages for the injuries committed, are admissible to show the damage where the evidence goes no further. *Story v. Nidiffer*, (Cal. 1905) 80 Pac. Rep. 692.

**Offers to Confess Judgment.**—An Offer to Confess Judgment, if not accepted, is not admissible

against the party making it. *Tyler v. Hamilton*, 108 Ky. 120; *Kelley v. Combs*, (Ky. 1900) 57 S. W. Rep. 476; *Walbridge v. Barrett*, 118 Mich. 433.

**715. 1. Offers to Buy Peace.**—*Holy Cross Gold Min., etc., Co. v. O'Sullivan*, 27 Colo. 237; *Georgia R., etc., Co. v. Wallace*, (Ga. 1905) 50 S. E. Rep. 478; *Ward v. Munson*, 105 Mich. 647; *Columbia Planing Mill Co. v. American F. Ins. Co.*, 58 Mo. App. 204; *Herman v. St. Louis R. Co.*, 77 Mo. App. 377; *Lehigh Valley Terminal R. Co. v. Currie*, 54 N. J. Eq. 84; *Tennant v. Dudley*, 144 N. Y. 504; *Roos v. Decker*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 168.

**Evidence of a Settlement with a Third Person**, injured in the same casualty, is inadmissible. *Georgia R., etc., Co. v. Wallace*, (Ga. 1905) 50 S. E. Rep. 478.

**716. 1. Admissions of Independent Facts.**—*Alabama.*—*Watson v. Reed*, 129 Ala. 388; *Matthews v. Farrell*, 140 Ala. 298.

*California.*—*Rose v. Rose*, 112 Cal. 341.

*Colorado.*—*Miller v. Kinsel*, (Colo. App. 1904) 78 Pac. Rep. 1075; *Chicago*, etc., R. Co. v. *Roberts*, 10 Colo. App. 87.

*Georgia.*—*Teasley v. Bradley*, 120 Ga. 373.

*Illinois.*—*Lusk v. Throop*, 189 Ill. 127, affirming 89 Ill. App. 509; *Thorn v. Hess*, 51 Ill. App. 274; *McKinzie v. Stretch*, 53 Ill. App. 184.

*Iowa.*—*Bowers v. Hanna*, 101 Iowa 660; *Rosenberger v. Marsh*, 108 Iowa 47.

*Kentucky.*—*Illinois Cent. R. Co. v. Manion*, 113 Ky. 7, 101 Am. St. Rep. 345, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 716; *List v. List*, 82 S. W. Rep. 446, 26 Ky. L. Rep. 691.

*Maine.*—*Beaudette v. Gagne*, 87 Me. 534.

*Massachusetts.*—*Snow v. New York*, etc., R. Co., 185 Mass. 321.

*Minnesota.*—*Person v. Bowe*, 79 Minn. 338.

*Nebraska.*—*Gatzmeyer v. Peterson*, (Neb. 1903) 94 N. W. Rep. 974. See also *Stuht v. Sweesy*, 48 Neb. 767.

*Nevada.*—*Quinn v. White*, 26 Nev. 42.

*New Hampshire.*—*Jenness v. Jones*, 68 N. H. 475.

*New York.*—*Armour v. Gaffey*, 165 N. Y. 630, affirming 30 N. Y. App. Div. 121; *Hess v. Van Aken*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 422; *Collins v. McGuire*, 76 N. Y. App. Div. 443.

*North Carolina.*—*Tapp v. Dibrell*, 134 N. Car. 546.

*Rhode Island.*—*Draper v. Horton*, 22 R. I. 592.

*Texas.*—*Rotan Grocery Co. v. Martin*, (Tex. Civ. App. 1900) 57 S. W. Rep. 706; *Ft. Worth*, etc., R. Co. v. *Lock*, 30 Tex. Civ. App. 426; *Blake v. Austin*, (Tex. Civ. App. 1903) 75 S. W. Rep. 571; *St. Louis Southwestern R. Co. v. Smith*, (Tex. Civ. App. 1903) 77 S. W. Rep. 28.

*Washington.*—*Long v. Pierce County*, 22 Wash. 330.

*Wisconsin.*—*Pym v. Pym*, 118 Wis. 662.

Whether the admissions are independent facts or offers to compromise is a question for the jury. *Kassing v. Ordway*, 100 Iowa 611.

**716.** Admissions under Duress. — See notes 2, 3.

**2.** Parol Admissions in Pais. — See note 5.

**717.** **3.** Documentary Admissions. — See note 3.

**716. 2.** *Notara v. De Kamalaris*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 337.

**3.** *Union Pac. R. Co. v. Sternberger*, 8 Kan. App. 131; *Parks v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 301.

**5.** *Admissions by Telephone*. — *Lord Electric Co. v. Morrill*, 178 Mass. 304; *Herendeen Mfg. Co. v. Moore*, 66 N. J. L. 74.

**717. 3.** *Zachry v. Nolan*, 66 Fed. Rep. 467, 30 U. S. App. 244; *Wolff v. Famous Mut. Sav. Fund*, etc., Assoc., 67 Mo. App. 678; *McCullough v. Cumberland Valley R. Co.*, 186 Pa. St. 112; *Moore v. Waco Bldg. Assoc.*, 9 Tex. Civ. App. 404.

**Will**. — A statement in a will that a certain legatee was the adopted daughter of the testatrix was an admission against interest, and admissible to prove adoption in a contest with a devisee under the will involving that question. *White v. Holman*, 25 Tex. Civ. App. 152.

**Letters**. — *Brown v. Fowler*, 133 Ala. 310; *Sanders v. State*, 113 Ga. 267; *Hansen v. Wayer*, 101 Ill. App. 212; *Rosenberger v. Marsh*, 108 Iowa 47; *Upton v. Adeline Sugar Factory Co.*, 109 La. 670; *Walter v. Victor G. Bloede Co.*, 94 Md. 80; *Mead v. Randall*, 111 Mich. 268; *Lowrey v. Danforth*, 95 Mo. App. 441; *Eppens*, etc., *Co. v. Littlejohn*, 27 N. Y. App. Div. 22; *Rand v. Whipple*, 71 N. Y. App. Div. 62; *Lewis Pub. Co. v. Lenz*, 86 N. Y. App. Div. 451; *Ravenswood Bank v. Reneker*, 18 Pa. Super. Ct. 192; *St. Paul White Lead*, etc., *Co. v. Tibbetts*, 13 S. Dak. 446; *Barbee v. Spivey*, (Tex. Civ. App. 1895) 32 S. W. Rep. 345; *Downey v. Taylor*, (Tex. Civ. App. 1898) 48 S. W. Rep. 541; *Crow v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 392; *Bell v. Gund*, 110 Wis. 271.

But the introduction of letters by one party admits the whole correspondence on the subject. *Darling v. Klock*, 165 N. Y. 623, *affirming* 33 N. Y. App. Div. 270.

Where a candidate for the office of mayor of an incorporated city published a letter stating that, if elected, he would agree to a reduction of the salary of that officer, the letter was held admissible against him in an action to recover the difference in the salary paid him and that paid his predecessor. *Boyle v. Ogden City*, 24 Utah 443.

**Notes, Bonds, Etc.** — Recitals in a bond are admissible against the obligors. *Hunt v. Card*, 94 Me. 386.

An unsigned note drawn by the defendant, but which he refused to execute, is admissible to show the amount of his indebtedness. *Turrenstine v. Grigsby*, 118 Ala. 380.

A detinue bond is admissible against the surety who subsequently claims the property, the subject of the suit in detinue, though not conclusive. *Collier v. Dick*, 111 Ala. 263.

An unpaid note retaining title to personal property may be admitted against the maker on a question as to his title to the property arising between him and his vendee. *Jensen v. McCornick*, 26 Utah 142.

**Accounts Rendered by a Party**. — *Atkinson v. Burt*, 65 Ark. 316; *Keith v. Electrical Engineering Co.*, 136 Cal. 178; *Nichols v. New Britain*, (Conn. 1905) 60 Atl. Rep. 655; *Patterson v. Houston*, 92 Ill. App. 624; *Foste v. Standard L.*, etc., *Ins. Co.*, 34 Oregon 125.

And see the title *ACCOUNTS*, *ante*, p. 57.

Where a statement of account between parties is checked over by them and signed, it is admissible as showing the status of account between them. *Miller v. Campbell Commission Co.*, 13 Okla. 75.

**Entries in the Books of a Party, Made by Himself**, are admissible in evidence against him. *Wallace v. Bernheim*, 63 Ark. 108; *Plummer v. Struby-Estabrooke Mercantile Co.*, 23 Colo. 190; *Wait v. Com.*, 113 Ky. 821; *Columbus Bldg.*, etc., *Assoc. v. Kriete*, 87 Ill. App. 51; *Second Borrowers*, etc., *Bldg. Assoc. v. Cochran*, 103 Ill. App. 29; *Magi's Succession*, 107 La. 208; *Moise's Succession*, 107 La. 717; *Steam Stone-Cutter Co. v. Scott*, 157 Mo. 520; *Copeland v. Boston Dairy Co.*, 184 Mass. 207; *Commercial Bank v. Bolton*, 87 Hun (N. Y.) 547; *Saugerties Bank v. Mack*, 34 N. Y. App. Div. 494; *Goetting v. Weber*, 71 N. Y. App. Div. 503; *Kirkpatrick v. Goldsmith*, 81 N. Y. App. Div. 265; *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796. Or against those claiming under him. *Banning v. Marleau*, 121 Cal. 240.

Where the general manager of a corporation was required by the by-laws to have correct accounts kept, the books of the corporation were held admissible to show his negligence and the amount of his liability. *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74.

Entries in the books and records of a state treasurer are admissible against him and the sureties on his official bond to show his defalcation. *State v. Paxton*, 65 Neb. 110.

**Entries in the Books of a Corporation** made by an officer, whose duty it was to keep such books, showing moneys received by him, are admissible against him as admissions that he received the sums entered. *Delbridge v. Lake*, etc., *Bldg.*, etc., *Assoc.*, 98 Ill. App. 96; *Second Borrowers*, etc., *Bldg. Assoc. v. Cochran*, 103 Ill. App. 29. And so, too, entries in the books of a corporation kept by or under the supervision of its manager are evidence against the manager. *Kane v. Schuylkill F. Ins. Co.*, 199 Pa. St. 198.

**Tax List**. — *Waller v. Leonard*, (Tex. Civ. App. 1896) 34 S. W. Rep. 799, 89 Tex. 507; *Jones v. Cummins*, 17 Tex. Civ. App. 661.

A tax return made by a party to the suit is admissible on the question as to his assets in the year of the return. *Mashburn v. Dannenberg Co.*, 117 Ga. 567.

An unsworn tax list, acquiesced in by the defendant, is admissible on the question of the value of the property assessed. *Steam Stone-Cutter Co. v. Scott*, 157 Mo. 520.

A tax list, being an admission for a special purpose, was held inadmissible against the person making it in a suit for the recovery of

**718.** See note 2.

**719.** 4. Judicial Admissions — Admissions Made in Pleadings. — See note 3.

insurance on the property taxed. *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624.

**Partnership Books.** — *Turner v. Turner*, 98 Md. 22; *Ryder v. Jacobs*, 196 Pa. St. 386; *Hotopp v. Huber*, 16 N. Y. App. Div. 327. *Compare Cody v. Gainesville First Nat. Bank*, 103 Ga. 789.

**Bank Books, Etc.** — *Globe Sav. Bank v. National Bank of Commerce*, 64 Neb. 413; *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577; *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98; *Atlanta Trust, etc., Co. v. Close*, 115 Ga. 939.

A depositor's pass book is admissible in favor of his executors to show there was no credit of the proceeds of a note sued on by the bank. *Paducah First Nat. Bank v. Wisdom*, 111 Ky. 135.

A pass book is admissible against the depositor where he has gone over the books with the cashier of the bank and acquiesced in the account as there stated. *State v. McCauley*, 17 Wash. 88, following *Union Bank v. Knapp*, 3 Pick. (Mass.) 96.

A slip of paper on which a bank cashier entered the deposits and withdrawals of a customer is admissible against the bank to prove the account. *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137.

**Memoranda, Receipts, Etc.** — *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665; *People v. Quimby*, 134 Mich. 625, 10 Detroit Leg. N. 618; *Putnam v. Lincoln Safe Deposit Co.*, 87 N. Y. App. Div. 13, reversing (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 738; *Matter of Woodward*, 69 N. Y. App. Div. 286.

A memorandum of time made by the defendant's authorized agent is admissible against the defendant. *Selber v. Springbrook Trout Farm*, 19 Wash. 49.

**Telegrams.** — A telegram sent by a third person, but approved by the defendant, and the answer thereto are admissible against the defendant. *Farnsworth v. Nevada Co.*, 102 Fed. Rep. 578, 42 C. C. A. 509.

**The Recitals in an Act of the Legislature** passed in the interest of a corporation are receivable as admissions made by the corporation. *Cohen v. Methodist Protestant Church*, 32 N. Y. App. Div. 239.

**A Bill of Particulars** furnished by a party to a cause is competent evidence against him. *Lee v. Heath*, 61 N. J. L. 250.

**Contract.** — Where the defendant had constructed a dam flooding the plaintiff's land, and entered into a written contract admitting the construction of the dam and agreeing to change it so as to relieve the plaintiff, but failed to carry out the agreement, the contract was held competent as an admission by him in a suit by the plaintiff for damages for flooding the land. *Lynch v. Troxell*, 207 Pa. St. 162.

**Deed.** — A grantor is bound by the recitals in his deed. *Noble v. Worthy*, 1 Indian Ter. 458.

**Inventory.** — An inventory filed in the Orphan's Court by an administratrix is admissible against her. *Prenz v. Pennsylvania F. Ins. Co.*, 92 Md. 444; *Miller v. Garrecht*, 17 Lanc. L. Rev. 133.

**Pamphlets.** — Where pamphlets issued by a corporation state that a certain fund is held as a trust fund, they are admissible against the chief officer of the corporation to prove that he knew such fund was a trust fund. *Putnam v. Gunning*, 162 Mass. 552.

**Statements Made in a Proof of Death** are admissible against the party making them, in an action on a life insurance policy. *Siebelist v. Metropolitan L. Ins. Co.*, 19 Pa. Super. Ct. 221.

**Record in Bankruptcy.** — Where a record in bankruptcy contains an admission of indebtedness on a note, it is competent evidence against the bankrupt in a suit on the note subsequently brought. *Nicholson v. Snyder*, 97 Md. 415.

**Release.** — Where the defendant relied upon a written release from a debt, it was held to be an admission by him that the debt existed at the date of the release. *Bement v. Ohio Valley Banking, etc., Co.*, 99 Ky. 109, 59 Am. St. Rep. 445.

So where the plaintiff had settled with a railroad company for the destruction of his property by fire, and executed a release to the company, he was concluded, in a suit against the insurance company on his policy, from claiming that the railroad company did not destroy his property. *Sims v. Mutual F. Ins. Co.*, 101 Wis. 586.

**Reports of Agents or Officers.** — A report made by a servant in the scope of his authority and duty is admissible against the master. *Rogers v. New York, etc., Bridge*, 11 N. Y. App. Div. 141; *Weigley v. Kneeland*, 18 N. Y. App. Div. 47; *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563.

**Reports of Sales of Liquors in a Prohibition County** are admissible against the party making them, as admissions against interest, though the statute requiring them was unconstitutional. *People v. Robinson*, (Mich. 1904) 98 N. W. Rep. 12, 10 Detroit Leg. N. 857.

**A Schedule Filed in Bankruptcy Proceedings** is admissible to show the insolvency of the bankrupt. *Fales, etc., Mach. Co. v. Browning*, 68 S. Car. 13.

**An Entry in a Ship's Log** is admissible against the party making it. *The New Foundland*, 89 Fed. Rep. 510.

**Writings Sous Seing Privé** may be construed as admissions where they are not denied by the party against whom they are enforceable. *Thurston v. Hughes*, 16 Quebec Super. Ct. 472.

**718. 2. When Instrument Inoperative for Purpose Intended.** — Profile, etc., *Hotels Co. v. Bickford*, 72 N. H. 73; *Crow v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 392.

**Recitals in a Deed.** — *Sperry v. Wesco*, 26 Oregon 483.

**719. 3. General Rule as to Admissions in Pleadings — California.** — See *Bollinger v. Wright*, 143 Cal. 292.

**Colorado.** — *Mutzenburg v. McGowan*, 10 Colo. App. 486.

**Connecticut.** — *Connecticut Insane Hospital v. Brookfield*, 69 Conn. 1.

**Illinois.** — *West Chicago St. R. Co. v. Loewe*, 58 Ill. App. 606; *Wheatley v. Chicago Trust, etc., Bank*, 64 Ill. App. 612; *Glanz v. Smith*, 76

Ill. App. 630. See also *Stuart v. Harris*, 69 Ill. App. 668; *Potter v. Fitchburg Steam Engine Co.*, 110 Ill. App. 430.

*Iowa*.—*Murry v. Weber*, 103 Iowa 477; *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa 682; *McIntosh v. Coulthard*, (Iowa 1902) 88 N. W. Rep. 1069.

*Kentucky*.—*Com. v. Lewis*, (Ky. 1897) 39 S. W. Rep. 438; *Edwards v. Mattingly*, 107 Ky. 332; *Vollman Buggy Body Co. v. Spry*, (Ky. 1904) 80 S. W. Rep. 1092; *Palmer Transfer Co. v. Eaves*, (Ky. 1905) 85 S. W. Rep. 750.

*Louisiana*.—See *Trouilly's Succession*, 52 La. Ann. 276.

*Maryland*.—*Hensel v. Johnson*, 94 Md. 729.

*Michigan*.—*Brinkerhoff v. Peek*, 114 Mich. 628.

*Minnesota*.—*Evenson v. Keystone Mfg. Co.*, 83 Minn. 164.

*Mississippi*.—*Hall v. Waddill*, 78 Miss. 18.

*Missouri*.—*Price v. Clevenger*, 99 Mo. App. 536; *Harrison v. McReynolds*, 183 Mo. 533.

*Montana*.—*Hoffman v. Gallatin County*, 18 Mont. 224; *Aikens v. Frank*, 21 Mont. 192; *Christiansen v. Aldrich*, (Mont. 1904) 76 Pac. Rep. 1007.

*Nebraska*.—*Best v. Stewart*, 48 Neb. 859; *Halt County v. Scott*, 53 Neb. 176; *Rohman v. Gaiser*, 53 Neb. 474.

*New Jersey*.—*Tate v. Field*, 56 N. J. Eq. 35; *Craft v. Schlag*, 61 N. J. Eq. 567.

*New York*.—*Cromwell v. Hughes*, (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 372; *Finklestein v. Barnett*, (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 488; *Browne v. Stecher Lith. Co.*, 24 N. Y. App. Div. 480; *Johnson v. Thorn*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 771; *Jaeger v. Koenig*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 780; *Traitel v. Dwyer*, (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 1100; *Dwyer v. McLoughlin*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 510; *Dimon v. Keery*, 54 N. Y. App. Div. 318; *Grant v. Pratt*, 87 N. Y. App. Div. 490; *Sangunitto v. Goldey*, 88 N. Y. App. Div. 78; *Keating v. Mott*, 92 N. Y. App. Div. 156; *Fiebigler v. Forbes*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 612.

*North Carolina*.—*Cook v. Guirkin*, 19 N. Car. 13; *Gossler v. Wood*, 120 N. Car. 69; *Tiddy v. Graves*, 127 N. Car. 502, rehearing and reversing 126 N. Car. 620.

*Ohio*.—*Fisher v. Tryon*, 8 Ohio Cir. Dec. 556, 15 Ohio Cir. Ct. 541; *Hart v. Sarvis*, 3 Ohio Dec. 708, 3 Ohio N. P. 316.

*Rhode Island*.—*O'Connell v. King*, 59 Atl. Rep. 926.

*Oregon*.—*Veasey v. Humphreys*, 27 Oregon 515; *Landigan v. Mayer*, 32 Oregon 245, 67 Am. St. Rep. 521.

*Pennsylvania*.—*Goucher v. Providence Washington Ins. Co.*, 3 Pa. Super. Ct. 230; *Patterson v. Hausbeck*, 8 Pa. Super. Ct. 36.

*South Carolina*.—*Littlejohn v. Richmond*, etc., R. Co., 45 S. Car. 181.

*South Dakota*.—*Commercial Bank v. Jackson*, 9 S. Dak. 605.

*Texas*.—*Missouri, etc., R. Co. v. Vance*, (Tex. Civ. App. 1897) 41 S. W. Rep. 167; *Panhandle Nat. Bank v. Security Co.*, 18 Tex. Civ. App. 96; *Emerson v. Kneezell*, (Tex. Civ. App. 1900) 62 S. W. Rep. 551.

*Washington*.—*Goldwater v. Burnside*, 22 Wash. 215.

*West Virginia*.—*Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 719.

*Wisconsin*.—*Lindner v. St. Paul F. & M. Ins. Co.*, 93 Wis. 526; *Duncan v. Duncan*, 111 Wis. 75.

An admission in a pleading that a certain instrument attached thereto is a lease is of little weight as against the terms of the instrument. *St. Joseph, etc., R. Co. v. St. Louis, etc., R. Co.*, 135 Mo. 173.

In *Texas* the rule is that no statements of the answer are admissible against the defendant where a general denial is filed. *Hynes v. Packard*, 92 Tex. 44.

**Where a Party Fails to Rely upon an Admission in the Pleadings**, and introduces evidence to controvert his own allegations, such admission is not binding. *Dressner v. Manhattan Delivery Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 800.

**A Reconvention or Cross-Bill** may be used by the opposite party as evidence to support his claim if introduced by him for that purpose. *Lewis v. Crouch*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1009.

**Admissions Made by Party as Witness**.—*Kingsbury v. Joseph*, 94 Mo. App. 298; *Holmes v. Leadbetter*, 95 Mo. App. 419; *Cogan v. Cass Ave., etc., R. Co.*, 101 Mo. App. 179.

**Deposition**.—*Gay v. Rogers*, 109 Ala. 624; *Dimon v. Keery*, 54 N. Y. App. Div. 318.

**Suppressed Deposition**.—See *Joy v. Liverpool, etc., Ins. Co.*, 32 Tex. Civ. App. 433.

**Payment of Money into Court**.—See *Craw v. Abrams*, (Neb. 1903) 94 N. W. Rep. 639, affirmed on rehearing 97 N. W. Rep. 296.

**Pleading Stricken Out**.—See *Dunson v. Nacogdoches County*, 15 Tex. Civ. App. 9.

Such pleading must be formally offered in evidence to render its admission available. *Marshall Field Co. v. Oren Ruffcorn Co.*, 117 Iowa 157.

**Pleading Withdrawn**.—*California*.—*Miles v. Woodward*, 115 Cal. 308; *Ruddock Co. v. Johnson*, 135 Cal. xix, 67 Pac. Rep. 680.

*Georgia*.—*Alabama Midland R. Co. v. Guilford*, 114 Ga. 627; *Alabama Midland R. Co. v. Guilford*, 119 Ga. 523; *Wachstein v. Germania Bank*, 120 Ga. 229.

*Iowa*.—*Ludwig v. Blackschiere*, 102 Iowa 366; *Caldwell v. Drummond*, (Iowa 1903) 96 N. W. Rep. 1122. Compare *Leyner v. Leyner*, 123 Iowa 185.

*Kentucky*.—*Wyles v. Berry*, 76 S. W. Rep. 126, 25 Ky. L. Rep. 606.

*Missouri*.—*Walser v. Wear*, 141 Mo. 443; *Mahan v. Brinnell*, 94 Mo. App. 165.

*New York*.—*Herzfeld v. Reinach*, 44 N. Y. App. Div. 326; *Breese v. Graves*, 67 N. Y. App. Div. 322.

*Oklahoma*.—*Lane Implement Co. v. Lowder*, 11 Okla. 61.

*Oregon*.—*Sayre v. Mohney*, 35 Oregon 141, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 719.

*South Carolina*.—*Willis v. Tozer*, 44 S. Car. 1.

*Texas*.—*Itasca First Nat. Bank v. Watson*, (Tex. Civ. App. 1902) 66 S. W. Rep. 232, 95 Tex. 351; *Houston, etc., R. Co. v. De Walt*, 96 Tex. 121; *Barrett v. Featherston*, (Tex. Civ.

**720. They Are Admissible Also Against Him in Another Suit. — See note 1.**

App. 1896) 35 S. W. Rep. 11, 89 Tex. 567; *Ryan v. Dutton*, (Tex. Civ. App. 1896) 38 S. W. Rep. 546; *Goodbar Shoe Co. v. Sims*, (Tex. Civ. App. 1897) 43 S. W. Rep. 1065; *Wright v. U. S. Mortgage Co.*, (Tex. Civ. App. 1899) 54 S. W. Rep. 368; *Jordan v. Young*, (Tex. Civ. App. 1900) 56 S. W. Rep. 762; *Southern Pac. Co. v. Wellington*, (Tex. Civ. App. 1900) 57 S. W. Rep. 856; *Prouty v. Musquiz*, (Tex. Civ. App. 1900) 59 S. W. Rep. 568; *Ft. Worth, etc., R. Co. v. Wright*, 27 Tex. Civ. App. 198; *Orange Rice Mill Co. v. McIlhinney*, (Tex. Civ. App. 1903) 77 S. W. Rep. 428; *Texas, etc., R. Co. v. Coggin*, (Tex. Civ. App. 1903) 77 S. W. Rep. 1053; *Galloway v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1903) 78 S. W. Rep. 32. But see *contra*, *Southern Pac. Co. v. Wellington*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1114; *McGregor v. Sima*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1021.

*Utah*. — *Kilpatrick-Koch Dry Goods Co. v. Box*, 13 Utah 494.

*Wisconsin*. — *Schultz v. Culbertson*, (Wis. 1905) 103 N. W. Rep. 234.

A withdrawn pleading is available for impeachment purposes. *Matter of O'Connor*, 118 Cal. 69.

To be available as evidence such pleading must be introduced at the trial. *Leach v. Hill*, 97 Iowa 81.

Admissions in an abandoned pleading are not conclusive. *Cleveland, etc., R. Co. v. Gray*, 148 Ind. 266; *Bernard v. Pittsburg Coal Co.*, (Mich. 1904) 100 N. W. Rep. 396, 11 Detroit Leg. N. 246; *McDonald v. Nugent*, 122 Iowa 651; *Reeves v. Cress*, 80 Minn. 466; *Mahoney v. Butte Hardware Co.*, 19 Mont. 377; *Miller v. Nicodemus*, 58 Neb. 352; *Houston, etc., R. Co. v. Dewalt*, (Tex. Civ. App. 1903) 71 S. W. Rep. 774.

Where inconsistent defenses were filed, and defendant was required to elect between them, the pleading withdrawn was held inadmissible on the issue raised by the other. *Lane v. Bryant*, 100 Ky. 138.

A pleading signed and verified by an attorney, superseded by an amended pleading, is not admissible as evidence against his client, without a showing that the client directed the drawing of the pleading or sanctioned it as drawn. *Corbett v. Clough*, 8 S. Dak. 176.

In *Geraty v. National Ice Co.*, 16 N. Y. App. Div. 174, the court held that a complaint verified by a guardian *ad litem* on information and belief, was not admissible on trial under an amended complaint.

**Unnecessary Pleadings.** — In *Sims v. Mutual F. Ins. Co.*, 101 Wis. 586, it was held that admissions made in a pleading treated at the trial as a proper pleading were binding on the pleader, though the pleading was wholly unnecessary.

**Knowledge of Contents.** — A party testifying in his own behalf cannot be impeached by the allegations of his pleadings unless he has knowledge of the contents or authorized the same. *Denison, etc., R. Co. v. Foster*, 28 Tex. Civ. App. 578. See also *Schlotterer v. Brooklyn, etc., Ferry Co.*, 75 N. Y. App. Div. 330.

**Bringing Suit Against a Foreign Corporation**

in a state in which it does business is an admission by the plaintiff that it does business and is to be found within the state. *Southern R. Co. v. Mayes*, (C. C. A.) 113 Fed. Rep. 84.

**Whole Pleading Must Be Introduced.** — A party desiring to avail himself of admissions in the pleading of his adversary must introduce the whole pleading, whether favorable or unfavorable to him. *Young v. Katz*, 22 N. Y. App. Div. 542; *Steinhardt v. Baker*, 25 N. Y. App. Div. 197; *Hoes v. Nagele*, 28 N. Y. App. Div. 374; *Garrie v. Schmidt*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 753; *Shrady v. Shrady*, 42 N. Y. App. Div. 9.

**Answering a Garnishment** issued upon a judgment fully described in the garnishment is an admission by the garnishee of the existence of the judgment. *Bradley Fertilizer Co. v. Pollock*, 104 Ala. 402.

**Admissions Made in an Application for Appeal** are competent against the party making them, on a trial of the cause after reversal. *Galveston, etc., R. Co. v. Eckles*, (Tex. Civ. App. 1899) 54 S. W. Rep. 651.

**Motions.** — Where the defendant in a motion to require the plaintiff to give bond for costs stated that the plaintiff had become a nonresident since beginning suit, this was held an admission that the plaintiff was a resident when the suit was filed. *Fidelity, etc., Co. v. Brown*, (Indian Ter. 1902) 69 S. W. Rep. 915.

**Admissions in a Motion in Arrest of Judgment** are admissible against the party making them in a subsequent suit. *Ager v. State*, 162 Ind. 538.

**Requested Instructions.** — The defendant in an action for damages for injury to a team requested an instruction in which he referred to the team as "plaintiff's team," and it was held an admission of title in the plaintiff, and sufficient proof of ownership to sustain the verdict. *Louisville, etc., R. Co. v. Pirschbacher*, 63 Ill. App. 144.

**Judgment Being Rendered upon Admissions Made by Mistake** in the pleadings, the party may show such mistake and be relieved by the court. *East v. O'Connor*, 19 Ont. Pr. 301.

**At Law Each Plea Is Independent of Every Other** and the admission contained in one plea cannot be used to limit the effect of another. *Chicago, etc., R. Co. v. Newell*, 113 Ill. App. 263.

**720. 1. When Admissible in Another Suit — United States.** — *General Electric Co. v. Jonathan Clark, etc., Co.*, 108 Fed. Rep. 170.

*Alabama*. — *Hartsell v. Masterson*, 132 Ala. 275. See also *Tennessee Coal, etc., Co. v. Linn*, 123 Ala. 112, 82 Am. St. Rep. 108.

*Florida*. — *Younglove v. Knox*, 44 Fla. 743; *Booth v. Lenox*, (Fla. 1903) 34 So. Rep. 566.

*Georgia*. — *Munnerlyn v. Augusta Sav. Bank*, 94 Ga. 356; *St. Paul F. & M. Ins. Co. v. Brunswick Grocery Co.*, 113 Ga. 786.

*Illinois*. — *Wadsworth v. Duncan*, 164 Ill. 360; *Seymour v. O. S. Richardson Fueling Co.*, 103 Ill. App. 625.

*Indiana*. — *Holland v. Spell*, 144 Ind. 561.

*Kansas*. — *Murphy v. Hindman*, 58 Kan. 184.

*Kentucky*. — *Paducah First Nat. Bank v. Wisdom*, 111 Ky. 135.

*Maine*. — *Rockland v. Farnsworth*, 89 Me. 481.

*Michigan*.—Mack v. Cole, 130 Mich. 84, 8 Detroit Leg. N. 1148.

*Missouri*.—Bowman v. Globe Steam-Heating Co., 80 Mo. App. 628.

*Montana*.—Tague v. John Caplice Co., 28 Mont. 51.

*Nebraska*.—Paxton v. State, 59 Neb. 460, 80 Am. St. Rep. 689; Paxton v. State, 60 Neb. 763. See Hamilton Brown Shoe Co. v. Milliken, 62 Neb. 116.

*New York*.—Taft v. Little, 178 N. Y. 127, reversing 78 N. Y. App. Div. 74.

*Oklahoma*.—Myers v. Perry First Presb. Church, 11 Okla. 544.

*Oregon*.—Feldman v. McGuire, 34 Oregon 309; Walker v. Harold, 44 Oregon 205.

*Texas*.—Cuneo v. De Cuneo, 24 Tex. Civ. App. 436.

*West Virginia*.—Hast v. Piedmont, etc., R. Co., 52 W. Va. 396, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 720. See also International, etc., R. Co. v. Mulliken, 10 Tex. Civ. App. 663.

Admissions made in pleadings in a civil suit are not competent evidence against the party filing them in a criminal prosecution against him. Farmer v. State, 100 Ga. 47.

A plea was properly excluded where the party offering it failed to offer the complaint to which it was filed. Gardner v. Meeker, 169 Ill. 40.

**An Admission of What an Absent Witness Would Swear**, made to avoid a continuance, is not admissible at a subsequent term of the court at which the witness is present. Cutler v. Cutler, 130 N. Car. 1, 89 Am. St. Rep. 854.

**A Bill Brought to Enjoin the Prosecution** of an action at law may be received as an admission of the facts stated therein. Farr v. Rouillard, 172 Mass. 303; Aultman v. Martin, 49 Neb. 103. But see Grief v. Seligman, (Tex. Civ. App. 1904) 82 S. W. Rep. 533.

**Affidavits**.—*In re Henschel*, 114 Fed. Rep. 968, modifying 109 Fed. Rep. 861; Orr v. Travelers Ins. Co., 120 Ala. 647; Stickney v. Ward, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 667; Hastings v. Speer, 15 Pa. Super. Ct. 115. See also Cornelissen v. Ort, 132 Mich. 294, 9 Detroit Leg. N. 604.

An affidavit filed in another cause is admissible against the party making it. Knight v. Rothschild, 172 Mass. 546.

The affidavit must be formally offered in evidence to render it available. Marshall Field Co. v. Oren Ruffcorn Co., 117 Iowa 157.

Admissions of a mail carrier made in an affidavit filed in a criminal case are admissible and conclusive against him in a subsequent proceeding for extra pay for expedited service. Garman v. U. S., 34 Ct. Cl. 237.

An affidavit made by an ancestor, since deceased, in an action brought against him, which supported the *bona fides* of his deed, was held admissible in favor of his grantee and against his heir in a suit by the latter to avoid the deed, but it is not conclusive. Donnelly v. Rees, 141 Cal. 56.

**Depositions**.—Spann v. Torbert, 130 Ala. 541; Ferrell v. State, (Fla. 1903) 34 So. Rep. 220; Governor v. Rettalack, 86 Mo. App. 184; Avard v. Carpenter, 72 N. Y. App. Div. 258.

A deposition taken *de bene esse* is admissible against the witness who is a party to the suit. McGahan v. Crawford, 47 S. Car. 566.

A deposition of a party taken in a former suit is not admissible against him or his co-defendant in a later suit unless he is a necessary party thereto. J. I. Case Flow Works v. Ross, 74 Mo. App. 437.

**Admissions of a Witness**—*United States*.—Cimiotti Unhairing Co. v. Bowsky, 113 Fed. Rep. 698.

*Indiana*.—Ruble v. Bunting, 31 Ind. App. 654.

*Iowa*.—State v. Van Tassel, 103 Iowa 6; Steele-Smith Grocery Co. v. Potthast, 109 Iowa 413; Frick v. Kabaker, 116 Iowa 494.

*Kentucky*.—Louisville, etc., R. Co. v. Miller, (Ky. 1898) 44 S. W. Rep. 119; Shinkle v. McCullough, 77 S. W. Rep. 196, 25 Ky. L. Rep. 1143.

*Michigan*.—Lange v. Klatt, (Mich. 1903) 97 N. W. Rep. 708, 10 Detroit Leg. N. 747.

*Minnesota*.—White v. Collins, 90 Minn. 165.

*Missouri*.—Rosenfeld v. Siegfried, 91 Mo. App. 169; Padley v. Catterlin, 64 Mo. App. 629, 2 Mo. App. Rep. 1258.

*Nebraska*.—Churchill v. White, 58 Neb. 22, 76 Am. St. Rep. 64.

*New Jersey*.—Congleton v. Schreihofner, (N. J. 1903) 54 Atl. Rep. 144.

*New York*.—Reed v. McCord, 160 N. Y. 330; Reed v. McCord, 18 N. Y. App. Div. 381; Suffolk County v. Shaw, 21 N. Y. App. Div. 146; Sternbach v. Friedman, 75 N. Y. App. Div. 418; Egyptian Flag Cigarette Co. v. Comisky, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 236; Hillman v. De Rosa, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 261. See also Petzolt v. Thiess, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 707.

*North Carolina*.—Southern L. & T. Co. v. Benbow, 131 N. Car. 413.

*Oregon*.—Anderson v. Adams, 43 Oregon 621.

*Pennsylvania*.—Stevenson v. Ebervale Coal Co., 201 Pa. St. 112, 88 Am. St. Rep. 805.

But admissions made by a witness are not conclusive. Owsley v. Owsley, 77 S. W. Rep. 397, 25 Ky. L. Rep. 1186.

**Plea of Guilty in Criminal Cause Used as Admission in Civil Action**.—Hendle v. Geiler, (Del. 1895) 50 Atl. Rep. 632; Young v. Copple, 52 Ill. App. 547; Wesnieski v. Vanek, (Neb. 1904) 99 N. W. Rep. 258. See also State v. La Rose, 71 N. H. 435; Myers v. Dillon, 39 Oregon 581, affirmed on rehearing 39 Oregon 584.

A plea of guilty to a charge of adultery is admissible, but not conclusive, in an action by the husband of the woman for damages for criminal conversation. Jones v. Cooper, 97 Iowa 735.

**An Agreed Statement of Facts** used on the trial of a case is admissible in a later suit between the same parties involving the same issues, though not conclusive. Luther v. Clay, 100 Ga. 236.

Where a judgment rendered on an agreed statement of facts has been reversed, the statement is competent evidence on a subsequent trial of the cause. Prestwood v. Watson, 111 Ala. 604; King v. Shepard, 105 Ga. 473.

**Answer**.—An answer filed in another suit, to which plaintiff was not a party, is admissible,

**721. V. MODE AND REQUISITES OF PROOF — General Rule. — See note 1.**

The Whole Admission. — See note 3.

**722. See note 1.**

If an Admission Was Heard in a Conversation. — See note 3.

but not conclusive, against the defendant in whose behalf it was filed. *Vredenburg v. Baton Rouge Sugar Co.*, 52 La. Ann. 1666.

The Answer of a Garnishee filed in a cause is admissible against him in another suit. *Purcell v. St. Paul F. & M. Ins. Co.*, 5 N. Dak. 100.

**Explaining Admissions.** — When sworn pleadings are introduced to prove admissions by the party filing them, he may testify that the incorporation of such admissions was a mistake. *Goldwater v. Burnside*, 22 Wash. 215.

**A Constructive Admission** by reason of a failure to answer interrogatories has been held inadmissible in a subsequent action of a different nature between the same parties. *Durocher v. Durocher*, 27 Can. Sup. Ct. 363.

**A Statement of a Conclusion of Law in a Pleading** does not call for a denial and cannot be construed as an admission. *Kidwell v. Ketler*, (Cal. 1905) 79 Pac. Rep. 514.

**721. 1. Provable by Any Competent Witness Who Heard Them.** — *Macomber v. Bigelow*, 126 Cal. 9; *People v. Sexton*, 132 Cal. 37; *Harp v. Harp*, 136 Cal. 421; *Frick v. Kabaker*, 116 Iowa 494; *Walker v. Brantner*, 59 Kan. 117; *Barclay v. Com.*, 76 S. W. Rep. 4; 25 Ky. L. Rep. 463; *Marx v. Hart*, 166 Mo. 503; *Eichhold v. Tiffany*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 680; *Egyptian Flag Cigarette Co. v. Comisky*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 236; *McGahan v. Crawford*, 47 S. Car. 566.

**The Authorship of Letters Must Be Proved** before they are admissible as admissions. *Brooke v. Lowe*, (Ga. 1905) 50 S. E. Rep. 146.

**Admissions by an Alleged Officer of a Corporation** are inadmissible unless it is shown that the person was in fact an officer of the corporation and authorized to make such admissions. *Spencer v. Traveler's Ins. Co.*, (Mo. App. 1905) 86 S. W. Rep. 899.

**A Grand Juror** is a competent witness to prove the testimony of a party given before the grand jury. *Kirk v. Garrett*, 84 Md. 383.

**3. Whole Admission Must Be Proved — Indian Territory.** — *Hewlett v. Hyden*, (Indian Ter. 1902) 69 S. W. Rep. 839.

**Kentucky.** — *Illinois Cent. R. Co. v. Manion*, 113 Ky. 7, 101 Am. St. Rep. 345; *Marks v. Hardy*, 78 S. W. Rep. 864, 1105, 25 Ky. L. Rep. 1770, 1909.

**Louisiana.** — *Bordes v. Duprat*, 52 La. Ann. 306.

**Maine.** — *Lombard v. Chaplin*, 98 Me. 309.

**Missouri.** — *Hormann v. Wirtel*, 59 Mo. App. 646.

**New York.** — *Young v. Katz*, 22 N. Y. App. Div. 542; *Steinhardt v. Baker*, 25 N. Y. App. Div. 197; *Hoes v. Nagele*, 28 N. Y. App. Div. 374; *Garrie v. Schmidt*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 753; *Shrady v. Shrady*, 42 N. Y. App. Div. 9; *Walter v. Meader*, 75 N. Y. App. Div. 612.

**North Carolina.** — *Rawls v. White*, 127 N. Car. 17; *McCord v. Southern R. Co.*, 130 N. Car. 491.

**Rhode Island.** — *Sherman v. Stafford Mfg.*

*Co.*, 23 R. I. 529, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 721.

**West Virginia.** — *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796.

**Where the Admissions Are Contained in a Conversation.** — *Pittsburgh, etc., R. Co. v. Story*, 104 Ill. App. 132; *Johnson v. Opfer*, 58 Neb. 631; *Barrett v. New York Cent., etc., R. Co.*, 157 N. Y. 663; *Ætna Ins. Co. v. Eastman*, (Tex. Civ. App. 1904) 80 S. W. Rep. 255.

Conversations explaining conversation testified about are admissible in evidence under Iowa Code, § 4615. *Hutton v. Doxsee*, 116 Iowa 13.

Where the defendant offered a part of a conversation which was favorable to his interest, it was held proper to admit the remainder of the conversation, which was opposed to his interest. *Terry v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 986.

**Admission of Correctness of Account.** — *Boudinot v. Winter*, 190 Ill. 394.

**Letters.** — See *Elizabeth City Cotton Mills v. Loeb*, (C. C. A.) 119 Fed. Rep. 154; *Farrer v. Caster*, 17 Colo. App. 41; *Kinder v. Pope*, 106 Mo. App. 536; *Norris v. Hartford F. Ins. Co.*, 57 S. Car. 358; *Ætna Ins. Co. v. Fitze*, (Tex. Civ. App. 1904) 78 S. W. Rep. 370.

Where the plaintiff introduces a letter from the defendant as an admission, the defendant may introduce any correspondence on the same subject. *Lewis Pub. Co. v. Leng*, 86 N. Y. App. Div. 451.

Where the plaintiff introduced a letter written by the defendant, the defendant was allowed to introduce a letter, written by him the following day to the same parties, containing statements inconsistent with the contents of the first letter. *Lexow v. Belding*, 72 N. Y. App. Div. 446.

**Letters Inclosing and Explaining Statements of Accounts.** — Where the plaintiff introduced statements of account as admissions by the defendant, it was held competent for the defendant to introduce the letter in which the accounts were mailed to the plaintiff explaining them. *Morris v. Jamieson*, 205 Ill. 87, affirming 99 Ill. App. 32.

**If the Testimony on a Former Trial Is Read.** — *Reiser v. Portere*, 106 Mich. 102; *Taft v. Little*, 178 N. Y. 127, reversing 78 N. Y. App. Div. 74.

**722. 1. Matters Distinct from the Admission.** — *Granite Gold Min. Co. v. Maginness*, 118 Cal. 131; *Jones v. U. S. Mutual Acc. Assoc.*, 92 Iowa 652; *Pettis v. Green River Asphalt Co.*, (Neb. 1904) 99 N. W. Rep. 235; *Suffolk County v. Shaw*, 21 N. Y. App. Div. 146; *Hoes v. Nagele*, 28 N. Y. App. Div. 374; *Gossler v. Wood*, 120 N. Car. 69; *Lewis v. Norfolk, etc., R. Co.*, 132 N. Car. 382; *Avery v. Stewart*, 136 N. Car. 426; *Stewart v. North Carolina R. Co.*, 136 N. Car. 385; *Hedrick v. Southern R. Co.*, 136 N. Car. 510; *Watson v. Winston*, (Tex. Civ. App. 1897) 43 S. W. Rep. 852.

**3. Meacham v. State**, (Fla. 1903) 33 So. Rep. 983.

**722.** Province of Jury. — See note 4.

**723.** VI. WEIGHT OF EVIDENCE — Admissions Deliberately Made. — See note 1. But Verbal Admissions, Uncorroborated. — See note 2.

**724.** It is the Province of the Jury. — See note 1.

**722.** 4. Com. v. Hunton, 168 Mass. 130; Detroit Electric Light, etc., Co. v. Applebaum, 132 Mich. 555, 10 Detroit Leg. N. 4; Parret v. Craig, 56 N. J. Eq. 280, affirmed 56 N. J. Eq. 848, 42 Atl. Rep. 1117; McCord v. Southern R. Co., 130 N. Car. 491.

**723.** 1. United States. — Tucker v. Alexandroff, 183 U. S. 424; *In re Kersten*, 110 Fed. Rep. 929; Pitcairn v. Philip Hiss Co., 113 Fed. Rep. 492, 51 C. C. A. 323.

California. — Hearne v. De Young, 111 Cal. 373; Moore v. Grayson, 132 Cal. 602. Compare Donnelly v. Rees, 141 Cal. 56; Griseza v. Terwilliger, 144 Cal. 456.

Colorado. — Joralmon v. McPhee, 31 Colo. 26; Everett v. Hart, (Colo. App. 1904) 77 Pac. Rep. 254.

Delaware. — Levy v. Gillis, 1 Penn. (Del.) 119.

Illinois. — Leroy Payne Co. v. Van Evra, 94 Ill. App. 356; North v. Zerwick, 97 Ill. App. 306.

Kentucky. — Rone v. Smith, (Ky. 1897) 42 S. W. Rep. 740; O'Neal v. Fenwick, 64 S. W. Rep. 952, 23 Ky. L. Rep. 1219.

Louisiana. — Moise's Succession, 107 La. 717.

Maryland. — Turner v. Turner, 98 Md. 22.

Missouri. — Nolan v. Bedford, 89 Mo. App. 172; White City State Bank v. St. Joseph Stock Yards Bank, 90 Mo. App. 395; Moling v. Barnard, 65 Mo. App. 600, 2 Mo. App. Rep. 1233.

Nebraska. — Johnson v. Reed, 47 Neb. 322; Holt County v. Scott, 53 Neb. 176.

New York. — Humes v. Proctor, 151 N. Y. 520.

Ohio. — Penfield v. Mason, 9 Ohio Cir. Dec. 611, 17 Ohio Cir. Ct. 165.

Pennsylvania. — Peter's Estate, 20 Pa. Super. Ct. 223; Stewart v. Gleason, 23 Pa. Super. Ct. 325.

Texas. — Galveston, etc., R. Co. v. Lynes, (Tex. Civ. App. 1901) 65 S. W. Rep. 1119; Beard v. State, 44 Tex. Crim. 402.

Virginia. — Little v. Slemph, (Va. 1897) 27 S. E. Rep. 808.

Washington. — Schwede v. Hemrich, 29 Wash. 124; Ketchum v. Stetson, etc., Mill Co., 33 Wash. 92.

Declarations of an intestate against his interest and the interest of his heirs may, when testified to by his heirs, become potent evidence against the administrator. Harp v. Harp, 136 Cal. 421.

Where the Plaintiff Admits a Fact Material to Defendant's Case, the latter will not be permitted to introduce evidence of the fact. Anderson v. Scott, 70 N. H. 534.

**Inventories.** — Where the plaintiff was formerly executor of his father's will and as such filed an inventory in which was listed a claim against himself, such inventory is not conclusive against him and sufficient to support a set-off in an action brought by him on a note given by his father. Siebert v. Steinmeyer, 204 Pa. St. 419.

**Primary Evidence.** — Moore v. Crosthwait, 135

Ala. 272; Baker v. Hess, 53 Ill. App. 473; Second Borrowers, etc., Bldg. Assoc. v. Cochran, 103 Ill. App. 29; Pritchett v. Sheridan, 29 Ind. App. 81, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 723; Garr v. Shaffer, 139 Ind. 191; Eddings v. Boner, 1 Indian Ter. 173; Bullard v. Bullard, 112 Iowa 423; Frick v. Kabaker, 116 Iowa 494; Kirk v. Garrett, 84 Md. 383; White v. Collins, 90 Minn. 165; Roth v. Continental Wire Co., 94 Mo. App. 236; Churchill v. White, 58 Neb. 22, 76 Am. St. Rep. 64; Dunafon v. Barber, (Neb. 1902) 92 N. W. Rep. 198; McBlain v. Edgar, 65 N. J. L. 634, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508; Simpson v. Edens, 14 Tex. Civ. App. 235; Gulf, etc., R. Co. v. Combes, (Tex. Civ. App. 1904) 80 S. W. Rep. 1045; Hart v. Pratt, 19 Wash. 560.

**A Written Admission Is Substantive Evidence** when inconsistent with the claim of the party making it. Castner v. Chicago, etc., R. Co., (Iowa 1905) 102 N. W. Rep. 499.

**Admissions Procured by False Representations Not Binding.** — Wyckoff v. Lagrange, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 108.

**2. Verbal Admissions, Uncorroborated, Received with Caution.** — Burk v. Hill, 119 Ga. 38; Harvin v. Blackman, 108 La. 426; Reed v. Morgan, 100 Mo. App. 713; Roberge v. Bonner, 94 N. Y. App. Div. 342, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 723; Castner v. Chicago, etc., R. Co., (Iowa 1905) 102 N. W. Rep. 499; Copley v. Union Pac. R. Co., 26 Utah 361.

Greater caution should be exercised in weighing the admissions of a child of tender years than those of adults. Chicago City R. Co. v. Tuohy, 196 Ill. 410, affirming 95 Ill. App. 314.

**Admissions Made Loosely in Conversations.** — Owsley v. Owsley, 77 S. W. Rep. 397, 25 Ky. L. Rep. 1186; Strode v. Gilpin, 187 Mo. 383; Taube v. Dry-Dock, etc., R. Co., (N. Y. City Ct. Gen. T.) 12 Misc. (N. Y.) 650; Earp v. Edgington, 107 Tenn. 23.

**Strongest or Weakest Evidence — Dependent upon Circumstances.** — Bullard v. Bullard, 112 Iowa 423.

**When of Little Weight.** — Clinton Mut. County F. Ins. Co. v. Zeigler, 101 Ill. App. 165; Luke v. Koenen, 120 Iowa 103; Turner v. Turner, 98 Md. 22; Traders' Nat. Bank v. Rogers, 167 Mass. 315; Kinney v. Murray, 170 Mo. 674; Insurance Co. v. Telfair, 45 N. Y. App. Div. 564, reversing (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 247; Cheek v. Oak Grove Lumber Co., 134 N. Car. 225, 231; Anderson v. Davis, 55 W. Va. 429.

A person suffering from an injury just received is not concluded by the statement: "I alone am to blame." La Flam v. Missisquoi Pulp Co., 74 Vt. 125.

Admissions of persons since deceased are generally entitled to but little weight. Rosenwald v. Middlebrook, (Mo. 1905) 86 S. W. Rep. 200.

**724.** 1. Brown v. Wren, (1895) 1 Q. B.



**724. ADMIT.** — See note 3.

**ADOPT.** — See notes 6, 7.

390; *Zachry v. Nolan*, 66 Fed. Rep. 467, 30 U. S. App. 244; *Phoenix Ins. Co. v. Gray*, 113 Ga. 424; *Burk v. Hill*, 119 Ga. 38; *Patterson v. Houston*, 92 Ill. App. 624; *Atchison, etc., R. Co. v. Potter*, 60 Kan. 808; *Home-Riverside Coal Min. Co. v. Fores*, 64 Kan. 39; *South Covington, etc., St. R. Co. v. McHugh*, 77 S. W. Rep. 202, 25 Ky. L. Rep. 1112; *Rumrill v. Ash*, 169 Mass. 341; *Eastman v. Lake Shore, etc., R. Co.*, 101 Mich. 597; *Laird v. Laird*, 127 Mich. 24, 8 Detroit Leg. N. 217; *Ephland v. Missouri Pac. R. Co.*, 71 Mo. App. 597; *Hendrix v. Kirkpatrick*, 48 Neb. 670; *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689; *Gloe*

*v. Chicago, etc., R. Co.*, 65 Neb. 680; *Meister v. Sharkey's Monument Works*, 5 N. Y. App. Div. 470; *Metropolitan L. Ins. Co. v. Schaefer*, (County Ct.) 16 Misc. (N. Y.) 625; *Weigley v. Kneeland*, 18 N. Y. App. Div. 47; *Gulf, etc., R. Co. v. Combes*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1045.

**724. 3. Admitted to Bail.** — See *State v. Larson*, 12 N. Dak. 474.

**6. Adopt in the Sense of Legitimate.** — *Morton v. Morton*, 62 Neb. 420.

**7. Dallas v. Beeman**, 18 Tex. Civ. App. 335.

**Adopt and Ratify.** — See *Schreyer v. Turner Flouring Co.*, 29 Oregon 1.

## ADOPTION OF CHILDREN.

BY J. E. BRADY.

**726. I. DEFINITION AND ORIGIN** — Definition. — See note 1.

Origin. — See notes 2, 3, 4.

**727. II. CONSTITUTIONALITY OF ADOPTION STATUTES.** — See note 2.

**III. NATURE AND REQUISITES OF ADOPTION PROCEEDINGS** — 1. In

General. — See note 4.

**728. The Compliance Required.** — See note 1.

**726. 1. Younger v. Younger**, 106 Cal. 377; *Virgin v. Marwick*, 97 Me. 578; *Smith v. Allen*, 32 N. Y. App. Div. 374.

**2. Common Law.** — *Morris v. Dooley*, 59 Ark. 483; *Albring v. Ward*, (Mich. 1904) 100 N. W. Rep. 609, 11 Detroit Leg. N. 328; *Clarkson v. Hatton*, 143 Mo. 47; *Matter of Thorne*, 155 N. Y. 140; *Smith v. Allen*, 32 N. Y. App. Div. 374.

**The Law in England** does not recognize adoption. *In re Quai Shing*, 6 British Columbia 86.

**3. Clarkson v. Hatton**, 143 Mo. 47.

**4. Civil Law.** — *Matter of Thorne*, 155 N. Y. 140.

**727. 2. Affecting Devolution of Property.** — *Sayles v. Christie*, 187 Ill. 420.

**4. Judicial Procedure.** — *Ferguson v. Herr*, 64 Neb. 649.

An informal memorandum made and signed by a judge for purposes of reference merely has no bearing on and does not in any way affect the validity of the final decree of the court making the adoption. *Hill, Appellant*, 97 Me. 82.

**Ministerial Act.** — *Matter of Camp*, 131 Cal. 470, 82 Am. St. Rep. 371; *Monk v. McDaniel*, 120 Ga. 480; *Bresser v. Saarman*, 112 Iowa 720. See *Baskette v. Streight*, 106 Tenn. 549; *Bland v. Gollaher*, (Tenn. Ch. 1898) 48 S. W. Rep. 320.

In *Missouri* an adoption may be effected by the execution, acknowledgment, and recording of a deed, the process being the same as in a conveyance of real estate. *Clarkson v. Hatton*, 143 Mo. 47.

**728. 1. Strict Compliance.** — *Watts v. Dull*, 184 Ill. 86, 75 Am. St. Rep. 141; *Sarazin v. Union R. Co.*, 153 Mo. 479, citing 1 AM. AND

ENG. ENCYC. OF LAW (2d ed.) 728; *Matter of Thorne*, 155 N. Y. 140; *Brown's Adoption*, 25 Pa. Super. Ct. 259, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 728.

In order that the right to inherit may be acquired through adoption, there must be a compliance with the statute on the subject. A verbal agreement to adopt is not sufficient, though the child devoted herself to the adopting parents up to the time of their death, and fully performed her duties to them as a daughter. *McColpin v. McColpin*, (Tex. Civ. App. 1903) 75 S. W. Rep. 824. See also *Clark v. West*, 96 Tex. 437.

**The Mere Surrendering of the Custody** of a child does not constitute an adoption. Such a surrender of custody will be presumed not to be permanent, and the burden is on the party asserting the adoption to contravert the presumption. *Miller v. Miller*, 123 Iowa 165.

**An Agreement to Adopt** and to take steps, if necessary, to secure such adoption, cannot be made the basis of an agreement to convey land, and cannot be held sufficient to take the place of adoption. *Bowins v. English*, (Mich. 1904) 101 N. W. Rep. 204.

**A Description in a Deed** in which the grantee is termed the adopted daughter of the grantor cannot be regarded as an adoption under a special law authorizing the adoption. *Conrad v. Herring*, (Tex. Civ. App. 1904) 83 S. W. Rep. 427.

**Filing Instrument for Record.** — See *Bresser v. Saarman*, 112 Iowa 720. See also *James v. James*, 35 Wash. 650; *Renz v. Drury*, 57 Kan. 84.

**728. Presumption of Adoption.** — See note 2.

Noncompliance with Statute — Contract as to Property. — See note 3.

**729. 2. Consent and Notice — The Parents.** — See note 1.

**Defective Acknowledgment.** — Adoption proceedings have been held to be void where the instrument of adoption was not acknowledged as required by the statute. *Monk v. McDaniel*, 120 Ga. 480. But see *Cook v. Bartlett*, 179 Mass. 576.

**Substantial Compliance.** — *Matter of Evans*, 106 Cal. 562; *Matter of McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80; *Flannigan v. Howard*, 200 Ill. 396, 93 Am. St. Rep. 201; *Hilpire v. Claude*, 109 Iowa 159, 77 Am. St. Rep. 524; *Ferguson v. Herr*, (Neb. 1903) 94 N. W. Rep. 542.

The neglect by the recorder to properly index the record in an adoption proceeding, as required by statute, is an immaterial defect, and does not vitiate the adoption. *Bresser v. Saarman*, 112 Iowa 720.

Where it appeared that the statute of the state where the adoption took place was complied with in every particular excepting possibly the requirement of acknowledgment, it was held proper to submit it to the jury to determine whether or not there had been a sufficient conformity. *Cook v. Bartlett*, 179 Mass. 576.

In *Wisconsin* failure to state that the natural parents of such child shall be deprived of all legal rights respecting such child is immaterial where the statute is strictly followed as respects the contents of the order. *In re Sandon*, (Wis. 1905) 101 N. W. Rep. 1089.

**728. 2. Henry v. Taylor**, 16 S. Dak. 424. See also *Merchant v. White*, 77 N. Y. App. Div. 539, 12 N. Y. Annot. Cas. 233.

**Indian Custom.** — Where the grandmother of an Indian child, abandoned by its mother, took care of the child until its death, the grandmother could not on showing such facts merely claim that she had adopted the child, although according to a custom adhered to by the Indians an adoption had taken place. *Non-she-po v. Wa-win-ta*, 37 Oregon 213, 82 Am. St. Rep. 749.

**3. Sarazin v. Union R. Co.**, 153 Mo. 479, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 728; *Lynn v. Hockaday*, 162 Mo. 111, 85 Am. St. Rep. 480.

In such cases the right of the claimant is derived solely from the contract and not by virtue of an intended adoption. *Steele v. Steele*, 161 Mo. 566.

Noncompliance with the statute by a woman who signs a paper with her husband adopting a child does not invalidate the adoption as to the husband. *Burnes v. Burnes*, 132 Fed. Rep. 485.

In *Albring v. Ward*, (Mich. 1904) 100 N. W. Rep. 609, 11 Detroit Leg. N. 328, it is stated as a matter of dictum that if the statute is not complied with the adoption fails and "the supposed adopted person obtains no interest in the property or estate of the adopting person."

**Measure of Damages.** — The defendant's intestate during his lifetime contracted with the plaintiff that he would adopt her and provide for her to the extent of leaving her one-half of his property at his death. The plaintiff remained with the deceased sixteen months, but

no steps to adopt were ever taken. In an action for breach of contract it was held that the measure of damages was the value of the services rendered by the plaintiff. *Sandham v. Grounds*, 36 C. C. A. 103, 94 Fed. Rep. 83.

**Specific Performance.** — The plaintiff when a child was virtually adopted under a verbal agreement on the part of the deceased to bring the plaintiff up as his own child and to provide for her in his will as such. The contract having been fully performed except as to the provision in the will, the court decreed that the plaintiff was entitled to specific performance of the entire agreement. *Healy v. Healy*, 167 N. Y. 572, 55 N. Y. App. Div. 315.

In *Grantham v. Gossett*, 182 Mo. 651, the court makes the following statement, supported by the citation of a number of cases: "Oral contracts of the kind stated in the petition [a contract to adopt a child and make a will in his or her favor] when proven according to the standard of proof required, and shown to have been performed on the part of the parent and that of the child, when to suffer it to go unenforced would be to suffer a fraud to be perpetrated, will be decreed to be specifically performed." But the proof of such a contract must be to the point and must show beyond doubt that the parties did so contract. The court here ruled that the evidence offered was insufficient.

Where there has not been a substantial compliance with the statutes governing adoption and where the value of the services of the foster child are easily ascertainable, a parol agreement to make said foster child an heir will not be enforced even though the child has made a complete performance of the contractual obligation. *Renz v. Drury*, 57 Kan. 84.

**729. 1. Consent of Parents.** — *Bresser v. Saarman*, 112 Iowa 720.

The law of *Massachusetts* provides that "a giving up in writing of a child, for the purpose of adoption, to a charitable institution incorporated by law, shall operate as a consent to any adoption subsequently approved by such institution." *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441.

**Adoption by Deed.** — Where the method of adoption is by the execution of a deed, there is in the *Missouri* statutes no provision made for consent of the natural parents of the adopted party, and it is held that such consent is not necessary to entitle the child to inherit as heir from the adopting parent. *Clarkson v. Hatton*, 143 Mo. 47.

**Failure to Examine the Father** does not affect the validity of the adoption where the court has acquired jurisdiction of all the parties whose consent is necessary. *Matter of McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80.

**Word "Parents" Construed.** — *In re Gregory*, (Surrogate Ct.) 25 Civ. Pro. (N. Y.) 71, 13 Misc. (N. Y.) 363.

**Consent Dispensed With.** — *Matter of McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80.

Where a mother has agreed to the adoption of her child by another, the consent of the

**730.** See notes 1, 2.

*The Guardian or Next Friend.* — See note 3.

*Consent of Child.* — See notes 4, 5.

**731. IV. WHO MAY ADOPT AND WHO MAY BE ADOPTED — Who May Adopt. —**

See notes 1, 2.

**732.** *Who May Be Adopted.* — See notes 1, 2, 3, 4.**733. V. EXTRATERRITORIAL EFFECT OF ADOPTION.** — See note 1.**734. VI. DECREE OF ADOPTION — HOW AND WHEN SET ASIDE — 1. In General.** — See notes 1, 2.

father not being obtained for the reason that he had been the offending party in a suit for divorce, a modifying decree of the divorce court, subsequent to the adoption, giving the custody of the child to the father for a part of each year, is ineffectual upon the status of the child as determined by the adoption. *Younger v. Younger*, 106 Cal. 377.

In *Iowa* the statute requires, in cases where parents are divorced or separated, the consent only of the parent entitled to the custody of the child; but it is held that the deed of adoption must clearly show the parent's consent. *Hopkins v. Antrobus*, 120 Iowa 21.

Consent of the mother is necessary only when she is living with her husband, or has custody and control of her child. *James v. James*, 35 Wash. 650.

**730. 1. Abandonment of Child.** — *Watts v. Dull*, 184 Ill. 86, 75 Am. St. Rep. 141 [citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729, 730]; *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894. See *Von Beck v. Thomsen*, 44 N. Y. App. Div. 373, 7 N. Y. Annot. Cas. 33.

In some states it is provided by statute that the consent of a parent who has abandoned his child shall not be required in adoption proceedings. *Watts v. Dull*, 184 Ill. 86, 75 Am. St. Rep. 141; *Wilson v. Otis*, 71 N. H. 483, 93 Am. St. Rep. 564; *Richards v. Mattheson*, 8 S. Dak. 77.

**Where Parent Is Deprived of Civil Rights.** — *Matter of McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80.

**2. Service of Notice.** — *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441; *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894.

**3. Next of Kin.** — It is within the jurisdiction of the court to determine who may be the next of kin of the child adopted. *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894.

**4. Consent of Child.** — *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441.

**5. In re Gregory**, (Surrogate Ct.) 25 Civ. Pro. (N. Y.) 71, 13 Misc. (N. Y.) 363.

**731. 1. Who May Adopt.** — *Hopkins v. Antrobus*, 120 Iowa 21.

In *Massachusetts* any person over twenty-one may adopt another younger than himself. Under the statute reciting the above it was held that the adoption of persons of middle age by a man of seventy was valid. *Collamore v. Learned*, 171 Mass. 99.

**Specified Difference in Age Required.** — See *Baskette v. Streight*, 106 Tenn. 549; *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441.

**Adoption by Nonresidents.** — *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441.

**Guardian May Adopt.** — *Unforsake's Succession*, 48 La. Ann. 546.

**2. Consent of Other Spouse Necessary.** — The *Kentucky* statute providing that no order of adoption shall be made unless the husband or wife of the petitioner joins in the petition does not require that a petition shall be signed or sworn to by the wife of the petitioner, but merely that she shall join on the face of the petition. *Bland v. Gollaher*, (Tenn. Ch. 1898) 48 S. W. Rep. 320.

The *Tennessee* statute does not require a joint application by husband and wife for the adoption of a child, but provides generally that any person may adopt another on giving sufficient reasons and obtaining the sanction of the court. Under this statute where an adoption is by a husband without the concurrence of his wife, he is the exclusive adoptive parent, and at his death his widow has no right to the custody of the child as against its natural parents. *Baskette v. Streight*, 106 Tenn. 549.

**Joint Adoption by Husband and Wife.** — *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441.

Under a statute providing that an adoption by a married person shall be in the form of a joint adoption by husband and wife, it is not sufficient for a wife to show that her husband is insane and for that reason did not join, and in such a case the right of adoption is denied. *Watts v. Dull*, 184 Ill. 86, 75 Am. St. Rep. 141.

**732. 1.** See *Baskette v. Streight*, 106 Tenn. 549.

**2.** *Collamore v. Learned*, 171 Mass. 99.

**3. Child Defined.** — The word "child," as used in statutes of adoption, is not synonymous with "issue" and is more comprehensive in its meaning than the latter word. *Virgin v. Marwick*, 97 Me. 578. See also the title CHILD — CHILDREN.

**4. Includes Adults.** — *In re Moran*, 151 Mo. 555; *Caldwell's Succession*, (La. 1905) 38 So. Rep. 140.

**733. 1.** *Gray v. Holmes*, 57 Kan. 217.

The status of an adopted child should be governed by the laws of the state wherein he was adopted. *Steele v. Steele*, 161 Mo. 566.

**734. 1. Next of Kin Cannot Appeal.** — *Mul-lany's Adoption*, 25 Pa. Co. Ct. 561, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 734, and following *Gray v. Gardner*, 81 Me. 554.

**Averment of Petition — Estoppel.** — One who was a party to an adoption proceeding is most clearly estopped to deny its validity. *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894.

**2. Adoption Set Aside on Mother's Motion.** — *In re Olson*, 3 Ohio Dec. 668, 3 Ohio N. P. 304.

**An Order of Adoption May Be Revoked** where it appears that the consent of the mother to the adoption was not secured, and further that the child had not been cared for by a charitable in-

**736.** 2. **Fraud and Mistake.** — See note 1.3. **May Not Be Attacked Collaterally.** — See note 2.**737.** **ADULT.** — See note 3.stitution for the period of one year. *In re Sleep*, 6 Pa. Dist. 256.**736.** 1. **Fraud Ground for Revocation.** — See *McKay v. Kean*, 167 Mass. 524; *In re Olson*, 3 Ohio Dec. 668, 3 Ohio N. P. 304.**Revocation of Decree on Account of Mistake.** — *In re Sovanafsky*, 18 Lanc. L. Rev. 30.**Mere Irregularities** are insufficient to annul the decree of adoption where the relationship has been entered into with honesty of purpose. *Brown's Adoption*, 25 Pa. Super. Ct. 259.**A Mere Error of the Clerk** is not sufficient to invalidate an order of adoption, and the court may amend the record several years later by a *nunc pro tunc* order. *Ward v. Magness*, (Ark. 1905) 86 S. W. Rep. 822.**2. Collateral Attack.** — *Matter of McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80; *Flannigan v. Howard*, 200 Ill. 396, 93 Am. St. Rep. 201; *Caldwell's Succession*, (La. 1905) 38 So. Rep. 140, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 736; *Wilson v. Otis*, 71 N. H. 483,93 Am. St. Rep. 564; *Crocker v. Balch*, 104 Tenn. 6.A determination by a judge that the child to be adopted in proceedings for that purpose had been abandoned by its parent was a jurisdictional fact and is not open to collateral attack. *Matter of Camp*, 131 Cal. 469, 82 Am. St. Rep. 371.In ejectment to recover lands claimed by the plaintiff as the adopted child of the deceased owner, it was held that it might be shown that the record in the adoption proceedings did not state the residence of the adopted party as expressly required by statute and that it was therefore void. *Morris v. Dooley*, 59 Ark. 483.**737.** 3. **Adult Inhabitants** within the meaning of a statute prohibiting the sale of intoxicating liquors upon the petition of a majority of the adult inhabitants of a certain district means all males over the age of twenty-one years and females over the age of eighteen years. *Wilson v. Lawrence*, 70 Ark. 545.

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## ADULTERATION.

By M. B. WAILES.

**738.** I. **DEFINITION AND SCOPE** — **Definition.** — See note 1.**739.** III. **BY STATUTE.** — See note 2.**738.** 1. *Grosvenor v. Duffy*, 121 Mich. 220; *Com. v. Hufnal*, 185 Pa. St. 376.**739.** 2. **Statutes Prohibiting Adulteration Valid under Police Power.** — *People v. Worden Grocer Co.*, 118 Mich. 604; *People v. Hinshaw*, (Mich. 1904) 97 N. W. Rep. 758; *People v. Snowberger*, 113 Mich. 86, 67 Am. St. Rep. 449; *State v. Williams*, (Minn. 1904) 100 N. W. Rep. 641 (linseed oil below test); *Crossman v. Lurman*, 171 N. Y. 329, 98 Am. St. Rep. 599, affirming 57 N. Y. App. Div. 393 (adulterated coffee); *Com. v. Hartman*, 6 Pa. Dist. 136; *Com. v. Kevin*, 202 Pa. St. 23, 90 Am. St. Rep. 613.**Sale of Food and Drugs Act—Adulteration by Abstraction.** — Where a chemist supplied a purchaser with an ointment containing a smaller proportion of mercury than that prescribed by the pharmacopœia, it was held that the chemist was liable under section 6 of the act, although the purchaser did not refer to the pharmacopœia, as he must be taken to have demanded that the ointment be compounded of the proportions therein prescribed. *Dickins v. Randerson*, (1901) 1 K. B. 437. In this case it was further held that the fact that the ointment was a compounded drug would not take it out of section 6 of the above act. And see to the same effect *Beardsley v. Walton*, (1900) 2 Q. B. 1.*A Joint Stock Company Is a Person* whomay be convicted of an offense under section 6 of this act. *Pearks v. Ward*, (1902) 2 K. B. 1.**Knowledge of Purchaser.** — A sale may be to the prejudice of the purchaser within section 6, although the purchaser had special knowledge, not derived from information given by the seller, that the article sold was not of the nature, substance, and quality demanded by him. The test is whether the sale would have been to the prejudice of a purchaser who had not that special knowledge. *Pearks v. Ward*, (1902) 2 K. B. 1.**Butter—Notice in Shop—Label on Wrapper.** — A notice displayed on the walls of a shop that the butter sold was blended with milk by machinery, whereby it retained about twenty to twenty-four per cent. of moisture, is sufficient to protect the seller within the meaning of section 6 of the Sale of Food and Drugs Act. But a label on the inner wrapper in which the butter was delivered is not a sufficient notice by label within section 8 of this act. *Pearks v. Houghton*, (1902) 1 K. B. 889.**False Warranty—Limit of Time for Taking Proceedings.** — *Whitaker v. Pomfret*, (1902) 1 K. B. 661.**False Warranty—Jurisdiction—Place Where Article Purchased for Analysis.** — *Manners v. Tyler*, (1902) 1 K. B. 901; *McNair v. Cave*, (1903) 1 K. B. 24.

**740. Oleomargarine.** — See note I.

*Mode of Dividing Sample Purchased for Analysis.* — *Mason v. Cowdary*. (1900) 2 Q. B. 419.

**Alcoholic Liquors.** — *A Sale of Beer as Food*, containing salicylic acid in any quantity, without a label on the package notifying the buyer that it contains such ingredient, is, when the beer is found to be poisonous or deleterious to health by its continuous or indiscriminate use, an offense against the pure food laws of the state, under the definition of an adulteration contained in clause 7, paragraph "b," section 3 of the act as amended April 22, 1890. *State v. Hutchinson*, 55 Ohio St. 573.

**Whiskey** is recognized by that name in the pharmacopœia, where its proper standard of purity and strength is laid down, and is a drug within the meaning of the pure food and drug statute. *State v. Hutchinson*, 56 Ohio St. 82.

**Lard** — *Minnesota*. — *State v. Hanson*, 84 Minn. 42, holding that the Minnesota statute prohibits the sale of cottolene manufactured so as to resemble lard unless the package containing it is labeled "Lard Substitute."

**740. 1. Oleomargarine — Validity of Act Prohibiting Sale.** — *State v. Armour Packing Co.*, 124 Iowa 323; *State v. Rogers*, 95 Me. 94, 85 Am. St. Rep. 395; *People v. Rotter*, 131 Mich. 250; *People v. Phillips*, 131 Mich. 395; *State v. Bockstruck*, 136 Mo. 335; *Beha v. State*, (Neb. 1903) 93 N. W. Rep. 155; *State v. Ball*, 70 N. H. 40; *McCann v. Com.*, 198 Pa. St. 509; *Com. v. Diefenbacher*, 14 Pa. Super. Ct. 264; *Com. v. Andrews*, 24 Pa. Super. Ct. 571.

**Interstate Commerce.** — In *Schollenberger v. Pennsylvania*, 171 U. S. 1, the court said: "The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food. \* \* \* The act of the legislature of *Pennsylvania*, under consideration, to the extent that it prohibits the introduction of oleomargarine from another state and its sale in the original package, as described in the special verdict, is invalid." Followed in *Armour Packing Co. v. Snyder*, 84 Fed. Rep. 136; *In re Scheitlin*, 99 Fed. Rep. 272; *State v. Rogers*, 95 Me. 94, 85 Am. St. Rep. 395; *Fox v. State*, 89 Md. 381, 73 Am. St. Rep. 193; *Rasch v. State*, 89 Md. 757; *McAllister v. State*, 94 Md. 290; *Com. v. Vandyke*, 13 Pa. Super. Ct. 484.

Thus a *New Hampshire* statute prohibiting the sale of oleomargarine as a substitute for butter, unless of a pink color, was held to be invalid as absolutely prohibitory. *Collins v. New Hampshire*, 171 U. S. 30. But see *Armour Packing Co. v. Snyder*, 84 Fed. Rep. 136.

And a state statute permitting the manufacture and sale of oleomargarine free from any coloring matter causing it to appear to be butter, but expressly forbidding the manufacture or sale within the state of any oleomargarine which contains any methyl, orange,

butter yellow, annatto, aniline dye, or any other coloring matter, is constitutional. *Capital City Dairy Co. v. Ohio*, 183 U. S. 238.

**Sale in Unbroken Packages.** — A state statute prohibiting the sale of process butter unless it is plainly marked with the words "Renovated Butter," so as to prevent the imposition of a fraud on the public, falls within the police powers of the state, and is not in violation of art. 1, § 8 of the Federal Constitution, which delegates to Congress the power to regulate commerce between the states, even when such butter is sent from another state for purposes of sale in unbroken packages. *Hathaway v. McDonald*, 27 Wash. 659.

**Construction of Statutes.** — The Term "Yellow Butter," as used in the *Michigan* act prohibiting the sale of oleomargarine colored in imitation of yellow butter made from cream, means any butter produced from pure milk, or cream thereof, having a perceptible shade of yellow. *People v. Phillips*, 131 Mich. 395.

**New York — Must Prove Intention to Sell as Butter.** — *People v. Meyer*, 44 N. Y. App. Div. 1.

**The Court Cannot Take Judicial Notice** of the semblance of butter, and the plaintiff must establish that the oleomargarine kept, used, or served by the defendant has been so changed as to resemble dairy butter. *People v. Meyer*, 44 N. Y. App. Div. 1; *People v. Hillman*, 58 N. Y. App. Div. 571; *People v. Berwind*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 315.

**Preservation of Portion of Sample.** — The *Massachusetts* statute punishing the manufacture and sale of imitation butter, which provides for inspectors of milk taking samples of suspected butter, does not require the preservation of a portion before analysis, as does the statute in regard to the sale of adulterated milk. *Com. v. Ryberg*, 177 Mass. 67.

**Seizure by Dairy Commissioner.** — Under *Laws Wash.* 1899, p. 56, providing in section 28 that the dairy commissioner may seize and take possession of any article the sale of which is prohibited by that act, and in section 30 that no one shall manufacture or offer for sale process butter, unless the same is plainly marked "Renovated Butter," under penalty of fine or imprisonment, or both fine and imprisonment, the dairy commissioner is authorized to seize such process butter when kept for sale in violation of law, since by a construction of the two sections together the commissioner is fully clothed with such power, although the penalty by fine and imprisonment is imposed. *Hathaway v. McDonald*, 27 Wash. 659.

**Inspection — Brands and Marks.** — The subjects of section 5 of the Act of May 9, 1902, c. 784, 32 Stat. 196, are clearly "process or renovated butter," and the marking and branding thereof, prior to transportation. It is equally clear that the purposes of the section are to provide for the sanitary inspection of such butter at the place of manufacture, and to take every precaution in order that none shall be shipped from the factory which can in any way be injurious to the health of the consumer. All rules and regulations adopted by the secretary of agriculture which are calculated to

**741. Milk.** — See note 1.

**742. Skimmed Milk.** — See note 1.

**Action for Penalty.** — See note 2.

**Sampling Milk.** — See note 3.

carry such subjects and purposes into full effect have all the force of the statute itself. But a regulation forbidding the obliteration of a brand does not tend to aid in enforcement of the act and will not support an information for obliterating a brand. *U. S. v. Bohl*, 125 Fed. Rep. 625.

**Tax on Manufacturers.** — A federal statute providing for the taxation of persons engaged in the manufacture or sale of oleomargarine does not authorize such manufacture or sale in a state in which either is lawfully forbidden. *People v. Meyer*, 89 N. Y. App. Div. 185.

**741. 1. Milk Below a Certain Standard Deemed Adulterated.** — The *Rhode Island* statute provides that if milk be shown on analysis to contain more than eighty-eight per centum of watery fluids, or to contain less than twelve per centum of milk solids, or less than two and one-half per centum of milk fats, it shall be deemed to be adulterated. It is enough for the purpose of the prosecution if the milk complained of fails to meet the requirement of the statute in either of the three particulars specified. *State v. Luther*, 20 R. I. 472.

**The Question Whether the Standard of Milk** described by a statute is reasonable or not is not open to inquiry on the trial. *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559.

**Kind of Foreign Matter Used in Adulterating Immaterial.** — *State v. Schlenker*, 112 Iowa 642, 84 Am. St. Rep. 360.

**City Ordinances.** — An ordinance providing for an examination of milk and the establishment where it is produced and the cows producing it, and prohibiting the sale of impure milk, is constitutional. *Walton v. Toledo*, 23 Ohio Cir. Dec. 547; *Norfolk v. Flynn*, 101 Va. 473, 99 Am. St. Rep. 918.

**Experts.** — A physician who is also a chemist was held to be qualified as an expert to testify on the effect of formaldehyde on milk as a substance of food, though his knowledge had been gained from reading and conversation and not from experiments. *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228.

**Constitutionality of Statutes.** — A statute prohibiting the sale of adulterated milk is within the police power of the state, though there is no fraud or deceit in the sale, and the adulteration is harmless. *State v. Schlenker*, 112 Iowa 642, 84 Am. St. Rep. 360.

*Gen. Stat. Minn.* (1894), § 7002, which prohibits the sale of cream that contains less than twenty per centum of fat, is a valid exercise of the police power and is constitutional. *State v. Crescent Creamery Co.*, 83 Minn. 284, 85 Am. St. Rep. 464.

The *New York* statute (*Laws* 1893, c. 338, as amended by *Laws* 1900, c. 101) providing a penalty for exposing for sale adulterated cream is constitutional. *People v. Hills*, 64 N. Y. App. Div. 584; *People v. Laesser*, 79 N. Y. App. Div. 384.

**742. 1. Regulations as to Skimmed Milk.** —

It is not an indictable offense under the Act of June 26, 1895, P. L. 317, entitled "An Act to provide against the adulteration of foods," etc., to sell, as "skimmed milk," milk from which the cream or butter fat has been taken by the centrifugal or "separator" process. *Com. v. Hufnal*, 185 Pa. St. 376.

**2. Sufficiency of Evidence.** — In an action for a penalty for selling adulterated cream, evidence that the number on the milk wagon corresponded with the defendant's license number, and that the cream was seized while the wagon was being driven through the streets of a city by a person admitted to be in his employ, was held sufficient to warrant a conviction, though there was no evidence of a direct sale. *People v. Hills*, 64 N. Y. App. Div. 584.

**3. Manner of Taking Sample.** — The analysis of a sample of milk taken from only part of the product delivered by the producer at any one time to a single purchaser will not afford a basis for an action for a penalty. *People v. Wiard*, 61 N. Y. App. Div. 612, affirmed 170 N. Y. 590; *People v. Gilmor*, 73 N. Y. App. Div. 483.

The provision of the statute requiring the taking of a sample of the "mixed milk of the herd of cows" from which the milk claimed to be adulterated was drawn applies only to the producer and not to a mere peddler. *People v. Laesser*, 79 N. Y. App. Div. 384.

The question of the fairness of the sample is ordinarily for the jury, but not where there is a total lack of evidence tending to impeach the fairness of the sample. *People v. Laesser*, 79 N. Y. App. Div. 384.

**Manner of Taking Analysis.** — "The object of the analysis is to show the amount of milk solids or of fat, and if a defendant in any case is furnished with those he is furnished, we think, with the analysis required by the statute to be sent to him." *Com. v. McCance*, 176 Mass. 292.

The Act of Congress of Feb. 17, 1898, impliedly repealed the Act of March 2, 1895, so as to make it no longer necessary to make the analysis in the presence of two witnesses; but the party having the milk or other articles of food for sale is required upon application to furnish a sample thereof to an officer of the health department for analysis, and the party analyzing the article is required to reserve a portion of the same, sealed, for thirty days, which in case of complaint shall be delivered to the defendant or his attorney. *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559.

In the proceeding to recover a penalty for the violation of placitum 36 of the Act to Prevent the Adulteration of Milk (*Gen. Stat.*, p. 1170), it is not necessary to show the particular manner in which the analysis was conducted. All that it was necessary to allege or to prove was that the milk contained more than eighty-eight per centum of watery fluids, or less than twelve per centum of milk solids, *Vandegrift v. Meihie*, 66 N. J. L. 92,

**743. Other Articles.** — See note I.

**Test by Lactometer.** — See *Com. v. Darling-ton*, 9 Pa. Dist. 700.

**Certificate of Analysis, When Admissible in Evidence.** — In a prosecution under the Sale of Food and Drugs Act, 1875, for selling adulterated milk to a purchaser, the only evidence of adulteration was the certificate of the public analyst, which stated that the sample submitted to him "contained the percentage of foreign ingredients as under:—five per cent. of added water," it was held that the certificate was bad as evidence, under the act, of adulteration, because it did not state the constituent parts of the sample analyzed. *Fortune v. Hanson*, (1896) 1 Q. B. 202.

In a prosecution under the Sale of Food and Drugs Act, 1875, for selling adulterated milk, the certificate of the public analyst stated that the sample submitted to him contained six per cent. of added water, and went on to say: "This opinion is based on the fact that the sample contained 7.97 per cent. solids not fat, whereas genuine milk contains not less than 8.5 per cent. solids not fat." It was held that the certificate was good, although it did not state the constituent parts of the sample analyzed. *Bridge v. Howard*, (1897) 1 Q. B. 80.

**Sufficiency of Certificate.** — The insertion in the certificate given by a public analyst under the Sale of Food and Drugs Act, 1875, of the weight of the sample analyzed, is obligatory only where the weight of the sample is material to the accuracy of the analysis, and its omission does not necessarily invalidate the certificate where the accuracy of the analysis does not in any way depend upon the weight of the sample. *Sneth v. Taylor*, (1901) 2 K. B. 376.

**Certificate of Analysis Not Conclusive.** — At the hearing of an information under the Sale of Food and Drugs Act, 1875, the production of the certificate of the analyst is not conclusive evidence if the defendant tenders himself as a witness and gives evidence on his own behalf. *Hewitt v. Taylor*, (1896) 1 Q. B. 287.

**743. 1. Michigan Statute.—Right of Defendant to Sample.** — One charged with the sale of vinegar not in compliance with the statutory standard is not entitled to have a sample of the vinegar left with him by the prosecution, nor can he complain, upon conviction, that he was deprived of his property without due process of law because he was unable to obtain a sample for analysis, where he was not prevented from doing so by any person interested in the prosecution of the suit. *People v. Worden Grocer Co.*, 118 Mich. 604.

**Coloring Matter.** — The provision of the statute prohibiting coloring an article, whereby damage or inferiority is concealed, has no application where the coloring matter employed in the manufacture of a lemon extract was not injurious to public health and the difference from the standard article in other respects consisted only in the elimination of nonessential ingredients. *People v. Jennings*, 132 Mich. 662.

**Use of Harmless Coloring Matter No Defense.** — The use of coal-tar dye, though harmless, to make vanilla extract appear of a better quality than it is, is within the *Michigan* statute prohibiting adulteration by coloring to conceal in-

feriority of an article. *People v. Hinshaw*, (Mich. 1904) 97 N. W. Rep. 758.

**Substitution of Inferior Substance.** — The provision of the *Michigan* statute that an article is adulterated "if any inferior or cheaper substance or substances have been substituted wholly or in part for it" should be construed in connection with the following provision: "if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it;" and therefore means the substitution of a cheaper or inferior substance for an essential ingredient. *People v. Jennings*, 132 Mich. 662.

**New York Statute.—Adulterated Lemonade.** — Where the defendant sold a preparation known as "Eiffel Tower Lemonade," which it appeared was manufactured of sugar, tartaric acid, citric acid, and five per cent. oil of lemon, it was held that a conviction would properly lie under section 41 of the New York Public Health Law. *People v. Park*, 60 N. Y. App. Div. 255.

**The Prohibition Against the Sale of Dairy Products Containing a Preservative in the New York Agricultural Law is unconstitutional.** *People v. Biesecker*, 169 N. Y. 53, 88 Am. St. Rep. 534, affirming 58 N. Y. App. Div. 391.

**Vinegar.** — In *People v. Henry J. Heinz Co.*, 90 N. Y. App. Div. 408, the court said that the object of the statute, namely, to prevent adulteration and injury to health, is not defeated, or in any way hindered, by the treatment of the apple juice in the course of manufacture by the introduction of pure water for the purpose of reducing the product to the proper degree of acidity. "So long as the product complied with the standard of unadulterated products, all its ingredients being pure and in no way deleterious, it ought not to be declared impure or adulterated. The construction to be given to the word 'pure,' as used in section 50 of this statute, should be 'free from mixture or contact with that which is deleterious, impairs, vitiates, or pollutes.' Within this definition no violation of the statute has been shown."

**Tagging Carcasses of Calves.** — A statute making it unlawful "to ship to or from any part of this state" any carcass of a calf unless there is attached thereto a tag stating certain facts is not violative of the interstate commerce provisions of the Federal Constitution, nor does it conflict with the New York constitution as an unreasonable interference with private rights and property. *People v. Bishopp*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 12.

**Ohio Statute.—Fraud on Purchaser.** — To offer for sale as an article of food and as liquid coffee, a mixture of liquid coffee and chicory, is an offense under the statute, whether the compound be deleterious or not. It is a fraud on the purchaser. *State v. Dreher*, 55 Ohio St. 115.

**Whether or Not an Analysis of the Adulterated Food should be made is discretionary with the trial judge.** *Breckenridge v. State*, 4 Ohio Dec. 389.

**Pennsylvania Statute.—Nature of Foreign Substance Added.** — The Act of June 26, 1895, P. L. 317, entitled "An Act to provide against the adulteration of food and providing for the enforcement thereof," as properly construed,

**744.** Intent. — See notes 1, 2, 3.

**745.** Master's Liability for Act of Servant. — See note 1.

prohibits the addition to a food product of any foreign substance poisonous or injurious to health, regardless of the quantity used, or whether or not the quantity of the substance used was sufficient to make the adulterated article poisonous or injurious to health. It is not the quantity but the nature of the substance added which the act prohibits. *Com. v. Kevin*, 202 Pa. St. 23, 90 Am. St. Rep. 613.

**Texas Statute — Diseased Meat.** — The mere fact that an animal's leg was broken and swollen when killed does not warrant a conviction for the sale of diseased meat under the Texas statute. *Marxen v. State*, 44 Tex. Crim. 41.

**744. 1. Guilty Intent Not Necessary — Milk.** — *U. S. v. Southern R. Co.*, 135 Fed. Rep. 122 citing *obiter* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744; *Reg. v. McIntosh*, 33 Can. L. J. 246; *Spiers v. Bennett*, (1896) 2 Q. B. 65; *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559; *State v. Schlenker*, 112 Iowa 642, 84 Am. St. Rep. 360; *Vandegrift v. Meihle*, 66 N. J. L. 92; *People v. Laesser*, 79 N. Y. App. Div. 384.

**Oleomargarine.** — *State v. Rogers*, 95 Me. 94, 85 Am. St. Rep. 395; *State v. Ryan*, 70 N. H. 196, 85 Am. St. Rep. 629; *People v. Meyer*, 44 N. Y. App. Div. 1; *People v. Hillman*, 58 N. Y. App. Div. 571, holding an intent to imitate natural butter not necessary if the article made is like natural butter; *State v. Rippeth*, 71 Ohio St. 85.

*Com. v. Seiler*, 20 Pa. Super. Ct. 260, holding that a dealer in butter who has bought renovated butter as and for creamery butter, believing it to be creamery butter, and sells it as such in good faith, is liable under the Act of July 10, 1901, for not having taken out a license. In such a case the intention of the violators of the law is immaterial.

**Beer.** — Beer, with which a quantity of arsenic injurious to health had been mixed in the process of manufacture, and which is sold by the retailer without knowledge or reasonable grounds for suspicion of the presence of arsenic, is not beer of the quality required by the act, and the retailer may be convicted under section 6 thereof. *Goulder v. Rook*, (1901) 2 K. B. 290.

**Butter.** — *Pearks v. Knight*, (1901) 2 K. B. 825.

**Molasses.** — *State v. Kelly*, 54 Ohio St. 166.

**Mustard.** — *People v. Snowberger*, 113 Mich. 87, 67 Am. St. Rep. 449.

**Vinegar.** — *People v. Worden Grocer Co.*, 118 Mich. 604.

**Wine.** — *Myer v. State*, 6 Ohio Cir. Dec. 477.

**Statute Requiring Knowledge.** — *State v. Nusenholtz*, 76 Conn. 92.

**When Knowledge Presumed.** — *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228.

**Evidence of Good Character** of defendant inadmissible where habitual sales of imitation butter were admitted. *Com. v. Kolb*, 13 Pa. Super. Ct. 347.

**An Agent** who, in good faith, takes an order for pure goods, is not guilty of a violation of the pure-food law, if his principal fills the order with adulterated goods. *People v. Skillman*, 129 Mich. 618; *People v. Morse*, 131 Mich. 68.

Where a milk salesman contracted to deliver pure milk to an association at a railway terminus, and delivered the milk in a pure and unadulterated condition to the railway company at a local station, and the milk was adulterated without his knowledge or consent during the transit from the local station to the terminus, it was held that the salesman was nevertheless guilty under section 6 of the Sale of Food and Drugs Act, 1875. *Parker v. Alder*, (1899) 1 Q. B. 20.

**Defense — Written Warranty.** — In a prosecution under the Sale of Food and Drugs Act, 1875, for adulterating milk, where the defendant relies on section 25 as a defense, it is sufficient if, in order to prove that he bought the milk in question with a written warranty, he proves that he had contracted with dairymen to supply him with milk daily; that they gave him a written warranty with respect to all milk which they should so supply, and that the milk in question was sold and supplied to him under that contract and warranty. He need not prove a specific written warranty with respect to each delivery, nor need there be evidence in writing to connect the milk in question with the warranty on which he relies. *Elliot v. Pilcher*, (1901) 2 K. B. 817, *distinguishing* *Robertson v. Harris*, (1900) 2 Q. B. 117.

**2. Intent to Sell.** — The mere fact that adulterated milk is found in cans upon one of defendant's wagons on the public street, and that his driver stated that they were for delivery, is not sufficient to show a sale or exposure for sale within the meaning of the statute. *People v. Wright*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 135; *People v. Kellina*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 134; *People v. McDermott-Bunger Dairy Co.*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 365. *Compare* *People v. Koch*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 634.

The intent to sell adulterated milk or to have it for sale is an essential element of the offense, and mere possession alone apart from any such intent or purpose is not inhibited. *People v. Timmerman*, 79 N. Y. App. Div. 565, *affirmed* 179 N. Y. 550.

**Sale in Restaurant.** — The keeper or proprietor of a restaurant who keeps, uses, and serves for food to his guests, customers, and patrons, and for cooking, an article known as oleomargarine, made in imitation or semblance of butter produced from unadulterated milk or cream, subjects himself to the penalty imposed therefor by the Agricultural Law (L. 1893, c. 338, §§ 26, 27, 28) and it need not be alleged or proved by the plaintiff that the article in question was kept, used, or served as "butter" by said keeper or proprietor. *People v. Berwind*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 315.

**3.** See *Com. v. Davison*, 11 Pa. Super. Ct. 130, holding that the fact that the article sold was in imitation of butter is an essential element to a conviction under the *Pennsylvania* statute.

**745. 1. Master's Responsibility for Act of Servant.** — *Meyer v. State*, 54 Ohio St. 242; *Com. v. Kolb*, 13 Pa. Super. Ct. 347.



# ADULTERY (AS A CRIME).

BY ROLLO N. CHAFFEE.

**747. I. BY THE COMMON LAW — 1. Definition — Reason of Rule. —** See note 2.

**2. Not Indictable. —** See note 3.

**II. BY THE CANON LAW — 1. Definition. —** See note 6.

**2. An Ecclesiastical Offense. —** See note 8.

**III. UNDER STATUTES MAKING ADULTERY A CRIME — 1. In General.**

— See note 10.

**748. 2. What Constitutes — a. UNDER STATUTES NOT DEFINING THE OFFENSE — (1) The Common-law Definition Adopted. —** See note 3.

**(2) The Canon-law Definition Adopted. —** See notes 4, 5.

**749. See note 1.**

**750. (3) Points of Agreement Between the Two Definitions — (a) One of the Parties Must Be Married. —** Intercourse Between Unmarried and Divorced Persons. — See note 2.

**b. UNDER STATUTES DEFINING THE OFFENSE. —** See note 6.

**3. The Carnal Knowledge. —** See note 7.

**751. 4. The Criminal Intent — d. MISTAKE OR IGNORANCE OF FACT — Marriage Not Known to Be Bigamous. —** See note 3.

**752. Illicit Intercourse in Ignorance of Marriage. —** See note 2.

**5. Consent of the Woman Not Essential. —** See note 3.

**IV. LIVING IN ADULTERY. —** See notes 5, 6.

**747. 2. See State v. Hasty, 121 Iowa 507.**

**3. Ex p. Richards, 53 W. Va. 555.**

**6. See State v. Hasty, 121 Iowa 507.**

**8. See Ex p. Richards, 53 W. Va. 555.**

**10. In California, adultery, without open and notorious cohabitation, is not made a crime by statute. Ex p. Thomas, 103 Cal. 497.**

**Conspiracy to Commit Adultery. —** A combination to commit the unlawful act, not an agreement between the immediate parties to the intended crime, may constitute a conspiracy. *State v. Clemenson, 123 Iowa 524.*

**748. 3. Names v. State, 20 Ind. App. 168.**

**4. Adultery and Fornication. —** If one of the parties to the criminal act is married and the other single, each is guilty of adultery and fornication under Pen. Code Ga., § 381. *Kendrick v. State, 100 Ga. 360.*

**5. Lyman v. People, 198 Ill. 544 (following Miner v. People, 58 Ill. 59, cited in the original note); State v. Hasty, 121 Iowa 507.**

**749. 1. Kendrick v. State, 100 Ga. 360.**

**750. 2. Fraudulent Divorce. —** *State v. Keller, 8 Idaho 699, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 750. See also State v. Watson, 20 R. I. 354, 78 Am. St. Rep. 871.*

**6. Matter of Smith, 2 Okla. 153.**

Under Code Iowa, § 4008, the crime of adultery may be committed where only one of the parties is married, and in such case both are declared to be guilty of the offense. *State v. Oden, 100 Iowa 22; State v. Hasty, 121 Iowa 507.*

**7. People v. Payment, 109 Mich. 553.**

**751. 3. State v. Clemenson, 123 Iowa 524.**

**752. 2. Where Fornication Is Not a Crime** one accused of adultery cannot be convicted if he acted in ignorance of the fact that the woman was married. *State v. Clemenson, 123 Iowa 524.*

**3. State v. Clemenson, 123 Iowa 524. See also Mathews v. State, 101 Ga. 547.**

**5. State v. Byrum, 60 Neb. 384.**

If for a single day (or night) they live together in adultery, intending a continuance of the connection, the offense is complete. *Walker v. State, 104 Ala. 56; McAlpine v. State, 117 Ala. 93.*

An indictment for living in an open state of adultery on a certain day is sufficient without charging a continuance of the offense. *Lyman v. People, 198 Ill. 544.*

**6. See Wright v. State, 108 Ala. 60; Lawson v. State, 116 Ga. 571; Crane v. People, 168 Ill. 395; Sweeney v. State, 59 Neb. 269.**

**"Habitual Intercourse."** — The statute requires, where the parties do not live together, that the proof must show habitual intercourse, and not merely occasional acts. *Hilton v. State, 41 Tex. Crim. 190.*

**"Open and Notorious Adultery."** — *State v. Coffee, 75 Mo. App. 88.*

**"Living Together"** means that the parties dwell or reside together. *Burnett v. State, 44 Tex. Crim. 226. See also the title LEWD AND LASCIVIOUS COHABITATION AND CONDUCT.*

**A Servant Occupying a Room in the House of Her Master** and his family is not necessarily "living together" with such master. *Boswell v. State, (Tex. Crim. 1905) 85 S. W. Rep. 1076.*

**752. V. EVIDENCE — 2. Of the Carnal Act — a. CIRCUMSTANTIAL EVIDENCE.** — See note 8.

**753.** See notes 1, 2.

**Conduct, Situation, and Opportunity of the Parties.** — See note 3.

**b. CORROBORATIVE EVIDENCE.** — See note 7.

**Other Like Acts.** — See note 8.

**Before the Offense Charged.** — See note 9.

**754. Improper Familiarities.** — See note 1.

**Sexual Intercourse.** — See note 2.

**After the Offense Charged.** — See notes 4, 5.

**755. Must Be Connected with the Offense Charged.** — See note 1.

**c. THE TIME AND PLACE.** — See note 3.

**d. NAME OF PARTICIPE CRIMINIS.** — See notes 6, 7.

**756. 3. Of the Marriage — How Proved.** — See notes 6, 7, 8, 9, 10.

**752. 8.** *Gibson v. Gibson*, 18 App. Cas. (D. C.) 72; *Starke v. State*, 97 Ga. 193; *Crane v. People*, 168 Ill. 395; *Cooke v. Cooke*, 71 Ill. App. 663; *State v. Schaedler*, 116 Iowa 488; *U. S. v. Griego*, (N. Mex. 1902) 72 Pac. Rep. 20; *Stewart v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 979; *Henderson v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 707; *State v. Brink*, 68 Vt. 659, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752; *State v. Kimball*, 74 Vt. 223; *Monteith v. State*, 114 Wis. 165. See also the dissenting opinion of Adams, P. J., in *Billings v. Albright*, 66 N. Y. App. Div. 239.

**Delivery of Child by Woman.** — Evidence that a woman gave birth to a child twenty months after she had last seen or cohabited with her husband is admissible to show that she committed adultery with some one. *State v. Nelson*, (Wash. 1905) 81 Pac. Rep. 721.

**Neighborhood Rumor.** — See *Guinn v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 376.

**753. 1.** See *State v. Brink*, 68 Vt. 659, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752.

**2.** See *State v. Brink*, 68 Vt. 659, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752. But see *Arcenaux v. Arcenaux*, 106 La. 792, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752, 753.

**3.** *State v. Butts*, 107 Iowa 653; *State v. Brink*, 68 Vt. 659, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753.

**7.** See *Smith v. Com.*, 109 Ky. 685, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753; *Powell v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 504.

**8.** See *State v. Eggleston*, (Oregon 1904) 77 Pac. Rep. 738. Compare *Goldie v. Goldie*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 389.

**9.** *Wright v. State*, 108 Ala. 60; *State v. De Masters*, 15 S. Dak. 580, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753.

**754. 1.** *Campbell v. State*, 133 Ala. 158; *Crane v. People*, 168 Ill. 395; *State v. Snover*, 65 N. J. L. 289; *U. S. v. Griego*, (N. Mex. 1902) 72 Pac. Rep. 20; *State v. Nelson*, (Wash. 1905) 81 Pac. Rep. 721; *Guinn v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 376; *Roller v. State*, 43 Tex. Crim. 433.

**Improper Familiarities Occurring Four or Five Years Previous to the Offense Charged** are too remote to be admissible. *French v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 4.

**2.** See *Roth v. Roth*, 90 N. Y. App. Div. 87; *State v. De Masters*, 15 S. Dak. 580, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754.

**4.** *State v. Butts*, 107 Iowa 653; *State v. More*, 115 Iowa 178; *Monteith v. State*, 114 Wis. 165.

**5.** *People v. Koller*, 142 Cal. 621, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754; *Crane v. People*, 168 Ill. 395; *State v. Hilberg*, 22 Utah 27, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754; *State v. Snowden*, 23 Utah 318.

**755. 1.** *State v. Crowley*, 13 Ala. 172.

**3.** *State v. Eggleston*, (Oregon 1904) 77 Pac. Rep. 738.

**6.** See *Lenert v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 563.

**7.** Where the indictment charged the defendant with adultery with Dollie Croffitt, and the evidence showed that he had committed adultery with Dollie Crawford, an instruction that the defendant was not guilty if the woman's name was Crawford was held proper. *Henderson v. State*, 105 Ala. 139.

**756. 6.** The defendant's letter to the complainant, in which he addressed her as "wife," is admissible to prove the marriage. *People v. Imes*, 110 Mich. 250.

In cases of adultery the fact of marriage may be proved by general reputation and the declarations of the parties. *State v. Still*, 68 S. Car. 37, 102 Am. St. Rep. 657.

**7.** *Lyman v. People*, 198 Ill. 544; *People v. Imes*, 110 Mich. 250; *State v. Eggleston*, (Oregon 1904) 77 Pac. Rep. 738; *State v. Nelson*, (Wash. 1905) 81 Pac. Rep. 721.

**8. The Spouse of Defendant's Paramour** is a competent witness where the paramour is not under indictment. *State v. Nelson*, (Wash. 1905) 81 Pac. Rep. 721.

**Divorced Wife of Defendant Competent Witness.** — *State v. Nelson*, (Wash. 1905) 81 Pac. Rep. 721.

**9.** *State v. McDonald*, 25 Mo. 176.

**An Extrajudicial Confession** by the defendant, of his marriage, will not alone support a conviction of adultery. *People v. Isham*, 109 Mich. 72.

**The Admissions of the Defendant** that he cohabited for four weeks with the woman claimed to be his wife are admissible to prove the marriage. *People v. Imes*, 110 Mich. 250.

**10. Certificate and Record of Marriage.** — Mead

**757.** 4. Sufficiency of Proof. — See note 1.

5. Evidence Admissible Against One Only of Two Joint Defendants. — See note 3.

**VI. PUNISHMENT — In General.** — See notes 4, 5.

**758. AD VALOREM.** — See note 7.

**ADVANCE — ADVANCES.** — See note 9.

*v. Randall*, 111 Mich. 268, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 756; *People v. Isham*, 109 Mich. 72; *State v. Isenhardt*, 32 Oregon 170.

A Foreign Certificate of marriage is inadmissible, being hearsay. *People v. Imes*, 110 Mich. 250.

**757.** 1. *State v. Wiltsey*, 103 Iowa 54; *State v. Chaney*, 110 Iowa 199; *Conway v. Conway*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 414; *State v. Scott*, 28 Oregon 331; *Kahn v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 989; *Bradshaw v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 713; *Manuel v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 30; *Collins v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 372.

For cases where the evidence was held insufficient, see *Aitchison v. Aitchison*, 99 Iowa 93.

3. In an action for adultery where evidence is admissible against only one of the two joint defendants the acquittal of one does not work the same result as to the other, or prevent the

court from rendering judgment. *State v. Simpson*, 133 N. Car. 676.

4. *State v. Clemenson*, 123 Iowa 524.

5. See *Massey v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 911.

Where the Statute Prescribes that the offense shall be punished by a fine, no imprisonment can be imposed. *Ex p. Richards*, 53 W. Va. 555.

**758. 7. Ad Valorem Tax.** — *Pingree v. Auditor Gen.*, 120 Mich. 95.

9. Distinguished from Advancements. — *Cowen v. Adams*, (C. C. A.) 78 Fed. Rep. 536.

**Loan and Advance.** — *Compare* Trust, etc., Co. *v. Verity*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 4.

**Same — Advance to an Agent.** — *Schlesinger v. Burland*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 208, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757.

**Lien upon Crops for Advances.** — *McCaslan v. Nance*, 46 S. Car. 568.

# ADVANCEMENTS.

By F. G. BAMMAN.

**760. I. DEFINITION.** — See note 1.

**761.** Distinguished from Gift, Debt, and Ademption. — See notes 1, 2.

**762. II. ORIGIN.** — See note 1.

**III. REQUISITES** — 1. **Must Be a Completed Transfer.** — See note 4.

2. **The Donor Must Die Intestate** — In General — Wills. — See notes 7, 8. Partial Intestacy. — See notes 10, 11.

**764. IV. OF WHAT ADVANCEMENT MAY CONSIST** — 1. **In General** — Statutory Regulation. — See note 5.

**765. 2. Real Property** — Voluntary Conveyance from Father to Child — Presumption. — See note 4.

**766. Presumption Rebuttable.** — See note 2.

Substantial Consideration — Presumption. — See notes 5, 6.

Remainder — Reversion, etc. — See note 9.

**767. 3. Personal Property** — Presents of Inconsiderable Value. — See note 2.

**760. 1. Advancement Defined.** — Matter of Lewis, 29 Ont. 609, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 760; Waldron v. Taylor, 52 W. Va. 284, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 760.

**Other Definitions.** — Garry v. Newton, 201 Ill. 170, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 760; Slaughter v. Slaughter, 21 Ind. App. 641; Matter of Pickenbrock, 102 Iowa 81; Bissell v. Bissell, 120 Iowa 127; Schweitzer v. Schweitzer, (Ky. 1904) 82 S. W. Rep. 625; Matter of Cramer, (Surrogate Ct.) 43 Misc. (N. Y.) 494; De Vault v. De Vault, (Tenn. Ch. 1898) 48 S. W. Rep. 361.

**Payment of a Debt** by a father to a daughter is not an advancement, and the mere designation of it as such cannot change the real facts of the transaction. Schweitzer v. Schweitzer, (Ky. 1904) 82 S. W. Rep. 625.

**761. 1.** Waldron v. Taylor, 52 W. Va. 284, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 761.

An advancement constitutes no consideration for a note subsequently executed where the note was intended as a receipt. Marsh v. Crown, 104 Iowa 556.

2. McCormick v. Hanks, 105 Iowa 639; Waldron v. Taylor, 52 W. Va. 284, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 761.

**762. 1. Provisions of Statute Similar to Certain Particular Customs.** — Williams's Estate, 62 Mo. App. 339.

**A Gift Cannot Be Presumed** when that character is not clearly given to the transaction. Matter of Robinson, (Surrogate Ct.) 45 Misc. (N. Y.) 551.

4. The conveyance of land to minor children at the request of their father, who bought and paid for the land, is an advancement. Rhea v. Bagley, 63 Ark. 374.

**Delivery of Personal Property Necessary.** — But it has been held that although a gift to be an advancement must be made in the lifetime of

the donor, yet it may take effect at his death or on a contingency within a time, and still constitute an advancement. Matter of Pickenbrock, 102 Iowa 81.

7. *In re Cummings*, 120 Iowa 421.

8. See Trammel v. Trammel, 148 Ind. 487.

**10. Ancestor Must Die Wholly Intestate.** — See Blanks v. Clark, 68 Ark. 98.

11. Messmann v. Egenberger, 46 N. Y. App. Div. 46, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 764; Kent v. Hopkins, 86 Hun (N. Y.) 611.

**764. 5. Question Depends on Statute.** — Williams's Estate, 62 Mo. App. 339.

**Statute Embracing Both Real and Personal Property.** — West v. Beck, 95 Iowa 520.

**765. 4. Conveyance from Father to Child** — Natural Love and Affection. — Howard v. Howard, 101 Ga. 224.

**766. 2. Presumption as to Advancement Rebuttable.** — Lisles v. Huffman, 88 Mo. App. 143.

5. **Substantial Consideration** — Presumption of a Purchase. — Kiger v. Terry, 119 N. Car. 456.

6. **Presumption of Purchase May Be Rebutted.** — Clark v. Hedden, 109 La. 147; Dobbins v. Humphreys, 171 Mo. 198.

But where a father transferred to himself as guardian of his children land which was worth more than the consideration expressed in the deed, parol evidence for the purpose of showing that the excess was intended by the father as an advancement was held inadmissible. Miller v. Miller, 105 Ga. 305.

**Parol Evidence Admissible to Rebut Presumption.** — Finch v. Garrett, 102 Iowa 381.

9. **Remainder or Reversion May Be Subject of Advancement.** — Cain v. Cain, 53 S. Car. 350, 69 Am. St. Rep. 863, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 766.

**767. 2. Small Presents Not Prima Facie Advancements.** — See Carmichael v. Lathrop, 112 Mich. 301.

- 767.** Question Dependent on Parent's Means and on Circumstances. — See note 5.  
Will Specifying What to Be Considered as Advancements. — See note 7.  
Money Expended for Child's Education, Maintenance, and Travels. — See note 8.
- 768.** Establishing Child in Business. — See note 2.  
Life Insurance Policy. — See note 5.  
Stock Purchased in Child's Name. — See note 7.

- 769.** Failure of Father to Collect of Son Rent of Land Leased. — See note 3.

**V. BETWEEN WHOM ADVANCEMENTS MAY BE MADE — 1. General Principles** — Presumption. — See note 4.

- 771.** Indebtedness of Parent to Child. — See note 3.  
**2. Parent and Child** — Presumption in Favor of Advancement. — See notes 4, 6.  
This Presumption May Be Rebutted. — See note 7.
- 772.** What Not Sufficient to Overcome the Presumption. — See note 1.
- 773.** Dealings Between Mother and Child. — See note 2.  
**3. Husband and Wife.** — See note 4.  
**4. Parent-in-law and Son-in-law — Personalty.** — See note 9.
- 774.** Realty. — See notes 1, 2.  
Time of Transaction — Consent of Wife. — See note 4.

**767.** 5. *Culp v. Price*, 107 Iowa 133. See also *McDonald v. McDonald*, 86 Mo. App. 122.

7. *Elliott's Estate*, 5 Pa. Dist. 226, 17 Pa. Co. Ct. 515. See also *Callender v. Woodward*, (Tenn. Ch. 1899) 52 S. W. Rep. 756.

8. *Education of Child.* — *King v. King*, 107 La. 437.

**General and Professional Education.** — If by any distinct expression of intent it is apparent that money expended by a father for his son's professional education was to be regarded as an advancement, the court will give effect to such intention. *Garrett v. Colvin*, 77 Miss. 408, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 767.

**768.** 2. *Setting Child Up in Business or Profession.* — *St. Louis Trust Co. v. Rudolph*, 136 Mo. 169, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 768.

5. *Life Insurance Policy May Constitute Advancement.* — But see *Vinson v. Vinson*, 105 La. 30.

7. *Payment of Debts.* — *West v. Beck*, 95 Iowa 520; *Matter of Pickenbrock*, 102 Iowa 81.

**769.** 3. *Hamilton v. Moore*, 70 S. W. Rep. 402, 24 Ky. L. Rep. 982; *King v. King*, 107 La. 437.

4. *General Rule When Title to Property Purchased Is Taken in Name of Another.* — *Euans v. Curtis*, 190 Ill. 199, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 769. See *Kern v. Howell*, 180 Pa. St. 315, 57 Am. St. Rep. 641.

**Burden of Proof.** — *Ellis v. Newell*, 120 Iowa 71.

**771.** 3. *Brooks v. Summers*, 100 Ky. 620, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 771; *Schweitzer v. Schweitzer*, (Ky. 1904) 82 S. W. Rep. 625.

4. *Transfer of Property from Father to Child — Presumption in Favor of Advancement.* — *Goodwin v. Farnell*, 69 Ark. 629; *Finch v. Garrett*, 102 Iowa 381; *McDonald v. McDonald*, 86 Mo. App. 122; *Heft's Case*, 9 Kulp (Pa.) 339. But see *Kirchner v. Lenz*, 114 Iowa 527.

*Transfer in Consideration of Release of All Interest in Parent's Estate.* — *Matter of Lewis*, 29 Ont. 609, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 771.

*The Use and Enjoyment of Land by the Owner's Child* must be accounted for as an advancement. *Boblett v. Barlow*, (Ky. 1904) 83 S. W. Rep. 145.

6. *Long v. King*, 117 Ala. 423; *Ellis v. Newell*, 120 Iowa 71.

7. *Evidence of Contrary Intention.* — *Faylor v. Faylor*, 136 Cal. 92; *Culp v. Price*, 107 Iowa 133; *Grumley v. Grumley*, 63 N. J. Eq. 568; *Elrod v. Cochran*, 59 S. Car. 467; *Williams v. Emberson*, 22 Tex. Civ. App. 522, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 771.

**772.** 1. *Parent Remaining in Possession Receiving the Rents.* — A father's estate was held liable to his son's guardian for rents collected by the father on property which he had advanced to his sons. *Rhea v. Bagley*, 63 Ark. 374.

**773.** 2. *Mother and Child.* — *Euans v. Curtis*, 190 Ill. 199, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 773; *Murphy v. Murphy*, 95 Iowa 271. See also *Elrod v. Cochran*, 59 S. Car. 467.

4. *Wife Receiving Property from Husband.* — *Lewis v. McGrath*, 191 Ill. 401. See *Bailey v. Dobbins*, (Neb. 1903) 93 N. W. Rep. 687.

**Strength of Presumption.** — The presumption is overcome by evidence of the husband's control and improvement and the admissions of the wife that the land was held in trust for her husband. *Hagan v. Powers*, 103 Iowa 593.

9. *Gift of Personalty to Son-in-law, Prima Facie Advancement to Daughter.* — *Frye v. Avritt*, 68 S. W. Rep. 420, 24 Ky. L. Rep. 183.

**Where the Release of the Husband from Jail** was secured with money given for that purpose by his father-in-law, it was held to be *prima facie* not an advancement to the daughter though done at her request. *Booth v. Foster*, 111 Ala. 312, 56 Am. St. Rep. 52.

**774.** 1. *Gifts of Realty — Authorities Not Agreed.* — See *Rogers v. Rogers*, 52 S. Car. 388.

2. See *Carpenter v. Coats*, 183 Mo. 52; *Callender v. Woodward*, (Tenn. Ch. 1899) 52 S. W. Rep. 756.

4. *Boyer v. Boyer*, 7 Ohio Dec. 525, 7 Ohio N. P. 153.

**774.** 5. Grandparent and Grandchild — The Term "Child" in the Statutes Generally Held to Include "Grandchild." — See note 7.

**775.** Advancements Made to the Parent. — See note 3.

Presumption. — See note 4.

6. Other Relations. — See notes 5, 7, 8.

**VI. HOW ADVANCEMENTS MAY BE DETERMINED — 1. A Question of Intention** — See note 9.

Time of the Intention. — See note 11.

Transfer Must Be Voluntary. — See note 13.

**776.** 2. How Intention May Be Shown — Preponderance of Evidence. — See note 1.

Parol Evidence. — See notes 2, 3.

Circumstances — Declarations. — See note 4.

**777.** Subsequent Declarations. — See notes 1, 2, 3.

Contemporaneous Memoranda and Charges. — See note 4.

3. Intention as Determined by Will. — See note 7.

**778.** When Will Directs Gifts to Be Considered Advancements. — See note 1.

**774.** 7. Williams's Estate, 62 Mo. App. 339, 1 Mo. App. Rep. 516.

**775.** 3. Grandchildren Taking Per Stirpes — Advancements to Their Parents. — Matter of Lewis, 29 Ont. 609; Williams's Estate, 62 Mo. App. 339, 1 Mo. App. Rep. 516.

4. See Boone v. Thornsby, (Ky. 1899) 51 S. W. Rep. 563.

5. Uncle and Niece. — See Matter of Cramer, (Surrogate Ct.) 43 Misc. (N. Y.) 494, wherein a transaction between uncle and niece was held not to constitute an advancement.

7. A Brother to whom the deceased gave property during his lifetime is not a "descendant" within the meaning of the *West Virginia* statute controlling the question of advancements. Waldron v. Taylor, 52 W. Va. 284, wherein Brannon, J., in a dissenting opinion, quotes 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 775.

8. Father-in-law and Daughter-in-law. — But it was held that where a father transferred part of his farm to his daughter-in-law, intending it as his son's distributive share in his estate, and the son acquiesced in such disposition, this constituted an advancement to the son. Palmer v. Culbertson, 143 N. Y. 213.

9. Intention. — Moore v. Moore, 1 N. Bruns. Eq. Rep. 204. Comp. Schweitzer v. Schweitzer, (Ky. 1904) 82 S. W. Rep. 625.

11. Bissell v. Bissell, 120 Iowa 127.

13. To Constitute an Advancement the Transfer Must Be Voluntary. — Bissell v. Bissell, 120 Iowa 127.

**776.** 1. The Intention Will Not Be Presumed. — Moore v. Moore, 1 N. Bruns. Eq. Rep. 204.

2. Parol. — Faylor v. Faylor, 136 Cal. 92; Justis v. Justis, (Md. 1904) 57 Atl. Rep. 23; Palmer v. Culbertson, 143 N. Y. 213.

3. Statute Requiring Writing. — Bartmess v. Fuller, 170 Ill. 193; Gary v. Newton, 201 Ill. 170; Young v. Young, 204 Ill. 430; Jones v. Dawson, 68 Ill. App. 70; Boden v. Mier, (Neb. 1904) 98 N. W. Rep. 701; Pomeroy v. Pomeroy, 93 Wis. 262; Schmidt v. Schmidt, (Wis. 1904) 101 N. W. Rep. 678.

The *Illinois* statute provides that "no gift or grant shall be deemed to have been made in advancement unless so expressed in writing or charged in writing, by the intestate, as an advancement, or acknowledged in writing by the

child or other descendant." Under this statute it is held that any advancement which is not evidenced in the manner required by the statute is in legal effect no advancement at all, however clear it may appear that it was so intended. Marshall v. Coleman, 187 Ill. 556.

The *Nebraska* statute requires that advancements be expressed in the gift or grant to be made as such, or, that they be charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant. Lodge v. Fitch, (Neb. 1904) 101 N. W. Rep. 338.

4. Lisles v. Huffman, 88 Mo. App. 143.

In the absence of special circumstances showing consideration or moral obligation for remittances from a mother to her son, it was held that the money should be considered advancements even against the intention of the mother. Heyward v. Middleton, 65 S. Car. 493.

Acts and Circumstances may be proved to show that a conveyance was not intended to be an advancement. Brennaman v. Schell, 212 Ill. 356.

**777.** 1. General Rule as to Subsequent Declarations. — Howard v. Howard, 101 Ga. 224; Ellis v. Newell, 120 Iowa 71; Dare's Estate, 24 Pa. Co. Ct. 58; Garner v. Taylor, (Tenn. Ch. 1900) 58 S. W. Rep. 758.

2. When Subsequent Declarations Part of Res Gestæ. — Heady v. Brown, 151 Ind. 75; West v. Beck, 95 Iowa 520; Bailey v. Barclay, 109 Ky. 636, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 776.

But it has been held that though subsequent declarations of the father to a third person, to the effect that he had made advancements to a child, were not admissible, yet subsequent declarations were admissible to show that he had given the child nothing, since they were admissions against his interest. Waddell v. Waddell, 87 Mo. App. 216.

3. See Gunn v. Thruston, 130 Mo. 339; McDonald v. McDonald, 86 Mo. App. 122.

4. Contemporaneous Memoranda and Charges. — See Marshall v. Coleman, 187 Ill. 556; McDonald v. McDonald, 86 Mo. App. 122.

7. Cowen v. Adams, 78 Fed. Rep. 536, 47 U. S. App. 676, affirmed 174 U. S. 800.

**778.** 1. Direction in Will Controlling. — Matter of Tompkins, 132 Cal. 173; Matter of

**778.** No Reference in Will to Advancements Received. — See note 4.

4. Effect of Evidence of Indebtedness — *Prima Facie* Loan. — See notes 5, 6.

**779.** Declarations of the Donor. — See note 2.

A Statement Signed by the Donee. — See note 3.

Gifts Intended and Accepted as Advancements. — See note 4.

**780.** Release of All Claims Against Ancestor's Estate. — See note 1.

5. Entries in Books — Insufficient to Show an Advancement. — See note 2.

**VII. CHANGE OF GIFT TO ADVANCEMENT, AND VICE VERSA — Donor**

May Change Advancement to Gift Without Donee's Consent. — See note 8.

Changing Debts to Advancements. — See note 10.

**781.** See note 1.

Advancement Irrevocable Without Donee's Consent. — See note 2. <sup>1</sup>

**VIII. RIGHTS AND REMEDIES OF PARTIES TO ADVANCEMENTS — Release**

by Donee of Interest in Ancestor's Estate. — See notes 5, 6.

Donee Need Not Accept Advancement — Effect of Acceptance. — See note 7.

Grandchildren Account for Advancements to Their Parent. — See note 8.

**782.** A Purchaser of an Heir's Interest. — See note 1.

Transfer in Fraud of Creditors. — See notes 4, 5.

Moore, 61 N. J. Eq. 616; Miller v. Coudert, 73 N. Y. App. Div. 538; Keiser v. Keiser, 199 Pa. St. 77; M'Kibbin's Estate, 207 Pa. St. 1.

**778.** 4. Property Given as Advancement — No Reference Thereto in Will. — Vreeland v. Vreeland, 65 N. J. Eq. 668, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 778, affirmed (N. J. 1904) 59 Atl. Rep. 1118; Justis v. Justis, (Md. 1904) 57 Atl. Rep. 23; Dare's Estate, 24 Pa. Co. Ct. 58. See also Erwin v. Smith, 95 Ga. 699.

5. Sprague v. Moore, 130 Mich. 92, 8 Detroit Leg. N. 1139, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 778; Matter of Cramer, (Surrogate Ct.) 43 Misc. (N. Y.) 494; Woessner v. Wells, (Tex. Civ. App. 1894) 28 S. W. Rep. 247. See also Strickler's Estate, 182 Pa. St. 253.

6. Notes — *Prima Facie* Debt. — Lodge v. Fitch, (Neb. 1904) 101 N. W. Rep. 338; Medill v. Fitzgerald, 8 Ohio Cir. Dec. 129; Garner v. Taylor, (Tenn. Ch. 1900) 58 S. W. Rep. 758. See also Handy's Estate, 167 Pa. St. 552. But see M'Kibbin's Estate, 207 Pa. St. 1.

**779.** 2. Declarations of Donor to Third Party. — Dare's Estate, 24 Pa. Co. Ct. 58.

3. Statement Signed by Donee that Property Is Advancement. — Vreeland v. Vreeland, 65 N. J. Eq. 668.

4. Palmer v. Culbertson, 143 N. Y. 213.

**780.** 1. Cass v. Brown, 68 N. H. 85.

The Release of His Whole Interest in the ancestor's estate does not prevent the transaction from constituting an advancement. Gary v. Newton, 201 Ill. 170.

2. Entries in Parent's Account Books. — Jones v. Dawson, 68 Ill. App. 70; Dare's Estate, 24 Pa. Co. Ct. 58. See also Young v. Young, 204 Ill. 430; Dobbins v. Humphreys, 171 Mo. 198.

8. Changing Advancement to Gift. — M'Kibbin's Estate, 207 Pa. St. 1. See also Leggett v. Davison, 131 Mich. 77, 9 Detroit Leg. N. 233.

10. Matter of Tompkins, 132 Cal. 173; Baker v. Safe Deposit, etc., Co., 93 Md. 368; Rohrer's Estate, 17 Lanc. L. Rev. 393.

**781.** 1. Lodge v. Fitch, (Neb. 1904) 101 N. W. Rep. 338; Dare's Estate, 24 Pa. Co. Ct.

58; Garner v. Taylor, (Tenn. Ch. 1900) 58 S. W. Rep. 758.

Money Given as Advancement Cannot Be Made a Debt. — Boblett v. Barlow, (Ky. 1904) 83 S. W. Rep. 145.

2. Advancement Not Revocable Without Donee's Consent. — But it was held that a daughter might prefer payment to having an advancement stand and that a note given by her to that end was not without consideration. See Banning v. Purinton, 105 Iowa 642.

5. Release — DeVault v. DeVault, (Tenn. Ch. 1898) 48 S. W. Rep. 361; Coffman v. Coffman, 41 W. Va. 8; Matter of Lewis, 29 Ont. 609. See also Morris v. Carlin, 18 Pa. Co. Ct. 281, 5 Pa. Dist. 714.

6. Where a note was indorsed to a granddaughter, "being the share of my estate that I intend her to have," it was held not to be a release of her interest in her grandfather's estate, since it did not appear that the ancestor had the same estate at his death as at the time the advancement was made. Binns v. Dazey, 147 Ind. 536, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 781.

7. Donee's Option to Accept Advancement. — The donee was permitted to return notes given as an advancement when it appeared she could not collect on them, and it was held a *pro tanto* satisfaction of the advancement. Nall v. Wright, (Ky. 1904) 80 S. W. Rep. 1120.

8. Frye v. Avritt, 68 S. W. Rep. 420, 24 Ky. L. Rep. 183; Miller v. Miller, 105 La. 257; Williams's Estate, 62 Mo. App. 339, 1 Mo. App. Rep. 516; Mickle's Estate, 4 Pa. Super. Ct. 550; Coffman v. Coffman, 41 W. Va. 8; Matter of Lewis, 29 Ont. 609. See also Lee v. Baird, 132 N. Car. 755.

**782.** 1. Purchaser of Heir's Interest Takes Subject to Advancements. — Finch v. Garrett, 102 Iowa 381.

4. When Transfer of Property in Fraud of Creditors. — Howard v. Duke, (Ky. 1898) 45 S. W. Rep. 69.

Fraud a Question of Fact. — See Banning v. Purinton, 105 Iowa 642.

5. See Comer v. Shehee, 129 Ala. 588, 87 Am. St. Rep. 78.

**783.** A Power to a Wife to Divide Property. — See note 3.

**IX. VALUE OF ADVANCEMENTS — 1. How Computed — General Rule.** — See note 6.

**784.** See note 1.

Value Fixed by Will. — See note 2.

Rents and Profits. — See notes 3, 4.

Property Destroyed or Made Valueless. — See note 6.

**785.** Life Insurance Policy. — See note 2.

2. Interest. — See notes 3, 5, 6.

**X. APPLICATION OF THE DOCTRINE OF ADVANCEMENTS — Intention — Agreement.** — See note 9.

**783.** 3. See *Taylor v. Jones*, 97 Ky. 201.

**6. Present Advancement — Value at Time Made.** — *Safe Deposit, etc., Co. v. Baker*, 91 Md. 297, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 783; *Matter of Lewis*, 29 Ont. 609, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 782 [783]. See also *Carmichael v. Lathrop*, 112 Mich. 301.

**Regulated by Statute.** — Where the statute provides that an advancement shall be taken at what it would "now" be worth, it was held to refer to the time of distribution and not to the time the advancement was made. *Finch v. Garrett*, 102 Iowa 381.

The value of advancements should be estimated at what they would be worth at the death of the decedent if in the condition in which they were at the time the advancement was made. *Eastwood v. Crane*, (Iowa 1904) 101 N. W. Rep. 481.

**784.** 1. **Advancement in Future — Valued at Time of Possession.** — *Safe Deposit, etc., Co. v. Baker*, 91 Md. 297, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 783; *Matter of Lewis*, 29 Ont. 609, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 784.

In *Cain v. Cain*, 53 S. Car. 350, it is laid down as a general rule that "an estate in remainder after a life estate may be valued at one-half of the fee-simple value of the whole."

**2. Will Fixing Value Controls.** — *In re Cummings*, 120 Iowa 421.

Where the will directs that the value recited in the deed of conveyance should be the value of an advancement, and in legal effect no consideration was therein expressed, it was held that a receipt naming its agreed value given by the donee at the time of the conveyance was to be considered in connection with the deed, and the will thereby determined the value. *Ballinger v. Connable*, 100 Iowa 600.

**3. Rents and Profits Not Chargeable.** — *Ladd v. Stephens*, 147 Mo. 319.

**4. Improvements Made by the Donee.** — *Eastwood v. Crane*, (Iowa 1904) 101 N. W. Rep. 481.

**6.** But where a will directed that slaves should be charged as advances and also contained a clause equalizing shares to distributees,

it was held that since the slaves were emancipated they were no longer property, and the expressed desire of the testator to divide his property equally would be thwarted if the children had to account for such slaves as advancements. *Ezell v. Head*, 99 Ga. 560.

**785.** 2. *Culberhouse v. Culberhouse*, 68 Ark. 405.

**3. Not Chargeable up to Donor's Death.** — *Baker v. Safe Deposit, etc., Co.*, 93 Md. 368; *Sprague v. Moore*, 130 Mich. 92, 8 Detroit Leg. N. 1130, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 785. See also *Comer v. Shehee*, 129 Ala. 588, 87 Am. St. Rep. 78. But see *Slaughter v. Slaughter*, 21 Ind. App. 641, wherein the writing evidencing the advancement provided that it should bear interest.

**Unless There Be a Clearly Manifest Intention,** advancements do not bear interest. *Stahl's Estate*, 25 Pa. Super. Ct. 402.

**5. Chargeable for Time Between Death of Donor and the Distribution.** — *Sprague v. Moore*, 130 Mich. 92, 8 Detroit Leg. N. 1130, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 785, note 5. Compare *In re Dallmeyer*, (1896) 1 Ch. 372.

Interest is chargeable "from the testator's death down to the time when the estate ought to have been, or should be deemed to have been, divided." *Re Hargreaves*, 86 L. T. N. S. 43.

Where the one who claimed that there had been an unequal distribution waited twenty-two years before seeking to have the advancements settled, it was held that interest should be charged from the donor's death only for a period equal to "the probable law's delay," which was considered two years in this case. *Wysong v. Rambo*, (Tenn. Ch. 1899) 56 S. W. Rep. 1053.

**Protection of a Life Interest** justifies trustees in charging interest on annuities advanced to the sons of a testator. *In re Finlayson*, 5 British Columbia 517.

**6.** *Hays v. Freshwater*, 47 W. Va. 217, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 785. See also *Rohrer's Estate*, 17 Lanc. L. Rev. 393.

**9.** *Vreeland v. Vreeland*, 65 N. J. Eq. 668, affirmed (N. J. 1904) 59 Atl. Rep. 1118.



# ADVERSE POSSESSION.

By G. W. WALSH.

**789. I. DEFINITION.** — See notes 1, 2.

## II. WHAT CONSTITUTES ADVERSE POSSESSION — 1. General Principles

— *a.* OUSTER — CLAIM OF TITLE. — See note 4.

**790. b. INTENT.** — See notes 1, 2.

**789. 1.** *Wright v. Stice*, 173 Ill. 571, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789; *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789; *Swope v. Ward*, 185 Mo. 316, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795; *Whitaker v. Thayer*, (Tex. Civ. App. 1905) 86 S. W. Rep. 364.

**2.** *Kapiolani Estate v. Cleghorn*, 14 Hawaii 346, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789; *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789; *Glover v. Sage*, 87 Minn. 526; *Swope v. Ward*, 185 Mo. 316, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795; *Wade v. Crouch*, 14 Okla. 593, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789.

**4. Must Be Ouster of True Owner and Claim of Right.** — *Owsley v. Owsley*, (Ky. 1903) 77 S. W. Rep. 397; *Nicolai v. Baltimore*, (Md. 1905) 60 Atl. Rep. 627; *Ivy v. Yancey*, 129 Mo. 501; *Swope v. Ward*, 185 Mo. 316, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795; *Hindley v. Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56; *Altschul v. O'Neill*, 35 Oregon 202; *Dignan v. Nelson*, 26 Utah 189, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789; *Blake v. Shriver*, 27 Wash. 593; *Port Townsend v. Lewis*, 34 Wash. 413; *Yesler v. Holmes*, (Wash. 1905) 80 Pac. Rep. 851. See also *Tyee Consol. Min. Co. v. Langstedt*, (C. C. A.) 136 Fed. Rep. 124.

**Possession Must Be Either under Claim of Right or Color of Title.** — *Atkinson v. Smith*, (Va. 1896) 24 S. E. Rep. 901.

**790. 1. Intention Controlling** — *United States*. — *Westenfelder v. Green*, 76 Fed. Rep. 925.

*Alabama*. — *Davis v. Caldwell*, 107 Ala. 526; *Stiff v. Cobb*, 126 Ala. 381, 85 Am. St. Rep. 38.

*Arkansas*. — *Wilson v. Hunter*, 59 Ark. 626, 43 Am. St. Rep. 63.

*Illinois*. — *Nickrans v. Wilk*, 161 Ill. 76.  
*Iowa*. — *Litchfield v. Sewell*, 97 Iowa 247; *Miller v. Mills County*, 111 Iowa 654; *Wilbur v. Cedar Rapids, etc., R. Co.*, 116 Iowa 65.

*Michigan*. — *Pugh v. Schindler*, 127 Mich. 196, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789 [790].

*Minnesota*. — *Carpenter v. Coles*, 75 Minn. 9; *Todd v. Weed*, 84 Minn. 4; *Collins v. Collieran*, 86 Minn. 199; *Maas v. Burdetzke*, (Minn. 1904) 101 N. W. Rep. 182.

*Missouri*. — *Kansas City Milling Co. v. Riley*, 133 Mo. 574; *Kansas City v. Scarritt*,

169 Mo. 471; *Swope v. Ward*, 185 Mo. 316, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795.

*Nebraska*. — *Cervena v. Thurston*, 59 Neb. 343; *Knight v. Denman*, 64 Neb. 814; *Beer v. Plant*, (Neb. 1901) 96 N. W. Rep. 348.

*New York*. — *Lewis v. New York, etc., R. Co.*, 162 N. Y. 202.

*Ohio*. — *McAllister v. Hartzell*, 60 Ohio St. 69.

*Tennessee*. — *Fuller v. Jackson*, (Tenn. Ch. 1901) 62 S. W. Rep. 274.

*Texas*. — *Whitaker v. Thayer*, (Tex. Civ. App. 1905) 86 S. W. Rep. 364.

*Virginia*. — *Brock v. Bear*, 100 Va. 562; *Haney v. Breeden*, 100 Va. 781.

*Washington*. — *Blake v. Shriver*, 27 Wash. 593.

*Wisconsin*. — *Ryan v. Schwartz*, 94 Wis. 403.

**Conduct and Admissions** of a person claiming title to land by adverse possession, occurring subsequent to the expiration of the statutory period of fifteen years, are competent evidence upon and as tending to explain and characterize the antecedent possession. *Todd v. Weed*, 84 Minn. 4. See also the title **ADMISSIONS**.

**2. Intention to Claim as Owner.** — *Littledale v. Liverpool College*, (1900) 1 Ch. 19, 81 L. T. N. S. 564; *Dowdell v. Orphans' Home Soc.*, (La. 1905) 38 So. Rep. 16; *Bond v. O'Gara*, 177 Mass. 139, 83 Am. St. Rep. 265; *McCabe v. Bruere*, 153 Mo. 1; *Swope v. Ward*, 185 Mo. 316, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795; *Beale v. Hite*, 35 Oregon 176. But see *McAllister v. Hartzell*, 60 Ohio St. 69.

**Occupation in Belief that Land Is Vacant.** — *Hunnell v. Burchett*, 152 Mo. 611; *Hartman v. Huntington*, 11 Tex. Civ. App. 130; *Leon & H. Blum Land Co. v. Rogers*, 11 Tex. Civ. App. 184; *Newton v. Alexander*, (Tex. Civ. App. 1897) 44 S. W. Rep. 416. But see *Maas v. Burdetzke*, (Minn. 1904) 101 N. W. Rep. 182; *Cartwright v. Pipes*, 9 Tex. Civ. App. 309; *Longley v. Warren*, 11 Tex. Civ. App. 269; *Price v. Eardley*, (Tex. Civ. App. 1903) 77 S. W. Rep. 416.

**Ignorance of Adverse Rights.** — *Cartwright v. Pipes*, 9 Tex. Civ. App. 309.

**Motive.** — *Knight v. Denman*, 64 Neb. 814.

**The Intention Must Be Manifest.** — *Haney v. Breeden*, 100 Va. 781.

**But It Need Not Be Expressed.** — *Brock v. Bear*, 100 Va. 562; *Haney v. Breeden*, 100 Va. 781.

**Evidence — Improvements.** — *Brock v. Bear*, 100 Va. 562.

**791.** Occupation by Mistake — Boundaries. — See notes 1, 2.

**792.** See note 1.

**793.** Agreement upon Line. — See note 1.

**794.** c. PERMISSIVE POSSESSION. — See note 1.

**791. 1. Mistake in Location — Alabama.** — Barrett v. Kelly, 131 Ala. 378.

*Arkansas.* — Wilson v. Hunter, 59 Ark. 626, 43 Am. St. Rep. 63; Broad v. Beatty, (Ark. 1904) 83 S. W. Rep. 339.

*California.* — Lucas v. Provines, 130 Cal. 270; Woodward v. Faris, 109 Cal. 12.

*Indiana.* — Rennett v. Shirk, 163 Ind. 543, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 791-792 [791]; Logsdon v. Dingg, 32 Ind. App. 158.

*Iowa.* — Fullmer v. Beck, 105 Iowa 517.

*Kentucky.* — Carnish v. Follis, (Ky. 1898) 45 S. W. Rep. 1050.

*Massachusetts.* — Jordan v. Riley, 178 Mass. 524; Beckman v. Davidson, 162 Mass. 347.

*Minnesota.* — Diers v. Ward, 87 Minn. 475.

*Missouri.* — Hedges v. Pollard, 149 Mo. 216; McCabe v. Bruere, 153 Mo. 1; Davis v. Braswell, 185 Mo. 576.

*Nebraska.* — Baty v. Elrod, 66 Neb. 735; Brownfield v. Bleekman, (Neb. 1903) 94 N. W. Rep. 714.

*Oregon.* — Gist v. Doke, 42 Oregon 225.

*Tennessee.* — Bell v. Whitehead, (Tenn. Ch. 1901) 62 S. W. Rep. 213.

*Texas.* — Daughtrey v. New York, etc., Land Co., (Tex. Civ. App. 1901) 61 S. W. Rep. 947.

*Vermont.* — Brown v. Clark, 73 Vt. 233.

*Washington.* — Bowers v. Ledgerwood, 25 Wash. 14; Hesser v. Siepmann, 35 Wash. 14.

**Mistake in Location.** — Bowers v. Ledgerwood, 25 Wash. 14; Erickson v. Murlin, (Wash. 1905) 80 Pac. Rep. 853.

**2. United States.** — Treece v. American Assoc., (C. C. A.) 122 Fed. Rep. 598.

*Alabama.* — Taylor v. Fomby, 116 Ala. 621, 67 Am. St. Rep. 149; Davis v. Caldwell, 107 Ala. 526; Doe v. Adams, 121 Ala. 664; Barrett v. Kelly, 131 Ala. 378.

*Arkansas.* — Wilson v. Hunter, 59 Ark. 626, 43 Am. St. Rep. 63; Murdock v. Stillman, (Ark. 1904) 82 S. W. Rep. 834.

*California.* — Peters v. Gracia, 110 Cal. 89; Woodward v. Faris, 109 Cal. 12.

*Indiana.* — Pittsburgh, etc., R. Co. v. Stickley, 155 Ind. 312; Logsdon v. Dingg, 32 Ind. App. 158.

*Iowa.* — Kahl v. Schmidt, 107 Iowa 550; Miller v. Mills County, 111 Iowa 654; Palmer v. Osborne, 115 Iowa 714.

*Kansas.* — Rasdell v. Shumway, 58 Kan. 818; Rasdell v. Shumway, 6 Kan. App. 45; Conrad v. Sackett, 8 Kan. App. 635.

*Kentucky.* — Rudd v. Monarch, (Ky. 1895) 32 S. W. Rep. 1083; Small v. Hamlet, (Ky. 1902) 68 S. W. Rep. 395; Cuyler v. Bush, (Ky. 1905) 84 S. W. Rep. 579.

*Louisiana.* — Gaude v. Williams, 47 La. Ann. 1325.

*Missouri.* — Roecker v. Haperla, 138 Mo. 33; Flynn v. Wacker, 151 Mo. 545; McCabe v. Bruere, 153 Mo. 1; Schwartz v. Gebhardt, 157 Mo. 99.

*Tennessee.* — East Tennessee Iron, etc., Co.

v. Ferguson, (Tenn. Ch. 1895) 35 S. W. Rep. 900.

*Washington.* — Suksdorf v. Humphrey, 36 Wash. 1.

*Wisconsin.* — Fuller v. Worth, 91 Wis. 406. **Temporary Fence.** — Lowe v. Cunningham, (Tenn. Ch. 1897) 39 S. W. Rep. 1052. See also Williams v. Bernstein, 51 La. Ann. 115.

**792. 1.** Taylor v. Fomby, 116 Ala. 621, 67 Am. St. Rep. 149; Powers v. Oroville Bank, 136 Cal. 486; Pittsburgh, etc., R. Co. v. Stickley, 155 Ind. 312; Miller v. Mills County, 111 Iowa 654; Liter v. Shirley, (Ky. 1896) 35 S. W. Rep. 550; Richardson v. Watts, 94 Me. 476; Pugh v. Schindler, 127 Mich. 191, 8 Detroit Leg. N. 241; Bisso v. Casper, 14 Tex. Civ. App. 19; Swordferger v. Hopkins, 67 Vt. 136; Wilcox v. Smith, (Wash. 1905) 80 Pac. Rep. 803.

**Boundary Lines May Be Determined by Adverse Possession.** — Erickson v. Murlin, (Wash. 1905) 80 Pac. Rep. 853.

**Intention a Question for Jury.** — "Whether or not the plaintiffs took possession by mistake, or without the intention of claiming title, is a question for the jury." Haney v. Breeden, 100 Va. 781.

**793. 1. Alabama.** — Hess v. Rudder, 117 Ala. 525, 67 Am. St. Rep. 182; Pittman v. Pittman, 124 Ala. 306.

*Iowa.* — Klinker v. Schmidt, 114 Iowa 695; English v. Craford, (Iowa 1903) 94 N. W. Rep. 276; Handorf v. Hoes, 121 Iowa 79.

*Kansas.* — Zimmerman v. Ginther, 10 Kan. App. 331.

*Kentucky.* — Grider v. Davenport, 60 S. W. Rep. 866, 22 Ky. L. Rep. 1455.

*Missouri.* — Ward v. Ihler, 132 Mo. 375; Schwartz v. Gebhardt, 157 Mo. 99. See also Ward v. Ihler, 132 Mo. 375.

*New York.* — Allerton v. Steele, 59 N. Y. App. Div. 622.

*Oregon.* — Pearson v. Dryden, 28 Oregon 350.

*Pennsylvania.* — Reiter v. McJunkin, 173 Pa. St. 82.

*Wisconsin.* — Wollman v. Ruehle, 100 Wis. 31.

**794. 1. Alabama.** — Hicks v. Swift Creek Mill Co., 133 Ala. 411, 91 Am. St. Rep. 38.

*California.* — Southern California R. Co. v. Slauson, (Cal. 1902) 68 Pac. Rep. 107.

*Colorado.* — Evans v. Welch, 29 Colo. 355.

*Delaware.* — Doe v. Pepper, 2 Marv. (Del.) 221.

*Georgia.* — Doris v. Story, (Ga. 1905) 50 S. E. Rep. 348.

*Illinois.* — Ely v. Brown, 183 Ill. 596, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794; Wright v. Stice, 173 Ill. 571; Sanitary Dist. v. Allen, 178 Ill. 330.

*Indiana.* — Chicago, etc., R. Co. v. Wood, 30 Ind. App. 650.

*Iowa.* — Schrimper v. Chicago, etc., R. Co., 115 Iowa 35; Gill v. Candler, 114 Iowa 332.

*Kentucky.* — Ward v. Edge, 100 Ky. 757.

**795. 2. Essential Elements — a. IN GENERAL. — See note 1.**

*Massachusetts.* — See *Percival v. Chase*, 182 Mass. 371.

*Michigan.* — *Pugh v. Schindler*, 127 Mich. 196, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794; *St. Joseph v. Seel*, 122 Mich. 70.

*Minnesota.* — *Backus v. Burke*, 63 Minn. 272. *Nebraska.* — *Johnson v. Butt*, 46 Neb. 220; *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364.

*New York.* — *Coleman v. Pickett*, 82 Hun (N. Y.) 287; *Bird v. New Jersey, etc., R. Co.*, 3 N. Y. App. Div. 344; *Allerton v. Steele*, 59 N. Y. App. Div. 622.

*Pennsylvania.* — *Cole v. Philadelphia*, 199 Pa. St. 464.

*Tennessee.* — *Long v. Hall*, (Tenn. Ch. 1898) 46 S. W. Rep. 343.

*Texas.* — See *Haggard v. Martin*, (Tex. Civ. App. 1896) 34 S. W. Rep. 660.

*Washington.* — *Northern Counties Invest. Trust v. Enyard*, 24 Wash. 366.

*Wisconsin.* — *Meyer v. Hope*, 101 Wis. 123. As to what constitutes permissive possession, see *Jones v. Shomaker*, 41 Fla. 232; *Lewis v. New York, etc., R. Co.*, 162 N. Y. 202.

**Permission Presumed to Continue.** — *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70; *Chicago, etc., R. Co. v. Snyder*, 120 Iowa 532; *Collins v. Colleran*, 86 Minn. 199; *Lewis v. New York, etc., R. Co.*, 162 N. Y. 202.

**795. 1. United States.** — *Eastern Oregon Land Co. v. Cole, (C. C. A.)* 92 Fed. Rep. 949; *Tyee Consol. Min. Co. v. Langstedt, (C. C. A.)* 121 Fed. Rep. 709; *Snowden v. Loree*, 122 Fed. Rep. 493.

*Alabama.* — *Parks v. Barnett*, 104 Ala. 438; *Eureka Co. v. Norment*, 104 Ala. 625; *Wiggins v. Kirby*, 106 Ala. 262; *Goodson v. Brothers*, 111 Ala. 589; *Beasley v. Howell*, 117 Ala. 499; *Adler v. Prestwood, (Ala. 1899)* 24 So. Rep. 999; *Jackson Lumber Co. v. McCreary*, 137 Ala. 278; *Chastang v. Chastang, (Ala. 1904)* 37 So. Rep. 799, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795.

*Arkansas.* — *Nicklace v. Dickerson*, 65 Ark. 422; *Wilson v. Hunter*, 59 Ark. 626, 43 Am. St. Rep. 63.

*Delaware.* — *Doe v. Pepper*, 2 Marv. (Del.) 221.

*District of Columbia.* — *Holtzman v. Douglas*, 5 App. Cas. (D. C.) 397; *Bradshaw v. Stott*, 4 App. Cas. (D. C.) 527; *Reid v. Anderson*, 13 App. Cas. (D. C.) 30.

*Florida.* — *Wilkins v. Pensacola City Co.*, 36 Fla. 36.

*Georgia.* — *Carstarphen v. Holt*, 96 Ga. 703.

*Idaho.* — *Green v. Christie*, 4 Idaho 438.

*Illinois.* — *Zirngibl v. Calumet, etc., Canal, etc., Co.*, 157 Ill. 430; *Hayden v. McCloskey*, 161 Ill. 351; *Harms v. Kransz*, 167 Ill. 421; *Knight v. Knight*, 178 Ill. 553; *Ely v. Brown*, 183 Ill. 575; *Alsup v. Stewart*, 194 Ill. 595, 88 Am. St. Rep. 169; *Travers v. McElvain*, 200 Ill. 377; *Illinois Cent. R. Co. v. Hatter*, 207 Ill. 88; *Roby v. Calumet, etc., Canal, etc., Co.*, 211 Ill. 173.

*Indiana.* — *Worthley v. Burbanks*, 146 Ind. 539, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795; *Chicago, etc., R. Co. v. Wood*, 30 Ind. App. 650; *Wood v. Ripley*, 27 Ind. App.

356; *Rennert v. Shirk, (Ind. 1904)* 72 N. E. Rep. 546.

*Iowa.* — *Agne v. Seitsinger, (Iowa 1894)* 60 N. W. Rep. 483.

*Kansas.* — *Anderson v. Canter*, 10 Kan. App. 167.

*Kentucky.* — *Helton v. Strubbe*, 62 S. W. Rep. 12, 22 Ky. L. Rep. 1919; *Owsley v. Owsley, (Ky. 1903)* 77 S. W. Rep. 397.

*Maryland.* — *Merryman v. Cumberland Paper Co.*, 98 Md. 223.

*Michigan.* — *Beecher v. Ferris*, 110 Mich. 537.

*Minnesota.* — *Butler v. Drake*, 62 Minn. 229; *Todd v. Weed*, 84 Minn. 4; *Maas v. Burdetzke, (Minn. 1904)* 101 N. W. Rep. 182; *Young v. Grieb, (Minn. 1905)* 104 N. W. Rep. 131.

*Mississippi.* — *McCaughlin v. Young, (Miss. 1905)* 37 So. Rep. 839.

*Missouri.* — *McVey v. Carr*, 159 Mo. 648; *Weller v. Wagner*, 181 Mo. 151; *Hunnell v. Burchett*, 152 Mo. 611; *Swope v. Ward*, 185 Mo. 316, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795.

*Nebraska.* — *Twohig v. Leamer*, 48 Neb. 247; *Chicago, etc., R. Co. v. Schalkopf*, 54 Neb. 448; *Hoffine v. Ewings*, 60 Neb. 729; *Knight v. Denman*, 64 Neb. 814; *Beer v. Dalton, (Neb. 1902)* 92 N. W. Rep. 593.

*New Mexico.* — *Johnston v. Albuquerque, (N. Mex. 1903)* 72 Pac. Rep. 9; *Catron v. Laughlin, (N. Mex. 1903)* 72 Pac. Rep. 26.

*North Carolina.* — *Everett v. Newton*, 118 N. Car. 919.

*Ohio.* — *Happ v. Dayton, etc., R. Co.*, 14 Ohio Dec. 172.

*Oklahoma.* — *Wade v. Crouch*, 14 Okla. 593, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795.

*Oregon.* — *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 215, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795.

*Pennsylvania.* — *Schwab v. Bickel*, 11 Pa. Super. Ct. 312; *Pierce v. Barney*, 209 Pa. St. 132; *Handley v. Barrett*, 176 Pa. St. 246.

*Tennessee.* — *Sequatchie Valley Coal, etc., Co. v. Coppinger*, 95 Tenn. 528; *Cowan v. Hatcher, (Tenn. Ch. 1900)* 59 S. W. Rep. 689; *Fuller v. Jackson, (Tenn. Ch. 1901)* 62 S. W. Rep. 274.

*Texas.* — *Cook v. Lister*, 15 Tex. Civ. App. 31; *Lawless v. Wright, (Tex. Civ. App. 1905)* 86 S. W. Rep. 1039.

*Utah.* — *Yeager v. Woodruff*, 17 Utah 369, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795; *Snow v. Rich*, 22 Utah 123.

*Vermont.* — *Jangraw v. Mee*, 75 Vt. 211, 98 Am. St. Rep. 816.

*West Virginia.* — *Heavner v. Morgan*, 41 W. Va. 428; *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470; *Jarvis v. Grafton*, 44 W. Va. 453; *Maxwell v. Cunningham*, 50 W. Va. 298; *Wilson v. Braden, (W. Va. 1904)* 49 S. E. Rep. 409.

*Wisconsin.* — *Kurz v. Miller*, 89 Wis. 426; *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 80 Am. St. Rep. 54; *Illinois Steel Co. v. Jeka, (Wis. 1904)* 101 N. W. Rep. 399.

*Canada.* — *McIntyre v. Thompson*, 1 Ont. L. Rep. 163.

**796.** *b. POSSESSION MUST BE HOSTILE AND UNDER CLAIM OF RIGHT* — (1) *General Principles.* — See note 1.

**797.** See note 1.

**798.** See note 1.

**Hostility.** — See note 2.

**Where Originally Subordinate.** — See note 3.

**799.** (2) *Executory Contracts of Purchase* — **Before Payment of Purchase Money.** — See note 1.

**796. 1. Arkansas.** — *Boynton v. Ashabraner*, (Ark. 1905) 88 S. W. Rep. 566.

*California.* — *Huntley v. San Francisco Sav. Union*, 130 Cal. 46.

*Colorado.* — *U. S. Security, etc., Co. v. Wolfe*, 27 Colo. 219, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795 [796]; *Evans v. Welch*, 29 Colo. 355.

*Georgia.* — *Wade v. Johnson*, 94 Ga. 348.

*Illinois.* — *Reuter v. Stuckart*, 181 Ill. 529; *Alsop v. Stewart*, 194 Ill. 595, 88 Am. St. Rep. 169.

*Iowa.* — *Van Ormer v. Harley*, 102 Iowa 157, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 796; *Schrimper v. Chicago, etc., R. Co.*, 115 Iowa 35.

*Kentucky.* — *Owsley v. Owsley*, (Ky. 1903) 77 S. W. Rep. 397.

*Michigan.* — *Cass Farm Co. v. Detroit*, (Mich. 1905) 102 N. W. Rep. 848.

*Missouri.* — *Baber v. Henderson*, 156 Mo. 566, 79 Am. St. Rep. 540.

*Nebraska.* — *Hoffine v. Ewings*, 60 Neb. 729.

*New York.* — *New York Cent., etc., R. Co. v. Brennan*, 24 N. Y. App. Div. 343, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 976 [797]; *Monohan v. New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 619; *Heller v. Cohen*, 154 N. Y. 299.

*Ohio.* — *Happ v. Dayton, etc., R. Co.*, 14 Ohio Dec. 172.

*Oregon.* — *Beale v. Hite*, 35 Oregon 176; *Gist v. Doke*, 42 Oregon 225.

*Pennsylvania.* — *Jenkins v. McMichael*, 17 Pa. Super. Ct. 476; *Collins v. Lyneh*, 167 Pa. St. 635.

*Tennessee.* — *Free v. Fine*, (Tenn. Ch. 1900) 59 S. W. Rep. 384.

*Virginia.* — *Virginia Midland R. Co. v. Barbours*, 97 Va. 118.

*Washington.* — *Blake v. Shriver*, 27 Wash. 593; *Wilcox v. Smith*, (Wash. 1905) 80 Pac. Rep. 803.

*West Virginia.* — *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470.

*Wisconsin.* — *Davis v. Appleton*, 109 Wis. 580.

**If the Adverse Possessor Acquire Knowledge in Any Way** that the possession is hostile the statute of limitations begins to run. *Hovatt v. Green*, (Mich. 1905) 102 N. W. Rep. 734.

**Must Be Hostile to All the World.** — *Bracken v. Union Pac. R. Co.*, (C. C. A.) 75 Fed. Rep. 347; *Tennessee Coal, etc., Co. v. Linn*, 123 Ala. 112, 82 Am. St. Rep. 108; *Ashford v. Ashford*, 136 Ala. 631, 96 Am. St. Rep. 82; *Carpenter v. Coles*, 75 Minn. 9; *Baber v. Henderson*, 156 Mo. 566, 79 Am. St. Rep. 540; *Flewellen v. Randall*, 32 Tex. Civ. App. 361; *Beaumont Pasture Co. v. Polk*, (Tex. Civ. App. 1900) 55 S. W. Rep. 614.

"Mere naked possession or occupancy of the premises, no matter how long, without a claim

of right or color of title, cannot ripen into a good title, but must always be regarded as being an occupancy for the use and benefit of the true owner." *Wade v. Crouch*, (Okla. 1904) 78 Pac. Rep. 91.

See *Whitaker v. Thayer*, (Tex. Civ. App. 1905) 86 S. W. Rep. 364, holding that it is not necessary that the defendant's possession should be shown to be adverse to all others, where there is no evidence that any person other than the plaintiff had any claim to the land.

**Verbal Assertion of Claim.** — *Hill v. Coal Valley Min. Co.*, 103 Ill. App. 41; *Rennett v. Shirk*, (Ind. 1904) 72 N. E. Rep. 546; *Wilbur v. Cedar Rapids, etc., R. Co.*, 116 Iowa 65; *Cool v. Kelly*, 78 Minn. 102.

**Possession under Parol Gift.** — *Brown v. Norvell*, (Ark. 1905) 86 S. W. Rep. 306.

**797. 1. Must Be No Recognition of Title in Another.** — *Tennessee Coal, etc., Co. v. Linn*, 123 Ala. 112, 82 Am. St. Rep. 108; *Sample v. Reeder*, 107 Ala. 227; *Ashford v. Ashford*, 136 Ala. 631, 97 Am. St. Rep. 67; *Williams v. Scott*, 122 N. Car. 545; *Happ v. Dayton, etc., R. Co.*, 14 Ohio Dec. 172, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 797; *Altschul v. O'Neill*, 35 Oregon 202.

**Recognition of Superior Title After Statute Has Run.** — *Jones v. Williams*, 108 Ala. 282.

**798. 1. Declarations.** — *Alsop v. Stewart*, 194 Ill. 595, 88 Am. St. Rep. 169, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 797 [798]; *Litchfield v. Sewell*, 97 Iowa 247; *Altschul v. O'Neill*, 35 Oregon 202.

2. *Alsop v. Stewart*, 194 Ill. 595, 88 Am. St. Rep. 169; *Ely v. Brown*, 183 Ill. 575; *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239; *Downing v. Mayes*, 153 Ill. 330, 46 Am. St. Rep. 896; *Knight v. Denman*, 64 Neb. 814; *Lewis v. New York, etc., R. Co.*, 162 N. Y. 202, affirming 40 N. Y. App. Div. 343; *Fuller v. Jackson*, (Tenn. Ch. 1901) 62 S. W. Rep. 274. See also *Henderson v. Henderson*, 23 Ont. App. 577.

3. **When Possession Originally in Recognition of True Title.** — *Sample v. Reeder*, 107 Ala. 227; *L. Grunewald Co. v. Copeland*, 131 Ala. 345; *McClenahan v. Stevenson*, 118 Iowa 106; *Smith v. Cunningham*, 79 Miss. 425; *Hunnewell v. Adams*, 153 Mo. 440; *Stevenson v. Black*, 168 Mo. 549; *Miller v. Warren*, 94 N. Y. App. Div. 195, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 798; *Sanders v. Riedinger*, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 289; *Ralston v. Weston*, 46 W. Va. 546, 76 Am. St. Rep. 834, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 798; *Maxwell v. Cunningham*, 50 W. Va. 298.

**799. 1. Alabama.** — *Perry v. Lawson*, 112 Ala. 480.

**800.** Estoppel. — See note 1.

Subpurchasers. — See note 4.

**801.** After Payment of Purchase Money. — See note 1.

**802.** (3) *Tenants in Common* — Must Be an Ouster. — See note 1.

*California.* — Woodard v. Hennegan, 128 Cal. 293.

*Delaware.* — Lynch v. Roe, 7 Houst. (Del.) 386.

*Georgia.* — Brown v. Huey, 103 Ga. 448.

*Illinois.* — Peadro v. Carriker, 168 Ill. 570, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 799; Davis v. Howard, 172 Ill. 343, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 799.

*Iowa.* — Laraway v. Zenor, 100 Iowa 181.

*Michigan.* — Burke v. Douglass, 115 Mich. 199, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 799.

*Minnesota.* — Johnson v. Peterson, 90 Minn. 503.

*Missouri.* — Manning v. Kansas, etc., Coal Co., 181 Mo. 359.

*Nebraska.* — Beer v. Dalton, (Neb. 1902) 92 N. W. Rep. 593.

*New York.* — Griswold v. Little, (Supm. Ct.) 13 Misc. (N. Y.) 281; Bird v. New Jersey, etc., R. Co., 3 N. Y. App. Div. 344; Harison v. Caswell, 17 N. Y. App. Div. 252.

*Oregon.* — West v. Edwards, 41 Oregon 609.

*Pennsylvania.* — Jenkins v. McMichael, 17 Pa. Super. Ct. 476.

*Texas.* — Durst v. Skillern, (Tex. Civ. App. 1898) 45 S. W. Rep. 840.

*Virginia.* — Chapman v. Chapman, 91 Va. 397, 50 Am. St. Rep. 846; Alleghany County v. Parrish, 93 Va. 615.

In Durst v. Skillern, (Tex. Civ. App. 1898) 45 S. W. Rep. 840, the court said: "The possession may be made adverse by an unequivocal repudiation of the relation, with notice to the vendor of such repudiation. This notice need not be formal and express, \* \* \* but may be shown by circumstances. The adverse claim may be asserted by acts so openly hostile to the claim of the vendor as to necessarily put him upon notice." See also Smith v. Pate, (Tex. Civ. App. 1897) 43 S. W. Rep. 312; Shotwell v. McCardell, 19 Tex. Civ. App. 174.

**Party Entering into Possession under Agreement to Purchase.** — Davis v. Howard, 172 Ill. 344, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 800 [799].

**Vendee by Title Bond.** — Bradsher v. Hightower, 118 N. Car. 399.

**800.** 1. Cook v. Colemar, (Tex. Civ. App. 1895) 33 S. W. Rep. 756. See also Jones v. Madison County, 72 Miss. 777.

**A Purchaser by Executory Contract Is a Quasi Tenant.** — Dollarhide v. Mabary, 125 Mo. 197. 4. See Snow v. Rich, 22 Utah 123.

**801.** 1. **Possession of Vendee After Purchase Price Is Paid.** — Tennessee Coal, etc., Co. v. Linn, 123 Ala. 112, 82 Am. St. Rep. 108; Lynch v. Roe, 7 Houst. (Del.) 386; Ambrose v. Huntington, 34 Oregon 484. But see Chapman v. Chapman, 91 Va. 397, 50 Am. St. Rep. 846.

**Parol Contract of Sale.** — "A vendee of land in possession under a parol contract of sale holds adversely to his vendor, at least from the mo-

ment that the contract of sale is executed on his part by the payment of the purchase money." Ward v. Cochran, (C. C. A.) 71 Fed. Rep. 127.

**802.** 1. **Rule as to Tenants in Common — United States.** — Elder v. McClaskey, (C. C. A.) 70 Fed. Rep. 529, reversing 47 Fed. Rep. 154; Westenfelder v. Green, 76 Fed. Rep. 925.

*Alabama.* — Inglis v. Webb, 117 Ala. 387; Ashford v. Ashford, 136 Ala. 631, 96 Am. St. Rep. 82.

*California.* — Faubel v. McFarland, 144 Cal. 717.

*Delaware.* — Doe v. Pepper, 2 Marv. (Del.) 221.

*Georgia.* — Morgan v. Mitchell, 104 Ga. 596; Street v. Collier, 118 Ga. 470; Roberson v. Downing Co., 120 Ga. 833, 102 Am. St. Rep. 128.

*Illinois.* — Nickrans v. Wilk, 161 Ill. 76; Boyd v. Boyd, 176 Ill. 40, 68 Am. St. Rep. 169; Brumback v. Brumback, 198 Ill. 66.

*Iowa.* — Bader v. Dyer, 106 Iowa 722, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801 [802]; Van Ormer v. Harley, 102 Iowa 157; Blankenhorn v. Lenox, 123 Iowa 67; Crawford v. Meis, 123 Iowa 610, 101 Am. St. Rep. 337.

*Louisiana.* — Rhodes v. Cooper, 113 La. 600.

*Michigan.* — Weshgyl v. Schick, 113 Mich. 22; Nowlen v. Hall, 128 Mich. 274, 8 Detroit Leg. N. 665.

*Mississippi.* — Bentley v. Callaghan, 79 Miss. 305, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801, 802.

*Missouri.* — Golden v. Tyer, 180 Mo. 196; Hendricks v. Musgrove, 183 Mo. 300.

*Nebraska.* — Beall v. McMenemy, 63 Neb. 73, 93 Am. St. Rep. 427, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801 [802]; Carson v. Broady, 56 Neb. 648, 71 Am. St. Rep. 691.

*New York.* — Sweetland v. Buell, 89 Hun (N. Y.) 543.

*Ohio.* — Payne v. Cooksey, 8 Ohio Dec. 407.

*Oregon.* — Mattis v. Hosmer, 37 Oregon 523, affirmed 37 Oregon 533.

*South Carolina.* — Hill v. Gray, 45 S. Car. 91; Metz v. Metz, 48 S. Car. 472.

*Tennessee.* — Woodruff v. Roysden, 105 Tenn. 491, 80 Am. St. Rep. 905.

*Texas.* — House v. Williams, 16 Tex. Civ. App. 122; Clemons v. Clemons, (Tex. Civ. App. 1898) 45 S. W. Rep. 199; Newcomb v. Cox, 27 Tex. Civ. App. 583.

*West Virginia.* — Talbott v. Woodford, 48 W. Va. 451, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 799 [802]; Justice v. Lawson, 46 W. Va. 163; Parker v. Brast, 45 W. Va. 399.

**Intent.** — Brown v. McKay, 125 Cal. 291.

In Canada, under statute, exclusive possession by one cotenant is regarded as adverse against the other cotenants. This also is said to be the law in England, Bentley v. Peppard, 33 Can. Sup. Ct. 444.

**803.** What Amounts to Ouster. — See note 1.

**805.** Evidence Required. — See note 1.

Notice. — See note 2.

**806.** Questions for Jury under Instructions from Court. — See note 1.  
Conveyance by Cotenant. — See note 2.

**803.** 1. *Boyd v. Boyd*, 176 Ill. 40, 68 Am. St. Rep. 169; *Kotz v. Belz*, 178 Ill. 434; *Casey v. Casey*, 107 Iowa 192, 70 Am. St. Rep. 190; *Whitaker v. Whitaker*, 157 Mo. 342; *Tharpe v. Holcomb*, 126 N. Car. 365; *Justice v. Lawson*, 46 W. Va. 163; *Bennett v. Pierce*, 50 W. Va. 604.

**Acts of Ownership During a Series of Years.** — *Hutson v. Hutson*, 139 Mo. 229; *Burnett v. Crawford*, 50 S. Car. 161.

Under the statute of limitations, c. 84, § 13, C. S., one tenant in common who continues in possession of the property, or in the receipt of the rents and profits, for his own benefit for the statutory period, acquires title by adverse possession which will not be extinguished either by a subsequent accounting for the rents or a subsequent acknowledgment. *Ramsay v. Ramsay*, 2 N. Bruns. Eq. Rep. 179.

**Exclusive Possession, etc., Held Not Sufficient to Raise Presumption of Ouster.** — *McMahill v. Torrence*, 163 Ill. 277.

**Claiming under Deed to Whole.** — *Dawson v. Edwards*, 189 Ill. 60; *Call v. Phelp*, (Ky. 1898) 45 S. W. Rep. 1051; *Craven v. Craven*, (Neb. 1903) 94 N. W. Rep. 604; *Wheeler v. Taylor*, 32 Oregon 421, 67 Am. St. Rep. 540; *Mole v. Folk*, 45 S. Car. 265. See also *O'Mara v. Lilly*, (Ky. 1899) 53 S. W. Rep. 516.

**Purchase at Tax Sale.** — *Van Ormer v. Harley*, 102 Iowa 157; *Parker v. Brast*, 45 W. Va. 399. See also *Cecil v. Clark*, 44 W. Va. 659.

**Purchase of an Outstanding Claim** by one cotenant inures to the benefit of all. *Boyd v. Boyd*, 176 Ill. 40, 68 Am. St. Rep. 169.

The right of joint tenants to participate in the benefit of a superior claim purchased by one of them in possession is dependent on a timely offer to contribute their rightly proportion of the money expended by the tenant in possession in procuring such superior claim. *Craven v. Craven*, (Neb. 1903) 94 N. W. Rep. 604. And see the title JOINT TENANTS AND TENANTS IN COMMON, 675. 1. *et seq.*

**Payment of Taxes, Accompanied by Possession.** — *Newcomb v. Cox*, 27 Tex. Civ. App. 583; *Madison v. Matthews*, (Tex. Civ. App. 1902) 66 S. W. Rep. 803.

**A Sale of the Whole Parcel** does not amount to an ouster. *Neher v. Armijo*, 9 N. Mex. 325. See also *Truth Lodge No. 213 v. Barton*, 119 Iowa 230, 97 Am. St. Rep. 303; *Van Ormer v. Harley*, 102 Iowa 157.

**Partition.** — "Where there is a decree of partition, setting off different tracts of land in severalty to the persons therein named, possession taken of the whole thereunder is an act of ouster." *Nickrans v. Wilk*, 161 Ill. 76. See also *Slone v. Grider*, (Ky. 1898) 44 S. W. Rep. 384.

**Burial Lot.** — Entering into possession of a portion of a cemetery lot which is inclosed by a fence, by one claiming to be the owner of such portion, and erecting a substantial iron fence, so as to divide the part so claimed

from the remaining part of the lot, is an act showing adverse possession. *Roumillot v. Gardner*, 113 Ga. 60.

**805.** 1. *Zapf v. Carter*, 70 N. Y. App. Div. 395; *Wheeler v. Taylor*, 32 Oregon 425, 76 Am. St. Rep. 540, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 804 [805].

**Distinction Between Strangers and Tenants in Common.** — *Nickrans v. Wilk*, 161 Ill. 76; *Logan v. Phenix*, (Ky. 1902) 66 S. W. Rep. 1042.

**2. Notice to Cotenant.** — *Ashford v. Ashford*, 136 Ala. 631, 96 Am. St. Rep. 82; *Morris v. Wheat*, 11 App. Cas. (D. C.) 201; *Bader v. Dyer*, 106 Iowa 715, 68 Am. St. Rep. 332; *Casey v. Casey*, 107 Iowa 192, 70 Am. St. Rep. 190; *Logan v. Phenix*, (Ky. 1902) 66 S. W. Rep. 1042; *Weshgyl v. Schick*, 113 Mich. 22; *Bentley v. Callaghan*, 79 Miss. 302; *Whitaker v. Whitaker*, 157 Mo. 342; *Hamerslag v. Duryea*, 38 N. Y. App. Div. 130; *Zapf v. Carter*, 70 N. Y. App. Div. 395; *Wheeler v. Taylor*, 32 Oregon 426, 67 Am. St. Rep. 540, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 805; *Garcia v. Illg*, 14 Tex. Civ. App. 482; *Newcomb v. Cox*, 27 Tex. Civ. App. 583; *House v. Williams*, 16 Tex. Civ. App. 122; *Pillow v. Southwest Virginia Imp. Co.*, 92 Va. 144, 53 Am. St. Rep. 804; *Davis v. Little*, 43 W. Va. 17; *Cochran v. Cochran*, 55 W. Va. 178; *Rodgers v. Miller*, 55 W. Va. 576; *Saladin v. Kraayvauger*, 96 Wis. 180.

If a person in possession had no knowledge that another claimed to be his cotenant, notice is not necessary. *Roberts v. Decker*, 120 Wis. 102.

**Notice of Ouster to a Cotenant May Be Constructive.** — *Elder v. McClaskey*, (C. C. A.) 70 Fed. Rep. 529; *Dunlap v. Griffith*, 146 Mo. 283; *Edwards v. Humphreys*, (Tex. Civ. App. 1896) 36 S. W. Rep. 333.

**806.** 1. *La Fountain v. Dee*, 110 Mich. 347.

**Burden of Proof.** — *Pillow v. Southwest Virginia Imp. Co.*, 92 Va. 144, 53 Am. St. Rep. 804; *Parker v. Brast*, 45 W. Va. 399.

**2. Georgia.** — *Morgan v. Mitchell*, 104 Ga. 596; *Street v. Collier*, 118 Ga. 470.

**Iowa.** — *Murray v. Quigley*, 119 Iowa 6, 97 Am. St. Rep. 276; *Blankenhorn v. Lenox*, 123 Iowa 67.

**Kentucky.** — *Rose v. Ware*, 115 Ky. 420.

**Maryland.** — *Merryman v. Cumberland Paper Co.*, 98 Md. 223.

**Michigan.** — *Watkins v. Green*, 101 Mich. 493; *Fuller v. Swensberg*, 106 Mich. 305, 58 Am. St. Rep. 481; *Brigham v. Reau*, (Mich. 1905) 102 N. W. Rep. 845.

**Minnesota.** — *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692.

**New York.** — *Sweetland v. Buell*, 89 Hun (N. Y.) 543; *Hamerslag v. Duryea*, 58 N. Y. App. Div. 288, affirmed 172 N. Y. 622.

**North Carolina.** — See *Roscoe v. John L. Roper Lumber Co.*, 124 N. Car. 42; *Hardee v. Weathington*, 130 N. Car. 91.

**807.** (4) *Life Tenant and Remainderman — As Against the Remainderman — Before Life Estate Has Fallen In.* — See note 1.

**808.** *Grantee of Life Tenant.* — See note 1.

**809.** *After the Life Estate Has Fallen In — As Against the Remainderman or Reversioner.* — See note 1.

*Life Estate Acquired by Adverse Possession.* — See note 2.

**810.** (5) *Landlord and Tenant — Rule Stated.* — See note 1.

*South Carolina.* — *Sudduth v. Sumeral*, 61 S. Car. 276, 85 Am. St. Rep. 883.

*Virginia.* — *Johnston v. Virginia Coal, etc., Co.*, 96 Va. 158.

*West Virginia.* — *Cecil v. Clark*, 44 W. Va. 698, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 806; *Talbott v. Woodford*, 48 W. Va. 451, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 806; *Bennett v. Pierce*, 50 W. Va. 609, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 806; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 635, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 806.

*Pending Administration.* — *Webb v. Winter*, (Cal. 1901) 65 Pac. Rep. 1028.

*When Presumption Arises.* — *Hardee v. Weathington*, 130 N. Car. 91.

**807.** 1. *Rule as to Life Tenant and Remainderman — Alabama.* — *McLeod v. Bishop*, 110 Ala. 640; *Caperton v. Hall*, 118 Ala. 265.

*Connecticut.* — *Schroeder v. Tomlinson*, 70 Conn. 348; *Lewis v. Lewis*, 76 Conn. 586.

*Illinois.* — *Turner v. Hause*, 199 Ill. 472, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 807; *Chicago, etc., R. Co. v. Vaughn*, 206 Ill. 234.

*Kentucky.* — *Watt v. Watt*, (Ky. 1897) 39 S. W. Rep. 48.

*Michigan.* — *Hamilton v. Wickson*, 131 Mich. 76, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 807; *Lumley v. Haggerty*, 110 Mich. 552, 64 Am. St. Rep. 364.

*Minnesota.* — *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692.

*Missouri.* — *Hall v. French*, 165 Mo. 430.

*New York.* — *Simis v. McElroy*, 160 N. Y. 156, 73 Am. St. Rep. 673.

*West Virginia.* — *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616.

In *Crawford v. Meis*, 123 Iowa 610, 101 Am. St. Rep. 337, the court said: "But the rule supposes an uninterrupted continuation of the relation of life tenant and remainderman. As in the case of cotenants, it does not apply where there has been an ouster and disseizin by the life tenant, or one claiming by or through him, and this under claim of right or color of title, followed by adverse possession for the statutory period."

*Possession of Widow Not Adverse to Heir.* — *Allison v. Robinson*, 136 Ala. 434; *Brumback v. Brumback*, 198 Ill. 66; *Atwell v. Shook*, 133 N. Car. 387.

*Possession of Widow Not Adverse Pending Assignment of Dower.* — *Foy v. Wellborn*, 112 Ala. 160; *Stiff v. Cobb*, 126 Ala. 381, 85 Am. St. Rep. 38; *Reuter v. Stuckart*, 181 Ill. 529; *Dewitt v. Shea*, 203 Ill. 393, 96 Am. St. Rep. 311; *Lumley v. Haggerty*, 110 Mich. 552, 64 Am. St. Rep. 364; *Carpenter v. Carpenter*, 126 Mich. 217; *Fischer v. Siekmann*, 125 Mo. 165.

*Possession by Grantee of Widow.* — *Roberts v. Thomason*, 174 Mo. 378. See also *Osborn v. Weldon*, 146 Mo. 185.

*Parol Partition.* — After a parol partition the possession of the widow becomes adverse. *Whittemore v. Cope*, 11 Utah 344.

**808.** 1. *Alabama.* — *McMichael v. Craig*, 105 Ala. 382.

*Arkansas.* — *Gallagher v. Johnson*, 65 Ark. 90.

*Illinois.* — *Turner v. Hause*, 199 Ill. 472, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 808; *Chicago, etc., R. Co. v. Vaughn*, 206 Ill. 234.

*Kansas.* — *Menger v. Carruthers*, 57 Kan. 425.

*Michigan.* — *Bowen v. Brogan*, 119 Mich. 218, 75 Am. St. Rep. 387; *Porter v. Osmun*, (Mich. 1904) 97 N. W. Rep. 756.

*Missouri.* — *Fischer v. Siekmann*, 125 Mo. 165; *Westmeyer v. Gallenkamp*, 154 Mo. 28, 77 Am. St. Rep. 747; *Hall v. French*, 165 Mo. 430.

*New Hampshire.* — *Clark v. Parsons*, 69 N. H. 147, 76 Am. St. Rep. 157.

*North Carolina.* — *Hauser v. Craft*, 134 N. Car. 319.

*Texas.* — *Beaty v. Clymer*, (Tex. Civ. App. 1903) 75 S. W. Rep. 540.

**809.** 1. *After Expiration of Life Tenancy.* — *Mann v. Mann*, 141 Cal. 326; *Turner v. Hause*, 199 Ill. 472, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 809; *Chicago, etc., R. Co. v. Vaughn*, 206 Ill. 234; *Hall v. French*, 165 Mo. 430; *Clark v. Parsons*, 69 N. H. 147, 76 Am. St. Rep. 157.

2. *McMichael v. Craig*, 105 Ala. 382; *Dawson v. Edwards*, 189 Ill. 60; *Ewin v. Lindsay*, (Tenn. Ch. 1900) 58 S. W. Rep. 388.

Where the life estate was acquired by adverse possession, the statute does not begin to run against the remainder in fee. The life estate does not thereby become merged in the fee so as to enable the owners of the title in fee to sue for and recover the possession. *Dawson v. Edwards*, 189 Ill. 60.

*Possession under Heir Not Adverse to Dower Right.* — *Sargent v. North Cumberland Mfg. Co.*, 112 Ky. 888.

**810.** 1. *Possession of Tenant the Possession of Landlord.* — *Martin v. Martin*, (Iowa 1903) 94 N. W. Rep. 493; *Beam v. Gardner*, 18 Pa. Super. Ct. 245; *O'Connor v. Dykes*, (Tex. Civ. App. 1895) 29 S. W. Rep. 920; *Hintze v. Krabbenschmidt*, (Tex. Civ. App. 1897) 44 S. W. Rep. 38; *Balles v. Dolch*, (Tex. Civ. App. 1900) 60 S. W. Rep. 267; *Bruce v. Richardson*, 26 Tex. Civ. App. 615; *Wilson v. Braden*, 48 W. Va. 196.

*Possession Presumed Continuous.* — *Miller v. Warren*, 94 N. Y. App. Div. 192.

*Tenant by Sufferance.* — *Lyebrook v. Hall*, 73 Miss. 509.

**811. Failure to Pay Rent.** — See note 1.

Limitation of Rule. — See notes 2, 3.

Tenant Holding Over. — See note 4.

Claimants under Tenant. — See note 5.

**812. (6) Trust Estates** — As Between Trustee and Cestui Que Trust — Express Trusts. — See note 1.**813. Constructive Trusts.** — See note 1.**814. As to Third Parties.** — See notes 3, 4.**815. (7) Principal and Agent.** — See note 1.(8) *Mortgagor and Mortgagee* — Possession of Mortgagor. — See notes 2, 3.**816. Possession of His Grantee.** — See note 1.**811. 1.** *Ross v. McManigal*, 61 Neb. 90.

In England, under the Real Property Limitation Act of 1874, where a tenant fails to pay rent for a period of twelve years and no action is taken by the landlord, all the latter's rights in respect to the land come to an end. *In re Jolly*, (1900) 2 Ch. 616, 83 L. T. N. S. 118.

**2.** *Lambert v. Huber*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 462.

**3.** *Morris v. Wheat*, 11 App. Cas. (D. C.) 201; *Dasher v. Ellis*, 102 Ga. 830; *Greenwood v. Moore*, 79 Miss. 203, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 811; *Nessley v. Ladd*, 29 Oregon 354; *New York, etc., Land Co. v. Dooley*, (Tex. Civ. App. 1903) 77 S. W. Rep. 1030.

**A Tenant May, by Open and Notorious Renunciation**, hold adversely to his landlord. *South v. Marcum*, 58 S. W. Rep. 527, 22 Ky. L. Rep. 641.

**But to Initiate an Adverse Holding** he must surrender possession, etc. *Flannery v. Hightower*, 97 Ga. 592; *Ross v. McManigal*, 61 Neb. 92, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 811; *Schields v. Horbach*, 49 Neb. 262; *Perkins v. Potts*, 52 Neb. 110; *Church v. Wright*, 4 N. Y. App. Div. 312; *Beam v. Gardner*, 18 Pa. Super. Ct. 245; *Neff v. Ryman*, 100 Va. 521. See also *Huntington v. Mattfield*, (Tex. Civ. App. 1900) 55 S. W. Rep. 361; *Bruce v. Richardson*, 26 Tex. Civ. App. 615; *Glezen v. Haskins*, 23 R. I. 601; *Miller v. Wolfe*, 30 Nova Scotia 277.

**It Must Be Made Plain that the Real Owner Has Been Given a Cause of Action.** — *Wilkins v. Pensacola City Co.*, 36 Fla. 36.

**The Purchase of a Tax Title.** — See *Millett v. Lagomarsino*, (Cal. 1894) 38 Pac. Rep. 308.

**Presumption.** — Where a tenant in possession orally contracts for the purchase of the leased premises, his subsequent possession will be presumed to be under the lease, unless it be clearly shown that he holds under the contract of purchase. *Schields v. Horbach*, 49 Neb. 262.

**While the Attornment of a Tenant to a Stranger** may not alone operate as a disseizin of a landlord, yet if possession be assumed by other acts besides the attornment, and the landlord has full knowledge of such change in the tenancy, and of the possession in connection therewith, the latter may become adverse as to him. *Winn v. Strickland*, 34 Fla. 610.

**4. Holding Over After Expiration of Term.** — *Schields v. Horbach*, 49 Neb. 262; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691.

**5. Rule as to Persons Claiming under Tenant.** — *Koloa Sugar Co. v. Brown*, 12 Hawaii 146,

citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 810 [811]; *Neff v. Ryman*, 100 Va. 521. See also *Church v. Shultes*, 4 N. Y. App. Div. 378.

**812. 1.** *Westenfelder v. Green*, 78 Fed. Rep. 892; *Kansas City Invest. Co. v. Fulton*, 4 Kan. App. 115; *Dresser v. Travis*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 358; *French v. French*, (Tenn. Ch. 1898) 52 S. W. Rep. 517; *Wallace v. Goodlett*, 104 Tenn. 670; *Ellis v. Southwestern Land Co.*, 102 Wis. 400.

**Disclaimer.** — See *Com. v. Clark*, (Ky. 1904) 83 S. W. Rep. 100.

**813. 1.** *Westenfelder v. Green*, 78 Fed. Rep. 892; *Faggart v. Bost*, 122 N. Car. 517.

**814. 3.** Where one buys land that is under a recorded deed of trust, given by the owner from whom the purchase is made, the possession of such purchaser is not adverse to the right of the grantor in such trust deed, and possession will not save the land from liability; and the statute of limitations will not run against the deed of trust, though the debt may be barred by the presumption of payment after twenty years. *Pickens v. Love*, 44 W. Va. 725.

**Purchaser from Trustee.** — Where a purchaser from a trustee notifies the former owner of the land that he has purchased and holds the same as owner, the deed which he holds in consideration of the *bona fide* payment of the purchase money is sufficient basis of title to render his subsequent occupancy hostile, even though the trustee's deed is void for some irregularity of which the purchaser had no knowledge. *McCaughn v. Young*, (Miss. 1905) 37 So. Rep. 840.

**4.** *McCrary v. Clements*, 95 Ga. 778; *Walton v. Ketchum*, 147 Mo. 209.

**815. 1.** *Richardson v. Bruce*, (Tex. Civ. App. 1903) 75 S. W. Rep. 835. See also *Henderson v. Henderson*, 23 Ont. App. 577. Compare *Carney v. Hennessey*, (Conn. 1905) 60 Atl. Rep. 129.

**2.** *Garren v. Fields*, 131 Ala. 304; *Alsup v. Stewart*, 194 Ill. 595, 88 Am. St. Rep. 169, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815; *French v. Goodman*, 167 Ill. 345; *Jones v. Foster*, 175 Ill. 459; *Eyermaun v. Piron*, 151 Mo. 107.

**3.** *Goodman v. Pareira*, 70 Ark. 49; *Skinner v. Hale*, 76 Conn. 223; *Alsup v. Stewart*, 194 Ill. 598, 88 Am. St. Rep. 169, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815; *Bentley v. Callaghan*, 79 Miss. 305, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815; *Eyermaun v. Piron*, 151 Mo. 107.

**816. 1.** *Goodman v. Pareira*, 70 Ark. 49; *Alsup v. Stewart*, 194 Ill. 595, 88 Am. St. Rep.



**816.** After Foreclosure Sale. — See note 2.

**817.** Possession by Mortgagee. — See notes 1, 2.

**818.** (9) *Purchaser Pendente Lite*. — See note 1.

(10) *Vendor and Vendee* — Possession of Vendor. — See note 2.

**819.** See notes 1, 2.

**820.** Possession of Vendee. — See note 1.

169; *Eyermann v. Piron*, 151 Mo. 107; *Stan-  
cill v. Spain*, 133 N. Car. 76; *Glezen v. Haskins*,  
23 R. I. 601.

Where a grantee of the mortgagor paid in-  
terest on the mortgage, such payment was an  
acknowledgment that the mortgagor or his  
grantee held under or by permission of the  
mortgagee. The possession only became ad-  
verse when such payments ceased. *Colton v.*  
*Depew*, 59 N. J. Eq. 126, *affirmed* 60 N. J. Eq.  
454, 83 Am. St. Rep. 650. See also *Ely v.*  
*Wilson*, 61 N. J. Eq. 94.

**816.** 2. *Martin v. Martin*, (Iowa 1903) 94  
N. W. Rep. 493.

**817.** 1. *Munro v. Barton*, 98 Me. 250.

**Mortgagee in Possession to Satisfy His Claim  
Out of Proceeds.** — See *McGuire v. Lynch*, 126  
Cal. 576.

**Void Foreclosure — Color of Title.** — See *H. B.*  
*Clafin Co. v. Middlesex Banking Co.*, 113 Fed.  
Rep. 958.

**Deed Absolute on Its Face.** — *Dunton v. Mc-*  
*Cook*, 93 Iowa 258; *Barbee v. Spivey*, (Tex.  
Civ. App. 1895) 32 S. W. Rep. 345.

**Presumption.** — After a mortgagee has held  
possession of mortgaged land for forty years,  
and fifteen years after the death of the mort-  
gagor, the possession of the mortgagee will be  
presumed to be adverse. *Tibbs v. Reed*, 105  
Ky. 331.

2. *Backus v. Burke*, 63 Minn. 272; *Hall v.*  
*Hooper*, 47 Neb. 111; *Finn v. Lally*, 1 N. Y.  
App. Div. 411.

**818.** 1. **Rule as to Purchasers Pendente Lite.**  
— *Wille v. Ellis*, 22 Tex. Civ. App. 462.

**Administration.** — Where the widow of a de-  
cedent, who was also his executrix and had  
power under the will to dispose of the estate  
for the support of herself and children, mort-  
gaged the decedent's land in her individual  
capacity to secure a loan, and the mortgagee  
purchased the land under foreclosure sale, his  
possession was adverse to any right of posses-  
sion in the executrix. *Webb v. Winter*, 135  
Cal. 455.

Where the heirs take possession of their an-  
cestor's land at his death, such possession is  
in their own right and is adverse to that  
of an administrator subsequently appointed.  
*Davitt v. Southern R. Co.*, 108 Ga. 665.

2. *Alabama.* — *Ivey v. Beddingfield*, 107 Ala.  
616.

*Arkansas.* — *Graham v. St. Louis, etc., R.*  
*Co.*, 69 Ark. 567, *citing* 1 AM. AND ENG. ENCYC.  
OF LAW (2d ed.) 818.

*California.* — *Tully v. Tully*, 137 Cal. 60.

*Iowa.* — *McClenahan v. Stevenson*, 118 Iowa  
106; *Luckhart v. Luckhart*, 120 Iowa 248.

*Minnesota.* — *Kelly v. Palmer*, 91 Minn. 133.

*Pennsylvania.* — *Pierce v. Barney*, 209 Pa. St.  
132; *Hads v. Tiernan*, 25 Pa. Super. Ct. 14.

*Texas.* — See *Thomson v. Weisman*, (Tex.  
1904) 82 S. W. Rep. 503, *reversing* (Tex. Civ.  
App. 1903) 78 S. W. Rep. 728.

*Utah.* — *English v. Openshaw*, (Utah 1904)  
78 Pac. Rep. 476.

**Presumption.** — Where a grantor remains in  
possession after a valid conveyance, his posses-  
sion is presumed to be permissive and subor-  
dinate to the grantee. *Horbach v. Boyd*, 64  
Neb. 129.

**Gift.** — After giving the home place to his  
daughter, and delivery of a deed, the possession  
of the father is not adverse unless he mani-  
fested his intention to hold adversely. *Reed v.*  
*Smith*, 125 Cal. 491.

**819.** 1. *Graham v. St. Louis, etc., R. Co.*,  
69 Ark. 567, *citing* 1 AM. AND ENG. ENCYC. OF  
LAW (2d ed.) 819; *Knight v. Knight*, 178 Ill.  
553; *Fain v. Miles*, 60 S. W. Rep. 939, 22 Ky.  
L. Rep. 1584.

**Warranty Deed.** — *Milnes v. Van Gilder*, 197  
Pa. St. 347, 80 Am. St. Rep. 828.

2. *Arkansas.* — *Graham v. St. Louis, etc., R.*  
*Co.*, 69 Ark. 567, *citing* 1 AM. AND ENG. ENCYC.  
OF LAW (2d ed.) 819.

*California.* — *Baker v. Clark*, 128 Cal. 181.

*Illinois.* — *Peoria, etc., R. Co. v. Tamplin*,  
156 Ill. 285; *Knight v. Knight*, 178 Ill. 553.

*Iowa.* — *McClenahan v. Stevenson*, 118 Iowa  
106.

*Minnesota.* — *Kelly v. Palmer*, 91 Minn. 133;  
*Collins v. Collieran*, 86 Minn. 199.

*Missouri.* — *Fox v. Windes*, 127 Mo. 502, 48  
Am. St. Rep. 648.

*North Carolina.* — *Scarboro v. Scarboro*, 122  
N. Car. 234.

*New York.* — *Mannix v. Riordan*, 75 N. Y.  
App. Div. 135.

*Pennsylvania.* — *Milnes v. Van Gilder*, 197  
Pa. St. 347, 80 Am. St. Rep. 828; *Pierce v.*  
*Barney*, 209 Pa. St. 132; *Hads v. Tiernan*, 25  
Pa. Super. Ct. 14.

*Utah.* — *Center Creek Water, etc., Co. v.*  
*Lindsay*, 21 Utah 201, *citing* 1 AM. AND ENG.  
ENCYC. OF LAW (2d ed.) 818 [819].

*Virginia.* — *Virginia Midland R. Co. v. Bar-*  
*bour*, 97 Va. 118.

**Re-entry of Grantor.** — A grantor in a deed  
with covenant of warranty may acquire a new  
title, adverse to that of his grantee, by a sub-  
sequent entry and adverse possession, and is  
not estopped from asserting the same by his  
deed and covenant. *Horbach v. Boyd*, 64 Neb.  
129.

**820.** 1. **Rule as to Possession of Vendee.** —  
*Perry v. Lawson*, 112 Ala. 480; *Brown v.*  
*Swango*, (Ky. 1894) 28 S. W. Rep. 156; *Wald-*  
*ron v. Harvey*, 54 W. Va. 608, 102 Am. St.  
Rep. 959; *Roberts v. Decker*, 120 Wis. 102.

**Parol Gift.** — *Lynn v. Cannada*, (Ky. 1899) 49  
S. W. Rep. 461; *Murphy v. Roney*, 82 S. W.  
Rep. 396, 26 Ky. L. Rep. 634; *Schafer v.*  
*Hauser*, 111 Mich. 622, 66 Am. St. Rep. 403.  
See also *Owsley v. Owsley*, (Ky. 1903) 77 S.  
W. Rep. 397.

**Parol Purchase.** — A party may by parol pur-  
chase land, and he may enter on and openly

**820.** (11) *Husband and Wife* — As Between Husband and Wife. — See note 2.

**821.** See note 1.

As to Third Parties. — See note 2.

(12) *Parent and Child*. — See note 3.

**822.** c. POSSESSION MUST BE ACTUAL — (1) *General Rule*. — See notes 1, 2.

The Usual Tests of Entry and Possession. — See note 3.

**823.** Question of Actual Adverse Possession Dependent on Circumstances. — See notes 1, 2.

When Actual Occupation, Cultivation, or Residence Unnecessary. — See note 3.

and notoriously hold, claim, and occupy the same adverse to all the world, and such adverse holding and occupancy will ripen into a perfect title. *Creech v. Abner*, 106 Ky. 239.

Possession under a parol purchase is adverse to the vendor. *Gilbert v. Kelly*, (Ky. 1900) 57 S. W. Rep. 228.

**820.** 2. *Stiff v. Cobb*, 126 Ala. 387, 85 Am. St. Rep. 38, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820; *Skinner v. Hale*, 76 Conn. 223, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820; *Hays v. Marsh*, 123 Iowa 81; *Hovorka v. Havlik*, (Neb. 1903) 93 N. W. Rep. 990; *Reagle v. Reagle*, 179 Pa. St. 89.

If the husband in his lifetime has conveyed the land by a deed, in which his wife did not join, and she, after the first husband's death, marries the grantee, who lives with her upon the premises, the possession is the possession of the wife until her dower is assigned, and not the possession of the husband. *Reed v. Hackney*, 69 N. J. L. 27.

**821.** 1. *Ross v. McCain*, 145 Mo. 271; *Ferring v. Fleischman*, (Tenn. Ch. 1896) 39 S. W. Rep. 19.

2. *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70; *Laraway v. Zenor*, 100 Iowa 181; *Brown-eller v. Wells*, 109 Iowa 230.

3. *Wright v. Stice*, 173 Ill. 571, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 821; *O'Boyle v. McHugh*, 66 Minn. 391, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 821. See also *Malone v. Malone*, 88 Minn. 418.

Where the Title Is in the Child. — *Bozarth v. Watts*, (Tenn. Ch. 1900) 61 S. W. Rep. 108.

**Widow.** — "The widow's possession and occupancy of the homestead is, in its inception, perfectly friendly, and not adverse to the heirs of the deceased husband or their assigns, and will be regarded as continuing so until disclaimed by hostile acts or declarations." *Meddis v. Kenney*, 176 Mo. 200, 98 Am. St. Rep. 496.

**822.** 1. *Ohio, etc., R. Co. v. Wooten*, (Ky. 1898) 46 S. W. Rep. 681; *Row v. Johnston*, (Ky. 1904) 78 S. W. Rep. 906; *Helton v. Strubbe*, 62 S. W. Rep. 12, 22 Ky. L. Rep. 1919; *Michel v. Stream*, 48 La. Ann. 341; *Proctor v. Maine Cent. R. Co.*, (Me. 1905) 60 Atl. Rep. 423; *Johnston v. Albuquerque*, (N. Mex. 1903) 72 Pac. Rep. 9; *Fuller v. Elizabeth City*, 118 N. Car. 25; *Lieberman v. Clark*, (Tenn. 1905) 85 S. W. Rep. 262, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 822; *Polk v. Beaumont Pasture Co.*, 26 Tex. Civ. App. 242; *Brooke v. Gibson*, 27 Ont. 218; *McIntyre v. Thompson*, 1 Ont. L. Rep. 163.

2. *Woolfolk v. Buckner*, 67 Ark. 411; *Ely v.*

*Brown*, 183 Ill. 597, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 822; *Horbach v. Boyd*, 64 Neb. 129; *Lieberman v. Clark*, (Tenn. 1905) 85 S. W. Rep. 262, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 822.

3. Tests of Entry and Possession. — *Lennig v. White*, (Va. 1894) 20 S. E. Rep. 831.

**823.** 1. Situation of the Lands — Uses to Which They May Be Applied. — *Chamberlain v. Abadie*, 48 La. Ann. 587; *Adams v. Clapp*, 87 Me. 316; *Batchelder v. Robbins*, 95 Me. 59; *Whitaker v. Erie Shooting Club*, 102 Mich. 454; *Butler v. Drake*, 62 Minn. 229; *Wheeler v. Gorman*, 80 Minn. 462; *Goltermann v. Schiermeyer*, 125 Mo. 291; *Benne v. Miller*, 149 Mo. 228; *Twoligh v. Leamer*, 48 Neb. 247; *Hamilton v. Fluornoy*, 44 Oregon 97; *Clithero v. Fenner*, (Wis. 1904) 99 N. W. Rep. 1027; *Illinois Steel Co. v. Jeka*, (Wis. 1904) 101 N. W. Rep. 399.

2. *Mason v. Calumet Canal, etc.*, 'Co., 150 Ind. 699. See also *Ortiz v. State*, (Tex. Civ. App. 1905) 86 S. W. Rep. 45.

3. When Actual Occupation, Cultivation, or Residence Dispensed With. — *Bynum v. Hewlett*, 137 Ala. 333; *Johns v. McKibben*, 156 Ill. 71; *Sullivan v. Eddy*, 154 Ill. 199; *French v. Goodman*, 167 Ill. 345; *Worthley v. Burbanks*, 146 Ind. 539; *Moore v. Hinkle*, 151 Ind. 343; *Dice v. Brown*, 98 Iowa 297; *Dickinson v. Bales*, 62 Kan. 865, 61 Pac. Rep. 403; *Merryman v. Cumberland Paper Co.*, 98 Md. 223; *Whitaker v. Erie Shooting Club*, 102 Mich. 454; *McCaughn v. Young*, (Miss. 1905) 37 So. Rep. 839; *Sequatchie Valley Coal, etc., Co. v. Coppinger*, 95 Tenn. 528; *Ortiz v. State*, (Tex. Civ. App. 1905) 86 S. W. Rep. 45; *Lennig v. White*, (Va. 1894) 20 S. E. Rep. 831.

**Acts of Ownership.** — In *Stein v. Green*, 6 Lack. Leg. N. (Pa.) 292, the court said: "The established rule with regard to woodland seems to be that when the party is a mere trespasser, to acquire title by adverse possession he must either fence or indicate his boundaries by distinct and visible marks upon the ground — that being the only way he can convey notice to the real owner on whom he intrudes, of the extent of his claim — and this must be accompanied by exclusive use and occupancy up to the boundaries so made." See also *Goodson v. Brothers*, 111 Ala. 589; *Dickinson v. Bales*, 59 Kan. 224.

Hauling sand at intervals of twenty years from an island which is submerged during half of each year is not sufficient, although that may be all the possession the claimant or owner is capable of making. *Strange v. Spalding*, (Ky. 1895) 29 S. W. Rep. 137.

**Land Covered by Water.** — Adverse possession of land covered by water, which is the subject

**824.** Wild Lands. — See note 1.

Mere Naked Possession Without Color of Title. — See note 3.

Entry under Conveyance from One Having Color of Title. — See note 4.

**825.** Legal Owner in Possession of Part of the Tract. — See note 2.

(2) Evidence Of — (a) By Occupation. — See note 4.

**826.** An Entry to Survey. — See note 1.

**827.** When Question for Jury. — See note 1.

of private ownership, may be acquired by any means which actually and notoriously exclude the true owner therefrom, effectually dispossessing him thereof. Other means than physical exclusion by residence thereon or by inclosing the same will accomplish it. *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905.

**824.** 1. *Mason v. Calumet Canal, etc., Co.*, 150 Ind. 699; *Vincent v. Blanton*, (Ky. 1905) 85 S. W. Rep. 703; *Soper v. Lawrence Bros. Co.*, 98 Me. 268, 99 Am. St. Rep. 397.

**Swamp Land.** — "The occasional getting boards and shingles in this swamp were no more than trespasses and did not amount to possession." *Rowe v. Cape Fear Lumber Co.*, 128 N. Car. 301, modified 129 N. Car. 97. See also *Bump v. Butler County*, 93 Fed. Rep. 290; *Travers v. McElvain*, 200 Ill. 377; *White v. Harris*, 206 Ill. 584; *Chabert v. Russell*, 109 Mich. 571.

**Cutting Grass.** — The mere fact that a trespasser cuts natural hay on and lets his cattle run over and feed upon wild and uninclosed land, adjoining land actually occupied by him, is not sufficient to constitute adverse possession. *Sage v. Morosick*, 69 Minn. 167.

**Cutting Timber — Paying Taxes.** — There can be no adverse possession of wild lands as against a superior title unless such possession is actual, exclusive, visible, and notorious. A mere claim by the occasional cutting of timber, the prevention of trespassers, the payment of taxes, and the assertion of title, is not sufficient. *Wilson v. Braden*, (W. Va. 1904) 49 S. E. Rep. 409. See also *Fleming v. Katahdin Pulp, etc., Co.*, 93 Me. 110; *McKinnon v. Meston*, 104 Mich. 642.

**Accretions.** — In *Benne v. Miller*, 149 Mo. 228, the court said: "One who acquires title to the mainland by ten years' adverse possession acquires title to river deposits made and making on his front before and during the period in which his possessory title was forming." And see the title ACCRETION.

**Adverse Possession to Middle of Stream.** — One who holds to the shore of a stream by adverse possession "is confined to his actual occupancy on the shore unless by notorious acts of ownership, in so far as he may be able to exercise them, he furnishes evidence of his intention to claim and hold to the middle of the stream." *Stanberry v. Mallory*, 101 Ky. 49.

**3. Naked Possession Without Color of Title — How Far Adverse.** — *Sage v. Larson*, 69 Minn. 122; *Goltermann v. Schiermeyer*, 125 Mo. 291; *Pennsylvania R. Co. v. Breckenridge*, 60 N. J. L. 583; *Lieberman v. Clark*, (Tenn. 1905) 85 S. W. Rep. 258, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 824; *Funk v. Anderson*, 22 Utah 238.

**4.** *Zundel v. Baldwin*, 114 Ala. 328; *Doe v. Edmondson*, 127 Ala. 445; *Lieberman v. Clark*,

(Tenn. 1905) 85 S. W. Rep. 258, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 824; *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470.

**825.** 2. *Wilkins v. Pensacola City Co.*, 36 Fla. 36; *Strong v. Powell*, 92 Ga. 591; *Benne v. Miller*, 149 Mo. 228; *Peden v. Crenshaw*, (Tex. 1904) 84 S. W. Rep. 362.

**4.** *Wiggins v. Kirby*, 106 Ala. 262; *Elyton Land Co. v. Denny*, 108 Ala. 553; *Jackson Lumber Co. v. McCreary*, 137 Ala. 278; *Stalford v. Goldring*, 197 Ill. 156; *Stern v. Fountain*, 112 Iowa 96; *Price v. Beall*, (Ky. 1897) 40 S. W. Rep. 918; *Barr v. Potter*, (Ky. 1900) 57 S. W. Rep. 478; *Archibald v. New York Cent., etc., R. Co.*, 157 N. Y. 574; *College Point Sav. Bank v. Vollmer*, 44 N. Y. App. Div. 619; *Fuller v. Jackson*, (Tenn. Ch. 1901) 62 S. W. Rep. 274; *Hearn v. Jones*, (Tenn. Ch. 1900) 64 S. W. Rep. 344; *McIntyre v. Thompson*, 1 Ont. L. Rep. 163.

**Occasional Acts of Ownership.** — *Freedman v. Oppenheim*, 102 N. Y. App. Div. 622.

**Cutting Timber, etc., Not Sufficient.** — *Soape v. Doss*, 18 Tex. Civ. App. 649. See also *Patterson v. T. J. Moss Tie Co.*, (Ky. 1903) 71 S. W. Rep. 930; *Combs v. Combs*, (Ky. 1903) 72 S. W. Rep. 8; *Call v. Cozart*, (Tenn. Ch. 1898) 48 S. W. Rep. 312.

**Mining Lands.** — *Finnegan v. Pennsylvania Trust Co.*, 28 Pittsb. Leg. J. N. S. (Pa.) 68.

**Presumption as to Quantity of Land Occupied.** — The actual occupancy of a small portion of an entire tract of land, which entire tract has been marked by locating the corners and plowing around the outside lines, must be deemed to be an occupation of the entire tract so marked, for the purpose of starting and continuing the running of the statute of limitations. *Pratt v. Ard*, 63 Kan. 182.

**Use and Occupation Establish the Fact of Adverse Possession.** — *Off v. Heinrichs*, (Wis. 1905) 102 N. W. Rep. 904.

**826.** 1. *Mead v. Illinois Cent. R. Co.*, 112 Iowa 291.

**827.** 1. *Alabama.* — *Doe v. Adams*, 121 Ala. 664.

*Delaware.* — *Doe v. Pepper*, 2 Marv. (Del.) 221.

*Georgia.* — *Flannery v. Hightower*, 97 Ga. 592.

*Illinois.* — *Johns v. McKibben*, 156 Ill. 71.

*Indian Territory.* — *Robinson v. Nail*, 2 Indian Ter. 509.

*Minnesota.* — *Butler v. Drake*, 62 Minn. 229.

*Nebraska.* — *Fink v. Dawson*, 52 Neb. 647.

*New York.* — *Race v. Stewart*, 5 N. Y. App. Div. 598; *Stillwell v. Boyer*, 36 N. Y. App. Div. 424, affirmed without opinion 165 N. Y. 621; *O'Donohue v. Cronin*, 62 N. Y. App. Div. 379.

*Texas.* — *McCarty v. Johnson*, 20 Tex. Civ. App. 184; *Beaumont Pasture Co. v. Polk*, (Tex. Civ. App. 1900) 55 S. W. Rep. 614; *Williams v.*

**827.** Residence May Be by Tenant or Vendee under Contract of Purchase. — See note 2.

(b) By Cultivation — Occasional Acts of Working and Improving Insufficient. — See note 4.

Reaping Not Cultivation. — See note 5.

Cutting Timber — Firewood. — See note 7.

**828.** See note 1.

Merely Grazing Cattle. — See note 2.

**829.** (c) By Inclosure. — See note 1.

Inclosure Without Residence. — See note 2.

By Statute in Some States. — See note 3.

Sufficiency of Inclosure. — See notes 4, 5.

**830.** The Fence Should Be a Complete Inclosure. — See note 1.

Temporary Breaches. — See note 2.

**831.** (d) By Payment of Taxes. — See notes 1, 2.

Galveston, (Tex. Civ. App. 1900) 58 S. W. Rep. 551; Haigler v. Pope, (Tex. Civ. App. 1903) 77 S. W. Rep. 1039.

*Wisconsin.* — Illinois Steel Co. v. Bilot, 109 Wis. 418, 83 Am. St. Rep. 905; Illinois Steel Co. v. Jeka, 119 Wis. 122.

**827.** 2. Kopley v. Scully, 185 Ill. 52; Jacob Tome Institute v. Crothers, 87 Md. 569; Heinemann v. Bennett, 144 Mo. 113; McNeill v. Fuller, 121 N. Car. 209; Cochran v. Linville Imp. Co., 127 N. Car. 386; Bateman v. Jackson, (Tex. Civ. App. 1898) 45 S. W. Rep. 224; Collier v. Coutts, (Tex. Civ. App. 1898) 45 S. W. Rep. 485.

4. Nicholson v. Aronson, 58 Kan. 814, 48 Pac. Rep. 917.

5. See Voigt v. Meyer, 42 N. Y. App. Div. 350.

7. Boynton v. Ashabrunner, (Ark. 1905) 88 S. W. Rep. 566; A. W. Stevens Lumber Co. v. Hughes, (Miss. 1905) 38 So. Rep. 769; Goltermann v. Schiermeyer, 125 Mo. 291; Robinson v. Claggett, 149 Mo. 153; Wheeler v. Taylor, 32 Oregon 421, 67 Am. St. Rep. 540.

In Carter v. Hornback, 139 Mo. 238, the court said: "Cutting and hauling firewood, saw timber, making and hauling fence rails from the land, and clearing up same" do not constitute adverse possession. See also Driver v. Martin, 68 Ark. 551.

**828.** 1. Boynton v. Ashabrunner, (Ark. 1905) 88 S. W. Rep. 566; Hilton v. Singletary, 107 Ga. 821; Ohio, etc., R. Co. v. Wooten, (Ky. 1898) 46 S. W. Rep. 681; Nye v. Alfiter, 127 Mo. 529; Lieberman v. Clark, (Tenn. 1905) 85 S. W. Rep. 262, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 828 [829]; Broom v. Pearson, (Tex. 1905) 85 S. W. Rep. 790, rehearing denied (Tex. 1905) 86 S. W. Rep. 733.

**Illustration — Timber Land.** — In Shaffer v. Gaynor, 117 N. Car. 15, the court said: "The acts of dominion consisted of cutting board timber some time during a particular year on a piece of woodland; but there was no evidence to show that they were continuous, or, if they were, that the land, though while covered with timber it was not susceptible to other use, might not have been cleared and cultivated, regardless of its capacity for profitable production."

2. Bergere v. U. S., 168 U. S. 66; McCloskey v. Hayden, 169 Ill. 297; Haase v. Kelley, 8 Kan. App. 651, quoting 1 AM. AND ENG. ENCYC. OF

LAW (2d ed.) 828; Knight v. Denman, 64 Neb. 814; Calloway v. Sanford, (Tenn. Ch. 1895) 35 S. W. Rep. 776; Vineyard v. Brundrett, 17 Tex. Civ. App. 147; Zapeda v. Hoffman, 31 Tex. Civ. App. 312. Compare Pierson v. McClintock, (Tex. Civ. App. 1904) 78 S. W. Rep. 706.

**829.** 1. Actual Fencing and Inclosing Not Necessary Unless Required by Statute. — Holtzman v. Douglas, 5 App. Cas. (D. C.) 397; Johnson v. Thomas, 23 App. Cas. (D. C.) 141; O'Flaherty v. Mann, 196 Ill. 304; Dice v. Brown, 98 Iowa 297; Dickinson v. Bales, 56 Kan. 224; Adams v. Clapp, 87 Me. 316; Stori v. James, 84 Md. 282; Young v. Grieb, (Minn. 1905) 104 N. W. Rep. 131; Robinson v. Claggett, 149 Mo. 153; Cowan v. Hatcher, (Tenn. Ch. 1900) 59 S. W. Rep. 691, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 829; Illinois Steel Co. v. Bilot, 109 Wis. 430, 83 Am. St. Rep. 905, denying rehearing 109 Wis. 424; Batz v. Woerpel, 113 Wis. 442. See also McCook v. Crawford, 114 Ga. 337; Cowan v. Hatcher, (Tenn. Ch. 1900) 59 S. W. Rep. 689.

**Town Lots.** — See Pendo v. Beakey, 15 S. Dak. 344.

2. Perry v. Lawson, 112 Ala. 480; Hamilton v. Flournoy, 44 Oregon 97; Ambrose v. Huntington, 34 Oregon 484.

3. See Funk v. Anderson, 22 Utah 238.

4. Fence Must Be Substantial. — Helton v. Strubbe, 62 S. W. Rep. 12, 22 Ky. L. Rep. 1919; Johnston v. Albuquerque, (N. Mex. 1903) 72 Pac. Rep. 9; Freedman v. Borner, (Tex. Civ. App. 1897) 40 S. W. Rep. 47; Sharrock v. Ritter, (Tex. Civ. App. 1898) 45 S. W. Rep. 156.

**The Usual Test** is whether an inclosure is sufficient to turn cattle. Jones v. Hodges, (Cal. 1905) 79 Pac. Rep. 869.

5. **Fencing on Margin of River.** — Sanders v. Riedinger, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 289, affirmed 164 N. Y. 564.

**830.** 1. Ely v. Brown, 183 Ill. 575. But see Brown v. Doherty, 93 N. Y. App. Div. 190.

2. Baldwin v. Durfee, 116 Cal. 625; Jones v. Hodges, (Cal. 1905) 79 Pac. Rep. 869; Hillman v. White, (Ky. 1898) 44 S. W. Rep. 111; Sharrock v. Ritter, (Tex. Civ. App. 1898) 45 S. W. Rep. 156; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470.

**831.** 1. Effect of Payment of Taxes. — Holtzman v. Douglas, 168 U. S. 278; Chastang v. Chastang, (Ala. 1904) 37 So. Rep. 799; Boynton

**831.** Necessity of Payment of Taxes. — See note 5.

**832.** *d.* POSSESSION MUST BE OPEN AND NOTORIOUS — Rule Stated. — See note 1.

**833.** Actual Notice Unnecessary. — See note 1.

The Question of Notoriety Does Not Arise. — See note 2.

ton *v.* Ashabrunner, (Ark. 1905) 88 S. W. Rep. 566; Dickinson *v.* Bales, 59 Kan. 224; Chamberlain *v.* Abadie, 48 La. Ann. 587; Whitman *v.* Shaw, 166 Mass. 451; Whitaker *v.* Erie Shooting Club, 102 Mich. 454; Miller *v.* Davis, 106 Mich. 300; Young *v.* Grieb, (Minn. 1905) 104 N. W. Rep. 131; Sweringen *v.* St. Louis, 151 Mo. 348; Consolidated Ice Co. *v.* New York, 166 N. Y. 92; Mission of Immaculate Virgin, etc. *v.* Cronin, 143 N. Y. 524; Fuller *v.* Elizabeth City, 118 N. Car. 25; Truman *v.* Raybuck, 207 Pa. St. 357; Fuller *v.* Jackson, (Tenn. Ch. 1901) 62 S. W. Rep. 274; Hilburn *v.* Harris, (Tex. Civ. App. 1895) 29 S. W. Rep. 923; Texas Tram, etc., Co. *v.* Gwin, (Tex. Civ. App. 1902) 67 S. W. Rep. 892, (Tex. Civ. App. 1902) 68 S. W. Rep. 721.

"Pasturing the land and the payment of taxes upon it did not constitute adverse possession." McVey *v.* Carr, 159 Mo. 648.

"Unimproved and Uninclosed Land shall be deemed and held to be in the possession of the person who pays taxes thereon if he have color of title thereto, but no person shall be entitled to invoke the benefit of this act unless he and those under whom he claims shall have paid such taxes for at least seven years in succession and not less than three of such payments, must be made subsequent to the passage of this act." Acts Ark. 1899, p. 117, quoted in *Townson v. Denson*, (Ark. 1905) 86 S. W. Rep. 661.

**831. 2. Payment of Taxes in Connection with Other Circumstances.** — Chastang *v.* Chastang, (Ala. 1904) 37 So. Rep. 799; Merwin *v.* Morris, 71 Conn. 555; Holtzman *v.* Douglas, 5 App. Cas. (D. C.) 397; Wilbur *v.* Cedar Rapids, etc., R. Co., 116 Iowa 65; Carter *v.* Clark, 92 Me. 225. See *Archibald v. New York Cent., etc., R. Co.*, 157 N. Y. 574.

In *Reddick v. Long*, 124 Ala. 260, the court said: "The mere payment of taxes, and an occasional trip over the land by himself or his agent in looking after it, did not, without more, constitute possession."

**5. California.** — *Tuffree v. Polhemus*, 108 Cal. 670; *Southern Pac. R. Co. v. Whitaker*, 109 Cal. 268; *Eberhardt v. Coyne*, 114 Cal. 283; *Carpenter v. Lewis*, 119 Cal. 18; *Allen v. McKay*, 120 Cal. 332; *McDonald v. McCoy*, 121 Cal. 55; *Williams v. Gross*, 129 Cal. xviii, 61 Pac. Rep. 934; *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115; *Nathan v. Dierssen*, (Cal. 1905) 79 Pac. Rep. 739. If the title was complete before the statute took effect the statute does not affect the title. *Lucas v. Provines*, 130 Cal. 270.

**Idaho.** — Code Civ. Pro. of Idaho made it necessary, in order to establish adverse possession, to prove the payment of taxes. *Brose v. Boise City R., etc., Co.*, 5 Idaho 694. See also *Urguide v. Flanagan*, 7 Idaho 163.

**Illinois.** — *Osburn v. Seales*, 156 Ill. 88; *Converse v. Dunn*, 166 Ill. 25; *Chicago, etc., R. Co. v. Grant*, 167 Ill. 489; *Bell v. Neiderer*, 169 Ill. 54; *Wright v. Stice*, 173 Ill. 571;

*Neiderer v. Bell*, 174 Ill. 325; *Loewenthal v. Elkins*, 175 Ill. 553; *Renner v. Kannally*, 96 Ill. App. 392, affirmed 193 Ill. 212.

**North Dakota.** — See *Power v. Kitching*, 10 N. Dak. 254, 88 Am. St. Rep. 691.

**South Dakota.** — *Bennett v. Moore*, (S. Dak. 1904) 99 N. W. Rep. 855.

**Texas.** — *Wall v. Club Land, etc., Co.*, (Tex. Civ. App. 1905) 88 S. W. Rep. 534.

**Utah.** — See *Funk v. Anderson*, 22 Utah 238; *Dignan v. Nelson*, 26 Utah 186.

**832. 1. United States.** — *National Waterworks Co. v. Kansas City*, 78 Fed. Rep. 428.

**Alabama.** — *Croft v. Doe*, 125 Ala. 391; *Bynum v. Hewlett*, 137 Ala. 333.

**Arkansas.** — *Boynton v. Ashabrunner*, (Ark. 1905) 88 S. W. Rep. 566.

**Connecticut.** — *Carney v. Hennessey*, 74 Conn. 107, 92 Am. St. Rep. 199.

**Georgia.** — *McCook v. Crawford*, 114 Ga. 337.

**Illinois.** — *Eckert v. Weilmuenster*, 103 Ill. App. 490.

**Kentucky.** — *Helton v. Strubbe*, 62 S. W. Rep. 12, 22 Ky. L. Rep. 1919; *Owsley v. Owsley*, (Ky. 1903) 77 S. W. Rep. 397.

**Maine.** — *Adams v. Clapp*, 87 Me. 316; *Carter v. Clark*, 92 Me. 225.

**Maryland.** — *Hackett v. Webster*, 97 Md. 404.

**Michigan.** — *Chabert v. Russell*, 109 Mich. 571; *Red Jacket v. Pinton*, 126 Mich. 194.

**Missouri.** — *Goltermann v. Schiermeyer*, 125 Mo. 291; *Herbst v. Merrifield*, 133 Mo. 267; *Robinson v. Claggett*, 149 Mo. 153.

**North Carolina.** — *Brinkley v. Smith*, 131 N. Car. 130.

**Vermont.** — *Jangraw v. Mee*, 75 Vt. 211, 98 Am. St. Rep. 816.

**Washington.** — *Flint v. Long*, 12 Wash. 342; *Blake v. Shriver*, 27 Wash. 593; *Wilcox v. Smith*, (Wash. 1905) 80 Pac. Rep. 803.

**Wisconsin.** — *Kurz v. Miller*, 89 Wis. 426.

**Canada.** — *McIntyre v. Thompson*, 1 Ont. L. Rep. 163.

In *Goodson v. Brothers*, 111 Ala. 589, the court said: "A possession to be adverse, need not be so open, continuous, and notorious as necessarily to be seen and known by the owner if he should casually go upon the land."

**A Possession Known to the True Owner** and which is adverse is equivalent to a possession which is open and notorious and adverse. *McCaughn v. Young*, (Miss. 1905) 37 So. Rep. 839.

**833. 1.** *Carney v. Hennessey*, 74 Conn. 107, 92 Am. St. Rep. 199; *St. Louis, etc., R. Co. v. Nugent*, 152 Ill. 119; *Miller v. Rosenberger*, 144 Mo. 292; *Bowers v. Ledgerwood*, 25 Wash. 14.

Possession of land is notice to the world of the possessor's rights therein. *Draper v. Taylor*, 58 Neb. 787.

**2. When Notoriety Unimportant.** — *McCaughn v. Young*, (Miss. 1905) 37 So. Rep. 839; *McAuliff v. Parker*, 10 Wash. 141.

**834.** Possession under Deed Duly Recorded — Constructive Notice. — See note 1.

In Constructive Notice the Element of Quantity. — See note 2.

When Possession Is Originally Taken and Held under the True Owner. — See note 3.

*e.* POSSESSION MUST BE EXCLUSIVE. — See note 4.

**835.** *f.* POSSESSION MUST BE CONTINUOUS — (1) *General Rule.* — See notes 1, 2.

Continuity in Point of Locality. — See note 3.

**836.** (2) *Interruption of Possession* — (a) *Re-entry and Intrusion* — By the True Owner. — See note 1.

Nature of Re-entry Required. — See note 2.

**834.** 1. *Hill v. Harris*, 26 Tex. Civ. App. 408.

2. *Extending an Inclosure Over the Line of Another.* — *McAdams v. Moody*, (Tex. Civ. App. 1899) 50 S. W. Rep. 628.

3. *Transferee of Licensee.* — While the transfer of possession by a mere licensee to a third person terminates the license, and gives the licensor the right, if he so elects, to treat the transferee as a trespasser, yet the possession of such transferee is not adverse, so as to set the statute of limitations in motion, unless such adverse holding is declared, and brought to the knowledge of the licensor. *Cameron v. Chicago, etc., R. Co.*, 60 Minn. 100.

4. *Possession Must Be Exclusive.* — *Littledale v. Liverpool College*, (1900) 1 Ch. 19, 81 L. T. N. S. 567; *McIntyre v. Thompson*, 1 Ont. L. Rep. 163; *Hatch v. Heim*, (C. C. A.) 86 Fed. Rep. 436; *Tyee Consol. Min. Co. v. Langstedt*, (C. C. A.) 136 Fed. Rep. 124; *Pennington v. Lewis*, 4 Penn. (Del.) 447; *Burch v. Burch*, 96 Ga. 133; *McCook v. Crawford*, 114 Ga. 337; *Eckert v. Weilmuenster*, 103 Ill. App. 490; *Travers v. McElvain*, 181 Ill. 382; *Ely v. Brown*, 183 Ill. 597, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 834; *Cass Farm Co. v. Detroit*, (Mich. 1905) 102 N. W. Rep. 848; *Altschul v. O'Neill*, 35 Oregon 221, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 834; *Hamilton v. Flournoy*, 44 Oregon 97; *Wilcox v. Smith*, (Wash. 1905) 80 Pac. Rep. 803.

*Grazing the Owner's Cattle on the land will prevent the possession from being exclusive.* *Rennie v. Frame*, 29 Ont. 586.

*Joint Occupancy.* — If two persons are present, claiming the title, the possession is his who has the title. *Spencer Christian Church v. Thomas*, (Ky. 1905) 84 S. W. Rep. 750.

Where the holder of a junior title makes entry upon land in the actual or constructive possession of the owner of an older title, he acquires possession only to the extent of his actual inclosure. *Cuyler v. Bush*, (Ky. 1905) 84 S. W. Rep. 579.

**835.** 1. *Continuity of Possession* — *Alabama.* — *Davidson v. Alabama Iron, etc., Co.*, 109 Ala. 383; *Carter v. Chevalier*, 108 Ala. 563.

*Arkansas.* — *Rowland v. Wadly*, 71 Ark. 273; *Boynton v. Ashabanner*, (Ark. 1905) 88 S. W. Rep. 566.

*California.* — *Nathan v. Dierssen*, (Cal. 1905) 79 Pac. Rep. 739.

*District of Columbia.* — *Reid v. Anderson*, 13 App. Cas. (D. C.) 30.

*Georgia.* — *Clark v. White*, 120 Ga. 957.

*Illinois.* — *Ely v. Brown*, 183 Ill. 596, *citing*

1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835-837; *Downing v. Mayes*, 153 Ill. 330, 46 Am. St. Rep. 896; *Burns v. Edwards*, 163 Ill. 494; *Reuter v. Stuckart*, 181 Ill. 529; *Blackaby v. Blackaby*, 185 Ill. 94.

*Indiana.* — *Fatic v. Myer*, (Ind. 1904) 72 N. E. Rep. 142.

*Kentucky.* — *Barr v. Potter*, (Ky. 1900) 57 S. W. Rep. 478.

*Michigan.* — *Beecher v. Ferris*, 117 Mich. 108.

*Minnesota.* — *St. Paul v. Chicago, etc., R. Co.*, 63 Minn. 330; *Olson v. Burk*, (Minn. 1905) 103 N. W. Rep. 335.

*Missouri.* — *Goltermann v. Schiermeyer*, 125 Mo. 291; *Three States Lumber Co. v. Rogers*, 145 Mo. 445; *Brown v. Hartford*, 173 Mo. 183.

*North Carolina.* — *Brinkley v. Smith*, 131 N. Car. 130; *Monk v. Wilmington*, (N. Car. 1904) 49 S. E. Rep. 345.

*Tennessee.* — *Free v. Fine*, (Tenn. Ch. 1900) 59 S. W. Rep. 384.

*Texas.* — *Settegast v. O'Donnell*, 16 Tex. Civ. App. 56; *Collier v. Coutts*, 92 Tex. 234; *Wille v. Ellis*, 22 Tex. Civ. App. 462; *Allen v. Courtney*, 24 Tex. Civ. App. 86; *Lawless v. Wright*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1039.

*West Virginia.* — *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470.

*Wisconsin.* — *Allis v. Field*, 89 Wis. 327.

*Canada.* — *Handley v. Archibald*, 30 Can. Sup. Ct. 130; *McIntyre v. Thompson*, 1 Ont. L. Rep. 163.

2. *Reid v. Anderson*, 13 App. Cas. (D. C.) 30.

3. *Ely v. Brown*, 183 Ill. 597, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835.

**836.** 1. *Re-entry by True Owner.* — *Schlossnagle v. Kolb*, 97 Md. 285; *Day v. Philbrook*, 89 Me. 462; *Illinois Steel Co. v. Budzisz*, 115 Wis. 68.

*Forible Entry.* — *Hornsby v. Davis*, (Tenn. Ch. 1895) 36 S. W. Rep. 159.

*Joint Possession.* — *Chastang v. Chastang*, (Ala. 1904) 37 So. Rep. 799.

*Entry During Absence of Claimant.* — The continuity is broken by the entry of the owner even though the adverse claimant was absent. *Brinkerhoff v. Mooney*, 42 N. Y. App. Div. 420.

2. *Batchelder v. Robbins*, 93 Me. 579, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 836, *affirmed* 95 Me. 59; *Illinois Steel Co. v. Budzisz*, 115 Wis. 68; *Brock v. Benness*, 29 Ont. 468.

*Entry Must Bear Upon Its Face the Intention to Resume Possession.* — *Murphy v. Com.*, 187 Mass. 361.

**837.** Any Interruption, for However Short a Time. — See note 5.

Question for Jury. — See note 6.

Entry by Another Adverse Claimant. — See note 7.

Mere Intrusion Unknown to the Possessor. — See note 8.

Interruption During Suspension of Statute. — See note 9.

**838.** (b) Acknowledgment of Superior Title — Rule Stated. — See note 2.

Presumption from Agreement to Arbitrate or Suspend Suit. — See note 3.

**839.** Possession Part of Period in Subordination to True Owner. — See note 1.

Purchase of Outstanding Claims. — See notes 2, 3.

**840.** The Purchase of a Tax Title. — See note 1.

But the Offer to Purchase or Rent the Property. — See note 2.

(c) Suit by True Owner — Recovery. — See note 3.

**837. 5.** *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70; *Deppen v. Bogar*, 7 Pa. Super. Ct. 434; *Illinois Steel Co. v. Budzisz*, 115 Wis. 68.

A break of a single day is sufficient to destroy the operation of the statute. *Free v. Fine*, (Tenn. Ch. 1900) 59 S. W. Rep. 384.

**6.** *Hopkins v. Deering*, 71 N. H. 353; *Fortier v. Delaware, etc., R. Co.*, 93 N. Y. App. Div. 24; *Handley v. Barrett*, 176 Pa. St. 246.

**7.** Occupying the land by permission of the adverse holder is not an interruption of the possession of the person who claims by adverse possession. *Jacob Tome Institute v. Crothers*, 87 Md. 569.

**8.** *Cowan v. Hatcher*, (Tenn. Ch. 1900) 59 S. W. Rep. 691, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 837. See also *Prouty v. Tilden*, 164 Ill. 163.

**Entry by Trespassers or Squatters.**—Where little patches of ground were used for gardens by trespassers or squatters, it did not work an interruption of plaintiff's adverse possession. *Batchelder v. Robbins*, 95 Me. 59.

**9.** *Collier v. Coutts*, 92 Tex. 234, reversing (Tex. Civ. App. 1898) 45 S. W. Rep. 485.

**Pendente Lite.**—An entry made *pendente lite* does not interrupt the possession. *Middlesboro Waterworks v. Neal*, 105 Ky. 586.

**838. 2. Acknowledgment of Superior Title.**—*Cleveland v. Cleveland, etc., R. Co.*, 93 Fed. Rep. 113; *McMahill v. Torrence*, 163 Ill. 277; *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70; *Litchfield v. Sewell*, 97 Iowa 247; *Lake City v. Fulkerson*, 122 Iowa 569; *Pratt v. Ard*, 63 Kan. 182; *Olson v. Burk*, (Minn. 1905) 103 N. W. Rep. 335; *Oldig v. Fisk*, 53 Neb. 162, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 838; *Hindley v. Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56; *Hindley v. Manhattan R. Co.*, 103 N. Y. App. Div. 504, affirming *Hindley v. Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56; *Barrell v. Title Guarantee, etc., Co.*, 27 Oregon 77; *Deppen v. Bogar*, 7 Pa. Super. Ct. 434; *Truman v. Raybuck*, 207 Pa. St. 357; *Free v. Fine*, (Tenn. Ch. 1900) 59 S. W. Rep. 384; *Texas, etc., R. Co. v. Speights*, 94 Tex. 350; *Weisman v. Thomson*, (Tex. Civ. App. 1903) 78 S. W. Rep. 728; *Whitaker v. Thayer*, (Tex. Civ. App. 1905) 86 S. W. Rep. 364; *Illinois Steel Co. v. Budzisz*, 115 Wis. 68. But see *McAllister v. Hartzell*, 60 Ohio St. 69.

**Disclaimer of Part.**—See *O'Flaherty v. Mann*, 196 Ill. 304; *Rabbermann v. Carroll*, 207 Ill. 253.

**Agreement Pending Suit.**—An attempt to obtain defendant's consent to the use of the

houses by the tenants pending a settlement of the suit, under a proviso that whatever arrangement was then made was not to impair the rights of either party did not amount to an acknowledgment of defendant's title. *Slater v. Reed*, 37 Oregon 274.

**3. Agreement to Have Land Resurveyed.**—An agreement between adjacent landowners to have the existing boundary line resurveyed is not such an admission of its incorrectness as will interrupt a claim of adverse possession. *Baty v. Elrod*, 66 Neb. 735.

**Negotiating for a Compromise.**—The running of the statute will not be suspended by the parties in interest entering into negotiations for a compromise. *Anderson v. Canter*, 10 Kan. App. 167.

**839. 1.** *St. Paul v. Chicago, etc., R. Co.*, 63 Minn. 330.

**2.** *Elder v. McClaskey*, (C. C. A.) 70 Fed. Rep. 529; *Richardson v. Watts*, 94 Me. 476; *Oldig v. Fisk*, 53 Neb. 156; *West v. Edwards*, 41 Oregon 609; *Meyer v. Hope*, 101 Wis. 123; *Clithero v. Fenner*, (Wis. 1904) 99 N. W. Rep. 1027.

**3.** *Webb v. Thiele*, 56 Neb. 752.

**840. 1. Purchase of Outstanding Tax Title Not an Admission of Another's Right.**—*Zweibel v. Myers*, (Neb. 1903) 95 N. W. Rep. 597.

**A Sale of Land for Taxes** while adversely occupied by a tenant is not such an interruption as will prevent the acquisition of a title by adverse possession. *Harrison v. Dolan*, 172 Mass. 395.

**2.** *McAllister v. Hartzell*, 60 Ohio St. 69; *Barrell v. Title Guarantee, etc., Co.*, 27 Oregon 77.

**Acceptance of a Lease or Contract for the Purchase of the Land** from the owner is an acknowledgment of the title of such owner. *Olson v. Burk*, (Minn. 1905) 103 N. W. Rep. 335.

**3.** *Breon v. Robrecht*, 118 Cal. 469, 473.

**A Decree** finding that the defendant had no interest in the land interrupts the possession. *Oberein v. Wells*, 163 Ill. 101.

**One Remaining in Possession After Adverse Decree.**—*Oberein v. Wells*, 163 Ill. 109. But see *Thomson v. Weisman*, (Tex. 1904) 82 S. W. Rep. 503, reversing (Tex. Civ. App. 1903) 78 S. W. Rep. 728.

**Suit by One of Several Co-tenants.**—*Cobb v. Robertson*, (Tex. 1905) 86 S. W. Rep. 746.

**A Suit in Ejectment by One Tenant in Common** in the joint names of himself and a cotenant interrupts the adverse possession of the cotenant when judgment is entered in such suit.

**840.** Suit Unsuccessful or Dismissed. — See note 6.

**841.** (a) Abandonment. — See note 1.

But the Mere Fact that the Premises Are Vacant at Times. — See note 2.

The Mere Lapse of Time. — See note 3.

**842.** When the Statutory Bar Is Complete. — See note 2.

(3) Tacking — Rule Stated. — See note 4.

Handley v. Archibald, 30 Can. Sup. Ct. 130, affirming Archibald v. Handley, 32 Nova Scotia 1.

**840.** 6. Elder v. McClaskey, (C. C. A.) 70 Fed. Rep. 529; Bradford v. Wilson, 140 Ala. 633; Duffy v. Duffy, 20 Pa. Super. Ct. 25; Rook v. Greenwald, 22 Pa. Super. Ct. 641.

**841.** 1. Driver v. Martin, 68 Ark. 551; Blomberg v. Montgomery, 69 Minn. 149; Linen v. Maxwell, 67 N. H. 370; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470; Handley v. Archibald, 30 Can. Sup. Ct. 130. See also Halbert v. Maysville, etc., R. Co., 98 Ky. 661.

2. Perry v. Lawson, 112 Ala. 484, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 841; Beasley v. Howell, 117 Ala. 499; Richards v. Haskins, (Neb. 1904) 100 N. W. Rep. 151; First Presb. Soc. v. Bass, 68 N. H. 333; Hornsby v. Davis, (Tenn. Ch. 1895) 36 S. W. Rep. 159; Cowan v. Hatcher, (Tenn. Ch. 1900) 59 S. W. Rep. 689.

If the Party Removing Has Color of Title, and by his acts manifests an intention still to claim and use it the possession is not lost. McCaughn v. Young, (Miss. 1905) 37 So. Rep. 839.

3. Chicago, etc., R. Co. v. Wood, 30 Ind. App. 650.

**842.** 2. Tennessee Coal, etc., Co. v. Linn, 123 Ala. 112, 82 Am. St. Rep. 108; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470; Summerfield v. White, 54 W. Va. 311.

But a person claiming land by adverse possession for the statutory period cannot suffer another who is connected with the record title to go into possession, thereafter sell the property to an innocent purchaser, and then come in and establish title by adverse possession as against such purchaser. Adams v. Carpenter, (Mo. 1905) 86 S. W. Rep. 445.

4. Tacking — General Rule — *Alabama*. — Carter v. Chevalier, 108 Ala. 563; Robinson v. Allison, 124 Ala. 325.

*Arkansas*. — Cox v. Dougherty, 62 Ark. 629, 36 S. W. Rep. 184; Robinson v. Nordman, (Ark. 1905) 88 S. W. Rep. 592.

*District of Columbia*. — Reid v. Anderson, 13 App. Cas. (D. C.) 30.

*Hawaii*. — See Kapiolani Estate v. Cleghorn, 14 Hawaii 330.

*Illinois*. — Ely v. Brown, 183 Ill. 597, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 842; Lourance v. Goodwin, 170 Ill. 390; Kepley v. Scully, 185 Ill. 52.

*Louisiana*. — Dowdell v. Orphans' Home Soc., (La. 1905) 38 So. Rep. 16.

*Maryland*. — Wickes v. Wickes, 98 Md. 307.

*Massachusetts*. — Frost v. Curtis, 172 Mass. 401.

*Minnesota*. — Hall v. Connecticut Mut. L. Ins. Co., 76 Minn. 401.

*Nebraska*. — Pohlman v. Evangelical Lutheran Trinity Church, 60 Neb. 364; Zweibel v. Myers, (Neb. 1903) 95 N. W. Rep. 597; Mon-

tague v. Marunda, (Neb. 1904) 99 N. W. Rep. 653.

*New Jersey*. — Davock v. Nealon, 58 N. J. L. 21.

*North Carolina*. — Alexander v. Gibbon, 118 N. Car. 796, 54 Am. St. Rep. 757.

*Ohio*. — Morehouse v. Burgot, 12 Ohio Cir. Dec. 163, 22 Ohio Cir. Ct. 174.

*Oregon*. — Wheeler v. Taylor, 32 Oregon 421, 67 Am. St. Rep. 540.

*Pennsylvania*. — Covert v. Pittsburg, etc., R. Co., 204 Pa. St. 341.

*South Carolina*. — Sutton v. Clark, 59 S. Car. 440, 82 Am. St. Rep. 848; Love v. Turner, (S. Car. 1905) 51 S. E. Rep. 101.

*Texas*. — O'Connor v. Dykes, (Tex. Civ. App. 1895) 29 S. W. Rep. 920; Bateman v. Jackson, (Tex. Civ. App. 1898) 45 S. W. Rep. 224; Houston v. Finnigan, (Tex. Civ. App. 1905) 85 S. W. Rep. 470.

*Wisconsin*. — Allis v. Field, 89 Wis. 327; Ryan v. Schwartz, 94 Wis. 403.

*Canada*. — Ker v. Little, 25 Ont. App. 387.

Where property sold under execution is afterwards sold for taxes in the name of the purchaser at the execution sale, the original owner may acquire the title of the tax purchaser and tack his possession to that of the tax purchaser. Gauthier v. Cason, 107 La. 52.

**Husband and Wife — Widow.** — East Tennessee Iron, etc., Co. v. Walton, (Tenn. Ch. 1895) 35 S. W. Rep. 459, to the same effect as Sawyer v. Kendall, 10 Cush. (Mass.) 241, stated in the original note.

**Widow and Heirs.** — Atwell v. Shook, 133 N. Car. 387.

**The Possession of the Receiver** pending the foreclosure of a mortgage cannot be tacked to the possession of the person who bought the property under the sale made by the receiver. Wilkinson v. Lehman-Durr Co., 136 Ala. 463.

**Tenants in Common.** — The successive possessions of tenants in common may be connected when the parties hold under color of title and not as mere trespassers without color of title. Woodruff v. Roysden, 105 Tenn. 491, 80 Am. St. Rep. 905.

In *North Carolina*, thirty years' adverse possession will bar the state, and this need not be continuous nor need there be any connection between the tenants. Walden v. Ray, 121 N. Car. 237.

**Grantor and Grantee.** — The possession of a grantee cannot be tacked to that of his grantor where no color of title is shown in the grantor. Morrison v. Craven, 120 N. Car. 327. See also Burch v. Burch, 96 Ga. 133; J. B. Streeter Jr. Co. v. Fredrickson, 11 N. Dak. 300.

To tack the possession of a grantee to that of a grantor it must be against some one to whom the grantor held adversely. Sluyter v. Schuch (Neb. 1905) 102 N. W. Rep. 757.

**Absence of Privity Between Some of the Successors.**



- 844.** Where There Is No Privty. — See note 1.  
How the Requisite Privty May Arise. — See note 2.
- 845.** See note 1.  
Continuity Shown by Parole. — See note 2.  
Cannot Rely upon Grantor's Possession of Other Lands. — See note 4.
- 846.** III. COLOR OF TITLE — 1. Definition. — See notes 1, 2.
- 847.** 3. Not Essential to Adverse Possession. — See notes 1, 3.

sive Disseizors has been held not to prevent the barring of the real owner's title. *Handley v. Archibald*, 30 Can. Sup. Ct. 130.

**844. 1.** *Ely v. Brown*, 183 Ill. 597, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 843 [844]; *Wilson v. Purl*, 133 Mo. 367; *Davock v. Nealon*, 58 N. J. L. 21; *Johnston v. Case*, 131 N. Car. 491.

The Possession of Mere Trespassers cannot be tacked to the possession of one claiming to hold by adverse possession. *Haggart v. Ranney*, (Ark. 1904) 84 S. W. Rep. 703.

2. *Memphis, etc., R. Co. v. Organ*, 67 Ark. 84; *Kepley v. Scully*, 185 Ill. 52; *Hall v. Connecticut Mut. L. Ins. Co.*, 76 Minn. 401; *Murray v. Romine*, 60 Neb. 96; *Clark v. Bundy*, 29 Oregon 190; *Illinois Steel Co. v. Budzisz*, 106 Wis. 508, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 842 [844]; *Clithero v. Fenner*, (Wis. 1904) 9 N. W. Rep. 1027.

If the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title, and such occupant claims title from such prior possession, then the possession of the occupant may be tacked to that of such prior possessor. *Lantry v. Wolff*, 49 Neb. 374.

**Agreement for Purchase.** — *Oldig v. Fisk*, (Neb. 1901) 95 N. W. Rep. 492.

**In South Carolina.** — "Where possession of land is transmitted by the act of the disseizor before the expiration of the statutory period necessary to bar the real owner, the continuity of possession is broken, and the grantee or successor of the disseizor cannot unite his possession with that of the disseizor in order to show adverse possession." *Burnett v. Crawford*, 50 S. Car. 161; *Garrett v. Weinberg*, 48 S. Car. 28; *Epperson v. Stansill*, 64 S. Car. 485.

In *Kilgore v. Kirkland*, 69 S. Car. 78, it was held that "when the heir is in of his ancestor's possession, and makes no new entry, the possession of ancestor and heir may be united in making out the period necessary to quiet title."

**845. 1.** *Montague v. Marunda*, (Neb. 1904) 99 N. W. Rep. 653; *Munroe v. Wilson*, 68 N. H. 580; *Turpin v. Sudduth*, 53 S. Car. 295; *East Tennessee Iron, etc., Co. v. Broyles*, 95 Tenn. 612.

**2. When Paper Evidence of Transfer Unnecessary.** — *Doe v. Adams*, 121 Ala. 669, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 844 [845]; *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70; *Kepley v. Scully*, 185 Ill. 52; *Nauman v. Burch*, 91 Ill. App. 48; *Wishart v. McKnight*, 178 Mass. 356, 86 Am. St. Rep. 486; *South Omaha v. Meehan*, (Neb. 1904) 98 N. W. Rep. 691; *Davock v. Nealon*, 58 N. J. L. 21; *West v. Edwards*, 41 Oregon 609; *Rembert v. Edmondson*, 99 Tenn. 15, 63 Am. St. Rep. 819; *Johnson v. Simpson*, 22 Tex. Civ. App. 290; *McManus v. Matthews*, (Tex. Civ. App. 1900) 55 S. W. Rep.

589; *Thompson v. Dutton*, (Tex. Civ. App. 1902) 69 S. W. Rep. 641; *Allis v. Field*, 89 Wis. 327; *Ryan v. Schwartz*, 94 Wis. 403.

The right of one person holding possession adversely may be transferred to another verbally. *Murray v. Romine*, 60 Neb. 96.

4. *Evans v. Welch*, 29 Colo. 355; *Vicksburg, etc., R. Co. v. Le Rosen*, 52 La. Ann. 192.

**In New Jersey**, where one incloses and possesses more land than is covered by the description in his deed, and sells to another by the same description, who enters in possession of all the land inclosed, the successive possessions can be tacked. *Davock v. Nealon*, 58 N. J. L. 21.

**846. 1.** *Nashville, etc., R. Co. v. Mathis*, 109 Ala. 377; *Bloom v. Strauss*, 79 Ark. 487, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 846; *White v. Stokes*, 67 Ark. 188; *De Foresta v. Gast*, 20 Colo. 307; *Tumlin v. Perry*, 108 Ga. 520; *Wilson v. Johnson*, 145 Ind. 40, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 846; *Lindt v. Uihlein*, 116 Iowa 48; *Kopp v. Herrman*, 82 Md. 339; *Erdman v. Corse*, 87 Md. 506; *Barker v. Southern R. Co.*, 125 N. Car. 596, 74 Am. St. Rep. 658; *Randolph v. Casey*, 43 W. Va. 289; *Whitcomb v. Provost*, 102 Wis. 278.

**2. Other Definitions.** — "Color of title for the purpose of adverse possession under the statute of limitations as to land is that which has the semblance or appearance of title, legal or equitable, but which in fact is no title." *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27, 3 Va. Sup. Ct. 589. See also *Sulphur Mines Co. v. Thompson*, 93 Va. 293.

**Definitions Assuming Necessity of a Writing.** — Color of title is mere semblance of title — anything in writing connected with title to land which serves to define the limits of the claim. *Connell v. Culpepper*, 111 Ga. 805; *Street v. Collier*, 118 Ga. 470.

**847. 1.** *Swope v. Ward*, 185 Mo. 316, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 846.

**3. Alabama.** — *Parks v. Barnett*, 104 Ala. 438; *Edmondson v. Anniston City Land Co.*, 128 Ala. 589.

*Illinois.* — *Horner v. Reuter*, 152 Ill. 106.

*Indiana.* — *Wilson v. Johnson*, 145 Ind. 40, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 847; *Wood v. Ripley*, 27 Ind. App. 356; *Moore v. Hinkle*, 151 Ind. 343.

*Kansas.* — *Schrimphcher v. Stockton*, 58 Kan. 758; *Pratt v. Ard*, 63 Kan. 182.

*Michigan.* — *Vier v. Detroit*, 111 Mich. 646; *Barnard v. Brown*, 112 Mich. 452, 67 Am. St. Rep. 432; *Ward v. Nestell*, 113 Mich. 185.

*Minnesota.* — *Carpenter v. Coles*, 75 Minn. 9; *Cool v. Kelly*, 78 Minn. 102.

*Montana.* — *Minnesota, etc., Land, etc., Co. v. Brasier*, 18 Mont. 444.

**848.** See notes 1, 2.

**4. What Constitutes — a. WHETHER A WRITING IS NECESSARY —**

(1) *In General.* — See note 3.

**849.** See note 1.

**850.** (3) *Descent Cast.* — See note 3.

**b. INOPERATIVE CONVEYANCES — (1) General Rule.** — See note 4.

*Nebraska.* — Lantry *v.* Wolff, 49 Neb. 374; Murray *v.* Romine, 60 Neb. 96.

*Ohio.* — McAllister *v.* Hartzell, 60 Ohio St. 69.

*Utah.* — Toltec Ranch Co. *v.* Babcock, 24 Utah 183; Toltec Ranch Co. *v.* Cook, 24 Utah 453.

*Virginia.* — Virginia Midland R. Co. *v.* Barbour, 97 Va. 118; Sharp *v.* Shenandoah Furnace Co., 100 Va. 27.

*Washington.* — Hesser *v.* Siepmann, 35 Wash. 14.

*West Virginia.* — Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470.

*New York.* — "In order to constitute such adverse possession as will avoid a deed, there must be a claim of some title or interest under some written instrument purporting to convey the lands to the claimant, or else some judgment, decree, or executed process of some court." Arents *v.* Long Island R. Co., 156 N. Y. 1.

**Tennessee Doctrine.** — Color of title is essential to adverse possession in Tennessee. Schmittou *v.* McFall, (Tenn. Ch. 1896) 39 S. W. Rep. 886; Brown *v.* Watkins, 98 Tenn. 454.

**Statutes Requiring Color of Title.** — See Archer *v.* Beihl, (C. C. A. 1905) 136 Fed. Rep. 113 (Alaska statute); Duck Island Club *v.* Bexstead, 174 Ill. 435; Allmendinger *v.* McHie, 189 Ill. 308; Massie *v.* Meeks, (Tex. Civ. App. 1894) 28 S. W. Rep. 44.

**848.** 1. Wilson *v.* Johnson, 145 Ind. 40, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 848, 849; Worthley *v.* Burbanks, 146 Ind. 539, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 847 [848].

**2. Adverse Possession With or Without Color of Title.** — Tennessee Coal, etc., Co. *v.* Linn, 123 Ala. 112, 82 Am. St. Rep. 108; Wilson *v.* Johnson, 145 Ind. 40, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 848, 849; Carpenter *v.* Coles, 75 Minn. 9; Sharp *v.* Shenandoah Furnace Co., 100 Va. 27; Robinson *v.* Lowe, 50 W. Va. 75.

**3.** Acme Brewing Co. *v.* Central R., etc., Co., 115 Ga. 494; Morgan *v.* Mitchell, 104 Ga. 596; Slatton *v.* Tennessee Coal, etc., Co., 109 Tenn. 415.

*North Carolina.* — "There can be no such thing in North Carolina as color of title without some paper writing attempting to convey title." Williams *v.* Scott, 122 N. Car. 545.

**Partition Record.** — A partition record is color of title. Smith *v.* Tew, 127 N. Car. 299; Lindsay *v.* Beaman, 128 N. Car. 189.

**Statutory Requirement of Writing.** — See Standard Quicksilver Co. *v.* Habishaw, 132 Cal. 115; De Foresta *v.* Gast, 20 Colo. 307; Lower Latham Ditch Co. *v.* Louden Irrigating Canal Co., 27 Colo. 267, 83 Am. St. Rep. 80; Converse *v.* Calumet River R. Co., 195 Ill. 204; Hodges *v.* Robbins, 23 Tex. Civ. App. 57; Hatch *v.* Lusignan, 117 Wis. 428.

**849.** 1. Tennessee Coal, etc., Co. *v.* Linn,

123 Ala. 137, 82 Am. St. Rep. 108, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 848 [849]; Blankenhorn *v.* Lenox, 123 Iowa 67; Libbey *v.* Young, 103 Iowa 258. See also Pendo *v.* Beakey, 15 S. Dak. 344.

**Equitable Title.** — A decree in chancery declaring that certain described lands, title to which is in the defendant in the case, shall be held by the defendant in trust for the sole and separate use of the plaintiff, is admissible in evidence as color of title upon which the plaintiff and those claiming under him may base a claim to a prescriptive title. Wardlaw *v.* McNeill, 106 Ga. 29.

**850.** 3. Peadro *v.* Carriker, 168 Ill. 570, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 850; Miller *v.* Davis, 106 Mich. 300.

**4. General Rule as to Inoperative Conveyances.** — Schrimpscher *v.* Stockton, 183 U. S. 290, affirming 58 Kan. 758; East Tennessee Iron, etc., Co. *v.* Wiggins, (C. C. A.) 68 Fed. Rep. 446; La Crosse *v.* Cameron, (C. C. A.) 80 Fed. Rep. 264; Goodson *v.* Brothers, 111 Ala. 589; Schlageter *v.* Gude, 30 Colo. 310; Bradshaw *v.* Stott, 4 App. Cas. (D. C.) 527; Mackall *v.* Mitchell, 18 App. Cas. (D. C.) 58; Collins *v.* Boring, 96 Ga. 360; Connell *v.* Culpepper, 111 Ga. 805; Litchfield *v.* Sewell, 97 Iowa 247; Zion Church *v.* Hilken, 84 Md. 170; Erdman *v.* Corse, 87 Md. 506; Wilson *v.* Purl, 133 Mo. 367; Neal *v.* Nelson, 117 N. Car. 393, 53 Am. St. Rep. 590; Murphy *v.* Dafoe, (S. Dak. 1904) 99 N. W. Rep. 86; Reusens *v.* Lawson, 91 Va. 226; Sharp *v.* Shenandoah Furnace Co., 100 Va. 27, 3 Va. Sup. Ct. 589; Robinson *v.* Lowe, 50 W. Va. 75; Hatch *v.* Lusignan, 117 Wis. 428; Pitman *v.* Hill, 117 Wis. 318.

**A Void Deed.** — Treece *v.* American Assoc., (C. C. A.) 122 Fed. Rep. 598; Reddick *v.* Long, 124 Ala. 260; Bowling *v.* Mobile, etc., R. Co., 128 Ala. 550; Bennet *v.* North Colorado Springs Land, etc., Co., 23 Colo. 470, 58 Am. St. Rep. 281; Avera *v.* Williams, 81 Miss. 714; Twohig *v.* Leamer, 48 Neb. 247; Murphy *v.* Pierce, (S. Dak. 1903) 95 N. W. Rep. 925; Lieberman *v.* Clark, (Tenn. 1905) 85 S. W. Rep. 258; Randolph *v.* Casey, 43 W. Va. 289; Bennett *v.* Pierce, 50 W. Va. 604.

**An Invalid Sale under a Trust Deed.** — Dubuque *v.* Coman, 64 Conn. 475.

**A Tax Deed** does not convey the title to real estate, but it is sufficient color of title, when coupled with possession, to put the statute of limitations in operation against the rights of all cotenants in the land. Craven *v.* Craven, (Neb. 1903) 94 N. W. Rep. 604.

**Junior Grant.** — Junior grants and surveys are color of title. Middlesboro Waterworks *v.* Neal, 105 Ky. 586.

**A Void Judgment or Decree of Court.** — Jones *v.* Thomas, 124 Mo. 586.

**Sheriff's Deed, Return, or Record.** — Dollarhide *v.* Mabary, 125 Mo. 197.

**852.** (2) *What Sufficient* — (a) Defects in Title Appearing Dehors the Immediate Conveyance. — See note 1.

No Title in Grantor. — See note 2.

**853.** Fraud on Part of Grantor. — See note 1.

Want of Capacity in Grantor. — See note 2.

No Authority in Person Acting as Agent or Attorney. — See note 3.

No Authority in Person Acting Officially. — See note 4.

**854.** Irregularities in Proceedings on Which the Conveyance Is Based. — See note 2.

**855.** Break in Chain of Title. — See note 2.

(b) Defects on Face of Writing — *aa.* IN GENERAL. — See note 3.

**856.** See notes 1, 2.

A sheriff's deed to land, made in pursuance of a sale under a justice's court execution, accompanied by possession, is good as color of title, although there was upon the execution no entry of a search and failure to find personalty upon which to levy the same. *Wade v. Garrett*, 109 Ga. 270.

**852.** 1. *Bartlett v. Ambrose*, (C. C. A.) 78 Fed. Rep. 839; *Nelson v. Davidson*, 160 Ill. 254, 52 Am. St. Rep. 338; *Taylor v. Hamilton*, 173 Ill. 392; *El Paso v. Ft. Dearborn Nat. Bank*, 96 Tex. 496.

2. *West v. East Coast Cedar Co.*, (C. C. A.) 101 Fed. Rep. 621, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 852; *La Crosse v. Cameron*, (C. C. A.) 80 Fed. Rep. 264; *Clayton v. Feig*, 179 Ill. 534; *Nauerth v. Duke*, (Iowa 1899) 79 N. W. Rep. 271; *Roth v. Munzenmaier*, 118 Iowa 326; *Blankenhorn v. Lenox*, 123 Iowa 67; *Allen v. Van Bibber*, 89 Md. 434; *Poindexter v. Rawlings*, 106 Tenn. 97, 82 Am. St. Rep. 869; *Stull v. Rich Patch Iron Co.*, 92 Va. 253.

A deed by a husband, executed prior to the Georgia Married Woman's Act of 1866, which purports to convey land of the wife, is good as color of title, notwithstanding that at the time of the conveyance the husband had not reduced the property to possession. *Street v. Collier*, 118 Ga. 470.

**853.** 1. A Conveyance in Fraud of Creditors affords no beginning point for the statute of limitations unless the creditors had been advised of the fraud, and then slept over their rights until the bar of the statute had intervened. *Farrar v. Bernheim*, (C. C. A.) 74 Fed. Rep. 435.

2. A Deed from a Married Woman inoperative to pass title, for the reason that her husband did not join as a grantor, served to give color of title. *Perry v. Lawson*, 112 Ala. 480.

3. *Street v. Collier*, 118 Ga. 470.

**Power of Attorney Not Produced.** — A deed appearing to have been executed by an attorney in fact, though unaccompanied by a power of attorney, is admissible in evidence as color of title. *Connell v. Culpepper*, 111 Ga. 805.

4. **Conveyance by Public Officer Without Authority.** — *El Paso v. Ft. Dearborn Nat. Bank*, 96 Tex. 496.

**Administrator's Deed.** — A deed signed by the administrator of an estate is good as color of title, although it does not purport upon its face to have been executed under an order of the court of ordinary. *Street v. Collier*, 118 Ga. 470.

**854.** 2. *Brind v. Gregory*, 120 Cal. 640,

*affirmed* 122 Cal. 480; *Sexson v. Barker*, 172 Ill. 361; *Waldron v. Harvey*, 54 W. Va. 618, 102 Am. St. Rep. 959, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 854.

A deed made by a special commissioner in a chancery cause, under a decree confirming the sale, purporting to convey the real estate described in the deed, gives color of title in the grantee, notwithstanding irregularities in the proceedings in such cause and sale. *Hitchcox v. Morrison*, 47 W. Va. 206.

Where there is an attempt, unattended with any fraud, to foreclose a mortgage, and a decree is rendered and a sale had, the deed made in pursuance of such decree and sale will be regarded as color of title made in good faith, though the decree is erroneous. *Reedy v. Camfield*, 159 Ill. 254.

**No Jurisdiction of Person.** — *Wright v. Stice*, 173 Ill. 571.

**855.** 2. **Statutes Requiring Chain of Transfers.** — *Bartell v. Kelsey*, (Tex. Civ. App. 1900) 59 S. W. Rep. 631; *Nelson v. Cooper*, (C. C. A.) 108 Fed. Rep. 919. See also *Baldwin v. Root*, (Tex. Civ. App. 1896) 38 S. W. Rep. 630.

3. *Wilson v. Johnson*, 145 Ind. 40, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 855.

**Tax Deeds.** — *Redfield v. Parks*, 132 U. S. 239.

**Under "Occupying Claimants' Acts."** — See *Miesen v. Canfield*, 64 Minn. 513.

**856.** 1. *Miesen v. Canfield*, 64 Minn. 513. In *La Crosse v. Cameron*, (C. C. A.) 80 Fed. Rep. 264, the court said: "We do not deem the question to be one which is now at large. As we read the decisions, it is the settled law of the state of Wisconsin that possession for the requisite period under an instrument absolutely void upon its face will draw to it the protection of the statute." See also *Hoge v. Magnes*, (C. C. A.) 85 Fed. Rep. 355.

A Tax Deed will constitute color of title, under the statute, even if the tax upon which it was issued was void by reason of irregularities in the tax proceedings, and irregularities appearing on the face of the deed sufficient to render the deed void on its face will not operate to defeat the instrument as a color of title. *Power v. Kitching*, 10 N. Dak. 254, 88 Am. St. Rep. 691.

2. *Bloom v. Strauss*, 70 Ark. 483; *Brinker v. Union Pac., etc.*, R. Co., 11 Colo. App. 166.

The existence of a defect in a tax sale, resulting from a defect in the assessment of the property, does not prevent the sale from being made the basis of prescription of ten years, where the defect is a latent one which the pur-

- 857.** *bb.* COMMISSION OF SEAL. — See note 1.  
*cc.* DEFECTIVE ACKNOWLEDGMENT. — See note 2.  
*dd.* INSUFFICIENTLY WITNESSED. — See note 4.  
*(e)* Instrument Must Apparently Convey Title — *aa.* IN GENERAL. — See note 5.
- 858.** *bb.* MUST HAVE GRANTOR AND GRANTEE. — See note 1.  
*cc.* MUST DESCRIBE THE LAND. — See notes 4, 6, 7.
- 859.** See note 1.  
 Sufficiency of Description. — See notes 2, 3.  
 Executory Contract of Purchase and Bond to Convey. — See note 5.
- 860.** Tax Certificates. — See note 1.  
*(d)* Unrecorded Instruments. — See note 4.  
*(e)* Quitclaim Deeds. — See note 5.
- 861.** *(g)* A Question of Law. — See note 2.  
 5. Good Faith. — See notes 3, 4.

chaser was not called upon to ascertain or know.  
*Jopling v. Chachere*, 107 La. 522.

**Rule of the North Carolina Cases.** — *Williams v. Scott*, 122 N. Car. 545.

**857.** 1. *Sanitary Dist. v. Allen*, 178 Ill. 330.  
 2. *La Crosse v. Cameron*, (C. C. A.) 80 Fed. Rep. 264; *Dorlan v. Westervitch*, 140 Ala. 283.

A deed by a husband in which his wife did not join was held to give color of title. *Avera v. Williams*, 81 Miss. 714.

**4. Insufficient Subscribing Witnesses to Will.** — *Love v. Turner*, (S. Car. 1905) 51 S. E. Rep. 101.

**5.** *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115; *Lightcap v. Bradley*, 186 Ill. 510; *Converse v. Calumet River R. Co.*, 195 Ill. 204; *Skelly v. Warren*, 17 S. Dak. 25.

**858.** 1. *Nelson v. Cooper*, (C. C. A.) 108 Fed. Rep. 919; *Burns v. Edwards*, 163 Ill. 494.  
 4. *Wilson v. Johnson*, 145 Ind. 40, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858, 859.

**6.** *Laughlin v. Denver*, 24 Colo. 255; *Williamson v. Tison*, 99 Ga. 791; *Zilch v. Young*, 184 Ill. 333; *Williams v. Thomas*, 18 Tex. Civ. App. 472.

**7.** *Hanna v. Palmer*, 194 Ill. 41; *Barker v. Southern R. Co.*, 125 N. Car. 596, 74 Am. St. Rep. 658; *Newton v. Alexander*, (Tex. Civ. App. 1897) 44 S. W. Rep. 416; *Simpson v. Johnson*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1076; *Bruce v. Richardson*, 26 Tex. Civ. App. 615.

"A deed is color of title only as to the land actually described in it." *Archer v. Beihl*, (C. C. A. 1905) 136 Fed. Rep. 113.

**859.** 1. *Reddick v. Long*, 124 Ala. 260.

**2.** *Archer v. Beihl*, (C. C. A. 1905) 136 Fed. Rep. 113; *Tumlin v. Perry*, 108 Ga. 520; *Luttrell v. Whitehead*, (Ga. 1905) 49 S. E. Rep. 691; *Pitts v. Whitehead*, (Ga. 1905) 49 S. E. Rep. 693; *Priester v. Melton*, (Ga. 1905) 51 S. E. Rep. 330; *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27; *Flint v. Long*, 12 Wash. 342.

In *Allmendinger v. McHie*, 189 Ill. 308, the court said: "It is essential to color of title that the premises shall be described with the same degree of certainty as is required in deeds relied upon as absolute conveyances."

**3.** *Dorlan v. Westervitch*, 140 Ala. 283; *Lieberman v. Clark*, (Tenn. 1905) 85 S. W. Rep. 258; *Heinselman v. Hunsicker*, 103 Wis. 12.

**5.** *White v. Stokes*, 67 Ark. 188, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 859;

*Burns v. Edwards*, 163 Ill. 494; *Louisville, etc., R. Co. v. Gulf of Mexico Land, etc., Co.*, 82 Miss. 188, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 857-859; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 631, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 859.

**Rule in Texas.** — *Wille v. Ellis*, 22 Tex. Civ. App. 462.

**860.** 1. *Burns v. Edwards*, 163 Ill. 494; *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538. But see *Winters v. Hainer*, 107 Tenn. 337; *Philadelphia Mortg., etc., Co. v. Palmer*, 32 Wash. 455.

**4.** *Dorlan v. Westervitch*, 140 Ala. 283; *Roberson v. Downing Co.*, 120 Ga. 841, 102 Am. St. Rep. 128, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860; *Utley v. Wilmington, etc., R. Co.*, 119 N. Car. 720. See also *Plaster v. Grabeel*, 160 Mo. 669.

**Registration Necessary in Some Jurisdictions.** — *Nye v. Alfter*, 127 Mo. 529; *Austin v. Staten*, 126 N. Car. 783; *Lindsay v. Beaman*, 128 N. Car. 189; *Snider v. Brown*, (Tenn. Ch. 1898) 48 S. W. Rep. 377; *Wille v. Ellis*, 22 Tex. Civ. App. 462; *Doom v. Taylor*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1086; *Watts v. Bruce*, 31 Tex. Civ. App. 347; *McLavy v. Jones*, 31 Tex. Civ. App. 354; *Rice v. Willis*, (C. C. A.) 87 Fed. Rep. 626 (construing Texas statute).

Where a deed conveys several distinct tracts of land lying contiguous to each other, but not covered by one general description which would embrace them all, and the grantee enters into the possession of one of such lots only, prescription will not run in his favor as to the other of such lots until after his deed has been recorded; but as to that lot into the possession of which he actually enters, prescription will run whether such deed be recorded or not. *Carstarphen v. Holt*, 96 Ga. 703.

**5. Quitclaim Deed as Giving Color of Title.** — *Zundel v. Baldwin*, 114 Ala. 328; *Johnson v. Girtman*, 115 Ga. 794; *McVey v. Carr*, 159 Mo. 648. But see *Laraway v. Zenor*, 100 Iowa 181.

**861.** 2. *Lee v. O'Quin*, 103 Ga. 364, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861.

**3.** *De Foresta v. Gast*, 20 Colo. 307; *Burns v. Edwards*, 163 Ill. 494; *Kopp v. Herrman*, 82 Md. 339; *Erdman v. Corse*, 87 Md. 506.

**4. The Correct View as to the Relation of Good Faith.** — *Broback v. Morsbach*, (Wash. 1905) 80 Pac. Rep. 275.

**861. IV. EXTENT OF ADVERSE POSSESSION — 1. Without Color of Title. —**

See note 5.

**863. 2. Under Color of Title — a. GENERAL RULE — CONSTRUCTIVE POSSESSION. —** See note 1.**864. Limitation of the General Rule. —** See notes 2, 3.**865. b. PREREQUISITES TO CONSTRUCTIVE POSSESSION — (1) Color of Title — Constructive Possession Limited to Colorable Title. —** See note 1.

Derived from Several Writings. — See note 2.

**(2) Actual Possession of Part of Land. —** See note 3.

**861. 5.** *Smith v. Keyser*, 115 Ala. 455; *Chastang v. Chastang*, (Ala. 1904) 37 So. Rep. 799; *Nicklace v. Dickerson*, 65 Ark. 422; *Ely v. Brown*, 183 Ill. 575; *Taylor v. Combs*, (Ky. 1899) 50 S. W. Rep. 64; *Krauth v. Hahn*, (Ky. 1901) 65 S. W. Rep. 18; *Hackett v. Webster*, 97 Md. 404; *Barber v. Robinson*, 78 Minn. 193; *Benne v. Miller*, 149 Mo. 228; *Sweringen v. St. Louis*, 151 Mo. 348; *South Omaha v. Ford*, (Neb. 1904) 98 N. W. Rep. 665; *South Omaha v. Meehan*, (Neb. 1904) 98 N. W. Rep. 691; *Hamilton v. Fluornoy*, 44 Oregon 97; *Pendo v. Beakey*, 15 S. Dak. 356, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361; *Sulphur Mines Co. v. Thompson*, 93 Va. 293; *Heavner v. Morgan*, 41 W. Va. 428; *Maxwell v. Cunningham*, 50 W. Va. 298; *Bentley v. Peppard*, 33 Can. Sup. Ct. 444.

**863. 1.** *United States*. — *Scaife v. Western North Carolina Land Co.*, (C. C. A.) 90 Fed. Rep. 238; *Treece v. American Assoc.*, (C. C. A.) 122 Fed. Rep. 598; *Scott v. Mineral Development Co.*, (C. C. A.) 130 Fed. Rep. 497. *Alabama*. — *Zundel v. Baldwin*, 114 Ala. 328; *Smith v. Keyser*, 115 Ala. 455; *Reddick v. Long*, 124 Ala. 260; *Barrett v. Kelly*, 131 Ala. 378; *Bowling v. Mobile, etc., R. Co.*, 128 Ala. 550; *Chastang v. Chastang*, (Ala. 1904) 37 So. Rep. 799.

*Arkansas*. — *Nicklace v. Dickerson*, 65 Ark. 422; *Sparks v. Farris*, 71 Ark. 121; *Crill v. Hudson*, 71 Ark. 390; *Haggart v. Ranney*, (Ark. 1904) 84 S. W. Rep. 703.

*Georgia*. — *Ferguson v. Bagley*, 95 Ga. 516; *O'Brien v. Fletcher*, (Ga. 1905) 51 S. E. Rep. 405.

*Illinois*. — *Johns v. McKibben*, 156 Ill. 71; *Peoria, etc., R. Co. v. Tamplin*, 156 Ill. 285; *Zirngibl v. Calumet, etc., Canal, etc., Co.*, 157 Ill. 430; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426; *White v. Harris*, 206 Ill. 584; *Nauman v. Burch*, 91 Ill. App. 48.

*Indiana*. — *Worthley v. Burbanks*, 146 Ind. 539; *Moore v. Hinkle*, 151 Ind. 343.

*Iowa*. — *Libbey v. Young*, 103 Iowa 258.

*Maryland*. — *Kopp v. Herrman*, 82 Md. 339; *Zion Church v. Hilken*, 84 Md. 170; *Schlossnagle v. Kolb*, 97 Md. 285.

*Massachusetts*. — *Murphy v. Com.*, 187 Mass. 361.

*Minnesota*. — *McRoberts v. McArthur*, 62 Minn. 310; *Barber v. Robinson*, 78 Minn. 193, 82 Minn. 112.

*Mississippi*. — See *Mitchell v. Bond*, 84 Miss. 72, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863.

*Missouri*. — *Heinemann v. Bennett*, 144 Mo. 113; *Plaster v. Grabeel*, 160 Mo. 669; *Stevens v. Martin*, 168 Mo. 407.

*New York*. — *New York Cent., etc., R. Co. v. Brennan*, 24 N. Y. App. Div. 343; *Stillman v. Burfeind*, 21 N. Y. App. Div. 13; *Bennett v. Ko-*

*varick*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 73. *North Carolina*. — *Worth v. Simmons*, 121 N. Car. 357.

*Pennsylvania*. — *Stein v. Green*, 6 Lack. Leg. N. (Pa.) 292.

*Tennessee*. — *Duke v. Helms*, 100 Tenn. 249; *Winters v. Hainer*, 107 Tenn. 337; *Lieberman v. Clark*, (Tenn. 1905) 85 S. W. Rep. 258.

*Texas*. — *Small v. McMurphy*, 11 Tex. Civ. App. 409; *Brown v. O'Brien*, 11 Tex. Civ. App. 459; *Cook v. Lister*, 15 Tex. Civ. App. 31; *Puryear v. Friery*, 16 Tex. Civ. App. 316; *Watkins v. Smith*, 91 Tex. 589; *McAdams v. Moody*, (Tex. Civ. App. 1899) 50 S. W. Rep. 628; *Bogges v. Allen*, (Tex. Civ. App. 1900) 56 S. W. Rep. 195, affirmed 94 Tex. 83; *Coleman v. Florey*, (Tex. Civ. App. 1901) 61 S. W. Rep. 412; *Peden v. Crenshaw*, (Tex. Civ. App. 1904) 81 S. W. Rep. 369.

*Vermont*. — *Fullam v. Foster*, 68 Vt. 590.

*Virginia*. — *Stull v. Rich Patch Iron Co.*, 92 Va. 253.

*West Virginia*. — *Maxwell v. Cunningham*, 50 W. Va. 298.

*Canada*. — *Bentley v. Peppard*, 33 Can. Sup. Ct. 444.

**864. 2.** *Zirngibl v. Calumet, etc., Canal, etc., Co.*, 157 Ill. 430; *Louisville, etc., R. Co. v. Gulf of Mexico Land, etc., Co.*, 82 Miss. 188, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 864; *Archibald v. New York Cent., etc., R. Co.*, 1 N. Y. App. Div. 251. See also *Mitchell v. Bond*, 84 Miss. 72, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863.

**Only Land Immediately Adjacent** to a part of that which is in absolute and uncontrolled possession can be said to be held in constructive possession. *Crist v. Boust*, 26 Pa. Super. Ct. 543.

**3.** *Henry v. Henry*, 122 Mich. 6; *Miesen v. Canfield*, 64 Minn. 513.

**865. 1.** *Buckley v. Mohr*, 125 Cal. xix, 58 Pac. Rep. 261; *South v. Deaton*, 113 Ky. 312; *Johnston v. Case*, 131 N. Car. 491; *Marshall v. Corbett*, (N. Car. 1905) 50 S. E. Rep. 210; *Fullam v. Foster*, 68 Vt. 590; *Lampman v. Van Alstyne*, 94 Wis. 417.

The deed under which land is held must determine by the boundaries therein given the extent of the constructive possession, and possession under such deed cannot be extended by construction to the boundaries of another and separate tract held under another deed. *Broom v. Pearson*, (Tex. 1905) 85 S. W. Rep. 790.

**2.** *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27.

**3. Actual Possession of Part.** — *Kirker v. Daniels*, (Ark. 1904) 83 S. W. Rep. 912; *Herbst v. Merrifield*, 133 Mo. 267; *Brown v. Hartford*, 173 Mo. 183; *Worth v. Simmons*, 121 N. Car. 357; *Hines v. Moye*, 125 N. Car. 8; *Willamette*

- 866.** Alienation of the Part Actually Occupied. — See note 1.  
 The Possession Required. — See note 2.  
 Under Instrument Describing Land in Separate Parcels. — See note 3.  
 Where Land Claimed Consists of Separate Tracts. — See note 4.
- 867.** Under Title Void as to Part Only. — See note 1.  
 Possession, by Mistake, of Land Not Covered by Colorable Title. — See notes 2, 3.  
 (3) *Claim of Right to Whole Tract.* — See note 5.
- 868.** Color of Title, Evidence Of. — See notes 1, 2.  
 (4) *Good Faith* — In General. — See notes 3, 4, 5.
- 869.** Fraud Must Be Actual. — See note 1.  
 A Question of Fact. — See note 4.  
 c. MIXED POSSESSION — (2) *When True Owner Is in Possession of Part.* — See note 6.

Real Estate Co. v. Hendrix, 28 Oregon 485, 52 Am. St. Rep. 800; McNeeley v. South Penn Oil Co., 52 W. Va. 641, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 865.

**Possession by Tenant.** — Possession of part of the land by a tenant is sufficient. Zundel v. Baldwin, 114 Ala. 328; Smith v. Keyser, 115 Ala. 455; Barrett v. Kelly, 131 Ala. 378; Puryear v. Friery, 16 Tex. Civ. App. 316. See also Treece v. American Assoc., (C. C. A.) 122 Fed. Rep. 598.

**866.** 1. Puryear v. Friery, 16 Tex. Civ. App. 316; Sharp v. Shenandoah Furnace Co., 100 Va. 33, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 865, 866.

2. McRoberts v. McArthur, 62 Minn. 310; Willamette Real Estate Co. v. Hendrix, 28 Oregon 485, 52 Am. St. Rep. 800.

If a person claims only to a given line, and makes no claim as to where such line is located, his adverse possession is limited to such line wherever it may be established. Wilcox v. Smith, (Wash. 1905) 80 Pac. Rep. 803.

**3. Undivided Tract of Several Parcels.** — Scaife v. Western North Carolina Land Co., (C. C. A.) 90 Fed. Rep. 238; Brougher v. Stone, 72 Miss. 647; Turnage v. Kenton, 102 Tenn. 328; Elliott v. Cumberland Coal, etc., Co., 109 Tenn. 749, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866.

Where an occupant's boundary covers adjoining lands of separate owners, his possession on land of one of them will not be adverse possession of land of the other, without actual possession of such other's land, on the theory that possession of part is possession of the whole. McNeeley v. South Penn Oil Co., 52 W. Va. 616.

**4. Separate and Distinct Tracts.** — Carter v. Ruddy, 166 U. S. 493; Haggart v. Ranney, (Ark. 1904) 84 S. W. Rep. 703; Georgia Pine Invest., etc., Co. v. Holton, 94 Ga. 551; Missouri, etc., R. Co. v. Allen, 67 Kan. 838; McRoberts v. McArthur, 62 Minn. 310; Herbst v. Merrifield, 133 Mo. 267; Basnight v. Meekins, 121 N. Car. 23; Willamette Real Estate Co. v. Hendrix, 28 Oregon 485, 52 Am. St. Rep. 800; Wheeler v. Taylor, 32 Oregon 421, 67 Am. St. Rep. 540; McSpadden v. Starrs Mountain Iron Co., (Tenn. Ch. 1897) 42 S. W. Rep. 497; Faison v. Primm, (Tex. Civ. App. 1896) 34 S. W. Rep. 834.

**867.** 1. Deed Void in Part. — Mitchell v. Bond, 84 Miss. 72, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867.

2. Ohio Riv. R. Co. v. Johnson, 50 W. Va. 499.

3. Possession by Mistake. — Johnson v. Thomas,

23 App. Cas. (D. C.) 141; Roulston v. Stewart, 40 N. Y. App. Div. 200; Jayne v. Hanna, (Tex. Civ. App. 1899) 51 S. W. Rep. 296.

5. Handley v. Barrett, 176 Pa. St. 246; Pope v. Riggs, (Tex. Civ. App. 1897) 43 S. W. Rep. 306.

**868.** 1. Presumption. — Possession under color of title is presumed to be adverse. Faggart v. Bost, 122 N. Car. 517.

2. Marmion v. McPeak, 51 La. Anh. 1631; Knight v. Denman, 64 Neb. 814.

3. See *supra*, this title, 850. 4. *et seq.* See also Mitchell v. Bond, 84 Miss. 72, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 868.

4. Mitchell v. Bond, 84 Miss. 72, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 868.

5. Lee v. O'Quin, 103 Ga. 355; Burns v. Edwards, 163 Ill. 494; Taylor v. Hamilton, 173 Ill. 392; Miller v. Rich, 204 Ill. 444; Clark v. Sexton, 122 Iowa 310; Mitchell v. Bond, 84 Miss. 72, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 868; Lampman v. Van Alstyne, 94 Wis. 417; McCann v. Welch, 106 Wis. 142; Pitman v. Hill, 117 Wis. 318.

**Presumption of Good Faith.** — Possession to be the foundation for a prescription must not have originated in fraud, but direct evidence of *bona fides* is not required. A presumption of good faith arises from adverse possession. Baxley v. Baxley, 117 Ga. 60; Sexson v. Barker, 172 Ill. 361; Duck Island Club v. Bexstead, 174 Ill. 435; Dawson v. Edwards, 189 Ill. 60; Lampman v. Van Alstyne, 94 Wis. 417.

**Notice of the Adverse Claim** does not establish that there was a lack of good faith on the part of the holder of color of title. Simons v. Drake, 179 Ill. 62; Keppel v. Dreier, 187 Ill. 298.

Allowing property to be sold for taxes, and afterwards acquiring the tax title based upon such sale by purchase, is evidence of bad faith. Hanna v. Palmer, 194 Ill. 41.

**869.** 1. Connell v. Culpepper, 111 Ga. 805; Street v. Collier, 118 Ga. 470; Muller v. Mazzerat, 109 La. 116.

4. Lee v. O'Quin, 103 Ga. 365, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869.

**6. True Owner in Possession of Part.** — Peoria, etc., R. Co. v. Tamplin, 156 Ill. 285; Schlossnagle v. Kolb, 97 Md. 285; Potter v. Adams, 125 Mo. 118, 46 Am. St. Rep. 478.

"In a case of common possession by two or more persons, the law adjudges the rightful possession to him who has the legal title; and no length of holding in such case can give title by possession, against such legal title." Quillen v. Betts, 1 Penn. (Del.) 53.

**870.** See notes 1, 2.

(3) *When Neither Claimant Has True Title.* — See note 3.

**871.** See note 1.

*d. OVERLAPPING BOUNDARIES — Where the Owner Has Possession —*

General Rule. — See note 3.

Both Parties in Possession Outside of Overlap. — See note 4.

**872.** Both Parties in Possession of Part of Overlap. — See note 1.

Possession by Holder of Inferior Title Inside, and by Owner Outside, of Overlap. —

See note 2.

**873.** Possession of Overlap by Claimant under Colorable Title. — See note 1.

Possession Outside of Overlap by Such Claimant. — See note 2.

**874. V. SUBJECTS OF ADVERSE POSSESSION — 2. The Several Classes of Property Considered — a. PERSONALTY.** — See note 2.

*b. MINES.* — See note 3.

**875.** See note 1.

*c. WATER.* — See note 2.

*d. EASEMENTS.* — See notes 3, 4.

**870. 1.** Sparks *v. Farris*, 71 Ark. 121; Peoria, etc., R. Co. *v. Tamplin*, 156 Ill. 285; Kentucky Land, etc., Co. *v. Sloan*, (Ky. 1904) 78 S. W. Rep. 175; Proctor *v. Maine Cent. R. Co.*, (Me. 1905) 60 Atl. Rep. 423; Louisville, etc., R. Co. *v. Buford*, 73 Miss. 494; Cuyler *v. Bush*, (Ky. 1905) 84 S. W. Rep. 579; Benne *v. Miller*, 149 Mo. 228; Zimmerman *v. Kennedy*, (Tex. Civ. App. 1899) 52 S. W. Rep. 642; Beaumont Pasture Co. *v. Polk*, (Tex. Civ. App. 1900) 55 S. W. Rep. 614; Payton *v. Caplen*, 24 Tex. Civ. App. 364; Freedman *v. Bonner*, (Tex. Civ. App. 1897) 40 S. W. Rep. 47.

2. See Carter *v. Chevalier*, 108 Ala. 563.

**3. Title in Neither Claimant.** — Reddick *v. Long*, 124 Ala. 267, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870.

**871. 1.** Libbey *v. Young*, 103 Iowa 258.

3. See Caudill *v. Caudill*, (Ky. 1899) 52 S. W. Rep. 957; Kentucky Land, etc., Co. *v. Crabtree*, 113 Ky. 922; Hebard *v. Scott*, 95 Tenn. 467; Elliott *v. Cumberland Coal, etc., Co.*, 109 Tenn. 745; Zimmerman *v. Kennedy*, (Tex. Civ. App. 1899) 52 S. W. Rep. 642; Zapeda *v. Hoffman*, 31 Tex. Civ. App. 312.

4. Krauth *v. Hahn*, (Ky. 1901) 65 S. W. Rep. 18; Kentucky Land, etc., Co. *v. Crabtree*, 113 Ky. 922; Kentucky Land, etc., Co. *v. Sloan*, (Ky. 1904) 78 S. W. Rep. 175; Goltermann *v. Schiermeyer*, 125 Mo. 291; Harman *v. Ratliff*, 93 Va. 249.

**872. 1.** Hall *v. Blanton*, (Ky. 1904) 77 S. W. Rep. 1110; Wilson *v. Braden*, 48 W. Va. 196.

2. Goltermann *v. Schiermeyer*, 125 Mo. 291; Tellico Mfg. Co. *v. Williams*, (Tenn. Ch. 1900) 59 S. W. Rep. 1075; Fry *v. Stowers*, 98 Va. 417; Wilson *v. Braden*, 48 W. Va. 196. But see Vintroux *v. Simms*, 45 W. Va. 548.

**873. 1.** Swafford *v. Herd*, (Ky. 1901) 65 S. W. Rep. 803; Kirby *v. Scott*, (Ky. 1903) 73 S. W. Rep. 749; Polk *v. Beaumont Pasture Co.*, 26 Tex. Civ. App. 242.

**Subsequent Entry by Owner.** — "The rule is well settled that where the junior patentee enters first, his possession will extend to his boundary, and will not be interrupted by a subsequent entry of the senior patentee outside of the lap." Kentucky Land, etc., Co. *v. Reynolds*, 60 S. W. Rep. 635, 22 Ky. L. Rep. 1389.

2. McCoy *v. De Long*, 58 S. W. Rep. 704, 22 Ky. L. Rep. 719; Hall *v. Blanton*, (Ky. 1904) 77 S. W. Rep. 1110; Walsh *v. Wheelwright*, 96 Me. 174; Roach *v. Fletcher*, 11 Tex. Civ. App. 225; Cook *v. Lister*, 15 Tex. Civ. App. 31; Wilson *v. Braden*, 48 W. Va. 196. See also Coal Creek Consol. Coal Co. *v. East Tennessee Iron, etc., Co.*, 105 Tenn. 574, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 874.

**874. 2. Other Chattels.** — Kopp *v. Herrman*, 82 Md. 339; Morris *v. Lowe*, 97 Tenn. 243; Coal Creek Consol. Coal Co. *v. East Tennessee Iron, etc., Co.*, 105 Tenn. 574, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 874.

3. Mines. — Davis *v. Shepherd*, 31 Colo. 141; Catlin Coal Co. *v. Lloyd*, 176 Ill. 275; Horst *v. Shea*, 23 Mont. 390. See Manning *v. Kansas, etc., Coal Co.*, 181 Mo. 359.

**875. 1.** Louisville, etc., R. Co. *v. Massey*, 136 Ala. 156, 96 Am. St. Rep. 17; Catlin Coal Co. *v. Lloyd*, 176 Ill. 275; Manning *v. Kansas, etc., Coal Co.*, 181 Mo. 359; Brady *v. Brady*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 411; Finnegan *v. Pennsylvania Trust Co.*, 5 Pa. Super. Ct. 124; Delaware, etc., Canal Co. *v. Hughes*, 183 Pa. St. 66, 63 Am. St. Rep. 743; Finnegan *v. Pennsylvania Trust Co.*, 28 Pittsb. Leg. J. N. S. (Pa.) 68; Murray *v. Allred*, 100 Tenn. 100, 66 Am. St. Rep. 740.

2. Water. — Union Mill, etc., Co. *v. Dangberg*, 81 Fed. Rep. 73; Smith *v. Green*, 109 Cal. 228; Dexter *v. Jefferson Paper Co.*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 389; Bowman *v. Bowman*, 35 Oregon 279; McLemore *v. Lomax*, (Tex. Civ. App. 1905) 86 S. W. Rep. 635; Yeager *v. Woodruff*, 17 Utah 369; Center Creek Water, etc., Co. *v. Lindsay*, 21 Utah 192; Hunter *v. Emerson*, 75 Vt. 173.

3. Easements. — La Crosse *v. Cameron*, (C. C. A.) 80 Fed. Rep. 264; Illinois Cent. R. Co. *v. O'Connor*, 154 Ill. 550; Wahls *v. Brandt*, 175 Ill. 354; Waters *v. Snouffer*, 88 Md. 391; Schulenberg *v. Zimmerman*, 86 Minn. 70; Spottiswoode *v. Morris*, etc., R. Co., 61 N. J. L. 322; Hindley *v. Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56; Lewis *v. New York, etc., R. Co.*, 162 N. Y. 202; Hudson *v. Watson*, 11 Pa. Super. Ct. 266; Wilkins *v. Nicolai*, 99 Wis. 178; Ker *v. Little*, 25 Ont. App. 387.

**875. Right of Way.** — See note 5.

**876. e. PUBLIC LANDS.** — See note 1.

*f. STATE LANDS* — *General Rule.* — See note 2.

**877. Adverse Possession by Statute.** — See note 1.

**878. Presumption of Grant.** — See note 1.

*g. PROPERTY OF MUNICIPAL AND QUASI-MUNICIPAL CORPORATIONS* — (1) *Property Dedicated to Public Uses* — *Highways, Streets, Parks, Etc.* — See note 2.

**Burial Lot.** — See *Meiggs v. Hoagland*, 68 N. Y. App. Div. 182.

**875. 4. Terre Haute, etc., R. Co. v. Zehner**, 15 Ind. App. 273; *Matthews v. Lake Shore, etc., R. Co.*, 110 Mich. 170, 64 Am. St. Rep. 336; *Downing v. Dinwiddie*, 132 Mo. 92; *Deppen v. Bogar*, 7 Pa. Super. Ct. 434.

**5. Right of Way.** — *Pennington v. Lewis*, 4 Penn. (Del.) 447; *Cleveland, etc., R. Co. v. Munsell*, 192 Ill. 430; *Clement v. Bettie*, 65 N. J. L. 675; *Shell v. Poulson*, 23 Wash. 535; *Wooldridge v. Coughlin*, 46 W. Va. 349, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875.

**876. 1. Lands Owned by United States.** — *Redfield v. Parks*, 132 U. S. 239; *Sutter v. Heckman*, 1 Alaska 81; *Lewis v. Johnson*, 1 Alaska 529; *Carr v. Moore*, 119 Iowa 152; *Schlosser v. Hemphill*, 118 Iowa 458, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875 [876]; *James v. Wilkinson*, 2 Kan. App. 361; *Perkins v. Vincent*, 47 La. Ann. 579; *State v. Lake St. Clair Fishing, etc., Club*, 127 Mich. 592, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 876; *Topping v. Cohn*, (Neb. 1904) 99 N. W. Rep. 372; *Altschul v. Clark*, 39 Oregon 315. And see generally the title STATE AND PUBLIC LANDS.

As to when title from the United States is perfected so as to set the statute of limitations running, see *Gonsoulin v. Gulf Co.*, (C. C. A.) 116 Fed. Rep. 251; *Joplin v. Chachere*, 192 U. S. 94; *Williams Invest. Co. v. Pugh*, 137 Ala. 346; *Tyee Consol. Min. Co. v. Langstedt*, 1 Alaska 439; *Adams v. Hopkins*, (Cal. 1902) 69 Pac. Rep. 228; *Toltec Ranch Co. v. Babcock*, 24 Utah 183, affirmed *Toltec Ranch Co. v. Cook*, 24 Utah 453.

**The Statute of Limitations Cannot Avail a Pre-emption Claimant.** — See *Doe v. Beck*, 108 Ala. 71.

**A Person in Possession in Subordination to the Title of the United States.** — See *Toltec Ranch Co. v. Babcock*, 24 Utah 183, affirmed *Toltec Ranch Co. v. Cook*, 24 Utah 453.

**Homestead Entry.** — *Wormouth v. Gardner*, 105 Cal. 149.

**Indian Lands.** — There can exist no adverse possession of lands in a private party while such lands are a portion of the Indian country, and the right of occupancy in the Indians has not been terminated by the United States. *Kreuger v. Schultz*, 6 N. Dak. 310.

**2. State Lands.** — *Wagon v. Fairbanks*, 105 Ala. 527; *Wiggins v. Kirby*, 106 Ala. 262; *Stringfellow v. Tennessee Coal, etc., Co.*, 117 Ala. 250; *Adler v. Prestwood*, (Ala. 1899) 24 So. Rep. 999; *Kapiolani Estate v. Cleghorn*, 14 Hawaii 346; *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274; *Carr v. Moore*, 119 Iowa 152, 97 Am. St. Rep. 292; *Taylor v. Combs*, (Ky. 1899) 50 S. W. Rep. 64; *Slattery v. Heil-*

*perin*, 110 La. 86; *Bright v. New Orleans R. Co.*, (La. 1905) 38 So. Rep. 494; *Ulman v. Charles St. Ave. Co.*, 83 Md. 130; *Topping v. Cohn*, (Neb. 1904) 99 N. W. Rep. 372; *Zapeda v. Hoffman*, 31 Tex. Civ. App. 312; *Reusens v. Lawson*, 91 Va. 226; *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905.

**No Adverse Possession Before Patent.** — *Taylor v. Combs*, (Ky. 1899) 50 S. W. Rep. 64; *Dooley v. Maywald*, 18 Tex. Civ. App. 386.

**877. 1. Adverse Possession by Statute.** — *Harrison v. Dolan*, 172 Mass. 395; *Schneider v. Hutchinson*, 35 Oregon 253, 76 Am. St. Rep. 474.

**878. 1. Presumption of Grant.** — *Lewis v. Overby*, 126 N. Car. 347.

**Break in Possession.** — *Lewis v. Overby*, 126 N. Car. 347.

**2. Cases Holding that Title Can Be Acquired Against Municipality** — *Arkansas*. — *Broad v. Beatty*, (Ark. 1904) 83 S. W. Rep. 339.

*Kentucky*. — *Cadiz v. Hillman*, (Ky. 1899) 50 S. W. Rep. 49.

*Michigan*. — *Vier v. Detroit*, 111 Mich. 646; *Darrow v. Homer*, 122 Mich. 229; *State v. Dickinson*, 129 Mich. 221; *Schneider v. Detroit*, (Mich. 1904) 98 N. W. Rep. 258.

*Minnesota*. — The rule that a public easement in the street could be acquired by adverse possession has been changed for all future purposes by *Laws Minn. 1899, c. 65. Hastings v. Gillitt*, 85 Minn. 331; *Haramon v. Krause*, (Minn. 1904) 101 N. W. Rep. 791.

*Nebraska*. — *Florence v. White*, 50 Neb. 516; *Webster v. Lincoln*, 56 Neb. 502. See also *Wahoo v. Netheway*, (Neb. 1905) 102 N. W. Rep. 86.

Code Civ. Pro. Neb., § 6, as amended in 1899, provides "that there shall be no limitation to the time within which any county, city, town, village, or other municipal corporation may begin an action for the recovery of the title or possession of any public road, street, alley, or other public grounds or city or town lots." *Krueger v. Jenkins*, 59 Neb. 641; *Weatherford v. Union Pac. R. Co.*, (Neb. 1904) 98 N. W. Rep. 1089.

*Ohio*. — *Winslow v. Cincinnati*, 9 Ohio Dec. 89, 6 Ohio N. P. 47; *Morehouse v. Burgot*, 12 Ohio Cir. Dec. 163, 22 Ohio Cir. Ct. 174.

**Highway.** — Title by adverse possession may be obtained against the county. *Axmear v. Richards*, 112 Iowa 657; *McDougal v. Popken*, (Iowa 1902) 89 N. W. Rep. 1088.

**County Road.** — Title to a county road can be acquired by adverse possession. *Grady v. Dundon*, 30 Oregon 333.

**Cases Holding that Title Cannot Be Acquired Against Municipality** — *United States*. — *London, etc., Bank v. Oakland*, 86 Fed. Rep. 30; *Snowden v. Lorce*, 122 Fed. Rep. 493;



**882.** (2) *Property Held in Private Right.* — See note 2.

(3) *Equitable Estoppel.* — See note 3.

**883.** VI. EFFECT OF ADVERSE POSSESSION. — See note 1.

*Alabama.* — *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143.

*California.* — *Oakland v. Oakland Water Front Co.*, 118 Cal. 160; *Home for Care of Inebriate v. San Francisco*, 119 Cal. 534.

*Georgia.* — *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133; *Worrell v. Augusta R., etc., Co.*, 116 Ga. 316, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 878.

*Illinois.* — *Sullivan v. Tichenor*, 179 Ill. 97; *De Kalb v. Luney*, 193 Ill. 185; *Shirk v. Chicago*, 195 Ill. 298; *Owen v. Brookport*, 208 Ill. 35.

*Indiana.* — *Kelly v. Pittsburgh, etc., R. Co.*, 28 Ind. App. 457, 91 Am. St. Rep. 134; *Hall v. Breyfogle*, 162 Ind. 494.

*Iowa.* — *Weber v. Iowa City*, 119 Iowa 638, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 878; *Markham v. Anamosa*, 122 Iowa 689; *Taraldson v. Lime Springs*, 92 Iowa 187.

*Louisiana.* — *Handlin v. H. Weston Lumber Co.*, 47 La. Ann. 401; *Board of Control v. Weston Lumber Co.*, 109 La. 925.

*Maryland.* — *Ulman v. Charles St. Ave. Co.*, 83 Md. 130.

*Missouri.* — *Columbia v. Bright*, 179 Mo. 441.

*New Jersey.* — *Atlantic City v. Snee*, 68 N. J. L. 39.

*New York.* — *Timpson v. New York*, 5 N. Y. App. Div. 424; *Slattery v. McCaw*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 426.

*North Carolina.* — *Turner v. Hillsboro Com'rs*, 127 N. Car. 153.

*Pennsylvania.* — *Jones v. Girard*, 26 Pa. Co. Ct. 390, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 878; *Washington Female Seminary v. Washington*, 23 Pa. Co. Ct. 545.

*South Carolina.* — *Chaffee v. Aiken*, 57 S. Car. 507.

*Tennessee.* — *Raht v. Southern R. Co.*, (Tenn. Ch. 1897) 50 S. W. Rep. 72.

*Virginia.* — *Depriest v. Jones*, (Va. 1895) 21 S. E. Rep. 478.

*West Virginia.* — *Ralston v. Weston*, 46 W. Va. 554, 76 Am. St. Rep. 834, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 878, and overruling *Wheeling v. Campbell*, 12 W. Va. 36; *Teass v. St. Albans*, 38 W. Va. 1; *Foley v. County Ct.*, 54 W. Va. 31, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 878.

*Wisconsin.* — See *Nicolai v. Davis*, 91 Wis. 370.

**Partial Encroachment on Public Road.** — The right of an adjoining landowner to inclose by a fence a portion of a public highway cannot be acquired by adverse possession. *Heddeston v. Hendricks*, 52 Ohio St. 460; *Rae v. Miller*, 99 Iowa 650; *Krueger v. Jenkins*, 59 Neb. 641; *Lydyck v. State*, 61 Neb. 309.

**Adverse User of Abandoned Street or Highway.** — *Jordan v. Chenoa*, 166 Ill. 530; *Carlinville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212.

Comp. Stat. Neb., 1899, c. 78, § 3, providing "that all roads that have not been used within five years shall be deemed vacated." applies only to roads which have been entirely abandoned. It does not apply to the unused parts of a road lying on either side of the line of travel. *Krueger v. Jenkins*, 59 Neb. 641.

**Artificial Lake.** — Under Sayles's Rev. Civ. Stat. Tex., 1897, art. 3351, a body of water dedicated to public use cannot be acquired by adverse possession. *Gilleen v. Frost*, (Tex. Civ. App. 1901) 61 S. W. Rep. 345.

**882. 2. Land Held in Private Right.** — *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274; *Turner v. Hillsboro Com'rs*, 127 N. Car. 153. See also *Krueger v. Jenkins*, 59 Neb. 641; *Johnson v. Llano County*, 15 Tex. Civ. App. 421.

**3. Equitable Estoppel.** — *Sullivan v. Tichenor*, 179 Ill. 97; *Edwardsville v. Barnsback*, 66 Ill. App. 381; *De Kalb v. Luney*, 193 Ill. 185; *Uptagraff v. Smith*, 106 Iowa 385; *Blennerhassett v. Forest City*, 117 Iowa 680; *Markham v. Anamosa*, 122 Iowa 689; *Morehouse v. Burtog*, 12 Ohio Cir. Dec. 163, 22 Ohio Cir. Ct. 174.

**Absence of Estoppel.** — Where taxes are specially assessed on the land occupied by a street the question of estoppel can arise; but where the owner paid taxes on certain lots, and there is no claim that the highway covers all or a considerable portion of the lots, the city is not estopped. *Cedar Rapids v. Young*, 119 Iowa 552.

**Doctrine of Equitable Estoppel Rejected.** — *Ralston v. Weston*, 46 W. Va. 555, 76 Am. St. Rep. 834, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 882.

**883. 1. Adverse Possession Vests Title — United States.** — *East Tennessee Iron, etc., Co. v. Wiggin*, (C. C. A.) 68 Fed. Rep. 446; *Elder v. McClaskey*, (C. C. A.) 70 Fed. Rep. 529; *Ward v. Cochran*, (C. C. A.) 71 Fed. Rep. 127; *West v. East Coast Cedar Co.*, (C. C. A.) 101 Fed. Rep. 621; *H. B. Claffin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958.

*Alabama.* — *Inglis v. Webb*, 117 Ala. 387; *Pittman v. Pittman*, 124 Ala. 306.

*California.* — *Woodward v. Faris*, 109 Cal. 12; *Southern Pac. R. Co. v. Whitaker*, 109 Cal. 268; *Baker v. Clark*, 128 Cal. 181.

*Georgia.* — *Georgia R., etc., Co. v. Gardner*, 113 Ga. 897; *Johnson v. Girtman*, 115 Ga. 794.

*Indiana.* — *McKinney v. Lanning*, 139 Ind. 170; *Wood v. Ripley*, 27 Ind. App. 356; *Webb v. Rhodes*, 28 Ind. App. 393.

*Kentucky.* — *Brown v. Swango*, (Ky. 1894) 28 S. W. Rep. 156; *Pollock v. Maysville, etc., R. Co.*, 103 Ky. 84; *Hornsby v. Davidson*, (Ky. 1900) 55 S. W. Rep. 684; *Fain v. Miles*, 60 S. W. Rep. 939, 22 Ky. L. Rep. 1584; *Logan v. Phenix*, (Ky. 1902) 66 S. W. Rep. 1042.

*Louisiana.* — *Goodwin v. McNeely*, 104 La. 19; *Mortimer v. Hodgson*, 105 La. 734; *In re Lockhart*, 109 La. 740.

*Massachusetts.* — *Percival v. Chase*, 182 Mass. 371.

*Michigan.* — *Barnard v. Brown*, 112 Mich. 452, 67 Am. St. Rep. 432.

*Missouri.* — *Heinemann v. Bennett*, 144 Mo. 113; *Ross v. McCain*, 145 Mo. 271; *Stevens v. Martin*, 168 Mo. 407; *Kirton v. Bull*, 168 Mo. 622; *Scannell v. American Soda Fountain Co.*, 161 Mo. 606; *Franklin v. Cunningham*, 187 Mo. 184.

*Nebraska.* — *Lantry v. Wolff*, 49 Neb. 374;

**886.** See note 1.**VII. EVIDENCE — 1. A Question of Law and Fact. — See notes 2, 3.**

*Florence v. White*, 50 Neb. 516; *Fink v. Dawson*, 52 Neb. 647; *Oldig v. Fisk*, 53 Neb. 156; *McAllister v. Beymer*, 54 Neb. 247; *Cervena v. Thurston*, 59 Neb. 343.

*New Jersey*. — *Spottiswoode v. Morris*, etc., R. Co., 61 N. J. L. 322.

*New Mexico*. — *Solomon v. Yrisarri*, 9 N. Mex. 480; *Pueblo v. Romero*, 10 N. Mex. 58.

*New York*. — *Hamerschlag v. Duryea*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 678, affirmed 172 N. Y. 622; *Hindley v. Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56.

*North Carolina*. — *Taylor v. Smith*, 121 N. Car. 76; *Bullock v. Lake Drummond Canal*, etc., Co., 132 N. Car. 179; *Woodlief v. Woodlief*, 136 N. Car. 133.

*Oregon*. — *Barrell v. Title Guarantee*, etc., Co., 27 Oregon 77; *Ambrose v. Huntington*, 34 Oregon 484; *Beale v. Hite*, 35 Oregon 176, rehearing denied 35 Oregon 182; *Hamilton v. Fluornoy*, 44 Oregon 97.

*Pennsylvania*. — *Patterson v. Wheeler*, 13 Montg. Co. Rep. (Pa.) 16.

*Rhode Island*. — *Radican v. Radican*, 22 R. I. 405.

*South Carolina*. — *Sutton v. Clark*, 59 S. Car. 440, 82 Am. St. Rep. 848; *Few v. Keller*, 63 S. Car. 154.

*Tennessee*. — *Coal Creek Consol. Coal Co. v. East Tennessee Iron*, etc., Co., 105 Tenn. 571, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 883; *East Tennessee Iron*, etc., Co. v. Broyles, 95 Tenn. 612; *Buttery v. Brown*, (Tenn. Ch. 1899) 52 S. W. Rep. 713; *Earnest v. Little River Land*, etc., Co., 109 Tenn. 427.

*Texas*. — *Bowyer v. Robertson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 916; *Hines v. Lumpkin*, 19 Tex. Civ. App. 556; *Texas*, etc., R. Co. v. Bancroft, (Tex. Civ. App. 1900) 56 S. W. Rep. 606; *Grayson v. Peyton*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1074; *Burton v. Carroll*, 96 Tex. 320.

*Virginia*. — *Stull v. Rich Patch Iron Co.*, 92 Va. 253.

*Washington*. — *Rogers v. Miller*, 13 Wash. 82, 52 Am. St. Rep. 20; *Northern Pac. R. Co. v. Ely*, 25 Wash. 384; *Kline v. Stein*, 30 Wash. 189.

*West Virginia*. — *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 475, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 883; *Adkins v. Spurllock*, 46 W. Va. 142, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 883; *Wilson v. Braden*, 48 W. Va. 196; *Summerfield v. White*, 54 W. Va. 311; *Bennett v. Pierce*, 50 W. Va. 604.

**Bar to Ejectment.** — *Ward v. Cochran*, (C. C. A.) 71 Fed. Rep. 127; *Kepley v. Scully*, 185 Ill. 52; *Austin v. Colson*, (Ky. 1896) 37 S. W. Rep. 486; *Bowyer v. Robertson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 916.

**Bar to Relief in Equity.** — *Keppel v. Dreier*, 187 Ill. 298; *Davidson v. Thomas*, (Iowa 1901) 86 N. W. Rep. 291.

See also the following cases as to the effect of adverse possession to create title or as a bar to an action to recover lands:

*Illinois*. — *Sanitary Dist. v. Allen*, 178 Ill. 330; *Mickey v. Barton*, 194 Ill. 446.

*Iowa*. — *Independent Dist. v. Fagen*, 94 Iowa 676; *Roth v. Munzenmaier*, 118 Iowa 326.

*Kentucky*. — *Howes v. Kirk*, (Ky. 1896) 35 S. W. Rep. 1032; *Woolley v. McCormick*, (Ky. 1898) 45 S. W. Rep. 885; *Terry v. Hilton*, (Ky. 1898) 46 S. W. Rep. 216.

*Maryland*. — *Erdman v. Corse*, 87 Md. 506.

*Michigan*. — *Vier v. Detroit*, 111 Mich. 646.

*New Jersey*. — *Ely v. Wilson*, 61 N. J. Eq. 94.

*South Carolina*. — *Busby v. Florida Cent.*, etc., R. Co., 45 S. Car. 312; *Duren v. Kee*, 50 S. Car. 444.

*Tennessee*. — *French v. French*, (Tenn. Ch. 1898) 52 S. W. Rep. 517.

*Texas*. — *Parsons v. Thompson*, (Tex. Civ. App. 1895) 32 S. W. Rep. 327; *Vodrie v. Tynan*, (Tex. Civ. App. 1900) 57 S. W. Rep. 680.

*Virginia*. — *Virginia Midland R. Co. v. Barbour*, 97 Va. 118; *Chesterman v. Bolling*, 102 Va. 471.

*Wisconsin*. — *McCann v. Welch*, 106 Wis. 142; *Gilman v. Brown*, 115 Wis. 1.

**Dower.** — *Lucas v. Whitacre*, 121 Iowa 251.

**Colorado Statute.** — *Evans v. Welch*, 29 Colo. 355.

**Adverse Possession of Land for a Period Less than That Prescribed.** — *Bradshaw v. Ashley*, 14 App. Cas. (D. C.) 485; *Hall v. Gallemore*, 138 Mo. 638.

**Title Once Acquired by Adverse Possession Cannot Be Divested by Subsequent Declarations.** — *Jones v. Williams*, 108 Ala. 282; *Parham v. Dedman*, 66 Ark. 26; *Illinois Cent. R. Co. v. Wakefield*, 173 Ill. 564; *Rand v. Huff*, 59 Kan. 777, 53 Pac. Rep. 483; *Lamoreaux v. Creveling*, 103 Mich. 501; *Sage v. Rudnick*, 67 Minn. 362; *Baty v. Elrod*, 66 Neb. 735, 744; *Williams v. Rand*, 9 Tex. Civ. App. 631; *Mann v. Schueling*, (Tex. Civ. App. 1902) 68 S. W. Rep. 292. See also *McKinney v. Lanning*, 139 Ind. 170; *Fatic v. Myer*, (Ind. 1904) 72 N. E. Rep. 142; *Fulton v. Borders*, 61 S. W. Rep. 1001, 22 Ky. L. Rep. 1876; *Webb v. Thiele*, 56 Neb. 752.

**886. 1.** *Snowden v. Loree*, 122 Fed. Rep. 493; *Illinois Cent. R. Co. v. Moore*, 160 Ill. 9; *Donahue v. Illinois Cent. R. Co.*, 165 Ill. 640; *Sanitary Dist. v. Allen*, 178 Ill. 330; *Kepley v. Scully*, 185 Ill. 52; *Clinton v. Franklin*, 83 S. W. Rep. 142, 26 Ky. L. Rep. 1053; *Roecker v. Harperla*, 138 Mo. 33; *Spottiswoode v. Morris*, etc., R. Co., 61 N. J. L. 322; *Barrell v. Title Guarantee*, etc., Co., 27 Oregon 77; *Coal Creek Consol. Coal Co. v. East Tennessee Iron*, etc., Co., 105 Tenn. 571, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 883 [8861]; *Northern Counties Invest. Trust v. Enyard*, 24 Wash. 366; *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470.

Adverse possession for ten years gives a good title which may be affirmatively asserted against one not protected by some disability. *Cave v. Anderson*, 50 S. Car. 293.

**2. What Constitutes Adverse Possession — Question of Law for Court.** — *Reid v. Anderson*, 13 App. Cas. (D. C.) 30; *Banks v. Collins*, (Ky. 1897) 39 S. W. Rep. 519; *Benne v. Miller*, 149 Mo. 228; *Hendricks v. Musgrove*, 183 Mo. 300; *Schwab v. Bickel*, 11 Pa. Super. Ct. 312; *Kurz v. Miller*, 89 Wis. 426.

**887. 2. Burden of Proof.** — See note 1.**3. Clear Proof Required.** — See note 2.

**886. 3. Whether the Requisite Facts Exist — Question for the Jury** — *Alabama*. — Zundel v. Baldwin, 114 Ala. 328.

*Connecticut*. — Merwin v. Morris, 71 Conn. 555.

*District of Columbia*. — Reid v. Anderson, 13 App. Cas. (D. C.) 30.

*Georgia*. — Cochran v. Warlick, 111 Ga. 396; Baxley v. Baxley, 117 Ga. 60; Georgia Iron, etc., Co. v. Allison, 121 Ga. 483.

*Kansas*. — Douglas v. Muse, 62 Kan. 865.

*Kentucky*. — Owsley v. Owsley, (Ky. 1903) 77 S. W. Rep. 397.

*Michigan*. — McKay v. Gardner, 120 Mich. 267.

*Minnesota*. — Kelly v. Palmer, 91 Minn. 133.

*Missouri*. — Benne v. Miller, 149 Mo. 228; Sell v. McAnaw, 158 Mo. 466.

*Nebraska*. — Webb v. Thiele, 56 Neb. 752; Ritter v. Myers, (Neb. 1902) 92 N. W. Rep. 638.

*New Hampshire*. — Hopkins v. Deering, 71 N. H. 353.

*New York*. — Buffalo Creek R. Co. v. Collins, 41 N. Y. App. Div. 8.

*North Carolina*. — Britton v. Ruffin, 122 N. Car. 113.

*Pennsylvania*. — Deppen v. Bogar, 7 Pa. Super. Ct. 434; Schwab v. Bickel, 11 Pa. Super. Ct. 312.

*South Carolina*. — Bryce v. Cayce, 62 S. Car. 546.

*Texas*. — Cartwright v. Pipes, 9 Tex. Civ. App. 309.

*Vermont*. — Jangraw v. Mee, 75 Vt. 211, 98 Am. St. Rep. 816.

*Wisconsin*. — Kurz v. Miller, 89 Wis. 426; Lampman v. Van Alstyne, 94 Wis. 417; Illinois Steel Co. v. Jeka, (Wis. 1904) 101 N. W. Rep. 399.

*Canada*. — Miller v. Wolfe, 30 Nova Scotia 277.

*Ouster*. — Roumillot v. Gardner, 113 Ga. 60.

**887. 1. Burden of Proof** — *Alabama*. — Eureka Co. v. Norment, 104 Ala. 625; Newton v. Louisville, etc., R. Co., 110 Ala. 474; Carter v. Chevalier, 108 Ala. 563; Beasley v. Howell, 117 Ala. 499; Pittman v. Pittman, 124 Ala. 306; Bowling v. Mobile, etc., R. Co., 128 Ala. 550; Wilkinson v. Lehman-Durr Co., 136 Ala. 463.

*Arkansas*. — Nicklace v. Dickerson, 65 Ark. 422; McConnell v. Day, 61 Ark. 464.

*California*. — Tuffree v. Polhemus, 108 Cal. 670; Southern Pac. R. Co. v. Whitaker, 109 Cal. 268; Nathan v. Dierssen, (Cal. 1905) 79 Pac. Rep. 739.

*Colorado*. — Evans v. Welch, 29 Colo. 355.

*Delaware*. — Doe v. Pepper, 2 Marv. (Del.) 221.

*District of Columbia*. — Holtzman v. Douglas, 5 App. Cas. (D. C.) 397.

*Florida*. — Wilkins v. Pensacola City Co., 36 Fla. 36.

*Georgia*. — Harris v. Cole, 114 Ga. 295.

*Hawaii*. — Albertina v. Kapiolani Estate, 14 Hawaii 325, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888.

*Illinois*. — Donahue v. Illinois Cent. R. Co., 165 Ill. 640.

*Indiana*. — Webb v. Rhodes, 28 Ind. App. 393; Moore v. Hinkle, 151 Ind. 343.

*Iowa*. — Bader v. Dyer, 106 Iowa 715, 68 Am. St. Rep. 332; McClenahan v. Stevenson, 118 Iowa 106. But see Klinkner v. Schmidt, 114 Iowa 695.

*Kansas*. — Ard v. Wilson, 60 Kan. 857, 56 Pac. Rep. 80, affirming 8 Kan. App. 471.

*Kentucky*. — Chenault v. Quisenberry, (Ky. 1900) 56 S. W. Rep. 410.

*Louisiana*. — Landry v. Landry, 105 La. 362; Chapman v. Morris Bldg., etc., Imp. Assoc., 108 La. 283.

*Maine*. — Batchelder v. Robbins, 95 Me. 59.

*Massachusetts*. — See Murphy v. Com., 187 Mass. 361.

*Missouri*. — Price v. Hallett, 138 Mo. 561; Hendrickson v. Grable, 157 Mo. 42; Hunnewell v. Burchett, 152 Mo. 611; Hunnewell v. Adams, 153 Mo. 440.

*Nebraska*. — Baty v. Elrod, 66 Neb. 744.

*New York*. — Lewis v. New York, etc., R. Co., 162 N. Y. 229, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 778 [887]; Bissing v. Smith, 85 Hun (N. Y.) 564; Miner v. Hilton, 15 N. Y. App. Div. 55; Cutting v. Burns, 57 N. Y. App. Div. 185; Lambert v. Huber, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 462; Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574.

*North Carolina*. — Bradsher v. Hightower, 118 N. Car. 399; Monk v. Wilmington, (N. Car. 1904) 49 S. E. Rep. 345.

*Oregon*. — Altschul v. O'Neill, 35 Oregon 202; Altschul v. Casey, (Oregon 1904) 76 Pac. Rep. 1083.

*Pennsylvania*. — Collins v. Lynch, 167 Pa. St. 635.

*South Carolina*. — Love v. Love, 57 S. Car. 530; Hunter v. Hunter, 63 S. Car. 78, 90 Am. St. Rep. 663.

*Tennessee*. — Fuller v. Jackson, (Tenn. Ch. 1901) 62 S. W. Rep. 274.

*Texas*. — Smith v. Estill, 87 Tex. 264; O'Connor v. Dykes, (Tex. Civ. App. 1895) 29 S. W. Rep. 920; Cochran v. Moerer, 31 Tex. Civ. App. 495.

*Utah*. — Dignan v. Nelson, 26 Utah 186; English v. Openshaw, (Utah 1904) 78 Pac. Rep. 476.

*West Virginia*. — Clifton v. Weston, 54 W. Va. 250; Wilson v. Braden, (W. Va. 1904) 49 S. E. Rep. 409.

*Wisconsin*. — Kurz v. Miller, 89 Wis. 426; Allis v. Field, 89 Wis. 327; Fuller v. Worth, 91 Wis. 406.

**2. Clear and Positive Proof Required** — *Colorado*. — Evans v. Welch, 29 Colo. 355.

*District of Columbia*. — Holtzman v. Douglas, 5 App. Cas. (D. C.) 397.

*Florida*. — Wilkins v. Pensacola City Co., 36 Fla. 36.

*Illinois*. — Davis v. Howard, 172 Ill. 344, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 887; Zirngibl v. Calumet, etc., Canal, etc., Co., 157 Ill. 430; Burns v. Edwards, 163 Ill. 494; Davis v. Howard, 172 Ill. 340; Clayton v. Feig, 179 Ill. 534; Travers v. McElvain, 181 Ill. 382; Roby v. Calumet, etc., Canal, etc., Co., 211 Ill. 173.

*Iowa*.—*Litchfield v. Sewell*, 97 Iowa 247.  
*Kentucky*.—*Wohlwend v. Weingardner*, (Ky. 1897) 40 S. W. Rep. 928.

*New Jersey*.—*Munger v. Curley*, (N. J. 1904) 57 Atl. Rep. 306.

*New York*.—*Sanders v. Riedinger*, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 289; *Cutting v. Burns*, 57 N. Y. App. Div. 185.

*Ohio*.—*Happ v. Dayton, etc.*, R. Co., 14 Ohio Dec. 172.

*Pennsylvania*.—*Kron v. Dougherty*, 9 Pa. Super. Ct. 163.

*South Carolina*.—*Thomas v. Dempsey*, 53 S. Car. 216.

*Tennessee*.—*Sequatchie Valley Coal, etc., Co. v. Coppinger*, 95 Tenn. 526; *Fuller v. Jackson*, (Tenn. Ch. 1901) 62 S. W. Rep. 274.

*Texas*.—*Smith v. Estill*, 87 Tex. 264; *Leon & H. Blum Land Co. v. Rogers*, 11 Tex. Civ. App. 184.

*West Virginia*.—*Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470.

*Wisconsin*.—*Allis v. Field*, 89 Wis. 327; *Kurz v. Miller*, 89 Wis. 426; *Fuller v. Worth*, 91 Wis. 406; *Lampman v. Van Alstyne*, 94 Wis. 417; *Ryan v. Schwartz*, 94 Wis. 403; *Meyer v. Hope*, 101 Wis. 123; *Illinois Steel Co. v. Budzisz*, 115 Wis. 68.

*Canada*.—*McIntyre v. Thompson*, 1 Ont. L. Rep. 163.

"Adverse possession may be shown by inference. A strong circumstance from which such possession may be inferred is the making of permanent improvements such as the erection of division fences, the planting of orchards, or the erection of substantial buildings on the premises in controversy." *Hill v. Coal Valley Min. Co.*, 103 Ill. App. 47.

**It Must Be Shown** that the successive claimants have paid all taxes levied and assessed on the land, that the possession was continuous and uninterrupted, and either that such possession was protected by a substantial inclosure, or that the land was usually cultivated or improved. *Nathan v. Dierssen*, (Cal. 1905) 79 Pac. Rep. 739.

**For Cases Where the Evidence Was Held Sufficient to Show Adverse Possession**, see the following:

*Alabama*.—*Stephens v. Moore*, 116 Ala. 397.  
*Arkansas*.—*Broad v. Beatty*, (Ark. 1904) 83 S. W. Rep. 339; *Robinson v. Nordman*, (Ark. 1905) 88 S. W. Rep. 592.

*California*.—*Baum v. Roper*, 132 Cal. 42; *Andrus v. Smith*, 133 Cal. 78.

*Georgia*.—*Robson v. Shelnutt*, (Ga. 1905) 50 S. E. Rep. 91.

*Illinois*.—*Sullivan v. Eddy*, 164 Ill. 391.

*Iowa*.—*Independent Dist. v. Fagen*, 94 Iowa 676; *St. Luke's Parish v. Miller*, (Iowa 1900) 84 N. W. Rep. 686; *Hohl v. Osborne*, (Iowa 1902) 92 N. W. Rep. 697.

*Kentucky*.—*Reno v. Blackburn*, (Ky. 1903) 72 S. W. Rep. 775.

*Louisiana*.—*Goodwin v. McNeely*, 104 La. 19; *Dowdell v. Orphans' Home Soc.*, (La. 1905) 38 So. Rep. 16.

*Maine*.—*Wiggin v. Mullen*, 96 Me. 375.

*Maryland*.—*Nicolai v. Baltimore*, (Md. 1905) 60 Atl. Rep. 627.

*Massachusetts*.—*Murphy v. Com.*, 187 Mass. 361.

*Michigan*.—*Miskwabik Development Assoc. v. Croze*, (Mich. 1905) 103 N. W. Rep. 558.

*Minnesota*.—*Glover v. Sage*, 87 Minn. 526; *Young v. Grieb*, (Minn. 1905) 104 N. W. Rep. 131.

*Mississippi*.—*Gathings v. Miller*, 76 Miss. 651.

*Nebraska*.—*Twohig v. Leamer*, 48 Neb. 247; *Williams v. Shepherdson*, (Neb. 1903) 95 N. W. Rep. 827.

*New York*.—*Cornelius v. Hall*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 663.

*North Carolina*.—*Dean v. Gupton*, 136 N. Car. 141.

*Oregon*.—*Slater v. Reed*, 37 Oregon 274.

*Pennsylvania*.—*Williams v. Beam*, 196 Pa. St. 341; *Hart v. Williams*, 189 Pa. St. 31.

*Tennessee*.—*Fuller v. Jackson*, (Tenn. Ch. 1901) 62 S. W. Rep. 274; *Savage v. Bon Air Coal, etc., Co.*, 2 Tenn. Ch. App. 594.

*Texas*.—*Brown v. O'Brien*, 11 Tex. Civ. App. 459; *Alley v. Bailey*, (Tex. Civ. App. 1898) 47 S. W. Rep. 821; *McCarty v. Johnson*, 20 Tex. Civ. App. 184; *Texas, etc., R. Co. v. Maynard*, (Tex. Civ. App. 1899) 51 S. W. Rep. 255; *Carlyle v. Pruett*, (Tex. Civ. App. 1904) 84 S. W. Rep. 372; *Houston v. Finnigan*, (Tex. Civ. App. 1905) 85 S. W. Rep. 470.

*Virginia*.—*Lusk v. Pelter*, 101 Va. 790.

*Washington*.—*McAuliff v. Parker*, 10 Wash. 141; *Rogers v. Miller*, 13 Wash. 82, 52 Am. St. Rep. 20; *Bowers v. Ledgerwood*, 25 Wash. 14; *Olson v. Howard*, (Wash. 1905) 80 Pac. Rep. 170; *Noyes v. Douglas*, (Wash. 1905) 81 Pac. Rep. 724.

**For Cases Where the Evidence Was Held Insufficient to Show Adverse Possession** see the following:

*United States*.—*Western Union Beef Co. v. Thurman*, (C. C. A.) 70 Fed. Rep. 960; *Palmer v. Lansburgh*, 102 Fed. Rep. 376; *Snowden v. Loree*, 122 Fed. Rep. 493; *Tyee Consol. Min. Co. v. Langstedt*, (C. C. A.) 136 Fed. Rep. 124.

*Alabama*.—*Croft v. Doe*, 125 Ala. 391; *Chastang v. Chastang*, (Ala. 1904) 37 So. Rep. 799.

*Arkansas*.—*Boynton v. Ashabranner*, (Ark. 1905) 88 S. W. Rep. 566.

*California*.—*Nathan v. Dierssen*, (Cal. 1905) 79 Pac. Rep. 739.

*Illinois*.—*Hayden v. McCloskey*, 161 Ill. 351; *McCauley v. Mahon*, 174 Ill. 384; *Dewitt v. Shea*, 203 Ill. 393, 96 Am. St. Rep. 311.

*Kentucky*.—*Hibbard v. Wilson*, (Ky. 1895) 32 S. W. Rep. 1086.

*Maryland*.—*Hackett v. Webber*, 97 Md. 404.

*Minnesota*.—*St. Paul v. Chicago, etc., R. Co.*, 63 Minn. 330.

*Missouri*.—*Hendrickson v. Grable*, 157 Mo. 42.

*Nebraska*.—*Zweibel v. Myers*, (Neb. 1903) 95 N. W. Rep. 597; *Baty v. Elrod*, 66 Neb. 744.

*New Mexico*.—*Catron v. Laughlin*, (N. Mex. 1903) 72 Pac. Rep. 26.

*New York*.—*Freedman v. Oppenheim*, 80 N. Y. App. Div. 487.

*North Carolina*.—*Everett v. Newton*, 118 N. Car. 919; *Prevatt v. Harrelson*, 132 N. Car. 250.

*Pennsylvania*.—*Huss v. Jacobs*, 210 Pa. St. 145.

*South Carolina*.—*Thomas v. Dempsey*, 53 S. Car. 216.

**889.** 4. Presumptions of Law. — See note 1.

**890.** See note 1.

5. What Evidence Admissible — Invalid Deed. — See note 2.

**891.** Record of Suit. — See note 1.

Declarations. — See note 2.

*Tennessee.* — Beard *v.* Utley, (Tenn. Ch. 1896) 39 S. W. Rep. 735.

*Utah.* — English *v.* Openshaw, (Utah 1904) 78 Pac. Rep. 476.

*Vermont.* — Mitchell *v.* Prepont, 68 Vt. 613.

*Virginia.* — Harman *v.* Stearns, 95 Va. 58.

*Washington.* — McInerney *v.* Beck, 10 Wash. 515.

**889. 1. Presumption of Law Is in Favor of True Owner — Alabama.** — Newton *v.* Louisville, etc., R. Co., 110 Ala. 474. See also Croft *v.* Doe, 125 Ala. 391.

*California.* — Allen *v.* McKay, (Cal. 1902) 70 Pac. Rep. 8.

*Colorado.* — Evans *v.* Welch, 29 Colo. 355.

*Illinois.* — Zirngibl *v.* Calumet, etc., Canal, etc., Co., 157 Ill. 430.

*Iowa.* — McClenahan *v.* Stevenson, 118 Iowa 106.

*Louisiana.* — Dowdell *v.* Orphans' Home Soc., (La. 1905) 38 So. Rep. 16.

*Missouri.* — Hunnewell *v.* Burchett, 152 Mo. 611.

*New York.* — Heller *v.* Cohen, 154 N. Y. 299; Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, affirming (Supm. Ct. App. Div.) 37 N. Y. Supp. 1143, 1 N. Y. App. Div. 251; Sanders *v.* Riedinger, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 289; Monohan *v.* New York Cent., etc., R. Co., (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 619; Miner *v.* Hilton, 15 N. Y. App. Div. 55; Cutting *v.* Burns, 57 N. Y. App. Div. 185; Arents *v.* Long Island R. Co., 156 N. Y. 1.

*North Carolina.* — Monk *v.* Wilmington, (N. Car. 1904) 49 S. E. Rep. 345.

*Ohio.* — Happ *v.* Dayton, etc., R. Co., 14 Ohio Dec. 172.

*Oregon.* — Altschul *v.* O'Neill, 35 Oregon 202.

*South Carolina.* — Metz *v.* Metz, 48 S. Car. 472.

*Utah.* — Funk *v.* Anderson, 22 Utah 238.

*Wisconsin.* — Allis *v.* Field, 89 Wis. 327; Kurz *v.* Miller, 89 Wis. 426; Fuller *v.* Worth, 91 Wis. 406; Ryan *v.* Schwartz, 94 Wis. 403; Wollman *v.* Ruehle, 100 Wis. 31; Meyer *v.* Hope, 101 Wis. 123; Illinois Steel Co. *v.* Budzisz, 115 Wis. 68.

**Lapse of Time.** — Adverse possession is not a matter open to presumption, but its continuance for the statutory period under a claim or color of title is required to be proved. Atkinson *v.* Smith, (Va. 1896) 24 S. E. Rep. 901.

**Title Deeded with Plaintiff — Entry by Defendant.** — See Du Pont *v.* Charleston Bridge Co., 65 S. Car. 524.

**890. 1. Albertina *v.* Kapiolani Estate,** 14 Hawaii 325, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888, 890; Kapiolani Estate *v.* Cleghorn, 14 Hawaii 338, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 890; Shaw *v.* Smithes, 167 Ill. 269; Webb *v.* Rhodes, 28 Ind. App. 393; Rennert *v.* Shirk, 163 Ind. 542, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d

ed.) 889-890; Browning *v.* Davis, (Ky. 1899) 53 S. W. Rep. 9; Cameron *v.* Chicago, etc., R. Co., 60 Minn. 100; Carroll County *v.* Estes, 72 Miss. 171; Alexander *v.* Gibbon, 118 N. Car. 796, 54 Am. St. Rep. 757; Satcher *v.* Grice, 53 S. Car. 126; Toltec Ranch Co. *v.* Babcock, 24 Utah 192, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 890; Wollman *v.* Ruehle, 100 Wis. 31; Meyer *v.* Hope, 101 Wis. 123; Wollman *v.* Ruehle, 104 Wis. 603; Bishop *v.* Bleyer, 105 Wis. 330; Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 80 Am. St. Rep. 54; Pitman *v.* Hill, 117 Wis. 318; Illinois Steel Co. *v.* Jeka, 119 Wis. 122. See also Buffalo Creek R. Co. *v.* Collins, 41 N. Y. App. Div. 8.

A grant of lands may be presumed from acts of exclusive use and continuous occupation for ten years or more when such use and occupation are accompanied by a claim of ownership. Flanagan *v.* Mathieson, (Neb. 1903) 97 N. W. Rep. 287. See also, as to evidence required to rebut a plea of adverse possession, Amite County *v.* Steen, 72 Miss. 567.

**2. Kepley *v.* Scully,** 185 Ill. 52; Reusens *v.* Lawson, 91 Va. 226.

**A Tax Deed, Though Void,** would be evidence, as color of title, to mark the boundaries and extent of the purchaser's possession if there was any evidence that the plaintiff entered and claimed under it. National Bank *v.* Baker Hill Iron Co., 108 Ala. 635; Chabert *v.* Russell, 109 Mich. 571. See also Barron *v.* Barron, 122 Ala. 194; Pasley *v.* Richardson, 119 N. Car. 449.

**The Record of a Tax Sale** was admissible in evidence in connection with other evidence, to show the character of the possession, as being under a claim of ownership, and in hostility to the true owner, and thus to show an adverse holding of so much of the land as was in actual possession. Nashville, etc., R. Co. *v.* Mathis, 109 Ala. 377.

**A Trustee's Deed,** whether it was a proper execution of the power granted in the will or not, was admissible to characterize and define the possession subsequently held by the plaintiff. It gave at least color of title, and tended to show that a possession claimed under it was commensurate with the estate which it purported to convey. Dubuque *v.* Coman, 64 Conn. 475.

**A Survey and Map** never recorded were proper evidence to show the character of defendant's claim of right or title. Sulphur Mines Co. *v.* Thompson, 93 Va. 293.

**891. 1. Ponder *v.* Cheeves,** 104 Ala. 307; Barron *v.* Barron, 122 Ala. 194; Miller *v.* Davis, 106 Mich. 300.

**2. Declarations Admissible to Show Character of Possession.** — Ward *v.* Cochran, (C. C. A.) 71 Fed. Rep. 127; Pittman *v.* Pittman, 124 Ala. 306; Roberson *v.* Downing Co., 120 Ga. 833, 102 Am. St. Rep. 128; Prouty *v.* Tilden, 164 Ill. 163; Knight *v.* Knight, 178 Ill. 553; Kotz *v.* Belz, 178 Ill. 434; Casey *v.* Casey, 107 Iowa 192, 70 Am. St. Rep. 190; Rand *v.* Huff, 59

**892.** General Reputation. — See notes 1, 2.

**ADVERTISE.** — See note 3.

Kan. 777, 53 Pac. Rep. 483; Mann *v.* Cavanaugh, 110 Ky. 776; Dunlap *v.* Griffith, 146 Mo. 283; Swope *v.* Ward, 185 Mo. 316; Decker *v.* Decker, 64 Neb. 239; Scarboro *v.* Scarboro, 122 N. Car. 234; Metz *v.* Metz, 48 S. Car. 472; Murphy *v.* Dafoe, (S. Dak. 1904) 99 N. W. Rep. 86; Williams *v.* Rand, 9 Tex. Civ. App. 631; Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470. See also the titles DECLARATIONS (IN EVIDENCE), 12. 6; RES GESTÆ, 690. 3. *et seq.*

Sayings of a person in possession of real estate, or some interest therein, ought not to be admitted against another, unless it appears that this other claims through or under him, or stands in privity with him; these declarations not being offered apparently to prove adverse possession on the part of the person making them. When such declarations are offered, it is material to show accurately or approximately when they were made. Whelchel *v.* Gainesville, etc., Electric R. Co., 116 Ga. 431.

**Declarations Admissible to Show that Possession Is Not Adverse.** — Beasley *v.* Howell, 117 Ala. 499; Wade *v.* Johnson, 94 Ga. 348; Mann *v.* Cavanaugh, 110 Ky. 776; Walsh *v.* Wheelwright, 96 Me. 174; Boynton *v.* Miller, 144 Mo. 681; Waller *v.* Leonard, 89 Tex. 507. See also Sage *v.* Rudnick, 67 Minn. 362.

**Grantor's Declaration Admissible Against Grantee.** — Coffrin *v.* Cole, 67 Vt. 226.

**892. 1.** Eastern Oregon Land Co. *v.* Cole, (C. C. A.) 92 Fed. Rep. 949; Holtzman *v.* Douglas, 5 App. Cas. (D. C.) 397; Knight *v.* Knight, 178 Ill. 553; Whitaker *v.* Erie Shooting Club, 102 Mich. 454; Lusk *v.* Pelter, 101 Va. 790; McAuliff *v.* Parker, 10 Wash. 141. See also Hasson *v.* Klee, 168 Pa. St. 510; Ramsay *v.* Ramsay, 2 N. Bruns. Eq. Rep. 179.

In Tennessee Coal, etc., Co. *v.* Linn, 123 Ala. 112, 82 Am. St. Rep. 108, the court said: "We understand the rule to be that the existence of a fact cannot be proved by reputation or notoriety, yet where the fact is otherwise established general notoriety in the neighborhood may be proved, as competent evidence to charge a resident in such vicinity with knowledge of it."

**2. Possession Cannot Be Established by Evidence of General Reputation.** — Goodson *v.* Brothers, 111 Ala. 589; Metz *v.* Metz, 48 S. Car. 472; McInerney *v.* Beck, 10 Wash. 515.

It is notorious occupation which is one of the elements necessary to constitute a title by adverse possession. It is not proved by reputation. Notoriety of occupation is not to be inferred from notoriety of claim. Carter *v.* Clark, 92 Me. 225.

**Payment of Taxes.** — Consolidated Ice Co. *v.* New York, 166 N. Y. 92. See also Chastang *v.* Chastang, (Ala. 1904) 37 So. Rep. 799.

**Other Evidence.** — Where the defendants offered evidence that they had mortgaged the land and insured the improvements thereon in their own name, it was held not competent against the plaintiff to establish an adverse possession. Broughan *v.* Broughan, 10 Kan. App. 575, 61 Pac. Rep. 874.

**Cutting Timber** is admitted as a circumstance to be taken into consideration with other evidence in determining the fact and the extent of adverse possession. Chastang *v.* Chastang, (Ala. 1904) 37 So. Rep. 799.

**Sale of Part of Land.** — Dowdell *v.* Orphans' Home Soc., (La. 1905) 38 So. Rep. 16.

**3.** Montford *v.* Allen, 111 Ga. 18.

# ADVICE OF COUNSEL.

By O. D. ESTEE.

**894. I. LIABILITY OF ATTORNEY — 1. To Client — a. FOR IMPROPER OR ERRONEOUS ADVICE — Attorney's Undertaking. — See note 1.**

**895. No Warranty of Correctness of Opinion. — See note 1.**

**Where the Advice Is Fraudulent. — See note 3.**

**896. 3. For Contempt in Giving Improper Advice. — See note 3.**

**897. II. THE ADVICE A PRIVILEGED COMMUNICATION. — See note 2.**

**III. THE ADVICE AS A DEFENSE — 1. To Clients Generally — a. IN ACTIONS GENERALLY — Violation of Law. — See note 9.**

**898. b. CONTEMPT — General Rule — Advice of Counsel No Justification. — See note 1.**

**Qualifications. — See note 2.**

**899. c. PERJURY — Where a Question of Law Is Involved. — See note 1.**

**e. FALSE ARREST AND IMPRISONMENT. — See note 3.**

**f. MALICIOUS PROSECUTION — (1) General Rule. — See note 4.**

**894. 1. Couse v. Horton, 23 N. Y. App. Div. 198; Patterson v. Frazer, (Tex. Civ. App. 1904) 79 S. W. Rep. 1077.**

**Advice as to Title to Real Estate. — Humboldt Bldg. Assoc. Co. v. Ducker, (Ky. 1904) 82 S. W. Rep. 969; Renkert v. Title Guaranty Trust Co., 102 Mo. App. 267; Byrnes v. Palmer, 18 N. Y. App. Div. 1; Gardner v. Wood, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 93.**

**Layman Representing Himself to Be a Lawyer. — Where a layman induces another to deal with him by falsely representing that he is a lawyer, he is held to just as strict a liability to the client as if he were in fact an attorney. Miller v. Whelan, 158 Ill. 544.**

**895. 1. Morrison v. Burnett, 56 Ill. App. 129; Harriman v. Baird, 6 N. Y. App. Div. 518; Hill v. Mynatt, (Tenn. Ch. 1900) 59 S. W. Rep. 163.**

**3. In Young v. Murphy, 120 Wis. 49, a client was advised to convey property to the wife of an attorney to avoid judgment liens being taken thereon. The attorney promised to have the property reconveyed on request, but he failed to keep his promise. The court held that the deed to the attorney's wife should be canceled.**

**896. 3. Advising Disobedience of Injunction. — Stoltz v. Tuska, 82 N. Y. App. Div. 81.**

**897. 2. Butler v. Fayerweather, (C. C. A.) 91 Fed. Rep. 458; Renoux v. Geney, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 782; Austin, etc., Mfg. Co. v. Heiser, 6 S. Dak. 429.**

**But the privilege does not apply to a case where an attorney gives his client advice to aid him in a proposed violation of the law. State v. Faulkner, 175 Mo. 546.**

**9. State v. Hunt, 25 R. I. 75, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 897, 898.**

**898. 1. Rodgers v. Pitt, 89 Fed. Rep. 424, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 898; Continental Nat. Bldg., etc., Assoc. v. Scott, 41 Fla. 421; People v. Rice, 144 N. Y. 249.**

**Injunction. — The fact that a party disobeys**

**an injunction under advice of an attorney is no justification, but it may be offered in evidence in mitigation of punishment. Stoltz v. Tuska, 82 N. Y. App. Div. 81.**

**2. Rodgers v. Pitt, 89 Fed. Rep. 424, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 898; Royal Trust Co. v. Washburn, etc., R. Co., 113 Fed. Rep. 531.**

**899. 1. Failure to Disclose Material Facts. — In a prosecution for perjury a party cannot avail himself of the plea that he acted under advice of counsel unless he fully and fairly stated all the material facts of the case within his knowledge to his attorney. State v. Allen, 94 Mo. App. 508.**

**3. Young v. Gormley, 120 Iowa 372; Burbanks v. Lepovsky, 134 Mich. 384.**

**4. United States. — Widmeyer v. Felton, 95 Fed. Rep. 926; Staunton v. Goshorn, (C. C. A.) 94 Fed. Rep. 52.**

**Alabama. — O'Neal v. McKinna, 116 Ala. 606.**

**California. — Holliday v. Holliday, 123 Cal. 26; Seabridge v. McAdam, 119 Cal. 460.**

**Illinois. — Abel v. Downey, 110 Ill. App. 343, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 899.**

**Kansas. — Atchison, etc., R. Co. v. Brown, 57 Kan. 785.**

**Kentucky. — Tandy v. Riley, (Ky. 1904) 80 S. W. Rep. 776; Farmers', etc., Tobacco Warehouse Co. v. Gibbons, 107 Ky. 611; Mesker v. McCourt, (Ky. 1898) 44 S. W. Rep. 975.**

**Louisiana. — Sandoz v. Veazie, 106 La. 202.**

**Massachusetts. — Black v. Buckingham, 174 Mass. 102; Connery v. Manning, 163 Mass. 44.**

**Michigan. — Bennett v. Eddy, 120 Mich. 300; Pawlowski v. Jenks, 115 Mich. 275; Fletcher v. Chicago, etc., R. Co., 109 Mich. 363.**

**Minnesota. — Shea v. Cloquet Lumber Co., 92 Minn. 348; Jeremy v. St. Paul Boom Co., 84 Minn. 516.**

**Nebraska. — Gillispie v. Stafford, (Neb. 1903) 96 N. W. Rep. 1039; Jensen v. Halstead, 61 Neb. 249.**

**901.** (2) *Disclosure of Facts by Client.* — See note 1.

**902.** See note 1.

**903.** (3) *Requisites as to the Advice Given* — The Statement that the Plaintiff Was Liable to Prosecution Sufficient. — See note 4.

(4) *Qualifications of the Attorney.* — See note 7.

**904.** See notes 1, 2, 4.

**905.** Where the Attorney Is Personally Interested in the Subject-matter. — See note 3.

**906.** (5) *Good Faith of Client in Acting upon Advice.* — See notes 1, 2, 3.

*New Jersey.* — *Magowan v. Rickey*, 64 N. J. L. 402.

*Ohio.* — *Eihlert v. Gommoll*, 23 Ohio Cir. Ct. 586.

*Pennsylvania.* — *Replogle v. Frothingham*, 16 Pa. Super. Ct. 374.

*Rhode Island.* — *Goldstein v. Foulkes*, 19 R. I. 291.

*Texas.* — *Kleinsmith v. Hamlin*, (Tex. Civ. App. 1901) 60 S. W. Rep. 994.

*Wisconsin.* — *Billingsley v. Maas*, 93 Wis. 176.

**Rule Applied to Wrongful Attachments.** — *Dorr Cattle Co. v. Des Moines Nat. Bank*, (Iowa 1904) 98 N. W. Rep. 918; *Le Clear v. Perkins*, 103 Mich. 131. See also *Kompass v. Light*, 122 Mich. 86.

**Advice of Counsel in Mitigation of Damages.** — *Hicks v. Brantley*, 102 Ga. 264.

**Criminal Prosecution.** — A party is protected in instituting a criminal proceeding if he makes a full and fair disclosure of the facts to the public prosecuting attorney and honestly acts on his advice. *Ambs v. Atchison*, etc., R. Co., 114 Fed. Rep. 317; *Chicago*, etc., R. Co. v. *Pierce*, 98 Ill. App. 368; *Fowles v. Hayden*, 129 Mich. 586; *Warren v. Flood*, 72 Mo. App. 199; *Hess v. Oregon German Baking Co.*, 31 Oregon 503.

**Attorney Cannot Invoke Aid of Rule.** — An attorney who is a defendant in a suit for malicious prosecution cannot invoke the aid of this rule where he merely relied on his own judgment. *Epstein v. Berkowsky*, 64 Ill. App. 498.

**Cases Holding that Advice of Counsel Negatives Malice.** — *Johnson v. McDaniel*, 5 Ohio Dec. 717.

**Cases Holding that Advice of Counsel Establishes Probable Cause.** — *Kansas*, etc., *Coal Co. v. Galloway*, 71 Ark. 351, 100 Am. St. Rep. 79; *Ahrens*, etc., *Mfg. Co. v. Hoeher*, 106 Ky. 692; *Pawlowski v. Jenks*, 115 Mich. 275; *Poupard v. Dumas*, 105 Mich. 326; *Maynard v. Sigman*, 65 Neb. 590; *Peterson v. Reisdorph*, 49 Neb. 529; *Krause v. Bishop*, (S. Dak. 1904) 100 N. W. Rep. 434.

**Cases Holding that Advice of Counsel Is Evidence Both to Establish Probable Cause and to Negative Malice.** — *Myers v. Litts*, 3 Lack. Leg. N. (Pa.) 363.

**901.** 1. *California.* — *Scrivani v. Dondero*, 128 Cal. 31; *Holliday v. Holliday*, 123 Cal. 26; *Seabridge v. McAdam*, 119 Cal. 460.

*Colorado.* — *Clement v. Major*, 8 Colo. App. 86.

*Iowa.* — *Dorr Cattle Co. v. Des Moines Nat. Bank*, (Iowa 1904) 98 N. W. Rep. 918.

*Massachusetts.* — *Black v. Buckingham*, 174 Mass. 102; *Connery v. Manning*, 163 Mass. 44.

*Missouri.* — *Butcher v. Hoffman*, 99 Mo. App. 239; *Warren v. Flood*, 72 Mo. App. 199.

*Nebraska.* — *Hiersche v. Scott*, (Neb. 1901) 95 N. W. Rep. 494; *Rosenblatt v. Rosenberg*, (Neb. 1901) 95 N. W. Rep. 686.

*New York.* — *Davidoff v. Wheeler*, etc., *Mfg. Co.*, (N. Y. City Ct. Gen. T.) 14 Misc. (N. Y.) 456, affirmed (Supm. Ct. App. T.) 16 Misc. (N. Y.) 31.

*Ohio.* — *Broerman v. Ryan*, 6 Ohio Cir. Dec. 15.

*Pennsylvania.* — *Myers v. Litts*, 3 Lack. Leg. N. (Pa.) 363.

*South Dakota.* — *Wuest v. American Tobacco Co.*, 10 S. Dak. 394.

**Omission of Material Facts.** — *Struby-Estabrook Mercantile Co. v. Kyes*, 9 Colo. App. 190.

**Proof Must Show that Counsel Knew All the Facts.** — *Merchant v. Pielke*, 10 N. Dak. 48.

**Diligence Required.** — A party is not required to institute a diligent inquiry to discover facts which would tend to exculpate the accused. *Holliday v. Holliday*, (Cal. 1898) 53 Pac. Rep. 42; *Hess v. Oregon German Baking Co.*, 31 Oregon 503.

**Erroneous Statement of Facts.** — The advice of counsel is no defense where the defendant erroneously stated to his counsel facts within his knowledge. *Lawrence v. Leathers*, 31 Ind. App. 414.

**902.** 1. *Daily v. Donath*, 100 Ill. App. 52; *Atchison*, etc., R. Co. v. *Brown*, 57 Kan. 785; *Ahrens*, etc., *Mfg. Co. v. Hoeher*, 106 Ky. 692; *Butcher v. Hoffman*, 99 Mo. App. 239; *Rosenblatt v. Rosenberg*, (Neb. 1901) 95 N. W. Rep. 686; *Johnson v. McDaniel*, 5 Ohio Dec. 717; *Humphreys v. Mead*, 23 Pa. Super. Ct. 415; *Replogle v. Frothingham*, 16 Pa. Super. Ct. 374.

**903.** 4. In *Gillispie v. Stafford*, (Neb. 1903) 96 N. W. Rep. 1039, it was held that the attorney should advise his client not only whether the facts disclosed showed probable cause for instituting a criminal prosecution, but also whether sufficient diligence had been used in ascertaining those facts.

7. *O'Neal v. McKinna*, 116 Ala. 606.

**904.** 1. *Staunton v. Goshorn*, (C. C. A.) 94 Fed. Rep. 52; *Clement v. Major*, 8 Colo. App. 86; *Eihlert v. Gommoll*, 23 Ohio Cir. Ct. 586.

2. *Atkinson v. Van Cleave*, 25 Ind. App. 508, holding evidence that the attorney who was consulted had no public sign to be admissible as showing that he did not hold himself out to the public as a lawyer.

4. *Necker v. Bates*, 118 Iowa 545; *Auer v. Mauser*, 6 Pa. Super. Ct. 618.

**905.** 3. *Adkin v. Pillen*, (Mich. 1904) 100 N. W. Rep. 176.

**Question for Jury.** — See *Merchant v. Pielke*, 10 N. Dak. 48.

**906.** 1. *Seabridge v. McAdam*, 119 Cal.



- 906.** (6) *Effect of Advice as Evidence — Not a Defense, per Se.* — See note 4.  
**907.** A Question of Fact for the Jury. — See notes 1, 2, 3.  
 2. To Trustees — United States. — See note 5.

[**ADVISABLE.** — See note 5a.]

**ADVISE.** — See note 6.

- 909.** **AFFECT — AFFECTING.** — See note 1.

**AFFIDAVIT.** — See note 3.

- 910.** See notes 2, 3.

- 912.** **AFFINITY.** — See notes 1, 2, 3.

- 913.** See note 1.

460; Kehl v. Hope Oil Mill, etc., Co., 77 Miss. 762; Hiersche v. Scott, (Neb. 1901) 95 N. W. Rep. 494; Merchant v. Pielke, 10 N. Dak. 48; Humphreys v. Mead, 23 Pa. Super. Ct. 415; Replogle v. Frothingham, 16 Pa. Super. Ct. 374; Kleinsmith v. Hamlin, (Tex. Civ. App. 1904) 60 S. W. Rep. 994.

**Client Must Show that He Followed the Advice.** — Gruel v. Mengler, 74 Ill. App. 36.

**906.** 2. Clement v. Major, 8 Colo. App. 86; Rosenblatt v. Rosenberg, (Neb. 1901) 95 N. W. Rep. 686.

**Criminal Prosecution to Collect Debt.** — Strehlow v. Pettit, 96 Wis. 22.

3. Clement v. Major, 8 Colo. App. 86.

**Advice Not Given in Good Faith.** — Shea v. Cloquet Lumber Co., 92 Minn. 348.

**4.** Morrow v. Carnes, 108 Ill. App. 621; Terre Haute, etc., R. Co. v. Mason, 148 Ind. 578; Atkinson v. Van Cleave, 25 Ind. App. 508; Womack v. Fudikar, 47 La. Ann. 33; Parr v. Loder, 97 N. Y. App. Div. 218; Smith v. Eastern Bldg., etc., Assoc., 116 N. Car. 73; Thurber v. Eastern Bldg., etc., Assoc., 116 N. Car. 75; R. F. Scott Grocer Co. v. Kelly, 14 Tex. Civ. App. 136.

**Where Facts Are Disputed.** — Brown v. McBride, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 235.

**907.** 1. Butcher v. Hoffman, 99 Mo. App. 239; Gillispie v. Stafford, (Neb. 1903) 96 N. W. Rep. 1039; Miles v. Walker, 66 Neb. 728; Bell v. Atlantic City R. Co., 202 Pa. St. 178, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 906, 907.

2. Jensen v. Halstead, 61 Neb. 249; Bell v. Atlantic City R. Co., 202 Pa. St. 178, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 906, 907. See also Bennett v. Eddy, 120 Mich. 300.

3. Kehl v. Hope Oil Mill, etc., Co., 77 Miss. 762; Bell v. Atlantic City R. Co., 202 Pa. St. 178, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 906, 907; Billingsley v. Maas, 93 Wis. 176.

5. Matter of Ball, 55 N. Y. App. Div. 284, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 907.

5a. In Barrett v. Bloomfield Sav. Inst., 64 N. J. Eq. 441, the court said: "The meaning of the word *advisable* is sufficiently clear and simple. That is *advisable* which is expedient, prudent, and proper to be done, and therefore proper to be advised to be done. Its synonyms, according to Webster, Worcester, and the Century Dictionary, are 'expedient,' 'proper,' 'desirable,' 'prudent,' 'wise,' 'best.'"

**6.** Advise and Instruct. — People v. Daniels, 195 Cal. 262.

**Legal Adviser.** — Under an act providing that it shall be the duty of the city attorney to *advise* the city in all matters of litigation or legal proceedings, the word *advise* is used in a broad sense meaning that he shall be the legal adviser in all matters of litigation, and the attorney cannot recover for services rendered in litigation against the city as extraordinary services. Ludlow v. Richie, (Ky. 1904) 78 S. W. Rep. 199.

**909.** 1. **Real Estate Affected.** — Delta County Land, etc., Co. v. Talcott, 17 Colo. App. 316; Goldstein v. Curtis, 65 N. J. Eq. 382.

**Parties Affected.** — Mortgagees who had served notice upon tenants of the mortgaged, in occupation of the mortgaged premises, to pay the rents to them, and to whom such tenants had attorned, were, within the meaning of Rule 536, "parties affected" by *ex parte* orders obtained by a judgment creditor of the mortgagor attaching such rents as debts. Parker v. McIlwain, 17 Ont. Pr. 84.

3. State v. Headrick, 149 Mo. 403, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909.

**910.** 2. **Distinguished from Deposition.** — Crenshaw v. Miller, 111 Fed. Rep. 450; *In re Liter*, 19 Mont. 474.

3. **Subscription by Affiant.** — Barhydt v. Alexander, 59 Mo. App. 188; Lutz v. Kinney, 23 Nev. 279.

**Jurat of Clerk.** — Theobald v. Chicago, etc., R. Co., 75 Ill. App. 208.

**Petition as Affidavit.** — Lawrey v. Sterling, 41 Oregon 518.

**912.** 1. North Arkansas, etc., R. Co. v. Cole, 71 Ark. 38, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 912; Holt v. Watson, 71 Ark. 87; State v. Wall, 41 Fla. 463; Doyle v. Com., 100 Va. 811, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 911, 912, the whole text paragraph.

2. **Between Kinsman of Wife and Kinsman of Husband.** — See North Arkansas, etc., R. Co. v. Cole, 71 Ark. 38, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 912.

3. Wilson v. State, 100 Tenn. 596; Stringfellow v. State, 42 Tex. Crim. 592, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 912.

**Husband of Aunt and Husband of Niece.** — State v. Wall, 41 Fla. 463.

**913.** 1. Wilson v. State, 100 Tenn. 597, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 913.

**Birth of Issue.** — Stringfellow v. State, 42 Tex. Crim. 592, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 913.

## AFFRAY.

**915. I. DEFINITION.** — See note 1.

**916. II. ELEMENTS OF OFFENSE — Actual Fighting.** — See note 1.  
By Two or More Persons. — See note 5.

**917. Mutual Consent.** — See note 3.  
In a Public Place. — See notes 4, 5.

**920. AFORETHOUGHT.** — See note 2.

**921. AFTER.** — See note 1.

**925. AGAINST.** — See note 1.

**929. [AGED.]** — See note 1.]

**915. 1. At Common Law.** — *State v. Fritz*, 133 N. Car. 725. See also *Strutton v. Com.*, (Ky. 1901) 62 S. W. Rep. 875; *Reynolds v. Com.*, (Ky. 1904) 82 S. W. Rep. 978.

The Word "Affray" as Used in a Manslaughter Instruction does not mean that two persons must engage in a fight on a public road to be guilty of the common-law offense of an affray. If A halts B on a public highway and attempts to draw a gun on him, and B fires four shots at A, after which A fires one at B, it certainly would constitute an affray. *Burton v. Com.*, (Ky. 1901) 60 S. W. Rep. 526; *Reynolds v. Com.*, (Ky. 1904) 82 S. W. Rep. 978.

**Appearing in Public Place Armed with Dangerous Weapons.** — *State v. Griffin*, 125 N. Car. 693.

**Dueling Is Simply an Aggravated Form of Affray**, and under an indictment therefor the party may be convicted of a mutual fighting by consent without deadly weapons. *State v. Fritz*, 133 N. Car. 725.

**Statutes Defining Affray — Georgia.** — *Gamble v. State*, 113 Ga. 701.

**Justification — Self-defense.** — Failure to charge on self-defense in a prosecution for an affray is error. *Coyle v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 847.

**916. 1. Persons Engaged in a Friendly Scuffle** are not guilty of an affray. *State v. Freeman*, 127 N. Car. 544.

**Sufficiency of Evidence to Show an Affray.** — See *State v. Glenn*, 119 N. Car. 804; *Piper v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1118.

**5. Piper v. State**, (Tex. Crim. 1899) 51 S. W. Rep. 1118.

**917. 3. Mutual Consent of the Parties Necessary.** — *State v. Fritz*, 133 N. Car. 725.

**4. Public Place.** — *Piper v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1118. Compare *State v. Griffin*, 125 N. Car. 692.

In *Gamble v. State*, 113 Ga. 701, it was held that a fight in the presence of a number of persons invited to attend a dance in a private house near a public road, in the absence of evidence to show the distance of the house from the road and whether the fighting could be seen or heard from the road, was not in a place open to the general public so as to constitute it a public place within the meaning of the law of affrays.

In *State v. Fritz*, 133 N. Car. 725, it was held that the presence of seven other persons, at a fight in the nature of a duel, made the place of combat a public place so as to constitute an affray.

**5. State v. Fritz**, 133 N. Car. 725.

**920. 2. Malice Aforethought.** — *State v. Tate*, 156 Mo. 119. See also *Hathaway v. Com.*, (Ky. 1904) 82 S. W. Rep. 400.

**921. 1. Subject to Order in Point of Right of Enjoyment.** — *Haug v. Schumacher*, 166 N. Y. 506; *Canfield v. Fallon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345.

**925. 1. Against the Will.** — *Gore v. State*, 119 Ga. 418.

**Against Law.** — *Drexel v. Daniels*, 49 Neb. 99.  
**Verdict Against Evidence.** (See also ENCYC. OF PL. AND PR., titles NEW TRIAL; VERDICT.) — See *Jenkins v. Hankins*, 98 Tenn. 545.

**929. 1.** The word *aged*, as used in a Texas statute making an assault aggravated when committed by a person of robust health or strength upon one who is *aged* or decrepit, "means that the party has reached that degree of weakness which characterizes declining years. One might be quite old, and yet not *aged*, within the meaning of the statute." *Black v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 113.

**As Used in Exemption Statute.** — *Allen v. Pearce*, 101 Ga. 316.

# AGENCY.

By E. C. ELLSBREE.

**938. I. DEFINITIONS — 3. Agent.** — See note 4.

**4. The Power of Authority.** — See note 7.

**940. III. COMPETENCY OF PARTIES — 1. Competency to Be Principal —**

*a. INDIVIDUALS — (3) Persons Legally Incompetent — (a) Infants — Appointment of Agents.* — See note 8.

**941.** See note 2.

**942. (b) Married Women — By Statute.** — See note 2.

**944. d. CORPORATIONS.** — See note 8.

**946. 2. Competency to Be Agent — b. VARIOUS PERSONS — (5) Married Women — (a) As Agent for Her Husband.** — See note 4.

**947. (6) Husband as Wife's Agent — Appointment.** — See note 3.

**948. IV. APPOINTMENT — 1. Necessity.** — See notes 1, 3, 4, 5.

**938. 4. Wynegar v. State,** 157 Ind. 577, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 938; *International Bldg., etc., Assoc. v. Watson*, 158 Ind. 508.

**7. Valkenberg v. Treasurer,** 14 Hawaii 182, per Perry, J., dissenting, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 938.

**940. 8. Burns v. Smith,** 29 Ind. App. 181, 94 Am. St. Rep. 268, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 940; *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 100 Am. St. Rep. 560, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 940; *Poston v. Williams*, 99 Mo. App. 513.

**For Necessaries** it has been held that an infant may bind himself by an agent. *Fruchey v. Eagleson*, 15 Ind. App. 88.

**941. 2. Rocks v. Cornell,** 21 R. I. 532, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 940-941.

**Appointment Not Prejudicial to Infant.** — The appointment of an agent for the purpose of giving notice of the rescission of a contract of insurance and making a demand is not such an act as can be held, as matter of law, to be prejudicial to an infant, and therefore void, but it is at most only voidable. *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 100 Am. St. Rep. 560.

**942. 2. Wife May Appoint Attorney in Relation to Her Separate Estate.** — *Linton v. National L. Ins. Co.*, 104 Fed. Rep. 584, 44 C. C. A. 54; *Williams v. Paine*, 169 U. S. 55; *Nigh v. Dovel*, 84 Ill. App. 228; *Tompkins v. Triplett*, 110 Ky. 824, 96 Am. St. Rep. 472; *Morris v. Linton*, 61 Neb. 537.

**In Regard to Property Not Separately Held** a married woman cannot appoint an agent. *Macfarland v. Heim*, 127 Mo. 327, 48 Am. St. Rep. 629; *Spurlock v. Dornan*, 182 Mo. 242.

**Oral Appointment Insufficient.** — In *Alabama* a married woman has been held not to be bound by the acts of an agent orally appointed. *Troy Fertilizer Co. v. Zachry*, 114 Ala. 177; *Tuscaloosa First Nat. Bank v. Leland*, 122 Ala. 289.

**944. 8. Member of Corporation as Agent.** —

A corporation may contract with directors to act as selling agents, provided this is done openly and with the express or implied assent of all the stockholders. *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97. See also the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**946. 4. Agency of Wife for Husband.** — *Steffens v. Nelson*, (Minn. 1905) 102 N. W. Rep. 871; *Sibley v. Gilmer*, 124 N. Car. 635; *Presnall v. McLeary*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1066.

**Measure of Authority.** — Whether the wife has power to bind her husband depends, not upon the bare fact of marriage or cohabitation, but upon his authority or assent, either express or implied. If it be express, her power must be measured by the terms employed in conferring it. If it be implied, its extent must be gathered from all the circumstances of the case. *Jones v. Gutman*, 88 Md. 355.

**947. 3. Agency of Husband for Wife.** — *Nigh v. Dovel*, 84 Ill. App. 228; *Magerstadt v. Schaefer*, 110 Ill. App. 166; *Saunders v. King*, 119 Iowa 291; *Tompkins v. Triplett*, 110 Ky. 824, 96 Am. St. Rep. 472; *First Commercial Bank v. Newton*, 117 Mich. 433; *Stone v. William Exch. Bank*, 81 Mo. App. 9; *Greenberg v. Palmieri*, (N. J. 1904) 58 Atl. Rep. 297.

**948. 1. Must Be Appointment by Principal and Acceptance by Agent.** — *In re Carpenter*, 125 Fed. Rep. 831, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 948; *Booker v. Booker*, 208 Ill. 529, 100 Am. St. Rep. 250.

**3. Agency Must Have Essential Elements of Other Contracts.** — *In re Carpenter*, 125 Fed. Rep. 831, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 948; *Walton v. Dore*, 113 Iowa 1.

**4. Ketchem v. Marsland, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 450, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 948.**

**5. Wilson v. Vogeler, (Idaho 1905) 79 Pac. Rep. 508; *Kelly v. Tracy, etc., Co.*, 71 Ohio St. 220. See also *Browne v. Gault*, 19 Quebec Super. Ct. 523.**

**A Telegraph Operator in the employment of a**

**949. 2. Requisites — a. WHEN MADE BY NATURAL PERSONS — Intention.** — See note 1.

Correspondence as to Sale of Real Estate. — See note 3.  
One Employed to Receive and Report Bids. — See note 8.

**950. Intention to Create Agency.** — See notes 2, 3.

**951. b. WHEN MADE BY CORPORATIONS — Vote of Directors.** — See notes 3, 4.

**952. Implied Appointment.** — See note 1.

**3. Modes — b. EXPRESS — (1) Under Seal — General Rules.** — See note 7.

**953. Seal Regarded as Surplusage.** — See note 5.

**954. Insertions in Deeds.** — See notes 1, 2.

**955. When Conveyances by Agents with Parol Authority Binding as Contracts of Sale.** — See note 1.

(2) *By Parol* — General Rule. — See notes 2, 3.

Instances. — See note 10.

**956.** See notes 2, 3, 4.

telegraph company does not become the agent of a party for whom he receives and transmits a message. *Bérubé v. Great N. W. Tel. Co.*, 14 Quebec Super. Ct. 178.

**An Unauthorized Real-estate Agent** who calls the attention of a purchaser to a piece of property is not entitled to a commission where the owner of the property is unaware of such agent's intervention. *Plummer v. Gillespie*, 10 Quebec Super. Ct. 243.

**949. 1. Intention Implied from Conduct of Principal.** — *Halladay v. Underwood*, 90 Ill. App. 130.

**3. Opie v. Pacific Invest. Co.**, 26 Wash. 505. See also *Riley v. Grant*, 16 S. Dak. 553.

**8. One Who Merely Solicits Orders for Sales.** — *Illinois Moulding Co. v. Page, et al., Mfg. Co.*, 104 Ill. App. 1.

**950. 2. How Established or Disproved.** — *In re Carpenter*, 125 Fed. Rep. 831, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950; *Connell v. McLoughlin*, 28 Oregon 230.

**3. Presence of Some Elements of Agency — Intention.** — *In re Carpenter*, 125 Fed. Rep. 831, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950; *Evans-Snyder-Buel Co. v. Holder*, 16 Tex. Civ. App. 300.

**951. 3. The Directors Must Act as a Board**, and not as individuals, though it is not necessary that their votes should be formal or that they should be proved by record. *Peirce v. Morse-Oliver Bldg. Co.*, 94 Me. 406.

**4. Acts of Corporate Officers.** — *Smith v. New England Bank*, 72 N. H. 4.

**952. 1. Municipal Corporations.** — The employment of an agent to perform service for a municipal corporation need not necessarily be in writing or by a formal ordinance, by-law, or resolution. *Wilt v. Redkey*, 29 Ind. App. 199.

**7. Common-law Rule** — *Daniel v. Garner*, 71 Ark. 484; *Hartnett v. Baker*, 4 Penn. (Del.) 431; *Overman v. Atkinson*, 102 Ga. 750; *Wilson v. Wood*, 10 Okla. 279; *Hotchkiss v. Middlekauf*, 96 Va. 649.

**953. 5. Nichols v. Haines**, 98 Fed. Rep. 692, 39 C. C. A. 235, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 953; *Hartnett v. Baker*, 4 Penn. (Del.) 431, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 953. See also *McIntosh v. Hodges*, 119 Mich. 319,

**954. 1. Insertions in Deeds by Agents Without Authority under Seal — Authorities Conflicting.** — *Lund v. Thackeray*, (S. Dak. 1904) 99 N. W. Rep. 856.

**2. Lafferty v. Lafferty**, 42 W. Va. 783, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 954.

**955. 1. Interposition of Equity.** — *Daniel v. Garner*, 71 Ark. 484.

**2. Lamar v. Smith**, 129 Ala. 418; *Marshall v. Rugg*, 6 Wyo. 270.

**3. Kentucky Gen. Stat.**, § 20, c. 22, applies to bail bonds taken pursuant to section 82 of the Criminal Code. *Com. v. Belt*, (Ky. 1899) 51 S. W. Rep. 431.

**In Order to Give a License to Cut Standing Timber** an agent need not have written authority. *Antrim Iron Co. v. Anderson*, (Mich. 1905) 104 N. W. Rep. 319.

**10. Agent to Contract for Sale of Lands.** — *Columbia Land, et al., Co. v. Tinsley*, 60 S. W. Rep. 10, 22 Ky. L. Rep. 1082, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 955; *Lindley v. Keim*, 54 N. J. Eq. 418; *Tyrrell v. O'Connor*, 56 N. J. Eq. 448; *Smith v. Browne*, 132 N. Car. 365; *Monfort v. McDonough*, 20 Wash. 710; *Horr v. Hollis*, 20 Wash. 424. *Contra*, by statute, *Thompson v. New South Coal Co.*, 135 Ala. 630, 93 Am. St. Rep. 49; *Lambert v. Gerner*, 142 Cal. 399; *Power v. Immigration Land Co.*, (Minn. 1904) 101 N. W. Rep. 161; *Cockrell v. McIntyre*, 161 Mo. 59; *Mine La Motte Lead, et al., Co. v. White*, 106 Mo. App. 222; *O'Shea v. Rice*, 49 Neb. 893; *Brandrup v. Britten*, 11 N. Dak. 376; *Hickox v. Bacon*, (S. Dak. 1903) 97 N. W. Rep. 847. See further the title REAL ESTATE BROKERS.

**Pennsylvania.** — *Ott v. Heineman*, 31 Pittsb. Leg. J. N. S. (Pa.) 161.

**956. 2. Surety Bond.** — In *Texas* parol authority is sufficient to authorize an agent to sign a surety's name to a bond. *Bannister v. Wallace*, 14 Tex. Civ. App. 452.

**3. Bills and Notes.** — *Phillips v. Sanger Lumber Co.*, 130 Cal. 431.

**4. Lease for More than One Year.** — Authority to lease lands for a longer period than one year must be in writing. *Shea v. Seelig*, 89 Mo. App. 146; *Bourne v. Campbell*, 21 R. I. 490. But this rule has been held not to apply in the case of the general agent of a corporation who

- 956.** Where Statute Requires a Writing. — See note 5.  
**957.** *c.* IMPLIED — (1) *From the Relation of the Parties.* — See note 5.  
 Wife as Agent of Husband. — See note 7.  
**958.** See notes 1, 2.  
 Husband as Agent of Wife. — See note 3.  
 Other Relations. — See note 5.  
**959.** (2) *From Conduct* — General Rule — Estoppel — Acquiescence. — See note 5.  
**960.** See notes 1, 2, 4.  
**961.** Single Transaction. — See notes 1, 2.

may be authorized orally. *Donovan v. P. Schoenhofen Brewing Co.*, 92 Mo. App. 341.

**956.** 5. Statute Requiring Writing — Executing Verbal Authority in Presence and at Request of Principal. — *Morton v. Murray*, 176 Ill. 54, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 956, *Contra*, *Bramel v. Byron*, (Ky. 1897) 43 S. W. Rep. 695.

**957.** 5. Agency Implied from Relation of Parties. — *Keim v. Lindley*, (N. J. 1895) 30 Atl. Rep. 1063.

**Extent of Implied Authority.** — Where agency is shown by proof of the relative situation of the parties, the agency is established no further than is necessary for the discharge of the duties ordinarily belonging to it. *Wikle v. Louisville, etc.*, R. Co., 116 Ga. 309.

**7. Wife as Agent of Husband in Matters Concerning Household.** — *Johnson v. Briscoe*, 104 Mo. App. 493; *Bradt v. Shull*, 46 N. Y. App. Div. 347; *Haberman v. Gasser*, 104 Wis. 98. And see the title HUSBAND AND WIFE.

**958.** 1. Wife's Authority by Necessity. — *Johnson v. Briscoe*, 104 Mo. App. 493; *Bostwick v. Brower*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 709.

**2. Wife as Agent of Husband in Other Matters.** — *Western Union Tel. Co. v. Moseley*, 28 Tex. Civ. App. 562; *National F. Ins. Co. v. Wagley*, (Tex. Civ. App. 1902) 68 S. W. Rep. 819.

**Question of Fact.** — The question of the wife's agency for her husband is in every case one of fact, arising either from his neglect to supply her with necessities, or from his authority expressly given or fairly to be inferred from the circumstances. *Martin v. Oakes*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 201; *Wanamaker v. Weaver*, 176 N. Y. 75, 98 Am. St. Rep. 621.

**Agency of Wife Readily Presumed.** — An agency or assent may be more readily presumed from the acts and condition of a wife than in ordinary cases. *Brown v. Woodward*, 75 Conn. 254.

**3. Husband as Agent of Wife.** — *Wagoner v. Silva*, 139 Cal. 559; *Mickleberry v. O'Neal*, 98 Ga. 42; *Norfolk Nat. Bank v. Nenow*, 50 Neb. 429; *Harris v. Weir-Shugart Co.*, 51 Neb. 483; *Elliott v. Bodine*, 59 N. J. L. 567; *Bazemore v. Mountain*, 121 N. Car. 59; *Whitaker v. Lee*, (Tenn. Ch. 1900) 57 S. W. Rep. 348; *Cushman v. Masterson*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1031; *Cooper v. Sawyer*, 31 Tex. Civ. App. 620. See also the title HUSBAND AND WIFE.

**The Husband Is the Natural and Presumptive Agent in law of the wife.** *American Express Co. v. Lankford*, 1 Indian Ter. 233, 2 Indian Ter. 18. But evidence that work was being done upon a wife's property by order of the husband and with her knowledge is not sufficient to charge her as principal. *Snyder v.*

*Sloane*, 65 N. Y. App. Div. 543; *Valentine v. Applebee*, 87 Hun (N. Y.) 1. *Compare* *Farley v. Stroeh*, 68 Mo. App. 85; *Whipple v. Webb*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 332; *Bankard v. Shaw*, 199 Pa. St. 623.

**When a Husband Has the General Management** of his wife's property, and with her knowledge orders lumber which is used in the erection or repair of buildings upon her land, a jury will be justified in finding that the husband acted as her agent. *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538.

**In Texas** the husband is not, by implication of law, the agent of the wife, nor can she by express power of attorney constitute him her agent to convey her land. *Lewis v. Hoeldtke*, (Tex. Civ. App. 1903) 76 S. W. Rep. 309; *Chaison v. Beauchamp*, 12 Tex. Civ. App. 109.

**5. Mere Relationship.** — *Valentine v. Applebee*, 87 Hun (N. Y.) 1; *Snyder v. Sloane*, 65 N. Y. App. Div. 543; *Hickox v. Bacon*, (S. Dak. 1903) 97 N. W. Rep. 847.

**959.** 5. Agency Arising from General Conduct. — *Bull v. Duncan*, 9 Kan. App. 887, 59 Pac. Rep. 42; *Werth v. Ollis*, 61 Mo. App. 401; *Zinke v. Zinke*, 90 Hun (N. Y.) 127; *Nutting v. Kings County El. R. Co.*, 21 N. Y. App. Div. 72; *Sloss Iron, etc., Co. v. Jackson Architectural Iron Works*, 103 N. Y. App. Div. 316; *Horowitz v. Hines*, (Supm. Ct. App. T.) 93 N. Y. Supp. 469; *Lough v. Davis*, 35 Wash. 449.

**The Selection of the Office of a Notary as the Place of Payment** of a hypothecary claim and interest does not establish the relation of principal and agent between the notary and the party making the selection. *Latulippe v. Grenier*, 13 Quebec Super. Ct. 157.

**960.** 1. Holding Out One as Agent. — *Smith v. Delaware, etc., Tel., etc., Co.*, 64 N. J. Eq. 770; *Bisaillon v. Elliott*, 13 Quebec Super. Ct. 289.

**The Test** is whether under the circumstances of the case a reasonably prudent man would be justified in believing that one was acting for another. *Harbison v. Iliff*, 10 Ohio Dec. 58.

**2. Estoppel.** — *Richards v. John Spry Lumber Co.*, 169 Ill. 238; *Schmidt v. Shaver*, 196 Ill. 108, 89 Am. St. Rep. 250; *Johnston v. Milwaukee, etc., Invest. Co.*, 46 Neb. 480; *Harbison Nat. Bank v. Austin*, 65 Neb. 632, 101 Am. St. Rep. 639; *Morris v. Joyce*, 63 N. J. Eq. 549.

**4. Carrying on Business in Name of Another.** — To the same effect as *Garner v. A. Fisher Brewing Co.*, 6 Utah 332, stated in the original note, see *McKinney v. Stephens*, 17 Pa. Super. Ct. 125.

**961.** 1. Agency Implied from Single Transaction. — *Grant v. Humerick*, 123 Iowa 571. But see *Ravenna Bank v. Dobbins*, 96 Mo. App. 693, holding that an isolated act is not proof

- 962.** Third Person Must Have Relied upon Agency. — See note 1.  
 The Authority Will Be Limited. — See note 3.  
 Circumstances Which Justify the Inference of Agency. — See notes 5, 6.
- 963.** See note 2.
- 964.** See notes 1, 3.  
 By the Ratification of Past Acts. — See note 6.
- 965.** Recognition of Agent's Acts. — See note 8.
- 966.** 4. Adoption of the Agent of Another. — See notes 1, 2.

of a general agency; *Molt v. Baumann*, 65 N. Y. App. Div. 445, holding that evidence that a husband acted as agent for his wife in a transaction similar to the one before the court is incompetent to prove his agency in the particular transaction in question.

**961. 2. Series of Transactions.** — *St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619; *Harrison v. Legore*, 109 Iowa 618; *Wheeler v. Benton*, 67 Minn. 293; *Wheeler v. Benton*, 71 Minn. 456; *Hare v. Bailey*, 73 Minn. 409; *Haubelt v. Rea*, etc., Mill Co., 77 Mo. App. 672; *Standley v. Clay*, (Neb. 1903) 94 N. W. Rep. 140; *Smith v. New England Bank*, 72 N. H. 4; *Mikles v. Hawkins*, 59 N. Y. App. Div. 253; *National Park Bank v. American Exch. Nat. Bank*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 672.

**Indorsing Notes.** — *Best v. Krey*, 83 Minn. 32. See also *Lytle v. Dothan Bank*, 121 Ala. 215.

**Previous Course of Dealing.** — *Gambrill v. Brown Hotel Co.*, 11 Colo. App. 529; *Marsh v. French*, 82 Ill. App. 76; *McCormick Harvesting Mach. Co. v. Lambert*, 120 Iowa 181; *Continental Tobacco Co. v. Campbell*, (Ky. 1903) 76 S. W. Rep. 125; *Eisenberg v. Matthews*, 84 Minn. 76; *Bonner v. Lisenby*, 86 Mo. App. 666; *Crosno v. Bowser Milling Co.*, 106 Mo. App. 236; *Welch v. Clifton Mfg. Co.*, 55 S. Car. 568.

And this is true without regard to knowledge thereof by the principal. *Best v. Krey*, 83 Minn. 32.

**Previous Agency** justifies the other party in accepting as true representations express or implied of present agency, but does not supply the place of these when none is given, and the only intimation given is that the act is unauthorized, but may be ratified. *Edwards v. Law*, (Fla. 1903) 36 So. Rep. 569.

**962. 1. Good Faith Required of Third Party.** — *Gosliner v. Grangers' Bank*, 124 Cal. 225; *Peter Schoenhofen Brewing Co. v. Wengler*, 57 Ill. App. 184; *Hollinshead v. Stuart*, 8 N. Dak. 35; *Merchants', etc., Cotton Oil Co. v. Lufkin Nat. Bank*, (Tex. Civ. App. 1904) 79 S. W. Rep. 651.

3. See *Swofford Bros. Dry Goods Co. v. Berkowitz*, 7 Kan. App. 24.

**5. Undertaking to Sell Land at Agreed Price.** — Where one person undertakes to sell land for another at an agreed price, the relation of principal and agent is established. *Fisher v. Seymour*, 23 Colo. 542.

**6. Giving One Custody of Personalty.** — *Pittsburgh Plate Glass Co. v. Kerlin Bros Co.*, 122 Fed. Rep. 414, 58 C. C. A. 648. And to the same effect as *Gibney v. Curtis*, 61 Md. 192, stated in the original note, see *Sutton v. Baker*, 91 Minn. 12.

**Power to Sell Not Implied.** — The mere possession of personal property does not generally

authorize an inference of power as agent to sell it and receive the proceeds. *Schmidt v. Shaver*, 196 Ill. 108, 89 Am. St. Rep. 250; *Rogers v. Dutton*, 182 Mass. 187; *Peerless Mach. Co. v. Gates*, 61 Minn. 124.

**963. 2. Putting One in Charge of a Business.** — *Hutchings v. Adams*, 12 Manitoba 118.

**964. 1. Giving One Money to Invest or to Pay to Another.** — *Reformed Presbyterian Church v. Livingston*, 210 Pa. St. 536.

3. See *Macdonald v. Cool*, 134 Cal. 302.

**6. Effect of Ratification.** — *Grant v. Humerick*, 123 Iowa 571; *Haubelt v. Rea*, etc., Mill Co., 77 Mo. App. 672; *Wilber First Nat. Bank v. Ridpath*, 47 Neb. 96; *Harrison Nat. Bank v. Austin*, 65 Neb. 632, 101 Am. St. Rep. 639; *Osborne v. Gatewood*, (Tex. Civ. App. 1903) 74 S. W. Rep. 72.

**Substantially Similar Conditions and Circumstances** are, however, necessary to raise an implication of agency from ratification of past acts. *Smith v. Georgia*, etc., R. Co., 113 Ga. 625.

**965. 8. United States.** — *Gale v. Chase Nat. Bank*, 104 Fed. Rep. 214, 43 C. C. A. 496; *Sun Printing, etc., Assoc. v. Moore*, 183 U. S. 642.

**Colorado.** — *Gambrill v. Brown Hotel Co.*, 11 Colo. App. 529.

**Georgia.** — *Strong v. West*, 110 Ga. 382.

**Iowa.** — *Wilson v. Fones*, 99 Iowa 132.

**Massachusetts.** — *Scribner v. Flagg Mfg. Co.*, 175 Mass. 536.

**Minnesota.** — *Jackson v. Mutual Ben. L. Ins. Co.*, 79 Minn. 49, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 965.

**Nebraska.** — *Cheshire Provident Inst. v. Vandegrift*, (Neb. 1901) 95 N. W. Rep. 615.

**New York.** — *Dickinson v. Salmon*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 169; *Chambers v. Lancaster*, 160 N. Y. 342.

**Pennsylvania.** — *Culver v. Pocono Spring Water Ice Co.*, 206 Pa. St. 481.

**South Dakota.** — *Iowa Nat. Bank v. Sherman*, (S. Dak. 1903) 97 N. W. Rep. 12.

**Texas.** — *Pullman-Palace-Car Co. v. Nelson*, 22 Tex. Civ. App. 223; *Osborne v. Gatewood*, (Tex. Civ. App. 1903) 74 S. W. Rep. 72.

**Utah.** — *Moyle v. Congregational Soc.*, 16 Utah 69.

**Vermont.** — *John A. Roebling's Sons Co. v. Barre*, etc., Traction, etc., Co., 76 Vt. 131.

**Evidence of Recognition.** — Circumstances tending to show the exercise of authority on the part of the agent and its recognition on the other's part may be shown, although they may have no direct connection with the issues tried. *Lytle v. Dothan Bank*, 121 Ala. 215; *Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co.*, 127 Ala. 137.

**966. 1. Where Parties Sign an Application**

**967.** See notes 1, 2.

**5. Evidence—*a.* IN GENERAL—When Question for Court—When for**

**Jury.**—See notes 3, 4.

**968.** See note 1.

**Evidence May Be Either Direct or Indirect.**—See note 2.

**for a Loan.**—*Land Mortg. Invest. Agency Co. v. Preston*, 119 Ala. 290; *Hamil v. American Freehold Land Mortg. Co.*, 127 Ala. 90; *Goodwynne v. Bellerby*, 116 Ga. 901; *Johnson v. Shattuck*, 67 Ark. 159.

Although there is a contract in evidence by which a borrower formally constitutes another his agent to negotiate a loan, it is nevertheless open to the borrower to show that such agent really acted as the agent of the lender. *State v. Bristol Sav. Bank*, 108 Ala. 3, 54 Am. St. Rep. 141.

**966. 2. Where One May Be Agent of Both Parties to Contract.**—See *Cheney v. Woodworth*, 13 Colo. App. 176; *Rosaler v. Mandeville*, (Supm. Ct. App. T.) 92 N. Y. Supp. 341.

**967. 1. Land Mortg. Invest. Agency Co. v. Preston**, 119 Ala. 290, holding that an agent of a borrower who receives the money from the lender acts as the agent of the latter in the transaction of paying it over to his principal; *Thomas v. Arthurs*, 8 Kan. App. 126.

**2. Strict Proof Required.**—*Fisher v. Denver Nat. Bank*, 22 Colo. 373.

**3. When Facts Undisputed—Agency Question for Court.**—*Lester v. Snyder*, 12 Colo. App. 351; *Halladay v. Underwood*, 90 Ill. App. 130; *Trimble v. Keer-Rountree Mercantile Co.*, 56 Mo. App. 683; *Strauss v. American Talcum Co.*, 63 N. J. L. 613; *Leinkauf v. Lombard*, 12 N. Y. App. Div. 302; *Simonds v. Wrightman*, 36 Oregon 120, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967; *Langenheim v. Anschutz-Bradberry Co.*, 2 Pa. Super. Ct. 285; *Willcox v. Hines*, 100 Tenn. 524, 66 Am. St. Rep. 761, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967; *McCornick v. Queen of Sheba Gold Min., etc., Co.*, 23 Utah 71, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967.

**When Different Conclusions Might Be Drawn** from undisputed facts, by impartial minds, it has been held in several cases that the facts should be submitted to the jury. *Thomson v. Shelton*, 49 Neb. 644; *Southern Pine Lumber Co. v. Fries*, (Neb. 1901) 96 N. W. Rep. 71; *Connell v. McLoughlin*, 28 Oregon 230; *Reid v. Kellogg*, 8 S. Dak. 596; *Parr v. Northern Electrical Mfg. Co.*, 117 Wis. 278.

**4. When Facts Disputed—Agency Question for Jury—Connecticut.**—*Irving v. Shethar*, 71 Conn. 434.

*Georgia.*—*Palmour v. Roper*, 119 Ga. 10.

*Illinois.*—*Iroquois Furnace Co. v. Ross*, 76 Ill. App. 549; *Cook v. Smith*, 73 Ill. App. 483; *St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619.

*Iowa.*—*Jewell v. Posey*, 119 Iowa 412; *Gough v. Loomis*, 123 Iowa 642.

*Maine.*—*Cloran v. Houlehan*, 88 Me. 221.

*Maryland.*—*Swindell v. Gilbert*, (Md. 1905) 60 Atl. Rep. 102.

*Massachusetts.*—*Beston v. Amadon*, 172 Mass. 84.

*Michigan.*—*Fontaine Crossing, etc., Co. v. Rauch*, 117 Mich. 401; *McClure v. Murphey*,

126 Mich. 134; *Griffin v. McKnight*, 116 Mich. 468.

*Missouri.*—*Berkson v. Kansas City Cable R. Co.*, 144 Mo. 211.

*Nebraska.*—*Walsh v. Peterson*, 59 Neb. 645, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967.

*New Jersey.*—*Crossley v. Kenny*, (N. J. 1904) 58 Atl. Rep. 395.

*New York.*—*Brand v. Newton*, 82 Hun (N. Y.) 550; *Franklin Bank Note Co. v. Mackey*, 83 Hun (N. Y.) 511; *Lewis v. Guardian F., etc., Assur. Co.*, 93 N. Y. App. Div. 157; *Williams v. Brandt*, 90 N. Y. App. Div. 607.

*Oregon.*—*Long Creek Bldg. Assoc. v. State Ins. Co.*, 29 Oregon 569; *Connell v. McLoughlin*, 28 Oregon 230; *Neppach v. Oregon, etc., R. Co.*, (Oregon 1905) 80 Pac. Rep. 482.

*Pennsylvania.*—*Langenheim v. Anschutz-Bradberry Co.*, 2 Pa. Super. Ct. 285; *Lininger v. Latshaw*, 169 Pa. St. 398; *Hertzler v. Geigley*, 196 Pa. St. 419, 79 Am. St. Rep. 724.

*South Carolina.*—*Dickert v. Farmers' Mut. Ins. Assoc.*, 52 S. Car. 412, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967.

*Tennessee.*—*Willcox v. Hines*, 100 Tenn. 524, 66 Am. St. Rep. 761, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967.

*Utah.*—*McCornick v. Queen of Sheba Gold Min., etc., Co.*, 23 Utah 71, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967.

*Washington.*—*Novelty Mill Co. v. Heinzerling*, (Wash. 1905) 81 Pac. Rep. 742.

**Summary Statement of Rule.**—The existence of an agent's authority is a question of fact to be ascertained by the jury, but what the agent may do under the power conferred is a question of law to be determined by the court. *Anderson v. Adams*, 43 Oregon 621; *Neppach v. Oregon, etc., R. Co.*, (Oregon 1905) 80 Pac. Rep. 482.

**Evidence Held Insufficient to Establish Agency.**—*Holman v. Goslin*, (Supm. Ct. App. T.) 93 N. Y. Supp. 126.

**968. 1. Evidence Need Not Be Full and Satisfactory.**—Whatever evidence has a tendency to prove agency is admissible, even though it be not full and satisfactory, as it is the province of the jury to pass upon it. *Dickinson v. Salmon*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 169.

**All the Evidence Must Be In** before the court can decide whether it is sufficient to submit to the jury. *Beal v. Adams Express Co.*, 13 Pa. Super. Ct. 143.

**For Evidence Held to Be Sufficient** to go to the jury, see *Griffin v. McKnight*, 116 Mich. 468; *Mosby v. McKee, etc., Commission Co.*, 91 Mo. App. 500.

**2. Evidence of Appointment May Be Either Direct or Indirect—California.**—*Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681.

*Colorado.*—*Gambrill v. Brown Hotel Co.*, 11 Colo. App. 529.

*Delaware.*—*State v. Foster*, 1 Penn. (Del.) 289.

**968. The Burden of Proof.** — See notes 3, 4.

**969. Merely Assuming to Act as Agent.** — See notes 1, 2.

**Circumstances and Conduct of the Parties.** — See note 3.

*Indiana.* — Fruchey v. Eagleson, 15 Ind. App. 88.

*Missouri.* — Watkins v. Edgar, 77 Mo. App. 148; Bonner v. Lisenby, 86 Mo. App. 666; Hackett v. Van Frank, 105 Mo. App. 384; Crosno v. Bowser Milling Co., 106 Mo. App. 236.

*New Jersey.* — Lindley v. Keim, 54 N. J. Eq. 418.

*New York.* — Nutting v. Kings County El. R. Co., 21 N. Y. App. Div. 72.

*Ohio.* — Chicago Cottage Organ Co. v. Rishforth, 24 Ohio Cir. Ct. 660.

*Pennsylvania.* — Beal v. Adams Express Co., 13 Pa. Super. Ct. 143.

**968. 3. Burden of Proof on Party Affirming Relation** — *Alabama.* — Powell v. Wade, 109 Ala. 95, 55 Am. St. Rep. 915; George v. Ross, 128 Ala. 666.

*Colorado.* — Stuart v. Asher, 15 Colo. App. 403.

*Illinois.* — Rice, etc., Malting Co. v. International Bank, 185 Ill. 422, affirming 86 Ill. App. 136; Jahn v. Kelly, 58 Ill. App. 570.

*Iowa.* — Darr v. Darrow, 120 Iowa 29; Saunders v. King, 119 Iowa 291.

*Kentucky.* — O'Day v. Bennett, (Ky. 1904) 82 S. W. Rep. 442.

*Michigan.* — Clark v. Dillman, 108 Mich. 625.

*New Jersey.* — Agricultural Ins. Co. v. Fritz, 61 N. J. L. 211.

*New York.* — Patten v. Climax Quick-Tanning Co., 40 N. Y. App. Div. 607.

*Oregon.* — Sears v. Daly, 43 Oregon 346.

*Pennsylvania.* — Beal v. Adams Express Co., 13 Pa. Super. Ct. 143; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. Ct. 285; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. Ct. 396.

*Texas.* — Baker v. Kellett-Chatham Mach. Co., (Tex. Civ. App. 1905) 84 S. W. Rep. 661.

*Wisconsin.* — Parr v. Northern Electrical Mfg. Co., 117 Wis. 278.

**Burden to Show Authority.** — The burden of proof rests on the party alleging a particular authority to show that fact. Extension Gold Min., etc., Co. v. Skinner, 28 Colo. 237; Danziger v. Pittsfield Shoe Co., 204 Ill. 145; Odell Typewriter Co. v. Sears, 86 Ill. App. 621; Wilcox v. Eadie, 65 Kan. 459; Whitaker v. Ballard, 178 Mass. 584; Knoche v. Whiteman, 86 Mo. App. 568; Langbein v. Tongue, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 757; White Sewing Mach. Co. v. Hill, (N. Car. 1904) 48 S. E. Rep. 575; Connell v. McLoughlin, 28 Oregon 230; Corbet v. Waller, 27 Wash. 242; Grafton, etc., R. Co. v. Davisson, 45 W. Va. 12, 72 Am. St. Rep. 799; Ames v. D. J. Murray Mfg. Co., 114 Wis. 85; Parr v. Northern Electrical Mfg. Co., 117 Wis. 278.

**4. Proof Must Be Clear and Specific.** — Booker v. Booker, 208 Ill. 529, 100 Am. St. Rep. 250; Corey v. Hunter, 10 N. Dak. 5, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 968; Brown v. Daugherty, 120 Fed. Rep. 526.

**Agency of Husband for Wife.** — It is sufficient to establish a husband's agency for his wife by a preponderance of testimony, except where the husband has contracted in writing and in his

own name, when the evidence must be clear and convincing beyond a reasonable doubt. Long v. Martin, 71 Mo. App. 569; Farley v. Stroeh, 68 Mo. App. 85.

**Proof as to Time.** — One seeking to prove agency must show that such agency existed at the very time of the transaction in question. Booth v. Newton, 46 N. Y. App. Div. 175.

**969. 1. Merely Assuming to Act as Agent Not Sufficient.** — Lambert v. Gerner, 142 Cal. 399; Wilson v. Vogeler, (Idaho 1905) 79 Pac. Rep. 508; St. Louis, etc., R. Co. v. Brown, 3 Kan. App. 260; Southern Home Bldg., etc., Assoc. v. Butt, 77 Miss. 944, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 969; Agricultural Ins. Co. v. Fritz, 61 N. J. L. 211; Leary v. Albany Brewing Co., 77 N. Y. App. Div. 6; Taylor v. Commercial Bank, 174 N. Y. 181, 95 Am. St. Rep. 564, reversing 68 N. Y. App. Div. 458; Cooper v. Sawyer, 31 Tex. Civ. App. 620. See also People v. Courson, 87 Ill. App. 254, holding that evidence of an agent's acts is not admissible until his authority has been proved.

In MacLatchy v. Hannan, 104 N. Y. App. Div. 70, it was held that an assignment purporting to have been executed by an attorney in fact was not sufficient evidence of the title of the assignee, without proof that the person executing the assignment had authority to do so.

**Declarations** of an agent that he was such agent are admissible, not to prove the fact of agency, but to show that he held himself out as agent. Parker v. Bond, 121 Ala. 529. And what an agent said while professing to act for another is to be regarded as an act rather than a declaration, and is therefore admissible. Dodge v. Weill, 158 N. Y. 346. See also the title ADMISSIONS, vol. 1, p. 690 *et seq.*, and matter pertaining thereto in this Supplement.

**Acts Tending to Show Whom the Person Represented** are competent evidence in determining the question of agency. Land Mortg. Invest., etc., Co. v. Gillam, 49 S. Car. 345.

2. White v. German Alliance Ins. Co., 103 Fed. Rep. 260, 43 C. C. A. 216; Donohoe v. Trinity Consol. Gold, etc., Min. Co., 113 Cal. 119; Richardson, etc., Co. v. School Dist. Number Eleven, 45 Neb. 777; C. F. Blanke Tea, etc., Co. v. Rees Printing Co., (Neb. 1903) 97 N. W. Rep. 627; Peche v. Sloane, 16 N. Y. App. Div. 458; Sheetram v. Trexlar Stave, etc., Co., 13 Pa. Super. Ct. 219; Hoge v. Turner, 96 Va. 624.

**A Habit of Performing Certain Acts** is not evidence of authority so to do where the principal was ignorant of such performance. Goodell v. Sinclair, 112 Ill. App. 594.

**A Newspaper Advertisement** is inadmissible to prove agency where knowledge of such advertisement is not brought home to the principal. Joseph Schlitz Brewing Co. v. Barlow, 107 Iowa 252.

**3. Circumstances and Apparent Relations and Conduct of Parties May Be Shown.** — Foster v. Murphy, (C. C. A.) 135 Fed. Rep. 47; Central Coal, etc., Co. v. Niemeyer Lumber Co., 65 Ark. 106; Bergholdt v. Porter Bros. Co., 114 Cal. 681; Beattyville Coal Co. v. Hoskins, (Ky.



**969.** Competency of Principal and Agent as Witnesses. — See notes 4, 5.

**970.** Evidence of General Reputation. — See note 1.

**b. WHERE THE APPOINTMENT IS IN WRITING — Loss of Original Document.** — See note 3.

1898) 44 S. W. Rep. 363; *Swindell v. Gilbert*, (Md. 1905) 60 Atl. Rep. 102; *Baker v. Tibbetts*, 164 Mass. 412; *Roberson v. Clevenger*, (Mo. App. 1905) 86 S. W. Rep. 512; *Zinke v. Zinke*, 90 Hun (N. Y.) 127; *Foste v. Standard L.*, etc., Ins. Co., 34 Oregon 125; *Pullman Palace Car Co. v. Nelson*, 22 Tex. Civ. App. 223; *McCornick v. Queen of Sheba Gold Min.*, etc., Co., 23 Utah 71.

**Illustrations.** — A conversation between principal and agent is admissible as tending to show the character and extent of the agency. *Frank v. Levi*, 110 Iowa 267.

Although the authority of an agent terminates at the death of his principal, evidence as to the course of dealing between them is competent for the purpose of throwing light on the question of what authority was given to the agents by the executor. *Dexter v. Berge*, 76 Minn. 216.

**Payment of Commissions.** — As tending to prove agency evidence that one paid to another commissions for making a sale is admissible. *Slaughter v. Coke County*, (Tex. Civ. App. 1904) 79 S. W. Rep. 863.

**Evidence to Prove Implied Agency.** — Greater latitude is allowed in the admission of testimony tending to prove facts and circumstances from which the existence of an agency may legitimately be inferred than to prove an express agency. *Patterson v. Van Loon*, 186 Pa. St. 367.

**969. 4. Principal and Agent as Witnesses — United States.** — *Ætna Indemnity Co. v. Ladd*, (C. C. A.) 135 Fed. Rep. 636.

*Alabama.* — *Parker v. Bond*, 121 Ala. 529; *Gilliland v. Dunn*, 136 Ala. 327.

*California.* — *McRae v. Argonaut Land*, etc., Co., (Cal. 1898) 54 Pac. Rep. 743. See also *Swinnerton v. Argonaut Land*, etc., Co., 112 Cal. 375.

*Colorado.* — *Fisher v. Denver Nat. Bank*, 22 Colo. 373.

*Connecticut.* — *Haywood v. Hamm*, (Conn. 1904) 58 Atl. Rep. 695.

*Georgia.* — *Armour v. Ross*, 110 Ga. 403.

*Illinois.* — *Phillips v. Poulter*, 111 Ill. App. 330; *St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619.

*Indian Territory.* — *American Express Co. v. Lankford*, 1 Indian Ter. 233, affirmed on rehearing 2 Indian Ter. 18, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 969.

*Iowa.* — *O'Neill v. Wilcox*, 115 Iowa 15; *Joseph Schlitz Brewing Co. v. Barlow*, 107 Iowa 252; *O'Leary v. German-American Ins. Co.*, 100 Iowa 390.

*Kansas.* — *Aultman Threshing*, etc., Co. v. Knoll, (Kan. 1905) 79 Pac. Rep. 1074; *Jahren v. Palmer*, (Kan. 1905) 79 Pac. Rep. 1081.

*Missouri.* — *State v. Henderson*, 86 Mo. App. 482; *Christian v. Smith*, 85 Mo. App. 117; *Long v. Martin*, 152 Mo. 668; *Haubelt v. Rea*, etc., Mill Co., 77 Mo. App. 672.

*Montana.* — *Nyhart v. Pennington*, 20 Mont. 158.

*New Hampshire.* — *Union Hosiery Co. v. Hodgson*, 72 N. H. 427.

*New York.* — *Joseph v. Struller*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 173; *Brown v. Cone*, 80 N. Y. App. Div. 413. See also *Snyder v. Sloane*, 65 N. Y. App. Div. 543; *Stone v. Cronin*, 72 N. Y. App. Div. 565.

*North Carolina.* — *New Home Sewing Mach. Co. v. Seago*, 128 N. Car. 158.

*North Dakota.* — *Reeves v. Bruening*, (N. Dak. 1904) 100 N. W. Rep. 241.

*Pennsylvania.* — *Lawall v. Groman*, 180 Pa. St. 532, 57 Am. St. Rep. 662.

*Texas.* — *American Telephone*, etc., Co. v. Kersh, 27 Tex. Civ. App. 127.

*Utah.* — *McCornick v. Queen of Sheba Gold Min.*, etc., Co., 23 Utah 71, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 969.

*Washington.* — *Williams v. Blumenthal*, 27 Wash. 24, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 969.

*West Virginia.* — *Moundsville*, etc., R. Co. v. Wilson, 52 W. Va. 647, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 969; *Garber v. Blatchley*, 51 W. Va. 147.

**Husband and Wife.** — The principle of the text operates where the wife acts as agent for the husband, or the husband for the wife. *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210.

**Opinion Evidence.** — In an action to charge defendant on contract made by a third person as agent, the alleged agent cannot testify that he "had authority" to make the contract, but must state the facts. *American Telephone*, etc., Co. v. Green, (Ind. 1905) 73 N. E. Rep. 707.

**The Agent Cannot Testify to His Conclusions** merely. *McCluskey v. Minck*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 565.

**5. Admissions.** — *Kelly v. Shumway*, 51 Ill. App. 634; *American Express Co. v. Lankford*, 2 Indian Ter. 18, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 969; *Thiry v. Taylor Brewing*, etc., Co., 37 N. Y. App. Div. 391; *Connell v. McLoughlin*, 28 Oregon 230.

**Admissibility of Declarations and Admissions by Agent.** — *W. K. Niver Coal Co. v. Piedmont*, etc., Coal Co., (C. C. A.) 136 Fed. Rep. 179; *Fisher v. Southern Loan*, etc., Co., (N. Car. 1905) 50 S. E. Rep. 592.

**970. 1. Evidence of General Reputation.** — *St. Louis*, etc., Packet Co. v. McPeters, 124 Ala. 451; *Union Trust Co. v. McKeon*, 76 Conn. 508; *McGregor v. Hudson*, (Tex. Civ. App. 1895) 30 S. W. Rep. 489; *Dyer v. Winston*, (Tex. Civ. App. 1903) 77 S. W. Rep. 227.

**Any One Having Personal Knowledge** may testify as to the relation of principal and agent. *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 106 Iowa 229; *Ruthven v. Clarke*, 109 Iowa 25.

**3. When Parol Evidence Admissible.** — *Somers v. Wescoat*, 66 N. J. L. 551; *Langbein v. Tongue*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 757.

**971. V. DELEGATION — 1. Delegation of Authority by Principal — b. EXCEPTIONS TO THE RULE — (1) *Personal Acts*. — See notes 4, 5.**

**972. 2. Delegation of Authority by Agent — a. GENERAL RULE: DELEGATUS NON POTEST DELEGARE. — See note 2.**

**976. b. RULE APPLIED TO VARIOUS CLASSES OF AGENTS — (2) *Officers and Agents of Municipal Corporations — The Selectmen of a Town*. — See note 2.**

**(3) *Officers and Agents of Private Corporations — General Rule*. — See note 4.**

**977. (5) *Personal Representatives and Trustees — General Rule*. — See note 6.**

**978. (6) *Attorneys at Law*. — See note 3.**

**(7) *Factors and Brokers*. — See note 5.**

**c. QUALIFICATIONS OF GENERAL RULE — (1) *Ministerial, Executive, or Mechanical Duties — General Rule*. — See note 6.**

**979. *Bills of Exchange — Subscription Paper — Insurance*. — See note 4.**

**(2) *Authority to Redelagate Implied — (a) Usage of Trade*. — See note 8.**

**980. (b) *Necessity — General Rule*. — See notes 1, 2.**

***Banks*. — See note 3.**

**(c) *Nature of Agency*. — See note 7.**

**971. 4. Farrar v. Bell, 73 Vt. 342, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 971.**

**5. Com. v. Farmers, etc., Leaf Tobacco Warehouse Co., 107 Ky. 1, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 971.**

**The Statutory Right to Make an Assignment cannot be delegated to an agent. Minneapolis Trust Co. v. School Dist. No. Five, 68 Minn. 414.**

**972. 2. General Rule as to Delegation by Agent. — Bancroft v. Scribner, (C. C. A.) 72 Fed. Rep. 988; Insurance Co. of North America v. Wisconsin Cent. R. Co., (C. C. A.) 134 Fed. Rep. 794; Dingley v. McDonald, 124 Cal. 682, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 972; Lucas v. Rader, 29 Ind. App. 287; Jones v. Brand, 106 Ky. 410; Floyd v. Mackey, 112 Ky. 646; Trent v. Sherlock, 24 Mont. 255; Home F. Ins. Co. v. Garbacz, 48 Neb. 827; Patterson v. Portland Smelting, etc., Works, 35 Oregon, 96, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 972; Fargo v. Cravens, 9 S. Dak. 646; Williams v. Moore, 24 Tex. Civ. App. 402, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 972; Rohrbough v. U. S. Express Co., 50 W. Va. 148, 88 Am. St. Rep. 849, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 972; Kohl v. Beach, 107 Wis. 409, 81 Am. St. Rep. 849; Canadian F. Ins. Co. v. Robinson, 31 Can. Sup. Ct. 488.**

**A Verbal Authority to Sell Land. — Bromley v. Aday, 70 Ark. 351.**

**Agent to Receive Money. — The rule that an agency to collect and receive money is one of personal trust, and therefore not to be delegated, is applicable only to special authority, and not to a general agency to take charge of and manage the business of the principal. McConnell v. Meekin, 22 N. Y. App. Div. 537.**

**Authority to Compromise a Suit is a personal trust, involving the exercise of judgment as to terms of settlement, and is incapable of delegation to referees or other persons. New York v. Dubois, (C. C. A.) 132 Fed. Rep. 752; New York v. Du Bois, 86 Fed. Rep. 889.**

**Exception. — The rule will not be invoked where its application would accomplish a defeat of justice. Delawder v. Jones, 99 Ill. App. 301.**

**976. 2. Farrar v. Bell, 73 Vt. 342, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 876.**

**4. Caldwell v. Mutual Reserve Fund L. Assoc., 53 N. Y. App. Div. 245; Bryant v. Bank of Commerce, 95 Wis. 476.**

**977. 6. An Executor has authority to employ an agent to find a purchaser for land, and to pay to him an agreed commission therefor; but he cannot delegate to him a discretion as to the terms of sale. Dyer v. Winston, (Tex. Civ. App. 1903) 77 S. W. Rep. 227.**

**978. 3. Lockwood v. Dillenbeck, 104 N. Y. App. Div. 71, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978.**

**5. Burke v. Frye, 44 Neb. 223.**

**6. McCroskey v. Hamilton, 108 Ga. 640, 75 Am. St. Rep. 79; Neiner v. Altemeyer, 68 Mo. App. 243; Bowman v. Lickey, 86 Mo. App. 47; Patterson v. Portland Smelting, etc., Works, 35 Oregon 96; Williams v. Moore, 24 Tex. Civ. App. 402; Farrar v. Bell, 73 Vt. 342; Rohrbough v. U. S. Express Co., 50 W. Va. 148, 88 Am. St. Rep. 849, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978.**

**979. 4. Rohrbough v. U. S. Express Co., 50 W. Va. 148, 88 Am. St. Rep. 849, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 979.**

**8. Breck v. Meeker, (Neb. 1903) 93 N. W. Rep. 993.**

**980. 1. McCroskey v. Hamilton, 108 Ga. 640, 75 Am. St. Rep. 79, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 979, 980.**

**2. Hartford, etc., Transp. Co. v. Plymmer, (C. C. A.) 120 Fed. Rep. 624; Irwin v. Reeves Pulley Co., 20 Ind. App. 101, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980; Eastland v. Maney, (Tex. Civ. App. 1904) 81 S. W. Rep. 574.**

**3. Holder v. Western German Bank, 132 Fed. Rep. 187; Davis v. King, 66 Conn. 465; Irwin v. Reeves Pulley Co., 20 Ind. App. 101, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980. See also Girard First Nat. Bank v. Craig, 3 Kan. App. 166; Sherman v. Port Huron Engine, etc., Co., 8 S. Dak. 343, 13 S. Dak. 95.**

**7. Breck v. Meeker, (Neb. 1903) 93 N. W. Rep. 993.**

**980. 3. Subagents — b. RESPONSIBILITY OF PRINCIPAL FOR ACTS OF SUBAGENT — General Rule.** — See note 10.

**981. Authority to Appoint Implied from Nature of Agency.** — See note 1.

**c. RESPONSIBILITY OF AGENT FOR ACTS OF SUBAGENT — General Rule.** — See note 3.

**982. Necessity or Emergency.** — See note 2.

**No Authority to Appoint.** — See note 3.

**983. d. RESPONSIBILITY OF SUBAGENT — (1) To Principal.** — See note 2.

**(2) To Agent.** — See note 3.

**984. e. RIGHTS OF SUBAGENT — (1) Against Principal — For Compensation.** — See note 1.

**980. 10. Acts of Subagent Binding on Principal.** — Louisville, etc., R. Co. *v.* Tift, 100 Ga. 86; Bellinger *v.* Collins, 117 Iowa 173; Bowman *v.* Lickey, 86 Mo. App. 47.

**When Principal Not Liable.** — Evidence of the scope of authority of a clerk of an agent, employed by the agent for his own convenience, and without knowledge of or authority from his principal, express or implied, is incompetent to fasten a liability upon the principal. Springfield F. & M. Ins. Co. *v.* De Jarnett, 111 Ala. 248.

**981. 1. Authority to Appoint Subagent Implied.** — Insurance Co. of North America *v.* Thornton, 130 Ala. 222, 89 Am. St. Rep. 30; Breck *v.* Meeker, (Neb. 1903) 93 N. W. Rep. 993; Eastland *v.* Maney, (Tex. Civ. App. 1904) 81 S. W. Rep. 574; Fritz *v.* Western Union Tel. Co., 25 Utah 263.

**3. Liability of Agent.** — Davis *v.* King, 66 Conn. 465; Morris *v.* Warlick, 118 Ga. 421, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 981; Bianki *v.* Greater American Exposition Co., (Neb. 1902) 92 N. W. Rep. 615; Kuhner *v.* Angell, 10 N. Dak. 59, 88 Am. St. Rep. 675; Harrison *v.* Van Gunten, 15 Pa. Super. Ct. 491, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 981.

**An Insurance Agent** is responsible to the company for the acts of his authorized subagent contrary to the instructions of the company, if done in the course of such subagent's employment, although the agent has no knowledge of such acts. Franklin F. Ins. Co. *v.* Bradford, 201 Pa. St. 32, 88 Am. St. Rep. 770.

**982. 2. Authority for Appointment of Subagent Implied from Necessity.** — Canfield *v.* Chicago, etc., R. Co., 59 Mo. App. 354.

**3. Agents — When Liable.** — National Bank of Republic *v.* Old Town Bank, 112 Fed. Rep. 726, 50 C. C. A. 443.

**Employment of Attorney.** — Dentzel *v.* City, etc., R. Co., 90 Md. 434. See also Talcott *v.* Cowdry, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 333.

**983. 2. Butler County v. Boatmen's Bank,** 143 Mo. 13, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 983.

**Collection of Money by Subagent.** — In support of the second paragraph of the original note see Milton *v.* Johnson, 79 Minn. 170.

**3. Liability to Agent.** — National Bank of Republic *v.* Old Town Bank, 112 Fed. Rep. 726, 50 C. C. A. 443; Butler County *v.* Boatmen's Bank, 143 Mo. 13, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 983; Commercial Bank

*v.* Red River Valley Nat. Bank, 8 N. Dak. 382.

**984. 1. Liability of Principal for Compensation.** — Barnes *v.* Hogate, 103 Iowa 743; Hornbeck *v.* Gilmer, 110 La. 500; Ladonia Dry-Goods Co. *v.* Conyers, (Tex. Civ. App. 1900) 58 S. W. Rep. 967; Eastland *v.* Maney, (Tex. Civ. App. 1904) 81 S. W. Rep. 574.

**But One Employed by an Agent Without Authority** from the principal cannot recover from the principal upon the agreement of the agent. Fudge *v.* Seckner Contracting Co., 80 Ill. App. 35; Hanback *v.* Corrigan, 7 Kan. App. 479 (even though the subagent's acts are ratified); Jones *v.* Brand, 106 Ky. 410; Breen *v.* Miehle Printing Press, etc., Co., 8 Pa. Dist. 151, 22 Pa. Co. Ct. 275; National Cash Register Co. *v.* Hagan, (Tex. Civ. App. 1904) 83 S. W. Rep. 727; Williams *v.* Moore, 24 Tex. Civ. App. 402. See also Swayne *v.* Union Mut. L. Ins. Co., 92 Tex. 575. Compare Hornbeck *v.* Gilmer, 110 La. 500, holding that where the principal is informed of the amount to which the subagent will be entitled, he is bound therefor by accepting the result of the services of such subagent.

**Insurance Companies.** — An insurance company is not liable for the compensation of a person employed by a general agent, in his individual capacity, to work for him. Boren *v.* Manhattan L. Ins. Co., 99 Ga. 238.

**Officers and Agents Employing Surgical Aid.** — Mt. Wilson Gold, etc., Min. Co. *v.* Burbridge, 11 Colo. App. 487; Hasler *v.* Ozark Land, etc., Co., 101 Mo. App. 136; Evans *v.* Marion Min. Co., 100 Mo. App. 670; Southern R. Co. *v.* Humphries, 79 Miss. 761; Chicago, etc., R. Co. *v.* Davis, 94 Ill. App. 54. But see Godshaw *v.* Struck, 109 Ky. 285, in which case the court said: "We are not prepared to hold, as a matter of law, that the employment of physicians or surgeons for injured employees comes within the scope of the duties of a general manager of an ordinary manufacturing business. It seems to us that the rule \* \* \* is confined exclusively to railroad companies, and generally in cases which involve some act of negligence on the part of the company which occasioned the injury." And see further Spelman *v.* Gold Coin Min., etc., Co., 26 Mont. 76, 91 Am. St. Rep. 402.

**Limitations of Rule.** — The employer will not be liable for services rendered by the physician after the emergency has passed. Holmes *v.* McAllister, 123 Mich. 493.

The manager of a business corporation has no implied authority to furnish medical aid and

**985. (2) Against Agent.** — See note 1.

**VI. NATURE AND EXTENT OF AUTHORITY — 1. Authority, General and Special — a. DISTINCTION BETWEEN GENERAL AND SPECIAL AGENCIES — General Agent.** — See note 2.

**Special Agent.** — See note 3.

**986. Principal Bound According to Extent of Apparent Authority.** — See note 3.

**987. b. THIRD PARTIES MUST ASCERTAIN AGENT'S AUTHORITY.** — See notes 2, 3, 4.

assistance to a servant of the corporation who has been injured outside the line of his duties. *Chase v. Swift*, 60 Neb. 696, 83 Am. St. Rep. 552.

*Aid to Trespassers.* — It has been held that a railroad conductor has no authority to bind the road by engaging a physician to attend trespassers on the road. *Adams v. Southern R. Co.*, 125 N. Car. 565. See also *Arkansas Southern R. Co. v. Loughridge*, 65 Ark. 300; *Hunt v. Illinois Cent. R. Co.*, (Ind. 1904) 71 N. E. Rep. 195.

*Where the Principal Ratifies the Employment made in his name, with full knowledge of the fact that it has been so made, he will be liable therefor.* *Lithgow Mfg. Co. v. Samuel*, (Ky. 1903) 71 S. W. Rep. 906.

**By Express Contract with the General Agent** a principal may exempt himself from liability for commissions to subagents. *Union Casualty, etc., Co. v. Gray*, (C. C. A.) 114 Fed. Rep. 422.

**985. 1. Liability of Agent to Subagent for Compensation.** — *Hanback v. Corrigan*, 7 Kan. App. 479; *Dulon v. Camp*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 548; *Brown v. Barse*, 3 N. Y. App. Div. 257.

**2. Aetna Indemnity Co. v. Ladd**, 135 Fed. Rep. 636, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985; *Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co.*, 127 Ala. 137; *Godshaw v. Struck*, 109 Ky. 285; *Baldwin v. Tucker*, 112 Ky. 282; *Cross v. Atchison, etc., R. Co.*, 71 Mo. App. 585.

**A General Agent.** — *Pacific Biscuit Co. v. Dugger*, 40 Oregon 302, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985; *Langenheim v. Anschutz-Bradberry Co.*, 2 Pa. Super. Ct. 285. See also *Conneautville First Nat. Bank v. Robinson*, 105 Iowa 463.

**General Agent as to Particular Business.** — *Fishbaugh v. Spunaugle*, 118 Iowa 337.

**Territorial Limitation of Authority.** — *Cross v. Atchison, etc., R. Co.*, 141 Mo. 132.

An agent authorized to sell goods to all persons wishing to buy within the territory of his operations is a general agent. *Potter v. Springfield Milling Co.*, 75 Miss. 532.

**3. Godshaw v. Struck**, 105 Ky. 285; *Baldwin v. Tucker*, 112 Ky. 282; *Cross v. Atchison, etc., R. Co.*, 71 Mo. App. 585; *Pacific Biscuit Co. v. Dugger*, 40 Oregon 302, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985; *Langenheim v. Anschutz-Bradberry Co.*, 2 Pa. Super. Ct. 285; *Donnan v. Adams*, 30 Tex. Civ. App. 615; *Bryant v. Bank of Commerce*, 95 Wis. 476.

**The Distinction Between a General and a Special Agent.** — *Robinson v. Aetna Ins. Co.*, 128 Ala. 477.

**Presumption.** — The fact of agency being proved, the agency is presumed to be general,

not in respect to everything, but in respect to the business with which it is concerned. *Maher v. Moore*, (Del. 1898) 42 Atl. Rep. 721.

**986. 3. Camp v. Southern Banking, etc., Co.**, 97 Ga. 582, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 986; *Godshaw v. Struck*, 109 Ky. 285, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 986.

**987. 2. Metzger v. Huntington**, 139 Ind. 501; *Godshaw v. Struck*, 109 Ky. 285, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Baker v. Kellett-Chatham Machinery Co.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 661; *Cobb v. Glenn Boom, etc., Co.*, (W. Va. 1905) 49 S. E. Rep. 1005.

**Duty to Inquire as to Agent's Authority.** — *Camp v. Southern Banking, etc., Co.*, 97 Ga. 582, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987, note; *Lauer Brewing Co. v. Schmidt*, 24 Pa. Super. Ct. 396, holding that the rule is especially applicable in the first transaction with an agent. But see *Landis v. Shadle*, 23 Pa. Co. Ct. 505.

**Especially Is This the Case.** — *Sioux City Nursery, etc., Co. v. Magnes*, 5 Colo. App. 172; *Camp v. Southern Banking, etc., Co.*, 97 Ga. 582, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987, note.

**Principal Not Liable to One Neglecting Inquiry.** — *Gregory v. Loose*, 19 Wash. 599.

**No Duty to Inquire When Agent's Power Is Absolute.** — *Witcher v. McPhee*, 16 Colo. App. 298.

**3. Saranac v. Groton Bridge, etc., Co.**, 55 N. Y. App. Div. 134, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Jones v. Keeler*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 221, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Baker v. Kellett-Chatham Machinery Co.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 661. See also *Gorham v. Felker*, 102 Ga. 260.

**4. England.** — *Jacobs v. Morris*, (1901) 1 Ch. 261, 84 L. T. N. S. 112; *Hambro v. Burnand*, (1903) 2 K. B. 399, 89 L. T. N. S. 180; *Kenny v. Harrington*, 31 Nova Scotia 290.

**Colorado.** — *Gates Iron Works v. Denver Engineering Works Co.*, 17 Colo. App. 15; *Witcher v. Gibson*, 15 Colo. App. 163; *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393; *Lester v. Snyder*, 12 Colo. App. 351.

**Georgia.** — *Camp v. Southern Banking, etc., Co.*, 97 Ga. 582, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Central of Georgia R. Co. v. Felton*, 110 Ga. 597, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987.

**Illinois.** — *Schneider v. Lebanon Dairy, etc., Co.*, 73 Ill. App. 612.

**Indiana.** — *Lucas v. Rader*, 29 Ind. App. 287, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987.

**Kentucky.** — *Godshaw v. Struck*, 109 Ky. 285,

**988. Power in Writing.** — See note 1.

**Public Officers.** — See note 2.

**c. WHEN PRINCIPAL IS BOUND — (1) In General — Acts Authorized Directly or by Implication.** — See note 3.

quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Russell v. Cox*, (Ky. 1897) 38 S. W. Rep. 1087; *Blood v. Herring*, 61 S. W. Rep. 273, 22 Ky. L. Rep. 1725.

*Michigan.* — *Gore v. Canada L. Assur. Co.*, 119 Mich. 136; *Schofield v. Conley*, 126 Mich. 712; *Deffenbaugh v. Jackson Paper Mfg. Co.*, 120 Mich. 242.

*Montana.* — *Cornish v. Woolverton*, (Mont. 1905) 81 Pac. Rep. 4.

*Nebraska.* — *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478.

*New York.* — *Joseph v. Struller*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 173, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Owen v. Sell*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 272; *Brooks v. Mortimer*, 10 N. Y. App. Div. 518; *Miner v. Edison Electric Illuminating Co.*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 543; *Sexsmith v. Siegel-Cooper Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 925.

*North Carolina.* — *Grubbs v. Ferguson*, 136 N. Car. 60.

*Pennsylvania.* — *Breen v. Miehle Printing Press, etc.*, Co., 8 Pa. Dist. 151, 22 Pa. Co. Ct. 275; *Langenheim v. Anschutz-Bradberry Co.*, 2 Pa. Super. Ct. 285; *Lauer Brewing Co. v. Schmidt*, 24 Pa. Super. Ct. 396.

*South Dakota.* — *Shull v. New Birdsall Co.*, 15 S. Dak. 8, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Fargo v. Cravens*, 9 S. Dak. 646; *Kirby v. Western Wheeled Scraper Co.*, 9 S. Dak. 623.

*Tennessee.* — *Fabian Mfg. Co. v. Newman*, (Tenn. Ch. 1900) 62 S. W. Rep. 218.

*Vermont.* — *Brown v. West*, 69 Vt. 440.

*West Virginia.* — *Wells v. Michigan Mut. L. Ins. Co.*, 41 W. Va. 131; *O'Connor v. O'Connor*, 45 W. Va. 354; *Rosendorf v. Poling*, 48 W. Va. 621.

**Agents of Private Corporations.** — *City Electric St. R. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282; *Leigh v. American Brake-Beam Co.*, 205 Ill. 147, affirming 107 Ill. App. 444; *Newland Hotel Co. v. Lowe Furniture Co.*, 73 Mo. App. 135; *Sturdevant v. Farmers', etc., Bank*, (Neb. 1903) 95 N. W. Rep. 819.

*By-laws* of a private corporation cannot operate to extend or restrict the apparent authority of an agent in the absence of actual notice to the party dealing with such agent. *Johnston v. Milwaukee, etc., Invest. Co.*, 46 Neb. 480. See also the title *BY-LAWS*.

**One Dealing with Agent Bound by Limitations of Authority.** — To the same effect as *Craycraft v. Selva*, 10 Bush (Ky.) 708, stated in the original note, see *Spalding v. Tucker*, (Ky. 1890) 51 S. W. Rep. 2.

**The Mere Possession of an Application for Shares of Stock and a Promissory Note**, signed by another person, should not, of itself, be taken as giving or implying authority to apply for shares on behalf of such person and to deliver the note on account thereof. The authority of the person possessing the instrument should be in-

quired into. *Ottawa Dairy Co. v. Sorley*, 34 Can. Sup. Ct. 508.

**988. 1.** *Boord v. Strauss*, 39 Fla. 381; *Blackmer v. Summit Coal, etc., Co.*, 187 Ill. 32, affirming 88 Ill. App. 636; *Mt. Morris Bank v. Gorham*, 169 Mass. 519; *Bradley v. Basta*, (Neb. 1904) 98 N. W. Rep. 697; *Thomas Gibson Co. v. Carlisle*, 3 Ohio Dec. 27, 1 Ohio N. P. 398.

**A Statement by the Principal Himself** defining the authority of an agent will excuse the person to whom it is made from inspecting the writing conferring the authority. *Phipps v. Mallory Commission Co.*, 105 Mo. App. 67.

**2.** *Butler County v. Boatmen's Bank*, 143 Mo. 13; *Saranac v. Grotton Bridge, etc., Co.*, 55 N. Y. App. Div. 134, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988; *Honaker v. Board of Education*, 42 W. Va. 170, 57 Am. St. Rep. 847; *State v. Chilton*, 49 W. Va. 453.

**An Agency Conferred by Statute.** — *Madison v. Newsome*, 39 Fla. 149.

**3.** *Robinson v. Aetna Ins. Co.*, 128 Ala. 477; *Main v. Aukam*, 12 App. Cas. (D. C.) 375; *Nappin v. Abbott*, 51 Ill. App. 615; *Danky v. Parker*, 108 Ill. App. 527; *American Telephone, etc., Co. v. Green*, (Ind. 1905) 73 N. E. Rep. 707, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988; *Nebraska Bridge Supply, etc., Co. v. Owen Conway*, (Iowa 1905) 103 N. W. Rep. 122; *Elliott v. Bodine*, 59 N. J. L. 567; *Lein-kauf v. Lombard*, 12 N. Y. App. Div. 302, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988; *Lowenstein v. Lombard*, 164 N. Y. 324; *Rohrbough v. U. S. Express Co.*, 50 W. Va. 148, 88 Am. St. Rep. 849, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988.

**Authority Necessarily Implied in Agent's Character.** — To justify a party's reliance upon some implied authority of an agent to do any particular act, the act must be practically indispensable to the execution of the duties delegated. *English v. Rauchfuss*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 494; *Miner v. Edison Electric Illuminating Co.*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 543.

General agents are clothed, as a matter of law, with authority only to employ the usual and ordinary means of accomplishing that for which the agency was created. *Bohanan v. Boston, etc., R. Co.*, 70 N. H. 526.

**Principal's Knowledge of Acts Not Essential.** — *Indian River State Bank v. Hartford F. Ins. Co.*, (Fla. 1903) 35 So. Rep. 228.

**Principal May Prove Actual Authority.** — *Chicago, etc., R. Co. v. Willard*, 68 Ill. App. 315; *Rosenberger v. Marsh*, 108 Iowa 47; *Mt. Morris Bank v. Gorham*, 169 Mass. 519; *Grubbs v. Ferguson*, 136 N. Car. 60; *J. I. Case Threshing Mach. Co. v. Eichinger*, 15 S. Dak. 530; *Elfring v. New Birdsall Co.*, 16 S. Dak. 252.

**Authority to Pay a Debt** carries with it the power to promise payment. *In re Hale*, (1899) 2 Ch. 107, 80 L. T. N. S. 827.

**Liability for Crime of Agent.** — A principal is not civilly liable for the crime of his agent. *Walsh v. Hunt*, 120 Cal. 46.

**989. Acts Within Apparent Authority. — See note 1.**

**989. 1. England.** — *Robinson v. Montgomeryshire Brewery Co.*, (1896) 2 Ch. 841.

**United States.** — *G. V. B. Mining Co. v. Hailey First Nat. Bank*, (C. C. A.) 95 Fed. Rep. 23; *Dysart v. Missouri, etc.*, R. Co., 122 Fed. Rep. 228, 58 C. C. A. 592; *Egbert v. Sun Co.*, 126 Fed. Rep. 568. See also *Farmers L. & T. Co. v. Northern Pac. R. Co.*, (C. C. A.) 120 Fed. Rep. 873.

**Alabama.** — *La Fayette R. Co. v. Tucker*, 124 Ala. 514, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989.

**Arkansas.** — *Little Rock, etc.*, R. Co. v. *Wiggins*, 65 Ark. 385.

**California.** — *Buckley v. Silverberg*, 113 Cal. 673; *Ukiah Bank v. Mohr*, 130 Cal. 268; *Southern Pac. Co. v. Pomona*, 144 Cal. 339; *Dover v. Pittsburg Oil Co.*, 143 Cal. 501.

**Colorado.** — *Robinson Reduction Co. v. Johnson*, 10 Colo. App. 135; *Hagerman v. Bates*, 24 Colo. 71; *Witcher v. Gibson*, 15 Colo. App. 163; *Wedge Mines Co. v. Denver Nat. Bank*, (Colo. App. 1903) 73 Pac. Rep. 873.

**Georgia.** — *Milledgeville Water Co. v. Edwards*, 121 Ga. 555, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989. See also *Atkinson v. Southern R. Co.*, 114 Ga. 146.

**Illinois.** — *Deweese v. Osborne*, 178 Ill. 39, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989; *Nash v. Classon*, 55 Ill. App. 356; *St. Louis Southwestern R. Co. v. Elgin Condensed-Milk Co.*, 74 Ill. App. 619; *Williams v. Pelley*, 96 Ill. App. 346; *Schmoldt v. Langston*, 106 Ill. App. 385; *Domestic Bldg. Assoc. v. Guadiano*, 195 Ill. 222.

**Indiana.** — *Ellinger v. Rawlings*, 12 Ind. App. 336. See also *Pittsburgh, etc.*, R. Co. v. *Street*, 26 Ind. App. 224.

**Iowa.** — *Fishbaugh v. Spunaugle*, 118 Iowa 337, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989; *Harrison v. Legore*, 109 Iowa 618; *Osborne v. Ringland*, 122 Iowa 329.

**Kansas.** — *Dreyfus v. Goss*, 67 Kan. 57.

**Kentucky.** — *Cartmel v. Unverzagt*, (Ky. 1900) 54 S. W. Rep. 965, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989; *Columbia Land, etc.*, Co. v. *Tinsley*, 60 S. W. Rep. 10, 22 Ky. L. Rep. 1082; *Blood v. Herring*, 61 S. W. Rep. 273, 22 Ky. L. Rep. 1725; *Tompkins v. Triplett*, 110 Ky. 824, 96 Am. St. Rep. 472; *Henry Vogt Mach. Co. v. Lingenfelser*, 62 S. W. Rep. 499, 23 Ky. L. Rep. 38; *Continental Tobacco Co. v. Campbell*, (Ky. 1903) 76 S. W. Rep. 125.

**Maine.** — *Heath v. Stoddard*, 91 Me. 499, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 969 [989].

**Massachusetts.** — *Mt. Morris Bank v. Gorham*, 169 Mass. 519; *Doyle v. Corey*, 170 Mass. 337; *Garfield, etc.*, Coal Co. v. *Rockland-Rockport Lime Co.*, 184 Mass. 60, 100 Am. St. Rep. 543.

**Michigan.** — *Warren v. Halley*, 107 Mich. 120; *Baker v. Barnett Produce Co.*, 113 Mich. 533.

**Minnesota.** — *Jackson v. Mutual Ben. L. Ins. Co.*, 79 Minn. 49, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989.

**Missouri.** — *May v. Jarvis-Conklin Mortg. Trust Co.*, 138 Mo. 275, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985 et seq. [989];

*Butler County v. Boatmen's Bank*, 143 Mo. 13; *Carthage First Nat. Bank v. Mutual Ben. L. Ins. Co.*, 145 Mo. 127; *Muth v. St. Louis Trust Co.*, 94 Mo. App. 94; *Rosenbaum v. Gilliam*, 101 Mo. App. 126; *Haubelt v. Rea, etc.*, Mill. Co., 77 Mo. App. 672; *Phipps v. Mallory Commission Co.*, 105 Mo. App. 67; *Hackett v. Van Frank*, 105 Mo. App. 384; *Miller v. Chicago, etc.*, R. Co., 1 Mo. App. Rep. 474; *Wilson v. Missouri Pac. R. Co.*, 66 Mo. App. 388, 2 Mo. App. Rep. 1366.

**Montana.** — *Spelman v. Gold Coin Min., etc.*, Co., 26 Mont. 76, 91 Am. St. Rep. 402.

**Nebraska.** — *Brown v. Eno*, 48 Neb. 538; *Creighton v. Finlayson*, 46 Neb. 457; *Plano Mfg. Co. v. Nordstrom*, 63 Neb. 123; *Fidelity, etc.*, Co. v. *Field*, (Neb. 1902) 89 N. W. Rep. 249; *Harrison Nat. Bank v. Austin*, 65 Neb. 632, 101 Am. St. Rep. 639. See also *Fremont, etc.*, R. Co. v. *New York, etc.*, R. Co., 66 Neb. 159.

**New York.** — *Leinkauf v. Lombard*, 12 N. Y. App. Div. 302, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989; *Lowenstein v. Lombard*, 164 N. Y. 324; *Babin v. Ensley*, 14 N. Y. App. Div. 548; *Ring v. Long Island Real Estate Exch., etc.*, Co., 93 N. Y. App. Div. 442. See also *Talcott v. Wabash R. Co.*, 159 N. Y. 461.

**Oregon.** — *Gardner v. Wiley*, (Oregon 1905) 79 Pac. Rep. 341.

**Pennsylvania.** — *National Bank v. Fridenberg*, 206 Pa. St. 243; *Himes v. Herr*, 3 Pa. Super. Ct. 124; *Fees v. Shadel*, 20 Pa. Super. Ct. 193; *Grasselli Chemical Co. v. Biddle Purchasing Co.*, 22 Pa. Super. Ct. 426; *Lauer Brewing Co. v. Schmidt*, 24 Pa. Super. Ct. 396; *Ruane v. Murray*, 26 Pa. Super. Ct. 187; *Phillips v. International Text-Book Co.*, 26 Pa. Super. Ct. 230.

**South Carolina.** — *Merchants', etc.*, Nat. Bank v. *Clifton Mfg. Co.*, 56 S. Car. 320.

**Tennessee.** — *Nunnally v. Goodwin*, (Tenn. Ch. 1896) 39 S. W. Rep. 855.

**Texas.** — *Waters Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989; *Schleicher v. Armstrong*, (Tex. Civ. App. 1895) 32 S. W. Rep. 327; *Dabney v. McFarlin*, (Tex. Civ. App. 1896) 34 S. W. Rep. 142; *Greer v. Marble Falls First Nat. Bank*, (Tex. Civ. App. 1898) 47 S. W. Rep. 1045; *Insurance Co. of North America v. Bell*, 25 Tex. Civ. App. 129; *Clarkson v. Reinhartz*, (Tex. Civ. App. 1902) 70 S. W. Rep. 111; *Osborne v. Gatewood*, (Tex. Civ. App. 1903) 74 S. W. Rep. 72; *Bay City Irrigation Co. v. Sweeney*, (Tex. Civ. App. 1904) 81 S. W. Rep. 545. See also *Galveston, etc.*, R. Co. v. *Thompson*, (Tex. Civ. App. 1898) 44 S. W. Rep. 8; *Gulf, etc.*, Co. v. *Irvine*, (Tex. Civ. App. 1903) 73 S. W. Rep. 540; *Pacific Express Co. v. Needham*, (Tex. Civ. App. 1904) 83 S. W. Rep. 22; *Baker v. Kellett-Chatham Machinery Co.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 661.

**Utah.** — *Nichols v. Oregon Short Line R. Co.*, 24 Utah 83, 91 Am. St. Rep. 778.

**Washington.** — *Gregory v. Loose*, 19 Wash. 599, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988, 989.

**West Virginia.** — *Rohrbough v. U. S. Ex-*

**990. Theory upon Which the Principal Is Held Liable.** — See note 1.**(2) General Agencies — Authority Not Unlimited.** — See note 2.

press Co., 50 W. Va. 148, 88 Am. St. Rep. 849, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989.

**Apparent Authority Renders Principal Liable to Third Persons.** — *Union Trust Co. v. McKeon*, 76 Conn. 508; *Heath v. Stoddard*, 91 Me. 499.

**Party Not Relying on Agent's Ostensible Authority.** — *Patterson v. Neal*, 135 Ala. 477; *Rodgers v. Peckham*, 120 Cal. 238; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113, reversing 99 Ill. App. 108; *Hastings First Nat. Bank v. Farmers', etc., Bank*, 56 Neb. 149.

**Appearance of Authority Caused by Agent Only.** — *Robinson v. Nipp*, 20 Ind. App. 156; *Curl v. Bond*, 52 La. Ann. 1052; *Waters-Pierce Oil Co. v. Jackson Jr. Zinc Co.*, 98 Mo. App. 324; *Figueira v. Lerner*, 52 N. Y. App. Div. 216; *Corey v. Hunter*, 10 N. Dak. 5.

**How Apparent Authority Determined.** — *Johnston v. Milwaukee, etc., Invest. Co.*, 46 Neb. 480; *Holt v. Schneider*, 57 Neb. 523; *Reid v. Kellogg*, 8 S. Dak. 596.

The apparent authority of an agent for which his principal is liable must be such as a person of ordinary caution and prudence in business would be warranted in believing to exist. *Welch v. Clifton Mfg. Co.*, 55 S. Car. 568.

**Apparent Authority Defined.** — Ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess. *Thomson v. Shelton*, 49 Neb. 644; *Phoenix Ins. Co. v. Walter*, 51 Neb. 182; *Holt v. Schneider*, 57 Neb. 523; *Lebanon Sav. Bank v. Henry*, (Neb. 1902) 89 N. W. Rep. 169; *Faulkner v. Simms*, (Neb. 1902) 89 N. W. Rep. 171; *Harrison Nat. Bank v. Williams*, (Neb. 1902) 89 N. W. Rep. 245; *C. F. Blanke Tea, etc., Co. v. Trade Exhibit Co.*, (Neb. 1904) 98 N. W. Rep. 714.

**Agents of Private Corporations.** — The rule of the text applies to corporations as well as to individuals. *Bullen v. Milwaukee Trading Co.*, 109 Wis. 41.

**It Is Presumed** that an agent empowered to act at the beginning of a transaction is authorized until the termination of the matter. *Parker v. Crilly*, 113 Ill. App. 309.

An agent in charge of cattle for the purpose of seeing that they were properly at the place of shipment is not presumed to have authority to make a contract for such shipment where the principal has already made a contract for that purpose. *Atchison, etc., R. Co. v. Watson*, (Kan. 1905) 81 Pac. Rep. 499.

**Good Faith Required of Third Party.** — One having actual or constructive knowledge that an agent is exceeding his authority cannot hold the principal.

*United States.* — *National Bank v. Munger*, 95 Fed. Rep. 87, 36 C. C. A. 659; *Colorado Springs Co. v. American Pub. Co.*, (C. C. A.) 97 Fed. Rep. 843.

*California.* — *Gosliner v. Grangers' Bank*, 124 Cal. 225.

*Delaware.* — *Maher v. Moore*, (Del. 1898) 42 Atl. Rep. 721.

*Iowa.* — *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737.

*Kansas.* — *Hier v. Miller*, 68 Kan. 258; *Trustees', etc., Ins. Corp. v. Bowling*, 2 Kan. App. 770. *Kentucky.* — *Russell v. Cox*, (Ky. 1897) 38 S. W. Rep. 1087; *McCarty v. Stanfill*, (Ky. 1897) 41 S. W. Rep. 278; *Charles Brown Grocery Co. v. Beckett*, (Ky. 1900) 57 S. W. Rep. 458.

*Michigan.* — *Clark v. Haupt*, 109 Mich. 212.

*Missouri.* — *White v. Massey*, 65 Mo. App. 260; *Carter v. Aetna Loan Co.*, 1 Mo. App. Rep. 355; *Carson v. Culver*, 78 Mo. App. 597.

*New York.* — *Waldorf v. Simpson*, 15 N. Y. App. Div. 297; *Sage v. Shepard, etc., Lumber Co.*, 4 N. Y. App. Div. 290; *Leinkauf v. Lombard*, 12 N. Y. App. Div. 302; *Lowenstein v. Lombard*, 17 N. Y. App. Div. 408; *Eldridge v. Husted*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 177; *Burlingame v. Aetna Ins. Co.*, 36 N. Y. App. Div. 358.

*Utah.* — *Nephi First Nat. Bank v. Foote*, 12 Utah 157.

**Essential Elements of Apparent Authority.** — Before the application of this rule of law can be invoked, two important facts must be clearly established: First, the principal must have held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly acquiesced in the agent's assertion of the requisite authority; and second, the party dealing with such agent must have had reason to believe, and must have believed, that the agent possessed the necessary authority. *Connell v. McLoughlin*, 28 Oregon 230; *Harrisburg Lumber Co. v. Washburn*, 29 Oregon 150.

**Principal Must Have Knowledge of Acts.** — To make out a case of implied authority in an agent to do acts beyond and in violation of his express authority, notice to the principal must be shown. *Jackson v. Mutual Ben. L. Ins. Co.*, 79 Minn. 43.

**990. 1. Farmers' L. & T. Co. v. Fidelity Trust Co.**, (C. C. A.) 86 Fed. Rep. 541, *per* Hawley, J., *dissenting*, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990; *Patterson v. Neal*, 135 Ala. 477, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990; *German-American Bldg. Assoc. v. Droge*, (Ind. App. 1895) 41 N. E. Rep. 397; *Davies v. Eastern Steamboat Co.*, 94 Me. 379, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990; *Dawson v. Wombles*, (Mo. App. 1905) 86 S. W. Rep. 271; *Connell v. McLoughlin*, 28 Oregon 230.

**2. Gates Iron Works v. Denver Engineering Works Co.**, 17 Colo. App. 15; *Davies v. Eastern Steamboat Co.*, 94 Me. 379, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990; *Cowan v. Sargent Mfg. Co.*, (Mich. 1905) 104 N. W. Rep. 377, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990; *Cosh-Murray Co. v. Adair*, 9 Wash. 686. See also *Manufacturer's Acc. Ins. Co. v. Pudsey*, 27 Can. Sup. Ct. 374, *affirming* 20 Nova Scotia 124.

**Powers of General Agent Are Restricted.** — An agent of a corporation can have no apparent authority to transact business which the

**991.** See note 1.

**992.** Principal Bound if Such Agent Acts Within General Authority. — See note 1.

**993.** (3) *Special Agencies* — Authority Must Be Strictly Pursued. — See note 1.

corporation itself by its charter is not authorized to transact. *Leary v. Albany Brewing Co.*, 77 N. Y. App. Div. 6.

**A General Agent in a Particular Branch** of his principal's business has no implied authority in any other branch. *Lauer Brewing Co. v. Schmidt*, 24 Pa. Super. Ct. 396.

**Cannot Grant Interest in Principal's Business.** — A general agent is not clothed, by virtue of his agency, with power to contract with an employee for an interest in his principal's business, or an interest in the profits thereof. *Defenbaugh v. Jackson Paper Mfg. Co.*, 120 Mich. 242. See also *Gore v. Canada L. Assur. Co.*, 119 Mich. 136.

**Submission to Arbitration.** — A general agent has no authority to bind his principal to a submission to arbitration. To be binding such reference can be made only under a special authority. *Macdonald v. Bond*, 195 Ill. 122, affirming 96 Ill. App. 116.

**991.** 1. *Richardson, etc., Co. v. School Dist. Number Eleven*, 45 Neb. 777; *Spies v. Stein*, (Neb. 1903) 97 N. W. Rep. 752; *Timpson v. Allen*, 149 N. Y. 513; *Richards v. Nova Scotia Bank*, 26 Can. Sup. Ct. 381. See also *Burke v. Chicago, etc., R. Co.*, 114 Mich. 685; *Maxson v. Michigan Cent. R. Co.*, 117 Mich. 218; *Cowan v. Sargent Mfg. Co.*, (Mich. 1905) 104 N. W. Rep. 377, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990, 991; *Olson v. Great Northern R. Co.*, 81 Minn. 402; *Patterson v. Consolidated Traction Co.*, 9 Pa. Dist. 362; *Missouri, etc., R. Co. v. Belcher*, 88 Tex. 549; *Quale v. Hazel*, (S. Dak. 1905) 104 N. W. Rep. 215.

**Act Must Be Within Power to Bind Principal.** — *Terre Haute, etc., R. Co. v. Crews*, 53 Ill. App. 50; *Heath v. New Bedford Safe Deposit, etc., Co.*, 184 Mass. 481; *Foley v. Boulware*, 86 Mo. App. 674; *Maass v. Jarvis*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 687; *Moyle v. Congregational Soc.*, 16 Utah 69.

**No Authority to Bind Principal for Debt of Another.** — *Pacific Lumber Co. v. Moffat*, (C. C. A.) 134 Fed. Rep. 836. In this case the defendant's agent contracted in the defendant's name for the purchase of a large quantity of lumber from the plaintiff at a price exceeding the market rates in order to make up the amount lost by the plaintiff in consequence of previous sales to an insolvent. It was held that the defendant was not liable on the contract.

**Apparent Authority — Estoppel.** — *Clark v. Dillman*, 108 Mich. 625.

**Agent Acting for Himself.** — It is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time. *National Bank v. Munger*, 95 Fed. Rep. 87, 36 C. C. A. 659; *Park Hotel Co. v. St. Louis Fourth Nat. Bank*, (C. C. A.) 86 Fed. Rep. 742; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737; *Hier v. Miller*, 68 Kan. 258; *New York Nat. Banking Assoc. Bank v. American Dock, etc., Co.*, 143 N. Y. 564; *Sage v. Shepard, etc., Lumber Co.*, 4 N. Y. App. Div. 290.

**992.** 1. *England.* — *Brocklesby v. Temperance Permanent Bldg. Soc.*, (1895) A. C. 173, 11 Reports 159.

*United States.* — *Gowen v. Bush*, 76 Fed. Rep. 349, 40 U. S. App. 349.

*Alabama.* — *Robinson v. Aetna Ins. Co.*, 128 Ala. 477; *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252.

*Illinois.* — *St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619; *Gray v. Merchant's Ins. Co.*, 113 Ill. App. 537.

*Indiana.* — *American Quarries Co. v. Lay*, (Ind. App. 1905) 73 N. E. Rep. 608.

*Iowa.* — *Conneautville First Nat. Bank v. Robinson*, 105 Iowa 463.

*Kansas.* — *Loomis Milling Co. v. Vawter*, 8 Kan. App. 437.

*Kentucky.* — *Travelers' Ins. Co. v. Ebert*, (Ky. 1898) 47 S. W. Rep. 865; *Forked Deer Pants Co. v. Shipley*, (Ky. 1904) 80 S. W. Rep. 476.

*Minnesota.* — *Baker v. Chicago G. W. R. Co.*, 91 Minn. 118.

*Mississippi.* — *Potter v. Springfield Milling Co.*, 75 Miss. 532.

*Missouri.* — *Porter v. Woods*, 138 Mo. 539; *Southwest Missouri Electric R. Co. v. Missouri Pac. R. Co.*, (Mo. App. 1905) 85 S. W. Rep. 966.

*Nebraska.* — *Hall v. Hopper*, 64 Neb. 633; *Fidelity Mut. F. Ins. Co. v. Lowe*, (Neb. 1903) 93 N. W. Rep. 749; *Day, etc., Lumber Co. v. Bixby*, (Neb. 1903) 93 N. W. Rep. 688.

*New Hampshire.* — *Flint v. Boston, etc., R. Co.*, (N. H. 1905) 59 Atl. Rep. 938.

*New York.* — *Lowenstein v. Lombard*, 164 N. Y. 324.

*Pennsylvania.* — *Beal v. Adams Express Co.*, 13 Pa. Super. Ct. 143; *Grasselli Chemical Co. v. Biddle Purchasing Co.*, 22 Pa. Super. Ct. 426; *Lauer Brewing Co. v. Schmidt*, 24 Pa. Super. Ct. 396.

*Texas.* — *Baker v. Kellett-Chatham Machinery Co.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 661.

*Utah.* — *Smith v. Dronbay*, 20 Utah 443.

*Wisconsin.* — *McDermott v. Jackson*, 97 Wis. 64.

**How Far Third Persons Must Inquire as to Agent's Authority.** — *Warren-Scharf Asphalt Paving Co. v. Commercial Nat. Bank*, 97 Fed. Rep. 181, 38 C. C. A. 108; *Lytle v. Dothan Bank*, 121 Ala. 215; *Indian River State Bank v. Hartford F. Ins. Co.*, (Fla. 1903) 35 So. Rep. 228; *Trent v. Sherlock*, 26 Mont. 85.

**Mistake of Agent with Discretionary Powers.** — *Blumenthal v. Shaw*, 77 Fed. Rep. 954, 39 U. S. App. 490.

**Illustrations — Principal Bound.** — A general agent having power to enter into a contract may change or waive its terms. *Peterson v. Walter A. Wood Mowing, etc., Mach. Co.*, 97 Iowa 148, 59 Am. St. Rep. 399; *Blaess v. Nichols, etc., Co.*, 115 Iowa 373; *Van Santvoord v. Smith*, 79 Minn. 316.

A general agent has authority to enter a payment made to him on a mortgage executed to his principal. *Long v. Jennings*, 137 Ala. 190.

**993.** 1. *England.* — *Forman v. The Ship*



**994. Inquiry as to the Extent of Authority. — See note 1.****d. AUTHORITY MODIFIED BY INSTRUCTIONS — (1) General Agents****— Instructions Not Known to Third Parties. — See note 2.**

Liddesdale, (1900) A. C. 190, 82 L. T. N. S. 331; Macnutt v. Shaffner, 34 Nova Scotia 402; Starr v. Royal Electric Co., 33 Nova Scotia 156.

Canada. — Commercial Union Assur. Co. v. Margeson, 29 Can. Sup. Ct. 601; Atlas Assur. Co. v. Brownell, 29 Can. Sup. Ct. 537; Garneau v. North American Transp. Co., 12 Quebec Super. Ct. 77; Murray v. Jenkins, 28 Can. Sup. Ct. 565; Torrop v. Imperial F. Ins. Co., 26 Can. Sup. Ct. 585; Becherer v. Asher, 23 Ont. App. 202.

United States. — Forrest v. Vanderbilt, 107 Fed. Rep. 734, 46 C. C. A. 611.

Alabama. — Moore v. Ensley, 112 Ala. 228.

California. — See Ballard v. Nye, 138 Cal. 588.

Colorado. — McIntosh-Huntington Co. v. Rice, 13 Colo. App. 393.

Connecticut. — See Harris v. Fitzgerald, 75 Conn. 72; Haywood v. Hamm, (Conn. 1904) 58 Atl. Rep. 695.

Georgia. — Phoenix Ins. Co. v. Gray, 107 Ga. 110; Lewis v. Equitable Mortg. Co., 94 Ga. 572; Larned v. Wentworth, 114 Ga. 208.

Illinois. — American Telephone, etc., Co. v. Jones, 78 Ill. App. 372; Young v. Harbor Point Club House Assoc., 99 Ill. App. 290.

Indiana. — Cleveland, etc., R. Co. v. Moline Plow Co., 13 Ind. App. 225.

Kentucky. — Dugan v. Champion Coal, etc., Co., 105 Ky. 821. See also Campbellsville Lumber Co. v. Spotswood, 74 S. W. Rep. 235, 24 Ky. L. Rep. 2430.

Massachusetts. — Brown v. Henry, 172 Mass. 559; Heath v. New Bedford Safe Deposit, etc., Co., 184 Mass. 481.

Nebraska. — Norfolk Nat. Bank v. Nenow, 50 Neb. 429; Lederer v. Union Sav. Bank, 52 Neb. 133.

New Hampshire. — Bohanan v. Boston, etc., R. Co., 70 N. H. 526; Union Hosiery Co. v. Hodgson, 72 N. H. 427.

New York. — McGowan v. Treacy, (Supm. Ct. App. T.) 84 N. Y. Supp. 497.

Pennsylvania. — Pennsylvania L. Ins. Co. v. Franklin F. Ins. Co., 181 Pa. St. 40; Getty v. Pennsylvania Blind Inst., 194 Pa. St. 571; Mundis v. Emig, 171 Pa. St. 417; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. Ct. 285; MacDonald v. O'Neil, 21 Pa. Super. Ct. 364. See also Smith v. Crum Lynne Iron, etc., Co., 208 Pa. St. 462.

Tennessee. — Bement v. Armstrong, (Tenn. Ch. 1896) 39 S. W. Rep. 899.

Texas. — Mann v. Dublin Cotton Oil Co., 92 Tex. 377; Baker v. Kellett-Chatham Machinery Co., (Tex. Civ. App. 1905) 84 S. W. Rep. 661.

Washington. — Gregory v. Loose, 19 Wash. 599.

West Virginia. — Fishburne v. Engledove, 91 Va. 548.

Wisconsin. — Bryant v. Bank of Commerce, 95 Wis. 476, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 993; Godfrey v. Schneck, 105 Wis. 568; Hoyer v. Ludington, 100 Wis. 441.

A Local Freight Agent. — Page v. Chicago, etc., R. Co., 7 S. Dak. 297.

Authority to a Baggage Agent of a connecting road to check baggage carries no authority to check merchandise as baggage. Toledo, etc., R. Co. v. Bowler, etc., Co., 63 Ohio St. 274.

Authority to Do an Act Subject to Approval of the principal confers no authority to dispense with such approval. Chauche v. Pare, 75 Fed. Rep. 283, 44 U. S. App. 544.

**994. 1. Arkansas.** — Schenck v. Griffith, (Ark. 1905) 86 S. W. Rep. 850.

Georgia. — Littleton v. Loan, etc., Assoc., 97 Ga. 172; Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480; Harris Loan Co. v. Elliott, etc., Book-Typewriter Co., 110 Ga. 302; Americus Oil Co. v. Gurr, 114 Ga. 624; Inman v. Crawford, 116 Ga. 63.

Illinois. — Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 93 Am. St. Rep. 113, reversing 99 Ill. App. 108; Young v. Harbor Point Club House Assoc., 99 Ill. App. 290.

Indiana. — Hunt v. Illinois Cent. R. Co., (Ind. 1904) 71 N. E. Rep. 195.

Iowa. — Wolf v. Davenport, etc., R. Co., 93 Iowa 218.

Maryland. — Hardwick v. Kirwan, 91 Md. 285.

New York. — Joseph v. Struller, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 173; Beck v. Donohue, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 230.

North Carolina. — Ferguson v. Davis, etc., Mfg. Co., 118 N. Car. 946; West-End Hotel, etc., Co. v. Crawford, 120 N. Car. 347.

Pennsylvania. — MacDonald v. O'Neil, 21 Pa. Super. Ct. 364.

South Dakota. — J. I. Case Threshing Mach. Co. v. Eichinger, 15 S. Dak. 530.

Texas. — Baker v. Kellett-Chatham Machinery Co., (Tex. Civ. App. 1905) 84 S. W. Rep. 661.

West Virginia. — Findley v. Cunningham, 53 W. Va. 1.

**2. England.** — Rimmer v. Webster, (1902) 2 Ch. 163, 86 L. T. N. S. 491.

United States. — Aetna Indemnity Co. v. Ladd, (C. C. A.) 135 Fed. Rep. 636.

Alabama. — Phillips, etc., Mfg. Co. v. Whitney, 109 Ala. 645; Robinson v. Aetna Ins. Co., 128 Ala. 477.

California. — Mitrovich v. Fresno Fruit-Packing Co., 123 Cal. 379.

Georgia. — Louisville, etc., R. Co. v. Tift, 100 Ga. 86; Armour v. Ross, 110 Ga. 403.

Illinois. — Catholic Bishop v. Troup, 61 Ill. App. 641; Swisher v. Palmer, 106 Ill. App. 432.

Indiana. — American Telephone, etc., Co. v. Green, (Ind. 1905) 73 N. E. Rep. 707.

Iowa. — Fishbaugh v. Spunaugle, 118 Iowa 337; Getchell, etc., Lumber, etc., Co. v. Peterson, 124 Iowa 599.

Kansas. — Ludlow-Saylor Wire Co. v. Fribley Hardware, etc., Co., 67 Kan. 710; Aultman Threshing, etc., Co. v. Knoll, (Kan. 1905) 79 Pac. Rep. 1074.

Kentucky. — H. Herman Sawmill Co. v. Bailey, 58 S. W. Rep. 449, 22 Ky. L. Rep. 552.

Louisiana. — Chaffe v. Baratara Canning Co., 113 La. 215.

**995. Instructions Known to Third Parties.** — See note 1.

(2) *Special Agents* — Instructions Contravening Apparent Authority. — See note 2.

**996. e. AUTHORITY AS AFFECTED BY USAGE OR CUSTOM.** — See note 2.

**997. See note 1.****2. Powers Prima Facie Incident to Every Authority.** — See note 3.

*Maine.* — Wood v. Finson, 89 Me. 459.

*Michigan.* — Antrim Iron Co. v. Anderson, (Mich. 1905) 104 N. W. Rep. 319.

*Minnesota.* — Watts v. Howard, 70 Minn. 122; Van Santvoord v. Smith, 79 Minn. 316.

*Missouri.* — Cross v. Atchison, etc., R. Co., 71 Mo. App. 585; Cross v. Atchison, etc., R. Co., 141 Mo. 132.

*New York.* — Waldron v. Fargo, 52 N. Y. App. Div. 18; Newman v. Lee, 87 N. Y. App. Div. 116; Graves v. Miami Steamship Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 645; Smith v. Robinson Bros. Lumber Co., 88 Hun (N. Y.) 148.

*Oregon.* — Pacific Biscuit Co. v. Dugger, 40 Oregon 302.

*Pennsylvania.* — Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. Ct. 285; Rice v. Jackson, 16 Pa. Co. Ct. 15, 3 Pa. Dist. 829; Landis v. Shadle, 23 Pa. Co. Ct. 505; Anderson v. National Surety Co., 196 Pa. St. 288.

*South Carolina.* — Whaley v. Duncan, 47 S. Car. 139; Merchants', etc., Nat. Bank v. Clifton Mfg. Co., 56 S. Car. 320.

*Texas.* — Conn. v. Hagan, 93 Tex. 334; Clarkson v. Reinhartz, (Tex. Civ. App. 1902) 70 S. W. Rep. 111; Eastern Mfg. Co. v. Brenk, 32 Tex. Civ. App. 97; Bay City Irrigation Co. v. Sweeney, (Tex. Civ. App. 1904) 81 S. W. Rep. 545.

*Washington.* — Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370.

*West Virginia.* — Rohrbough v. U. S. Express Co., 50 W. Va. 148, 88 Am. St. Rep. 849, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 994.

*Wisconsin.* — Parr v. Northern Electrical Mfg. Co., 117 Wis. 278.

**Evidence of Instructions.** — Wellington First Nat. Bank v. Mansfield Sav. Bank, 3 Ohio Dec. 141.

**Evidence of Private Instructions** not communicated or known to the third party is inadmissible so far as such instructions are inconsistent with the agent's apparent general authority. Higman v. Camody, 112 Ala. 267, 57 Am. St. Rep. 33; Hichhorn v. Bradley, 117 Iowa 130; Continental Tobacco Co. v. Campbell, (Ky. 1903) 76 S. W. Rep. 125; Sanford v. Orient Ins. Co., 174 Mass. 416; Meinhold v. Bradley Salt Co., (Supm. Ct. App. T.) 20 Misc. (N. Y.) 608.

**995. 1. Instructions of Which Third Parties Are Aware.** — Spooner v. Browning, (1808) 1 Q. B. 528, 78 L. T. N. S. 98; Modern Woodmen of America v. Tevis, 117 Fed. Rep. 369, 54 C. C. A. 293; Central of Georgia R. Co. v. Felton, 110 Ga. 597, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 995; Forked Deer Pants Co. v. Shipley, (Ky. 1904) 80 S. W. Rep. 476; Murphy v. Royal Ins. Co., 52 La. Ann. 775; Antrim Iron Co. v. Anderson, (Mich.

1905) 104 N. W. Rep. 319; Thrall v. Wilson, 17 Pa. Super. Ct. 376; Landis v. Shadle, 23 Pa. Co. Ct. 505; Brown v. West, 69 Vt. 440.

**2. Secret Instructions to Special Agents.** — Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124; Cross v. Atchison, etc., R. Co., 1 Mo. App. Rep. 424; Kampman v. Nicewaner, 60 Neb. 208, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 995; Smith v. Robinson Bros. Lumber Co., 88 Hun (N. Y.) 148.

**996. 2. Usage and Custom.** — Hartford, etc., Transp. Co. v. Plymmer, (C. C. A.) 120 Fed. Rep. 624, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996; Mallory Commission Co. v. Elwood, 120 Iowa 632; American Min., etc., Co. v. Converse, 175 Mass. 449; Burchard v. Hull, 71 Minn. 430; Mabray v. Kelly-Goodfellow Shoe Co., 73 Mo. App. 1; Lowenstein v. Lombard, 164 N. Y. 324; Durkee v. Carr, 38 Oregon 189; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. Ct. 396; Ames v. D. J. Murray Mfg. Co., 114 Wis. 85. See also the title USAGES AND CUSTOMS.

**May Employ Means Justified by Usage.** Rohrbough v. U. S. Express Co., 50 W. Va. 148, 88 Am. St. Rep. 849; Western v. Page, 94 Wis. 251; Waupaca Electric Light, etc., Co. v. Milwaukee Electric R., etc., Co., 112 Wis. 469.

**Usage Binds Principal Although Not Known to Him.** — Taylor v. Bailey, 169 Ill. 181; Reese v. Bates, 94 Va. 321.

Whatever may be the rule as to presumptive notice of a custom or usage in the case of parties engaged in the same business, no such presumption can be indulged in where the party to be charged is engaged in a separate line of business. Great Western Elevator Co. v. White, (C. C. A.) 118 Fed. Rep. 406. But see Burchard v. Hull, 71 Minn. 430; Corey v. Hunter, 10 N. Dak. 5.

**Custom Cannot Alter Business.** — It is only the mode of transacting the business which can be affected by usage. No man can be compelled by custom to alter the character of his business. Gates Iron Works v. Denver Engineering Works Co., 17 Colo. App. 15.

**Question for Jury.** — The question what is usual or suitable is for the jury. Hartford, etc., Transp. Co. v. Plymmer, (C. C. A.) 120 Fed. Rep. 624.

**997. 1.** Taylor v. Bailey, 169 Ill. 181; White v. San Antonio Waterworks Co., 9 Tex. Civ. App. 465; Reese v. Bates, 94 Va. 321. Compare San Antonio Waterworks Co. v. White, (Tex. Civ. App. 1898) 44 S. W. Rep. 181.

**Mere Conflict in the Evidence** will not justify its exclusion. Hichhorn v. Bradley, 117 Iowa 130.

**3. United States.** — National Bank of Republic v. Old Town Bank, 112 Fed. Rep. 726, 50 C. C. A. 443; Ladd v. Aetna Indemnity

**998.** See note 1.

**3. Construction of Authority — a. WRITTEN AUTHORITIES — Question for Court.** — See note 2.

**999.** The Object of the Power. — See note 1.

Subject to Strict Interpretation. — See note 2.

**1000.** Restricted to Individual Business and Use of Principal. — See note 1.

General Words. — See note 2.

**1001.** Parol Evidence. — See note 1.

Co., 128 Fed. Rep. 298; *Ætna Indemnity Co. v. Ladd*, (C. C. A.) 135 Fed. Rep. 636.

*Alabama.* — *Lytle v. Dothan Bank*, 121 Ala. 215; *La Fayette R. Co. v. Tucker*, 124 Ala. 514.

*Colorado.* — *Fisk Min., etc., Co. v. Reed*, (Colo. 1893) 77 Pac. Rep. 240.

*Georgia.* — *Strong v. West*, 110 Ga. 382.

*Iowa.* — *Blaess v. Nichols, etc., Co.*, 115 Iowa 373; *Fishbaugh v. Spunaugle*, 118 Iowa 337; *Nebraska Bridge Tie Co. v. Owen Conway & Sons*, (Iowa 1905) 103 N. W. Rep. 122.

*Minnesota.* — *Watts v. Howard*, 70 Minn. 122; *Burchard v. Hull*, 71 Minn. 430.

*Mississippi.* — *Potter v. Springfield Milling Co.*, 75 Miss. 532.

*Missouri.* — *Rider v. Kirk*, 82 Mo. App. 120.

*Nebraska.* — *Jones v. Wattles*, 66 Neb. 533.

*North Carolina.* — *Daniel v. Atlantic Coast Line R. Co.*, 136 N. Car. 517.

*Oregon.* — *Durkee v. Carr*, 38 Oregon 189, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 997; *Connell v. McLoughlin*, 28 Oregon 230; *Neppach v. Oregon, etc., R. Co.*, (Oregon 1905) 80 Pac. Rep. 482.

*Pennsylvania.* — *Lauer Brewing Co. v. Schmidt*, 24 Pa. Super. Ct. 396.

*South Dakota.* — *Davis v. Matthews*, 8 S. Dak. 300.

*Texas.* — *Half v. O'Connor*, 14 Tex. Civ. App. 191; *Hanrick v. Gurley*, 93 Tex. 458, modified 93 Tex. 479.

*Utah.* — *Genter v. Conglomerate Min. Co.*, 23 Utah 165, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 997.

*Wisconsin.* — *McDermott v. Jackson*, 97 Wis. 64; *Parr v. Northern Electrical Mfg. Co.*, 117 Wis. 278.

**Illustrations of Powers Necessarily Implied.** — An agent to whom goods are consigned has implied authority to borrow money to pay the transportation charges, if, without so doing, he cannot get possession of the goods. *Rankin v. McFarlane Carriage Co.*, 75 S. W. Rep. 221, 25 Ky. L. Rep. 258.

Authority to build a house implies authority to buy the lumber. *John Spry Lumber Co. v. McMillan*, 77 Ill. App. 280.

An agent of a creditor to procure a transfer of the books and accounts of the debtor is authorized to enter into an agreement establishing a consideration upon which such transfer shall be based. *Martin v. Rotan Grocery Co.*, (Tex. Civ. App. 1902) 66 S. W. Rep. 212, 95 Tex. 437.

**998.** 1. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124; *Watts v. Howard*, 70 Minn. 122.

2. *Glucose Sugar Refining Co. v. Flinn*, 184 Ill. 123; *Illinois Cent. R. Co. v. Foulks*, 191 Ill. 57; *De Remer v. Brown*, 165 N. Y. 410,

*Williamson v. North Pac. Lumber Co.*, 38 Oregon 560, rehearing denied 38 Oregon 567.

**A Letter by the Principal to His Agent.** — *Farrell v. Edwards*, 8 S. Dak. 425.

**A Letter of Authority** to an agent is properly admitted in evidence to show the scope of his authority. *Bell v. Rankin*, 1 Kan. App. 209.

**999.** 1. *Leavenworth First Nat. Bank v. Wright*, 104 Mo. App. 242.

**Intention of Parties.** — *White v. Furgeson*, 29 Ind. App. 144; *Muth v. Goddard*, 28 Mont. 237, 98 Am. St. Rep. 553; *Security Sav. Bank v. Smith*, 38 Oregon 72, 84 Am. St. Rep. 756; *Wynne v. Parke*, 89 Tex. 413.

2. *Henry v. Lane*, (C. C. A.) 128 Fed. Rep. 243; *Golinsky v. Allison*, 114 Cal. 458; *Born v. Simmons*, 111 Ga. 869; *White v. Furgeson*, 29 Ind. App. 144; *Security Sav. Bank v. Smith*, 38 Oregon 72, 84 Am. St. Rep. 756; *Union Trust Co. v. Means*, 201 Pa. St. 374; *MacDonald v. O'Neil*, 21 Pa. Super. Ct. 364; *Stokes v. Dewees*, 24 Pa. Super. Ct. 471; *Morton v. Morris*, 27 Tex. Civ. App. 262; *Wynne v. Parke*, 89 Tex. 413; *Hotchkiss v. Middlekauf*, 96 Va. 649; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927.

**Construction Must Not Defeat Intention.** — *Muth v. Goddard*, 28 Mont. 237, 98 Am. St. Rep. 553; *Smith v. Cantrel*, (Tex. Civ. App. 1899) 59 S. W. Rep. 1081; *Texas Loan Agency v. Miller*, 94 Tex. 464.

**An Informal Instrument**, such as a letter of advice or instruction, conferring an express authority, is construed with more liberality than a formal and deliberate instrument. *Half v. O'Connor*, 14 Tex. Civ. App. 191.

**1000.** 1. See *Muth v. Goddard*, 28 Mont. 237, 98 Am. St. Rep. 553.

2. *St. Augustine First Nat. Bank v. Kirkby*, 43 Fla. 376, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1000; *Born v. Simmons*, 111 Ga. 869. See also *Welch v. McKenzie*, 66 Ark. 251 (as to relinquishment of dower); *Mitchell v. McLaren*, (Tex. Civ. App. 1899) 51 S. W. Rep. 269.

**Illustrations — General Powers Construed with Reference to Subject-matter — To Collect Debts and Do All Acts Which the Principal Could Personally Do.** — See *Jacoby v. Payson*, 91 Hun (N. Y.) 480.

A power of attorney to collect money, pay debts, settle business matters, and do whatever may be necessary and proper, does not authorize a relending of the money collected. *Haynes v. Carpenter*, 86 Mo. App. 30.

**1001.** 1. *Montgomery v. Ætna L. Ins. Co.*, 97 Fed. Rep. 913, 38 C. C. A. 553; *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124; *Davis v. Fidelity F. Ins. Co.*, 208 Ill. 375; *Roberts v. Minneapolis Threshing Mach. Co.*, 8 S. Dak. 579, 59 Am. St. Rep. 777.

**1001.** Usage or Custom. — See note 4.

*b.* WHERE AUTHORITY IS AMBIGUOUS. — See notes 6, 7.

**1002.** *c.* IMPLIED AUTHORITIES. — See notes 1, 2.

**1003.** See note 1.

**Parol Evidence to Interpret Powers.** — *Muir v. Westcott*, 34 Wash. 463.

**1001.** 4. *Norwood v. Alamo F. Ins. Co.*, 13 Tex. Civ. App. 475; *Morton v. Morris*, 27 Tex. Civ. App. 262; *State v. Chilton*, 49 W. Va. 453, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1001.

**6. Construction Favorable to Third Party.** — Where the authority is ambiguous it should be construed most favorably to the party dealing with the agent. *Osborne v. Ringland*, 122 Iowa 329.

**7. Oxford Lake Line v. Pensacola First Nat. Bank**, 40 Fla. 349; *Evans v. Wrenn*, 93 N. Y. App. Div. 346, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1001; *Half v. O'Connor*, 14 Tex. Civ. App. 191.

**1002.** 1. *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113, reversing 99 Ill. App. 108 and quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002; *Harrison v. LeGore*, 109 Iowa 618, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002; *Hare v. Bailey*, 73 Minn. 409, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002; *Trent v. Sherlock*, 24 Mont. 255, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002; *Trent v. Sherlock*, 26 Mont. 85; *Corey v. Hunter*, 10 N. Dak. 5; *Moyle v. Congregational Soc.*, 16 Utah 69.

**Ascertained by Course of Dealing.** — *Watkins v. Edgar*, 77 Mo. App. 148; *Pierce City Nat. Bank v. Hughlett*, 84 Mo. App. 268; *Bonner v. Lisenby*, 86 Mo. App. 666; *Batavian Bank v. Minneapolis, etc., R. Co.*, (Wis. 1904) 101 N. W. Rep. 687.

The acts and conduct of an agent with reference to his principal's business constitute competent evidence to establish, by implication, authority in such agent to perform acts which are not expressly authorized, without regard to knowledge thereof by the principal. *Best v. Krey*, 83 Minn. 32.

**For Evidence Held to Be Insufficient to show a course of dealing**, see *Gale v. Chase Nat. Bank*, 104 Fed. Rep. 214, 43 C. C. A. 496.

**Recognition of Similar Acts.** — *Grant v. Hummerick*, 123 Iowa 571, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002; *Anderson v. Johnson*, 74 Minn. 171, sustaining *Wilcox v. Chicago, etc., R. Co.*, 24 Minn. 269, stated in the original note.

**An Isolated Act is not proof of a general agency.** *Ravenna Bank v. Dobbins*, 96 Mo. App. 693; *Owens v. Hughes*, (Tex. Civ. App. 1903) 71 S. W. Rep. 783. See also *Bartley v. Rhodes*, (Tex. Civ. App. 1895) 33 S. W. Rep. 604.

**Illustrations — Implied Powers.** — Authority to take orders includes the power to make sales. *Pittsburg Sheet Mfg. Co. v. West Penn Sheet Steel Co.*, 197 Pa. St. 491.

Authority to pay a debt includes authority to promise to pay it, so as to take the case out of the statute of limitations. *In re Hale*, (1899) 2 Ch. 107, 80 L. T. N. S. 827.

Authority to employ agents necessarily im-

plies the power to contract with them for their compensation, according to the method usual in matters of the kind. Opinion of Justices, 72 N. H. 601.

**Admissibility of Evidence.** — Evidence that an agent made similar contracts with others is admissible as tending to show authority to make the contract in question. *Kent v. Addicks*, 126 Fed. Rep. 112, 60 C. C. A. 660; *H. C. Mahrt Co. v. Hyman-Hall Co.*, 17 Wash. 415. Provided the principal knew of such acts. *Alt v. Groschlose*, 61 Mo. App. 409.

But evidence that a husband acted as agent for his wife in a transaction similar to the one before the court has been held to be incompetent to prove his agency in the particular transaction in question. *Molt v. Baumann*, 65 N. Y. App. Div. 445.

**2. Halladay v. Underwood**, 90 Ill. App. 130; *Trammell v. Turner*, (Tex. Civ. App. 1904) 82 S. W. Rep. 325; *Gregory v. Loose*, 19 Wash. 599, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002.

**To Exchange.** — An agent to effect an exchange of property on terms already agreed upon has no authority to bind his principal by the execution of a note for the difference in value. *Oliver v. Smith*, 66 Ill. App. 94.

**Authority to Deposit Money** in bank does not imply power to draw it out. *Heath v. New Bedford Safe Deposit, etc., Co.*, 184 Mass. 481.

**Authority to Perform a Contract** confers no power to change it. *Owen v. Sell*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 272.

**Authority to Make Collections** does not necessarily imply authority to make or negotiate loans. *International Bldg., etc., Assoc. v. Watson*, 158 Ind. 508.

**Agency of Husband for Wife.** — Although a husband is the agent of his wife to attend to her business generally, such an agency does not imply authority to declare her to be his partner in business. *Tuscaloosa First Nat. Bank v. Leland*, 122 Ala. 289.

**1003.** 1. *District of Columbia.* — *Norfolk, etc., Steamboat Co. v. Davis*, 12 App. Cas. (D. C.) 306.

*Illinois.* — *Morris v. Dixon Nat. Bank*, 55 Ill. App. 298; *Schmoldt v. Langston*, 106 Ill. App. 385.

*Kentucky.* — *Meagher v. Bowling*, 107 Ky. 412; *Cartmel v. Unverzagt*, (Ky. 1900) 54 S. W. Rep. 965.

*Massachusetts.* — *Hawks v. Davis*, 185 Mass. 119.

*Michigan.* — *Hodges v. Detroit Electric Light, etc., Co.*, 109 Mich. 547; *Flattery v. Cunningham*, 125 Mich. 467; *Schaub v. Welded Barrel Co.*, 125 Mich. 591.

*Missouri.* — *Stone v. Gilliam Exch. Bank*, 81 Mo. App. 9; *Wimp v. Early*, 104 Mo. App. 85; *Johnson v. Briscoe*, 104 Mo. App. 493.

*New York.* — *Wanamaker v. Megraw*, 48 N. Y. App. Div. 54; *Conant v. American Rubber-Tire Co.*, 48 N. Y. App. Div. 327; *Murgatroyd v. Hempstead Gas, etc., Co.*, 52 N. Y. App. Div.

**1003.** *4. Construction and Scope of Certain Particular Authorities — a. TO SELL GENERALLY — (1) Consideration Must Be in Money. —* See notes 2, 3.

**1004.** *Agent Cannot Give Away. —* See note 1.

*Nor Barter or Exchange. —* See note 2.

*Nor Pledge or Dispose of the Property to Be Sold in Payment of His Own Debts. —*

See note 4.

**1005.** *Or the Debts of the Principal. —* See note 1.

*(3) Power Exhausted by Sale. —* See note 4.

**1006.** *b. TO SELL REAL ESTATE — (1) Sufficiency of Power — Authority Must Be Clear. —* See notes 1, 2.

625, *denying rehearing* 51 N. Y. App. Div. 612; *Fitch v. Metropolitan Hotel Supply Co.*, 69 N. Y. App. Div. 611.

*Pennsylvania. —* *Stockwell v. Loecher*, 9 Pa. Super. Ct. 241.

*Texas. —* *Gulf, etc., R. Co. v. White*, (Tex. Civ. App. 1895) 32 S. W. Rep. 322.

*Washington. —* *Lough v. Davis*, 35 Wash. 449.

*Wisconsin. —* *Domasek v. Kluck*, 113 Wis. 336.

*Where the Authority Rests in Parol, its extent is a question of fact for the jury. Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co.*, 127 Ala. 137.

*For Evidence Held to Be Sufficient to justify a finding of the jury that an agent had apparent authority to bind his principal, see Union Paving, etc., Co. v. Mowry*, 137 Cal. xix, 70 Pac. Rep. 81; *Heinz v. American Nat. Bank*, 9 Colo. App. 31; *C. and C. Electric Motor Co. v. Frisbie*, 66 Conn. 67; *Bird v. Phillips*, 115 Iowa 703; *Hilliard v. Weeks*, 173 Mass. 304; *Dowagiac Mfg. Co. v. Watson*, 90 Minn. 100; *Winter, etc., Co. v. Atlantic Elevator Co.*, 88 Minn. 196; *Droste v. Metropolitan Hotel Supply Co.*, 69 N. Y. App. Div. 611; *Mullin v. Sire*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 807; *Bay State Shoe Co. v. Leeser*, 196 Pa. St. 76; *Edinburgh American Land, etc., Mortg. Co. v. Briggs*, (Tex. Civ. App. 1897) 41 S. W. Rep. 1036; *Tabet v. Powell*, (Tex. Civ. App. 1903) 78 S. W. Rep. 997.

*For Evidence Sufficient to Go to the Jury on the question of authority see Booth v. Bethel*, 78 S. W. Rep. 868, 25 Ky. L. Rep. 1747.

**1003.** *2. Wilken v. Voss*, 120 Iowa 500; *McGrath v. Vanaman*, 53 N. J. Eq. 459; *Beck v. Donohue*, 27 Misc. (N. Y.) 230, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1003; *Fay, etc., Co. v. Causey*, 131 N. Car. 350; *Lewis v. Lewis*, 203 Pa. St. 194, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1003; *Paul v. Grimm*, 165 Pa. St. 139, 44 Am. St. Rep. 648.

**3. Payment in Negotiable Paper. —** See *Baldwin v. Tucker*, 112 Ky. 282.

*Taking a Note in the Name of Another Person than the principal is fatal to the transaction, and the principal may have the contract rescinded. McGrath v. Vanaman*, 53 N. J. Eq. 459.

**1004.** *1. Lewis v. Lewis*, 203 Pa. St. 104, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1004. See also *Morton v. Morris*, 27 Tex. Civ. App. 262.

*2. Sioux City Nursery, etc., Co. v. Magnes*, 5 Colo. App. 172; *Woodruff v. American Road Mach. Co.*, 65 S. W. Rep. 600, 23 Ky. L. Rep.

1551; *Block v. Dundon*, 83 N. Y. App. Div. 539 (even though the sale could not have been effected for money). See also *Morton v. Morris*, 27 Tex. Civ. App. 262.

*Authority to Exchange May Be Implied from the terms of the contract of agency. Gaus v. Hathaway*, 66 Ill. App. 149 (authority to exchange pianos).

*4. Hodgson v. Raphael*, 105 Ga. 480; *Baldwin v. Tucker*, 112 Ky. 282; *Stewart v. Cowles*, 67 Minn. 194; *Lewis v. Lewis*, 203 Pa. St. 194, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1004; *Kern's Estate*, 176 Pa. St. 373; *Wilson v. Wilson-Rogers Co.*, 181 Pa. St. 80.

*Note for Sewing Machine — Boarding Agent No Defense. —* See *Singer Mfg. Co. v. Flynn*, 63 Minn. 475.

**1005.** *1. Shaw v. Saranac Horsenail Co.*, 144 N. Y. 220. See also *Morton v. Morris*, 27 Tex. Civ. App. 262.

*4. Fletcher v. Nelson*, 6 N. Dak. 94; *Brigham v. Hibbard*, 28 Oregon 386.

*Agent to Sell Cannot Rescind. —* *West-End Hotel, etc., Co. v. Crawford*, 120 N. Car. 347.

*Contra of General Agent. —* *Parsons Band-Cutter, etc., Co. v. Mallinger*, 122 Iowa 703.

**1006.** *1. Authority to Sell Subject to Approval. —* An agent who has authority only to receive proposals to purchase the property of his principal, and submit them to the latter for acceptance or rejection, cannot make an absolute contract of sale which will be binding upon the principal. *Johnson v. American Freehold Land Mortg. Co.*, 111 Ga. 490.

*Authority to Negotiate a Sale or exchange of land does not imply authority to enter into a binding contract of sale or exchange. Holmes v. Redhead*, 104 Iowa 399.

*Authority "to Demand and Receive of and from any person or persons all such real and personal estate," etc., does not give authority to sell land. Hotchkiss v. Middlekauf*, 96 Va. 649.

**2. Illustrations of Powers Authorizing Sale. —** A power of attorney "to sell or dispose of any or the whole of my property" and "in my name to sign and execute any and all instruments of writing" authorizes a sale of real estate. *Gardiner v. Griffith*, (Tex. Civ. App. 1900) 56 S. W. Rep. 558.

A power of attorney "to buy and sell lands, etc., and to transact all business necessary in the transaction of my affairs," was held under the circumstances to authorize a sale of lands then owned, since no intention to authorize a business of buying and selling land appeared. *Texas Loan Agency v. Miller*, 94 Tex. 464. See *Bean v. Bennett*, (Tex. Civ. App. 1904) 80 S. W. Rep. 662.

**1007.** (2) *Certainty and Extent of Power.* — See note 3.

**1008.** *After-acquired Land.* — See note 1.

(3) *Must Be in Manner Authorized.* — See notes 2, 3.

**1009.** (4) *When May Receive Payment.* — See note 1.

(5) *When May Sell on Credit.* — See notes 2, 3, 4.

**1010.** (6) *Authority Not Extended by Construction.* — See notes 2, 3, 4.

(7) *Powers Implied — To Execute Conveyances — Power to Sell Authorizes Conveyance.* — See note 9.

**1011.** *Power Not under Seal.* — See note 1.

**1012.** *Warranties and Representations.* — See notes 1, 2.

c. TO SELL PERSONALTY — (1) *Must Act Within Authority.* —

See note 3.

**Authority to Collect Rents and Pay Taxes** does not carry with it authority to sell. *Samson v. Beale*, 27 Wash. 557.

**1007. 3. Illustrations of Descriptions of Property.** — A description of land as the "forty-acres tract" is insufficient to allow it to be identified by extrinsic proof, or to satisfy the statute of frauds. *Johnson v. Fecht*, 94 Mo. App. 605.

A power of attorney authorizing the sale of "my headright, 640 acres of land," is sufficiently definite, as one can have but one headright of 640 acres. *Pool v. Unknown Heirs*, (Tex. Civ. App. 1899) 49 S. W. Rep. 923.

**1008. 1.** See *Snell v. Weyerhaeuser*, 71 Minn. 57.

**Power to Buy and Sell Authorizes Sale Only of Property Bought under Power.** — *Compare Texas Loan Agency v. Miller*, 94 Tex. 464.

**To Sell and Assign Mortgages.** — A power of attorney to sell and assign mortgages owned and possessed by the principal at the time of its execution confers no authority to sell mortgages acquired after its execution. *Union Trust Co. v. Means*, 201 Pa. St. 374.

**2.** *Amyot v. Daulnais*, 15 Quebec Super. Ct. 311.

**3.** *Lucas v. Rader*, 29 Ind. App. 287.

**1009. 1.** *Smith v. Browne*, 132 N. Car. 365, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1008.

**2.** *Morton v. Morris*, 27 Tex. Civ. App. 262.

**Where There is no Authority to Sell on Credit,** and the original purchaser knows, or is charged with notice of this fact, a sale on credit may be treated as void at the option of the purchaser. *Whitley v. James*, (Ga. 1904) 49 S. E. Rep. 600.

**3. The Presumption** is that the sale is to be for cash. *Morton v. Morris*, 27 Tex. Civ. App. 262.

**4.** See *Morton v. Morris*, 27 Tex. Civ. App. 262, holding that an agent is not authorized to make a sale on such terms as would require his principal to discharge a lien by the payment of a disputed claim in order to make certain the time when the purchase money for his property would become due.

**1010. 2. Illustrations.** — Authority to sell land is not authority to sell timber alone, *St. Louis Southwestern R. Co. v. Bramlette*, (Tex. Civ. App. 1896) 35 S. W. Rep. 25; or to waive claim of title, *Iowa Railroad Land Co. v. Fehring*, (Iowa 1904) 101 N. W. Rep. 120; or to organize a corporation to purchase, *Godfrey v. Schneek*, 105 Wis. 568.

**An Agent to Negotiate the Sale of Land,** but without authority to make a binding contract of sale without the consent of his principal, cannot grant a license to use part of the land as an approach. *Noftsgger v. Barkdoll*, 148 Ind. 531.

**3.** *Golinsky v. Allison*, 114 Cal. 458; *Salem Nat. Bank v. White*, 159 Ill. 136; *Edgerly v. Cover*, 106 Iowa 670; *Morris v. Ewing*, 8 N. Dak. 99; *Nacogdoches First Nat. Bank v. Hicks*, 24 Tex. Civ. App. 269; *Minnesota Stone-ware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927.

**4.** *Anderson v. Bigelow*, 16 Wash. 198.

**9.** *Paolillo v. Faber*, 56 N. Y. App. Div. 241. *Compare Armstrong v. Oakley*, 23 Wash. 122; *Samson v. Beale*, 27 Wash. 557.

**Power to Sell and Convey — Conveyance Without Sale.** — A power to sell and convey does not authorize a conveyance without sale, or, in other words, without consideration. *Alcorn v. Buschke*, 133 Cal. 655.

**Power to Sell Lands Does Not Imply Power of Exchange.** — *Chapman v. Hughes*, 134 Cal. 641.

**Authority to Sign a Contract of Sale** is included in the powers of an agent who is authorized to sell real estate. *Rosenbaum v. Belson*, (1900) 2 Ch. 267, 82 L. T. N. S. 658.

**Conveyance upon Consideration Inuring to Agent.** — The agent has no power to convey without consideration, or upon a consideration inuring to himself. *Hunter v. Eastham*, 95 Tex. 648; *Hunter v. Eastham*, (Tex. Civ. App. 1904) 81 S. W. Rep. 336.

**1011. 1.** *Tyrrell v. O'Connor*, 56 N. J. Eq. 448, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1011.

**Authority of Real-estate Agent.** — *Lindley v. Keim*, 54 N. J. Eq. 418; *Brandrup v. Britten*, 11 N. Dak. 376; *Donnan v. Adams*, 30 Tex. Civ. App. 615.

**1012. 1.** *Farrell v. Edwards*, 8 S. Dak. 425.

**2. Representations as to Quantity or Quality.** — *Samson v. Beale*, 27 Wash. 557.

**Representations as to Boundaries** have been held to bind the principal although such representations were not authorized. *Green v. Worman*, 83 Mo. App. 568.

**Representations as to Value.** — One who has merely a right to dispose of certain property provided he can obtain a certain price is not such an agent as can bind his principal by representations as to value. *Mayo v. Wahlgreen*, 9 Colo. App. 506.

**3.** See *Forbis v. Reeves*, 109 Ill. App. 98;

**1013.** See note 2.

Powers Implied. — See note 3.

May Sell on Approval. — See note 6.

**1014.** (2) *When Can Sell on Credit.* — See notes 1, 2.(6) *Power to Receive Payment* — General Rule. — See note 7.**1015.** See note 1.

*Blackmer v. Summit Coal, etc., Co.*, 187 Ill. 32, affirming 88 Ill. App. 636; *Case v. Hammond Packing Co.*, 105 Mo. App. 168; *L. D. Garrett Co. v. McComb*, 58 N. Y. App. Div. 419; *Kirby v. Western Wheeled Scraper Co.*, 9 S. Dak. 623.

A sales agent in the absence of evidence to the contrary is presumed to have authority to make absolute sales as distinguished from merely taking orders subject to the approval of his principal. *Nebraska Bridge Tie Co. v. Owen Conway & Sons*, (Iowa 1905) 103 N. W. Rep. 122.

**Price.** — One appointed to sell a particular article to a particular person has authority to fix the price. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124.

An agent may bind his principal by a sale to a purchaser without notice at a price lower than he was authorized to make, where it is not so low as to indicate fraud. *U. S. School Furniture Co. v. Board of Education*, (Ky. 1897) 38 S. W. Rep. 864; *Scudder-Gale Grocer Co. v. Russell*, 65 Ill. App. 281.

**Authority to Sell Does Not Imply Power to Execute Chattel Mortgage.** — *Kiefer v. Klinsick*, 144 Ind. 46; *Wycoff, Seaman & Benedict v. Davis*, (Iowa 1905) 103 N. W. Rep. 349.

**Authority to Sell and Transfer Securities** does not authorize an agent to pledge them. *Hawxhurst v. Rathgeb*, 119 Cal. 531, 63 Am. St. Rep. 142.

**1013. 2. An Agent Authorized Merely to Receive Proposals** cannot bind the principal by a contract entered into without obtaining his approval. *Brandenstein v. Douglas*, 105 Ga. 845; *Spooner v. Browning*, (1898) 1 Q. B. 528, 67 L. J. Q. B. 339, 78 L. T. N. S. 98.

**3. Hartford, etc., Transp. Co. v. Plymmer**, (C. C. A.) 120 Fed. Rep. 624, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1013.

**Illustrations.** — An agent having power and authority to sell a machine under a contract which contains conditions for the benefit of the seller, has authority to bind his principal by a waiver of such conditions. *Webster City First Nat. Bank v. Dutcher*, (Iowa 1905) 104 N. W. Rep. 497.

**The Power of a Mortgagor to Purchase as Agent of the Mortgagee Is Not Implied** from a power to sell goods and apply the proceeds to the payment of the mortgage. *Kelly v. Tracy, etc.*, Co., 71 Ohio St. 220.

**Cannot Advertise Business.** — *Beck v. Donohue*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 230; *Brooklyn Daily Eagle v. Dellmar*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 747.

**Cannot Pay Commissions to Third Person.** — *Jones v. Keeler*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 221; *National Cash Register Co. v. Hagan*, (Tex. Civ. App. 1904) 83 S. W. Rep. 727.

**Cannot Bind Principal by Collateral Undertaking.** — A general selling agent has no authority to

bind his principal by a collateral undertaking to answer for the conduct of a competitor. *Hess v. Heegaard*, 54 Ill. App. 227; *Kinser v. Calumet Fire-Clay Co.*, 165 Ill. 505. See also *Braun v. Hess*, 187 Ill. 283, 79 Am. St. Rep. 221, affirming 86 Ill. App. 544.

**May Fix Time of Delivery.** — An agent having power to make a contract of sale has power to fix the time of delivery. *Smith v. Droubay*, 20 Utah 443.

**6. Jesse French Piano, etc., Co. v. Cardwell**, 114 Ga. 340; *Marion Mfg. Co. v. Harding*, 155 Ind. 648; *Eastern Mfg. Co. v. Brenk*, 32 Tex. Civ. App. 97.

**Sales on Approval.** — But an agent cannot thus vary the express terms of a written contract. *Flower City Plant Food Co. v. Roberts*, 81 N. Y. App. Div. 249.

**And Give Further Time for Trial.** — To the same effect as *Bannon v. Aultman*, 80 Wis. 307, stated in the original note, see *Reeves v. Cress*, 80 Minn. 466. See also *Warder, etc., Co. v. Fischer*, 110 Wis. 363.

**May Agree to Put in Good Condition.** — An agent has authority to agree with a purchaser that a machine shall be put in good condition, *McCormick Harvesting Mach. Co. v. Smith*, 9 Kulp (Pa.) 448; and also to agree upon a time within which it shall be done, notwithstanding a clause in the contract providing "that no agent has any power to make additions to or to vary the terms and conditions hereof," *Holt Mfg. Co. v. Dunnigan*, 22 Wash. 134.

**1014. 1. Norton v. Nevills**, 174 Mass. 243; *Kops Bros. Co. v. Smith*, (Mich. 1904) 100 N. W. Rep. 169; *State v. Chilton*, 49 Va. 453, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1014.

**2. Granting Extension.** — An agent selling goods on credit has no authority to grant an extension. *Mater v. American Nat. Bank*, 8 Colo. App. 325.

**7. Fabian Mfg. Co. v. Newman**, (Tenn. Ch. 1900) 62 S. W. Rep. 218.

**Sale and Delivery by Agent.** — *Maxfield v. Carpenter*, 84 Hun (N. Y.) 450.

**Authority to Sell and Collect Implies Authority to Deduct from Price.** — See *Thomas Roberts Stevenson Co. v. Fox*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 177.

**1015. 1. Dreyfus v. Goss**, 67 Kan. 57; *Clark v. Murphy*, 164 Mass. 490; *Ketelman v. Chicago Brush Co.*, 65 Neb. 429; *Hahnenfeld v. Wolff*, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 133; *Giltman v. Bergey*, 11 Montg. Co. Rep. (Pa.) 162; *Shull v. New Birdsall Co.*, 15 S. Dak. 8, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; *Fabian Mfg. Co. v. Newman*, (Tenn. Ch. 1900) 62 S. W. Rep. 218.

**Notice to Pay Principal.** — If a purchaser has notice, express or implied, to pay the principal, payment to the agent will not bind the principal. *Lamb v. Hirschberg*, 1 N. Y. App. Div. 519.

**1015.** Sales on Credit. — See notes 2, 3.

**1016.** Traveling Salesmen and Soliciting Agents. — See note 3.

**1017.** (7) *Powers of Traveling Salesmen* — Hotel Bills. — See note 2.

*d.* TO MORTGAGE — Power to Insert Usual Provisions Implied. — See note 5.

**1018.** When Authority to Mortgage Not Implied. — See note 2.

To Cancel Mortgage. — See note 3.

*e.* TO LEASE. — See notes 5, 6.

Power to Lease Implied. — See note 8.

**1019.** Agent to Lease — Scope of Powers. — See note 2.

Lease for Unauthorized Period. — See note 4.

**1020.** *f.* TO PURCHASE — (1) *Must Observe Authority*. — See notes 1, 3, 4.

**1015.** 2. *Williams v. Anderson*, 107 Ill. App. 32.

**Agent Receiving Securities — When Authority to Collect Terminates.** — *Rhodes v. Belchee*, 36 Oregon 141.

**3. Doctrine of "Holding Out" Applies.** — An agent placed in sole charge of a branch office is held out as being something more than a mere selling agent, and has implied authority to receive payment for goods sold. *Carter White Lead Co. v. Pounds*, 65 N. Y. App. Div. 476.

**1016.** 3. *Brown v. Lally*, 79 Minn. 38; *Giltinan v. Bergey*, 5 Pa. Dist. 20; *Fabian Mfg. Co. v. Newman*, (Tenn. Ch. 1900) 62 S. W. Rep. 218; *Crawford v. Whittaker*, 42 W. Va. 430, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1036 [1016], and holding further that false representations by a salesman as to membership in the firm cannot affect the rule.

**Order Given to Agent Is Not Sale.** — To the same effect as *McKindly v. Dunham*, 55 Wis. 515, stated in the original note, see *John Matthews Apparatus Co. v. Renz*, 61 S. W. Rep. 9, 22 Ky. L. Rep. 1528. To the same effect as *Greenhood v. Keator*, 9 Ill. App. 183, stated in the original note, see *Lakeside Press, etc., Co. v. Campbell*, 39 Fla. 523, 22 So. Rep. 878.

**Contra.** — *Kuhlman v. E. J. Hart Co.*, (Tenn. Ch. 1900) 59 S. W. Rep. 455.

**1017.** 2. *Grand Ave. Hotel Co. v. Friedman*, 83 Mo. App. 491.

**A Salesman Cannot Bind His Principal for Laundry Bills** or other expenses not connected with his business. *Grand Ave. Hotel Co. v. Friedman*, 83 Mo. App. 491.

**5. Collateral Undertaking.** — Authority to create and execute a mortgage to one person, if it includes discretion respecting its character and terms of payment, cannot by implication be extended to embrace a collateral undertaking with a second lien to a stranger. *Bangor, etc., R. Co. v. American Bangor Slate Co.*, 203 Pa. St. 6.

**1018.** 2. *Reed v. Kimsey*, 98 Ill. App. 364.

**3. Authority to Foreclose** a mortgage does not authorize an extension of the period of redemption. *Karcher v. Gans*, 13 S. Dak. 383, 79 Am. St. Rep. 893.

**General Directions to Foreclose a Mortgage** which in terms covers the right of possession of the premises leave to the agent the exercise of discretion as to taking possession of the premises. *Standard Brewery v. Nudelman*, 70 Ill. App. 356.

**Authority to Enter Satisfaction** of a mortgage

carries no authority to assign it. *Googe v. Gaskill*, 18 Pa. Super. Ct. 39.

**5. Where a Seal Is Not Necessary to the Validity of a Lease** it is not necessary that an agent's authority to execute the lease should be in writing and under seal, although a seal is in fact affixed. *McIntosh v. Hodges*, 110 Mich. 319.

6. *Marshall v. Rugg*, 6 Wyo. 270.

**Authority to Extend a Lease** has been held to be included in authority to lease. *Pittsburg Mfg. Co. v. Fidelity Title, etc., Co.*, 207 Pa. St. 223.

**8. Authority Not Implied.** — *Dieckman v. Weirich*, 73 S. W. Rep. 1119, 24 Ky. L. Rep. 2340. See also *Burgess v. Willis*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 672.

**The Right to Accept a Surrender** of a lease is not included by implication in authority to collect rent. *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671.

**Substitution of Tenants.** — An agent to rent premises and to collect rent, at least where the lease made is for a term of more than one year and under seal, has no implied power to consent to the substitution of a new tenant. *Wallace v. Dinniny*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 317.

**Authority to Alter Terms.** — A general agent who fixed the terms of the original letting has authority to modify such terms. *Ireland v. Hyde*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 546.

**1019.** 2. *Faville v. Lundvall*, 106 Iowa 135; *Barkley v. Holt*, (Supm. Ct. App. T.) 84 N. Y. Supp. 957.

**Authority to Reduce Rent.** — An agent with authority to modify a lease by reducing the rent has authority to accept a surrender of the premises. *Goldsmith v. Schroeder*, 93 N. Y. App. Div. 206.

**No Authority to Waive Lien.** — Mere authority to lease land does not of itself carry power to waive the principal's lien for rent. *Wimp v. Early*, 104 Mo. App. 85.

4. See *Borderre v. Den*, 106 Cal. 594, holding that an agent empowered to let a tract of land for one year, at a rental of six hundred dollars, cannot make a lease, either oral or written, obligatory on his principal, for a portion of the land at a rental of two hundred and twenty-five dollars for a term exceeding one year. See also *Schumacher v. Pabst Brewing Co.*, 78 Minn. 50.

**1020.** 1. **Purchase at Higher Price.** — An agent authorized to purchase at a certain price



**1020.** (2) *To Purchase on Credit — Not Implied.* — See note 5.

**1021.** Where Furnished with Funds. — See note 1.

Where No Funds Furnished. — See note 3.

(3) *Implied Powers.* — See notes 4, 5.

**1022.** Agent to Purchase on Credit. — See note 1.

Execution of Negotiable Notes. — See note 2.

*g. TO MANAGE BUSINESS OR PROPERTY — Power Coextensive with Business.* — See note 3.

**1023.** See note 1.

cannot bind his principal by an oral agreement to pay more. *Burks v. Stam*, 65 Mo. App. 455.

**No Authority to Sell Implied.** — *Hogue v. Simonson*, 94 N. Y. App. Div. 139.

**Agent Cannot Take Deed to Himself.** — *Nelms v. Dougherty*, (Ky. 1898) 45 S. W. Rep. 870.

**Agent Cannot Divert Purchase Money to Private Use.** — *Thompson v. Sproul*, 179 Pa. St. 266.

**1020. 3. An Agent Authorized to Buy a Certain Grade of brick cannot bind his principal by a purchase of an inferior grade, unless the principal accepts such purchase.** *Theille v. Chicago Brick Co.*, 60 Ill. App. 559.

**4. Robinson Mercantile Co. v. Thompson**, 74 Miss. 847; *Bement v. Armstrong*, (Tenn. Ch. 1896) 39 S. W. Rep. 899, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1020, notes 1-4.

**5. Brittain v. Westhall**, 135 N. Car. 492.

**By a Long-continued Course of Dealing**, authority to purchase on credit may be proved. *Witcher v. Gibson*, 15 Colo. App. 163.

**A Coachman** has no implied authority to purchase forage on his employer's credit. *Wright v. Glyn*, (1902) 1 K. B. 745.

**1021. 1. Americus Oil Co. v. Gurr**, 114 Ga. 624; *Chapman v. Americus Oil Co.*, 117 Ga. 881; *Brooks v. Mortimer*, 10 N. Y. App. Div. 518; *Saugerties, etc., Steamboat Co. v. Miller*, 76 N. Y. App. Div. 167; *Thomas Gibson Co. v. Carlisle*, 3 Ohio Dec. 27, 1 Ohio N. P. 398.

**3. Spear, etc., Supply Co. v. Van Riper**, 103 Fed. Rep. 689. See also *Merchants, etc., Bank v. Cottrell*, 96 Ga. 168.

**4. See Thompson v. Barry**, 184 Mass. 429 (power to make statements as to class to which purchaser belongs); *Watts v. Howard*, 70 Minn. 122 (power to agree to particular mode of measuring logs); *Brown v. Jackson*, (Tex. Civ. App. 1897) 40 S. W. Rep. 162 (power to agree on terms of redemption from execution sale).

**5. Modification of Contract.** — See *Day Bros. Lumber Co. v. Daniel*, 62 S. W. Rep. 866, 23 Ky. L. Rep. 285.

**Rescinding Contract.** — A general agent for the purchase of grain may rescind a contract of purchase. *Middle Div. Elevator Co. v. Vandeventer*, 80 Ill. App. 669.

**1022. 1. Morris v. Posner**, 111 Iowa 335.

**2. Edgerly v. Cover**, 106 Iowa 670, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1022.

**Clerk Having General Management of Business.** — See *Graton, etc., Mfg. Co. v. Redelsheimer*, 28 Wash. 370.

**3. Sun Printing, etc., Assoc. v. Moore**, 183 U. S. 642; *Hille v. Adair*, 58 S. W. Rep. 697, 22 Ky. L. Rep. 742. See also *Flint v. Boston, etc., R. Co.*, (N. H. 1905) 59 Atl. Rep. 938.

**Repairing, Rebuilding.** — An agent authorized to pay for repairs to a house out of the rents

and also recognized as "agent for the house" has authority to contract for repairs. *Scofield v. Warren*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 209. But the caretaker of a house has no authority to contract for unnecessary repairs. *Hill v. Coates*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 535.

**Keep Up Stock.** — An agent placed in charge of goods "with authority to transact any business in reference thereto that may be necessary and in accordance with the desire of, or by agreement with, the principal" is not authorized to replenish the stock. *Weekes v. A. F. Shapleigh Hardware Co.*, 23 Tex. Civ. App. 577.

**For Other Illustrations of the principle** see *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252 (power to rent storehouse); *Phillips, etc., Mfg. Co. v. Whitney*, 109 Ala. 645 (power to renew lease); *Baldwin v. Garrett*, 111 Ga. 876 (power to rent a house); *B. S. Green Co. v. Blodgett*, 55 Ill. App. 556 (power to contract for advertising); *Forked Deer Pants Co. v. Shipley*, (Ky. 1904) 80 S. W. Rep. 476 (power to contract for labor); *Nichols, etc., Co. v. Hackney*, 78 Minn. 461 (power to accept notes); *Kaes v. Lime Co.*, 71 Mo. App. 101 (power to purchase whatever necessary to carry on business); *Laming v. Peters Shoe Co.*, 71 Mo. App. 646 (power to employ a foreman); *New York Telephone Co. v. Barnes*, (Supm. Ct. App. T.) 85 N. Y. Supp. 327 (power to contract for telephone service); *Hughes v. Lansing*, 34 Oregon 118, 75 Am. St. Rep. 574 (power to waive liens).

**1023. 1. An Agent to Manage a Hotel** has authority to bind his principal by a contract for advertising the hotel in a daily paper. *Mullin v. Sire*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 540.

**The General Manager of a Mining Company** is not, by virtue of his office, authorized to convey its lands, or to grant an easement or give a license therein. *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, 21 Mont. 539.

A superintendent of a mine is not, as such, authorized to make contracts for machinery and other supplies necessary for the milling or smelting operations of his principal. *Trent v. Sherlock*, 26 Mont. 85.

The manager of a mining company has authority to contract for the drainage of the mine, when necessary to the continuance of the work. *Fisk Min., etc., Co. v. Reed*, (Colo. 1903) 77 Pac. Rep. 240.

**To Manage Plantation.** — One employed to manage a plantation has no authority to bind his employer by the execution of notes. *La-fourche Transp. Co. v. Pugh*, 32 La. Ann. 1517,

**1024.** See note 1.

**Cannot Dispose of Business.** — See note 2.

**Nor Mortgage.** — See note 3.

**1025.** Cannot Borrow. — See notes 3, 4.

**Nor Execute Notes.** — See note 5.

**h. TO RECEIVE PAYMENT** — (1) *From What Authority Will Be Implied* — Presentation of Bill. — See note 6.

**1026.** Making the Contract. — See note 1.

**The Receipt of Interest.** — See note 2.

**Possession of Securities.** — See notes 3, 4.

**1024. 1. For Illustrations of Acts Beyond Authority** see George v. Ross, 128 Ala. 666; McClun v. McClun, 176 Ill. 376; Hackett v. Van Frank, 105 Mo. App. 384; Camacho v. Hamilton Bank-Note, etc., Co., 2 N. Y. App. Div. 369; Parr v. Northern Electrical Mfg. Co., 117 Wis. 278.

**2. Agent to Manage Property — Disposing of Property.** — Johnson v. Sage, 4 Idaho 758.

**3. Alabama Nat. Bank v. O'Neil**, 128 Ala. 192, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1024; Golinsky v. Allison, 114 Cal. 458; St. Augustine First Nat. Bank v. Kirkby, 43 Fla. 376; Edgerly v. Cover, 106 Iowa 670.

To the same effect as Taylor v. Labeaume, 17 Mo. 338, stated in the original note, see Thayer v. Nehalem Mill Co., 31 Oregon 437.

**1025. 3. McDermott v. Jackson**, 97 Wis. 64. **Evidence Showing Authority to Borrow.** — See Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 63 Am. St. Rep. 628.

**4. Cannot Bind Principal as Surety.** — See Bulard v. De Groff, 59 Neb. 783.

**5. Alabama Nat. Bank v. O'Neil**, 128 Ala. 192, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1025; Golinsky v. Allison, 114 Cal. 458; Sanford Cattle Co. v. Williams, 18 Colo. App. 378; Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 63 Am. St. Rep. 628; Jacoby v. Payson, 91 Hun (N. Y.) 480. But see Glidden, etc., Varnish Co. v. Interstate Nat. Bank, 69 Fed. Rep. 912, 32 U. S. App. 654; Baines v. Coos Bay, etc., R., etc., Co., (Oregon 1904) 77 Pac. Rep. 400; Whitten v. Fincastle Bank, 100 Va. 546.

**6. One Sent to Deliver Notice of Foreclosure to a mortgagor has no authority to accept a tender from the mortgagor.** Bacon v. Hooker, 173 Mass. 554.

**1026. 1. Fortune v. Stockton**, 182 Ill. 454; Ortmeier v. Ivory, 208 Ill. 577, affirming 109 Ill. App. 361; Trull v. Hammond, 71 Minn. 172; Central Trust Co. v. Folsom, 167 N. Y. 285; Henken v. Schwicker, 174 N. Y. 298, affirming 67 N. Y. App. Div. 196; Corey v. Hunter, 10 N. Dak. 5, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026; Western Security Co. v. Douglass, 14 Wash. 215. See also Henken v. Schwicker, 67 N. Y. App. Div. 196, per Woodward, J., dissenting, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026.

**AN Agent to Negotiate a Loan** has no implied authority to collect it. Madison v. Cabalet, 86 Ill. App. 450; Townsend v. Studer, 109 Iowa 103; White v. Madigan, 78 Minn. 286; Werth v. Ollis, 70 Mo. App. 318; Hefferman v. Boteler, 87 Mo. App. 316; Evans-Snyder-Bucl Co. v. Holder, 16 Tex. Civ. App. 300.

**Note Payable at Certain Place.** — The mere fact

that a note is made payable at a certain place, as the office of an attorney, does not of itself confer any agency upon the owner or occupant of that place to receive payment in behalf of the payee. Klindt v. Higgins, 95 Iowa 529; Bloomer v. Dau, 122 Mich. 522; Dwight v. Lenz, 75 Minn. 78; White v. Kehlor, 85 Mo. App. 557; Hollinshead v. Stuart, 8 N. Dak. 35; Stolzman v. Wyman, 8 N. Dak. 108; Corey v. Hunter, 10 N. Dak. 5; Bartel v. Brown, 104 Wis. 493. See also Montreal Bank v. Ingerson, 105 Iowa 349.

**2. United States.** — Ilgenfritz v. Mutual Ben. L. Ins. Co., 81 Fed. Rep. 27; Mutual Ben. L. Ins. Co. v. Miles, 81 Fed. Rep. 32.

**Colorado.** — Lester v. Snyder, 12 Colo. App. 351.

**Iowa.** — Klindt v. Higgins, 95 Iowa 529.

**Kansas.** — Bronson v. Ashlock, 2 Kan. App. 255.

**Michigan.** — Joy v. Vance, 104 Mich. 97; Bromley v. Lathrop, 105 Mich. 492; Trowbridge v. Ross, 105 Mich. 598; Wilson v. Campbell, 110 Mich. 580; Terry v. Durand Land Co., 112 Mich. 665.

**Minnesota.** — Trull v. Hammond, 71 Minn. 172; Dwight v. Lenz, 75 Minn. 78; Thomas v. Swanke, 75 Minn. 326; White v. Madigan, 78 Minn. 286.

**Missouri.** — Hefferman v. Boteler, 87 Mo. App. 316.

**Nebraska.** — Richards v. Waller, 49 Neb. 639; Porter v. Ourada, 51 Neb. 510; Frey v. Curtis, 52 Neb. 406; Thompson v. Kyner, 53 Neb. 625; Chandler v. Pyott, 53 Neb. 786; Campbell v. O'Connor, 55 Neb. 638; Walsh v. Peterson, 59 Neb. 645; Gilbert v. Garber, 62 Neb. 464; Dewey v. Bradford, (Neb. 1902) 89 N. W. Rep. 249; Lay v. Honey, (Neb. 1902) 89 N. W. Rep. 998.

**New York.** — Central Trust Co. v. Folsom, 38 N. Y. App. Div. 295.

**North Dakota.** — Stolzman v. Wyman, 8 N. Dak. 108; Hollinshead v. Stuart, 8 N. Dak. 35.

**Ohio.** — Hitchcock v. Kelley, 4 Ohio Cir. Dec. 180, 18 Ohio Cir. Ct. 808.

**Texas.** — Cunningham v. McDonald, (Tex. 1904) 83 S. W. Rep. 372; Higley v. Dennis, (Tex. Civ. App. 1905) 88 S. W. Rep. 400.

**3. Union Trust Co. v. McKeon**, 76 Conn. 508; Smith v. Landeck, 101 Ill. App. 248; Dwight v. Lenz, 75 Minn. 78; Frank v. Tuozzo, 26 N. Y. App. Div. 447; Central Trust Co. v. Folsom, 167 N. Y. 285, reversing 38 N. Y. App. Div. 295; Hitchcock v. Kelley, 4 Ohio Cir. Dec. 180, 18 Ohio Cir. Ct. 808; Corbet v. Waller, 27 Wash. 242.

**Possession of Bond and Mortgage.** — O'Loughlin v. Billy, 95 N. Y. App. Div. 99.

**1027.** (2) *Payment Must Be in Money.* — See note 2.

Notes, Drafts, Checks, etc. — See note 3.

**1028.** See note 1.

Certificates of Deposit. — See note 2.

**1026.** 4. *United States.* — *Ilgenfritz v. Mutual Ben. L. Ins. Co.*, 81 Fed. Rep. 27.*Arkansas.* — *Bagnell v. Walker*, 65 Ark. 325.*Colorado.* — *Lester v. Snyder*, 12 Colo. App. 351.*Georgia.* — *Walton Guano Co. v. McCall*, 111 Ga. 114.*Illinois.* — *Fortune v. Stockton*, 182 Ill. 454, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026; *Stockton v. Fortune*, 82 Ill. App. 272.*Kansas.* — *Bronson v. Ashlock*, 2 Kan. App. 255. *Compare Fowle v. Outcalt*, 64 Kan. 352.*Michigan.* — *Joy v. Vance*, 104 Mich. 97; *Bloomer v. Dau*, 122 Mich. 522.*Minnesota.* — *Schenk v. Dexter*, 77 Minn. 15; *Dwight v. Lenz*, 75 Minn. 78.*Missouri.* — *Padley v. Neill*, 134 Mo. 364.*Nebraska.* — *Walsh v. Peterson*, 59 Neb. 645; *Gilbert v. Garber*, 62 Neb. 464.*North Dakota.* — *Corey v. Hunter*, 10 N. Dak. 5, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026.*Texas.* — *Evans-Snyder-Buel Co. v. Holder*, 16 Tex. Civ. App. 300.*Washington.* — *Western Security Co. v. Douglass*, 14 Wash. 215; *Corbet v. Waller*, 27 Wash. 242.*Wisconsin.* — *Winkelman v. Brickett*, 102 Wis. 50; *Bartel v. Brown*, 104 Wis. 493; *Spence v. Pieper*, 107 Wis. 453; *Kohl v. Beach*, 107 Wis. 409, 81 Am. St. Rep. 849.*Compare Union Trust Co. v. McKeon*, 76 Conn. 508, holding that possession of the securities is not in every case essential to the existence of apparent authority; *Morgan v. Neal*, 7 Idaho 629, 97 Am. St. Rep. 264.**Burden of Proof.** — One paying money to another to be applied on a note which such person has not in his possession assumes the burden to show the authority of the person to whom payment is made to receive the money.*Iowa.* — *Townsend v. Studer*, 109 Iowa 103; *Harrison v. Legore*, 109 Iowa 618.*Minnesota.* — *Thomas v. Swanke*, 75 Minn. 326; *Budd v. Broen*, 75 Minn. 316.*Missouri.* — *Hefferman v. Boteler*, 87 Mo. App. 316; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123.*Nebraska.* — *Omaha First Nat. Bank v. Chilson*, 45 Neb. 257; *Bull v. Mitchell*, 47 Neb. 647; *Richards v. Waller*, 49 Neb. 639; *City Missionary Soc. v. Reams*, 51 Neb. 225; *Chandler v. Pyott*, 53 Neb. 786; *Campbell v. O'Connor*, 55 Neb. 638; *Dewey v. Bradford*, (Neb. 1902) 89 N. W. Rep. 249; *Lay v. Honey*, (Neb. 1902) 89 N. W. Rep. 998.*New York.* — *Frank v. Tuozzo*, 26 N. Y. App. Div. 447.*Oregon.* — *Long Creek Bldg. Assoc. v. State Ins. Co.*, 29 Oregon 569; *Rhodes v. Belchee*, 36 Oregon 141.**Lack of Possession Is Not Conclusive** of the question of authority, or want of it, but is a circumstance to be considered in the determination of such question. *Thomson v. Shelton*, 49 Neb. 644; *Phoenix Ins. Co. v. Walter*, 51Neb. 182; *Harrison Nat. Bank v. Austin*, 65 Neb. 632, 101 Am. St. Rep. 639.**Apparent Authority May Exist Without Possession.** — *Reid v. Kellogg*, 8 S. Dak. 596.**For Evidence Held to Be Sufficient** to show authority to receive payment, see *Frost v. Fisher*, 13 Colo. App. 322; *Wolford v. Young*, 105 Iowa 512; *Doe v. Callow*, 64 Kan. 886, 67 Pac. Rep. 824; *Wilson v. La Tour*, 108 Mich. 547; *Ziegan v. Stricker*, 110 Mich. 282; *Bissell v. Dowling*, 117 Mich. 646; *Springfield Sav. Bank v. Kjaer*, 82 Minn. 180; *General Convention, etc., v. Torkelson*, 73 Minn. 401; *May v. Jarvis-Conklin Mortg. Trust Co.*, 138 Mo. 275; *Gathercole v. Peck*, (Neb. 1902) 91 N. W. Rep. 513. See also *Dilenbeck v. Rehse*, 105 Iowa 749.**For Evidence Held to Be Insufficient**, see *Church Assoc. v. Walton*, 114 Mich. 677; *New England L. & T. Co. v. Browne*, 157 Mo. 116; *Hefferman v. Boteler*, 87 Mo. App. 316; *Bradbury v. Kinney*, 63 Neb. 754.**1027.** 2. *National Bank of Republic v. Old Town Bank*, 112 Fed. Rep. 726, 50 C. C. A. 443; *Stetson v. Briggs*, 114 Cal. 511; *Reed v. Jennings*, 196 Ill. 472, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027; *Cooney v. U. S. Wringer Co.*, 101 Ill. App. 468, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027; *Scott v. Gilkey*, 153 Ill. 168; *Rush v. Rush*, 170 Ill. 623; *McCormick Harvesting Mach. Co. v. Breen*, 61 Ill. App. 528; *Woodruff v. American Road Mach. Co.*, 65 S. W. Rep. 600, 23 Ky. L. Rep. 1551; *Trull v. Hammond*, 71 Minn. 172; *Moore v. Pollock*, 50 Neb. 900; *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478; *Gilbert v. Garber*, 62 Neb. 464; *Dixon v. Guay*, 70 N. H. 161; *Paul v. Grimm*, 165 Pa. St. 139, 44 Am. St. Rep. 648; *Columbia Phosphate Co. v. Farmers' Alliance Store*, 47 S. Car. 358; *Willis v. Gorrell*, 102 Va. 746; *Corbet v. Waller*, 27 Wash. 242, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027.**May Take Order for Money About to Become Due to Debtor.** — *Ruthven v. Clarke*, 109 Iowa 25.3. *Holt v. Schneider*, 57 Neb. 523.**Drafts.** — *Hine v. Steamship Ins. Syndicate*, 11 Reports 777; *Gowling v. American Express Co.*, 102 Mo. App. 366.**Checks.** — *Ormsby v. Graham*, 123 Iowa 202. But a check immediately paid is equivalent to money. *Hine v. Steamship Ins. Syndicate*, 11 Reports 777.**Where the Agent Is Authorized to Receive Checks**, a check given in payment operates as a discharge of the debt although the agent cashes the check and misappropriates the proceeds. *Sage v. Burton*, 84 Hun (N. Y.) 267. See also *Allen v. Tarrant*, 7 N. Y. App. Div. 172.**1028.** 1. *Rodgers v. Peckham*, 120 Cal. 238; *Woodruff v. American Road Mach. Co.*, 65 S. W. Rep. 600, 23 Ky. L. Rep. 1551.**By Statute in Georgia** a general agent to collect binds his principal by the receipt of property other than money. *Holmes v. Langston*, 110 Ga. 861.2. See *Montreal Bank v. Ingerson*, 105 Iowa 349.

- 1028.** Cannot Compound Debt. — See notes 3, 4.  
 Cannot Substitute Note Payable to Agent. — See note 5.  
 Nor Exchange the Security. — See note 6.

- 1029.** (3) *Time of Payment.* — See notes 1, 2.

- (4) *Powers Implied* — May Employ Counsel and Sue. — See notes 3, 4.

- 1030.** Part Payment. — See note 5.  
 No Authority to Indorse. — See note 6.

- Nor Transfer Claim. — See note 7.

- 1031.** i. TO SETTLE. — See note 1.

- Limitation of Powers. — See notes 5, 6.

- 1032.** j. TO DRAW AND INDORSE NEGOTIABLE INSTRUMENTS — (1)  
*Express or Implied Power.* — See notes 4, 5.

**1028.** 3. *Hoster v. Lange*, 80 Mo. App. 234; *Langdon First Nat. Bank v. Prior*, 10 N. Dak. 146; *Corbet v. Waller*, 27 Wash. 242.

No Authority to Release. — *Johnson v. Wilson*, 137 Ala. 468, 97 Am. St. Rep. 52; *Torbit v. Heath*, 11 Colo. App. 492; *Robinson v. Nipp*, 20 Ind. App. 156; *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478; *Knoche v. Whiteman*, 86 Mo. App. 568.

No Authority to Waive Lien. — *Couch v. Davidson*, 109 Ala. 313.

Cannot Set Off for Debt Due by Principal. — *Hill v. Van Duzer*, 111 Ga. 867.

4. *Stetson v. Briggs*, 114 Cal. 511; *Walton Guano Co. v. McCall*, 111 Ga. 114; *Cooney v. U. S. Wringer Co.*, 101 Ill. App. 468, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1028; *Western White Bronze Co. v. Portrey*, 50 Neb. 801; *Chattanooga Foundry, etc., Works v. Gorman*, 12 Tex. Civ. App. 75.

Commencing Debt. — *L'Artiste Pub. Co. v. Walker*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 426.

5. *Everts v. Lawther*, 165 Ill. 487; *Baldwin v. Tucker*, 112 Ky. 282. See also H. J. Mohlman Co. v. Reikers, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 770. Compare *Baldwin v. Tucker*, 75 S. W. Rep. 196, 25 Ky. L. Rep. 222.

6. *Farmers', etc., Bank v. Bennett*, (Ky. 1898) 47 S. W. Rep. 623.

**1029.** 1. Cannot Extend Time. — *Behrns v. Rogers*, (Tex. Civ. App. 1897) 40 S. W. Rep. 419.

2. Cannot Receive Payment Before Due. — *Little Rock, etc., R. Co. v. Wiggins*, 65 Ark. 385; *Lester v. Snyder*, 12 Colo. App. 351; *Barstow v. Stone*, 10 Colo. App. 396; *Madison v. Cabalek*, 86 Ill. App. 450; *Williams v. Pelley*, 96 Ill. App. 346; *Wilcox v. Eadie*, 65 Kan. 459; *Park v. Cross*, 76 Minn. 187, 77 Am. St. Rep. 630; *Schenk v. Dexter*, 77 Minn. 15; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123; *Cunningham v. McDonald*, (Tex. 1904) 83 S. W. Rep. 372. See also *Frost v. Fisher*, 13 Colo. App. 322.

Effect of Usage. — To the same effect as *Thompson v. Elliott*, 73 Ill. 221, stated in the original note, see *McIntosh v. Ransom*, 106 Ill. App. 172; *Thornton v. Lawther*, 169 Ill. 228. See also *Peterson v. Fullerton*, 106 Ill. App. 237.

3. *Strong v. West*, 110 Ga. 382.

4. Authority to Collect Implies Authority to Sue. — *Briggs v. Yetzer*, 103 Iowa 342.

But an agent authorized to collect an interest coupon has no implied authority to foreclose a

collateral mortgage. *Burchard v. Hull*, 71 Minn. 430; *Dexter v. Morrow*, 76 Minn. 413; *White v. Madigan*, 78 Minn. 286; *Corey v. Hunter*, 10 N. Dak. 5.

**1030.** 5. A Banking Company, as agent to collect a check, has no authority to accept a partial payment. *Lowenstein v. Bresler*, 109 Ala. 326.

6. *Deering v. Kelso*, 74 Minn. 41, 73 Am. St. Rep. 324; *Jacoby v. Payson*, 85 Hun (N. Y.) 367. See also *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113, reversing 99 Ill. App. 108; *Bennett v. Chandler*, 199 Ill. 97, modifying 101 Ill. App. 409. But see *National Bank of Republic v. Old Town Bank*, 112 Fed. Rep. 726, 50 C. C. A. 443.

Authority Given to Collector to Receive Checks. — *Sinclair v. Goodell*, 93 Ill. App. 592; *Goodell v. Sinclair*, 112 Ill. App. 594.

7. *Dingley v. McDonald*, 124 Cal. 682; *Rigby v. Lowe*, 125 Cal. 613.

**1031.** 1. *Griffith v. Fields*, 105 Iowa 362.

Power to Execute Deeds of Relinquishment. — An agent authorized to compromise and adjust adverse claims to land is authorized to execute deeds of relinquishment to the adverse claimants. *Smith v. Cantrel*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1081; *Wilcoxon v. Howard*, 26 Tex. Civ. App. 281.

Power to Appeal from Judgment. — Power "to acknowledge or contest any claim" and "to defend, compromise, or settle any suit," embraces authority to appeal from, as well as to resist, a judgment in the first instance. *Lowrey v. Bates*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 407.

5. Reference to Arbitration. — *New York v. Du Bois*, 86 Fed. Rep. 889; *New York v. Dubois*, 132 Fed. Rep. 752; *Allen v. Confederate Pub. Co.*, 121 Ga. 773, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1031; *King v. King*, 104 La. 420; *Manufacturers, etc., F. Ins. Co. v. Mullen*, 48 Neb. 620.

6. *Hussey v. Crass*, (Tenn. Ch. 1899) 53 S. W. Rep. 986, holding that authority to effect a settlement confers no authority to sell the bonds received in settlement.

**1032.** 4. *Sanford Cattle Co. v. Williams*, 18 Colo. App. 378. See also *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628; *Stock Exch. Bank v. Williamson*, 6 Okla. 348.

Authority given to an agent to sell goods and take notes for the price does not authorize him to indorse the notes so taken. *National Fence*

**1032.** When Implied. — See note 6.

**1033.** (2) *Subject to Strict Interpretation.* — See notes 1, 2.

**1034.** (3) *Must Be for Benefit of Principal.* — See note 3.

k. TO SHIP. — See note 4.

l. TO EMPLOY. — See note 5.

**1035.** m. TO BORROW OR LEND. — See note 1.

Mach. Co. v. Highleyman, (Kan. 1905) 80 Pac. Rep. 568.

**1032.** 5. Ederly v. Cover, 106 Iowa 670, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1032.

6. Boord v. Strauss, '39 Fla. 381; Black v. Westminster First Nat. Bank, 96 Md. 399, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1032; State v. Rivers, 124 Iowa 17; Flewellen v. Mittenenthal, (Tex. Civ. App. 1896) 38 S. W. Rep. 234; Whitten v. Fincastle Bank, 100 Va. 546.

**Illustrations of Implied Power.**—A manager having the sole and exclusive control and management of a branch house of a mercantile and manufacturing corporation whose domicile is in a distant state has authority, when necessary, to borrow money and give his principal's negotiable note therefor. Glidden, etc., Varnish Co. v. Interstate Nat. Bank, (C. C. A.) 69 Fed. Rep. 912.

A power of attorney "to transact all business of every nature which I may have in the state of Texas, and to make, execute, and deliver any and all papers, documents, deeds of conveyance, or other instruments," confers authority to transfer a note. Presnall v. McLeary, (Tex. Civ. App. 1899) 50 S. W. Rep. 1066.

**1033.** 1. **Illustrations of Interpretation of Authorities**—*No Authority to Renew.*—Stock Exch. Bank v. Williamson, 6 Okla. 348.

*Or Indorse.*—Authority to draw on the principal for money to carry on the business includes authority to procure an indorser of the drafts drawn. Marsh v. French, 82 Ill. App. 76.

*No Authority to Waive Protest and Notice.*—Authority to indorse notes, etc., does not include authority to waive protest or notice. Needles' Estate, 4 Pa. Dist. 762.

2. Eldridge v. Husted, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 177, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033, and supporting the text paragraph generally.

**Authority Strictly Pursued.**—Power to make restricted indorsements will not authorize a general indorsement in blank. Exchange Bank v. Thrower, 118 Ga. 433.

Authority to make drafts for timber delivered to the agent does not confer authority to make drafts for timber which he has not received and which has no existence. Gray Tie, etc., Co. v. Farmers' Bank, 78 S. W. Rep. 207, 25 Ky. L. Rep. 1596. Compare Slaughter v. Fay, 80 Ill. App. 105.

**1034.** 3. Boord v. Strauss, 39 Fla. 381; Eldridge v. Husted, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 177, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1034, and reversing (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 534; Connell v. McLoughlin, 28 Oregon 230; Rohrbough v. U. S. Express Co., 50 W. Va. 148, 88 Am. St. Rep. 849, citing 1 AM. AND

ENG. ENCYC. OF LAW (2d ed.) 1032, 1034. Compare Slaughter v. Fay, 80 Ill. App. 105.

**Accommodation Paper.**—Myers v. Walker, 104 Ga. 316.

4. California Powder Works v. Atlantic, etc., R. Co., 113 Cal. 329; Adams Express Co. v. Carnahan, 29 Ind. App. 606, 94 Am. St. Rep. 279, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1034; Jones v. New York, etc., R. Co., 3 N. Y. App. Div. 341; Waldron v. Fargo, 52 N. Y. App. Div. 18.

5. Drohan v. Merrill, etc., Lumber Co., 75 Minn. 251, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1034; Opinion of Justices, 72 N. H. 601. See also Stahlberger v. New Hartford Leather Co., 92 Hun (N. Y.) 245.

**Time for Which Agent May Employ.**—An agent has apparent authority to hire an employee for six months, when it is well known that the business will last that length of time. World's Columbian Exposition v. Richards, 57 Ill. App. 601.

**Compensation.**—Authority to employ laborers to work upon the roadbed of a railway company has been held not to imply power to agree to pay the rent of their dwelling houses. Savannah, etc., R. Co. v. Humphreys, 114 Ga. 681.

An agent to employ has no authority to make an agreement that if an employee will resign his position the balance of his salary for the season will be paid to him. Prior v. Flagler, (N. Y. City Ct. Gen. T.) 10 Misc. (N. Y.) 496.

**Authority to Employ Implied.**—One employed as manager of a department of a store, his duties in connection therewith to begin at a future date, has ostensible authority to hire help so as to have that department organized and ready for business on that date. Wanamaker v. Megraw, 92 N. Y. App. Div. 616.

**1035.** 1. Security Sav. Bank v. Smith, 38 Oregon 72, 84 Am. St. Rep. 756; Young v. Union Sav. Bank, etc., Co., 23 Wash. 360.

**When Authority Implied.**—Authority to borrow money must be created by express terms, or be necessarily implied from the very nature of the agency actually created. It will not be presumed even from the appointment of one as general agent, unless the character of the business or the duties of the agent are of such a nature that he is bound to borrow in order to carry out his instructions and the duties of the office. Exchange Bank v. Thrower, 118 Ga. 433. But it may be implied when indispensable to the conduct of the business in the agent's hands. Ladd v. Aetna Indemnity Co., 128 Fed. Rep. 298.

**What Powers Implied.**—One who places a mortgage and certificate of no defense in the hands of an agent for the purpose of obtaining a loan cannot deny such agent's authority to repledge the securities for a second loan to pay the first. Hayes's Appeal, 195 Pa. St. 177. An agent to borrow money for his principal

**1035. VII. MANNER OF EXECUTION OF AUTHORITY — 2. Formal Execution**

— *a. GENERAL RULE.* — See note 7.

**1036.** *b. INSTRUMENTS UNDER SEAL* — (1) *Application of the General Rule.* — See note 1.

**1038.** "Principal by Agent" — "Agent for Principal." — See note 1.

Statutes. — See note 5.

(2) *Imperfect Execution* — (a) *Agent Bound — Agent Using Apt Words to Charge Himself.* — See note 6.

**1039.** See notes 2, 3.

**1041.** (c) *Conveyances of Estates.* — See note 2.

**1042.** *c. NEGOTIABLE INSTRUMENTS* — (1) *Application of General Rule.* — See notes 2, 3.

**1043.** *Descriptio Personæ.* — See note 1.

**1046.** (3) *Signature in Principal's Name.* — See note 2.

(4) *Undisclosed Principal.* — See note 3.

**1047.** (5) *Principal Impliedly Disclosed — Name Printed on the Instrument.* — See note 1.

has no right to pay it over to a third person. *Land Mortg. Invest. Agency Co. v. Preston*, 119 Ala. 290.

An agent authorized to negotiate a mortgage loan, and to bind his principal to pay for making a complete search of the title to premises to be mortgaged, has no power to give to the loaning company "clear title insurance." *Giltinan v. Lehman*, 65 N. J. L. 668.

**Authority to Effect a Loan for a Particular Purpose** does not empower the agent to obtain a smaller loan for a different purpose. *Keegan v. Rock*, (Iowa 1905) 102 N. W. Rep. 805.

**Evidence of Agency to Borrow Money.** — Evidence that a person acted as attorney for another is not competent for the purpose of establishing an agency to borrow money. *Keegan v. Rock*, (Iowa 1905) 102 N. W. Rep. 805.

**1035. 7. Estrella Vineyard Co. v. Butler**, 125 Cal. 232; *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393; *Cockerham v. Perot*, 48 La. Ann. 209; *Persons v. McDonald*, 60 Neb. 452, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1035; *Wallace v. Langston*, 52 S. Car. 152, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1035; *Findley v. Cunningham*, 53 W. Va. 1, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1035.

**1036. 1. Must Be in Name of Principal, under His Seal, and Purport to Be His Deed.** — *Chauche v. Pare*, 75 Fed. Rep. 283, 44 U. S. App. 544; *Williams v. Paine*, 7 App. Cas. (D. C.) 116; *Lenney v. Pinley*, 118 Ga. 718, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1036; *Walsh v. Murphy*, 167 Ill. 228, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1036; *McColgan v. Katz*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 136; *Bourne v. Campbell*, 21 R. I. 490; *Wallace v. Langston*, 52 S. Car. 152, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1036; *Turner v. Kingston Lumber, etc., Co.*, (Tenn. Ch. 1900) 59 S. W. Rep. 410.

**Rule in Equity.** — *Hall v. Hooper*, 47 Neb. 111, holding that a mortgage made by an agent in his own name is binding in equity, if the agent had authority, and the failure to execute it in the name of the principal resulted from accident or mistake; *Turner v. Kingston Lumber, etc., Co.*, (Tenn. Ch. 1900) 59 S. W. Rep. 410.

**1038. 1. Sun Printing, etc., Assoc. v. Moore**, 183 U. S. 642, affirming (C. C. A.) 101 Fed. Rep. 591; *Rand v. Moulton*, 72 N. Y. App. Div. 236, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1037; *Donovan v. Welch*, 11 N. Dak. 113; *Turner v. Kingston Lumber, etc., Co.*, (Tenn. Ch. 1900) 59 S. W. Rep. 410.

5. See *McCreary v. McCorkle*, (Tenn. Ch. 1899) 54 S. W. Rep. 53.

6. *De Remer v. Brown*, 36 N. Y. App. Div. 634.

**1039. 2. Braun v. Hess**, 187 Ill. 283, 79 Am. St. Rep. 221, affirming 86 Ill. App. 544.

3. *Wallace v. Langston*, 52 S. Car. 152, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1038, 1039.

**1041. 2. Williams v. Paine**, 7 App. Cas. (D. C.) 116.

**1042. 2. Western Wheeled Scraper Co. v. McMillen**, (Neb. 1904) 99 N. W. Rep. 512.

3. **Corporation Signature Followed by That of Officer.** — *Wilson v. Fite*, (Tenn. Ch. 1897) 46 S. W. Rep. 1056, wherein the signers were held not to be bound individually.

**1043. 1. Andres v. Kridler**, 47 Neb. 585; *Penn Mut. L. Ins. Co. v. Conoughy*, 54 Neb. 123; *Western Wheeled Scraper Co. v. McMillen*, (Neb. 1904) 99 N. W. Rep. 512; *Campbell v. Porter*, 46 N. Y. App. Div. 628; *Barnhisel v. Commercial Nat. Bank*, 7 Ohio Cir. Dec. 533, 14 Ohio Cir. Ct. 124; *Keokuk Falls Imp. Co. v. Kingsland, etc., Mfg. Co.*, 5 Okla. 32.

**Both Principal and Agent Liable.** — The fact that an agent has made himself personally liable by the execution of a note does not prevent his principal from also being liable, where he received the benefit of the goods for the purchase of which the note was given. *Froelich v. Froelich Trading Co.*, 120 N. Car. 39.

**1046. 2. Northwestern Sav. Bank v. International Bank**, 90 Mo. App. 205; *Youngs v. Perry*, 42 N. Y. App. Div. 247.

3. *Patterson v. Irvin*, (Ala. 1905) 38 So. Rep. 121; *Keokuk Falls Imp. Co. v. Kingsland, etc., Mfg. Co.*, 5 Okla. 32.

**1047. 1. Akron Second Nat. Bank v. Midland Steel Co.**, 155 Ind. 581, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1047. See also *Continental Nat. Bank v. Heilman*, 81 Fed. Rep. 36.

**1049.** (6) *Agent as Payee and Indorser — Bank Officers.* — See note 2.

**1050.** *d. SIMPLE CONTRACTS OTHER THAN NEGOTIABLE INSTRUMENTS — (1) General Rule — Intention Controlling.* — See note 1.

**1051.** See notes 1, 2.

*e. ADMISSIBILITY OF PAROL EVIDENCE — (1) Instruments under Seal — Parol Evidence Not Admissible to Discharge Agent or Charge Principal.* — See note 5.

**1052.** (2) *Negotiable Instruments — (a) Action Between the Original Parties — When Parol Evidence Admissible.* — See note 2.

**1053.** Instrument Not Indicating Principal. — See note 1.

**1054.** Parol Evidence Not Admissible to Discharge Agent. — See note 1.

(b) *Action by Bona Fide Holder — When Parol Evidence Admitted.* — See note 3.

**1055.** (3) *Other Simple Contracts.* — See notes 1, 2, 3, 4.

**1056.** *f. PUBLIC OFFICERS — Presumed to Have Contracted on Principal's Credit.* — See note 2.

**1057.** *g. JOINT AGENTS — Private Agency.* — See note 3.

*Contrary Intention.* — See note 4.

**1058.** Public Agency. — See note 1.

**1049.** 2. *Brenner v. Lawrence*, (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 755.

**1050.** 1. *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436.

**1051.** 1. *Conant v. American Rubber Tire Co.*, 48 N. Y. App. Div. 327; *Donovan v. Welch*, 11 N. Dak. 113.

2. *Edwards v. Gildemeister*, 61 Kan. 141; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436; *State v. Cass County*, 60 Neb. 566; *Turner v. Kingston Lumber, etc., Co.*, (Tenn. Ch. 1000) 59 S. W. Rep. 410.

5. *Farrar v. Lee*, 10 N. Y. App. Div. 130; *Blanchard v. Archer*, 93 N. Y. App. Div. 459. See further *infra*, this title, **1141**, 1, 2.

**1052.** 2. *Simanton v. Vliet*, 61 N. J. L. 595.

**1053.** 1. *Manufacturers', etc., Bank v. Love*, 13 N. Y. App. Div. 561; *New York State Banking Co. v. Van Antwerp*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 38; *Barnhisel v. Commercial Nat. Bank*, 7 Ohio Cir. Dec. 533, 14 Ohio Cir. Ct. 124; *Shuey v. Adair*, 18 Wash. 188, 63 Am. St. Rep. 879; *Murphy v. Clarkson*, 25 Wash. 585. See also *Marx v. Luling Co-Operative Assoc.*, 17 Tex. Civ. App. 408. And see *infra*, this title, **1141**, 3.

*Contra.* — See *Foster v. Honan*, 22 Ind. App. 252.

*On an Issue of Reformation* parol evidence has been held to be admissible. *Western Wheeled Scraper Co. v. McMillen*, (Neb. 1904) 99 N. W. Rep. 512.

**1054.** 1. *Keokuk Falls Imp. Co. v. Kingsland, etc., Mfg. Co.*, 5 Okla. 32.

*When Not Admissible to Charge Agent.* — *Brackenridge v. Claridge*, 91 Tex. 527.

*Note by Corporation, Signature by Agents Personally.* — *Simanton v. Vliet*, 61 N. J. L. 595.

3. *Intention to Contract as Agent.* — *Society of Shakers v. Watson*, 68 Fed. Rep. 730, 37 U. S. App. 147.

*Explaining Ambiguity.* — Where, upon the face of the note, such an ambiguity exists as makes it impossible for the court to say what the contract does express, parol evidence may be admitted to explain the contract, but not to mod-

ify or change it so that the maker may avoid his liability. *Keokuk Falls Imp. Co. v. Kingsland, etc., Mfg. Co.*, 5 Okla. 32.

**1055.** 1. *Southern Pac. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368.

2. *Prichard v. Budd*, 76 Fed. Rep. 710, 42 U. S. App. 186; *Estrella Vineyard Co. v. Butler*, 125 Cal. 232; *Edwards v. Gildemeister*, 61 Kan. 141; *Crawford v. Moran*, 168 Mass. 446; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427; *Tobin v. Larkin*, 183 Mass. 389; *Haubelt v. Rea, etc., Mill Co.*, 77 Mo. App. 672; *Rice v. Fidelity, etc., Co.*, 1 Lack. Leg. N. (Pa.) 111; *Belt v. Washington Water Power Co.*, 24 Wash. 387.

3. *Prichard v. Budd*, 76 Fed. Rep. 710, 42 U. S. App. 186; *Powell v. Wade*, 109 Ala. 55, 55 Am. St. Rep. 915; *Escondido Oil, etc., Co. v. Glaser*, 144 Cal. 494; *Rice, etc., Malting Co. v. International Bank*, 185 Ill. 422, *affirming* 86 Ill. App. 136; *State v. O'Neill*, 74 Mo. App. 134; *Coulter v. Blatchley*, 51 W. Va. 163.

4. *Prichard v. Budd*, 76 Fed. Rep. 710, 42 U. S. App. 186; *Vail v. Northwestern Mut. L. Ins. Co.*, 192 Ill. 567, *affirming* 92 Ill. App. 655; *Miller v. Early*, 58 S. W. Rep. 789, 22 Ky. L. Rep. 825; *Lewis v. Weidenfeld*, 114 Mich. 581; *Wm. Lindeke Land Co. v. Levy*, 76 Minn. 364; *McDonald v. Wesendonck*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 776.

**1056.** 2. *Akron Second Nat. Bank v. Midland Steel Co.*, 155 Ind. 581, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056.

**1057.** 3. *Authority Conferred on a Partnership.* — *Albany Land Co. v. Rickel*, 162 Ind. 222; *McCulloch County Land, etc., Co. v. Whitefort*, 21 Tex. Civ. App. 314.

*Assignment by One Agent to Other.* — An assent to the assignment by one of two joint agents to the other of his interest in the contract of agency is equivalent to an agreement to substitute the assignee for the assignor. *Albany Land Co. v. Rickel*, 162 Ind. 222.

4. *U. S. Fidelity, etc., Co. v. Ettenheimer*, (Neb. 1904) 99 N. W. Rep. 652.

**1058.** 1. *Doland v. Grand Valley Irrigation Co.*, 28 Colo. 150, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057.

**1058. VIII. DUTIES AND LIABILITIES INTER SE — 1. Of Agent to Principal — a. FIDELITY TO INSTRUCTIONS — (1) General Rule — (a) In Case of Remunerated Agent.** — See notes 3, 5.

**1059.** Illustrations. — See notes 1, 3.

**1060.** See note 1.

Intention. — See note 2.

(b) In Case of Unremunerated Agent. — See notes 5, 6.

**1061.** (2) *Qualifications and Exceptions* — (b) *Illegal or Immoral Acts.* — See note 3.

**1062.** (d) *Uncertainty and Ambiguity in Instructions.* — See notes 2, 3.

(3) *Effect of Established Usage or Custom.* — See note 4.

**1063.** (4) *Departure from Instructions — Nature of Liability.* — See notes 1, 2.

*b. REASONABLE SKILL AND DILIGENCE — (1) Agency for Reward — (a) Rule and Its Extent.* — See note 3.

**1058. 3. A Request to an Agent** from his principal for action in the line of the agency, is equivalent to a command. *British America Ins. Co. v. Wilson*, 77 Conn. 559.

**5. Liability of Agent for Disobedience of Instructions.** — *British Am. Ins. Co. v. Wilson*, 77 Conn. 559; *Holmes v. Langston*, 110 Ga. 861; *Oxford Lake Line v. Pensacola First Nat. Bank*, 40 Fla. 349; *Dazey v. Roleau*, 111 Ill. App. 367; *Continental Ins. Co. v. Clark*, (Iowa 1904) 100 N. W. Rep. 524; *Northern Assur. Co. v. Borgelt*, (Neb. 1903) 93 N. W. Rep. 226, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058; *Talcott v. Cowdry*, (Supm. St. App. T.) 17 Misc. (N. Y.) 333; *Minneapolis Trust Co. v. Mather*, 181 N. Y. 205.

**1059. 1. Responsibility Left to Agent.** — Where the responsibility of the purchaser is left to the agent's judgment, the principal is bound thereby. *Peay v. Seigler*, 48 S. Car. 496.

**3. Violating Instructions to Sell for Cash.** — An agent instructed to sell for cash only does not violate such instructions by postponing payment of the price until actual delivery of the goods. *Bristol v. Mente*, 79 N. Y. App. Div. 67, affirmed (N. Y. 1904) 70 N. E. Rep. 1096.

**1060. 1. Failure to Insure as Instructed.** — *Matteson v. Rice*, 116 Wis. 328.

**2. Dazey v. Roleau**, 111 Ill. App. 367.

**6. Marshall v. Ferguson**, 94 Mo. App. 175.

**5. Nashville, etc., R. Co. v. Smith**, 132 Ala. 434; *Battelle v. Cushing*, 21 D. C. 59; *Marshall v. Ferguson*, 94 Mo. App. 175.

**1061. 3. Bishop v. American Preserver's Co.**, 157 Ill. 284, 48 Am. St. Rep. 317; *Latrave v. Morgan*, 14 Quebec Super. Ct. 511.

**1062. 2. Central of Georgia R. Co. v. Felton**, 110 Ga. 597, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1062.

**3. Instructions Uncertain and Obscure.** — *Oxford Lake Line v. Pensacola First Nat. Bank*, 40 Fla. 349; *Berry v. Haldeman*, 111 Mich. 667; *Falksen v. Falls City State Bank*, (Neb. 1904) 98 N. W. Rep. 425.

**No Authority to Substitute Own Judgment.** — The fact that an agent's instructions will admit of different interpretations does not authorize him to disregard them entirely, and substitute his own judgment in the place thereof. If he acts at all in such cases, he must follow one of the interpretations reasonably derivable from the instructions. *Oxford Lake Line v. Pensacola First Nat. Bank*, 40 Fla. 349.

**4. Central of Georgia R. Co. v. Felton**, 110 Ga. 597, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1062; *State v. Chilton*, 49 W. Va. 453, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1062.

**1063. 1. Marshall v. Ferguson**, 94 Mo. App. 175, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1062; 101 Mo. App. 653.

**Measure of Damages.** — In an action for breach of contract and negligence in investing in unsafe mortgages, the measure of damages is the difference in value between the mortgages acquired and safe mortgages, measured as of the time when the breach of contract and wrong occurred. *Coffing v. Dodge*, 167 Mass. 231.

Where land was sold by an agent with full power to sell and convey, but who, without fraud, exceeded his authority, and accepted bonds instead of money in payment, the measure of damages was held to be the market value of the land at the time, it appearing that the price named in the deed was fictitious, and was obtained only by reason of the agreement to accept in payment securities of doubtful value. *Paul v. Grimm*, 183 Pa. St. 330.

**2. Chase v. Baskerville**, (Minn. 1904) 101 N. W. Rep. 950; *Marshall v. Ferguson*, 94 Mo. App. 175.

**There Must Be an Entire Departure** by the agent from his authority before an action for a conversion can be maintained. *Minneapolis Trust Co. v. Mather*, 181 N. Y. 205.

**May Waive Tort.** — The principal may waive the tort and recover on the common counts in assumpsit. *Brown v. Foster*, (Mich. 1904) 100 N. W. Rep. 167. See also *Paul v. Grimm*, 165 Pa. St. 139, 44 Am. St. Rep. 648.

**Agent to Purchase — Refusal to Deliver.** — Where an agent, after purchasing goods for his principal, refuses to deliver them, and holds them as his own, he is guilty of conversion. *Nading v. Howe*, 23 Ind. App. 690.

**3. Rule as to Skill and Negligence of Remunerated Agent.** — *Rice v. Longfellow Bros. Co.*, 82 Minn. 154; *Ehmer v. Title Guarantee, etc., Co.*, 89 Hun (N. Y.) 120; *American Cent. Ins. Co. v. Hagerty*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 213.

**Agent Not Liable for Accidental Losses.** — See *Louisville, etc., R. Co. v. Buffington*, 131 Ala. 620; *Norton v. Melick*, 97 Iowa 564; *Keystone*



**1065.** See note 1.

**Agents to Loan or Invest.** — See note 6.

**1066.** **Agents to Collect.** — See note 1.

**1067.** **Agents to Sell.** — See note 2.

**1068.** **Measure of Damages.** — See note 5.

(b) **Duty as to Insurance.** — See note 7.

**1069.** See note 1.

(c) **Duty to Advise Principal of Matters Material to His Interest.** — See note 2.

**1070.** (2) **Gratuitous Agency** — (a) **Ordinary Agencies.** — See note 1.

(b) **Agencies Implying Peculiar Knowledge or Skill.** — See note 5.

**1071.** c. **GOOD FAITH AND LOYALTY** — (1) *Necessity and Extent of Rule.* — See notes 1, 2, 3, 4.

*Watch Case Co. v. Romero*, (N. Y. City Ct. Spec. T.) 36 Misc. (N. Y.) 381.

**An Error of Judgment** is not necessarily evidence of a want of skill or care. *Coombs v. Beede*, 89 Me. 187, 56 Am. St. Rep. 406.

**1065. 1. Insurance Agents.** — *Shepard v. Davis*, 42 N. Y. App. Div. 462.

**6. Agent to Loan and Invest — Insufficient Securities.** — An agent to lend money is liable for negligence in taking insufficient security. *Van Cott v. Hull*, 11 N. Y. App. Div. 89; *Lowenburg v. Wolley*, 25 Can. Sup. Ct. 51. See also *Ledbetter v. Vinton*, 108 Ala. 644.

To the same effect as *Stewart v. Parnell*, 147 Pa. St. 523, stated in the original note, see *Wagner v. Phillips*, 12 S. Dak. 335.

**Not Liable Unless Negligent.** — An agent having authority to lend money is not liable for its loss unless he was guilty of negligence with respect to such loan. *Haines v. Christie*, 28 Colo. 502.

**1066. 1. In Making Collections.** — *Omaha Nat. Bank v. Kiper*, 60 Neb. 34, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1066. See also *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. Dak. 382; *Simmons v. Looney*, 41 W. Va. 738.

**1067. 2. Willson v. Imperial Fertilizer Co.**, 67 S. Car. 467.

**Sale on Credit.** — An agent authorized to sell on credit is not liable for conversion of goods so sold although he has failed to collect therefor. *Standard Fertilizer Co. v. Van Valkenburgh*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 559.

Where there is no stipulation against selling on credit, and the agent sells in good faith on credit and fails to collect, the principal can exact civil liability for the invoice price, but cannot hold the agent in arrest and bail. *Southern Grocery Co. v. Davis*, 132 N. Car. 96.

**1068. 5. Omaha Nat. Bank v. Kiper**, 60 Neb. 34.

**Failure to Collect Commercial Paper.** — The measure of damages for the negligence of an agent to collect commercial paper is *prima facie* the amount of the paper, with interest. *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. Dak. 382.

*7. Prichard v. Deering Harvester Co.*, 117 Wis. 97.

**1069. 1. Sandusky v. Beirne**, 80 N. Y. App. Div. 272.

**2. Rideri v. Salvesen**, Sc. Ct. of Sess. 6 F. 64; *Morey v. Laird*, 108 Iowa 679, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069; *Holmes v. Cathcart*, 88 Minn. 213, 97 Am. St. Rep. 513,

citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1609; *Snell v. Goodlander*, 90 Minn. 533, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081 [1069]; *Bush v. Froelich*, 14 S. Dak. 62; *Dorr v. Camden*, 55 W. Va. 226.

**Agent Must Communicate Facts Affecting Value of Land to Be Sold by Him.** — *Hall v. Gambrill*, 88 Fed. Rep. 709; *Prince v. Dupuy*, 163 Ill. 417.

**1070. 1. Ordinary Agencies Not Implying Peculiar Knowledge or Skill.** — *Charlesworth v. Whitlow*, (Ark. 1905) 85 S. W. Rep. 423, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1070. See also *Samonset v. Mesnager*, 108 Cal. 354.

**An Agent Without Remuneration to Lend the money of another is guilty of gross negligence in taking no security for the loan.** *Samonset v. Mesnager*, 108 Cal. 354.

**5. Lawall v. Groman**, 180 Pa. St. 532, 57 Am. St. Rep. 662.

**1071 1. Largey v. Bartlett**, 18 Mont. 265; *Townsley v. Bankers' L. Ins. Co.*, 56 N. Y. App. Div. 232, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071; *West End Real Estate Co. v. Nash*, 51 W. Va. 341, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071.

**Fraud.** — A positive affirmation of the quality of lands as of one's personal knowledge when he has no knowledge on the subject, whereby his employer is misled and injured, renders the agent making it liable. *Miller v. John*, 111 Ill. App. 56.

**Bribe.** — The fact of the agent having been bribed or tempted to betray his principal is sufficient to entitle the principal to repudiate the transaction, and it is not necessary to show the actual effect of the bribe or gift upon the agent. *Alger v. Anderson*, 78 Fed. Rep. 729.

**2. St. Louis Electric Light, etc., Co. v. Edison General Electric Co.**, 64 Fed. Rep. 997; *Sessions v. Payne*, 113 Ga. 955, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071; *Townsley v. Bankers' L. Ins. Co.*, 56 N. Y. App. Div. 232, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071; *Gillespie v. Weiss*, 22 Pa. Co. Ct. 177, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071, 8 Pa. Dist. 170, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071; *Wallace v. Oceanic Packing Co.*, 25 Wash. 143; *Atty.-Gen. v. Halifax*, 36 Nova Scotia 177, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071.

**3. Gillespie v. Weiss**, 8 Pa. Dist. 170, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071.

**4. Calmon v. Sarraile**, 142 Cal. 638; *Gillespie v. Weiss*, 8 Pa. Dist. 170, citing 1 AM. AND ENG.

**1072.** (2) *Making Profit Out of Agency.* — See notes 1, 2, 3, 4.

**1073.** *Gratuities.* — See note 2.

(3) *Acting for Both Parties* — Rule Stated. — See note 4.

ENCYC. OF LAW (2d ed.) 1071; Triplett v. Woodward, 98 Va. 187.

**1072.** 1. *Agent May Not Deal in Agency for His Own Benefit* — *England.* — Bulfield v. Tourner, 15 Reports 176.

*Canada.* — Earle v. Burland, 27 Ont. App. 540; Jones v. Linde British Refrigeration Co., 32 Ont. 191; Martel v. Pageau, 9 Quebec Super. Ct. 175.

*United States.* — McKinley v. Williams, (C. A.) 74 Fed. Rep. 94.

*California.* — Calmon v. Sarraile, 142 Cal. 638.

*Colorado.* — Calumet Gold Min., etc., Co. v. Phillips, 31 Colo. 267, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1072; Whitehead v. Lynn, (Colo. App. 1904) 76 Pac. Rep. 1119.

*Georgia.* — Sessions v. Payne, 113 Ga. 955, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1072.

*Illinois.* — Tilden v. Blackwell, 94 Ill. App. 605; James T. Hair Co. v. Daily, 161 Ill. 379.

*Kentucky.* — McDoel v. Ohio Valley Imp., etc., Co., (Ky. 1896) 36 S. W. Rep. 175.

*Maryland.* — Vansant v. State, 96 Md. 110, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1072.

*Minnesota.* — Snell v. Goodlander, 90 Minn. 533; Farmers' Warehouse Assoc. v. Montgomery, 92 Minn. 194; Schick v. Suttle, (Minn. 1905) 102 N. W. Rep. 217.

*Missouri.* — Smith v. Taylor, 57 Mo. App. 668; Patterson v. Missouri Glass Co., 72 Mo. App. 492; Marshall v. Ferguson, 94 Mo. App. 175.

*Nebraska.* — Barbar v. Martin, (Neb. 1903) 93 N. W. Rep. 722.

*New York.* — Carruthers v. Diefendorf, 66 N. Y. App. Div. 31.

*Pennsylvania.* — Graham v. Cummings, 208 Pa. St. 516; Humbird v. Davis, 210 Pa. St. 311.

*Texas.* — Moore v. Waco Bldg. Assoc., 19 Tex. Civ. App. 68.

*Utah.* — Argentine Min. Co. v. Benedict, 18 Utah 183.

**Agreement for Profits as Compensation.** — If there is a fair understanding, when the agency is created, that the agent shall have certain profits as compensation for his services, he will be entitled to receive them by virtue of the contract. O'Day v. Conn, 131 Mo. 321.

2. McKinley v. Williams, (C. C. A.) 74 Fed. Rep. 94; Nading v. Howe, 23 Ind. App. 690; Densmore v. Searle, 7 N. Y. App. Div. 45.

**Measure of Relief.** — The measure of the principal's relief in equity is the exact amount of the agent's profit. Loudenslager v. Woodbury Heights Land Co., 58 N. J. Eq. 556.

3. **Selling for Higher Price than That Named.** — Mulvane v. O'Brien, 58 Kan. 463.

4. **Purchasing for Price Less than That Named by Principal.** — Kuhlman v. Burns, 117 Cal. 469; Callaway v. Wilson, 141 Cal. 421; Salsbury v. Ware, 183 Ill. 505; Yeane v. Keck, 183 Pa. St. 532; Hindle v. Holcomb, 34 Wash. 336.

**1073.** 2. *Compare* Barbar v. Martin, (Neb. 1903) 93 N. W. Rep. 722, holding that an agent

for one party cannot appropriate to himself a fee paid by the other party to the contract for bringing about the contract.

**Gift After Transaction Completed.** — The principal is not entitled to a gratuity given to the agent after the transaction is fully completed. Lamb Knit-Goods Co. v. Lamb, 119 Mich. 568.

**Gratuity Vitiates Contract.** — Any gratuity given to an agent of the buyer by the seller for the purpose of influencing the execution of his agency vitiates a contract which is subsequently made by the agent, as presumptively made under that influence, or one subsequently made by the buyer himself, if in any material degree effected through the influence of the corrupted agent. Alger v. Keith, (C. C. A.) 105 Fed. Rep. 105.

4. **General Rule** — *Agent May Not Act for Both Parties* — *England.* — Bartram v. Lloyd, 88 L. T. N. S. 286, 90 L. T. N. S. 357.

*United States.* — Findlay v. Pertz, 66 Fed. Rep. 427, 31 U. S. App. 340; Donovan v. Campion, 85 Fed. Rep. 71, 56 U. S. App. 388.

*California.* — Blood v. La Serena Land, etc., Co., 113 Cal. 221.

*Colorado.* — British America Assur. Co. v. Cooper, 6 Colo. App. 25.

*Georgia.* — Ramspeck v. Pattillo, 104 Ga. 772, 69 Am. St. Rep. 197.

*Illinois.* — Bunn v. Keach, 214 Ill. 259, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1073; Black v. Miller, 71 Ill. App. 342.

*Iowa.* — Morey v. Laird, 108 Iowa 670.

*Kentucky.* — McDoel v. Ohio Valley Imp., etc., Co., (Ky. 1896) 36 S. W. Rep. 175.

*Maryland.* — Baltimore Sugar Refining Co. v. Campbell, etc., Co., 83 Md. 36.

*Missouri.* — Harper v. Fidler, 105 Mo. App. 680.

*Nebraska.* — Judkins v. Burr, (Neb. 1901) 95 N. W. Rep. 475.

*New York.* — Carr v. National Bank, etc., Co., 167 N. Y. 375, 82 Am. St. Rep. 725.

*Virginia.* — Ferguson v. Gooch, 94 Va. 1.

*West Virginia.* — West End Real Estate Co. v. Nash, 51 W. Va. 341, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1073.

**Property Sold at Public Auction.** — Union Planters' Bank v. Edgell, (Miss. 1903) 33 So. Rep. 409.

**Effect of Custom or Usage.** — The rule cannot be defeated by any custom or usage of real-estate agents or brokers which is plainly of their own creation, for their convenience and advantage in the settlement of speculative dealings. Ferguson v. Gooch, 94 Va. 1.

**The Contract Is Voidable, but Not Void,** unless the conduct of the person acting in a dual relation amounted to fraud. Salem Iron Co. v. Lake Superior Consol. Iron Mines, (C. C. A.) 112 Fed. Rep. 239.

**If the Principal Refuses to Comply with His Contract** with his agent, the latter may perhaps consider the contract terminated, and accept employment adverse to the principal. Asher v. Beckner, (Ky. 1907) 41 S. W. Rep. 35.

**1074.** See note 1.

Limitation — Where Interests Not Conflicting. — See note 2.

Limitation — Where Principals Consent. — See note 3.

**1075.** (5) *Uniting Opposite Characters of Buyer and Seller* — (a) *Statement of Rule.* — See note 3.**1077.** (b) *Agent to Purchase, Purchasing from Himself.* — See notes 1, 2.(c) *Agent to Sell, Purchasing for Himself.* — See note 3.**1078.** See note 1.**1079.** *Purchase Through Third Party.* — See note 2.**1080.** *Character of Sale Immaterial.* — See note 1.*Sale Not Void.* — See note 4.(d) *Adoption of Transaction by Principal — Implied.* — See note 8.**1081.** (e) *Dealing Directly with the Principal — Rule Stated.* — See note 1.*Must Make Full Disclosure.* — See note 2.**1082.** *Presumption of Invalidity.* — See note 1.(6) *Agent to Purchase, Purchasing for Himself.* — See note 5.**1074.** 1. *Goodell v. Hurlbut*, 5 N. Y. App. Div. 77.2. *German Ins. Co. v. Independent School Dist.*, 80 Fed. Rep. 366, 49 U. S. App. 271; *Nevada Nickel Syndicate v. National Nickel Co.*, 96 Fed. Rep. 133; *Cunningham v. State*, 105 Ga. 676; *Casey v. Donovan*, 65 Mo. App. 521.3. *Consent of Principals.* — *Pine Mountain Iron, etc., v. Bailey*, 94 Fed. Rep. 258, 36 C. C. A. 229; *Nevada Nickel Syndicate v. National Nickel Co.*, 96 Fed. Rep. 133; *Lawall v. Groman*, 180 Pa. St. 532, 57 Am. St. Rep. 662; *Patterson v. Van Loon*, 186 Pa. St. 367; *Valley Glass Co. v. American Cent. Ins. Co.*, 197 Pa. St. 254; *Baldwin v. Root*, (Tex. Civ. App. 1896) 38 S. W. Rep. 630.**1075.** 3. *General Rule — Agent May Not Be Both Buyer and Seller.* — *Pine Mountain Iron, etc., v. Bailey*, 94 Fed. Rep. 258, 36 C. C. A. 229; *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393; *Godfrey v. Dutton*, 16 App. Cas. (D. C.) 117, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1075; *Baltimore Sugar Refining Co. v. Campbell, etc., Co.*, 83 Md. 36; *Barnes v. Lynch*, 9 Okla. 11, 156; *Blais v. Brazeau*, 25 R. I. 420, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1075.**1077.** 1. *Whitehead v. Lynn*, (Colo. App. 1904) 76 Pac. Rep. 1119; *Oliver v. Lansing*, 48 Neb. 338.*But the Principal Will Not Be Permitted to Keep the Property and compel a return of the money paid.* *Antiseptic Fiber Package Co. v. Klein*, 119 Mich. 225.2. *Baird v. Ryan*, (Ky. 1896) 35 S. W. Rep. 132.3. *Hodgson v. Raphael*, 105 Ga. 480; *Prince v. Dupuy*, 163 Ill. 417; *Rich v. Black*, 173 Pa. St. 92.**Raffle.** — It has been held that an agent to sell cannot acquire title by raffling the property and becoming the winner at the raffle. *Hodgson v. Raphael*, 105 Ga. 480.**Rule Applies to Leases.** — An agent to lease the lands of his principal, is not authorized to lease them to himself. *Clendenning v. Hawk*, 10 N. Dak. 90.**The Agent of the Vendor Being the President or Agent of the Purchaser** authorizes the principal to repudiate the transaction. *Whitley v. James*, (Ga. 1904) 49 S. E. Rep. 600.**1078.** 1. *Quertermous v. Taylor*, 62 Ark. 598; *Green v. Peeso*, 92 Iowa 261; *Fisher v. Lee*, 94 Iowa 611; *Rogers v. French*, (Iowa 1903) 96 N. W. Rep. 767; *Anderson v. Grand Forks First Nat. Bank*, 5 N. Dak. 80; *Campbell v. Beard*, (W. Va. 1905) 50 S. E. Rep. 747.**Agent for Control of Property Buying at Mortgage Sale.** — *Kimball v. Ranney*, 122 Mich. 160, 80 Am. St. Rep. 548.**1079.** 2. *Agent Purchasing Through Third Person.* — *Moore v. Petty*, (C. C. A.) 135 Fed. Rep. 668; *Webb v. Marks*, 10 Colo. App. 429; *Off v. J. B. Inderrieden Co.*, 74 Ill. App. 105; *White v. Leech*, (Iowa 1903) 96 N. W. Rep. 709; *Hinman v. Devlin*, 31 N. Y. App. Div. 590.**Qualification of Rule — Good Faith.** — See *Smith v. Tyler*, 57 Mo. App. 668.**1080.** 1. *Stipulation as to Price Immaterial.* — *Anderson v. Grand Forks First Nat. Bank*, 5 N. Dak. 80.4. *Whitley v. James*, (Ga. 1904) 49 S. E. Rep. 600; *Anderson v. Grand Forks First Nat. Bank*, 5 N. Dak. 451.8. **Principal Must Disprove Within Reasonable Time.** — Delay for three years in bringing suit against the agent has been held not to constitute a ratification. *Kimball v. Ranney*, 122 Mich. 160, 80 Am. St. Rep. 548.**1081.** 1. **When Agent May Deal Directly with Principal.** — *Swan v. Davenport*, 119 Iowa 46; *Schneider v. Schneider*, (Iowa 1904) 98 N. W. Rep. 159.2. **Duty as to Disclosure.** — *McKinley v. Williams*, (C. C. A.) 74 Fed. Rep. 94; *Fisher v. Seymour*, 23 Colo. 542; *Rogers v. French*, (Iowa 1903) 96 N. W. Rep. 767; *Van Dusen v. Bigelow*, (N. Dak. 1904) 100 N. W. Rep. 723, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Footo v. Utah Commercial, etc., Bank*, 17 Utah 283; *Jackson v. Pleasonton*, 95 Va. 654, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081.**1082.** 1. **Burden upon Agent to Show Fairness of Transaction.** — *Paige v. Akins*, 112 Cal. 401; *Webb v. Marks*, 10 Colo. App. 429; *Jackson v. Pleasonton*, 95 Va. 654, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082.5. *Seacoast R. Co. v. Wood*, 65 N. J. Eq. 530; *Thompson v. Thompson*, (Tenn. Ch. 1899) 54 S. W. Rep. 145; *Jackson v. Pleasonton*, 95 Va. 654; *In re Lemelin*, 22 Quebec Super. Ct. 87.

**1085.** (7) *Acquiring Adverse Interests.* — See notes 2, 3.

**1086.** *d. KEEPING AND RENDERING ACCOUNTS* — (1) *General Principles.* — See note 4.

**1088.** *Legality of Transaction Immaterial* — See note 1.

*Failure to Account — Form of Action.* — See note 2.

**1089.** *Must Keep Regular Accounts.* — See notes 1, 2.

(2) *Commingling Principal's Property with His Own.* — See note 4.

**1085.** 2. *Lagarde v. Anniston Lime, etc., Co.*, 126 Ala. 496; *Bouton v. Cameron*, 99 Ill. App. 600; *Dorrah v. Hill*, 73 Miss. 787; *Quinn v. Le Duc*, (N. J. 1902) 51 Atl. Rep. 199; *Victor Gold, etc., Min. Co. v. National Bank of Republic*, 15 Utah 391.

**3. Agent Purchasing Principal's Land at Tax Sale.** — *Stanley v. McConnell*, 64 Ill. App. 591; *Young v. Iowa Toolers' Protective Assoc.*, 106 Iowa 447; *Bush v. Froelich*, 14 S. Dak. 62; *Dana v. Duluth Trust Co.*, 99 Wis. 663. See also *Abrams v. Wingo*, 9 Kan. App. 884, 59 Pac. Rep. 661.

**After His Discharge**, however, an agent may acquire a good title to his principal's land under a tax deed. *Bemis v. Plato*, 119 Iowa 127.

**1086.** 4. *General Rule as to Accounting.* — *Dodge v. Hatchett*, 118 Ga. 883, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1086; *Clayton v. Patterson*, 32 Ont. 435; *Sherman v. Sherman, etc., Co.*, 64 N. J. Eq. 57.

**Burden on Agent to Show Payment by Him to Principal.** — *Dodge v. Hatchett*, 118 Ga. 883; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74; *Laporte v. Laporte*, 109 La. 958; *Farmers' Warehouse Assoc. v. Montgomery*, 92 Minn. 194. But see *Beattie v. Beattie*, 83 Hun (N. Y.) 295, holding that in the absence of proof the presumption is that the agent has accounted for money collected by him; *Breed v. Breed*, 55 N. Y. App. Div. 121.

**Effect of Accepting Account.** — Where an agent misstates an account in a respect peculiarly within his own knowledge, which misstatements cannot be discovered by an inspection of the account, the fact that the principal accepts and retains such account without objection cannot be regarded as an acquiescence in its accuracy. *Gale v. New York Hay Co.*, 54 N. Y. App. Div. 72.

**A General Showing of the amount of property delivered to the agent and a failure to return or account for it on demand is *prima facie* sufficient, and shifts the burden upon the agent to make a specific accounting.** *Lahr v. Kraemer*, 91 Minn. 26.

**Where Relation Created by Fraud.** — The fact that the relation of principal and agent was created by the fraud of the agent will not affect his duty to account for money collected. *De Leonis v. Etchepare*, 120 Cal. 407.

**1088.** 1. *Holleman v. Bradley Fertilizer Co.*, 106 Ga. 156; *State v. Patterson*, 66 Kan. 447, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088; *Hardy v. Jones*, 63 Kan. 8. 88 Am. St. Rep. 223; *Hertzler v. Geigley*, 196 Pa. St. 419, 79 Am. St. Rep. 724, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088; *Smith v. Blachley*, 188 Pa. St. 550. 68 Am. St. Rep. 887; *Hovey's Estate*, 108 Pa. St. 385; *Lovejoy v. Kaufman*, 16 Tex. Civ. App. 377.

See also *Munns v. Donovan Commission Co.*, 117 Iowa 516.

2. *Schanz v. Martin*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 492. And to the same effect as *Walter v. Bennett*, 16 N. Y. 251, stated in the original note, see *Wright v. Duffie*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 338.

**For an Authorized Sale** by an agent conversion will not lie. *Twogood v. Allee*, (Iowa 1904) 99 N. W. Rep. 288.

**The Principal May Waive the Conversion** and recover in assumpsit the value of the property at the time of such conversion. *Boyle v. Staten Island, etc., Land Co.*, 17 N. Y. App. Div. 624; *Anderson v. Grand Forks First Nat. Bank*, 5 N. Dak. 80. See also *Guernsey v. Davis*, 67 Kan. 378.

**When Trover Maintainable.** — As a general rule, the mere failure of an agent to pay over or account for money collected for his principal will not sustain an action of conversion, because the agent is not bound to pay over the identical money received; but where the principal is entitled to receive, and the terms of the employment of the agent require him to pay over, the identical money received, an action of trover will lie for its conversion. *Salem Light, etc., Co. v. Anson*, 41 Oregon 562. See also *Herrmann Furniture, etc., Works v. Hyman*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 567; *Rothchild v. Schwarz*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 521; *Hartman v. Hicks*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 527.

**1089.** 1. *Keighley v. Durant*, (1901) A. C. 240, 84 L. T. N. S. 777; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74; *Chicago Title, etc., Co. v. Ward*, 113 Ill. App. 327.

**His Failure in This Respect.** — *Armour v. Gaffey*, 30 N. Y. App. Div. 121, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1089, note.

2. *Dodge v. Hatchett*, 118 Ga. 883, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1089.

**The Character of the Statement** must be such as to enable the principal to make some test of its honesty and accuracy. *Chicago Title, etc., Co. v. Ward*, 113 Ill. App. 327.

4. *Kennesaw Guano Co. v. Wappoo Mills*, 119 Ga. 776; *Harding v. Field*, 1 N. Y. App. Div. 391; *Lance v. Butler*, 135 N. Car. 419; *Brooks v. Lowenstein*, 95 Tenn. 262. See also the titles *CONFUSION OF GOODS*; *TRUSTS AND TRUSTEES*.

**Modification of Rule.** — Where an agent mixes trust goods with his own, the principal has an equitable title to a quantity to be taken from the mass equivalent to the amount of money advanced to the agent and expended by him in the purchase of such goods. *Carter v. Long*, 26 Can. Sup. Ct. 430.

**1090.** Bank Deposits. — See notes 3, 4.

**1091.** (3) *Disputing Principal's Title*. — See note 1.

(4) *Demand by Principal for Accounting* — General Rule. — See note 4.

**1092.** Limitations of Rule. — See notes 1, 2.

**1094.** (5) *Interest* — Neglect to Notify Principal of Collection. — See note 2.

Neglect or Refusal to Pay After Demand — See note 3.

Misapplication. — See note 5.

When Agent Receives Interest. — See note 6.

(6) *Accounting in Equity*. — See note 7.

**1095.** See note 2.

**2. Of Principal to Agent** — *a. REMUNERATION FOR SERVICES RENDERED* — (1) *How the Right May Be Derived* — (a) *Special Agreement*. — See note 4.

**1096.** Where Remuneration Is Made to Depend upon Contingency. — See notes 1, 2, 3.

**1090.** 3. *Allen v. Davis*, 17 Ind. App. 338, applying the rule to the case of an overdraft.

4. *Beugnot v. Tremoulet*, 111 La. 1, citing 18 [1] AM. AND ENG. ENCYC. OF LAW (2d ed.) 1090, and supporting the whole text paragraph.

**1091.** 1. *May Not Deny Principal's Title*. — *Gilbert v. American Surety Co.*, 121 Fed. Rep. 499, 57 C. C. A. 619; *Star Brewery v. United Breweries Co.*, 121 Fed. Rep. 713, 58 C. C. A. 133; *Mason v. Hartgrove*, 103 Ill. App. 163; *Ah Tone v. McGarry*, 22 Nev. 310.

4. *Cole v. Baker*, 16 S. Dak. 1.

**1092.** 1. *Where There Is an Unconditional Promise* on the part of the agent to turn over all remittances as soon as received, a demand of performance is not a prerequisite to a suit. *Haebler v. Luttgen*, 2 N. Y. App. Div. 390.

2. *Nading v. Howe*, 23 Ind. App. 690; *Bartels v. Kinnenger*, 144 Mo. 370; *Baker v. Moore*, 4 N. Y. App. Div. 234.

**1094.** 2. *Beugnot v. Tremoulet*, 111 La. 1; *Thorp v. Thorp*, 75 Vt. 34.

3. *Miller v. McCormick Harvesting Mach. Co.*, 84 Ill. App. 571.

**Rate of Interest.** — Refusal to pay after demand entitles the principal to legal interest from the time of such demand although the money had been invested by the agent at a lower rate. *De Crano v. Moore*, 50 N. Y. App. Div. 361.

5. *Beugnot v. Tremoulet*, 52 La. Ann. 454; *Hovey's Estate*, 198 Pa. St. 385.

6. See *De Crano v. Moore*, 50 N. Y. App. Div. 361, holding that where money was invested by an agent at a certain rate of interest, and it does not appear that the agent ever changed the investment, it may be presumed that the money continued to earn that rate.

7. *San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588; *Coffin v. Craig*, 89 Minn. 226; *Decell v. Hazlehurst Oil Mill, etc., Co.*, 83 Miss. 346; *Rogers v. Wheeler*, 89 N. Y. App. Div. 435; *Jordan v. Underhill*, 91 N. Y. App. Div. 124.

**Agent Has Reciprocal Right.** — Wherever the principal has the right to call his agent to account in a court of equity, it follows that the agent has the reciprocal right to maintain such an action. *Underhill v. Jordan*, 72 N. Y. App. Div. 71.

**1095.** 2. *San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588.

4. *Beale v. Bond*, 84 L. T. N. S. 313; *Chapman v. Winson*, 91 L. T. N. S. 17; *Petrie v. Machan*, 28 Ont. 642; *Huber Mfg. Co. v. Watson*, (Ky. 1897) 42 S. W. Rep. 110; *Giltinan v. Lehman*, 65 N. J. L. 668; *Smythe v. O'Brien*, 198 Pa. St. 223.

**Construction of Agreement** — *Cash or Credit Sales*. — Where one agreed to pay an agent for his services in selling his goods, and there was no distinction made between sales for cash and sales on credit, the agent is entitled to compensation for all his sales, whether for cash or on credit. *Sherman v. Consolidated Dental Mfg. Co.*, 202 Pa. St. 451.

Where a certain commission was to be allowed on cash sales, a sale by which a note was given, due more than six months after delivery of the goods, does not entitle the agent to such commission. *Huber Mfg. Co. v. Seabold*, 14 Ind. App. 109.

**Agent to Sell on Commission.** — For construction of a contract to sell on commission, see *McCoy Engineering Co. v. Crocker-Wheeler Elec. Co.*, (Md. 1905) 60 Atl. Rep. 443.

Where a contract of employment to sell goods on commission provides that commissions shall be earned only on orders accepted and filled by shipment, the principal cannot defeat the agent's right to commissions by arbitrarily rejecting orders obtained in good faith. *In re Ladue Tate Mfg. Co.*, 135 Fed. Rep. 910.

**1096.** 1. *Compensation Depending upon Contingency*. — *White v. Turnbull*, 78 L. T. N. S. 726; *New York L. Ins. Co. v. Dubau*, 15 Quebec Super. Ct. 100; *Currier v. Mutual Reserve Fund L. Assoc.*, (C. C. A.) 108 Fed. Rep. 737, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1096; *Allen v. Armstrong*, 58 N. Y. App. Div. 427. See also *Wolfson v. Allen Bros. Co.*, 120 Iowa 455; *Opinion of Justices*, 72 N. H. 601. And see the titles ATTORNEY AND CLIENT; CHAMPERTY AND MAINTENANCE.

2. *Wolfson v. Allen Bros. Co.*, 120 Iowa 455; *Sherman v. Port Huron Engine, etc., Co.*, 8 S. Dak. 343.

3. *Currier v. Mutual Reserve Fund L. Assoc.*, (C. C. A.) 108 Fed. Rep. 737, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1096; *Tyler v. E. G. Bernard Co.*, (Tenn. Ch. 1899) 57 S. W. Rep. 179. See also *Westinghouse Co. v. Tilden*, (Neb. 1901) 96 N. W. Rep. 74; *Hix v. Edison Electric Light Co.*, 19 N. Y.

**1096.** (b) When Promise to Pay Implied — Prior Request. — See note 4.

Implied from Circumstances — Service Performed with Knowledge of Party Benefited. — See note 5.

**1097.** See note 1.

When Promise Not Implied — Gratuitous Services — General Rule. — See note 3.

**1101.** (2) *When the Right May Be Deemed to Have Attached* — (a) General Rule. — See notes 2, 4.

(b) Where Service Has Not Been Faithfully Performed — Negligence — Gross Negligence. — See note 5.

**1102.** Fraud. — See notes 2, 3.

Where the Agent's and the Principal's Interests Are Adverse. — See note 4.

**1103.** (c) Where Service Has Not Been Completely Performed — *aa*. WHERE AGENCY IS REVOKED BY PRINCIPAL — (*aa*) *Agency Revocable at the Pleasure of Principal*. — See notes 5, 6.

(*bb*) *Agent Discharged for Cause* — Remuneration for Services Already Rendered. — See note 7.

App. Div. 75; *Stone v. Argersinger*, 32 N. Y. App. Div. 208; *Reed v. Union Cent. L. Ins. Co.*, 21 Utah 295.

**Sale Defeated by Defective Title.** — An agent may recover commissions of his principal who holds himself out as having a good title, when he has procured a purchaser, and a sale is not effected by reason of a defect in the title, the burden being upon the agent to show the defect. *Brackenridge v. Claridge*, 91 Tex. 527; *Scottish-American Mortg. Co. v. Davis*, (Tex. Civ. App. 1902) 72 S. W. Rep. 217.

**Cannot Arbitrarily Refuse to Accept Orders.** — The principal cannot defeat his agent's right to commissions by arbitrarily refusing to accept orders from *bona fide* purchasers. *Jacquiu v. Boutard*, 89 Hun (N. Y.) 437; *Aikins v. Thackara Mfg. Co.*, 15 Pa. Super. Ct. 250; *Madden v. Equitable L. Assur. Soc.*, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 540.

**Remedy of Agent.** — Where an agent is unable to complete his right to commissions because of conduct of his principal which worked a breach of the contract, his remedy is an action for damages for the breach, and not an action for commissions. *Greenberg v. American Technical Book Co.*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 786.

**1096.** 4. *Allen v. Gates*, 73 Vt. 222. See generally the title IMPLIED OR QUASI CONTRACTS.

**5. Mandate.** — To the same effect as *Waterman v. Gibson*, 5 La. Ann. 672, stated in the original note, see *Beugnot v. Tremoulet*, 52 La. Ann. 454.

**1097.** 1. *Kinder v. Pope*, 106 Mo. App. 536.

3. *Eberhart v. Camp*, 55 Ill. App. 248; *Buelterman v. Meyer*, 132 Mo. 474.

**1101.** 2. *Nosotti v. Auerbach*, 79 L. T. N. S. 413.

**Delivery Deferred.** — An agent is entitled to commissions on goods sold during the life of the contract, but deliverable afterwards. *Jacquiu v. Boutard*, 89 Hun (N. Y.) 437; *Dibble v. Dimick*, 143 N. Y. 549.

**Binding Contract Essential.** — The commission of an agent who undertakes to sell (as distinguished from a mere agreement to find a purchaser) is earned only when a contract is entered into which is mutually obligatory upon the vendor and the vendee. *Ormsby v. Graham*, 123 Iowa 202.

**4. Payments on Contract Not Essential.** — An  
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agreement to pay commissions, based in amount upon an excess over a stipulated purchase price to be procured by the agent, imposes upon the principal a liability for such payment when the sale is made, although no payments upon the contract are made. *Strong v. Prentice Brown Stone Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 380. See *Nosotti v. Auerbach*, 79 L. T. N. S. 413.

**5. Gross Negligence.** — See *Haskell v. Smith*, (Supm. Ct. App. T.) 86 N. Y. Supp. 779 (failure to disclose material matters); *Aikins v. Thackara Mfg. Co.*, 15 Pa. Super. Ct. 250 (selling to irresponsible persons); *Cleveland School-Furniture Co. v. Hotchkiss*, 89 Tex. 117 (void sales).

**1102.** 2. **Compensation Forfeited on Account of Fraud.** — *Ellis v. Pond*, (1898) 1 Q. B. 426, 78 L. T. N. S. 125; *Manitoba, etc., Land Corp. v. Davidson*, 34 Can. Sup. Ct. 255; *Ring v. Potts*, 36 N. Bruns. 42; *Quinn v. Le Duc*, (N. J. 1902) 51 Atl. Rep. 199; *Hindle v. Holcomb*, 34 Wash. 336.

**The Receipt of Secret Profits by a Subagent** has been held not to debar the original agent from recovering his commission in a case where the subagent was adopted by the principal. *Powell v. Jones*, (1905) 1 K. B. 11.

**Where the Principal Was Not Prejudiced,** misconduct of an agent has been held not to be sufficient to deprive him of his right to commissions. *Davidson v. Manitoba, etc., Land Corp.*, 14 Manitoba 232 (appealed to Can. Sup. Ct.).

3. *Andrews v. Ramsay*, (1903) 2 K. B. 635, 89 L. T. N. S. 450; *Hindle v. Holcomb*, 34 Wash. 336.

4. *Williams v. McKinley*, 65 Fed. Rep. 4; *Jackson v. Pleasanton*, 101 Va. 282.

**1103.** 5. *Urquhart v. Scottish-American Mortg. Co.*, 85 Minn. 69; *Merriman v. McCormick Harvesting Mach. Co.*, 96 Wis. 600. See also *Courier-Journal Co. v. Miller*, (Ky. 1899) 50 S. W. Rep. 46.

6. *Barrett v. Gilmour*, 6 Com. Cas. (Eng.) 72; *Milligan v. Owen*, 123 Iowa 285; *Thomas v. Gwyn*, 131 N. Car. 460.

**Orders Secured After the Termination of the agency** carry no right to commissions. *Barrett v. Gilmour*, 6 Com. Cas. (Eng.) 72.

7. *Urquhart v. Scottish-American Mortg. Co.*, 85 Minn. 69.

**1104.** See note 1.

(cc) *Agent Wrongfully Discharged — Action on Quantum Meruit.* — See note 3.  
*Action for Damages for Breach of Contract.* — See note 4.

*When Cause of Action Arises.* — See note 5.

**1105.** Measure of Damages. — See note 2.**1106.** Other Employment in Reduction of Damages. — See note 3.

*Employment Must Be of the Same General Nature.* — See note 5.

**1107.** Burden of Proof on the Principal. — See note 1.

**1110.** cc. WHERE AGENCY IS RENOUNCED BY AGENT — (bb) *Where He Has Good Cause*  
 — *Misconduct of Principal.* — See note 3.

**1113.** (a) *Where Agent Acts for Both Parties to Transaction — Where Parties Are Ignorant of the Double Agency.* — See notes 3, 4.

*Where, However, the Double Agency.* — See note 5.

**1114.** What Evidence of Knowledge Is Required. — See note 1.

(e) *Where Agency Is Illegal.* — See note 2.

(3) *Amount of Remuneration* — (a) *Where There Is an Express Agreement.* — See note 3.

**1115.** (b) *Where There Is No Express Agreement — Reasonable Amount.* — See note 1.

**1117.** b. REIMBURSEMENT — (1) *For Advances and Expenditures.* — See note 1.

*Needless or Unauthorized Expenditures.* — See notes 2, 3.

(2) *For Loss and Damage Sustained* — *General Rule.* — See note 4.

**1104.** 1. Cotton v. Rand, 93 Tex. 7.

**3.** Quantum Meruit. — Geo. O. Richardson Machinery Co. v. Swartzel, (Kan. 1905) 79 Pac. Rep. 660.

**4.** Damages for Breach of Contract. — Macgregor v. Union L. Ins. Co., (C. C. A.) 121 Fed. Rep. 493; Geo. O. Richardson Machinery Co. v. Swartzel, (Kan. 1905) 79 Pac. Rep. 660; Greenberg v. American Technical Book Co., (Supm. Ct. App. T.) 33 Misc. (N. Y.) 786, the latter case holding that where the agent is unable to complete his right to commissions because of conduct of his principal which worked a breach of the contract, his remedy is an action for damages for the breach and not an action for commissions.

**5.** Forked Deer Pants Co. v. Shipley, (Ky. 1904) 80 S. W. Rep. 476.

**1105.** 2. Alaska Fish, etc., Co. v. Chase, (C. C. A.) 128 Fed. Rep. 886, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1104; Strong v. West, 110 Ga. 382; Milligan v. Owen, 123 Iowa 285; Rightmire v. Hirner, 188 Pa. St. 325.

**1106.** 3. Alaska Fish, etc., Co. v. Chase, (C. C. A.) 128 Fed. Rep. 886; Forked Deer Pants Co. v. Shipley, (Ky. 1904) 80 S. W. Rep. 476; Rightmire v. Hirner, 188 Pa. St. 325.

**5.** Marx v. Miller, 134 Ala. 347, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1106.

**1107.** 1. Lahr v. Kraemer, 91 Minn. 26.

**1110.** 3. Duffield v. Michaels, 97 Fed. Rep. 825, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1110.

**1113.** 3. Humphrey v. Eddy Transp. Co., 107 Mich. 163; Carr v. Ubsdell, 97 Mo. App. 326; Labinsks v. Holst, (Supm. Ct. App. T.) 84 N. Y. Supp. 991.

**Agent Subsequently Acting for Other Party.** — An attorney is not entitled to a commission for selling land where he subsequently accepts employment from the purchaser to aid in de-

fending a suit for the price of such land. Asher v. Beckner, (Ky. 1897) 41 S. W. Rep. 35.

**4.** Alta Invest. Co. v. Worden, 25 Colo. 215, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1101 et seq.; Deutsch v. Baxter, 9 Colo. App. 58; Smythe v. Evans, 209 Ill. 376, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1113; Campbell v. Baxter, 41 Neb. 729.

**5.** Reed v. Hayward, 82 N. Y. App. Div. 416.

**1114.** 1. Humphrey v. Eddy Transp. Co., 107 Mich. 163; Labinsks v. Holst, (Supm. Ct. App. T.) 84 N. Y. Supp. 991.

**2.** Black v. Security Mut. L. Assoc., 95 Me. 35; Brand v. Metropolitan Stock Exch., 11 Quebec Super. Ct. 303.

**3.** Petrie v. Machan, 28 Ont. 642. See also Hale Elevator Co. v. Hale, 201 Ill. 131, affirming 98 Ill. App. 430; Gray v. Josselyn, 117 Mich. 23; Carruthers v. Diefendorf, 66 N. Y. App. Div. 31, affirmed 174 N. Y. 549.

**1115.** 1. Nyhart v. Pennington, 20 Mont. 158.

**1117.** 1. In re Wells, 15 Reports 169; Clifton v. Ross, 60 Ark. 97; Selz v. Guthman, 62 Ill. App. 624; Whitmore v. Nelson, (Tex. Civ. App. 1895) 29 S. W. Rep. 521; A. B. Frank Co. v. Waldrup, (Tex. Civ. App. 1902) 71 S. W. Rep. 298; Johnston v. Gerry, 34 Wash. 524.

**Principal Entitled to Know for What Expended.**

— A principal is not bound to pay a claim of his agent for expenses without knowing for what the money was expended. Moyses v. Rosenbaum, 98 Ill. App. 7.

**2.** Veltum v. Koehler, 85 Minn. 125.

**3.** Montgomery v. Aetna L. Ins. Co., 97 Fed. Rep. 913, 38 C. C. A. 553; Carpenter v. Mommensen, 92 Wis. 449.

**4.** Selz v. Guthman, 62 Ill. App. 624; Talbot v. Montmagny Assur. Co., 12 Quebec Super. Ct. 64. Compare Halbronn v. International Horse Agency, etc., (1903) 1 K. B. 270, 88 L. T. N. S. 232.

**1118.** Loss Must Be Incurred in Execution of Agency. — See notes 1, 2.

Where the Act Performed Is Illegal. — See note 5.

**1119.** c. AGENT'S RIGHT TO LIEN. — See note 2.

**IX. RIGHTS, DUTIES, AND LIABILITIES AS TO THIRD PARTIES — 1. Of**

**Agent to Third Parties — a. ON CONTRACT — (1) When Acting with Authority**  
— (a) Principal Disclosed — aa. IN GENERAL. — See note 4.

**1120.** bb. WHEN AGENT PLEDGES HIS OWN CREDIT. — See notes 1, 2.

**1121.** See note 1.

cc. WHEN AGENT UNINTENTIONALLY BINDS HIMSELF. — See note 3.

**1118.** 1. *Hoggan v. Cahoon*, 26 Utah 444, 99 Am. St. Rep. 837; *Talbot v. Montmagny Assur. Co.*, 12 Quebec Super. Ct. 64.

**When Right of Action Accrues.**—The implied contract of indemnity on the part of the principal is only against actual loss, and not merely against liability. *Brown v. Mechanics'*, etc., Bank, 16 N. Y. App. Div. 207; *Brown v. Mechanics'*, etc., Bank, 43 N. Y. App. Div. 173.

2. *Victoria First Nat. Bank v. Hayes*, 64 Ohio St. 100.

5. *Parker v. Moore*, (C. C. A.) 115 Fed. Rep. 799, reversing 111 Fed. Rep. 470; *Hoggan v. Cahoon*, 26 Utah 444, 99 Am. St. Rep. 837. See also *Harvey v. Doty*, 54 S. Car. 382.

**1119.** 2. *German Trust Co. v. Board of Equalization*, 121 Iowa 325; quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1119; *Underhill v. Jordan*, 72 N. Y. App. Div. 71; *Johnston v. Gerry*, 34 Wash. 524.

4. *United States.*—*Monticello Bank v. Bostwick*, 71 Fed. Rep. 641.

*Alabama.*—*Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1119; *Hudson v. Scott*, 125 Ala. 172, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1119; *Gulf City Constr. Co. v. Louisville*, etc., R. Co., 121 Ala. 621; *Manly v. Sperry*, 115 Ala. 524.

*Colorado.*—*Frambach v. Frank*, (Colo. 1905) 81 Pac. Rep. 247, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1119.

*Illinois.*—*Wheeler v. Cannon*, 84 Ill. App. 591; *Durham v. Stubbings*, 111 Ill. App. 10.

*Michigan.*—*Bleau v. Wright*, 110 Mich. 183. *Minnesota.*—*J. D. Moran Mfg. Co. v. Clarke*, 59 Minn. 456.

*Missouri.*—*Huston v. Tyler*, 140 Mo. 252; *Emery-Bird-Thayer Dry Goods Co. v. Coomer*, 87 Mo. App. 404.

*Nebraska.*—*Brong v. Spence*, 56 Neb. 638, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1119; *Fremont Carriage Mfg. Co. v. Thomson*, 65 Neb. 370.

*New York.*—*Hayden v. Post*, (N. Y. City Ct. Gen. T.) 12 Misc. (N. Y.) 204; *Mulligan v. Cannon*, (Supm. Ct.) 25 Civ. Pro. (N. Y.) 348; *Morris v. Murray*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 7; *Iserman v. Conklin*, (County Ct.) 21 Misc. (N. Y.) 194; *Crandall v. Rollins*, 83 N. Y. App. Div. 618; *T. E. Hayman Co. v. Knepper*, (Supm. Ct. App. T.) 88 N. Y. Supp. 930.

*Pennsylvania.*—*Rosenberg v. Clyde*, 2 Pa. Super. Ct. 572; *People's Nat. Bank v. Kern*, 8 Pa. Dist. 72.

*Tennessee.*—*Bailey v. Galbreath*, 100 Tenn. 599, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1119.

*Vermont.*—*Johnson v. Cate*, (Vt. 1905) 59 Atl. Rep. 830.

*Virginia.*—*Richmond Union Pass. R. Co. v. New York*, etc., R. Co., 95 Va. 386.

*Washington.*—*Wilson v. Wold*, 21 Wash. 398, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1119.

*West Virginia.*—*Johnson v. Welch*, 42 W. Va. 18.

*Wisconsin.*—*Alexander*, etc., *Lumber Co. v. McGeehan*, (Wis. 1905) 102 N. W. Rep. 571.

**Agent When Liable — Principal Disclosed.**—See *Sharp v. Swayne*, 1 Penn. (Del.) 210; *Whiting v. Saunders*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 332; *Commercial Bank v. Waters*, 45 N. Y. App. Div. 441; *Livingston-Middleitch Co. v. New York College of Dentistry*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 259; *Johnson v. Welch*, 42 W. Va. 18.

The rule applies whether the agent himself disclosed the fact of his agency, or the other party acquired knowledge of the fact through some other source. *Scaling v. Knollin*, 94 Ill. App. 443.

**1120.** 1. **Presumption.**—*Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. Rep. 66, 53 U. S. App. 580; *Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1120; *John Spry Lumber Co. v. McMillan*, 77 Ill. App. 280; *Commercial Bank v. Waters*, 45 N. Y. App. Div. 441, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1120; *Richmond Union Pass. R. Co. v. New York*, etc., R. Co., 95 Va. 386.

**Whether Credit Given to Agent — Question of Fact.**—When the contract is verbal, the question whether the credit was given to the agent in exclusion of the credit of the principal is a question of fact, to be ascertained by the jury from a consideration of all the circumstances attending the transaction. *Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105.

2. *Manly v. Sperry*, 115 Ala. 524; *Nall v. Farmers Warehouse Co.*, 95 Ga. 570; *Scaling v. Knollin*, 94 Ill. App. 443; *Miller v. Early*, 58 S. W. Rep. 789, 22 Ky. L. Rep. 825; *White v. Taylor*, 113 Mich. 543; *Thompson v. Irwin*, 76 Mo. App. 418; *Ross v. McAnaw*, 72 Mo. App. 99; *De Remer v. Brown*, 165 N. Y. 410. See also *Powers v. McLean*, 14 N. Y. App. Div. 92.

**Agent Indorsing for Principal.**—*Cook v. Foraker*, 193 Pa. St. 461, 74 Am. St. Rep. 699.

**1121.** 1. *Merrell v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39; *Lewis v. Weidenfeld*, 114 Mich. 581; *Dockarty v. Tillotson*, 64 Neb. 432.

3. *Nall v. Farmers Warehouse Co.*, 95 Ga. 770.



**1121.** Sealed Instruments. — See note 5.

**1122.** *ee.* WHEN PRINCIPAL IS IRRESPONSIBLE. — See note 2.

(b) Agency Undisclosed. — See note 4.

**1123.** See note 1.

**1124.** Agency Disclosed but Principal Undisclosed. — See note 1.

(2) *When Acting with No Authority* — (a) *In General*. — See note 3.

**1121.** 5. *Williams v. Hipple*, 17 Pa. Super. Ct. 81.

**1122.** 2. *Johnston v. Allis*, 71 Conn. 207, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1122; *Anderson v. Stapel*, 80 Mo. App. 115; *Learm v. Upstill*, 52 Neb. 271.

**Qualification of Rule.** — The rule is founded upon the presumption that the parties intended to create an enforceable legal obligation, and does not obtain when it appears that a different method of fulfilment was provided, and that the agent was not to be held personally liable. *Codding v. Munson*, 52 Neb. 580, 66 Am. St. Rep. 524.

4. *England.* — *Stewart v. Shaunessy*, Sc. Ct. Sess. 2 F. 1288.

*United States.* — *American Alkali Co. v. Kurtz*, 134 Fed. Rep. 663.

*Alabama.* — *Manly v. Sperry*, 115 Ala. 524.

*California.* — *Bradford v. Woodworth*, 108 Cal. 684.

*Delaware.* — *Sharp v. Swayne*, 1 Penn. (Del.) 210.

*Illinois.* — *Loehde v. Halsey*, 88 Ill. App. 452; *Scaling v. Knollin*, 94 Ill. App. 443; *Corrigan v. Reilly*, 64 Ill. App. 531; *Weil v. Defenbaugh*, 65 Ill. App. 489; *Trench v. Hardin County Canning Co.*, 67 Ill. App. 269.

*Iowa.* — *Thompson v. People's Bldg., etc., Co.*, 114 Iowa 481; *Fritz v. Kennedy*, 119 Iowa 628.

*Maine.* — *Nolan v. Clark*, 91 Me. 38.

*Massachusetts.* — *Brigham v. Herrick*, 173 Mass. 460.

*Michigan.* — *Banks v. Cramer*, 109 Mich. 168; *Rathbun v. Allen*, (Mich. 1904) 98 N. W. Rep. 735.

*Minnesota.* — *Amans v. Campbell*, 70 Minn. 493, 68 Am. St. Rep. 547, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1122.

*Missouri.* — *Leckie v. Rothenbarger*, 82 Mo. App. 615; *Porter v. Merrill*, 138 Mo. 555.

*Nebraska.* — *Jackson v. McNatt*, (Neb. 1903) 93 N. W. Rep. 425.

*New York.* — *Boyd v. L. H. Quinn Co.*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 278; *Powers v. McLean*, 14 N. Y. App. Div. 92; *Ashner v. Abenheim*, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 282; *Whiting v. Saunders*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 332; *Arfman v. Hare*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 777; *McDonald v. Wesendonck*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 776; *Forrest v. McCarthy*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 125; *Good v. Rumsey*, 50 N. Y. App. Div. 280; *Cook v. Williams*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1123; *De Remer v. Brown*, 165 N. Y. 410, affirming 36 N. Y. App. Div. 634; *Tew v. Wolfsohn*, 174 N. Y. 272, affirming 77 N. Y. App. Div. 454; *McClure v. Central Trust Co.*, 165 N. Y. 108, reversing 28 N. Y. App. Div. 433.

*South Carolina.* — *Danforth v. Timmerman*, 65 S. Car. 259, citing 1 AM. AND ENG. ENCYC.

OF LAW (2d ed.) 1122; *Long v. McKissick*, 50 S. Car. 218.

*Texas.* — *Williams v. Leon, etc., Land Co.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 374, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1122; *Neal v. Andrews*, (Tex. Civ. App. 1900) 60 S. W. Rep. 459.

*Wisconsin.* — *Alexander, etc., Lumber Co. v. McGeehan*, (Wis. 1905) 102 N. W. Rep. 571.

**Subsequent Disclosure of the Principal's Name** will not relieve the agent from liability. *Lull v. Anamosa Nat. Bank*, 110 Iowa 537. But the agent of an undisclosed principal cannot be held responsible for dealings with the principal after the agency is disclosed. *Brackenridge v. Claridge*, 91 Tex. 527.

**Third Party Must Have Actual Knowledge.** — It is not sufficient to exonerate the agent from liability that the seller has means of ascertaining the name of the principal. He must have actual knowledge. *De Remer v. Brown*, 165 N. Y. 410.

**Limitation upon Rule.** — It has been held that an agent selling a business for an undisclosed principal is not personally bound by a condition against re-engaging in the same line of business. *Hamblen v. Birch*, (Supm. Ct. Spec. T.) 59 N. Y. Supp. 40.

**1123.** 1. *Scaling v. Knollin*, 94 Ill. App. 443; *Williams v. Leon, etc., Land Co.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 374, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1123.

**Agent Not Relieved Because He Generally Acts as Such.** — To the same effect as *Brent v. Miller*, 81 Ala. 317, stated in the original note, see *Philips v. Hine*, 61 N. Y. App. Div. 428.

**Agent's Duty to Disclose Agency.** — To the same effect as the original note, see *Horan v. Hughes*, 129 Fed. Rep. 248, 1005; *Fritz v. Kennedy*, 119 Iowa 628; *Johnston v. Parrott*, 92 Mo. App. 199; *Foster v. Meeks*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 461; *De Remer v. Brown*, 165 N. Y. 410; *Powers v. McLean*, 14 N. Y. App. Div. 92. *Compare* *Marine Ins. Co. v. Walsh-Upstill Coal Co.*, 23 Ohio Cir. Ct. 191.

**Where No Contract Relation Is Induced and Entered Into** between the agent of an undisclosed principal and the other party, the principle that the agent of an undisclosed principal is equally liable with the principal, does not apply. *American Alkali Co. v. Kurtz*, 134 Fed. Rep. 663.

**1124.** 1. See *Nelson v. Andrews*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 623, holding that disclosure of the fact that one is agent for the "Bradford estate" is not a sufficient disclosure of the name of the principal to avoid personal liability on the part of the agent; *Nichols v. Weil*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 441.

3. *Thomas v. Drennen*, 112 Ala. 679, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1124; *Lingenfelder v. Leschen*, 134 Mo. 55; *B. F. Myers Tailoring Co. v. Keeley*, 58 Mo. App.

- 1125.** (b) When He Has Knowledge of His Want of Authority. — See notes 1, 2. Rights of Third Party. — See note 3.  
 (c) When He Bona Fide Believes He Has Authority. — See note 4.  
**1126.** *bb.* ACTING IN EXCESS OF AUTHORITY ACTUALLY POSSESSED. — See note 1. Ground of Liability. — See note 3.  
**1127.** (a) Third Party Must Be Ignorant of Want of Authority. — See note 1. Parties Mutually Mistaken. — See note 2.  
 (c) Nature of Liability — Form of Action. — See notes 3, 4.  
**1128.** Liability on the Contract. — See notes 1, 2.  
**1130.** *b.* FOR MONEY PAID TO AGENT — (1) *In General.* — See note 1. (2) *When Paid under Mistake.* — See note 2.

491; *Campbell v. Porter*, 46 N. Y. App. Div. 628; *Williams v. Hipple*, 17 Pa. Super. Ct. 81; *Woodard v. Bird*, 105 Tenn. 671, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1124, 1125.

**Agent Acting in His Own Interest.** — When a party purporting to act as the agent of another makes certain promises and agreements on behalf of his principal, if such party was at the time acting in his own interest, or in a matter in which he and his alleged principal were jointly interested, then such person will be personally bound upon such promises and agreements. *Moore v. Booker*, 4 N. Dak. 543.

**1125.** 1. *Oliver v. Bank of England* (1902) 1 Ch. 610, 86 L. T. N. S. 248; *McCormick v. Seeberger*, 73 Ill. App. 87; *Groeltz v. Armstrong*, (Iowa 1904) 99 N. W. Rep. 128; *McKown v. Gettys*, 80 S. W. Rep. 169, 25 Ky. L. Rep. 2070; *Campbell v. Muller*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 189; *Cobb v. Glenn Boom, etc., Co.*, (W. Va. 1905) 49 S. E. Rep. 1005.

**Officers of Corporations** acting in excess of their authority are amenable to the principle stated. *Groeltz v. Armstrong*, (Iowa 1904) 99 N. W. Rep. 128. See also the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

2. *Starkey v. Bank of England*, (1903) A. C. 114, 88 L. T. N. S. 244.

**Contract Must Be Valid to Hold Agent.** — *Kent v. Addicks*, 126 Fed. Rep. 112, 60 C. C. A. 660; *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa 357, 75 Am. St. Rep. 259; *Morrison v. Hazzard*, (Tex. Civ. App. 1905) 88 S. W. Rep. 385.

**Third Party Must Be Able to Perform.** — *Kent v. Addicks*, 126 Fed. Rep. 112, 60 C. C. A. 660.

**Agent Liable for Commissions of Subagent.** — One who falsely represents that he has authority to sell certain land is liable for the commission of a subagent who negotiates a sale which is repudiated by the owner of the land. *Duffy v. Mallinkrodt*, 81 Mo. App. 449.

3. *Oliver v. Morawetz*, 97 Wis. 332.

4. *Mendenhall v. Stewart*, 18 Ind. App. 262; *Lagrone v. Timmerman*, 46 S. Car. 372.

**1126.** 1. *Rice v. Western Fuse, etc., Co.*, 64 Ill. App. 603; *Chaison v. Beauchamp*, 12 Tex. Civ. App. 109.

3. *Campbell v. Muller*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 189; *Cochran v. Baker*, 34 Oregon 555.

**1127.** 1. *Halbot v. Lens*, (1901) 1 Ch. 344, 83 L. T. N. S. 702; *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa 357, 75 Am. St. Rep. 259; *McKown v. Gettys*, 80 S. W. Rep. 169, 25 Ky. L. Rep. 2070; *Le Roy v. Jacobosky*, 136 N. Car. 443.

**It Is a Question for the Jury** whether the third party has knowledge of the agent's want of authority. *Huston v. Tyler*, 140 Mo. 252.

2. *Smith v. Sherman*, 113 Iowa 601, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1127.

3. *Kent v. Addicks*, 126 Fed. Rep. 112, 60 C. C. A. 660, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1127; *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa 357, 75 Am. St. Rep. 259; *Campbell v. Muller*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 189.

4. *Seeberger v. McCormick*, 178 Ill. 404, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1127, *affirming* 73 Ill. App. 87; *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa 357, 75 Am. St. Rep. 259; *Groeltz v. Armstrong*, (Iowa 1904) 99 N. W. Rep. 128; *Campbell v. Muller*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 189; *Le Roy v. Jacobosky*, 136 N. Car. 443; *Cochran v. Baker*, 34 Oregon 555, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1127; *Anderson v. Adams*, 43 Oregon 621; *Oliver v. Morawetz*, 97 Wis. 332.

**1128.** 1. *Kennedy v. Stonehouse*, (N. Dak. 1904) 100 N. W. Rep. 258.

2. *McCormick v. Seeberger*, 73 Ill. App. 87; *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa 357, 75 Am. St. Rep. 259; *McKown v. Gettys*, 80 S. W. Rep. 169, 25 Ky. L. Rep. 2070; *Newland Hotel Co. v. Lowe Furniture Co.*, 73 Mo. App. 135; *Le Roy v. Jacobosky*, 136 N. Car. 443; *Anderson v. Adams*, 43 Oregon 621, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1128. See also *Andrus v. Blazzard*, 23 Utah 233, *per* Miner, C. J., *dissenting*, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1127.

**1130.** 1. *Compare Huffman v. Newman*, 55 Neb. 713, holding that an agent, the fact of agency and the name of the principal being disclosed, who receives money for his principal which he fails to pay to the latter, is not liable to the payor, either in an action for conversion or for money had and received; *Matthews v. O'Shea*, 45 Neb. 299.

**After Payment Over to the Principal** the agent is not liable. *Zimmele v. American Plaster-Board Co.*, 1 N. Y. App. Div. 327. See also *Eufaula Grocery Co. v. Missouri Nat. Bank*, 118 Ala. 408; *Kurzwaski v. Schneider*, 179 Pa. St. 500.

2. **Settlement Between Principal and Agent.** — When an agent pays over to his principal money voluntarily paid to him for that purpose, without notice from the party from whom he receives it not to do so, the payment relieves him from all responsibility for it. *Embry v. Galbreath*, 110 Tenn. 297. See also *Ledwith v.*

**1130.** When Agency Undisclosed. — See note 3.

**1131.** (3) When Money Is Illegally Received. — See note 1.

**c. IN TORT** — (1) For Nonfeasance and Misfeasance — Distinctions Made. — See note 2.

Agent Not Liable for Nonfeasance. — See note 3.

**1132.** Agent Liable for Misfeasance. — See note 1.

**1134.** See note 1.

**1135.** See note 1.

(2) For Fraud and Malice. — See note 2.

**1136.** False Representations of Agency. — See note 3.

**1137.** 2. Of Principal to Third Parties — *a.* LIABILITY CIVILLY — (2) On Contract — (a) Liability of Principal Generally. — See note 2.

**1138.** (b) Where the Other Party Has Elected to Hold Agent Liable — *aa.* IN GENERAL. — See note 1.

*bb.* REQUISITES OF AN ELECTION A QUESTION FOR THE JURY. — See note 2.

Merritt, 74 N. Y. App. Div. 64, affirmed 174 N. Y. 512.

**1130.** 3. See *Needles v. Fuson*, 68 S. W. Rep. 644, 24 Ky. L. Rep. 369.

**Money Properly Paid to Agent — Not Liable.** — *Cooper v. Tim*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 372; *Middleworth v. Blackwell*, 85 N. Y. App. Div. 613; *Gable v. Crane*, 24 Pa. Super. Ct. 56.

**1131.** 1. *Bocchino v. Cook*, 67 N. J. L. 467, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1131; *Parsons v. Maxwell*, 53 W. Va. 39, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1131.

2. *Drake v. Hagan*, 108 Tenn. 265, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1131.

**3. Agent Not Liable for Nonperformance.** — *Kimbrough v. Boswell*, 119 Ga. 201; *Steinhauer v. Spraul*, 127 Mo. 541; *Van Antwerp v. Linton*, 89 Hun (N. Y.) 417; *Drake v. Hagan*, 108 Tenn. 265, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1131.

**1132.** 1. **Agent Liable for Misfeasance.** — *Kimbrough v. Boswell*, 119 Ga. 201; *Carraher v. Allen*, 112 Iowa 168; *Sheffler v. Mudd*, 71 Mo. App. 78; *Coon v. Froment*, 25 N. Y. App. Div. 250; *Hindson v. Markle*, 171 Pa. St. 138.

**Conversion of Goods.** — *Mohr v. Langan*, 77 Mo. App. 481.

**Illegal Act.** — One charged with a crime cannot escape the penalty by claiming that what he did was as the agent of some one else. *Douglass v. State*, 18 Ind. App. 289.

**Doing Business Without License.** — *Nashville, etc., R. Co. v. Attalla*, 118 Ala. 362; *Cunningham v. State*, 105 Ga. 676.

**An Agent Selling Stolen Goods** will be liable to the true owner, *Thompson v. Irwin*, 76 Mo. App. 418; although innocent, *Laughlin v. Barnes*, 76 Mo. App. 258.

**Trespass.** — The fact that one in committing a trespass acted as the agent of another will not relieve him from liability therefor. *Marshall v. Eggleston*, 82 Ill. App. 52.

**1134.** 1. *Stiewel v. Borman*, 63 Ark. 30. See also *Baxter v. Jones*, 4 Ont. L. Rep. 541.

**Failure to Repair.** — *Compare Kuhnert v. Angell*, 10 N. Dak. 59, 88 Am. St. Rep. 675; *Lough v. Davis*, 30 Wash. 204, 94 Am. St. Rep. 848; *Lough v. Davis*, 35 Wash. 449.

**1135.** 1. *Illinois Cent. R. Co. v. Foulks*,

191 Ill. 57, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1134, 1135.

**2. Agent Liable for Fraud.** — *Hallett v. Gordon*, 122 Mich. 573, modifying 122 Mich. 567; *Hedin v. Minneapolis Medical, etc., Institute*, 62 Minn. 146, 54 Am. St. Rep. 628; *Thompson v. Irwin*, 76 Mo. App. 418; *Atchison County Bank v. Byers*, 139 Mo. 627; *White v. New York, etc., R. Co.*, 68 N. J. L. 123; *Lewis v. Hoeldtke*, (Tex. Civ. App. 1903) 76 S. W. Rep. 309.

**1136.** 3. **An Action of Assumpsit** upon the express warranty of authority may be maintained instead of an action on the case. *Oliver v. Morawetz*, 97 Wis. 332.

**1137.** 2. *Corbit v. Kimball*, 107 Cal. 665; *Galvano Type Engraving Co. v. Jackson*, (Conn. 1905) 60 Atl. Rep. 127; *Davis v. Lynch*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 724; *Tapper v. Sunlight Oil, etc., Co.*, 192 Pa. St. 620.

**Effect of Agent's Violation of Law.** — The mere fact that an agent, in the course of exercising a delegated authority, himself violates a prohibitive statute does not liberate or discharge the principal from the obligation of the contract, if it be one within the scope of his authority. *Rickards v. Rickards*, 98 Md. 136.

**1138.** 1. **Disclosed Principal.** — *Cross v. Matthews*, 91 L. T. N. S. 500; *Highway Advertising Co. v. Ellis*, 7 Ont. L. Rep. 504; *Barrell v. Newby*, (C. C. A.) 127 Fed. Rep. 656; *Watte v. Thayer*, 56 Ill. App. 282; *Allen v. Davis*, 17 Ind. App. 338; *McLean v. Ficke*, 94 Iowa 283; *Adams Oil Co. v. Christmas*, 101 Ky. 564; *Yates v. Repetto*, 65 N. J. L. 294.

**Undisclosed Principal.** — *Barrell v. Newby*, (C. C. A.) 127 Fed. Rep. 656. See also *Ranger v. Thalmann*, 84 N. Y. App. Div. 341, affirmed (N. Y. 1904) 70 N. E. Rep. 1108.

**What Third Party Must Show.** — A party seeking to charge a supposed principal upon the contract of an ostensible agent must show at the very outset that he gave credit to the alleged principal, and that he intended to bind the principal. *Sperry v. Pittsburg Short Method Smelting, etc., Co.*, 9 Colo. App. 314.

2. *Barrell v. Newby*, (C. C. A.) 127 Fed. Rep. 656; *Hoffman v. Anderson*, 112 Ky. 893; *Lambert v. Metropolitan Sav., etc., Assoc.*, 65 N. J. L. 79; *Ranger v. Thalmann*, 65 N. Y. App. Div. 5; *Wasserman v. Bacon*, 80 N. Y.

**1139. Fact of Agency and Name of Principal Must Be Known. — See note 1.**

(c) **Liability of Undisclosed Principal**—*aa. ON SIMPLE CONTRACTS.*—See note 3.

App. Div. 505; *McKeen v. Providence County Sav. Bank*, 24 R. I. 542.

**Credit Is Presumed to Be Given to Principal.**—*John Spry Lumber Co. v. McMillan*, 77 Ill. App. 280; *Wasserman v. Bacon*, 80 N. Y. App. Div. 505. See also *Mulligan v. Cannon*, (Supm. Ct.) 25 Civ. Pro. (N. Y.) 348.

**The Commencement of an Action Against the Agent** which is never prosecuted is no bar to an action against the principal. *Richmond Union Pass. R. Co. v. New York, etc., R. Co.*, 95 Va. 386. But see *Greenberg v. Palmieri*, (N. J. 1904) 58 Atl. Rep. 297.

But a suit prosecuted to judgment against either, though without satisfaction, has been held to discharge the remedy against the other. *Lage v. Weinstein*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 298.

Where the evidence tended to show that one sold goods directly to the principal, the fact that he brought suit against the agent to recover for such goods was held not to operate as such an election as to bar an action against the principal. *Daggett v. Champlain Mfg. Co.*, 71 Vt. 370.

**If Two or More Persons Are Severally Liable for the same debt**, payment of the debt alone discharges the debtor, and the maintenance of an action and recovery of a judgment against one does not debar the creditor from suing, in a separate action, others liable for the same debt. *Brooklyn First Nat. Bank v. Wallis*, 84 Hun (N. Y.) 376; *McLean v. Sexton*, 44 N. Y. App. Div. 520; *Tew v. Wolfsohn*, 77 N. Y. App. Div. 454. Compare *Booth v. Barron*, 29 N. Y. App. Div. 66.

**An Action Brought Against the Agent under a Misunderstanding** of the facts of the case does not amount to an election. *Bertoli v. Smith*, 69 Vt. 425.

**Effect of Suing Principal.**—After the creditor has elected to sue the principal and has prosecuted his suit to final judgment he cannot sue the agent. *E. J. Codd Co. v. Parker*, 97 Md. 319.

**Election Implies a Deliberate Intention**, a definite purpose to accept one debtor, or a particular remedy, in lieu of another. *Atlas Steamship Co. v. Colombian Land Co.*, 102 Fed. Rep. 358, 42 C. C. A. 398.

**Quære** whether an election by a third party to look to the agent involves an abandonment by the principal of his rights against the third party. *Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. Rep. 66, 53 U. S. App. 580.

**1139. 1.** *Steele Smith Grocery Co. v. Potthast*, 109 Iowa 413; *Greenberg v. Palmieri*, (N. J. 1904) 58 Atl. Rep. 297; *Brown v. Reiman*, 48 N. Y. App. Div. 295. See also *Semisich v. Guenther*, 10 British Columbia 371.

**3. England.**—*Gaskell v. Gosling*, (1896) 1 Q. B. 669, 74 L. T. N. S. 674.

**Canada.**—*Hutchings v. Adams*, 12 Manitoba 118.

**United States.**—*Prichard v. Budd*, 76 Fed. Rep. 710, 42 U. S. App. 186; *Moore v. Sun Printing, etc., Assoc.*, (C. C. A.) 101 Fed. Rep. 591.

**California.**—*Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681.

**Colorado.**—*McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393.

**Georgia.**—*Allison v. Sutlive*, 99 Ga. 151; *Simpson v. Patapsco Guano Co.*, 99 Ga. 168; *Baldwin v. Garrett*, 111 Ga. 876.

**Iowa.**—*Steele Smith Grocery Co. v. Potthast*, 109 Iowa 413, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139 [1139].

**Kansas.**—*Freund v. Hixon*, 6 Kan. App. 919, 49 Pac. Rep. 640; *Edwards v. Gildemeister*, 61 Kan. 141; *Fowle v. Outcalt*, 64 Kan. 352.

**Kentucky.**—*Henry Vogt Mach. Co. v. Lingensfelder*, 62 S. W. Rep. 499, 23 Ky. L. Rep. 38; *Ware v. Long*, 69 S. W. Rep. 797, 24 Ky. L. Rep. 696.

**Maine.**—*Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 56 Am. St. Rep. 436.

**Michigan.**—*Frohlich v. Carroll*, 127 Mich. 561, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1139.

**Minnesota.**—*Wm. Lindeke Land Co. v. Levy*, 76 Minn. 364, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1139; *J. B. Streeter Jr. Co. v. Janu*, 90 Minn. 393, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1139.

**Mississippi.**—*Simmons Hardware Co. v. Todd*, 79 Miss. 163.

**Missouri.**—*Weber v. Collins*, 139 Mo. 501.

**Nebraska.**—*Jones v. Wattles*, 66 Neb. 533.

**New Jersey.**—*Elliott v. Bodine*, 59 N. J. L. 567; *Yates v. Repetto*, 65 N. J. L. 294; *Greenberg v. Palmieri*, (N. J. 1904) 58 Atl. Rep. 297.

**New York.**—*Adolff v. Schmitt*, (Buffalo Super. Ct. Gen. T.) 13 Misc. (N. Y.) 623; *New York Cent., etc., R. Co. v. Davis*, 86 Hun (N. Y.) 86; *Jennings v. Davies*, 29 N. Y. App. Div. 227; *City Trust, etc., Co. v. American Brewing Co.*, 70 N. Y. App. Div. 511; *Wasserman v. Bacon*, 80 N. Y. App. Div. 505.

**North Dakota.**—*Patrick v. Grand Forks Mercantile Co.*, (N. Dak. 1903) 99 N. W. Rep. 55.

**Pennsylvania.**—*Rice v. Fidelity, etc., Co.*, 1 Lack. Leg. N. (Pa.) 111.

**Texas.**—*Sanger v. Warren*, (Tex. Civ. App. 1897) 40 S. W. Rep. 840.

**Washington.**—*Belt v. Washington Water-Power Co.*, 24 Wash. 387.

**Principal Must Have Received Benefit.**—An undisclosed principal is not liable unless he actually received and used or in some way got the benefit of the goods purchased by his agent upon his own credit. *Mickleberry v. O'Neal*, 98 Ga. 42.

**Bringing an Action Against Both agent and undisclosed principal** does not constitute an election to hold the principal and not the agent. The plaintiff need not elect which party he intends to hold until the end of the case. *Tew v. Wolfsohn*, 77 N. Y. App. Div. 454.

**Cannot Hold Both.**—While a party to a contract may elect to sue the ostensible principal, or the actual and undisclosed principal, when he is disclosed, yet there are not two different contracts for a breach of which he can obtain satisfaction from each of the respective parties.

- 1140.** Contract Within Statute of Frauds. — See note 1.  
**1141.** *bb.* ON CONTRACTS UNDER SEAL — Common-law Rule. — See note 1.  
 Modification of Common-law Rule. — See note 2.  
*cc.* ON NEGOTIABLE CONTRACTS. — See note 3.  
**1142.** *dd.* WHERE PRINCIPAL HAS SETTLED WITH AGENT. — See note 2.  
**1143.** (3) *Representations* — Admissions. — See notes 2, 3.

Orvis v. Wells, 38 U. S. App. 471, 73 Fed. Rep. 110; *Provenchere v. Reifess*, 62 Mo. App. 50.

**An Agent Acting Within the Scope of His Authority** may bind an undisclosed principal although the party with whom the contract was made may have known the principal under some other name. *Phillips v. International Text Book Co.*, 26 Pa. Super. Ct. 230.

"The Evidence Required to Charge an Undisclosed Principal to a contract made by his agent is neither greater nor less when suit is brought by a third person directly against such alleged principal than it would be had a recovery been had against the agent by such third person and such agent was seeking to recover damages from the principal." *W. K. Niver Coal Co. v. Piedmont, etc., Coal Co.*, (C. C. A.) 136 Fed. Rep. 179.

**1140. 1. Charging Undisclosed Principal on Written Contract.** — *Daugherty v. Heckard*, 189 Ill. 239, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1140; *Wm. Lindeke Land Co. v. Levy*, 76 Minn. 364, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1140; *Weber v. Collins*, 139 Mo. 501; *Haubelt v. Rea, etc.*, Mill Co., 77 Mo. App. 672; *City Trust, etc., Co. v. American Brewing Co.*, 70 N. Y. App. Div. 511; *Brodhead v. Reinbold*, 200 Pa. St. 618, 86 Am. St. Rep. 735.

**1141. 1.** *Badger Silver Min. Co. v. Drake*, (C. C. A.) 88 Fed. Rep. 48; *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393; *Lenney v. Finley*, 118 Ga. 718, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1141; *J. B. Streeter Jr. Co. v. Janu*, 90 Minn. 393, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1139 *et seq.*; *Farrar v. Lee*, 10 N. Y. App. Div. 130; *De Remer v. Brown*, 36 N. Y. App. Div. 634; *Blanchard v. Archer*, 93 N. Y. App. Div. 459; *Sanger v. Warren*, (Tex. Civ. App. 1897) 40 S. W. Rep. 840; *Sanger v. Warren*, 91 Tex. 472, 66 Am. St. Rep. 913.

**Illustrations.** — *Beck v. Eagle Brewery*, (N. J. 1895) 30 Atl. Rep. 1100, *sustaining* *Borchering v. Katz*, 37 N. J. Eq. 150, stated in the original note.

**2. Where the Distinction Between Sealed and Unsealed Contracts Is Abrogated**, it has been held to follow that testimony to charge an undisclosed principal is competent. *J. B. Streeter Jr. Co. v. Janu*, 90 Minn. 393.

**3.** *Ranger v. Thalmann*, 84 N. Y. App. Div. 341, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1141, *reversing* 39 Misc. (N. Y.) 420; *Cortland Wagon Co. v. Lynch*, 82 Hun (N. Y.) 173; *Manufacturers', etc., Bank v. Love*, 13 N. Y. App. Div. 561; *New York State Banking Co. v. Van Antwerp*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 38; *Sanger v. Warren*, 91 Tex. 472, 66 Am. St. Rep. 913.

**A Contrary Doctrine.** — *Harper v. Tiffin Nat. Bank*, 54 Ohio St. 425. But see dictum in *McGregor v. Hudson*, (Tex. Civ. App. 1895) 30 S. W. Rep. 489, the court saying that if it were

necessary to decide the point it might feel constrained to depart from the doctrine of *Sessums v. Henry*, 38 Tex. 37, stated in the original note.

**1142. 2.** *English v. Rauchfuss*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 494. See also *Simmons Hardware Co. v. Todd*, 79 Miss. 163.

**1143. 2. Representations of Agent with Authority Delegated.** — *Emerson v. Burnett*, 11 Colo. App. 86; *Robins Min. Co. v. Murdock*, (Kan. 1904) 77 Pac. Rep. 596; *Deering v. Veal*, (Ky. 1904) 78 S. W. Rep. 886; *Tompkins v. Triplett*, 110 Ky. 824; *Wilson v. Pritchett*, (Md. 1904) 58 Atl. Rep. 360, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1143; *Hill Bros. v. Bank of Seneca*, 100 Mo. App. 230; *Leary v. Albany Brewing Co.*, 77 N. Y. App. Div. 6; *White Hall Co. v. Hall*, 102 Va. 284; *Hall v. Union Cent. L. Ins. Co.*, 23 Wash. 610, 83 Am. St. Rep. 844; *McDonald v. Cole*, 46 W. Va. 186, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1143; *Nutter v. Brown*, 51 W. Va. 598.

**Declarations Outside of the Scope of Authority** will not bind the principal. *Walrath v. Champion Min. Co.*, 63 Fed. Rep. 552.

**3. Representations Contemporaneous with Business.** — *Pittsburgh Plate Glass Co. v. Kerlin Bros. Co.*, 122 Fed. Rep. 414, 58 C. C. A. 648; *Maher v. Moore*, (Del. 1898) 42 Atl. Rep. 721; *National Bldg. Assoc. v. Quin*, 120 Ga. 358; *Harris Loan Co. v. Elliott, etc.*, Book Type-writer Co., 110 Ga. 302; *Wilson v. Pritchett*, 99 Md. 583; *Maxson v. Michigan Cent. R. Co.*, 117 Mich. 218, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1143; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358; *Cate v. Blodgett*, 70 N. H. 316; *Lambert v. Metropolitan Sav., etc., Assoc.*, 65 N. J. L. 79; *Decker v. Sexton*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 59; *Pacific Livestock Co. v. Gentry*, 38 Oregon 275, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1143; *White v. San Antonio Waterworks Co.*, 9 Tex. Civ. App. 465. See also *Fisher v. West Virginia, etc., R. Co.*, 42 W. Va. 183, *per Holt, P.*, *dissenting*, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1143.

This rule does not extend to representations made after the transaction, though in relation to it. *Brown v. Cranberry Iron, etc., Co.*, 25 U. S. App. 679, 72 Fed. Rep. 96; *Alger v. Keith*, 105 Fed. Rep. 105, 44 C. C. A. 371; *Haywood v. Hamm*, (Conn. 1904) 58 Atl. Rep. 695; *Mentzer v. Sargeant*, 115 Iowa 527; *Acme Harvester Co. v. Madden*, 4 Kan. App. 598; *Jackson v. Mutual Ben. L. Ins. Co.*, 79 Minn. 43; *Moore v. Rankin*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 749; *Estey v. Birnbaum*, 9 S. Dak. 174; *Moyle v. Congregational Soc.*, 16 Utah 69.

**After the Termination of the Agency** statements made by the agent are not binding on the

**1143.** (4) *Delivery or Payment to Agent.* — See notes 4, 5.

**1144.** (5) *Notice to Agent* — (a) *Rule Stated.* — See note 1.

principal. *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629.

**Statements Made Prior to the Transaction** are not admissible. *Helfrich Lumber, etc., Co. v. Bland*, (Ky. 1900) 54 S. W. Rep. 728.

**Order of Proof.** — It is essential that agency or authority to act for the principal in the transaction in question be first proven by either positive or circumstantial evidence. *International Bldg., etc., Assoc. v. Watson*, 158 Ind. 508; *Pease v. Trench*, 197 Ill. 101, *affirming* 98 Ill. App. 24.

**1143. 4. Delivery of Goods to Agent.** — *Callahan v. Crow*, 91 Hun (N. Y.) 346; *Austin v. Elk Mercantile Co.*, (Wash. 1905) 80 Pac. Rep. 525 (holding the principal liable for the price of goods converted by the agent to his own use).

**Inspection and Acceptance** of merchandise at the place of delivery by an agent will bind the principal. *Darby v. Hall*, 3 Penn. (Del.) 25.

**The Rule Ceases to Apply** where the third person has notice of the termination of the agency and is forbidden to make delivery. *Newlove v. Pond*, 130 Cal. 342.

**The Surrender of a Lease** to an agent is not binding on the principal unless it is shown that such agent had authority to accept the surrender. *Earle v. Gillies*, (Supm. Ct. App. T.) 92 N. Y. Supp. 239.

**5. Payment of Money to Agent.** — *Hamil v. American Freehold Land Mortg. Co.*, 127 Ala. 90; *Meserve v. Hanford*, 59 Kan. 777, 53 Pac. Rep. 835; *Wagner v. Supreme Lodge, etc.*, 128 Mich. 660; *Hoskins v. Rochester Sav., etc., Assoc.*, 133 Mich. 505; *Bonner v. Lisenby*, 86 Mo. App. 666; *Thomas Roberts Stevenson Co. v. Fox*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 177; *Gross v. Owen*, (Supm. Ct. App. T.) 86 N. Y. Supp. 266.

**The Agent Must Have Actual or Apparent Authority** to make a payment to him binding on the principal. *Lakeside Press, etc., Co. v. Campbell*, 39 Fla. 523.

**Payment After Notice of Lack of Authority** will not discharge the obligation of the debtor. *Williams v. Anderson*, 107 Ill. App. 32; *Henderson v. McNally*, 48 N. Y. App. Div. 134, *affirmed* 168 N. Y. 646.

**An Authority Forged by the Agent** will not operate to discharge the debtor. *Girard v. Beauchemin*, 18 Quebec Super. Ct. 111.

**Payment for Unlawful Purpose.** — Where money is paid to an agent for a lease for an unlawful purpose, there is no presumption that the agent is authorized to receive the money on behalf of his principal, and hence a payment made to him under such circumstances is not binding on his principal. *Stover v. Flower*, 120 Iowa 514.

**1144. 1. United States.** — *La Dow v. North American Trust Co.*, 113 Fed. Rep. 13.

*Alabama.* — *Kelly v. Burke*, 132 Ala. 235, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144; *Russell v. Peavy*, 131 Ala. 563.

*California.* — *Chapman v. Hughes*, 134 Cal. 641, *affirmed* 134 Cal. 646.

*District of Columbia.* — *Slater v. Hamacher*, 15 App. Cas. (D. C.) 558.

*Georgia.* — *Strickland v. Vance*, 99 Ga. 531;

*People's Sav. Bank v. Smith*, 114 Ga. 185; *Morris v. Georgia Loan, etc., Co.*, 109 Ga. 12; *Pursley v. Stahley*, (Ga. 1905) 50 S. E. Rep. 139.

*Illinois.* — *Sheppard v. Wood*, 78 Ill. App. 428; *Fischer v. Tuohy*, 186 Ill. 143; *Bouton v. Cameron*, 205 Ill. 50.

*Indiana.* — *Forsythe v. Brandenburg*, 154 Ind. 588, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145 (1144); *Rauh v. Waterman*, 29 Ind. App. 344, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144-1150; *Blair v. Whittaker*, 31 Ind. App. 664, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144.

*Indian Territory.* — *Noyes v. Tootle*, 2 Indian Ter. 144.

*Iowa.* — *McMaken v. Niles*, 91 Iowa 628; *Young v. Iowa Toilers Protective Assoc.*, 106 Iowa 447; *Baldwin v. Davis*, 118 Iowa 36; *Manson v. Simplot*, 119 Iowa 94.

*Kansas.* — *Westerman v. Evans*, 1 Kan. App. 1; *Hawley v. Smeiding*, 3 Kan. App. 159; *New Hampshire Banking Co. v. Walker*, 5 Kan. App. 881, 47 Pac. Rep. 543.

*Kentucky.* — *Bramblett v. Henderson*, (Ky. 1896) 41 S. W. Rep. 575, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144; *Com. v. Roark*, 76 S. W. Rep. 140, 25 Ky. L. Rep. 603; *Helfrich Lumber, etc., Co. v. Honaker*, (Ky. 1903) 76 S. W. Rep. 342.

*Mississippi.* — *Equitable Securities Co. v. Sheppard*, 78 Miss. 217, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144.

*Missouri.* — *Babbitt v. Kelley*, 96 Mo. App. 529; *Atkinson v. Elmore*, 103 Mo. App. 403.

*Nebraska.* — *Farmers, etc., Ins. Co. v. Wiard*, 59 Neb. 451; *Pochin v. Knoebel*, 63 Neb. 768.

*New York.* — *Mull v. Ingalls*, (County Ct.) 30 Misc. (N. Y.) 80; *Leszynsky v. Ross*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 652; *Koslovki v. International Heater Co.*, 75 N. Y. App. Div. 60; *Consolidated Fruit Jar Co. v. Wisner*, 103 N. Y. App. Div. 453.

*Ohio.* — *Tate v. Tate*, 10 Ohio Cir. Dec. 321, 19 Ohio Cir. Ct. 532.

*Pennsylvania.* — *Heckman's Estate*, 172 Pa. St. 185; *Moulton v. O'Bryan*, 17 Pa. Super. Ct. 593; *Nutting v. Lynn*, 18 Pa. Super. Ct. 59.

*South Carolina.* — *Blackwell v. British-American Mortg. Co.*, 65 S. Car. 105.

*Tennessee.* — *Major v. Stone's River Nat. Bank*, (Tenn. Ch. 1899) 64 S. W. Rep. 352.

*Texas.* — *Baldwin v. Root*, (Tex. Civ. App. 1896) 38 S. W. Rep. 630; *People's Bldg, etc., Assoc. v. Dailey*, 17 Tex. Civ. App. 38; *Morrill v. Bosley*, (Tex. Civ. App. 1905) 88 S. W. Rep. 519.

*Virginia.* — *Schreckhise v. Wiseman*, 102 Va. 9; *Mack Mfg. Co. v. Smoot*, 102 Va. 724.

*Washington.* — *Pacific Nat. Bank v. Aetna Indemnity Co.*, 33 Wash. 428, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144; *Dormitzer v. German Sav., etc., Soc.*, 23 Wash. 132; *Haynes v. Gay*, (Wash. 1905) 19 Pac. Rep. 794.

*Canada.* — *Graham v. British Canadian Loan, etc., Co.*, 12 Manitoba 244.

**Reason of the Rule.** — See *Com. v. Roark*, 76 S. W. Rep. 140, 25 Ky. L. Rep. 603.

**Attorneys.** — *American Freehold Land Mortg. Co. v. Felder*, 44 S. Car. 478.

**1145. When It Is Not the Agent's Duty to Communicate Such Knowledge. — See note 1.**  
**When Agent Acts in His Own Interest. — See note 2.**

**Agents of Corporations.**—Howison *v.* Alabama Coal, etc., Co., (C. C. A.) 70 Fed. Rep. 683; Brobston *v.* Penniman, 97 Ga. 527; Waters *v.* West Chicago St. R. Co., 101 Ill. App. 265; Beacon Trust Co. *v.* Souther, 183 Mass. 413; St. Paul, etc., Trust Co. *v.* Howell, 59 Minn. 295; Wheeler *v.* St. Joseph Stock Yards, etc., Co., 66 Mo. App. 260; Trent *v.* Sherlock, 26 Mont. 85; Eagle Fire Co. *v.* Globe L. & T. Co., 44 Neb. 380; Bexar Bldg., etc., Assoc. *v.* Lockwood, (Tex. Civ. App. 1899) 54 S. W. Rep. 253.

**Power or Duty to Act Must Exist.**—For a corporation to be bound by notice to an officer or agent, such officer or agent must have the power to act upon the notice, or be under a duty to communicate the notice to the officers who have power. Nehawka Bank *v.* Ingersoll, (Neb. 1902) 89 N. W. Rep. 618.

**Where a Person Is the Agent of Two Corporations,** knowledge acquired by him as the agent of one is not imputed to the other, unless under the circumstances it is his duty to communicate it. *In re Fenwick*, (1902) 1 Ch. 507.

**When the Agent Is a Nominal Agent Merely,** or is acting merely as to ministerial matters, knowledge by him will not be imputed to his principal. *Etna Indemnity Co. v. Schroeder*, 12 N. Dak. 110.

**Notice to Agent Not Notice to Principal for Purpose of Imputing Conspiracy to Defraud.**—Benton *v.* Minneapolis Tailoring, etc., Co., 73 Minn. 498.

**Constructive Notice to the Agent** cannot be imputed to the principal; the agent must have actual notice. *Central Trust Co. v. West India Imp. Co.*, 48 N. Y. App. Div. 147.

**Where an Agent Acts for Both Parties,** with their knowledge, notice to him in the course of his employment is to be imputed to each. *Smith v. Farrell*, 66 Mo. App. 8.

**When Agent Requested Not to Inform Principal.**—Notice to an agent, coupled with a request not to transmit it to his principal, is not notice to the latter, when such request is complied with. *Lenhart v. St. Louis, etc., R. Co.*, 62 Mo. App. 90.

**1145. 1.** *Mack v. McIntosh*, 181 Ill. 633; *Equitable Securities Co. v. Sheppard*, 78 Miss. 217, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145; *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 899. See also *Chicago, etc., R. Co. v. Hammond*, 210 Ill. 187.

**2. United States.**—*American Surety Co. v. Pauly*, 170 U. S. 133; *Hatch v. Ferguson*, (C. C. A.) 66 Fed. Rep. 668. See also *Fidelity, etc., Co. v. Courtney*, 186 U. S. 342; *Pine Mountain Iron, etc., Co. v. Bailey*, 87 Fed. Rep. 29; *Waite v. Santa Cruz*, 89 Fed. Rep. 619; *Pine Mountain Iron, etc., Co. v. Bailey*, 94 Fed. Rep. 258, 36 C. C. A. 229; *School Dist. v. De Weese*, 100 Fed. Rep. 705; *Levy, etc., Mule Co. v. Kauffman*, 114 Fed. Rep. 170, 52 C. C. A. 126; *Overton Bank v. Thompson*, (C. C. A.) 118 Fed. Rep. 798; *Central Coal, etc., Co. v. Good*, 120 Fed. Rep. 793, 57 C. C. A. 161.

**Alabama.**—*Scotch Lumber Co. v. Sage*, 132 Ala. 598, 90 Am. St. Rep. 932, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145.

**Colorado.**—*Sanford Cattle Co. v. Williams*, 18 Colo. App. 378.

**Georgia.**—*English-American L. & T. Co. v. Hiers*, 112 Ga. 823; *People's Bank v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144; *Pursley v. Stahley*, (Ga. 1905) 50 S. E. Rep. 139.

**Illinois.**—*Jummel v. Mann*, 80 Ill. App. 288; *Metcalf v. Draper*, 98 Ill. App. 399; *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125; *Seaverns v. Presbyterian Hospital*, 64 Ill. App. 463; *Booker v. Booker*, 208 Ill. 529, 100 Am. St. Rep. 250.

**Iowa.**—*Findley v. Mann*, 80 Ill. App. 288.

**Kansas.**—*Hart Pioneer Nurseries v. Coryell*, 8 Kan. App. 496.

**Massachusetts.**—*Indian Head Nat. Bank v. Clark*, 166 Mass. 27; *Shepard, etc., Lumber Co. v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446; *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577.

**Michigan.**—*State Sav. Bank v. Montgomery*, 126 Mich. 327; *People's Sav. Bank v. Hine*, 131 Mich. 181; *Brown v. Harris*, (Mich. 1905) 102 N. W. Rep. 960.

**Minnesota.**—*Benton v. Minneapolis Tailoring, etc., Co.*, 73 Minn. 498, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145; *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309.

**Mississippi.**—*Equitable Securities Co. v. Sheppard*, 78 Miss. 217, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145.

**Missouri.**—*Butler v. Montgomery Grain Co.*, 85 Mo. App. 50; *Traber v. Hicks*, 131 Mo. 180; *Smith v. Boyd*, 162 Mo. 146; *Kenneth Invest. Co. v. National Bank of Republic*, 96 Mo. App. 125.

**Montana.**—*Stanford v. Coram*, 26 Mont. 285, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145.

**Nebraska.**—*Houghton v. Todd*, 58 Neb. 360; *Jones v. Lincoln First Nat. Bank*, (Neb. 1902) 90 N. W. Rep. 912.

**New Jersey.**—*Camden Safe Deposit, etc., Co. v. Lord*, (N. J. 1904) 58 Atl. Rep. 607.

**New York.**—*Matter of Guldenkirch*, (Surrogate Ct.) 35 Misc. (N. Y.) 123, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145; *English v. Rauffuss*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 494; *Olyphant v. Phyfe*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 64; *Barnett v. Daw*, 55 N. Y. App. Div. 202; *Critten v. Chemical Nat. Bank*, 60 N. Y. App. Div. 241; *Crooks v. People's Nat. Bank*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 450; *Brady v. Mt. Morris Bank*, 65 N. Y. App. Div. 212; *Henry v. Allen*, 151 N. Y. 1; *Benedict v. Arnoux*, 154 N. Y. 715.

**North Dakota.**—*Etna Indemnity Co. v. Schroeder*, 12 N. Dak. 110.

**Pennsylvania.**—*Gunster v. Scranton Illuminating, etc., Co.*, 181 Pa. St. 327, 59 Am. St. Rep. 650, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145; *United Security L. Ins. etc., Co. v. Central Nat. Bank*, 185 Pa. St. 586; *Sproul v. Standard Plate Glass Co.*, 201 Pa. St. 103.

**South Carolina.**—*Knoblock v. Germania Sav. Bank*, 50 S. Car. 259.

**Utah.**—*Nephi First Nat. Bank v. Foote*, 12

**1146. Where the Agent Colludes with a Third Party. — See note 1.****(b) Must Relate to Business Within Scope of Agency. — See note 3.**

Utah 157; *Jungk v. Reed*, 12 Utah 196; *Victor Gold, etc., Min. Co. v. National Bank of Republic*, 15 Utah 391.

*Wisconsin.* — *Cole v. Getzinger*, 96 Wis. 559.

**Reason of the Rule as to Agents Acting in Their Own Interest.** — To the same effect as *Frankel v. Hudson*, 82 Ala. 162, 60 Am. Rep. 736, set out in the original note, see *Knoblock v. Germania Sav. Bank*, 50 S. Car. 259; *Nephi First Nat. Bank v. Foote*, 12 Utah 157.

**When Agent Transcends Authority.** — The rule as to notice cannot be extended to imply that a special agent, whose powers are limited to making a lease for one year, informed his principal that he had transcended his authority and made two leases for longer terms. *Long v. Poth*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 85.

**1146. 1.** *Western Mortg., etc., Co. v. Ganzer*, 63 Fed. Rep. 647, 23 U. S. App. 608; *Hudson v. Randolph*, 66 Fed. Rep. 216, 23 U. S. App. 681; *Scripture v. Scottish-American Mortg. Co.*, 20 Tex. Civ. App. 153; *Cooper v. Ford*, 29 Tex. Civ. App. 253. See also *Smith v. Boyd*, 162 Mo. 146.

**3.** *United States.* — *Denver v. Sherret*, (C. C. A.) 88 Fed. Rep. 226; *Chicago, etc., R. Co. v. Bellwith*, 83 Fed. Rep. 437, 55 U. S. App. 113; *Zeis v. Potter*, 105 Fed. Rep. 671, 44 C. C. A. 665; *Curtice v. Crawford County Bank*, 110 Fed. Rep. 830.

*California.* — *Ayers v. Green Gold Min. Co.*, 116 Cal. 333.

*Colorado.* — *Deane v. Roaring Fork Electric Light, etc., Co.*, 5 Colo. App. 521; *Schollay v. Moffitt-West Drug Co.*, 17 Colo. App. 126.

*Georgia.* — *McLean v. Camak*, 97 Ga. 804.

*Illinois.* — *Consolidated Coal Co. v. Block, etc.*, *Smelting Co.*, 53 Ill. App. 565; *Ryan v. Potwin*, 62 Ill. App. 134; *Wright v. Bruschke*, 62 Ill. App. 358; *Germania L. Ins. Co. v. Koehler*, 63 Ill. App. 188.

*Indiana.* — *Marion Mfg. Co. v. Harding*, 155 Ind. 648; *International Bldg., etc., Assoc. v. Watson*, 158 Ind. 508.

*Kansas.* — *Topliff v. Shadwell*, 68 Kan. 317; *Arkansas City First Nat. Bank v. Skinner*, 10 Kan. App. 517.

*Kentucky.* — *Tate v. Illinois Cent. R. Co.*, (Ky. 1904) 81 S. W. Rep. 256.

*Massachusetts.* — *Low v. Low*, 177 Mass. 306.

*Minnesota.* — *Jackson v. Mutual Ben. L. Ins. Co.*, 79 Minn. 43, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1146; *Jackson v. Mutual Ben. L. Ins. Co.*, 79 Minn. 49; *Strauch v. May*, 80 Minn. 343.

*Missouri.* — *Smith v. Boyd*, 162 Mo. 146; *O'Neill v. Blase*, 94 Mo. App. 648; *Kyle v. Gaff*, (Mo. App. 1904) 78 S. W. Rep. 1047.

*New Hampshire.* — *Bohanan v. Boston, etc., R. Co.*, 70 N. H. 526.

*New Jersey.* — *Canda Mfg. Co. v. Woodbridge Tp.*, 58 N. J. L. 134.

*New York.* — *Canda v. Casey*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 322; *Goldenson v. Lawrence*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 570; *Crooks v. People's Nat. Bank*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 450; *Flanagan v. Shaw*, 74 N. Y. App. Div. 508.

*South Carolina.* — *American Freehold Land*

*Mortg. Co. v. Felder*, 44 S. Car. 478; *Sparkman v. Supreme Council, etc.*, 57 S. Car. 16.

*Texas.* — *Missouri, etc., R. Co. v. Belcher*, 88 Tex. 549; *Texas Loan Agency v. Taylor*, 88 Tex. 47; *Galveston, etc., R. Co. v. Gormley*, 91 Tex. 393, 66 Am. St. Rep. 894; *Pughe v. Coleman*, (Tex. Civ. App. 1898) 44 S. W. Rep. 576; *Allen v. Garrison*, 92 Tex. 546; *Ferguson v. McCrary*, 20 Tex. Civ. App. 529; *Smith v. Smith*, 23 Tex. Civ. App. 304; *Campbell v. Crowley*, (Tex. Civ. App. 1900) 56 S. W. Rep. 373; *Ash v. Fidelity Mut. L. Assoc.*, 26 Tex. Civ. App. 501; *Lane v. De Bode*, 29 Tex. Civ. App. 602; *June v. Doke*, (Tex. Civ. App. 1904) 80 S. W. Rep. 402.

*Wisconsin.* — *Andrews v. Robertson*, 111 Wis. 334, 87 Am. St. Rep. 870.

*Wyoming.* — *Rock Springs Nat. Bank v. Luman*, 5 Wyo. 159.

**Notice Must Be in Regard to Matter Within Scope of Agent's Business — Illustrations.** — Where an agent's duties were limited to finding borrowers for his principal's money, and the approval of the security was not intrusted to him, it was held that his knowledge of the trust character of the land offered as security could not be attributed to his principal. *Donham v. Hahn*, 127 Mo. 439.

Agents to inspect land offered as security for a loan, the inspection being for the sole purpose of ascertaining its character and value, are not agents of the lender to receive notice of an adverse title or an outstanding equity. *Lewis v. Equitable Mortg. Co.*, 94 Ga. 572.

Where the examination of corporate books in making trial balances was not made in the performance of a duty owed by the corporation to any other party, the knowledge acquired by the agent making the examinations is not to be imputed to the corporation. *Shepard, etc., Lumber Co. v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446.

**Criminal Transactions Beyond Scope of Agency.** — Where the agent, participating in criminal transactions beyond the scope of the agency, acquires knowledge of matters affecting the business of his principal, the presumption of notice fails. *Hart v. Bier*, 74 Fed. Rep. 592.

**Insurance Agent.** — *Germania Ins. Co. v. Wingfield*, (Ky. 1900) 57 S. W. Rep. 456; *Union Cent. L. Ins. Co. v. Smith*, 105 Mich. 353; *O'Brien v. Greenwich Ins. Co.*, 95 Mo. App. 301; *Eagle Fire Co. v. Globe L. & T. Co.*, 44 Neb. 380; *Fidelity Mut. F. Ins. Co. v. Lowe*, (Neb. 1903) 93 N. W. Rep. 749; *Spalding v. New Hampshire F. Ins. Co.*, 71 N. H. 441; *Northwestern L. Assoc. v. Findley*, (Tex. Civ. App. 1902) 68 S. W. Rep. 695; *Sun L. Ins. Co. v. Phillips*, (Tex. Civ. App. 1902) 70 S. W. Rep. 603; *Welch v. Fire Assoc.*, 120 Wis. 456.

Where an insurance agent acts as the agent of both parties, notice received as agent of the insurer is not notice to the insured. *British America Assur. Co. v. Cooper*, 6 Colo. App. 25.

**President of Corporation.** — *Curtice v. Crawford County Bank*, (C. C. A.) 118 Fed. Rep. 390; *Witter v. McCarthy Co.*, (Cal. 1896) 43 Pac. Rep. 469; *Sullivan County R. Co. v. Connecticut River Lumber Co.*, 76 Conn. 464; *Fouché v.*



- 1149.** (c) **Must Be of Important Facts.** — See note 1.  
 (d) **When Notice Must Be Had — During Continuance of Agency.** — See note 2.  
**After Agency Is Terminated.** — See note 3.  
**1150.** **Notice Acquired Prior to Agency.** — See notes 1, 2.  
**1151.** (6) *In Tort.* — See note 1.  
**1152.** See note 1.

'Merchants' Nat. Bank, 110 Ga. 827; Indiana, etc., R. Co. v. Swannell, 157 Ill. 616; Joseph Wolf Co. v. Bank of Commerce, 107 Ill. App. 58; Reagan v. Chicago First Nat. Bank, 157 Ind. 623, rehearing denied 157 Ind. 673; Tate v. Security Trust Co., 63 N. J. Eq. 559.

Information acquired while acting in a private capacity will not be deemed notice to the corporation. Smith v. Carmack, (Tenn. Ch. 1901) 64 S. W. Rep. 372.

**Director of Corporation.** — Where it does not appear that a director having notice acted as a member of the board upon the matter affected thereby, the corporation will not be charged with such notice. Hatch v. Ferguson, (C. C. A.) 66 Fed. Rep. 668.

Notice to an individual director who has no duty to perform in relation to the subject-matter of the notice is not notice to the corporation unless communicated to the board. Murphy v. Gumaer, 12 Colo. App. 472; Home Sav., etc., Bank v. Peoria Agricultural, etc., Soc., 206 Ill. 9, 99 Am. St. Rep. 132; Crooks v. People's Nat. Bank, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 450; Boston Commercial Bank v. Heppes, 23 Pa. Co. Ct. 447, 9 Pa. Dist. 352. See also Black v. Westminster First Nat. Bank, 96 Md. 399, adhering to the doctrine of the *Maryland* cases cited in the original note as to knowledge not communicated.

**Stockholder.** — Blood v. La Serena Land, etc., Co., 134 Cal. 361.

**Cashier of Bank.** — Singleton v. Monticello Bank, 113 Ga. 527; Goshorn v. People's Nat. Bank, 32 Ind. App. 428, 102 Am. St. Rep. 248; Grant County Deposit Bank v. Points, (Ky. 1900) 56 S. W. Rep. 662; Farmers', etc., Bank v. Loyd, 89 Mo. App. 262; Rhinehart v. People's Bank, 89 Mo. App. 511.

**Officers Generally.** — Citizens' Trust, etc., Co. v. Zane, 113 Fed. Rep. 596, affirmed (C. C. A.) 117 Fed. Rep. 814; Paul Steam System Co. v. Paul, 129 Fed. Rep. 757; Blood v. La Serena Land, etc., Co., 134 Cal. 361; Home Sav., etc., Bank v. Wheeler, 74 Ill. App. 261; Union Nat. Bank v. Manhattan L. Ins. Co., 52 La. Ann. 36; Mayer v. Old, 57 Mo. App. 639; Baird v. New York Cent., etc., R. Co., 64 N. Y. App. Div. 14; *In re Sweet*, 20 R. I. 557.

*Under the Washington Statutes* prescribing that all corporate control shall be vested in and exercised by a board of trustees, the knowledge of a single officer or trustee or the president cannot be imputed to the corporation unless it is affirmatively shown that his knowledge was brought home to the board of trustees. American Bonding Co. v. Spokane Bldg., etc., Soc., (C. C. A.) 130 Fed. Rep. 737.

**1149.** 1. Bramblett v. Henderson, (Ky. 1896) 41 S. W. Rep. 575.

**Source of Information to Be Regarded.** — Patterson v. Irvin, (Ala. 1905) 38 So. Rep. 121.

2. Stanley v. Schwalby, 162 U. S. 255; Wheeler v. St. Joseph Stock Yards, etc., Co.,

65 Mo. App. 260; McChesney v. Davis, 86 Ill. App. 380.

3. Alger v. Keith, 105 Fed. Rep. 105, 44 C. C. A. 371; American Ins. Co. v. Walston, 111 Ill. App. 133; Day v. Exchange Bank, 78 S. W. Rep. 132, 25 Ky. L. Rep. 1449. See also Smith v. Boyd, 162 Mo. 146.

**1150.** 1. Scotch Lumber Co. v. Sage, 132 Ala. 598, 90 Am. St. Rep. 932, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1149, 1150; Kyle v. Gaff, (Mo. App. 1904) 78 S. W. Rep. 1047; Samuelson v. Gale Mfg. Co., (Neb. 1901) 95 N. W. Rep. 809; Langenheim v. Anschütz-Bradberry Co., 2 Pa. Super. Ct. 285; Chester v. Schaffer, 24 Pa. Super. Ct. 162; Bangor, etc., R. Co. v. American Bangor Slate Co., 203 Pa. St. 6; Cooper v. Ford, 29 Tex. Civ. App. 253; Merrill v. Southwestern Tel., etc., Co., 31 Tex. Civ. App. 614.

2. Brown v. Cranberry Iron, etc., Co., (C. C. A.) 72 Fed. Rep. 96; Booker v. Booker, 208 Ill. 529, 100 Am. St. Rep. 250; McClelland v. Saul, 113 Iowa 208, 86 Am. St. Rep. 370; Westerman v. Evans, 1 Kan. App. 1; Schwind v. Boyce, 94 Md. 510, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1150; Haines v. Starkey, 82 Minn. 230, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1150; Equitable Securities Co. v. Sheppard, 78 Miss. 217; Gregg v. Baldwin, 9 N. Dak. 515, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1150; George v. Butler, 16 Utah 111; Melms v. Pabst Brewing Co., 93 Wis. 153, 57 Am. St. Rep. 899. See also Smith v. Boyd, 162 Mo. 146.

**Reason of the Doctrine.** — To the same effect as *The Distilled Spirits*, 11 Wall. (U. S.) 367, stated in the original note, see *Modern Woodmen of America v. Colman*, (Neb. 1903) 94 N. W. Rep. 814, rehearing denied (Neb. 1903) 96 N. W. Rep. 154; Melms v. Pabst Brewing Co., 93 Wis. 153, 57 Am. St. Rep. 899.

**Where Agency Is Concerned with Long Series of Transactions.** — Foote v. Utah Commercial, etc., Bank, 17 Utah 283.

**An Exception to the Rule,** under the *Illinois* doctrine, arises where the information obtained by the agent in a former transaction is so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction. Roderick v. McMeekin, 204 Ill. 625.

**Conversely,** the principal is entitled to the benefits and advantages of knowledge previously possessed by his agent. Haines v. Starkey, 82 Minn. 230.

**1151.** 1. **Independent Contractor.** — A principal is not liable for the wrong doings of an independent contractor if the act contracted to be done be legal. Slingerland v. East Jersey Water Co., 58 N. J. L. 411.

**1152.** 1. **Torts Committed in the Course of Employment.** — Citizens' L. Assur. Co. v. Brown, (1904) A. C. 423, 90 L. T. N. S. 739; Washington Gas Light Co. v. Lansden, 172 U. S.

**1154. Torts Outside the Agent's Employment.** — See note 1.

Corporations. — See note 3.

**1155. Negligence.** — See note 2.**1156. See note 1.**

Wanton or Malicious Acts. — See note 3.

534; *Hanover F. Ins. Co. v. Bradford*, 102 Fed. Rep. 45; *St. Louis, etc., R. Co. v. Grant*, (Ark. 1905) 88 S. W. Rep. 580; *Sanders v. Illinois Cent. R. Co.*, 90 Ill. App. 582; *Ogle v. Hudson*, 30 Ind. App. 539; *Clark v. Folscroft*, 67 Kan. 446; *Singer Mfg. Co. v. Stephens*, (Ky. 1899) 53 S. W. Rep. 525; *Warren v. Dennett*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 86; *Dupre v. Childs*, 52 N. Y. App. Div. 306; *Hall v. Norfolk, etc., R. Co.*, 44 W. Va. 36, 67 Am. St. Rep. 757, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1151; *McDonald v. Cole*, 46 W. Va. 186, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1151. See also *Graham v. British Canadian Loan, etc., Co.*, 12 Manitoba 244.

**Usury.** — If an agent to lend money exacts, with the knowledge of the principal, either directly or indirectly, interest in excess of the legal rate, the transaction is usurious. *Richards v. Bippus*, 18 App. Cas. (D. C.) 293.

Where an agent with authority to lend money at a lawful rate lends it at usurious rates for his own benefit, or exacts a bonus in addition to the lawful interest, without the knowledge of his principal, the transaction is not usurious. *Short v. Pullen*, 63 Ark. 385; *Clarke v. Havard*, 111 Ga. 242; *McCall v. Herring*, 116 Ga. 235; *McCall v. Herrin*, 118 Ga. 522; *McLean v. Camak*, 97 Ga. 804; *Gantzer v. Schmeltz*, 206 Ill. 560, modifying 107 Ill. App. 641; *Commonwealth Title Ins., etc., Co. v. Dakko*, 89 Minn. 386; *Brainard v. Prouty*, 66 Minn. 343; *Flanagan v. Shaw*, 74 N. Y. App. Div. 508; *Barger v. Taylor*, 30 Oregon 228; *Land Mortg. Invest., etc., Co. v. Gillam*, 49 S. Car. 345. *Compare Robinson v. Blaker*, 85 Minn. 242, 89 Am. St. Rep. 541; *Western Storage, etc., Co. v. Glasner*, 169 Mo. 38; *Hare v. Hooper*, 56 Neb. 480; *Hare v. Winterer*, 64 Neb. 551; *Hare v. Winterer*, (Neb. 1901) 96 N. W. Rep. 179; *Braine v. Rosswog*, 13 N. Y. App. Div. 249; *Dunlap v. Toy*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 627; *Bliss v. Sherrill*, 24 N. Y. App. Div. 280. And see the title **USURY**.

**Selling Intoxicating Liquors in Violation of Statute.** — The holder of a liquor-tax certificate is responsible for the act of his clerk in improperly selling liquor while engaged in the performance of his master's business, even though in such act the clerk violated his specific instructions. *Cullinan v. Burkard*, 93 N. Y. App. Div. 31.

**Assault and Battery.** — *Monnier v. New York Cent., etc., R. Co.*, 70 N. Y. App. Div. 405.

**Ostensible Agent.** — The principal is liable for the torts of an ostensible agent as well as in the case of an actual agency. *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417.

**Ex Delicto and Ex Contractu Liabilities Compared.** — Whenever the tort consists of a violation of a duty which springs from a contract between the parties, the ostensible principal is liable to the same extent in an action *ex delicto* as in one *ex contractu*. *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244.

**Question for Jury.** — Whether the agent at the time of the commission of the tort is acting within the scope of his authority is a question for the jury. *Field v. Kane*, 99 Ill. App. 1.

**1154. 1. Torts Beyond Scope of Agent's Authority.** — *Carter v. St. Mary Abbott's Vestry*, 63 J. P. 487; *St. Louis, etc., R. Co. v. Grant*, (Ark. 1905) 88 S. W. Rep. 580; *West v. A. F. Messick Grocery Co.*, (N. Car. 1905) 50 S. E. Rep. 565; *Hart v. Maney*, 12 Wash. 266.

**3. Corporations.** — *Southern Express Co. v. Platten*, 93 Fed. Rep. 936, 36 C. C. A. 46; *Sunnyside Coal, etc., Co. v. Reitz*, 14 Ind. App. 478; *Larson v. Fidelity Mut. L. Assoc.*, 71 Minn. 101; *Minter v. Bradstreet Co.*, 174 Mo. 444; *Ring v. Long Island Real Estate Exch., etc., Co.*, 93 N. Y. App. Div. 442.

**1155. 2. Black v. Christchurch Finance Co.**, (1894) A. C. 48, 6 Reports 394; *Wrought-Iron Range Co. v. Graham*, (C. C. A.) 80 Fed. Rep. 474; *Parsons v. Empire Transp. Co.*, 111 Fed. Rep. 202, 49 C. C. A. 302; *Holmes v. Tennessee Coal, etc., Co.*, 49 La. Ann. 1465; *Blanki v. Greater American Exposition Co.*, (Neb. 1902) 92 N. Y. Rep. 615.

**1156. 1. Flinn v. World's Dispensary Medical Assoc.**, 64 N. Y. App. Div. 490.

**3. Tanger v. Southwest Missouri Electric R. Co.**, 85 Mo. App. 28; *Riser v. Southern R. Co.*, 67 S. Car. 419; *Lipscomb v. Houston, etc., R. Co.*, 95 Tex. 5, 93 Am. St. Rep. 804.

**Liability of Corporation for Malicious Acts.** — *Dwyer v. St. Louis Transit Co.*, 108 Mo. App. 152; *Western Cottage Piano, etc., Co. v. Anderson*, (Tex. 1904) 79 S. W. Rep. 516; *Canfield v. Chicago, etc., R. Co.*, 59 Mo. App. 354.

**Malicious Prosecution by Agents of Corporations.** — In support of the first paragraph of the original note, see *Atchison, etc., R. Co. v. Brown*, 57 Kan. 785; *Walker v. Culman*, 9 Kan. App. 691; *Smith v. Munch*, 65 Minn. 256; *Dwyer v. St. Louis Transit Co.*, 108 Mo. App. 152; *Schwartz v. Van Wie N. Y. Grocery Co.*, 69 N. Y. App. Div. 282. *Compare Laird v. Farwell*, 60 Kan. 512.

To the same effect as *Dally v. Young*, 3 Ill. App. 39, and other cases stated in the same paragraph of the original note, see *Hancock v. Singer Mfg. Co.*, 174 Ill. 503; *Singer Mfg. Co. v. Hancock*, 74 Ill. App. 556; *Baltimore, etc., Turnpike Road v. Green*, 86 Md. 161; *Beiswanger v. American Bonding, etc., Co.*, 98 Md. 287; *Larson v. Fidelity Mut. L. Assoc.*, 71 Minn. 101; *Daniel v. Atlantic Coast Line R. Co.*, 136 N. Car. 517; *Moore v. Cohen*, 128 N. Car. 345; *Thompson v. Bell*, 11 Tex. Civ. App. 1.

**Slander by Agent of Corporation.** — A corporation is not responsible for slanderous words uttered by its agent, in the absence of any proof of authority or ratification. *Redditt v. Singer Mfg. Co.*, 124 N. Car. 100.

**Liability for Exemplary Damages.** — A principal cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent upon the part

**1158.** See note 1.

**Fraud.** — See note 2.

**1159.** Misrepresentations. — See note 1.

**1160.** See note 1.

**1161.** See note 1.

*b.* LIABILITY CRIMINALLY. — See note 2.

**1163.** 3. Of Third Parties to Agent — *b.* AGENT'S RIGHT OF ACTION AGAINST THIRD PARTIES — (1) *On Contract* — (a) *When Made with Agent Personally* — *aa.* GENERAL RULE. — See notes 1, 2.

of the agent, unless he authorized or approved such act. *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213; *Haywood v. Hamm*, (Conn. 1904) 58 Atl. Rep. 695; *Woodward v. Ragland*, 5 App. Cas. (D. C.) 220; *Palo Alto Bank v. Pacific Postal Tel. Cable Co.*, 103 Fed. Rep. 841.

**1158.** 1. *Callahan v. Hyland*, 59 Ill. App. 348; *Larson v. Fidelity Mut. L. Assoc.*, 71 Minn. 101; *Cullinan v. Burkard*, 93 N. Y. App. Div. 31; *Daniel v. Atlantic Coast Line R. Co.*, 136 N. Car. 517.

2. *Farquharson v. King*, (1901) 2 K. B. 697, 85 L. T. N. S. 264; *London L. Ins. Co. v. Molson Bank*, 5 Ont. L. Rep. 407; *Alger v. Anderson*, 78 Fed. Rep. 729, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1158, 1159; *McIntire v. Pryor*, 173 U. S. 38; *Palo Alto Bank v. Pacific Postal Tel. Cable Co.*, 103 Fed. Rep. 841; *Binghamton Trust Co. v. Auten*, 68 Ark. 299, 82 Am. St. Rep. 295; *Cook v. Boyd*, (Iowa 1904) 99 N. W. Rep. 1063; *Phipps v. Mallory Commission Co.*, (Mo. App. 1904) 78 S. W. Rep. 1097; *Nowack v. Metropolitan St. R. Co.*, 166 N. Y. 433, 82 Am. St. Rep. 691; *Vanderslice v. Royal Ins. Co.*, 13 Pa. Super. Ct. 455; *Whaley v. Duncan*, 47 S. Car. 139.

**Fraud Within Apparent Scope of Authority — Illustrations.** — Where a purchasing agent fraudulently represents his principal to be the head of a family seeking a home, when in fact the buyer is a corporation seeking a site for a factory or a church, the principal must bear the consequences of the fraud. *Thompson v. Barry*, 184 Mass. 429.

A bank is liable for the fraud of its cashier acting within the scope of his apparent authority and according to the general course of business. *Goshorn v. People's Nat. Bank*, 32 Ind. App. 428, 102 Am. St. Rep. 248.

**Fraud Beyond Scope of Authority.** — *Thorne v. Heard*, (1895) A. C. 495, 73 L. T. N. S. 291, 11 Reports 254, (1894) 1 Ch. 599, 7 Reports 100; *Gompertz v. Cook*, 20 Times L. Rep. 106; *Gunster v. Scranton Illuminating, etc., Co.*, 181 Pa. St. 327, 59 Am. St. Rep. 650; *Harvey v. Schuykill Trust Co.*, 199 Pa. St. 421.

**Deceit.** — An action of deceit will not lie against an innocent principal. *White v. New York, etc., R. Co.*, 68 N. J. L. 123; *Mayo v. Wahlgreen*, 9 Colo. App. 506; *Keefe v. Sholl*, 181 Pa. St. 90. See also *Freyer v. McCord*, 165 Pa. St. 539. But see *Alger v. Anderson*, 78 Fed. Rep. 729.

**Where the Principal Has Accepted the Fruits of an agent's deceit** by accepting a payment thus unlawfully acquired, the injured party, by a timely rescinding of the contract and demanding a return of the money paid, may main-

tain an action upon contract to recover it back. *White v. New York, etc., R. Co.*, 68 N. J. L. 123.

**1159.** 1. *Hindman v. Louisville First Nat. Bank*, 112 Fed. Rep. 931, 50 C. C. A. 623; *Briggs v. Foster*, (C. C. A.) 137 Fed. Rep. 773; *Quarg v. Scher*, 136 Cal. 406; *West Florida Land Co. v. Studebaker*, 37 Fla. 28; *O'Donnell, etc., Bavarian Brewing Co. v. Farrar*, 62 Ill. App. 471; *Campbell v. Park*, (Iowa 1904) 101 N. W. Rep. 861; *Taylor v. Commercial Bank*, 68 N. Y. App. Div. 458; *Chisholm v. Eisenhuth*, 69 N. Y. App. Div. 134; *Freyer v. McCord*, 165 Pa. St. 539; *McDonald v. Cole*, 46 W. Va. 186, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1159; *Milburn v. Wilson*, 31 Can. Sup. Ct. 481.

**1160.** 1. *Hindman v. Louisville First Nat. Bank*, 112 Fed. Rep. 931, 50 C. C. A. 623; *Williamson v. Tyson*, 105 Ala. 644; *Belmont v. Talbot*, (Ky. 1899) 51 S. W. Rep. 588; *Cunningham v. Wathen*, 14 N. Y. App. Div. 553; *Smith v. Hildenbrand*, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 129; *Schram v. Strouse*, (Tex. Civ. App. 1894) 28 S. W. Rep. 262; *Hoyer v. Ludington*, 100 Wis. 441; *Godfrey v. Schneck*, 105 Wis. 568.

**Where the Act of Executing an Authority Is Itself a Representation of the Existence of Certain Facts.** — *New York Nat. Banking Assoc. Bank v. American Dock, etc., Co.*, 143 N. Y. 559; *Merchants', etc., Cotton Oil Co. v. Lufkin Nat. Bank*, (Tex. Civ. App. 1904) 79 S. W. Rep. 651.

**Representation that Corporation Is Partnership.** — The false statement of an agent of a corporation appointed to buy timber, in making the contract, that the company is a partnership does not bind its members or the corporation to liability as partners. *McDonald v. Cole*, 46 W. Va. 186.

**Representations as to Financial Standing of Principal.** — Representations by an agent as to the financial standing of his principal will not bind the latter in the absence of evidence that the agent was authorized to make such representations. *Ralph v. Fon Dersmith*, 3 Pa. Super. Ct. 618.

**1161.** 1. *Trankla v. McLean*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 221, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1158 [1161]; *Forster v. Wilshusen*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 520; *Milburn v. Wilson*, 31 Can. Sup. Ct. 481.

2. *Boyer v. Coxen*, 92 Md. 368, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1161; *Hall v. Norfolk, etc., R. Co.*, 44 W. Va. 36, 67 Am. St. Rep. 757, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1161.

**1163.** 1. *Neal v. Andrews*, (Tex. Civ. App. 1900) 60 S. W. Rep. 459.

**1164.** *bb.* WHEN AGENT IS OSTENSIBLE PRINCIPAL. — See note 1.

**1165.** See note 1.

(b) When Agent Has Beneficial Interest. — See note 3.

**1166.** (2) *In Tort* — (a) 'For Injury to Principal's Property in Agent's Possession. — See note 3.

**1167.** *d.* DEFENSES TO ACTION BROUGHT BY AGENT. — See note 3.

**1168.** 4. Of Third Parties to Principal — *a.* ON THE AGENT'S CONTRACTS — (1) *Principal May Maintain Action* — (a) *When Disclosed*. — See note 1.

*Equities Against Agent*. — See note 2.

(b) *When Undisclosed* — *aa.* IN GENERAL. — See note 3.

**1170.** *bb.* SUBJECT TO EQUITIES. — See notes 1, 2.

**1163.** 2. *Tustin Fruit Assoc. v. Earl Fruit Co.*, (Cal. 1898) 53 Pac. Rep. 693; *Spence v. Wilson*, 102 Ga. 762.

**1164.** 1. *Carter v. Southern R. Co.*, 111 Ga. 38; *Georgia Southern, etc., R. Co. v. Marchman*, 121 Ga. 235; *Simons v. Wittman*, (Mo. 1905) 88 S. W. Rep. 791; *Stewart v. Gregory*, 9 N. Dak. 618, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1164; *National Bank v. Nolting*, 94 Va. 263.

**1165.** 1. *Stockbarger v. Sain*, 69 Ill. App. 436.

3. See *Whiting v. Wm. H. Crawford Co.*, 93 Md. 390.

**1166.** 3. *Mitchell v. Georgia, etc., R. Co.*, 111 Ga. 760, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1166.

**1167.** 3. *Holden v. Rutland R. Co.*, 73 Vt. 317.

**1168.** 1. *Rea v. Barker*, 135 Fed. Rep. 890; *Randolph v. Wheeler*, 182 Mo. 145.

**Right Not Affected by Agent's Qualified Title.** — The right of the principal to collect the proceeds of a sale of goods is not impaired by the fact that the agents who made the sale had a qualified title in the goods as security for the payment of obligations assumed for their principal. *Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. Rep. 66, 53 U. S. App. 580.

2. *Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. Rep. 66, 53 U. S. App. 580.

3. *England*. — *Durant v. Roberts*, (1900) 1 Q. B. 629, 82 L. T. N. S. 217.

*United States*. — *Prichard v. Budd*, 76 Fed. Rep. 710, 42 U. S. App. 186; *Morris v. Chesapeake, etc., Steamship Co.*, 125 Fed. Rep. 62.

*Alabama*. — *Powell v. Wade*, 109 Ala. 95, 55 Am. St. Rep. 915; *McFadden v. Henderson*, 128 Ala. 221; *Western Union Tel. Co. v. Millsap*, 135 Ala. 415; *Manker v. Western Union Tel. Co.*, 137 Ala. 292; *Brooks v. Cook*, (Ala. 1905) 38 So. Rep. 641.

*Georgia*. — *Dodd Grocery Co. v. Postal Tel. Cable Co.*, 112 Ga. 685, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1168; *McConnell v. East Point Land Co.*, 100 Ga. 129.

*Illinois*. — *Stockbarger v. Sain*, 69 Ill. App. 436.

*Iowa*. — *Young v. Lohr*, 118 Iowa 624, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1168.

*Massachusetts*. — *Foster v. Graham*, 166 Mass. 202.

*Missouri*. — *Kelly v. Thuey*, 143 Mo. 422; *State v. O'Neill*, 74 Mo. App. 134.

*New York*. — *Johnson v. Doll*, (C. Pl. Gen.

T.) 11 Misc. (N. Y.) 345; *Wiehle v. Saffold*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 562; *Henderson v. McNally*, 48 N. Y. App. Div. 134; *Talcott v. Wabash R. Co.*, 159 N. Y. 461. *Oregon*. — *Kitchen v. Holmes*, 42 Oregon 252.

*Texas*. — *Low v. Moore*, 31 Tex. Civ. App. 460; *Gulf, etc., R. Co. v. Brown*, (Tex. Civ. App. 1905) 86 S. W. Rep. 53, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1168.

*West Virginia*. — *Coulter v. Blatchley*, 51 W. Va. 163.

See also *Real Estate Invest. Co. v. Richmond*, 23 Quebec Super. Ct. 151.

**Principal Must Show Agency.** — *McConnell v. East Point Land Co.*, 100 Ga. 129.

**Agent's Contract with Common Carrier.** — *Southern R. Co. v. Jones*, 132 Ala. 437; *Central of Georgia R. Co. v. James*, 117 Ga. 832; *Trimble v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 403. See also *Talcott v. Wabash R. Co.*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 443.

**1170.** 1. *Munroe v. Whitehouse*, 90 Me. 139; *Bertoli v. Smith*, 69 Vt. 425, the latter case holding that one who purchases from an agent who has neither the possession of the goods nor the muniments of title cannot defend against the undisclosed principal by showing that he credited the goods on a claim against the agent, supposing that he was the owner.

2. *United States*. — *Buchanan v. Cleveland Linseed-Oil Co.*, (C. C. A.) 91 Fed. Rep. 88, *Morris v. Chesapeake, etc., Steamship Co.*, 125 Fed. Rep. 62.

*Connecticut*. — *Sullivan v. Shailor*, 70 Conn. 733.

*Georgia*. — *McConnell v. East Point Land Co.*, 100 Ga. 129.

*Illinois*. — *Wiser v. Springside Coal Min. Co.*, 94 Ill. App. 471.

*Maine*. — *Munroe v. Whitehouse*, 90 Me. 139. *Massachusetts*. — *Foster v. Graham*, 166 Mass. 202; *Cushman v. Snow*, 186 Mass. 169.

*Minnesota*. — *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631.

*New York*. — *Pollace v. Scholl*, 51 N. Y. App. Div. 319.

*Ohio*. — *Hitchcock v. Kelley*, 4 Ohio Cir. Dec. 180, 18 Ohio Cir. Ct. 808.

*Pennsylvania*. — *Finn-Vipond Constr. Co. v. Wolf*, 12 Pa. Super. Ct. 317; *Belfield v. National Supply Co.*, 189 Pa. St. 189, 69 Am. St. Rep. 799.

*Texas*. — *Pacific Express Co. v. Redman*,

**1171. Third Party Must Show Lack of Knowledge.** — See note 1.*cc.* EXCEPTIONS. — See notes 2, 4.**1172.** See note 1.*b.* FOR PROPERTY WRONGFULLY TRANSFERRED TO THIRD PARTY — (1) *When Principal May Recover* — (a) *In General.* — See notes 2, 3.**1173.** See note 1.**1174.** (b) *Property Bartered, Pledged, or Mortgaged.* — See note 2.(c) *Property Used to Pay Agent's Debt* — *aa.* BY AGENT. — See note 5.**1175.** *bb.* BY SEIZURE UNDER EXECUTION OR ATTACHMENT. — See note 1.(d) *Securities.* — See note 2.**1176.** *c.* FOR MONEY WRONGFULLY PAID TO OR APPROPRIATED BY THIRD PARTY — (1) *When Principal May Recover* — (a) *In General.* — See note 1.

(Tex. Civ. App. 1901) 60 S. W. Rep. 677; Low v. Moore, 31 Tex. Civ. App. 460.

**1171.** 1. *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631; *Mull v. Ingalls*, (County Ct.) 30 Misc. (N. Y.) 80.2. *Melcher v. Kreiser*, 28 N. Y. App. Div. 362; *McColgan v. Katz*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 136; *Smith v. Pierce*, (Supm. Ct. App. Div.) 60 N. Y. Supp. 1011; *Anderson v. Conner*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 384.4. *Wiehle v. Safford*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 562..**Undisclosed Principal One with Whom the Other Party Would Not Have Dealt.** — See *Real Estate Invest. Co. v. Richmond*, 23 Quebec Super. Ct. 151.When it is clearly shown, either from the terms of the agreement or by the attendant circumstances, that the contract was with the agent personally, the principal, even though known, does not become a party to the contract, and cannot sue upon it in his own name. *Sullivan v. Shailor*, 70 Conn. 733.**1172.** 1. See *Temple v. Pennell*, 123 Iowa 729, holding that if an agent makes a contract to subserve some purpose of his own, and deals with the property as though he were the owner thereof, he alone can enforce it.2. *Gentry v. Singleton*, (Indian Ter. 1902) 69 S. W. Rep. 898, *reversing* 3 Indian Ter. 516; *Worthington v. Vette*, 77 Mo. App. 445; *Garden v. Neily*, 31 Nova Scotia 89.3. *Henderson v. Williams*, (1895) 1 Q. B. 521, 14 Reports 375; *Connally v. McConnell*, 1 Penn. (Del.) 133; *Continental Tobacco Co. v. Campbell*, (Ky. 1903) 76 S. W. Rep. 125; *Pacific Express Co. v. Carroll County Bank*, 66 Mo. App. 275, 2 Mo. App. Rep. 1295; *Sage v. Shepard*, etc., *Lumber Co.*, 4 N. Y. App. Div. 290; *Simar v. Shea*, 89 N. Y. App. Div. 84; *Bennett v. Williamson*, 6 Ohio Cir. Dec. 590, 9 Ohio Cir. Ct. 107, 2 Ohio Dec. 134; *Bradley v. Pike*, 5 Ohio Cir. Dec. 50; *Schleicher v. Armstrong*, (Tex. Civ. App. 1895) 32 S. W. Rep. 327; *Low v. Moore*, 31 Tex. Civ. App. 460.**Prerequisites to Create Estoppel in Principal.** — The doctrine of estoppel has no application where everything is equally known to all the parties, or where the party sought to be estopped was ignorant of the facts out of which his rights sprung, or where the other party was not influenced by the acts asserted in estoppel. *Cleveland, etc., R. Co. v. Moline Plow Co.*, 13 Ind. App. 225.**Mere Possession as Indication of Title or Authority.** — *Harris Loan Co. v. Elliott*, etc., *Book-Typewriter Co.*, 110 Ga. 302; *Wilson v. Loeb*, 69 Ill. App. 445; *Peerless Mach. Co. v. Gates*, 61 Minn. 124; *Gussner v. Hawks*, (N. Dak. 1904) 101 N. W. Rep. 898; *Roberts v. Francis*, (Wis. 1904) 100 N. W. Rep. 1076.**Necessary to Refund Price Paid.** — A principal cannot recover property which his agent was authorized to sell, and did sell, merely because he sold for less than he had authorized him to take, although that fact was not known to the purchaser, without refunding or offering to refund the amount that was paid. *Dentzel v. City, etc., R. Co.*, 90 Md. 434.**1173.** 1. *Farquharson v. King*, (1901) 2 K. B. 697.**Factor's or Agent's Acts.** — *Cairns v. Page*, 165 Mass. 552, construing the *Massachusetts* statute.**1174.** 2. *Wycoff, Seaman & Benedict v. Davis*, (Iowa 1905) 103 N. W. Rep. 349.5. *Barnett v. Daw*, 55 N. Y. App. Div. 202, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1174; *Hoffman v. Kramer*, 123 N. Car. 579, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1174; *Low v. Moore*, 31 Tex. Civ. App. 460, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1174. See also *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854.**Assumpsit Will Not Lie** in such a case, where the third person has not sold the property. *McCormick Harvesting Mach. Co. v. Waldo*, 128 Mich. 135.**1175.** 1. *Jacob v. Watkins*, 10 N. Y. App. Div. 475.**West Virginia.** — *Morris v. Clifton Forge Grocery Co.*, 46 W. Va. 197.**Mississippi.** — *Meridian Land, etc., Co. v. Ormond*, 82 Miss. 758.**In Virginia** a statute similar to those of *West Virginia* and *Mississippi* is in force. *Hoge v. Turner*, 96 Va. 624.2. *Gearon v. Kearney*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 285; *Montgomery v. Pittsburg Lodge*, No. 336, 31 Pittsb. Leg. J. N. S. (Pa.) 295; *Garvin v. Pettee*, 15 S. Dak. 266.**1176.** 1. *Grant v. Gold Exploration, etc., Syndicate*, (1900) 1 O. B. 233, 82 L. T. N. S. 5; *Hovenden v. Millhoff*, 83 L. T. N. S. 41; *Cohen v. Kuschke*, 83 L. T. N. S. 102; *Central Stock, etc., Exch. v. Bendinger*, 109 Fed. Rep. 926, 48 C. C. A. 726; *Guernsey v. Davis*, 67 Kan. 378; *Jacoby v. Payson*, 85 Hun (N. Y.) 367; *National Express Co. v. Hough*,

**1177.** (b) *Proceeds of Restrictively Indorsed Paper.* — See note 1.

(c) *Money Lost on Wager Contracts.* — See note 2.

(2) *Principal May Follow Fund.* — See note 3.

**1178.** *e.* FOR BREACH OF WARRANTY AND MISREPRESENTATION — Principal May Recover Damages. — See note 2.

*f.* FOR SURREPTITIOUS DEALINGS OF THIRD PARTY WITH AGENT — Principal's Rights. — See note 3.

**1179.** See note 1.

**1180.** *h.* PRINCIPAL'S RIGHT OF ACTION SUPERIOR TO AGENT'S — (1) *In General.* — See note 4.

*i.* DEFENSES TO PRINCIPAL'S ACTION — (1) *Payment to Agent.* — See note 6.

(2) *Fraudulent Acts of Agent.* — See note 7.

**1181.** [*j.* NEGLIGENCE OF AGENT. — See note 1a.]

**X. RATIFICATION** — 1. *Nature.* — See note 2.

*Ratification of Contract* — No New Consideration. — See note 3.

3 Ohio Dec. 169; 3 Ohio N. P. 289; Young v. Glendenning, 8 Pa. Dist. 57, 22 Pa. Co. Ct. 113.

**Right of Principal Against Bank Receiving Deposit from Agent.** — A bank cannot be held to account to the owner of a fund, where such fund has been deposited by an agent, in his own name and paid out upon his check, without knowledge by the bank of any want of power on the part of the agent. *Martin v. Kansas Nat. Bank*, 66 Kan. 655. Compare *Henry v. Allen*, 151 N. Y. 1.

**1177.** 1. *Indorsement Not Indicating Restriction.* — See *Wedge Mines Co. v. Denver Nat. Bank*, (Colo. App. 1903) 73 Pac. Rep. 873.

2. *Central Stock, etc., Exch. v. Bendinger*, 109 Fed. Rep. 926, 48 C. C. A. 726; *Thompson v. Hynds*, 15 Utah 389.

3. *Central Stock, etc., Exch. v. Bendinger*, 109 Fed. Rep. 926, 48 C. C. A. 726; *Pearce v. Dill*, 149 Ind. 136; *Harding v. Field*, 1 N. Y. App. Div. 391; *Phelan v. Downs*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 518; *Stevens v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854.

**1178.** 2. *Principal Denying Agency.* — It is not competent for the principal to deny the agency, and to deny his responsibility to the agent for the loss, and still take advantage of representations made to the agent and sue the person making such representations for damages. *U. S. Mortgage, etc., Co. v. Crutcher*, 169 Mo. 444.

3. *Shipway v. Broadwood*, (1899) 1 Q. B. 369, 80 L. T. N. S. 11.

**1179.** 1. *Shipway v. Broadwood*, (1899) 1 Q. B. 369, 80 L. T. N. S. 11; *Baltimore Sugar-Refining Co. v. Campbell, etc., Co.*, 83 Md. 36; *Dorrah v. Hill*, 73 Miss. 787.

**Transaction Not Amounting to Fraud.** — The principal cannot avoid a contract for fraud where it appears that the third party agreed to share the profits with the agent, not with the intention of inducing him to depart from his duty to his principal, but submitted to it as an exaction. *Yellow Poplar Lumber Co. v. Daniel*, 109 Fed. Rep. 39, 48 C. C. A. 204.

**1180.** 4. See *Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. Rep. 66, 53 U. S. App. 580.

6. *Shine v. Kennealy*, 102 Ill. App. 473; *National Mortg., etc., Co. v. Lash*, 5 Kan. App. 633; *Cheshire Provident Inst. v. Feysner*, 63

Neb. 682; *Cheshire Provident Inst. v. Gibson*, (Neb. 1902) 89 N. W. Rep. 243; *Sage v. Burton*, 84 Hun (N. Y.) 267; *Maxfield v. Carpenter*, 84 Hun (N. Y.) 450; *Schroeder v. Waters*, 173 Pa. St. 422; *Brown v. William Clark Co.*, 22 R. I. 36.

**Promissory Note.** — If the maker of a note pays other than the rightful owner, he cannot rely on facts unknown to him, and not influencing his action, as an estoppel; but if the money has reached the hands of an agent authorized to collect for the holder, such payment will be a satisfaction of the debt. *Stuart v. Stonebraker*, 63 Neb. 554; *Pochin v. Knoebel*, 63 Neb. 768; *Union Stock Yards Nat. Bank v. Haskell*, (Neb. 1902) 90 N. W. Rep. 233; *Boyd v. Pape*, (Neb. 1902) 90 N. W. Rep. 646.

7. *Honaker v. Board of Education*, 42 W. Va. 170, 57 Am. St. Rep. 847, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1180.

**But the Fraudulent Representations Must Have Been Relied On** by the third party. *Chicago Bldg., etc., Co. v. Higginbotham*, (Miss. 1901) 29 So. Rep. 79.

**1181.** 1a. A principal cannot recover damages from a third person on account of the neglect of his own agent. *Brown v. St. John Trust Co.*, (Kan. 1905) 80 Pac. Rep. 37.

2. *Larsen v. Thuringia American Ins. Co.*, 208 Ill. 166, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1181, affirming 108 Ind. App. 420, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1181; *Trent v. Sherlock*, 26 Mont. 85.

In an action on contract made by an alleged agent of the defendant, evidence of communications between defendant and the agent are not admissible where it is claimed that the agent had authority either express or implied to make the contract, and no question of ratification of an unauthorized act is involved. *American Telephone, etc., Co. v. Green*, (Ind. 1905) 73 N. E. Rep. 707.

**The Term Ratification** applies only where the act done was beyond the scope of the agency. *Sparkman v. Supreme Council, etc.*, 57 S. Car. 16.

3. *Lynch v. Smyth*, 25 Colo. 103; *Smyth v. Lynch*, 7 Colo. App. 383; *Schneck v. Jeffersonville*, 152 Ind. 204, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1181.

**1182.** Ratification After Disavowal. — See notes 2, 3.

2. Who May Ratify. — See note 4.

A Corporation. — See note 5.

Ultra Vires Acts of Corporation. — See note 6.

**1183.** Ratification by Agents. — See note 4.

**1184.** 3. What Acts May Be Ratified — *a.* IN GENERAL. — See notes 3, 4.

Void and Voidable Acts. — See notes 5, 6.

Contracts Tainted with Fraud. — See note 8.

**1185.** *b.* TORTS. — See note 1.

What Amounts to Adoption of Tort. — See note 2.

The Rule Is Otherwise where there is no claim of agency, but the ratification is of the act of a mere stranger, done on his own account and in his own name. *Plumb v. Curtis*, 66 Conn. 154. This, however, is not ratification, properly speaking. See *infra*, this title, **1089**, 1; and see RATIFY — RATIFICATION.

**1182.** 2. Distinction Between Ratification and Estoppel. — *Steffens v. Nelson*, (Minn. 1905) 102 N. W. Rep. 871.

3. An Option to Purchase Within a Limited Time which has been accepted by an unauthorized agent is not legally accepted unless the act of the agent is ratified by the principal before the expiration of the time limited. *Dibbins v. Dibbins*, (1896) 2 Ch. 348, 75 L. T. N. S. 137.

4. *Hollingsworth v. Hill*, 116 Ala. 184; *Hickox v. Fels*, 86 Ill. App. 216; *In re Soulard*, 141 Mo. 642.

An Executor who could not authorize a sale of decedent's property cannot ratify such sale. *Krumdick v. White*, 107 Cal. 37. See also *Borderre v. Den*, 106 Cal. 594.

A Married Woman may ratify the unauthorized act of an attorney in renewing an indorsement of a note made by her before her marriage. *Harrisburg Nat. Bank v. Bradshaw*, 178 Pa. St. 180.

When Agency Undisclosed. — The fact that the agent did not disclose his agency to the third party will not prevent a ratification by the principal. *Durant v. Roberts*, (1900) 1 Q. B. 629.

After Disposal of Interest in Subject-matter. — One who has parted with all his interest in property cannot ratify the subsequent act of his agent in disposing of it. *McDonald v. McCoy*, 121 Cal. 55.

The Person in Whose Name a Contract Is Made may ratify, even though such contract is without his actual authority, and although the agent has acted with fraudulent intent causing the other party to repudiate the transaction. *Tiedemann v. Ledermann*, (1899) 2 Q. B. 66, 81 L. T. N. S. 191.

5. *Findlay v. Pertz*, 66 Fed. Rep. 427, 31 U. S. App. 340; *Blood v. La Serena Land, etc., Co.*, 113 Cal. 221; *Trent v. Sherlock*, 26 Mont. 85; *Schreyer v. Turner Flouring Mills Co.*, 29 Oregon 1; *Steiner v. Polk County*, 40 Oregon 124; *Haynie v. American Trust Invest. Co.*, (Tenn. Ch. 1896) 39 S. W. Rep. 860; *North Point Consol. Irrigation Co. v. Utah, etc., Canal Co.*, 16 Utah 246, 67 Am. St. Rep. 607; *Moody, etc., Co. v. M. E. Church*, 99 Wis. 49; *Appel v. State*, 9 Wyo. 187, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1182. See also *Hall v. Concord*, 71 N. H. 367, per

*Rennick, J., dissenting, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1182 et seq.*

Corporate Action Necessary. — In order to bind a corporation by ratification, corporate action of some kind is necessary. *Spinks v. Athens Sav. Bank*, 108 Ga. 376.

No Vote of ratification is necessary. *Simmons v. Shaw*, 172 Mass. 516.

6. *Park Hotel Co. v. St. Louis Fourth Nat. Bank*, (C. C. A.) 86 Fed. Rep. 742; *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A.) 132 Fed. Rep. 721; *Thompson v. West*, 59 Neb. 677; *Metropolitan Stock Exch. v. Lyndonville Nat. Bank*, 76 Vt. 303. See also *Fergus Falls v. Fergus Falls Hotel Co.*, 80 Minn. 165, 81 Am. St. Rep. 249, per *Brown, J., dissenting, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1182.*

**1183.** 4. *Fay v. Slaughter*, 194 Ill. 157, 88 Am. St. Rep. 148, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1183, reversing 94 Ill. App. 111; *Hartman Steel Co. v. Hoag*, 104 Iowa 269; *Deffenbaugh v. Jackson Paper-Mfg. Co.*, 120 Mich. 242; *Bullard v. De Groff*, 59 Neb. 783; *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596; *Fargo v. Cravens*, 9 S. Dak. 646, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1183.

**1184.** 3. Acts Not Done in Name or Behalf of Principal. — In *Wycoff, Seamans & Benedict v. Davis*, (Iowa 1905) 103 N. W. Rep. 349, it was held that the doctrine of ratification had no application to a case where the agent was acting for himself only and did nothing in the principal's name or behalf.

4. *Athy Guardians v. Murphy*, (1896) 1 Ir. R. 65; *Hughes County v. Ward*, 81 Fed. Rep. 314; *Larsen v. Thuringia American Ins. Co.*, 208 Ill. 166, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1184, affirming 108 Ill. App. 429, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1184; *Alexander v. Wade*, 106 Mo. Ann. 141.

5. *Rawlings v. Neal*, 126 N. Car. 275; *Nashville First Nat. Bank v. Shook*, 100 Tenn. 436.

6. *Kelly v. Burke*, 132 Ala. 235; *Grant v. Miller*, 107 Ga. 804.

8. See *Henry Christian Bldg., etc., Assoc. v. Walton*, 181 Pa. St. 201, 59 Am. St. Rep. 636.

The Fact that the Third Party Repudiated the contract, and that the agent acted fraudulently in making it, will not prevent subsequent ratification by the principal. *Tiedemann v. Ledermann*, (1899) 2 Q. B. 66.

**1185.** 1. *Creson v. Ward*, 66 Ark. 209, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1185; *Brown v. Webster City*, 115 Iowa 511.

2. *Dodge v. Black*, (Ky. 1899) 53 S. W. Rep. 1039.

**1185. c. CRIMINAL ACTS — FORGERY —** View that Forgery Cannot Be Ratified. — See note 3.

**1187. View that Forgery May Be Ratified. —** See note 1.

**1188. 4. Prerequisites to Valid Ratification — b. ACTS DONE IN CAPACITY OF AGENT. —** See note 1.

**1189. c. KNOWLEDGE OF MATERIAL FACTS. —** See note 2.

**Acceptance of Benefits** with full knowledge of the tort will amount to ratification. Kilpatrick v. Haley, 66 Fed. Rep. 133, 27 U. S. App. 752.

**Where an Act Is Simply in Excess of Authority,** mere approval of the wrong is generally held to be sufficient. Brown v. Webster City, 115 Iowa 511.

**1185. 3. Kelchner v. Morris,** 75 Mo. App. 588; Henry Christian Bldg., etc., Assoc. v. Walton, 181 Pa. St. 201, 59 Am. St. Rep. 636.

**1187. 1. Ofenstein v. Bryan,** 20 App. Cas. (D. C.) 1, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1187; Fay v. Slaughter, 194 Ill. 157, 88 Am. St. Rep. 148, reversing 94 Ill. App. 111, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1185, as to the contrary doctrine in some jurisdictions.

**Doubtful State of Facts. —** Ratification of a forged instrument cannot be implied from a doubtful state of facts. Chicago Edison Co. v. Fay, 164 Ill. 323.

**1188. 1. Keighley v. Durant,** (1901) A. C. 240; Thompson v. Brown, 121 Ga. 814, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1188; Ferris v. Snow, 130 Mich. 254, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1188; Herd v. Buffalo Bank, 66 Mo. App. 643; Dumois v. Hill, 2 N. Y. App. Div. 525; Rawlings v. Neal, 126 N. Car. 275, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1187; Williams v. Stearns, 59 Ohio St. 28; Backhaus v. Buells, 43 Oregon 558; American Nat. Bank v. Cruger, 91 Tex. 446; Williams v. Moore, 24 Tex. Civ. App. 402. See also Woodman v. Wicker, (Supm. Ct. App. T.) 88 N. Y. Supp. 411.

**Agency Need Not Be Known to Third Person. —** It is necessary that the act should have been done by one who was in fact acting as an agent, but it is not necessary that he should have been understood to be such by the party with whom he was dealing. Hayward v. Langmaid, 181 Mass. 426.

**1189. 2. United States. —** Starr v. Galgate Ship Co., (C. C. A.) 68 Fed. Rep. 234; Henry v. Lane, (C. C. A.) 128 Fed. Rep. 243. *Alabama. —* Brown v. Bamberger, 110 Ala. 342.

*Arizona. —* McGlassen v. Tyrrell, (Ariz. 1896) 44 Pac. Rep. 1088.

*Arkansas. —* Martin v. Hickman, 64 Ark. 217, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1189.

*California. —* Brown v. Rouse, 104 Cal. 672; Ballard v. Nye, (Cal. 1902) 69 Pac. Rep. 481; Lambert v. Gerner, 142 Cal. 399.

*Colorado. —* Extension Gold Min., etc., Co. v. Skinner, 28 Colo. 237; Dean v. Hipp, 16 Colo. App. 537; Schollay v. Moffitt-West Drug Co., 17 Colo. App. 126.

**District of Columbia. —** Ofenstein v. Bryan, 20 App. Cas. (D. C.) 1, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1189.

*Florida. —* Madison v. Newsome, 39 Fla. 149; Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349; St. Augustine First Nat. Bank v. Kirkby, 43 Fla. 376.

*Georgia. —* Ludden, etc., Southern Music House v. McDonald, 117 Ga. 60; Whitley v. James, (Ga. 1904) 49 S. E. Rep. 600.

*Illinois. —* Danziger v. Pittsfield Shoe Co., 204 Ill. 145.

*Indiana. —* Metzger v. Huntington, 139 Ind. 501; Willison v. McKain, 12 Ind. App. 78.

*Iowa. —* Thompson v. Des Moines Driving Park, 112 Iowa 628; Groeltz v. Armstrong Real Estate Co., 115 Iowa 602.

*Kentucky. —* McDoel v. Ohio Valley Imp., etc., Co., (Ky. 1896) 36 S. W. Rep. 175.

*Massachusetts. —* Beacon Trust Co. v. Souther, 183 Mass. 413.

*Michigan. —* Maxson v. Michigan Cent. R. Co., 117 Mich. 218, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1189; Leonardson v. School Dist. No. 3, 125 Mich. 209; Upton v. Dennis, 133 Mich. 238.

*Minnesota. —* Prentiss v. Nelson, 69 Minn. 496, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1189; Hunt v. Pitts Agricultural Works, 69 Minn. 539.

*Missouri. —* Johnson v. Fecht, 94 Mo. App. 605; Case v. Hammond Packing Co., (Mo. App. 1904) 79 S. W. Rep. 732.

*Nebraska. —* Columbia Nat. Bank v. Rice, 48 Neb. 428; O'Shea v. Rice, 49 Neb. 893; Cram v. Sickel, 51 Neb. 828, 66 Am. St. Rep. 478; Nebraska Wesleyan University v. Parker, 52 Neb. 453; Bullard v. De Groff, 59 Neb. 783.

*New Hampshire. —* Bohanan v. Boston, etc., R. Co., 70 N. H. 526.

*New Jersey. —* Lindley v. Keim, 54 N. J. Eq. 418.

*New York. —* Long v. Poth, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 85; Camacho v. Hamilton Bank Note, etc., Co., 2 N. Y. App. Div. 369; Beck v. Donohue, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 230; Northern Assur. Co. v. Goelet, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 361; Caldwell v. Mutual Reserve Fund L. Assoc., 53 N. Y. App. Div. 245; Hogue v. Simonson, 94 N. Y. App. Div. 139; Prichard v. Sigafus, 103 N. Y. App. Div. 535.

*Oklahoma. —* Stock Exch. Bank v. Williamson, 6 Okla. 348.

*South Dakota. —* Shull v. New Birdsall Co., 15 S. Dak. 8, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1189; Fargo v. Cravens, 9 S. Dak. 646; Quale v. Hazel, (S. Dak. 1905) 104 N. W. Rep. 215.

*Tennessee. —* Bement v. Armstrong, (Tenn. Ch. 1896) 39 S. W. Rep. 899, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1189.

*Texas. —* Meyer Bros. Drug Co. v. Tucker, (Tex. Civ. App. 1896) 34 S. W. Rep. 786; Iron City Nat. Bank v. San Antonio Fifth Nat. Bank, (Tex. Civ. App. 1898) 47 S. W. Rep. 533.



- 1190.** Careless Ignorance. — See note 1.  
Deliberate Ignorance. — See note 2.
- 1191.** Ignorant Acceptance of Profits or Goods. — See note 1.  
Ratification of Agent's Warranty. — See note 4.
- 1192.** *d.* RATIFICATION OF WHOLE ACT. — See note 4.

*Utah.* — *Nephi First Nat. Bank v. Foote*, 12 Utah 157; *Moyle v. Congregational Soc.*, 16 Utah 69.

*Virginia.* — *Day v. National Mut. Bldg., etc., Assoc.*, 96 Va. 484; *Hotchkiss v. Middlekauf*, 96 Va. 649.

*Washington.* — *Armstrong v. Oakley*, 23 Wash. 122; *Murphy v. Clarkson*, 25 Wash. 585.  
*Wisconsin.* — *Roberts v. Francis*, (Wis. 1904) 100 N. W. Rep. 1076.

**1190.** 1. *Drainage Commission Co. v. National Contracting Co.*, 136 Fed. Rep. 780, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1190; *Brown v. Bamberger*, 110 Ala. 342. But see *Glor v. Kelly*, 49 N. Y. App. Div. 617.

**Knowledge Is Not to Be Presumed** from the fact that the principal had a reasonable opportunity to have acquired such knowledge. *Sehrt-Patterson Milling Co. v. Hughes*, 8 Kan. App. 514.

2. *Ballard v. Nye*, 138 Cal. 588; *Lynch v. Smyth*, 25 Colo. 103; *Campbell v. Millar*, 84 Ill. App. 208, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1190; *Swisher v. Palmer*, 106 Ill. App. 432, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1190; *Bliss v. Sherrill*, 24 N. Y. App. Div. 280, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1190. See also *Anderson v. Creston Land Co.*, 96 Va. 257.

**1191.** 1. *Martin v. Hickman*, 64 Ark. 217; *Schollay v. Moffitt-West Drug Co.*, 17 Colo. App. 126; *Willison v. McKain*, 12 Ind. App. 78; *Gaskill v. Huffaker*, (Ky. 1899) 49 S. W. Rep. 770; *Clark v. Clark*, 59 Mo. App. 532; *Holm v. Bennett*, 43 Neb. 808. See also *Boehm v. Yanquell*, 8 Ohio Cir. Dec. 184, 15 Ohio Cir. Ct. 454.

**Malicious Attachment.** — *Gimbel v. Gomprecht*, (Tex. Civ. App. 1896) 36 S. W. Rep. 781.

**Passing Money Through Bank Account Not Ratification.** — The mere passing of the proceeds of an unauthorized transaction through the bank account of the principal without authority given by him, and in the absence of evidence that it went to his benefit or was used by or for him, has been held not to be such receiving of the money as will render him liable therefor. *Fay v. Slaughter*, 194 Ill. 157, 88 Am. St. Rep. 148, reversing 94 Ill. App. 111.

4. **Effect of Pleading Set-off.** — A vendor sued for breach of a warranty made by his agent affirms the sale and the warranty by declaring in set-off for the price of the goods after notice of the alleged warranty. *Edgar v. Breck, etc., Corp.*, 172 Mass. 581.

**1192.** 4. *United States.* — *Egbert v. Sun Co.*, 126 Fed. Rep. 568.

*Colorado.* — *Moffitt-West Drug Co. v. Lyne-man*, 10 Colo. App. 249.

*Idaho.* — *Burke Land, etc., Co. v. Wells*, 7 Idaho 42.

*Illinois.* — *Swisher v. Palmer*, 106 Ill. App. 432.

*Indiana.* — *Wayne International Bldg., etc.,*

*Assoc. v. Moats*, 149 Ind. 123; *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279.

*Iowa.* — *White v. Marquardt*, (Iowa 1897) 70 N. W. Rep. 193; *Harrison v. Schoff*, 101 Iowa 463; *Wisconsin Lumber Co. v. Greene, etc., Telephone Co.*, (Iowa 1904) 101 N. W. Rep. 742; *National Imp., etc., Co. v. Maiken*, 103 Iowa 118; *Key v. National L. Ins. Co.*, 107 Iowa 446.

*Kansas.* — *Wells v. Hickox*, 1 Kan. App. 485; *McKinstry v. Citizens' Bank*, 57 Kan. 279; *Loomis Milling Co. v. Vawter*, 8 Kan. App. 437.

*Louisiana.* — *St. Landry State Bank v. Meyers*, 52 La. Ann. 1769; *Boudreaux v. Feibleman*, 105 La. 401.

*Massachusetts.* — *Brown v. Henry*, 172 Mass. 559, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1192; *Henderson v. Raymond Syndicate*, 183 Mass. 443.

*Minnesota.* — See *Fergus Falls v. Fergus Falls Hotel Co.*, 80 Minn. 165, 81 Am. St. Rep. 249, *per Brown, J., dissenting*, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1192.

*Missouri.* — *Porter v. Woods*, 138 Mo. 539; *Shinn v. Guyton, etc., Mule Co.*, (Mo. App. 1904) 83 S. W. Rep. 1015; *Trenton First Nat. Bank v. Badger Lumber Co.*, 54 Mo. App. 327.

*Nebraska.* — *Hall v. Hooper*, 47 Neb. 111; *Farmers', etc., Bank v. Farmers, etc., Nat. Bank*, 49 Neb. 379; *D. M. Osborn Co. v. Jordan*, 52 Neb. 465; *U. S. School-Furniture Co. v. School Dist. No. 87*, 56 Neb. 645; *Martin v. Humphrey*, 58 Neb. 414; *German Nat. Bank v. Hastings First Nat. Bank*, 59 Neb. 7; *Hinman v. Austin Mfg. Co.*, 65 Neb. 187; *Hall v. Hopper*, 64 Neb. 633; *Warder, etc., Co. v. Myers*, (Neb. 1903) 96 N. W. Rep. 992.

*New York.* — *Nutting v. Kings County El. R. Co.*, 21 N. Y. App. Div. 72.

*Oregon.* — *La Grande Nat. Bank v. Blum*, 27 Oregon 215.

*Pennsylvania.* — *Chicago Cottage Organ Co. v. McManigal*, 8 Pa. Super. Ct. 632.

*Tennessee.* — *Bement v. Armstrong*, (Tenn. Ch. 1896) 39 S. W. Rep. 899, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1192.

*Utah.* — *Genter v. Conglomerate Min. Co.*, 23 Utah 165; *Shafer v. Russell*, (Utah 1905) 79 Pac. Rep. 559.

*Virginia.* — *New York L. Ins. Co. v. Taliaferro*, 95 Va. 522.

*West Virginia.* — *Dewing v. Hutton*, 48 W. Va. 576, quoting with strong approval 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1192.

*Wisconsin.* — *Aultman Co. v. McDonough*, 110 Wis. 263.

**Ratification Must Cover Whole Act — Illustrations.** — *Reynolds v. Leyden*, 24 N. Y. App. Div. 401, quoting from *Lane v. Black*, 21 W. Va. 617, as stated in 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1192.

Where a principal recognizes a contract as being with a certain person, by suing him upon

- 1193.** **A Contract Wholly Unauthorized.** — See note 2.  
**1194.** **e. MUTUALITY** — Notice to Quit under Lease. — See note 3.  
**1195.** **5. Implied Ratification** — *a.* IN GENERAL. — See note 1.  
**Ratification Favored** — Question for Jury. — See notes 2, 3.  
**1196.** **Implied from Previous Acts.** — See note 1.  
**[Action Against Agent.** — See note 3*a*.]  
**1197.** **b. BY ACCEPTING BENEFITS.** — See note 1.

it, such principal cannot repudiate the rest of the contract and thus escape liability for a breach thereof. *Hart v. Maney*, 12 Wash. 266.

**Ratification by Minors.** — The rule applies even to minors. *State v. New Orleans*, 105 La. 768.

**1193.** **2.** *Wood v. Finson*, 89 Me. 459; *Citizens' State Bank v. Pence*, 59 Neb. 579; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370.

**1194.** **3.** *McCroskey v. Hamilton*, 108 Ga. 640, 75 Am. St. Rep. 79, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1194.

**1195.** **1.** *Pope v. J. K. Armsby Co.*, 111 Cal. 159; *Ballard v. Nye*, 138 Cal. 588; *Curnane v. Scheldel*, 70 Conn. 13; *Campbell v. Millar*, 84 Ill. App. 208; *Joseph Wolf Co. v. Bank of Commerce*, 107 Ill. App. 58; *Denison, etc., R. Co. v. Ranney-Alton Mercantile Co.*, 3 Indian Ter. 104, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1195; *Oberne v. Burke*, 50 Neb. 764, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1195; *Clement v. Young-McShea Amusement Co.*, (N. J. 1905) 60 Atl. Rep. 419; *Bliss v. Sherrill*, 24 N. Y. App. Div. 280, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1195; *Dupignac v. Bernstrom*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 677; *Schreyer v. Turner Flouring Mills Co.*, 29 Oregon 1; *Bement v. Armstrong*, (Tenn. Ch. 1896) 39 S. W. Rep. 899, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1195.

**2.** *Bement v. Armstrong*, (Tenn. Ch. 1896) 39 S. W. Rep. 899, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1195.

**Slight Circumstances and Small Matters.** — *Strong v. West*, 110 Ga. 382.

**Intention to Ratify.** — *Campbell v. Millar*, 84 Ill. App. 208; *Bement v. Armstrong*, (Tenn. Ch. 1896) 39 S. W. Rep. 899. Compare *Merritt v. Bissell*, 155 N. Y. 396, holding that a ratification of the unauthorized act of an agent or of a stranger who claims to act as such, if it exists, must be found in the intention of the principal, either express or implied.

**Illustrations — Circumstances Sufficient to Show Ratification.** — See *Carter v. St. Mary Abbotts' Vestry*, 64 J. P. 548 (reply of principal to protest against acts of agent that principal's lawyers would accept service of process); *Wright v. Farmers' Mut. Live-Stock Ins. Assoc.*, 96 Iowa 360 (acting on contract); *Burlington, etc., R. Co. v. Columbus Junction*, 104 Iowa 110 (agreement of agent to give land for road — ratification by building fence so as to leave land in roadway); *Owyhee Land, etc., Co. v. Tautphas*, (C. C. A.) 121 Fed. Rep. 343 (payment for work done); *Southern R. Co. v. Marshall*, 111 Ky. 560 (acting on contract); *Christopher v. National Brewery Co.*, 72 Mo. App. 121 (ratification of lease by excepting it from general warranty in subsequent deed). See also *Appelbaum v. Gafewski*, (Supm. Ct.

Spec. T.) 34 Misc. (N. Y.) 281; *Van Campen v. Bruns*, 54 N. Y. App. Div. 86 (repayment to agent of money expended); *Hill v. Coates*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 535 (failure to object to bill except as regards amount thereof); *Brown v. Wilson*, 45 S. Car. 519, 55 Am. St. Rep. 779 (as to indorsement of note); *Richmond Union Pass. R. Co. v. Richmond, etc., R. Co.*, 96 Va. 670 (payment for work done).

**3.** *Ætna Indemnity Co. v. Ladd*, (C. C. A.) 135 Fed. Rep. 636; *Chicago Edison Co. v. Fay*, 164 Ill. 323, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1195; *Hance v. Wabash, etc., R. Co.*, 62 Mo. App. 60; *Hesse v. Travelers' Protective Assoc.*, 72 Mo. App. 598; *Farmers', etc., Bank v. Pittsburg Third Nat. Bank*, 165 Pa. St. 500.

**The Burden of Proof** is upon him who relies on ratification. *Moore v. Ensley*, 112 Ala. 228; *Oxford Lake Line v. Pensacola First Nat. Bank*, 40 Fla. 349.

**1196. 1. Exception to Rule.** — Ratification of an act that the principal was bound to perform, or of an act that could inure to his benefit alone, has no tendency to establish an agency to act generally concerning the matter for such principal. *Gordon v. Vermont L. & T. Co.*, 6 N. Dak. 454.

**3a.** A purchaser of land sued his agent through whom the purchase was made to recover commissions secretly paid to the agent by the vendor; and it was held that the purchaser by bringing such action against his agent did not ratify the contract of purchase, and therefore he was not precluded from afterwards suing the vendor to recover damages for false and fraudulent representations as to the value of the land. *Barnsdall v. O'Day*, (C. C. A.) 134 Fed. Rep. 828.

**1197. 1. United States.** — *American Exch. Nat. Bank v. Spokane Falls First Nat. Bank*, (C. C. A.) 82 Fed. Rep. 961; *G. V. B. Min. Co. v. Hailey First Nat. Bank*, (C. C. A.) 95 Fed. Rep. 23; *Domenico v. Alaska Packers' Assoc.*, 112 Fed. Rep. 554; *Hartford, etc., Transp. Co. v. Plymmer*, (C. C. A.) 120 Fed. Rep. 624; *Owyhee Land, etc., Co. v. Tautphas*, (C. C. A.) 121 Fed. Rep. 343.

*Alabama.* — *Hoene v. Pollak*, 118 Ala. 617, 72 Am. St. Rep. 189.

*California.* — *Market St. R. Co. v. Hellman*, 109 Cal. 571; *Avakian v. Noble*, 121 Cal. 216; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431; *Mills v. Boyle Min. Co.*, 132 Cal. 95.

*Connecticut.* — *Ansonia v. Cooper*, 64 Conn. 536.

*Illinois.* — *Fay v. Slaughter*, 104 Ill. 157, 88 Am. St. Rep. 148, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1196, and reversing 94 Ill. App. 111; *Carlin v. Brown*, 80 Ill. App. 541; *Hartford Deposit Co. v. Calkins*, 109 Ill.

**1198. Acceptance Accompanied with Words of Dissent.** — See note 1.  
**Receiving Goods Purchased by Agent.** — See note 2.

App. 579; *W. H. Stubbings Co. v. World's Columbian Exposition Co.*, 110 Ill. App. 210; *Fraternal Army v. Evans*, 114 Ill. App. 578. *Indiana.* — *Hunt v. Listenberger*, 14 Ind. App. 320; *Albany Land Co. v. Rickel*, 162 Ind. 222.

*Indian Territory.* — *Denison, etc., R. Co. v. Ranney-Alton Mercantile Co.*, 3 Indian Ter. 104, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1197.

*Iowa.* — *Hartley State Bank v. McCorkell*, 91 Iowa 660; *Casady v. Manchester F. Ins. Co.*, 109 Iowa 539; *Lull v. Anamosa Nat. Bank*, 110 Iowa 537; *Fleishman v. Ver Does*, 111 Iowa 322; *Des Moines Nat. Bank v. Meredith*, 114 Iowa 9.

*Kansas.* — *Westerman v. Evans*, 1 Kan. App. 1; *Lakin Bank v. National Bank of Commerce*, 57 Kan. 183; *German Ins. Co. v. Emporia Mut. Loan, etc., Assoc.*, 9 Kan. App. 803.

*Kentucky.* — *E. T. Kenney Co. v. Anderson*, (Ky. 1904) 81 S. W. Rep. 663; *Singer Mfg. Co. v. Stephens*, (Ky. 1899) 53 S. W. Rep. 525.

*Maryland.* — *Swindell v. Gilbert*, (Md. 1905) 60 Atl. Rep. 102.

*Michigan.* — *Clement v. Michigan Clothing Co.*, 110 Mich. 458; *Payn v. Gidley*, 122 Mich. 605.

*Missouri.* — *Fahy v. Springfield Grocer Co.*, 57 Mo. App. 73; *Mayer v. Old*, 57 Mo. App. 639; *Hutting Sash, etc., Co. v. Gitchell*, 69 Mo. App. 115; *Bohlmann v. Rossi*, 73 Mo. App. 312; *J. T. Donovan Real Estate Co. v. Clark*, 84 Mo. App. 163; *Porter v. Woods*, 138 Mo. 539; *Stotts City Bank v. Miller Lumber Co.*, 102 Mo. App. 75; *Trenton First Nat. Bank v. Badger Lumber Co.*, 60 Mo. App. 255, 1 Mo. App. Rep. 120.

*Nebraska.* — *Johnston v. Milwaukee, etc., Invest. Co.*, 49 Neb. 68; *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478; *People's Nat. Bank v. Geisthardt*, 55 Neb. 232; *Brong v. Spence*, 56 Neb. 638; *U. S. School-Furniture Co. v. School Dist. No. 87*, 56 Neb. 645; *Plano Mfg. Co. v. Nordstrom*, 63 Neb. 123; *McCormick Harvesting Mach. Co. v. Hiatt*, (Neb. 1903) 95 N. W. Rep. 627; *Warder, etc., Co. v. Myers*, (Neb. 1903) 96 N. W. Rep. 992.

*New Jersey.* — *O'Brien v. Paterson Brewing, etc., Co.*, (N. J. 1905) 61 Atl. Rep. 437.

*New York.* — *Hobkirk v. Green*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 18, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1196; *Wheeler, etc., Mfg. Co. v. Elbersen*, 84 Hun (N. Y.) 501; *Quantmeyer v. J. H. Mohlman Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 746; *Jaeger v. Koenig*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 580; *Murray v. Sweasy*, 69 N. Y. App. Div. 45; *Budd v. Howard Thomas Co.*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 52; *Rollins v. Sidney B. Bowman Cycle Co.*, 84 N. Y. App. Div. 287; *Rosenthal v. Hasberg*, (Supm. Ct. App. T.) 84 N. Y. Supp. 290; *Sultan v. Bailey*, (Supm. Ct. App. T.) 85 N. Y. Supp. 332; *Curtis v. Natalie Anthracite Coal Co.*, 89 N. Y. App. Div. 61; *McVity v. E. D. Albro Co.*, 90 N. Y. App. Div. 109.

*North Carolina.* — *Corbett v. Clute*, (N. Car. 1905) 50 S. E. Rep. 216.

*North Dakota.* — *Anderson v. Grand Forks First Nat. Bank*, 5 N. Dak. 451.

*Oklahoma.* — *Fant v. Campbell*, 8 Okla. 586, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1196.

*Oregon.* — *Schreyer v. Turner Flouring Mills Co.*, 29 Oregon 1.

*Pennsylvania.* — *Central School Supply House v. School Board*, 9 Pa. Super. Ct. 110.

*South Dakota.* — *Dedrick v. Ormsby Land, etc., Co.*, 12 S. Dak. 59.

*Texas.* — *Rutherford v. Montgomery*, 14 Tex. Civ. App. 319; *Houston, etc., R. Co. v. Wright*, 15 Tex. Civ. App. 151; *Sanger v. Warren*, (Tex. Civ. App. 1897) 40 S. W. Rep. 840; *Wells v. Simpson Nat. Bank*, 19 Tex. Civ. App. 636; *Pioneer Sav., etc., Co. v. Baumann*, (Tex. Civ. App. 1900) 58 S. W. Rep. 49; *Greenville First Nat. Bank v. Greenville Oil, etc., Co.*, 24 Tex. Civ. App. 645; *Clark v. Elmendorf*, (Tex. Civ. App. 1904) 78 S. W. Rep. 538; *Evans-Snyder-Buel Co. v. Hilje*, (Tex. Civ. App. 1904) 83 S. W. Rep. 208.

*Utah.* — *Smith v. Droubay*, 20 Utah 443.

*Virginia.* — *Day v. National Mut. Bldg., etc., Assoc.*, 96 Va. 484.

*Wisconsin.* — *Moody, etc., Co. v. M. E. Church*, 99 Wis. 49; *Bullen v. Milwaukee Trading Co.*, 109 Wis. 41.

**Illustrations of Ratification by Acceptance of Benefits — Receiving Rents.** — *Clement v. Young-McShea Amusement Co.*, (N. J. 1905) 60 Atl. Rep. 419.

**Duty to Return.** — See *National Imp., etc., Co. v. Maiken*, 103 Iowa 118; *Russ v. Hansen*, 119 Iowa 375.

**Exception to Rule.** — The acceptance of benefits does not amount to a ratification where it is not within the power of the principal to reject them. *Swayne v. Union Mut. L. Ins. Co.*, (Tex. Civ. App. 1899) 49 S. W. Rep. 518.

**1198. 1.** *Haney School-Furniture Co. v. Hightower Baptist Institute*, 113 Ga. 289; *Campbell v. Millar*, 84 Ill. App. 208.

**2.** *Alabama.* — *Thompson v. Stringfellow*, 119 Ala. 317.

*California.* — *Blood v. La Serena Land, etc., Co.*, 113 Cal. 221.

*Colorado.* — *Moffitt-West Drug Co. v. Lyneman*, 10 Colo. App. 249; *Witcher v. Gibson*, 15 Colo. App. 163.

*Connecticut.* — *Duncan v. Kearney*, 72 Conn. 585.

*Georgia.* — *Haney School-Furniture Co. v. Hightower Baptist Institute*, 113 Ga. 289.

*Illinois.* — *Campbell v. Millar*, 84 Ill. App. 208.

*Kentucky.* — *Howe v. Combs*, (Ky. 1897) 38 S. W. Rep. 1052; *Southern Lumber Co. v. Wireman*, (Ky. 1897) 41 S. W. Rep. 297; *Luttrell v. East Tennessee Telephone Co.*, (Ky. 1905) 86 S. W. Rep. 1124.

*Minnesota.* — *Wright v. Vineyard M. E. Church*, 72 Minn. 78.

*New York.* — *Snyder v. Gardner*, (Buffalo Super. Ct. Gen. T.) 13 Misc. (N. Y.) 626; *Kraus v. J. H. Mohlman Co.*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 430.

*North Carolina.* — *Williams v. Crosby Lum-*

- 1199.** Accepting Results to Prevent Further Loss. — See note 1.  
Acceptance of Proceeds of Loan. — See note 2.
- 1200.** The Acceptance of Rents. — See note 1.  
A Settlement with an Agent with Full Knowledge. — See note 2.
- 1201.** Acceptance of Fruits of Compromise. — See note 1.  
Dealing with Agent's Notes. — See note 2.  
Filling Order Procured by Agent. — See note 3.
- 1202.** Entry on Land Purchased or Leased. — See note 1.  
Accepting Proceeds of Sale by Agent. — See note 2.

ber Co., 118 N. Car. 928; *Brittain v. Westhall*, 135 N. Car. 492.

*South Carolina.* — *Welch v. Clifton Mfg. Co.*, 55 S. Car. 568.

**Part Payment of the consideration of a contract is a ratification.** *Wright v. Farmers Mut. Live-Stock Ins. Assoc.*, 96 Iowa 360; *Manne v. Siegel-Cooper Co.*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 592; *Anderson v. National Surety Co.*, 196 Pa. St. 288. See also *Evans-Snyder-Buel Co. v. Hilje*, (Tex. Civ. App. 1904) 83 S. W. Rep. 208.

**When Return of Goods Impossible.** — If at the time when the principal discovers the unauthorized purchase of goods by his agent such goods have become so commingled with the goods of the principal that they cannot be identified and returned, the subsequent retention of them will not constitute a ratification of the purchase. *Thrall v. Wilson*, 17 Pa. Super. Ct. 376.

**1199.** 1. *Goodale v. Middaugh*, 8 Colo. App. 223.

**Accepting Results to Which Entitled Without Ratification.** — *Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480, to the same effect as *White v. Sanders*, 32 Me. 188, stated in the original note.

Ratification cannot be inferred from the party's doing something which he had the right to do independently of the unauthorized transaction. *Williams v. Moore*, 24 Tex. Civ. App. 402. See also *Continental Ins. Co. v. Clark*, (Iowa 1904) 100 N. W. Rep. 524.

**Accepting Unauthorized Work Incorporated in Building.** — *Moyle v. Congregational Soc.*, 16 Utah 69. See also *Forman v. The Ship "Lid-desdale"*, (1900) A. C. 190.

**Accepting Benefits Through Necessity.** — Where the acceptance of benefits is forced upon the principal, it is not, *quoad* the agent, a ratification of his acts. *Chaffe v. Barataria Canning Co.*, 113 La. 215.

**2.** *Campbell v. Campbell*, 133 Cal. 33; *Kirklin v. Atlas Sav., etc., Assoc.*, 107 Ga. 313; *Marks v. Taylor*, 23 Utah 152, modified 33 Utah 470; *McDermott v. Jackson*, 97 Wis. 64.

**Loan by Agent of Corporation.** — *Mohrfeld v. Second German South-Eastern Bldg. Assoc.*, 194 Pa. St. 488, holding that the payment of interest on a loan made to a corporation through its secretary operates as a ratification of the act of the secretary in receiving the money; *Murray v. Beal*, 23 Utah 548.

**1200.** 1. *Judik v. Crane*, 81 Md. 610; *Anderson v. Conner*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 384.

**Where the Lessor Repudiates an Unauthorized Lease** made by his agent, but allows the lessees to remain as tenants from month to month, acceptance of rent does not constitute a ratifi-

cation of the lease. *Owens v. Swanton*, 25 Wash. 112.

**Subsequent Acceptance of the Tenant by the landlord is not a ratification of the unauthorized act of a subagent in accepting from such prospective tenant a deposit to be applied on the rent.** *McGowan v. Treacy*, (Supm. Ct. App. T.) 84 N. Y. Supp. 497.

**2.** *Sanders v. Peck*, (C. C. A.) 87 Fed. Rep. 61.

**1201.** 1. *Orvis v. Wells*, 73 Fed. Rep. 110, 38 U. S. App. 471; *American Quarries Co. v. Lay*, (Ind. App. 1905) 73 N. E. Rep. 608; *Hagerman v. Bates*, 24. Colo. 71; *West v. Banigan*, 51 N. Y. App. Div. 328; *Cobb v. Edson*, (Supm. Ct. App. T.) 84 N. Y. Supp. 916; *Dowagiac Mfg. Co. v. Hellekson*, (N. Dak. 1904) 100 N. W. Rep. 717, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1201; *Smith v. Cantrel*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1081.

**2. Negotiating with Knowledge of the Facts** a note and mortgage executed by an agent constitutes a ratification. *Iowa State Nat. Bank v. Taylor*, 98 Iowa 631.

**3.** *Canda v. Casey*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 322; *Smith v. Droubay*, 20 Utah 443.

**1202.** 1. *Janet v. Albers*, 7 Colo. App. 271; *William Wicke Co. v. Kaldenberg Mfg. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 79.

**2.** *Arkansas.* — *Creson v. Ward*, 66 Ark. 209. *Colorado.* — *Farrer v. Caster*, 17 Colo. App. 41.

*Iowa.* — *Blaess v. Nichols, etc., Co.*, 115 Iowa 373; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737.

*Kentucky.* — *Columbia Land, etc., Co. v. Tinsley*, 60 S. W. Rep. 10, 22 Ky. L. Rep. 1082; *Givens v. Cord*, (Ky. 1898) 44 S. W. Rep. 665.

*Minnesota.* — *Payne v. Hackney*, 84 Minn. 195.

*Missouri.* — *Akers v. Ray County Sav. Bank*, 63 Mo. App. 316; *Short v. Stephens*, 92 Mo. App. 151; *Leavitt v. Fairbanks*, 92 Me. 521.

*New York.* — *Hess v. Baar*, (N. Y. City Ct. Gen. T.) 11 Misc. (N. Y.) 619; *White v. Sheppard*, 41 N. Y. App. Div. 113; *Smith v. Barnard*, 148 N. Y. 420.

*Rhode Island.* — *Robinson v. Bailey*, 19 R. I. 464.

*South Dakota.* — *Hormann v. Sherin*, 6 S. Dak. 82.

*Washington.* — *Irwin v. Buffalo Pitts Co.*, (Wash. 1905) 81 Pac. Rep. 849.

*Wisconsin.* — *Fintel v. Cook*, 88 Wis. 485.

**Dealing with Purchaser as Owner.** — An unauthorized sale is ratified by the act of the principal in dealing with the purchaser as the owner of the property. *German Nat. Bank v. Hastings First Nat. Bank*, 59 Neb. 7.

**1202.** Implied Ratification of Representations by Which Contract Was Procured. — See note 3.

**1203.** *c.* BY SILENT ACQUIESCENCE — (1) *General Rule.* — See note 1. *Duty to Disavow.* — See note 2.

**When Acceptance Not Ratification.** — Where a power of attorney conferred no authority to convey land with warranty of title, acceptance of the purchase money by the vendor cannot be held to be a ratification of the act of his agent in executing a conveyance with warranty of title. *Chaison v. Beauchamp*, 12 Tex. Civ. App. 109.

In *Texas*, the fact that a married woman accepts the fruits of a sale, without any act of disaffirmance, with full knowledge, amounts to neither a ratification nor an estoppel, nor does it raise an equity against her right to recover. *Owens v. New York, etc., Land Co.*, (Tex. Civ. App. 1895) 32 S. W. Rep. 1057.

Retention of the purchase-money notes has been held not to amount to a ratification of an unauthorized sale of land by an agent when no deed was signed or delivered, and the agent tendered back the cash he had received. *Bromley v. Aday*, 70 Ark. 351.

**1202. 3. United States.** — *Clark v. Reeder*, 158 U. S. 505; *Alger v. Anderson*, 78 Fed. Rep. 729; *Aiger v. Keith*, 105 Fed. Rep. 105; 44 C. C. A. 371.

*Alabama.* — *Williamson v. Tyson*, 105 Ala. 644.

*California.* — *Wilder v. Beede*, 119 Cal. 646. *Indiana.* — *Aultman v. Richardsop*, 21 Ind. App. 211.

*Iowa.* — *Higbee v. Trumbauer*, 112 Iowa 74. *Kentucky.* — *Warren Deposit Bank v. Fidelity, etc., Co.*, 74 S. W. Rep. 1111, 25 Ky. L. Rep. 289.

*Louisiana.* — *Boudreaux v. Feibleman*, 105 La. 401.

*Michigan.* — *Dodge v. Tullock*, 110 Mich. 480; *Sokup v. Letellier*, 123 Mich. 640.

*Nebraska.* — *D. M. Osborn Co. v. Jordan*, 52 Neb. 465.

*New York.* — *Ettlinger v. Weil*, 94 N. Y. App. Div. 291; *Taylor v. Commercial Bank*, 174 N. Y. 181, reversing 68 N. Y. App. Div. 458.

*Pennsylvania.* — *Meyerhoff v. Daniels*, 173 Pa. St. 555, 51 Am. St. Rep. 782.

*Tennessee.* — *Stephens v. Ozbourne*, 107 Tenn. 572, 89 Am. St. Rep. 957.

*Texas.* — *Texas Elevator, etc., Co. v. Mitchell*, 7 Tex. Civ. App. 222; *Jones v. Chapman*, (Tex. Civ. App. 1897) 41 S. W. Rep. 527; *American Nat. Bank v. Cruger*, 91 Tex. 446; *Allen v. Garrison*, 92 Tex. 546.

*Virginia.* — *Owens v. Boyd Land Co.*, 95 Va. 560; *Rowland Lumber Co. v. Ross*, 100 Va. 275, 4 Va. Sup. Ct. 191.

**Duty of Principal to Make Inquiries.** — *Wilder v. Beede*, 119 Cal. 646.

**May Deny Representations of Third Person.** — Where a principal is represented by a duly authorized agent, and some third person who may also be benefited by the transaction assumes, without the knowledge or consent of the principal or his agent, to make representations and statements to promote the transaction, the principal will not be bound thereby although he accepts the benefits of the transaction nego-

tiated by his agent. *Tecumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163.

**1203. 1.** *Denison, etc., R. Co. v. Ranney-Alton Mercantile Co.*, 3 Indian Ter. 104, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1203.

**2. United States.** — *The Henrietta*, 91 Fed. Rep. 675.

*Alabama.* — *Comer v. Way*, 107 Ala. 300, 54 Am. St. Rep. 93.

*California.* — *Kendall v. Earl*, (Cal. 1896) 44 Pac. Rep. 791; *Illinois Trust, etc., Bank v. Pacific R. Co.*, 117 Cal. 332.

*Colorado.* — *Tennis v. Barnes*, 11 Colo. App. 196.

*Connecticut.* — *J. B. Owens Pottery Co. v. Turnbull Co.*, 75 Conn. 628.

*Georgia.* — *Smith v. Holbrook*, 99 Ga. 256; *Whitley v. James*, (Ga. 1904) 49 S. E. Rep. 600.

*Illinois.* — *Sammis v. Poole*, 188 Ill. 396, affirming 89 Ill. App. 118; *Lepman v. Woods*, 79 Ill. App. 269; *Joseph Wolf Co. v. Bank of Commerce*, 107 Ill. App. 58.

*Indiana.* — *American Quarries Co. v. Lay*, (Ind. App. 1905) 73 N. E. Rep. 608.

*Indian Territory.* — *Denison, etc., R. Co. v. Ranney-Alton Mercantile Co.*, 3 Indian Ter. 104, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1203.

*Iowa.* — *National Imp., etc., Co. v. Maiken*, 103 Iowa 118.

*Kansas.* — *German Ins. Co. v. Emporia Mut. Loan, etc., Assoc.*, 9 Kan. App. 803.

*Kentucky.* — *Tarvin v. Walkers Creek Coal, etc., Co.*, (Ky. 1904) 80 S. W. Rep. 504.

*Maryland.* — *Hartlove v. William Fait Co.*, 89 Md. 254.

*Massachusetts.* — *Brown v. Henry*, 172 Mass. 559.

*Minnesota.* — *Singer Mfg. Co. v. Flynn*, 63 Minn. 475; *Anderson v. Johnson*, 74 Minn. 171.

*Missouri.* — *Mayer v. Old*, 57 Mo. App. 639; *Grand Ave. Hotel Co. v. Friedman*, 83 Mo. App. 491.

*New Hampshire.* — *Dixon v. Guay*, 70 N. H. 161.

*New Jersey.* — *Lyle v. Addicks*, 62 N. J. Eq. 123; *Baldwin v. Howell*, (N. J. 1894) 30 Atl. Rep. 423; *Keim v. Lindley*, (N. J. 1895) 30 Atl. Rep. 1063.

*New York.* — *Ketchum v. Marsland*, (Supr. Ct. App. T.) 18 Misc. (N. Y.) 450 [citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1203]; *Snyder v. Gardner*, (Buffalo Super. Ct. Gen. T.) 13 Misc. (N. Y.) 626; *Glor v. Kelly*, 49 N. Y. App. Div. 617.

*Nebraska.* — *Farmers', etc., Bank v. Farmers', etc., Nat. Bank*, 49 Neb. 379; *Johnston v. Milwaukee, etc., Invest. Co.*, 49 Neb. 68; *Day v. Miller*, (Neb. 1901) 95 N. W. Rep. 359.

*Pennsylvania.* — *Himes v. Herr*, 3 Pa. Super. Ct. 124, 39 W. N. C. (Pa.) 568; *Knauer v. McKoon*, 19 Pa. Super. Ct. 539; *Carlisle, etc., Co. v. Iron City Sand Co.*, 20 Pa. Super. Ct. 378; *Sloan v. Johnson*, 20 Pa. Super. Ct. 643; *Auge v. Darlington*, 185 Pa. St. 111.

- 1205.** No Ratification Without Opportunity to Repudiate. — See note 1.  
Reasonable Time a Question for Jury. — See note 2.  
Failure to Disavow Instantly. — See note 3.
- 1206.** Prompt Disavowal Demanded by Usage or to Prevent Loss. — See note 1.  
Failure to Examine Report of Agent. — See notes 2, 3.  
Delay in Hope of Gaining Advantage. — See note 4.
- 1207.** Silence Accompanied with Possession of Property. — See note 2.  
Silent Acquiescence by Corporation. — See note 6.
- 1208.** See note 1.  
(2) *Where Act Is Done by a Stranger.* — See note 2.
- 1209.** Silence Ratification as to Third Parties. — See note 1.

*Tennessee.*—Bement v. Armstrong, (Tenn. Ch. 1896) 39 S. W. Rep. 899, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1203.

*Texas.*—Angel v. Miller, 16 Tex. Civ. App. 679; Northwestern L. Assoc. v. Findley, (Tex. Civ. App. 1902) 68 S. W. Rep. 695; Bean v. Bennett, (Tex. Civ. App. 1904) 80 S. W. Rep. 662.

*Washington.*—Lynch v. Richter, 10 Wash. 486.  
*Wisconsin.*—Andrews v. Robertson, 111 Wis. 334, 87 Am. St. Rep. 870; Roundy v. Erspamer, 112 Wis. 181.

*Wyoming.*—Knight v. Beckwith Commercial Co., 6 Wyo. 500.

**When Silence a Ratification.**—To the same effect as *De Land v. Dixon Nat. Bank*, 111 Ill. 326, cited in the original note, see *Smyth v. Lynch*, 7 Colo. App. 383.

**Silence Not Ratification.**—Where the principal promptly repudiates the unauthorized act as soon as informed of it, and as promptly notifies the agent, mere subsequent silence will not constitute a ratification. *Snapp v. Stanwood*, 65 Ark. 222.

**Silence Is Not Conclusive** unless the party affected thereby has been misled or injured. *Lynch v. Smyth*, 25 Colo. 103, reversing on other grounds 7 Colo. App. 383; *Smith v. Fletcher*, 75 Minn. 189.

**Acquiescence for Five Years** after knowledge of the facts has been held to amount to a ratification. *Thompson v. Stringfellow*, 119 Ala. 317.

**Elements of Estoppel Necessary.**—Failure to repudiate the act of an unauthorized person, to operate as a ratification, should embrace the essential elements of estoppel. *Smith v. Fletcher*, 75 Minn. 189; *Williams v. Moore*, 24 Tex. Civ. App. 402. See also *Atlanta Nat. Bldg., etc., Assoc. v. Bollinger*, 63 Ark. 212.

**Question for Jury.**—Whether silence alone for an unreasonable time amounts to a ratification is a question for the jury. *Iron City Nat. Bank v. San Antonio Fifth Nat. Bank*, (Tex. Civ. App. 1898) 47 S. W. Rep. 533; *San Antonio Fifth Nat. Bank v. Iron City Nat. Bank*, 92 Tex. 436.

**1205.** 1. *Farmers', etc., Bank v. Farmers', etc., Nat. Bank*, 49 Neb. 379; *Hopkins v. Clark*, 7 N. Y. App. Div. 207, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1205.

2. *Whitley v. James*, (Ga. 1904) 49 S. E. Rep. 600; *Jones v. Consolidated Portrait, etc., Co.*, 100 Ill. App. 89; *Ketchem v. Marsland*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 450, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1205.

3. **When Failure to Disavow Need Not Be Instantaneous.**—*Kendall v. Earl*, (Cal. 1896) 44 Pac. Rep. 791.

**1206.** 1. *Comer v. Way*, 107 Ala. 300, 54 Am. St. Rep. 93; *Kendall v. Earl*, (Cal. 1896) 44 Pac. Rep. 791; *Robbins v. Blanding*, 87 Minn. 246; *Dewing v. Hutton*, 48 W. Va. 576, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1206; *Roberts v. Tavenner*, 48 W. Va. 632, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1206.

**Illustration.**—Where an agent sold certain notes of his principal for the notes of other persons, it was held that an offer to rescind more than a month after the maturity of one of the notes was too late. *Hotchkiss v. Roehm*, 181 Pa. St. 65.

2. *Bliss v. Sherrill*, 24 N. Y. App. Div. 280, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1206; *Bement v. Armstrong*, (Tenn. Ch. 1896) 39 S. W. Rep. 899, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1206; *Dewing v. Hutton*, 48 W. Va. 576, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1206.

3. *Dewing v. Hutton*, 48 W. Va. 576, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1206. But see *Hansen v. Boyd*, 161 U. S. 397.

4. **Speculative Delay.**—*Robbins v. Blanding*, 87 Minn. 246.

**1207.** 2. *State Bank v. Kelly*, 109 Iowa 544.

6. *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, (C. C. A.) 112 Fed. Rep. 239; *Denison, etc., R. Co. v. Ranney-Alton Mercantile Co.*, 3 Indian Ter. 104, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1207; *Trent v. Sherlock*, 26 Mont. 85; *German Nat. Bank v. Hastings First Nat. Bank*, 59 Neb. 7; *Alexander v. Culbertson Irrigation, etc., Co.*, 61 Neb. 333; *Smith v. New England Bank*, 72 N. H. 4; *Nashville First Nat. Bank v. Shook*, 100 Tenn. 436.

**Act of Corporation Officer Ratified by Silent Acquiescence.**—*Alaska, etc., Commercial Co. v. Solner*, (C. C. A.) 123 Fed. Rep. 855; *Egbert v. Sun Co.*, 126 Fed. Rep. 568.

**1208.** 1. **Silence for Two Years** has been held not to be sufficiently long continued to be evidence of acquiescence. *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596.

2. *Deane v. Gray Bros. Artificial Stone Paving Co.*, 109 Cal. 433; *Robbins v. Blanding*, 87 Minn. 246.

**1209.** 1. *Bement v. Armstrong*, (Tenn. Ch. 1896) 39 S. W. Rep. 899, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1209.

**1209.** Silence Some Evidence of Ratification. — See note 2.*d.* BY SUIT. — See note 4.**1210.** See note 1.

SUIT TO ENFORCE CONTRACT. — See notes 2, 3.

SUIT TO RECOVER PRICE OF GOODS. — See note 4.

**1211.** See note 1.

6. RATIFICATION OF INSTRUMENTS UNDER SEAL. — See note 2.

**1212.** Principal Estopped to Deny Deed. — See note 1.

SEAL SURPLUSAGE. — See note 3.

**1213.** 7. Effect of Ratification — *a.* IN GENERAL. — See note 2.

**1209.** 2. *Ketchum v. Marsland*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 450, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1209. See also *Merritt v. Bissell*, 155 N. Y. 396, holding that a failure to disavow the acts of a mere volunteer will not amount to a ratification unless under such circumstances as indicate an intention to ratify.

4. *Curnane v. Scheidel*, 70 Conn. 13; *Singleton v. Monticello Bank*, 113 Ga. 527; *Central of Georgia R. Co. v. James*, 117 Ga. 832; *American Express Co. v. Lankford*, 2 Indian Ter. 18; *Warder, etc., Co. v. Cuthbert*, 99 Iowa 681; *Bissell v. Dowling*, 117 Mich. 646; *Watson v. Southern Ins. Co.*, (Miss. 1902) 31 So. Rep. 904; *Alexander v. Wade*, 106 Mo. App. 141; *German-American Bank v. Schwinger*, 75 N. Y. App. Div. 393, (N. Y. 1904) 70 N. E. Rep. 1099; *Arnold v. St. Paul F. & M. Ins. Co.*, 106 Tenn. 529; *Campbell v. Jenkins*, (Tex. Civ. App. 1896) 34 S. W. Rep. 673.

SUIT FOR MONEY RECEIVED WITHOUT AUTHORITY. — See *Schanz v. Martin*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 492.

A SUIT WITHOUT COMPLETE KNOWLEDGE OF THE FACTS does not constitute a ratification. *Bank of Commerce v. Miller*, 105 Ill. App. 224.

**1210.** 1. *Fraternal Army v. Evans*, 215 Ill. 625, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1209, 1210.

2. *Williamson v. Tyson*, 105 Ala. 644; *Kentucky Lumber Co. v. Middleton*, (Ky. 1897) 41 S. W. Rep. 48.

3. *La Grande Nat. Bank v. Blum*, 27 Oregon 215.

4. *Terry v. Buek*, 40 N. Y. App. Div. 419. Compare *Holland Coffee Co. v. Johnson*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 187, holding that an action against an agent to recover the price of goods sold did not constitute a ratification of the act of the agent in accepting a suit of clothes in payment.

**1211.** 1. *Plano Mfg. Co. v. Millage*, 14 S. Dak. 331.

2. *Blood v. La Serena Land, etc., Co.*, 113 Cal. 221; *Lynch v. Smyth*, 25 Colo. 103. See also *supra*, this title, **952**. 7. *et seq.*

Where the Authority Is Required to Be in Writing the ratification must be made with equal ceremony. *Long v. Poth*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 85.

**1212.** 1. *Blood v. La Serena Land, etc., Co.*, 113 Cal. 221.

3. *Smyth v. Lynch*, 7 Colo. App. 383; *Lynch v. Smyth*, 25 Colo. 103; *Rutherford v. Montgomery*, 14 Tex. Civ. App. 319.

**1213.** 2. *United States*. — *Farmers' L. & T. Co. v. Memphis, etc., R. Co.*, 83 Fed. Rep. 870.

*California*. — *Market St. R. Co. v. Hellman*, 109 Cal. 571; *Ballard v. Nye*, 138 Cal. 588.

*Colorado*. — *Lynch v. Smyth*, 25 Colo. 103.

*Connecticut*. — *Ansonia v. Cooper*, 64 Conn. 536.

*Georgia*. — *Kirklin v. Atlas Sav., etc., Assoc.*, 107 Ga. 313.

*Iowa*. — *Bradford v. Smith*, 123 Iowa 41.

*Kansas*. — *Aultman Threshing, etc., Co. v. Knoll*, (Kan. 1905) 79 Pac. Rep. 1074.

*Kentucky*. — *Hewling v. Wilshire*, 61 S. W. Rep. 264, 22 Ky. L. Rep. 1702.

*Massachusetts*. — *Beacon Trust Co. v. Souther*, 183 Mass. 413.

*Minnesota*. — *Hunter v. Cobe*, 84 Minn. 187.

*Missouri*. — *Roe v. Versailles Bank*, 167 Mo. 406; *Alexander v. Wade*, 106 Mo. App. 141.

*New Hampshire*. — *Smith v. New England Bank*, 72 N. H. 4.

*New Jersey*. — *McAlpin v. Universal Tobacco Co.*, (N. J. 1904) 57 Atl. Rep. 802.

*Nebraska*. — *Hohn v. Bennett*, 43 Neb. 808; *Johnston v. Milwaukee, etc., Invest. Co.*, 49 Neb. 68.

*New York*. — *Merritt v. Bissell*, 84 Hun (N. Y.) 194; *Hess v. Baar*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 286; *Schanz v. Martin*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 492; *Dupignac v. Bernstrom*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 677.

*Pennsylvania*. — *Himes v. Herr*, 3 Pa. Super. Ct. 124, 39 W. N. C. (Pa.) 568; *Straub Brewing Co. v. Bonistalli*, 5 Pa. Super. Ct. 415; *Daughters of American Revolution v. Schenley*, 204 Pa. St. 572.

*Utah*. — *Genter v. Conglomerate Min. Co.*, 23 Utah 165; *Murray v. Beal*, 23 Utah 548.

*Wisconsin*. — *Platt v. Schmitt*, 117 Wis. 489.

*Canada*. — *Scott v. New Brunswick Bank*, 23 Can. Sup. Ct. 277.

A principal cannot appropriate to himself all the advantages of his agent's unauthorized conduct and repudiate its obligations, nor can he escape liability by claiming ignorance of some of the facts. *Aultman Threshing, etc., Co. v. Knoll*, (Kan. 1905) 79 Pac. Rep. 1074.

**Effect as Notice.** — One who, by ratification, makes the act of another his own, becomes chargeable with notice of all such matters as appeared to be within the knowledge of the agent at the time of the transaction. *Lampkin v. Cartersville First Nat. Bank*, 96 Ga. 487.

**Ratification of Acceptance of Option.** — Where an agent accepts an option of purchase without authority, ratification of such act by the principal after the time limit has expired is ineffective. *Dibbins v. Dibbins*, (1896) 2 Ch. 348.

**1214. Ratification Irrevocable.** — See note 2.**c. LIABILITY OF PRINCIPAL AND AGENT TO THIRD PARTIES.** —

See note 7.

Distinction Between Ratification of Contracts and Torts. — See note 9.

**1215. d. AS TO INTERVENING RIGHTS.** — See note 1.**1216. XI. TERMINATION — 1. By Act of Parties — a. IN ACCORDANCE WITH AGREEMENT — Agreement for Term, if Satisfactory.** — See note 1.**b. REVOCATION BY PRINCIPAL — (1) In General.** — See note 2.

Authority to Sell Lands — To Appropriate Funds. — See note 3.

**1217. Stipulation Against Revocation.** — See notes 1, 2.

Revocation After Sale Effected by Agent. — See note 5.

(2) *When Agency Is Coupled with an Interest.* — See note 6.**1218. What Constitutes Authority Coupled with Interest.** — See notes 1, 3, 4.

Agency for Protection of Party Authorized. — See note 5.

**1214. 2.** *Sanders v. Peck*, (C. C. A.) 87 Fed. Rep. 61; *Hunter v. Cobe*, 84 Minn. 187; *Richmond Union Pass. R. Co. v. Richmond, etc.*, R. Co., 96 Va. 670.

**7.** *Ansonia v. Cooper*, 64 Conn. 536; *Aultman Threshing, etc., Co. v. Knoll*, (Kan. 1905) 79 Pac. Rep. 1074.

**9.** *Lingenfelder v. Leschen*, 134 Mo. 55.

**1215. 1.** *Dingley v. McDonald*, 124 Cal. 682; *Chesapeake, etc., R. Co. v. Howard*, 14 App. Cas. (D. C.) 262, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1215; *Graham v. Williams*, 114 Ga. 716; *Stickley v. Widle*, 122 Iowa 400, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1215; *Clendenning v. Hawk*, 10 N. Dak. 90; *Murray v. Beal*, 23 Utah 548; *Platt v. Schmitt*, 117 Wis. 489.

**1216. 1.** *Chaffe v. Barataria Canning Co.*, 113 La. 215.

**The Principal Alone Has the Right to Determine** when he is justified in terminating the agency. *Karsner v. Union Cent. L. Ins. Co.*, 6 Ohio Cir. Dec. 335, 12 Ohio Cir. Ct. 394.

**No Implied Contract to Remain in Business.** — A contract of agency for ten years does not raise any implied guaranty that the principal will remain in business for that length of time. *Northey v. Trevillion*, 7 Com. Cas. (Eng.) 201.

**2.** *Barrett v. Gilmour*, 6 Com. Cas. (Eng.) 72; *Galibert v. Atteaux*, 23 Quebec Super. Ct. 427; *Sheahan v. National Steamship Co.*, (C. C. A.) 87 Fed. Rep. 167; *Linder v. Adams*, 95 Ga. 668; *Smith v. Dare*, 89 Md. 47; *Royal Remedy, etc., Co. v. Gregory Grocer Co.*, 90 Mo. App. 53; *Elwell v. Coon*, (N. J. 1900) 46 Atl. Rep. 580; *Hitchcock v. Kelley*, 4 Ohio Cir. Dec. 180, 18 Ohio Cir. Ct. 808; *Rice v. Fidelity, etc., Co.*, 1 Lack. Leg. N. (Pa.) 111; *Flaherty v. O'Connor*, 24 R. I. 587.

**Contract for Permanent Employment.** — Though by the contract the agency is made permanent, the law still holds that the term is indefinite, and the agency may be terminated at the will of either party. *Davis v. Fidelity F. Ins. Co.*, 208 Ill. 375.

**3.** *Kolb v. J. E. Bennett Land Co.*, 74 Miss. 567, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1216.

**1217. 1.** *Buffalo Land, etc., Co. v. Strong*, 91 Minn. 84; *Montague v. McCarroll*, 15 Utah 318.

**2.** *Woods v. Hart*, 50 Neb. 497.

**5.** *Davis v. Huber Mfg. Co.*, 119 Iowa 56;

*Merton v. J. I. Case Threshing Mach. Co.*, 99 Mo. App. 630; *Odum v. J. I. Case Threshing Mach. Co.*, (Tenn. Ch. 1895) 36 S. W. Rep. 191; *Leupold v. Weeks*, 96 Md. 280.

**Expenses Incurred by Agent Before Revocation.** — To the same effect as *U. S. v. Jarvis*, Dav. (U. S.) 274, stated in the original note, see *Terwilliger v. Ontario, etc., R. Co.*, 149 N. Y. 86. See also *Royal Remedy, etc., Co. v. Gregory Grocer Co.*, 90 Mo. App. 53.

**6.** *Ray v. Hemphill*, 97 Ga. 563, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1217 *et seq.*; *Bird v. Phillips*, 115 Iowa 703; *Buffalo Land, etc., Co. v. Strong*, 91 Minn. 84; *Miller v. Home Ins. Co.*, 71 N. J. L. 175, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1217; *Terwilliger v. Ontario, etc., R. Co.*, 149 N. Y. 86; *Montague v. McCarroll*, 15 Utah 318.

**An Oral Authority** may be irrevocable as well as an authority in writing. *Terwilliger v. Ontario, etc., R. Co.*, 149 N. Y. 86.

**1218. 1.** *Kolb v. J. E. Bennett Land Co.*, 74 Miss. 567, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1218; *Brown v. Skotland*, 12 N. Dak. 445, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1217.

**3.** *Nevitt v. Woodburn*, 82 Ill. App. 649; *Marbury v. Barnett*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 386, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1216.

**Must Be Derived from Same Source.** — To constitute an agency coupled with an interest, both agency and interest must be derived from the same source. *Black v. Harsha*, 7 Kan. App. 794.

**4. Authority to Sell on Commission.** — *Andrews v. Travelers' Ins. Co.*, 70 S. W. Rep. 43, 24 Ky. L. Rep. 844, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1217 [1218], and supporting the whole text paragraph; *Kolb v. J. E. Bennett Land Co.*, 74 Miss. 567, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1218; *Elwell v. Coon*, (N. J. 1900) 46 Atl. Rep. 580; *Wainwright v. Massenburg*, 129 N. Car. 46, *citing* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1217, 1218.

**Agency to Sell Land on Commission.** — *Hall v. Gambrell*, 88 Fed. Rep. 709. See also *Yingling v. West End Imp. Co.*, 5 Pa. Dist. 607.

**Agency to Solicit Insurance on Commission.** — *Andrews v. Travelers' Ins. Co.*, 70 S. W. Rep. 43, 24 Ky. L. Rep. 844; *Ballard v. Travellers' Ins. Co.*, 119 N. Car. 187.

**5.** *Ray v. Hemphill*, 97 Ga. 563; *Durbrow v.*



**1219.** See note 1.

(3) *How Effected.* — See note 3.

**1220.** Subagents. — See note 1.

(4) *When Effective — Notice of Revocation — As to the Agent.* — See note 2.

*As to Third Persons.* — See note 3.

**1221.** See note 1.

Statutes Requiring Record of Revocation. — See note 2.

Constructive Notice. — See note 4.

**1222.** Effect of Revocation and Notice. — See note 3.

c. RENUNCIATION BY AGENT. — See note 4.

Implied Renunciation — Rights of Principal. — See note 6.

Eppens, 65 N. J. L. 16; Miller v. Home Ins. Co., 71 N. J. L. 175, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1217-1219.

**1219.** 1. Miller v. Home Ins. Co., 71 N. J. L. 175, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1219; Stevens v. Sessa, 50 N. Y. App. Div. 547.

3. Kolb v. J. E. Bennett Land Co., 74 Miss. 567, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1219.

**Disposition of Subject-matter.** — A power of attorney to convey land is revoked by a subsequent deed to the agent as trustee and guardian of the principal's son. *Chenault v. Quisenberry*, (Ky. 1900) 56 S. W. Rep. 410, (Ky. 1900) 57 S. W. Rep. 234.

**The Sale of the Property.** — *Kelly v. Brennan*, 55 N. J. Eq. 423; *Donnan v. Adams*, 30 Tex. Civ. App. 615.

**Appointment of Agent to Inconsistent Duties.** — Authority to collect money for an estate is suspended, if, indeed, the agency is not entirely renounced, by the appointment of the agent as administrator of the estate. *Matter of Watkins*, 121 Cal. 327.

**Demand for Return of Power.** — The demand by the principal for the return of a written power under which an attorney in fact was acting, and its surrender and withdrawal without any explanatory words or further instructions, amount to a revocation of the power. *Kelly v. Brennan*, 55 N. J. Eq. 423.

**Appointment of Another Agent.** — Authority to one to dismiss a certain suit is revoked by authority to another to continue it. *Aiken v. Taylor*, (Tenn. Ch. 1900) 62 S. W. Rep. 200.

**1220.** 1. *Union Casualty, etc., Co. v. Gray*, 114 Fed. Rep. 422, 52 C. C. A. 224.

2. *Union Special Sewing Mach. Co. v. Lockwood*, 110 Ill. App. 387; *Donnan v. Adams*, 30 Tex. Civ. App. 615.

**The Agent Must Be Notified of the revocation** where the contract is in the nature of a letting and hiring. *Spinks v. Georgia Quincy Granite Co.*, (La. 1905) 38 So. Rep. 824.

3. *Alger v. Keith*, 105 Fed. Rep. 105, 44 C. C. A. 371; *Continental F. Ins. Co. v. Brooks*, 131 Ala. 614, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1220; *Swinerton v. Argonaut Land, etc., Co.*, 112 Cal. 375; *Stockton Ice Co. v. Argonaut Land, etc., Co.*, (Cal. 1899) 56 Pac. Rep. 885; *Meeker v. Mannia*, 162 Ill. 203; *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 56 Am. St. Rep. 436; *Waters-Pierce Oil Co. v. Jackson Junior Zinc Co.*, 98 Mo. App. 324;

*Vogel v. Weissmann*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 256; *Stevens v. Schroeder*, 40 N. Y. App. Div. 590; *Lynch v. Rabe*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 215; *Cosmopolitan Range Co. v. Midland R. Terminal Co.*, 44 N. Y. App. Div. 467; *Sibley v. Gilmer*, 124 N. Car. 635, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1230 (1220); *Edinburgh-American Land Mortg. Co. v. Noonan*, 11 S. Dak. 141.

**In the Case of a Special Agent** no notice need be given to third persons. *Donnan v. Adams*, 30 Tex. Civ. App. 615.

**Exception to Rule.** — The doctrine that one who has dealt with an agent in a matter within his authority has a right to assume in subsequent dealings with him, unless otherwise informed, that the agency continues, cannot be held to apply to a case where the agent of an undisclosed principal afterwards embarks in a new enterprise in his own name, the fact that he ever was an agent being unknown to the party with whom he deals. *Illston v. Evans*, 27 N. Y. App. Div. 447.

**1221.** 1. *Gratz v. Land, etc., Imp. Co.*, 82 Fed. Rep. 381, 53 U. S. App. 499; *Cheshire Provident Inst. v. Feusner*, 63 Neb. 682.

2. **When Recording of the Revocation Is Not Required**, the recording does not amount to constructive notice. *Best v. Gunther*, (Wis. 1905) 104 N. W. 82.

4. *Donnan v. Adams*, 30 Tex. Civ. App. 615.

**1222.** 3. *Florida Cent., etc., R. Co. v. Ashmore*, 43 Fla. 272.

4. *Hitchcock v. Kelley*, 4 Ohio Cir. Dec. 180, 18 Ohio Cir. Ct. 808.

**Agent Repudiating Agency and Acting for Self.** — "Where an agent abandons the object of his agency, and acts for himself by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment, and to that extent ceases to act as agent." *Sternback v. Friedman*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 173.

Where an agent puts himself into a position antagonistic to his principal, such a breach of duty, unless condoned by the principal with a full knowledge of the facts, puts an end *ipso facto* to the agency. *Cotton v. Rand*, 93 Tex. 7.

6. **When Renunciation Not Implied.** — Where an agent remonstrated with his principal for acting with other agents, and said that he would not continue to act as agent, but did continue to do so, the agency was held not to be terminated. *Stringfellow v. Elsea*, (Tex. Civ. App. 1898) 45 S. W. Rep. 418.

- 1223.** 2. By Operation of Law — *a.* DEATH OF PRINCIPAL. — See note 1. Authority Coupled with an Interest. — See note 5.
- 1224.** Acts Done Bona Fide Without Notice of Principal's Death. — See note 3.
- 1225.** Payment to or Purchase by Agent After Principal's Death. — See note 2.
- 1226.** *b.* DEATH OF AGENT. — See note 2.
- c.* INSANITY OF EITHER PARTY — Insanity of Principal. — See note 5.
- 1227.** *d.* BANKRUPTCY OF EITHER PARTY — Principal. — See note 3. Agent. — See note 5.
- 1228.** *f.* EFFECT OF WAR. — See note 5.
- 1229.** *g.* ACCOMPLISHMENT OF PURPOSE — LAPSE OF TIME. — See note 4.
- 1230.** Authority to Find Purchasers. — See note 1.

**1223.** 1. *United States.* — *Pacific Bank v. Hannah*, 90 Fed. Rep. 72, 59 U. S. App. 457.

*Arizona.* — *Tuttle v. Green*, (Ariz. 1897) 48 Pac. Rep. 1009.

*California.* — *Krumdick v. White*, 107 Cal. 37.

*Illinois.* — *Mecartney v. Carbine*, 108 Ill. App. 282.

*Kansas.* — *Farmer v. Marvin*, 63 Kan. 250.

*Massachusetts.* — *Brown v. Cushman*, 173 Mass. 368.

*New York.* — *Stevens v. Sessa*, 50 N. Y. App. Div. 547; *Van Campen v. Bruns*, 54 N. Y. App. Div. 86.

*North Carolina.* — *Wainwright v. Massenburg*, 129 N. Car. 46, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1222; *Duckworth v. Orr*, 126 N. Car. 674; *Fisher v. Southern Loan, etc., Co.*, (N. Car. 1905) 50 S. E. Rep. 592.

*North Dakota.* — *Brown v. Skotland*, 12 N. Dak. 445; *Moore v. Weston*, (N. Dak. 1904) 102 N. W. Rep. 163.

*Pennsylvania.* — *Kern's Estate*, 176 Pa. St. 373.

*Texas.* — *Renfro v. Waco*, (Tex. Civ. App. 1896) 33 S. W. Rep. 766.

*Virginia.* — *Triplett v. Woodward*, 98 Va. 187.

*Canada.* — *Ex p. Welch*, 2 N. Bruns. Eq. Rep. 129.

**5.** *Muth v. Goddard*, 28 Mont. 237, 98 Am. St. Rep. 553; *Durbrow v. Eppens*, 65 N. J. L. 10, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1223; *Stevens v. Sessa*, 50 N. Y. App. Div. 547, quoting 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1223.

**1224.** 3. Acts Effective in Agent's Name Held Binding Though Done After Principal's Death. — *Deweese v. Muff*, 57 Neb. 17, 73 Am. St. Rep. 488, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1224, and holding that where a negotiable note, indorsed by the payee in blank, is delivered to an agent for collection, the payment thereof by the maker in good faith to the agent while the note is in the agent's possession, after the death of the principal but without notice of his death, will discharge the debt. And see *Meinhardt v. Newman*, (Neb. 1904) 99 N. W. Rep. 261, holding that it is not a hard and fast rule that an agency shall be deemed to have been revoked for all purposes by the death of the principal, as against those dealing in good faith with such agent without knowledge of revocation and within the scope of his apparent authority.

**1225.** 2. See *Meinhardt v. Newman*, (Neb. 1904) 99 N. W. Rep. 261.

**1226.** 2. *Bristol Sav. Bank v. Holley*, (Conn. 1904) 58 Atl. Rep. 691; *Hayner v. Trott*, 4 Kan. App. 679.

**5.** *Chase v. Chase*, 163 Ind. 178, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1226; *Renfro v. Waco*, (Tex. Civ. App. 1896) 33 S. W. Rep. 766.

**1227.** 3. *Wilson v. Harris*, 21 Mont. 374, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1227; *Franzen v. Zimmer*, 90 Hun (N. Y.) 103.

**Rights of Agent.** — The failure of the principal will not justify the agent in terminating the agency, putting an end to the service partly performed, and becoming the employee of a third person to the contract between him and his principal. *Means v. Ross*, 106 La. 175.

**5. The Insolvency.** — In *Cushman v. Snow*, 186 Mass. 169, it was held that where factors became insolvent and made an assignment for the benefit of their creditors, their agency was thereby terminated.

The mere fact, however, that a factor is insolvent in the sense that he is unable to meet his obligations as they mature was held not to effect a revocation of his authority, where he had made no assignment and no bankruptcy or insolvency proceedings had been instituted by or against him. *Interstate Nat. Bank v. Claxton*, 97 Tex. 569, citing 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1227, and *distinguishing* the case at bar.

See also the title **INSOLVENCY AND BANKRUPTCY**.

**1228.** 5. Power of Attorney to Sell Land Revoked. — Compare *Williams v. Paine*, 169 U. S. 55.

**1229.** 4. An Agency to Procure a Loan terminates when the money is received by the borrower. *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629.

**Illustrations — Determination by Accomplishment of Purpose.** — Where an agent is authorized to effect a particular loan, the termination of the negotiations for such loan terminates the agent's authority. *Keegan v. Rock*, (Iowa 1905) 102 N. W. Rep. 805.

**1230.** 1. Agent to Sell Lands. — Authority granted to an agent to sell real estate does not give authority to enter into a contract for a conveyance. When the agent procures a purchaser, ready, able, and willing to buy on the terms proposed, his employment is at an end. *Armstrong v. Oakley*, 23 Wash. 122. See also *supra*, this title, **998. 2. et seq.**, and the title **REAL-ESTATE BROKERS**.

1. **AGGRAVATION.**—See note 2.
- AGGREGATE.**—See note 3.
2. **AGGREGATION.**—See note 1.

1. 2. *Southern R. Co. v. O'Bryan*, 119 Ga. 150, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1.

3. **Aggregate Compensation.**—See *Chapin v. Wilcox*, 114 Cal. 498.

2. 1. *Osgood Dredge Co. v. Metropolitan Dredging Co.*, (C. C. A.) 75 Fed. Rep. 670.

## AGISTMENT.

BY O. D. HAMMOND.

3. **I. DEFINITION AND NATURE**—Definition.—See note 1.  
Nature.—See note 4.

4. **II. DUTIES AND LIABILITIES OF AGISTOR**—1. **To Owner of Agisted Animals**—*a. DUTY TO TAKE ORDINARY OR REASONABLE CARE.*—See notes 1, 2.

5. *b. LIABILITY FOR LOSS OR INJURY OF STOCK*—(1) *In General*—Agistor Liable Only When Negligent.—See note 1.

6. **Negligence of Servants.**—See note 1.

(2) *Warranty of Pasture—Diseases Contracted*—Agistor Must Provide Suitable Pasture.—See note 3.

7. (3) *Duty to Maintain Good Fences*—Agistor Must Keep Pasture Inclosed.—See note 2.

8. (5) *Negligence—Burden of Proof.*—See note 4.

3. 1. **Definition.**—*W. H. Howard Commission Co. v. National Live Stock Bank*, 93 Ill. App. 473.

4. **An Agistor of Sheep must account to the owner for wool cut and for increase in the flock.** *Iowa Bank v. Price*, 12 S. Dak. 184.

**Keeping Sheep for Share of Wool.**—One who keeps sheep for a share of the wool is an agistor within the meaning of the statute establishing an agistor's lien in favor of one who pastures animals for a "price." *Schrandt v. Young*, 62 Neb. 254.

**Keeping a Cow for Her Calf.**—One who keeps a cow for her increase is an agistor. *Cunningham v. Hamill*, 84 Mo. App. 389.

4. 1. **Agistor Must Exercise Ordinary and Reasonable Care.**—*Harper v. Lockhart*, 9 Colo. App. 430; *Arrington v. Fleming*, 117 Ga. 449, 97 Am. St. Rep. 169, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 4; *Union Stock-yard, etc., Co. v. Mallory, etc., Co.*, 157 Ill. 554, 48 Am. St. Rep. 341; *Wells v. Sutphin*, 64 Kan. 873; *Humbert v. Crump*, 66 Kan. 57; *Rayl v. Kreilich*, 74 Mo. App. 246; *Crawford v. Cashman*, 82 Mo. App. 554; *Miller v. Lewis*, (S. Dak. 1903) 97 N. W. Rep. 364.

2. **Must Exercise Same Care as Towards His Own Property.**—*Deyer v. Ashley*, 6 N. J. L. J. 283.

5. 1. *Crawford v. Cashman*, 82 Mo. App. 554.

6. 1. *Wells v. Sutphin*, 64 Kan. 873.

3. **Agistor Must Provide Suitable Pasture.**—*Ware Cattle Co. v. Anderson*, 107 Iowa 231.

A pasture that is overstocked is not suitable pasture. *Fields v. Haley*, (Tex. Civ. App. 1899) 52 S. W. Rep. 115.

An agistor is not liable for scarcity of food and water during a general drought. *Hines v. Shafer*, (Tex. Civ. App. 1903) 74 S. W. Rep. 562.

What is suitable is a question for the jury. *Ware Cattle Co. v. Anderson*, 107 Iowa 231.

7. 2. **Agistor Must Maintain Good Fences.**—*Arrington v. Fleming*, 117 Ga. 449, 97 Am. St. Rep. 169.

**Duty to Maintain a Legal Fence.**—*Lucia v. Meech*, 68 Vt. 175.

**Knowledge on Part of Agistor.**—It is necessary where the plaintiff claims that an agistor's fence was defective to show that the defendant had knowledge of such defect. *Lucia v. Meech*, 68 Vt. 175.

**Must Prevent Cattle from Going into Dangerous Places.**—*Arrington v. Fleming*, 117 Ga. 449, 97 Am. St. Rep. 169.

8. 4. **General Rule—Burden of Proof.**—See *Ware Cattle Co. v. Anderson*, 107 Iowa 231; *Rayl v. Kreilich*, 74 Mo. App. 246; *Casey v. Donovan*, 65 Mo. App. 521, in which cases it is held that failure to return cattle is *prima facie* evidence of negligence; *Hudson v. Bradford*, 91 Ill. App. 219, holding that where an agistor receives cattle in good condition and returns them in bad condition the law presumes negligence and the burden of proof rests on him to show that he exercised care and diligence.

**Burden of Proof Not Shifted.**—When the liability of an agistor is founded on his negligence the burden of proof never shifts. *Casey v. Donovan*, 65 Mo. App. 521; *Crawford v. Cashman*, 82 Mo. App. 554. And see generally the title **BURDEN OF PROOF**.

**11. IV. RIGHTS OF AGISTOR — 1. Against Third Persons.** — See note 2.

**12. 2. Against Owner — Right to Lien — a. AT COMMON LAW — (1) No Lien in General.** — See note 1.

(2) *Reasons for Denying Lien.* — See note 2.

**13. (3) Lien for Special Services.** — See note 1.

(4) *Lien by Agreement.* — See notes 3, 4.

**14. b. LIENS BY STATUTE.** — See note 1.

**AGREE.** — See note 3.

**16. AGREEABLY.** — See note 2.

**17. AGREEMENT.** — See note 1.

**11. 2. Right of Agistor to Recover for Conversion.** — Willard v. Whinfield, 2 Kan. App. 53.

**12. 1. Sharp v. Johnson,** 38 Oregon 246, 84 Am. St. Rep. 788, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 12; Dale v. Council Bluffs Sav. Bank, 65 Neb. 692, reversed on other grounds 65 Neb. 695; Lambert v. Nicklass, 45 W. Va. 527, 72 Am. St. Rep. 828.

**2. Sharp v. Johnson,** 38 Oregon 250, 84 Am. St. Rep. 788.

**13. 1. Lien for Special Services.** — Scott v. Mercer, 98 Iowa 258, 60 Am. St. Rep. 188; Maryville Nat. Bank v. Snyder, 85 Mo. App. 82, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 13.

**3. Agistor May Acquire Lien by Special Contract.** — Harper v. Lockhart, 9 Colo. App. 430; Bowden v. Dugan, 91 Me. 141; Cunningham v. Hamill, 84 Mo. App. 389; Dale v. Council Bluffs Sav. Bank, 65 Neb. 692, reversed on other grounds 65 Neb. 695.

**Lien by Implied Agreement.** — Powers v. Botts, 63 Mo. App. 285.

**Lien by Agreement Does Not Prevail over Prior Chattel Mortgage.** — Central Nat. Bank v. Brecheisen, 65 Kan. 807; Jackson v. McCray, 63 Kan. 238; Harding v. Kelso, 91 Mo. App. 607. But see under the statute in Ohio, Aylmore v. Kahn, 5 Ohio Cir. Dec. 410, 11 Ohio Cir. Ct. 392; Graham v. Winchell, 4 Ohio Dec. 139, 3 Ohio N. P. 106.

**4. When Lien Not Lost.** — An agistor does not lose his lien where the animals during his temporary absence were taken away by a person claiming especial property in them as mortgagee, when their return was demanded within a reasonable time by the agistor. Willard v. Whinfield, 2 Kan. App. 53.

**Agistor's Lien Forfeited.** — An attempt on the part of the agistor, except by consent of the bailor, to remove the cattle from the country or to dispose of them otherwise than by advertisement and sale, forfeits the lien. Dale v. Council Bluffs Sav. Bank, 65 Neb. 695.

**Termination of Agistment.** — The owner's responsibility for payment does not end on mere

notice to the agistor, but only, by accepting possession of the animal. Andrews v. Keith, 168 Mass. 558.

**14. 1. Agistor Must Have Absolute Care and Control.** — Feltman v. Chinn, (Ky. 1897) 43 S. W. Rep. 192.

**Lien After Delivery of Part.** — An agistor having delivered part of the herd may still retain a lien on those remaining, for the amount due on the whole herd. George R. Barse Live Stock Commission Co. v. Adams, 2 Indian Ter. 119.

**Statutes Creating Agistor's Liens Held Constitutional.** — Griffith v. Gross, 108 Ky. 160.

**Statutory Liens Discussed and Interpreted — Colorado.** — Bailey v. O'Fallon, 30 Colo. 418. **Illinois.** — Howard Commission Co. v. National Live Stock Bank, 93 Ill. App. 473.

**Indiana.** — Woodard v. Myers, 15 Ind. App. 42.

**Kentucky.** — Griffith v. Speaks, 111 Ky. 149.

**Maine.** — Bowden v. Dugan, 91 Me. 141.

**Massachusetts.** — Andrews v. Keith, 168 Mass. 558; Folsom v. Barrett, 180 Mass. 439.

**Missouri.** — Powers v. Botts, 63 Mo. App. 285; Duke v. Duke, 93 Mo. App. 244; Maryville Nat. Bank v. Snyder, 85 Mo. App. 82.

**Nebraska.** — Weber v. Whetstone, 53 Neb. 371; Schrandt v. Young, 62 Neb. 254; Becker v. Brown, 65 Neb. 264; Dale v. Council Bluffs Sav. Bank, 65 Neb. 692, reversed on other grounds 65 Neb. 695.

**Oklahoma.** — Boston, etc., Cattle Loan Co. v. Dickson, 11 Okla. 680.

**Oregon.** — Sharp v. Johnson, 38 Oregon 250, 84 Am. St. Rep. 788.

**West Virginia.** — Lambert v. Nicklass, 45 W. Va. 527, 72 Am. St. Rep. 828.

**3. Marshall v. Old,** 14 Colo. App. 32.

**Importing a Concluded Agreement — Agree to Rent.** — See Ver Steeg v. Becker-Moore Paint Co., 106 Mo. App. 257.

**16. 2. United States Statute.** — U. S. v. Sauer, 73 Fed. Rep. 671.

**17. 1. Compact or Agreement.** — Stearns v. Minnesota, 179 U. S. 223.

# AGRICULTURAL SOCIETIES.

BY R. N. CHAFFEE.

**18. I. DEFINITION.** — See note 2.

**19.** See note 1.

**21. IV. RIGHTS AND POWERS — 2. Special Powers and Privileges.** — See note 2.

**25. V. AGRICULTURAL FAIRS — 6. Duty and Liability to the Public — In Regard to Buildings and Grounds.** — See note 2.

**18. 2. Private Corporations, According to Some Authorities.** — *Ismon v. Loder*, (Mich. 1904) 97 N. W. Rep. 769, 10 Detroit Leg. N. 779, to same effect as *Dunn v. Brown County Agricultural Soc.*, 46 Ohio St. 93, 15 Am. St. Rep. 556.

**19. 1. Held by Some Courts to Be Public Corporations.** — *Lane v. Minnesota State Agricultural Soc.*, 62 Minn. 175; *Berman v. Minnesota State Agricultural Soc.*, (Minn. 1904) 100 N. W. Rep. 732.

**Agricultural Societies as Agencies of the State.** — *Melvin v. State*, 121 Cal. 16.

**21. 2. See State v. Reynolds, (Conn. 1904) 58 Atl. Rep. 755; *Ismon v. Loder*, (Mich. 1904) 97 N. W. Rep. 769, 10 Detroit Leg. N. 779; *Lane v. Minnesota State Agricultural Soc.*, 62**

Minn. 175; *Berman v. Minnesota State Agricultural Soc.*, (Minn. 1904) 100 N. W. Rep. 732.

**25. 2. Must Render Buildings and Grounds Safe.** — *Texas State Fair v. Brittain*, (C. C. A.) 118 Fed. Rep. 713; *Thornton v. Maine State Agricultural Soc.*, 97 Me. 108; *Texas State Fair v. Marti*, 30 Tex. Civ. App. 132.

Persons exhibiting horses at agricultural fairs have a right to assume that a reasonably safe track will be furnished for displaying them. *Warren County Agricultural Soc. v. McKinley*, 94 Ill. App. 664.

A cyclist riding in a race at an agricultural fair has a right to assume that the proprietor of the fair will exercise due care in keeping the track clear. *Benedict v. Union Agricultural Soc.*, 74 Vt. 91.

# AIDER AND ABETTOR.

By O. D. HAMMOND.

**29. I. DEFINITION AND GENERAL PRINCIPLES** — Definition. — See note 1.

**30.** See note 1.

**What Offenses Admit Aiders and Abettors.** — See notes 3, 4.

**Relation of Aider and Abettor to Principal in the First Degree.** — See note 6.

**31.** See notes 1, 2.

**29. 1. Definition.** — *People v. Compton*, 123 Cal. 403; *People v. Moran*, 144 Cal. 48; *Pearce v. Territory*, 11 Okla. 438; *Leslie v. State*, 42 Tex. Crim. 65.

"Aid" means help. "Abet" means encourage, counsel. *State v. Snell*, 5 Ohio Dec. 670.

**A Principal in the Second Degree.** — *Thornton v. State*, 119 Ga. 437; *Williams v. U. S.*, 1 Indian Ter. 560.

**Aid and Abet.** — *State v. Snell*, 5 Ohio Dec. 670.

**30. 1.** *Williams v. U. S.*, 1 Indian Ter. 560. See also *U. S. v. Van Schaick*, 134 Fed. Rep. 592.

**3. Aiders and Abettors in Statutory Felonies.** — *Bishop v. State*, 118 Ga. 799.

In *Minnesota*, where all common-law crimes are abolished and only statutory crimes exist, one who gives a bribe is not guilty as an aider and abettor under a statute making the taking and receiving of a bribe a felony. *State v. Sargent*, 71 Minn. 28.

**Manslaughter.** — *Mathis v. State*, (Fla. 1903) 34 So. Rep. 287.

**Arson.** — *Bliss v. U. S.*, (C. C. A.) 105 Fed. Rep. 508; *Howard v. State*, 109 Ga. 137.

**4.** *State v. Stark*, 63 Kan. 529, 88 Am. St. Rep. 251; *Atkins v. State*, 95 Tenn. 474; *Caudle v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 545.

**Aiders and Abettors in Misdemeanors.** — *Casey State*, 49 Neb. 403.

**Purchaser of Intoxicants.** — One who purchases whiskey is not an aider and abettor in the violation of the local-option laws. *Terry v. State*, 44 Tex. Crim. 411; *Walker v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 401; *Smith v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 801; *Terry v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 320.

**6.** *Pearce v. Territory*, 118 Fed. Rep. 425, 55 C. C. A. 550; *People v. Compton*, 123 Cal. 403; *State v. Bland*, (Idaho 1904) 76 Pac. Rep. 780; *State v. Smith*, 106 Iowa 701; *State v. Berger*, 121 Iowa 581; *People v. Canepi*, 93 N. Y. App. Div. 379; *People v. Mills*, 178 N. Y. 274; *Wilson v. State*, 1 Ohio Cir. Dec. 350; *Pearce v. Territory*, 11 Okla. 438; *State v. Branton*, 33 Oregon 533.

**31. 1. Aider and Abettor Convicted — Principal Acquitted.** — *Williams v. U. S.*, 1 Indian Ter. 560.

**Effect of Principal's Guilt or Innocence.** — Where a husband was charged with the rape of his own wife by aiding and abetting another man to commit the crime, and the other man

was previously acquitted, the husband cannot be convicted on the grounds of his legal inability to rape his own wife. *State v. Haines*, 51 La. Ann. 731.

The guilt of one who aids or abets the commission of a crime must be determined upon the facts which show the part he had in it, and does not depend upon the degree of another's guilt. *Davis v. State*, 152 Ind. 145; *State v. Smith*, 100 Iowa 1; *State v. Wolf*, 112 Iowa 458; *Red v. State*, 39 Tex. Crim. 667, 73 Am. St. Rep. 965.

Aiding and abetting a felony is an independent substantive crime, and in no wise dependent for its punishment upon the conviction of the principal. *Casey v. State*, 49 Neb. 403.

**The Death of the Principal** does not prevent indictment and conviction of one charged with aiding and abetting an embezzlement. *Gallot v. U. S.*, (C. C. A.) 87 Fed. Rep. 446.

**There Must Be a Crime by the Principal.** — Where the larceny that the defendant counseled and advised was never committed by the party so advised and counseled, but by a third person, the defendant is not guilty as an aider and abettor. *People v. Mills*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 195.

**2.** *Williams v. U. S.*, 1 Indian Ter. 560; *State v. Cannon*, 49 S. Car. 550.

**Order of Trial.** — Indictment for aiding and abetting may be either before or after the indictment or trial of the principal. *Daughtrey v. State*, (Fla. 1903) 35 So. Rep. 397; *Com. v. Bradley*, 16 Pa. Super. Ct. 561.

**Indictment as Principal** — *United States*. — *Bliss v. U. S.*, 105 Fed. Rep. 508, 44 C. C. A. 324.

*California.* — *People v. Morine*, 138 Cal. 626. *Delaware.* — *State v. Pullen*, 3 Penn. (Del.) 184.

*Illinois.* — *McCracken v. People*, 209 Ill. 215. *Indiana.* — *Hauk v. State*, 148 Ind. 238.

*Iowa.* — *State v. Smith*, 106 Iowa 701.

*Missouri.* — *State v. McLain*, 92 Mo. App. 456.

*Montana.* — *State v. De Wolfe*, 29 Mont. 415.

*New Mexico.* — *U. S. v. Densmore*, (N. Mex. 1904) 75 Pac. Rep. 31.

*New York.* — *People v. Lagroppo*, 90 N. Y. App. Div. 219.

*North Carolina.* — *State v. De Boy*, 117 N. Car. 702.

*Oklahoma.* — *Pearce v. Territory*, 11 Okla. 438.

*Oregon.* — *State v. Branton*, 33 Oregon 533.

*Texas.* — *Yates v. State*, (Tex. Crim. 1897)

**32. II. WHO MAY BE AN AIDER AND ABETTOR.** — See note 1.**III. ESSENTIALS** — 1. **Generally.** — See note 2.**2. Presence** — *a. GENERALLY.* — See note 3.*b. CONSTRUCTIVE PRESENCE.* — See notes 4, 5.**33. c. MERE PRESENCE.** — See notes 1, 2, 3.

42 S. W. Rep. 296; *Criner v. State*, 41 Tex. Crim. 290; *Red v. State*, 39 Tex. Crim. 667, 73 Am. St. Rep. 965.

**Indictment as Aider and Abettor.** — Where aiding and abetting is a distinct and substantive crime one who is indicted as principal may not be convicted for aiding and abetting. *Oerter v. State*, 57 Neb. 135.

**Joint Indictment** — *Arkansas.* — *Greene v. State*, (Ark. 1902) 70 S. W. Rep. 1038.

*Florida.* — *Green v. State*, 40 Fla. 191.

*Georgia.* — *Brooks v. State*, 103 Ga. 50; *Bishop v. State*, 118 Ga. 799.

*Kentucky.* — *Tudor v. Com.*, (Ky. 1897) 43 S. W. Rep. 187.

*Nebraska.* — *Johnson v. State*, 53 Neb. 103.

*Ohio.* — *Jones v. State*, 7 Ohio Cir. Dec. 305, 14 Ohio Cir. Ct. 35.

*Tennessee.* — *Thompson v. State*, 105 Tenn. 177, 80 Am. St. Rep. 875.

*West Virginia.* — *State v. Lilly*, 47 W. Va. 496; *State v. Roberts*, 50 W. Va. 422.

**Conviction of Lower Degree of Offense.** — The conviction of the principal or of another aider and abettor of a lesser crime than murder in the first degree would not operate as a bar to the defendant's conviction of murder in the first degree. *Green v. State*, 40 Fla. 191; *Bruce v. State*, 99 Ga. 50.

**32. 1. Aiders and Abettors, Although Incapable of Being Actors.** — *Gallot v. U. S.*, (C. C. A.) 87 Fed. Rep. 446; *Bishop v. State*, 118 Ga. 799; *State v. Rowe*, 104 Iowa 323; *State v. Elliott*, 61 Kan. 518; *State v. Haines*, 51 La. Ann. 731; *Thomas v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1045.

**Persons Aiding and Abetting a Corporation** may be held liable therefor although the corporation may not be subject to punishment for its act. *U. S. v. Van Schaick*, 134 Fed. Rep. 592.

**2. Presence and Participation** — *California.* — *People v. Schoedde*, 126 Cal. 373.

*Delaware.* — *State v. Palmer*, 4 Penn. (Del.) 126; *State v. Lewis*, 4 Penn. (Del.) 332.

*Florida.* — *Green v. State*, 40 Fla. 191.

*Georgia.* — *Thornton v. State*, 119 Ga. 437.

*Indiana.* — *Reed v. State*, 147 Ind. 41; *Hauk v. State*, 148 Ind. 238.

*Indian Territory.* — *Williams v. U. S.*, 1 Indian Ter. 560.

*Nebraska.* — *Casey v. State*, 49 Neb. 403.

*New York.* — *People v. Winant*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 361.

*Texas.* — *Colter v. State*, 37 Tex. Crim. 284; *Bell v. State*, 39 Tex. Crim. 677; *Wright v. State*, 40 Tex. Crim. 45; *Joy v. State*, 41 Tex. Crim. 46; *Criner v. State*, 41 Tex. Crim. 290; *Walton v. State*, 41 Tex. Crim. 454; *Yates v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 296; *Leslie v. State*, 42 Tex. Crim. 65; *Renner v. State*, 43 Tex. Crim. 347; *Whitworth v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 1019; *Mitchell v. State*, 44 Tex. Crim. 228; *Winfield v. State*, 44 Tex. Crim. 475; *Bynum v.*

*State*, (Tex. Crim. 1903) 72 S. W. Rep. 844; *McAlister v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 760; *Parks v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 537; *McDonald v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 542.

*West Virginia.* — *State v. Roberts*, 50 W. Va. 422.

But see *Pearce v. Territory*, (C. C. A.) 118 Fed. Rep. 425; *People v. Compton*, 123 Cal. 403; *State v. Gordon*, (Utah 1904) 76 Pac. Rep. 882.

**3. Thornton v. State**, 119 Ga. 437; *Lamb v. State*, (Neb. 1903) 95 N. W. Rep. 1050; *Dawson v. State*, 38 Tex. Crim. 50; *State v. Roberts*, 50 W. Va. 422. See also *U. S. v. Van Schaick*, 134 Fed. Rep. 592.

**Aiding and Abetting Offense in Another State.** — One may, in *Indiana*, aid and abet a crime committed in *Illinois*, provided the offense perpetrated in *Illinois* would have been an offense against the laws of *Indiana* if perpetrated within that state. *Cruthers v. State*, 161 Ind. 139.

**4. Grimsinger v. State**, 44 Tex. Crim. 1.

**5. Constructive Presence.** — One who stands on watch while another burglarizes a store is guilty of burglary. Also the one inside is guilty of a murder committed by the one on watch who kills to prevent detection. *Starks v. State*, 137 Ala. 9.

**Illustrations of Constructive Presence.** — *State v. Peebles*, 178 Mo. 475; *State v. Pearson*, 119 N. Car. 871; *Grimsinger v. State*, 44 Tex. Crim. 1; *Martin v. State*, 44 Tex. Crim. 279; *Newberry v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 774; *State v. Roberts*, 50 W. Va. 422.

**33. 1. Mere Presence.** — *Thornton v. State*, 119 Ga. 437, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33; *State v. Fox*, 70 N. J. L. 353; *Leslie v. State*, 42 Tex. Crim. 65; *Renner v. State*, 43 Tex. Crim. 347; *Johnson v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 83; *Martin v. State*, 44 Tex. Crim. 279; *Monroe v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 726.

**Mental Approval.** — Mere mental approval while present, with no participation, does not constitute one an aider and abettor in the crime of rape. *State v. Wolf*, 112 Iowa 458.

**2. Colorado.** — *Mow v. People*, 31 Colo. 351. *Georgia.* — *Thornton v. State*, 119 Ga. 437. *Indiana.* — *Anderson v. State*, 147 Ind. 445. *Iowa.* — *State v. Dunn*, 116 Iowa 219; *State v. Berger*, 121 Iowa 581.

*Nebraska.* — *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158.

*New Mexico.* — *U. S. v. Densmore*, (N. Mex. 1904) 75 Pac. Rep. 31.

*Texas.* — *Kaufman v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 771; *Leslie v. State*, 42 Tex. Crim. 65; *Renner v. State*, 43 Tex. Crim. 347; *Bynum v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 844; *Thomas v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1045; *Morawietz v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 997.

- 34. 3. Participation in the Crime — Necessity for Participation. —** See note 1. Criminal Intent. — See note 2.  
**How Participation Shown. —** See note 3.  
**35. When Preconcert Necessary. —** See note 4.  
**36. Combination for Crime — Act of One, Act of All. —** See note 1.

[AISLE. — See note 3a.]

- 37. ALCOHOL. —** See note 3.

*Washington.* — *State v. Klein*, 19 Wash. 368.

**Failure to Give Alarm.** — Failure to give the alarm and failure to report the crime to the authorities do not constitute participation. *Monroe v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 726; *Martin v. State*, 44 Tex. Crim. 279; *Miller v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 996; *Franklin v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 473.

**33. 3. Failure to Interfere. —** *State v. Fox*, 70 N. J. L. 353; *Renner v. State*, 43 Tex. Crim. 347.

**34. 1. Alabama. —** *Sankey v. State*, 128 Ala. 51; *Smith v. State*, 136 Ala. 1.

*Delaware.* — *State v. Palmer*, 4 Penn. (Del.) 126.

*Georgia.* — *Thornton v. State*, 119 Ga. 437.

*Illinois.* — *Jones v. People*, 166 Ill. 264.

*Indiana.* — *Reed v. State*, 147 Ind. 41.

*Indian Territory.* — *Williams v. U. S.*, 1 Indian Ter. 560.

*Iowa.* — *State v. Wolf*, 112 Iowa 458.

*New Jersey.* — *State v. Hess*, 65 N. J. L. 544.

*New York.* — *People v. Mills*, 91 N. Y. App. Div. 331, affirmed 178 N. Y. 274.

*Ohio.* — *State v. Snell*, 5 Ohio Dec. 670.

*Texas.* — *Bell v. State*, 39 Tex. Crim. 677; *Wright v. State*, 46 Tex. Crim. 45; *Joy v. State*, 41 Tex. Crim. 46; *Criner v. State*, 41 Tex. Crim. 290; *Yates v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 296; *Walton v. State*, 41 Tex. Crim. 454; *Leslie v. State*, 42 Tex. Crim. 65; *Renner v. State*, 43 Tex. Crim. 347; *Mitchell v. State*, 44 Tex. Crim. 228; *McCulloh v. State*, (Tex. Crim. 1902) 71 S. W. Rep. 278; *Martin v. State*, 44 Tex. Crim. 279; *Parks v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 537.

**No Crime Committed.** — Where a detective breaks in a door in collusion with the defendant to trap him, the aider and abettor is not guilty, because his principal entered by permission and there was no crime committed. *Strait v. State*, 77 Miss. 693.

**2. Common Criminal Intent Is Essential. —** *People v. Moran*, 144 Cal. 48; *Thornton v. State*, 119 Ga. 437; *Backenstoe v. State*, 10 Ohio Cir. Dec. 688, 19 Ohio Cir. Ct. 568; *Leslie v. State*, 42 Tex. Crim. 65; *Newberry v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 774; *Renner v. State*, 43 Tex. Crim. 347; *Whitworth v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 1019; *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648.

**3. What Amounts to Participation. —** *State v. Lewis*, 4 Penn. (Del.) 332; *Green v. State*, 114 Ga. 918; *Thornton v. State*, 119 Ga. 437; *Birdsong v. State*, 120 Ga. 854; *State v. Peebles*, 178 Mo. 475; *Franklin v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 473; *Renner v. State*, 43 Tex. Crim. 347; *Martin v. State*, 44 Tex. Crim. 279; *Barnett v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1013.

**35. 4. Preconcert. —** *Sankey v. State*, 128 Ala. 51; *Whorley v. State*, (Fla. 1903) 33 So. Rep. 849; *Easterlin v. State*, 43 Fla. 565; *Colter v. State*, 37 Tex. Crim. 284.

**36. 1. McLeroy v. State, 120 Ala. 274; *Starks v. State*, 137 Ala. 9; *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Smith*, 106 Iowa 701; *People v. Hilfman*, 61 N. Y. App. Div. 541; *Leslie v. State*, 42 Tex. Crim. 65; *Renner v. State*, 43 Tex. Crim. 347; *McAlister v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 760; *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648.**

**Act in Furtherance of Common Criminal Purpose. —** *State v. Cannon*, 49 S. Car. 550.

**3a. Aisle of a Theatre. —** Under a *New York* statute prohibiting the obstruction of the *aisles* of a theatre, the court, *per Gildersleeve, J.*, said: "An *aisle* is popularly understood to mean the space between the regularly constructed seats set apart as a passageway for ingress and egress, and an audience is entitled to so consider that space, and act accordingly. To hold that an *aisle* is only that amount of space prescribed by the building law would defeat the plain intention of the law, and permit the use of chairs in all passageways, to the extent of not encroaching upon the prescribed limit of space, and render such passageways exceedingly dangerous in case of fire or panic. The *aisle* of a theatre must be said to be the *aisle* laid down in the plans filed, the *aisle* accordingly constructed, in use, and observable to all persons entering and occupying a theatre. The manager of a theatre has the right to utilize, to the fullest extent, the seating capacity of his house, so long as he complies with the law; but the law does not permit him to occupy the portion of the auditorium he has voluntarily set apart for *aisles* with camp stools or chairs." *Sturgis v. Coleman*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 302.

**37. 3. U. S. v. Cohn, 2 Indian Ter. 474.**



# ALCOHOLISM, INTEMPERANCE, AND NARCOTICS (IN INSURANCE).

By W. H. BUCHANAN.

**40. II. SECOND STAGE—3. Statements as to Past and Present Habits — Total Abstinence.**— See notes 5, 6, 7, 8.

The Use Must Have Become 'a Habit. — See note 9.

**41. The Term "Habit" Defined.**— See note 1.

Exceptional Over-indulgence. — See note 3.

**42. See note 1.**

Frequent Intoxication. — See note 7.

False Answers as to Habits. — See note 8.

**44. 4. Promises Regarding Future Habits — Prevailing Rule — Considered a Warranty.**— See note 1.

**46. III. THIRD STAGE — EXPRESS CLAUSE IN POLICY — 2. Phraseology and Construction — a. "DEATH CAUSED BY INTEMPERANCE," ETC. — "Death Caused by Intoxicants and Narcotics."**— See note 5.

**40. 5. Terms "Temperate" or "of Temperate Habits" Do Not Mean Abstinence.**— *Chambers v. Northwestern Mut. L. Ins. Co.*, 64 Minn. 495, 58 Am. St. Rep. 549.

**6. Occasional Use of Intoxicants.**— *Provident Sav. L. Assur. Soc. v. Exchange Bank*, (C. C. A.) 126 Fed. Rep. 360; *Supreme Lodge, etc., v. Foster*, 26 Ind. App. 333; *Chambers v. Northwestern Mut. L. Ins. Co.*, 64 Minn. 495, 58 Am. St. Rep. 549; *Equitable L. Assur. Soc. v. Liddell*, 32 Tex. Civ. App. 252. See also *Holtum v. Germania L. Ins. Co.*, 139 Cal. 645; *Brignac v. Pacific Mut. L. Ins. Co.*, 112 La. 574; *Malicki v. Chicago Guaranty Fund L. Soc.*, 119 Mich. 151.

**7. Chambers v. Northwestern Mut. L. Ins. Co.**, 64 Minn. 495, 58 Am. St. Rep. 549.

**8. See Malicki v. Chicago Guaranty Fund L. Soc.**, 119 Mich. 151.

**9. Provident Sav. L. Assur. Soc. v. Exchange Bank, (C. C. A.) 126 Fed. Rep. 360; *Holtum v. Germania L. Ins. Co.*, 139 Cal. 645; *Supreme Lodge, etc., v. Foster*, 26 Ind. App. 333; *Malicki v. Chicago Guaranty Fund L. Soc.*, 119 Mich. 151; *Chambers v. Northwestern Mut. L. Ins. Co.*, 64 Minn. 495, 58 Am. St. Rep. 549; *Sitton v. Grand Lodge, etc.*, 84 Mo. App. 208; *Moore v. Prudential Ins. Co.*, 92 N. Y. App. Div. 135; *National Fraternity v. Karnes*, 24 Tex. Civ. App. 607; *Equitable L. Assur. Soc. v. Liddell*, 32 Tex. Civ. App. 252. See *Brignac v. Pacific Mut. L. Ins. Co.*, 112 La. 574; *Sovereign Camp Woodmen of the World v. Burgess*, (Miss. 1902) 31 So. Rep. 809.**

**Drunkenness Is Not a Disease, but a Habit**, and the term "disease" in a question on an application for a benefit certificate, regarding what disease the applicant has consulted a physician for, does not include drunkenness, especially where there is another provision that the certificate is avoided "if death is caused or superinduced by the use of intoxicating liquor," etc. *Supreme Lodge, etc., v. Taylor*, (Ala. 1897) 24 So. Rep. 247.

**41. 1. An Habitual Drunkard** is a person given to inebriety or excessive use of intoxicating drinks who has lost the power or will, by frequent indulgence, to control his appetite for it. *Sitton v. Grand Lodge, etc.*, 84 Mo. App. 208.

**Narcotics.**— *National Fraternity v. Karnes*, 24 Tex. Civ. App. 607.

**3. Delirium Tremens as Consequence of Exceptional Excessive Indulgence.**— *Holtum v. Germania L. Ins. Co.*, 139 Cal. 645.

**42. 1. Compare Brignac v. Pacific Mut. L. Ins. Co.**, 112 La. 574.

**7. Shea v. Great Camp, etc.**, 31 N. Y. App. Div. 633; *Mengel v. Northwestern Mut. L. Ins. Co.*, 176 Pa. St. 280.

**8. Provident Sav. Life Assur. Soc.**, (Ky. 1905) 86 S. W. Rep. 522. *Compare Northwestern Mut. L. Ins. Co. v. Risley*, 12 Ohio Cir. Dec. 1886, 22 Ohio Cir. Ct. 160.

**Narcotics.**— A false statement that the applicant was not a user of and never did use narcotics will avoid the policy, although such statement is made in good faith. *National Fraternity v. Karnes*, 24 Tex. Civ. App. 607.

**An Answer that the Applicant Does Not Use Intoxicating Liquors** is false if he is in the habit of taking intoxicants, although such use is neither excessive nor intemperate. *Union Cent. L. Ins. Co. v. Lee*, (Ky. 1898) 47 S. W. Rep. 614.

**A Statement that the Applicant Drank Two or Three Glasses of Beer Daily**, made in answer to the question "Do you drink beer, ale, wine, or spirits, and if so, state what, how often, and how much?" constitutes a false representation where the applicant is an habitual user of spirituous liquors. *Malicki v. Chicago Guaranty Fund L. Soc.*, 119 Mich. 151.

**44. 1. Promise Treated as Warranty.**— *Waters v. Supreme Conclave, etc.*, 105 Ga. 151; *Northwestern Masonic Aid Assoc. v. Bodurtha*, 23 Ind. App. 121, 77 Am. St. Rep. 414.

**46. 5. Sickness Due to Intemperance.**—

**47. b. "INTEMPERANCE IMPAIRING HEALTH," ETC.** — Serious and Permanent Impairment of Health. — See note 7.

Question for Jury. — See note 9.

**48. c. "DEATH OR INJURY WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUORS"** — Causal Relation Unnecessary. — See note 1.

**49. IV. ENFORCEMENT OF THE CLAUSE** — 1. Province of Court and Jury. — See notes 1, 2, 3, 4, 5.

Verdict Contrary to the Evidence. — See note 6.

2. Burden of Proof. — See note 9.

**50. 3. Evidence** — Witness Testifying as to Insured's Appearance. — See note 5.

Asking Witness if He Ever Saw Insured Intoxicated. — See note 7.

General Reputation for Temperance. — See note 8.

**51. V. WAIVER** — Acceptance of Premiums with Knowledge of Matters Constituting Breach of the Contract. — See notes 2, 3.

Under the by-laws of a beneficial association it was provided that the widow of any member entitled to sick benefits should be entitled to a death benefit. It was further provided that a member should forfeit his right to sick benefits where his illness was due to intemperance, and in a case where a member was fatally injured as a result of intoxication it was held that the widow was not entitled to the death benefit. *Marcoux v. Society of Beneficence*, etc., 91 Me. 250.

**An Accident Policy** exempting the insurer from liability in case of an injury resulting from intoxication or narcotics is avoided where the insured died from an overdose of a narcotic administered to quiet him while suffering from the effects of a spree. *Flint v. Travelers' Ins. Co.*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1079.

**47. 7. Intemperance Impairing Health or Inducing Delirium Tremens.** — Under a policy giving the insurer the right to terminate the contract when the insured has "become so intemperate as to impair his health or induce delirium tremens," the right does not arise unless the insured, becomes, as a matter of fact, so intemperate as to impair his health or to induce delirium tremens. *Janneck v. Metropolitan L. Ins. Co.*, 13 N. Y. App. Div. 514, *affirmed* 162 N. Y. 574.

**Permanent Impairment of Health** by intemperance may be a cause for expulsion from a beneficiary association, and the fact that the insured is insane at the time of such expulsion is immaterial. *Kempe v. Woodmen of World*, (Tex. Civ. App. 1898) 44 S. W. Rep. 688.

9. *Janneck v. Metropolitan L. Ins. Co.*, 13 N. Y. App. Div. 514, *affirmed* 162 N. Y. 574.

**48. 1. No Causal Relation Necessary.** — *Pyne v. Mutual Acc. Co.*, 2 Dauphin Co. Rep. (Pa.) 110.

**Actual Drunkenness** at the time of the injury is essential to prevent recovery on the policy. *Campbell v. Fidelity*, etc., Co., 109 Ky. 661.

Where the insured died of an illness not caused by the use of intoxicating liquors, and was not intemperate at any time during his last illness, though he had been intemperate prior to such last illness, there was no violation of the provision in the policy relating to death during or by reason of the violation of a condition against intemperance in the

use of intoxicating liquors. *Union Cent. L. Ins. Co. v. Hughes*, 110 Ky. 26.

**49. 1.** *Bacon v. New England Order of Protection*, 123 Fed. Rep. 152; *Union L. Ins. Co. v. Jameson*, 31 Ind. App. 28; *Moore v. Prudential Ins. Co.*, 92 N. Y. App. Div. 135.

**What Constitutes Intemperate Habits** is a question of law, but it is for the jury to determine whether the use or excess is occasional or habitual in a particular case. *Drakeford v. Supreme Conclave*, etc., 61 S. Car. 338.

2. *Keatley v. Travelers' Ins. Co.*, 187 Pa. St. 197.

3. *Bacon v. New England Order of Protection*, 123 Fed. Rep. 152.

4. *Supreme Lodge*, etc., *v. Lloyd*, 107 Fed. Rep. 70, 46 C. C. A. 153; *DeVan v. Commercial Travelers' Mut. Acc. Assoc.*, 92 Hun (N. Y.) 256.

5. *DeVan v. Commercial Travelers' Mut. Acc. Assoc.*, 92 Hun (N. Y.) 256.

**6. A Verdict Against the Weight of the Evidence** as to intemperance and habitual excesses will be set aside on appeal. *Moore v. Prudential Ins. Co.*, 92 N. Y. App. Div. 135.

**9. Burden of Proof.** — *Campbell v. Fidelity*, etc., Co., (Ky. 1902) 66 S. W. Rep. 1033; *Malicki v. Chicago Guaranty Fund L. Soc.*, 119 Mich. 151.

**50. 5.** See *DeVan v. Commercial Travelers' Mut. Acc. Assoc.*, 92 Hun (N. Y.) 256.

**7. Pains in the Head and Chest** complained of by the insured may be testified to on cross-examination by a witness who has stated on direct examination that he has seen the insured in a state of intoxication. *Union L. Ins. Co. v. Jameson*, 31 Ind. App. 28.

**8. Evidence of Physicians** that, prior to the date of the policy, they had treated the insured for the alcohol habit is not affected by evidence tending to show that the insured was a temperate man, where the issue is as to whether he had ever been treated for the alcohol habit. *Home L. Ins. Co. v. Sibert*, 96 Va. 403.

**51. 2. Knowledge by the Insurer Is Essential** to effect a waiver of the insured's false statements in his application regarding the use of intoxicants. *Whigham v. Independent Foresters*, 44 Oregon 543.

**3. Forfeiture Clause Not Self-executing.** — *Steinert v. United Brotherhood*, etc., 91 Minn. 189.

**51.** Delay to Exercise Option to Cancel Policy. — See note 6.

**ALEATORY.** — See note 9.

**52.** ALIAS. — See note 1.

**51. 6.** Deferring Action after a trial wherein it is shown that the insured has used intoxicants and become drunk is a waiver of a forfeiture for such use and intoxication of the insured before his application for insurance where the insurer has no knowledge thereof. *Callies v. Modern Woodmen of America*, 98 Mo. App. 521.

**9.** Aleatory Contracts. — A contract "is alea-

tory or hazardous when the performance of that which is one of its objects depends on an uncertain event." Civ. Code La., art. 1776. *Losecco v. Gregory*, 108 La. 648.

**52. 1.** U. S. v. Howard, 132 Fed. Rep. 360, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 52; *Ferguson v. State*, 134 Ala. 63; *State v. Howard*, (Mont. 1904) 77 Pac. Rep. 50.

## ALIBI.

By E. RAWITZER.

**53. I. DEFINITION AND NATURE** — Definition. — See note 1.

Nature. — See notes 2, 3.

**54.** See note 1.

Duty of the Court. — See note 2.

**53. 1.** The Term Defined. — *Schultz v. Territory*, (Ariz. 1898) 52 Pac. Rep. 352; *Williams v. State*, (Ga. 1905) 51 S. E. Rep. 322; *State v. Worthen*, 124 Iowa 408; *People v. Resh*, 107 Mich. 251; *Beck v. State*, 51 Neb. 106.

An Alibi. — *Peyton v. State*, 54 Neb. 191, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 53.

The Theory of an Alibi. — *State v. Davis*, 6 Idaho 159.

**2.** Alibi Considered as an Affirmative Defense. — *State v. Thornton*, 10 S. Dak. 358, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 53; *Saenz v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 316; *Young v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 34.

**3.** Alibi Not Technically a Defense. — *People v. Roberts*, 122 Cal. 377; *McNamara v. People*, 24 Colo. 61; *State v. Ardoin*, 49 La. Ann. 1145, 62 Am. St. Rep. 678; *Com. v. Gutshall*, 22 Pa. Super. Ct. 269.

**54. 1.** Evidence of Alibi to Be Treated Like Other Evidence. — *Kimbrough v. State*, 101 Ga. 583; *Waters v. People*, 172 Ill. 367; *State v. Crowell*, 149 Mo. 391; *State v. Taylor*, 134 Mo. 109; *Casey v. State*, 49 Neb. 403; *Com. v. Gutshall*, 22 Pa. Super. Ct. 269; *Legere v. State*, 111 Tenn. 370, 102 Am. St. Rep. 781.

Instructions to Jury on Question of Alibi. — See *State v. Worthen*, 124 Iowa 408; *People v. Tice*, 115 Mich. 219, 69 Am. St. Rep. 560; *People v. Portenga*, 134 Mich. 247, which cases are similar to *State v. Blunt*, 59 Iowa 468, set out in the original note; *State v. Powers*, 72 Vt. 168.

The court should not disparage the defense of alibi in its instruction to the jury. *Henry v. State*, 51 Neb. 149, 66 Am. St. Rep. 450.

In *Texas*, an instruction which suggests that an alibi is a special plea, independent of a plea of not guilty, is upheld. *Young v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 34.

It Is the Exclusive Province of the Jury to judge of the testimony and if they see fit they may disregard all the evidence of alibi. *Droak v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 988.

**Conflicting Evidence.** — It is for the jury to determine the truth of the evidence where the evidence introduced on behalf of the state and of the defendant is conflicting. *State v. Watson*, 102 Iowa 651; *State v. White*, 99 Iowa 46.

**2.** Duty of Court to Instruct. — *Garcia v. State*, 34 Fla. 311; *State v. Harvey*, 131 Mo. 339; *State v. Fox*, 148 Mo. 517; *Legere v. State*, 111 Tenn. 370, 102 Am. St. Rep. 781; *Wilson v. State*, 41 Tex. Crim. 115. See also as to the sufficiency of instructions, *Stevens v. State*, 42 Tex. Crim. 154; *Benavides v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 125; *Winfield v. State*, 44 Tex. Crim. 475.

Where the evidence shows a conspiracy to kill, an instruction on alibi is properly refused. *State v. Gatlin*, 170 Mo. 354.

**Texas Law as to Instructions.** — *Donaho v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 469; *Hines v. State*, 40 Tex. Crim. 23; *Parker v. State*, 40 Tex. Crim. 119; *Smith v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 583; *Ford v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 951; *Byas v. State*, 41 Tex. Crim. 51. See also, as to the rule in *Arkansas*, *Goldsby v. U. S.*, 160 U. S. 70.

It is otherwise, if the omission is excepted to, or instructions were asked for. *Smith v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 362; *Rountree v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 827; *Padron v. State*, 41 Tex. Crim. 548.

**Same Rule Applied in Other States.** — *State v. Lightfoot*, 107 Iowa 344; *Com. v. Boschino*, 176 Pa. St. 103.

**Where Alibi Is the Sole Defense.** — *Arismendis v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 47.

**55.** See note 1.

Harmless Error in Instructions. — See note 2.

**II. EVIDENCE AND ITS EFFECT — 1. Burden of Proof — Decisions Not Harmless.** — See notes 3, 4.**56.** The Correct Doctrine Stated. — See note 1.**2. Sufficiency of Evidence — Jury Must Acquit on Reasonable Doubt.** — See note 2.**Issue Not Raised by Evidence — No Issue Raised.**

— Where the testimony does not raise the defense, it is not necessary to charge an alibi even upon request. *Walker v. State*, 118 Ga. 757; *Murphy v. State*, 118 Ga. 780; *Benavides v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 125; *Smith v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 516; *Johnson v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 105; *Jackson v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 497. See also *State v. Gatlin*, 170 Mo. 354.

**55. 1. Refusal to Instruct, Reversible Error.** — *Long v. State*, 42 Fla. 509; *State v. Fox*, 148 Mo. 517; *State v. Harvey*, 131 Mo. 339; *State v. Koplan*, 167 Mo. 298; *Joy v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 935; *Tijerina v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 913.

**2. Harmless Error in Instructions.** — *McVey v. State*, 57 Neb. 471.

**If Once Erroneously Stated**, a subsequent statement of the law will not cure the error. *McNamara v. People*, 24 Colo. 61; *State v. Ardoin*, 49 La. Ann. 1145, 62 Am. St. Rep. 678; *State v. Tatlow*, 136 Mo. 678; *State v. McClellan*, 23 Mont. 532; *Beck v. State*, 51 Neb. 106; *Henry v. State*, 51 Neb. 149, 66 Am. St. Rep. 450.

The fact that the court's charge "that the burden of proof is on the defendant to establish his alibi, and this must be done to your satisfaction," may have had a tendency to confuse the jury and to mislead it did not render said charge reversible error; and the proper way of correcting such instructions is by a request for explanatory instructions. *Towns v. State*, 111 Ala. 1.

**3. The Rule that the Burden of Proof Remains upon Prosecution.** — *Peyton v. State*, 54 Neb. 192, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 55; *State v. Ardoin*, 49 La. Ann. 1145, 62 Am. St. Rep. 678; *State v. Harvey*, 131 Mo. 339; *State v. Tatlow*, 136 Mo. 678; *Sherlock v. State*, 60 N. J. L. 31; *Shoemaker v. Territory*, 4 Okla. 118; *Gawn v. State*, 7 Ohio Cir. Dec. 19, 13 Ohio Cir. Ct. 116.

**Burden of Proof Not Shifted.** — *Schultz v. Territory*, (Ariz. 1898) 52 Pac. Rep. 352; *State v. McClellan*, 23 Mont. 532; *Casey v. State*, 49 Neb. 403; *Shoemaker v. Territory*, 4 Okla. 118.

**4. The Rule that the Accused Must Show Alibi by Preponderance of Evidence.** — *State v. McGarry*, 111 Iowa 711, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 53; *State v. Hogan*, 115 Iowa 455; *State v. Worthen*, 124 Iowa 408; *People v. Kessler*, 13 Utah 60.

**For the Purpose of the Particular Defense of Alibi.** — *Rayburn v. State*, 69 Ark. 177; *State v. Hogan*, 115 Iowa 455; *State v. Worthen*, 124 Iowa 408; *Com. v. Gutshall*, 22 Pa. Super. Ct. 269; *State v. Lowry*, 42 W. Va. 205.

**The Burden of Proving Alibi** is on the accused. *State v. Watson*, 102 Iowa 651.

**56. 1. Arizona.** — *Schultz v. Territory*, (Ariz. 1898) 52 Pac. Rep. 352.

*California.* — *People v. Winters*, 125 Cal. 328, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56; *People v. Roberts*, 122 Cal. 377.

*Colorado.* — *McNamara v. People*, 24 Colo. 61.

*Georgia.* — *Cochran v. State*, 113 Ga. 726;

*Henderson v. State*, 120 Ga. 504.

*Illinois.* — *Hauser v. People*, 210 Ill. 253;

*Flanagan v. People*, 214 Ill. 170.

*Massachusetts.* — *Com. v. Choate*, 105 Mass. 451.

*Michigan.* — *People v. Resh*, 107 Mich. 251.

*Missouri.* — *State v. Hale*, 156 Mo. 102.

*New Jersey.* — *Sherlock v. State*, 60 N. J. L. 31.

*New Mexico.* — *Wilburn v. Territory*, 10 N. Mex. 402.

*Oklahoma.* — *Shoemaker v. Territory*, 4 Okla. 118; *Wright v. Territory*, 5 Okla. 78.

*South Dakota.* — *State v. Thornton*, 10 S. Dak. 358, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56.

*Vermont.* — *State v. Powers*, 72 Vt. 168.

**2. Jury Must Acquit on Reasonable Doubt of Guilt.** — *Goldsby v. U. S.*, 160 U. S. 70.

*Alabama.* — *Towns v. State*, 111 Ala. 1.

*California.* — *People v. Worden*, 113 Cal. 569.

*Colorado.* — *Barr v. People*, 30 Colo. 522.

*Florida.* — *Adams v. State*, 28 Fla. 511;

*Garcia v. State*, 34 Fla. 311.

*Iowa.* — *State v. McGarry*, 111 Iowa 711, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56; *State v. Worthen*, 124 Iowa 408.

*Louisiana.* — *State v. Ardoin*, 49 La. Ann. 1145, 62 Am. St. Rep. 678.

*Missouri.* — *State v. Miller*, 156 Mo. 76; *State v. Harvey*, 131 Mo. 339.

*Montana.* — *State v. Spotted Hawk*, 22 Mont. 33; *State v. McClellan*, 23 Mont. 532.

*Nebraska.* — *Peyton v. State*, 54 Neb. 190, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56; *Beck v. State*, 51 Neb. 106; *Casey v. State*, 49 Neb. 403; *Nightingale v. State*, 62 Neb. 371; *Henry v. State*, 51 Neb. 149, 66 Am. St. Rep. 450.

*Oklahoma.* — *Shoemaker v. Territory*, 4 Okla. 118.

*Pennsylvania.* — *Com. v. Gutshall*, 22 Pa. Super. Ct. 269.

*South Dakota.* — *State v. Thornton*, 10 S. Dak. 352, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56.

*Texas.* — *Jenkins v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 312.

*Utah.* — *People v. Kessler*, 13 Utah 69.

*West Virginia.* — *State v. Lowry*, 42 W. Va. 205.

See also upon the sufficiency of instructions in this regard, *State v. Worthen*, 124 Iowa

**57.** Evidence of Alibi Need Not Be Conclusive. — See note 1.

**58.** See note 1.

Established Alibi Conclusive of Innocence. — See note 2.

**59.** 3. Failure to Establish Alibi — Presumptions. — See notes 2, 3.

**60.** ALIENATE, ALIENATION, ETC. — See note 2.

408; *State v. Conway*, 56 Kan. 682; *People v. Resh*, 107 Mich. 251; *State v. Jones*, 153 Mo. 457; *McVey v. State*, 57 Neb. 471; *Parker v. State*, 40 Tex. Crim. 119; *State v. Powers*, 72 Vt. 168; *State v. Burton*, 27 Wash. 528; *Emery v. State*, 101 Wis. 627.

**Evidence to Rebut Alibi.** — *State v. Watson*, 102 Iowa 651. See also *Williams v. State*, (Tex. Crim. 1896) 38 S. W. Rep. 202.

Any question which has for its purpose to show that an entry made on a certain book introduced in evidence was not an original one and had been erased and rewritten is competent and proper, where the entries are introduced to prove an alibi. *State v. Powers*, 72 Vt. 168.

**57. 1. Evidence Need Not Be Conclusive.** — *Ford v. State*, 101 Tenn. 457, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57, 58; *Shoemaker v. Territory*, 4 Okla. 118; *Gawn v. State*, 7 Ohio Cir. Dec. 19, 13 Ohio Cir. Ct. 116. Compare *Ex p. Smotherman*, 140 Ala. 168.

The testimony of certain witnesses that they saw the defendant on the Friday before the commission of the crime was not rendered incompetent because they could not definitely fix the day the crime was committed. *Blake v. State*, 38 Tex. Crim. 377.

But it was held, in *Georgia*, not error to charge that in order for the accused to be successful in overcoming the evidence of his guilt by setting up an alibi, his proof must satisfy the jury that he "was at a place where it was impossible for him to have committed the crime." *Harris v. State*, 120 Ga. 167.

It is erroneous to charge that the defense of alibi is set up under a plea of not guilty, and that the burden of proving this alibi is on the defendant. *State v. Atkins*, 49 S. Car. 481.

**It Is Not Necessary that Proof of Alibi Should Cover the Entire Time.** — *Henry v. State*, 51 Neb. 149, 66 Am. St. Rep. 450; *Gawn v. State*, 7 Ohio Cir. Dec. 19, 13 Ohio Cir. Ct. 116.

**Consistent Evidence of Presence in Two Places.** — *Copeland v. State*, 36 Tex. Crim. 576; *Donaho v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 469. But see *Thompson v. State*, 42 Tex. Crim. 140; *State v. Powers*, 72 Vt. 168.

**58. 1. The Evidence to Establish an Alibi Must Cover the Whole Time Occupied by the Offense.** — *McCormack v. State*, 133 Ala. 202; *People v. Worden*, 113 Cal. 569; *Barr v. People*, 30 Colo. 522; *State v. Powers*, 130 Mo. 475; *State v. Fox*, 148 Mo. 517; *Nightingale v. State*, 62 Neb. 371; *Com. v. Gutshall*, 22 Pa. Super. Ct. 269; *State v. Gadsden*, 70 S. Car. 430.

Any evidence which tends to show that the

accused was not at the place at the time of the commission of the crime is competent. *Ratliff v. State*, 122 Ala. 104.

Where the exact time of the commission of the offense is shown and an alibi is proved covering such time, it is error to charge that the state's witnesses may have been mistaken as to the exact time and that the jury should convict if they believe that the defendant committed the offense within two years before the finding of the indictment. *State v. Lee*, 63 N. J. L. 474, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 58.

**To Make Mere Distance a Conclusive Answer.** — *Peyton v. State*, 54 Neb. 190, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 53.

**2. Alibi Conclusive of Innocence.** — *People v. Winters*, 125 Cal. 328, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56; *Towns v. State*, 111 Ala. 1; *Adams v. State*, 28 Fla. 511; *State v. Worthen*, 124 Iowa 408; *People v. Resh*, 107 Mich. 251; *People v. Portenga*, 134 Mich. 247; *State v. Spotted Hawk*, 22 Mont. 33; *Casey v. State*, 49 Neb. 403; *Beck v. State*, 51 Neb. 106; *Henry v. State*, 51 Neb. 149, 66 Am. St. Rep. 450.

**59. 2. Failure to Establish Alibi — Its Weight Against Accused.** — *Ford v. State*, 101 Tenn. 457, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 59; *Jackson v. State*, 117 Ala. 155; *Tatum v. State*, 131 Ala. 32; *Adams v. State*, 28 Fla. 511.

**3. Fraudulent Attempt to Show Alibi Unfavorable to Accused.** — *Crittenden v. State*, 134 Ala. 145; *State v. Aspara*, 113 La. 940; *Com. v. McMahon*, 145 Pa. St. 413; *State v. Manning*, 75 Vt. 185.

**Falsehood — Erroneous Instructions.** — *State v. Manning*, 74 Vt. 449.

**60. 2. Orrell v. Bay Mfg. Co.**, 83 Miss. 800; *Stark v. Duvall*, 7 Okla. 213.

**Voluntary Bankruptcy.** — Under a will property was given to one for life with a gift over in the event of his "alienating or encumbering or agreeing to alienate or encumber his interest." It was held that a voluntary petition in bankruptcy and adjudication consequent thereon constituted an *alienation* within the meaning of the gift over. *In re Cotgrave*, (1903) 2 Ch. 705, following *In re Amherst*, L. R. 13 Eq. 464, and distinguishing *In re Riggs*, (1901) 2 K. B. 16.

**Voluntary Wills.** — *Caro v. Caro*, (Fla. 1903) 34 So. Rep. 309; *Dickson v. New York Biscuit Co.*, 211 Ill. 468; *Bostick v. Chevin*, 55 S. Car. 427.

# ALIENS.

BY HERBERT GANNAWAY.

**64. I. DEFINITION.** — See note 2.

**65.** See notes 3, 4.

**II. ALIEN FRIEND** — **2. Rights, Privileges, and Liabilities** — *a. THOSE PERTAINING TO THE PERSON* — (1) *Political and Miscellaneous Rights.* — See note 6.

**66.** See note 1.

**Right to Pursue Trade.** — See note 4.

**67.** **May Sue or Be Sued.** — See note 1.

**64. 2. Alien in United States.** — U. S. v. Wong Kim Ark, 169 U. S. 655; Hennessy v. Richardson Drug Co., 189 U. S. 34; De Baca v. U. S., 36 Ct. Cl. 407; *In re* Moses, 83 Fed. Rep. 995; U. S. v. Boyd, (C. C. A.) 83 Fed. Rep. 547; Jenns v. Landes, 85 Fed. Rep. 801; Creagh v. Equitable L. Assur. Soc., 88 Fed. Rep. 1; U. S. v. Yee Mun Sang, 93 Fed. Rep. 365; *In re* Di Simone, 108 Fed. Rep. 942; De Graff v. Went, 164 Ill. 485; Torre v. Jeanin, 76 Miss. 898; Glynn v. Glynn, 62 Neb. 872.

An alien is a citizen or subject of a foreign state. *Gonzales v. Williams*, 192 U. S. 1; *Ruckgaber v. Moore*, 104 Fed. Rep. 947; *Adams v. Akerlund*, 168 Ill. 632; *Tanas v. Municipal Gas Co.*, 88 N. Y. App. Div. 251.

There must be a union of birth abroad and subjection to some other power. *Bishop v. Averill*, 76 Fed. Rep. 386; *Bahuaud v. Bize*, 105 Fed. Rep. 485.

An alien woman who marries an American citizen becomes a citizen of the United States. *Tsoi Sim v. U. S.*, (C. C. A.) 116 Fed. Rep. 920; *Hopkins v. Fachant*, (C. C. A.) 130 Fed. Rep. 839.

A person born in the United States, though of alien parents, is a citizen. *In re* Giovanna, 93 Fed. Rep. 659; *Lee Sing Far v. U. S.*, (C. C. A.) 94 Fed. Rep. 834; *U. S. v. Lee Pon*, 94 Fed. Rep. 827; *U. S. v. Lee Seick*, (C. C. A.) 100 Fed. Rep. 398; *U. S. v. Jue Wy*, 103 Fed. Rep. 795; *U. S. v. Leung Sam*, 114 Fed. Rep. 702; *Lee Ah Yin v. U. S.*, (C. C. A.) 116 Fed. Rep. 614; *U. S. v. Lee Huen*, 118 Fed. Rep. 442; *In re* Moy Quong Shing, 125 Fed. Rep. 641.

**Presumption.** — *Bishop v. Averill*, 76 Fed. Rep. 386; *Kadlec v. Pavik*, 9 N. Dak. 278; *Ferguson v. Johnson*, 11 Tex. Civ. App. 413.

**65. 3. Ruckgaber v. Moore**, 104 Fed. Rep. 947; *Newcomb v. Newcomb*, (Ky. 1900) 57 S. W. Rep. 2.

**4. Citizens of Porto Rico** are citizens of the United States. *Gonzales v. Williams*, 192 U. S. 1, *reversing In re* Gonzalez, 118 Fed. Rep. 941.

**6. Fourteenth Amendment to Federal Constitution.** — *Williams v. Fears*, 179 U. S. 270; *Fraser v. McConway*, etc., Co., 82 Fed. Rep. 257; *Reymann Brewing Co. v. Bristor*, 92 Fed. Rep. 28; *U. S. v. Ah Sou*, 132 Fed. Rep. 878; *State v. Montgomery*, 94 Me. 192, 80 Am. St.

Rep. 386; *Crashley v. Press Pub. Co.*, 179 N. Y. 27; *Juniata Limestone Co. v. Fagley*, 187 Pa. St. 193, 67 Am. St. Rep. 579. See also the title UNITED STATES.

**Fourth and Fifth Amendments.** — Aliens are also entitled to the benefit of the fourth and fifth amendments to the Constitution of the United States. *U. S. v. Wong Quong Wong*, 94 Fed. Rep. 832; *In re* Yamasaka, 95 Fed. Rep. 652. See also the title UNITED STATES.

**Equal Privileges and Immunity.** — An alien cannot raise the question whether a statute violates the clause in the United States Constitution declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. *Matter of Johnson*, 139 Cal. 532, 96 Am. St. Rep. 161.

**66. 1. Subject to the Laws of the Land.** — *In re* Burbidge, (1902) 1 Ch. 426, 71 L. J. Ch. 271; *Ornelas v. Ruiz*, 161 U. S. 502; *Storti v. Massachusetts*, 183 U. S. 138; *U. S. v. Ah Poing*, 69 Fed. Rep. 972; *In re* Breen, 73 Fed. Rep. 458; *U. S. v. Ah Won*, 97 Fed. Rep. 494; *U. S. v. Severino*, 125 Fed. Rep. 949; *State v. Neighbaker*, (Mo. 1904) 83 S. W. Rep. 523; *Tanas v. Municipal Gas Co.*, 88 N. Y. App. Div. 251.

**Exclusion and Deportation.** — Aliens may be excluded from the United States by the political department of the government, and aliens are subject to these laws of exclusion and deportation. *Li Sing v. U. S.*, 180 U. S. 486. And this is true of the privilege of transit. *Fok Yung Yo v. U. S.*, 185 U. S. 296; *Lee Gon Yung v. U. S.*, 185 U. S. 306. And see generally the title CHINESE EXCLUSION ACTS.

**4. Rights as to Labor and Trades.** — *Fraser v. McConway*, etc., Co., 82 Fed. Rep. 257, as to right to labor without paying a special tax.

**67. 1. Right to Sue and Be Sued.** — *Pabst Brewing Co. v. Ekers*, 21 Quebec Super. Ct. 545; *Stalker v. Pullman's Palace-Car Co.*, 81 Fed. Rep. 989; *Creagh v. Equitable L. Assur. Soc.*, 83 Fed. Rep. 849; *Jenns v. Landes*, 85 Fed. Rep. 801; *Creagh v. Equitable L. Assur. Soc.*, 88 Fed. Rep. 1; *Bahuaud v. Bize*, 105 Fed. Rep. 485; *Shea v. Nilima*, (C. C. A.) 133 Fed. Rep. 209; *Omnium Invest. Co. v. North American Trust Co.*, 65 Kan. 53; *Philippine Sugar Estates Development Co. v. U. S.*, 39 Ct. Cl. 225; *Crashley v. Press Pub. Co.*, 179 N. Y.

- 68.** Rights in Regard to Insolvent Laws, Etc. — See notes 2, 5.  
As Executor, Administrator, Trustee, and Corporator. — See notes 7, 8.  
(2) *Disabilities of Aliens*. — See note 9.

- 69.** See notes 1, 2, 7.

- 70.** See note 1.

*b.* THOSE PERTAINING TO PROPERTY — (1) *Real Property* — (a) *At Common Law* — *Alien May Take by Act of Parties*. — See note 3.

27; *Belden v. Wilkinson*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 659.

**Suits Against United States in Court of Claims.** — *Trabing v. U. S.*, 32 Ct. Cl. 440; *De Baca v. U. S.*, 36 Ct. Cl. 407.

**Foreign Sovereigns and Representatives.** — See *Pooley v. Luco*, 72 Fed. Rep. 561, supporting the second paragraph of the original note.

**Suits Between Aliens.** — *Stalker v. Pullman's Palace-Car Co.*, 81 Fed. Rep. 989, supporting the first paragraph of the original note.

But the federal Circuit Courts have no jurisdiction unless a federal question is involved. *Pooley v. Luco*, 72 Fed. Rep. 561. See also the title UNITED STATES COURTS.

**Suits Between Aliens and Citizens — Jurisdiction of Court.** — *Creagh v. Equitable L. Assur. Soc.*, 83 Fed. Rep. 849, 88 Fed. Rep. 1; *Jenns v. Landes*, 85 Fed. Rep. 801. See also the title UNITED STATES COURTS.

**Proof of Alienage.** — *Torre v. Jeanin*, 76 Miss. 898.

**Death by Wrongful Act.** — As to the right of nonresident aliens to sue for death by wrongful act, see the title DEATH BY WRONGFUL ACT, 905. 3.

**68. 2. Entitled to Benefit of Insolvent Laws.** — *Barrier v. Kelly*, 82 Miss. 247, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 68.

**Exemptions.** — A nonresident alien is not entitled to the benefit of exemption laws. *Deni v. Pennsylvania R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676.

**5. Trademarks.** — *Pabst Brewing Co. v. Ekers*, 21 Quebec Super. Ct. 545; *J. & P. Baltz Brewing Co. v. Kaiserbrauerei*, (C. C. A.) 74 Fed. Rep. 222; *Tanàs v. Municipal Gas Co.*, 88 N. Y. App. Div. 251.

And see generally the titles COPYRIGHT; EXEMPTIONS (FROM EXECUTION); INSOLVENCY AND BANKRUPTCY; PATENTS; POOR AND POOR LAWS; TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION.

**7. Right to Act as Executor or Administrator.** — *Tanas v. Municipal Gas Co.*, 88 N. Y. App. Div. 251.

**8. Belden v. Wilkinson, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 659. See also the title EXECUTORS AND ADMINISTRATORS.**

**9. As an Elector.** — *Dorsey v. Brigham*, 177 Ill. 250, 69 Am. St. Rep. 228; *Gill v. Shurtleff*, 183 Ill. 440; *Rexroth v. Schein*, 206 Ill. 80; *Rushworth v. Judges*, 58 N. J. L. 97. See also the title ELECTIONS.

**Declaration of Intention to Become Citizen.** — *Kadlec v. Pavik*, 9 N. Dak. 278; *Trabing v. U. S.*, 32 Ct. Cl. 440.

**Evidence of Alienage.** — *Trabing v. U. S.*, 32 Ct. Cl. 440. See also *Kadlec v. Pavik*, 9 N. Dak. 278.

**69. 1. Rights and Disabilities in Regard to Hodin g Office.** — *People v. Wheeler*, 136 Cal.

652; *Vicksburg v. Groome*, (Miss. 1898) 24 So. Rep. 306.

**Removal of Disability of Alienage Before Term Begins.** — A person who was elected to office but was disqualified because an alien, though he afterwards became naturalized, was merely a *de facto* officer, and as such could maintain no action for salary. *Vicksburg v. Groome*, (Miss. 1898) 24 So. Rep. 306.

**2. As State Representative.** — *Barrier v. Kelly*, 82 Miss. 247, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 69.

**7. Cannot Serve as Juror.** — See also as to the effect of alienage, *Kohl v. Lehlback*, 160 U. S. 293; *State v. Durnam*, 73 Minn. 150, holding that the objection would not be available after verdict. See also the title JURY AND JURY TRIAL.

**70. 1.** See the title ATTORNEY AND CLIENT, 285. 2.

**3. Alien May Take by Deed or Grant** — *United States*. — *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563; *U. S. v. Southern Pac. R. Co.*, 88 Fed. Rep. 832; *Lohmann v. Helmer*, 104 Fed. Rep. 178.

*Indiana*. — *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029.

*Iowa*. — *Burrow v. Burrow*, 98 Iowa 400.

*Kansas*. — *Omnium Invest. Co. v. North American Trust Co.*, 65 Kan. 53, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70; *Wuester v. Folin*, 60 Kan. 334; *Madden v. State*, 68 Kan. 658.

*Missouri*. — *Pembroke v. Huston*, 180 Mo. 627.

*New York*. — *Belden v. Wilkinson*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 659; *Smith v. Smith*, 70 N. Y. App. Div. 286.

*Oregon*. — *Quinn v. Ladd*, 37 Oregon 272, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70; *Lavery v. Arnold*, 36 Oregon 84.

*Washington*. — *Oregon Mortg. Co. v. Carstens*, 16 Wash. 165; *Goon Gan v. Richardson*, 16 Wash. 373.

**Foreign Corporation.** — *Oregon Mortg. Co. v. Carstens*, 16 Wash. 165; *State v. Morrison*, 18 Wash. 664; *State v. Hudson Land Co.*, 19 Wash. 85.

**Adverse Possession by Alien.** — An alien may acquire water rights by adverse use. *Lavery v. Arnold*, 36 Oregon 84.

**Water Rights.** — *Lavery v. Arnold*, 36 Oregon 84.

**Administration of Alien's Estate — Right of Consul.** — The state statutes must be construed and the procedure of local courts must be made to conform, as nearly as practicable, to the treaty obligations of the federal government. *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18. See also *Matter of Lorgiorato*, (Surrogate Ct.) 34 Misc. (N. Y.) 31, as to the necessity of conformance by the consul to the laws of the state.

**72.** See notes 1, 2.

**73.** Alien May Not Take by Operation of Law. — See note 1.

**74.** See note 1.

**75.** Descent Interrupted by Alienage of Any Mediate Ancestor. — See note 1.

**72. 1. Alien May Take by Devise** — *United States*. — *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563; *Brigham v. Kenyon*, 76 Fed. Rep. 30; *Lohmann v. Helmer*, 104 Fed. Rep. 178.

*Indiana*. — *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029.

*Iowa*. — *Easton v. Huott*, 95 Iowa 473; *Burrow v. Burrow*, 98 Iowa 400.

*Kansas*. — *Omnium Invest. Co. v. North American Trust Co.*, 65 Kan. 53, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70-72; *Madden v. State*, 68 Kan. 658.

*Missouri*. — *Pembroke v. Huston*, 180 Mo. 627.

*New York*. — *Smith v. Reilly*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 701; *Smith v. Smith*, 70 N. Y. App. Div. 286; *Richardson v. Amsdon*, (Supm. Ct. Spec. T.) 85 N. Y. Supp. 342; *Fay v. Taylor*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 32.

*Oregon*. — *Quinn v. Ladd*, 37 Oregon 272.

**2. United States**. — *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563.

*Indiana*. — *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029.

*Kansas*. — *Omnium Invest. Co. v. North American Trust Co.*, 65 Kan. 53, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70-72; *Madden v. State*, 68 Kan. 658.

*Michigan*. — *Hopkins v. Crossley*, 132 Mich. 612.

*Missouri*. — *Pembroke v. Huston*, 180 Mo. 627.

*New York*. — *Smith v. Reilly*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 701; *Belden v. Wilkinson*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 659; *Smith v. Smith*, 70 N. Y. App. Div. 286.

*Utah*. — *Strickley v. Hill*, 22 Utah 257, 83 Am. St. Rep. 786; *Wilson v. Triumph Consol. Min. Co.*, 19 Utah 66, 75 Am. St. Rep. 718.

*Washington*. — *Oregon Mortg. Co. v. Carstens*, 16 Wash. 165; *Goon Gan v. Richardson*, 16 Wash. 373.

**Title May Not Be Questioned in Collateral Proceeding**. — See *Wuester v. Folin*, 60 Kan. 334; *Omnium Invest. Co. v. North American Trust Co.*, 65 Kan. 53; *Belden v. Wilkinson*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 659; *Oregon Mortg. Co. v. Carstens*, 16 Wash. 165.

**Naturalization Has a Retroactive Effect**. — *Lone Jack Min. Co. v. Megginson*, (C. C. A.) 82 Fed. Rep. 89; *Pembroke v. Huston*, 180 Mo. 627.

**73. 1. Alien Cannot Take by Descent** — *United States*. — *Blythe v. Hinckley*, 180 U. S. 333; *Brigham v. Kenyon*, 76 Fed. Rep. 30; *Pacific Bank v. Hannah*, (C. C. A.) 90 Fed. Rep. 72. *California*. — *Matter of Pendergast*, 143 Cal.

**135.** *Connecticut*. — *Crosgrave v. Crosgrave*, 69 Conn. 416.

*Idaho*. — *State v. Stevenson*, 6 Idaho 367.

*Illinois*. — *De Graff v. Went*, 164 Ill. 485; *Meadowcroft v. Winnebago County*, 181 Ill. 504.

*Indiana*. — *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029.

*Iowa*. — *Burrow v. Burrow*, 98 Iowa 400.

*Missouri*. — *Pembroke v. Huston*, 180 Mo. 627; *Utassy v. Giedinghagen*, 132 Mo. 53.

*Nebraska*. — *Glynn v. Glynn*, 62 Neb. 872; *Dougherty v. Kubat*, (Neb. 1903) 93 N. W. Rep. 317.

*New York*. — *Smith v. Smith*, 70 N. Y. App. Div. 286.

*Oregon*. — *Quinn v. Ladd*, 37 Oregon 272, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70.

See also *Crosgrave v. Crosgrave*, 69 Conn. 416.

**Estate of Alien Goes to Next of Kin Having Inheritable Blood**. — *Blythe v. Hinckley*, 180 U. S. 333; *Meadowcroft v. Winnebago County*, 181 Ill. 504.

**A State May by Law Make Aliens Capable of Taking by Descent**. — *Lohmann v. Helmer*, 104 Fed. Rep. 178; *Blythe v. Hinckley*, 127 Cal. 431; *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029.

In the absence of treaty the laws of the state where the property is situated govern, and the state may allow aliens to inherit or not. *De Vaughn v. Hutchinson*, 165 U. S. 566; *Clarke v. Clarke*, 178 U. S. 186.

The state may allow even nonresident aliens to inherit without violating the Constitution of the United States. *Blythe v. Hinckley*, 180 U. S. 333.

**The Law Existing at the Time of Descent Cast** — *Burrow v. Burrow*, 98 Iowa 400; *Smith v. Lynch*, 61 Kan. 609; *Stewart v. Russell*, 91 N. Y. App. Div. 310.

**Married Women Who Have Become Citizens by Their Marriage**. — *Ruckgaber v. Moore*, 104 Fed. Rep. 947.

**74. 1. Alien Cannot Transmit by Descent**. — *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029; *Smith v. Lynch*, 61 Kan. 609.

**Escheat**. — *In re Barnett*, (1902) 1 Ch. 847, 71 L. J. Ch. 408; *Pacific Bank v. Hannah*, (C. C. A.) 90 Fed. Rep. 72; *State v. Stevenson*, 6 Idaho 367; *Meadowcroft v. Winnebago County*, 181 Ill. 504; *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74; *Madden v. State*, 68 Kan. 658; *Pembroke v. Huston*, 180 Mo. 627; *McGillis v. McGillis*, 154 N. Y. 532; *Kelly v. Pratt*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 31; *Richardson v. Amsdon*, (Supm. Ct. Spec. T.) 85 N. Y. Supp. 342; *Smith v. Smith*, 70 N. Y. App. Div. 286.

Where the conditions of the statute allowing aliens to hold land, etc., are not complied with, the land escheats to the state. *Matter of Pendergast*, 143 Cal. 135; *Wuester v. Folin*, 60 Kan. 334.

**If the Ancestor Had a Defeasible Title**. — *Smith v. Reilly*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 701.

**75. 1. Descent Through Aliens**. — *Meadowcroft v. Winnebago County*, 181 Ill. 504; *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029; *Wilcke v. Wilcke*, 102 Iowa 173; *Meier v. Lee*, 106 Iowa 303; *Smith v. Lynch*, 61 Kan. 609.



**75.** *Curtsey* — *Dower*. — See notes 2, 3.

**76.** (b) *By Statute*. — See note 1.

**81.** *Mining Claims*. — See note 1.

(2) *Personal Property* — (a) *At Common Law*. — See note 2.

**Alienage of Parent No Bar to Descent Between Children.** — *Wilcke v. Wilcke*, 102 Iowa 173.

**75. 2. *Curtsey* — *Alien Husband Who Has Declared Intention to Become Citizen.*** — *Quinn v. Ladd*, 37 Oregon 272, supporting the first and second paragraphs of the original note.

**8. *Dower*.** — *Pacific Bank v. Hannah*, (C. C. A.) 90 Fed. Rep. 72.

**76. 1. *California*.** — *Blythe v. Hinckley*, 127 Cal. 431; *Matter of Pendergast*, 143 Cal. 135; *Blythe v. Hinckley*, 180 U. S. 333.

***Idaho*.** — Under the statute, "resident aliens may take in all cases by succession as citizens; \* \* \* but no nonresident foreigner can take by succession, unless he appears and claims such succession within five years," etc. *State v. Stevenson*, 6 Idaho 367.

***Illinois*.** — *De Graff v. Went*, 164 Ill. 485; *Jele v. Lemberger*, 163 Ill. 338; *Adams v. Akerlund*, 168 Ill. 632; *Scharpf v. Schmidt*, 172 Ill. 255; *Jele v. Lemberger*, 163 Ill. 338. Laws 1897, p. 6, provide that "no person shall be deprived of his right to take title to real estate as heir at law, by descent from any deceased person because he may be \* \* \* compelled to trace his relationship to such deceased person through one or more aliens." *Meadowcroft v. Winnebago County*, 181 Ill. 504.

***Indiana*.** — The Act of 1885 confers on resident aliens who have declared their intention of becoming citizens power to acquire and hold real estate as citizens; all other aliens may take and hold by devise and descent only, with power of disposal within five years. *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029.

***Iowa*.** — *Opel v. Shoup*, 100 Iowa 407; *Meier v. Lee*, 106 Iowa 303; *Burrow v. Burrow*, 98 Iowa 400; *Doehrel v. Hilmer*, 102 Iowa 169.

***Kansas*.** — Under a statute (Act of 1891) a resident alien may take and hold land for a period of six years; and under certain conditions may sell, assign, mortgage, or dispose of the same in any manner, as if a citizen. *Wuester v. Folin*, 60 Kan. 334. See also *Smith v. Lynch*, 61 Kan. 609; *Madden v. State*, 68 Kan. 658.

***Kentucky*.** — *Com. v. Newcomb*, 109 Ky. 18.

***Louisiana*.** — Resident aliens have the same property rights as citizens. *Rabasse's Succession*, 49 La. Ann. 1405; *Rixner's Succession*, 48 La. Ann. 558; *Sala's Succession*, 50 La. Ann. 1009.

***Missouri*.** — *Utassy v. Giedinghagen*, 132 Mo. 53; *Pembroke v. Huston*, 180 Mo. 627.

***Nebraska*.** — Nonresident aliens and corporations not incorporated under the laws of the state are prohibited from acquiring or holding land, etc., by descent, devise, or purchase. *Glynn v. Glynn*, 62 Neb. 872; *Bahuaud v. Bize*, 105 Fed. Rep. 485. See also *Dougherty v. Kubat*, (Neb. 1903) 93 N. W. Rep. 317. The common-law doctrine of inability of aliens to take by descent, re-enacted by statute of 1889, does not apply, by proviso of statute, to lands situated within the limits of cities and towns;

there aliens, both resident and nonresident, may inherit. *Glynn v. Glynn*, 62 Neb. 872; *Bahuaud v. Bize*, 105 Fed. Rep. 485.

***New York*.** — *Richardson v. Amsdon*, (Supm. Ct. Spec. T.) 85 N. Y. Supp. 342; *Smith v. Smith*, 70 N. Y. App. Div. 286; *Smith v. Reilly*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 701; *Kelly v. Pratt*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 31; *Stewart v. Russell*, 91 N. Y. App. Div. 310. Nonresident aliens may take and hold lands by devise. *Fay v. Taylor*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 32. Laws of 1889, c. 42, permit foreign-born descendants and children of a woman born in the United States, notwithstanding her marriage with an alien and residence in a foreign country, to take and hold title derived through such woman as if they were citizens of United States. *McGillis v. McGillis*, 154 N. Y. 532.

Laws N. Y. 1897, c. 593, p. 706, gives to the citizen of any other country that allows the citizens of the state of New York to take, hold, and transfer real estate, similar privileges in New York. *Haley v. Sheridan*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 864.

***Oregon*.** — An unnaturalized alien is not qualified to purchase lands under Laws Oregon 1891, p. 189. *Spencer v. Carlson*, 36 Oregon 364.

***Tennessee*.** — For construction of earlier statutes, see *Ehrlich v. Weber*, (Tenn. 1905) 88 S. W. Rep. 188.

***Texas*.** — *Hanrick v. Gurley*, (Tex. Civ. App. 1899) 48 S. W. Rep. 994.

***Washington*.** — "The ownership of lands by aliens \* \* \* is prohibited in this state, except where acquired by inheritance, under mortgage, or in good faith in the ordinary course of justice in the collection of debts." *Oregon Mortg. Co. v. Carstens*, 16 Wash. 165. See also *Brigham v. Kenyon*, 76 Fed. Rep. 30; *Pacific Bank v. Hannah*, (C. C. A.) 90 Fed. Rep. 72; *State v. Hudson Land Co.*, 19 Wash. 85; *State v. Morrison*, 18 Wash. 664; *State v. Superior Ct.*, 33 Wash. 542.

**81. 1. *Mining Lands*.** — *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563; *Lohmann v. Helmer*, 104 Fed. Rep. 178; *Shea v. Nilima*, (C. C. A.) 133 Fed. Rep. 209; *Providence Gold-Min. Co. v. Burke*, (Ariz. 1899) 57 Pac. Rep. 641. See also the title MINES AND MINING CLAIMS.

***The Right of a Locator Can Be Questioned*** only by the United States. *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563; *Shea v. Nilima*, (C. C. A.) 133 Fed. Rep. 209; *McCarthy v. Speed*, 11 S. Dak. 362.

**2. *Personal Property*.** — *Ruckgaber v. Moore*, 104 Fed. Rep. 947; *Crosgrave v. Crosgrave*, 69 Conn. 416; *Cleveland, etc., R. Co. v. Osgood*, (Ind. App. 1905) 73 N. E. Rep. 285, citing 2. AM. AND ENG. ENCYC. OF LAW (2d ed.) 81; *Sala's Succession*, 50 La. Ann. 1009; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386; *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18; *Matter of Barandon*, (Surrogate

**82.** (b) *By Statute.* — See note 1.

(3) *Rights and Liabilities Incidental to the Ownership of Property — Right to Convey and Maintain Actions.* — See note 2.

**83.** See note 1.

**84.** *Taxation.* — See note 5.

**85.** *c. RIGHTS SECURED BY TREATIES.* — See note 2.

**86.** See notes 1, 2.

**89.** *c. SUITS BY AND AGAINST ALIEN ENEMIES — Entitled to Make Defense.* — See note 2.

Ct.) 41 Misc. (N. Y.) 380; *Tanas v. Municipal Gas Co.*, 88 N. Y. App. Div. 251.

A state may debar aliens from holding stock in her corporations. *State v. Travelers Ins. Co.*, 70 Conn. 590, 66 Am. St. Rep. 138.

**82. 1.** *Blythe v. Hinckley*, 127 Cal. 431; *Cleveland, etc., R. Co. v. Osgood*, (Ind. App. 1905) 73 N. E. Rep. 285; *Matter of Barandon*, (Surrogate Ct.) 41 Misc. (N. Y.) 380.

**2. Right to Convey.** — *Lykins v. McGrath*, 184 U. S. 169; *Laughton v. Nadeau*, 75 Fed. Rep. 789; *Lone Jack Min. Co. v. Megginson*, (C. C. A.) 82 Fed. Rep. 89; *U. S. v. Southern Pac. R. Co.*, 88 Fed. Rep. 832; *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029; *Ingraham v. Ward*, 56 Kan. 550; *Hannon v. Taylor*, 57 Kan. 1; *Blauw v. Love*, 9 Kan. App. 55; *Wuester v. Folin*, 60 Kan. 334; *Dagenett v. Jenks*, 7 Kan. App. 499; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386; *Wilson v. Triumph Consol. Min. Co.*, 19 Utah 66, 75 Am. St. Rep. 718; *Strickley v. Hill*, 22 Utah 257, 83 Am. St. Rep. 786; *Oregon Mortg. Co. v. Carstens*, 16 Wash. 165.

**Power of Aliens to Transmit by Will — By Statute.** — *Ruckgaber v. Moore*, 104 Fed. Rep. 947; *Matter of Barandon*, (Surrogate Ct.) 41 Misc. (N. Y.) 380.

**83. 1. Real Actions.** — *Lohmann v. Helmer*, 104 Fed. Rep. 178; *Shea v. Nilima*, (C. C. A.) 133 Fed. Rep. 209; *Omnium Invest. Co. v. North American Trust Co.*, 65 Kan. 53.

**Though He May Defend His Title Against All Persons but the State.** — *Lohmann v. Helmer*, 104 Fed. Rep. 178; *Wilson v. Triumph Consol. Min. Co.*, 19 Utah 66, 75 Am. St. Rep. 718.

**84. 5. Liability to Taxation.** — *Fraser v. McConway, etc., Co.*, 82 Fed. Rep. 257; *Matter of Johnson*, 139 Cal. 532, 96 Am. St. Rep. 161; *Rixner's Succession*, 48 La. Ann. 552.

**85. 2. Rights Secured to Aliens by Treaty — Argentine Republic.** — *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18; *Matter of Logiorato*, (Surrogate Ct.) 34 Misc. (N. Y.) 31.

*Austria.* — *J. & P. Baltz Brewing Co. v. Kaiserbrauerei*, (C. C. A.) 74 Fed. Rep. 222; *State v. Neighbaker*, (Mo. 1904) 83 S. W. Rep. 523.

*China.* — *Fok Yung Yo v. U. S.*, 185 U. S. 296; *U. S. v. Lee Yen Tai*, 185 U. S. 213; *Chin Bak Kan v. U. S.*, 186 U. S. 193; *Chin Ying v. U. S.*, 186 U. S. 202; *In re Gee Hóp*,

71 Fed. Rep. 274; *In re Lee Gon Yung*, 111 Fed. Rep. 998.

*France.* — *Bahuaud v. Bize*, 105 Fed. Rep. 485; *Rixner's Succession*, 48 La. Ann. 552; *Rabasse's Succession*, 49 La. Ann. 1405.

*German Empire.* — *Bavaria: Opel v. Shoup*, 100 Iowa 407; *Rixner's Succession*, 48 La. Ann. 552. *Prussia: J. & P. Baltz Brewing Co. v. Kaiserbrauerei*, (C. C. A.) 74 Fed. Rep. 222; *Wilcke v. Wilcke*, 102 Iowa 173; *Doehrel v. Hillmer*, 102 Iowa 169. *Wurtemberg: Scharpf v. Schmidt*, 172 Ill. 255.

*Great Britain.* — *Blythe v. Hinckley*, 127 Cal. 431; *Dockstader v. Roe*, 4 Penn. (Del.) 398; *Rixner's Succession*, 48 La. Ann. 552; *Newcomb v. Newcomb*, (Ky. 1900) 57 S. W. Rep. 2; *Com. v. Newcomb*, 109 Ky. 18; *Fay v. Taylor*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 32.

*Italy.* — *Storti v. Massachusetts*, 183 U. S. 138; *Rixner's Succession*, 48 La. Ann. 552; *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18; *Matter of Logiorato*, (Surrogate Ct.) 34 Misc. (N. Y.) 31.

*Japan.* — *Japanese Immigrant Case*, 189 U. S. 86.

*Mexico.* — *Ornelas v. Ruiz*, 161 U. S. 502.

*Spain.* — *Sala's Succession*, 50 La. Ann. 1009.

*Sweden.* — *Adams v. Akerlund*, 168 Ill. 632; *Meier v. Lee*, 106 Iowa 303.

**Treaties Wholly or Partially Removing Disabilities.** — *Wilcke v. Wilcke*, 102 Iowa 173.

**Removal of Disability to Inherit.** — *Adams v. Akerlund*, 168 Ill. 632; *Bahuaud v. Bize*, 105 Fed. Rep. 485.

**86. 1. State Laws Denying to Aliens Rights Secured by Treaties.** — *Storti v. Massachusetts*, 183 U. S. 138; *Bahuaud v. Bize*, 105 Fed. Rep. 485; *Blythe v. Hinckley*, 127 Cal. 431; *Dockstader v. Roe*, 4 Penn. (Del.) 398, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 86; *Adams v. Akerlund*, 168 Ill. 632; *Scharpf v. Schmidt*, 172 Ill. 255; *Opel v. Shoup*, 100 Iowa 407; *Doehrel v. Hillmer*, 102 Iowa 169; *Wilcke v. Wilcke*, 102 Iowa 173; *Rixner's Succession*, 48 La. Ann. 552; *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18.

**2. Dorsey v. Brigham**, 177 Ill. 250, 69 Am. St. Rep. 228.

**89. 2. Confiscation Acts.** — *The Buena Ventura*, 87 Fed. Rep. 927; *The Rita*, 87 Fed. Rep. 925; *The Maria Dolores*, 88 Fed. Rep. 548; *The Adula*, 89 Fed. Rep. 357.

# ALIMONY.

By R. A. GREER.

**92. I. DEFINITION.** — See note 1.

Alimony on Behalf of the Husband. — See notes 2, 3.

**93. II. AS AN INDEPENDENT RIGHT** — 1. In General; Without Divorce — Originally an Incident to Some Other Proceeding. — See note 1.

**94. Prevailing Rule in United States** — Allowed Independently Only by Statute. — See note 1.

In Some States Jurisdiction Regarded Inherent in Equity. — See note 2.

**95. Statutory Authorization.** — See note 1.

**96. 2. For What Causes Allowed** — When the Jurisdiction Conferred by Statute. — See note 1.

Where Jurisdiction Considered Inherent. — See notes 2, 3.

**92. 1. Alimony Defined.** — *Alexander v. Alexander*, 13 App. Cas. (D. C.) 334; *Rush v. Flood*, 105 Ill. App. 182; *Johnson v. Johnson*, 57 Kan. 343, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92; *Brown v. Brown*, 135 Mich. 141, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92; *Henderson v. Henderson*, 37 Oregon 147, 82 Am. St. Rep. 741, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92; *Wheeler v. Wheeler*, 17 Ont. Pr. 45.

**Alimony Is Founded upon the Marital Obligation to Support and Maintain**, and is awarded by the court, either *pendente lite* or upon the final determination of the litigation, in enforcement of this obligation and duty. *Shepard v. Shepard*, 99 N. Y. App. Div. 308.

**2.** *Groth v. Groth*, 69 Ill. App. 68; *Greene v. Greene*, 49 Neb. 546, 59 Am. St. Rep. 560, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92; *Hoagland v. Hoagland*, 19 Utah 110, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92.

**Alimentary Allowance to Husband.** — It has been held that a merchant sued for separation from bed and board may claim an alimentary allowance from his wife, if she has obtained possession of the shop so as to deprive him of his resources. *Joly v. Garneau*, 5 Quebec Pr. 137.

**3.** In *California* the husband is entitled to support from the wife where he is rendered unable to support himself by infirmity, and this, too, independent of divorce, and an order allowing him support may be enforced by contempt proceedings. *Livingston v. Superior Ct.*, 117 Cal. 633.

**93. 1. Agreement for Separate Maintenance.** — *Daniels v. Benedict*, (C. C. A.) 97 Fed. Rep. 367; *Chamberlain v. Cumming*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 815.

**94. 1.** *De Witt v. De Witt*, 67 Ohio St. 346, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 93.

**2. Jurisdictions in Which the Power Is Regarded as Inherent in Courts of Equity** — *Alabama*. — *Brindley v. Brindley*, 121 Ala. 431, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 101; *Pearce v. Pearce*, 132 Ala. 221, 90 Am. St. Rep. 901.

*Arkansas*. — *Horton v. Horton*, (Ark. 1905) 86 S. W. Rep. 82.

*California*. — *Murray v. Murray*, 115 Cal. 266, 56 Am. St. Rep. 97.

*Colorado*. — *In re Popejoy*, 26 Colo. 32, 77 Am. St. Rep. 222; *Dye v. Dye*, 9 Colo. App. 320.

*Louisiana*. — *State v. King*, 49 La. Ann. 1503.

*Minnesota*. — A wife, living apart from her husband for a good cause, may sue for separate support independent of divorce proceedings. *Baier v. Baier*, 91 Minn. 165.

*Missouri*. — *Long v. Long*, 78 Mo. App. 32.

*Nebraska*. — *Eldred v. Eldred*, 62 Neb. 615.

*Washington*. — *Schonborn v. Schonborn*, 27 Wash. 421; *Kimble v. Kimble*, 17 Wash. 75.

A wife may maintain an action for support independent of any suit for divorce. *Branscheid v. Branscheid*, 27 Wash. 368.

**95. 1. Jurisdiction Conferred by Statute.** — *Benton v. Benton*, 122 Cal. 395; *Donnelly v. Donnelly*, 39 Fla. 229; *Dole v. Gear*, 14 Hawaii 554, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 95; *Williams v. Williams*, 77 Ill. App. 229.

*But Temporary Alimony* pending a suit for separate maintenance independent of divorce is not allowable. *Therkelsen v. Therkelsen*, 35 Oregon 75.

**96. 1. Abandonment.** — *Enslin v. Enslin*, (N. J. 1897) 37 Atl. Rep. 442; *Parker v. Parker*, 57 N. J. Eq. 577; *Levin v. Levin*, 68 S. Car. 123.

**Cruel Treatment.** — Where the evidence shows that the husband has beaten the wife or permitted another to do so in his presence, she is entitled to alimony. *Cross v. Cross*, (Ky. 1897) 41 S. W. Rep. 272. And see the title **DIVORCE**.

**Voluntary Separation.** — *Powers v. Powers*, 33 N. Y. App. Div. 126. Compare *Scherer v. Scherer*, 23 Ind. App. 384, 77 Am. St. Rep. 437.

**Both Parties at Fault.** — *Levin v. Levin*, 68 S. Car. 123.

**2. Husband Leaving Wife Unjustifiably and Without Means of Support.** — *Margarum v. Margarum*, 57 N. J. Eq. 249; *Skittletharpe v. Skittletharpe*, 130 N. Car. 72.

**3. Wife Forced to Leave Husband by Reason of**

**97.** See note 1.

Wife at Fault. — See note 2.

**98.** Husband's Willingness, After Separation, to Receive Wife Back. — See note 1.

3. Subsequent to Divorce a Vinculo. — See note 2.

**99.** Divorce in Ex Parte Proceedings or Obtained by Fraud. — See note 1.

III. ALIMONY PENDENTE LITE — 1. Definition. — See notes 4, 5.

**100.** Action to Set Aside Decree of Divorce. — See note 5.

2. General Principles — The Usual Practice. — See note 6.

**101.** Allowance Not a Matter of Right. — See note 1.

Essentials. — See note 2.

**103.** 3. Necessary Prerequisites — *a.* MARRIAGE. — See note 5.**104.** Prima Facie Case Sufficient. — See note 1.

Marriage de Facto. — See note 3.

**Improper Treatment.** — *Porter v. Porter*, 162 Ill. 398; *Harris v. Harris*, 109 Ill. App. 148; *Itzkowitz v. Itzkowitz*, 33 N. Y. App. Div. 244; *Levin v. Levin*, 68 S. Car. 123.

**What Constitutes Cruelty.** — *Wise v. Wise*, 60 S. Car. 426. And see generally the title DIVORCE.

**Specific Acts of Cruelty Should Be Set Forth in Bill.** — *Earle v. Earle*, 79 N. Y. App. Div. 631; *Mackintosh v. Mackintosh*, 44 N. Y. App. Div. 118.

**97. 1. Other Grounds.** — *Harding v. Harding*, 79 Ill. App. 590; *Dummer v. Dummer*, (N. J. 1898) 41 Atl. Rep. 149.

**2. Alimony Disallowed When Wife in Fault.** — *Williams v. Williams*, 114 Ga. 772, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97; *Harris v. Harris*, 109 Ill. App. 148; *Orendorff v. Orendorff*, 91 Ill. App. 61; *Scott v. Scott*, (Ky. 1897) 42 S. W. Rep. 836; *Reade v. Continental Trust Co.*, 49 N. Y. App. Div. 400.

**98. 1. When After Separation Husband Offers to Receive Wife Again.** — Where the husband in good faith offers to provide a home for the wife and resume the marital relations and she refuses she was held not to be entitled to separate maintenance. *McMullin v. McMullin*, 123 Cal. 653.

Alimony was refused a wife who left her husband merely because she had had some differences with his children and refused to return to his home and live with him. *Springer v. Springer*, (Ky. 1900) 54 S. W. Rep. 710.

**Offer Must Be Made in Good Faith.** — *Porter v. Porter*, 162 Ill. 398.

**Second Separation and Reconciliation.** — *Schradin v. Schradin*, 24 Ohio Cir. Ct. 647.

**2. Alimony After Divorce a Vinculo.** — *Howell v. Howell*, 104 Cal. 45, 43 Am. St. Rep. 70; *Campbell v. Campbell*, 115 Ky. 656; *Moross v. Moross*, 129 Mich. 27; *Eldred v. Eldred*, 62 Neb. 615, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98; *McKenssey v. McKenssey*, 65 N. J. Eq. 633; *Weidman v. Weidman*, 57 Ohio St. 101; *Adams v. Abbott*, 21 Wash. 29.

**99. 1. Goldie v. Goldie, 123 Iowa 178, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.**

**4. Thomas v. Thomas, 109 Ill. App. 352; *Perkins v. Perkins*, (N. J. 1899) 42 Atl. Rep. 336; *Gundry v. Gundry*, 11 Okla. 426, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 100.**

**5. Long v. Long, 78 Mo. App. 32; *Patton v. Patton*, (N. Y. Super. Ct. Spec. T.) 13 Misc. (N. Y.) 726.**

**100. 5. Hopper v. Hopper, 92 Hun (N. Y.) 415.**

**6. Anderson v. Anderson, 137 Cal. 225; *Cupples v. Cupples*, 31 Colo. 443; *Mercer v. Mercer*, (Colo. App. 1903) 73 Pac. Rep. 662; *Alexander v. Alexander*, 13 App. Cas. (D. C.) 334; *Kendrick v. Kendrick*, 105 Ga. 38; *Cooper v. Cooper*, 185 Ill. 163; *McCue v. McCue*, 149 Ind. 466; *Steele v. Steele*, 85 Mo. App. 224; *Smith v. Smith*, 51 S. Car. 379, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 100; *Arey v. Arey*, 22 Wash. 261, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 100.**

**A Prior Agreement for Separation and Allowance** does not preclude the court from making a provision *pendente lite* for the maintenance and education of the children of the marriage, in a suit by the wife. *Barry v. Barry*, (1901) P. 87. See also *Bishop v. Bishop*, (1897) P. 138.

**101. 1. Not Matter of Absolute Right.** — *Cairnes v. Cairnes*, 29 Colo. 260, 93 Am. St. Rep. 55; *Lesh v. Lesh*, 21 App. Cas. (D. C.) 475; *Haddon v. Haddon*, 36 Fla. 413; *Fullhart v. Fullhart*, (Mo. App. 1904) 83 S. W. Rep. 541.

**Matter of Right under Alabama Statute.** — *Rast v. Rast*, 113 Ala. 319; *Webb v. Webb*, 140 Ala. 262.

**2. Court Should Be Satisfied of Complainant's Good Faith.** — *Reed v. Reed*, (Miss. 1905) 37 So. Rep. 642, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 101; *Deisler v. Deisler*, 65 N. Y. App. Div. 208.

**That a Prima Facie Case Must Be Shown on behalf of the wife**, see *Smith v. Smith*, 51 S. Car. 379, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 101.

**103. 5. Banks v. Banks, 42 Fla. 362; *McKenna v. McKenna*, 70 Ill. App. 340; *Knott v. Knott*, (N. J. 1902) 51 Atl. Rep. 15; *Brown v. Brown*, (Va. 1896) 24 S. E. Rep. 238.**

**104. 1. Prima Facie Proof Sufficient.** — *Weigand v. Weigand*, 103 N. Y. App. Div. 293. In *Hite v. Hite*, 124 Cal. 389, 71 Am. St. Rep. 82, it was held that where the fact of marriage was denied, alimony *pendente lite* will not be allowed unless the preponderance of the evidence establishes the marriage.

**3. Mere De Facto Marriage Generally Sufficient.** — *Eickhoff v. Eickhoff*, 29 Colo. 295, 93 Am. St. Rep. 64; *Leckney v. Leckney*, (R. I. 1904) 59 Atl. Rep. 311, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 104; *Arey v. Arey*, 22 Wash. 261, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 104.

**105. b. SEPARATION.**—See note 1.

Constructive Separation. — See note 2.

**106. c. WIFE'S NECESSITY — No Allowance When Wife Has Sufficiency.** — See note 1.

When Provision Has Already Been Made by Husband. — See note 2.

**107. Although the Fact that the Wife Has Some Property.** — See note 1.

d. HUSBAND'S ABILITY. — See note 3.

**108. 4. Effect of Wife's Adultery.** — See note 4.

Wife's Sworn Denial. — See note 5.

**109. Finding Against Wife Before Final Hearing.** — See note 1.

5. Commencement of Payment — Discretionary. — See note 7.

**110. 6. Allowance Pending Appeal — Right of Trial Court.** — See notes 1, 2.

When Wife's Cause Meritorious, and She Is Without Means. — See note 3.

**111. Not a Matter of Right — Good Faith.** — See note 1.

7. Amount — a. IN GENERAL — There Is No Fixed Rule. — See note 2.

**112. One-fifth of the Joint Income.** — See note 3.

The General Principles to Be Observed. — See note 5.

**105. 1. Separation Necessary.**—Fullhart v. Fullhart, (Mo. App. 1904) 83 S. W. Rep. 541; Smith v. Smith, 92 N. Y. App. Div. 442.**2. Bucknam v. Bucknam,** 176 Mass. 229.**106. 1. Wife Must Be Without Adequate Means.**—Haddon v. Haddon, 36 Fla. 413; Carlin v. Carlin, 65 Ill. App. 160; Penningroth v. Penningroth, 71 Mo. App. 438; Lambert v. Lambert, (Mo. App. 1904) 84 S. W. Rep. 203; Wood v. Wood, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 50, 7 N. Y. Annot. Cas. 236; Hunter v. Hunter, 78 N. Y. App. Div. 631; Vaughn v. Vaughn, 89 N. Y. App. Div. 611; Richardson v. Richardson, (Supm. Ct. Spec. T.) 94 N. Y. Supp. 582.**2. When Husband Has Made Provision for Wife upon Separation.**—Grube v. Grube, 65 N. Y. App. Div. 239.**107. 1. Where Wife Has Some Property, but Not a Sufficiency.**—Lumpkin v. Lumpkin, 78 Ill. App. 324; Stiehm v. Stiehm, 69 Minn. 464, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 106.**3. Husband's Resources.**—Pherrill v. Pherrill, 6 Ont. L. Rep. 642; Paule v. Paule, 17 Pa. Co. Ct. 147.

It must appear that the husband has the means to supply the necessities of the wife. Haddon v. Haddon, 36 Fla. 413.

**108. 4. Funk v. Funk,** 81 Ill. App. 540.**Wife a Common Drunkard.**—In *Illinois* it is held that where the husband is granted a divorce on the ground of the wife being an habitual drunkard, he is not bound to pay her alimony. Becklenberg v. Becklenberg, 102 Ill. App. 504.**5. Sworn Denial by Wife of Charge of Adultery.**—Glaser v. Glaser, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 231; Israel v. Israel, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 57; Levy v. Levy, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 374.**109. 1. Bordeaux v. Bordeaux,** 29 Mont. 478; Masey v. Masey, 58 N. Y. App. Div. 619.**7. Corbin v. Corbin,** 16 Pa. Co. Ct. 448.**110. 1. Trial Court May Order Alimony to Continue During Appeal.**—Gay v. Gay, (Cal. 1905) 79 Pac. Rep. 885; People v. Circuit Ct., 169 Ill. 201; Haddock v. Haddock, 75 N. Y. App. Div. 565; Middleton v. Middleton, 19

Pa. Co. Ct. 353; McNeil v. McNeil, 19 Pa. Co. Ct. 93.

**2. Hall v. Hall,** 77 Miss. 741.**In Appellate Court.**—In *Prine v. Prine*, 36 Fla. 676, it was held that the appellate court may entertain a petition for the allowance of alimony.In *Missouri* it has been held that the appellate court has the power to grant the wife an allowance to cover the expense of the appeal, if it appears that the appeal was taken in good faith and was not without merit although unsuccessful. Viertel v. Viertel, 99 Mo. App. 710.**3. Mahn v. Mahn,** 70 Mo. App. 337; Rosenfeld v. Rosenfeld, 63 Mo. App. 411.**111. 1. Allowance Not Matter of Absolute Right.**—Brasch v. Brasch, 50 Neb. 73; Von Trott v. Von Trott, 118 Wis. 29.**2. Amount Within Discretion of Court.**—Sykes v. Sykes, (1897) P. 306; Plant v. Plant, 63 Ark. 128; Gray v. Gray, 74 Ill. App. 509; McCue v. McCue, 149 Ind. 466; Campbell v. Campbell, (Ky. 1899) 50 S. W. Rep. 849; Reed v. Reed, (Neb. 1904) 98 N. W. Rep. 73; Patterson v. Patterson, 4 N. Y. App. Div. 146; Moore v. Moore, 130 N. Car. 333; Bloom v. Bloom, 17 Pa. Co. Ct. 478; Pollock v. Pollock, 7 S. Dak. 331; Goff v. Goff, 54 W. Va. 364; Wass v. Wass, 42 W. Va. 460.**Payments Made by Husband to Be Deducted.**—Where a husband has made payments under an order which is subsequently modified he is not entitled to a credit for the excess payment. Johnson v. Johnson, (Tenn. Ch. 1898) 49 S. W. Rep. 305.**Upon the Discontinuance of the Action** the amount of alimony due is the sum measured and fixed by the court which was required in discharge of the obligation and duty. Shepard v. Shepard, 99 N. Y. App. Div. 308.**112. 3. Allowance of One-fifth of Joint Income.**—Kettlewell v. Kettlewell, (1898) P. 138.**When the Husband's Income Is Large,** less than one-fifth may be allowed, the practice being not to regard the proportion so much as to fix a sum which appears to be adequate, having regard to the wife's position in life and necessities. Sykes v. Sykes, (1897) P. 306.**5. Illustrations.**—In *Moore v. Moore*, 130 N.

- 113.** *b. EXPENSES OF SUIT.* — See note 1.  
*Prevailing Rule — Common-law Right.* — See note 3.
- 114.** *Nature of Expenses Allowed.* — See notes 2, 4.  
*c. COUNSEL FEES.* — See note 5.
- 115.** *Rights of Wife's Attorney Against Husband.* — See notes 1, 2, 3.  
*Number of Counsel.* — See note 4.
- 116.** *Agreement by Attorney for Contingent Fee.* — See note 2.  
*Dismissal of Divorce Suit by Husband.* — See note 4.

Car. 333, an allowance of \$4,000 alimony *pendente lite* was held not to be excessive where the defendant was worth from \$80,000 to \$100,000.

Where the husband has no property and the evidence shows him unable to procure employment an allowance of \$350 as alimony and \$25 a month, with \$300 as counsel fees, was held to be excessive. *Culpepper v. Culpepper*, 98 Ga. 304.

An allowance of \$40 as temporary alimony has been held to be insufficient where the evidence shows the wife was put to the expense of \$60 in taking depositions. *Cairnes v. Cairnes*, 29 Colo. 260, 93 Am. St. Rep. 55.

Where the husband conceded that he earned \$20 per week, and there was not sufficient evidence that he earned \$50 per week as alleged by the wife, an allowance of \$12 per week was held proper. *Weigand v. Weigand*, 103 N. Y. App. Div. 293.

For other examples, see *Meyer v. Meyer*, (Cal. 1898) 52 Pac. Rep. 485; *Baker v. Baker*, 136 Cal. 302; *Ayers v. Ayers*, 99 Ga. 325; *Grove v. Grove*, 79 Mo. App. 142.

**113.** 1. *Storke v. Storke*, 116 Cal. 47; *Allen v. Superior Ct.*, 133 Cal. 504; *McCue v. McCue*, 149 Ind. 466; *Bordeaux v. Bordeaux*, 29 Mont. 478; *Reed v. Reed*, (Neb. 1904) 98 N. W. Rep. 73; *Shepherd v. Shepherd*, 18 Pa. Co. Ct. 614; *Smith v. Smith*, 51 S. Car. 384, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92.

3. *States Where Granted Independently of Statute.* — *Kunze v. Kunze*, (Supm. Ct. Spec. T.) 5 N. Y. Annot. Cas. 8.

**114.** 2. *Earle v. Earle*, 75 Ill. App. 351.

*Only Necessary Expenses* should be provided for, and the defendant should not be made to pay for a stenographer's minutes of a mistrial, they not being necessary. *Herrmann v. Herrmann*, 88 N. Y. App. Div. 76.

*Past Expenses.* — *Lynch v. Lynch*, 99 Ill. App. 454; *Bordeaux v. Bordeaux*, 29 Mont. 478.

*Prospective Expenses.* — *Stevenson v. Stevenson*, 19 Ont. Pr. 48. Compare *Gallagher v. Gallagher*, 17 Ont. Pr. 575.

4. *Expense of Investigating and Obtaining Information.* — *Fernald v. Fernald*, 5 Pa. Super. Ct. 629.

5. *Allowance of Counsel Fees.* — *Meyer v. Meyer*, (Cal. 1898) 52 Pac. Rep. 485; *Hinton v. Hinton*, 117 Ga. 547; *Hilker v. Hilker*, 153 Ind. 425; *Donnelly v. Donnelly*, 78 S. W. Rep. 182, 25 Ky. L. Rep. 1543; *McCloskey v. McCloskey*, 68 Mo. App. 199; *Van Vleck v. Van Vleck*, 21 N. Y. App. Div. 272; *Carden v. Carden*, (Tenn. Ch. 1896) 37 S. W. Rep. 1022; *McClelland v. McClelland*, (Tex. Civ. App. 1896) 37 S. W. Rep. 350. Compare *Gallagher v. Gallagher*, 17 Ont. Pr. 575.

Where the wife is not in fault and has no estate, the husband is liable for her attorney's fees, though the case is settled and the parties reconciled before a hearing takes place. *Evans v. Stewart*, (Ky. 1897) 38 S. W. Rep. 697.

*Allowance on Appeal.* — An allowance for attorney's fee on appeal will not be made in the absence of proof as to the ability of the husband to pay. *Engleman v. Engleman*, 97 Va. 487.

**115.** 1. *Claim of Attorney for Fees.* — *Ander-son v. Steger*, 173 Ill. 112; *Garrison v. Garri-son*, 150 Ind. 417; *Yeiser v. Lowe*, 50 Neb. 310; *Millady v. Stein*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 652; *Naumer v. Gray*, 28 N. Y. App. Div. 529; *Kellogg v. Stoddard*, 89 N. Y. App. Div. 137.

*Lien.* — An attorney for the wife has no lien for his fees. *Carden v. Carden*, (Tenn. Ch. 1896) 37 S. W. Rep. 1022.

2. *Lynch v. Lynch*, 99 Ill. App. 454; *Werres v. Werres*, 102 Ill. App. 360; *Miles v. Miles*, 102 Ill. App. 130.

3. *Hays v. Ledman*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 575.

4. *Proof of the Amount of Labor or the Value of Services.* — *Hutchinson v. Hutchinson*, 105 Ill. App. 349; *Blair v. Blair*, 74 Iowa 311.

*In Determining the Reasonableness of the Amount.* — *Rose v. Rose*, 109 Cal. 544.

*Illustrations as to Number of Counsel and Amount of Fees.* — A fee of \$8,000 was allowed where the husband was shown to be worth \$1,000,000. *Harding v. Harding*, 180 Ill. 592.

Five hundred dollars allowed as counsel fee for four attorneys was held to be excessive in the absence of proof of the necessity of four counsel. *Rogers v. Rogers*, 103 Ga. 763.

A fee of \$250 was reduced to \$75 in the case of *Plant v. Plant*, 63 Ark. 128.

In making an allowance for attorney's fee the court should determine from the evidence what would be a reasonable amount. *Schneider v. Kohn*, 70 S. W. Rep. 287, 24 Ky. L. Rep. 924.

In *Hughbanks v. Hughbanks*, 76 S. W. Rep. 355, 25 Ky. L. Rep. 840, it was held that a fee of \$300, allowed counsel in a suit for separation from bed and board, was a reasonable allowance.

**116.** 2. *Van Vleck v. Van Vleck*, 21 N. Y. App. Div. 272.

*Part of Alimony.* — An agreement between the wife and her counsel, whereby the attorney is to receive a share of the alimony as compensation for his services, is void as against public policy and because such a claim is not assignable. *Lynde v. Lynde*, 64 N. J. Eq. 736, 97 Am. St. Rep. 692.

4. *O'Neil v. O'Neil*, 100 Iowa 743.

*Upon Reconciliation.* — The husband is liable for the fee of the wife's attorney though the

**116.** After Adverse Termination of Wife's Suit. — See note 5.

8. Termination. — See note 7.

**117.** See note 2.

Upon the Death of Either Party. — See note 3.

**IV. PERMANENT ALIMONY — 1. Nature.** — See note 5.

Assignability. — See note 6.

**2. In Dissolution and Nullity Suits — At Common Law.** — See note 8.**118.** See note 1.

The Matter of Alimony Is Regulated by Statute. — See note 2.

**3. Where Wife Is in Fault.** — See note 4.

suit for divorce was instituted by him and the parties became reconciled and the suit was dismissed at the wife's directions, before a hearing. *Powell v. Lilly*, 68 S. W. Rep. 123, 24 Ky. L. Rep. 193.

**Setting Aside Dismissal.**—The court has power to set aside a dismissal of a suit by the husband at the same term and allow alimony. *Woodward v. Woodward*, 84 Mo. App. 328.

**116. 5.** *Corder v. Speake*, (Oregon 1898) 51 Pac. Rep. 647. *Contra*, *Bordeaux v. Bordeaux*, 29 Mont. 478.

**7. Termination of Proceedings.**—*Wald v. Wald*, 124 Iowa 183; *Ulbricht v. Ulbricht*, 89 Hun (N. Y.) 479; *State v. Second Judicial Dist. Court*, (Montana 1905) 79 Pac. Rep. 13.

**117. 2. After Dismissal of Bill.**—Where a wife dismisses her bill before issue is joined, the attorneys for the wife are not entitled to any allowance. *Carden v. Carden*, (Tenn. Ch. 1896) 37 S. W. Rep. 1022.

**3.** *Kellogg v. Stoddard*, 89 N. Y. App. Div. 137. See also *Shepard v. Shepard*, 99 N. Y. App. Div. 308.

**Past-due Alimony** may be enforced against the estate of the decedent. See *Shepard v. Shepard*, 99 N. Y. App. Div. 308.

**5.** "Alimony, as distinguished from suit money, is founded on the duty of the husband to maintain the wife, and it is the duty of the judiciary to enforce this duty in a proper case." *Motley v. Motley*, 93 Mo. App. 473.

**Not in Lieu of Dower.**—Under Ga. Civ. Code, § 2464 *et seq.*, the allowance of permanent alimony bars the dower right of the wife. *Harris v. Davis*, 115 Ga. 950.

In *Ohio* the decree for alimony may recite that it is in lieu of dower, and if it does is a bar to the claim of the wife for any such right. *Julier v. Julier*, 62 Ohio St. 90, 78 Am. St. Rep. 697.

**6. Not Assignable.**—*Watkins v. Watkins*, (1896) P. 222; *Lynde v. Lynde*, 64 N. J. Eq. 736, 97 Am. St. Rep. 692. *Compare* *Maclurcan v. Maclurcan*, 77 L. T. N. S. 474.

**Discharge in Insolvency.**—*Turner v. Turner*, 108 Fed. Rep. 785, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 117; *Audubon v. Shufeldt*, 181 U. S. 575; *Welly v. Welly*, 96 Ill. App. 141; *Young v. Young*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 335; *Maisner v. Maisner*, 62 N. Y. App. Div. 286; *Arrington v. Arrington*, 131 N. Car. 143, 92 Am. St. Rep. 769; *Lemert v. Lemert*, 25 Ohio Cir. Ct. 253. See also *Kerr v. Kerr*, (1897) 2 Q. B. 439. And see generally the title INSOLVENCY AND BANKRUPTCY.

**Inhibition of Imprisonment for Debt Not Applicable.**—*Kerr v. Kerr*, (1897) 2 Q. B. 439;

*Webb v. Webb*, 140 Ala. 262; *In re Popejoy*, 26 Colo. 32, 77 Am. St. Rep. 222; *Bronk v. State*, 43 Fla. 461, 99 Am. St. Rep. 119; *Barclay v. Barclay*, 184 Ill. 375; *State v. King*, 49 La. Ann. 1503; *Ervay v. Ervay*, 120 Mich. 525; *Hurd v. Hurd*, 63 Minn. 443; *State v. Jamison*, 69 Minn. 427; *Ronan v. Ronan*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 467; *Hutchison v. Canon*, 6 Okla. 725; *Matter of Cave*, 26 Wash. 213, 90 Am. St. Rep. 736; *State v. Ditmar*, 19 Wash. 324; *State v. Smith*, 17 Wash. 430. *Contra*, *Leeder v. State*, 55 Neb. 133.

But where the defendant is unable to pay the alimony awarded he cannot be held in contempt. *Ex p. Silvia*, 123 Cal. 293, 69 Am. St. Rep. 58.

**Alimony Is Not Itself an "Estate."**—*Lynde v. Lynde*, 64 N. J. Eq. 736, 97 Am. St. Rep. 692.

**8.** *Taylor v. Taylor*, 7 Colo. App. 549; *Park v. Park*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 372; *Herron v. Herron*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 323.

**118. 1.** *Wabberson v. Wabberson*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 125.

In *Prine v. Prine*, 36 Fla. 676, it was held that the chancery court has inherent power to grant alimony to the wife in a suit by the husband to declare the marriage void *ab initio*.

**2. Statutes.**—In *Connecticut*, alimony may be awarded to the wife in suits to annul, and this right is not limited to where the woman is blameless or not equally in fault with the husband. *Stapleberg v. Stapleberg*, (Conn. 1904) 58 Atl. Rep. 233.

In *Kentucky* it has been held that the wife is entitled to alimony in all cases of separation where she was not in fault, though the husband procured the divorce. *Irwin v. Irwin*, 105 Ky. 632.

In *Texas* there can be no allowance for permanent alimony. The wife is entitled to alimony *pendente lite* and the final decree may order a division of community property, but cannot provide, by way of alimony, support or maintenance of the divorced wife. *Boyd v. Boyd*, 22 Tex. Civ. App. 200.

In *New York* the Supreme Court has power, under Code Civ. Proc., §§ 1742-1755, to award alimony and counsel fee in suits to annul. *Higgins v. Sharp*, 164 N. Y. 4.

**4. Misconduct of Wife.**—*Beeler v. Beeler*, (Ky. 1898) 44 S. W. Rep. 136.

*After Divorce a Mensa.*—In divorce *a mensa et thoro* the wife is still under the obligation of chastity, and alimony is conditioned upon her good behavior in this respect. *G. v. G.*, (N. J. 1903) 56 Atl. Rep. 736.

*Though the Wife Obtained the Divorce, still,*

- 119.** Statutory Provisions. — See notes 1, 2, 3.  
 Rule Relaxed under Special Circumstances. — See note 4.
- 120.** And Where the Entire Blame Does Not Rest on the Wife. — See note 3.  
 4. Amount — *a.* IN GENERAL — Matter of Judicial Discretion. — See note 4.
- 121.** One-third of Husband's Income Usual Rule. — See note 1.
- 122.** Where Wife Has Contributed to Husband's Property. — See note 3.  
 Interest. — See note 5.
- 123.** *b.* CIRCUMSTANCES DETERMINING — (1) *Estate and Faculties of Husband.* — See note 2.  
 The Fact that the Husband Has No Estate. — See note 3.
- 124.** What Property to Be Taken into Account. — See note 1.
- 125.** (2) *Means and Condition of Wife* — When Wife in Comfortable Circumstances. — See note 2.

where it was clearly shown that she was in fault and the husband was an old man having no trade or profession, alimony was not allowed. *Garrett v. Garrett*, (Ky. 1898) 44 S. W. Rep. 112.

**Where the Wife Refuses to Live with Her Husband**, without cause she is not entitled to recover alimony of him in a divorce proceeding. *Isaacs v. Isaacs*, (Neb. 1904) 99 N. W. Rep. 268.

**119.** 1. *Motley v. Motley*, 93 Mo. App. 473. See also *De Hoog v. De Hoog*, 65 Mo. App. 246.  
 2. *Pauly v. Pauly*, (Okla. 1904) 76 Pac. Rep. 148.

In *Kentucky*, by statute, the husband is liable for alimony and attorney's fee in addition, unless it appears that the wife is in fault and that she has ample estate to pay the costs. It has been held that both of these conditions must exist before the wife can be taxed with the costs. *Turner v. Turner*, 62 S. W. Rep. 1022, 23 Ky. L. Rep. 370.

**3. It Is Entirely Within the Discretion of the Court** to order an allowance under such a statute, and the wife need not show special circumstances to entitle her to the order — such as the misconduct of her husband. *Ashcroft v. Ashcroft*, (1902) P. 270.

**4.** *Alderson v. Alderson*, 113 Ky. 830; *Pore v. Pore*, (Ky. 1899) 50 S. W. Rep. 681.

"It is not the rule in this state that the party in the wrong can have no alimony under any circumstances." *McDonald v. McDonald*, 117 Iowa 307.

**120.** 3. *Raper v. Raper*, 58 Kan. 590.

**4. Question of Amount Largely Matter of Discretion.** — *Cobb v. Cobb*, (1900) P. 294; *Benham v. Benham*, 208 Ill. 98; *Harding v. Harding*, 79 Ill. App. 590; *Stutsman v. Stutsman*, 30 Ind. App. 645; *Young v. Young*, 59 Kan. 775, 52 Pac. Rep. 889; *Franck v. Franck*, 107 Ky. 362; *Youngs v. Youngs*, 78 Mo. App. 225; *Kimbro v. Kimbro*, (Neb. 1905) 102 N. W. Rep. 271.

**121.** 1. **General Rule — One-third of Husband's Income.** — *Cobb v. Cobb*, (1900) P. 294; *Irwin v. Irwin*, (Ky. 1900) 55 S. W. Rep. 199; *Wilson v. Wilson*, 67 Minn. 444; *Griffin v. Griffin*, 18 Utah 98; *Edleman v. Edleman*, (Wis. 1905) 104 N. W. Rep. 56.

**One-third of Joint Incomes**, when wife has means of her own, apart from her husband. *Kettlewell v. Kettlewell*, (1898) P. 138; *Cobb v. Cobb*, (1900) P. 294.

**When the Husband's Income Is Very Large**,

less than one-third may be allowed, if the provision is ample considering the circumstances. *Kettlewell v. Kettlewell*, (1898) P. 138.

In *Arkansas* the wife is entitled by statute to one-third of the husband's personalty absolutely, and one-third for life of all the real estate of which he is seized. *Beene v. Beene*, 64 Ark. 518.

**122.** 3. **Where Wife Has Brought Property to the Husband.** — *Champion v. Myers*, 207 Ill. 308; *Casey v. Casey*, 116 Iowa 655.

Where the joint labor, care, and investments of both parties produced the property of the husband, an allowance to the wife of about one-half of such property was held to be reasonable in a case where such wife was weak, sickly, and unable to earn her own living. *Metcalfe v. Metcalfe*, (Neb. 1905) 102 N. W. Rep. 79.

**5. Interest.** — *Huellmantel v. Huellmantel*, 124 Cal. 583; *Harding v. Harding*, 79 Ill. App. 621.

**123.** 2. **Considerations Determining Amount.** — *Walton v. Walton*, 64 J. P. 264; *Fredericks v. Sault*, 19 Ind. App. 604; *Boreing v. Boreing*, 114 Ky. 522; *Parsons v. Parsons*, (Ky. 1904) 80 S. W. Rep. 1187; *Hall v. Hall*, 77 S. W. Rep. 668, 25 Ky. L. Rep. 1304; *Heist v. Heist*, 48 Neb. 794; *Walton v. Walton*, 57 Neb. 102; *Zimmerman v. Zimmerman*, 59 Neb. 80; *Metcalfe v. Metcalfe*, (Neb. 1905) 102 N. W. Rep. 79; *Read v. Read*, (Utah 1904) 78 Pac. Rep. 675.

**Income to Which Husband Has No Legal Claim.** — It is proper to take into consideration an income the payment of which the husband has no legal power to enforce — such as a voluntary allowance made him by his brother. *Bonsor v. Bonsor*, (1897) P. 77.

**3. Husband Without Property — Ability to Earn Money.** — *Compare Dupuis v. St. Mars*, 5 Quebec Pr. 404; *Gaston v. Gaston*, 114 Cal. 542, 55 Am. St. Rep. 86; *Snedager v. Kincaid*, 60 S. W. Rep. 522, 22 Ky. L. Rep. 1347; *Downing v. Downing*, (N. J. 1903) 54 Atl. Rep. 542.

**124.** 1. **Pension Money.** — *Bailey v. Bailey*, 76 Vt. 264.

**125.** 2. **Where Wife Has Sufficiency.** — Where a wife owned property yielding an annual rental of \$300, besides having other investments, and was not entirely blameless, it was held that she was not entitled to alimony although her husband owned 300 acres of land worth \$12,000, which, however, was covered by a mortgage for \$7,500, and he was otherwise



**125.** When Husband Has Already Provided for Wife. — See note 3.

**126.** Where the Parties Accustomed to Rely upon Their Joint Labors. — See note 1.

(3) *Dependencies — Children.* — See note 2.

Children Intrusted to Mother. — See note 3.

But Where the Children Are Grown Up. — See note 5.

(4) *Conduct of the Parties.* — See note 6.

**127.** Wife's Misconduct. — See note 1.

c. EFFECT OF AGREEMENT BETWEEN THE PARTIES — Before Divorce.

— See note 2.

After Divorce. — See note 4.

Court Adopting Agreement of the Parties. — See note 5.

**128.** See note 1.

d. ILLUSTRATIONS AS TO AMOUNT. — See note 3.

in debt. *Henry v. Henry*, 76 S. W. Rep. 130, 25 Ky. L. Rep. 596.

**125. 3. Not Bar to Alimony.**— This, however, is not a bar to the wife's right to alimony, though it may be considered in determining the amount. *McKnight v. McKnight*, (Neb. 1904) 98 N. W. Rep. 62.

**126. 1. Where Parties Labored Jointly.**— Where the wife is of middle age and in good health and in great part supporting herself, in the absence of any reason showing why permanent alimony should be made, an order to that effect will not be made. *Abele v. Abele*, 62 N. J. Eq. 644.

2. *Bloom v. Bloom*, 22 Pa. Co. Ct. 433.

**3. Maintenance of Children.**— *Anderson v. Anderson*, 123 Cal. 48, 71 Am. St. Rep. 17; *Harding v. Harding*, 79 Ill. App. 590.

Where the mother was awarded the custody of four small children, an allowance of one-half of the personal property and of two hundred acres of land she had assisted her husband in accumulating, was held not excessive. *Crabtree v. Crabtree*, (Ky. 1905) 85 S. W. Rep. 211.

5. *Streitwolf v. Streitwolf*, 58 N. J. Eq. 570.

**6. Conduct of Parties to Be Considered.**— *Donnelly v. Donnelly*, 78 S. W. Rep. 182, 25 Ky. L. Rep. 1543.

**127. 1. Wife in Fault.**— *Goodsell v. Goodsell*, 82 N. Y. App. Div. 65, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 127; *Stearns v. Stearns*, 33 N. Y. App. Div. 630.

In *Smith v. Smith*, (Ky. 1905) 86 S. W. Rep. 678, it was held that if the wife was the principal cause of the family disturbances, she was not entitled to alimony, especially as the husband was in poor health and had barely enough to support himself in his old age.

**2. Agreement Intended to Promote Dissolution Void.**— *Birch v. Anthony*, 109 Ga. 350, 77 Am. St. Rep. 379, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 127; *Foote v. Nickerson*, 70 N. H. 496; *Buttlar v. Buttlar*, 57 N. J. Eq. 645, 73 Am. St. Rep. 648; *Poillon v. Poillon*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 666, affirmed 49 N. Y. App. Div. 341; *Palmer v. Palmer*, 26 Utah 47. Compare *Bishop v. Bishop*, (1897) P. 138; *Barry v. Barry*, (1901) P. 87; *King v. Molohan*, 61 Kan. 683; *Gibbons v. Gibbons*, (Ky. 1900) 54 S. W. Rep. 710; *Kefauver v. Kefauver*, (Ky. 1900) 57 S. W. Rep. 467; *Parsons v. Parsons*, 62 S. W. Rep. 719, 23 Ky. L. Rep. 223; *Vandegrift v. Vandegrift*, 63 N. J. Eq. 124. And see generally the title ILLEGAL CONTRACTS.

4. *Fleming v. Peterson*, 167 Ill. 465; *Garrett v. Garrett*, (Ky. 1898) 44 S. W. Rep. 112.

5. *Collier v. Collier*, 66 Ill. App. 484; *Masterson v. Masterson*, (Ky. 1898) 46 S. W. Rep. 20.

**128. 1.** *Cavanaugh v. Cavanaugh*, 106 Ill. App. 209.

**3. The Following Allowances Have Been Made.**— Three thousand pounds a year, where the husband's annual income was nineteen thousand pounds. *Kettlewell v. Kettlewell*, (1898) P. 138.

Five hundred dollars a year alimony and three hundred dollars a year for the support of each of two children, when this amount is but a little more than half of the defendant's income. *Valentine v. Valentine*, 87 N. Y. App. Div. 156.

An allowance of \$2,400, where the husband's income is \$4,500 per year and the wife was given the custody of four children. *Harris v. Harris*, 83 N. Y. App. Div. 123.

Fourteen hundred dollars, where the husband owned personal property worth about \$1,140 and a farm worth about \$3,350. *Templeton v. Templeton*, 126 Mich. 44.

For various other instances, see the following cases: *Rast v. Rast*, 113 Ala. 319; *Stapleberg v. Stapleberg*, (Conn. 1904) 58 Atl. Rep. 233; *Elzas v. Elzas*, 171 Ill. 632; *Driver v. Driver*, (Ind. 1898) 52 N. E. Rep. 401; *Dorsey v. Dorsey*, 29 Ind. App. 248; *Haight v. Haight*, (Iowa 1900) 82 N. W. Rep. 443; *Aitchison v. Aitchison*, 99 Iowa 93; *Walker v. Walker*, (Iowa 1905) 102 N. W. Rep. 435; *Russell v. Russell*, (Ky. 1895) 32 S. W. Rep. 619; *Trapp v. Trapp*, (Ky. 1898) 46 S. W. Rep. 213; *Bristow v. Bristow*, (Ky. 1899) 51 S. W. Rep. 819; *Baker v. Baker*, (Ky. 1905) 85 S. W. Rep. 729; *Thompson v. Thompson*, (Ky. 1905) 85 S. W. Rep. 730; *Dale v. Hauer*, 109 La. 711; *Gagneaux v. Desonier*, 51 La. Ann. 1095; *Adams v. Seibly*, 115 Mich. 402; *Schabel v. Schabel*, 115 Mich. 487; *Horning v. Horning*, 107 Mich. 587; *Kirkland v. Kirkland*, 111 Mich. 166; *Streitwolf v. Streitwolf*, (N. J. 1900) 47 Atl. Rep. 14; *Mayer v. Mayer*, (N. J. 1901) 49 Atl. Rep. 1078; *Read v. Read*, (Utah 1904) 78 Pac. Rep. 675; *Trimble v. Trimble*, 97 Va. 217; *Owens v. Owens*, 96 Va. 191.

**Excessive Allowances.**— Where the husband earned from his profession about \$5,000 a year and owned real estate worth \$15,000, the greater part of which was unproductive, an allowance of \$7,500 as alimony was held to be excessive. *Irwin v. Irwin*, 105 Ky. 632.

**129.** 5. Mode of Allowance — Periodical Payments. — See note 1.

**130.** Divesting Husband of Fee Simple. — See note 1.

Consent of Parties. — See note 3.

Statutes Authorizing Sum in Gross — Portion of Estate — Restoration of Property.

— See note 6.

**132.** 6. Lien of Alimony — Pendency of Bill for Divorce and Alimony. — See note 6.

**133.** Effect of Decree for Alimony. — See notes 2, 3.

**134.** Intervening Creditors. — See note 1.

Transfers by Husband — Good Faith. — See note 3.

In Anticipation of Divorce Proceedings. — See note 4.

**135.** 7. Commencement of Payment. — See note 4.

**136.** 8. Modification of Allowance — *a.* IN GENERAL. — See note 1.

An allowance of \$75 per month as alimony has been held excessive where the husband's estate merely consisted of land worth about \$19,000 and he had others dependent upon him. *Gooding v. Gooding*, 104 Ky. 755.

Where a wife has, in her own right, property worth about \$6,500 an award of \$5,500 as alimony is excessive if the husband, sixty-five years of age, is left with encumbered property to the value of \$22,700, from which he must pay an indebtedness of \$6,000 and the alimony. *Kimbrow v. Kimbrow*, (Neb. 1905) 102 N. W. Rep. 271.

An allowance of an unencumbered farm valued at \$6,000, and \$400 in cash and \$100 a year for two years and \$50 a year for three years, was held to be excessive where the husband was worth only about \$17,000 and owed \$4,900. *Roelke v. Roelke*, 103 Wis. 204.

For Further Illustrations as to Amount, see *Anderson v. Anderson*, 124 Cal. 48, 71 Am. St. Rep. 17; *Eickhoff v. Eickhoff*, 29 Colo. 295, 93 Am. St. Rep. 64; *Aurand v. Aurand*, 157 Ill. 321; *Stutsman v. Stutsman*, 30 Ind. App. 645; *Goldie v. Goldie*, 123 Iowa 178; *McDonald v. McDonald*, 117 Iowa 307; *Kefauver v. Kefauver*, (Ky. 1900) 57 S. W. Rep. 467; *Wagoner v. Wagoner*, 128 Mich. 635; *Donaldson v. Donaldson*, 134 Mich. 289; *Van Der Beck v. Van Der Beck*, 124 Mich. 479; *Tietken v. Tietken*, 60 Neb. 138; *Randall v. Randall*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 423; *Hoernig v. Hoernig*, 109 Wis. 229; *Lindenmann v. Lindenmann*, 118 Wis. 175; *McChesney v. McChesney*, 91 Wis. 268.

**129.** 1. Payment by Instalments. — *Twentyman v. Twentyman*, (1903) P. 82.

**130.** 1. Husband May Not Be Divested of Fee Simple. — But this does not mean that the wife may not enforce a judgment for alimony by execution against the property of the husband. *Tyler v. Tyler*, 99 Ky. 31.

Where Husband and Wife Hold Jointly a decree may be made awarding the property to the wife, where the husband owns other property. *Reeves v. Reeves*, 117 Mich. 526.

**3.** Agreement of Parties to Gross Sum. — *MacLurcan v. MacLurcan*, 77 L. T. N. S. 474.

**6.** Allowance in Gross — Division of Estate, Etc. — *Marsh v. Marsh*, 162 Ind. 210; *Gooding v. Gooding*, 104 Ky. 755; *De Roche v. De Roche*, 12 N. Dak. 17; *Uhl v. Irwin*, 3 Okla. 388; *Hubbard v. Hubbard*, (Tex. Civ. App. 1896) 38 S. W. Rep. 388; *Hooper v. Hooper*, 102 Wis. 598.

Household Furniture. — *Fletcher v. Fletcher*, (Ky. 1900) 54 S. W. Rep. 953.

**132.** 6. Rights of Purchasers. — A conveyance by the husband pending an action for divorce, which is made for the purpose of defeating a claim for alimony, passes a good title except as against the wife. *Fiske v. Fiske*, 173 Mass. 413. See also the title FRAUDULENT SALES AND CONVEYANCES.

**133.** 2. When Lien Created by Decree. — *Campbell v. Trosper*, 108 Ky. 602; *Glick v. Glick*, 110 Mich. 304; *Trumble v. Trumble*, 26 Wash. 133.

Statutory Lien. — *Foulds v. Foulds*, 12 Manitoba 389.

**3.** Court May Make Allowance a Charge. — *Gaston v. Gaston*, 114 Cal. 542, 55 Am. St. Rep. 86; *Huellmantel v. Huellmantel*, 124 Cal. 583; *Fletcher v. Fletcher*, (Ky. 1900) 54 S. W. Rep. 953.

Property of Nonresident. — *Bailey v. Bailey*, 127 N. Car. 474.

Lands Situated in Another County. — *Wesner v. O'Brien*, 56 Kan. 724, 54 Am. St. Rep. 604.

No Property in State. — Alimony cannot be allowed where the husband is nonresident and has no property in the state. *Johnson v. Matthews*, 124 Iowa 255; *Rea v. Rea*, 123 Iowa 241.

Restraint of Alienation Until Security for Alimony Is Given. — See *Twentyman v. Twentyman*, (1903) P. 82.

**134.** 1. *John v. John*, 5 Ohio Cir. Dec. 535, 12 Ohio Cir. Ct. 328.

**3.** *Johnson v. Johnson*, 22 Colo. 20, 55 Am. St. Rep. 113.

**4.** Fraudulent Transfers. — *Ruffenach v. Ruffenach*, 13 Colo. App. 102; *De Ruiter v. De Ruiter*, 28 Ind. App. 9, 91 Am. St. Rep. 107; *Dougan v. Dougan*, 90 Minn. 471, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 134. See also the title FRAUDULENT SALES AND CONVEYANCES.

Wife Within Statute of Fraudulent Conveyances. — *Hall v. Harrington*, 7 Colo. App. 474; *Maze v. Griffin*, 65 Mo. App. 377; *Maharry v. Maharry*, 5 Okla. 371. See also the title FRAUDULENT SALES AND CONVEYANCES.

When Husband, Pending Suit for Divorce. — *Ruffenach v. Ruffenach*, 13 Colo. App. 102.

**135.** 4. *Carroll v. Carroll*, 48 La. Ann. 835.

**136.** 1. Permanent Alimony upon Divorce a Mensa. — *Dushinsky v. Dushinsky*, (Supm. Ct. App. T.) 94 N. Y. Supp. 638.

**136.** But in the Case of a Decree a Vinculo. — See notes 3, 4, 5.

**137.** Change Should Be Made with Caution. — See notes 1, 2.

Wife Acquiring Property — Husband's Reduced Faculties. — See notes 4, 5.

**138.** Wife's Needs Greater or Husband's Resources Greater. — See note 3.

When Education of Children Completed. — See note 6.

An Agreement Is No Bar. — See note 7.

*b.* REMARRIAGE. — See note 9.

**139.** See notes 1, 2.

*c.* SUBSEQUENT ADULTERY OF WOMAN. — See note 3.

**136. 3. Divorce a Vinculo — General Rule, No Alteration.** — *Coffee v. Coffee*, 101 Ga. 787; *Law v. Law*, 64 Ohio St. 369; *Bassett v. Bassett*, 99 Wis. 344; *Reinhard v. Reinhard*, 96 Wis. 555.

**4. Qualification — Reservation in Decree.** — *Ex p. O'Brien*, (Cal. 1897) 48 Pac. Rep. 71; *Alexander v. Alexander*, 13 App. Cas. (D. C.) 334; *Demonet v. Burkhart*, 23 App. (D. C.) 308; *Daugherty v. Daugherty*, 171 Ill. App. 301; *Franck v. Franck*, 107 Ky. 362.

**New York.** — Before the passage of the amendments of 1894 and 1895 to Code Civ. Pro., § 1759, the courts did not have power to modify a decree for alimony after the entry of final judgment. *Walker v. Walker*, 155 N. Y. 77. See also *Gould v. Gould*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 334; *Noble v. Noble*, 20 N. Y. App. Div. 395; *Hauscheld v. Hauscheld*, 33 N. Y. App. Div. 296; *Livingston v. Livingston*, 46 N. Y. App. Div. 18.

**5. Qualification — Statutory Authorization — California.** — *Parkhurst v. Parkhurst*, 118 Cal. 18.

**Colorado.** — *Stevens v. Stevens*, 31 Colo. 188.

**District of Columbia.** — *Alexander v. Alexander*, 13 App. Cas. (D. C.) 334, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 136; *Demonet v. Burkhart*, 23 App. Cas. (D. C.) 308, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 136.

**Georgia.** — *Sumner v. Sumner*, 118 Ga. 408.

**Illinois.** — *Craig v. Craig*, 163 Ill. 176; *Welty v. Welty*, 96 Ill. App. 141; *Cavanaugh v. Cavanaugh*, 106 Ill. App. 209; *Shaw v. Shaw*, 59 Ill. App. 268.

**Kentucky.** — "It is always in the power of the chancellor, if the conditions change, to change the amount of alimony to conform to the necessities of the case." *Bristow v. Bristow*, (Ky. 1899) 51 S. W. Rep. 819.

**Minnesota.** — *Holmes v. Holmes*, 90 Minn. 466; *Barbaras v. Barbaras*, 88 Minn. 105.

**Missouri.** — *Burnside v. Wand*, 77 Mo. App. 382; *Scales v. Scales*, 65 Mo. App. 292.

**New Jersey.** — *Rigney v. Rigney*, 62 N. J. Eq. 8.

**Wisconsin.** — *Crugom v. Crugom*, 64 Wis. 253.

**137. 1. Ferguson v. Ferguson**, 111 Iowa 158; *Smith v. Smith*, 77 Minn. 67; *Holmes v. Holmes*, 90 Minn. 466; *Wetmore v. Wetmore*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 700; *Wetmore v. Wetmore*, 44 N. Y. App. Div. 220.

"There must be a showing either that further payments are not necessary, or of such an inability to pay as reasonably to excuse performance." *Palica v. Palica*, 114 Wis. 236.

**2. Change of Circumstances Must Have Occurred Since Original Decree.** — *Tobin v. Tobin*, 29 Ind.

App. 382; *Warren v. Warren*, 101 Ill. App. 308; *Cariens v. Cariens*, 50 W. Va. 113, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 137.

**4. Subsequent Acquisition of Property by Wife.** — *Smith v. Smith*, 77 Minn. 67.

**5. Husband's Reduced Resources.** — *Barbaras v. Barbaras*, 88 Minn. 105; *Beard v. Beard*, 57 Neb. 754; *Kunze v. Kunze*, (Supm. Ct. Spec. T.) 5 N. Y. Annot. Cas. 8; *Henderson v. Henderson*, 37 Oregon 147, 82 Am. St. Rep. 741. See also *Read v. Read*, (Utah 1904) 78 Pac. Rep. 675.

**138. 3. When Wife's Necessities Increase.** — *Halligan v. Halligan*, (1896) 1 Ir. R. 244. See also *Bishop v. Bishop*, (1897) P. 138.

**Sickness of Wife.** — The facts that the wife had been confined in a hospital for insane at a moderate rate and the husband has incurred great expense for medical aid and attendance were proper matters for consideration on an application to reduce an allowance. *Davis v. Davis*, 78 N. Y. App. Div. 500.

**6. Flower v. Flower**, (N. J. 1899) 44 Atl. Rep. 951.

**7. A Decree for Alimony May Not Be Vacated by Agreement.** — *Fricke v. Fricke*, 10 Ohio Cir. Dec. 203, 18 Ohio Cir. Ct. 433.

**9. Effect of Remarriage.** — *Morgan v. Lowman*, 80 Ill. App. 557; *Southworth v. Treadwell*, 168 Mass. 511; *Brandt v. Brandt*, 40 Oregon 477.

Where the wife married again and waited for seven years after her second marriage to enforce an allowance for alimony in the decree for divorce from her first husband, the court refused to enforce the payment of said alimony, the condition of the parties having materially changed. *Franck v. Franck*, 107 Ky. 362.

*The Remarriage of the Man* is no ground for reducing the amount of alimony decreed the first wife. *Smith v. Smith*, (Mich. 1905) 102 N. W. Rep. 631; *State v. Brown*, 31 Wash. 397.

**139. 1. Remarriage of Woman to One Able to Support Her.** — *Kiralfy v. Kiralfy*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 407.

**2. Allowance Dum Sola et Casta Vixerit.** — *Kettlewell v. Kettlewell*, (1898) P. 138.

**Insertion of Clause Dependent on Circumstances.** — *Kettlewell v. Kettlewell*, (1898) P. 138.

**Omission of "Et Casta."** — Where the wife's conduct during marriage was irreproachable, it was held that the allowance might be granted "*dum sola*," without adding the words "*et casta*," as the imposition of that condition should be restricted to cases where unchastity is not altogether improbable. *Smith v. Smith*, (1898) P. 29.

**3. Subsequent Adultery of Woman.** — *Cariens v. Cariens*, 50 W. Va. 113, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139.

**139.** 9. Termination — *a.* DEATH. — See note 6.

**140.** 10. Arrears of Alimony — Divorce from Bonds of Matrimony. — See note 7.  
Where Husband Has Unjustly Withheld Payments. — See note 9.

**141.** ALIZARIN. — See note 2.

ALL. — I. DEFINITION AND GENERAL RULES. — See note 3.

**143.** See notes 1, 3.

**145.** II. CONSTRUCTION IN WILLS. — See note 1.

**146.** Whether Fee Passes. — See notes 1, 11.

**147.** Wills — Additional Words of Description. — See note 8.

**148.** ALLEGIANCE. — See note 3.

**149.** ALLEY. — See notes 3, 5.

**151.** ALLONGE. — See note 1.

ALLOT — ALLOTMENT. — See note 6.

**152.** ALLOW. — See notes 2, 3.

**153.** ALLOWANCE. — See note 1.

In England, if the wife subsequently commits adultery, the husband is entitled, under § 7 of the Married Women's Act of 1895, to an order relieving him from making further payments to her; and this though he has been guilty of conduct conducing to the adultery. *Ruther v. Ruther*, (1903) 2 K. B. 270.

**139.** 6. In Absence of Statute, Ceases upon Death of Either Party. — See *Davidson v. Winteler*, 13 Quebec K. B. 97, *appeal quashed* 34 Can. Sup. Ct. 274; *Johns v. Johns*, 44 N. Y. App. Div. 533.

But in *Smith v. Smith*, (Cal. 1901) 64 Pac. Rep. 302, where the wife was awarded two-thirds of the community property and died pending the appeal, it was held that her grantee's title to the property awarded her could not be disturbed.

Where the Judgment Requires the Alimony to Be Secured by a Lien Upon Property, the obligation is personal so long as the husband lives and is imposed upon the security after his death. *Wilson v. Hinman*, 99 N. Y. App. Div. 41, *distinguishing* *Field v. Field*, (Supm. Ct. Spec. T.) 66 How. Pr. (N. Y.) 346, 15 Abb. N. Cas. (N. Y.) 434.

**140.** 7. *Coffman v. Finney*, 65 Ohio St. 61.  
**9.** Compare *Watkins v. Watkins*, (1896) P. 222.

**141.** 2. "*Alizarin*, whether natural or artificial, is a color for dyeing fabrics, and, though originally used for producing 'Turkey red,' was early used for producing a variety of colors, according to the nature of the mordant which was employed." *Farbenfabriken v. U. S.*, (C. C. A.) 102 Fed. Rep. 603. See also *Keppelmann v. U. S.*, 116 Fed. Rep. 777.

**3.** *Reed v. Reed*, (Ky. 1902) 66 S. W. Rep. 819.

See for the use of *all* in its comprehensive sense as applied to kin, *Lusby v. Cobb*, 80 Miss. 715.

All Cases. — *Saunders v. U. S.*, 73 Fed. Rep. 782; *Kellett v. Kellett*, 94 Tex. 206.

**143.** 1. *Field v. Thistle*, 58 N. J. Eq. 339.  
**3.** *Lobach v. Riegel*, 26 Pa. Co. Ct. 145, 11

Pa. Dist. 533, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.), title ALL; *Whicker v. Husshaw*, 159 Ind. 1; *Pittsburgh, etc., R. Co. v. Lightheiser*, (Ind. 1904) 71 N. E. Rep. 222.

**145.** 1. All the Best and Residue. — *Thomas v. Thomas*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 541; *In re Jeremy*, 178 Pa. St. 477.

**146.** 1. *Mulvane v. Rude*, 146 Ind. 476.

11. *Mulvane v. Rude*, 146 Ind. 476.

**147.** 8. *Williams v. Brice*, 201 Pa. St. 595.

**148.** 3. *U. S. v. Wong Kim Ark*, 169 U. S. 649.

**149.** 3. *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488.

**5.** Alleys Are Not Public Highways. — *Chicago v. Borden*, 190 Ill. 449, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 149; *Carpenter v. Capital Electric Co.*, 178 Ill. 34, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 149; *Milliken v. Denny*, 135 N. Car. 19. But see *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488.

Dedication. — See *Dodge v. Hart*, 113 Iowa 685.

**151.** 1. *Haug v. Riley*, 101 Ga. 372; *Bishop v. Chase*, 156 Mo. 158.

**6.** Indian Treaty. — *Minnesota v. Hitchcock*, 185 U. S. 373, *following* *Worcester v. Georgia*, 6 Pet. (U. S.) 582.

**152.** 2. *Thurman v. Adams*, 82 Miss. 204 (intoxicating liquor case), *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 152. See also *Marshall v. Franklin F. Ins. Co.*, 176 Pa. St. 636 (insurance case).

Allowed to Be Kept or Used. — The word *allowed* in an insurance policy providing that the policy should be void "if there be kept, used, or *allowed*" on the premises gasoline, means "*allowed* to be kept or used." *London, etc., F. Ins. Co. v. Fischer*, (C. C. A.) 92 Fed. Rep. 500.

**3.** *Thurman v. Adams*, 82 Miss. 204 (intoxicating liquor case), *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 152.

**153.** 1. Alimony — Whether the Term Allowance Imports a Stated Sum Payable Periodically. — *De Roche v. De Roche*, 12 N. Dak. 17.

# ALLOWANCES.

By LEO GOODMAN.

**156. II. ORIGIN AND NATURE** — 1. Origin. — See note 2.

2. Nature. — See note 3.

**157. III. BENEFICIARIES** — 1. Generally. — See note 1.

**158. 2. Allowance to Widow Alone.** — See notes 1, 2.

**159. 3. Allowance to Minor Children.** — See note 1.

**161. IV. AMOUNT OF ALLOWANCE.** — See notes 3, 4.

**162.** See note 1.

When Whole Estate Allowed. — See note 2.

**163. Reasonableness of Amount.** — See note 4.

**V. HOW ALLOWANCE MAY BE BARRED** — 1. Delay in Making Application. — See note 6.

**156. 2. Matter of Mersereau, (Surrogate Ct.)** 38 Misc. (N. Y.) 215, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 156.

**3. Nature of the Allowance.** — *Havens's Appeal*, 69 Conn. 684; *Goss v. Harris*, 117 Ga. 345; *Matter of Williams*, 31 N. Y. App. Div. 620, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 156; *Matter of Mersereau, (Surrogate Ct.)* 38 Misc. (N. Y.) 215; *Woolley v. Sullivan*, 92 Tex. 28; *Matter of Park*, 25 Utah 161.

**157. 1.** See *Matter of Mersereau, (Surrogate Ct.)* 38 Misc. (N. Y.) 215, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 157.

**"Family" Defined.** — *Goss v. Harris*, 117 Ga. 345; *Hollomon v. Hollomon*, 125 N. Car. 29. See also *Major v. Major, (Tenn. 1903)* 76 S. W. Rep. 817.

**158. 1. Exempt Property Vests in Widow Absolutely** under the *Kentucky* statutes. *Harris v. Adams*, 78 S. W. Rep. 156, 25 Ky. L. R. 1492.

**2. Nonresident Widow.** — *Comerford v. Coulter*, 82 Mo. App. 362; *Smith v. Smith*, 112 Ga. 351.

**159. 1.** *Matter of Gorkow*, 20 Wash. 573, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 159.

**Right of Children in Allowance.** — The widow, to the prejudice of the children, cannot appropriate the allowance to the payment of a personal obligation. *Hill v. Van Duzer*, 111 Ga. 867.

Under a statute allowing "the widow or the children," the widow may take to the exclusion of the children. *Henkel's Estate*, 13 Pa. Super. Ct. 337.

A waiver by the wife is effective against the children under the *Pennsylvania* statute. *Henkel's Estate*, 13 Pa. Super. Ct. 337.

**A Nonresident Minor** is entitled to a year's support. *Banse v. Muhme*, 7 Ohio Cir. Dec. 224, 13 Ohio Cir. Ct. 501.

**An Allowance to the Widow and Minor Children** vests a one-half interest in said minors. *McGuire v. Lynch*, 126 Cal. 576; *Woolley v. Sullivan*, 92 Tex. 28.

**161. 3. Statutes Fixing the Amount.** — *Hollomon v. Hollomon*, 125 N. Car. 29.

**Money in Lieu of Specific Articles.** — If the husband was not possessed of the articles exempted to the widow by the code, she is entitled to their value in money. *Matter of Hulse, (Surrogate Ct.)* 41 Misc. (N. Y.) 307; *Western Nat. Bank v. Rizer*, 12 Colo. App. 202. *Contra, Matter of Perry, (Surrogate Ct.)* 38 Misc. (N. Y.) 167; *Matter of Keough, (Surrogate Ct.)* 42 Misc. (N. Y.) 387.

**4. Amount Within Discretion of Court.** — *Matter of Lufkin*, 131 Cal. 291; *Matter of Lux*, 114 Cal. 89; *Matter of Slade*, 122 Cal. 434; *Havens's Appeal*, 69 Conn. 684; *Busby v. Busby*, 120 Iowa 536; *Chase v. Webster*, 168 Mass. 228.

**162. 1. Considerations Determining Amount.** — *Smith v. Smith*, 115 Ga. 692; *In re Mullen*, 6 Ohio Dec. 134.

In making allowances the court may take into consideration the character and amount of the estate left, and the provision the husband sought to make for the benefit of the widow, as well as her actual necessities. *Matter of Drasdo*, 36 Wash. 478.

**2. When Whole Estate Allowed.** — *Smith v. Smith*, 115 Ga. 692.

**163. 4. Allowance Held to Be Reasonable.** — *Read v. Franklin, (Tenn. Ch. 1900)* 60 S. W. Rep. 215; *Matter of Drasdo*, 36 Wash. 478.

**6. Undue Delay in Applying for Allowance.** — *Perkins v. Brinkley*, 133 N. Car. 86; *Holmes's Estate*, 20 Pa. Co. Ct. 434; *Elsasser's Estate*, 17 Pa. Super. Ct. 622; *Dutch's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 55; *Ehrehart's Estate*, 18 Pa. Co. Ct. 536.

**Delay of Seven Years** bars the right in *Illinois*. *Tarrant v. Kelly*, 81 Ill. App. 118.

**Delay of One Month** is immaterial. *Bower's Estate*, 17 Pa. Super. Ct. 59.

**Where No Intervening Rights Have Accrued**, a delay of thirteen months is harmless. *Irwin's Estate*, 6 Pa. Dist. 351.

**No Waiver.** — It being the duty of the appraisers to set off the allowance, there can be no waiver of her right by delay. *In re Rierdon*, 5 Ohio Dec. 606, 5 Ohio N. P. 516.

**A Justifiable Delay.** — Where the widow has demanded the statutory appraisement, she may claim her exemption out of the proceeds of

- 165.** 2. **Misconduct or Desertion.** — See notes 1, 2.  
**166.** **Divorce.** — See note 2.  
 3. **Antenuptial Agreement as a Bar.** — See note 3.  
**167.** 4. **Separate Estate as a Bar.** — See note 4.  
 5. **Testamentary Provisions as a Bar** — Intent. — See note 6.  
**168.** See note 1.  
**Renunciation of Provision of Will.** — See notes 2, 3.  
**But a Will Disposing of All Testator's Estate.** — See notes 4, 5.  
 6. **Death of Widow as a Bar.** — See note 6.  
**169.** See note 1.  
**VI. PRIORITY OVER OTHER CLAIMS.** — See notes 2, 3.

the sale of her husband's real estate. *Gibson's Estate*, 5 Pa. Super. Ct. 57.

Two years will not bar an ignorant aged widow, who had no knowledge of her rights. *Potter's Estate*, 6 Pa. Super. Ct. 627.

**Arkansas.** — A delay beyond the statutory limit for causing an appraisal will not bar the widow of her right. *Henry v. Tillar*, 70 Ark. 246.

**Remarriage of Widow as Bar.** — *Seittenspinner's Estate*, 6 Pa. Dist. 454.

**165.** 1. **Adultery.** — *Richard v. Lazard*, 108 La. 540.

Adultery at the time of the husband's death is no bar to her allowance. *In re Diller*, 6 Ohio Dec. 182.

**Where a Wife Continues to Be What She Was Known by Her Husband to Be When He Married Her**, and her acts are the acts that won him, and she but continues to pursue the ways he evidently desires her to pursue, she cannot be deprived of an allowance by a showing that her ways were not the ways of continence and sobriety. *Matter of Drasdo*, 36 Wash. 478.

**2. Desertion by Wife.** — *Creighton's Estate*, 21 Pa. Co. Ct. 83; *Welsh's Estate*, 18 Pa. Co. Ct. 517, 5 Pa. Dist. 675. See also *Welch v. Welch*, 181 Mass. 37.

**Desertion by Husband.** — See *Balmforth's Estate*, 26 Pa. Super. Co. Ct. 491.

**Separation by Mutual Consent** is a bar to her right of allowance. *Fisher v. Clopton*, 110 Mo. App. 663; *In re Roth*, 9 Ohio Dec. 429, 6 Ohio N. P. 498; *Linares v. De Linares*, 93 Tex. 84; *Matter of Park*, 25 Utah 161.

**166.** 2. **Divorce a Mensa et Thoro.** — *Evans's Estate*, 21 Pa. Super. Ct. 430.

3. *Cowles v. Cowles*, 74 Conn. 24; *Buffington v. Buffington*, 151 Ind. 200; *Perkins v. Brinkley*, 133 N. Car. 86; *Broadstone v. Baldwin*, 8 Ohio Dec. 236, 5 Ohio N. P. 39. See also the title **MARRIAGE SETTLEMENTS**.

**An Oral Agreement** made after marriage is no bar. *Yelton v. Kerns*, 16 Ind. App. 92.

**167.** 4. *Matter of Lux*, 114 Cal. 89. See also *Matter of Lufkin*, 131 Cal. 291.

6. *Whisnand v. Fee*, 21 Ind. App. 270; *Pierce v. Pierce*, 21 Ind. App. 184; *Matter of Mersereau*, (Surrogate Ct.) 38 Misc. (N. Y.) 215, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 167.

**Allowance Where Widow Is Beneficiary under Will.** — *Hill v. Kalamazoo Probate Judge*, 128 Mich. 77.

**168.** 1. *Matter of Lufkin*, 131 Cal. 291; *McCaughy v. Eades*, 78 Miss. 853.

2. **In Some States Allowance Barred Unless Will**

**Is Renounced.** — *Zunkel v. Colson*, 109 Iowa 695.

3. **Where Assertion of Both Rights Would Defeat Testator's Purpose.** — *Buffington v. Buffington*, 151 Ind. 200; *McDonald v. Moak*, 24 Ind. App. 528; *Whisnand v. Fee*, 21 Ind. App. 270; *In re Witner*, 10 Ohio Dec. 30, 7 Ohio N. P. 143.

4. **Testator Cannot Bar Allowance by Will.** — *Matter of Mersereau*, (Surrogate Ct.) 38 Misc. (N. Y.) 208; *Woolley v. Sullivan*, 92 Tex. 28.

5. **Testacy or Intestacy, Solvency or Insolvency, Does Not Bar Allowance.** — *Glenn v. Gunn*, 88 Mo. App. 442.

6. **In Some States Death Abates Petition for Allowance.** — *Carey v. Monroe*, 54 N. J. Eq. 632.

**169.** 1. **In Some States Death of Widow Not a Bar.** — *Matter of Lux*, 114 Cal. 89; *Swain v. Stewart*, 98 Ga. 366.

2. **Paramount to Claims of General Creditors.** — *Havens's Appeal*, 69 Conn. 684; *Commercial Bank v. Burckhalter*, 98 Ga. 736; *Goss v. Harris*, 117 Ga. 345; *King v. Battaglia*, (Tex. Civ. App. 1905) 84 S. W. Rep. 839.

**Liens Created by Law and Contract.** — *Blake v. Durrell*, 103 Ky. 600.

A landlord's lien for supplies and advances is superior to the widow's allowance. *Walker v. Patterson*, (Tex. Civ. App. 1903) 77 S. W. Rep. 437.

**A Surviving Partner** cannot set off a personal debt of the deceased against the widow's exemption. *Book v. O'Neil*, 2 Pa. Super. Ct. 306.

**Last Sickness, Funeral, and Administration Expenses**, by statute in *Utah* take precedence of the widow's allowance. *Matter of Thorn*, 24 Utah 209.

**Last Sickness, Funeral, and Administration Expenses.** — In *Texas*, claims for the expenses of the funeral and of the last sickness take precedence of the widow's and minor children's allowance. *Zieschang v. Helmke*, (Tex. Civ. App. 1904) 84 S. W. Rep. 436; *King v. Battaglia*, (Tex. Civ. App. 1905) 84 S. W. Rep. 839.

3. **Priority Over Specific Liens.** — *Enos v. Brant*, 24 Pa. Co. Ct. 416; *Cupp's Estate*, 14 York Leg. Rec. (Pa.) 16; *Zieschang v. Helmke*, (Tex. Civ. App. 1904) 84 S. W. Rep. 436. See also *Reed's Estate*, 22 Pa. Super. Ct. 935; *Beetern v. Getz*, 5 Pa. Super. Ct. 77, which cases support the second paragraph of the original note.

**Allowance a Debt Against the Estate.** — *In re Laurence*, 32 Tex. Civ. App. 465.

**Priority Over Mortgage.** — *Derrick v. Sams*, 114 Ga. 81; *Gleason v. Troynham*, 111 Ga. 887.

**170. VII. OUT OF WHAT PROPERTY TO BE DISCHARGED.**—See notes 1, 2.

**171.** Where the Appraisers Omit to Set Apart.—See note 3.

Partnership Property.—See note 5.

**172. VIII. INCREASE, DECREASE, AND DISCONTINUANCE**—1. Increase.—See note 3.

**173. ALLUVION.**—See note 5.

**ALMANAC.**—See note 6.

**174. ALMS-HOUSE.**—See note 2.

**175. ALONG.**—See note 1.

**176. ALONGSIDE.**—See note 1.

**177. ALREADY.**—See note 1.

**ALSO.**—See note 3.

**Lien Attaching When Husband Acquired Title.**—Brigham v. Brigham, 113 Ga. 810.

**Chattel Mortgage.**—The widow's allowance, in Georgia, is superior to a purchase-money mortgage lien on personal property. Puffer v. Caldwell, 111 Ga. 798.

**The State's Taxes** are superior to the widow's allowance. State v. Jordan, 25 Tex. Civ. App. 17.

**An Assignee's rights** are superior to those of the widow. Sterritt v. Lingo, 6 Ohio Dec. 481, 4 Ohio N. P. 366.

**The Joinder by a Married Woman in a Deed of Trust**, given by her deceased husband, does not deprive her or the minor children of the decedent, of the right, when the estate is insolvent, to have the proceeds of the sale of the property upon which the deed of trust was given, applied to the payment of the widow's and children's allowance for a year's support after the husband's death. King v. Battaglia, (Tex. Civ. App. 1905) 84 S. W. Rep. 839.

**170. 1. General Rule—Payable Out of Personality.**—Havens's Appeal, 69 Conn. 684; Elstroth v. Young, 88 Mo. App. 418.

**Tennessee.**—The year's allowance is not payable out of the general estate nor is it a charge on the realty, but is only payable out of the personal estate on hand or due. Cate v. Cate, (Tenn. Ch. 1897) 43 S. W. Rep. 365.

**2. California.**—The allowance to minors may be made out of any estate of the deceased, and it is immaterial whether the estate is a separate estate or a community one. Matter of Leslie, 118 Cal. 72.

**171. 3. Bower's Estate**, 17 Pa. Super. Ct. 59.

**5. Wood v. Brown**, 121 Ga. 471.

**172. 3. The Order of Allowance** is subject to rescission or modification at any time. Marskey v. Lawrence, 121 Mich. 577; *In re James*, (Neb. 1903) 97 N. W. Rep. 22.

**173. 5. Freeland v. Pennsylvania R. Co.**, 197 Pa. St. 540.

**6. Judicial Notice.**—Barnwell v. Marion, 58 S. Car. 464, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 173.

**174. 2. New York Poor Law.**—See People v. Lyke, 159 N. Y. 153; Matter of McCutcheon, (County Ct.) 25 Misc. (N. Y.) 650.

**English Statutes.**—A home provided for the reception or relief of poor persons is an *alms-house* and exempt from the landlord's property tax and the inhabited house duty. Mary Clark Home v. Anderson, (1904) 2 K. B. 645.

**175. 1. Railroads—Fires—Along Its Route.**—Martin v. Grand Trunk R. Co., 87 Me. 411.

**Along and Parallel—Telegraph Lines.**—Postal Tel.-Cable Co. v. Farmville, etc., R. Co., 96 Va. 661.

**Along the Shore of River—Whether Grantee Takes to the Centre.**—Jacquemin v. Finnegan, (County Ct.) 39 Misc. (N. Y.) 628. See also *infra*, the title BOUNDARIES, 813. 3; 821. 2; 831. 1.

**Along in the Sense of "In the Vicinity of"—Highway Along Stream.**—Stahr v. Carter, 116 Iowa 380, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 175.

**"Upon and Along"—Sidepath.**—A New York statute provides that "no sidepath shall be constructed upon or *along* any regularly constructed or maintained sidewalk, except with the consent of the persons owning the abutting lands." The court in construing this statute said: "The use of the word *along* in the phrase 'upon or *along*' is to complete the idea of superimposition; for 'upon' means 'on,' and a sidewalk presents the feature of length or extension, and I think that *along* is used in complement to that idea, as it means literally, 'in line with, in connection with.' \* \* \* To give *along*, as used in this statute, the full force of 'alongside of,' is not to make it a synonym of another word, but is to disregard the force of a compound with the very same word, although such compound itself expresses the idea of locality, namely, beside, by the side of." O'Donnell v. Preston, 74 N. Y. App. Div. 86.

**"Along the Waters of Any Bay"** does not necessarily mean over, in, or through the waters, and may well mean along the borders of any bay; and in the statutes under consideration it seems to mean that or nothing. Davis v. Port Arthur Channel, etc., Co., (C. C. A.) 87 Fed. Rep. 515.

**176. 1. Alongside Not Synonymous with Along.**—O'Donnell v. Preston, 74 N. Y. App. Div. 86.

**177. 1.** See Harrison v. Masonic Mut. Ben. Soc., 61 Kan. 134.

**3. Overland Machinery Co. v. Alpenfels**, 30 Colo. 163; Morrison v. Schorr, 197 Ill. 565, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177; State v. Camp Sing, 18 Mont. 141; Reynolds v. Washington Real Estate Co., 23 R. I. 197; Du Pont v. Du Bos, 52 S. Car. 260, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177.

**178.** See note 1.

**179.** ALTER, ALTERATION, ETC. — See notes 1, 2.

**178.** 1. *Silk v. Merry*, 23 Ohio Cir. Ct. 223, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178; *Noble v. Ayres*, 61 Ohio St. 493, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177 [178]; *Du Pont v. Du Bos*, 52 S. Car. 260, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

**179.** 1. *Sessions v. State*, 115 Ga. 18, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 179. See also *Wingert v. Krakauer*, 76 N. Y. App. Div. 34.

2. What Constitutes an "Alteration" Within the Meaning of a Labor Act. — See *Wingert v. Krakauer*, 76 N. Y. App. Div. 34.

**Altering Streets or Road.** — *Buchholz v. New York, etc., R. Co.*, 71 N. Y. App. Div. 452; *State v. Burgeson*, 108 Wis. 174.

**Massachusetts.** — *Bigelow v. Worcester*, 169 Mass. 390.

The Word "Alteration" in a Covenant in a Lease that the lessee would not "make or suffer to be made any *alteration* to the said premises, except as herein expressly provided, without the consent" of the lessor, was held to mean such *alteration* only as would affect the form or structure of the building. *Bickmore v. Dimmer*, (1903) 1 Ch. 158.

**The Erection of an Engine House** for an electric lighting apparatus at a short distance from the mansion house is not an *alteration* within the meaning of the Settled Land Act, 1890, allowing a tenant for life to make any *alterations* in buildings reasonably necessary to enable them to be let. *In re Blagrave*, (1903) 1 Ch. 560.



# ALTERATION OF INSTRUMENTS.

BY LEO GOODMAN.

## 185. II. KINDS OF ALTERATIONS — Material Alterations. — See note 1.

Spoliation. — See note 3.

## III. EFFECT OF ALTERATIONS — 1. In General. — See note 4.

### 2. Material Alterations — a. IN GENERAL. — See note 5.

b. BY GRANTEE OR PROMISEE — (2) *Without Consent of Grantor or Promisor* — (a) *On Executory Contracts* — aa. GENERAL RULE. — See note 7.

## 186. See note 1.

bb. NONESSENTIAL ELEMENTS — (aa) *Prejudice to Grantor or Promisor*. — See note 2.

Sureties. — See note 3.

(bb) *Actual Fraud*. — See note 4.

## 187. cc. REASON FOR THE RULE. — See notes 2, 3, 4.

**185. 1. Material Alterations.** — Carroll v. Warren, (Ala. 1904) 37 So. Rep. 687; Osborn v. Hall, 160 Ind. 153; Foxworthy v. Colby, 64 Neb. 216; Porter v. Hardy, 10 N. Dak. 551.

**3. Alteration and Spoliation Distinguished.** — McMurtrey v. Sparks, 71 Mo. App. 126.

**4. In re Howgate**, (1902) 1 Ch. 451, 86 L. T. N. S. 180.

**5. Cook v. Moulton**, 59 Ill. App. 428.

**7. Executory Contracts — General Rule.** — Payne v. Long, 121 Ala. 385; Carroll v. Warren, (Ala. 1904) 37 So. Rep. 687; Bedgood-Howell Co. v. Moore, (Ga. 1905) 51 S. E. Rep. 420; Hayes v. Wagner, 89 Ill. App. 390; Robertson v. Vasey, (Iowa 1904) 101 N. W. Rep. 271; Sheley v. Sampson, 5 Kan. App. 465; Lee v. Butler, 167 Mass. 426, 57 Am. St. Rep. 466; Harrison v. Lakeman, (Mo. 1905) 88 S. W. Rep. 53; Schmidt v. Quinzel, 55 N. J. Eq. 792; Porter v. Hardy, 10 N. Dak. 551; Acme Harvester Co. v. Butterfield, 12 S. Dak. 91; Belleville Pump, etc., Works v. Samuelson, 16 Utah 234; Holden v. Rutland R. Co., 73 Vt. 317; Cleavenger v. Franklin F. Ins. Co., 47 W. Va. 595.

**186. 1. See Hayes v. Wagner**, 89 Ill. App. 390.

**2. Need Not Be Prejudicial to Promisor or Grantor.** — Sheley v. Sampson, 5 Kan. App. 465.

**3. Sureties.** — John A. Tolman Co. v. Hunter, (Mo. App. 1905) 88 S. W. Rep. 636.

**4. Actual Fraud Unnecessary** — *United States*. — Brady v. Berwind-White Coal Min. Co., 94 Fed. Rep. 28.

*Alabama*. — Brown v. Johnson, 127 Ala. 286, 85 Am. St. Rep. 134.

*Illinois*. — *Compare* Cook v. Moulton, 59 Ill. App. 428.

*Iowa*. — Phillips v. Crips, 108 Iowa 605.

*Kansas*. — Sheley v. Sampson, 5 Kan. App. 465.

*Kentucky*. — Phoenix Ins. Co. v. McKernan, 100 Ky. 97.

*Missouri*. — Girdner v. Gibbons, 91 Mo. App. 412; Law v. Crawford, 67 Mo. App. 150.

*Ohio*. — McAlpin v. Clark, 5 Ohio Cir. Dec. 364.

*Oklahoma*. — Richardson v. Fellner, 9 Okla. 513.

*Oregon*. — Wallace v. Tice, 32 Oregon 283; Savage v. Savage, 36 Oregon 268.

*Texas*. — Ford v. Cameron First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. Rep. 684.

**By Statute in Georgia**, fraud is an essential element in vitiating an instrument through alteration. Burch v. Pope, 114 Ga. 334; Shirley v. Swafford, 119 Ga. 43; Miller v. Slade, 116 Ga. 772; Hotel Lanier Co. v. Johnson, 103 Ga. 604.

**187. 2. Reason for Rule — Identity of Writing Destroyed** — *Alabama*. — Brown v. Johnson, 127 Ala. 292, 85 Am. St. Rep. 134.

*California*. — Walsh v. Hunt, 120 Cal. 46.

*Indian Territory*. — Taylor v. Acom, 1 Indian Ter. 436.

*Iowa*. — Sawyer v. Campbell, 107 Iowa 397.

*Kansas*. — Hocknell v. Sheley, 66 Kan. 357.

*Massachusetts*. — Lee v. Butler, 167 Mass. 426, 57 Am. St. Rep. 466.

*Missouri*. — McMurtrey v. Sparks, 71 Mo. App. 126.

*North Dakota*. — Decorah First Nat. Bank v. Laughlin, 4 N. Dak. 391.

*Ohio*. — Newman v. King, 54 Ohio St. 273, 56 Am. St. Rep. 705.

*Pennsylvania*. — Bowers v. Rineard, 209 Pa. St. 545.

*Tennessee*. — Moss v. Maddux, 108 Tenn. 405.

*West Virginia*. — Cleavenger v. Franklin F. Ins. Co., 47 W. Va. 595, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187.

**3. Sawyer v. Campbell**, 107 Iowa 397; Sheley v. Sampson, 5 Kan. App. 465; Hocknell v. Sheley, 66 Kan. 357; McMurtrey v. Sparks, 71 Mo. App. 126; Jones v. Crowley, 57 N. J. L. 222; Richardson v. Fellner, 9 Okla. 513; Gettysburg Nat. Bank v. Chisolm, 169 Pa. St. 564, 47 Am. St. Rep. 929; Holden v. Rutland R. Co., 73 Vt. 317.

**4. Hocknell v. Sheley**, 66 Kan. 357; Lee v. Butler, 167 Mass. 426, 57 Am. St. Rep. 466; Jones v. Crowley, 57 N. J. L. 222; Moss v. Maddux, 108 Tenn. 405; Otto v. Half, 89 Tex.

**187.** *dd.* APPLICATION OF RULE — (*aa*) *In General.* — See note 5.

**188.** (*bb*) *Deeds.* — See note 1.

(*cc*) *Mortgages.* — See note 4.

**189.** See note 1.

(*dd*) *Bonds.* — See note 2.

(*ee*) *Insurance Policies.* — See note 3.

(*ff*) *Leases.* — See note 4.

**190.** (*gg*) *Negotiable Instruments — General Rule.* — See notes 1, 2, 3.

*Promissory Notes.* — See note 4.

**191.** *Material Alteration by Payee — Effect upon Maker and Sureties.* — See note 1.

*Bills of Exchange.* — See note 5.

*Checks.* — See note 7.

**192.** (*ii*) *Instruments of Merely Evidential Character.* — See note 6.

*ee.* AS TO SURETIES. — See note 7.

**193.** *ff.* AS TO INNOCENT THIRD PERSONS — *Bona Fide Purchasers of Negotiable Instruments — Of Promissory Notes.* — See note 1.

384, 59 Am. St. Rep. 56, *affirming* (Tex. Civ. App. 1895) 32 S. W. Rep. 1052; Holden v. Rutland R. Co., 73 Vt. 317.

**187. 5. Doctrine Applicable to Written Instruments Generally.** — *In re* Howgate, (1902) 1 Ch. 451, 86 L. T. N. S. 180; Cleavenger v. Franklin F. Ins. Co., 47 W. Va. 595, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187.

**188. 1. Alterations in Deeds.** — Coney v. Laird, 153 Mo. 408.

See also Parker's Estate, 19 Pa. Co. Ct. 606, wherein the court said that "an interlineation after the execution of a deed, even as to an immaterial point, if made without the knowledge and consent of the opposite party will avoid it."

**4. Alteration of Mortgage Annuls Lien.** — Bacon v. Hooker, 177 Mass. 335, 83 Am. St. Rep. 279, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188.

**189. 1. Preventing Foreclosure of Mortgage.** — Bacon v. Hooker, 177 Mass. 335, 83 Am. St. Rep. 279, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188; Kime v. Jesse, 52 Neb. 606.

**2. Alterations in Bonds.** — Fillmore County v. Greenleaf, 80 Minn. 242; American Casualty Ins. Co. v. Green, 70 N. Y. App. Div. 267.

**3. Alterations in Policies of Insurance.** — Mannheim Ins. Co. v. Atlantic, etc., R. Co., 11 Quebec K. B. 200; Phoenix Ins. Co. v. McKernan, 100 Ky. 97; Fletcher v. Minneapolis F. & M. Mut. Ins. Co., 80 Minn. 152.

**4. Alterations in Leases.** — Zeigler v. Hallahan, (C. C. A.) 131 Fed. Rep. 205; Landt v. McCullough, 206 Ill. 214.

**190. 1. Alterations in Negotiable Instruments.** — Taylor v. Acom, 1 Indian Ter. 436; Ford v. Cameron First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. Rep. 684.

**2.** U. S. Glass Co. v. Mathews, (C. C. A.) 89 Fed. Rep. 828, *reversing* 81 Fed. Rep. 993.

**3.** Offenstein v. Bryan, 20 App. Cas. (D. C.) 1; Hampton v. Mayes, 3 Indian Ter. 65.

**4. Material Alterations in Promissory Notes — Alabama.** — Jordan v. Long, 109 Ala. 414; Brown v. Johnson, 127 Ala. 292, 85 Am. St. Rep. 134.

*Illinois.* — Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246.

*Indiana.* — Casto v. Evinger, 17 Ind. App. 298; Light v. Killinger, 16 Ind. App. 102, 59

Am. St. Rep. 313; Young v. Baker, 29 Ind. App. 130.

*Kansas.* — McCormick Harvesting Mach. Co. v. Lauber, 7 Kan. App. 730.

*Maryland.* — Avirett v. Barnhart, 86 Md. 545.

*Missouri.* — McMurtrey v. Sparks, 71 Mo. App. 126; Girdner v. Gibbons, 91 Mo. App. 412.

*North Dakota.* — Porter v. Hardy, 10 N. Dak. 551.

*Ohio.* — Tucker v. Hendricks, 25 Ohio Cir. Ct. 426.

*Oregon.* — Cox v. Alexander, 30 Oregon 438; Savage v. Savage, 36 Oregon 268.

*Rhode Island.* — Keene v. Weeks, 19 R. I. 309.

*South Carolina.* — Edwards v. Sartor, 69 S. Car. 540; White v. Harris, 69 S. Car. 65.

*South Dakota.* — Searles v. Seipp, 6 S. Dak. 472.

*Texas.* — Ford v. Cameron First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. Rep. 684.

**191. 1.** Payne v. Long, 121 Ala. 385; Gettysburg Nat. Bank v. Chisolm, 169 Pa. St. 564, 47 Am. St. Rep. 929; Alexander v. Buckwalter, 8 Del. Co. Rep. (Pa.) 74, 17 Lanc. L. Rev. 366.

**5. Payee May Not Sue upon Altered Bill.** — Scholfield v. Londesborough, (1895) 1 Q. B. 536.

**7. Checks.** — Morris v. Beaumont Nat. Bank, (Tex. Civ. App. 1904) 83 S. W. Rep. 36.

**192. 6. Alterations in Instruments of Evidential Nature.** — Hayes v. Wagner, 89 Ill. App. 390. See also Nickum v. Gaston, 28 Oregon 322.

**Certificate to Practice Medicine.** — A material alteration made by the licensee in a certificate to practice medicine will avoid the instrument. Volp v. Saylor, 42 Oregon 546.

**7. Material Alterations — Rule as to Sureties.** — Ellesmere Brewery Co. v. Cooper, (1896) 1 Q. B. 75; Zeigler v. Hallahan, (C. C. A.) 131 Fed. Rep. 205; Orleans, etc., R. Co. v. International Constr. Co., 113 La. 409; Fillmore County v. Greenleaf, 80 Minn. 242; McGavock v. Morton, 57 Neb. 385; American Casualty Ins. Co. v. Green, 70 N. Y. App. Div. 267; Cambria Iron Co. v. Keynes, 56 Ohio St. 501; McAlpin v. Clark, 5 Ohio Cir. Dec. 364. See also Pogue v. Ross, 74 S. W. Rep. 1101, 25 Ky. L. Rep. 187.

**193. 1. Bona Fide Transferee of Promissory Notes — California.** — Walsh v. Hunt, 120 Cal. 46.

*Colorado.* — Mater v. American Nat. Bank, 8 Colo. App. 325.

**193.** Of Bills of Exchange. — See note 3.

Where Instrument Is Negligently Drawn. — See note 5.

**194.** See note 1.

*gg.* ALTERATION MUST BE MADE AFTER EXECUTION OF INSTRUMENT — (aa) *In General*. — See note 3.

(bb) *Alteration of Instrument While in Course of Execution*. — See note 4.

**196.** (cc) *Accommodation Paper Altered Before Negotiation*. — See notes 1, 2.

**197.** (b) *On Executed Contracts* — aa. *IN GENERAL* — bb. *CONVEYANCES OF PROPERTY* — (aa) *In General*. — See note 4.

**198.** (bb) *Where Estate Conveyed Does Not Lie Wholly in Grant* — *Estate in Fee Simple*. — See notes 2, 3.

**200.** (dd) *Mortgages*. — See note 1.

(e) *On Right to Recover on Original Consideration* — aa. *IN GENERAL* — *Intent*. — See note 4.

bb. *WHERE ALTERATION IS MADE WITHOUT FRAUDULENT INTENT* — (aa) *General Principles*. — See note 5.

*Illustrations*. — See note 7.

**201.** See note 1.

*Illinois*. — *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 193.

*Indiana*. — *Young v. Baker*, 29 Ind. App. 130, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 193.

*Kansas*. — *Herington Bank v. Wangerin*, 65 Kan. 423.

*Maryland*. — *Schwartz v. Wilmer*, 90 Md. 136.

*Massachusetts*. — *Massachusetts Nat. Bank v. Snow*, (Mass. 1905) 72 N. E. Rep. 959.

*Michigan*. — *Cassopolis First Nat. Bank v. Carter*, (Mich. 1904) 101 N. W. Rep. 585.

*Minnesota*. — *Seebold v. Tatlie*, 76 Minn. 131; *Commercial Bank v. Maguire*, 89 Minn. 394.

*Nebraska*. — *Foxworthy v. Colby*, 64 Neb. 216.

*North Dakota*. — *Porter v. Hardy*, 10 N. Dak. 557, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 193.

*Ohio*. — *Newman v. King*, 54 Ohio St. 273, 56 Am. St. Rep. 705.

*South Dakota*. — *Rochford v. McGee*, 16 S. Dak. 606, 102 Am. St. Rep. 719.

**193.** 3. *Bona Fide Transferee of Bill of Exchange*. — *Scholfield v. Londesborough*, (1896) A. C. 514.

5. *Instrument Negligently Made — Liability of Maker*. — *Statton v. Stone*, 15 Colo. App. 237; *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246; *Humphrey Hardware Co. v. Herrick*, (Neb. 1904) 101 N. W. Rep. 1016. See also *Mater v. American Nat. Bank*, 8 Colo. App. 325.

**194.** 1. *Walsh v. Hunt*, 120 Cal. 46; *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246; *Young v. Baker*, 29 Ind. App. 130; *Herington Bank v. Wangerin*, 65 Kan. 423; *Searles v. Seipp*, 6 S. Dak. 472.

3. *Alteration Must Be After Execution of Instrument*. — *Bowie v. Hume*, 13 App. Cas. (D. C.) 286; *Hodge v. Scott*, (Neb. 1901) 95 N. W. Rep. 837.

4. *Alteration of Instrument While in Course of Execution*. — *Boyd v. Agricultural Ins. Co.*, (Colo. App. 1904) 76 Pac. Rep. 986.

**196.** 1. *Illustrations*. — *Pelton v. San Jacinto Lumber Co.*, 113 Cal. 21; *Hill v. O'Neill*,

101 Ga. 832; *Moore v. Hinshaw*, 23 Ind. App. 267; *Jackson v. Cooper*, (Ky. 1897) 39 S. W. Rep. 39; *McMillan v. Hefferlin*, 18 Mont. 385; *Handley v. Barrows*, 68 Mo. App. 623.

2. *Hill v. O'Neill*, 101 Ga. 832; *Handley v. Barrows*, 68 Mo. App. 623; *Moss v. Maddux*, 108 Tenn. 405.

**197.** 4. *Alterations in Conveyances*. — *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117; *Slattery v. Slattery*, 120 Iowa 717; *Goodwin v. Norton*, 92 Me. 532; *Bacon v. Hooker*, 177 Mass. 335, 83 Am. St. Rep. 279; *Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co.*, 89 Mo. App. 556.

**198.** 2. *Material Alterations by Grantee — He May Not Sue upon Covenants*. — See *Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co.*, 89 Mo. App. 556; *Ver Steeg v. Becker-Moore Paint Co.*, 106 Mo. App. 257.

3. *Material Alterations by Grantee — Title Not Divested*. — *Burgess v. Blake*, 128 Ala. 105, 86 Am. St. Rep. 78; *Slattery v. Slattery*, 120 Iowa 717. See also *Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co.*, 89 Mo. App. 556; *Ver Steeg v. Becker-Moore Paint Co.*, 106 Mo. App. 257. *Contra*, *Jones v. Crowley*, 57 N. J. L. 222.

**200.** 1. *Chattel Mortgages*. — *Bacon v. Hooker*, 177 Mass. 335, 83 Am. St. Rep. 279.

4. *Intent Material*. — *Maguire v. Eichmeier*, 109 Iowa 301, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 200. See also *Hampton v. Mayes*, 3 Indian Ter. 65.

The Question of Intent is one for the jury. *Savage v. Savage*, 36 Oregon 272, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 200.

5. *Innocent Alterations*. — *Hayes v. Wagner*, 89 Ill. App. 390; *Savage v. Savage*, 36 Oregon 268; *Otto v. Half*, 89 Tex. 384, 59 Am. St. Rep. 56.

7. *Effect upon Sureties*. — *Savage v. Savage*, 36 Oregon 268, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 200.

**201.** 1. *Recovery Against Maker*. — *Hampton v. Mayes*, 3 Indian Ter. 65; *Jeffrey v. Rosenfeld*, 179 Mass. 509; *Savage v. Savage*, 36 Oregon 272, citing 2 AM. AND ENG. ENCYC.

**201.** (cc) *Return of Writing.* — See note 5.

**202.** cc. WHERE ALTERATION IS FRAUDULENT. — See notes 1, 2.

dd. EFFECT ON MORTGAGE OF ALTERATION OF MORTGAGE NOTE — *Innocently Made* — See notes 3, 4.

**204.** (d) *On Instrument as Evidence* — cc. TO PROVE TITLE. — See note 4.

dd. TO PROVE ORIGINAL CONTRACT. — See note 6.

**205.** (3) *By Consent of Grantor or Promisor* — (a) *In General.* — See notes 2, 3.

**210.** (g) *Changes to Conform Instrument to Intention of Parties* — aa. *IN GENERAL* — According to Some Authorities, May Be Done Only in Equity. — See note 2.

**211.** According to Some Authorities, May Be Done with Consent of Parties. — See note 1

bb. CORRECTION OF MISTAKES. — See note 2.

**212.** See note 1.

Must Be to Conform to Intention of All the Parties, and Not of One Only. — See note 3.

cc. SUPPLYING OMISSIONS — FILLING BLANKS. — See note 4.

**214.** c. BY A STRANGER TO THE CONTRACT — (2) *Rule in the United States* — English Rule Disapproved. — See note 2.

Rule Applicable Alike to Sealed and Unsealed Instruments. — See notes 4, 5.

OF LAW (2d ed.) 200; *Wallace v. Tice*, 32 Oregon 283; *Keene v. Weeks*, 19 R. I. 309.

**201.** 5. *Return of Note a Condition of Right to Sue.* — See *Savage v. Savage*, 36 Oregon 268.

**202.** 1. *Effect of Fraudulent Alteration.* — *Hayes v. Wagner*, 89 Ill. App. 390; *Hocknell v. Sheley*, 66 Kan. 360, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202; *McClure v. Little*, 15 Utah 379, 62 Am. St. Rep. 938.

2. *Fraudulent Alteration of Promissory Note.* — *Maguire v. Eichmeier*, 109 Iowa 301; *Hocknell v. Sheley*, 66 Kan. 360, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202; *Jeffrey v. Rosenfeld*, 179 Mass. 509, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202; *Decorah First Nat. Bank v. Laughlin*, 4 N. Dak. 391; *Wallace v. Tice*, 32 Oregon 283.

3. *Where Note Operates as Payment of Debt.* — *Simpson v. Sheley*, 9 Kan. App. 512, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202.

4. *Where There Is No Fraud.* — *Simpson v. Sheley*, 9 Kan. App. 512, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202. See *Kime v. Jesse*, 32 Neb. 606.

**204.** 4. *Altered Deed as Proof of Title.* — *Burgess v. Blake*, 128 Ala. 105, 86 Am. St. Rep. 78, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204.

6. *Altered Instrument as Evidence of Original Contract.* — "In order to affect the question of the admissibility of a writing in evidence it must appear that the alteration was in a part material to the question in dispute." *Sullivan v. California Realty Co.*, 142 Cal. 201.

**205.** 2. *Made with Consent.* — *Nichols v. Rosenfeld*, 181 Mass. 525; *Martin v. Buffalo*, 121 N. Car. 34, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205.

*Implied Assent of Obligor.* — *Kane v. Herman*, 109 Wis. 33.

*Whether Consent and Alteration Must Be Contemporaneous.* — Where it is expressly agreed that the alteration shall be made, and this is done by the payee, though without the knowledge of the payor, then an action may be maintained on the note, for no more has been done

than to carry out the intention of the parties *Phillips v. Crips*, 108 Iowa 605.

*The Obligor May Enforce* at his option a contract which has been altered by the obligee *Lane v. Pacific, etc., R. Co.*, 8 Idaho 230.

*With Assent of Obligees.* — *Taylor v. Graves*, 4 Ohio Dec. (Reprint) 107, 1 Cleve. L. Rep. 31

3. *Martin v. Buffalo*, 121 N. Car. 36, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205

**210.** 2. *View that Correction Must Be in Equity.* — See *McClure v. Little*, 15 Utah 379 62 Am. St. Rep. 938.

**211.** 1. *View that Correction May Be Made with Consent of Parties.* — See *Newman v. King* 54 Ohio St. 273, 56 Am. St. Rep. 705.

*Altering Instrument to Conform with Intention* — *Lee v. Butler*, 167 Mass. 426, 57 Am. St. Rep. 466.

2. *Correction of Mistake in Note by Payee.* — *Osborn v. Hall*, 160 Ind. 153, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211, 212.

**212.** 1. *Correction of Mistakes in Mortgages* — *In re Howgate*, (1902) 1 Ch. 451, 86 L. T. N. S. 180.

3. *Osborn v. Hall*, 160 Ind. 160, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211 212; *Reynolds v. Smitz*, 9 Ohio Cir. Dec. 484 18 Ohio Cir. Ct. 84. But see *Wallace v. Tice* 32 Oregon 283.

4. *Insertion of the Time of Payment of Interest* according to intention and agreement of parties will not vitiate the instrument. *McClure v. Little*, 15 Utah 379, 62 Am. St. Rep. 938.

**214.** 2. *Disapproval of English Rule.* — See *White v. Harris*, 69 S. Car. 65, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 214.

4. *Unsealed Instruments.* — *Powell v. Banks* 146 Mo. 620; *Colby v. Foxworthy*, (Neb. 1904) 100 N. W. Rep. 798; *Deering Harvester Co. v. White*, 110 Tenn. 132.

5. *Promissory Notes.* — *Forbes v. Taylor*, 130 Ala. 286; *Walsh v. Hunt*, 120 Cal. 53, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 214; *Schwartz v. Wilmer*, 90 Md. 136, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 214; *Jeffrey v. Rosenfeld*, 179 Mass. 509 *McMurtrey v. Sparks*, 71 Mo. App. 126; *Hay*

**215.** See note 3.

**216.** (3) *Who Is to Be Considered a Stranger* — (c) **Public Officer Required to Approve Bond.** — See note 1.

**Alteration at Time of Approval.** — See note 2.

*d.* **BY AGENT OF GRANTEE OR OBLIGEE — In the United States — Agent with Authority.** — See note 4.

**217.** **Agent Without Authority.** — See note 1.

*e.* **BY THE GRANTOR OR PROMISOR — (1) In General.** — See note 2.

(3) *By Grantor in Deed or Lease.* — See note 4.

(4) *By Promisor in Note.* — See note 6.

**218.** (5) *By Part Only of Grantors or Promisors* — **General Rule.** — See notes 1, 3.

**220.** *f.* **BY AGENT OF GRANTOR OR PROMISOR.** — See note 1.

**3. Immaterial Alterations** — *a.* **BY GRANTEE OR PROMISEE.** — See note 4.

**In the United States — In Several States Strict Rule Obtains.** — See note 5.

**221.** **Prevailing Rule.** — See note 2.

*v. Odom*, 79 Mo. App. 425; *Perkins Windmill*, etc., *Co. v. Tillman*, 55 Neb. 652; *Foxworthy v. Colby*, 64 Neb. 216; *Tarbill v. Richmond City Mill Works*, 1 Ohio Cir. Dec. 643; *White v. Harris*, 69 S. Car. 65, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 214; *Acme Harvester Co. v. Butterfield*, 12 S. Dak. 91.

**215. 3. Mortgages.** — *Mathias v. Leathers*, 99 Iowa 18.

**216. 1.** *Schlageck v. Widhalm*, 59 Neb. 541.

**2. When Altered at Time of Approval.** — *Schlageck v. Widhalm*, 59 Neb. 541.

**4. Alteration by Agent with Authority.** — *Deering Harvester Co. v. White*, 110 Tenn. 132, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 216.

Where an agent without authority alters an instrument and subsequently the payee with knowledge of his agent's act sues on the instrument, he thereby ratifies the agent's act and it becomes his own and the instrument is avoided. *Perkins Windmill, etc., Co. v. Tillman*, 55 Neb. 652.

**217. 1. Alterations by Agent Without Authority.** — *Forbes v. Taylor*, 139 Ala. 286; *Walsh v. Hunt*, 120 Cal. 53, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 217; *Paterson v. Higgins*, 58 Ill. App. 268; *Mathias v. Leathers*, 99 Iowa 18; *Hays v. Odom*, 79 Mo. App. 425; *Waldorf v. Simpson*, 15 N. Y. App. Div. 297; *Acme Harvester Co. v. Butterfield*, 12 S. Dak. 91; *Deering Harvester Co. v. White*, 110 Tenn. 132, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 216.

**2. Discharge of Surety.** — Where an agreement which is to be construed with a bond is materially altered by the promisor with the consent of the promisee, a surety on the bond is thereby discharged. *French v. Graves*, 50 N. Y. App. Div. 522. See also *Lancaster v. Barrett*, 1 Pa. Super. Ct. 9.

**4. Alteration in Conveyance of Land by Grantor.** — *Fulton v. Priddy*, 123 Mich. 298, 81 Am. St. Rep. 201, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 217.

**6. An Alteration by the Maker with the Consent of the Payee discharges the surety on a note.** *McAlpin v. Clark*, 5 Ohio Cir. Dec. 364.

**218. 1. Alteration of Note by Part Only of**

**Promisors.** — *Mattingly v. Riley*, (Ky. 1899) 49 S. W. Rep. 799.

**3. Alteration Before Delivery to Obligee or Promisee.** — See *Connor v. Thornton*, (Tex. Civ. App. 1899) 51 S. W. Rep. 354.

**220. 1. Alteration by an Agent of a Mortgagor of a Chattel Mortgage does not vitiate the instrument.** *Chicago Title, etc., Co. v. O'Marr*, 18 Mont. 568.

**4. Present English Rule — Alteration Must Be Material to Vitate Instrument.** — *In re Howgate*, (1902) 1 Ch. 451, 86 L. T. N. S. 180.

**5. Strict Rule.** — *Jones v. Crowley*, 57 N. J. L. 222; *Bailey v. Gilman Bank*, 99 Mo. App. 571; *Powell v. Banks*, 146 Mo. 620; *Kelly v. Thuey*, 143 Mo. 422.

**221. 2. Prevailing Rule — Immaterial Alteration Does Not Vitate** — *United States.* — *Butte First Nat. Bank v. Weidenbeck*, (C. C. A.) 97 Fed. Rep. 896.

*Colorado.* — *Creede First Nat. Bank v. Miner*, 9 Colo. App. 361.

*Delaware.* — *Warder, etc., Co. v. Stewart*, 2 Marv. (Del.) 275.

*Georgia.* — *Brice v. Sheffield*, 118 Ga. 128.

*Indiana.* — *Casto v. Evinger*, 17 Ind. App. 298.

*Indian Territory.* — *Taylor v. Acom*, 1 Indian Ter. 436.

*Iowa.* — *Sawyer v. Campbell*, 107 Iowa 397; *James v. Dalbey*, 107 Iowa 463; *Iowa Valley State Bank v. Sigstad*, 96 Iowa 491.

*Kansas.* — *Galva First Nat. Bank v. Nordstrom*, (Kan. 1904) 78 Pac. Rep. 804; *McCormick Harvesting Mach. Co. v. Lauber*, 7 Kan. App. 730.

*Kentucky.* — *Keene v. Miller*, 103 Ky. 628; *Tranter v. Hibbard*, 108 Ky. 265; *Hedrick v. Huffaker*, (Ky. 1904) 80 S. W. Rep. 1130.

*Massachusetts.* — *James v. Tilton*, 183 Mass. 275.

*Michigan.* — *Prudden v. Nester*, 103 Mich. 540.

*Minnesota.* — *Theopold v. Deike*, 76 Minn. 121, 77 Am. St. Rep. 607.

*Missouri.* — *Kelly v. Thuey*, (Mo. 1896) 37 S. W. Rep. 516. See also *Heman v. Gilliam*, 171 Mo. 258.

*New York.* — *John Polhemus Printing Co. v. Hallenbeck*, 46 N. Y. App. Div. 563.

**222.** See note 1.

**IV. MATERIALITY OF ALTERATIONS — 1. Constituent Elements of Material Alterations — a. IN GENERAL.** — See note 4.

**223.** *b. MUST CHANGE LEGAL EFFECT OF INSTRUMENT — (1) In General.* — See note 1.

**224.** *An Alteration Will Be Material.* — See note 4.

**225.** *(2) Changes Which Enlarge Liability of Party.* — See note 3.  
*Change Whereby Liability Is Reduced.* — See note 4.

*Test.* — See note 5.

*(3) Addition of Special Clauses or New Terms.* — See note 6.

**226.** *(4) Addition of Words Waiving Notice and Protest.* — See note 1.

*North Dakota.* — *J. I. Case Threshing Mach. Co. v. Ebbighausen*, 11 N. Dak. 466.

*Oregon.* — *Brown v. Feldwert*, (Oregon 1905) 80 Pac. Rep. 414.

*South Carolina.* — *Gunter v. Addy*, 58 S. Car. 178.

**222.** *1. Immaterial Alterations Made with Fraudulent Intent.* — *Sawyer v. Campbell*, 107 Iowa 397; *Kelly v. Thuey*, (Mo. 1896) 37 S. W. Rep. 516; *Theopold v. Deike*, 76 Minn. 121, 77 Am. St. Rep. 607.

**4. Essentials of Material Alteration — Alabama.** — *Payne v. Long*, 121 Ala. 392; *Brown v. Johnson*, 127 Ala. 296, 85 Am. St. Rep. 134.  
*Georgia.* — *Winkles v. Guenther*, 98 Ga. 472.  
*Illinois.* — *Landt v. McCullough*, 206 Ill. 214, reversing 103 Ill. App. 668; *Cook v. Moulton*, 59 Ill. App. 428.

*Indiana.* — *Casto v. Evring*, 17 Ind. App. 298.  
*Iowa.* — *Sawyer v. Campbell*, 107 Iowa 397, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 222.

*Kansas.* — *Galva First Nat. Bank v. Nordstrom*, (Kan. 1904) 78 Pac. Rep. 804.

*Kentucky.* — *Tranter v. Hibbard*, 108 Ky. 265.  
*Minnesota.* — *Theopold v. Deike*, 76 Minn. 121, 77 Am. St. Rep. 607.

*Nebraska.* — *Harnett v. Holdrege*, (Neb. 1903) 97 N. W. Rep. 443; *Foxworthy v. Colby*, 64 Neb. 216.

*North Dakota.* — *Porter v. Hardy*, 10 N. Dak. 551.

*Ohio.* — *Carlile v. Lamb*, 9 Ohio Cir. Dec. 70.  
*Oklahoma.* — *Richardson v. Fellner*, 9 Okla. 513.

**Evidence or Mode of Proof.** — Any alteration which changes the evidence or mode of proof is material. *Brady v. Berwind-White Coal Min. Co.*, 94 Fed. Rep. 28.

**223.** *1. General Rule — Alteration Must Change Legal Effect of Instrument — United States.* — *Woodbury v. Allegheny, etc., R. Co.*, 72 Fed. Rep. 371.

*Colorado.* — *Creede First Nat. Bank v. Miner*, 9 Colo. App. 361.

*Florida.* — *Turnipseed v. State*, (Fla. 1903) 33 So. Rep. 851.

*Iowa.* — *Sawyer v. Campbell*, 107 Iowa 397, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 222; *James v. Dalby*, 107 Iowa 463; *Iowa Valley State Bank v. Sigstad*, 96 Iowa 401.

*Kansas.* — *Galva First Nat. Bank v. Nordstrom*, (Kan. 1904) 78 Pac. Rep. 804.

*Kentucky.* — *Tranter v. Hibbard*, 108 Ky. 265; *Heddrick v. Huffaker*, (Ky. 1904) 80 S. W. Rep. 1130.

*Massachusetts.* — *Rowe v. Bowman*, 183 Mass. 488; *James v. Tilton*, 183 Mass. 275.

*Michigan.* — *Prudden v. Nester*, 103 Mich. 540.

*Minnesota.* — *Theopold v. Deike*, 76 Minn. 121, 77 Am. St. Rep. 607.

*Missouri.* — *Kelly v. Thuey*, (Mo. 1896) 37 S. W. Rep. 516; *Bailey v. Gilman Bank*, 99 Mo. App. 571.

*Texas.* — *Hutches v. J. I. Case Threshing Mach. Co.*, (Tex. Civ. App. 1896) 35 S. W. Rep. 60; *Chamberlain v. Wright*, (Tex. Civ. App. 1896) 35 S. W. Rep. 707; *Marx v. Luling Co-Operative Assoc.*, 17 Tex. Civ. App. 408.

**Miscellaneous Instances of Immaterial Alteration.** — The erasure of the words "and grace" does not alter the legal effect of a note where by the general mercantile law such note is entitled to days of grace. *Portsmouth Sav. Bank v. Wilson*, 5 App. Cas. (D. C.) 8.

**224.** *4. Steinau v. Moody*, 100 Ga. 136; *Armstrong v. Penn*, 105 Ga. 229; *Brannum Lumber Co. v. Pickard*, (Ind. App. 1904) 71 N. E. Rep. 676; *McKinney v. Cabell*, 24 Ind. App. 676; *White v. Harris*, 69 S. Car. 65, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224.

**225.** *3. Change Extending Liability.* — *Jordan v. Long*, 109 Ala. 414; *Carlisle v. People's Bank*, 122 Ala. 446; *Harnett v. Holdrege*, (Neb. 1903) 97 N. W. Rep. 443. See also *Lancaster v. Barrett*, 1 Pa. Super. Ct. 9.

*4. Prim v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52; *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97; *Ford v. Cameron First Nat. Bank*, (Tex. Civ. App. 1896) 34 S. W. Rep. 684.

**5. Test of Materiality.** — *Zeigler v. Hallahan*, (C. C. A.) 131 Fed. Rep. 205; *Brady v. Berwind-White Coal Min. Co.*, 94 Fed. Rep. 28; *Carroll v. Warren*, (Ala. 1904) 37 So. Rep. 687; *Richardson v. Fellner*, 9 Okla. 513; *Citizens Nat. Bank v. Williams*, 174 Pa. St. 66; *White v. Harris*, 69 S. Car. 65, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225.

**6. Special Clauses — New Terms.** — *Steinau v. Moody*, 100 Ga. 136; *McGavock v. Morton*, 57 Neb. 385; *White v. Harris*, 69 S. Car. 65, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225.

**Interlineation of Acceptance of Contract Over Indorsement on a Written Proposal.** — *Sawyer v. Campbell*, 107 Iowa 397.

**Waiver of Homestead** added to an acknowledgment is a material alteration. *Rosenberg v. Jett*, 72 Fed. Rep. 90.

**226.** *1. Schwartz v. Wilmer*, 90 Md. 143, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 226; *Harnett v. Holdrege*, (Neb. 1903) 97 N. W. Rep. 443.

**227.** *c.* MUST BE IN MATERIAL PART OF INSTRUMENT — (1) *In General*. — See note 1.

(2) *Change in Marginal Figures*. — See note 2.

(3) *Removal or Addition of Memoranda* — Collateral or Reference Memoranda. — See notes 3, 4.

**228.** See notes 1, 2, 3.

Memoranda Forming Part of Instrument. — See notes 6, 7

**229.** 2. *Change in Respect to Parties* — *a.* IN GENERAL. — See note 4.

**230.** *b.* SUBSTITUTION OF PARTIES — Grantees, Promisees. — See note 1.

*c.* CHANGING PERSONALITY OF PARTIES BY ADDITION OR ERASURE OF WORDS. — See note 4.

The Addition of the Word "Cashier." — See note 5.

**231.** *d.* ADDITION OR ERASURE OF WORDS DESCRIPTIO PERSONÆ. — See note 2.

**232.** *e.* FORMAL CHANGES IN NAME OF PARTY. — See note 2.

*f.* ADDITION OF PARTIES — General Rule. — See note 4.

**233.** As to the Original Sureties. — See notes 1, 2.

**227.** 1. Obliterating Indorsement of a Payment on a note does not avoid the instrument. *Lau v. Blomberg*, (Neb. 1902) 91 N. W. Rep. 206.

2. *Change in Marginal Figures of Bill or Note*. — *Prim v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52; *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246; *Goodin v. Plugge*, 47 Neb. 284.

3. *Payne v. Long*, 121 Ala. 393, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 227.

4. *Removal of Memorandum Not Part of Instrument*. — *U. S. Glass Co. v. Mathews*, (C. C. A.) 89 Fed. Rep. 828; *Payne v. Long*, 121 Ala. 393, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 227.

Erasing an Indorsement of a Partial Payment is not an alteration of the instrument. *Theopold v. Deike*, 76 Minn. 121, 77 Am. St. Rep. 607; *Lau v. Blomberg*, (Neb. 1902) 91 N. W. Rep. 206.

**228.** 1. *Change Affecting Some Only of Parties*. — An indorsement setting out that the indorser will pay seven per cent. is collateral to the main contract. *Boutelle v. Carpenter*, 182 Mass. 417.

Collateral Memorandum. — *Payne v. Long*, 121 Ala. 393, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 228.

2. *Reference Memorandum*. — *Mente v. Townsend*, 68 Ark. 391; *Light v. Killinger*, 16 Ind. App. 102, 59 Am. St. Rep. 313.

3. *Merchants' Bank v. Brown*, 86 N. Y. App. Div. 599.

6. *Payne v. Long*, 121 Ala. 393, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 228.

7. *Memorandum Constituting Part of Instrument*. — *Payne v. Long*, 121 Ala. 393, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 228; *Mater v. American Nat. Bank*, 8 Colo. App. 325; *Cassopolis First Nat. Bank v. Carter*, (Mich. 1904) 101 N. W. Rep. 585; *Law v. Crawford*, 67 Mo. App. 150. See also *Hillsboro First Nat. Bank v. Mack*, 35 Oregon 122.

Severance of Note and "Stub" Containing Qualifying Conditions. — *Cassopolis First Nat. Bank v. Carter*, (Mich. 1904) 101 N. W. Rep. 585.

Obliterating or Placing Memorandum on Back of Note. — *Reed v. Culp*, 63 Kan. 595.

229. 4. *Change in Personality, Number, or Relations of Parties to Instrument*. — *Sneed v.*

*Sabinal Min., etc., Co.*, (C. C. A.) 71 Fed. Rep. 493; *Sheley v. Sampson*, 5 Kan. App. 465; *Rochford v. McGee*, 16 S. Dak. 606, 102 Am. St. Rep. 719.

Obliterating the Name of the Bank upon which a check is drawn and substituting therefor another bank is a material alteration. *Morris v. Beaumont Nat. Bank*, (Tex. Civ. App. 1904) 83 S. W. Rep. 36.

Insurance Policy. — Changing the beneficiary from "A. H. Fletcher & Son" to "A. H. Fletcher" is a material alteration. *Fletcher v. Minneapolis F. & M. Mut. Ins. Co.*, 80 Minn. 152.

**230.** 1. *Substitution of Grantee or Promisee*. — *Casto v. Evinger*, 17 Ind. App. 298. Compare *James v. Tilton*, 183 Mass. 275.

4. *The Addition of the Word "Guardian"* after the payee's name is a material alteration vitiating the liability of a surety. *Jackson v. Cooper*, (Ky. 1897) 39 S. W. Rep. 39.

5. *Sawyer v. Campbell*, 107 Iowa 397.

**231.** 2. *Where Words Are Descriptive Personæ*. — *Casto v. Evinger*, 17 Ind. App. 298; *Birmingham Trust, etc., Co. v. Whitney*, 95 N. Y. App. Div. 280; *Flitcraft v. Commonwealth Title Ins., etc., Co.*, (Pa. 1905) 60 Atl. Rep. 557; *Marx v. Luling Co-operative Assoc.*, 17 Tex. Civ. App. 408.

**232.** 2. *Correcting Name of Party*. — *In re Howgate*, (1902) 1 Ch. 451, 71 L. J. Ch. 279, 86 L. T. N. S. 180.

4. *Addition of Parties* — General Rule. — See *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97; *Ford v. Cameron First Nat. Bank*, (Tex. Civ. App. 1896) 34 S. W. Rep. 684. Compare *Taylor v. Acom*, 1 Indian Ter. 436.

The addition of another name to a note before its delivery does not release those previously signing it, though done without their knowledge. *Edwards v. Mattingly*, 107 Ky. 332; *Evans v. Partin*, (Ky. 1900) 56 S. W. Rep. 648, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 232.

**233.** 1. *Addition of Other Makers or Sureties* — Effect upon Original Sureties. — *Sawyer v. Campbell*, 107 Iowa 397; *State v. Paxton*, 65 Neb. 110.

2. See *Boyd v. Agricultural Ins. Co.*, (Colo. App. 1904) 76 Pac. Rep. 986.

**233.** As to the Original Makers. — See notes 3, 4.

**234.** See note 1.

Liability of the Additional Promisor. — See note 2.

*g.* ERASURE OF NAMES OF PARTIES — Name of Principal. — See note 4.

**235.** Name of Surety. — See notes 3, 4.

**236.** 3. Change in Joint or Several Nature of Contract. — See note 1.

**237.** 5. Change in Date. — See note 1.

**238.** 6. Change in Amount of Principal. — See notes 1, 2.

Provision for Attorney's Fees. — See notes 4, 5.

**239.** 7. Change in Interest — Alteration of Rate. — See notes 1, 2, 4.

Insertion of Interest Clause. — See note 5.

Erasure of Interest Clause. — See note 6.

**240.** Alteration of Time from Which Interest to Run. — See notes 1, 2.

Alteration in Periods of Payment. — See note 3.

8. Change in Medium of Payment. — See note 4.

The President Signing the Bond after the sureties have signed does not vitiate the instrument. *Standard Underground Cable Co. v. Stone*, 35 N. Y. App. Div. 62.

**233.** 3. Additional Parties to Note — Effect upon Original Maker. — *Butte First Nat. Bank v. Weidenbeck*, 87 Fed. Rep. 271; *Brown v. Johnson*, 127 Ala. 296, 85 Am. St. Rep. 134, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 233; *Ford v. Cameron First Nat. Bank*, (Tex. Civ. App. 1896) 34 S. W. Rep. 684.

**4.** Additional Surety — Effect upon Original Promisor. — *Brown v. Johnson*, 127 Ala. 296, 85 Am. St. Rep. 134, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 233.

**234.** 1. *Butte First Nat. Bank v. Weidenbeck*, (C. C. A.) 97 Fed. Rep. 896; *Taylor v. Acom*, 1 Indian Ter. 436; *Babcock v. Murray*, 58 Minn. 385; *Royse v. State Nat. Bank*, 50 Neb. 16. See also *U. S. Glass Co. v. Mathews*, (C. C. A.) 89 Fed. Rep. 828.

**2.** Liability of Additional Maker or Surety. — *Evans v. Partin*, (Ky. 1900) 56 S. W. Rep. 648.

**4.** Erasure of Name of Principal. — *Connor v. Thornton*, (Tex. Civ. App. 1899) 51 S. W. Rep. 354.

**235.** 3. Erasure of Name of One of Several Sureties in a Bond. — *Cass County v. American Exch. State Bank*, 9 N. Dak. 263.

**4.** Erasure of Name of Surety on Note. — *Butte First Nat. Bank v. Weidenbeck*, 87 Fed. Rep. 271; *International Bank v. Parker*, 88 Mo. App. 117.

**236.** 1. Changing Words "I Promise" into "We Promise." — *Banque Provinciale v. Arnoldi*, 2 Ont. L. Rep. 624.

Changing Joint Note into Joint and Several. — *Landauer v. Sioux Falls Imp. Co.*, 10 S. Dak. 205.

**237.** 1. Rule as to Change in Date. — *U. S. Glass Co. v. Mathews*, (C. C. A.) 89 Fed. Rep. 828; *Brannum Lumber Co. v. Pickard*, (Ind. App. 1904) 71 N. E. Rep. 676; *McCormick Harvesting Mach. Co. v. Lauber*, 7 Kan. App. 730, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 237; *Sheley v. Sampson*, 5 Kan. App. 465; *Tranter v. Hibberd*, 108 Ky. 265; *McMurtrey v. Sparks*, 71 Mo. App. 126; *McMillan v. Hefferlin*, 18 Mont. 385; *Cambria Iron Co. v. Keynes*, 56 Ohio St. 501, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 237; *Newman v. King*, 54 Ohio St. 273, 56 Am. St. Rep. 705; *Wallace v. Tice*, 32 Oregon 283.

**238.** 1. Changing Amount of Principal. — *Winkles v. Guenther*, 98 Ga. 472; *Maguire v. Eichmeier*, 109 Iowa 301; *Schlageck v. Widhalm*, 59 Neb. 541; *Moss v. Maddux*, 108 Tenn. 405; *White v. Harris* 69 S. Car. 65, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 238. See also *Heard v. Tappan*, 116 Ga. 930.

**2.** Decreasing Amount of Principal. — *White v. Harris*, 69 S. Car. 65, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 238. See also *Chamberlain v. Wright*, (Tex. Civ. App. 1896) 35 S. W. Rep. 707; *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97.

**4.** Erasure of Provision for Attorney's Fees. — *White v. Harris*, 69 S. Car. 65, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 238.

**5.** Change in Amount of Attorney's Fees. — *White v. Harris*, 69 S. Car. 65, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 238.

**239.** 1. Increasing Rate of Interest. — *Hill v. O'Neill*, 101 Ga. 832; *Phillips v. Crips*, 108 Iowa 605; *Handley v. Barrows*, 68 Mo. App. 623; *Tucker v. Hendricks*, 25 Ohio Cir. Ct. 426.

*Contra.* — Where the change in the rate does not alter the legal liability of a surety the alteration will be immaterial and the surety will not be discharged. *Keene v. Miller*, 103 Ky. 628.

**2.** Decreasing Rate of Interest. — *Fillmore County v. Greenleaf*, 80 Minn. 242; *Edwards v. Sartor*, 69 S. Car. 540.

**4.** Insertion of Legal Rate. — *James v. Dalbey*, 107 Iowa 463; *McAlpin v. Clark*, 5 Ohio Cir. Dec. 364.

**5.** Adding Interest Clause. — *Moore v. Hinshaw*, 23 Ind. App. 267, 77 Am. St. Rep. 434; *Derr v. Keaough*, 96 Iowa 397; *Commercial Bank v. Maguire*, 89 Minn. 394; *Otto v. Half*, 89 Tex. 384, 59 Am. St. Rep. 56; *Farmers, etc., Nat. Bank v. Novich*, 89 Tex. 381.

**6.** Erasure of Interest Clause. — *Robertson v. Vasey*, (Iowa 1904) 101 N. W. Rep. 271.

**240.** 1. Accelerating Time of Interest. — *Sheley v. Sampson*, 5 Kan. App. 465; *Hocknell v. Sheley*, 66 Kan. 357; *Simpson v. Sheley*, 9 Kan. App. 512; *Matlock v. Wheeler*, 29 Oregon 64.

**2.** Delaying Time of Interest. — *Commercial Bank v. Maguire*, 89 Minn. 394.

**3.** Alteration in Periods of Payment of Interest. — *Sawyer v. Campbell*, 107 Iowa 397; *McClure v. Little*, 15 Utah 379, 62 Am. St. Rep. 938.

**4.** Addition of Words Denoting Kind of Currency. — *Foxworthy v. Colby*, 64 Neb. 216.



- 241.** 9. Change in Time of Payment. — See notes 1, 2.  
 10. Change in Place of Payment. — See note 4.  
**242.** 11. Change in Statement of Consideration. — See note 4.  
 12. Change in Description of Property. — See note 5.  
**243.** See notes 1, 2.  
**244.** 13. Change in Negotiability — Altering Non-negotiable to Negotiable Instrument. — See notes 2, 4.  
**245.** See note 1.  
 Change in Manner of Negotiability. — See note 4.  
 14. Change in Attestation — Inserting Signature of Attesting Witness. — See note 6.  
**247.** 15. Affixing or Removing Seal — Affixing Seal. — See note 1.  
**251.** V. FILLING BLANKS — 1. By Express Parol Agreement — *b.* SEALED INSTRUMENTS — (4) *Perfecting Merely Incomplete Instrument* — (b) Rule in the United States — Parol Authority Sufficient in Some Jurisdictions. — See note 4.  
**252.** See notes 1, 2.  
**253.** Blanks Filled by Agent with Parol Authority. — See note 1.  
 2. Implied Authority — *a.* GENERAL RULE. — See notes 4, 5.

Addition of words making a note payable in stock is material. *Harnett v. Holdrege*, (Neb. 1903) 97 N. W. Rep. 443.

**241.** 1. Delaying Time of Payment. — *Avirrett v. Barnhart*, 86 Md. 545; *Sawyer v. Campbell*, 107 Iowa 397; *Ft. Worth First Nat. Bank v. Payne*, (Ky. 1897) 42 S. W. Rep. 736; *Cambria Iron Co. v. Keynes*, 56 Ohio St. 501, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 240; *Bowers v. Rineard*, 209 Pa. St. 545. See also *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97.

**2.** Accelerating Time of Payment. — *Seebold v. Tattie*, 76 Minn. 131.

**4.** Alteration in Place of Payment — General Rule. — *Holmes v. Ft. Gaines Bank*, 120 Ala. 493; *Carroll v. Warren*, (Ala. 1904) 37 So. Rep. 687; *Pelton v. San Jacinto Lumber Co.*, 113 Cal. 21; *Young v. Baker*, 29 Ind. App. 130; *Pope v. Branch County Sav. Bank*, 23 Ind. App. 210; *Sheley v. Sampson*, 5 Kan. App. 465; *In re Day*, 13 York Leg. Rec. (Pa.) 133.

**242.** 4. Change in Statement of Consideration. — *Richardson v. Fellner*, 9 Okla. 513.

**5.** Alteration in Description of Mortgaged Property. — *Kime v. Jesse*, 52 Neb. 606.

Alteration in Range Number will avoid the instrument. *Kalbach v. Mathis*, 104 Mo. App. 300.

**243.** 1. Alteration in Deed of Quantity of Land Conveyed. — *Powell v. Pearlstine*, 43 S. Car. 403.

The Intentional Addition of Property by Mortgagee in Chattel Mortgage renders the instrument void. *Bedgood-Howell Co. v. Moore*, (Ga. 1905) 51 S. E. Rep. 420.

Erasure of Letter "s" from Words "Walls and Buildings" Material. — *Webster Realty Co. v. Thomas*, (Supm. Ct. Spec. T. 1905) 94 N. Y. Supp. 916.

**2.** Identity Not Changed. — *Chicago Title, etc., Co. v. O'Marr*, 18 Mont. 568; *Gunter v. Addy*, 58 S. Car. 178; *Churchill v. Bielstein*, 9 Tex. Civ. App. 445. Compare *McKinney v. Cabell*, 24 Ind. App. 676, 31 Ind. App. 548.

**244.** 2. Change in Negotiability — Insertion of Words "or Order." — See *Carlile v. Lamb*, 9 Ohio Cir. Dec. 70.

**4.** Inserting Place of Payment. — *Carroll v. Warren*, (Ala. 1904) 37 So. Rep. 687.

**245.** 1. An Attempt to Insert "or Order" does not amount to a material alteration of a non-negotiable instrument where the insertion is in the wrong place and is spelled "or oder." *Carlile v. Lamb*, 9 Ohio Cir. Dec. 70.

**4.** Substitution of Words "or Bearer" for "or Order." — *Burch v. Daniel*, 101 Ga. 228; *Burch v. Pope*, 114 Ga. 334; *Sawyer v. Campbell*, 107 Iowa 397; *Marshall v. Wilhite*, 2 Ohio Cir. Dec. 500.

**6.** Adding Signature of Witness. — *White Sewing Mach. Co. v. Saxon*, 121 Ala. 399, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 245.

**247.** 1. Affixing Seal Where Legal Effect of Instrument Unaltered. — See *Carlile v. Lamb*, 9 Ohio Cir. Dec. 70.

**251.** 4. Execution of and Filling Blanks in Instrument Distinguished. — *Martin v. Buffalo*, 121 N. Car. 34.

**252.** 1. Filling Blanks in Sealed Instruments — Parol Authority Held Sufficient. — *Otis v. Browning*, 59 Mo. App. 326; *Marin v. Buffalo*, 121 N. Car. 34; *Lafferty v. Lafferty*, 42 W. Va. 783.

**2.** Filling Blanks in Deeds. — *Otis v. Browning*, 59 Mo. App. 326.

Filling in Name of Grantee. — *Lafferty v. Lafferty*, 42 W. Va. 783.

**253.** 1. Blanks Filled by Agent Having Parol Authority. — *Otis v. Browning*, 59 Mo. App. 326.

**4.** Blanks in Negotiable Paper Filled by Transferee. — *Howie v. Lewis*, 14 Pa. Super. Ct. 232.

**5.** General Rule as to Implied Authority. — *Prim v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52; *Ofenstein v. Bryan*, 20 App. Cas. (D. C.) 1; *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246; *Young v. Baker*, 29 Ind. App. 130; *Moore v. Hinshaw*, 23 Ind. App. 267, 77 Am. St. Rep. 434; *Pope v. Branch County Sav. Bank*, 23 Ind. App. 210; *Herington Bank v. Wangerin*, 65 Kan. 423; *Roe v. Town Mut. F. Ins. Co.*, 78 Mo. App. 452; *Humphrey Hardware Co. v. Herrick*, (Neb. 1904) 101 N. W. Rep. 1016; *Porter v. Hardy*, 10 N. Dak. 551; *Farmers, etc., Nat. Bank v. Novich*, 89 Tex. 381.

**254. b. BASIS OF RULE.** — See note 1.

**c. APPLICATION OF RULE** — (3) *Sealed Instruments* — (b) *Where Sufficiency of Parol Authority Is Sustained.* — See note 9.

**255. d. EXTENT OF IMPLIED AUTHORITY** — (1) *Insertion of Matter Necessary to Complete Instrument.* — See note 1.

*Filling in Date.* — See note 2.

**256. Filling in Interest.** — See note 1.

*Filling in Place of Payment.* — See note 5.

*Filling in Name of Party.* — See note 6.

**257. (2) Insertion of Repugnant Stipulations.** — See note 1.

(3) *Addition of Stipulations Not Provided for by Blanks.* — See note 2.

(4) *Erasure or Alteration of Written or Printed Words.* — See note 3.

**3. Effect of Unauthorized Filling of Blanks** — *a. AS BETWEEN ORIGINAL PARTIES.* — See note 4.

**258. b. AS TO THIRD PERSONS** — (1) *With Knowledge.* — See note 1.

(2) *Bona Fide Purchasers of Negotiable Instruments.* — See note 2.

**259. (3) Filling Blanks in Specialties** — *Estoppel.* — See note 1.

**VI. RATIFICATION OF ALTERATIONS** — **1. General Rule.** — See notes 4, 5.

**2. What Constitutes Ratification** — *a. SEALED INSTRUMENTS* — *Sufficiency of Parol Consent Denied.* — See note 7.

**260. Parol Consent Held Sufficient.** — See note 2.

*b. NEGOTIABLE INSTRUMENTS.* — See note 3.

*Ratification Need Not Be Express or in Writing.* — See note 5.

**254. 1. Porter v. Hardy, 10 N. Dak. 551.**  
**9. Right Implied from All Circumstances.** — *Spring Garden Ins. Co. v. Lemmon, 117 Iowa 691, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 254.*

**255. 1. Extent of Implied Authority — General Rule.** — See *Herington Bank v. Wangerin, 65 Kan. 423; Porter v. Hardy, 10 N. Dak. 551.*

**2. Filling in Date.** — *Lance v. Calvert, 21 Pa. Super. Ct. 102.*

**256. 1. Filling in Rate of Interest.** — *Farmers, etc., Nat. Bank v. Novich, 89 Tex. 381.*

**5. Filling in Place of Payment.** — *Cox v. Alexander, 30 Oregon 438. Compare Light v. Killinger, 16 Ind. App. 102, 59 Am. St. Rep. 313.*

**6. Blank Left for Name of Payee.** — *Cox v. Alexander, 30 Oregon 438.*

**257. 1. Young v. Baker, 29 Ind. App. 130; Porter v. Hardy, 10 N. Dak. 551.**

**2. Insertion of Additional Stipulations.** — *Porter v. Hardy, 10 N. Dak. 551; Cox v. Alexander, 30 Oregon 438. See also Light v. Killinger, 16 Ind. App. 102, 59 Am. St. Rep. 313.*

**3. Erasing or Altering Written or Printed Words.** — *Ofenstein v. Bryan, 20 App. Cas. (D. C.) 1; Porter v. Hardy, 10 N. Dak. 551; Cox v. Alexander, 30 Oregon 438.*

**4. Unauthorized Filling of Blanks — Effect upon Original Parties.** — *Pope v. Branch County Sav. Bank, 23 Ind. App. 210.*

**258. 1. Unauthorized Filling of Blanks — As to Third Parties with Knowledge.** — *Pope v. Branch County Sav. Bank, 23 Ind. App. 210; Young v. Baker, 29 Ind. App. 130.*

**2. Unauthorized Filling of Blanks — Bona Fide Purchasers.** — *Prim v. Hammel, 134 Ala. 652, 92 Am. St. Rep. 52; Statton v. Stone, 15 Colo.*

*App. 237; Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246; Weaver v. Leseure, 89 Ill. App. 628; Pope v. Branch County Sav. Bank, 23 Ind. App. 210; Hackett v. Louisville First Nat. Bank, 114 Ky. 193; Weidman v. Symes, 120 Mich. 657, 77 Am. St. Rep. 603; Humphrey Hardware Co. v. Herrick, (Neb. 1904) 101 N. W. Rep. 1016; Porter v. Hardy, 10 N. Dak. 551. See also Derr v. Keaough, 96 Iowa 397.*

**259. 1. Filling Blanks in Specialties.** — *Kelly v. Thuey, 143 Mo. 422.*

**4. Material Alteration May Be Ratified.** — *Woodbury v. Allegheny, etc., R. Co., 72 Fed. Rep. 371; Cabell v. McKinney, 31 Ind. App. 548; Mockler v. St. Vincent's Inst., 87 Mo. App. 473; State v. Paxton, 65 Neb. 110; Bryant v. Charleston Bank, 107 Tenn. 560; Jones v. Ferd Heim Brewing Co., (Tex. Civ. App. 1897) 44 S. W. Rep. 896; Chezum v. McBride, 21 Wash. 558; Marks v. Schram, 109 Wis. 452. See also Barnsdall v. Boley, 119 Fed. Rep. 191.*

**5. New Consideration Not Necessary.** — *State v. Paxton, 65 Neb. 110.*

**7. Ratification of Alteration in Bond.** — *Wester v. Bailey, 118 N. Car. 193.*

**260. 2. Consent by Parol to Alteration of Specialty Held Sufficient.** — See *Coney v. Laird, 153 Mo. 408.*

**3. Parol Consent of Party.** — *Lance v. Calvert, 21 Pa. Super. Ct. 102.*

**5. Failing to Object to Alteration.** — *Matlock v. Wheeler, 29 Oregon 64.*

Accepting profits under an altered lease with knowledge of the alteration is a waiver of the right to thereafter object. See *Barnsdall v. Boley, 119 Fed. Rep. 191.*

**261.** Intent to Ratify and Knowledge of Alteration Essential. — See notes 1, 2. Illustrations. — See notes 3, 5.

**263.** VIII. EFFECT OF RESTORATION — Restoration Will Not Revive Validity. — See note 1.

**266.** IX. ALTERATIONS IN WILLS — 2. Alterations by the Testator — *b*. EFFECT OF ALTERATION AFTER EXECUTION — Alteration in Clauses. — See note 3.

**267.** 3. Alterations by a Legatee. — See note 3.

**268.** 4. Alterations by a Stranger. — See note 1.

X. RECOVERY OF MONEY PAID ON ALTERED INSTRUMENT. — See note 2.

XII. QUESTIONS OF LAW AND FACT — Fact of Alteration. — See note 4.

**269.** Where Alteration Is Presumed from Appearance of Instrument. — See notes 2, 3. Materiality of Alterations. — See note 4.

Consent. — See note 5.

**270.** Intent. — See note 1.

XIII. EVIDENCE — 1. Competency and Sufficiency of Evidence — *a*. COMPETENCY OF EVIDENCE — In General. — See note 3.

**271.** Corroborating Circumstances. — See note 1.

Expert Testimony. — See note 2.

**261.** 1. Knowledge of Alteration Necessary. — State *v.* Paxton, 65 Neb. 110.

Contra. — See Harrison *v.* Luce, 64 Ark. 583.

**2.** Intent to Ratify Necessary. — State *v.* Paxton, 65 Neb. 110.

**3.** Promise to Pay Note. — Ofenstein *v.* Bryan, 20 App. Cas. (D. C.) 1; Marks *v.* Schram, 109 Wis. 452. See Mulkey *v.* Long, 5 Idaho 213.

**5.** Partial Payment of Note. — Payne *v.* Long, 121 Ala. 385, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 261.

**263.** 1. Restoration of Altered Instrument. — Hayes *v.* Wagner, 89 Ill. App. 390; McMurtrey *v.* Sparks, 71 Mo. App. 126; McAlpin *v.* Clark, 5 Ohio Cir. Dec. 364; Edwards *v.* Sartor, 69 S. Car. 540; Deering Harvester Co. *v.* White, 110 Tenn. 132; Conner *v.* Thornton, (Tex. Civ. App. 1899) 51 S. W. Rep. 354. See also Phoenix Ins. Co. *v.* McKernan, 100 Ky. 97.

**266.** 3. Alteration in Legacies. — Thomas *v.* Thomas, 76 Minn. 237, 77 Am. St. Rep. 639.

**267.** 3. Alterations by Legatee. — Thomas *v.* Thomas, 76 Minn. 237, 77 Am. St. Rep. 639.

**268.** 1. Alterations by Stranger. — Thomas *v.* Thomas, 76 Minn. 237, 77 Am. St. Rep. 639.

**2.** Money Paid on a Raised Check may be recovered, provided the one seeking to recover has not, by his careless or negligent act, injured or prejudiced the rights of the person from whom the recovery is sought. Oppenheim *v.* West Side Bank, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 722.

**4.** Georgia. — Heard *v.* Tappan, 116 Ga. 930; Armstrong *v.* Penn, 105 Ga. 229; Winkles *v.* Guenther, 98 Ga. 472.

Iowa. — Benton County Sav. Bank *v.* Strand, 106 Iowa 606.

Missouri. — McMurtrey *v.* Sparks, 71 Mo. App. 126; Paul *v.* Leeper, 98 Mo. App. 515.

Nebraska. — Dorsey *v.* Conrad, 49 Neb. 443; Geodin *v.* Plugge, 47 Neb. 284; McClintock *v.* State Bank, 52 Neb. 130.

New Jersey. — Jones *v.* Crowley, 57 N. J. L. 222.

New York. — Mosher *v.* Davis, 41 N. Y. App. Div. 622.

North Dakota. — Cass County *v.* American Exch. State Bank, 9 N. Dak. 263.

Oklahoma. — Richardson *v.* Fellner, 9 Okla. 513.

South Carolina. — White *v.* Harris, 69 S. Car. 65.

**269.** 2. Ofenstein *v.* Bryan, 20 App. Cas. (D. C.) 1.

**3.** Ofenstein *v.* Bryan, 20 App. Cas. (D. C.) 1; Weidman *v.* Symes, 120 Mich. 657, 77 Am. St. Rep. 603.

**4.** Payne *v.* Long, 121 Ala. 385, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 269; Winkles *v.* Guenther, 98 Ga. 472; McMurtrey *v.* Sparks, 71 Mo. App. 126; Jones *v.* Crowley, 57 N. J. L. 222; Richardson *v.* Fellner, 9 Okla. 513.

**5.** White *v.* Harris, 69 S. Car. 65.

**270.** 1. Ofenstein *v.* Bryan, 20 App. Cas. (D. C.) 1.

**3.** See Gandy *v.* Bissell, (Neb. 1904) 100 N. W. Rep. 803; Matlock *v.* Wheeler, 29 Oregon 64.

Illustrations. — It is competent to ask the plaintiff whether his attention was in any manner drawn to these changes in the note. Stough *v.* Ogden, 49 Neb. 291.

The duplicate of a contract is admissible to show that the original has been altered. Young *v.* Cohen, 42 S. Car. 328.

Testimony of the scrivener regarding certain interlineations is competent. Batchelder *v.* Blake, 70 Vt. 197.

**271.** 1. A Renewal Note is admissible to contradict the payee who testifies that the interlined original note was drawn in his usual manner of drawing notes. Hellriegel *v.* Corson, 24 N. Y. App. Div. 452.

**2.** Opinion of Expert Competent Evidence. — Ofenstein *v.* Bryan, 20 App. Cas. (D. C.) 1; Rass *v.* Sebastian, 160 Ill. 602; Coppock *v.* Lampkin, 114 Iowa 664.

**272.** *b. SUFFICIENCY OF EVIDENCE.* — See note 1.

**2.** *Burden of Proof* — *a. NONAPPARENT ALTERATIONS.* — See notes 3, 5.

*b. APPARENT ALTERATIONS — PRESUMPTIONS — (1) Generally — Conflict of Authorities.* — See note 6.

**273.** *(2) Preliminary Inquiry by Court.* — See note 2.

**274.** *Question Should Generally Be Submitted to Jury.* — See note 1.

*(3) View that Apparent Alteration Raises No Presumption.* — See note 2.

*Duty of Explanation Devolves on Him Who Produces Instrument.* — See note 3.

**275.** *Proof of Signature Generally Makes Prima Facie Case.* — See note 1.

*Rebuttal of Prima Facie Case.* — See note 2.

*Evidence in Rebuttal — The Writing as Evidence.* — See note 3.

*Where the Alteration Is in Itself Suspicious.* — See note 4.

*Absence of Explanation Considered as Evidence.* — See note 5.

*(4) View that Alteration Presumed Made Before Execution.* — See notes 7, 8.

**272.** 1. See *Rosenberg v. Jett*, 72 Fed. Rep. 90.

An Affidavit by Defendant that the note sued on was altered must show when and by whom altered, what was changed, and the original tenor of the altered note. *Bryan v. Harr*, 21 App. Cas. (D. C.) 190.

3. *Conkling v. Olmstead*, 63 Ill. App. 649.

**5. Nonapparent Alterations — Burden of Proof.** — *Dewey v. Merritt*, 106 Ill. App. 156; *Jackson v. Day*, 80 Miss. 800; *Hodge v. Scott*, (Neb. 1901) 95 N. W. Rep. 837; *McClintock v. State Bank*, 52 Neb. 130; *Gettysburg Nat. Bank v. Gage*, 4 Pa. Super. Ct. 505; *Cosgrove v. Fanebust*, 10 S. Dak. 213; *Bradley v. Dells Lumber Co.*, 105 Wis. 245.

**Immaterial Alteration.** — Where the alteration is absolutely immaterial, so far as the parties are concerned, the burden of proof is on the party alleging the invalidity of the instrument. *Parker's Estate*, 19 Pa. Co. Ct. 606.

6. *Wheaden v. Turregano*, 112 La. 931.

For a review of authorities and a discussion of this proposition see *Dorsey v. Conrad*, 49 Neb. 443.

**273.** 2. *Ward v. Cheney*, 117 Ala. 238, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 273; *State v. Chick*, 146 Mo. 645; *Bradley v. Dells Lumber Co.*, 105 Wis. 245. See also *Stough v. Ogden*, 49 Neb. 291.

**Testimony that Alteration Was Made Before Delivery to Plaintiff.** — *Consumers Ice Co. v. Jennings*, 100 Va. 719, supporting fifth paragraph in original note.

**274.** 1. *Graham v. Middleby*, 185 Mass. 349; *McClintock v. State Bank*, 52 Neb. 130.

**2. Question of Fact for Jury.** — *Ward v. Cheney*, 117 Ala. 241; *Hart v. Sharpton*, 124 Ala. 638; *Klein v. German Nat. Bank*, 69 Ark. 144, 86 Am. St. Rep. 183, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 274; *Cattin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 274; *State v. Chick*, 146 Mo. 645; *Goodin v. Plugge*, 47 Neb. 284; *Stough v. Ogden*, 49 Neb. 291; *Winters v. Mowrer*, 1 Pa. Super. Ct. 47; *Moddie v. Breiland*, 9 S. Dak. 506; *Kansas Mut. L. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 64; *Consumers Ice Co. v. Jennings*, 100 Va.

719. See also *Winkles v. Guenther*, 98 Ga. 472; *Harper v. Reeves*, 132 Ala. 625.

**3. Plaintiff Must Make Out His Case.** — *In re Howgate*, (1902) 1 Ch. 451, 71 L. J. Ch. 279; *Klein v. German Nat. Bank*, 69 Ark. 144, 86 Am. St. Rep. 183, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 274; *Baxter v. Camp*, 71 Conn. 245, 71 Am. St. Rep. 169; *Kelly v. Thuey*, 143 Mo. 422; *State v. Chick*, 146 Mo. 645; *Gowdey v. Robbins*, 3 N. Y. App. Div. 353; *Marshall v. Wilhite*, 2 Ohio Cir. Dec. 500; *Alexander v. Buckwalter*, 8 Del. Co. Rep. (Pa.) 74; *Gettysburg Nat. Bank v. Gage*, 4 Pa. Super. Ct. 505; *Davis v. Crawford*, (Tex. Civ. App. 1899) 53 S. W. Rep. 384; *Kansas Mut. L. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 64; *Consumers Ice Co. v. Jennings*, 100 Va. 719.

**275.** 1. **Proof of Execution Enough in First Instance.** — *Klein v. German Nat. Bank*, 69 Ark. 144, 86 Am. St. Rep. 183; *Dewey v. Merritt*, 106 Ill. App. 156; *Fudge v. Marquell*, (Ind. 1904) 72 N. E. Rep. 565; *Graham v. Middleby*, 185 Mass. 349; *Richardson v. Fellner*, 9 Okla. 513; *Cosgrove v. Fanebust*, 10 S. Dak. 213; *Moddie v. Breiland*, 9 S. Dak. 506; *Maldaner v. Smith*, 102 Wis. 30.

2. *Fudge v. Marquell*, (Ind. 1904) 72 N. E. Rep. 565; *Graham v. Middleby*, 185 Mass. 349.

**3. The Instrument Itself as Evidence.** — *Cass County v. American Exch. State Bank*, 9 N. Dak. 263; *Foley-Wadsworth Implement Co. v. Solomon*, 9 S. Dak. 511. See also *Cosgrove v. Fanebust*, 10 S. Dak. 213.

4. *Yeager v. Cassidy*, 16 Lanc. L. Rev. 305; *Kansas Mut. L. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 64.

**What Constitutes "Suspicious Circumstances."** — *Landt v. McCullough*, 206 Ill. 214.

5. See *Peugh v. Mitchell*, 3 App. Cas. (D. C.) 321.

7. *Burgess v. Blake*, 128 Ala. 105, 86 Am. St. Rep. 78; *Gunkel v. Seiberth*, (Ky. 1905) 85 S. W. Rep. 733.

**8. United States.** — *Sneed v. Sabinal Mtn., etc., Co.*, (C. C. A.) 73 Fed. Rep. 925.

*Alabama.* — *Ward v. Cheney*, 117 Ala. 241. *Missouri.* — *Noah v. German Ins. Co.*, 69 Mo. App. 332; *Paul v. Leeper*, 98 Mo. App. 515; *Kalbach v. Mathis*, 104 Mo. App. 300.

**276.** Subsidiary Principle as to Suspicious Alteration. — See note 2.

**277.** (5) *View that Alteration Presumed Made After Execution.* — See note 1.

Presumption Denied, Limited, or Explained. — See notes 3, 4.

**278.** Where the Alteration Is Against Interest, or Not Suspicious. — See note 2.

(6) *Suspicious Circumstances Calling for Explanations* — Instances of Suspicious Alterations. — See note 3.

**279.** See note 1.

**280.** *c.* PROOF OF FACTS AVOIDING EFFECT OF ALTERATION — General Rule. — See note 4.

## **286. AMALGAMATE — AMALGAMATION.** — See note 1.

*Nebraska.* — Dorsey *v.* Conrad, 49 Neb. 443.  
*North Dakota.* — Cass County *v.* American Exch. State Bank, 9 N. Dak. 263; Decorah First Nat. Bank *v.* Laughlin, 4 N. Dak. 391.

*Ohio.* — Newman *v.* King, 54 Ohio St. 273, 56 Am. St. Rep. 705; Tarbill *v.* Richmond City Mill Works, 1 Ohio Cir. Dec. 643.

*Oregon.* — See Galloway *v.* Bartholomew, 44 Oregon 75.

*South Dakota.* — Moddie *v.* Breiland, 9 S. Dak. 506; Foley-Wadsworth Implement Co. *v.* Solomon, 9 S. Dak. 511.

*Texas.* — Parshall *v.* Clark, (Tex. Civ. App. 1903) 77 S. W. Rep. 437.

*Washington.* — Blewett *v.* Bash, 22 Wash. 536.

*Wisconsin.* — Bradley *v.* Dells Lumber Co., 105 Wis. 245; Maldaner *v.* Smith, 102 Wis. 30.

"Alterations are *prima facie* presumed to have been made before execution, unless the paper be denied on oath." Winkles *v.* Guenther, 98 Ga. 472.

**Alteration in Same Ink.** — Peugh *v.* Mitchell, 3 App. Cas. (D. C.) 321. See also Cook *v.* Moulton, 59 Ill. App. 428.

**276. 2. Where the Alteration Is Suspicious** — *Alabama.* — See Burgess *v.* Blake, 128 Ala. 105, 86 Am. St. Rep. 78; Ward *v.* Cheney, 117 Ala. 238.  
*Illinois.* — See Landt *v.* McCullough, 103 Ill. App. 668.

*Iowa.* — Rambousek *v.* Supreme Council, etc., 119 Iowa 263.

*Louisiana.* — Messi *v.* Frechede, 113 La. 679; Wheadon *v.* Turregano, 112 La. 931.

*Missouri.* — Burton *v.* American Guarantee Fund F. Ins. Co., 88 Mo. App. 392; Noah *v.* German Ins. Co., 69 Mo. App. 332; Kalbach *v.* Mathis, 104 Mo. App. 300. See also Burton *v.* American Guarantee Fund Mut. F. Ins. Co., 96 Mo. App. 204.

*New York.* — Rosenbloom *v.* Finch, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 818.

*Pennsylvania.* — Citizens Nat. Bank *v.* Williams, 174 Pa. St. 66.

*South Dakota.* — Landauer *v.* Sioux Falls Imp. Co., 10 S. Dak. 205.

*Tennessee.* — Riseden *v.* Harrison, (Tenn. Ch. 1897) 42 S. W. Rep. 884.

*Virginia.* — Bashaw *v.* Wallace, 101 Va. 733.

*Wisconsin.* — Bradley *v.* Dells Lumber Co., 105 Wis. 245; Maldaner *v.* Smith, 102 Wis. 30.

**277. 1.** Barnsdall *v.* Boley, 119 Fed. Rep. 191, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 276; Dewey *v.* Merritt, 106 Ill. App. 156. See Holmes *v.* Ft. Gaines Bank, 120 Ala. 493; Wheadon *v.* Turregano, 112 La. 931; Messi *v.* Frechede, 113 La. 679.

**Statute in Idaho.** — Where the alteration is apparent, the party producing the instrument must explain it. Mulkey *v.* Long, 5 Idaho 213.

**3. Presumption Against Validity of Instrument Denied.** — See Parker's Estate, 19 Pa. Co. Ct. 606; Portsmouth Sav. Bank *v.* Wilson, 5 App. Cas. (D. C.) 8.

**4. Rule Confined to Commercial Paper.** — See Winters *v.* Mowrer, 1 Pa. Super. Ct. 47.

**278. 2.** See Bowers *v.* Rineard, 209 Pa. St. 545.

**3. Alterations in Favor of Propounder.** — Landauer *v.* Sioux Falls Imp. Co., 10 S. Dak. 205, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 278; Burton *v.* American Guarantee Fund Mut. F. Ins. Co., 88 Mo. App. 392.

**279. 1.** Peugh *v.* Mitchell, 3 App. Cas. (D. C.) 321; Bashaw *v.* Wallace, 101 Va. 733; Bradley *v.* Dells Lumber Co., 105 Wis. 245.

**Instrument Cut.** — Where the instrument shows that a part of it has been clipped or cut away by a sharp instrument, it is suspicious on its face and the burden of proof is shifted. Burton *v.* American Guarantee Fund Mut. F. Ins. Co., 88 Mo. App. 392.

**280. 4.** Sullivan *v.* California Realty Co., 142 Cal. 201; Maguire *v.* Eichmeier, 109 Iowa 301; Wheadon *v.* Turregano, 112 La. 931; Citizens Nat. Bank *v.* Williams, 174 Pa. St. 66.

In Idaho such evidence is especially set out by statute. Mulkey *v.* Long, 5 Idaho 213.

**286. 1. "Amalgamation" in England Equivalent to "Consolidation" in United States.** — Shadford *v.* Detroit, etc., R. Co., 130 Mich. 300.

**Amalgamation and Reconstruction.** — *In re* South Africa Supply, etc., Co., (1904) 2 Ch. 287, the court said: "The only question I have to determine is whether, in the case of each of these two companies, there has or has not been a winding-up 'for the purpose of reconstruction or amalgamation.' Neither of these words, 'reconstruction' and *amalgamation*, has any definite legal meaning. Each is a commercial and not a legal term, and, even as a commercial term, bears no exact definite meaning. In each case one has to decide whether the transaction is such as that, in the meaning of commercial men, it is one which is comprehended in the term 'reconstruction' or *amalgamation*. \* \* \* An *amalgamation* involves, I think, a different idea. There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam — a blending of two undertakings."

# AMBIGUITY.

By W. H. BUCHANAN.

## 289. II. KINDS OF AMBIGUITY — 2. Latent Ambiguity. — See note 1.

A Question of Fact. — See note 2.

3. Ambiguity of Intermediate Class. — See note 3.

## III. PAROL EVIDENCE TO EXPLAIN — 1. Patent Ambiguity — General Rule. — See note 4.

**289. 1. Latent Ambiguity Defined.** — *Flynn v. Holman*, 119 Iowa 731; *Ladnier v. Ladnier*, 75 Miss. 777; *Petrie v. Hamilton College*, 158 N. Y. 458.

**Latent Ambiguity Distinguished from Mistake or Error in Description.** — A latent ambiguity may be explained and the description aided by parol evidence in a court of law, while a mistake or error in description requires the jurisdiction of a court of equity for its correction. *Donehoo v. Johnson*, 120 Ala. 438.

**The Term "The Southeast Forty of the Northeast Quarter"** does not create a latent ambiguity where the common acceptance and meaning of such term is "the southeast forty acres of the northeast quarter." *Evans v. Gerry*, 174 Ill. 595.

**2. Latent Ambiguity — Question of Fact.** — *Davenport First Nat. Bank v. Rothschild*, 107 Ill. App. 133.

**When Question of Law.** — In *Thorn*, etc., *Lime*, etc., *Co. v. St. Louis Expanded Metal Fire Proofing Co.*, 77 Mo. App. 21, the court said: "Where an ambiguity exists and it is solved by extraneous matter about which there is no dispute, the construction is. \* \* \* for the court. But where the extrinsic facts are unconceded and rest upon conflicting testimony from which different inferences might be drawn, it is for the triers of the facts to draw the inferences and say what the parties meant by the contract."

**3. Ambiguity of Intermediate Class.** — *Moody v. Alabama G. S. R. Co.*, 124 Ala. 195; *Miles v. Miles*, 78 Miss. 904, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 289; *Sullivan v. Visconti*, 68 N. J. L. 543, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 287, 304; *Dorris v. King*, (Tenn. Ch. 1899) 54 S. W. Rep. 683. See also *Schlottman v. Hoffman*, 73 Miss. 188, 55 Am. St. Rep. 527; *Hattiesburg Plumbing Co. v. Carmichael*, 80 Miss. 66.

**The Omission of the Number of a Lot** intended to be described in a lease does not effect a patent ambiguity, within the accurate and proper definition of that term, but is such as may be corrected by parol proof. *Marske v. Willard*, 169 Ill. 276.

**Omission from a Deed of the Names of the State and County**, when the land is described by section, township, and range, may be corrected by proof of extrinsic facts applying the deed to the property sought to be conveyed. *Ladnier v. Ladnier*, 75 Miss. 777.

**"Cost in Market"** has no fixed meaning and may be explained by parol evidence of the

meaning given to it by the parties at the time of the execution of the contract. *McGrath v. Crouse*, 6 Kan. App. 507.

**The Term "Strand"** is of universal use, and therefore does not come within the rule of admissibility of parol evidence to prove how it was understood or accepted in any particular locality. *Stillman v. Burfeind*, 21 N. Y. App. Div. 13.

**The Term "Westerly Half"** of a store when used in a lease may be explained by parol evidence in a case where the application of the middle line of the store fails definitely to create the part intended to be leased. *Freund v. Kearney*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 685.

**An Imperfect Description of Notes** secured by a trust deed, which is simply inaccurate in failing to add some additional matter, which would have made the description perfect, may be aided by extrinsic evidence. *McDonald v. Dorbrandt*, 17 Tex. Civ. App. 277.

**4. Effect of Patent Ambiguity — England.** — *In re Hetley*, (1902) 2 Ch. 866, 87 L. T. N. S. 265; *In re Fleetwood*, 15 Ch. D. 594. See also *Flood v. Flood*, (1902) 1 Ir. R. 538.

*Alabama.* — *Hereford v. Hereford*, 131 Ala. 573.

*Indiana.* — *Compare Holt v. Sweetzer*, 23 Ind. App. 237.

*Iowa.* — *Augustine v. McDowell*, 120 Iowa 401.

*Kentucky.* — *Hall v. Conlee*, (Ky. 1901) 62 S. W. Rep. 899; *Smith v. Smith*, (Ky. 1903) 72 S. W. Rep. 766. See also *Kentucky Citizens Bldg., etc., Assoc. v. Lawrence*, 106 Ky. 88; *Thomas v. Scott*, (Ky. 1903) 72 S. W. Rep. 1129.

*Maryland.* — *Castleman v. Du Val*, 89 Md. 657.

*Missouri.* — *Mudd v. Dillon*, 166 Mo. 110; *C. E. Donnell Newspaper Co. v. Jung*, 81 Mo. App. 577.

*New Jersey.* — *Compare Simanton v. Vliet*, 61 N. J. L. 595.

*North Carolina.* — *Holman v. Whitaker*, 119 N. Car. 113. See also *Worth v. Simmons*, 121 N. Car. 358.

*Oklahoma.* — See *Powers v. Rude*, (Okla. 1904) 79 Pac. Rep. 89.

*Oregon.* — *Tallmadge v. Hooper*, 37 Oregon 503.

*Texas.* — *Cammack v. Prather*, (Tex. Civ. App. 1903) 74 S. W. Rep. 354.

In *Schlottman v. Hoffman*, 73 Miss. 188, 55 Am. St. Rep. 527, the court said: "When the

- 291.** Reason of the Rule. — See note 1.  
Qualification of the Rule. — See note 2.
- 292.** See note 1.

parol evidence is for the purpose of adding a material term to an instrument, or when the court, having looked to the circumstances of the parties, the subject-matter of the instrument, and all proper collateral facts, remains uncertain as to what the meaning of the written words is, a patent ambiguity appears, which parol evidence cannot aid."

**Omission of the Name of the Town** in which is situated property intended to be described in a deed, produces a patent ambiguity, and parol evidence is not admissible to remedy the uncertainty in the description. *Taffinder v. Merrell*, 18 Tex. Civ. App. 661.

**The Word "Well"** may not of itself convey a distinct idea of the precise thing the parties intended should be produced, but as the doubt is suggested at once by the phrase itself, it has been held that it is an ambiguity which the law terms a "patent ambiguity," and as a general rule such a one may not be cured by proof of what the parties intended by the use of the doubtful phrase. *Strong v. Waters*, 27 N. Y. App. Div. 299.

**291.** 1. *Strong v. Waters*, 27 N. Y. App. Div. 299, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 289, 290.

**2. Evidence of Intention.** — *Borden v. Fletcher*, 131 Mich. 220, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 291.

**Under Georgia Code.** — *Chauncey v. Brown*, 99 Ga. 766.

**292.** 1. **Proof of Collateral Facts and Surrounding Circumstances** — *England*. — *New Zealand Bank v. Simpson*, (1900) A. C. 182, 82 L. T. N. S. 102; *In re Grainger*, (1900) 2 Ch. 756, 83 L. T. N. S. 209.

*California*. — *Baker v. Clark*, 128 Cal. 181; *Matter of Langdon*, 129 Cal. 451.

*Connecticut*. — *Fritsche v. Fritsche*, 75 Conn. 285.

*Florida*. — *L'Engle v. Scottish Union*, etc., F. Ins. Co., (Fla. 1904) 37 So. Rep. 462.

*Georgia*. — *Penn Tobacco Co. v. Leman*, 109 Ga. 428; *Follendore v. Follendore*, 110 Ga. 359.

*Illinois*. — *Chambers v. Prewitt*, 172 Ill. 615; *Davenport First Nat. Bank v. Rothschild*, 107 Ill. App. 133; *Sanitary Dist. v. McMahon*, etc., Co., 110 Ill. App. 510. See also *Keeley Brewing Co. v. Neubauer Decorating Co.*, 194 Ill. 580; *Davis v. Fidelity F. Ins. Co.*, 208 Ill. 375.

*Iowa*. — *American Sav. Bank v. Shaver Carriage Co.*, 111 Iowa 137; *Ingram v. Dailey*, 123 Iowa 188.

*Kansas*. — *Peters v. McVey*, 59 Kan. 775, 52 Pac. Rep. 896.

*Kentucky*. — *Chapman v. Clements*, (Ky. 1900) 56 S. W. Rep. 646.

*Maryland*. — See *Castleman v. Du Val*, 89 Md. 657.

*Massachusetts*. — *Hebb v. Welsh*, 185 Mass. 335.

*Michigan*. — *Borden v. Fletcher*, 131 Mich. 220, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 291.

*Minnesota*. — *Ripon College v. Brown*, 66 Minn. 179; *Reeves v. Cress*, 80 Minn. 466.

*Missouri*. — *Arnoldia v. Childs*, 70 Mo. App. 530.

*New York*. — *Myers v. Sea Beach R. Co.*, 43 N. Y. App. Div. 573; *Bird v. Beckwith*, 45 N. Y. App. Div. 124; *New York House-Wrecking Co. v. O'Rourke*, 92 N. Y. App. Div. 217; *Tanenbaum v. Levy*, 83 N. Y. App. Div. 319, affirmed 178 N. Y. 594; *Bowery Bank v. Hart*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 412. See also *Southampton v. Jessup*, 173 N. Y. 84.

*North Carolina*. — *Ward v. Gay*, (N. Car. 1905) 49 S. E. Rep. 884.

*Oregon*. — *Baker County v. Huntington*, (Oregon 1905) 79 Pac. Rep. 187.

*Pennsylvania*. — *Cummins v. German American Ins. Co.*, 197 Pa. St. 61.

*Texas*. — *Ascarete v. Pfaff*, (Tex. Civ. App. 1904) 78 S. W. Rep. 974; *Missouri, etc., R. Co. v. Anderson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 781.

*West Virginia*. — *Newman v. Kay*, (W. Va. 1905) 49 S. E. Rep. 926.

*Wisconsin*. — *Murray Hill Land Co. v. Milwaukee Light, etc., Co.*, 110 Wis. 555; *Excelsior Wrapper Co. v. Messenger*, 116 Wis. 549.

In *Marske v. Willard*, 169 Ill. 276, the court said: "Some confusion exists in the authorities, arising, it is believed, out of incorrect meanings attached to the terms 'latent' and 'patent' ambiguities, for it is certainly not true that, as the term 'patent ambiguity' is often understood, it is an inflexible rule that extrinsic evidence is inadmissible to explain the ambiguity."

In *Citizens' Bank v. Brigham*, 61 Kan. 727, the court said: "Where the phraseology of an instrument is doubtful or ambiguous, meaning can be given to it by showing the inducing causes to the making of it and the facts and circumstances surrounding its execution and involving the parties to it; and generally, evidence not contradictory of the language of an instrument, but explanatory of the purpose and object of the parties in executing it, will be received."

In *Schlottman v. Hoffman*, 73 Miss. 188, 55 Am. St. Rep. 527, the court said: "The rule against the introduction of parol testimony in cases of patent ambiguity is very generally stated too broadly — frequently for the reason that, with reference to the case before the court, the rule, however broadly stated, is correct in its application."

In *Wolff v. Wells*, (C. C. A.) 115 Fed. Rep. 32, the court said: "If there is any uncertainty or ambiguity as to the meaning of the words used in the written contract, where it is based upon or refers to a conversation, parol evidence may be admitted, not to vary the terms of the contract, but to explain the sense in which the language in the writing was used. Such attendant and surrounding circumstances are competent evidence for the purpose of placing the court in the same situation and giving it the same advantage for construing the instrument as were possessed by the parties who executed it."

**293. Reputation or Usage.** — See note 1.

Acts under the Instrument. — See note 2.

**294. Verbal Declarations to Explain Contracts.** — See note 2.**295. 2. Latent Ambiguity** — *a. IN GENERAL.* — See note 1.

In *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672, the court said: "That which may be so shown [for the purpose of ascertaining the meaning of the terms of a contract] is frequently spoken of as the surrounding circumstances, but it does not include the prior representations, proposals, and negotiations of a promissory character leading up to, and superseded by, the written agreement."

**293. 1. Usage and Custom** — *Delaware.* — Penn Steel Casting, etc., Co. v. Wilmington Malleable Iron Co., 1 Penn. (Del.) 337.

*Georgia.* — *Dixon v. Central of Georgia R. Co.*, 110 Ga. 173.

*Illinois.* — *McChesney v. Chicago*, 173 Ill. 75.

*Indiana.* — *Rastetter v. Reynolds*, 160 Ind. 133.

*Iowa.* — *Wood v. Allen*, 111 Iowa 97; *Grasmier v. Wolf*, (Iowa 1902) 90 N. W. Rep. 813. See also *Cameron v. Fellows*, 109 Iowa 534.

*Kansas.* — *Seymour v. Armstrong*, 62 Kan. 720, affirming 10 Kan. App. 10.

*Michigan.* — See *Chase v. Ainsworth*, (Mich. 1903) 97 N. W. Rep. 404.

*Missouri.* — *Turner v. Dixon*, 150 Mo. 416; *Heyworth v. Miller Grain, etc., Co.*, 174 Mo. 171; *Sharp v. Sturgeon*, 66 Mo. App. 191; *Wilcox v. Baer*, 85 Mo. App. 587.

*Montana.* — *Cambers v. Lowry*, 21 Mont. 478. *New Jersey.* — *Halsey v. Adams*, 63 N. J. L. 330.

*New York.* — *Woodruff v. Klee*, 47 N. Y. App. Div. 638; *McIntosh v. Miner*, 53 N. Y. App. Div. 240.

*Oregon.* — *Barnes v. Leidigh*, (Oregon 1905) 79 Pac. Rep. 51.

*Pennsylvania.* — *Miller v. McKeesport, etc., R. Co.*, 179 Pa. St. 350; *Glenn v. Strickland*, 21 Pa. Super. Ct. 88.

*Tennessee.* — *Fry v. Provident Sav. L. Assur. Soc.*, (Tenn. Ch. 1896) 38 S. W. Rep. 116.

*Texas.* — *Fort Grain Co. v. Hubby*, (Tex. Civ. App. 1904) 79 S. W. Rep. 363.

*Vermont.* — *New England Granite Works v. Bailey*, 69 Vt. 257.

In *Hinote v. Brigman*, 44 Fla. 589, the court said: "The rule \* \* \* is that where words or phrases used in a contract have acquired a definite meaning generally or by local usage, or, when used in reference to certain things or commodities, have acquired a definite meaning among those dealing with such things or commodities, and the language used in the writing is such that the court does not understand it, oral testimony is admissible to explain the meaning of such words or phrases."

In *Kohl v. Frederick*, 115 Iowa 517, the court said: "Where, by giving a word its strict technical legal meaning, a contract will be rendered entirely meaningless, it is competent to show by parol the sense in which it was used; if it is used by laymen in a different sense, or has a popular or common meaning, if by doing so the contract may be given force and effect."

**Effect of Parol Evidence.** — Parol evidence of

the meaning of technical terms, as established by usage or custom in the trade, neither varies nor adds to the written instrument, but merely translates it from the language of the trade into the ordinary language of people generally. *Maurin v. Lyon*, 69 Minn. 257, 65 Am. St. Rep. 568.

**Warranted Sound and Safe Property.** — Where it was contended that this phrase, when used in reference to a horse, had from long custom come to be understood in a certain locality as referring to the title to the animal exclusively, and not to his qualities, it was held that the word "sound" is a common word the meaning of which could not be varied, but that the term "safe property" could be shown by parol evidence to have been used in a technical sense. *Thompson v. Pruden*, 9 Ohio Cir. Dec. 857.

**The Term "Persistent Policy Holder"** cannot be explained by extrinsic evidence when the ordinary meaning of the term in the connection in which it occurs is the true one and is sufficiently obvious. *Fry v. Provident Sav. L. Assur. Soc.*, (Tenn. Ch. 1896) 38 S. W. Rep. 116.

**2. Acts of the Parties.** — *Carroll v. Drury*, 170 Ill. 571, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293; *Graves v. Broughton*, 185 Mass. 174; *Borden v. Fletcher*, 131 Mich. 220, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293; *Smith v. Stacey*, 68 N. Y. App. Div. 521; *Pope v. Riggs*, (Tex. Civ. App. 1897) 43 S. W. Rep. 306; *Missouri, etc., R. Co. v. Anderson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 781; *Newman v. Kay*, (W. Va. 1905) 49 S. E. Rep. 926. See also *Miles v. Miles*, 78 Miss. 904, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293; *Brown v. Markland*, 16 Utah 360, 67 Am. St. Rep. 629. Compare *Castleman v. Du Val*, 89 Md. 657.

**294. 2. Sharp v. Sturgeon**, 66 Mo. App. 191; *Sabin v. Kendrick*, 58 N. Y. App. Div. 108; *Smith v. Stacey*, 68 N. Y. App. Div. 521; *Easton Power Co. v. Sterlingworth R. Supply Co.*, 22 Pa. Super. Ct. 538. See also *Vandiver v. Vandiver*, 115 Ala. 328, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 294; *Bird v. Beckwith*, 45 N. Y. App. Div. 124, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 294.

**295. 1. Rule as to Latent Ambiguities** — *Alabama.* — *Donehoo v. Johnson*, 120 Ala. 438; *Stamphill v. Bullen*, 121 Ala. 250.

*Arkansas.* — *Wolff v. Elliott*, 68 Ark. 326. *Illinois.* — *O'Connell v. Lamb*, 63 Ill. App. 652. *Indiana.* — *Thomas v. Troxel*, 26 Ind. App. 322.

*Kentucky.* — *Kentucky Citizens Bldg., etc., Assoc. v. Lawrence*, 106 Ky. 88; *Craft v. Bates*, (Ky. 1899) 49 S. W. Rep. 436. See also *Smith v. Smith*, (Ky. 1903) 72 S. W. Rep. 766.

*Mississippi.* — *Ladnier v. Ladnier*, 75 Miss. 777.

*Montana.* — *Carman v. Staudaker*, 20 Mont. 364.



**296.** *b. WILLS.* — See note 2.

**297.** See notes 1, 2, 3.

**298.** *How the Ambiguity May Be Removed.* — See note 1.

**299.** *In the Case of a Misdescription.* — See note 2.

**300.** *c. CONVEYANCES* — Where the Description May Apply to More than One Person or Thing. — See note 1.

*Nebraska.* — Fidelity Mut. F. Ins. Co. v. Murphy, (Neb. 1903) 95 N. W. Rep. 702.

*New Jersey.* — Axford v. Meeks, 59 N. J. L. 502.

*New York.* — Petrie v. Hamilton College, 158 N. Y. 458, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295; McKee v. De Witt, 12 N. Y. App. Div. 617.

*Pennsylvania.* — Sheaffer v. Sensenig, 182 Pa. St. 634.

*Texas.* — Robbins v. Ginnocchio, (Tex. Civ. App. 1898) 45 S. W. Rep. 34.

*Virginia.* — Richardson v. Planters Bank, 94 Va. 130.

*Washington.* — Pennsylvania Mortg. Invest. Co. v. Simms, 16 Wash. 243; Reformed Presb. Church v. McMillan, 31 Wash. 643.

In Sulphur Mines Co. v. Thompson, 93 Va. 293, the court said: "No court is at liberty to pronounce an instrument ambiguous or uncertain until it has brought to and in its interpretation all the lights afforded by collateral facts and circumstances which are properly provable by parol."

In Harmon v. Thompson, (Ky. 1905) 84 S. W. Rep. 569, the court said: "Where, after applying the rules of interpretation applicable to the writing alone, the judicial mind is still in doubt as to the meaning of the parties, and there exists a latent ambiguity, the law admits parol or other outside evidence to explain what was meant by the writing."

*The Minutes of a Corporation* may be explained by parol evidence, John C. Grafflin Co. v. Woodside, 87 Md. 146.

**A Notice of the Levy of Attachment** which contains a defective description of the property cannot be helped out by parol evidence. Hailey First Nat. Bank v. Sonnelitner, 6 Idaho 21.

**Not All Latent Ambiguities May Be Explained by Parol.** — See dicta in Schlottman v. Hoffman, 73 Miss. 188, 55 Am. St. Rep. 527.

**296. 2. Two Persons Answering the Description.** — Pawnee City Second United Presb. Church v. Pawnee City First United Presb. Church, (Neb. 1904) 99 N. W. Rep. 252. See also Wheaton v. Pope, 91 Minn. 299.

"My Nephew," when used in a will to describe a beneficiary, refers to the nephew of the testator, and the fact that the testator's wife has a nephew of the same name does not create an ambiguity. Root's Estate, 187 Pa. St. 118.

**297. 1. Two Things Answering the Description.** — See Borden v. Fletcher, 131 Mich. 220, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 297, 298. See also Wheaton v. Pope, 91 Minn. 299.

**2. Misdescription of Object.** — Vandiver v. Vandiver, 115 Ala. 328. See also Schlottman v. Hoffman, 73 Miss. 188, 55 Am. St. Rep. 527.

**3. Misdescription of Subject.** — Gordon v. Burris, 141 Mo. 692. See also Wheaton v. Pope, 91 Minn. 299.

**Erroneous Description of Previous Will.** — Where a previous will referred to as having been made on a certain day was in fact made at an earlier date, a latent ambiguity arises and parol evidence is admissible in explanation thereof. Whiteman v. Whiteman, 152 Ind. 263.

**298. 1. Two Persons or Things Within the Description** — *How the Ambiguity Removed* — *Connecticut.* — See Thompson v. Betts, 74 Conn. 576, 92 Am. St. Rep. 235.

*Illinois.* — Missionary Soc. v. Cadwell, 69 Ill. App. 280. See also Vestal v. Garret, 197 Ill. 398.

*Indiana.* — See Whiteman v. Whiteman, 152 Ind. 263.

*Iowa.* — Flynn v. Holman, 119 Iowa 731; In re Frahm, 120 Iowa 85.

*Kentucky.* — Thomas v. Scott, (Ky. 1903) 72 S. W. Rep. 1129.

*Nebraska.* — Pawnee City Second United Presb. Church v. Pawnee City First United Presb. Church, (Neb. 1904) 99 N. W. Rep. 252, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 298.

*New Jersey.* — Crosson v. Carr, 70 N. J. L. 393.

*North Carolina.* — Tilley v. Ellis, 119 N. Car. 233; Keith v. Scales, 124 N. Car. 497.

*Pennsylvania.* — Root's Estate, 19 Pa. Co. Ct. 217, 6 Pa. Dist. 77. See also Thompson v. Kaufman, 6 Pa. Dist. 522, affirmed 9 Pa. Super. Ct. 305.

*Texas.* — See Lenz v. Sens, 27 Tex. Civ. App. 442.

**299. 2. Rule in Case of Misdescription** — *Alabama.* — Vandiver v. Vandiver, 115 Ala. 328.

*Michigan.* — Cook v. Universalist Gen. Convention, (Mich. 1904) 101 N. W. Rep. 217.

*Minnesota.* — Wheaton v. Pope, 91 Minn. 299.

*Missouri.* — Gordon v. Burris, 141 Mo. 692.

*New York.* — Klock v. Stevens, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 383; Gough v. Davis, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 245, affirmed 39 N. Y. App. Div. 639.

*Ohio.* — McCormick v. Dunker, 24 Ohio Cir. Ct. 553.

*Washington.* — Reformed, etc., Presb. Church v. McMillan, 31 Wash. 643.

*West Virginia.* — Rose v. Kiger, 42 W. Va. 402. See also Powers v. Scharling, 64 Kan. 339.

**Facts and Circumstances** as shown by parol evidence are admissible to show the identity of persons misnamed in a will. Wilson v. Stevens, 59 Kan. 771, 51 Pac. Rep. 903.

**300. 1. Description Applicable to More than One Person or Thing.** — Staphill v. Bullen, 121 Ala. 250; Wolff v. Elliott, 68 Ark. 326; Hall v. Conlee, (Ky. 1901) 62 S. W. Rep. 899; Turner v. Jackson, (Tenn. Ch. 1899) 63 S. W. Rep. 511; Clark v. Regan, (Tex. Civ. App. 1898) 45 S. W. Rep. 169; Newman v. Buzard, 24 Wash. 225. See also Bartlett v. La Rochelle, 68 N. H. 211; Dyer v. Cranston Print Works, (R. I. 1893) 41 Atl. Rep. 1014.

**301.** Ambiguity as to Consideration. — See note 2.

**302.** Where There Is a Misdescription. — See notes 2, 3.

**303.** *d.* CONTRACTS. — See note 1.

**Sheriff's Deed.** — While there are decisions to the effect that resort to extrinsic evidence is not permissible to aid a description in a sheriff's deed, there never have been any solid reasons given why such a distinction should have been recognized. *Frazier v. Waco Bldg. Assoc.*, 25 Tex. Civ. App. 476. See also *Abbott v. Coates*, 62 Neb. 247.

**301.** 2. **Misdescription in Consideration.** — *Henderson v. Stith*, (Tex. Civ. App. 1898) 43 S. W. Rep. 566.

**302.** 2. **Misdescription in Name of Party.** — *Hicks v. Ivey*, 99 Ga. 648. See also *McCormick v. Dunker*, 24 Ohio Cir. Ct. 553.

**3.** **Misdescription in Location of Property.** — *Donehoo v. Johnson*, 120 Ala. 438; *Hereford v. Hereford*, 131 Ala. 573; *Tumlin v. Perry*, 108 Ga. 520; *Leverett v. Bullard*, 121 Ga. 534; *Salmer v. Lathrop*, 10 S. Dak. 216; *Sloan v. King*, (Tex. Civ. App. 1903) 77 S. W. Rep. 48. See also *Powers v. Rude*, (Okla. 1904) 79 Pac. Rep. 89.

**The Amount of a Grantor's Property** at the time he made a conveyance of "all my estate, real and personal," to his sister, may be shown by parol. *Graham v. Botner*, (Ky. 1896) 37 S. W. Rep. 583.

**Words of General Description** being used in a deed, parol evidence may be resorted to to locate the premises conveyed. *Orvis v. Elmira*, etc., R. Co., 17 N. Y. App. Div. 187.

**A Description of Land** as "Thirty (30) acres of land, situated in Stony Creek township, adjoining the lands of" A, B, C, and D, may be explained by parol evidence. *Wilkins v. Jones*, 119 N. Car. 95.

**The Location of a Corner Called for in a Grant** may be shown by parol evidence. The "doctrine of allowing the use of parol evidence and the proof of marked lines to locate and establish the lines and corners called for in a grant or deed is held in a number of the decisions of this court. Indeed, it is common learning, fully recognized by the courts and the profession. But it is never allowed to contradict and change the calls in a grant or deed." *Davidson v. Shuler*, 119 N. Car. 582.

**The Terms of a Deed Being Satisfied** by an existing subject-matter, extrinsic evidence to explain the extent of the subject sold will not be admitted. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Pass. R. Co.*, 6 Pa. Dist. 269.

**The Location of Adjoining Lands** may be shown by parol so as to apply a deed to its proper subject-matter. *Sulphur Mines Co. v. Thompson*, 93 Va. 293.

**No Ambiguity Being Apparent on the Face of the Deed**, it has been held that parol evidence is not admissible to show the intention of the parties. *Owen v. Henderson*, 16 Wash. 39; *Davis v. Kirksey*, 14 Tex. Civ. App. 380.

**Parol Evidence Is Not Admissible** where it tends to vary and contradict the description in the deed. *Donehoo v. Johnson*, 113 Ala. 126.

**303.** 1. **General Rule as to Contracts** — *United States*. — *The Barnstable*, 84 Fed. Rep. 895; *Western Union Tel. Co. v. American Bell*

*Telephone Co.*, 105 Fed. Rep. 684; *Consolidated Dental Mfg. Co. v. Holliday*, 131 Fed. Rep. 384.

*Alabama*. — *Moore v. Barber Asphalt Paving Co.*, 118 Ala. 563; *Moragne v. Richmond Locomotive, etc., Works*, 124 Ala. 537; *Alabama Mut. F. Ins. Co. v. Minchener*, 133 Ala. 632.

*California*. — *Ontario Deciduous Fruit Growers Assoc. v. Cutting Fruit Packing Co.*, 134 Cal. 21.

*Colorado*. — *Lewis v. Mutual L. Ins. Co.*, 8 Colo. App. 368. See also *Hardwick v. McClurg*, 16 Colo. App. 354.

*Connecticut*. — See *Adams v. Turner*, 73 Conn. 38.

*Georgia*. — See *Carter v. Williamson*, 106 Ga. 280.

*Illinois*. — *Evans v. Gerry*, 174 Ill. 595; *Scott v. Schnadt*, 70 Ill. App. 25.

*Indiana*. — *Etna Ins. Co. v. Strout*, 16 Ind. App. 160; *Thomas v. Troxel*, 26 Ind. App. 322.

*Iowa*. — *Wilts v. Mulhall*, 102 Iowa 458; *Clement v. Drybread*, 108 Iowa 701; *Kelly v. Fejervary*, 111 Iowa 693.

*Kansas*. — *Jenkins v. Kirtley*, (Kan. 1905) 79 Pac. Rep. 671.

*Kentucky*. — *Kentucky Citizens Bldg., etc., Assoc. v. Lawrence*, 106 Ky. 88.

*Louisiana*. — *Bagley v. Rose Hill Sugar Co.*, 111 La. 249.

*Maryland*. — *Morrison v. Baechtold*, 93 Md. 319.

*Massachusetts*. — *Callender, etc., Co. v. Flint*, (Mass. 1904) 72 N. E. Rep. 345.

*Michigan*. — *Germain v. Central Lumber Co.*, 120 Mich. 61; *Gregory v. Lake Linden*, 130 Mich. 368; *Borden v. Fletcher*, 131 Mich. 220, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303.

*Mississippi*. — *Miles v. Miles*, 78 Miss. 904.

*Missouri*. — *Newberry v. Durand*, 87 Mo. App. 290; *Laclede Constr. Co. v. T. J. Moss Tie Co.*, 185 Mo. 25.

*Nebraska*. — *Modern Woodmen Acc. Assoc. v. Kline*, 50 Neb. 345; *Latenser v. Misner*, 56 Neb. 340; *State v. Cass County*, 60 Neb. 566; *Fidelity Mut. F. Ins. Co. v. Murphy*, (Neb. 1903) 95 N. W. Rep. 702.

*New Jersey*. — *Streeter v. Seigman*, (N. J. 1901) 48 Atl. Rep. 907. See also *Camden, etc., R. Co. v. Adams*, 62 N. J. Eq. 656.

*New York*. — *Emmett v. Penoyer*, 151 N. Y. 564; *Vogel v. Weissmann*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 256; *Rodger v. Toilettes Co.*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 779; *Hart v. Thompson*, 10 N. Y. App. Div. 183; *Garvin Mach. Co. v. Hammond Typewriter Co.*, 12 N. Y. App. Div. 294, affirmed 159 N. Y. 539; *La Chicotte v. Richmond R., etc., Co.*, 15 N. Y. App. Div. 380; *Sabin v. Kendrick*, 58 N. Y. App. Div. 108; *O'Connor v. Green*, 60 N. Y. App. Div. 553; *Dady v. O'Rourke*, 61 N. Y. App. Div. 529, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303; *Flagler v. Hearst*, 62 N. Y. App. Div. 18. See also *Hutchinson v. Root*, 2 N. Y. App. Div. 584, affirmed (N. Y. 1899) 52 N. E. Rep. 1124;

- 304.** One or the Other of the Two Things Must Be Intended. — See note 1.  
Likewise, Where There Is a Misdescription. — See note 2.  
4. Object of Evidence. — See note 5.

- 305.** AMEND — AMENDMENTS. — See note 5.

- 307.** AMICUS CURIAE. — See note 1.

AMNESTY. — See note 4.

- 308.** AMONG. — See note 1.

- 319.** AN. — See note 1.

ANARCHY. — See note 4.

ANCESTOR. — See note 5.

United Press v. New York Press Co., 164 N. Y. 406; De Remer v. Brown, 165 N. Y. 410.  
*Oregon.* — Oliver v. Oregon Sugar Co., 42 Oregon 276.

*Pennsylvania.* — Schwab v. Ginkinger, 181 Pa. St. 8; Wright v. Monongahela Natural Gas Co., 2 Pa. Super. Ct. 219; Glenn v. Strickland, 21 Pa. Super. Ct. 88; Easton Power Co. v. Sterlingworth R. Supply Co., 22 Pa. Super. Ct. 538; Hunsecker's Estate, 19 Pa. Co. Ct. 14, 6 Pa. Dist. 202.

*Rhode Island.* — Phetteplace v. British, etc., Marine Ins. Co., 23 R. I. 26.

*Texas.* — Connecticut F. Ins. Co. v. Hilbrant, (Tex. Civ. App. 1903) 73 S. W. Rep. 558. See also Jones v. Hanna, 24 Tex. Civ. App. 550.

*Utah.* — Brown v. Markland, 16 Utah 360, 67 Am. St. Rep. 629.

*Virginia.* — Grubb v. Burford, 98 Va. 553.  
*Washington.* — Pennsylvania Mortg. Invest. Co. v. Simms, 16 Wash. 243.

*West Virginia.* — Uhl v. Ohio River R. Co., 51 W. Va. 106. See also Knowlton v. Campbell, 48 W. Va. 294.

*Wisconsin.* — Boden v. Maher, 105 Wis. 539; Wussow v. Hase, 108 Wis. 382; Lippert v. Saginaw Milling Co., 108 Wis. 512; Andrews v. Robertson, 111 Wis. 334; Rib River Lumber Co. v. Ogilvie, 113 Wis. 482.

**304. 1.** The Term "Your Lot" in a contract to convey land, has been held too indefinite to allow the admission of parol evidence to explain it where it appeared that the intended grantor had several lots in the same locality. Farthing v. Rochelle, 131 N. Car. 563.

**2.** Parol Evidence to Identify Parties to Contract. — Hogan v. Wallace, 166 Ill. 328, reversing 63 Ill. App. 385; Haskell v. Tukesbury, 92 Me. 551, 69 Am. St. Rep. 529; Stokes v. Riley, 29 Tex. Civ. App. 373.

**5.** United States. — Standard Sewing-Mach. Co. v. Leslie, (C. C. A.) 78 Fed. Rep. 325; Wolff v. Wells, (C. C. A.) 115 Fed. Rep. 32.

*Alabama.* — Donehoo v. Johnson, 120 Ala. 438, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 304.

*California.* — Matter of Young, 123 Cal. 337.

*Iowa.* — Flynn v. Holman, 119 Iowa 731.

*Massachusetts.* — Hebb v. Welsh, 185 Mass.

335.

*Nebraska.* — State v. Cass County, 60 Neb. 566.

*New York.* — Sabin v. Kendrick, 58 N. Y. App. Div. 108.

*Oregon.* — Baker County v. Huntington, (Oregon 1905) 79 Pac. Rep. 187.

*Pennsylvania.* — Gaston's Estate, 188 Pa. St. 374.

*Texas.* — Lenz v. Sens, 27 Tex. Civ. App. 442.

*West Virginia.* — Newman v. Kay, (W. Va. 1905) 49 S. E. Rep. 926.

**305. 6.** Sessions v. State, 115 Ga. 18, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 305.

**307. 1.** See Robinson v. Lee, 122 Fed. Rep. 1011, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 307.

**4.** Distinguished from Pardon. — State v. Eby, 170 Mo. 497.

**308. 1.** Wills — Equal Among. — See Holder's Petition, 21 R. I. 49, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 308.

**319. 1.** Equivalent to "Any." — Under Code Civ. Pro. Cal., § 581, an action may be dismissed by the plaintiff at any time before trial, on payment of costs, provided a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant. The particle *an* is equivalent to "any," and the provisions of the section are applicable to an action in interpleader. Kaufman v. Superior Ct., 115 Cal. 155.

Equivalent to "One." — People v. Ogden, 8 N. Y. App. Div. 464.

**4.** See Von Gerichten v. Seitz, 94 N. Y. App. Div. 130.

**Anarchist.** — As to who is an *anarchist* within the United States statute providing for the exclusion and deportation of alien *anarchists*, see U. S. v. Williams, 194 U. S. 279.

**5.** Ancestor. — Matter of Reeve, (Surrogate Ct.) 38 Misc. (N. Y.) 409; Righter v. Ludwig, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 416. See also Bowen v. Hackney, 136 N. Car. 187.

# ANCIENT DOCUMENTS.

BY R. N. CHAFFEE.

**322. I. DEFINITION** — The Term Includes. — See note 2.

**323. II. HOW AGE OF DOCUMENT COMPUTED** — 1. Time Reckoned from Date of Execution. — See note 1.

**324. 2. Time Reckoned to Day of Introduction in Evidence.** — See note 1.

**III. PROOF OF ANCIENT DOCUMENTS** — 1. General Rule — Prove Themselves. — See note 2.

**322. 2. Deeds** — *Alabama*. — *White v. Farris*, 124 Ala. 461.

*Georgia*. — *McArthur v. Morrison*, 107 Ga. 796.

*Missouri*. — *Kansas City v. Scarritt*, 169 Mo. 471.

*Tennessee*. — *Perry v. Clift*, (Tenn. Ch. 1899) 54 S. W. Rep. 121.

*Texas*. — *Huff v. Crawford*, (Tex. Civ. App. 1895) 32 S. W. Rep. 592; *Jouett v. Gunn*, 13 Tex. Civ. App. 84; *Timmony v. Burns*, (Tex. Civ. App. 1897) 42 S. W. Rep. 133; *Walker v. Peterson*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1045; *Pendleton v. Shaw*, 18 Tex. Civ. App. 439; *Smith v. Cavitt*, 20 Tex. Civ. App. 558; *Ferguson v. Ricketts*, (Tex. Civ. App. 1900) 55 S. W. Rep. 975; *Ward v. Cameron*, (Tex. Civ. App. 1903) 76 S. W. Rep. 240.

*Wills*. — *Smyth v. New Orleans Canal, etc.*, Co., 93 Fed. Rep. 899, 35 C. C. A. 646.

**Bonds**. — *Wille v. Ellis*, 22 Tex. Civ. App. 462.  
**Letters and Receipts**. — *Culmore v. Medlenka*, (Tex. Civ. App. 1898) 44 S. W. Rep. 676.

**Old Records**. — *Smyth v. New Orleans Canal, etc.*, Co., 93 Fed. Rep. 899, 35 C. C. A. 646; *Hamerslag v. Duryea*, 58 N. Y. App. Div. 288.

**Proceedings in Ancient Suits**. — *Pendleton v. Shaw*, 18 Tex. Civ. App. 439.

**Maps and Surveys**. — In a proceeding to establish the title to certain city lots under the Burnt Records Act, an ancient abstract of title was properly admitted. *Cooney v. A. Booth Packing Co.*, 169 Ill. 370.

In an action for the recovery of land a map or plan purporting to describe the property in dispute, is admissible as an ancient map. *Whitman v. Shaw*, 166 Mass. 451.

A map showing the boundaries of the land taken by the commonwealth for public improvements is admissible. *Smucker v. Pennsylvania R. Co.*, 188 Pa. St. 40.

**Plat of a City**. — *Davis v. Clinton*, 79 S. W. Rep. 259, 25 Ky. L. Rep. 2021.

**Copies, etc.** — The presumption in favor of the authenticity of an ancient document would not obtain in favor of a copy made by a surveyor of a tracing on file in the town clerk's office, though the original has since been destroyed by fire. *Hamilton v. Smith*, 74 Conn. 374.

A copy of a deed executed in 1796 and recorded in 1797, taken from the records which have been lost or destroyed, being certified by the register in 1859 and indorsed to the effect

that it was "acknowledged in open court," is properly admissible. *Cochran v. Linville Imp. Co.*, 127 N. Car. 386.

*Copy of Act of Sale from Parish Records*. — *Hodge v. Palms*, 54 C. C. A. 570, 117 Fed. Rep. 396.

**323. 1. From Date Instrument Recorded**. — *Ehrenberg v. Baker*, (Tex. Civ. App. 1899) 54 S. W. Rep. 435.

**324. 1. Time Computed to Day of Introduction in Evidence**. — *Reuter v. Stuckart*, 181 Ill. 529.

**2. Ancient Document Proves Itself** — *England*. — *In re Airey*, (1897) 1 Ch. 164.

*United States*. — *Smyth v. New Orleans Canal, etc.*, Co., 93 Fed. Rep. 899, 35 C. C. A. 646; *Plaster v. Rigney*, 97 Fed. Rep. 12, 38 C. C. A. 25.

*Alabama*. — *White v. Farris*, 124 Ala. 461.

*Georgia*. — *McArthur v. Morrison*, 107 Ga. 796; *Follendore v. Follendore*, 110 Ga. 359.

*Illinois*. — *Reuter v. Stuckart*, 181 Ill. 529; *Stalford v. Goldring*, 197 Ill. 156; *Bradley v. Lightcap*, 201 Ill. 511.

*Massachusetts*. — *New York, etc., R. Co. v. Benedict*, 169 Mass. 262; *Cunningham v. Davis*, 175 Mass. 213; *Butrick, Petitioner*, 185 Mass. 107.

*Missouri*. — *Kansas City v. Scarritt*, 169 Mo. 471.

*New York*. — *Wolcott v. Merchants' Gargling Oil Co.*, 45 N. Y. App. Div. 379.

*Tennessee*. — *Perry v. Clift*, (Tenn. Ch. 1899) 54 S. W. Rep. 121.

*Texas*. — *Pendleton v. Robertson*, (Tex. Civ. App. 1895) 32 S. W. Rep. 442; *Kellogg v. McCabe*, 14 Tex. Civ. App. 598; *Rigsby v. Galceron*, 15 Tex. Civ. App. 377; *Walker v. Peterson*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1045; *Smith v. Cavitt*, 20 Tex. Civ. App. 558.

**Illustrations** — *Presumption of Authority to Execute*. — Where an ancient instrument was signed "R. W. B. Martin by his attorney, John S. Martin," and no power of attorney was offered in connection with the deed and no authority was mentioned in the body of the deed, such authority will be presumed. *Ferguson v. Ricketts*, (Tex. Civ. App. 1900) 55 S. W. Rep. 975. See also *Reuter v. Stuckart*, 181 Ill. 529; *Pearson v. Davis*, (Tex. Civ. App. 1896) 37 S. W. Rep. 602; *Rigsby v. Galceron*, 15 Tex. Civ. App. 377. *Contra, In re Airey*, (1897) 1 Ch. 164.

*Acts of Court, Where Records Lost Pre-*

**325.** 2. Prerequisites to Application of Rule — *a.* NO FRAUD OR INVALIDITY APPARENT ON FACE OF INSTRUMENT. — See note 1.

**326.** *b.* MUST COME FROM PROPER CUSTODY. — See note 1.

**328.** *c.* POSSESSION OR ACTION UNDER THE DOCUMENT — Doctrine in England. — See note 3.

**329.** Doctrine in United States. — See notes 1, 2.

**330.** Length of Possession Necessary. — See note 2.

*d.* PROOF OF ANTIQUITY REQUIRED. — See note 4.

**331.** IV. PURPOSES FOR WHICH USED IN EVIDENCE. — See note 1.

**332.** AND — I. IN GENERAL. — See note 4.

**333.** See note 1.

II. "AND" READ AS "OR," AND VICE VERSA — Statutes and Wills. — See note 2.

*sumed to Be Valid.* — *Pendleton v. Shaw*, 18 Tex. Civ. App. 439.

**325.** 1. Burden of Proof. — But in *Georgia*, where a certified copy is offered in evidence, the burden of proof is upon the person offering the deed. *Bentley v. McCall*, 119 Ga. 530.

But Where There Is a Conflict of Evidence. — *Gann v. Roberts*, 32 Tex. Civ. App. 561.

**Forgery.** — An ancient deed, after being admitted in evidence, may be shown to be a forgery. *Albright v. Jones*, 106 Ga. 302.

Where an affidavit of forgery is filed, the age of the record, a copy of which is offered in evidence, is not conclusive evidence of the execution of the deed. *Gann v. Roberts*, 32 Tex. Civ. App. 561.

Where Name of Grantee Left Blank When Executed. — A transfer of a land certificate with the name of the grantee left blank when executed, and the grantee's name afterwards inserted, all of which appears on the face of the instrument, does not affect its status as an ancient document. *Ward v. Cameron*, (Tex. Civ. App. 1903) 76 S. W. Rep. 240.

**326.** 1. Where Proper Custody Is Not Shown the instrument does not come within the rule admitting its genuineness as an ancient document. *Swafford v. Herd*, 65 S. W. Rep. 803, 23 Ky. L. Rep. 1556.

**Any Proper Custody Sufficient** — *Illustrations.* — Where the deed was produced from the general land office, having been deposited there by one of the defendant's predecessors in title, there was a proper custody. *Templeton v. Luckett*, 75 Fed. Rep. 254, 41 U. S. App. 392; *Timony v. Burns*, (Tex. Civ. App. 1897) 42 S. W. Rep. 133.

Where a transfer of a land certificate sent to the county surveyor to be recorded was found among the papers of the surveyor after his death by the surveyor's son, it was held that the transfer came from a proper custody. *Ward v. Cameron*, (Tex. Civ. App. 1903) 76 S. W. Rep. 240.

**Parties.** — Where an ancient deed has been in the possession of the grantor and his heirs since its execution, there is not a proper custody. *Heintz v. O'Donnell*, 17 Tex. Civ. App. 21.

**328.** 3. See *Cunningham v. Davis*, 175 Mass. 213, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328.

**329.** 1. *Georgia.* — See § 3610 of the Civil

Code, as applied in *Williamson v. Mosley*, 110 Ga. 53.

**2.** *Hodge v. Palms*, 117 Fed. Rep. 396, 54 C. C. A. 570; *Cunningham v. Davis*, 175 Mass. 213, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328.

**330.** 2. *Reuter v. Stuckart*, 181 Ill. 529.

**4. Other Circumstances than Possession.** — In determining the age of a deed, all indorsements made thereon and certificates attached thereto, which in any manner indicate its age, are matters to be considered by the jury. *Bell v. Hutchings*, (Tex. Civ. App. 1897) 41 S. W. Rep. 200.

**331.** 1. *Wilson v. Braden*, 56 W. Va. 372, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 331.

**Illustrations — For What Purposes Introduced** — *To establish Boundaries.* — A map showing the boundaries of the land taken by the state for public improvements is admissible for that purpose. *Smucker v. Pennsylvania R. Co.*, 188 Pa. St. 40. See also *Pierce v. Schram*, (Tex. Civ. App. 1899) 53 S. W. Rep. 716.

**Extent of Doctrine of Ancient Documents.** — The doctrine of admitting ancient documents in evidence, without proof of their genuineness, is based on the ground that they prove themselves, the witness being presumed to be dead. The doctrine goes no further than this. The questions of its relevancy and admissibility as evidence cannot be affected by the fact that it is an ancient document. *King v. Watkins*, 98 Fed. Rep. 913.

**332.** 4. *Beedy v. Finney*, 118 Iowa 276.

**Addition.** — *La Salle v. Kostka*, 190 Ill. 130.

**333.** 1. *Beedy v. Finney*, 118 Iowa 276.

**2.** *People v. Van Cleave*, 187 Ill. 133, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 333; *Ayers v. Chicago Title, etc., Co.*, 187 Ill. 56, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 333; *Warren County v. Booth*, 81 Miss. 267, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 333.

**"And" Read as "Or" — Wills.** — *Davie v. Davie*, (Ky. 1904) 81 S. W. Rep. 246; *Zabriskie v. Huyler*, 62 N. J. Eq. 697; *Tripp's Estate*, 202 Pa. St. 260.

**Same — Statutes.** — *In re Swift*, (C. C. A.) 112 Fed. Rep. 315; *Union Cent. L. Ins. Co. v. Skipper*, (C. C. A.) 115 Fed. Rep. 69; *Starr v. Flynn*, 62 Kan. 845; *Red Wing v. Gupta*, 72 Minn. 259; *Geiger v. Kobilka*, 26 Wash. 171.

**338.** Penal Statutes. — See note 2.

**339.** III. OTHER INSTRUMENTS. — See note 4.

**340.** See note 5.

**Liability of Stockholders.** — *Seaton v. Grimm*, 110 Iowa 145.

**"Or" Read as "And" — Statutes.** — *Ayers v. Chicago Title, etc., Co.*, 187 Ill. 56; *People v. Van Cleave*, 187 Ill. 133; *Kennedy v. Haskell*, 67 Kan. 612; *Witherspoon v. Jernigan*, 97 Tex. 98.

**"And" Not Read "Or" — Statutes.** — *Duke v. Caluwaert*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 623.

**In Constitution — "Or" Read as "And."** — *Vicksburg, etc., R. Co. v. Goodenough*, 108 La. 442.

**"Or" Not Read as "And" — Statutes.** — *Brown v. Rushing*, 70 Ark. 111.

**338. 2. "And" Read "Or" — Criminal Statutes.** — *Douglass v. State*, 18 Ind. App. 289.

**339. 4. "And" Not Read "Or" — Guaranty.** — *Mayer v. Cook*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 774.

**"Or" Read "And" — Appeal Bond.** — *Giddings v. Fischer*, 97 Tex. 184.

**340. 5. Ordinance — "Or" Not Read as "And."** — *Koch v. Fox*, 71 N. Y. App. Div. 288.

**Same — "And" Read "Or."** — *Kansas City v. Grush*, 151 Mo. 128.

## ANIMALS.

By J. L. McREE.

**342. I. PROPERTY IN ANIMALS — 1. Wild Animals — a. IN GENERAL.** — See note 1.

**Private Right of Property May Be Acquired.** — See note 2.

**Right of Property — How Acquired.** — See note 4.

**344. When Right of Property Ceases.** — See note 1.

**345. Cannot Be Acquired by Trespasser.** — See note 1.

**c. LARCENY — By the Common Law.** — See note 3.

**346. 2. Domestic Animals — a. IN GENERAL.** — See note 1.

**347. b. LARCENY — Dogs.** — See note 1.

**Statutory Changes.** — See notes 2, 3, 4, 5.

**342. 1. General Ownership in State.** — *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74.

**2. Wild Animals Reclaimed.** — *Salley v. Manchester, etc., R. Co.*, 54 S. Car. 481.

**4. Fish.** — Absolute security against the possibility of escape is not necessary in order for property to be acquired in fish. *State v. Shaw*, 67 Ohio St. 157.

Fish become the property of the party capturing them, as soon as they are taken. *Rex v. Mallison*, 20 Cox C. C. 204, 86 L. T. N. S. 600, 66 J. P. 503.

**344. 1. When Right of Property in Wild Animals Ceases.** — *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74; *Salley v. Manchester, etc., R. Co.*, 54 S. Car. 481.

**345. 1. Trespassers.** — *Vroom v. Tilly*, 99 N. Y. App. Div. 523, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345.

**3. Fish.** — Fish confined in any inclosed place which is private property are subject to larceny. *State v. Shaw*, 67 Ohio St. 157.

As soon as fish are taken they become the subject of larceny. *Rex v. Mallison*, 20 Cox C. C. 204, 86 L. T. N. S. 600, 66 J. P. 503.

**346. 1. Dead Domestic Animals** remain the property of the owner. *Campbell v. District of Columbia*, 19 App. Cas. (D. C.) 131.

**Dogs** are property in *Missouri*, and damages may be recovered civilly for injuries to them. *State v. Mease*, 69 Mo. App. 581,

**347. 1. Dogs as Subject of Larceny — Common-law Rule.** — *State v. Langford*, 55 S. Car. 322, 74 Am. St. Rep. 746.

**Dogs Subjects of Larceny by Statute.** — See the title LARCENY.

**Civil Action for Injury to Dog.** — *Louisville, etc., R. Co. v. Fitzpatrick*, 129 Ala. 322; *Graham v. Smith*, 100 Ga. 434, 62 Am. St. Rep. 323; *State v. Mease*, 69 Mo. App. 581; *Chapman v. Decrow*, 93 Me. 378, 74 Am. St. Rep. 357; *Salley v. Manchester, etc., R. Co.*, 54 S. Car. 481; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 66 Am. St. Rep. 754.

**2. State v. Mease, 69 Mo. App. 581.**

**3. Statutes — "Domesticated Animals."** — *Graham v. Smith*, 100 Ga. 434, 62 Am. St. Rep. 323.

**Burglary with Intent to Steal Dog.** — *State v. Langford*, 55 S. Car. 322, 74 Am. St. Rep. 740.

**4. Statutes — "Personal Property"** — *United States*. — *Sentell v. New Orleans, etc., R. Co.*, 166 U. S. 698.

*Connecticut.* — *McAdams v. Starr*, 74 Conn. 85.

*Florida.* — *Florida Cent., etc., R. Co. v. Davis*, (Fla. 1903) 34 So. Rep. 218.

*Indiana.* — *Vantrees v. McGee*, 26 Ind. App. 525.

*Louisiana.* — *Rausch v. Barrere*, 109 La. 563.

*Michigan.* — *Rockwell v. Oakland Circuit Judge*, 133 Mich. 11, 10 Detroit Leg. N. 67.

**348.** 3. Right to Increase of Animals — *a.* GENERALLY. — See note 1.

**349.** *b.* BETWEEN MORTGAGOR AND MORTGAGEE. — See note 3.

**350.** *c.* BETWEEN MORTGAGEE AND THIRD PARTIES. — See note 1.

Attaching Creditors and Subsequent Mortgagees. — See note 2.

**351.** II. LIABILITY FOR INJURIES BY ANIMALS — 1. Wild Animals —

*a.* GENERALLY. — See note 1.

*b.* KNOWLEDGE OF VICIOUSNESS PRESUMED. — See note 2.

**352.** Negligence Presumed. — See note 1.

2. Domestic Animals — *a.* IN GENERAL. — See note 2.

**354.** Gist of the Action. — See notes 1, 2.

*b.* TRESPASSING ANIMALS — STOCK — (1) *In General.* — See note 3.

**355.** Common-law Rule as to Restraining. — See note 1.

*Minnesota.* — *Smith v. St. Paul City R. Co.*, 79 Minn. 254.

*Mississippi.* — *Jones v. Illinois Cent. R. Co.*, 75 Miss. 970.

*Missouri.* — *Fisher v. Badger*, 95 Mo. App. 289.

*New York.* — *O'Connell v. Jarvis*, 13 N. Y. App. Div. 3.

*Ohio.* — *Fagin v. Humane Soc.*, 5 Ohio Dec. 596.

*Rhode Island.* — *Harris v. Eaton*, 20 R. I. 81.

*South Carolina.* — *State v. Langford*, 55 S. Car. 322, 74 Am. St. Rep. 746.

*Tennessee.* — *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 66 Am. St. Rep. 754.

**347.** 5. Statutes — "Thing of Value." — *Rockwell v. Oakland Circuit Judge*, 133 Mich. 11.

**Dog as Property — Value.** — See *Louisville, etc., R. Co. v. Fitzpatrick*, 129 Ala. 322; *Hodges v. Causey*, 77 Miss. 353, 78 Am. St. Rep. 525; *Fenton v. Bisel*, 80 Mo. App. 135; *Woolsey v. Haas*, 65 Mo. App. 198, 2 Mo. App. Rep. 1181.

**348.** 1. Increase Follows the Dam. — *Alferitz v. Borgwardt*, 126 Cal. 205, citing 2 Am. and Eng. ENCYC. OF LAW (2d ed.) 348; *Kelley v. Grundy*, (Ky. 1898) 45 S. W. Rep. 100; *Battle Creek Valley Bank v. Madison First Nat. Bank*, 62 Neb. 828.

**349.** 3. Right to the Increase as Between Mortgagor and Mortgagee. — *Cox v. Beck*, 83 Fed. Rep. 269; *Hopkins Fine Stock Co. v. Reid*, 106 Iowa 78.

**350.** 1. Right to the Increase as Between Mortgagee and Third Parties. — *Cox v. Beck*, 83 Fed. Rep. 269; *Desany v. Thorp*, 70 Vt. 31.

2. Rights of Attaching Creditors — *Contra.* — *Gannaway v. Tate*, 98 Va. 789, holding that a deed of trust conveying sheep included the increase thereof, though the increase was not mentioned in the deed.

**351.** 1. Liability of Owner for Damages by Wild Animals — General Rule. — *Barclay v. Hartman*, 2 Marv. (Del.) 351.

Trespasses by Rabbits and Deer. — Where the defendant's predecessor had kept foreign rabbits, which had bred in considerable numbers, but the defendant had done nothing to increase their numbers, and the defendant also kept deer on his premises, it was held that he was liable for the damages occasioned by the trespasses of the deer on the plaintiff's land, but not for the trespasses of the rabbits. *Brady v. Warren*, (1900) 2 Ir. R. 632.

**Bees Attacking Horses.** — See *Parsons v. Manser*, 119 Iowa 88, 97 Am. St. Rep. 283.

Where the defendant was negligent in the care of his bees and knew that they were accustomed to sting mankind and domestic animals, it was held that he was liable to the plaintiff for injuries sustained by reason of being thrown from his horse in consequence of stings inflicted on the horse by the defendant's bees. The damage was not too remote. *O'Gorman v. O'Gorman*, (1903) 2 Ir. R. 573.

2. Presumption of Knowledge of Vicious Nature of Animal. — *Parsons v. Manser*, 119 Iowa 88, 97 Am. St. Rep. 283; *Leonard v. Donoghue*, 87 N. Y. App. Div. 104.

**352.** 1. Presumption of Negligence on Part of Owner. — *Parsons v. Manser*, 119 Iowa 88, 97 Am. St. Rep. 283.

2. Liability of Owner for Injuries Done by Domestic Animals. — *Brown v. Green*, 1 Penn. (Del.) 535; *Ward v. Danzeizen*, 111 Ill. App. 163; *Byrne v. Morel*, (Ky. 1899) 49 S. W. Rep. 193; *Brooks v. Brooks*, (Ky. 1899) 53 S. W. Rep. 645; *O'Neill v. Blase*, 94 Mo. App. 648.

**354.** 1. Gist of the Action. — *Clowdis v. Fresno Flume, etc., Co.*, 118 Cal. 315, 62 Am. St. Rep. 238; *Brown v. Green*, 1 Penn. (Del.) 535; *Barclay v. Hartman*, 2 Marv. (Del.) 351; *West Chicago St. R. Co. v. Walsh*, 78 Ill. App. 595; *Perry v. Cobb*, (Indian Ter. 1903) 76 S. W. Rep. 289; *Byrne v. Morel*, (Ky. 1899) 49 S. W. Rep. 193; *Brooks v. Brooks*, (Ky. 1899) 53 S. W. Rep. 645; *Benoit v. Troy, etc., R. Co.*, 154 N. Y. 223; *Bennett v. Mallard*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 112; *O'Connell v. Mooney*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 641; *McHugh v. New York*, 31 N. Y. App. Div. 299.

2. When Prima Facie Case Established. — *Parsons v. Manser*, 119 Iowa 88, 97 Am. St. Rep. 283; *Brooks v. Brooks*, (Ky. 1899) 53 S. W. Rep. 645; *Talmage v. Mills*, 80 N. Y. App. Div. 382.

3. Trespassing Animals — General Rule. — *Garrioch v. McKay*, 13 Manitoba 404.

**355.** 1. Duty to Confine Cattle — Common-law Rule. — *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355; *McPherson v. James*, 69 Ill. App. 337; *Perry v. Cobb*, (Indian Ter. 1903) 76 S. W. Rep. 289; *Muir v. Thixton*, 78 S. W. Rep. 466, 25 Ky. L. Rep. 1688; *Gillespie v. Hendren*, 98 Mo. App. 622; *Jones v. Habberman*, 94 Mo. App. 1; *Randall v. Gross*, (Neb. 1903) 93 N. W. Rep. 233; *Lorance v. Hillyer*,

**356.** Statutory Changes. — See note 1.

**357.** In the Case of Wilful Trespass. — See note 1.

(2) *Right to Drive Off Trespassing Animals.* — See note 2.

**358.** No Right to Kill. — See note 2.

(3) *Seizure Damage Feasant* — (a) Generally — Common-law Rule. — See note 3.

(b) Statutory Regulation. — See note 3.

**360.** Constitutionality of Such Statutes. — See note 1.

(c) When Distrainer Liable as Trespasser. — See note 2.

**361.** c. ANIMALS ON HIGHWAY. — See note 1.

**362.** Driving Animals on Street. — See note 1.

57 Neb. 266; Pacific Live Stock Co. v. Murray, (Oregon 1904) 76 Pac. Rep. 1079, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 355; Walker v. Bloomingcamp, 34 Oregon 391; Poindexter v. May, 98 Va. 143; Cosgriff v. Miller, 10 Wyo. 190, 98 Am. St. Rep. 977; Martin v. Platte Valley Sheep Co., (Wyo. 1904) 76 Pac. Rep. 571; Garrioch v. McKay, 13 Manitoba 404.

**356. 1. Statutory Enactments.** — Lorange v. Hillyer, 157 Neb. 266; Randall v. Gross, (Neb. 1903) 93 N. W. Rep. 223; Ely v. Rosholt, 11 N. Dak. 559; Walker v. Bloomingcamp, 34 Oregon 391; Fry v. Hubner, 35 Oregon 184; Cosgriff v. Miller, 10 Wyo. 190, 98 Am. St. Rep. 977.

**Public Lands.** — Martin v. Platte Valley Sheep Co., (Wyo. 1904) 76 Pac. Rep. 571.

**Must Show a Good Fence.** — Sweetman v. Cooper, (Colo. App. 1904) 76 Pac. Rep. 925; Perry v. Cobb, (Indian Ter. 1903) 76 S. W. Rep. 289; Muir v. Thixton, 78 S. W. Rep. 466, 25 Ky. L. Rep. 1688; Gilmore v. Harp, 92 Mo. App. 77; Mackler v. Schuster, 68 Mo. App. 670; Beinhorn v. Griswold, 27 Mont. 79, 94 Am. St. Rep. 818; Poindexter v. May, 98 Va. 143.

**357. 1. Wilful Trespass.** — Northern Pac. R. Co. v. Cunningham, 89 Fed. Rep. 594; Sweetman v. Cooper, (Colo. App. 1904) 76 Pac. Rep. 925; Beinhorn v. Griswold, 27 Mont. 79, 94 Am. St. Rep. 818; Poindexter v. May, 98 Va. 143; Cosgriff v. Miller, 10 Wyo. 190, 98 Am. St. Rep. 977; Martin v. Platte Valley Sheep Co., (Wyo. 1904) 76 Pac. Rep. 571.

**2. Right to Drive Off Trespassing Stock — Degree of Force Justified.** — Harris v. Brummell, 74 Mo. App. 433.

**Shooting or Wounding Trespassing Cattle.** — In Alexander v. State, (Tex. Crim. 1902) 70 S. W. Rep. 425, it was held that the shooting of a roguish cow at a distance of forty yards with small shot is not wrongful.

**Turning Trespassing Animals Loose.** — Morse v. Glover, 68 N. H. 119.

**358. 2. Limitation upon Right — May Not Kill Trespassing Animals.** — Fenton v. Bisel, 80 Mo. App. 135; Harris v. Eaton, 20 R. I. 81.

**In the Case, However, of an Animal Attacking Another.** — Chapman v. Decrow, 93 Me. 378, 74 Am. St. Rep. 357; Nesbitt v. Wilbur, 177 Mass. 200.

**Dog Killed to Protect Property.** — A dog may be killed to protect property, but it must be in the act of committing a depredation at the time of the killing. O'Neil v. Newman, 132 Mich. 489; Throne v. Mead, 122 Mich. 273; Hodges v. Causey, 77 Miss. 353, 78 Am. St.

Rep. 525; Fisher v. Badger, 95 Mo. App. 289; Decker v. Holgate, 5 Lack. Leg. N. (Pa.) 56.

**3. Seizure Damage Feasant — Right to Distrain.** — Jones v. Habberman, 94 Mo. App. 1.

**Exception in Case of Dog.** — A dog is not subject to seizure damage feasant. Fisher v. Badger, 95 Mo. App. 289; Goff v. Byers, (Neb. 1903) 96 N. W. Rep. 1037, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 358; Gilbert v. Stephens, 6 Okla. 673, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 358.

**359. 3. Statutory Regulation.** — Little v. Swafford, 14 Ind. App. 7; Lynch v. Ford, 72 N. Y. App. Div. 536.

**360. 1. Constitutionality of the Statutes.** — Randall v. Gross, (Neb. 1903) 93 N. W. Rep. 223. See Greer v. Downey, (Ariz. 1903) 71 Pac. Rep. 900, holding statute to be unconstitutional.

**2. Statutes Must Be Strictly Complied With.** — Hill v. Ginn, 2 Penn. (Del.) 174; Holaman v. Marsh, 116 Iowa 483; Sloan v. Bain, 47 Neb. 914; McAllister v. Wrede, (Neb. 1903) 97 N. W. Rep. 318; Burns v. Morrow, (County Ct.) 42 Misc. (N. Y.) 657.

**Failure to Give Notice.** — Chase v. Putnam, 117 Cal. 364.

**Verbal Notice Sufficient.** — Healy v. Jordan, 103 Iowa 735.

**361. 1. Animals at Large on Highway — Common-law Rule.** — Patterson v. Fanning, 1 Ont. L. Rep. 415, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361, affirmed 2 Ont. L. Rep. 462.

**Leaving Horse Unhitched and Unattended, Negligence.** — Manthey v. Rauenbuehler, 71 N. Y. App. Div. 173; Wagner v. New York Condensed Milk Co., (Supm. Ct. App. T.) 21 Misc. (N. Y.) 62.

**Runaway Team.** — If a horse left alone runs away, negligence is presumed. Davis v. Kallfelz, (County Ct.) 22 Misc. (N. Y.) 602.

**Horse Escaping to Street.** — The owner of a horse which has escaped into the street, having no knowledge of any vicious propensities, is not liable for injuries resulting to a boy who was kicked while trying to catch the horse. The boy was guilty of contributory negligence in trying to catch the horse. Flett v. Coulter, 5 Ont. L. Rep. 375.

**Vicious Steer on Highway — Master Liable.** — Byrne v. Morel, (Ky. 1899) 49 S. W. Rep. 193.

**362. 1. Driving Animals Through Streets — Duty and Liability.** — Myers v. Lape, 101 Ill. App. 182; O'Neill v. Blase, 94 Mo. App. 648.

**A Man Has a Right to Drive His Cattle Along the Public Highways.** — Erdman v. Gottshall, 9 Pa. Super. Ct. 295.



**363.** Animals Unlawfully on Highway. — See note 1.

**364.** *d.* PROOF OF SCIENTER — WHEN NECESSARY. — See note 1.

**365.** When Animal Is a Trespasser. — See note 1.

**366.** *e.* INJURIES BY DOGS — (1) *In General* — The Owner of a Vicious Dog. — See note 2.

**368.** Gist of the Action. — See note 1.

**Driving Bull in Street.** — *Clowdis v. Fresno Flume, etc., Co.*, 118 Cal. 315, 62 Am. St. Rep. 238; *Pfaffinger v. Gilman*, (Ky. 1897) 38 S. W. Rep. 1088, which cases affirm the liability of the owner.

**Contributory Negligence — Assisting Person in Danger.** — *Manthey v. Rauenbuchler*, 71 N. Y. App. Div. 173.

**363. 1. Animals on Highway in Violation of Statutes.** — *Patterson v. Fanning*, 2 Ont. L. Rep. 462, affirming 1 Ont. L. Rep. 412; *Leonard v. Doherty*, 174 Mass. 565; *Healey v. Ballantine*, 66 N. J. L. 345; *Stern v. Hoffman Brewing Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 794; *Eddy v. Union R. Co.*, 25 R. I. 451; *Decker v. McSorley*, 111 Wis. 91. Compare *Flett v. Coulter*, 5 Ont. L. Rep. 375.

**Horse Unlawfully on Sidewalk.** — A horse standing on a sidewalk, where he had no right to be, kicked a passer-by, and the owner was held liable, although he had no knowledge of his vicious propensities. *Hardiman v. Wholley*, 172 Mass. 411, 70 Am. St. Rep. 292.

**364. 1. Domestic Animals Rightfully in the Place.** — *Barclay v. Hartman*, 2 Marv. (Del.) 351; *Fritsche v. Clemow*, 109 Ill. App. 355; *Ward v. Danzeizen*, 111 Ill. App. 163; *West Chicago St. R. Co. v. Walsh*, 78 Ill. App. 595; *Perry v. Cobb*, (Indian Ter. 1903) 76 S. W. Rep. 289; *Parsons v. Manser*, 119 Iowa 88, 97 Am. St. Rep. 283; *Healey v. Ballantine*, 66 N. J. L. 345, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 364; *O'Connell v. Mooney*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 641; *Hallyburton v. Burke County Fair Assoc.*, 119 N. Car. 526; *Eddy v. Union R. Co.*, 25 R. I. 451, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 364; *Patterson v. Fanning*, 1 Ont. L. Rep. 416, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361, affirmed 2 Ont. L. Rep. 462; *Noel v. Duchesneau*, 15 Quebec Super. Ct. 352.

**Evidence of Viciousness.** — *Talmage v. Mills*, 80 N. Y. App. Div. 382.

The fact that horses had run away before, but on that occasion were frightened by boys snow-balling, is not sufficient evidence of viciousness to render the owner liable. *Benoit v. Troy, etc., R. Co.*, 154 N. Y. 223.

**Evidence of Viciousness Held Insufficient.** — *Eastman v. Scott*, 182 Mass. 192; *Lawlor v. French*, 2 N. Y. App. Div. 140; *McHugh v. New York*, 31 N. Y. App. Div. 299.

**The Requisite Scienter** may be proved by notice of those circumstances which should have placed a reasonably prudent man on guard and which, on reasonable inquiry, would have afforded information of the true character of the animal. Actual personal knowledge or proof of the vicious propensities of the animal is not necessary. *McCready v. Stepp*, 104 Mo. App. 340.

**Doelle Conduct After Injury.** — Subsequent conduct of the animal cannot be considered

in determining the scienter. *Woodward v. Loomis*, 64 N. Y. App. Div. 27.

**Knowledge of Servant.** — The knowledge of a servant to whom the animal is intrusted is imputed to the master. *Clowdis v. Fresno Flume, etc., Co.*, 118 Cal. 315, 62 Am. St. Rep. 238; *Brown v. Green*, 1 Penn. (Del.) 535; *O'Neill v. Blase*, 94 Mo. App. 648.

**Under the English Dogs Act of 1865**, proof of scienter is unnecessary in the case of the killing of a trespassing sheep by the defendant's dog. *Grange v. Silcock*, 18 Cox C. C. 644, 77 L. T. N. S. 340.

**Question for Jury.** — The questions of viciousness and scienter are for the jury. *Brooks v. Brooks*, (Ky. 1899) 53 S. W. Rep. 645.

**Proof of Savage Nature Sufficient.** — *Bennett v. Mallard*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 112.

**Previous Vicious Acts.** — Proof of previous vicious acts should go to the jury from which to determine the scienter. *Tolmie v. Standard Oil Co.*, 59 N. Y. App. Div. 332.

**365. 1. Rule Where the Animal Is Trespasser.** — *Perry v. Cobb*, (Indian Ter. 1903) 76 S. W. Rep. 289; *Smith v. Selinsgrove*, 199 Pa. St. 615; *Troth v. Willis*, 42 W. N. C. (Pa.) 504.

**366. 2. Vicious Dogs — General Rule as to Liability.** — *Norris v. Warner*, 59 Ill. App. 300; *Speckmann v. Kreig*, 79 Mo. App. 376; *Gladstone v. Brinkhurst*, 70 N. J. L. 130; *Schilling v. Smith*, 76 N. Y. App. Div. 464; *Boler v. Sorgenfrei*, (Supm. Ct. App. T.) 86 N. Y. Supp. 180; *Zimett v. Hollenback*, 9 Kulp (Pa.) 564; *Harris v. Eaton*, 20 R. I. 81; *Kelly v. Alderson*, 19 R. I. 544; *Triolo v. Foster*, (Tex. Civ. App. 1900) 57 S. W. Rep. 698; *Price v. Wright*, 35 N. Bruns. 26.

**Vicious Dog a Nuisance.** — *Leonard v. Donoghue*, 87 N. Y. App. Div. 104; *Woodbridge v. Marks*, 5 N. Y. App. Div. 604.

**Right to Keep a Dog.** — *Sanders v. O'Callaghan*, 111 Iowa 574; *De Gray v. Murray*, 69 N. J. L. 458; *Woodbridge v. Marks*, 17 N. Y. App. Div. 139.

**Watch Dog.** — *Hayes v. Smith*, 62 Ohio St. 161.

**Injury Without Vicious Intent on Part of Dog.** — *Carroll v. Marcoux*, 98 Me. 259.

**368. 1. Gist of Action — Keeping Dog with Knowledge of Its Viciousness — Delaware.** — *Barclay v. Hartman*, 2 Marv. (Del.) 351.

*Illinois.* — *Ahlstrand v. Bishop*, 88 Ill. App. 424.

*Maine.* — *Carroll v. Marcoux*, 98 Me. 259.

*Michigan.* — *Fye v. Chapin*, 121 Mich. 675.

*Minnesota.* — *Rowe v. Ehrmanntraut*, 92 Minn. 17.

*Missouri.* — *Speckmann v. Kreig*, 79 Mo. App. 376.

*New York.* — *Lawlor v. French*, 2 N. Y. App. Div. 140; *Woodbridge v. Marks*, 5 N. Y. App. Div. 604; *Schilling v. Smith*, 76 N. Y.

- 368.** A Prima Facie Liability. — See note 2.  
 Proof of Negligence Not Necessary. — See note 3.  
 Dog as a Trespasser. — See note 4.
- 369.** (2) *Proof of Scienter Necessary* — (a) Generally. — See notes 1, 2.  
 In Many States Statutes Have Been Enacted. — See note 3.  
 (b) How Shown. — See note 4.
- 370.** See note 1.
- 371.** In Some Instances. — See note 1.  
 (3) *Measure of Damages*. — See note 2.

App. Div. 464; *Leonard v. Donoghue*, 87 N. Y. App. Div. 104.

*Texas*. — *Triolo v. Foster*, (Tex. Civ. App. 1900) 57 S. W. Rep. 698.

**368.** 2. *Prima Facie Liable*. — *De Gray v. Murray*, 69 N. J. L. 458; *McConnell v. Lloyd*, 9 Pa. Super. Ct. 25.

**3.** *Presumption of Negligence*. — *Fye v. Chapin*, 121 Mich. 675; *Speckmann v. Kreig*, 79 Mo. App. 376; *Woodbridge v. Marks*, 5 N. Y. App. Div. 604, 17 N. Y. App. Div. 139; *Schilling v. Smith*, 76 N. Y. App. Div. 464; *Boler v. Sorgenfrei*, (Supm. Ct. App. T.) 86 N. Y. Supp. 180; *Hayes v. Smith*, 62 Ohio St. 161, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 368; *Triolo v. Foster*, (Tex. Civ. App. 1900) 57 S. W. Rep. 698.

**4.** *Liability for Trespassing Dog*. — *O'Connell v. Jarvis*, 13 N. Y. App. Div. 3.

**369.** 1. *General Rule — Proof of Knowledge of Viciousness Necessary*. — *Friedmann v. McGowan*, 1 Penn. (Del.) 436; *Feldman v. Sellig*, 110 Ill. App. 130; *Cuney v. Campbell*, 76 Minn. 59; *De Gray v. Murray*, 69 N. J. L. 458; *Strubing v. Mahar*, 46 N. Y. App. Div. 409; *Peck v. Williams*, 24 R. I. 583; *Triolo v. Foster*, (Tex. Civ. App. 1900) 57 S. W. Rep. 698; *Plummer v. Ricker*, 71 Vt. 114.

**2.** *Proof of Savage Nature of Dog Equivalent to Express Notice on Part of Owner*. — *Friedmann v. McGowan*, 1 Penn. (Del.) 436; *Barclay v. Hartman*, 2 Marv. (Del.) 351; *Tubins v. District of Columbia*, 21 App. Cas. (D. C.) 267; *Johnson v. Eckberg*, 94 Ill. App. 634; *O'Neill v. Blase*, 94 Mo. App. 648.

**3.** *Statutory Enactments* — *Iowa*. — *Sanders v. O'Callaghan*, 111 Iowa 574.

*Kentucky*. — *Dillehay v. Hickey*, 71 S. W. Rep. 1, 24 Ky. L. Rep. 1220; *Bush v. Wathen*, 104 Ky. 548; *Wooldridge v. White*, 105 Ky. 247.

*Maine*. — *Carroll v. Marcoux*, 98 Me. 259.  
*Massachusetts*. — *Riley v. Harris*, 177 Mass. 163.

*Michigan*. — *Fye v. Chapin*, 121 Mich. 675.  
*Rhode Island*. — *Peck v. Williams*, 24 R. I. 583.

*Wisconsin*. — *Nelson v. Nugent*, 106 Wis. 477, 80 Am. St. Rep. 51.

**4.** *How Scienter Shown — Attendant Circumstances*. — *Price v. Wright*, 35 N. Bruns. 26; *Duval v. Barnaby*, 75 N. Y. App. Div. 154; *Dorer v. Winchester*, 70 Vt. 418.

If the dog had made vicious attacks upon other persons, without biting them, it is sufficient knowledge to the owner. *Johnson v. Eckberg*, 94 Ill. App. 634.

**Question for Jury**. — *Barclay v. Hartman*, 2 Marv. (Del.) 351; *Rowe v. Ehrmantraut*, 92

Minn. 17; *Trinity, etc., R. Co. v. O'Brien*, 18 Tex. Civ. App. 690.

**Keeping Dog Confined**. — *Chicago, etc., R. Co. v. Kuckkuck*, 98 Ill. App. 252, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369; *Sanders v. O'Callaghan*, 111 Iowa 574; *Speckmann v. Kreig*, 79 Mo. App. 376; *Leonard v. Donoghue*, 87 N. Y. App. Div. 104; *Woodbridge v. Marks*, 17 N. Y. App. Div. 139; *Plummer v. Ricker*, 71 Vt. 114.

The fact that a dog is kept confined should go to the jury to determine the scienter. *Friedmann v. McGowan*, 1 Penn. (Del.) 436.

**370.** 1. *Proof of Good Disposition of Dog Inadmissible*. — *Johnson v. Eckberg*, 94 Ill. App. 634; *Carroll v. Marcoux*, 98 Me. 259; *Gladstone v. Brinkhurst*, 70 N. J. L. 130; *Talmage v. Mills*, 80 N. Y. App. Div. 382.

**Evidence of Bad Reputation of Dog Competent**. — *Fisher v. Weinholzer*, 91 Minn. 22; *Triolo v. Foster*, (Tex. Civ. App. 1900) 57 S. W. Rep. 698.

Proof that the dog has on former occasions chased teams is admissible. *Broderick v. Higginson*, 169 Mass. 482, 61 Am. St. Rep. 296.

**Implied Notice of Viciousness**. — *Rowe v. Ehrmantraut*, 92 Minn. 17; *Hayes v. Smith*, 8 Ohio Cir. Dec. 92. See also *Nelson v. Barrett*, 89 N. Y. App. Div. 468.

In *Bauer v. Lyons*, 23 N. Y. App. Div. 204, the plaintiff, who had been bitten by defendant's dogs, gave evidence tending to prove that the dogs had about two weeks prior to the time of this occurrence attacked and bitten another person, and that the defendant had been advised of it. This was held sufficient to require the submission of the question to the jury whether the defendant was chargeable with such notice of the vicious disposition of the dogs as to render him liable to the plaintiff for suffering them to run at large.

**Notice to Servant — Notice to Master**. — *Duval v. Barnaby*, 75 N. Y. App. Div. 154.

The knowledge of the servant should not necessarily be imputed to the master. *Friedmann v. McGowan*, 1 Penn. (Del.) 436.

**Notice to Agent**. — *Niland v. Geer*, 46 N. Y. App. Div. 104.

**Notice to Wife of Owner**. — *Boler v. Sorgenfrei*, (Supm. Ct. App. T.) 86 N. Y. Supp. 180.

Notice to the wife is notice to the husband, of the vicious propensities of a dog. *Barclay v. Hartman*, 2 Marv. (Del.) 351.

**Notice to One Joint Owner** is notice to all. *Hayes v. Smith*, 8 Ohio Cir. Dec. 92.

**371.** 1. *Proof of Knowledge that Dog Had Previously Bitten a Goat Insufficient*. — *Osborne v. Chocqueel*, (1896) 2 Q. B. 109.

**2.** *Matters to Be Considered in Estimating*

**372.** Statutes Allowing Double Damages. — See note 1.

(4) *Contributory Negligence as a Defense.* — See note 3.

**373.** See note 1.

**374.** (5) *Injuries to Sheep* — At Common Law. — See note 1.

Statutes Abolishing Proof of Scier. — See note 2.

**375.** (6) *Liability of Harboring of Dog.* — See note 1.

**377.** *f. JOINT OWNERS — APPORTIONMENT OF DAMAGES.* — See notes

1, 2.

**378.** Statutory Changes — Dogs Killing Sheep. — See note 1.

III. ESTRAYS — 1. Definition. — See note 2.

**Damages.** — *Friedmann v. McGowan*, 1 Penn. (Del.) 436; *Barclay v. Hartman*, 2 Marv. (Del.) 351; *Brown v. Green*, 1 Penn. (Del.) 535; *Shultz v. Griffith*, 103 Iowa 150; *O'Neill v. Blase*, 94 Mo. App. 648; *Trinity, etc., R. Co. v. O'Brien*, 18 Tex. Civ. App. 690.

**Permanent Disfigurement — Speculative Damages.** — In an action for the biting of a girl five years old, it was held erroneous to instruct the jury that if they thought the scar on her face, caused by the bite, was likely to be permanent, and that the disfigurement might affect her prospects of making a good marriage, they might consider such fact in assessing the damages, as such damages were too speculative and remote. *Price v. Wright*, 35 N. Bruns. 26.

**Exemplary Damages.** — *Hahn v. Kordula*, 5 Kan. App. 142; *Triolo v. Foster*, (Tex. Civ. App. 1900) 57 S. W. Rep. 698; *Sanders v. O'Callaghan*, 111 Iowa 574.

**372. 1. Statutes Authorizing Double Damages.** — *Riley v. Harris*, 177 Mass. 163; *Fye v. Chapin*, 121 Mich. 675; *Unity v. Pike*, 68 N. H. 71.

**Dog Killing Sheep — Ten Times Damages.** — *Rausch v. Barrere*, 109 La. 563.

**3. Contributory Negligence as Defense.** — *Chicago, etc., R. Co. v. Kuckkuck*, 197 Ill. 308, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 372; *Shultz v. Griffith*, 103 Iowa 150; *Schilling v. Smith*, 76 N. Y. App. Div. 464. See also *Fye v. Chapin*, 121 Mich. 675.

**373. 1. Chicago, etc., R. Co. v. Kuckkuck**, 197 Ill. 308, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 373.

**Person Inciting Attack.** — *Feldman v. Sellig*, 110 Ill. App. 130; *Bush v. Wathen*, 104 Ky. 548; *Woodbridge v. White*, 105 Ky. 247.

But the act inviting the attack must take place at the time the attack is made in order to constitute a defense. *Schilling v. Smith*, 76 N. Y. App. Div. 464.

**Provoking Vicious Horse.** — A person who caused the injury to himself by provoking a vicious horse cannot recover damages of the owner. *Brown v. Green*, 1 Penn. (Del.) 535.

**Boy Teasing Dog.** — It appeared that a boy thirteen years of age had been teasing a dog which was confined in a house, and that the daughter of the dog's owner released the dog. It was held that an action could be maintained for damage done by the dog. *Bernier v. G  n  reux*, 12 Quebec K. B. 24.

**Injury to Trespasser.** — *Peck v. Williams*, 24 R. I. 583.

A peddler entering without permission is technically a trespasser, but the owner is liable

for injuries inflicted by his dog. *Carroll v. Marcoux*, 98 Me. 259.

**Trespasser — Dog Kept for Protection.** — *Sanders v. O'Callaghan*, 111 Iowa 574; *Leonovrovitz v. Ott*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 551.

**Dog in Safe Place.** — The owner of a dog which is confined in a safe place is not liable for damages to a boy who stuck his hand into the inclosure and was bitten by the dog. *Badali v. Smith*, (Tex. Civ. App. 1896) 37 S. W. Rep. 642.

**374. 1. Dogs Injuring Sheep.** — *Osborne v. Chocqueel*, (1896) 2 Q. B. 109.

**2. Statutory Enactments.** — *O'Connell v. Jarvis*, 13 N. Y. App. Div. 3; *Nelson v. Nugent*, 106 Wis. 477, 80 Am. St. Rep. 51.

**Evidence of Previous Character of Dog.** — *Kelly v. Alderson*, 19 R. I. 544.

**Owner Killing Dog — Evidence of Identity.** — *Peeler v. McMillan*, 91 Mo. App. 310.

**375. 1. Harboring of Vicious Dog — Rule as to Liability.** — *Gardner v. Hart*, 44 W. R. 527; *Chicago, etc., R. Co. v. Kuckkuck*, 197 Ill. 308; *Shultz v. Griffith*, 103 Iowa 150; *Hahn v. Kordula*, 5 Kan. App. 142; *Leonard v. Donoghue*, 87 N. Y. App. Div. 104; *Lynt v. Moore*, 5 N. Y. App. Div. 487; *Duval v. Barnaby*, 75 N. Y. App. Div. 154; *Hayes v. Smith*, 62 Ohio St. 161.

**Keeping on Premises of Another.** — *Boylan v. Everett*, 172 Mass. 453.

**"Owner or Keeper" Defined.** — *Jenkinson v. Coggins*, 123 Mich. 7.

**Liability of Master — Dog Kept by Servant.** — *Chicago, etc., R. Co. v. Kuckkuck*, 98 Ill. App. 252, affirmed 197 Ill. 304.

**Husband and Wife.** — *Hugron v. Statton*, 18 Quebec Super. Ct. 200.

**Father and Child.** — The father is liable for damages done by a dog kept on his premises by his son. *Plummer v. Ricker*, 71 Vt. 114.

**Keeping Dog Short Time Not Liable.** — *O'Donnell v. Pollock*, 170 Mass. 441.

**377. 1. Damages by Several Animals Belonging to Different Persons.** — *Williams v. Woodworth*, 32 Nova Scotia 271; *Nierenberg v. Wood*, 59 N. J. L. 112; *Shultz v. Quinn*, 2 Lack. Leg. N. (Pa.) 141.

**2. Equal Share of Damages.** — *Williams v. Woodworth*, 32 Nova Scotia 271.

**378. 1. Sheep-killing Dogs — Statutes.** — *Nelson v. Nugent*, 106 Wis. 477, 80 Am. St. Rep. 51.

**2. Estray Defined.** — The statute (2 Rev. Stat. N. Y. 351) relating to estrays applies more particularly to animals straying on the highways than to those trespassing upon private prop-

**380. IV. COMMUNICATING DISEASE.** — See note 2.

**382. Proof of Scienter — When Necessary.** — See note 1.

**384. ANNOUNCE.** — See note 1.

**385. ANNUAL—ANNUALLY.** — See note 2.

erty. *Boyce v. Perry*, (County Ct.) 26 Misc. (N. Y.) 355.

**380. 2. Constitutionality of Statutes as to Importing Diseased Animals.** — See *St. Louis Southwestern R. Co. v. Smith*, 20 Tex. Civ. App. 451.

**382. 1. Croff v. Cresse**, 7 Okla. 408.

**384. 1. Announcement Equivalent to Proclamation — Election Law.** — See *Dooley v. Van Hohenstein*, 170 Ill. 630.

**385. 2. Bailey's Estate**, 23 Pa. Co. Ct. 142,

quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 385, note 2. And see to the same effect *Henry v. Henderson*, 81 Miss. 743; *Mower v. Sanford*, 76 Conn. 504.

**Filing Certificate of Incorporation.** — In a statute requiring officers of a corporation to file a certificate of corporate condition, the word *annually* does not mean twice in one year, but yearly or once in one year. *Continental Nat. Bank v. Buford*, 107 Fed. Rep. 188.

## ANNUITIES.

BY W. H. CROW.

**387. I. DEFINITION.** — See note 1.

Term Used in a Broader Sense. — See notes 2, 3, 4.

**388. II. HOW CREATED — 1. In General.** — See note 1.

2. Contract for Annuity. — See note 2.

**389. III. CHARACTERISTICS — 1. Generally — a. DISTINGUISHED FROM INCOME.** — See note 4.

**390. b. DISTINGUISHED FROM LEGACY.** — See note 1.

**387. 1. The Term Defined.** — *Henry v. Henderson*, 81 Miss. 743.

2. *Nehls v. Sauer*, 119 Iowa 440; *Krigbaum v. Irvine*, 10 Ohio Dec. 226, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387.

**Sum Payable Quarterly May Be an Annuity.** — *Price v. Price*, 66 S. W. Rep. 529, 23 Ky. L. Rep. 1911, 1947.

**Contingent Annuity.** — *Stover's Appeal*, 77 Pa. St. 282.

3. *Krigbaum v. Irvine*, 10 Ohio Dec. 226.

**Annuity Is in Nature of Contingent Debt.** — Where an insolvent made an assignment for the benefit of creditors and previous to the assignment he had covenanted with trustees to pay an annuity to his wife, it was held that the growing payments were in the nature of contingent debts and that the trustees were not entitled, under Rev. Stat. Ont., c. 147, to rank on the estate of the insolvent for the present value of such payments. *Carswell v. Langley*, 3 Ont. L. Rep. 261.

4. *Krigbaum v. Irvine*, 10 Ohio Dec. 226. See *Nehls v. Sauer*, 119 Iowa 440.

**388. 1. Contract.** — *Cahill v. Maryland L. Ins. Co.*, 90 Md. 333, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388.

**Ademption of Annuity.** — A testator by his will gave to each of his two daughters an annuity for life of six thousand dollars. After making the will he gave to one daughter, absolutely, bonds sufficient to produce an income of a little more than one thousand two hundred dollars a year, and by a codicil reduced her annuity by

that amount. He subsequently gave to the other daughter, absolutely, bonds sufficient to produce an income of a little more than one thousand two hundred dollars a year, and instructed his solicitor to alter his will so as to reduce her annuity by that amount, but died suddenly before his will was altered. The court held that the doctrine of ademption applied, and that notwithstanding the different nature of the two gifts, and even without evidence of intention, the second daughter's annuity must be treated as adeemed *pro tanto*. *Tuckett-Lawry v. Lamoureux*, 3 Ont. L. Rep. 577, affirming 1 Ont. L. Rep. 364.

**A Widow May Have Both Dower and an Annuity** where there is nothing in the gift of the annuity inconsistent with the right to dower and she is not required to elect as to which she will take. *Cowan v. Allen*, 26 Can. Sup. Ct. 292.

2. **Release of a Debt of four thousand dollars for a grant of an annuity of sixty-two dollars and fifty cents every three months, is a good consideration for the annuity.** *Price v. Price*, 66 S. W. Rep. 529, 23 Ky. L. Rep. 1911, 1947.

**389. 4. Income and Annuity Distinguished.** — *Matter of Brown*, 143 Cal. 450; *Homer v. Landis*, 95 Md. 320; *Matter of Von Keller*, (Surrogate Ct.) 28 Misc. (N. Y.) 600; *Chisholm v. Shields*, 67 Ohio St. 374; *Overton v. Lea*, 108 Tenn. 529, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389. See also *Angle v. Angle*, (N. J. 1904) 57 Atl. Rep. 425.

**390. 1. Legacy and Annuity Distinguished** — *Krigbaum v. Irvine*, 10 Ohio Dec. 226.

**391.** 3. When an Incumbrance. — See note 5.

**392.** 4. Liability for Taxes. — See note 1.

**393.** IV. DURATION — 1. For Life or Perpetual. — See note 1.

Simple Gift of Annuity. — See note 2.

**394.** 2. Maintenance and Education. — See note 2.

**396.** V. ON WHAT PROPERTY CHARGEABLE — 1. In General — A Question of Intention. — See note 3.

**391.** 5. Mortgagee of Property Charged. — A mortgagee is not an innocent purchaser for value where a deed granting annuities is on record when he receives his mortgage, and he takes subject to the annuities. *Bentley v. Gardner*, 45 N. Y. App. Div. 216.

**Extent of Charge Is Dependent on Terms of Will.**

— Where a testator charges land with the payment of an annuity, an agreement between the devisees and the annuitant charging the land to a greater extent for the payment of the annuity is ineffectual as to a subsequent purchaser of the land who has no actual notice of such agreement, and such purchaser will take the land subject only to the charge imposed by the will. Thus, where the will provided that the annuity should be paid out of the funds of the estate and directed that if there were not sufficient funds therefor, it was to be a charge on separate parcels of land devised to other persons, and there were sufficient funds in the executors' hands for the payment of the annuity, but by an agreement for a valuable consideration made between the annuitant and the devisees, it was agreed that the annuity should not be paid out of the funds, but should be a charge on the lands, it was held that a subsequent purchaser without actual notice of the agreement was not affected thereby, and that the lands purchased by him were not liable for the payment of the annuity so long as there were sufficient funds in the executors' hands to pay it. *Coolidge v. Nelson*, 31 Ont. 646.

**Respective Liability of Life Tenant and Remainderman.** — A testator seized in fee of land subject to a mortgage to secure an annuity for his wife, devised the land for life, remainder over in fee. After the death of the testator the life tenant continued to pay the annuity to the widow. She also sold the timber on the land, claiming the right to do so on account of her payments on the annuity. In a suit by the remainderman to restrain waste, it was held that periodical payments of the annuity must be treated partly as interest which the tenant for life had to pay, and partly as principal for which she would have a charge on the inheritance in the proportion which the value of the life estate bore to the value of the remainder, and an injunction was granted restraining the cutting of the timber. *Whitesell v. Reece*, 5 Ont. L. Rep. 352.

**392.** 1. *Angle v. Angle*, (N. J. 1904) 57 Atl. Rep. 425.

**Purchase Money — Payments in Yearly Installments with Interest — Income Tax.** — See Secretary of State *v. Scoble*, (1903) A. C. 299, affirming (1903) 1 K. B. 494.

**393.** 1. Duration — Question of Construction. — *Goodyear Shoe Machinery Co. v. Dancel*, (C. C. A.) 119 Fed. Rep. 692, citing 2 AM. AND

ENG. ENCYC. OF LAW (2d ed.) 393. See also *Davis v. People*, 111 Ill. App. 207.

**Annuity Payable for Five Years.** — In *Hough-teling v. Stockbridge*, (Mich. 1904) 99 N. W. Rep. 759, the court held that the construction of the will showed that the annuities should cease to be paid after five years; though the estate was not settled until ten years after the death of the testator.

**Terminating with Distribution of Estate.** — Where a testator gave an annuity to his wife and to another with a provision that the estate should be divided after the death of his wife, the wife's decease was held to put an end to the other annuity. *Matter of Charlier*, 22 N. Y. App. Div. 71.

**Annuity During Widowhood.** — It has been held that the gift of an annuity, limited to the widowhood of the annuitant, is not invalid as being in undue restraint of marriage. *Cowan v. Allen*, 26 Can. Sup. Ct. 292.

**2. Mere Gift of Annuity, Without More — Continues for Life Only.** — *Goodyear Shoe Machinery Co. v. Dancel*, (C. C. A.) 119 Fed. Rep. 692, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393; *In re Follett*, 23 R. I. 410, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393.

**Pur Autre Vie.** — *Goodyear Shoe Machinery Co. v. Dancel*, (C. C. A.) 119 Fed. Rep. 692; *In re Follett*, 23 R. I. 410.

"A bequest of an annuity to A for a definite term of years, or during the life of B, is a gift to A and his personal representative during the term or during the life of B, and does not expire at the death of A." *Matter of Viele*, 35 N. Y. App. Div. 211, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393.

**Annuity Held to Be for Life.** — Where a will provided that an annuity should be paid to the testator's wife during her life, and provided for the payment of annuities to other relatives, without specifying their duration, and the will further directed that on the deaths of the respective annuitants the annuities should be divided between persons named, it was held that all of the annuities were for the lives of the annuitants only. *Ward v. Ward*, (1903) 1 Ir. R. 211.

**394.** 2. Annuity for Maintenance of Annuitant's Daughter — Death of Annuitant. — Where a testator directed his trustees to pay an annuity to his wife during widowhood, and to pay her a further annuity until his daughter should attain the age of twenty-one years, and to be applied to the maintenance and education of the daughter, and the widow died while the daughter was an infant, it was held that the further annuity did not thereupon cease to be payable. *In re Yates*, (1901) 2 Ch. 438.

**396.** 3. Intention. — *Overton v. Lea*, 108 Tenn. 529.

**397.** 2. Personal Estate Primarily Liable. — See note 2.

3. Charge on Specific Real Estate. — See note 3.

**399.** 5. Devise Subject to Annuity. — See note 1.

VI. RIGHT OF ANNUITANT TO CAPITAL SUM. — See note 2.

**400.** VII. APPORTIONMENT — 1. Generally — Common-law Rule. — See note 1.

Exceptions. — See notes 2, 3.

**401.** 2. Annuity in Lieu of Dower. — See notes 2, 3.

3. Statutory Changes. — See note 4.

**402.** VIII. PAYMENT — 1. From What Time. — See note 1.

**397.** 2. Personal Estate Primarily Liable. — In case the estate of the covenantor who has granted a life annuity is not sufficient to pay the full amount of the annuity, the whole of the fund must be paid to the annuitant. *Ashwin v. Bullock*, 81 L. T. N. S. 48.

**Charge on Real Estate — Exoneration of Personal Estate.** — Where a testator died possessed of freehold and leasehold property as well as ordinary personalty, and by his will he devised and bequeathed all his property, real and personal, to his son, and charged all the real and freehold property with the payment of an annuity to each of his daughters, it was held that the annuities were charged only on the freeholds and not on the leaseholds or other personalty. *Greer v. Waring*, (1896) 1 Ir. R. 427.

**3. Annuity Charged on Specific Real Estate.** — An annuity in lieu of dower granted in an antenuptial contract will be chargeable, after the death of the husband, dying intestate, upon the whole estate and not solely upon the half vesting in the heirs at law of the deceased. *Christy v. Marmon*, 163 Ill. 225. See also *Baylies v. Hamilton*, 36 N. Y. App. Div. 133.

**399.** 1. Liability of Residuary Legatees Inter Se. — Where a testator by his will, after giving certain legacies, devised and bequeathed his residuary estate to trustees on trust to pay out of the income thereof an annuity to his widow during her life, and subject thereto to divide the residuary estate into as many shares as there should be children living at his death, and to pay the annual income of such shares to his children, and he was survived by six children, it was held that each child's share must bear one-sixth of the annuity; that if the income of his share exceeded his proportion of the annuity he would be entitled to the surplus; that if his share of the income was not equal to his proportion of the full annuity, he must make good the deficiency; and that when his income was enlarged by the death of the annuitant he would have to account to the other children for the difference between the portion of his income that had been applied to the payment of the annuity and the sum that he ought to have provided for that purpose. *Re Hargreaves*, 88 L. T. N. S. 100, modifying 86 L. T. N. S. 43.

**2. Life Annuity Liable to Forfeiture.** — Where a life annuity had been given by a covenantor in terms which rendered it liable to forfeiture, in the event the annuitant should do or suffer some act, whereby the annuity or any part thereof, if belonging to him absolutely, would become vested in some other person, and such annuity had been valued in an action to administer the estate of the covenantor, which was

not sufficient to pay the annuity in full, it was held that the annuitant was entitled to have the whole of the fund representing the value of the annuity paid to him. *In re Sinclair*, (1897) 1 Ch. 921, following *Wroughton v. Colquhoun*, 1 De G. & Sm. 357, and *disapproving Carr v. Ingleby*, 1 De G. & Sm. 362.

**400.** 1. Apportionment of Annuities — Connecticut. — *Mower v. Sanford*, 76 Conn. 504, 100 Am. St. Rep. 1008.

*Iowa.* — *Nehls v. Sauer*, 119 Iowa 440.

*Michigan.* — *Chase v. Darby*, 110 Mich. 314, 64 Am. St. Rep. 347.

*Mississippi.* — *Henry v. Henderson*, 81 Miss. 743.

*Pennsylvania.* — *Bailey's Estate*, 23 Pa. Co. Ct. 139, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400.

*Rhode Island.* — *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 163, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400.

**2. Apportionment of Annuity for Support and Maintenance.** — *Cincinnati v. Strobbridge*, 9 Ohio Dec. 652, 7 Ohio N. P. 532; *Bailey's Estate*, 23 Pa. Co. Ct. 139, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400. See also *Chase v. Darby*, 110 Mich. 314, 64 Am. St. Rep. 347; *Henry v. Henderson*, 81 Miss. 743.

**3.** See *Chase v. Darby*, 110 Mich. 314, 64 Am. St. Rep. 347; *Henry v. Henderson*, 81 Miss. 743.

**401.** 2. Annuity in Lieu of Dower. — *Mower v. Sanford*, 76 Conn. 504, 100 Am. St. Rep. 1008; *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 163, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 401.

**3.** *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 163, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 401. See also *Henry v. Henderson*, 81 Miss. 743.

**4. Statutory Changes — Rhode Island.** — Gen. Laws R. I., c. 203, §§ 38, 39, provide for the appointment for the current year of an annuity given by will unless provision be made to the contrary. *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 163.

*Massachusetts.* — *Woods v. Gilson*, 178 Mass. 511.

*New Jersey.* — See *Parker v. Seeley*, 56 N. J. Eq. 110.

**402.** 1. When Annuity Payable. — *Mower v. Sanford*, 76 Conn. 504, 100 Am. St. Rep. 1008; *Henry v. Henderson*, 81 Miss. 743.

By the Civil Code of California, § 1368, it is provided that "annuities commence at the testator's decease." See *Crew v. Pratt*, 119 Cal. 131.

**May Be Paid in Instalments.** — In the absence

- 403.** 2. When Entitled to Priority. — See note 1.  
 3. How Enforced — *a.* IN GENERAL. — See note 5.  
**405.** 4. Arrears — *b.* WHEN PAYABLE OUT OF CORPUS. — See note 1.  
 Residuary Fund Set Apart. — See note 2.  
**406.** Charged on Income of Estate. — See note 1.  
**407.** *c.* WHEN PAYABLE OUT OF INCOME — Corpus to Remain Intact. — See note 1.  
*d.* INTEREST — WHEN ALLOWED. — See note 2.  
**408.** 5. Value — How Computed. — See note 2.

of any provision in the will as to the time of payment of an annuity, it will not be payable in advance, but may, in the discretion of the executor, having due regard to the condition of the estate and the collection of its income, be paid in instalments, providing that by the end of the year the legatee must receive the full amount of the annuity for that year. *Rucker v. Maddox*, 114 Ga. 899.

**Gift of Money to Be Used in Purchase of Annuity.** — A sum of money bequeathed to executors to be used by them in the purchase of an annuity carries interest only from a date twelve months after the death of the testator. This rule was applied where the testator bequeathed to his executors a sum of money free of duty, to be laid out by them in the purchase of an annuity for his daughter, and the will contained no clause for maintenance nor was there any further provision made for the daughter. *Re Friend*, 78 L. T. N. S. 222.

**403.** 1. *Kimball v. Cooney*, 27 Ont. App. 453; *Re McKenzie*, 4 Ont. L. Rep. 707.

**Widow.** — A widow who has failed for several years to urge her claim to priority over other legatees taking annuities, must be held to have acquiesced in the course of the executor in making pro rata payments; she cannot complain after such a continued acquiescence. *Houghteling v. Stockbridge*, (Mich. 1904) 99 N. W. Rep. 759.

**5. Right of Distress.** — In November, 1831, a testator devised certain lands to his daughters A and B, as tenants in common in tail. A married C, and B married D. In 1858, by a deed of settlement on her marriage, B disentailed her moieties and settled them on a trust to pay the income to her husband D for his life or until he became bankrupt, and then for the issue of the marriage, and in default of issue (which was the case) or in default of appointment, for her next of kin. B died in 1862, and her husband D became bankrupt in 1878, whereupon A became entitled to the entire property. In 1881 a deed was executed between A, her husband C, and D, whereby A, with the assent of her husband, in contemplation of D's second marriage, agreed to grant to D an annuity charged on the moieties, shares, and premises comprised in the marriage settlement of 1858, payable out of the rents, profits, and income thereof respectively. By that deed it was provided that if the annuity should become in arrears, the annuitant could enter into and distrain upon all or any of the moieties, shares, or premises, and hold them and receive and take the rents and profits thereof until the arrears were satisfied. The rental value of the undivided moiety eventually became quite insufficient to satisfy the annuity, the profits of

the whole hardly amounting to that sum. In a suit to enjoin the annuitant from distraining, it was held that though he had power to distrain on the entirety of the lands, the deed gave him no power to distrain for more than one-half of the rents and profits of the whole. *Ashwin v. Bullock*, 81 L. T. N. S. 48.

**405.** 1. **Arrears Payable Out of Annuitant's Share of Estate.** — A testator set apart a fund as a provision for his wife and also for his children until their majority or marriage. He gave the residue of his estate to his children living at his death and directed that it should be divided on the death of all of them. He further directed that from majority or marriage each child was to receive the revenue derivable from his share, limited to six thousand dollars a year, each child being charged with a substitution in favor of his or her children. In a suit brought by the eldest son to recover arrears of his annuity of six thousand dollars a year, it was held that according to the true intention of the testator as disclosed by the words of the will, the annuity of each child was a charge on the revenue of his own share and its arrears and not on the total revenue of the estate. *Beaudry v. Barbeau*, (1900) A. C. 569.

**2. Direction to Set Aside Fund Which Is to Fall into the Residue.** — *Re McKenzie*, 4 Ont. L. Rep. 707.

**406.** 1. **Income of Estate Charged with Payment of Annuity.** — *Kimball v. Cooney*, 27 Ont. App. 453; *Re McKenzie*, 4 Ont. L. Rep. 707. See also *In re Metcalf*, (1903) 2 Ch. 424.

**407.** 1. **Corpus to Remain Intact.** — *Homer v. Landis*, 95 Md. 320.

**2. Arrears of an Annuity Given by a Will Do Not as a Rule Carry Interest.** — *In re Hiscoe*, 71 L. J. Ch. 347.

**408.** 2. **Comparative Valuations of Immediate and Reversionary Annuities.** — When a life annuity is given to persons in succession, and the estate being ascertained to be insufficient at some period after the testator's death, it becomes necessary to value the annuity for the purposes of administration, in order to fix the respective amounts to be received by immediate and reversionary annuitants, only the interest in the future of the annuities is valued and a prior annuitant is not required to bring into hotchpot sums paid to him before the date fixed for the making of the valuation. When the annuity of a prior annuitant who dies before a valuation is made is in arrears at his death, the arrears must be paid up out of the fund applicable to that purpose, before a reversionary annuitant is entitled to claim anything, though the fund is thereby entirely exhausted, where it appears that under the terms of the will the trustees might have exhausted the whole of the

**409. X. DUTIES OF EXECUTORS AND TRUSTEES.** — See note 2.

**410.** Entitled to Best Security Obtainable. — See note 1.

[ANONYMOUS. — See note 2*a*.]

ANOTHER. — See note 3.

**414. ANY.** — See note 7.

**417.** See note 1.

**419.** See note 1.

**420. APARTMENT.** — See note 2.

**422. APPARATUS.** — See note 2.

**423. APPARENT.** — See notes 2, 3.

**425. APPEAL.** — See notes 2, 3.

estate in payment of the immediate annuity. *In re Metcalf*, (1903) 2 Ch. 424.

**409. 2. Duties of Executors and Trustees.** — See *Morse v. Tilden*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 560.

That the amount to be set aside should be such as will be likely to continue to pay the amount of the annuity, see *Hanbest's Estate*, 5 Pa. Dist. 691, 18 Pa. Co. Ct. 534.

**What Sum Should Be Set Aside.** — The annuitants are not entitled to have the estate of the testator converted into money further than may be necessary for the payment of his debts and funeral and testamentary expenses. Their right is limited after this has been done, to having the annuities sufficiently secured by the setting aside of such part of the estate as may be adequate for that purpose; and it is sufficient to set aside securities for such an amount as at the rate of four per cent. per annum will produce a yearly sum equal to the amount of the annuities to be provided for. *Re McIntyre*, 3 Ont. L. Rep. 212, following *In re Parry*, 42 Ch. D. 570, and *Harbin v. Masterman*, (1896) 1 Ch. 351.

**410. 1.** See *Re McIntyre*, 3 Ont. L. Rep. 212, following *In re Parry*, 42 Ch. D. 570, and *Harbin v. Masterman*, (1896) 1 Ch. 351.

**2*a*. Anonymous Publication.** — In *Williams v. Smith*, 134 N. Car. 252, the court, referring to *Acts N. Car. 1901*, c. 557 (London Libel Law), said: "We find that the word *anonymous* is defined in the Century Dictionary as 'of unknown name, one whose name is withheld, as an *anonymous* author, or as an *anonymous* pamphlet, or without any name, wanting a name, without the real name of the author, nameless.' The article is signed 'Smith.' The defendant's name is Isaac H. Smith. He refers to the plaintiff as 'one Williams,' and speaks of him as having been party to the suit for the recovery of usury. We are of the opinion that this article does not come within the definition of an *anonymous* publication."

**3. Statute of Frauds.** — See *Allen v. Beebe*, 63 N. J. L. 377.

**More than One.** — See *Eastham v. Holt*, 43 W. Va. 599.

**414. 7. Comprehensive Sense.** — *People v. Van Cleave*, 187 Ill. 135, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 414; *Ludwig v. Cory*, 158 Ind. 582, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 414; *White v. Furgeson*, 29 Ind. App. 144; *Cox v. Island Min. Co.*, 65 N. Y. App. Div. 515, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 414; *Heyler v. Watertown*, 16

S. Dak. 25; *Michels v. State*, 115 Wis. 43. See also *People v. Perales*, 141 Cal. 583.

"Any Action" includes a suit at law as well as a bill in chancery. *Swedish-American Telephone Co. v. Fidelity, etc., Co.*, 208 Ill. 576.

"Any Property" in a statute prohibiting the sale of *any* property by a personal representative without an order of court, embraces promissory notes. *Browne v. Fidelity, etc., Co.*, (Tex. 1904) 80 S. W. Rep. 593.

**417. 1. Limited Sense.** — *Brown v. Rushing*, 70 Ark. 111; *Clark v. Lee*, 185 Mass. 225; *State v. Woodman*, 26 Mont. 348; *State v. Middletown Turnpike Co.*, 65 N. J. L. 73.

**At Any Time.** — See *Shellar v. Shivers*, 171 Pa. St. 569.

**Any Person — Fellow Servants.** — *Miller v. Coffin*, 19 R. I. 164.

**419. 1. One Out of Several.** — *Winnebago County State Bank v. Hustel*, 119 Iowa 115.

**One or More.** — *Matter of McGhee*, 105 Iowa 9.

**420. 2. Apartment House Distinguished from Tenement House.** — See *White v. Collins Bldg., etc., Co.*, 82 N. Y. App. Div. 1; *McClure v. Leaycraft*, 97 N. Y. App. Div. 518.

**422. 2. Electric Light Company.** — See *Morrison v. Baechtold*, 93 Md. 319.

A typewriter is not a tool or *apparatus* belonging to the profession of a physician within the meaning of an exemption statute, though used for the purpose of correspondence and advertising. *Massie v. Atchley*, 28 Tex. Civ. App. 114. And see the title EXEMPTIONS (FROM EXECUTION).

**423. 2.** See *Chase v. Blodgett Milling Co.*, 111 Wis. 655, holding that the word *apparent* means "capable of being seen, or easily seen."

**3. Self-defense — Apparent Danger.** — *State v. Carter*, 15 Wash. 121.

**Same — Apparent Intention.** — *McCandless v. State*, 42 Tex. Crim. 58.

**The Term "Reasonably Apparent"** in an instruction relating to future pain and suffering is the equivalent of reasonably certain. *Harrison v. Ayrshire*, 123 Iowa 528.

**425. 2. National Furniture Co. v. Edwards**, 105 Ga. 240; *Rockford v. Compton*, 115 Ill. App. 412, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 425; *Nebraska L. & T. Co. v. Lincoln, etc., R. Co.*, 53 Neb. 246; *State v. Savery*, 126 N. Car. 1083.

**Technical Sense.** — *Western Cornice, etc., Works v. Leavenworth*, 52 Neb. 418; *Ritchey v. Seeley*, (Neb. 1903) 97 N. W. Rep. 818.

**3. Nebraska L. & T. Co. v. Lincoln, etc., R. Co.**, 53 Neb. 246, citing 2 AM. AND ENG. ENCYC.



**427. APPEAR.** — See note 2.

**APPEARANCE.** — See note 3.

**428. APPELLATE JURISDICTION.** — See note 3.

**431. APPLIANCES.** — See note 3.

**432. APPLICATION.** — See note 1.

OF LAW (2d ed.) 425; *State v. Jacksonville Terminal Co.*, 41 Fla. 363.

**Popular Sense.** — *Western Cornice, etc., Works v. Leavenworth*, 52 Neb. 418, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 425, 426; *Caldwell v. State*, (Wyo. 1903) 74 Pac. Rep. 496.

**427. 2. "Shall Be Made to Appear" — Removal of Causes.** — The meaning of the words, "shall be made to *appear* to the said Circuit Court," in the Act of Congress 1887-88, providing for the removal of causes "when it shall be made to *appear* to the said Circuit Court that from prejudice or local influence he will not be able to obtain justice in the state court," has been the subject of repeated adjudication in the Circuit Courts of the United States, and has been discussed in the Supreme Court. There can be no doubt that it must be made to *appear* to the legal satisfaction of the court; not that it be morally satisfied. *Crotts v. Southern R. Co.*, 90 Fed. Rep. 1.

3. *Boehmer v. Big Rock Irrigation Dist.*, 117

Cal. 19; *Salina Nat. Bank v. Prescott*, 60 Kan. 490; *Matter of White*, 52 N. Y. App. Div. 231, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 427.

**428. 3. Exercise of Appellate Jurisdiction.** — See *Maxson v. Superior Ct.*, 124 Cal. 468.

**431. 3. Master and Servant.** — *Broadfoot v. Shreveport-Cotton Oil Co.*, 111 La. 471, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 431; *Gallman v. Union Hardwood Mfg. Co.*, 65 S. Car. 195, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 431. See also *Hicks v. Southern R. Co.*, 63 S. Car. 559; *Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468.

**School Appliances.** — "*Appliance* is anything brought into use as a means to effect some end. An educational *appliance* is something necessary and useful to enable the teacher to teach the school children." *Honaker v. Board of Education*, 42 W. Va. 170.

**432. 1. Application for Insurance Policy.** — See *Webb v. Security Mut. L. Ins. Co.*, (C. C. A.) 126 Fed. Rep. 635.

# APPLICATION OF PAYMENTS.

By R. A. GREER.

**435. II. BY THE DEBTOR — 1. General Rule.** — See note 3.

**437. III. BY THE CREDITOR — 2. Common-law Rule — Failure of Debtor to Direct — Creditor's Right of Application.** — See note 1.

**Creditor May Consult His Own Interests Largely in Making the Application.** — See note 2.

**438.** See notes 1, 2.

**440. But Creditor May Not Make Application Injurious or Unjust to Debtor.** — See note 1.

**441.** See note 1.

**442. Illegal Demands.** — See note 2.

**435. 3. Debtor's Right of Application —**  
*Arkansas.* — *Farris v. Morrison*, 66 Ark. 318.  
*Colorado.* — *Boyd v. Agricultural Ins. Co.*, (Colo. App. 1904) 76 Pac. Rep. 986.  
*Delaware.* — *Lodge v. Ainscow*, 1 Penn. (Del.) 330.  
*Georgia.* — *Massengale v. Pounds*, 108 Ga. 762.

*Illinois.* — *Saffer v. Lambert*, 111 Ill. App. 410; *Hahn v. Geiger*, 96 Ill. App. 104; *Brinckenhoff v. Greenan*, 85 Ill. App. 253.

*Kentucky.* — *Howard v. London Mfg. Co.*, 72 S. W. Rep. 771, 24 Ky. L. Rep. 1934.

*Missouri.* — *McMillan v. Grayston*, 83 Mo. App. 428; *Missouri Cent. Lumber Co. v. Stewart*, 78 Mo. App. 456; *Littleton v. Harris*, 69 Mo. App. 596.

*New York.* — *New England Water Works Co. v. Farmers' L. & T. Co.*, 54 N. Y. App. Div. 309, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 435.

*Pennsylvania.* — *Risher v. Risher*, 194 Pa. St. 164.

*South Carolina.* — *Hopper v. Hopper*, 61 S. Car. 124.

*Texas.* — *Crawford v. Pancoast*, (Tex. Civ. App. 1900) 62 S. W. Rep. 559.

*Wisconsin.* — *Johnston v. Northwestern Live-Stock Ins. Co.*, 107 Wis. 337.

**437. 1. Creditor's Right of Application —**  
*Arkansas.* — *Farris v. Morrison*, 66 Ark. 318.  
*Delaware.* — *Lodge v. Ainscow*, 1 Penn. (Del.) 330.

*Iowa.* — *Keairnes v. Durst*, 110 Iowa 114; *Heaton v. Ainley*, 108 Iowa 112.

*Missouri.* — *McMillan v. Grayston*, 83 Mo. App. 425; *Missouri Cent. Lumber Co. v. Stewart*, 78 Mo. App. 456; *Littleton v. Harris*, 69 Mo. App. 596; *Cox v. Sloan*, 158 Mo. 430.

*Nebraska.* — *Lenzen v. Miller*, 53 Neb. 137.

*New Jersey.* — *Turner v. Hill*, 56 N. J. Eq. 293.

*Pennsylvania.* — *Risher v. Risher*, 194 Pa. St. 164.

*South Dakota.* — *Fargo v. Jennings*, 8 S. Dak. 99.

*Texas.* — *Rotan Grocery Co. v. Martin*, (Tex. Civ. App. 1900) 57 S. W. Rep. 706.

*Wisconsin.* — *Johnston v. Northwestern Live-Stock Ins. Co.*, 107 Wis. 337.

"It was the privilege of the debtor to direct the appropriation of the payments as they were made, but as this was not done, the creditor had the right to appropriate them as it chose, and did so as above stated." *Thorn, etc., Lime, etc., Co. v. Citizens Bank*, 158 Mo. 272.

The creditor has the right to direct the application of a payment if it does not appear that the debtor gave any direction as to application. *Powers v. McKnight*, (Tex. Civ. App. 1903) 73 S. W. Rep. 549.

**Exercise of Discretion.** — *Wellman v. Miner*, 179 Ill. 326; *Bogges v. Goff*, 47 W. Va. 139.

It has been held that where a debtor owing several accounts makes payment without directing application, the creditor may apply the payment to the oldest debt. *Lowenstein v. Meyer*, 114 Ga. 709.

If the debtor fails to give directions the creditor may apply a general payment equally to each of several notes which the debtor owes. *Young v. Alford*, 118 N. Car. 215.

**2. Open Account — Lien Security.** — *Thatcher v. Tillory*, 30 Tex. Civ. App. 327; *Union Nat. Bank v. Cleveland*, 3 Ohio Dec. 297.

**438. 1. Where there Is Demand Not Legally Chargeable to Debtor.** — *Kernan's Succession*, 105 La. 592, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 438.

**2. Barred by Limitation.** — *Hopper v. Hopper*, 61 S. Car. 124; *Risher v. Risher*, 194 Pa. St. 164; *McDowell v. McDowell*, 75 Vt. 405, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 438.

But if the creditor fails to apply payment to the debts barred the court will not do so. *Estes v. Fry*, 166 Mo. 70.

**440. 1. To Hold a Surety.** — *Risher v. Risher*, 194 Pa. St. 164.

**Money Furnished by Third Party.** — *Elizabeth City First Nat. Bank v. Scott*, 123 N. Car. 538.

**441. 1. Unreasonable or Unjust Application.** — *Thatcher v. Tillory*, 30 Tex. Civ. App. 327.

**442. 2. Illegal Demands.** — *Turner v. Hill*, 56 N. J. Eq. 293.

**Illegal Sale of Liquors.** — Where money is paid on account by the debtor without any directions for application, the creditor has the right to apply it to the satisfaction of a debt arising out of the illegal sale of liquors. *Mayberry v. Hunt*, 34 N. Bruns. 628.

**444. IV. TIME OF APPLICATION — 1. When Made by Debtor — a. AT THE TIME OF PAYMENT.** — See note 1.

**446. 2. When Made by Creditor — c. AMERICAN DECISIONS —** According to Some Authorities, Rights Extend to Time of Controversy or Suit. — See note 2.

**447. V. BY THE COURT — 1. In General.** — See notes 2, 3.

**2. Intention of the Parties — a. IN GENERAL.** — See note 5.

**448. b. EXPRESS INTENTION — (1) Communication.** — See note 2.

Form of Communication. — See note 4.

**(2) Acceptance — Accepting Payment with Directions as to Application.** — See note 8.

**450. (3) Ratification.** — See note 1.

**(4) Acquiescence.** — See note 2.

**c. IMPLIED INTENTION — (1) From Circumstances.** — See note 3.

**(2) From Conduct.** — See note 1.

**452. e. BURDEN OF PROOF.** — See note 2.

**453. 3. When No Intention Appears — a. GENERAL RULE — This Rule Is Necessarily a Universal One.** — See note 1.

**c. PRESUMED INTENTION — (1) In General.** — See note 3.

**Usurious Contracts.** — *Estey v. Capitol Invest.*, etc., Assoc., 131 Mich. 502; *Egan v. North American Sav., etc., Co.*, (Oregon 1904) 76 Pac. Rep. 774; *Frost v. Pacific Sav. Co.*, 42 Oregon 44; *People's Bldg., etc., Assoc. v. Bessonet*, (Tex. Civ. App. 1898) 48 S. W. Rep. 52.

**444. 1. Direction Not Made by Debtor at Time of Payment — Presumption.** — *Murray v. Schneider*, 64 Neb. 484; *Burnett v. Sledge*, 129 N. Car. 114.

**446. 2. Application Any Time Before Suit Commenced.** — *Thatcher v. Tillery*, 30 Tex. Civ. App. 327.

**447. 2. General Rule When Court Makes Application.** — *Saffer v. Lambert*, 111 Ill. App. 410; *Brinckerhoff v. Greenan*, 85 Ill. App. 253; *Missouri Cent. Lumber Co. v. Stewart*, 78 Mo. App. 456; *Raymond v. Newman*, 122 N. Car. 52.

**3. Court Will Not Interfere with Application by the Parties.** — *Wyman v. Herard*, 9 Okla. 35.

**5. General Rule — Intention of Parties Controlling.** — *Compound Lumber Co. v. Murphy*, 169 Ill. 343; *Thorne v. Allen*, 72 Minn. 461, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447; *Grogan v. Valley Trading Co.*, (Mont. 1904) 76 Pac. Rep. 211; *Radford Bank v. Kirby*, 100 Va. 498; *National Cash Register Co. v. Bonneville*, 119 Wis. 222.

**448. 2. Necessity of Communication of Intention — Creditor Making Application.** — The fact that the books of the creditor, to which the debtor had no access, show an application of a payment does not authorize the presumption that the debtor so applied the payment. *Richmond Second Nat. Bank v. Fitzpatrick*, 111 Ky. 228.

**4. Communication Need Not Be Expressed in Writing.** — *Saffer v. Lambert*, 111 Ill. App. 410. **It May Be Shown by Verbal Declaration.** — *Curtis v. Nash*, 88 Me. 476; *Grogan v. Valley Trading Co.*, (Mont. 1904) 76 Pac. Rep. 211.

**8. Creditor Bound by Directions When Payment Accepted.** — *Wipperman v. Hardy*, 17 Ind. App. 142; *Lincoln v. Lincoln St. R. Co.*, (Neb. 1903) 93 N. W. Rep. 766; *Langdon First Nat. Bank v. Prior*, 10 N. Dak. 146; *Christman v. Martin*,

7 Pa. Super. Ct. 568; *Hassard v. Tomkins*, 108 Wis. 186; *McGaffey v. Mathie*, 68 Vt. 403.

**450. 1. Debtor's Ratification of Creditor's Application.** — *Steiner v. Jeffries*, 118 Ala. 573; *Sweeney v. Pratt*, 70 Conn. 274; *Citizens' Bank v. Carey*, 2 Indian Ter. 84; *Lau v. Blomberg*, (Neb. 1902) 91 N. W. Rep. 206.

**2. Acquiescence of Debtor — How Inferred.** — *Hanly v. Potts*, 52 W. Va. 263.

**3. Intention Implied from Circumstances.** — *Boyd v. Agricultural Ins. Co.*, (Colo. App. 1904) 76 Pac. Rep. 986; *Thorne v. Allen*, 72 Minn. 461, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 450.

Where a debtor owed two accounts and made payments indiscriminately, all payments in excess of one debt will be applied to the other. *Buxton v. Debrecht*, 95 Mo. App. 599.

**451. 1. Intention Implied from Conduct.** — *Schoonover v. Osborne*, 117 Iowa 427.

**Illustration.** — Where goods were sold on the understanding that the buyer should pay a debt then owing to the seller from the husband of the buyer, it is proper for the seller to apply payments made thereafter on account to the debt due from the husband. *Frank v. Lockhart*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 781.

**452. 2. The Burden Is on the Debtor.** — *Trumbo v. Flournoy*, 77 Mo. App. 324; *London, etc., Bank v. Hanover Nat. Bank*, 36 N. Y. App. Div. 487.

**Mistake.** — An application of payments made by the receiver of the court in a pending cause at the direction of the debtor will not be set aside after the death of the receiver on the ground of mistake on the part of the debtor in that he intended to direct a different application, unless there is clear and convincing proof that the mistake was made as claimed. *May v. Burns*, (Ky. 1898) 44 S. W. Rep. 83.

**Where the Creditor Seeks to Establish Application.** — *Ross v. Rees*, (Ky. 1897) 43 S. W. Rep. 215.

**453. 1. Thorne v. Allen**, 72 Minn. 461, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 453.

**3. Where One Held a Note and Running Account against the debtor payment should be applied**

**454.** (2) *Presumed Intention of the Debtor* — (a) *In General* — Civil-law Rule. — See note 1.

(b) *Most Burdensome Debt.* — See note 2.

**455.** (c) *Injury to Debtor to Be Avoided.* — See note 2.

(3) *Presumed Intention of the Creditor* — (a) *In General.* — See note 3.

**456.** (b) *Most Precarious Security.* — See notes 1, 2.

**457.** (c) *Least Valuable Debts.* — See notes 1, 2.

**458.** 4. *Limitations of Power* — a. GENERAL RULES — (2) *Enforceable Debts.* — See note 2.

**459.** See note 1.

(3) *Involuntary Payments* — (a) *In General.* — See note 2.

**460.** (b) *Different Claims.* — See note 1.

**461.** b. CERTAIN FIXED RULES — (2) *Earliest Matured Obligation.* — See note 3.

first to the account and then on the note. *Reed v. Corry*, (Tex. Civ. App. 1901) 61 S. W. Rep. 157.

**454.** 1. *Debts Due at Time of Payment.* — *London, etc., Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64.

**2.** *Mortgage Debt.* — *Illinois Trust, etc., Bank v. Ottumwa Electric R. Co.*, 89 Fed. Rep. 235; *Snider v. Stone*, 78 Ill. App. 17.

*Most Stringent and Onerous Debt.* — *Clark v. Boorman*, 89 Md. 428; *Buchanan v. Lloyd*, 88 Md. 642.

"It is a general rule of equity that in the application of payments on an indebtedness, where the courts are called upon to make the application, the debtor will be favored, and the payment applied to the debt most onerous to him." *Paschall v. Pioneer Sav., etc., Co.*, 19 Tex. Civ. App. 102.

**455.** 2. *Application Which Would Destroy Homestead Avoided.* — *Briggs v. Iowa Sav. Loan Assoc.*, 114 Iowa 232.

**3.** *Interests of the Creditor.* — *Thorne v. Allen*, 72 Minn. 461, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 455.

**456.** 1. *To Hold a Surety.* — *U. S. v. Morgan*, 111 Fed. Rep. 474; *Wipperman v. Hardy*, 17 Ind. App. 142; *Sturgeon Sav. Bank v. Riggs*, 72 Mo. App. 239.

"The rule is that when neither the debtor nor the creditor directs the application to the payment of any particular debt, the court may appropriate it; and in so doing, the court will usually apply it to the payment of that debt which has the least security, upon the assumption that the debtor would desire to pay all his debts; and this disposition of the credit most nearly accomplishes that result." *Turner v. Hill*, 56 N. J. Eq. 293.

**2.** *To Preserve a Lien.* — *Kelso v. Russell*, 33 Wash. 474.

*Vendor's Lien.* — *Wingate v. People's Bldg., etc., Assoc.*, 15 Tex. Civ. App. 416.

*Labor Lien.* — *Chicago Title, etc., Co. v. McGlew*, 90 Ill. App. 58.

*To Charge an Indorser.* — *Blackmore v. Granbery*, 98 Tenn. 277.

**457.** 1. *To Prevent Operation of Statute of Limitations.* — Where there are different debts all but one of which are barred by the statute of limitations and neither party directs application of payment the court cannot apply the payment to the debts already barred. *Estes v. Fry*, 166 Mo. 79;

**2.** *Secured and Unsecured Items of Account.* — *Monson v. Meyer*, 93 Ill. App. 94; *Bell, etc., Co. v. Kentucky Glass Works Co.*, 106 Ky. 7; *Smith v. Lewiston Steam Mill*, 66 N. H. 613; *Creasy v. Emanuel Reformed Church*, 1 Pa. Super. Ct. 372; *Hutches v. J. I. Case Threshing Mach. Co.*, (Tex. Civ. App. 1896) 35 S. W. Rep. 60; *Coxe v. Milbrath*, 110 Wis. 499.

Where a debtor, owing the creditor two debts, one secured and the other unsecured, makes a payment, and neither party directs an application, the court will apply the payment to the unsecured debt. *Andrews v. Kentucky Citizens' Bldg. etc., Assoc.*, 70 S. W. Rep. 409, 24 Ky. L. Rep. 966.

*Oldest Debt.* — *Goldsmith v. Lewine*, 70 Ark. 516; *Andrews v. Exchange Bank*, 108 Ga. 802; *Sleet v. Sleet*, 109 La. 302; *Littleton v. Harris*, 69 Mo. App. 596; *Hurd v. Wing*, 93 N. Y. App. Div. 62; *Rowan v. Chenoweth*, 55 W. Va. 325.

But this rule does not apply as against a surety for a particular period. It has been held in such a case that all payments made during the currency of the surety would be applied by the court to the debit items made during the same time. *Nashville First Nat. Bank v. National Surety Co.*, (C. C. A.) 130 Fed. Rep. 401.

*Rebutting Presumption.* — The presumption that the oldest items of debit in a general account are extinguished by the earliest items of credit is rebuttable by proof. *Agricultural Ins. Co. v. Sargeant*, 26 Can. Sup. Ct. 29.

**458.** 2. *Debts Not Matured.* — *McWhorter v. Bluthenthal*, 136 Ala. 568, 96 Am. St. Rep. 43.

*Payment upon Rent.* — If the assignee of a lease gives no instructions about the application of payment of rents made by him, the landlord has the right to apply them in payment of rent accrued under the lease before the assignment. *Collender v. Smith*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 612.

**459.** 1. *The Rule Is Otherwise* where a payment is made with the specific intention of applying it to an illegal debt. *Johnston v. Dahlgren*, 48 N. Y. App. Div. 537.

**2.** *Payments Coerced by Process of Law.* — *Smith v. Moore*, 112 Iowa 60; *Armstrong v. McLean*, 153 N. Y. 490.

**460.** 1. *Where Several Notes Are Given at Different Times.* — *Rogers v. Moore*, (C. C. A.) 85 Fed. Rep. 920.

**461.** 3. *Earliest Matured Claim.* — *Moss v. Odell*, 141 Cal. 335; *People v. Sheehan*, 118

**462.** (3) *Open Accounts* — (a) *Earliest Items*. — See note 1.

**463.** (b) *Instances of Application* — *Partnership Accounts*. — See note 1.

**464.** *Items Secured and Unsecured*. — See note 1.

*Nature of the Account* — *Interest of the Parties*. — See note 3.

**465.** (c) *Official Bonds* — *Bonds with Different Sureties Covering Different Periods*. — See note 1.

**466.** (4) *Particular Fund*. — See note 3.

**468.** (5) *Legal Interest* — *Payments Insufficient for Both Principal and Interest*. — See note 1.

Mich. 539; *McMillan v. Grayston*, 83 Mo. App. 425.

It has been held that the courts will presume that payments made generally on notes were intended to be applied in the order of their maturity. *In re Stevens*, 107 Fed. Rep. 243.

**462.** 1. *Open Accounts* — *Application to Earliest Items* — *Delaware*. — *Lodge v. Ainscow*, 1 Penn. (Del.) 330, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 435, 437, 461, 462.

*Indiana*. — *Tapper v. New Home Sewing Mach. Co.*, 22 Ind. App. 313.

*Michigan*. — *Grasser, etc., Brewing Co. v. Rogers*, 112 Mich. 112, 67 Am. St. Rep. 389.

*Minnesota*. — *Pond, etc., Co. v. O'Connor*, 70 Minn. 266; *Redwood County v. Citizens' Bank*, 67 Minn. 236.

*New Hampshire*. — *Doherty v. Cotter*, 68 N. H. 37.

*New York*. — *Kloepfer v. Maher*, (Supm. Ct. App. T.) 84 N. Y. Supp. 138.

*Pennsylvania*. — *Risher v. Risher*, 194 Pa. St. 164.

**463.** 1. *Partnership Accounts*. — *Forst v. Kirkpatrick*, 64 N. J. Eq. 578.

*Individual and Partnership Indebtedness*. — *Burbank v. Buhler*, 108 La. 39; *Wright v. Market Bank*, (Tenn. Ct. 1900) 60 S. W. Rep. 623.

"If the debtor was a firm of partners, the creditor cannot, without its consent, appropriate moneys paid by the firm to the individual debts of one or more of the members of the firm." *Farris v. Morrison*, 66 Ark. 318.

**464.** 1. *Mortgage* — *Future Advances*. — *Milner v. Womble*, 122 N. Car. 135.

3. *Right of Surety*. — *Merchants' Ins. Co. v. Herber*, 68 Minn. 420.

**465.** 1. *Sureties on Bonds of Public Officers*. — *Merchants' Ins. Co. v. Herber*, 68 Minn. 420, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 465.

**466.** 3. *Proceeds of Mortgage*. — *Thorne v. Allen*, 72 Minn. 461, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 466; *Cowgill v. Roberson*, 75 Mo. App. 412.

*Where the Money Received by the Creditor, and applied on another debt, is the particular fund for the payment of which a surety was liable, the surety is not bound by such application.* *Merchants' Ins. Co. v. Herber*, 68 Minn. 420.

**468.** 1. *Payments Not Equal to Both Principal and Interest*. — *Becker v. Shaw*, 120 Ga. 1003; *Dickson v. Stewart*, (Neb. 1904) 98 N. W. Rep. 1085.

*Amount Paid Equal to Amount of Principal*. — *Peck v. Granite State Provident Assoc.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 84.

*Usurious Interest* — *Alabama*. — *Nicrosi v. Walker*, 139 Ala. 369.

*Georgia*. — *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629.

*Idaho*. — *Madsen v. Whitman*, 8 Idaho 762. *Kentucky*. — *Day v. Davis*, (Ky. 1898) 47 S. W. Rep. 769.

*Michigan*. — *Fretz v. Murray*, 118 Mich. 302. *Nebraska*. — *Tomblin v. Higgins*, 58 Neb. 336; *Rawles v. Reichenbach*, 65 Neb. 29.

*New Jersey*. — *Hughson v. Newark Mortg. Loan Co.*, 57 N. J. Eq. 139.

*New York*. — *Bosworth v. Kinghorn*, 94 N. Y. App. Div. 187.

*Oregon*. — *Nunn v. Bird*, 36 Oregon 515.

*Texas*. — *International Bldg., etc., Assoc. v. Braden*, (Tex. Civ. App. 1895) 32 S. W. Rep. 704.

*Virginia*. — *Munford v. McVeigh*, 92 Va. 446; *Exchange, etc., Bank v. Fugate*, 93 Va. 821.

*West Virginia*. — *Lorentz v. Pinnell*, 55 W. Va. 114.

Under Rev. Stat. *Ohio*, § 3183, the defendant in an action on a note with usurious interest is entitled to have the principal reduced by the amount of usurious interest paid. *Widdifield v. Aetna Live-Stock Ins. Co.*, 3 Ohio Dec. 276.

It has been held that where the debt draws usurious interest the debtor may at his election direct the application of payments first to the legal interest and second to the principal debt. *Russellville Bank v. Coke*, (Ky. 1898) 45 S. W. Rep. 867.

If a note drawing lawful interest is extended in consideration of the payment of interest above the lawful rate, it has been held that the payment over the legal rate should be applied to the principal. *Quinlan v. Smye*, 21 Tex. Civ. App. 156.

Payments made on a debt carrying usurious interest will be applied first to the discharge of the legal interest and then the principal, and no payment will be applied to the usurious interest as long as any of the principal remains. *Crenshaw v. Duff*, 113 Ky. 912.

Where the purchaser of land gives three notes for the purchase money, all of which are tainted with usury, and two of them have been paid in full more than a year before suit is filed, the usurious interest paid on the first two notes cannot be applied as payments on the third. *Carter v. Farthing*, 115 Ky. 123.

Where a general payment is made on a note which charges legal interest, but which is a renewal of an old note with usurious interest on said old note included, the payment must be applied to the principal debt and cannot be applied on the usurious interest. *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384.

**469. VI. BY THIRD PARTIES — 2. Qualifications of Rule — a. AGENTS. —**  
See note 4.

**471. c. RECEIPT IN DIFFERENT CAPACITIES. —** See note 2.

**VII. CHANGE OF APPLICATION. —** See note 3.

**472. See note 1.**

**APPLY. —** See note 2.

**Interest upon Interest. —** But it has been held that in no event is the creditor entitled to interest upon interest. *Bogges v. Goff*, 47 W. Va. 139.

**469. 4. Agent for Both Parties. —** *M. A. Sweeney Co. v. Fry*, 151 Ind. 178.

**471. 2. Claims Satisfied Ratably. —** *Kyle v. Chattahoochee Nat. Bank*, 96 Ga. 693.

**3. Mutual Consent Necessary to Change Application. —** *The Asiatic Prince*, (C. C. A.) 108 Fed. Rep. 287; *White v. Costigan*, 138 Cal. 564; *Hahn v. Geiger*, 96 Ill. App. 104; *Hughes v.*

*Nattes*, 104 La. 231; *Pond, etc., Co. v. O'Connor*, 70 Minn. 266.

**472. 1. When Change Would Be Injurious to Third Parties. —** *Pinney v. French*, 67 Kan. 473, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 471; *Boagni v. Wartelle*, 50 La. Ann. 128.

**2. To apply** is "to use or employ for a particular purpose, or in a particular case; to appropriate, to devote, as to **apply** money to the payment of a debt (Webster)." *Pryor v. Kansas City*, 153 Mo. 135. See also *Park v. Candler*, 114 Ga. 466.

## APPOINTMENT.

**475. II. APPOINTMENT TO OFFICE —** As Distinguished from Election. — See note 1.

**Nature of the Act. —** See note 4.

**III. APPOINTMENT UNDER A POWER —** Illusory Appointment. — See note 9.

**476. APPORTION. —** See note 9.

**475. 1. Reid v. Gorsuch, 67 N. J. L. 396; *State v. Compson*, 34 Oregon 25.**

**4. Appointment an Executive Act. —** *Pratt v. Breckinridge*, 112 Ky. 1; *Norwalk St. R. Co.'s Appeal*, 69 Conn. 576.

**9. Illusory Appointment. —** *Hawthorn v. Ulrich*, 207 Ill. 430, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 475, and holding that this doctrine does not obtain in *Illinois*. And see *Van Syckel's Estate*, 9 Pa. Dist. 367.

But in *Clay v. Smallwood*, 100 Ky. 212, the

court said: "It seems to be a well-recognized rule in equity that when the power is given to appoint or distribute among several, that each must have a substantial share, and this court, in the recent case of *Degman v. Degman*, 98 Ky. 717, held that where a power of appointment is given to be exercised, as to a class of persons, each one of the class is entitled to a substantial portion of the estate."

**476. 9. Not Equal Division — Cost of Sewer. —** *Jones v. Holzapfel*, 11 Okla. 405.

# APPORTIONMENT ACTS.

By M. B. WAILES.

**479. I. WHO MAY APPORTION — 3. County and Township Elections.** — See note 2.

**II. TIME OF MAKING APPORTIONMENT.** — See note 3.

**480. III. REQUISITES OF A VALID APPORTIONMENT — 2. Districts Must Be Equal in Population.** — See note 3.

**481. 3. Districts Must Consist of Compact and Contiguous Territory.** — See note 2.

**482.** See note 1.

**4. Rule as to Division of Counties and Towns.** — See note 2.

**483. 5. Districts Must Remain Unaltered Until New Census — Incidental Alterations.** — See note 1.

**484. 6. Gerrymandering.** — See note 1.

**485. 7. Legislature Cannot Disfranchise.** — See note 2.

**IV. JURISDICTION OF COURTS TO DETERMINE CONSTITUTIONALITY OF APPORTIONMENT ACTS — General Rule.** — See note 3.

**479. 2. County and Township Districts.** — A change in the township lines by the election commissioners, in the absence of one of the commissioners and without notice, is void. Schuman v. Sanderson, (Ark. 1904) 83 S. W. Rep. 940.

**3. Illinois Constitution.** — In *People v. Carlock*, 198 Ill. 155, the court said: "The power conferred by the constitution upon the general assembly to apportion the state into senatorial districts is not lost by the failure to exercise it at the first session after the completion of any federal census. It is continuous, and may be lawfully exercised at any time after it has constitutionally devolved upon the legislature, until it is performed. \* \* \* Hence it is very clear two valid apportionment acts may be adopted within less than ten years. The legislature, after a federal enumeration, may not exercise the power with which it is clothed until near the time for the next enumeration. After such succeeding enumeration the constitutional power to again make a reapportionment is conferred, and a valid enactment for that purpose may be adopted without any reference to the period of time which has elapsed after the passage of the former act." And see *People v. Hutchinson*, 172 Ill. 486.

**480. 3. Apportionment Must Be According to Population.** — *People v. Carlock*, 198 Ill. 150; *Brooks v. State*, 162 Ind. 568, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480.

**481. 2. Compact Territory.** — In *People v. Rose*, 203 Ill. 46, the court said: "The words 'be composed of contiguous counties in as nearly compact form as circumstances will permit,' as used in the constitution, when applied to the subject now under consideration, mean that the counties composing a Supreme Court district must touch each other and be as closely united as circumstances will permit. By reason of the fact that in forming a Supreme

Court district the legislature cannot divide a county and are required to take into consideration equality of population as applied to all the districts in the state, it is evident to all that a Supreme Court district cannot easily be created which will be in the form of a square or that of a parallelogram, but that its boundaries must conform to county lines, with all their irregularities. And the fact that the old district is more nearly square or more symmetrical in form than the new district will not justify the court, upon that fact alone, in holding the statute unconstitutional."

**Compactness — Function of Court and Legislature.** — *People v. Rose*, 203 Ill. 46; *People v. Carlock*, 198 Ill. 150.

**482. 1. People v. Carlock**, 198 Ill. 150.

**2. Division of Counties.** — *Brattland v. Calkins*, 67 Minn. 119.

**Under the Wisconsin Constitution.** — See *State v. Stevens*, 112 Wis. 170.

**483. 1. Incidental Changes in Election Districts.** — *People v. Rose*, 203 Ill. 46; *State v. Stevens*, 112 Wis. 170, holding that although the constitution provides that election districts shall remain unaltered, still territory may be lawfully taken from one district and attached to another, or new municipalities may be formed, provided that for political purposes the original district shall remain intact.

**484. 1. People v. Rose**, 203 Ill. 46, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 484.

**Fatal Inequality of Representation — Illustrations.** — The *Indiana Act of 1903* void for reasons stated in the original note. *Brooks v. State*, 162 Ind. 568.

**485. 2. See Hankey v. Bowman**, 82 Minn. 328.

**3. Constitutionality of Apportionment — Question for Court.** — *People v. Rose*, 203 Ill. 46; *Brooks v. State*, 162 Ind. 568. In this latter case it was held that a legal voter of the state at the

**486.** Jurisdiction of Courts Limited. — See notes 2, 3, 5.

**APPRAISAL — APPRAISEMENT.** — See notes 6, 7.

**487.** [APPRECIABLE. — See note 1a.]

**APPRECIATE.** — See note 2.

**APPREHEND.** — See note 4.

time the last preceding enumeration of the male inhabitants for legislative purposes was taken may maintain suit to test the constitutionality of an act of the general assembly based thereon, apportioning the number of senators and representatives of the state, though the wrong complained of does not exist in his own senatorial or representative district. The only defendants necessary to a suit to test the constitutionality of a legislative apportionment act are the clerk, sheriff, and auditor of the county in which the suit is brought. *Brooks v. State*, 162 Ind. 568.

**486. 2. Legislative Discretion.** — *Fragley v. Phelan*, 126 Cal. 383; *People v. Los Angeles*, 133 Cal. 338; *People v. Rose*, 203 Ill. 46; *People v. Carlock*, 198 Ill. 150, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486.

**The Court Cannot Inquire into the Motives.** — *People v. Rose*, 203 Ill. 46; *People v. Carlock*, 198 Ill. 150.

**3. Abuse of Discretion.** — *People v. Rose*, 203 Ill. 46; *People v. Carlock*, 198 Ill. 150, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486.

**5. Apportionment Not Void Because Not the Best Possible.** — *People v. Rose*, 203 Ill. 46; *People v. Carlock*, 198 Ill. 150.

**6.** See *Vincent v. German Ins. Co.*, 120 Iowa 272.

**7. Appraiser — Probate Law.** — *Fairbanks v. Mann*, 19 R. I. 499.

**487. 1a. "Appreciable Extent."** — The court charged the jury that the plaintiffs would

be entitled to recover nominal damages if the water had been ponded on their lands "to any appreciable extent;" saying, "*Appreciable* is defined as capable of being estimated, or large enough to be estimated; perceptible, as an appreciable quantity. We do not think that, in order to recover nominal damages, it is necessary to show an injury that is capable of being estimated, or one that is perceptible in the sense that it is attended with some actual damage." *Chaffin v. Fries Mfg., etc., Co.*, 135 N. Car. 95, affirmed 136 N. Car. 364.

**2. Appreciate Danger.** — As to the meaning of the word in an instruction in an action by a servant for personal injuries, see *Illinois Steel Co. v. Ryska*, 200 Ill. 288.

**4. Equivalent to Arrest — Rewards.** — In *Cummings v. Clinton County*, 181 Mo. 171, the court said: "It is true that the words used in the statute are '*apprehension* and arrest,' while in the reward paper the word *apprehension* alone is used, but their meaning is substantially the same, and it is generally so understood. One of the definitions of *apprehension* given in Webster's International Dictionary is: 'To take or seize (a person) by legal process; to arrest; as, to apprehend a criminal.' Arrest is defined in the same work as, 'The taking or *apprehending* of a person by authority of law; legal restraint; custody.' It will thus be seen that the one is comprehensive of the other."



# APPRENTICES.

BY GEO. G. ALBAN.

## 490. II. MODE OF BINDING APPRENTICES—2. Parties to the Indenture—

a. WHO MAY BIND OUT AN APPRENTICE—(1) *At Common Law*.—See note 2.

491. (2) *By Statute*—Father, Mother, or Guardian, with Consent of Minor.—See note 2.

How Minor's Consent Is to Be Evidenced.—See note 3.

495. b. TO WHOM APPRENTICE MAY BE BOUND.—See note 1.

496. 3. Stipulations in Indenture—*a. ON MASTER'S PART*—Care and Support.—See note 3.

Education of Apprentice.—See note 4.

497. 4. Validity of Indenture Not Conformable to Statute—In Other States Voidable.—See note 5.

498. 5. Indentures Made in Another State.—See note 4.

500. IV. DISSOLUTION OF CONTRACT—1. By Expiration of Term—Where Term Extends Beyond Full Age of Apprentice.—See note 3.

505. VI. RIGHTS OF PARTIES—2. Of Father—Where Contract Is Void as Indenture of Apprenticeship.—See note 1.

490. 2. Undertaking of Infant Alone.—See *Green v. Thompson*, (1899) 2 Q. B. 1.

491. 2. In *Georgia* it has been held that an indenture binding one of her children, executed by a mother without the father's consent, is a nullity as to the father if he has not lost his parental right, and he may recover custody of the child in a proper proceeding. *Wigley v. Mobley*, 101 Ga. 124.

3. How Minor's Consent Evidenced.—It has been held in *South Carolina* that by necessary implication, under the statutes of that state, the signature of the minor is necessary to bind him on an indenture of apprenticeship. *Anderson v. Young*, 54 S. Car. 388.

495. 1. A Manager of the Business of a Third Person may make a valid indenture by which an apprentice is to be taught and employed in such business. The master need not be the owner of the business in which the apprentice is employed. *O'Connor v. Simonson*, 24 Pa. Co. Ct. 576.

496. 3. Money Payments May Be Stipulated for in Lieu of Maintenance.—*O'Connor v. Simonson*, 24 Pa. Co. Ct. 576. See also *McDonald v. Sargent*, 171 Mass. 492; *Pardey v. American Ship Windlass Co.*, 20 R. I. 147, 78 Am. St. Rep. 844.

But such payments must be adequate for the maintenance of the apprentice, and therefore an indenture providing that the apprentice shall devote ten hours during each working day, or such other number of hours, according to the regulations of the workshop for the time being, for a term of four years, each of said years to consist of three hundred and ten working days of ten hours each, is unreasonable, because the number of working hours might be so reduced that the apprentice would not receive enough for each ordinary day to pay his board and lodging for that day. *Mac Gregor*

*v. Sully*, 31 Ont. 535. Compare *Green v. Thompson*, (1899) 2 Q. B. 1.

4. Absence of Stipulation as to Education.—The absence of a stipulation as to education does not vitiate the indenture where the apprentice is such an age as to warrant the presumption that he has had a sufficient common-school education. *O'Connor v. Simonson*, 24 Pa. Co. Ct. 576.

497. 5. The Infant May Ratify, when he becomes of age, a contract of indenture not conformable to statute. *McDonald v. Sargent*, 171 Mass. 492.

Indenture Void as to Apprentice May Be Binding on Parent.—*Anderson v. Young*, 54 S. Car. 388.

498. 4. An action by a father to recover possession of his son, who had been bound as apprentice under the laws of another state, will not be entertained where conflicting contract rights would arise determinable only by the laws of such other state. *Reiss v. Plicque*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 350.

500. 3. Term Extending Beyond Majority of Apprentice.—It has been held in *Rhode Island* that where an infant binds himself to serve for a term extending beyond full age he cannot avoid that contract on coming of age. *Pardey v. American Ship Windlass Co.*, 20 R. I. 147, 78 Am. St. Rep. 844.

In *Pennsylvania*, under the Act of Sept. 29, 1770, providing that the term of an apprentice shall end at the age of twenty-one as fully as if he were of age at the time of making the indenture, an apprentice is not free at the age of twenty-one, but is merely relieved from the summary proceedings provided by that act for difficulties between master and apprentice. *Flaccus v. Smith*, 30 Pittsb. Leg. J. N. S. (Pa.) 129.

505. 1. Right of Parent to Custody of Child,

**506. 3. Of Master** — *a.* AS TO APPRENTICE — (3) *Services and Earnings* — General Rule. — See note 1.

**507.** Where Master Consents to Substituted Service. — See note 1.

*b.* AS TO THIRD PARTIES — (1) *Enticing Away or Harboring Apprentice*. — See note 2.

**510. VII. OBLIGATION OF PARTIES** — 1. Of Apprentice — Liability to Control and Punishment. — See note 4.

Where Infant Executes Instrument Alone. — See note 7.

**511. 2. Of Father**. — See note 3.

**3. Of Master** — *a.* IN GENERAL — Performance of Covenants. — See note 6.

**513. APPROACHES**. — See note 9.

**514. APPROPRIATE — APPROPRIATION**. — See note 2.

**515.** See note 2.

**517.** See note 1.

**518.** See note 1.

**520. APPROVE — APPROVER — APPROVEMENT**. — See note 1.

— Though an indenture of apprenticeship may be void as such, it does not necessarily follow that the father will be entitled to custody of the child. The welfare of the child is the primary consideration as regards the matter of custody. *Anderson v. Young*, 54 S. Car. 388.

**506. 1. Illness as Excuse for Nonperformance of Services**. — *Mac Gregor v. Sully*, 31 Ont. 535.

**507. 1. Consent of Master to Substituted Service**. — An apprentice "duly and truly" serves his master if, with the master's consent, he is employed by another person during a portion of the term of apprenticeship. *Richardson v. Colne Fishery Co.*, 77 L. T. N. S. 501.

**2. Interference with Relationship**. — An injunction will lie to prevent the officers of a labor union interfering with apprentices and enticing them to join the union, where it appears that the apprentices had agreed in their indentures that they would not join a labor union. *Flaccus v. Smith*, 30 Pittsb. Leg. J. N. S. (Pa.) 129.

**Indictment**. — In *Georgia* a statute making it a misdemeanor to induce an articulated seaman or apprentice to leave his vessel while in the waters of that state has been declared constitutional when there was no legislation on the subject by Congress. *Handel v. Chaplin*, 111 Ga. 800.

**510. 4. Abandonment of Service — Right of Master to Compel Apprentice's Return**. — *Green v. Thompson*, (1899) 2 Q. B. 1.

**7. Voidable Indenture — Rights of Apprentice**. — It is held in *Rhode Island* that an infant may make a contract to learn a useful trade, and will be bound by it and may not avoid it. *Pardey v. American Ship Windlass Co.*, 20 R. I. 147, 78 Am. St. Rep. 844.

**511. 3. Indentures Not Signed by Apprentice**. — *Anderson v. Young*, 54 S. Car. 388.

**6. Master's Duties — General Rule**. — *Darling v. Vulcan Iron Works*, 26 Oregon 405.

**513. 9. Bridge Approaches — Highway Crossings**. — *Bloomington v. Illinois Cent. R. Co.*, 154 Ill. 539, affirming 49 Ill. App. 133.

**A Part of the Bridge**. — *McFarlane v. Chicago*, 185 Ill. 242.

**514. 2.** *State v. Derham*, 61 S. Car. 258.

**Grant of Public Lands Not Otherwise Appropriated**. — See *Springer v. Clopath*, 26 Nev. 183.

**515. 2.** *State v. Moore*, 50 Neb. 88; *State v. King*, 108 Tenn. 271, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 515. See also *Shattuck v. Kincaid*, 31 Oregon 379.

**517. 1.** *Pryor v. Kansas City*, 153 Mo. 145; *People v. Lammerts*, 164 N. Y. 144, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 516.

**Appropriation of Water**. — *Beers v. Sharpe*, 44 Oregon 386; *Nevada Ditch Co. v. Bennett*, 30 Oregon 91. See also the titles IRRIGATION; WATERS AND WATERCOURSES.

"An *appropriator* (using this term in its full and absolute sense, and to include both a diversion and an application, both of which are essential to the completion of a title to water) acquires a right of property in that which he has *appropriated*. It is a right in one sense absolute, and in another qualified; at least, qualified as to its rights with respect to third persons." *Suffolk Gold Min., etc., Co. v. San Miguel Consol. Min., etc., Co.*, 9 Colo. App. 407.

**518. 1.** *Kratzer v. Allen*, 10 Colo. App. 492.

**520. 1. Approval of Executive Officer — Discretion Implied**. — *Hover v. People*, 17 Colo. App. 375; *State v. Smith*, 23 Mont. 51.

**Approval of Tax Roll**. — See Board of Education *v. Kingfisher*, 5 Okla. 82.

**Accounts**. — *State v. Gee*, 28 Oregon 100.

An "*Approved*" Plan is a plan which has been lawfully *approved* by a local authority, and not one which has merely received their *approval* in fact, under a statute authorizing a local authority to make by-laws for the regulation of buildings within its jurisdiction. *Yabbicom v. King*, (1899) 1 Q. B. 444.

**Approved Service**. — Under the Police Act of 1890 providing a pension on retirement for a constable in a police force who has completed twenty-five years *approved* service, the service must be a continuous service. *Garbutt v. Durham Joint Committee*, (1904) 2 K. B. 514.

**Instructions — Indictment for Murder — Aiders and Abettors**. — *Harper v. State*, 83 Miss. 402.

**520.** [APPROXIMATELY. — See note 1*a*.]

**522.** APPURTENANCE — APPURTENANT. — See note 1.

**524.** See notes 1, 2.

**525.** See note 1.

**526.** See note 1.

**528.** See note 1.

**520.** 1*a*. "*Approximately* simply means 'nearly' or 'closely.'" *Oliver v. Hutchinson*, 41 Oregon 443.

**Distinguished from Proximately.** — See *Pledger v. Chicago, etc., R. Co.*, (Neb. 1903) 95 N. W. Rep. 1057.

**522.** 1. *Jarvis v. Seele Milling Co.*, 173 Ill. 192, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 521 [522]; *Rutherford v. Wabash R. Co.*, 147 Mo. 451; *Mulrooney v. O'Bear*, 80 Mo. App. 475; *Putnam v. Putnam*, 77 N. Y. App. Div. 554; *Newport Illuminating Co. v. Tax Assessors*, 19 R. I. 632; *Book v. West*, 29 Wash. 70, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 521 [522].

**Appurtenance Must Be Necessary to the Principal Thing.** — *Scott v. Moore*, 98 Va. 668; *Hamilton v. Graybill*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 523, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 520 [522]; *Cincinnati, etc., R. Co. v. Cincinnati, etc., R. Co.*, 9 Ohio Dec. 493; *Book v. West*, 29 Wash. 70.

**Whether Necessary in Conveyance.** — *Jarvis v. Seele Milling Co.*, 173 Ill. 192; *Hyde Park Thomson-Houston Light Co. v. Brown*, 172 Ill. 329; *Book v. West*, 29 Wash. 70.

**Light and Air.** — See *Kennedy v. Burnap*, 120 Cal. 488.

**Stairway.** — *Compare Peters v. Wort* 164 Mo. 431.

**524.** 1. *Book v. West*, 29 Wash. 70, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 523 [524].

**2. Building and Appurtenances.** — The word *appurtenances*, in the habendum of a lease for years of a building to be used for the purpose of manufacturing jewelry, cannot be construed to include the furnishing of steam and forced air for the use of the lessees. *Watkins v. Greene*, 22 R. I. 34.

**Personal Property.** — *Lincoln v. Lincoln St. R. Co.*, (Neb. 1903) 93 N. W. Rep. 766; *Sherrick v. Cotter*, 28 Wash. 25.

**525.** 1. A wharf is not land within the rule that land cannot pass as *appurtenant* to land; and tide flats may pass as *appurtenant* to a wharf if necessary to its use. *Brown v. Carkeck*, 14 Wash. 443. *Compare Book v. West*, 29 Wash. 70. And see the title WHARVES AND WHARFINGERS.

**526.** 1. **Convenience.** — See *Mason v. Thwing*, 94 N. Y. App. Div. 83.

**Irrigation — Montana.** — Montana Code definition same as California Code definition in the original note. *Smith v. Denniff*, 24 Mont. 20.

**528.** 1. *Mulrooney v. O'Bear*, 80 Mo. App. 475, *following Missouri Pac. R. Co. v. Maffitt*, 94 Mo. 60.

# ARBITRATION AND AWARD.

By J. L. McREE.

**539. 1. THE SUBMISSION — 1. Defined.** — See note 1.

**2. Form of Submission at Common Law — a. GENERAL RULE — No Particular Form Necessary.** — See notes 2, 3.

**540. Effect of Statutes.** — See note 1.

**541. b. ORAL SUBMISSION — Rule Stated.** — See note 2.

**543. But a Parol Submission Is Objectionable.** — See note 2.

**c. BY WRITING NOT UNDER SEAL.** — See note 4.

**539. 1. A Submission to Arbitration Is a Contract.** — *District of Columbia v. Bailey*, 171 U. S. 161; *Brown v. Mize*, 119 Ala. 10; *Searles v. Lum*, 81 Mo. App. 607.

An agreement between the parties to an action pending before a justice of the peace, that a designated person should act as justice of the peace, does not constitute a submission to arbitration. *Triplett v. Sims*, 89 Mo. App. 326.

An Agreement of Appraisal in a fire insurance policy is a contract. *Barnard v. Lancashire Ins. Co.*, (C. C. A.) 101 Fed. Rep. 36.

**Trial by a Voluntary Association an Arbitration.** — *Bartlett v. L. Bartlett, etc., Co.*, 116 Wis. 450.

An Agreement to Purchase Land, the price to be determined by the amount of timber thereon, which is to be ascertained by a third person, is not a submission to arbitration. *Noble v. Grandin*, 125 Mich. 383.

An Arbitration Is a Judicial Proceeding directly affecting the interests of both parties to the submission. *Grosvenor v. Flint*, 20 R. I. 21.

**2. Surplusage.** — A stipulation in a common-law submission that judgment shall be rendered on the award is mere surplusage and does not invalidate the submission. *Unterrainer v. Seelig*, 13 S. Dak. 152.

**3. Form Sufficient if Intention to Submit and Abide by Award Appeared.** — *Fooks v. Lawson*, 1 Marv. (Del.) 115; *Somerset v. Ott*, 207 Pa. St. 539; *Unterrainer v. Seelig*, 13 S. Dak. 152.

**Arbitration Distinguished from Reference.** — The Municipal Court of New York has no power to appoint a referee to hear and determine, and therefore where such appointment is made pursuant to an agreement between the parties, the appointment of a referee and all proceedings before him are void; and it is held that the report of such referee cannot be sustained as an award, because to give it such effect would be to enforce an entirely different agreement from that made by the parties, and would give the report of the referee an entirely different force and effect from that contemplated by the agreement which was made. *Barber v. Lane*, 60 N. Y. App. Div. 87, reversing (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 60.

**540. 1. Effect of Statutes.** — *District of Columbia v. Bailey*, 171 U. S. 161; *Shaw v. State*, 125 Ala. 80; *McClelland v. Hammond*, 12 Colo. App. 82; *Osborn, etc., Mfg. Co. v. Blanton*, 109 Ga. 196; *Poggenburg v. Conniff*, 67 S.

W. Rep. 845, 23 Ky. L. Rep. 2463; *Triplett v. Sims*, 89 Mo. App. 326; *Burhans v. Union Free School Dist. No. 1*, 24 N. Y. App. Div. 432, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 530 [540], affirmed 165 N. Y. 661; *Britton v. Hooper*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 388; *Hassenpflug v. Rice*, 9 Ohio Dec. (Reprint) 206, 11 Cinc. L. Bul. 200, affirmed 45 Ohio St. 377; *Graham v. Bates*, (Tenn. Ch. 1898) 45 S. W. Rep. 465; *Montgomery v. American Cent. Ins. Co.*, 108 Wis. 146.

**541. 2. Oral Submissions.** — *Shaw v. State*, 125 Ala. 80; *Gardner v. Newman*, 135 Ala. 522; *Fooks v. Lawson*, 1 Marv. (Del.) 115; *Bailey v. District of Columbia*, 9 App. Cas. (D. C.) 360, reversed on other points in 171 U. S. 161; *Sisson v. Pittman*, 113 Ga. 166; *Southern Live Stock Ins. Co. v. Benjamin*, 113 Ga. 1088; *Wilmington Water Power Co. v. Evans*, 166 Ill. 548; *Georges v. Niess*, 70 Minn. 250, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 541; *Searles v. Lum*, 81 Mo. App. 607; *Heist v. Kohler*, 10 Lanc. L. Rev. 140; *Barnum v. Backman*, 5 Luz. Leg. Reg. (Pa.) 145; *Miller v. Miller*, 99 Va. 125, 3 Va. Sup. Ct. 34; *Graham v. Bates*, (Tenn. Ch. 1898) 45 S. W. Rep. 465; *Montgomery v. American Cent. Ins. Co.*, 108 Wis. 146.

**Submission of Question of Boundary.** — An award on a submission involving a question as to the boundary of land is binding on the parties not as transferring title not previously held, but by way of estoppel on them to dispute the boundary so established. *Shaw v. State*, 125 Ala. 80.

**Price of Land and Not the Title in Dispute.** — *Hewitt v. Lehigh, etc., R. Co.*, 57 N. J. Eq. 511.

**But if the Title to Land Is in Dispute,** the submission must be in writing. See the title VERBAL AGREEMENTS (STATUTE OF FRAUDS).

**Submission of Question of Water Rights.** — *Horne v. Hutchins*, 71 N. H. 128.

**Oral Submission Notwithstanding Statute.** — *Graham v. Bates*, (Tenn. Ch. 1898) 45 S. W. Rep. 465.

**543. 2. A Parol Submission Cannot Be Made a Rule of Court.** — *Sisson v. Pittman*, 113 Ga. 166.

**Statute of Frauds.** — *Wilmington Water Power Co. v. Evans*, 166 Ill. 548, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 543.

**4. Submission by Writing Not under Seal.** — *Shaw v. State*, 125 Ala. 80.

**544.** *d.* BY WRITING UNDER SEAL. — See note 3.

**546.** 3. Submissions under the Statutes — *a.* GENERAL RULE. — See note 3.

**547.** Strict Compliance with Statute Necessary. — See note 1.

**550.** *b.* COMPULSORY ARBITRATION. — See note 2.

**551.** *d.* SUBMISSIONS BY RULE OF COURT — The Distinction Is Not Very Clearly Drawn. — See note 2.

**553.** 4. What Is a Proper Basis for a Submission — *a.* MUST BE MATTER OF DOUBT. — See notes 4, 6.

**554.** *b.* MINISTERIAL ACTS NOT A BASIS. — See note 1.

**556.** *c.* THERE MUST BE AN INTENTION TO BE BOUND. — See note 1.

**557.** 5. What May Be Submitted — *a.* GENERAL RULE — Civil but Not Illegal or Criminal Matters. — See note 3.

**558.** See note 1.

**559.** *b.* MATTERS REGARDING REAL ESTATE. — See notes 2, 3.

**561.** *c.* QUESTIONS OF, AND ACTIONS AT, LAW — All Actions of Law and Suits in Equity. — See note 3.

**562.** *d.* DOWER. — See note 4.

**563.** 6. Effect of Agreement to Submit — *a.* CASES PENDENTE LITE — (1) *General Rule* — Failure of Arbitration by Fault of One of the Parties. — See note 3.

**544.** 3. *Fooks v. Lawson*, 1 Marv. (Del.) 115.

**546.** 3. *England*. — *Zalinoff v. Hammond*, (1898) 2 Ch. 92, 78 L. T. N. S. 456.

*South Dakota*. — There is no statute in South Dakota authorizing parties to submit matters of difference between them to arbitration. *Unterrainer v. Seelig*, 13 S. Dak. 152.

**547.** 1. *Osborn, etc., Mfg. Co. v. Blanton*, 109 Ga. 196; *Burkland v. Johnson*, 50 Neb. 858.

**550.** 2. *Provision to Compel Arbitration Lawful*. — A rule of an association of merchants which provides that upon the refusal of a member to submit his accounts to arbitration the other members shall cease to extend credit to him is held not to be an unlawful provision. *Reynolds v. Plumbers Material Protective Assoc.*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 709.

**551.** 2. *Fidelity, etc., Co. v. St. Matthews Sav. Bank*, (C. C. A.) 104 Fed. Rep. 858.

*As to the Distinction Between Arbitration and Reference*. — *Story v. De Armond*, 179 Ill. 510.

*A Submission under an Order of Court Made in an Action Pending*. — *Drown v. Hamilton*, 68 N. H. 23.

**553.** 4. *Legal Cause of Action Unnecessary*. — *Downing v. Lee*, 98 Mo. App. 604.

**6.** *Bona Fide Difference of Opinion — Sufficient Basis*. — *Bunnell v. Bunnell*, 111 Ky. 566; *Noble v. Grandin*, 125 Mich. 383; *Downing v. Lee*, 98 Mo. App. 604.

**554.** 1. *Mere Ministerial Acts, Such as Calculations, Valuations, and Measurements*. — *Nelson v. Charles Betcher Lumber Co.*, 88 Minn. 521, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 554, 556; *Noble v. Grandin*, 125 Mich. 383; *Downing v. Lee*, 98 Mo. App. 604.

*Appraisals*. — *Wurster v. Armfield*, 67 N. Y. App. Div. 158, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 554.

*Appraisement without taking oath of office, giving notice, or taking proof is not an arbitration*. *Wurster v. Armfield*, 175 N. Y. 256.

**556.** 1. *Agreement to Abide By Award Implied*. — *Nelson v. Charles Betcher Lumber Co.*, 88 Minn. 521.

**557.** 3. *Matters of a Civil Nature*. — *Elliott v. Missouri, etc., R. Co.*, (C. C. A.) 74 Fed. Rep. 707.

**558.** 1. *Illegal Matters*. — *Lum v. Fauntleroy*, 80 Miss. 757, 92 Am. St. Rep. 620.

*Where the Matters Submitted Are Clearly Illegal, etc.* — *Benton v. Singleton*, 114 Ga. 548, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 558.

**559.** 2. *Where Questions of Title Cannot Be Submitted*. — Rev. Stat. Wis., § 3544, provides that no submission shall be made respecting the claim to any estate in fee or for life in real estate, but it is held to include legal titles only. *McCord v. Flynn*, 111 Wis. 78.

3. *Holgate v. Chase*, 7 Luz. Leg. Reg. (Pa.) 178.

*Boundary Partition — Estates for Years Determined by Arbitration*. — *McCord v. Flynn*, 111 Wis. 78.

*Question of Compensation for Right of Way*. — *Niagara Falls, etc., R. Co. v. Brundage*, 7 N. Y. App. Div. 445.

*Condemnation of Land*. — *Judson v. U. S.*, (C. C. A.) 120 Fed. Rep. 637.

*Boundary*. — *Miller v. Miller*, 99 Va. 125, 3 Va. Sup. Ct. 34.

Where a parol submission has been made of a dispute concerning a boundary line the award of the arbitrators, in pursuance of such submission, is conclusive on the parties. *Horne v. Hutchins*, 71 N. H. 128.

**561.** 3. *Actions Which Cannot Be Submitted*. — The question whether an agreement has been violated cannot be submitted. *Jones v. Brown*, 171 Mass. 318.

**562.** 4. *Question as to Dower*. — *McCord v. Flynn*, 111 Wis. 78.

**563.** 3. *Parties Bound by the Submission*. — *Allen v. Hickam*, 156 Mo. 58, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 563.

**564.** See note 1.

**565.** (2) *As a Discontinuance* — Rule Stated. — See note 1.

**566.** Although the Above Is Set Out as the Rule. — See note 1.

**568.** (3) *Suspension of the Case*. — See note 2.

**569.** (4) *As a Discharge of Bail* — When Not Discharged. — See note 4.

*b.* SUBMISSION OF PRESENT DISPUTE BARS ACTION. — See note 6.

**570.** But if They Are Not Bound. — See note 1.

*c.* AGREEMENT TO SUBMIT FUTURE DISPUTES — (1) *Does Not Oust Jurisdiction of Courts*. — See note 2.

**572.** See notes 1, 2.

**573.** See note 1.

(2) *Condition Precedent to Right of Action* — (a) General Rule. — See note 2.

**564.** 1. Fault of One of the Parties — New Agreement. — Western Assur. Co. v. Hall, 120 Ala. 547, 74 Am. St. Rep. 48; Grosvenor v. Flint, 20 R. I. 21.

The arbitration failing by the fault of one of the parties, he is estopped from pleading failure of arbitration. Read v. State Ins. Co., 103 Iowa 307, 64 Am. St. Rep. 180.

**565.** 1. New York. — Niagara Falls, etc., R. Co. v. Brundage, 7 N. Y. App. Div. 445.

Ohio. — A submission under a rule of the court operates as a discontinuance. Bradstreet v. Pross, 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117.

Wisconsin. — Jones v. Thomas, 120 Wis. 274.

**566.** 1. Goodwin v. Merchants', etc., Mut. Ins. Co., 118 Iowa 606, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 566.

**568.** 2. Submission Operating to Suspend Case. — Bailey v. District of Columbia, 4 App. Cas. (D. C.) 356.

Agreement Not to Discontinue. — Friedrich v. Fergen, 15 S. Dak. 546, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 568; Jones v. Thomas, 120 Wis. 274.

**569.** 4. Turner v. Stewart, 51 W. Va. 493.

6. Submission of Present Dispute a Bar to Action. — Turner v. Stewart, 51 W. Va. 493, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 570; Seibel v. Lebanon Mut. Ins. Co., 16 Lanc. L. Rev. 356.

**570.** 1. Mere Agreement to Submit. — No Proceedings Had. — Green v. American Cotton Co., 112 Fed. Rep. 743; Schrandt v. Young, 62 Neb. 254; Welch v. Miller, 70 Vt. 108; Riley v. Jarvis, 43 W. Va. 43.

2. Future Disputes — May Not Oust Courts of Jurisdiction. — United States. — Munson v. Straits of Dover Steamship Co., 99 Fed. Rep. 787, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 570; Dickson Mfg. Co. v. American Locomotive Co., 119 Fed. Rep. 488.

Alabama. — Western Assur. Co. v. Hall, 112 Ala. 318.

Georgia. — Parsons v. Ambros, 121 Ga. 98.

Kansas. — Cupples v. Alamo Irrigation, etc., Co., 7 Kan. App. 692.

Kentucky. — Gaither v. Dougherty, (Ky. 1896) 38 S. W. Rep. 2; Ison v. Wright, (Ky. 1900) 55 S. W. Rep. 202; Hartford F. Ins. Co. v. Bourbon County Ct., 115 Ky. 109; Continental Ins. Co. v. Vallandingham, 76 S. W. Rep. 22, 25 Ky. L. Rep. 468.

Massachusetts. — Miles v. Schmidt, 168 Mass. 339.

Michigan. — Hoste v. Dalton, (Mich. 1904) 100 N. W. Rep. 750, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 570; Weggner v. Greenstone, 114 Mich. 310.

Missouri. — McNees v. Southern Ins. Co., 61 Mo. App. 335; Bales v. Gilbert, 84 Mo. App. 675.

Nebraska. — Hartford F. Ins. Co. v. Hon, 66 Neb. 555, 103 Am. St. Rep. 725.

New York. — Baldwin v. Fraternal Acc. Assoc., (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 124.

Ohio. — Dayton, etc., R. Co. v. Pittsburgh, etc., R. Co., 25 Ohio Cir. Ct. 705.

Pennsylvania. — Acme Coal Co. v. Stroud, 5 Lack. Leg. N. (Pa.) 169.

Tennessee. — Hickerson v. Insurance Companies, 96 Tenn. 193.

Texas. — Florida Athletic Club v. Hope Lumber Co., 18 Tex. Civ. App. 170.

Wisconsin. — Fox v. Masons' Fraternal Acc. Assoc., 96 Wis. 390.

A contract which contains a general agreement to arbitrate differences of opinion arising between parties, but which does not make a submission to arbitration a condition precedent to the right to sue, does not prevent a suit on the contract without previous arbitration. Hind v. Low, 14 Hawaii 438, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 570.

**572.** 1. Breach of the Stipulation. — Hoste v. Dalton, (Mich. 1904) 100 N. W. Rep. 750, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 570.

Damages for Refusing to Refer. — Munson v. Straits of Dover Steamship Co., 99 Fed. Rep. 787.

2. Dickson Mfg. Co. v. American Locomotive Co., 119 Fed. Rep. 488.

**573.** 1. Florida Athletic Club v. Hope Lumber Co., 18 Tex. Civ. App. 170.

2. Submission to Arbitration Made Condition Precedent to Right of Action. — United States. — Hamilton v. Home Ins. Co., 137 U. S. 370; Burke v. Pierce, (C. C. A.) 83 Fed. Rep. 95. Alabama. — Western Assur. Co. v. Hall, 112 Ala. 318.

Georgia. — Southern Mut. Ins. Co. v. Turnley, 100 Ga. 301, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 573.

Kentucky. — Continental Ins. Co. v. Vallandingham, 76 S. W. Rep. 22, 25 Ky. L. Rep. 468.

**576.** (b) *Stipulations in Policies of Insurance.* — See note 1.

**581.** *In Order to Make an Award a Condition Precedent.* — See note 1.

*Denial of Liability by the Company.* — See note 2.

*Failure of Arbitration Through Fault of Company.* — See note 3.

*Massachusetts.* — *Miles v. Schmidt*, 168 Mass. 339.

*Nebraska.* — *Home F. Ins. Co. v. Kennedy*, 47 Neb. 138, 53 Am. St. Rep. 521.

*Ohio.* — *Hamilton v. Fireman's Ins. Co.*, 4 Ohio Dec. 407.

*Washington.* — *Zindorf Constr. Co. v. Western American Co.*, 27 Wash. 31.

*Wisconsin.* — *Fox v. Masons' Fraternal Acc. Assoc.*, 96 Wis. 394; *Montgomery v. American Cent. Ins. Co.*, 108 Wis. 146.

**Necessity of Naming Arbitrators.** — An agreement for arbitrating future controversies, but which does not name the arbitrators, is revocable by either party. *McQuade v. Pennsylvania R. Co.*, 20 Pa. Co. Ct. 51, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 576 [573].

**576. 1. Arbitration Clauses in Insurance Policies** — *United States.* — *Western Assur. Co. v. Decker*, (C. C. A.) 98 Fed. Rep. 381.

*Illinois.* — *Phoenix Ins. Co. v. Lorton*, 109 Ill. App. 63.

*Iowa.* — *Vincent v. German Ins. Co.*, 120 Iowa 272; *George Dee, etc., Co. v. Key City F. Ins. Co.*, 104 Iowa 167; *Zalesky v. Home Ins. Co.*, 102 Iowa 613.

*Kentucky.* — *Hartford F. Ins. Co. v. Bourbon County Ct.*, 115 Ky. 109.

*Michigan.* — *Kersey v. Phoenix Ins. Co.*, (Mich. 1903) 97 N. W. Rep. 57; *Raymond v. Farmers' Mut. F. Ins. Co.*, 114 Mich. 386.

*Minnesota.* — *Levine v. Lancashire Ins. Co.*, 66 Minn. 138; *Hamberg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291.

*Missouri.* — *McNees v. Southern Ins. Co.*, 61 Mo. App. 335; *Murphy v. Northern British, etc., Co.*, 61 Mo. App. 323.

*Ohio.* — *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258.

*Pennsylvania.* — *Seibel v. Lebanon Mut. Ins. Co.*, 16 Lanc. L. Rev. 356.

*Tennessee.* — *Palatine Ins. Co. v. Morton-Scott-Robertson Co.*, 106 Tenn. 558; *Doxey v. Royal Ins. Co.*, (Tenn. Ct. 1896) 36 S. W. Rep. 950.

*Texas.* — *American F. Ins. Co. v. Stuart*, (Tex. Civ. App. 1896) 38 S. W. Rep. 395; *American Cent. Ins. Co. v. Bass*, 90 Tex. 380.

*Wisconsin.* — *Montgomery v. American Cent. Ins. Co.*, 108 Wis. 146.

*Canada.* — A condition in a policy of insurance that no action shall be brought until the amount of loss is determined upon by arbitrators is valid, and there must be a decision by the arbitrators before a suit can be maintained. *Pharand v. Lancashire Ins. Co.*, 18 Quebec Super. Ct. 35.

**Where Stipulation Held Void or Arbitration Not Deemed Condition Precedent to Right of Action.** —

*Davis v. Anchor Mut. F. Ins. Co.*, 96 Iowa 70; *Read v. State Ins. Co.*, 103 Iowa 307, 64 Am. St. Rep. 180; *Ætna Ins. Co. v. McLead*, 57 Kan. 95, 57 Am. St. Rep. 320; *White v. Farmers' Mut. F. Ins. Co.*, 97 Mo. App. 590; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811; *Phoenix Ins.*

*Co. v. Zlotky*, 66 Neb. 584; *Manchester F. Ins. Co. v. Simmons*, 12 Tex. Civ. App. 607; *Fox v. Masons' Fraternal Acc. Assoc.*, 96 Wis. 390; *Montgomery v. American Cent. Ins. Co.*, 108 Wis. 146.

**581. 1. To Constitute Condition Precedent, There Must Be Express Words or Necessary Implication.** — *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 101 Iowa 514; *Grand Rapids F. Ins. Co. v. Finn*, 60 Ohio St. 513, 71 Am. St. Rep. 736.

**2. Where the Company Denies All Liability.** — *Western Assur. Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48; *Glens Falls Ins. Co. v. Hite*, 83 Ill. App. 549; *Denton v. Farmers' Mut. F. Ins. Co.*, 120 Mich. 690; *Hamberg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335; *Thomas v. Lebanon Town Mut. F. Ins. Co.*, 78 Mo. App. 268; *Seigle v. Badger Lumber Co.*, 106 Mo. App. 110; *White v. Farmers' Mut. F. Ins. Co.*, 97 Mo. App. 590; *Home F. Ins. Co. v. Kennedy*, 47 Neb. 138, 53 Am. St. Rep. 521; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811; *Baldwin v. Fraternal Acc. Assoc.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 124; *Lang v. Eagle Fire Co.*, 12 N. Y. App. Div. 39; *Mapes v. Metcalf*, 10 N. Dak. 601, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 581; *Yost v. McKee*, 179 Pa. St. 381; *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. St. 255, 69 Am. St. Rep. 810; *Hickerson v. Insurance Companies*, 96 Tenn. 193; *Connecticut F. Ins. Co. v. Hilbrant*, (Tex. Civ. App. 1903) 73 S. W. Rep. 558; *Stephens v. Union Assur. Soc.*, 16 Utah 22, 67 Am. St. Rep. 595; *Stoddard v. Cambridge Mut. F. Ins. Co.*, 75 Vt. 253.

**No Disagreement as to Amount of Loss — Company Denying All Liability.** — *Moyer v. Sun Ins. Office*, 176 Pa. St. 579.

**Denial of Liability After Suit Brought No Waiver.** — *Murphy v. Northern British, etc., Co.*, 61 Mo. App. 323; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502; *Yendel v. Western Assur. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 348; *American Cent. Ins. Co. v. Bass*, 90 Tex. 380.

**3. Company in Fault.** — *Western Assur. Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48; *George Dee, etc., Co. v. Key City F. Ins. Co.*, 104 Iowa 167; *Harrison v. Hartford F. Ins. Co.*, (Iowa 1899) 80 N. W. Rep. 309; *Harrison v. Hartford F. Ins. Co.*, 112 Iowa 77; *Kersey v. Phoenix Ins. Co.*, (Mich. 1903) 97 N. W. Rep. 57; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291; *Fowble v. Phoenix Ins. Co.*, 106 Mo. App. 527; *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. St. 255, 69 Am. St. Rep. 810; *Schouweiler v. Merchant's Mut. Ins. Assoc.*, 11 S. Dak. 401; *Hickerson v. Insurance Companies*, 96 Tenn. 193; *Stephens v. Union Assur. Soc.*, 16 Utah 22, 67 Am. St. Rep. 595.

**Assured at Fault.** — The assured cannot maintain an action on the policy if the arbitration fails through his fault. *Caledonian Ins. Co. v. Traub*, 83 Md. 524; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502; *Yendel v. Western Assur. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 348.

**581.** Total Destruction of Property. — See note 4.

**582.** Arbitration Clause Has Been Held Collateral to Agreement to Pay. — See note 1.  
Decisions of Architects, Engineers, and Other Experts. — See note 4.

**584.** In Some Cases the Decisions Held Not to Be Conclusive. — See note 1.

**585.** (c) Stipulations in Building and Other Contracts — Arbitrator Personally Interested. — See note 2.

Implication Is that Decision Shall Be an Honest One. — See note 3.

**586.** (d) Waiver of Arbitration Clause. — See note 5.

**593.** 8. Amending or Altering the Submission — *f.* EFFECT OF ALTERING THE SUBMISSION — Written Submission Altered by Parol. — See note 7.

**594.** 9. Setting Aside the Submission. — See note 1.

10. Revoking the Submission — *a.* COMMON-LAW RULE — Revocable at Any Time Before Award. — See note 4.

**596.** See note 1.

**581.** 4. Where Property Is Wholly Destroyed. — *Lang v. Eagle Fire Co.*, 12 N. Y. App. Div. 39; *Connecticut F. Ins. Co. v. Carnahan*, 10 Ohio Cir. Dec. 186; *Liverpool, etc., Ins. Co. v. Colgin*, (Tex. Civ. App. 1896) 34 S. W. Rep. 291; *Ætna Ins. Co. v. Shacklett*, (Tex. Civ. App. 1900) 57 S. W. Rep. 583.

Statute Specifying Damages Controls Stipulation in Policy. — *Hartford F. Ins. Co. v. Bourbon County Ct.*, 115 Ky. 109; *O'Keefe v. Liverpool, etc., Ins. Co.*, 140 Mo. 558.

Appraisement Necessary Although Loss Total. — *Stout v. Phoenix Assur. Co.*, 65 N. J. Eq. 566.

**582.** 1. Arbitration Clause Held Collateral to Agreement to Pay. — *Western Assur. Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48; *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 101 Iowa 514.

4. Decisions of Architects, Engineers, and Other Experts. — *Parsons v. Ambos*, 121 Ga. 98; *Mackler v. Mississippi River, etc., R. Co.*, 62 Mo. App. 677; *Heidlinger v. Onward Constr. Co.*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 555; *Florida Athletic Club v. Hope Lumber Co.*, 18 Tex. Civ. App. 170, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582; *Kilgore v. North West Texas Baptist Educational Soc.*, 89 Tex. 465.

The Decision of the Inspector of Ties of a Railroad company was held to be binding though the ties did not meet the requisites in regard to measurements. *Elliott v. Missouri, etc., R. Co.*, (C. C. A.) 74 Fed. Rep. 707.

**584.** 1. In Some Cases Decisions Held Not Conclusive. — *Central Trust Co. v. Louisville, etc., R. Co.*, 70 Fed. Rep. 282; *Gubbins v. Lautenschlager*, 74 Fed. Rep. 160.

**585.** 2. Arbitrator Formerly Witness. — The fact that an architect has been a witness in a matter between the parties does not disqualify him from serving as a referee. *Barclay v. Deckerhoof*, 171 Pa. St. 378.

3. *Elliott v. Missouri, etc., R. Co.*, (C. C. A.) 74 Fed. Rep. 707.

**586.** 5. Waiver of Arbitration Clauses. — *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 101 Iowa 514; *Jones v. Brown*, 171 Mass. 318; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291; *Silver v. Western Assur. Co.*, 33 N. Y. App. Div. 450; *Grand Rapids F. Ins. Co. v. Finn*, 60 Ohio St. 513, 71 Am. St. Rep. 736; *American F. Ins. Co. v. Stuart*, (Tex. Civ. App. 1896) 38 S. W. Rep. 395.

Agreeing to Award Not in Accordance with

Policy. — *Davis v. Atlas Assur. Co.*, 16 Wash. 232.

Where Neither Party Has Availed Himself of His Right, etc. — *Garretson v. Merchants, etc., F. Ins. Co.*, 114 Iowa 17; *Hayes v. Milford Mut. F. Ins. Co.*, 170 Mass. 492; *Springfield F. & M. Ins. Co. v. Cannon*, (Tex. Civ. App. 1898) 46 S. W. Rep. 375.

**593.** 7. Altering Written Submission by Parol Agreement. — *Montgomery v. American Cent. Ins. Co.*, 108 Wis. 146.

**594.** 1. Setting Aside the Submission. — *Dunham Lumber Co. v. Holt*, 123 Ala. 343, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 594; *Hall v. Western Assur. Co.*, 133 Ala. 637.

4. Common-law Rule as to Revocability of Submission. — *Fooks v. Lawson*, 1 Marv. (Del.) 115; *Parsons v. Ambos*, 121 Ga. 98; *Harrison v. Hartford F. Ins. Co.*, 112 Iowa 77; *Gregory v. Pike*, 94 Me. 27; *Noble v. Grandin*, 125 Mich. 383; *Butler v. Greene*, 49 Neb. 280; *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633; *Zehner v. Lehigh Coal, etc., Co.*, 187 Pa. St. 487, 67 Am. St. Rep. 586; *Seibel v. Firemen's Ins. Co.*, 24 Pa. Super. Ct. 154; *Nicholas v. Carr*, 6 Luz. Leg. Reg. (Pa.) 204; *Offerman v. Packer*, 26 Leg. Int. (Pa.) 205; *Friedrich v. Fergen*, 15 S. Dak. 546, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 594-597; *Turner v. Stewart*, 51 W. Va. 493.

Withdrawal from Agreement — Damages. — *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633; *Riley v. Jarvis*, 43 W. Va. 43.

Submission for Valuable Consideration. — *McCune v. Lytle*, 197 Pa. St. 404; *Zehner v. Lehigh Coal, etc., Co.*, 187 Pa. St. 487, 67 Am. St. Rep. 586; *Everhart v. Flynn*, 6 Pa. Dist. 131. See also *Grimm v. Sarmiento*, 2 Pa. Co. Ct. 484, holding that a submission for a valuable consideration is a contract and irrevocable.

New York. — The submission is not revocable for mere irregularities after the case has been finally submitted to the arbitrators. *Britton v. Hooper*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 388, following New York Lumber, etc., Co. v. Schnieder, 119 N. Y. 475.

Submission of Pending Case Revocable. — *Zehner v. Lehigh Coal, etc., Co.*, 20 Pa. Co. Ct. 29.

**596.** 1. Express Stipulation that Submission Should Be Irrevocable. — *Dickson Mfg. Co. v. American Locomotive Co.*, 119 Fed. Rep. 488;



**597.** After Award — Consent of Party. — See note 1.

Submission under Arbitration Clause in Deed or Contract. — See note 2.

**598.** Submission Made Rule of Court. — See notes 1, 2.

**599.** *c.* REVOCATION BY LEAVE OF COURT — Statutory Enactments. — See note 6.

*d.* FORM OF REVOCATION — No Particular Form Required — Intention. —

See notes 7, 9.

**600.** *f.* REVOCATION BY IMPLICATION OF LAW — (1) *By Death of a Party.* — See note 2.

**601.** (2) *By Death, or Refusal to Act, of Arbitrator.* — See notes 2, 3, 4.

**603.** *h.* LIABILITY FOR REVOCATION — General Rule Stated. — See notes 2, 4.

**604.** *i.* EFFECT OF REVOCATION. — See note 1.

12. Specific Performance of the Submission. — See note 3.

**605.** 13. Staying Proceedings — Where Injury Would Result Were the Proceedings Allowed. — See note 1.

14. Rules for Construing Submissions — *a.* LEADING RULE — Arbitration Favored — Liberally Construed. — See note 3.

**607.** Forced Construction. — See note 1.

Union Ins. Co. v. Central Trust Co., 157 N. Y. 633; Friedrich v. Fergen, 15 S. Dak. 546, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 596.

By Their Nature, Submissions of Disputes to Arbitration Are Revocable. — Sartwell v. Sowles, 72 Vt. 270, 82 Am. St. Rep. 943.

**597.** 1. Revocation of Submission After Award. — Vincent v. German Ins. Co., 120 Iowa 272; Georges v. Niess, 70 Minn. 250; Connecticut F. Ins. Co. v. O'Fallon, 49 Neb. 740; Zehner v. Lehigh Coal, etc., Co., 20 Pa. Co. Ct. 29; Friedrich v. Fergen, 15 S. Dak. 546, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 597; Houston, etc., R. Co. v. Newman, 2 Tex. App. Civ. Cas., § 349; Riley v. Jarvis, 43 W. Va. 43.

2. Submission Containing Other Terms to Be Performed by the Parties. — Harrison v. Hartford F. Ins. Co., 112 Iowa 77.

**598.** 1. Submission Made Rule of Court Is Irrevocable. — Waterbury Blank Book Mfg. Co. v. Hurlburt, 73 Conn. 715; Poppers v. Knight, 69 Ill. App. 578, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 598; Gregory v. Pike, 94 Me. 27; Allen v. Hickam, 156 Mo. 58; Zehner v. Lehigh Coal, etc., Co., 187 Pa. St. 487, 67 Am. St. Rep. 586, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 597; Grimm v. Sarmiento, 2 Pa. Co. Ct. 484; Riley v. Jarvis, 43 W. Va. 43.

2. Sanction of Court Necessary. — Zehner v. Lehigh Coal, etc., Co., 187 Pa. St. 487, 67 Am. St. Rep. 586.

**599.** 6. Statutes in the United States. — Poppers v. Knight, 69 Ill. App. 578; Turner v. Stewart, 51 W. Va. 493.

7. Revocation Must Be Plain, Positive, and Absolute. — Fooks v. Lawson, 1 Marv. (Del.) 115.

9. A Revocation Must Conform to the Submission. — Mand v. Patterson, 19 Ind. App. 619.

**600.** 2. Revocation — Death of Party. — Parsons v. Ambos, 121 Ga. 98; Gregory v. Pike, 94 Me. 27.

**601.** 2. Death of Single Arbitrator. — Hugins v. Neill, 2 Pa. Super. Ct. 103.

3. Death of One of Several Arbitrators. — Parsons v. Ambos, 121 Ga. 98; Wolf v. Augustine, 181 Pa. St. 576.

4. For Authorities in United States. — Parsons v. Ambos, 121 Ga. 98.

Resignation Too Late. — After the majority of the arbitrators have decided upon the award, under a submission allowing a majority to rule, the resignation of the dissenting arbitrator comes too late to defeat the award. Republic of Colombia v. Cauca Co., 106 Fed. Rep. 337.

**603.** 2. Liability for Revocation — Damages. — Union Ins. Co. v. Central Trust Co., 157 N. Y. 633.

4. Munson v. Straits of Dover Steamship Co., 99 Fed. Rep. 787, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 603.

Where property was pledged to secure performance of the award, and the submission was afterwards revoked, the party for whose benefit the pledge was made may foreclose and enforce against it the expense incurred in preparing for the arbitration and conducting the proceedings to the time of revocation. Union Ins. Co. v. Central Trust Co., 157 N. Y. 633, affirming 87 Hun (N. Y.) 140.

**604.** 1. Revocation Restores Parties to Their Original Rights. — Sartwell v. Sowles, 72 Vt. 270, 82 Am. St. Rep. 943.

3. General Rule as to Specific Performance. — Bales v. Gilbert, 84 Mo. App. 675; Van Beuren v. Wotherspoon, 12 N. Y. App. Div. 421; Grosvenor v. Flint, 20 R. I. 21.

**605.** 1. Injunction. — In White v. Mann, 9 Ohio Dec. 407, 5 Ohio N. P. 376, it was said that "the principle is firmly entrenched in precedent and authority that an injunction will not be granted to restrain an arbitration, because one of the things the arbitrators themselves will decide is whether the case is one of which they should take cognizance."

3. Submission to Arbitration Favored — Liberal Construction. — McClelland v. Hammond, 12 Colo. App. 82.

**607.** 1. Forced Construction — Intention. — Jacob v. Weisser, 207 Pa. St. 484; Chandley v. Cambridge Springs, 200 Pa. St. 230; Zindorf Constr. Co. v. Western American Co., 27 Wash. 31; Winsor v. German Sav., etc., Soc., 31 Wash. 365.

- 607.** In Determining What Is Included. — See note 2.  
*b.* GENERAL SUBMISSIONS — Controversies of All Kinds Embraced. — See note 3.
- 608.** It Is Immaterial What Terms Are Used. — See note 1.
- 610.** Period of Time Covered. — See note 1.  
*d.* WRITTEN SUBMISSION IS FINAL. — See note 3.
- 611.** *e.* UNCERTAIN OR INDEFINITE SUBMISSION. — See note 1.
- 613.** *i.* STIPULATIONS IN SUBMISSIONS — (2) *Right of Appeal* — Waiver. — See note 3.  
 (3) *To "Abide by" Award.* — See note 4.
- 614.** 15. Who May Be Parties to Submission — *a.* PERSONS WITH INTEREST IN SUBJECT-MATTER — (1) *General Rule.* — See note 3.
- 615.** (2) *Husband and Wife* — At Common Law. — See note 1.  
 Property Over Which Wife Has Absolute Control. — See note 3.
- 616.** (3) *Infants.* — See note 5.
- 617.** (4) *Partners.* — See note 2.
- 618.** See note 1.
- 619.** (6) *Persons Jointly Interested.* — See note 1.  
 (8) *Parties to a Pending Suit* — Nominal and Real Parties. — See note 4.
- 620.** (9) *Corporations Sole and Aggregate.* — See note 3.
- 623.** *b.* PERSONS WITHOUT INTEREST IN SUBJECT-MATTER — (1) *Agents* — (b) Where the Principal Is Not Bound — Express Authority Necessary. — See note 1.  
 A General Agent. — See note 2.

An agreement to submit questions which may arise as to the fulfilment of a contract does not give the right to pass on a claim of damages for nonfulfilment. Such an agreement is not to be extended by implication beyond its plain words. *Somerset v. Ott*, 207 Pa. St. 543.

**607.** 2. *Jensen v. Deep Creek Farm, etc.*, Co., 27 Utah 79.

3. What Submissions Are General. — *Jensen v. Deep Creek Farm, etc., Co.*, 27 Utah 79.

**608.** 1. Submission of All Pending Differences is a general submission. *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337.

A Submission of "All Claims" has been held to authorize the arbitrator to give credit for disbursements made for freight. *Stinesville, etc., Stone Co. v. White*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 135.

**610.** 1. Confined to Matters In Dispute Down to Time of Submission. — *Cutting v. Whittemore*, 72 N. H. 107, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 610.

3. Written Submission Final. — *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291.

**611.** 1. Submissions Uncertain and Indefinite. — *The Glencairn*, 78 Fed. Rep. 379.

**613.** 3. Waiver of Right of Appeal. — *Williams v. Danziger*, 91 Pa. St. 232; *McCahan v. Reamey*, 33 Pa. St. 535.

Although the parties expressly renounce the right to appeal, yet they can appeal, thereby subjecting themselves to a penalty. *King v. King*, 104 La. 420.

A stipulation that the award shall be "final and conclusive" does not take away the right to appeal. *Jolly v. Pittsburgh, etc., R. Co.*, 28 Pittsb. Leg. J. N. S. (Pa.) 376.

4. Stipulation to "Abide by the Award." — *King v. King*, 104 La. 420.

Agreement to Abide by Award Implied. — *Somerset v. Ott*, 207 Pa. St. 539.

**614.** 3. Persons Legally Competent to Contract. — *District of Columbia v. Bailey*, 171 U. S. 161; *Brown v. Mize*, 119 Ala. 10.

**615.** 1. *Crouch v. Crouch*, 30 Tex. Civ. App. 288.

3. Statutory Enactments. — The wife must comply with the statute in entering into an arbitration. *Brown v. Mize*, 119 Ala. 10.

A married woman can be a party to a common-law submission. *Hoste v. Dalton*, (Mich. 1904) 100 N. W. Rep. 750; *Montgomery v. American Cent. Ins. Co.*, 108 Wis. 146.

**616.** 5. Submission by Infant. — *Bivert v. Perkins*, 4 Okla. 718.

It has, however, been held that a submission made by an infant was absolutely void. *Mill-saps v. Estes*, 134 N. Car. 486.

**617.** 2. Submission by Partners. — *Mobile v. Wood*, 95 Fed. Rep. 537.

**618.** 1. When Partner Personally Bound. — *Runyon v. Rutherford*, 55 W. Va. 436.

**619.** 1. Submission in Case of Parties Jointly Interested. — *Mobile v. Wood*, 95 Fed. Rep. 537, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619.

4. Submission by Parties to Pending Suit. — *Turner v. Stewart*, 51 W. Va. 493, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619. See also *Runyon v. Rutherford*, 55 W. Va. 436.

**620.** 3. Municipal Corporations. — *District of Columbia v. Bailey*, 171 U. S. 161.

**623.** 1. Express Authority of Agent. — *Macdonald v. Bond*, 195 Ill. 128, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623; *King v. King*, 104 La. 420; *Manufacturers, etc., F. Ins. Co. v. Mullen*, 48 Neb. 620.

2. General Agent. — *Mobile v. Wood*, 95 Fed. Rep. 537; *Macdonald v. Bond*, 195 Ill. 128, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

- 623.** (c) Where the Agent Is Personally Bound. — See note 3.  
**625.** (e) Officers and Agents of Private Corporations. — See note 1.  
 (2) Attorneys — Matters Arising in the Cause. — See note 2.  
**627.** But They Have No General Authority. — See note 1.  
 Submission Must Be Formal One. — See note 3.  
**628.** (3) Executors and Administrators — General Rule. — See note 2.  
**631.** (8) Public Officers. — See note 4.  
**633.** II. THE ARBITRATOR — 1. Defined. — See note 1.  
**2. Who May Be an Arbitrator — a. GENERAL RULE. — See note 2.**  
**634.** b. MUST HAVE NO INTEREST. — See note 1.  
**635.** See notes 1, 2.  
**636.** c. MUST NOT BE BIASED. — See note 1.  
**637.** See note 1.  
 d. MUST NOT BE A RELATIVE. — See note 2.

**623.** 3. When Agent Personally Bound. — Macdonald v. Bond, 195 Ill. 128, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

**625.** 1. Treasurer Controlling Business. — Although a by-law provides that the president shall control the business and property of the corporation, an arbitration entered into by the treasurer, who exercises entire control of the property, will be binding on the corporation. Remington Paper Co. v. London Assur. Corp., 12 N. Y. App. Div. 218.

**2. Authority of Attorneys. —** Gregory v. Pike, 94 Me. 27. But see King v. King, 104 La. 420.

In Pennsylvania it is held that an attorney cannot bind his client, without his knowledge or consent, by the submission of an action in ejectment to arbitrators. Lew v. Nolan, 8 Pa. Dist. 531.

**A District Attorney of the United States** has authority, in a proceeding by the United States to condemn land, to submit to an arbitration. Judson v. U. S., (C. C. A.) 120 Fed. Rep. 637.

**627.** 1. Authority Limited to Lis Pendens. — Stinerville, etc., Stone Co. v. White, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 314; Millsaps v. Estes, 134 N. Car. 486.

**3. Formal Submission Necessary. —** King v. King, 104 La. 420.

**628.** 2. District of Columbia v. Bailey, 171 U. S. 161; McLeod v. Graham, 132 N. Car. 473; Unterrainer v. Seelig, 13 S. Dak. 148. See also the title EXECUTORS AND ADMINISTRATORS.

**631.** 4. Officers of United States. — The La Nina, (C. C. A.) 75 Fed. Rep. 513; Judson v. U. S., (C. C. A.) 120 Fed. Rep. 637.

**County Commissioners. —** Myers v. Gibson, 147 Ind. 457.

**Commissioners of the District of Columbia** have no power to make a common-law submission in respect to a claim against the district. District of Columbia v. Bailey, 171 U. S. 161.

**633.** 1. Mobile v. Wood, 95 Fed. Rep. 537, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 633.

**2. Employee of a Party. —** Story v. De Armond, 179 Ill. 510. See also Goodwin v. Merchants, etc., Mut. Ins. Co., 118 Iowa 606.

**Submission to Parties' Attorneys. —** Frankfurth v. Steinmeyer, 113 Wis. 200, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 633-637.

**Ecclesiastical Courts. —** Ecclesiastical courts

may act as arbitrators. Poggenburg v. Conniff, 67 S. W. Rep. 845, 23 Ky. L. Rep. 2463.

**Arbitrators Residents. —** A statute requiring insurance arbitrators to be residents of the county for one year prior to loss is constitutional. Germania Ins. Co. v. Cincinnati, etc., Packet Co., 7 Ohio Dec. 571.

**634.** 1 Continental Ins. Co. v. Vallandigham, 76 S. W. Rep. 22, 25 Ky. L. Rep. 468; Christianson v. Norwich Union F. Ins. Soc., 84 Minn. 539; Produce Refrigerating Co. v. Norwich Union F. Ins. Soc., 91 Minn. 210; Frankfurth v. Steinmeyer, 113 Wis. 200, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 634.

**Secret Interest Vitiates Award. —** Insurance Co. of North America v. Hegewald, 161 Ind. 631; Kaiser v. Hamburg-Bremen F. Ins. Co., 59 N. Y. App. Div. 525.

**635.** 1. Frankfurth v. Steinmeyer, 113 Wis. 200, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 635.

**2. Mere Indebtedness. —** Mather v. Day, 106 Mich. 371.

**Matters Not Amounting to Bias. —** The fact that an umpire has, in a similar case, given evidence on behalf of one of the parties, does not render him incompetent and biased. In re Haigh, (1896) 1 Q. B. 649.

Prior service of an arbitrator in a similar capacity does not render him incompetent. Van Winkle v. Continental F. Ins. Co., 55 W. Va. 286.

An appraiser who has acted in the same capacity on similar occasions is not thereby rendered incompetent or interested as a matter of law, but that is a question of fact for the jury. Meyerson v. Hartford F. Ins. Co., (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 286.

**636.** 1. Hall v. Western Assur. Co., 133 Ala. 637; Insurance Co. of North America v. Hegewald, 161 Ind. 631; Aetna F. Ins. Co. v. Davis, (Ky. 1900) 55 S. W. Rep. 705; New York Mut. Sav., etc., Assoc. v. Manchester F. Assur. Co., 94 N. Y. App. Div. 104; Frankfurth v. Steinmeyer, 113 Wis. 200, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 636.

**Former Service No Disqualification. —** Stemmer v. Scottish Union, etc., Ins. Co., 33 Oregon 74; Hickerson v. Insurance Companies, 96 Tenn. 193.

**637.** 1. Frankfurth v. Steinmeyer, 113 Wis. 200, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 637.

**2. Family Relationship, Etc. —** Produce Re-

**637.** *e.* WAIVER OF OBJECTIONS. — See notes 3, 4.

**638.** 4. Duties of Arbitrator — *a.* ARBITRATOR MUST ACT UPRIGHTLY. — See note 4.

**639.** *b.* MUST ACT AS AGENT OF BOTH PARTIES. — See note 2.

*c.* OATH OF ARBITRATOR — At Common Law. — See note 3.

The Statutes of the Various States. — See note 4.

**640.** See note 1.

**641.** No Particular Form of Oath Required. — See note 1.

*d.* ARBITRATORS MUST ALL ACT TOGETHER — (1) *General Rule.*

— See note 3.

**642.** (2) *Refusal of Arbitrator to Act.* — See note 1.

**643.** *e.* ARBITRATORS MUST ALL JOIN IN THE AWARD — (1) *General Rule.* — See note 6.

**645.** (2) *Rule in Public Matters.* — See note 2.

(3) *When Majority Award Sufficient.* — See note 3.

frigerating Co. v. Norwich Union F. Ins. Soc., 91 Minn. 210.

An award will be set aside when the umpire, who is appointed over the objection of a party, is related to the wife of the other party to the submission. *Stinson v. Davis*, (Ky. 1899) 50 S. W. Rep. 550.

**637.** 3. Waiver of Objections. — *Robertson v. Lion Ins. Co.*, 73 Fed. Rep. 928; *Southern Live Stock Ins. Co. v. Benjamin*, 113 Ga. 1088; *Story v. De Armond*, 179 Ill. 510; *Macdonald v. Bond*, 195 Ill. 128; *Seaton v. Kendall*, 61 Ill. App. 289; *Produce Refrigerating Co. v. Norwich Union F. Ins. Soc.*, 91 Minn. 210; *Stemmer v. Scottish Union, etc., Ins. Co.*, 33 Oregon 74, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 637; *Graham v. Bates*, (Tenn. Ch. 1898) 45 S. W. Rep. 465; *Frankfurth v. Steinmeyer*, 113 Wis. 200, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 637.

4. Objection Must Be Prompt. — *Allen v. Hickam*, 156 Mo. 58, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 637; *Frankfurth v. Steinmeyer*, 113 Wis. 200, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 637.

**638.** 4. *Hall v. Western Assur. Co.*, 133 Ala. 637; *Orme v. Burney*, 95 Ga. 418; *Insurance Co. of North America v. Hegewald*, 161 Ind. 631; *Read v. State Ins. Co.*, 103 Iowa 307, 64 Am. St. Rep. 180; *Levine v. Lancashire Ins. Co.*, 66 Minn. 138; *Produce Refrigerating Co. v. Norwich Union F. Ins. Soc.*, 91 Minn. 210; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502; *Kiernan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 190; *Kaiser v. Hamburg-Bremen F. Ins. Co.*, 59 N. Y. App. Div. 525; *Grosvenor v. Flint*, 20 R. I. 21; *Hickerson v. Insurance Companies*, 96 Tenn. 193; *Royal Ins. Co. v. Parlin, etc., Co.*, 12 Tex. Civ. App. 572; *Consolidated Water Power Co. v. Nash*, 109 Wis. 490; *Bartlett v. L. Bartlett, etc., Co.*, 116 Wis. 450.

**Proof of Misfeasance or Malfeasance of Arbitrators.** — *Barnard v. Lancashire Ins. Co.*, (C. C. A.) 101 Fed. Rep. 36.

**639.** 2. *Hall v. Western Assur. Co.*, 133 Ala. 637; *Produce Refrigerating Co. v. Norwich Union F. Ins. Soc.*, 91 Minn. 210; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502; *Grosvenor v. Flint*, 20 R. I. 21; *Frankfurth v. Steinmeyer*, 113 Wis. 200.

3. At Common Law Oath Not Essential. — *Gardner v. Newman*, 135 Ala. 522; *Southern*

*Live Stock Ins. Co. v. Benjamin*, 113 Ga. 1088; *Hassenpflug v. Rice*, 9 Ohio Dec. (Reprint) 206, 11 Cinc. L. Bul. 200, affirmed 45 Ohio St. 377.

4. Oath — Statutes — *Louisiana.* — *Mestier v. A. Chevalier Pavement Co.*, 108 La. 562.

**640.** 1. *Georgia.* — *Southern Live Stock Ins. Co. v. Benjamin*, 113 Ga. 1088.

*Illinois.* — *Story v. De Armond*, 179 Ill. 510.

*New York.* — Under a common-law submission the statute requiring an oath does not apply. *Britton v. Hooper*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 388.

*Ohio.* — *Bradstreet v. Pross*, 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117.

**641.** 1. Form of Oath. — The oath administered must follow the statute. *Sisson v. Pittman*, 113 Ga. 166.

3. Rule as to Arbitrators Acting Together. — *Caledonian Ins. Co. v. Traub*, 83 Md. 524; *Christianson v. Norwich Union F. Ins. Soc.*, 84 Minn. 530, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 641.

**Though Majority Award Sufficient, All Must Consult.** — *British America Assur. Co. v. Daragh*, (C. C. A.) 128 Fed. Rep. 890.

**642.** 1. Refusal After Submission. — The resignation of an arbitrator after the award has been returned does not affect the validity of it. *Eisenberg v. Stuyvesant Ins. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 463.

**Where a Majority Award Is Sufficient, Etc.** — *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337.

**643.** 6. Rule as to Arbitrators Joining in the Award. — *United Kingdom Mut. Steamship Assur. Assoc. v. Houston*, (1896) 1 Q. B. 567; *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337; *Morgan v. Merchants Co-operative F. Ins. Assoc.*, 52 N. Y. App. Div. 61, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 643.

**645.** 2. Matters of Public Nature. — *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337; *Republic of Colombia v. Cauca Co.*, 190 U. S. 524; *Morgan v. Merchants Co-operative F. Ins. Assoc.*, 52 N. Y. App. Div. 61.

**Judges.** — It is not necessary for all of the judges of the Chancery Court of Appeals to be present at the hearing of a case to render the judgment valid. *Cowan v. Murch*, 97 Tenn. 590, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 645.

3. *Greenville County v. Spartanburg County*,

**647.** *f.* ARBITRATORS MUST HEAR THE PARTIES IN PRESENCE OF EACH OTHER — (1) *General Rule.* — See note 1.

**650.** *g.* ARBITRATORS MUST GIVE NOTICE OF THE HEARING TO BOTH PARTIES — (1) *Generally* — (a) *Rule in the United States.* — See notes 2, 3.

**651.** *Sufficiency of Notice.* — See note 1.

**653.** (2) *When Notice Is Not Required.* — See note 1.

**654.** (3) *Waiver of Notice.* — See note 1.

**655.** See note 1.

*h.* THE ARBITRATORS MUST HEAR ALL THE EVIDENCE — (1) *General Rule.* — See note 4.

**658.** 5. Powers of the Arbitrator in the Proceedings — *a.* ARBITRATOR CONTROLS THE PROCEEDINGS. — See note 2.

**659.** *b.* POWER TO ENFORCE THE ATTENDANCE OF WITNESSES. — See note 2.

*c.* POWER TO ADMINISTER OATH TO WITNESSES — At the Common Law. — See notes 3, 4.

*Order Requiring Witnesses to Be Sworn.* — See note 5.

62 S. Car. 105, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 645.

**Where Submission Allows Majority Award.** — The submission providing that a majority decision shall be the unanimous decision, an award signed by two of the three arbitrators is sufficient. *Witz v. Tregallas*, 82 Md. 351.

**647.** 1. *Couch v. Harrison*, 68 Ark. 580; *Hewitt v. Reed City*, 124 Mich. 8, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 646; *Redner v. New York F. Ins. Co.*, 92 Minn. 306; *Rand v. Peel*, 74 Miss. 307, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 647; *Snodgrass v. Morrison*, 16 Lanc. L. Rev. 158; *Phoenix Ins. Co. v. Moore*, (Tex. Civ. App. 1898) 46 S. W. Rep. 1131; *Brown v. Farnandis*, 27 Wash. 236, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 646; *McDonald v. Lewis*, 18 Wash. 300; *Frankfurth v. Steinmeyer*, 113 Wis. 200.

An award is bad where one of the parties is absent by reason of representations made by the other party. *Alexander v. Bank*, 3 Lanc. L. Rev. 354.

**Receiving Evidence in Absence of One or Both Parties.** — In holding a private or *ex parte* meeting with one of the parties, an arbitrator is guilty of an act which is a sufficient ground for setting the award aside. *Insurance Co. of North America v. Hegewald*, 161 Ind. 631.

**Umpire Hearing One Party in Absence of the Other Vitiates the Award.** — *Frederic v. Margwarth*, 200 Pa. St. 156.

**Representation by Attorney Refused — Award Valid.** — *Gardner v. Newman*, 135 Ala. 522.

**650.** 2. *Noble v. Grandin*, 125 Mich. 383.

**3. Necessity of Notice.** — *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589; *Young v. Wells Glass Co.*, 187 Ill. 631, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650; *Macdonald v. Bond*, 195 Ill. 128; *Noble v. Grandin*, 125 Mich. 383; *Stout v. Phoenix Assur. Co.*, 65 N. J. Eq. 566; *Slater v. La Grande Light, etc., Co.*, 43 Oregon 131; *Snodgrass v. Morrison*, 16 Lanc. L. Rev. 158; *Phoenix Ins. Co. v. Moore*, (Tex. Civ. App. 1898) 46 S. W. Rep. 1131.

**Attorneys Present — Notice Unnecessary.** — *Mississippi Cotton Oil Co. v. Buster*, (Miss. 1904) 36 So. Rep. 146.

**651.** 1. *Remington Paper Co. v. London Assur. Co.*, 12 N. Y. App. Div. 218; *Slater v. La Grande Light, etc., Co.*, 43 Oregon 131.

**The Burden of Proof** is on the party setting up a failure of notice. *Kaiser v. Hamburg-Bremen F. Ins. Co.*, 59 N. Y. App. Div. 525.

**653.** 1. *Vincent v. German Ins. Co.*, 120 Iowa 272.

**Appraisement of Property under Inspection.** — *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589.

**654.** 1. *Vincent v. German Ins. Co.*, 120 Iowa 272.

**655.** 1. *Couch v. Harrison*, 68 Ark. 580, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655; *Macdonald v. Bond*, 96 Ill. App. 116.

**4.** *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589; *In re Connor*, 128 Cal. 279; *Insurance Co. of North America v. Hegewald*, 161 Ind. 631; *Christianson v. Norwich Union F. Ins. Soc.*, 84 Minn. 530, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655; *Redner v. New York F. Ins. Co.*, 92 Minn. 306; *Stemmer v. Scottish Union, etc., Ins. Co.*, 33 Oregon 74, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655; *McDonald v. Lewis*, 18 Wash. 300; *Van Winkle v. Continental F. Ins. Co.*, 55 W. Va. 286.

**658.** 2. **Hearing Counsel.** — It is within the sound discretion of the arbitrators to hear or refuse to hear counsel. *Pennsylvania Iron Works Co. v. East St. Louis Ice, etc., Co.*, 96 Mo. App. 563.

**659.** 2. *Bryant v. Levy*, 52 La. Ann. 1649. **Refusal to Testify Before, Not Contempt.** — *Brandt v. Chester, etc., R. Co.*, 8 Pa. Dist. 583.

**3.** *Bryant v. Levy*, 52 La. Ann. 1649; *Hasenpflug v. Rice*, 9 Ohio Dec. (Reprint) 206, 11 Cinc. L. Bul. 200; *Rounds v. Aiken Mfg. Co.*, 58 S. Car. 299, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 659.

**4.** *Rounds v. Aiken Mfg. Co.*, 58 S. Car. 299, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 659.

**5. Parties May Waive Oath.** — *In re Connor*, 128 Cal. 279; *Bryant v. Levy*, 52 La. Ann. 1649; *O'Neill v. Clark*, 57 Neb. 760; *Rounds v. Aiken Mfg. Co.*, 58 S. Car. 299.

**660.** Statutory Powers of Arbitrators. — See note 2.

**661.** *d.* POWER TO ADMIT OR REJECT EVIDENCE — (2) *The Rule in the United States.* — See note 1.

(3) *Arbitrator's Decision Is Final.* — See note 2.

**665.** *f.* POWER TO ADJOURN THE HEARING. — See note 3.

**667.** *h.* WAIVER OF IRREGULARITIES IN THE PROCEEDINGS. — See notes 3, 4.

**669.** After an Award Is Made and Satisfied. — See note 1.

**6.** Authority of the Arbitrator — *a.* GENERAL RULE — (1) *Source of Authority.* — See note 2.

(2) *Must Not Exceed His Powers.* — See note 3.

**671.** (3) *May Determine Incidental Matters.* — See note 1.

**672.** See note 1.

*b.* ARBITRATOR IS JUDGE OF LAW AND FACT — (1) *General Rule.*

— See note 2.

**674.** Whether Arbitrator May Disregard Rules of Law. — See note 2.

**676.** (3) *May Refer Question of Law to the Court.* — See note 3.

**681.** *c.* POWERS OF THE ARBITRATOR IN PARTICULAR MATTERS —

(5) *Awards in Partnership Cases — Directing a Dissolution.* — See note 1.

Wide Discretion Vested in Arbitrator. — See note 3.

**685.** *e.* AUTHORITY OVER STRANGERS TO THE SUBMISSION — (1) *Directing a Party to Do Act Towards Stranger.* — See note 2.

**687.** *f.* DELEGATION OF HIS AUTHORITY BY THE ARBITRATOR — (1) *General Rule — May Not Delegate His Authority.* — See note 1.

**660.** 2. Provisions in United States. — Arbitrators are empowered to administer oaths, but the parties may waive the swearing of witnesses. *In re Connor*, 128 Cal. 279.

**661.** 1. *Rounds v. Aiken Mfg. Co.*, 58 S. Car. 299, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 661.

2. *Caledonian R. Co. v. Turcan*, (1898) A. C. 256; *Waterman v. Merrow*, 94 Me. 237; *Stemmer v. Scottish Union, etc., Ins. Co.*, 33 Oregon 74.

**665.** 3. *Caldwell v. Mutual Reserve Fund L. Assoc.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 510.

**667.** 3. *Christenson v. Carleton*, 69 Vt. 91.

4. *United States.* — *Judson v. U. S.*, (C. C. A.) 120 Fed. Rep. 637.

*Alabama.* — *Gardner v. Newman*, 135 Ala. 522; *Dunham Lumber Co. v. Holt*, 123 Ala. 336.

*Georgia.* — *McMillan v. Allen*, 98 Ga. 405.

*Illinois.* — *Seaton v. Kendall*, 61 Ill. App. 289.

*Louisiana.* — *Bryant v. Levy*, 52 La. Ann. 1649.

*Massachusetts.* — *Farrell v. German-American Ins. Co.*, 175 Mass. 340.

*Missouri.* — *Allen v. Hickam*, 156 Mo. 58, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 667; *Pennsylvania Iron Works Co. v. East St. Louis Ice, etc., Co.*, 96 Mo. App. 653.

*Nebraska.* — *O'Neill v. Clark*, 57 Neb. 760; *Burkland v. Johnson*, 50 Neb. 858.

*New York.* — *Britton v. Hooper*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 388.

*South Carolina.* — *Rounds v. Aiken Mfg. Co.*, 58 S. Car. 299.

**669.** 1. *Judson v. U. S.*, (C. C. A.) 120 Fed. Rep. 637.

2. *Anderson v. Miller*, 108 Ala. 171.

3. *Mobile v. Wood*, 95 Fed. Rep. 537, quoting

2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 669; *In re Connor*, 128 Cal. 279; *Cullen v. Shipway*, 78 N. Y. App. Div. 130; *Jacob v. Weissner*, 207 Pa. St. 484; *McCord v. Flynn*, 111 Wis. 78.

**671.** 1. *Power Limited to the Precise Question Submitted.* — *Mobile v. Wood*, 95 Fed. Rep. 537, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 671.

**672.** 1. *Cannot Do General Justice.* — *Mobile v. Wood*, 95 Fed. Rep. 537, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 672.

2. *Allen v. Hickam*, 156 Mo. 58, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 672; *Barnum v. Backman*, 5 Luz. Leg. Reg. (Pa.) 145; *School Dist. No. 5 v. Sage*, 13 Wash. 352; *McCord v. Flynn*, 111 Wis. 78; *Bartlett v. L. Bartlett, etc., Co.*, 116 Wis. 450.

**674.** 2. *Authorities in the United States.* — *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337; *In re Connor*, 128 Cal. 279; *Mayberry v. Mayberry*, 121 N. Car. 248; *Henry v. Hilliard*, 120 N. Car. 479; *School Dist. No. 5 v. Sage*, 13 Wash. 352; *McCord v. Flynn*, 111 Wis. 78.

**676.** 3. *English Arbitration Act of 1889.* — If the application for a special case is frivolous, it is proper for the arbitrator to deny it. An arbitrator cannot, after his award, state a case for the opinion of the court under this act, nor can the court order him so to do. *In re Palmer*, 77 L. T. N. S. 350.

**681.** 1. *Awarding Dissolution of Partnership.* — *Vawdrey v. Simpson*, (1896) 1 Ch. 166.

3. *Wide Discretion.* — *Edmundson v. Wilson*, 108 Ala. 118.

**685.** 2. *Turner v. Stewart*, 51 W. Va. 493.

**687.** 1. *Blakeston v. Wilson*, 14 Manitoba 271.

*Award Based on Opinion of Stranger.* — *David Harley Co. v. Barnfield*, 22 R. I. 267.

**687.** (2) *May Take Opinion on Question of Fact.* — See note 3.

**693.** 7. *Power of the Arbitrator over the Costs* — *b.* *RULE IN THE UNITED STATES* — (1) *Generally* — View that Arbitrator Has No Implied Power to Award Costs. — See note 3.

**696.** 8. *Duration of the Arbitrator's Authority* — *a.* *WHERE TIME LIMITED BY THE SUBMISSION.* — See note 4.

**699.** *c.* *HIS AUTHORITY IS ENDED BY MAKING THE AWARD* — Cannot Alter Award in Accordance with Changed Views. — See note 1.

**700.** See note 1.

Cannot Correct Mistakes in Award. — See note 2.

**702.** 9. *The Arbitrator's Right to Remuneration* — *a.* *RULE IN ENGLAND* — Lien for Fees upon Award, Etc. — See note 3.

**704.** 10. *The Arbitrator as a Witness* — *a.* *GENERAL RULE* — Cannot Be Compelled to Testify in Correction or Explanation of Award. — See note 3.

**706.** Evidence Admissible to Sustain, but Not Generally to Impeach, Award. — See notes 1, 2.

*b.* *MAY TESTIFY AS TO THE PROCEEDINGS.* — See note 5.

**707.** 11. *Liability of the Arbitrator* — *a.* *LIABILITY FOR MISCONDUCT* — Want of Skill or Negligence. — See note 3.

**711.** 12. *The Umpire* — *a.* *UMPIRE AND THIRD ARBITRATOR* — An Umpire. — See note 1.

**714.** *b.* *APPOINTMENT OF UMPIRE* — (3) *When Appointment May Be Made* — Where the Submission Contains No Special Provision. — See note 3.

**715.** *c.* *POWERS AND DUTIES OF THE UMPIRE* — (1) *General Rule* — Must Use His Own Judgment. — See note 2.

**687.** 3. *Taking Opinion on Question of Fact.* — Though an arbitrator may lawfully take the opinion of a third person and adopt it as his own, yet if the conclusion which he adopts is not the result of any judgment or mental operation of his own, but a mere yielding to a judgment of the others, his decision is not binding as an award, because the parties are entitled to receive his opinion and not the opinion of some one selected by him. *David Harley Co. v. Barnefield*, 22 R. I. 267.

**693.** 3. *McLaughlin v. Old Colony R. Co.*, 166 Mass. 260.

**696.** 4. *Where Time Within Which Award Is to Be Made Is Specified.* — *Anderson v. Miller*, 108 Ala. 171; *Jordan v. Lobe*, 34 Wash. 48, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 696.

*Day for Award Fixed in Submission.* — See *Eifert v. Wolf*, (Ky. 1897) 41 S. W. Rep. 6, holding that a short delay in returning the award, under a submission of a pending suit where the award was to be made the judgment of the court, was not sufficient grounds on which to reverse the judgment on the award.

**699.** 1. *In re Stringer*, (1901) 1 K. B. 105; *Edmundson v. Wilson*, 108 Ala. 118; *Mand v. Patterson*, 19 Ind. App. 619; *Ezzell v. Rowland Lumber Co.*, 130 N. Car. 205, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 698 [699]; *Hartley v. Henderson*, 189 Pa. St. 283, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 698, 699.

**700.** 1. *Arbitrator Cannot Alter Award.* — *In re Stringer*, (1901) 1 K. B. 105; *Mand v. Patterson*, 19 Ind. App. 619.

**2.** *Errors in Award Cannot Be Corrected.* — *McCord v. Flynn*, 111 Wis. 78.

**702.** 3. *Several Cases Referred, Compensation*

*in Each.* — *Evans v. Hart*, 10 Lanc. Bar (Pa.) 77.

**704.** 3. *The Oral Testimony of the Arbitrators.* — *Corrigan v. Rockefeller*, 67 Ohio St. 354.

**706.** 1. *Manson v. Wilcox*, 140 Cal. 206; *Story v. De Armond*, 179 Ill. 510, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 705 [706]; *Seaton v. Kendall*, 171 Ill. 410; *Corrigan v. Rockefeller*, 67 Ohio St. 354; *Jensen v. Deep Creek Farm, etc., Co.*, 27 Utah 79; *Van Winkle v. Continental F. Ins. Co.*, 55 W. Va. 286.

**2.** *Fraud, Corruption, or Partiality.* — *Levine v. Lancashire Ins. Co.*, 66 Minn. 138.

**5.** *Testimony as to Proceedings on Reference.* — *Jensen v. Deep Creek Farm, etc., Co.*, 27 Utah 79.

**707.** 3. *No Liability for Want of Skill.* — *Chambers v. Goldthorpe*, (1901) 1 K. B. 624.

**711.** 1. *Whether Award Must Show that Arbitrators Could Not Agree.* — In *Manufacturers, etc., F. Ins. Co. v. Mullen*, 48 Neb. 620, it was held that where the submission provided for two arbitrators by whom an umpire was to be chosen to act on matters of difference between the arbitrators, but did not authorize one arbitrator and such umpire to make an award, an award signed by one arbitrator and the umpire was invalid where it did not show any difference between the two arbitrators.

*When the Arbitrators Agree in Part* they should refer to the umpire only the points of difference between them, the terms of the submission so directing. *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 379.

**714.** 3. *Appointment Before Disagreement.* — The appointment of the umpire before the arbitrators have disagreed renders the proceeding void. *Christenson v. Carleton*, 69 Vt. 91.

**715.** 2. See *Strome v. London Assur.*

**717.** (2) *Must Give Notice of Hearing.* — See note 2.

**719.** (4) *When Umpire's Authority Begins and Ends* — Where No Time Is Limited. — See note 1.

**720.** III. THE AWARD — 2. Formal Requisites of Award — *a.* AWARD — HOW MADE — (1) *General Rule: Directions of Submission Must Be Followed.* — See note 1.

**722.** Oral Award. — See note 3.

**723.** (3) *Form of the Award.* — See note 4.

**724.** See note 1.

**725.** (4) *What Award Must, and Need Not, State* — The Award Must Contain the Actual Decision. — See note 4.

**726.** Separate Award upon Different Items. — See note 4.

**727.** Findings of Fact and of Law — Evidence. — See note 1.

(5) *Waiver of Requirements of the Submission.* — See note 3.

*b.* PUBLICATION OF THE AWARD — Where the Submission So Requires. —

See note 4.

**728.** What Constitutes Publication — As to Its Validity. — See note 1.

**730.** *c.* DELIVERY OF THE AWARD — Delivery by Day Specified. — See note 2.

**731.** Delivery of Award in Duplicate. — See note 2.

*d.* SIGNING THE AWARD — Where There Are Several Arbitrators. — See note 4.

Signing on Day Other than That Agreed upon. — See note 5.

Corp., 20 N. Y. App. Div. 571, holding that the umpire should consider the appraisements of the arbitrators in arriving at his decision. See also Schmitt v. Boston Ins. Co., 82 N. Y. App. Div. 234.

**717.** 2. Schmitt v. Boston Ins. Co., 82 N. Y. App. Div. 234; Slater v. La Grande Light, etc., Co., 43 Oregon 131; Coons v. Coons, 95 Va. 434, 64 Am. St. Rep. 804.

**719.** 1. Authority Does Not Begin until Disagreement. — Caledonian Ins. Co. v. Traub, 83 Md. 524.

**720.** 1. Award Must Conform to Directions of Submission. — Continental Ins. Co. v. Garrett, (C. C. A.) 125 Fed. Rep. 589; Jordan v. Lobe, 34 Wash. 48.

**722.** 3. Oral Award Where Neither Submission Nor Statute Requires Writing. — Sisson v. Pittman, 113 Ga. 166; Mand v. Patterson, 19 Ind. App. 619. See also Heist v. Kohler, 10 Lanc. L. Rev. 140.

*When Award Must Be in Writing.* — If a writing is necessary to pass title to the thing in controversy, an award disposing of such title to be valid must be in writing. Brown v. Mize, 119 Ala. 10; Wilmington Water Power Co. v. Evans, 166 Ill. 548.

*Oral Award as to Boundary Lines.* — Miller v. Miller, 99 Va. 125, 30 Va. Sup. Ct. 34.

**723.** 4. No Particular Form of Words Necessary. — Kentucky Chair Co. v. Rochester German Ins. Co., (Ky. 1899) 49 S. W. Rep. 780; Masterson v. Masterson, 60 S. W. Rep. 301, 22 Ky. L. Rep. 1193.

**724.** 1. The Arbitrator Need Not Recite His Authority. — Shaw v. Wise, 166 Mass. 433.

*Recital of Presence of Parties Not Necessary.* — Macdonald v. Bond, 195 Ill. 128.

*Recital that Notice Was Given Unnecessary.* — Hassenpflug v. Rice, 9 Ohio Dec. (Reprint) 206, 11 Cinc. L. Bul. 200.

**725.** 4. Award Must Contain the Decision, but Not the Grounds Therefor. — *In re Connor*,

128 Cal. 279; Henry v. Hilliard, 120 N. Car. 479; Mayberry v. Mayberry, 121 N. Car. 248; Graham v. Bates, (Tenn. Ch. 1898) 45 S. W. Rep. 465.

**726.** 4. Separate Award upon Different Items of Account. — Koerner v. Leathe, 149 Mo. 361; Groff v. Musser, 3 S. & R. (Pa.) 262; Graham v. Bates, (Tenn. Ch. 1898) 45 S. W. Rep. 465.

*Under a General Submission of All Demands.* — Patrick v. Batten, 123 Mich. 203; Jensen v. Deep Creek Farm, etc., Co., 27 Utah 79.

**727.** 1. How Findings of Fact and Conclusions of Law Should Be Stated. — O'Neill v. Clark, 57 Neb. 760.

But a failure to state the findings separately only renders the award voidable and not void. Burkland v. Johnson, 50 Neb. 858.

**3.** Waiver of Requirements of Submission. — London, etc., F. Ins. Co. v. Storrs, (C. C. A.) 71 Fed. Rep. 120; Burkland v. Johnson, 50 Neb. 858; Remington Paper Co. v. London Assur. Corp., 12 N. Y. App. Div. 218.

**4.** Publication of Award — General Rule. — Anderson v. Miller, 108 Ala. 171.

*Parties Need Not Be Present.* — Wiley v. Heard, 1 Tex. App. Civ. Cas., § 1203.

**728.** 1. What Constitutes Publication. — Rounds v. Aiken Mfg. Co., 58 S. Car. 299.

*Arbitrators' Declaring Decision and Notifying Parties a Publication.* — Mand v. Patterson, 19 Ind. App. 619.

**730.** 2. Requirement for Delivery by Day Specified. — Anderson v. Miller, 108 Ala. 171.

*Submission Strictly Followed in Delivery.* — Anderson v. Miller, 108 Ala. 171.

**731.** 2. Delivery of Award in Duplicate. — See McMillan v. Allen, 98 Ga. 405.

**4.** Award Separately Signed. — It is immaterial that the arbitrators did not sign the award at the same time and place. Mississippi Cotton Oil Co. v. Buster, (Miss. 1904) 36 So. Rep. 146.

**5.** Mississippi Cotton Oil Co. v. Buster, (Miss. 1904) 36 So. Rep. 146.



- 731.** *c.* RETURN OF THE AWARD INTO COURT. — See note 6.
- 732.** **3. The Award Must Be Coextensive with Terms of Submission —**
- a.* MUST DECIDE ALL MATTERS SUBMITTED — (1) *General Rule.* — See note 2.
- 735.** *Determination by Implication.* — See note 1.
- 736.** (3) *Need Decide Only Matters Presented to the Arbitrators.* — See note 3.
- (4) *Presumption that All Matters Submitted Are Decided.* — See note 6.
- 738.** See note 1.
- The Burden of Proof.* — See note 3.
- b.* MUST NOT DECIDE MATTERS WHICH WERE NOT SUBMITTED — (1) *General Rule.* — See note 4.
- 740.** (2) *Presumption that Outside Matters Are Not Decided.* — See note 3.
- 741.** **4. An Award in Part Bad May Be Good in Part — a. GENERAL RULE.** — See note 6.
- 742.** *Arbitrators Exceeding Their Authority.* — See note 2.
- 746.** *b. WHEN NOT SEPARABLE — AWARD VOID.* — See note 1.
- 750.** **5. The Award Must Be Final — a. MEANING OF FINALITY.** — See note 1.

**731.** **6. Return of Award into Court — Statutes.** — In order for the award to be a lien, or to have an execution upon it, it must be returned into court. *Turner v. Stewart*, 51 W. Va. 493, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 731.

**732.** **2. All the Matters Submitted Must Be Decided.** — *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589; *Fooks v. Lawson*, 1 Marv. (Del.) 115; *Clark v. Goit*, 1 Kan. App. 345; *Hicks v. Magoun*, 38 N. Y. App. Div. 573; *American F. Ins. Co. v. Bell*, (Tex. Civ. App. 1903) 75 S. W. Rep. 319.

**735.** **1. Award Good if Matters Decided by Necessary Implication.** — *Witz v. Tregallas*, 82 Md. 351; *Jensen v. Deep Creek Farm, etc., Co.*, 27 Utah 79, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735.

**736.** **3.** *Houston, etc., R. Co. v. Newman*, 2 Tex. App. Civ. Cas., § 349.

**6. Presumption in Favor of Award.** — *Fooks v. Lawson*, 1 Marv. (Del.) 115; *Seaton v. Kendall*, 61 Ill. App. 289; *Witz v. Tregallas*, 82 Md. 351; *Stemmer v. Scottish Union, etc., Ins. Co.*, 33 Oregon 74; *Smith v. Clark*, 22 Tex. Civ. App. 485; *Jensen v. Deep Creek Farm, etc., Co.*, 27 Utah 79, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 736; *McCord v. Flynn*, 111 Wis. 78.

**738.** **1. Failure of Arbitrators to Decide All Matters Must Be Clearly Shown.** — *Jensen v. Deep Creek Farm, etc., Co.*, 27 Utah 79, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 738.

**3. Burden of Proof.** — *Witz v. Tregallas*, 82 Md. 351.

**4. Award Must Be Confined to Matters Submitted — Alabama.** — *Brown v. Mize*, 119 Ala. 17, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 738.

*New York.* — *Cullen v. Shipway*, 78 N. Y. App. Div. 130.

*Oregon.* — *Parrish v. Higinbotham*, 39 Oregon 600, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 738-741.

*Pennsylvania.* — *Somerset v. Ott*, 207 Pa. St.

539; *Holgate v. Chase*, 7 Luz. Leg. Reg. (Pa.) 178.

*South Carolina.* — *Rounds v. Aiken Mfg. Co.*, 58 S. Car. 299.

*West Virginia.* — *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 379.

*Wisconsin.* — *Bartlett v. L. Bartlett, etc., Co.*, 116 Wis. 450; *Consolidated Water Power Co. v. Nash*, 109 Wis. 490; *Frankfurth v. Steinmeyer*, 113 Wis. 200.

**740.** **3. Presumption that Extrinsic Matters Are Not Decided.** — *Falkingham v. Victorian Railways Com'r*, (1900) A. C. 452; *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337; *Seaton v. Kendall*, 171 Ill. 410, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 740; *Seaton v. Kendall*, 61 Ill. App. 289; *Stemmer v. Scottish Union, etc., Ins. Co.*, 33 Oregon 74, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 740; *Greenville County v. Spartanburg County*, 62 S. Car. 105; *Fire Assoc. v. Colgin*, (Tex. Civ. App. 1896) 33 S. W. Rep. 1004; *Liverpool, etc., Ins. Co. v. Colgin*, (Tex. Civ. App. 1896) 34 S. W. Rep. 291.

**Want of Technical Precision in Language of Award.** — *Parrish v. Higinbotham*, 39 Oregon 600.

**Matters Presented Decided Although Not in the Submission.** — *Huckestein v. Kaufman*, 173 Pa. St. 199.

**741.** **6. When Good and Bad Parts of Award Separable.** — *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337; *Brown v. Mize*, 119 Ala. 10; *Corrigan v. Rockefeller*, 10 Ohio Dec. 494; *Greenville County v. Spartanburg County*, 62 S. Car. 105; *Unterrainer v. Seelig*, 13 S. Dak. 152; *Graham v. Bates*, (Tenn. Ch. 1898) 45 S. W. Rep. 465.

**742.** **2.** *Unterrainer v. Seelig*, 13 S. Dak. 148.

**746.** **1. Good and Bad Parts Inseparable — Award Void in Toto.** — *Mobile v. Wood*, 95 Fed. Rep. 537, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 746.

**750.** **1. Rule that the Award Must Be Final.**

**751.** See note 1.

*b.* **CONDITIONAL AWARD.** — See note 2.

**755.** *g.* **PRESUMPTION AS TO FINALITY.** — See note 1.

**6. The Award Must Be Certain** — *a.* **GENERAL RULE** — **The Award Must Be Certain to a Common Intent.** — See note 2.

**757.** **Must Show Questions Decided, and How Decided.** — See notes 1, 2.

**758.** *b.* **MUST BE CERTAIN AS TO SUM AWARDED** — (1) *General Rule.* — See note 2.

**Where the Rule by Which Amount Is to Be Determined Is Stated.** — See note 3.

**762.** *e.* **CERTAINTY AS TO SUBJECT-MATTER** — (3) *Boundary Lines.* — See note 2.

**765.** *h.* **AWARD MADE CERTAIN BY EXTRINSIC AID.** — See note 4.

**766.** *i.* **WHEN AWARD WILL BE PRESUMED CERTAIN.** — See note 2.

**769.** **8. The Award Must Be Mutual** — *c.* **UNITED STATES RULE** — **RELEASES.** — See note 2.

**771.** **What Constitutes Mutuality.** — See note 1.

**773.** **10. How Far the Award Must Be Consistent and Reasonable** — *b.* **REASONABLENESS CANNOT BE INQUIRED INTO.** — See note 3.

**774.** **Excessive Award.** — See note 1.

**11. Construction of Awards Generally** — *a.* **GENERAL RULE** — **Modern Rule** — **Awards Construed Liberally.** — See notes 3, 4.

— *Hoit v. Berger-Crittenden Co.*, 81 Minn. 356, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 749, 755; *Hicks v. Magoun*, 38 N. Y. App. Div. 573; *Frankfurth v. Steinmeyer*, 113 Wis. 200.

**751.** **1. Arbitrators Leaving Ministerial Acts Unperformed.** — *Parker v. Dorsey*, 68 N. H. 181.  
**2. Rule as to Conditional Awards.** — *Rawlinson v. Shaw*, 124 Mich. 340.

**755.** **1. Rousseau v. Poitras**, 62 Ill. App. 103; *Hoit v. Berger-Crittenden Co.*, 81 Minn. 356, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 755.

**2. Award Must Be Certain to Common Intent.** — *Goldin v. Beall*, 107 Ga. 354; *Poggenburg v. Conniff*, 67 S. W. Rep. 845, 23 Ky. L. Rep. 2463; *Parker v. Dorsey*, 68 N. H. 181; *Hicks v. Magoun*, 38 N. Y. App. Div. 573; *Frankfurth v. Steinmeyer*, 113 Wis. 200.

**Certainty to a Common Intent** only is sufficient. *Brown v. Mize*, 119 Ala. 10.

**Rule as to Certainty Required Same as in Contracts.** — *Mather v. Day*, 106 Mich. 371.

**Awards Objected to for Uncertainty, but Sustained.** — *Seaton v. Kendall*, 61 Ill. App. 289.

**757.** **1. Cases Wherein Award Held Void for Uncertainty.** — *Georges v. Niess*, 70 Minn. 250; *Hicks v. Magoun*, 38 N. Y. App. Div. 573.

**2. Determination Certain.** — *Hoit v. Berger-Crittenden Co.*, 81 Minn. 356.

**758.** **2. Poggenburg v. Conniff**, 67 S. W. Rep. 845, 23 Ky. L. Rep. 2463.

**3. Indicating Rule or Principle of Calculation Sufficient.** — *Witz v. Tregallas*, 82 Md. 351.

**762.** **2. Certainty as to Boundary Lines.** — *Hayden v. Brown*, 33 Oregon 221.

**765.** **4. Jensen v. Deep Creek Farm, etc.**, Co., 27 Utah 79.

**766.** **2. When Award Presumed Certain.** — *Poggenburg v. Conniff*, 67 S. W. Rep. 845, 23 Ky. L. Rep. 2463, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 766; *Caldwell v. Brooks Elevator Co.*, 10 N. Dak. 575, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 766.

**769.** **2. Mutuality in Awards** — **Rule in United States.** — *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589.

**771.** **1. Turner v. Stewart**, 51 W. Va. 493.

**773.** **3. Rule as to Inquiry by Courts into Question of Reasonableness.** — *Board of Education v. Frank*, 64 Ill. App. 367; *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291; *Strome v. London Assur. Corp.*, 20 N. Y. App. Div. 571.

**774.** **1. Excessive Awards.** — *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337; *Insurance Co. of North America v. Hegewald*, 161 Ind. 631; *Hewitt v. Lehigh, etc.*, R. Co., 57 N. J. Eq. 511; *Ezzell v. Rowland Lumber Co.*, 130 N. Car. 205; *Stemmer v. Scottish Union, etc.*, Ins. Co., 33 Oregon 74; *Jolly v. Pittsburgh, etc.*, St. R. Co., 28 Pittsb. Leg. J. N. S. (Pa.) 376.

**Insufficient Award.** — *Strome v. London Assur. Corp.*, 20 N. Y. App. Div. 571; *Kaiser v. Hamburg-Bremen F. Ins. Co.*, 59 N. Y. App. Div. 525.

An inadequate award taken in connection with partiality of an arbitrator is a sufficient ground to set aside an award. *Royal Ins. Co. v. Parlin, etc.*, Co., 12 Tex. Civ. App. 572.

**3. Modern Rule** — **Liberal Construction of Awards.** — *Edmundson v. Wilson*, 108 Ala. 118; *Mand v. Patterson*, 19 Ind. App. 619; *Poggenburg v. Conniff*, 67 S. W. Rep. 845, 23 Ky. L. Rep. 2463; *Dobson v. Central R. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 582; *Corrigan v. Rockefeller*, 67 Ohio St. 354; *School Dist. No. 5 v. Sage*, 13 Wash. 352; *Van Winkle v. Continental F. Ins. Co.*, 55 W. Va. 286; *Montgomery v. American Cent. Ins. Co.*, 108 Wis. 146.

**4. Every Reasonable Presumption and Intendment Made in Favor of Awards** — *United States.* — *Fidelity, etc.*, Co. v. *St. Matthews Sav. Bank*, (C. C. A.) 104 Fed. Rep. 858; *Barnard v. Lancashire Ins. Co.*, (C. C. A.) 101 Fed. Rep. 36; *Williamson v. Liverpool, etc.*, Ins. Co., (C. C. A.) 122 Fed. Rep. 59; *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589.

*Alabama.* — *Edmundson v. Wilson*, 108 Ala.

**775.** To Be Construed in Light of the Submission. — See note 1.

b. AWARD SUSTAINED BY IMPLICATION. — See note 2.

**776.** 12. Mistake in the Award — a. GENERAL RULE — (1) *In England.*

— See notes 3, 4.

**777.** See note 1.

**778.** (2) *In United States* — (a) Award Generally Binding. — See note 1.

**780.** In Some Cases Awards Set Aside. — See note 2.

**781.** See notes 1, 2, 3.

(b) Mistakes of Fact. — See note 4.

**782.** Mistake Must Be Apparent and Prejudicial. — See note 2.

**783.** (c) Mistakes of Law. — See note 1.

**787.** b. QUALIFICATIONS OF THE RULE — (3) *Where the Arbitrator Expresses an Intention to Be Governed by Law.* — See note 2.

118; Georgia Home Ins. Co. v. Kline, 114 Ala. 366.

Georgia. — Southern Mut. Ins. Co. v. Turnley, 100 Ga. 301; Osborn, etc., Mfg. Co. v. Blanton, 109 Ga. 196.

Illinois. — Seaton v. Kendall, 171 Ill. 410, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 774; Macdonald v. Bond, 195 Ill. 128.

Iowa. — Vincent v. German Ins. Co., 120 Iowa 272.

Kentucky. — Ætna F. Ins. Co. v. Davis, (Ky. 1900) 55 S. W. Rep. 705.

Maryland. — Witz v. Tregallas, 82 Md. 351.

Minnesota. — Produce Refrigerating Co. v. Norwich Union F. Ins. Soc., 91 Minn. 210.

Nebraska. — Connecticut F. Ins. Co. v. O'Fallon, 49 Neb. 740.

North Dakota. — Caldwell v. Brooks Elevator Co., 10 N. Dak. 575.

South Carolina. — Greenville County v. Spartanburg County, 62 S. Car. 105.

Texas. — Kilgore v. North West Texas-Baptist Educational Soc., 89 Tex. 465.

Utah. — Jensen v. Deep Creek Farm, etc., Co., 27 Utah 79.

Virginia. — Coons v. Coons, 95 Va. 434, 64 Am. St. Rep. 804.

Washington. — School Dist. No. 5 v. Sage, 13 Wash. 352.

West Virginia. — Van Winkle v. Continental F. Ins. Co., 55 W. Va. 286.

Wisconsin. — Montgomery v. American Cent. Ins. Co., 108 Wis. 146.

Burden of Proof on Party Attacking Award. — Patrick v. Batten, 123 Mich. 203.

**775.** 1. Seaton v. Kendall, 171 Ill. 410.

2. Award Valid by Implication. — West v. Averill Grocery Co., 109 Iowa 488.

**776.** 3. Award Unreasonable or Against Law. — Caledonian R. Co. v. Turcan, (1898) A. C. 256; *In re* Montgomery, 78 L. T. N. S. 406.

4. Mistake of Fact. — Caledonian R. Co. v. Turcan, (1898) A. C. 256.

**777.** 1. Clear and Gross Mistakes Admitted by the Arbitrators. — Providence Washington Ins. Co. v. Board of Education, 49 W. Va. 379, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 777.

**778.** 1. Mistake in Award — General Tendency of Authorities in United States. — Robertson v. Lion Ins. Co., 73 Fed. Rep. 928; Republic of Colombia v. Cauca Co., 106 Fed. Rep. 337; Parsons v. Ambros, 121 Ga. 98; Ezzell v. Rowland Lumber Co., 130 N. Car. 205; Caldwell v. Brooks Elevator Co., 10 N. Dak. 575, citing 2

AM. AND ENG. ENCYC. OF LAW (2d ed.) 778; Huckestein v. Kaufman, 173 Pa. St. 199; Fredcrick v. Margwarth, 10 Kulp (Pa.) 53; Consolidated Water Power Co. v. Nash, 109 Wis. 490; McCord v. Flynn, 111 Wis. 78.

Decision of Engineers and Architects. — Elliott v. Missouri, etc., R. Co., (C. C. A.) 74 Fed. Rep. 707; Heidlinger v. Onward Constr. Co., (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 555.

**780.** 2. In Some Cases Awards Set Aside — Gross Mistakes of Law or Fact. — Bailey v. England, 1 Penn. (Del.) 12; Vincent v. German Ins. Co., 120 Iowa 272; Corrigan v. Rockefeller, 67 Ohio St. 354; Graham v. Bates, (Tenn. Ch. 1898) 45 S. W. Rep. 465.

**781.** 1. Where Mistake on Face of Award or Admitted by Arbitrator. — Blakeston v. Wilson, 14 Manitoba 271; Witz v. Tregallas, 82 Md. 351; Remington Paper Co. v. London Assur. Corp., 12 N. Y. App. Div. 218; Henry v. Hilliard, 120 N. Car. 479; Chester v. McIntyre, 13 Pa. Super. Ct. 545; Greenville County v. Spartanburg County, 62 S. Car. 105.

2. Mistakes Induced by Fraud of the Parties. — Mayberry v. Mayberry, 121 N. Car. 248.

3. What Must Be Shown by Party Alleging Mistake. — Remington Paper Co. v. London Assur. Corp., 12 N. Y. App. Div. 218.

4. Mistakes of Fact — General Rule. — Ezzell v. Rowland Lumber Co., 130 N. Car. 205.

Burden of Proof. — The burden of proof is on the party alleging that passion, corruption, or mistake influenced the award of the referee. Drown v. Hamilton, 68 N. H. 23.

**782.** 2. Mistake Must Be Apparent and Prejudicial. — Heidlinger v. Onward Constr. Co., (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 555; Happer v. Thomas, 5 Pa. Dist. 182; Bradstreet v. Pross, 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117; American F. Ins. Co. v. Bell, (Tex. Civ. App. 1903) 75 S. W. Rep. 319; School Dist. No. 5 v. Sage, 13 Wash. 352; Van Winkle v. Continental F. Ins. Co., 55 W. Va. 286.

**783.** 1. Mistakes of Law. — Dobson v. Central R. Co., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 582; Henry v. Hilliard, 120 N. Car. 479; Corrigan v. Rockefeller, 10 Ohio Dec. 494, 8 Ohio N. P. 281; School Dist. No. 5 v. Sage, 13 Wash. 352.

Errors of law, if they be upon questions doubtful in their nature, will not afford grounds for setting aside awards. Ætna F. Ins. Co. v. Davis, (Ky. 1900) 55 S. W. Rep. 705. See also Benton v. Singleton, 114 Ga. 548.

**787.** 2. Award Declaring Arbitrator's Inten-

**788.** *c.* WHEN EVIDENCE OF MISTAKE MAY BE ADMITTED — **Mistakes Not Apparent on Face of Award.** — See note 3.

**789.** See note 1.

*d.* EFFECT OF ACQUIESCENCE. — See note 3.

**790.** 13. Recommitment of the Award — *a.* POWER OF COURTS TO RECOMMIT. — See notes 1, 2.

**791.** *b.* WHEN AWARD WILL BE RECOMMITTED. — See notes 2, 3.

**792.** When the Award Is Good on Its Face. — See note 1.

**794.** 14. Effect of the Award — *a.* AWARD A FINAL JUDGMENT. — See note 5.

**tion to Decide According to Rules of Law.** — *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589; *Dobson v. Central R. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 582; *Mayberry v. Mayberry*, 121 N. Car. 248; *Bartlett v. L. Bartlett, etc., Co.*, 116 Wis. 450.

**788.** 3. In *Benton v. Singleton*, 114 Ga. 556, it was said that the uniform practice in Georgia "has been to listen to any meritorious attack upon an award, however innocent a countenance it might wear, and to receive all competent extrinsic evidence going to show that it would be unjust to allow the findings of the arbitrators to stand."

**789.** 1. When Mistake Not Apparent on Face of Award. — *Mayberry v. Mayberry*, 121 N. Car. 248; *Corrigan v. Rockefeller*, 67 Ohio St. 354.

3. Acquiescence. — *Bradstreet v. Pross*, 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117.

**790.** 1. *Blanton v. Littell*, 65 Ark. 76, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 790; *Goodwin v. Reg.*, 28 Can. Sup. Ct. 333, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 790.

2. In England. — *In re Stringer*, (1901) 1 K. B. 105; *In re Montgomery*, 78 L. T. N. S. 406.

**791.** 2. *School Dist. No. 5 v. Sage*, 13 Wash. 352.

3. An award may be recommitment where the sum is excessive, although it has been agreed that the award shall be conclusive. *Bradstreet v. Pross*, 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117.

**When Recommitment Refused.** — Where there is a conflict between the arbitrators and the plaintiff as to a mistake in a statement of fact as to certain payments, the court will not refer the award back to the arbitrators. *Klingensmith v. West Leechburg Steel, etc., Co.*, 17 Pa. Super. Ct. 210.

**792.** 1. Where Award Is Good on Its Face. — *In re Montgomery*, 78 L. T. N. S. 406; *School Dist. No. 5 v. Sage*, 13 Wash. 352.

**794.** 5. Award Binds Parties — England. — *Handsworth Dist. Council v. Derrington*, (1897) 2 Ch. 438; *Walshaw v. Brighthouse*, (1899) 2 Q. B. 286.

*United States.* — *Robertson v. Lion Ins. Co.*, 73 Fed. Rep. 928; *Elliott v. Missouri, etc., R. Co.*, (C. C. A.) 74 Fed. Rep. 707; *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337; *Judson v. U. S.*, (C. C. A.) 120 Fed. Rep. 637.

*Alabama.* — *Georgia Home Ins. Co. v. Kline*, 114 Ala. 366, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794; *Edmundson v. Wilson*, 108 Ala. 118; *Caldwell v. Caldwell*, 121 Ala. 598; *Shaw v. State*, 125 Ala. 80; *Gardner v. Newman*, 135 Ala. 522; *Wilbourn v. Hurt*, 139 Ala. 557.

*Colorado.* — *McClelland v. Hammond*, 12 Colo. App. 82.

*District of Columbia.* — *Sanborn v. Maxwell*, 18 App. Cas. (D. C.) 245, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794.

*Georgia.* — *Southern Live Stock Ins. Co. v. Benjamin*, 113 Ga. 1088.

*Illinois.* — *Story v. De Armond*, 179 Ill. 510.

*Indiana.* — *Myers v. Gibson*, 147 Ind. 457, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794.

*Iowa.* — *West v. Averill Grocery Co.*, 109 Iowa 488.

*Kansas.* — *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291.

*Kentucky.* — *Williamstown Bank v. Webb*, (Ky. 1896) 33 S. W. Rep. 1109; *Kentucky Chair Co. v. Rochester German Ins. Co.*, (Ky. 1899) 49 S. W. Rep. 780; *Thompson v. Thompson*, 66 S. W. Rep. 1007, 23 Ky. L. Rep. 2214.

*Massachusetts.* — *Worcester v. Lakeside Mfg. Co.*, 174 Mass. 299.

*Michigan.* — *Hoste v. Dalton*, (Mich. 1904) 100 N. W. Rep. 750.

*Mississippi.* — *Rand v. Peel*, 74 Miss. 307.

*Missouri.* — *Searles v. Lum*, 81 Mo. App. 607.

*Nebraska.* — *Connecticut F. Ins. Co. v. O'Fallon*, 49 Neb. 740; *Burkland v. Johnson*, 50 Neb. 858.

*New Hampshire.* — *Drown v. Hamilton*, 68 N. H. 23; *Strafford County v. Rockingham County*, 71 N. H. 37.

*New Jersey.* — *Booye v. Muth*, 69 N. J. L. 266.

*New York.* — *Burhans v. Union Free School Dist. No. 1*, 24 N. Y. App. Div. 429, affirmed 165 N. Y. 661; *Dobson v. Central R. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 582; *Heidlinger v. Onward Constr. Co.*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 555.

*Ohio.* — *Corrigan v. Rockefeller*, 67 Ohio St. 354; *Corrigan v. Rockefeller*, 10 Ohio Dec. 494.

*Pennsylvania.* — *McFadden's Estate*, 7 Pa. Super. Ct. 371, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794; *Worden v. Connell*, 196 Pa. St. 281; *Huckestein v. Kaufman*, 173 Pa. St. 199; *Thomas v. Heger*, 174 Pa. St. 345; *Somerset v. Ott*, 207 Pa. St. 539; *Barnum v. Backman*, 5 Luz. Leg. Reg. (Pa.) 145.

*Tennessee.* — *East Tennessee, etc., R. Co. v. Central Lumber, etc., Co.*, 95 Tenn. 538.

*Washington.* — *School Dist. No. 5 v. Sage*, 13 Wash. 352; *Zindorf Constr. Co. v. Western American Co.*, 27 Wash. 31; *Winsor v. German Sav. & Co.*, Soc., 31 Wash. 365.

*Wisconsin.* — *McCord v. Flynn*, 111 Wis. 78; *Bartlett v. L. Bartlett, etc., Co.*, 116 Wis. 450.

**When Erroneous or Made under Misapprehension.** — *Wilkins v. Allen*, 169 N. Y. 494.

**796.** Award Concludes Only Questions Directly in Issue. — See note 2.

In Equity. — See note 4.

**797.** Award Has Effect of Verdict. — See note 1.

*b.* EFFECT WHEN AWARD VOID OR NOT FINAL — Award Not Final Does Not Bar Original Cause of Action. — See note 3.

**798.** *c.* AN AWARD EFFECTS A MERGER. — See note 4.

**800.** *d.* EFFECT UPON MATTERS IN DIFFERENCE NOT PRESENTED — (2) *Rule in the United States* — View that Award under General Submission Conclusive as to All Matters. — See note 2.

**801.** *e.* EFFECT OF AWARD TO VEST TITLE TO PROPERTY — (1) *Real Estate* — Operates on Title by Estoppel Only. — See note 1.

**804.** *f.* EFFECT OF THE AWARD UPON STRANGERS — Award Does Not in General Affect Strangers. — See notes 1, 2.

**805.** *i.* AWARD AS EVIDENCE — As to Matters Within Submission. — See note 3.

**806.** As Regards Strangers to Submission. — See note 4.

**15.** Ratification and Repudiation of the Award — *a.* RATIFICATION — Voidable Award. — See note 6.

**808.** *b.* REPUDIATION. — See note 2.

**811.** 17. Performance of the Award — *b.* WHAT IS SUFFICIENT PERFORMANCE — Acts Directed on Both Sides, but Independent of Each Other. — See note 1.

Acts Directed on Each Side Mutually Dependent. — See note 2.

**812.** 18. Refusal to Execute Award — Refusal to Carry Out Justifies Refusal by the Other Party or Gives Cause of Action. — See note 6.

**813.** 19. Effect of the Failure of the Reference — Failure of Reference in Action Pending — Effect on Action. — See note 2.

**Enforcement of Award.** — At common law no judgment can be directly rendered on an award; the only remedy being by an action on the award. *Unterrainer v. Seelig*, 13 S. Dak. 152.

**796.** 2. Award Presumed to Cover All Matters Submitted. — *Fooks v. Lawson*, 1 Marv. (Del.) 115.

**4.** Award Equal to a Decree in Equity. — *Harris v. Davis*, 115 Ga. 950.

**797.** 1. U. S. Projectile Co. *v.* Sharpless, 115 Fed. Rep. 996; *Story v. De Armond*, 179 Ill. 510; *Corrigan v. Rockefeller*, 67 Ohio St. 354; *Zehner v. Lehigh Coal, etc., Co.*, 187 Pa. St. 487, 67 Am. St. Rep. 586.

**3.** When Award Illegal, Void, or Not Final. — *Benton v. Singleton*, 114 Ga. 551; *Turner v. Stewart*, 51 W. Va. 493, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 797.

**798.** 4. *Callier v. Watley*, 120 Ala. 38, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 798; *Gardner v. Newman*, 135 Ala. 522; *Myers v. Gibson*, 147 Ind. 457, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 798; *Searles v. Lum*, 81 Mo. App. 607; *Campbell v. Champlain, etc., R. Co.*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 412; *Florida Athletic Club v. Hope Lumber Co.*, 18 Tex. Civ. App. 170.

**Merger of Cause of Action.** — *Turner v. Stewart*, 51 W. Va. 493.

**Award a Merger.** — *Houston, etc., R. Co. v. Newman*, 2 Tex. App. Civ. Cas., § 349.

**800.** 2. General Submission — Award Conclusive as to All Matters. — *Georgia Home Ins. Co. v. Kline*, 114 Ala. 366, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 800.

**801.** 1. *Garvin v. Garvin*, 55 S. Car. 360. Award No Lien. — *Turner v. Stewart*, 51 W. Va. 493.

**804.** 1. Award Does Not Bind Strangers. —

*Edmundson v. Wilson*, 108 Ala. 118; *Gregory v. Pike*, 94 Me. 27; *Runyon v. Rutherford*, 55 W. Va. 436.

**Award Between Debtor and Creditor Held Discharge of Surety.** — *Turner v. Stewart*, 51 W. Va. 493, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 804.

2. *Turner v. Stewart*, 51 W. Va. 493, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 804.

**805.** 3. Effect of Award as Evidence. — *Caldwell v. Caldwell*, 121 Ala. 598.

**Of What Facts Award Is Evidence.** — *Corrigan v. Rockefeller*, 10 Ohio Dec. 494, 8 Ohio N. P. 281.

**806.** 4. As Evidence for Third Parties. — *Turner v. Stewart*, 51 W. Va. 493, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 806.

**6.** Performance a Ratification. — *Burkland v. Johnson*, 50 Neb. 858.

**808.** 2. Repudiation by Consent. — *Blanton v. Littell*, 65 Ark. 79, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 808; *Phipps v. Norton*, (Iowa 1903) 93 N. W. Rep. 562; *Goodwin v. Reg.*, 28 Can. Sup. Ct. 333, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 808.

**Repudiated Awards Cannot Be Revived.** — *Rawlinson v. Shaw*, 117 Mich. 5; *Georges v. Niess*, 70 Minn. 250.

**811.** 1. Award Enforceable by Stranger. — *Turner v. Stewart*, 51 W. Va. 493, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 811.

**2.** Acts Concurrent or Interdependent. — *Royals v. Lacey*, 32 Tex. Civ. App. 262.

**812.** 6. *Giles Lith., etc., Co. v. Recamier Mfg. Co.*, 14 Daly (N. Y.) 475.

**813.** 2. Submission Falls with Award. — *Rand v. Peel*, 74 Miss. 307, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 813; *Pretzfelder v. Merchants Ins. Co.*, 123 N. Car. 164.

**813.** Failure of Reference as to Contract — Whether Contract Enforceable in Equity. — See note 5.

**814.** See note 1.

Reference Failing Through Fault of Party. — See note 2.

**813.** 5. Where Matter Submitted Not of Essence of Contract and There Is Part Performance. — *Van Beuren v. Wotherspoon*, 12 N. Y. App. Div. 421.

**814.** 1. Although Matter Submitted Essential,

Yet Part Performance Held Sufficient. — *Cooke v. Miller*, 25 R. L. 92; *Grosvenor v. Flint*, 20 R. L. 21.

2. *Bales v. Gilbert*, 84 Mo. App. 675.

## ARCHITECTS.

By O. D. HAMMOND.

**815.** I. DEFINITION AND NATURE. — See note 1.

["Plans" Defined. — See note 1*a*.]

[Taxation and License. — See note 1*b*.]

**816.** Must Be Disinterested. — See note 1.

II. SUBMISSION OF PLANS — 1. Submission and Acceptance — No Stipulation as to Approval. — See note 4.

**818.** III. SKILL AND CARE REQUIRED — 1. Defective Plans. — See note 5.

**819.** Presumption. — See note 1.

**815.** 1. Term Defined. — *Illinois State Board, etc., v. People*, 93 Ill. App. 436, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815; *Coombs v. Beede*, 89 Me. 187, 56 Am. St. Rep. 406; *Wilson v. Greenville*, 65 S. Car. 426, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815.

1*a*. "Plans" Defined. — Plans include blueprints, and the word "plans" does not necessarily mean the original drawings. *School Dist. v. Fiske*, 61 Neb. 3.

1*b*. Taxation and License. — A nonresident architect who comes periodically to inspect and superintend a building comes within the taxation laws and is subject to taxation and must procure a license. *Wilson v. Greenville*, 65 S. Car. 426.

Under an act to regulate the practice of architecture the state board of architects having arbitrarily refused to grant the necessary license certificate to the plaintiff, it was held that the plaintiff, having passed the examinations and furnished the necessary affidavits, could not be denied his certificate. *Cardiff v. New Jersey State Board of Architects*, 69 N. J. L. 172.

**816.** 1. Employment by Contractor. — Where an architect accepts employment from a contractor no claim for extra work can be sustained against the owner. *Day v. Pickens County*, 53 S. Car. 46, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816.

Architect Subsequently Becoming Contractor. — Where an architect draws plans and specifications and subsequently becomes the contractor to do the building he cannot say a defect is one of plans and not of building, for he is responsible for both plans and construction. *Louisiana Molasses Co. v. Le Sassier*, 52 La. Ann. 2070.

4. No Agreement as to Approval of Plans Submitted. — The fact that the owner changes his

mind and does not build does not, in the absence of special agreement, excuse him from paying for the plans. *Sully v. Pratt*, 106 La. 601, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816.

Ownership of Plans. — An architect has no right of property in plans and specifications prepared by him for a client after they have been published, *e. g.*, by filing them with the building department of a city, and therefore he has no cause of action against one who copies the plans and specifications so filed for the purpose of erecting a building in accordance with them. *Wright v. Eisle*, 86 N. Y. App. Div. 356.

Estimate of Cost. — Where an architect is employed to draw plans and estimate the cost of a building he cannot collect a fee where the approximate cost far exceeds his estimate. *Feltham v. Sharp*, 99 Ga. 260.

Architect Entitled to Recover, Though Building Not Constructed. — *Hutchinson v. Conway*, 34 Nova Scotia 554.

No Lien, Attaches for Unused Plans. — Where an architect made plans for a building to be erected on a certain lot, his compensation being fixed at two and a half per cent. "on the cost of the building," no lien in favor of the architect can attach under the Mechanics' Lien Law of *Illinois*, where the owner abandons his intention of building. *Freeman v. Rinaker*, 185 Ill. 172.

**818.** 5. Representations of Requisite Skill. — *Chapel v. Clark*, 117 Mich. 640, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 818.

**819.** 1. A Negligent or Fraudulent Contract may disentitle an architect to compensation for his services—as where he negligently or fraudulently permits a contractor to do poor work or furnish inferior materials. *Lasher v. Colton*, 80 Ill. App. 75.

**819.** 2. Care in Superintendence — Must Exercise Reasonable Care and Diligence. — See note 3.

**820.** See note 1.

3. Question of Fact — Burden of Proof. — See note 3.

**IV. POWERS OF ARCHITECT** — 1. In General — Alterations — Extra Work. — See note 5.

Accepting Different Class of Work from That Required by Contract. — See note 6.

**821.** Subcontracts. — See note 3.

When Constituted General Agent. — See notes 6, 7.

**822.** See note 1.

Terms of Authority to Be Strictly Followed. — See note 2.

2. Delegation of Authority — See note 4.

**823.** VII. REMUNERATION OF ARCHITECT — 1. Rate of Compensation — Fixed Commission. — See note 1.

**819.** 3. Reasonable Care and Skill Required. — *Chapel v. Clark*, 117 Mich. 640, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 818; *Straus v. Buchman*, 96 N. Y. App. Div. 270, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819; *Johnson v. Wanamaker*, 17 Pa. Super. Ct. 301.

Responsibility resting on an architect for reasonable skill is the same as on a lawyer or doctor who holds himself out to the public service. The undertaking on the part of the architect implies a reasonable skill and ability. *Coombs v. Beede*, 89 Me. 187, 56 Am. St. Rep. 406.

In making his estimates of the cost of a building and of the time that will be required to construct it, an architect is only required to use a reasonable degree of care and skill, and if he does this, he is not liable for any loss caused by error in his estimates. *Grant v. Dupont*, 8 British Columbia 7, affirmed 8 British Columbia 223.

Satisfaction Not Warranted. — *Coombs v. Beede*, 89 Me. 187, 56 Am. St. Rep. 406.

Partially Constructed Building. — An architect employed to complete and superintend the construction of a partially completed building must use reasonable care to see that the timbers already placed in the building were properly secured and fastened. *Straus v. Buchman*, 96 N. Y. App. Div. 270.

**820.** 1. *Chapel v. Clark*, 117 Mich. 640; *Ashland Lime, etc., Co. v. Shores*, 105 Wis. 122.

3. Negligence — Question of Fact. — *Straus v. Buchman*, 96 N. Y. App. Div. 270, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820.

5. Power of Architect to Change Original Contract. — *Fontano v. Robbins*, 22 App. Cas. (D. C.) 253, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820; *Watts v. Metcalf*, 66 S. W. Rep. 824, 23 Ky. L. Rep. 2189; *Richard v. Clark*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 622; *Graves Elevator Co. v. John H. Parker Co.*, 92 N. Y. App. Div. 456; *Jacob v. Weissner*, 207 Pa. St. 484; *Day v. Pickens County*, 53 S. Car. 47, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820; *J. C. Wagner Co. v. Cawker*, 112 Wis. 532.

Alterations with Consent of Owner. — Where the architect orders alterations in the presence of the owner the architect is presumed to have the authority to so order, although the contract provides that any orders for alterations must be made in writing between the parties. *Perry*

*v. Levenson*, 82 N. Y. App. Div. 94, affirmed (N. Y. 1904) 70 N. E. Rep. 1104.

6. Accepting Different Class of Work. — *Mallard v. Moody*, 105 Ga. 400, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820. But see *Smith v. Farmers' Trust Co.*, 97 Iowa 117.

Failure to Condemn Unfit Material. — Failure by the architect to condemn unfit materials constitutes a waiver of a provision in the contract calling for fit materials. *Siebert v. Roth*, 118 Wis. 250.

**821.** 3. Subcontracts. — *Watts v. Metcalf*, 66 S. W. Rep. 824, 23 Ky. L. Rep. 2189.

6. Employer May Constitute Architect His General Agent for All Purposes. — *Langley v. Rouss*, 85 N. Y. App. Div. 27.

Architect the General Agent Within the Scope of His Authority. — *Vanderhoof v. Shell*, 42 Oregon 578; *Brin v. McGregor*, (Tex. Civ. App. 1898) 45 S. W. Rep. 923; *Kilgore v. North West Texas Baptist Educational Soc.*, 89 Tex. 465.

Estoppel. — An architect employed by a state board to construct a building is so far the agent of the board as to create an estoppel in its favor where the contractor made certain statements regarding the insurance to the architect. *Fansen v. Regents of Education*, (C. C. A.) 133 Fed. Rep. 24.

7. An architect is an agent of the owner for the purposes of the contract only. *Richard v. Clark*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 622.

**822.** 1. Where by contract the architect is declared to be "the agent of the owner" he has authority to bind the owner for extras and alterations. *Langley v. Rouss*, 85 N. Y. App. Div. 27.

2. *Weggner v. Greenstine*, 114 Mich. 310.

4. Architect Delegating Authority. — *Monahan v. Fitzgerald*, 164 Ill. 525.

An architect may delegate his authority by consent of the parties. *Weatherhogg v. Jasper County*, 158 Ind. 14.

Delegation to Partner. — An architect's partner, whose name is, however, not in the firm name, who is in charge of the work, and is so recognized by both parties, can bind both parties by signing an arbitration. *Wymard v. Deeds*, 21 Pa. Super. Ct. 332.

**823.** 1. Contract by Counties Prohibited. — An act prohibiting the letting of percentage contracts by counties does not apply in case

**823.** Percentage upon Estimated Cost. — See note 3.

2. Who Liable For. — See note 5.

**824.** 3. Lien for Fees — Statutes. — See note 1.

And in All the Instances in Which the Lien Has Been Allowed. — See note 4.

**826.** [ARID. — See note 2*a*.]

ARISE. — See note 3.

**827.** ARMED. — See note 1.

**829.** [ARPENT. — See note 4*a*.]

ARRAIGNMENT. — See note 5.

**830.** ARRANGEMENT. — See note 1.

of an architect's compensation. *Weatherhogg v. Jasper County*, 158 Ind. 14.

**Extra Compensation.**—A municipal corporation employing an architect annually has authority to allow him an extra compensation on a percentage basis for a new school building not contemplated at the time of the architect's appointment to office. *Carling v. Jersey City*, (N. J. 1904) 58 Atl. Rep. 395.

Additional work over and above the original contract, entailed by altered plans, entitles the architect to percentage compensation on the additions. *Weatherhogg v. Jasper County*, 155 Ind. 14.

**No Evidence of Fraud.**—The fact that the architect received five per cent. of the total cost does not warrant any inference of fraud or inflation of cost. *Kelly v. Public Schools*, 110 Mich. 529.

**Abandonment of Contract.**—Where a contract called for two and one-half per cent. of the cost of the building, and the owner abandons the intention of building, there is no way of fixing the amount due on a percentage plan, and hence no lien can attach. *Freeman v. Rinaker*, 185 Ill. 172.

**823.** 3. Usage Among Architects. — *Sully v. Pratt*, 106 La. 601.

**5. Employer Liable for Architect's Fees.**—An honest mistake or miscalculation on the part of the architect, or dissatisfaction with results on the part of the employer, does not excuse the employer from paying the architect's fees. *Coombs v. Beede*, 89 Me. 187, 56 Am. St. Rep. 406.

**824.** 1. Lien in Favor of Architects. — *Freeman v. Rinaker*, 185 Ill. 172, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 824; *Henry, etc., Co. v. Halter*, 58 Neb. 685; *Field v. Consolidated Mineral Water Co.*, 25 R. I. 319.

In *Massachusetts* the architect is allowed a lien for work and labor done, but not for his "mental conception." *Mitchell v. Packard*, 168 Mass. 467, 60 Am. St. Rep. 404.

**4. Lien Allowed on Lot Where Architect Did Not Superintend Building.**—*Freeman v. Rinaker*, 185 Ill. 172.

**Lien for Plans.**—*Johnson v. McClure*, 10 N. Mex. 506.

**826.** 2*a*. "Arid Portions of the State."—In a suit to enjoin the use of the waters of a creek for irrigation purposes an instruction

that "by *arid* portions of the state is meant those portions of the state where rainfall is insufficient for agricultural purposes, and irrigation therefore necessary. Where the rainfall is sufficient for agricultural purposes, that portion is not within the *arid* region, even though irrigation might or would increase the productiveness of the soil there," was held to be correct. *Hall v. Carter*, (Tex. Civ. App. 1903) 77 S. W. Rep. 19. See also the title IRRIGATION.

**3. Arising Out of Employment.**—A ticket collector got on the footboard of a train, after it had started, not for any object of his employment, but for his own pleasure. In getting off he was injured. It was held that the accident was not one "*arising out of*" his employment within section 1 of the Workmen's Compensation Act, 1897, and that compensation was not recoverable under the Act. *Smith v. Lancashire, etc., R. Co.*, (1899) 1 Q. B. 141.

**Accrue in the Sense of Arise.**—See *Union Cent. L. Ins. Co. v. Skipper*, (C. C. A.) 115 Fed. Rep. 69.

**Cases Arising under the Constitution.**—*Defiance Water Co. v. Defiance*, 191 U. S. 184.

**827.** 1. Armed with Dangerous Weapon — Assault. — See *State v. Lynch*, 88 Me. 195.

**829.** 4*a*. In Louisiana. — In *Randolph v. Sentilles*, 110 La. 419, the court said: "It not unfrequently happens in our state that the word *arpent* is used when 'acre' is meant; whereas there is a considerable difference between the two, the *arpent* being of one hundred and ninety-two feet, and the acre of two hundred and nine and a fraction."

5. *State v. Hunter*, 181 Mo. 316; *State v. Brock*, 61 S. Car. 144, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 829.

**Parts of Arraignment.**—*State v. De Wolfe*, 29 Mont. 415; *State v. Brock*, 61 S. Car. 144.

**830.** 1. In the Sense of Agreement. — "While it is true that the word *arrangement*, when taken by itself, has a different signification from the word 'contract' or 'agreement,' yet, when taken in connection with the other allegations in this complaint, it could mean nothing less than that by some mutual agreement between the parties the railroad company was to transport the employees of the copartnership." *Boyle v. Great Northern R. Co.*, 13 Wash. 383.



# ARREST.

By O. D. HAMMOND.

**834. II. WHAT CONSTITUTES — 1. In General — The Authority.** — See note 3. The Intention. — See note 5.

**835. Restraint.** — See note 1.

**836. 2. Manual Touching.** — See note 1.

**837.** See note 1.

**838. Mere Words.** — See note 2.

**839. III. PROCESS — 1. In Civil Cases — b. FINAL PROCESS.** — See note 4.

**840. c. MODE OF OBTAINING.** — See note 1.

**841.** See note 1.

**3. Execution of Process — a. GENERAL RULE** — See note 3.

**842.** See note 1.

**A Neglect or Refusal to Execute.** — See note 3.

**b. NOTICE OF OFFICER'S AUTHORITY.** — See note 4.

**834. 3. Authority Must Exist.** — *Davis v. Sanders*, 133 Ala. 275; *Wells v. Johnston*, 52 La. Ann. 713.

**5. Notice of Arrest.** — *People v. Coughlin*, 13 Utah 58.

**835. 1. Restraint Necessary.** — *Petit v. Colmery*, 4 Penn. (Del.) 266; *Goodell v. Tower*, (Vt. 1904) 58 Atl. Rep. 790.

**Force Not Necessary.** — The fact that the prisoner was not handcuffed or that no force was used does not show that he was not under arrest; it only shows that he was not resisting arrest. *State v. Deatherage*, 35 Wash. 326.

**836. 1. Arrest Accomplished When Party Within Officer's Power.** — *Petit v. Colmery*, 4 Penn. (Del.) 266; *State v. Deatherage*, 35 Wash. 326.

**837. 1. Petit v. Colmery, 4 Penn. (Del.) 266; *Dixon v. New England R. Co.*, 179 Mass. 242.**

**838. 2. Submission — Mere Words Without Touching or Restraint.** — *Goodell v. Tower*, (Vt. 1904) 58 Atl. Rep. 790.

**839. 4. The Common-law Rule** has been changed in *New York* by Code Civ. Pro. N. Y., § 1494. *Hoyle v. McCrea*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 290, affirmed 42 N. Y. App. Div. 313, in which case it was held that a judgment was not discharged by a notice from a judgment creditor to the sheriff to let a judgment debtor, held on execution against the person, go to see his sick wife. See generally the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

**840. 1. Amendment of Affidavit.** — Statements absolutely essential as a prerequisite to the right to arrest cannot be supplied by amendment. *Farrow v. Dutcher*, 19 R. I. 715.

**An Affidavit by an Attorney** is sufficient under the *Pennsylvania* statute where it sets forth positive averments of fact and furnishes "satisfactory evidence" to the judge. *C. M. Hapgood Shoe Co. v. Saupp*, 7 Pa. Super. Ct. 480.

**As to the Sufficiency of the Affidavit** and matters of procedure generally, see the title EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES, 8 ENCYC. OF PL. AND PR. 584.

**841. 1. Failure to Give Bond** has been held to render the arrest unlawful. *Eddings v. Boner*, 1 Indian Ter. 173.

**3. Execution of Process.** — *Spear v. State*, 120 Ala. 351; *Petit v. Colmery*, 4 Penn. (Del.) 266; *State v. Seery*, 95 Iowa 652.

**Warrant Executed by Deputy.** — A warrant directed to the sheriff may be properly executed by a deputy. *In re Rhodes*, 48 La. Ann. 1363. See generally the titles DEPUTY; SHERIFFS AND CONSTABLES.

**842. 1. Warrant in Force until Fully Executed.** — *State v. Nadeau*, 97 Me. 275; *State v. Shaw*, 73 Vt. 149.

**3. Ormond v. Ball, 120 Ga. 916.**

**4. Notice of Officer's Authority — United States.** — *North Carolina v. Gosnell*, 74 Fed. Rep. 734.

*Georgia.* — *Jones v. State*, 114 Ga. 73; *Franklin v. Amerson*, 118 Ga. 860; *Adams v. State*, 121 Ga. 163.

*Kansas.* — *State v. Appleton*, (Kan. 1904) 78 Pac. Rep. 445.

*Kentucky.* — *Pennington v. Com.*, (Ky. 1899) 51 S. W. Rep. 818.

*Montana.* — *State v. Gay*, 18 Mont. 51.

*New York.* — *Snead v. Bonnoil*, 49 N. Y. App. Div. 330.

*North Carolina.* — *State v. Stancill*, 128 N. Car. 606.

*Texas.* — *Patton v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 389; *Cortez v. State*, 43 Tex. Crim. 375, 44 Tex. Crim. 169.

*Utah.* — *People v. Coughlin*, 13 Utah 58.

*Vermont.* — *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648.

**Duty of Officer to Make Known His Warrant.** — See *Brown v. State*, 109 Ala. 70.

**Knowledge of Warrant by Party Arrested.** — See *Appleton v. State*, 61 Ark. 590.

**843. A Known Public Officer.** — See note 1.

**844. The Official Character.** — See note 1.

**845. Circumstances Attending the Arrest.** — See note 1.

*c.* **MUST ARREST PERSON NAMED IN WARRANT.** — See note 2.

**846. Mistake No Excuse.** — See note 1.

*d.* **WARRANT MUST BE IN OFFICER'S POSSESSION.** — See note 4.

**847. *e.* EXECUTION BY FORCE — (1) *General Rule.*** — See notes 1, 2, 3.

**Resistance Excusable — Instances.** — See *Pennington v. Com.*, (Ky. 1899) 51 S. W. Rep. 818; *Moore v. State*, 40 Tex. Crim. 439.

**Verbal Notice.** — For the officer, when near the accused, to call to him and tell him he has a warrant for his arrest is sufficient notice. *Williams v. State*, 70 Ark. 393. See also *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648.

**What Resistance Justified.** — The absence of notice of the officer's authority has been held to justify the accused in using whatever force he deems necessary in resisting, *Montgomery v. State*, 43 Tex. Crim. 304; but not to justify the killing of the officer, *Appleton v. State*, 61 Ark. 590.

**Notice Unnecessary When Resistance Apprehended.** — It has been held that an officer whose duty it is to make an arrest is not required to exhibit his warrant before making the arrest, nor even to notify the accused of his purpose if he has reason to believe that the accused is armed and will make a desperate resistance. *State v. Miller*, 5 Ohio Dec. 703, 7 Ohio N. P. 458, affirmed 7 Ohio Cir. Ct. 552, 13 Ohio Cir. Ct. 67.

**Notice of Intent to Arrest Is Not Necessary** when the party is actually engaged in resisting arrest. *State v. Phillips*, 118 Iowa 660.

**Right to Inspect Warrant.** — An accused has no right to an inspection of the warrant until he has placed himself peaceably in the custody of the officer. *State v. Miller*, 5 Ohio Dec. 703, 7 Ohio N. P. 458.

**843. 1.** *North Carolina v. Gosnell*, 74 Fed. Rep. 734; *Brown v. State*, 109 Ala. 70; *Petit v. Colmery*, 4 Penn. (Del.) 266; *Jones v. State*, 114 Ga. 73; *Franklin v. Amerson*, 118 Ga. 860; *Smalls v. State*, 99 Ga. 25; *State v. Gay*, 18 Mont. 51; *State v. Stancill*, 128 N. Car. 606; *State v. Shaw*, 73 Vt. 149.

**One Resisting an Officer, Known to Be Such,** does so at his peril even though he does not know that the officer is armed with a warrant. *State v. Russell*, (Iowa 1898) 76 N. W. Rep. 653.

**844. 1. Presumptive Notice of Officer's Authority.** — See *Brooks v. State*, 114 Ga. 6.

The presumption existing as to a sheriff does not extend to an officer acting for a particular occasion only. *Brown v. State*, 109 Ala. 70.

**Uniform and Insignia.** — *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669.

**Power by Law to Arrest Without Warrant.** — *State v. Dennis*, 2 Marv. (Del.) 433; *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648.

**845. 1. Circumstances Sufficient Notice.** — *Franklin v. Amerson*, 118 Ga. 860; *Territory v. McGinnis*, 10 N. Mex. 269; *People v. Coughlin*, 13 Utah 58; *State v. Shaw*, 73 Vt. 140.

**Apprehension in the Commission — Fresh Pursuit.** — Notice of authority is not necessary

where a party is apprehended on a fresh pursuit. *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669; *State v. Craft*, 164 Mo. 631.

**Where Officer's Authority and Intent Are Known.** — When the person on whom an attempt to arrest is made knows the officer and that the officer is armed with a warrant he is not authorized to resist. *Appleton v. State*, 61 Ark. 590.

**2. The Arrest of a Person under a Wrong Name.** — *Clark v. Winn*, 19 Tex. Civ. App. 223; *Newburn v. Durham*, 10 Tex. Civ. App. 655. See also *Harris v. McReynolds*, 10 Colo. App. 532.

**Killing in Arresting Wrong Person.** — A sheriff is liable for the act of his deputy who kills while attempting to arrest a person other than the one named in the warrant. *Johnson v. Williams*, 111 Ky. 289, 98 Am. St. Rep. 416.

**Middle Name and Initials.** — The omission of a middle name from a warrant is immaterial; and the initial of the first name is sufficient, especially where the accused is commonly designated and known by that initial. *Cox v. Durham*, (C. C. A.) 128 Fed. Rep. 870. So designation by initials was held to be sufficient to justify arrest in *Spear v. State*, 120 Ala. 351; *State v. Miller*, 7 Ohio Cir. Dec. 552, 13 Ohio Cir. Ct. 67. See also the title NAME; and see the title WARRANTS, 22 ENCYC. OF PL. AND PR. 1071.

**Idem Sonans.** — Where a warrant calling for the arrest of "Sawyer" is executed against "Sawyers" the arrest is valid, as the names are *idem sonans*. *Ex p. Sawyers*, (Tex. Crim. 1898) 48 S. W. Rep. 512.

**846. 1.** *Clark v. Winn*, 19 Tex. Civ. App. 223.

**4. Possession of Warrant.** — *Adams v. State*, 121 Ga. 163.

**847. 1. When Force Justifiable in General** — *United States.* — *North Carolina v. Gosnell*, 74 Fed. Rep. 734.

*Delaware.* — *Petit v. Colmery*, 4 Penn. (Del.) 266; *State v. Dennis*, 2 Marv. (Del.) 433.

*Georgia.* — *Moody v. State*, 120 Ga. 868.

*Illinois.* — *Lynn v. People*, 170 Ill. 527.

*Indiana.* — *Golibart v. Sullivan*, 30 Ind. App. 428.

*Iowa.* — *State v. Seery*, 95 Iowa 652.

*Kentucky.* — *Lindle v. Com.*, 111 Ky. 866.

*Maryland.* — *Baltimore, etc., R. Co. v. Cain*, 81 Md. 87.

*Montana.* — *State v. Gay*, 18 Mont. 51.

*Nebraska.* — *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598.

*North Carolina.* — *Sossamon v. Cruse*, 133 N. Car. 470.

*Pennsylvania.* — *Com. v. Rhoads*, 23 Pa. Super. Ct. 512.

*South Carolina.* — See *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845.

**848.** (2) *Handcuffing Prisoner.* — See note 1.

(3) *Killing to Effect Arrest* — (a) *Felony.* — See note 3.

**849.** See notes 1, 2, 3.

(b) *Misdemeanor.* — See note 4.

**851.** (d) *While Flying from Arrest.* — See notes 3, 4.

**The Burden of Proving Excessive Force.** — *Finnell v. Bohannon*, (Ky. 1898) 44 S. W. Rep. 94.

**Stratagem and Threats.** — If the accused by words or threats resists arrest and is visibly prepared to make resistance any words, stratagems, or threats the officers may employ to throw the accused off his guard are justifiable. *In re Johnson*, 167 U. S. 120; *State v. Miller*, 5 Ohio Dec. 703, 7 Ohio N. P. 458.

**847. 2. Must Not Use Excessive Force** — *California.* — *Towle v. Matheus*, 130 Cal. 574. *Delaware.* — *Petit v. Colmery*, 4 Penn. (Del.) 266; *State v. Dennis*, 2 Marv. (Del.) 433. *Georgia.* — *Moody v. State*, 120 Ga. 868.

*Indiana.* — *Golibart v. Sullivan*, 30 Ind. App. 428.

*Iowa.* — *State v. Phillips*, (Iowa 1902) 89 N. W. Rep. 1092; *State v. Weston*, 98 Iowa 125; *State v. Phillips*, 119 Iowa 655.

*Minnesota.* — *Rauma v. Lamont*, 82 Minn. 481, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 847.

*Mississippi.* — *Wallace v. State*, (Miss. 1897) 21 So. Rep. 662; *Brown v. Weaver*, 76 Miss. 7, 71 Am. St. Rep. 512.

*Nebraska.* — *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598.

*New York.* — *McMorris v. Howell*, 89 N. Y. App. Div. 272.

*North Carolina.* — *State v. Stancill*, 128 N. Car. 606; *Sossamon v. Cruse*, 133 N. Car. 470.

*Texas.* — *Hardin v. State*, 40 Tex. Crim. 208.

**The Officer Is Liable** for all excessive force over and above what is necessary. *State v. Hancock*, 73 Mo. App. 19.

**Discretion of Officer.** — The law does not require an officer in making an arrest to gauge the amount of force necessary to a nicety and with absolute precision, but he may use such force as seems to him, under the surrounding circumstances, to be reasonably necessary to carry out his purpose. *State v. Rose*, 142 Mo. 418.

**Means Other than Force.** — It is not necessary that the officer shall have exhausted all other means, such as calling on third parties for aid, before he may use force to accomplish the arrest. *Gillespie v. State*, 69 Ark. 573.

**3. Killing to Prevent Escape.** — *State v. Stancill*, 128 N. Car. 606.

**848. 1. A Prisoner Should Always Be Treated with Consideration.** — *Petit v. Colmery*, 4 Penn. (Del.) 266; *State v. Dennis*, 2 Marv. (Del.) 433; *Rauma v. Lamont*, 82 Minn. 481; *Mundine v. State*, 37 Tex. Crim. 5.

**Handcuffing** will not be tolerated except when it is absolutely necessary to protect the officer from an unruly prisoner or to prevent an absolute and threatened danger of escape. *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598. See also *Edger v. Burke*, 96 Md. 715.

**3. Homicide to Arrest Felon.** — *North Carolina v. Gosnell*, 74 Fed. Rep. 734; *People v.*

*Matthews*, 126 Cal. xvii, 58 Pac. Rep. 371; *Petit v. Colmery*, 4 Penn. (Del.) 266; *Brooks v. State*, 114 Ga. 6; *Lynn v. People*, 170 Ill. 527; *Petrie v. Cartwright*, 114 Ky. 103, 102 Am. St. Rep. 274; *Johnson v. Williams*, 111 Ky. 289, 98 Am. St. Rep. 416; *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669; *State v. Stancill*, 128 N. Car. 606; *Sossamon v. Cruse*, 133 N. Car. 470; *Com. v. Long*, 17 Pa. Super. Ct. 641.

**Notice to Person Arrested.** — *State v. Phillips*, 118 Iowa 660, supporting the first paragraph of the original note.

**849. 1. State v. Evans, 161 Mo. 95, 84 Am. St. Rep. 669.**

**2. Not Lawful to Kill Where Arrest Possible Otherwise.** — *Dover v. State*, 109 Ga. 485; *State v. Weston*, 98 Iowa 125; *Sossamon v. Cruse*, 133 N. Car. 470.

**3. State v. Dennis, 2 Marv. (Del.) 433; *Sossamon v. Cruse*, 133 N. Car. 470.**

**4. Misdemeanor** — *United States.* — *North Carolina v. Gosnell*, 74 Fed. Rep. 734.

*Indiana.* — *Golibart v. Sullivan*, 30 Ind. App. 428.

*Iowa.* — *State v. Weston*, 98 Iowa 125; *State v. Smith*, (Iowa 1904) 101 N. W. Rep. 110. See also *State v. Phillips*, 119 Iowa 655, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 849, and doubting, though not directly passing upon, the accuracy of an instruction to the effect that killing would be justified in an attempt to arrest for a misdemeanor if necessary to effect the object.

*Kansas.* — *State v. Appleton*, (Kan. 1904) 78 Pac. Rep. 445; *State v. Dietz*, 59 Kan. 576.

*Kentucky.* — *Petrie v. Cartwright*, 114 Ky. 103, 102 Am. St. Rep. 274.

*Mississippi.* — *Brown v. Weaver*, 76 Miss. 7, 71 Am. St. Rep. 512.

*North Carolina.* — *Sossamon v. Cruse*, 133 N. Car. 470; *State v. Stancill*, 128 N. Car. 606.

*Pennsylvania.* — *Com. v. Greer*, 20 Pa. Co. Ct. 535; *Com. v. Rhoads*, 23 Pa. Super. Ct. 510.

**Injury Threatened Must Be Serious.** — "An officer, when resisted in lawfully making an arrest, is not justified in killing the offender for the purpose of guarding his person from bodily harm, unless the injury threatened is a serious one." *State v. Hickey*, 70 N. J. L. 623.

**851. 3. Killing an Escaping or Fleeing Felon.** — *People v. Brooks*, 131 Cal. 311; *People v. Matthews*, 126 Cal. xvii, 58 Pac. Rep. 371; *Brooks v. State*, 114 Ga. 6; *Johnson v. Williams*, 111 Ky. 289, 98 Am. St. Rep. 416; *Petrie v. Cartwright*, 114 Ky. 103, 102 Am. St. Rep. 274; *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669; *Sossamon v. Cruse*, 133 N. Car. 470; *Com. v. Long*, 17 Pa. Super. Ct. 648; *State v. Morgan*, 22 Utah 162.

**Killing Suspected Felon.** — An officer acting without a warrant is not excusable for killing a fleeing person though he has reasonable grounds to suspect that a felony has been com-

**852.** See note 1.

An Unlawful Arrest. — See notes 2, 3.

**853.** (4) *Breaking Doors* — (a) In Civil Cases. — See note 1.  
The Protection of the Outer Door. — See note 4.**855.** Outer Door Open. — See note 6.

(b) In Criminal Cases. — See note 8.

**859.** 4. Right to Summon Bystanders. — See notes 2, 3.**860.** See note 1.

5. Taking Articles of Property from Person. — See notes 2, 3.

**861.** 6. Stopping Train to Execute Process. — See note 2.

7. Time of Making Arrest. — See note 3.

mitted, when in fact the offense was only a misdemeanor. *Petrie v. Cartwright*, 114 Ky. 103, 102 Am. St. Rep. 274.

Notice of the Intent to Make an Arrest is not necessary when the accused is fleeing from arrest. *State v. Phillips*, 118 Iowa 660.

**851.** 4. Misdemeanor — *United States*. — *North Carolina v. Gosnell*, 74 Fed. Rep. 734.

*Iowa*. — *State v. Smith*, (Iowa 1904) 101 N. W. Rep. 110; *State v. Weston*, 98 Iowa 125.

*Kansas*. — *State v. Dietz*, 59 Kan. 576; *State v. Appleton*, (Kan. 1904) 78 Pac. Rep. 445.

*Kentucky*. — *Petrie v. Cartwright*, 114 Ky. 103, 102 Am. St. Rep. 274.

*Mississippi*. — *Brown v. Weaver*, 76 Miss. 7, 71 Am. St. Rep. 512.

*North Carolina*. — *Sossamon v. Cruse*, 133 N. Car. 470; *State v. Stancill*, 128 N. Car. 606.

*Pennsylvania*. — *Com. v. Greer*, 20 Pa. Co. Ct. 535; *Com. v. Rhoads*, 23 Pa. Super. Ct. 512.

*Texas*. — *Hardin v. State*, 40 Tex. Crim. 208.

**852.** 1. *Chandler v. Rutherford*, (C. C. A.) 101 Fed. Rep. 774; *Johnson v. Williams*, 111 Ky. 289, 98 Am. St. Rep. 416; *State v. Stancill*, 128 N. Car. 606; *Hardin v. State*, 40 Tex. Crim. 208.

2. *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 852.

3. Force Lawful to Escape Unlawful Arrest. — *John Bad Elk v. U. S.*, 177 U. S. 529; *Franklin v. Amerson*, 118 Ga. 860; *Hughes v. Com.*, (Ky. 1897) 41 S. W. Rep. 294; *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 852; *Mundine v. State*, 37 Tex. Crim. 5. See also *infra*, this title, 909. 1. *et seq.*

**853.** 1. Civil Cases — Breaking Outer Doors. — *Foley v. Martin*, 142 Cal. 256, 100 Am. St. Rep. 123.

4. To Whom the Privilege Extends. — *State v. Albright*, 144 Mo. 645.

**855.** 6. Misdemeanor on View. — In arresting for a misdemeanor on view without a warrant an officer may enter without invitation or consent the outer door of a dwelling that stands open. *Ford v. Breen*, 173 Mass. 52.

8. Misdemeanor. — An officer has no right to break open outer doors in executing a warrant of arrest for a mere misdemeanor. *Com. v. Superintendent of County Prison*, 5 Pa. Dist. 635.

On Mere Suspicion of Misdemeanor an officer may not enter a dwelling house either peaceably or forcibly. *People v. Glennon*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 1.

An Officer May Not Lawfully Burn a House

to arrest a criminal with more ease and safety, and for such burning he is personally liable. *Goodman v. Condo*, 12 Pa. Super. Ct. 456.

Attempt to Make Illegal Arrest. — Where the attempt to arrest is illegal the accused has a right to protect his door and his residence even to the extent of taking life. *Allen v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 671.

**859.** 2. Officer Summoning Bystanders to Assist Him. — *North Carolina v. Gosnell*, 74 Fed. Rep. 734; *People v. Brooks*, 131 Cal. 311; *Petit v. Colmery*, 4 Penn. (Del.) 266; *State v. Phillips*, (Iowa 1902) 89 N. W. Rep. 1092; *State v. Rose*, 142 Mo. 418; *State v. Gay*, 18 Mont. 51. See also *infra*, this title, 890. 1, 2.

An Officer Is Not Bound to Ask Assistance of bystanders before he uses force to accomplish his purpose alone. It is not the law that all other means be resorted to before using force to make the arrest. *Gillespie v. State*, 69 Ark. 573.

Aid from Adjoining County Officers. — Officers may call to their aid officers from an adjoining county. *State v. Morgan*, 22 Utah 162.

3. Duty and Liability of Person Assisting. — *North Carolina v. Gosnell*, 74 Fed. Rep. 734; *People v. Brooks*, 131 Cal. 311; *State v. Gay*, 18 Mont. 51; *State v. Shaw*, 73 Vt. 149.

Killing of One Called to Assist an Officer. — Where one is called on by an officer to assist him to make an arrest, and is killed by the accused, the killing amounts to murder. *Brown v. State*, 109 Ala. 70.

**860.** 1. Refusal to Assist Indictable. — *North Carolina v. Gosnell*, 74 Fed. Rep. 734; *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562.

2. Taking Articles from Person for Purposes of Evidence. — *Hubbard v. Garner*, 115 Mich. 407, 69 Am. St. Rep. 580d, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860.

3. Taking Money from Prisoner. — *State v. Clausmeier*, 154 Ind. 599; *Hubbard v. Garner*, 115 Mich. 407, 69 Am. St. Rep. 580d, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860; *State v. Burns*, 27 Nev. 289.

**861.** 2. Stopping Train to Execute Process. — An officer of the law has a right to stop a train to execute process on a passenger thereon, or to make a lawful arrest. *Brunswick, etc., R. Co. v. Ponder*, 117 Ga. 63, 97 Am. St. Rep. 152.

3. Arrest May Be Made by Day or Night. — *Brown v. State*, 109 Ala. 70; *Petit v. Colmery*, 4 Penn. (Del.) 266.

Vacation. — An arrest of one against whom an indictment is found may be made during

**862.** See notes 2, 3.

**8. Where Process Must Be Executed — Independent of Statute. —** See note 4.

**863.** See note 1.

**865.** **11. Execution by Officer de Facto. —** See note 1.

**12. Execution by Special Bailiff or Deputy. —** See note 3.

**866.** **13. Disposition of Prisoner. —** See note 1.

**868.** **14. Return of Process. —** See note 1.

**16. Authority Cannot Be Delegated. —** See note 6.

**869.** **V. ARREST WITHOUT WARRANT — 1. In General. —** See note 3.

the vacation of the court before which the warrant is returnable. *Kent v. Miles*, 69 Vt. 379.

**862. 2. Arrest on Sunday — American Rule. —** *Parish v. State*, 130 Ala. 92.

**Selling Liquor. —** In *Pennsylvania* a warrant of arrest for selling liquor on Sunday cannot be served on that day, unless it alleges a breach of the peace. *Com. v. De Puyter*, 16 Pa. Co. Ct. 589.

**3. Valentine v. Roberts, 1 Alaska 536.**

**4. No Authority Beyond Jurisdiction. —** In *re Baum*, 61 Kan. 117; *Newburn v. Durham*, 10 Tex. Civ. App. 655; *Ex p. Sykes*, (Tex. Crim. 1904) 79 S. W. Rep. 538.

**Provision Is Usually Made by Statute. —** In *Iowa*, where the offense is committed within five hundred yards of the boundary of two counties the jurisdiction is concurrent, and an officer of either county is authorized to make an arrest. *State v. Seery*, 95 Iowa 652.

**Effect on Jurisdiction of Court. —** In *Kansas* a person illegally arrested in another county has a civil remedy for the trespass, but it does not divest the court into which he is brought of its jurisdiction to try him for a crime. *State v. May*, 57 Kan. 428.

**863. 1. Officer Has No Authority Out of His Precinct. —** *State v. Weston*, 98 Iowa 125; *Cardwell v. Com.*, (Ky. 1898) 46 S. W. Rep. 705.

**Kentucky. —** A town marshal in Kentucky has authority to arrest, without a warrant, for offenses in his presence, outside the limits of the town for which he is appointed, and his jurisdiction is coextensive with the county. *Helm v. Com.*, 81 S. W. Rep. 270, 26 Ky. L. Rep. 165.

**North Carolina. —** In North Carolina a policeman may not pursue an escaping prisoner beyond the limits of the town. The authority to arrest being confined to the town limits, the authority to pursue is encompassed with the same restriction. *Sossamon v. Cruse*, 133 N. Car. 470.

**865. 1. Officer de Facto. —** *People v. Payment*, 109 Mich. 553.

**3. Bailiff or Deputy. —** *Parish v. State*, 130 Ala. 92; *Brown v. State*, 109 Ala. 70.

**A Warrant Addressed to a Private Person Is Good**, though it is better practice to address it to a regular constable or officer. *Com. v. Baird*, 21 Pa. Co. Ct. 488.

**866. 1. Prisoner to Be Taken Before Magistrate Within a Reasonable Time. —** *Markey v. Griffin*, 109 Ill. App. 212; *Harness v. Steele*, 159 Ind. 286; *Stewart v. Feeley*, 118 Iowa 524; *Edger v. Burke*, 96 Md. 715; *Brish v. Carter*, 98 Md. 445; *Linnen v. Rappfield*, 114

*Mich.* 93; *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598; *Snead v. Bonnoil*, 49 N. Y. App. Div. 330; *Tobin v. Bell*, 73 N. Y. App. Div. 41; *Leger v. Warren*, 62 Ohio St. 500, 78 Am. St. Rep. 738; *Mulberry v. Fuellhart*, 203 Pa. St. 573; *Richardson v. Dybedahl*, 14 S. Dak. 126; *In re Jennison*, 74 Vt. 40.

**Probable Cause for Arrest. —** *Garnier v. Squires*, 62 Kan. 321.

**On Arrest Without Warrant. —** *Kirk v. Garrett*, 84 Md. 383.

**Arrest in Vacation. —** An officer making an arrest under warrant in vacation may hold the prisoner until the next session opens. *Kent v. Miles*, 69 Vt. 379.

**868. 1. Officer Must Make Return. —** *State v. Aucoin*, 111 La. 51.

**6. Officer Cannot Delegate Authority to Private Person. —** *Mann v. Com.*, (Ky. 1904) 82 S. W. Rep. 438.

**869. 3. Warrant Generally Necessary — Exceptions. —** *Baltimore, etc., R. Co. v. Cain*, 81 Md. 87; *State v. Leindecker*, 91 Minn. 278, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869; *Stittgen v. Rundle*, 99 Wis. 80, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869.

It is not sufficient that the offense was committed in the presence of an officer other than the one making the arrest. *Roberson v. State*, 42 Fla. 228, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869.

An officer may not without a warrant make an arrest for doing business without a license unless the offense was committed in his presence, and a city ordinance authorizing such an arrest is void. *Gambill v. Schmuck*, 131 Ala. 321.

**Hearsay. —** There can be no arrest without a warrant on mere suspicion or hearsay in case of misdemeanor. *People v. Glennon*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 1.

**Montana Statute. —** "An officer having authority to make arrests shall arrest a person, without a warrant: (1) When a person is attempting or has committed a public offense; (2) When a felony in fact has been committed and he has reasonable grounds for believing the person arrested has committed the same; (3) Where he has reasonable grounds to believe that a person has committed an offense, and that he can escape before he can be arrested by a warrant issued by some proper officer." *State v. Gay*, 18 Mont. 51.

**Contempt. —** For authority to arrest for contempt of court in the judge's presence, see *State v. Peterson*, 29 Wash. 571, and see the title CONTEMPT.

**870. 2. By Peace Officers — a. ON SUSPICION OF FELONY OF OFFICER'S OWN KNOWLEDGE.** — See note 1.

**872. Must Act with Discretion.** — See note 1.

**870. 1. Authorities in the United States — United States.** — *Chandler v. Rutherford*, (C. C. A.) 101 Fed. Rep. 774.

*California.* — *People v. Matthews*, 126 Cal. xvii, 58 Pac. Rep. 371.

*District of Columbia.* — *Davis v. U. S.*, 16 App. Cas. (D. C.) 442.

*Florida.* — *Roberson v. State*, 42 Fla. 228.

*Georgia.* — *Brooks v. State*, 114 Ga. 6.

*Illinois.* — *McMahon v. People*, 189 Ill. 222; *Mexican Cent. R. Co. v. Gehr*, 66 Ill. App. 173; *Lynn v. People*, 170 Ill. 527.

*Indiana.* — *Harness v. Steele*, 159 Ind. 286.

*Iowa.* — *State v. Phillips*, 118 Iowa 660.

*Kansas.* — *Garnier v. Squires*, 62 Kan. 321.

*Kentucky.* — *Petrie v. Cartwright*, 114 Ky. 103, 102 Am. St. Rep. 274; *Lindle v. Com.*, 111 Ky. 866; *Mann v. Com.*, (Ky. 1904) 82 S. W. Rep. 438.

*Maine.* — *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513.

*Maryland.* — *Brish v. Carter*, 98 Md. 445; *Edger v. Burke*, 96 Md. 715.

*Massachusetts.* — *Jackson v. Knowlton*, 173 Mass 94 [citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870]; *Com. v. Hughes*, 183 Mass. 221.

*Michigan.* — *Friesenhan v. Maines*, (Mich. 1904) 100 N. W. Rep. 172; *Tillman v. Beard*, 121 Mich. 475.

*Minnesota.* — *State v. Leindecker*, 91 Minn. 278.

*Missouri.* — *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870; *State v. Albright*, 144 Mo. 645; *State v. Dierker*, 101 Mo. App. 636; *State v. Evans*, 83 Mo. App. 301.

*Nebraska.* — *Kyner v. Laubner*, (Neb. 1902) 91 N. W. Rep. 491; *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598.

*New York.* — *Craven v. Bloomingdale*, 54 N. Y. App. Div. 266; *Grinnell v. Weston*, 95 N. Y. App. Div. 454; *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562; *People v. Glennon*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 1; *Snead v. Bonnoil*, 49 N. Y. App. Div. 330; *Westbrook v. New York Sun Assoc.*, 58 N. Y. App. Div. 562; *People v. Hochstim*, 76 N. Y. App. Div. 25; *Snead v. Bonnoil*, 166 N. Y. 325.

*Ohio.* — *Burch v. Franklin*, 7 Ohio Dec. 519.

*Pennsylvania.* — *Rarick v. McManomon*, 17 Pa. Super. Ct. 154.

*South Carolina.* — *State v. Whittle*, 59 S. Car. 297.

*Texas.* — *Allen v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 671; *Maddox v. Hudgeons*, 31 Tex. Civ. App. 291; *Cortez v. State*, 43 Tex. Crim. 375, 44 Tex. Crim. 169.

*Vermont.* — *State v. Shaw*, 73 Vt. 149; *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648.

*Washington.* — *State v. Symes*, 20 Wash. 484.

*Wisconsin.* — *Stittgen v. Rundle*, 99 Wis. 78; *Lamb v. Stone*, 95 Wis. 254; *Bergeron v. Peyton*, 106 Wis. 377, 80 Am. St. Rep. 33.

**Probable Cause in Malicious Prosecution as Test of Suspicion.** — *Kirk v. Garrett*, 84 Md. 383,

quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 871, note.

**Reasonable Grounds and Probable Cause Defined.**

— Such a case must be presented as would induce a discreet, prudent, sober, sensible person to act upon it. *Fry v. Kaessner*, 48 Neb. 133.

**Arrest under Void Warrant.** — It has been held that where an officer arrests under a warrant from another county, not signed by a magistrate in his own county, and therefore void, the arrest may be treated as a valid arrest without a warrant, where the void warrant shows that the complaint had been made on reasonable grounds. *Ex p. Smotherman*, 140 Ala. 168. But see to contrary effect *Elwell v. Reynolds*, 6 Kan. App. 545.

**A Railroad Policeman Is Not a Peace Officer** unless he has taken the oath of office under the acts relating to special policemen. *Missouri, etc., R. Co. v. Warner*, 19 Tex. Civ. App. 463.

**Mere Suspicion.** — An officer is not justified in making an arrest on the mere suspicion of a third party, and an officer so making an arrest is liable for false arrest. *Karner v. Stump*, 12 Tex. Civ. App. 460.

**Ignorance of Law on Part of Officer.** — The officer is not justified by the fact that he thought the crime committed was in law a felony, when in fact it was a misdemeanor. *Begley v. Com.*, 60 S. W. Rep. 847, 22 Ky. L. Rep. 1546.

**872. 1. Officer Must Use Diligence to Avoid Mistakes.** — *Chandler v. Rutherford*, (C. C. A.) 101 Fed. Rep. 774; *Wells v. Johnston*, 52 La. Ann. 713.

**Rule of Conduct for Officer Acting Without Warrant.** — An officer acting without a warrant must first state his official character and the reason for making the arrest, unless the person about to be arrested is in the actual commission of the offense or in actual flight at the time thereof. *State v. Gay*, 18 Mont. 51; *State v. Appleton*, (Kan. 1904) 78 Pac. Rep. 445.

**When Notice Not Necessary.** — No notice of the officer's intent to arrest is necessary to be given when the party is actually engaged in resistance or in flight. *State v. Phillips*, 118 Iowa 660.

**Amount of Force Permissible.** — An officer arresting without warrant on suspicion of felony is authorized to use such force only as is allowable in other cases not felonious, unless the offense was in fact a felony. If he uses greater force, he does so at his peril, and is liable if it turns out that he was mistaken. *Petrie v. Cartwright*, 114 Ky. 103, 102 Am. St. Rep. 274.

**Purpose of Officer.** — Although a larceny was committed and the right to arrest for the purpose of taking the prisoner before a magistrate according to law existed, the officer is liable where he makes the arrest for the sole purpose of forcing the accused to return the stolen money. *Bergeron v. Peyton*, 106 Wis. 377, 80 Am. St. Rep. 33.

**872. Crime Must Be Felony.** — See note 2.

Recapture. — See note 3.

*b.* ON INFORMATION OF THIRD PERSONS. — See note 4.

**873. *c.* FOR AFFRAYS AND OTHER OFFENSES IN OFFICER'S PRESENCE**

— Common-law Power to Arrest for Breach of Peace. — See note 1.

**872. 2. Rule Applies to Felony Only.** — *Franklin v. Amerson*, 118 Ga. 860; *State v. Albright*, 144 Mo. 645; *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562; *Westbrook v. New York Sun Assoc.*, 58 N. Y. App. Div. 562; *Burch v. Franklin*, 7 Ohio Dec. 519; *Rarick v. McManomon*, 17 Pa. Super. Ct. 154; *San Antonio, etc., R. Co. v. Griffin*, 20 Tex. Civ. App. 91.

**Rule Does Not Apply to Mere Threat to Commit Felony.** — *Allen v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 671.

**Arrest of One Charged with Felony, but Guilty of Misdemeanor.** — Where an arrest was made for a felony and the accused was, unknown to the officers at the time of the arrest, guilty of a misdemeanor by having a concealed weapon, the officer cannot justify the illegal arrest, there having been no felony or reasonable ground of suspicion, on the ground that the prisoner, while innocent of a felony, was actually guilty of a misdemeanor. *Snead v. Bonnoil*, 49 N. Y. App. Div. 330.

**3. Recapture.** — *McQueen v. State*, 130 Ala. 136; *State v. Craft*, 164 Mo. 631; *State v. Shaw*, 73 Vt. 149.

**So the Retaking of One Unlawfully Released from Jail** may be accomplished without a warrant, either by an officer or by a private person. *In re Troy*, 67 Kan. 186.

**No Distinction Between Felony and Misdemeanor in Recapture.** — Where a convict has escaped it is immaterial whether he was convicted of misdemeanor or of felony; the same rule of recapture without a warrant applies in both cases. *Williford v. State*, 121 Ga. 173.

**Ten Years After the Escape** of a convict the superintendent of convicts cannot make an arrest of the convict without a warrant. *State v. Stancill*, 128 N. Car. 606.

**4. On Information of Third Persons** — *Alabama*.

— *Gambill v. Schmuck*, 131 Ala. 321.

*Illinois*. — *Lynn v. People*, 170 Ill. 527.

*Indiana*. — *Harness v. Steele*, 159 Ind. 286.

*Louisiana*. — *Lyons v. Carroll*, 107 La. 471.

*Maryland*. — *Baltimore, etc., R. Co. v. Cain*, 81 Md. 87; *Brish v. Carter*, 98 Md. 445; *Edger v. Burke*, 96 Md. 715; *Kirk v. Garrett*, 84 Md. 383.

*Missouri*. — *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669.

*Nebraska*. — *Fry v. Kaessner*, 48 Neb. 133; *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598.

*Oregon*. — *State v. Williams*, (Oregon 1904) 77 Pac. Rep. 965.

*Pennsylvania*. — *Higby v. Pennsylvania R. Co.*, 209 Pa. St. 452; *Rarick v. McManomon*, 17 Pa. Super. Ct. 155.

*South Carolina*. — *State v. Whittle*, 59 S. Car. 297.

*Texas*. — *Montgomery v. State*, 43 Tex. Crim. 304; *Newburn v. Durham*, 10 Tex. Civ. App. 655; *Mundine v. State*, 37 Tex. Crim. 5; *San*

*Antonio, etc., R. Co. v. Griffin*, 20 Tex. Civ. App. 91.

*Vermont*. — *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363.

**Liability of Person Making Charge** — *United States*. — *Bryan v. Condon*, (C. C. A.) 86 Fed. Rep. 221.

*California*. — *Miller v. Fano*, 134 Cal. 103.

*Kansas*. — *Wichita, etc., R. Co. v. Quinn*, 57 Kan. 737.

*Louisiana*. — *Lyons v. Carroll*, 51 La. Ann. 1542.

*Missouri*. — *Thompson v. Bucholz*, 107 Mo. App. 121.

*New York*. — *Grinnell v. Weston*, 95 N. Y. App. Div. 454; *Midford v. Kann*, 32 N. Y. App. Div. 228; *McMorris v. Howell*, 89 N. Y. App. Div. 272; *Whitney v. Hanse*, 36 N. Y. App. Div. 420; *Limbeck v. Gerry*, (Supm. Ct. Tr. T.) 15 Misc. (N. Y.) 663.

*North Carolina*. — *Bryan v. Stewart*, 123 N. Car. 92.

*Pennsylvania*. — *Burk v. Howley*, 179 Pa. St. 539, 57 Am. St. Rep. 607; *Buchanan v. Goettmann*, 29 Pittsb. Leg. J. N. S. (Pa.) 302. *South Carolina*. — *Whaley v. Lawton*, 62 S. Car. 91.

*Compare Easton v. Com.*, (Ky. 1904) 82 S. W. Rep. 996.

**Charge of Accomplice.** — A bare and uncorroborated statement by one confessing himself guilty of a felony, without any facts or circumstances affording reasonable ground for suspicion, is not sufficient to justify an officer in making an arrest of another on the charge that he was also a principal. *Wills v. Jordan*, 20 R. I. 630.

**Liability of Officer.** — If the officer acts on insufficient information he does so at his peril. *State v. Phillips*, 118 Iowa 660.

**Mere Suspicion** does not justify an officer in arresting on information of third persons, and the person who so procures the arrest is liable. *Karner v. Stump*, 12 Tex. Civ. App. 460.

The arrest must be on information of a third person based on some knowledge of facts. *Wells v. Johnston*, 52 La. Ann. 713.

**What Amounts to a Request to Arrest.** — The mere fact that a citizen has called upon an officer to search for and recover his lost or stolen property will not justify the inference that he "requested or directed" the arrest subsequently made. *Joske v. Irvine*, 91 Tex. 574.

**On Offer of Reward.** — A publication by a private person in a newspaper of an offer of a reward for the arrest of one whom he accuses of a crime is not of itself reasonable or sufficient ground to justify an arrest by an officer without a warrant. *State v. Evans*, 83 Mo. App. 301.

**873. 1. Right to Arrest for Breach of Peace** — *Alabama*. — *Jones v. Anniston*, 138 Ala. 199. *Delaware*. — *State v. Dennis*, 2 Marv. (Del.) 433.

*Florida*. — *Roberson v. State*, 42 Fla. 228,

**875. Statutory Power to Arrest for Other Offenses. — See note 1.**

citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 873; *Roberson v. State*, 43 Fla. 156.

*Georgia*. — *Brooks v. State*, 114 Ga. 6.

*Illinois*. — *Lynn v. People*, 170 Ill. 527;

*McMahon v. People*, 189 Ill. 222.

*Indiana*. — *Weser v. Welty*, 18 Ind. App.

664; *Harness v. Steele*, 159 Ind. 286.

*Iowa*. — *Stewart v. Feeley*, 118 Iowa 524.

*Kentucky*. — *Hughes v. Com.*, (Ky. 1897) 41

S. W. Rep. 294; *Lynam v. Com.*, (Ky. 1900)

55 S. W. Rep. 686; *Easton v. Com.*, (Ky. 1904)

82 S. W. Rep. 996.

*Maine*. — *Palmer v. Maine Cent. R. Co.*, 92

Me. 399, 69 Am. St. Rep. 513.

*Maryland*. — *Baltimore, etc., R. Co. v. Cain*,

81 Md. 87.

*Massachusetts*. — *Ford v. Breen*, 173 Mass. 52.

*Michigan*. — *Tillman v. Beard*, 121 Mich.

475.

*Minnesota*. — *State v. Leindecker*, 91 Minn.

278, citing 2 AM. AND ENG. ENCYC. OF LAW (2d

ed.) 873.

*New York*. — *People v. Hochstim*, 76 N. Y.

App. Div. 25; *People v. Howard*, (Ct. Spec.

Sess.) 13 Misc. (N. Y.) 763; *Snead v. Bonnoil*,

166 N. Y. 325.

*Oregon*. — *State v. Williams*, (Oregon 1904)

77 Pac. Rep. 965.

*Pennsylvania*. — *Higby v. Pennsylvania R.*

*Co.*, 209 Pa. St. 452.

*South Carolina*. — *Percival v. Bailey*, 70 S.

*Car.* 72.

*Texas*. — *Montgomery v. State*, 43 Tex. Crim.

304; *Sierra v. State*, 37 Tex. Crim. 430.

**Assault Committed on Officer.** — A police officer

who is assaulted while trying to preserve the

peace can make an arrest without a warrant

for the assault committed on himself. *Riggs*

*v. Com.*, (Ky. 1895) 33 S. W. Rep. 413.

**Burden of Proof on Officer.** — When the legal-

ity of the arrest is questioned the burden of

proof is on the officer; and the officer also

has the burden of proof to show reasonable

grounds in all cases. *McCaffrey v. Thomas*,

4 Penn. (Del.) 437; *Marshall v. Cleaver*, 4

Penn. (Del.) 450; *White v. State*, 99 Ga. 16;

*Franklin v. Amerson*, 118 Ga. 860; *Edger v.*

*Burke*, 96 Md. 715; *Com. v. Hughes*, 183 Mass.

221; *Jackson v. Knowlton*, 173 Mass. 97.

**By Deputy Not Properly Appointed.** — As the

law gives this authority to peace officers, it is

necessary, in order to justify an arrest by a

deputy, to show his proper authority and ap-

pointment. *Buckles v. Com.*, 113 Ky. 795.

**Presumption.** — Where there is no statement

whether the arrest was with or without a war-

rant, the presumption is that a public officer

did his duty and that he either had a warrant

or that there was a criminal offense committed

in his presence. *Davis v. Pacific Telephone,*

*etc., Co.*, 127 Cal. 317.

**Card Playing.** — Card playing is not an of-

fense for which an arrest is authorized with-

out a warrant, for the authority to arrest with-

out a warrant is limited to felonies and

breaches of the peace committed in the view

of the officer. *Lee v. State*, (Tex. Crim. 1903)

74 S. W. Rep. 28.

**Counterfeiting.** — A government secret ser-

vice agent has a right to arrest without a war-

rant where he finds one secreting counterfeit coin to prevent the detection and conviction of a counterfeiter for whom he has a warrant. *U. S. v. Fuellhart*, 106 Fed. Rep. 911.

**Who Are Peace Officers.** — Justices of the peace, sheriffs, coroners, constables, watchmen, and all who come to their aid and assistance are peace officers, and a policeman is by statute equivalent to a watchman. *McDuffie v. State*, 121 Ga. 580; *State v. Seery*, 95 Iowa 652; *Helm v. Com.*, 81 S. W. Rep. 270, 26 Ky. L. Rep. 165; *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669; *State v. Stancill*, 128 N. Car. 606; *Sossamon v. Cruse*, 133 N. Car. 470; *Newburn v. Durham*, 10 Tex. Civ. App. 655; *Allen v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 671; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363.

Railway conductors are peace officers by statute in *South Carolina*. *Loggins v. Southern R. Co.*, 64 S. Car. 321.

And in *New Hampshire* "railroad police officers" are clothed with the powers of peace officers. *Cordner v. Boston, etc., R. Co.*, 72 N. H. 413.

In *Texas* a magistrate is a judicial officer, and not a peace officer. *Morawietz v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 997.

**875. 1. Right under Statute to Arrest Without Warrant — England.** — See *Rex v. Sherriff*, 20 Cox C. C. 334.

*United States.* — *Chandler v. Rutherford*, (C. C. A.) 101 Fed. Rep. 774; *U. S. v. Fuellhart*, 106 Fed. Rep. 911.

*Alabama.* — *Gambill v. Schmuck*, 131 Ala. 321; *Jones v. Anniston*, 138 Ala. 199.

*Delaware.* — *State v. Dennis*, 2 Marv. (Del.) 433; *Marshall v. Cleaver*, 4 Penn. (Del.) 450; *McCaffrey v. Thomas*, 4 Penn. (Del.) 437.

*Florida.* — *Roberson v. State*, 42 Fla. 223.

*Georgia.* — *Williford v. State*, 121 Ga. 173; *Franklin v. Amerson*, 118 Ga. 860; *Brooks v. State*, 114 Ga. 6.

*Illinois.* — *Markey v. Griffin*, 109 Ill. App. 212; *Quinlan v. Badenoch*, 78 Ill. App. 481; *Wice v. Chicago, etc., R. Co.*, 93 Ill. App. 266; *Lynn v. People*, 170 Ill. 527.

*Indiana.* — *Harness v. Steele*, 159 Ind. 286; *Weser v. Welty*, 18 Ind. App. 664.

*Kentucky.* — *Easton v. Com.*, (Ky. 1904) 82 S. W. Rep. 996; *Petrie v. Cartwright*, 114 Ky. 103, 102 Am. St. Rep. 274; *Helm v. Com.*, 81 S. W. Rep. 270, 26 Ky. L. Rep. 165; *Begley v. Com.*, 60 S. W. Rep. 847, 22 Ky. L. Rep. 1546; *Hendrickson v. Com.*, 81 S. W. Rep. 266, 26 Ky. L. Rep. 224; *Mann v. Com.*, (Ky. 1904) 82 S. W. Rep. 438.

*Massachusetts.* — *Com. v. Tay*, 170 Mass. 192; *Ford v. Breen*, 173 Mass. 52.

*Minnesota.* — *State v. Leindecker*, 91 Minn. 278.

*Missouri.* — *Bierwith v. Pieronnet*, 65 Mo. App. 431; *State v. Hancock*, 73 Mo. App. 19.

*Nebraska.* — *Fry v. Kaessner*, 48 Neb. 133.

*New Hampshire.* — *Cordner v. Boston, etc., R. Co.*, 72 N. H. 413.

*New York.* — *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562; *People v. Van Houten*, (Ct. Spec. Sess.) 13 Misc. (N. Y.) 603; *Grinnell v. Weston*, 95 N. Y. App. Div. 454.



**877.** Time When Arrest Must Be Made. — See note 1.

**878.** See note 1.

Arrest for Threatened Breach of Peace. — See note 2.

**879.** Power to Arrest in Case of Misdemeanor. — See notes 1, 2.

*Ohio.* — *Billington v. Hoverman*, 7 Ohio Cir. Dec. 358.

*Oregon.* — *State v. Williams*, (Oregon 1904) 77 Pac. Rep. 965.

*Pennsylvania.* — *Higby v. Pennsylvania R. Co.*, 209 Pa. St. 452.

*South Carolina.* — *Loggins v. Southern R. Co.*, 64 S. Car. 321.

*South Dakota.* — *Richardson v. Dybedahl*, 14 S. Dak. 126.

*Texas.* — *Allen v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 671; *Montgomery v. State*, 43 Tex. Crim. 304; *Griffin v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 319; *Lee v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 28; *Cortez v. State*, 43 Tex. Crim. 375, 44 Tex. Crim. 169; *Mundine v. State*, 37 Tex. Crim. 5; *Missouri, etc., R. Co. v. Warner*, 19 Tex. Civ. App. 463; *San Antonio, etc., R. Co. v. Griffin*, 20 Tex. Civ. App. 91.

*Vermont.* — *State v. Doherty*, 72 Vt. 381, 82 Am. St. Rep. 951.

*Wisconsin.* — *State v. Newman*, 96 Wis. 258.

**Municipal Ordinances.** — Where a borough ordinance provides that peddlers shall procure a license, and that any person found violating the ordinance shall be arrested with or without a warrant, an arrest made without a warrant and not on view is illegal. *Plymouth v. Williams*, 8 Kulp (Pa.) 167.

The fact that an ordinance is subsequently held to be unconstitutional and void does not render the officer who made an arrest under it liable in damages. *Tillman v. Beard*, 121 Mich. 475.

**Concealed Weapons.** — In some states it is held that an officer may not arrest, either on his own knowledge or on information, without a warrant, on the bare charge of carrying concealed weapons, unless there is an actual or threatened breach of the peace. *Roberson v. State*, 43 Fla. 156; *Pickett v. State*, 99 Ga. 12, 59 Am. St. Rep. 226; *Hughes v. Com.*, (Ky. 1897) 41 S. W. Rep. 294. Compare *Jones v. Anniston*, 138 Ala. 199; *State v. Laudano*, 74 Conn. 638; *Montgomery v. State*, 43 Tex. Crim. 304; *Manger v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 145; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363.

**Construction of Statute.** — The *Texas* statute giving to a peace officer authority to arrest a person where he knows that person to have concealed weapons does not authorize a magistrate to require the peace officer to arrest a person known to the magistrate, but not to the peace officer, to have concealed weapons. *Morawietz v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 997.

"In the Presence Of," in the statutes, means in the sight of, or requires that the act be done in such a manner that the officer can detect it by sight or hearing as the act of the accused. It does not apply to a case where he cannot detect the act, but has merely a suspicion. *Hughes v. Com.*, (Ky. 1897) 41 S. W. Rep. 294.

**Military Offenses.** — The right conferred by the statutes applies to breaches of the civil law

and not to those against military regulations. *Kendall v. Scheve*, 2 Ohio Cir. Dec. 303.

**Miscellaneous Grounds of Arrest.** — For cases upholding the right of an officer to arrest without a warrant for various violations of statutes in the officer's presence, see *Gillespie v. State*, 69 Ark. 573 (being drunk, swearing, and making threats); *White v. State*, 99 Ga. 16 (disturbing military parade); *State v. Appleton*, (Kan. 1904) 78 Pac. Rep. 445 (using vile epithets and cursing); *Quinn v. Com.*, 63 S. W. Rep. 792, 23 Ky. L. Rep. 1302 (selling beer without a license); *Com. v. Robinson*, (Ky. 1905) 84 S. W. Rep. 319 (being drunk and disorderly); *State v. Boyd*, 108 Mo. App. 518 (right to arrest inmates and habitues of bawdy house); *Reynolds v. Board of Education*, 33 N. Y. App. Div. 88 (truancy); *Jones v. Foster*, 43 N. Y. App. Div. 33 (peddling without license); *People v. Angie*, 74 N. Y. App. Div. 539 (child frequenting wine room or saloon); *People v. Hochstim*, 76 N. Y. App. Div. 25, (voting or attempting to vote illegally); *State v. Pate*, 5 Ohio Dec. 732, 7 Ohio N. P. 543 (right to arrest tramp carrying firearms); *Lamb v. Stone*, 95 Wis. 254 (shooting game at night); *Hawkins v. Lutton*, 95 Wis. 492, 60 Am. St. Rep. 131 (right to enter disorderly houses and arrest without warrant where disturbance audible outside).

**877. 1. Interval of Time After Commission of Offense.** — *Marshall v. Cleaver*, 4 Penn. (Del.) 450; *Fuller v. Redding*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 634; *Percival v. Bailey*, 70 S. Car. 72.

In *Com. v. Cosler*, 8 Kulp (Pa.) 97, it was held that a policeman may arrest without a warrant for a breach of the peace where he is present or where it is evident that a breach was committed immediately before his presence.

But in *Stittgen v. Rundle*, 99 Wis. 80, thirty minutes was held to be too great a lapse of time.

**878. 1. Arrest upon Fresh Pursuit.** — *Franklin v. Amerson*, 118 Ga. 860; *Marshall v. Cleaver*, 4 Penn. (Del.) 450; *Com. v. Grether*, 204 Pa. St. 203; *Higby v. Pennsylvania R. Co.*, 209 Pa. St. 452.

**2. Officer May Prevent Breach of Peace.** — *Riggs v. Com.*, (Ky. 1895) 33 S. W. Rep. 413; *State v. Boyd*, 108 Mo. App. 518; *San Antonio, etc., R. Co. v. Griffin*, 20 Tex. Civ. App. 91; *Allen v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 671; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363.

**879. 1. Must Be in Officer's Presence.** — *United States.* — *John Bad Elk v. U. S.*, 177 U. S. 529; *Chandler v. Rutherford*, (C. C. A.) 101 Fed. Rep. 774.

*Alabama.* — *Gambill v. Schmuck*, 131 Ala. 321.

*California.* — *People v. Matthews*, 126 Cal. xvii, 58 Pac. Rep. 371.

*Delaware.* — *Marshall v. Cleaver*, 4 Penn. (Del.) 450; *McCaffrey v. Thomas*, 4 Penn. (Del.) 437.

*Florida.* — *Roberson v. State*, 42 Fla. 228.  
*Georgia.* — *Franklin v. Amerson*, 118 Ga.

**879. d. FOR PAST OFFENSES.** — See note 3.

**880.** See notes 1, 2, 3.

**e. DISPOSITION OF PERSON ARRESTED WITHOUT WARRANT.** —

See note 4.

**882. g. OF NIGHT WALKERS AND SUSPICIOUS CHARACTERS.** — See notes 1, 2.

860; *Adams v. State*, 121 Ga. 163; *Brooks v. State*, 114 Ga. 6; *Williford v. State*, 121 Ga. 173.

*Illinois*. — *Markey v. Griffin*, 109 Ill. App. 212.

*Indiana*. — *Harness v. Steele*, 159 Ind. 286.

*Kansas*. — *State v. Appleton*, (Kan. 1904) 78 Pac. Rep. 445; *State v. Dietz*, 59 Kan. 576.

*Kentucky*. — *Hughes v. Com.*, (Ky. 1897) 41 S. W. Rep. 294.

*Maine*. — *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513.

*Minnesota*. — *State v. Leindecker*, 91 Minn. 277.

*Missouri*. — *State v. Dierker*, 101 Mo. App. 636.

*New Hampshire*. — *Cordner v. Boston*, etc., R. Co., 72 N. H. 413.

*New York*. — *People v. Hochstim*, 76 N. Y. App. Div. 25; *Craven v. Bloomingdale*, 54 N. Y. App. Div. 266; *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562; *People v. Glennon*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 1; *McMorris v. Howell*, 89 N. Y. App. Div. 272; *Westbrook v. New York Sun Assoc.*, 58 N. Y. App. Div. 562; *People v. Howard*, (Ct. Spec. Sess.) 13 Misc. (N. Y.) 763; *Fuller v. Redding*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 634.

*Oregon*. — *State v. Williams*, (Oregon 1904) 77 Pac. Rep. 965.

*Pennsylvania*. — *Higby v. Pennsylvania R. Co.*, 209 Pa. St. 452; *Rarick v. McManomon*, 17 Pa. Super. Ct. 154.

*South Carolina*. — *Percival v. Bailey*, 70 S. Car. 72; *Loggins v. Southern R. Co.*, 64 S. Car. 321.

*Texas*. — *Montgomery v. State*, 43 Tex. Crim. 304; *Mundine v. State*, 37 Tex. Crim. 5.

*Wisconsin*. — *Stittgen v. Rundle*, 99 Wis. 80; *State v. Newman*, 96 Wis. 258; *Hawkins v. Lutton*, 95 Wis. 492, 60 Am. St. Rep. 131; *Lamb v. Stone*, 95 Wis. 254.

**Missouri Statute.** — In Missouri police, state, and city officers are empowered by statute to make arrests without warrants, for past offenses or past misdemeanors not committed in their presence. *State v. Boyd*, 108 Mo. App. 518; *State v. Hancock*, 73 Mo. App. 19.

**879. 2. There Must Be a Breach of the Peace.** — *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513. See also *Com. v. Krubeck*, 8 Pa. Dist. 521. But see, under statute in *Oregon*, *State v. Williams*, (Oregon 1904) 77 Pac. Rep. 965.

**Legislature May Change Rule.** — *Hughes v. Com.*, (Ky. 1897) 41 S. W. Rep. 294.

**3. Past Offenses.** — *Franklin v. Amerson*, 118 Ga. 860; *Cordner v. Boston*, etc., R. Co., 72 N. H. 413; *Carpenter v. Pennsylvania R. Co.*, 13 N. Y. App. Div. 328; *Griffin v. San Antonio*, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. Rep. 319; *Mundine v. State*, 37 Tex. Crim. 5.

**By Statute in Missouri** the rule is otherwise. *State v. Hancock*, 73 Mo. App. 19; *State v. Boyd*, 108 Mo. App. 518.

**880. 1. Arrest Within Reasonable Time.** — *Fuller v. Redding*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 634.

**2. Danger of Death.** — *State v. Shaw*, 73 Vt. 149.

**3. No Power to Arrest on Suspicion of Misdemeanor.** — *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513; *Griffin v. San Antonio*, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. Rep. 319.

**4. No Warrant After Arrest Is Necessary.** — When the accused is lawfully arrested without a warrant it is unnecessary to issue a warrant. *People v. Mulkins*, (County Ct.) 25 Misc. (N. Y.) 599; *Jones v. Anniston*, 138 Ala. 199. *Compare Leger v. Warren*, 62 Ohio St. 500, 78 Am. St. Rep. 738.

By Statute authority is sometimes given to make arrests and retain custody of the prisoner "until a warrant can be obtained." *Weser v. Welty*, 18 Ind. App. 664; *Harness v. Steele*, 159 Ind. 286; *Kirk v. Garrett*, 84 Md. 383; *Fry v. Kaessner*, 48 Neb. 133. Thus, in *Nebraska*, a warrant is required after arrest by a private person on suspicion of petit larceny. *Kyner v. Laubner*, (Neb. 1902) 91 N. W. Rep. 491.

**Liability of Officer Detaining Prisoner Without a Warrant.** — *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598; *Raitz v. Green*, 7 Ohio Cir. Dec. 238; 13 Ohio Cir. Ct. 455.

**Disposition of Prisoner by Private Person.** — *Missouri*, etc., *R. Co. v. Warner*, 19 Tex. Civ. App. 463.

**Disposition of Escaped Convict.** — An officer arresting an escaped convict, without a warrant, must within a reasonable time return him to his proper keepers. *McQueen v. State*, 130 Ala. 136.

**Without Unreasonable Delay.** — It is the duty of the officer to take the party arrested before a magistrate without unreasonable delay. *Brish v. Carter*, 98 Md. 445; *Edger v. Burke*, 96 Md. 715; *Tobin v. Bell*, 73 N. Y. App. Div. 41; *Snead v. Bonnoil*, 49 N. Y. App. Div. 330; *Stewart v. Feeley*, 118 Iowa 524; *Higby v. Pennsylvania R. Co.*, 209 Pa. St. 452; *Richardson v. Dybedahl*, 14 S. Dak. 126.

**What Is Unreasonable Delay.** — Where a prisoner is arrested at four o'clock A. M., and an opportunity is given to him to go before a magistrate at nine o'clock A. M., he cannot complain of unreasonable delay. *Bishop v. Lucy*, 21 Tex. Civ. App. 326.

From December 31 to the evening of January 2 has been held to be an unreasonable delay in carrying the prisoner before a magistrate. *Linnen v. Banfield*, 114 Mich. 93.

In *Illinois* the statute provides that one arrested after four o'clock without a warrant may be held over night, or over Sunday, to await the appearance before a magistrate. *Markey v. Griffin*, 109 Ill. App. 212.

**882. 1. Night Walkers and Suspicious Characters.** — *State v. Shaw*, 73 Vt. 149.

**882.** *h.* OF FUGITIVES FROM OTHER STATES. — See note 3.

**883.** 4. By Sheriffs, Mayors, Coroners, and Other Officers. — See note 2.

**884.** 6. By Private Persons — *a.* FOR FELONIES IN THEIR PRESENCE. — See note 2.

Arrest to Prevent Felony. — See note 3.

**885.** *b.* FOR PAST FELONIES. — See note 1.

What Necessary to Justify Individual in Arresting for Past Felony. — See note 2.

**882. 2. Arrest of Prostitute.** — Compare *State v. Boyd*, 108 Mo. App. 518.

**3. Arrest of Fugitive from Another State.** — *Wells v. Johnston*, 52 La. Ann. 713; *State v. Aucoin*, 111 La. 51; *State v. Justus*, 84 Minn. 237; *Re Dickey*, 8 Can. Crim. Cas. (Nova Scotia) 318, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 882, and applying the doctrine there stated to the case of a fugitive from the United States apprehended in Canada. Compare *State v. Whittle*, 59 S. Car. 297; *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648.

Pending extradition papers a fugitive from justice may be arrested on a magistrate's warrant. *Com. v. Rhodes*, 8 Pa. Dist. 732.

**883. 2. Mayor or Coroner.** — *State v. McDaniel*, 78 Miss. 1, 84 Am. St. Rep. 618.

**884. 2. Arrest by Private Person for Felony in His Presence** — *United States*. — *Park v. Taylor*, (C. C. A.) 118 Fed. Rep. 34.

*California*. — *Davis v. Pacific Telephone, etc., Co.*, 127 Cal. 317.

*Georgia*. — *Franklin v. Amerson*, 118 Ga. 860.

*Indiana*. — *Golibart v. Sullivan*, 30 Ind. App. 428.

*Kentucky*. — *Mann v. Com.*, (Ky. 1904) 82 S. W. Rep. 438.

*Maine*. — *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513.

*Maryland*. — *Baltimore, etc., R. Co. v. Cain*, 81 Md. 87.

*Montana*. — *State v. Gay*, 18 Mont. 51.

*Nebraska*. — *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598.

*New York*. — *People v. Glennon*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 1; *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562.

*North Carolina*. — *State v. Stancill*, 128 N. Car. 606.

*Ohio*. — *Leger v. Warren*, 62 Ohio St. 500, 78 Am. St. Rep. 738.

*Oklahoma*. — *Barclay v. U. S.*, 11 Okla. 503.

*Pennsylvania*. — *Com. v. Long*, 17 Pa. Super. Ct. 648, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 884.

*South Carolina*. — *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845; *State v. Whittle*, 59 S. Car. 297.

**Notice of Intent to Arrest** has been held to be necessary when a private person makes an arrest without a warrant. *State v. Stancill*, 128 N. Car. 606.

**3. Arrest by Private Person to Prevent Felony.** — *Park v. Taylor*, (C. C. A.) 118 Fed. Rep. 34; *State v. Shaw*, 73 Vt. 149.

**885. 1. Arrest by Private Individual for Past Felony** — *Indiana*. — *Golibart v. Sullivan*, 30 Ind. App. 428.

*Iowa*. — *State v. Phillips*, 118 Iowa 660.

*Kentucky*. — *Begley v. Com.*, 60 S. W. Rep. 847, 22 Ky. L. Rep. 1546.

*Maine*. — *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513.

*Missouri*. — *State v. Albright*, 144 Mo. 645, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 885; *State v. Evans*, 83 Mo. App. 301.

*Nebraska*. — *Kyner v. Laubner*, (Neb. 1902) 91 N. W. Rep. 491.

*New York*. — *People v. Glennon*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 1.

*North Carolina*. — *State v. Stancill*, 128 N. Car. 606.

*Oklahoma*. — *Barclay v. U. S.*, 11 Okla. 503.

*Pennsylvania*. — *Com. v. Grether*, 204 Pa. St. 203.

*South Carolina*. — *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845; *State v. Whittle*, 59 S. Car. 297.

*Utah*. — *People v. Coughlin*, 13 Utah 58.

*Vermont*. — *State v. Shaw*, 73 Vt. 149.

*Wisconsin*. — *Bergeron v. Peyton*, 106 Wis. 377, 80 Am. St. Rep. 33.

*Contra*. — *Russell v. State*, 37 Tex. Crim. 314, holding that in order to justify an arrest by a private individual without a warrant the felony must have been committed in his actual presence and view, and it is not sufficient that the party making the arrest was near enough to have seen, but did not actually see, the offense.

**2. When Private Person Justified in Arresting for Past Felony** — *United States*. — *Park v. Taylor*, (C. C. A.) 118 Fed. Rep. 34.

*Indiana*. — *Golibart v. Sullivan*, 30 Ind. App. 428.

*Iowa*. — *State v. Phillips*, 118 Iowa 660.

*Maine*. — *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513.

*Missouri*. — *State v. Albright*, 144 Mo. 645, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 885; *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669; *State v. Evans*, 83 Mo. App. 301.

*Nebraska*. — *Kyner v. Laubner*, (Neb. 1902) 91 N. W. Rep. 491; *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598.

*New Mexico*. — *Territory v. McGinnis*, 10 N. Mex. 269.

*New York*. — *People v. Glennon*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 1; *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562.

*North Carolina*. — *State v. Stancill*, 128 N. Car. 606.

*South Carolina*. — *State v. Whittle*, 59 S. Car. 297; *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845.

*Utah*. — *People v. Coughlin*, 13 Utah 58; *State v. Morgan*, 22 Utah 162.

*Vermont*. — *State v. Shaw*, 73 Vt. 149.

**Private Person Acts at His Peril.** — A private person making an arrest acts at his peril and is responsible unless it can be shown that the felony has actually been committed. *Garnier v. Squires*, 62 Kan. 321.

**887.** If a Person Who Has Been Arrested for a Felony Escapes. — See note 1.

**888.** *c.* FOR AFFRAYS AND OTHER OFFENSES IN THEIR PRESENCE. — See note 1.

**889.** Where a Misdemeanor Amounts to a Breach of the Peace. — See note 1.  
Misdemeanor Not Amounting to a Breach of the Peace. — See note 2.

*d.* FOR PAST RIOTS AND AFFRAYS. — See note 4.

**890.** *e.* ASSISTING OFFICER. — See note 1.

*7.* By Surety in Bail Bond. — See note 3.

**891.** By Deputy of Surety. — See note 1.

*8.* By Military Officer — *a.* OF DESERTERS. — See note 2.

**892.** *9.* Hue and Cry. — See note 3.

**893.** *10.* For Insanity. — See note 1.

*11.* In Civil Cases. — See note 2.

**VI. ILLEGAL ARREST — 1. In General.** — See note 3.

**Rule of Conduct for Private Person Acting Without Warrant.** — In *Montana*, by statute, "a private person, before making an arrest, shall state to the person about to be arrested the cause thereof, and require him to submit, except when such person is in actual commission of the offense, at the time thereof, or is in actual flight thereafter." *State v. Gay*, 18 Mont. 51.

**887. 1. Rearrest After Escape of One Charged with Felony.** — *Willford v. State*, 121 Ga. 173; *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669; *State v. Stancill*, 128 N. Car. 609, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 887; *State v. Whittle*, 59 S. Car. 297; *State v. Shaw*, 73 Vt. 149.

**Arrest of Escaped Convict.** — A private person may arrest on sight an escaped convict and use all the force necessary. *State v. Craft*, 164 Mo. 631.

**888. 1. Arrest by Private Individual for Affray in His Presence** — *Georgia*. — *Franklin v. Amerson*, 118 Ga. 860.

*Illinois*. — *Lynn v. People*, 170 Ill. 527.

*Indiana*. — *Golibart v. Sullivan*, 30 Ind. App. 428.

*Iowa*. — *State v. Weston*, 98 Iowa 125.

*Maine*. — *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513.

*Maryland*. — *Baltimore, etc., R. Co. v. Cain*, 81 Md. 87.

*New York*. — *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562; *Emmerich v. Thorley*, 35 N. Y. App. Div. 452.

*North Carolina*. — *Sossamon v. Cruse*, 133 N. Car. 470.

*South Carolina*. — *State v. Whittle*, 59 S. Car. 297.

*Texas*. — *Russell v. State*, 37 Tex. Crim. 314.

*Vermont*. — *State v. Shaw*, 73 Vt. 149.

**Statute Declaratory of Common-law Right.** — The *Georgia* statute authorizing a military officer to arrest without a warrant any one disturbing an authorized parade is only declaratory of the right that exists to any private person under the common law. *White v. State*, 99 Ga. 16.

**Actual Guilt Must Be Proved.** — An arrest by a private person can be justified only by proving the actual guilt of the person arrested. *Siegel v. Connor*, 70 Ill. App. 116. See also *Hight v. Naylor*, 86 Ill. App. 508.

**889. 1. Misdemeanor Amounting to Breach**

of Peace. — *Golibart v. Sullivan*, 30 Ind. App. 428.

**2. Misdemeanors Generally.** — *Franklin v. Amerson*, 118 Ga. 860. Compare *Tobin v. Bell*, 73 N. Y. App. Div. 41.

In *Nebraska* a statute empowers a private person to arrest on reasonable grounds to suspect a petit larceny. *Kyner v. Laubner*, (Neb. 1902) 91 N. W. Rep. 491.

**4. Past Crimes.** — *Baltimore, etc., R. Co. v. Cain*, 81 Md. 87; *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845.

**890. 1. Private Person Assisting Officer at His Demand.** — *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669. See also *supra*, this title, **859. 2. et seq.**

**Who Is Assistant.** — A post-office inspector who assists an officer in searching a prisoner is an assistant of the arresting officer. *Stuart v. Harris*, 69 Ill. App. 668.

**Liability of Party Assisting.** — It has been held that all persons aiding or assisting in an unlawful arrest are liable although they did not have knowledge that the arrest was unlawful when they assisted in it. *Burch v. Franklin*, 7 Ohio Dec. 519, 7 Ohio N. P. 155.

**Duty of Assistants to Render Aid.** — Where in making an arrest a struggle ensues between the officer and the accused it is the duty of the officer's assistants to aid him whether so requested or not. *State v. Miller*, 5 Ohio Dec. 703, 7 Ohio N. P. 458.

**3. Surety on Bail Bond.** — *In re Siebert*, 61 Kan. 112; *Finney v. Com.*, (Ky. 1904) 82 S. W. Rep. 636; *Coleman v. State*, 121 Ga. 594. See also the titles BAIL (IN CIVIL CASES) **624. 3. et seq.**; BAIL AND RECOGNIZANCE (IN CRIMINAL CASES) **708. 2. et seq.**

**891. 1. Surrender by Surety's Agent.** — *Coleman v. State*, 121 Ga. 594.

**2. Same — By Police Officer — Private Person.** — *Kendall v. Scheve*, 2 Ohio Cir. Dec. 303.

**892. 3. Hue and Cry.** — See *State v. Shaw*, 73 Vt. 149.

**893. 1. Mulberry v. Fuellhart**, 203 Pa. St. 573.

**Private Person Acts at His Peril.** — A private person making an arrest of an alleged lunatic without a warrant does so at his peril. *Emmerich v. Thorley*, 35 N. Y. App. Div. 452.

**2. Park v. Taylor**, (C. C. A.) 118 Fed. Rep. 34; *In re Troy*, 67 Kan. 186.

**3. Warrant Fair on Its Face — Liability of**

**894. 2. Liability for Illegal Arrest — a. OF PERSON PROCURING WARRANT — A Private Person.** — See note 1.

**895. Assent — Arrest by Mistake.** — See note 3.

**897. b. OF JUSTICE ISSUING WARRANT — Inferior Magistrates.** — See note 1.

**898.** See note 1.

**899.** Superior Judges. — See note 1.

**Officers — United States.** — *Carman v. Emerson*, (C. C. A.) 71 Fed. Rep. 264; *Hofschulte v. Doe*, 78 Fed. Rep. 436; *Whitten v. Bennett*, 77 Fed. Rep. 271, *affirmed* (C. C. A.) 86 Fed. Rep. 405.

*Alabama.* — *Spear v. State*, 120 Ala. 351; *Brown v. State*, 109 Ala. 70.

*Georgia.* — *Page v. Citizens Banking Co.*, 111 Ga. 73, 78 Am. St. Rep. 144; *Williams v. Sewell*, 121 Ga. 665.

*Iowa.* — *Chambers v. Oehler*, 107 Iowa 155.

*Maine.* — *Jacques v. Parks*, 96 Me. 268.

*Massachusetts.* — *Tellefsen v. Fee*, 168 Mass. 188, 60 Am. St. Rep. 379.

*Michigan.* — *Schultz v. Huebner*, 108 Mich. 274.

*Nebraska.* — *Kelsey v. Klabunde*, 54 Neb. 760.

*New York.* — *Krauskopf v. Tallman*, 38 N. Y. App. Div. 273.

*Vermont.* — *Goodell v. Tower*, (Vt. 1904) 58 Atl. Rep. 790.

*Wisconsin.* — *Holz v. Rediske*, 116 Wis. 353.

**894. 1. Illegal Arrest — Liability of Private Individuals — United States.** — *Park v. Taylor*, (C. C. A.) 118 Fed. Rep. 34; *Bryan v. Congdon*, (C. C. A.) 86 Fed. Rep. 221.

*Alabama.* — *Oates v. Bullock*, 136 Ala. 537, 96 Am. St. Rep. 38; *Brown v. Birmingham*, 140 Ala. 590.

*Delaware.* — *Petit v. Colmery*, 4 Penn. (Del.) 266.

*Illinois.* — *Pinkerton v. Martin*, 82 Ill. App. 589; *Clark v. Hill*, 96 Ill. App. 383.

*Kansas.* — *Bell v. Day*, 9 Kan. App. 111.

*Maine.* — *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513.

*Massachusetts.* — *Morrow v. Wheeler*, etc., Mfg. Co., 165 Mass. 349.

*Michigan.* — *Doty v. Hurd*, 124 Mich. 671; *Tillman v. Beard*, 121 Mich. 475; *Burbanks v. Lepovsky*, 134 Mich. 384.

*Missouri.* — *McCaskey v. Garrett*, 91 Mo. App. 354; *Stubbs v. Mulholland*, 168 Mo. 47; *Monson v. Rouse*, 86 Mo. App. 97; *Dougherty v. Snyder*, 97 Mo. App. 495.

*Nebraska.* — *Scott v. Flowers*, 60 Neb. 675.

*New York.* — *Whitney v. Hanse*, 36 N. Y. App. Div. 420.

*South Carolina.* — *Whaley v. Lawton*, 62 S. Car. 91.

*South Dakota.* — *Richardson v. Dybedahl*, 14 S. Dak. 126.

*Texas.* — *Karner v. Stump*, 12 Tex. Civ. App. 460.

*Vermont.* — *Goodell v. Tower*, (Vt. 1904) 58 Atl. Rep. 790.

*Virginia.* — *Bolton v. Vellines*, 94 Va. 393, 64 Am. St. Rep. 737.

*Wisconsin.* — *Holz v. Rediske*, 116 Wis. 353.

**Question of Fact.** — The question whether the purpose of a person making an arrest is lawful or unlawful is for the jury. *State v. Pate*, 5 Ohio Dec. 732, 7 Ohio N. P. 543.

**A Client May Be Liable for His Attorney's Acts** in inducing a magistrate to issue a criminal warrant. *Brueckner v. Frederick*, (Mo. App. 1904) 83 S. W. Rep. 775.

**Municipal Corporations** are not, as a general rule, liable for illegal arrests by their officers. *Bartlett v. Columbus*, 101 Ga. 300; *Lahner v. Williams*, 112 Iowa 428; *Bean v. Middlesboro*, (Ky. 1900) 57 S. W. Rep. 478; *Crosdale v. Cynthiana*, (Ky. 1899) 50 S. W. Rep. 977; *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361; *Reynolds v. Board of Education*, 33 N. Y. App. Div. 88; *Alvord v. Richmond*, 4 Ohio Dec. 177, 3 Ohio N. P. 136; *Kelley v. Cook*, 21 R. I. 29. But it has been held that a city is liable in damages for an arrest by an officer under an unconstitutional city ordinance. *McGraw v. Marion*, 98 Ky. 673. See further the titles FALSE IMPRISONMENT, 776. 5. *et seq.*; MUNICIPAL CORPORATIONS, 1191. 3. *et seq.*, especially 1204.

**895. 3. Complainant Not Liable for Mistake** — *Joske v. Irvine*, 91 Tex. 574.

**897. 1. Liability of Inferior Magistrates.** — *McVeigh v. Ripley*, 77 Conn. 136; *McMichael v. Blasingame*, 108 Ga. 298; *Stephens v. Wilson*, 115 Ky. 27; *Gardner v. Couch*, (Mich. 1904) 101 N. W. Rep. 802; *Kelsey v. Klabunde*, 54 Neb. 760; *McKelvey v. Marsh*, 63 N. Y. App. Div. 396; *Kossouf v. Knarr*, 206 Pa. St. 146; *Magnussen v. Shortt*, 200 Pa. St. 257; *Smith v. Jones*, 16 S. Dak. 337; *Gaines v. Newbrough*, 12 Tex. Civ. App. 466; *Goodell v. Tower*, (Vt. 1904) 58 Atl. Rep. 799, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 897; *Bolton v. Vellines*, 94 Va. 393, 64 Am. St. Rep. 737; *Heller v. Clarke*, 121 Wis. 71; *Holz v. Rediske*, 116 Wis. 353.

**898. 1. Error of Judgment.** — *Cottam v. Oregon City*, 98 Fed. Rep. 570; *Peonage Cases*, 123 Fed. Rep. 671; *McVeigh v. Ripley*, 77 Conn. 136; *Gardner v. Couch*, (Mich. 1904) 100 N. W. Rep. 673, 101 N. W. Rep. 802; *Kelsey v. Klabunde*, 54 Neb. 760; *Jones v. Foster*, 43 N. Y. App. Div. 33; *Gilbert v. Satterlee*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 292; *Comstock v. Eagleton*, 11 Okla. 487; *Smith v. Jones*, 16 S. Dak. 337.

**Unworthy Motives.** — A judicial officer cannot be held liable in a civil action for issuing a warrant, where he has jurisdiction of the subject-matter, for an error of judgment, mistake of law, or even malice. *Dixon v. Cooper*, 109 Ky. 29.

**Legal Arrest Following Illegal Arrest.** — The fact that the original arrest was invalid does not affect the validity of proceedings based upon a subsequent arrest under a valid warrant. *People v. Payment*, 109 Mich. 553.

**899. 1. Superior Judges.** — *Howard v. State*, 121 Ala. 21; *Harris v. McReynolds*, 10 Colo. App. 532; *McVeigh v. Ripley*, 77 Conn. 136; *Bryan v. Stewart*, 123 N. Car. 92; *Taylor v.*

**899.** *c.* OF CLERK OF COURT. — See note 2.

*d.* OF OFFICER EXECUTING — (1) *In General* — Warrant Void on Its Face. — See note 4.

**901.** See note 1.

Lack of Jurisdiction. — See note 2.

Warrant Prima Facie Regular. — See note 4

**902.** See note 1.

**903.** (2) *Liability for Arrest of Privileged Person.* — See notes 1, 2, 3, 4.

*e.* OF ATTORNEY. — See note 5.

**904.** *f.* OF SHERIFF. — See notes 1, 2, 4.

**905.** *g.* OF RAILROAD COMPANY. — See note 1.

Goodrich, (Tex. Civ. App. 1897) 40 S. W. Rep. 515; Gaines *v.* Newbrough, 12 Tex. Civ. App. 466. See also Comstock *v.* Eagleton, 11 Okla. 487.

**899. 2. Clerk of Court.** — Bryan *v.* Stewart, 123 N. Car. 92.

**4. Warrant Void on Its Face** — United States. — Chandler *v.* Rutherford, (C. C. A.) 101 Fed. Rep. 774.

Connecticut. — Church *v.* Pearne, 75 Conn. 350.

Delaware. — Petit *v.* Colmery, 4 Penn. (Del.) 266.

Georgia. — Page *v.* Citizens Banking Co., 111 Ga. 73, 78 Am. St. Rep. 144.

Kansas. — Elwell *v.* Reynolds, 6 Kan. App. 545.

Kentucky. — Stephens *v.* Wilson, 115 Ky. 27.

Maine. — Jacques *v.* Parks, 96 Me. 268.

Massachusetts. — Tellefsen *v.* Fee, 168 Mass. 188, 60 Am. St. Rep. 379.

Michigan. — Tryon *v.* Pingree, 112 Mich. 338, 67 Am. St. Rep. 398; Doty *v.* Hurd, 124 Mich. 671.

Missouri. — Stubbs *v.* Mulholland, 168 Mo. 47.

South Carolina. — State *v.* Higgins, 51 S. Car. 51.

South Dakota. — Smith *v.* Jones, 16 S. Dak. 337.

Texas. — Fulkerson *v.* State, 43 Tex. Crim. 587; Garcia *v.* Sanders, (Tex. Civ. App. 1896) 35 S. W. Rep. 52.

Vermont. — Goodell *v.* Tower, (Vt. 1904) 58 Atl. Rep. 790.

Virginia. — Lacey *v.* Palmer, 93 Va. 159, 57 Am. St. Rep. 795.

Wisconsin. — Heller *v.* Clarke, 121 Wis. 71.

**Description of Offense.** — A warrant charging "thefts" instead of "theft" is invalid, and an officer acting under it is not protected. Garcia *v.* Sanders, (Tex. Civ. App. 1896) 35 S. W. Rep. 52.

**Signing by Justice.** — Where by mistake the informant signs the warrant in the space left for the magistrate's signature, and the magistrate signs the jurat, the warrant is void, and officers acting under it are unprotected. Oates *v.* Bullock, 136 Ala. 537, 96 Am. St. Rep. 38.

**901. 1.** Gaines *v.* Newbrough, 12 Tex. Civ. App. 466.

**2. Officer Put on Inquiry.** — A sheriff is bound to inquire into the authority of the court that issues the writ, and he is liable for its execution when it is issued by a court having no jurisdiction. Stephens *v.* Wilson, 115 Ky. 27.

**4. Warrant Regular on Its Face.** — Carman *v.* Emerson, (C. C. A.) 71 Fed. Rep. 264; Whitten

*v.* Bennett, 77 Fed. Rep. 271, affirmed (C. C. A.) 86 Fed. Rep. 405; Hofschulte *v.* Doe, 78 Fed. Rep. 436; Page *v.* Citizens Banking Co., 111 Ga. 73, 78 Am. St. Rep. 144; People *v.* Payment, 109 Mich. 553; Schultz *v.* Huebner, 108 Mich. 274.

**The Rule Adopted in the United States.** — Jacques *v.* Parks, 96 Me. 268.

**902. 1.** Tryon *v.* Pingree, 112 Mich. 338, 67 Am. St. Rep. 398; Gaines *v.* Newbrough, 12 Tex. Civ. App. 466; Regan *v.* Jessup, (Tex. Civ. App. 1903) 77 S. W. Rep. 972.

**Liability of Tax Collectors.** — See Jacques *v.* Parks, 96 Me. 268.

**903. 1. Arrest of Privileged Persons.** — Brower *v.* Tatro, 115 Mich. 368; Monroe *v.* St. Clair Circuit Judge, 125 Mich. 283; Greenleaf *v.* Peoples Bank, 133 N. Car. 292, 98 Am. St. Rep. 709; Ralston *v.* Tobin, 9 Pa. Dist. 234.

**2. Officer Not Bound to Take Notice of Privilege.** — Brower *v.* Tatro, 115 Mich. 368; State *v.* Polacheck, 101 Wis. 427.

**Where the Officer Is Informed of the Privilege** it has been held that he is liable if he arrests a person contrary to government treaty obligations. Tellefsen *v.* Fee, 168 Mass. 188, 60 Am. St. Rep. 379.

**3. Privilege Does Not Make Officer Trespasser.** — Brower *v.* Tatro, 115 Mich. 368.

**4.** Brower *v.* Tatro, 115 Mich. 368; Crandall *v.* Gavitt, 20 R. I. 366; State *v.* Polacheck, 101 Wis. 427.

**5. Liability of Attorney.** — Moore *v.* Cohen, 128 N. Car. 345.

But an attorney is not liable for an arrest made under process valid when issued but rendered invalid by alterations therein made without his knowledge or connivance. McMullin *v.* Erwin, 69 Vt. 338.

**904. 1.** Gaines *v.* Newbrough, 12 Tex. Civ. App. 466.

**2. Liability of Sheriff.** — Stephens *v.* Wilson, 115 Ky. 27; Maddox *v.* Hudgeons, 31 Tex. Civ. App. 291.

**4. Arrests by Deputy Sheriffs.** — Foley *v.* Martin, 142 Cal. 256, 100 Am. St. Rep. 123.

**905. 1. Railroad Company Liable for Unlawful Arrest.** — Lezinsky *v.* Metropolitan St. R. Co., (C. C. A.) 88 Fed. Rep. 437; Chicago, etc., R. Co. *v.* Pierce, 98 Ill. App. 368; Lange *v.* Illinois Cent. R. Co., 107 La. 687; Palmer *v.* Maine Cent. R. Co., 92 Me. 399, 69 Am. St. Rep. 513; Dixon *v.* New England R. Co., 179 Mass. 242; Alabama, etc., R. Co. *v.* Kuhn, 78 Miss. 114; Cone *v.* Central R. Co., 62 N. J. L. 99; Tidey *v.* Erie R. Co., 66 N. J. L. 382; Penny *v.* New York Cent., etc., R. Co., 34 N. Y. App. Div. 10;

- 905.** 3. Conspiracy to Arrest. — See note 2.  
 4. Arrests under Altered and Blank Warrants. — See notes 3, 4.  
 5. Killing While Attempting Illegal Arrest. — See note 5.  
**906.** VII. RESISTING ARREST — 1. In General. — See notes 1, 2.  
 Resisting Arrest for Misdemeanor. — See note 3.  
**907.** Killing Officer While Resisting Lawful Arrest. — See note 1.

*McKay v. Hudson River Line*, 56 N. Y. App. Div. 201; *McLeod v. New York, etc., R. Co.*, 72 N. Y. App. Div. 116; *Daniel v. Atlantic Coast Line R. Co.*, 136 N. Car. 517; *Lovick v. Atlantic Coast Line R. Co.*, 129 N. Car. 427; *Eichengreen v. Louisville, etc., R. Co.*, 96 Tenn. 229, 54 Am. St. Rep. 833; *Missouri, etc., R. Co. v. Warner*, 19 Tex. Civ. App. 463; *Texas, etc., R. Co. v. Parker*, 29 Tex. Civ. App. 264; *Clairborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363.

**Where Officers of the Law Make a Lawful Arrest** of a passenger on a railroad train the railroad company is under no duty to interfere, through its employees, to stop the officers from using an excessive amount of force in making the arrest. *Brunswick, etc., R. Co. v. Ponder*, 117 Ga. 63, 97 Am. St. Rep. 152.

**905.** 2. Conspiracy to Arrest. — *Bacon v. Bacon*, 76 Miss. 458; *State v. Davies*, 80 Mo. App. 239; *State v. Stancill*, 128 N. Car. 606.

3. Altered Warrants. — *State v. Taylor*, 118 N. Car. 1262; *McMullin v. Erwin*, 69 Vt. 338.

**Alteration After Arrest** cannot convert an unlawful arrest into one that is lawful. *Harris v. McReynolds*, 10 Colo. App. 532.

4. Blank Warrants. — In *Spear v. State*, 120 Ala. 351, it was held that where the offender is not known by name, but by description, the name may be left blank and the description given.

5. Killing While Attempting an Illegal Arrest. — *Sossamon v. Cruse*, 133 N. Car. 470.

In an attempt to arrest without a warrant, on suspicion of a felony, the killing of a fleeing man cannot be justified without proof of his guilt. *Com. v. Greer*, 20 Pa. Co. Ct. 535.

**906.** 1. Prisoner Arrested Lawfully Should Submit. — *Petit v. Colmery*, 4 Penn. (Del.) 266; *State v. Dennis*, 2 Marv. (Del.) 433; *Brooks v. State*, 114 Ga. 6; *State v. Smith*, (Iowa 1904) 101 N. W. Rep. 110; *State v. Hancock*, 73 Mo. App. 19; *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648.

**Liability of Officer for Oppressive Proceedings.** — *Stephens v. Com.*, (Ky. 1898) 47 S. W. Rep. 229; *Towle v. Matthews*, 130 Cal. 574.

**No Right to Resist Though Innocent.** — One who is being arrested by an officer with a valid warrant has no right to assault the officer even though he is innocent of the crime charged, nor does the fact that the arresting officer had absolute knowledge of the accused's innocence justify an assault. *Tellefsen v. Fee*, 168 Mass. 188, 60 Am. St. Rep. 379.

**No Right to Resist Special Officer.** — One who resists an officer is not excused on the ground that the officer was a special officer appointed for the occasion only. *Parish v. State*, 130 Ala. 92.

**What Amounts to Resistance.** — Drawing a pistol and threatening to use it amounts to resistance. *State v. Seery*, 95 Iowa 652. And pointing a gun at the officer constitutes resistance whether the gun was loaded or unloaded.

*State v. Russell*, (Iowa 1898) 76 N. W. Rep. 653. See generally the title OBSTRUCTING JUSTICE.

2. *Com. v. Robinson*, (Ky. 1905) 84 S. W. Rep. 319; *Territory v. McGinnis*, 10 N. Mex. 269; *State v. Stancill*, 128 N. Car. 610, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 906; *Com. v. Rhoads*, 23 Pa. Super. Ct. 512, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 906. See also *supra*, this title, **847. 1. et seq.**

**Arrest Must Be Peaceable if Possible, by Force if Necessary.** — *State v. Phillips*, (Iowa 1902) 89 N. W. Rep. 1092; *Allen v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 671.

**As to the Amount of Force Allowable in case of resistance** see *Gillespie v. State*, 69 Ark. 573; *State v. Smith*, (Iowa 1904) 101 N. W. Rep. 110; *Finnell v. Bohannon*, (Ky. 1898) 44 S. W. Rep. 94; *Territory v. McGinnis*, 10 N. Mex. 269; *State v. Pate*, 5 Ohio Dec. 732, 7 Ohio N. P. 543; *Moore v. State*, 40 Tex. Crim. 439; *Williams v. State*, 41 Tex. Crim. 365. And see *supra*, this title, **847. 2. et seq.**

**Surety on Bail Bond.** — The surety arresting his principal to deliver him to the jailer in order to relieve himself under a bail bond may use all necessary force, and he is not required to "avoid or avert the danger" in case of resistance. *Finney v. Com.*, (Ky. 1904) 82 S. W. Rep. 636.

**Resisting Arrest Defined.** — Resisting arrest does not always consist in the use of physical force. A person may resist arrest by fleeing from an officer attempting to arrest him. *People v. Brooks*, 131 Cal. 311.

3. See *North Carolina v. Gosnell*, 74 Fed. Rep. 734; *Golibart v. Sullivan*, 30 Ind. App. 428; *State v. Phillips*, 119 Iowa 655; *Sossamon v. Cruse*, 133 N. Car. 470. Compare *State v. Smith*, (Iowa 1904) 101 N. W. Rep. 110. See generally *supra*, this title, **847. 1. et seq.**

**907.** 1. Homicide in Resisting Lawful Arrest — *England.* — See *Rex v. Sheriff*, 20 Cox C. C. 334.

*Alabama.* — *Brown v. State*, 109 Ala. 70.

*California.* — *People v. Morales*, 143 Cal. 550.

*Georgia.* — *Williford v. State*, 121 Ga. 173; *Brooks v. State*, 114 Ga. 6; *Smalls v. State*, 99 Ga. 25; *McDuffie v. State*, 121 Ga. 580.

*Illinois.* — *Lynn v. People*, 170 Ill. 527; *McMahon v. People*, 189 Ill. 222.

*Iowa.* — *State v. Weston*, 98 Iowa 125.

*Kentucky.* — *Stephens v. Com.*, (Ky. 1898) 47 S. W. Rep. 229; *Lindle v. Com.*, 111 Ky. 866; *Quinn v. Com.*, 63 S. W. Rep. 792, 23 Ky. L. Rep. 1302; *Hendrickson v. Com.*, 81 S. W. Rep. 266, 26 Ky. L. Rep. 224.

*Missouri.* — *State v. Craft*, 164 Mo. 631; *State v. Albright*, 144 Mo. 645; *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669.

*New Mexico.* — *Territory v. McGinnis*, 10 N. Mex. 269.

*North Carolina.* — *Sossamon v. Cruse*, 133 N. Car. 470.

- 907.** Resisting Person Assisting Officer. — See note 2.  
 Resisting Private Persons. — See note 3.
- 908.** Resisting Through Ignorance. — See note 1.  
 Officer Making Arrest Killed by Third Person. — See note 2.  
 Standing in Way of Officer. — See note 3.
- 909.** 2. Resisting Unlawful Arrest. — See notes 1, 2.  
 Homicide in Resisting Arrest. — See note 3.

*Pennsylvania.* — *Com. v. Grether*, 204 Pa. St. 203.

*South Carolina.* — *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845.

*Texas.* — *Manger v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 145; *Montgomery v. State*, 43 Tex. Crim. 304; *Hardin v. State*, 40 Tex. Crim. 208.

*Utah.* — *State v. Morgan*, 22 Utah 162; *People v. Coughlin*, 13 Utah 58.

*Vermont.* — *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648; *State v. Shaw*, 73 Vt. 149.

*Washington.* — *State v. Symes*, 20 Wash. 484. See also the title MURDER AND MANSLAUGHTER, 122. 2.

**Murder or Manslaughter.** — To kill an officer while aiding another to escape from arrest is murder and not manslaughter. *Sierra v. State*, 37 Tex. Crim. 430. See also *Moore v. State*, 40 Tex. Crim. 439, and see the title MURDER AND MANSLAUGHTER, 141. 1. *et seq.*

**Homicide by Officer to Prevent Rescue.** — See *Williams v. State*, 41 Tex. Crim. 365, and see the title MURDER AND MANSLAUGHTER, 205. 11. *et seq.*

**Misconduct of Arresting Officer.** — If the conduct of a person making an arrest is such as to put the offender under fear of death or great bodily harm he is justified in resisting even to taking life. *State v. Pate*, 5 Ohio Dec. 732, 7 Ohio N. P. 543. To the same effect see *State v. Phillips*, 118 Iowa 660.

**Arkansas Statute.** — By statute in Arkansas any resisting of process by threatening to use or by displaying a gun or pistol is a felony. *Williams v. State*, 70 Ark. 393.

**907. 2.** *North Carolina v. Gosnell*, 74 Fed. Rep. 734; *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669; *State v. Gay*, 18 Mont. 51; *People v. Coughlin*, 13 Utah 58; *State v. Morgan*, 22 Utah 162; *State v. Shaw*, 73 Vt. 149.

**3. Private Persons.** — See *State v. Albright*, 144 Mo. 645; *State v. Craft*, 164 Mo. 631; *Com. v. Grether*, 204 Pa. St. 203; *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845.

**908. 1. Ignorance of Official Character.** — *State v. Phillips*, 118 Iowa 660; *State v. Stan-cill*, 128 N. Car. 606. See also *supra*, this title, 842. 4. *et seq.*

**2. All the Parties Resisting an Arrest Are Responsible for the Consequent Acts.** — *State v. Morgan*, 22 Utah 162; *People v. Coughlin*, 13 Utah 58.

**3. Standing in Officer's Way — Encouraging Resistance to Arrest.** — *Tomlin v. Birmingham*, 109 Ala. 243; *State v. McLeod*, 97 Me. 80; *State v. Gay*, 18 Mont. 51; *Williams v. State*, 41 Tex. Crim. 365.

**Effect of Illegality of Arrest.** — In *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562, it was held that there can be no "standing in the way of an officer" or "ob-

structing justice" where the arrest the officer is attempting to make is other than a lawful one. But in *Rhode Island* it has been held that it is no defense to an indictment against a third person for obstructing an officer that the arrest which the officer was attempting was illegal. *State v. Vidalla*, 24 R. I. 186.

**909. 1.** *Chandler v. Rutherford*, (C. C. A.) 101 Fed. Rep. 774; *Jones v. State*, 114 Ga. 73; *Franklin v. Amerson*, 118 Ga. 860; *Coleman v. State*, 121 Ga. 594; *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845; *Mundine v. State*, 37 Tex. Crim. 5.

**Notice Necessary.** — Without notice of intent and authority to arrest, the arrest becomes a trespass and justifies resistance. *State v. Stan-cill*, 128 N. Car. 606.

**2. Alabama.** — *Scottsboro v. Johnston*, 121 Ala. 397.

*Arkansas.* — *Appleton v. State*, 61 Ark. 590.

*Florida.* — *Roberson v. State*, 43 Fla. 156.

*Georgia.* — *Coleman v. State*, 121 Ga. 594.

*Kentucky.* — *Mann v. Com.*, (Ky. 1904) 82 S. W. Rep. 438, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909.

*New York.* — *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562.

*South Carolina.* — *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845.

*Texas.* — *Allen v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 671; *Montgomery v. State*, 43 Tex. Crim. 304; *Lee v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 28; *Fulkerson v. State*, 43 Tex. Crim. 587.

*Washington.* — *State v. Symes*, 20 Wash. 484.

**Right of Lawful Resistance.** — See *Dryer v. State*, 139 Ala. 117; *Appleton v. State*, 61 Ark. 590; *State v. Dennis*, 2 Marv. (Del.) 433; *Jones v. State*, 114 Ga. 73; *Pickett v. State*, 99 Ga. 12; 59 Am. St. Rep. 226; *Smalls v. State*, 99 Ga. 25; *Pennington v. Com.*, (Ky. 1899) 51 S. W. Rep. 818; *Russell v. State*, 37 Tex. Crim. 314; *Cortez v. State*, 44 Tex. Crim. 169. And see *supra*, this title, 852. 2, 3.

**Need Not Submit.** — It is not the duty of any citizen to submit to any other than a lawful arrest. *Brown v. State*, 109 Ala. 70.

**Where the Warrant Is Void on Its Face** the defendant is under no legal duty to submit to arrest, and may resist. *Howard v. State*, 121 Ala. 21.

**3.** *John Bad Elk v. U. S.*, 177 U. S. 529; *Smalls v. State*, 99 Ga. 25; *Williford v. State*, 121 Ga. 173; *Coleman v. State*, 121 Ga. 594; *State v. Dietz*, 59 Kan. 576; *State v. Eldred*, 8 Kan. App. 625; *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562; *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845; *State v. Pate*, 5 Ohio Dec. 732, 7 Ohio N. P. 543; *Mundine v. State*, 37 Tex. Crim. 5; *Montgomery v. State*, 43 Tex. Crim. 304; *State v. Symes*, 20 Wash. 484. See also the title Mur-



**910.** See note 1.

**VIII. WAIVER OF ILLEGAL ARREST.** — See note 3.

**911.** See note 1.

**IX. SECOND ARREST — 1. In General.** — See note 2.

**913.** **2. In Cases of Escape.** — See note 2.

**Discharge upon Condition.** — See note 5.

**914.** **X. REWARDS FOR ARREST.** — See note 3.

**A Person Who Claims a Reward.** — See note 4.

**Public Policy.** — See note 5.

**DER AND MANSLAUGHTER, 122. 2., 141. 1. et seq.**

**910.** 1. *Pennington v. Com.*, (Ky. 1899) 51 S. W. Rep. 818; *State v. Davis*, 53 S. Car. 150, 69 Am. St. Rep. 845; *Hardin v. State*, 40 Tex. Crim. 208; *Cortez v. State*, 44 Tex. Crim. 169; *Montgomery v. State*, 43 Tex. Crim. 304.

**3. Waiver of Defects in Warrant or Service.** — *Laney v. State*, 109 Ala. 34; *State v. Dennis*, 2 Marv. (Del.) 433; *State v. McManus*, 4 Kan. App. 247; *Logan v. Lawshe*, 62 N. J. L. 567; *Jones v. Foster*, 43 N. Y. App. Div. 33; *Com. v. Green*, 185 Pa. St. 641. See also *Bishop v. Lucy*, 21 Tex. Civ. App. 326.

**Submission to Unlawful Arrest.** — Submission and appearance before the justice constitute no waiver where they are compelled by force. *Church v. Pearne*, 75 Conn. 350.

**Presumption Is Against Waiver.** — In the absence of an affirmative statement or action, the presumption is that a person wrongfully arrested and illegally held did not consent to the wrong or waive the illegality. *In re Baum*, 61 Kan. 117.

**Submission Outside Jurisdiction of Officer.** — Where a sheriff with a warrant meets the accused outside the state, and the accused voluntarily surrenders and submits to arrest, the officer using neither force, deception, nor threats, the extradition papers and defects of jurisdiction are waived. *State v. Garrett*, 57 Kan. 132.

Any defects in the affidavit must be raised on habeas corpus before the accused is extradited, for they cannot be relied on after the accused is brought to trial in the jurisdiction where the crime was committed. *Ex p. Baker*, 43 Tex. Crim. 281.

**Entering into a Recognizance for appearance** at the next session of court has been held to waive all irregularities and defects of the warrant. *State v. Stredder*, 3 Kan. App. 631; *Com. v. Blair County Jail Warden*, 8 Pa. Dist. 159; *Com. v. Baird*, 21 Pa. Co. Ct. 488.

**But Where the Arrest Was Void** because made on Sunday, in a civil case, it was held that filing a bond for appearance, which act was also performed on Sunday, did not operate as a waiver. *Valentine v. Roberts*, 1 Alaska 536.

**911. 1. Member of State Legislature.** — *State v. Polacheck*, 101 Wis. 427.

**Giving a Bail Bond** has been held in *Indian Territory* not to waive defects in process. *Edgings v. Boner*, 1 Indian Ter. 173. Compare *Dickinson v. Farewell*, 71 N. H. 213.

**Illegal Arrest Does Not Invalidate a Conviction.** — From the fact that an arrest is illegal it does not follow that the indictment and conviction are void. *In re Johnson*, 167 U. S. 120.

**2. Second Arrest — Common Law.** — *Breckon v. Ottawa Circuit Judge*, 109 Mich. 615; *Hier v. Hutchings*, 58 Neb. 334; *Nason v. Fowler*, 70 N. H. 291; *Ex p. Baker*, 43 Tex. Crim. 281; *Letcher v. Crandell*, 18 Tex. Civ. App. 62.

**A Person Out on Bail** after an arrest on a warrant is in custody of the law, and may not be arrested on another warrant growing out of the same action. *In re Beavers*, 125 Fed. Rep. 988.

**One Who Has Served a Term of Imprisonment** for larceny cannot, under the *Pennsylvania* statute, be arrested on a *capias* in a proceeding to recover the value of the goods stolen. *Pavona v. Di Jorio*, 10 Pa. Dist. 83, 23 Pa. Co. Ct. 382. See further the title **IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS, 55. 1. et seq.**

**913. 2. Scottsboro v. Johnston, 121 Ala. 397; *McQueen v. State*, 130 Ala. 136; *Williford v. State*, 121 Ga. 173; *Grosslight v. Wayne Circuit Judge*, 127 Mich. 414; *State v. Craft*, 164 Mo. 631; *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669; *Sossamon v. Cruse*, 133 N. Car. 470; *Sierra v. State*, 37 Tex. Crim. 430; *State v. Shaw*, 73 Vt. 149.**

**5. Discharge upon Condition — Rearrest.** — *Fuller v. State*, 122 Ala. 32, 82 Am. St. Rep. 17.

**914. 3. Rewards — United States.** — *Witty v. Southern Pac. Co.*, 76 Fed. Rep. 217; *Drummond v. U. S.*, 35 Ct. Cl. 356.

*Illinois.* — *Swanton v. Ost*, 74 Ill. App. 281; *Williams v. West Chicago St. R. Co.*, 94 Ill. App. 385, affirmed 191 Ill. 610, 85 Am. St. Rep. 278.

*Kentucky.* — *Coffey v. Com.*, (Ky. 1896) 37 S. W. Rep. 575.

*Maine.* — *Haskell v. Davidson*, 91 Me. 488, 64 Am. St. Rep. 254.

*Mississippi.* — *Newton County v. Doolittle*, 72 Miss. 929.

**4. Witty v. Southern Pac. Co.**, 76 Fed. Rep. 217; *Van Horn v. Ricks Water Co.*, 115 Cal. 448; *Campbell v. Mercer*, 108 Ga. 103; *Swanton v. Ost*, 74 Ill. App. 281; *Ensminger v. Horn*, 70 Ill. App. 605; *Williams v. West Chicago St. R. Co.*, 94 Ill. App. 385, affirmed 191 Ill. 610, 85 Am. St. Rep. 278; *Stone v. Wickliffe*, 106 Ky. 252; *Johnson v. Cqm.*, 76 S. W. Rep. 832, 25 Ky. L. Rep. 986; *Heather v. Thompson*, 78 S. W. Rep. 194, 25 Ky. L. Rep. 1554; *Monroe County v. Bell*, (Miss. 1895) 18 So. Rep. 121; *Ralls County v. Stephens*, 104 Mo. App. 115; *Whitcher v. State*, 68 N. H. 605; *Ward v. Keystone Land, etc., Co.*, (Tex. Civ. App. 1896) 38 S. W. Rep. 532; *Kinn v. Mineral Point First Nat. Bank*, 118 Wis. 537, 99 Am. St. Rep. 1012.

**Joint Claims.** — See *Matthews v. U. S.*, 32 Ct. Cl. 123, and see the title **REWARDS, 959. 2. et seq.**

**5. Public Officers.** — See *Cornwell v. St. Louis Transit Co.*, 100 Mo. App. 258; *Brown v. San-*

**915. ARRIVAL.** — See note 1.

dusky County, 24 Ohio Cir. Ct. 481; Southwest-ern Tel., etc., Co. v. Priest, 31 Tex. Civ. App. 345; Kinn v. Mineral Point First Nat. Bank, 118 Wis. 537, 99 Am. St. Rep. 1012. And see the title REWARDS, **952. 12. et seq.**

**915. 1. Ships — Voluntary Arrival.** — See The Coquitlam, (C. C. A.) 77 Fed. Rep. 749, following Harrison v. Vose, 9 How. (U. S.) 372.

**Arrival — Intoxicating Liquors.** — As to the meaning of the word *arrival*, under the Wil-son Interstate Commerce Act and the State Dispensary Act, see State v. Holleyman, 55 S. Car. 207, and the title INTOXICATING LIQUORS, vol. 17, pp. 293, 294.

**ARSON.**

By R. L. BARTELS.

**917. I. DEFINITION.** — See note 1.

**918. II. ELEMENTS OF THE OFFENSE — 1. The Intent — a. WILFUL AND MALICIOUS.** — See notes 1, 2.

Malice Presumed. — See note 3.

**919. b. MUST BE AN INTENT TO BURN A HOUSE — Intent to Burn Not Specific.** — See notes 3, 4.

**920. c. TO INJURE OR DEFRAUD.** — See note 2.

**921.** See note 1.

Insurance — How Proven. — See note 4.

**922. 2. The Burning — a. MUST BE AN ACTUAL BURNING.** — See note 1.

**923. b. WHAT CONSTITUTES A BURNING — Material Injury Not Necessary.** — See note 1.

Charring Constitutes a Burning. — See note 3.

**924. c. MEANS BY WHICH FIRE IS APPLIED — Object to Which Fire Is Applied.** — See note 1.

**917. 1. Definition.** — State v. Snellgrove, 71 Ark. 101, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 917; Lipschitz v. People, 25 Colo. 265, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 917; Boone v. State, (Miss. 1903) 33 So. Rep. 172.

**918. 1. Wilful and Malicious Intent Essential.** — Morris v. State, 124 Ala. 47, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 918; State v. Hand, 1 Marv. (Del.) 545; Howard v. State, 109 Ga. 137; State v. Millmeier, 102 Iowa 692; Boone v. State, (Miss. 1903) 33 So. Rep. 172 (holding that there was fatal error in the omission of the word "maliciously" in an instruction as to the facts constituting arson); Knights v. State, 58 Neb. 225, 76 Am. St. Rep. 78.

The Motive of the Defendant in burning the building is immaterial. If the act constitutes arson in all other respects, the crime committed is arson, whether the motive be gain, revenge, or any malicious mischief. People v. Fong Hong, 120 Cal. 685.

**2. Accidental Burnings.** — Morris v. State, 124 Ala. 47, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 918; Knights v. State, 58 Neb. 225, 76 Am. St. Rep. 78.

**3. Morris v. State,** 124 Ala. 47, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 918; Lipschitz v. People, 25 Colo. 265, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 918.

**919. 3. General Intent to Burn Sufficient.** — People v. Hiltel, 131 Cal. 577.

**4. People v. Hiltel,** 131 Cal. 577.

**920. 2. Intent to Injure or Defraud — Burning Insured Property.** — Jones v. State, 70 Ohio St. 36.

**921. 1. Intent Must Be Alleged and Proved** — People v. Mooney, 127 Cal. 339.

**Evidence of Intent.** — Evidence that the owner of an insured building burned it justifies a finding that he did it with intent to defraud the insurer. People v. Vasalo, 120 Cal. 168.

**4. Where the Defendant Refused to Produce an insurance policy at the time ordered, standing on his statutory right to more time, it was held to be proper to allow proof of the contents of the policy by oral evidence and written memoranda.** People v. Vasalo, 120 Cal. 168.

**922. 1. Explosion Distinguished from Burning.** — A charge of burning is not sustained by proof that the building was blown up with dynamite, though some of the fragments took fire. The distinction made is between burning the house and burning parts detached from it by the explosion. Landers v. State, 39 Tex. Crim. 671.

**923. 1. Building Need Not Be Consumed or Materially Injured.** — State v. Spiegel, 111 Iowa 701.

**3. Charring Constitutes Burning.** — Benbow v. State, 128 Ala. 1; State v. Spiegel, 111 Iowa 701.

**924. 1. Communicating Fires.** — A person

**924. 3. The Property Burned** — *a. AT COMMON LAW* — (1) *Generally*. — See note 2.

**925.** (2) *Dwelling House* — (a) *What Constitutes a Dwelling House* — Character of Building Immaterial. — See note 3.

**927.** Temporary Absence. — See note 1.

Statutory Occupation. — See note 3.

**928.** (b) *Outhouses* — Character — How Determined. — See note 3.

**930.** *b. BY STATUTE* — (1) *Statutory Changes in the Law*. — See note 3. Degrees. — See note 4.

**931.** (2) *What Constitutes a House*. — See note 1.

(3) *Subjects of Statutory Arson*. — See note 3.

**932.** See notes 3, 4.

**933.** See notes 2, 5, 8, 9.

(4) *The Value*. — See note 10.

**934. 4. Ownership and Possession** — *a. MUST BE THE HOUSE OF ANOTHER* — At Common Law. — See notes 1, 2.

By Statute. — See note 4.

**935. b. OCCUPANT CONSIDERED AS OWNER**. — See note 1.

who sets fire to one building which is so near to another that it also burns as a natural and probable consequence may be convicted of arson in respect to the last-mentioned building though the indictment does not charge him with burning the building to which he actually applied the fire. *People v. Hiltel*, 131 Cal. 577.

**924. 2. Common Law — Arson Offense Against Security of Habitation**. — *Lipschitz v. People*, 25 Colo. 266, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 924.

**925. 3. Storehouse and Dwelling**. — A building wherein the lower floor is used as a store and the upper floor as a dwelling is a dwelling house. *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786. See also DWELLING, DWELLING HOUSE, ETC., and the cross-references there given.

**927. 1. Temporary Absence**. — *Meeks v. State*, 102 Ga. 572.

**3. What Constitutes an Actual Presence**. — Under the *Missouri* statute it is sufficient to constitute the crime of arson in the first degree that there was a human being in any part of the building burned. *State v. Young*, 153 Mo. 445.

**928. 3. A Freight Car** which has been taken off the wheels, placed on permanent posts near the railway track at a station, and used for storage purposes is an "outhouse" within the *Georgia* statute. *Carter v. State*, 106 Ga. 372, 71 Am. St. Rep. 262. See also OUTHOUSE — OUTBUILDING.

**930. 3. Statutory Arson**. — *Lipschitz v. People*, 25 Colo. 265; *Com. v. Uhrig*, 167 Mass. 420; *State v. Sarvis*, 45 S. Car. 668, 55 Am. St. Rep. 806.

Though statutory arson is an offense against property rights, it is also an offense against habitation as at common law, and therefore it is held to be sufficient under some of the statutes to aver ownership in the occupant, because one of the two reasons for showing ownership is to make it appear that the house burned was not the dwelling of the accused. *State v. Copeland*, 46 S. Car. 13; *State v. Carter*, 49 S. Car. 265.

**4. Degrees**. — See *Benbow v. State*, 128 Ala. 1; *Granison v. State*, 117 Ala. 22; *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786.

**931. 1. House Defined as Used in Statutes**. — A house used as a residence by a man and his family is an "occupied dwelling house" within the meaning of Pen. Code Ga., § 138, though every member of the family is absent at the time when the house is burned. *Meeks v. State*, 102 Ga. 572.

**3. Subjects of Statutory Arson — Barns**. — *State v. Fry*, 98 Tenn. 328, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 931.

**932. 3. A Corncrib Is Not Included in the Term "Barn"** as used in the *South Carolina* statute declaring the wilful and malicious burning of a "barn" to be arson. *State v. Jeter*, 47 S. Car. 2.

**4. Stacks**. — *State v. Harvey*, 131 Mo. 339; *State v. Harvey*, 141 Mo. 343.

**933. 2. Jail**. — *Howard v. State*, 109 Ga. 137.

**5. "Flouring, Grist, and Corn Mill House"**. — *Jordon v. State*, 142 Ind. 422.

**8. Warehouse**. — *Carter v. State*, 106 Ga. 372, 71 Am. St. Rep. 262; *Com. v. Uhrig*, 167 Mass. 420.

**9. Public Bridges**. — *Com. v. Fitzgerald*, 164 Mass. 587.

**10. Value of House Burned**. — *Jones v. State*, 70 Ohio St. 36.

**934. 1. Must Be House of Another Person — Common Law**. — *State v. Young*, 153 Mo. 445; *State v. Sarvis*, 45 S. Car. 668, 55 Am. St. Rep. 806.

**2. Husband or Wife Burning House of Other**. — *Jordon v. State*, 142 Ind. 422.

**4. Statutory Offense Distinguished from Arson**. — In some states burning insured property with intent to defraud the insurer is a special statutory offense which is separate and distinct from arson. *State v. Young*, 139 Ala. 136, 101 Am. St. Rep. 21; *People v. Fong Hong*, 120 Cal. 685; *Jones v. State*, 70 Ohio St. 36. See also *supra*, this title, **920. 2. et seq.**

**935. 1. Occupant Considered as Owner**. — *Hannigan v. State*, 131 Ala. 29; *State v. Young*, 139 Ala. 136, 101 Am. St. Rep. 21; *People v.*

**936.** Actual Occupant Burning House. — See notes 2, 4.

**937.** III. PRINCIPAL AND ACCESSORY. — See note 2.

IV. ATTEMPTS TO COMMIT ARSON. — See notes 3, 4. See generally the title ATTEMPTS TO COMMIT CRIME.

**938.** V. EVIDENCE — 1. The Corpus Delicti — Must Be Proven. — See notes 1, 2.

What Constitutes the Corpus Delicti. — See note 3.

Corpus Delicti — How Proven. — See note 4.

**939.** Testimony of Accomplice. — See notes 1, 2.

**940.** 2. Evidence of Motive. — See note 1.

Fong Hong, 120 Cal. 685; *People v. Davis*, 135 Cal. 162; *Lipschitz v. People*, 25 Colo. 266, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 935; *State v. Barrett*, 2 Penn. (Del.) 297; *Com. v. Elder*, 172 Mass. 187. See also *People v. De Winton*, 113 Cal. 403, 54 Am. St. Rep. 357.

Ownership Must Be Proven. — *Goldsmith v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 710.

**936.** 2. Lessee of House Burning It. — *State v. Young*, 139 Ala. 136, 101 Am. St. Rep. 21; *State v. Young*, 153 Mo. 445.

4. Statutes. — *Lipschitz v. People*, 25 Colo. 265; *State v. Young*, 153 Mo. 445; *State v. Daniel*, 121 N. Car. 574; *State v. Graham*, 121 N. Car. 623; *State v. Carter*, 49 S. Car. 265; *Gutgesell v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 1016; *Kelley v. State*, 44 Tex. Crim. 187.

**937.** 2. Principal and Accessory. — See *Howard v. State*, 109 Ga. 137; *Dawson v. State*, 38 Tex. Crim. 50.

Burning House at Owner's Solicitation. — In *South Carolina* an owner who procures his house to be burned by another is not guilty of arson. *State v. Sarvis*, 45 S. Car. 668, 55 Am. St. Rep. 806.

Holding a Horse in order to enable the owner of such horse to set fire to a building has been held to render the holder guilty as an accomplice. *People v. Jones*, 123 Cal. 65.

3. Mere Soliciting Sufficient to Constitute an Attempt. — *Com. v. Peaslee*, 177 Mass. 267.

4. Under Some Statutes Overt Act Necessary. — *Weaver v. State*, 116 Ga. 550; *Com. v. Peaslee*, 177 Mass. 267.

**938.** 1. Corpus Delicti Must Be Proven. — *People v. Jones*, 123 Cal. 65; *Chapman v. State*, 157 Ind. 300; *State v. Millmeier*, 102 Iowa 692.

Disproving License from Owner. — In *People v. Fong Hong*, 120 Cal. 685, it was claimed that since it is not arson in *California* to burn one's own property, it is, therefore, incumbent on the prosecution in an arson case to prove that the defendant did not have a license from the owner to burn; but the court did not find it necessary to pass on "this novel proposition."

2. Confessions Alone Insufficient to Convict. — *People v. Jones*, 123 Cal. 65.

3. *State v. Millmeier*, 102 Iowa 692; *People v. Wagner*, 71 N. Y. App. Div. 399.

4. Evidence of Felonious Burning. — See *People v. Fitzgerald*, 137 Cal. 546. See also *Hooker v. State*, 98 Md. 145, holding particular evidence inadmissible.

Evidence of Other Fires. — *People v. Jones*, 123 Cal. 65; *Knights v. State*, 58 Neb. 225, 76 Am. St. Rep. 78; *People v. Smith*, 37 N. Y. App. Div. 280.

Testimony showing the burning of other property of a corporation, two years previous to the burning charged, is not admissible, unless connected in some way with the crime charged. *People v. Fitzgerald*, 156 N. Y. 253.

The Confession of the defendant that he had burned another house on the same night and as part of the same scheme is admissible as tending to prove the crime charged. *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786.

Previous Attempts may be shown. *State v. Hallock*, 70 Vt. 159.

Circumstances in Defendant's Favor. — *People v. Fournier*, (Cal. 1897) 47 Pac. Rep. 1014; *Green v. State*, 111 Ga. 139.

Circumstantial Evidence Held Sufficient. — *People v. Hiltel*, 131 Cal. 577.

In *State v. Millmeier*, 102 Iowa 692, the corpus delicti was held to have been sufficiently proved by evidence that the building burned was unoccupied; that on the night of the fire the defendant necessarily passed it on his way home; that he had previously made threats against the owner of the building; and that footprints similar in size and style to those made by the defendant were found near to and leading from the building.

Evidence of the Odor of Kerosene on the defendant's clothing at the time of the fire is admissible where there is evidence that kerosene was used to burn the building. *People v. Bishop*, 134 Cal. 682.

**939.** 1. Testimony of Accomplices. — *Carter v. State*, 106 Ga. 372, 71 Am. St. Rep. 262.

2. Corroboration of Accomplice. — *People v. Butler*, 62 N. Y. App. Div. 508. See also *People v. Davis*, 135 Cal. 162, holding that the witness for the state was sufficiently corroborated by statements of the defendant.

**940.** 1. Evidence of Motive Admissible. — *Prater v. State*, 107 Ala. 26; *Simpson v. State*, 111 Ala. 6; *Morris v. State*, 124 Ala. 47; *Howard v. State*, 109 Ga. 137; *People v. Fitzgerald*, 156 N. Y. 253; *People v. Fitzgerald*, 20 N. Y. App. Div. 139; *State v. Shines*, 125 N. Car. 730.

Evidence that the defendant was not on good terms with the owner of the burned building, together with evidence of his proximity to the burned building at the time of the fire, is admissible to show motive. *People v. Gotshall*, 123 Mich. 474.

Inadmissible Evidence. — Evidence of ill will towards the agent of the owner of the burned premises is inadmissible to show motive, in the absence of threats against the latter. *State v. Battle*, 126 N. Car. 1036.

Insufficient Evidence. — Failure of the owner of the burned premises to settle with his em-

**940.** Threats. — See note 2.

**941.** Excessive Insurance. — See note 1.

**942.** 3. Evidence of Defendant's Presence — Tracks and Footprints. — See note 3.

**943.** ART. — See note 3.

**944.** ARTESIAN WELLS. — See note 1.

**946.** ARTICLE. — See note 1.

**947.** ARTIFICE. — See note 2.

**948.** ARTIFICIAL. — See note 1.

ARTISAN. — See note 3.

**949.** AS. — See note 2.

**950.** ASCERTAIN. — See note 3.

ASPHALT. — See note 4.

ployee (the party accused) is not sufficient to show motive. *Ross v. State*, 109 Ga. 516.

**940.** 2. Evidence of Threats — *Alabama*. — *Prater v. State*, 107 Ala. 26; *Mitchell v. State*, 140 Ala. 118.

*Georgia*. — *Howard v. State*, 109 Ga. 137.

*Iowa*. — *State v. Millmeier*, 102 Iowa 692.

*Massachusetts*. — *Com. v. Crowe*, 165 Mass. 139.

*Mississippi*. — *Strong v. State*, (Miss. 1898) 23 So. Rep. 392.

*North Carolina*. — *State v. Lytle*, 117 N. Car. 799; *State v. Shines*, 125 N. Car. 730; *State v. Battle*, 126 N. Car. 1036; *State v. Freeman*, 131 N. Car. 725; *State v. Ledford*, 133 N. Car. 714.

General Threats Inadmissible. — *Ross v. State*, 109 Ga. 516.

**941.** 1. Excessive Insurance — Evidence of Motive. — *People v. Goldsworthy*, 130 Cal. 600; *Hooker v. State*, 98 Md. 145; *People v. Gotshall*, 123 Mich. 474.

Overvaluation Not Conclusive Evidence of Motive. — *People v. Kelly*, 11 N. Y. App. Div. 495.

**942.** 3. Tracks and Footprints. — *Ethridge v. State*, 124 Ala. 106; *Morris v. State*, 124 Ala. 47; *State v. Millmeier*, 102 Iowa 692; *State v. Shines*, 125 N. Car. 730. See also *Landers v. State*, 39 Tex. Crim. 671, in which case the footprints were not identified as the defendant's and were held to furnish no evidence of his guilt.

**943.** 3. Seduction. — "Art is the skilful and systematic arrangement or adaptation of means for the attainment of some desired end." *Suther v. State*, 118 Ala. 88, followed in *Hall v. State*, 134 Ala. 90.

Patent Law — *Synonymous with Process*. — *Carnegie Steel Co. v. Cambria Iron Co.*, 89 Fed. Rep. 721.

**944.** 1. Meaning of Term "Artesian" Explained by Parol Evidence. — "The primary definition in all the dictionaries of the word *artesian* indicates a well from which the water flows naturally without artificial pressure; but the secondary definition of the word in the Century and Standard dictionaries and others seems to indicate that it may be applied, also, to wells from which the water is made to flow by artificial means. The word *artesian*,

therefore, becomes a term of equivocal significance, standing unexplained in a contract. It was hence competent to introduce parol testimony to show what meaning it had in this particular contract." *Hattiesburg Plumbing Co. v. Carmichael*, 80 Miss. 66.

**946.** 1. Carrier Limiting His Liability upon the Article Forwarded — *Baggage*. — *Carter v. Wilmington, etc., R. Co.*, 126 N. Car. 437.

*Ejusdem Generis* — Article of Personal Use and Ornament. — Such words in a bequest of furniture, etc., will not include a yacht. *Parry's Estate*, 188 Pa. St. 33.

**947.** 2. See *State v. Hamann*, 109 Iowa 646 (a seduction case).

**948.** 1. "Artificial" and "Artifice" *Synonymous*. — "One of the universal definitions of the word *artificial* is artful, subtle, crafty, and ingenious, so nearly like that of 'artifice' that an attempted distinction would be without a difference." *State v. Hamann*, 113 Iowa 367 (a seduction case).

The Term "Artificial Alizarin," as used in the Wilson Tariff Act, has acquired "a definite, fixed meaning, by which it is limited to such dyestuffs as are derived from anthracene." *Farbenfabriken v. U. S.*, (C. C. A.) 102 Fed. Rep. 603, affirming 99 Fed. Rep. 554.

Artificial or Ornamental Grains and Flowers — Customs Duties. — See *Herman v. U. S.*, 121 Fed. Rep. 201.

3. Mechanic's Lien. — *O'Clair v. Hale*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 31.

**949.** 2. As in the Sense of When. — *Finance Co. v. Anderson*, 106 Iowa 429.

**950.** 3. *Pughe v. Coleman*, (Tex. Civ. App. 1898) 44 S. W. Rep. 577.

Ascertained in the Sense of Judicially Ascertained. — *German Nat. Bank v. Farmers, etc., Bank*, 54 Neb. 595.

4. Asphalt Pavement. — The term *asphalt* in a suit for infringement of a patent for repairing pavements "is not limited in its meaning to the Trinidad deposit, or to so-called 'American mixtures,' but includes as well the bituminous paving material used in France and elsewhere, comprising natural rock *asphalt* and compositions of bitumen and lime or sand particles." *U. S. Repair, etc., Co. v. Assyrian Asphalt Co.*, 96 Fed. Rep. 235, affirmed (C. C. A.) 100 Fed. Rep. 965.

# ASSAULT AND BATTERY.

BY GEO. G. ALBAN.

## 953. I. DEFINITIONS — Assault. — See note 1.

Battery. — See note 2.

## II. ESSENTIAL ELEMENTS OF AN ASSAULT OR BATTERY — 1. Intent —

How Far Essential. — See note 3.

## 954. See note 1.

## 955. Intent Presumed. — See note 1.

Specific Intent Need Not Be Executed. — See note 2.

## 956. 2. Overt Act in Assault — a. GENERALLY. — See note 1.

**953.** 1. *Morgan v. O'Daniel*, (Ky. 1899) 53 S. W. Rep. 1040, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 953; *Ganaway v. Salt Lake Dramatic Assoc.*, 17 Utah 41, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 953.

**Other Definitions of Assault.** — An assault is an attempt with violence to do an injury to another with the means at hand of carrying that purpose into execution. *State v. Lockwood*, 1 Penn. (Del.) 76; *State v. Burton*, 2 Penn. (Del.) 472; *State v. Jones*, 2 Penn. (Del.) 573; *Hendle v. Geiler*, (Del. 1895) 50 Atl. Rep. 632; *State v. Mills*, 3 Penn. (Del.) 508; *Armstrong v. Little*, 4 Penn. (Del.) 255; *State v. Lewis*, 4 Penn. (Del.) 332; *State v. Harrigan*, 4 Penn. (Del.) 129; *State v. Di Guglielmo*, 4 Penn. (Del.) 336.

"An unlawful attempt or offer, with force and violence, to do a bodily injury to another." *State v. Hatfield*, 48 W. Va. 561.

An assault may be committed by the use of any dangerous weapon, or the semblance thereof, in a threatening manner, with intent to alarm, under circumstances tending to effect that object. *Tollett v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 335.

An assault is an intentional attempt by force to do an injury to the person of another. *Butler v. Stockdale*, 19 Pa. Super. Ct. 98.

**Facts Held to Constitute Assault.** — Where a man lays his hand on the arm of a woman against her will and, when she runs, follows her some distance, this constitutes an assault. *State v. Fulkerson*, 97 Mo. App. 599.

**2. Other Definitions of Battery.** — A battery is the laying on of hands in an assault or the infliction of the injury. *State v. Burton*, 2 Penn. (Del.) 472; *Hendle v. Geiler*, (Del. 1895) 50 Atl. Rep. 632; *State v. Mills*, 3 Penn. (Del.) 508; *Armstrong v. Little*, 4 Penn. (Del.) 255; *State v. Lewis*, 4 Penn. (Del.) 332; *State v. Harrigan*, 4 Penn. (Del.) 129.

"The least touching of another wilfully" does not constitute a battery, but touching another in anger is a battery. *Alston v. State*, 109 Ala. 51. To the same effect see *Jacobi v. State*, 133 Ala. 1.

"A battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person." *Butler v. Stockdale*, 19 Pa. Super. Ct. 98.

**3. Intent.** — *Thomas v. State*, 99 Ga. 38; *State v. Carver*, 89 Me. 74; *Shields v. State*, 39 Tex. Crim. 13; *Fuller v. State*, 44 Tex. Crim. 463; *Stermer v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 1072; *Chambless v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 577; *Stripling v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 376. See also *Bartell v. State*, 106 Wis. 342.

**954.** 1. *Carlton v. Henry*, 129 Ala. 479, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 954.

**In Illinois** the rule that intent to do injury is of the essence of an assault is applied to civil as well as to criminal actions. *Gilmore v. Fuller*, 198 Ill. 130.

**An Intent to Frighten** merely, and not to inflict injury, has been held not to be sufficient to sustain a civil action for assault. *Degenhardt v. Heller*, 93 Wis. 662.

**955.** 1. *State v. Foreman*, 1 Marv. (Del.) 517; *State v. Jones*, 2 Penn. (Del.) 573; *Shriver v. Bean*, 112 Mich. 508; *People v. Hannigan*, 42 N. Y. App. Div. 617; *State v. Baker*, 20 R. I. 275, 78 Am. St. Rep. 863.

**An Intent to Commit Rape May Be Inferred** from the conduct of the accused. *People v. Johnson*, 131 Cal. 511; *State v. Smith*, 9 Houst. (Del.) 588.

**Presumption of Fact.** — That one intends the natural consequences of his act is a presumption of fact, and does not mean that one who hurls a stone at another and misses him is presumed to have intended to miss. *State v. Hersom*, 90 Me. 273.

**It Is the Province of the Jury** to determine whether, from the facts, an intent to rob is to be inferred. *People v. Hite*, 135 Cal. 76.

**2.** *Bush v. State*, 136 Ala. 85; *Jennings v. U. S.*, 2 Indian Ter. 670; *Christian v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 422.

**General Malice.** — In a civil action by one injured by an attempt of the defendant to assault a third person, general malice may be presumed from reckless and wanton acts though there was no specific malice towards the plaintiff. *Davis v. Collins*, 69 S. Car. 460.

**956.** 1. *Gaskin v. State*, 105 Ga. 632, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 956; *Burton v. State*, 109 Ga. 134; *State v. Jones*, 118 N. Car. 1237.

**Drawing Pistol.** — *State v. Llewellyn*, 93 Mo. App. 469.

**957.** *b. THREATS AND ABUSIVE LANGUAGE.* — See notes 1, 2.

**958.** *3. Ability in Assault.* — See note 1.

*Ability Apparent Only.* — See note 2.

**959.** *4. Force in Battery — a. UNLAWFUL FORCE — (1) Generally.* — See note 2.

**960.** *(2) Administering Poison or Drugs — In the United States.* — See note 2.

*Firing a Pistol in the Direction of Another with the intention of frightening or of wounding him is an assault.* *State v. Baker*, 20 R. I. 275, 78 Am. St. Rep. 863.

**Person Assaulted Need Not Be Alarmed.** — Where the defendant drew a knife with the intent of cutting the prosecutor, but was restrained by a third party, the fact that the prosecutor did not see the knife and was not alarmed is no defense to the charge of assault. *Gann v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 725.

**Necessity of Present Danger.** — In *Georgia* it has been held that one who put poison into a well with intent that the water should be drunk by another was not guilty of an assault with intent to murder where the presence of the poison was discovered before any person had drunk of the water. *Peebles v. State*, 101 Ga. 585. See also the title POISONS AND POISONING.

**Shooting Wide of Mark.** — Shooting at a person constitutes an assault, although the bullet went wide of the mark. *State v. Hunt*, 25 R. I. 75.

**An Assault May Be Completed Without Touching the Person** of the one assaulted, as by lifting a cane, clinching the fist, or pointing a gun at him. *State v. Hatfield*, 48 W. Va. 561.

**957.** 1. *Jackson v. State*, 103 Ga. 417; *Penny v. State*, 114 Ga. 77; *Prince v. Ridge*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 666; *Rankin v. Sievern*, etc., R. Co., 58 S. Car. 532; *State v. Hatfield*, 48 W. Va. 561.

**Mere Threats.** — *Cox v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 157.

**2. Threats Not Legal Provocation** — *Delaware*. — *Watson v. Hastings*, 1 Penn. (Del.) 47; *State v. Burton*, 2 Penn. (Del.) 472; *Hendle v. Geiler*, (Del. 1895) 50 Atl. Rep. 632; *State v. Mills*, 3 Penn. (Del.) 508; *Armstrong v. Little*, 4 Penn. (Del.) 255; *State v. Harrigan*, 4 Penn. (Del.) 129.

*Iowa*. — *Irlbeek v. Bierl*, 101 Iowa 240; *State v. Leuhrman*, 123 Iowa 476.

*Louisiana*. — *Munday v. Landry*, 51 La. Ann. 393.

*Michigan*. — *Goucher v. Jamieson*, 124 Mich. 21.

*Missouri*. — *Berryman v. Cox*, 73 Mo. App. 67; *State v. Kaiser*, 78 Mo. App. 575.

*Pennsylvania*. — *Com. v. Brungess*, 23 Pa. Co. Ct. 13.

*Tennessee*. — *Daniel v. Giles*, 108 Tenn. 242.

*Texas*. — *Hill v. State*, 43 Tex. Crim. 583; *Gatling v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 471.

**Insulting Remarks No Defense.** — An insulting remark to one's wife does not justify an assault by the husband. *Hayes v. Sease*, 51 S. Car. 534. Compare *Burks v. State*, 40 Tex. Crim. 167, holding that insulting remarks concerning the defendant's wife will not reduce the degree of the assault unless it was committed immedi-

ately upon the defendant's learning of the remarks.

**Rule in Alabama and Georgia.** — *Johnson v. State*, 136 Ala. 76; *Rogers v. State*, 117 Ala. 192; *Moore v. State*, 102 Ga. 581; *Cross v. Carter*, 100 Ga. 632; *Samuels v. State*, 103 Ga. 3; *Mitchell v. State*, 110 Ga. 272.

But the rule applies only to words and language used at the time of the assault. *Berry v. State*, 105 Ga. 683. Thus, an assault offered to the defendant's daughter on the day before the assault was committed is not admissible as justification. *Walker v. State*, 117 Ga. 323.

Mere grimaces or facial expressions do not constitute sufficient provocation. *Behling v. State*, 110 Ga. 754.

And abusive language can never justify or mitigate an assault with intent to murder. *Nixon v. State*, 101 Ga. 574.

*In a Civil Case*, abusive language is never a bar to the right to recover damages for an assault and battery, but may be considered in mitigation. *Berkner v. Dannenberg*, 116 Ga. 954.

**The Rule in Mississippi** is that insulting language will not justify an assault with a deadly weapon. *Stone v. Heggie*, 82 Miss. 410. See also *Barr v. State*, (Miss. 1897) 21 So. Rep. 131.

**The Use of Vulgar and Obscene Language** by the prosecutor will not reduce the degree of the offense. *Mozee v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 250.

**958.** 1. *Lott v. State*, 83 Miss. 609.

**Intent Need Not Be Executed.** — If the defendant had the present ability to execute his unlawful intent, the fact that he was prevented by a third party from committing the battery is no defense to the charge of assault. *Gann v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 725. See also *Dillard v. State*, 65 Ark. 404.

2. *Christian v. State*, 133 Ala. 109; *Thomas v. State*, 99 Ga. 38.

**Presenting Unloaded Pistol.** — *State v. Archer*, 8 Kan. App. 737, supporting the first paragraph of the original note.

It is held in *California* that presenting an unloaded pistol at a person, or even a loaded pistol with no attempt to discharge it, does not constitute an assault. *People v. Sylva*, 143 Cal. 62.

**Presenting a Broken Pistol** is held in *Texas* to constitute a simple assault. *Pearce v. State*, 37 Tex. Crim. 643.

**959.** 2. *State v. Lewis*, 113 Wis. 393, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 959.

**Willfully or Intentionally to Drive a Horse Against One** constitutes an assault and battery. *State v. Lewis*, 4 Penn. (Del.) 332.

**Seizing a Gun in the Hands of Another** and violently wrenching it from him constitutes a battery. *Scott v. State*, 118 Ala. 115.

**960.** 2. *State v. Monroe*, 121 N. Car. 677, 61 Am. St. Rep. 686, holding that a druggist who, at another's request, drops croton oil into

- 961.** *b. LAWFUL FORCE* — (1) *Generally*. — See note 1.  
 (2) *By Officers*. — See note 2.  
 Liable for Excess of Force. — See note 3.
- 962.** *Any Indifferent Person*. — See note 1.  
 (3) *By Parents, and Persons in Loco Parentis*. — See notes 2, 3, 5.
- 963.** See note 1.
- 964.** (4) *By Husband*. — See note 1.  
 (5) *By Other Persons in Authority*. — See note 5.
- 965.** *III. AGGRAVATED ASSAULTS* — 1. *Generally*. — See notes 2, 4.

a piece of candy, knowing that it is to be used as a joke and not as medicine, is guilty of an assault. See also the title POISONS AND POISONING.

**961.** 1. *Chicago, etc., R. Co. v. Casazza*, 83 Ill. App. 421; *State v. Shea*, 104 Iowa 724; *Ponton v. State*, 35 Tex. Crim. 597; *Chase v. Watson*, 75 Vt. 385.

**2. Officer Using Lawful Force.** — *Finnell v. Bohannon*, (Ky. 1898) 44 S. W. Rep. 94; *People v. O'Brien*, 48 N. Y. App. Div. 66.

**3. Excessive Force in Arrest.** — *Finnell v. Bohannon*, (Ky. 1898) 44 S. W. Rep. 94; *Wallace v. State*, (Miss. 1897) 21 So. Rep. 662; *Sossamon v. Cruse*, 133 N. Car. 470; *State v. Clark*, 51 S. Car. 265. See also *Ryan v. Quinn*, 71 S. W. Rep. 872, 24 Ky. L. Rep. 1513.

**Firing at Person to Secure His Arrest.** — See *People v. Hannigan*, 42 N. Y. App. Div. 617.

**When a Person Is Violating No Law**, an officer has no right to order him to "move on," and, upon his failure to obey, to shove or strike him. *State v. Meyers*, 174 Mo. 352.

**962.** 1. *Prevention of Unlawful Acts.* — One who holds another to prevent his separating two persons who are fighting commits an assault, as a private citizen has a right to interfere to separate those who are committing a breach of the peace. *Wilson v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 315.

**2. Correction of Child by Parent.** — *Thompson v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 623; *Goode v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 799. See also the title PARENT AND CHILD.

**Question for Jury.** — Whether punishment of a child by a parent is excessive or cruel is a question for the jury. *Hornbeck v. State*, 16 Ind. App. 484.

Whether a parent, in punishing a child, acts in good faith and without passion, is to be determined largely from the character of the injuries received by the child. *State v. Washington*, 104 La. 443, 81 Am. St. Rep. 141.

**Delegation of Power.** — A mother may authorize another to punish her child, and if the punishment be not excessive it will not constitute assault and battery. *Harris v. State*, 115 Ga. 578. Compare *Donnelley v. Territory*, (Ariz. 1898) 52 Pac. Rep. 368.

**3. Correction of Ward by Guardian.** — *Clasen v. Pruhs*, (Neb. 1903) 95 N. W. Rep. 640.

**5. Correction of Pupil by Teacher.** — *State v. Boyer*, 70 Mo. App. 156; *Thomason v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 1013; *Stephens v. State*, 44 Tex. Crim. 67; *Reg. v. Robinson*, 7 Can. Crim. Cas. (Nova Scotia) 52, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 962, and supporting the whole text paragraph. See also the title SCHOOLS.

**Proof that Punishment Was Moderate.** — The defendant, a teacher, cannot himself testify as an expert that the punishment was not excessive under the circumstances. *Howerton v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 1018.

**A "Patriarch" or Priest** who is the spiritual adviser of a community has no right to punish a child of a member of the community, even, it has been held, at the parent's request. *Donnelley v. Territory*, (Ariz. 1898) 52 Pac. Rep. 368.

**963.** 1. *State v. Boyer*, 70 Mo. App. 156; *Reg. v. Robinson*, 7 Can. Crim. Cas. (Nova Scotia) 52, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 963.

**Excessive Punishment.** — A stepmother is liable for injuries to a child caused by severe punishment inflicted *malo animo*. *Treshman v. Treshman*, 28 Ind. App. 206.

**Question for Jury.** — What is excessive force is a question for the jury. *Clasen v. Pruhs*, (Neb. 1903) 95 N. W. Rep. 640.

**964.** 1. *Modern Doctrine as to Wife Whipping.* — Under the *Delaware* statute against wife beating one blow may constitute a beating, that being a question for the jury. *State v. Harrigan*, 4 Penn. (Del.) 129.

**5. Master of a Vessel.** — *Dorrell v. Schwerman*, 111 Fed. Rep. 209. See also the title MASTERS OF VESSELS.

**965.** 2. *In re Burns*, 113 Fed. Rep. 987, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 965.

**Assault with Intent to Commit Robbery.** — Acquittal of the charge of robbery is no bar to a prosecution for an assault committed at the same time. *McMahon v. People*, 189 Ill. 222. So a conviction for robbery is no bar to a prosecution for assault with intent to rob, committed at the same time. *Adams v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 1059. See generally the title JEOPARDY, 602. 2. *et seq.*

**4. Texas.** — Under the Texas statutes an assault, to be aggravated, need not actually inflict serious injury if the means used be calculated to have that effect. *Yeary v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1106. But see *Grayson v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 293.

A boy of eighteen years of age cannot be convicted under a statute making an assault by an adult male upon a female or child an aggravated assault. *Ellers v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 813.

As to persons of robust health and strength and "aged" persons, under the *Texas* statute, see *Black v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 113.

**Intent.** — In *Nebraska* a conviction for an assault with intent to inflict great bodily injury



**966.** See note 6.

**967.** 2. Assault with Intent to Murder. — See note 1.

The Intent to Murder. — See note 3.

**968.** See note 1.

cannot be sustained without proof of the specific intent to inflict great bodily injury. *Likens v. State*, 63 Neb. 249. See also *State v. Pasnau*, 118 Iowa 501.

**Other States.** — As to statutes in *Florida* and *Louisiana*, see *Williams v. State*, 41 Fla. 295; *Pyke v. State*, (Fla. 1904) 36 So. Rep. 577; *State v. Bolden*, 107 La. 116, 90 Am. St. Rep. 280.

**Secret Assault.** — In *North Carolina*, if an assault is made from behind and in such manner that the party attacked is taken unawares, it is a "secret assault." *State v. Harris*, 120 N. Car. 577; *State v. King*, 120 N. Car. 612.

**966. 6. Aggravated Assault Includes Common Assault** — *Alabama*. — *Sankey v. State*, 128 Ala. 51.

*Delaware*. — *State v. Smith*, 9 Houst. (Del.) 588; *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *State v. Jones*, 2 Penn. (Del.) 573; *State v. Scott*, 4 Penn. (Del.) 538.

*Georgia*. — *Tiller v. State*, 101 Ga. 782; *Sessions v. State*, 115 Ga. 18. Compare *Goldin v. State*, 104 Ga. 549.

*Iowa*. — *State v. Leuhrman*, 123 Iowa 476. *Kentucky*. — *Com. v. Garnell*, 68 S. W. Rep. 136, 24 Ky. L. Rep. 144; *Parrott v. Com.*, (Ky. 1898) 47 S. W. Rep. 452.

*Louisiana*. — *State v. Matthews*, 111 La. 962. But see *State v. Bellard*, 50 La. Ann. 594, 69 Am. St. Rep. 461; *State v. Washington*, 107 La. 298.

*Massachusetts*. — *Com. v. Crowley*, 167 Mass. 434.

*New Jersey*. — *State v. Jackson*, 65 N. J. L. 105.

*North Dakota*. — *State v. Climie*, 12 N. Dak. 33.

*Texas*. — *Keeling v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 372; *Bartlett v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 918; *Jay v. State*, 41 Tex. Crim. 451; *Werner v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 681; *Caddell v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 1015.

**967. 1. Assault with Intent to Murder.** — One who assaults another with a deadly weapon, with the specific intent to kill, is guilty of an assault with intent to kill. *Henry v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 592; *Alvarez v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1013.

The fact that the shots, as they took effect, would not be likely to cause death, does not lessen the degree of the crime, if the other elements necessary to constitute the offense be present. *Crowell v. People*, 190 Ill. 508.

To expose an infant to the elements with the intention of causing its death is assault with intent to murder. *Fallis v. State*, 123 Ala. 12, 82 Am. St. Rep. 106.

**3. California.** — *People v. Mendenhall*, 135 Cal. 344.

*Delaware*. — *State v. Foreman*, 1 Marv. (Del.) 517; *State v. Jones*, 2 Penn. (Del.) 573; *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *State v. Scott*, 4 Penn. (Del.) 538.

*Florida*. — *Knight v. State*, 42 Fla. 546; *Gray v. State*, 44 Fla. 436; *Drummer v. State*, (Fla. 1903) 33 So. Rep. 1008; *McDonald v. State*, (Fla. 1903) 35 So. Rep. 72.

*Georgia*. — *Jackson v. State*, 103 Ga. 417; *Kimball v. State*, 112 Ga. 541; *Frazier v. State*, 112 Ga. 868.

*Illinois*. — *Hammond v. People*, 199 Ill. 173. *Nebraska*. — *Ward v. State*, 58 Neb. 719.

*Texas*. — *Mozee v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 250; *Parker v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 115.

*Vermont*. — *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648.

**What Intent Sufficient.** — Assault with intent to murder may be committed on either express or implied malice. *People v. Mendenhall*, 135 Cal. 344; *State v. Foreman*, 1 Marv. (Del.) 517; *State v. Jones*, 2 Penn. (Del.) 573; *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *State v. Scott*, 4 Penn. (Del.) 538; *Howard v. Com.*, 71 S. W. Rep. 446, 24 Ky. L. Rep. 1301; *Christian v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 422.

A sedate and deliberate mind is not essential to constitute the offense. *Stewart v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 459.

Firing into a crowd with intent to kill one, not knowing or caring which, is an assault with intent to kill, upon each and all. *Jennings v. U. S.*, 2 Indian Ter. 670.

Murderous intent need not exist any length of time, but may be formed at the instant of the assault. *Hammond v. People*, 199 Ill. 173; *People v. Bernard*, 125 Mich. 550. See also *Welch v. State*, 124 Ala. 41; *Wood v. State*, 128 Ala. 27, 86 Am. St. Rep. 71.

**Aiming at One and Wounding Another.** — An intent to murder the person injured is not necessary; a general intent to murder is sufficient. *Mathis v. State*, 39 Tex. Crim. 549.

**968. 1. Inference of Intent.** — *State v. Scott*, 4 Penn. (Del.) 538; *Jackson v. State*, 103 Ga. 417; *Anderson v. State*, 147 Ind. 445; *State v. Grant*, 144 Mo. 56; *Little v. State*, 42 Tex. Crim. 551; *Franklin v. State*, 37 Tex. Crim. 113.

**Intent Inferred from Means Used.** — *State v. Foreman*, 1 Marv. (Del.) 517; *State v. Jones*, 2 Penn. (Del.) 573; *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *Voght v. State*, 145 Ind. 12, all supporting the first paragraph of the original note. See also *Scott v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 950; *Bryant v. State*, 7 Wyo. 311.

The jury may infer intent to murder where an assault was committed with a hammer, though the defendant had a loaded pistol in his pocket at the time, where the state's evidence goes to show that the pistol was not in working order. *Gaines v. State*, (Tex. Crim. 1808) 47 S. W. Rep. 1012.

**Shooting with Pistol.** — *State v. Hamilton*, 170 Mo. 377.

**Deadly Weapon Not Essential.** — *Gray v. State*, 44 Fla. 436; *Drummer v. State*, (Fla. 1903) 33

**968.** Test that Resulting Homicide Would Have Been Murder. — See note 2.

**969.** See notes 1, 2.

**970.** 3. Assault with Dangerous or Deadly Weapon — A Statutory Offense. — See notes 1, 4.

**971.** What Constitutes Dangerous or Deadly Weapon. — See note 4.

When a Question of Law for the Court. — See note 5.

**972.** When a Question of Fact for the Jury. — See note 1.

**973.** 4. Assault with Intent to Commit Rape — Intent Is the Essence of the Offense. — See note 1.

So. Rep. 1008; McDonald v. State, (Fla. 1903) 35 So. Rep. 72; Franklin v. State, 37 Tex. Crim. 113.

**Use of Deadly Weapon Not Conclusive.** — From the use of a deadly weapon or the presence of malice, an intent to kill is not necessarily to be implied. Lanier v. State, 106 Ga. 368; Stevens v. State, 38 Tex. Crim. 550.

**Malice** is not necessarily implied from the use of a deadly weapon. Hammond v. People, 199 Ill. 173.

**Question for Jury.** — Inference of intent to murder is a question of fact for the jury. Keady v. People, (Colo. 1903) 74 Pac. Rep. 892; Ponton v. State, 35 Tex. Crim. 597.

**968.** 2. Whether Murder in First or Second Degree Immaterial. — State v. Foreman, 1 Marv. (Del.) 517; State v. Scott, 4 Penn. (Del.) 538.

**969.** 1. Crime Must Have Been Murder Had Death Ensued. — State v. Foreman, 1 Marv. (Del.) 517; State v. Jones, 2 Penn. (Del.) 573; State v. Di Guglielmo, 4 Penn. (Del.) 336; State v. Scott, 4 Penn. (Del.) 538; Heard v. State, 114 Ga. 90; Hammond v. People, 199 Ill. 173; State v. Williamson, 65 S. Car. 242; Thompson v. State, 37 Tex. Crim. 448; Alvarez v. State, (Tex. Crim. 1900) 58 S. W. Rep. 1013. See also People v. Ochotski, 115 Mich. 601.

**Fact that Resulting Homicide Would Have Been Murder Not Conclusive.** — People v. Mendenhall, 135 Cal. 344; Lanier v. State, 106 Ga. 368; Smith v. State, 119 Ga. 564; State v. Taylor, 70 Vt. 1, 67 Am. St. Rep. 648.

**2. Resulting Manslaughter Not Sufficient.** — State v. Jones, 2 Penn. (Del.) 573; Hammond v. People, 199 Ill. 173. See also Williams v. State, 41 Fla. 295.

**970.** 1. *In re Burns*, 113 Fed. Rep. 987, quoting a AM. AND ENG. ENCYC. OF LAW (2d ed.) 970.

**4. Intent to Frighten.** — Under the statutes of Rhode Island, firing a pistol at one within shooting distance, with intent to frighten, constitutes an assault with a dangerous weapon. State v. Baker, 20 R. I. 275, 78 Am. St. Rep. 863. But under the Texas statutes, pointing a pistol at one with intent to alarm but no intent to shoot constitutes a simple assault, but not an aggravated assault. Wright v. State, (Tex. Crim. 1903) 77 S. W. Rep. 809. See also Barnes v. State, (Tex. Crim. 1903) 72 S. W. Rep. 168; Smith v. State, (Tex. Crim. 1900) 57 S. W. Rep. 949.

**971.** 4. Dangerous or Deadly Weapon. — Wilson v. State, 37 Tex. Crim. 156; Tollett v. State, (Tex. Crim. 1900) 55 S. W. Rep. 335.

**Bodily Hurt Unnecessary.** — Under the Rhode Island statute directed against assaults with dangerous weapons it is not necessary that bodily hurt should actually be inflicted. The

offense is complete when an assault with a dangerous weapon is made. State v. Baker, 20 R. I. 275, 78 Am. St. Rep. 863.

**5. Question of Law for the Court.** — State v. Sinclair, 120 N. Car. 603.

**Pistols.** — A loaded pistol, within carrying distance, is a deadly weapon. Keesier v. State, 154 Ind. 242; State v. Baker, 20 R. I. 275, 78 Am. St. Rep. 863.

A pistol, though not cocked, is a deadly weapon. Pace v. State, (Tex. Crim. 1904) 79 S. W. Rep. 531.

In the absence of proof to the contrary, a pistol is presumed to be loaded, and therefore is a deadly weapon. Lockland v. State, (Tex. Crim. 1903) 73 S. W. Rep. 1054.

Where the defendant, using a pistol as a club, struck the prosecutor three times, but inflicted no serious injury, it was held that the pistol was not, as used, a deadly weapon. McLendon v. State, (Tex. Crim. 1902) 66 S. W. Rep. 553.

**Knife.** — A knife that will make a wound five and a half inches deep is a deadly weapon. State v. Warren, 1 Marv. (Del.) 487.

**972.** 1. Question of Fact for Jury. — Jackson v. U. S., (C. C. A.) 102 Fed. Rep. 473; People v. Sylva, 143 Cal. 62; McWilliams v. Com., (Ky. 1896) 35 S. W. Rep. 538; Com. v. Yarnell, 68 S. W. Rep. 136, 24 Ky. L. Rep. 144; Saffold v. State, 76 Miss. 258; State v. Shipley, 171 Mo. 544; People v. McKenzie, 6 N. Y. App. Div. 199; State v. Hammond, 14 S. Dak. 545; Wilson v. State, 37 Tex. Crim. 156.

**The Mode and Manner of Use May Determine** the character of a weapon as deadly or the reverse. Mazzotte v. Territory, (Ariz. 1903) 71 Pac. Rep. 911 (pistol); Moore v. Com., (Ky. 1896) 35 S. W. Rep. 283 (axe handle); Cosby v. Com., 115 Ky. 221 (club or rock); State v. Sinegal, 51 La. Ann. 932 (razor); Stone v. Heggie, 82 Miss. 410 (stick); Walters v. State, 37 Tex. Crim. 388 (knife); Henry v. State, (Tex. Crim. 1899) 49 S. W. Rep. 96 (stick of stovewood); Scott v. State, 42 Tex. Crim. 607; Heinen v. State, (Tex. Crim. 1903) 74 S. W. Rep. 776 (cotton-hook).

**973.** 1. Assault with Intent to Rape. — Tiller v. State, 101 Ga. 782; State v. Sherman, 106 Iowa 684; People v. Dowell, (Mich. 1904) 99 N. W. Rep. 23; Allen v. State, 36 Tex. Crim. 381; Caddell v. State, 44 Tex. Crim. 213; State v. McCune, 16 Utah 170. See also Stermer v. State, (Tex. Crim. 1904) 78 S. W. Rep. 1072.

**Specific Intent to Commit Rape Essential.** — State v. Smith, 9 Houst. (Del.) 588; Franey v. People, 210 Ill. 206; State v. Hayden, 141 Mo. 311; Dunn v. State, 58 Neb. 807; Ross v. State, (Tex. Crim. 1904) 78 S. W. Rep.

**974.** Would Act, if Accomplished, Have Been Rape. — See notes 1, 2.

**975.** 5. Indecent Assault. — See note 1.

**IV. WHO ARE CRIMINALLY LIABLE — In General All Participants Principals.**

— See note 3.

503; *Dina v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 229, all of which cases support the first paragraph of the original note. But see *Jacobi v. State*, 133 Ala. 1.

**Force an Essential Ingredient.** — *Patterson v. State*, 11 Ohio Cir. Dec. 602, 21 Ohio Cir. Ct. 184, supporting the first paragraph of the original note.

Where the prosecutrix is under the age of consent, the law conclusively presumes the use of force. *State v. Smith*, 9 Houst. (Del.) 588.

**Desistance on Account of Resistance.** — It is no defense that the accused desisted from his efforts on account of interference or because of inability to accomplish penetration. *State v. Smith*, 9 Houst. (Del.) 588; *State v. Williams*, 121 N. Car. 628; *State v. Mehaffey*, 132 N. Car. 1062.

**Voluntary Desistance** is no defense. *People v. Johnson*, 131 Cal. 511.

**Corroboration.** — To the same effect as the cases cited in the original note see *Johnson v. People*, 197 Ill. 48. See also *Cox v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 157.

In *Nebraska* it has been held that direct corroboration of the prosecutrix is not necessary. Proof of incriminating circumstances is sufficient. *Dunn v. State*, 58 Neb. 807.

**Admissibility of Evidence.** — In *State v. Sargent*, 32 Oregon 110, it was held that the mother of an infant prosecutrix may testify as to her manner and appearance, and the condition of her person and apparel, shortly after the alleged assault, but she may not repeat the child's narrative of the occurrence. See also *State v. Hunter*, 18 Wash. 670.

Evidence of other acts of intercourse between the parties is admissible in corroboration of the testimony as to the particular act. *Callison v. State*, 37 Tex. Crim. 211.

**Attempt to Commit Rape.** — In *Texas* an attempt to commit rape is held to involve an intent to use the same force as would make the defendant guilty of rape or assault with intent to rape if carried out. *Moon v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 806. But under an indictment for assault with intent to commit rape, the defendant cannot be convicted of attempt to commit rape. *Taylor v. State*, 44 Tex. Crim. 153. See also *Warren v. State*, 38 Tex. Crim. 152.

In *Connecticut* attempt to rape and assault with intent to rape are the same thing. *Rooke v. State*, 70 Conn. 104.

**Overt Act.** — In order to convict of an assault with intent to commit rape, some overt act amounting to an assault must be shown. *Gaskin v. State*, 105 Ga. 631.

An assault with intent to rape may be committed by administering chloroform, although no actual violence is used. *Harlan v. People*, (Colo. 1904) 76 Pac. Rep. 702.

**Slightest Touching Sufficient.** — *McAvoy v. State*, 41 Tex. Crim. 56.

**Battery Is Not Necessary** to make one guilty

of an assault with intent to rape. *Goldin v. State*, 104 Ga. 549.

**974.** 1. *State v. Smith*, 9 Houst. (Del.) 588.

**Charge of Rape Includes Assault with Intent.** — *Rooke v. State*, 70 Conn. 104; *People v. Dowell*, (Mich. 1904) 99 N. W. Rep. 23.

**Assault with Intent Included in Rape.** — A charge of assault with intent to rape is sustained by proof of rape. *Hanes v. State*, 155 Ind. 112.

**Capacity to Commit Rape Not Essential.** — It has been held in *Pennsylvania* that a boy may be convicted of an assault with intent to commit rape although he is under the age at which, by statute, he would be capable of committing the crime of rape. *Com. v. Hummel*, 21 Pa. Co. Ct. 445, 7 Pa. Dist. 715.

**2. Consenting Female.** — *Martin v. State*, 7 Ohio Cir. Dec. 564, 13 Ohio Cir. Ct. 604; *State v. McCune*, 16 Utah 170.

**975.** 1. **Indecent Assault.** — *Walker v. State*, 132 Ala. 11, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 975; *Slawson v. State*, 39 Tex. Crim. 176, 73 Am. St. Rep. 914.

**Question for Jury.** — Where a defendant testifies that he mistook the prosecutrix for his wife and that there was no intent to injure, it is a question for the jury whether his acts occasioned such a sense of shame or other like emotions as would be necessary to constitute the conduct an assault. *Stermer v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 1072.

**3. General Rule — All Principals.** — *Elmore v. State*, 110 Ala. 63; *State v. Burton*, 2 Penn. (Del.) 472; *State v. Mills*, 3 Penn. (Del.) 508; *State v. Lewis*, 4 Penn. (Del.) 332; *Anderson v. State*, 147 Ind. 445; *O'Hara v. State*, 21 Ind. App. 320; *State v. Melvin*, 166 Mo. 565; *Henry v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 592; *Anderson v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 110. See also *Buford v. State*, 132 Ala. 6; *State v. Pasnau*, 118 Iowa 501; *Ryan v. Quinn*, 71 S. W. Rep. 872, 24 Ky. L. Rep. 1513; *State v. Washington*, 107 La. 298.

**Some Overt Act Necessary.** — *Elmore v. State*, 110 Ala. 63, holding that it is not sufficient to make one a principal that he was present and ready to aid; *Lister v. McKee*, 79 Ill. App. 210; *Schriebe v. State*, (Tex. Crim. 1896) 35 S. W. Rep. 375.

**A Person Arranging a Meeting** between a man and woman, not knowing he would assault her with intent to rape, is not guilty as a principal of the assault. *State v. Jackson*, 65 N. J. L. 105.

**Several Committing Felony.** — Where two or more persons are jointly committing a felony, and one, in so doing, commits an assault, all are guilty as principals. *McMahon v. People*, 189 Ill. 222.

**Assault with Intent to Murder.** — To be guilty of assault with intent to murder, one must not only aid in the commission of the act, but must also participate in the murderous design. *Kimball v. State*, 112 Ga. 541. See also *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648.

**977. V. DEFENSES — 1. Self-defense — a. WHEN ASSAULTED. —** See note 1.

**Apparent Danger Ground for Self-defense. —** See note 2.

**978. Excessive Force Must Not Be Used. —** See notes 1, 2.

**980. Aggressor Cannot Plead Self-defense. —** See note 1.

**977. 1. Self-defense. —** *Watson v. Hastings*, 1 Penn. (Del.) 47; *State v. Burton*, 2 Penn. (Del.) 472; *Armstrong v. Little*, 4 Penn. (Del.) 255; *State v. Harrigan*, 4 Penn. (Del.) 129; *Voght v. State*, 145 Ind. 12; *Ickenroth v. St. Louis Transit Co.*, 102 Mo. App. 597; *State v. Meyers*, 174 Mo. 352; *Hoy v. State*, (Neb. 1903) 96 N. W. Rep. 228; *Turner v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 53.

**Defense from Serious Bodily Harm. —** *State v. Petteys*, 65 Kan. 625.

**Severity of Attack. —** The attack to be repelled need not be so severe as to be calculated to inflict death or serious bodily harm, but may be of a less degree. *Heard v. State*, 114 Ga. 90; *State v. Goering*, 106 Iowa 636; *Thornton v. Taylor*, (Ky. 1897) 39 S. W. Rep. 830; *People v. Dankberg*, 91 N. Y. App. Div. 67; *McLendon v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 553; *Price v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 540; *Rea v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1003.

**Prevention of Felony. —** One is justified in interfering to prevent the killing of another, or his serious injury, unless he knows that the difficulty was brought on by the latter. *Kees v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 855.

**One Who, Acting in Self-defense, Injures an Innocent Third Party, is not guilty of an assault. —** *O'Rear v. Com.*, 78 S. W. Rep. 407, 25 Ky. L. Rep. 1537; *Howard v. Com.*, (Ky. 1904) 81 S. W. Rep. 689.

**The Fact that the Aggressor Is a Minor does not deprive the party attacked of his right of self-defense. —** *Latham v. State*, 39 Tex. Crim. 472.

**Burden of Proof Remains with State. —** See *People v. Shanley*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 290.

**2. Apparent Danger Only. —** *Gillespie v. State*, 69 Ark. 573; *Courvoisier v. Raymond*, 23 Colo. 113; *Moran v. Vicroy*, 74 S. W. Rep. 244, 24 Ky. L. Rep. 2415; *Beavers v. Bowen*, (Ky. 1904) 80 S. W. Rep. 1165; *Germolus v. Sausser*, 83 Minn. 141; *State v. Totman*, 80 Mo. App. 125; *Harris v. State*, 37 Tex. Crim. 454; *Burrage v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 169; *McLendon v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 553; *Hall v. State*, 43 Tex. Crim. 479; *Turner v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 53; *Williams v. State*, 44 Tex. Crim. 316; *Beard v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 33.

**Apprehension Must Be Reasonable. —** *Frazier v. State*, 112 Ga. 868, holding that in order to avail himself of the plea of self-defense, one must have acted in good faith and have really believed the danger to exist; *Germolus v. Sausser*, 83 Minn. 141; *Willis v. State*, (Miss. 1900) 27 So. Rep. 524; *State v. Pohl*, 170 Mo. 422.

A movement of the prosecutor's hand toward the waistband of his trousers has been held not sufficient to justify the defendant's shooting. *Burks v. State*, 40 Tex. Crim. 167.

To plead self-defense one need only have

acted as a reasonable and prudent man would have acted under the circumstances. *Patterson v. Standley*, 91 Ill. App. 671.

*Evidence Tending to Show the Reasonableness of the defendant's apprehension is admissible. —* *Moran v. Vicroy*, 74 S. W. Rep. 244, 24 Ky. L. Rep. 2415; *People v. Tillman*, 132 Mich. 23; *Coleman v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 24.

**Jury to Decide Reasonableness of Belief. —** *State v. Haynie*, 118 N. Car. 1265; *State v. Harris*, 119 N. Car. 861, both cases supporting the first paragraph of the original note.

**Burden of Proof — Self-defense. —** *State v. Shea*, 104 Iowa 724. But see *Sweet v. Boyd*, (Iowa 1904) 98 N. W. Rep. 601.

**978. 1. Moran v. Vicroy, 74 S. W. Rep. 244, 24 Ky. L. Rep. 2415; *Beavers v. Bowen*, (Ky. 1904) 80 S. W. Rep. 1165; *Thornton v. Taylor*, (Ky. 1897) 39 S. W. Rep. 830; *Rea v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1003. See also *Hall v. State*, 42 Tex. Crim. 444.**

**Assaulted Party Not Obligated to Retreat. —** *Hammond v. People*, 199 Ill. 173; *State v. Evenson*, 122 Iowa 88; *State v. Petteys*, 65 Kan. 625; *State v. Carver*, 89 Me. 74; *Turner v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 53; *Jackson v. Com.*, 96 Va. 107. See also *Tubbs v. Com.*, (Ky. 1900) 57 S. W. Rep. 623. But see *Welch v. State*, 124 Ala. 41; *State v. Burton*, 2 Penn. (Del.) 472; *Armstrong v. Little*, 4 Penn. (Del.) 255; *State v. Harrigan*, 4 Penn. (Del.) 129. And see the title SELF-DEFENSE.

**Assault by Body of Rioters. —** See *Thornton v. Taylor*, (Ky. 1899) 54 S. W. Rep. 16; *Hoy v. State*, (Neb. 1903) 96 N. W. Rep. 228.

**The Party Attacked May Continue Shooting as long as he reasonably believes that he is in danger. —** *Burks v. State*, 40 Tex. Crim. 167; *Hall v. State*, 43 Tex. Crim. 479; *Garling v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 471.

**2. Using Excessive Force. —** *Harris v. State*, 123 Ala. 69; *Watson v. Hastings*, 1 Penn. (Del.) 47; *State v. Burton*, 2 Penn. (Del.) 472; *Armstrong v. Little*, 4 Penn. (Del.) 255; *State v. Harrigan*, 4 Penn. (Del.) 129; *Beavers v. Bowen*, (Ky. 1904) 80 S. W. Rep. 1165; *Marrow v. State*, 37 Tex. Crim. 330; *Redden v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 929; *Gutzman v. Clancy*, 114 Wis. 589. See also *Dryer v. State*, 139 Ala. 117; *Turner v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 53.

**Attack with Fist Returned with Deadly Weapon. —** *Morgan v. State*, 119 Ga. 566, supporting the second paragraph of the original note.

**Rights of Trespasser Attacked with Deadly Weapon. —** Where a person committing a trespass upon property is assaulted with a deadly weapon, he is justified in acting in self-defense. *Montgomery v. Com.*, 98 Va. 852.

**Recovery of Damages. —** Though one attacked exceed the bounds of lawful self-defense, if the original assault was unwarranted he may recover damages. *McNatt v. McRae*, 117 Ga. 898.

**980. 1. Aggressor May Not Plead Self-defense.**

**980.** *b. RESISTING ARREST — Unlawful Arrest.* — See note 2.

**981.** *Excessive Force Not to Be Used.* — See note 1.

**2. Defense of Family.** — See notes 2, 3, 4.

**3. Defense of Property.** — See note 7.

**982.** *The Amount of Force.* — See note 2.

**983.** **4. Recapture of Property.** — See note 1.

**984.** See note 1.

**5. Ejectment of Trespassers.** — See note 2.

— *Welch v. State*, 124 Ala. 41; *Johnson v. State*, 136 Ala. 76; *Voght v. State*, 145 Ind. 12; *Starr v. State*, 160 Ind. 661; *State v. McCann*, 43 Oregon 155; *Shaw v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1046. See also *Brown v. Com.*, 79 S. W. Rep. 1193, 25 Ky. L. Rep. 2076. But see *Beard v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 33. See further the title SELF-DEFENSE.

**Revival of Right of Self-defense.** — One who, after provoking a quarrel, attempts in good faith to withdraw may avail himself of the plea of self-defense. *Voght v. State*, 145 Ind. 12; *Beavers v. Bowen*, (Ky. 1904) 80 S. W. Rep. 1165.

**Absence of Intent.** — To be deprived of the defense of self-defense the act of the defendant must have been intended to provoke a difficulty or be reasonably calculated to do so. *Mundine v. State*, 37 Tex. Crim. 5; *Hall v. State*, 42 Tex. Crim. 444, 43 Tex. Crim. 479; *Mozee v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 250; *Price v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 540. See also *Williams v. State*, 44 Tex. Crim. 115.

One who brings on a difficulty, but without felonious intent, may plead self-defense, as such conduct is not a bar. *State v. Garrett*, 170 Mo. 395; *Beard v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 33.

**Rule in Civil Action.** — An aggressor may recover damages against the party attacked if the latter uses excessive force in defending himself. *McNatt v. McRae*, 117 Ga. 898; *Beavers v. Bowen*, (Ky. 1904) 80 S. W. Rep. 1165.

**980.** **2. Brown v. State**, 43 Tex. Crim. 411. **Officer with No Authority to Arrest, or Not Showing His Authority.** — *Lynch v. State*, 41 Tex. Crim. 510; *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648.

**981.** **1.** See *Keady v. People*, (Colo. 1903) 74 Pac. Rep. 892.

**2. Tubbs v. Com.**, (Ky. 1900) 57 S. W. Rep. 623. See also the title SELF-DEFENSE.

**Defense of One's Brother Who Provoked Difficulty.** — *Wood v. State*, 128 Ala. 27, 86 Am. St. Rep. 71.

**Defense of Another.** — The use of reasonable force in defense of another is justifiable. *State v. Totman*, 80 Mo. App. 125. And see the title SELF-DEFENSE, 274. 3. *et seq.*

**3. Defense of Husband or Wife.** — *Tompkins v. Knut*, 94 Fed. Rep. 956.

**4. Parent or Child.** — *Beavers v. Bowen*, (Ky. 1904) 80 S. W. Rep. 1165; *Com. v. Brungess*, 23 Pa. Co. Ct. 13; *Williams v. State*, 44 Tex. Crim. 316.

**7. Defense of Property.** — *Wright v. Southern Express Co.*, 80 Fed. Rep. 85; *Goshen v. People*, 22 Colo. 270; *Atkinson v. State*, 58 Neb. 356; *State v. Austin*, 123 N. Car. 749.

**Possession Need Not Be Lasting or Permanent**, if it is lawful, in order to entitle one to use force in defending it. *State v. Howell*, 21 Mont. 165.

**982.** **2. People v. Teixeira**, 123 Cal. 297. *Compare Devor v. Knauer*, 84 Ill. App. 184.

**Question of Fact for Jury.** — *State v. Goode*, 130 N. Car. 651.

**A Mere Trespass on Land** does not authorize the owner to assault the trespasser with a deadly weapon. *Montgomery v. Com.*, 98 Va. 852.

**983.** **1. Using Force to Retake One's Own Property.** — *Winter v. Atkinson*, 92 Ill. App. 162, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 983; *Barr v. Post*, 56 Neb. 698. See also *Hamilton v. Arnold*, 116 Mich. 684.

**Recapture of One's Goods on the Land of Another.** — In *Texas* it is held that where live stock has gone upon the land of another and has there been shut up, the owner of such stock may go upon the land of that other and release the stock, and resistance will constitute an assault. *Cox v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 754.

**984.** **1. Where Title to Property Is in Dispute.** — *Sabre v. Mott*, 88 Fed. Rep. 780, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 983; *Culver v. State*, 42 Tex. Crim. 645. See also *Lockland v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1054.

**Forceful Entry.** — *State v. Bradbury*, 67 Kan. 808. See also *Robichaud v. Genest*, 16 Quebec Super. Ct. 337.

**2. Using Force to Eject Trespassers.** — *Watson v. Hastings*, 1 Penn. (Del.) 47; *State v. Lockwood*, 1 Penn. (Del.) 76; *Illinois Steel Co. v. Waznius*, 101 Ill. App. 535; *Brebach v. Johnson*, 62 Ill. App. 131; *State v. Shea*, 104 Iowa 724; *Hannabalsen v. Sessions*, 116 Iowa 457, 93 Am. St. Rep. 250; *State v. Kaiser*, 78 Mo. App. 575; *State v. Raper*, 141 Mo. 327; *State v. Hamilton*, 170 Mo. 377; *Harshman v. Rose*, 50 Neb. 113, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 984; *State v. Crook*, 133 N. Car. 672; *Vann v. State*, 43 Tex. Crim. 244; *Taylor v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 378. See also *Slingerland v. Gillespie*, 65 N. J. L. 92.

**Request to Depart Should Precede Use of Force.** — *Emmons v. Quade*, 176 Mo. 22.

**Where Title Is in Dispute** the rule does not apply. *Lobdell v. Keene*, 85 Minn. 90; *Hill v. State*, 43 Tex. Crim. 583.

**Provocation by Owner.** — The fact that one had abandoned his home, leaving the defendant in possession, and had then returned and set fire to the fence around the place, has been held to be no provocation or justification for an assault. *Scott v. State*, 118 Ala. 115.

**985. Force Used Must Be Reasonable.** — See note 1.

Common Carriers. — See note 2.

**986.** See note 1.

**6. Consent** — In Common Assault. — See note 3.

**987.** See note 1.

In Assault with Intent to Rape. — See notes 3, 4.

**988. 7. Accident.** — See note 1.

**989. VI. THE CIVIL ACTION — 1. When It Lies — a. GENERALLY.** — See notes 1, 2, 3.

**985. 1. Force Employed Must Be Reasonable.** — *Watson v. Hastings*, 1 Penn. (Del.) 47; *State v. Lockwood*, 1 Penn. (Del.) 76; *Brebach v. Johnson*, 62 Ill. App. 131; *State v. Kaiser*, 78 Mo. App. 575; *Emmons v. Quade*, 176 Mo. 22; *Harshman v. Rose*, 50 Neb. 113.

**Question of Fact for Jury.** — *Randell v. Chicago, etc., R. Co.*, 102 Mo. App. 352, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985.

**Shooting Trespasser.** — A mere civil trespass, unaccompanied by such force as to make it a breach of the peace, is not sufficient provocation to warrant the shooting of the trespasser. *State v. Dixon*, 7 Idaho 518.

**2. Agents of Common Carriers.** — *Coyle v. Southern R. Co.*, 112 Ga. 121; *McGarry v. Holyoke St. R. Co.*, 182 Mass. 123; *Ickenroth v. St. Louis Transit Co.*, 102 Mo. App. 597; *Wilt v. Wabash R. Co.*, 11 Ohio Cir. Dec. 589, 21 Ohio Cir. Ct. 579.

**986. 1. Central R. Co. v. Mackey**, 103 Ill. App. 15; *Chesapeake, etc., R. Co. v. Saulsberry*, 112 Ky. 915; *Ickenroth v. St. Louis Transit Co.*, 102 Mo. App. 597; *Monnier v. New York Cent., etc., R. Co.*, 175 N. Y. 281, 96 Am. St. Rep. 619; *Hart v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 521; *Cleveland City R. Co. v. Roebuck*, 12 Ohio Cir. Dec. 262, 22 Ohio Cir. Ct. 99; *St. Louis Southwestern R. Co. v. Johnson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 58.

**3. See Courtney v. Clinton**, 18 Ind. App. 620; *Miller v. Meche*, 111 La. 143.

**Consent of the Parent** has been held to be no defense to an action for assault on a child by a "patriarch" or priest. *Donnelley v. Teritory*, (Ariz. 1898) 52 Pac. Rep. 368.

**987. 1. Consent — Must Be No Breach of Peace.** — *Lund v. Tyler*, 115 Iowa 236.

**3. Consent to Sexual Intercourse.** — *People v. Marrs*, 125 Mich. 376.

**Degree of Resistance Required.** — No more resistance, in any case, is required by the law than the condition of the woman will permit her to make. *State v. McCune*, 16 Utah 170.

**4. Females under Legal Age of Consent.** — *People v. Vann*, 129 Cal. 118; *People v. Johnson*, 131 Cal. 511; *Hanes v. State*, 155 Ind. 112; *State v. Sargent*, 32 Oregon 110; *Croomes v. State*, 40 Tex. Crim. 672, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Allen v. State*, 36 Tex. Crim. 381; *Callison v. State*, 37 Tex. Crim. 211; *Rogers v. State*, 40 Tex. Crim. 355; *Blair v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 879; *State v. Hunter*, 18 Wash. 670; *Loose v. State*, 120 Wis. 115. But see *Hardin v. State*, 39 Tex. Crim. 426; *Welch v. State*, (Tex. Crim. 1898) 46 S. W. Rep. 812. See generally the title RAPE.

**Actual Violence Necessary.** — To constitute the crime of assault with intent to rape, actual violence, or an actual assault, is necessary even where the female is under the legal age of consent. *People v. Dowell*, (Mich. 1904) 99 N. W. Rep. 23.

**Indecent Assault.** — Consent of a female under the legal age is no defense to a charge of indecent assault. *Hill v. State*, 37 Tex. Crim. 279, 66 Am. St. Rep. 803.

**Knowledge of Defendant.** — That the defendant did not know that the prosecutrix was under the legal age is no defense. *State v. Sherman*, 106 Iowa 684.

**988. 1. Accident.** — *Shriver v. Bean*, 112 Mich. 508.

**Conductor Ejecting Drunken Man.** — Where a conductor, while ejecting, in a proper manner, a drunken man, accidentally injures another passenger, this does not constitute an assault. *Spade v. Lynn, etc., R. Co.*, 172 Mass. 488, 70 Am. St. Rep. 298.

**989. 1. Civil Action — All Principals.** — One actually present, aiding, abetting, or counseling another to commit an assault, is jointly liable with that other. *Sellman v. Wheeler*, 95 Md. 751.

**Civil Liability Though No Criminal Assault.** — One may be liable to a civil action though the elements necessary to constitute a criminal assault are not in evidence. *Kline v. Kline*, 158 Ind. 602.

**Contributory Negligence** of the plaintiff, whereby he was injured, is no defense to an unlawful assault. *Emmons v. Quade*, 176 Mo. 22.

**For Evidence Held to Sustain a Verdict for the Plaintiff** see *Reynolds v. Pierson*, 29 Ind. App. 273; *McDonald v. Franchere*, 102 Iowa 496; *Ragsdale v. Ezell*, (Ky. 1899) 49 S. W. Rep. 775; *Wood v. Young*, (Ky. 1899) 50 S. W. Rep. 541; *Turnbow v. Wimberly*, 106 La. 259; *Hirschman v. Emme*, 81 Minn. 99; *Watson v. Rinderknecht*, 82 Minn. 235; *Plonty v. Murphy*, 82 Minn. 268; *Rauma v. Lamont*, 82 Minn. 477; *Witzka v. Moudry*, 83 Minn. 78; *Loddell v. Keene*, 85 Minn. 90; *Lyddon v. Dose*, 81 Mo. App. 64; *Mengedoh v. Van Dorn*, 48 Neb. 880; *Harshman v. Rose*, 50 Neb. 113; *Barr v. Post*, 56 Neb. 698; *Krause v. Spinn*, 21 Tex. Civ. App. 510; *Galveston, etc., R. Co. v. La Prelle*, 27 Tex. Civ. App. 496; *Missouri, etc., R. Co. v. Gaines*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1104.

**For Evidence Held Not to Sustain a Verdict for the Plaintiff** see *Dorrell v. Schwerman*, 111 Fed. Rep. 209; *Phillips v. Mann*, (Ky. 1898) 44 S. W. Rep. 379; *Martin v. Moore*, (Md. 1904) 57 Atl. Rep. 671; *Mattice v. Scutt*, 94 N. Y. App. Div. 478; *Bisewski v. Booth*, 100 Wis. 383.

**989.** *b. INJURIES INFLICTED THROUGH NEGLIGENCE.* — See note 4.

**990.** *d. ACTION AGAINST CORPORATION.* — See note 2.

**991.** See note 1.

**992.** 2. Damages — *a. COMPENSATORY DAMAGES.* — See notes 1; 2.

**989.** 2. Conviction of Crime No Defense to Civil Action. — *Jackson v. Wells*, 13 Tex. Civ. App. 275.

3. *Wagner v. Gibbs*, 80 Miss. 53, 92 Am. St. Rep. 598.

**Exemplary Damages After Criminal Conviction.** — *Hauser v. Griffith*, 102 Iowa 215. But see *Borkenstein v. Schrack*, 31 Ind. App. 220.

4. **One Recklessly Firing a Gun** is liable to a person who may be injured thereby. *James v. Hayes*, 63 Kan. 133. See generally the title NEGLIGENCE.

**990.** 2. Assault and Battery by Corporate Agents. — *Southern Express Co. v. Platten*, (C. C. A.) 93 Fed. Rep. 936; *Monnier v. New York Cent.*, etc., R. Co., 70 N. Y. App. Div. 405.

The fact that the agent lost his temper and used an unreasonable amount of force will not acquit the defendant company from responsibility. *Texas*, etc., R. Co. *v. Taylor*, 31 Tex. Civ. App. 617.

**Liable Whether Particular Act Is Authorized or Not.** — *Southern R. Co. v. Wildman*, 119 Ala. 565; *McKeon v. New York*, etc., R. Co., 183 Mass. 271, 97 Am. St. Rep. 437; *Moritz v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 162; *Houston*, etc., R. Co. *v. Bell*, (Tex. Civ. App. 1903) 73 S. W. Rep. 56.

**991.** 1. *Alabama.* — *Birmingham R.*, etc., Co. *v. Baird*, 130 Ala. 334.

*Kansas.* — *Missouri Pac. R. Co. v. Divinney*, 66 Kan. 776.

*Michigan.* — *Johnson v. Detroit*, etc., R. Co., 130 Mich. 453.

*Missouri.* — *Tanger v. Southwest Missouri Electric R. Co.*, 85 Mo. App. 28; *O'Donnell v. St. Louis Transit Co.*, 107 Mo. App. 34.

*Nebraska.* — *Clancy v. Barker*, (Neb. 1904) 98 N. W. Rep. 440.

*New Jersey.* — *Haver v. Central R. Co.*, 62 N. J. L. 282, 72 Am. St. Rep. 647.

*New York.* — *Hart v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 521; *Willis v. Metropolitan St. R. Co.*, 76 N. Y. App. Div. 340.

*Texas.* — *Galveston*, etc., R. Co. *v. La Prelle*, 27 Tex. Civ. App. 496; *St. Louis Southwestern R. Co. v. Johnson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 58.

**Must Be Within Scope of Servant's Authority.** — *McKeon v. New York*, etc., R. Co., 183 Mass. 271, 97 Am. St. Rep. 437; *Palmer v. Winston-Salem R.*, etc., Co., 131 N. Car. 250.

**Duty of Carrier to Protect Passengers from Assaults of Fellow Passengers.** — *Lake Erie*, etc., R. Co. *v. Arnold*, 26 Ind. App. 190; *Spangler v. St. Joseph*, etc., R. Co., 68 Kan. 46; *Tall v. Baltimore Steam Packet Co.*, 90 Md. 248; *Thweatt v. Houston*, etc., R. Co., 31 Tex. Civ. App. 227; *Blain v. Canadian Pac. R. Co.*, 5 Ont. L. Rep. 334.

**Assault Provoked by Plaintiff.** — The rule that insulting language is no defense to a charge of assault applies to assaults committed by corporate agents, and such conduct will not relieve the company from liability, but may mitigate

damages. *Birmingham R.*, etc., Co. *v. Baird*, 130 Ala. 334; *Birmingham R.*, etc., Co. *v. Mullen*, 138 Ala. 614; *Hanson v. Urbana*, etc., Electric St. R. Co., 75 Ill. App. 474; *Palmer v. Winston-Salem R.*, etc., Co., 131 N. Car. 250. See *Georgia R.*, etc., Co. *v. Hopkins*, 108 Ga. 324, 75 Am. St. Rep. 39.

In *Texas*, however, it has been held that a corporation is not liable for an assault by its agent on one who, by insulting words and conduct, provoked the assault. *Texas*, etc., R. Co. *v. Taylor*, 31 Tex. Civ. App. 617. See generally *supra*, this title, **957. 2.**

And a corporation is not liable for an assault by its agent when the assault is provoked by the plaintiff's violence. *James v. Metropolitan St. R. Co.*, 80 N. Y. App. Div. 364.

**Conductor Acting in Good Faith.** — The fact that the conductor of defendant railroad company thought that he was justified in committing the assault does not exempt the company from liability. *Birmingham R.*, etc., Co. *v. Mullen*, 138 Ala. 614.

**Prior Assault on Conductor No Defense.** — *Galveston*, etc., R. Co. *v. La Prelle*, 27 Tex. Civ. App. 496.

**Assault upon Passenger by Third Party.** — It is the duty of a carrier to protect a passenger from attack by a third party when the attack may be reasonably anticipated or is actually known, but not otherwise. *Segal v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 233.

**Negligence Not Necessary Ingredient.** — *St. Louis Southwestern R. Co. v. Johnson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 58.

**992.** 1. *Armstrong v. Little*, 4 Penn. (Del.) 255. See generally the title DAMAGES.

**Recovery for Injuries Naturally the Result of Wrongful Act.** — *Hendle v. Geiler*, (Del. 1895) 50 Atl. Rep. 632; *Brownback v. Frailey*, 78 Ill. App. 262; *Carson v. Singleton*, 65 S. W. Rep. 821, 23 Ky. L. Rep. 1626; *McKeon v. New York*, etc., R. Co., 183 Mass. 271, 97 Am. St. Rep. 437; *Watson v. Rinderknecht*, 82 Minn. 235; *Yeager v. Berry*, 82 Mo. App. 534; *Emmons v. Quade*, 176 Mo. 22.

**Recovery for Medical Aid and Wages Lost.** — *Armstrong v. Rhoads*, 4 Penn. (Del.) 151; *Suffolk v. Woodward*, 5 N. J. L. 287; *Clayton v. Keeler*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 488.

**Reasonable Sum for Medical Expenses.** — *Golder v. Lund*, 50 Neb. 867.

**Wages and Time Lost.** — *Bagley v. Mason*, 69 Vt. 175.

**Medical Services — Action by Wife.** — In an action by the wife, expenses incurred for medical services are not recoverable. *Keller v. Lewis*, 116 Iowa 369. *Contra*, *Hickey v. Welch*, 91 Mo. App. 4.

**Loss of Time — Action by Wife.** — In an action by a wife, loss of time is not a proper element of damages where it is not shown that she had employment apart from her husband. *Denton v. Ordway*, 108 Iowa 487.

**993.** *b. EXEMPLARY DAMAGES.* — See note 1.

**994.** See note 1.

*Corporations.* — See note 2.

*Discretion of the Jury.* — See note 3.

**Technical Assault — Nominal Damages.** — Where a technical assault has been committed, but no actual damage is shown, nominal damages only may be recovered. *Armstrong v. Rhoads*, 4 Penn. (Del.) 151; *Armstrong v. Little*, 4 Penn. (Del.) 255; *Shaffer v. Austin*, 68 Kan. 234. See also *Frederickson v. Nelson*, (Mich. 1903) 97 N. W. Rep. 678. Compare *Conlon v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 394, holding that compensatory damages may be awarded.

**Admissibility of Evidence** — *Estimate of Value of Time Lost.* — In *Texas* it is held that the plaintiff's statement of his estimate of the value of his time, together with the attendant circumstances, is admissible in proving damages. *Jackson v. Wells*, 13 Tex. Civ. App. 275.

*Evidence of the Plaintiff's Physical Condition* at the time of the assault, with evidence from which the jury may infer that the defendant knew that condition, is admissible. *Jackson v. Wells*, 13 Tex. Civ. App. 275. See also *Harris v. State*, 123 Ala. 69; *Spade v. Lynn*, etc., R. Co., 172 Mass. 488, 70 Am. St. Rep. 298.

*The Plaintiff's Inability to Follow His Usual Vocation* is admissible as showing the extent of his injury. *Jones v. Peterson*, 44 Oregon 161.

*Evidence of Extent of Injury.* — The jury may be permitted to examine, by means of their fingers, the scars on the plaintiff's head shown to be the result of the battery. *Jackson v. Wells*, 13 Tex. Civ. App. 275.

The clothing worn by the plaintiff at the time he was shot by the defendant may be exhibited to show the nature and extent of the wound. *James v. Hayes*, 63 Kan. 133.

**992. 2. Pain and Wounded Feelings.** — *Southern Express Co. v. Platten*, (C. C. A.) 93 Fed. Rep. 936; *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213; *Hendle v. Geiler*, (Del. 1895) 50 Atl. Rep. 632; *Armstrong v. Rhoads*, 4 Penn. (Del.) 151; *Courtney v. Clinton*, 18 Ind. App. 620; *James v. Hayes*, 63 Kan. 133; *Beavers v. Bowen*, (Ky. 1904) 80 S. W. Rep. 1165; *Goucher v. Jamieson*, 124 Mich. 21; *Stuppy v. Hof*, 82 Mo. App. 272; *Hickey v. Welch*, 91 Mo. App. 4; *O'Donnell v. St. Louis Transit Co.*, 107 Mo. App. 34; *Cooper v. Hopkins*, 70 N. H. 271; *Clayton v. Keeler*, (Supm. Ct. T. T.) 18 Misc. (N. Y.) 488; *Nichols v. Brabazon*, 94 Wis. 549. See also the title DAMAGES.

**Humiliation and Degradation of Passenger.** — *Chicago, etc., R. Co. v. Tracey*, 109 Ill. App. 563.

**Compensatory Damages When No Battery Is Committed.** — *Kline v. Kline*, 158 Ind. 602; *Hickey v. Welch*, 91 Mo. App. 4; *Prince v. Ridge*, (Supm. Ct. T. T.) 32 Misc. (N. Y.) 666; *San Antonio Traction Co. v. Crawford*, (Tex. Civ. App. 1902) 71 S. W. Rep. 306. *Contra*, *Grayson v. St. Louis Transit Co.*, 100 Mo. App. 60.

**993. 1. Exemplary Damages** — *Delaware.* — *Hendle v. Geiler*, (Del. 1895) 50 Atl. Rep. 632; *Watson v. Hastings*, 1 Penn. (Del.) 47.

*Georgia.* — *Berkner v. Dannenberg*, 116 Ga. 954.

*Louisiana.* — *Webb v. Rothschild*, 49 La. Ann. 244.

*Minnesota.* — *Germolus v. Sausser*, 83 Minn. 141.

*Mississippi.* — *Lochte v. Mitchell*, (Miss. 1900) 28 So. Rep. 877.

*Missouri.* — *Berryman v. Cox*, 73 Mo. App. 67; *Ickenroth v. St. Louis Transit Co.*, 102 Mo. App. 597.

*New Jersey.* — *Blackmore v. Ellis*, 70 N. J. L. 264.

*Ohio.* — *Hendricks v. Fowler*, 9 Ohio Cir. Dec. 209, 16 Ohio Cir. Ct. 597.

*Texas.* — *Jackson v. Wells*, 13 Tex. Civ. App. 275. See also *Denison, etc., R. Co. v. Randell*, 29 Tex. Civ. App. 460.

*Wisconsin.* — *Lamb v. Stone*, 95 Wis. 254; *Nichols v. Brabazon*, 94 Wis. 549.

**Actual Damages Must Be Shown.** — *Shaffer v. Austin*, 68 Kan. 234.

**The Expenses of Litigation** constitute a proper element of punitive damages. *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213; *List v. Miner*, 74 Conn. 50.

**Plaintiff Aggressor.** — In *Chicago, etc., R. Co. v. Randolph*, 65 Ill. App. 208, it was held that one who used excessive force in resisting an assault calculated to arouse great passion was liable only in actual damages.

In a **Joint Assault**, where one of the wrongdoers is actuated by malice, both are liable for exemplary damages. *Reizenstein v. Clark*, 104 Iowa 287.

**994. 1. Compensatory Damages Only.** — In *Haviland v. Chase*, 116 Mich. 214, 72 Am. St. Rep. 519, it was held that in the absence of an express statutory provision, damages for trespass to the person are to be limited to a full compensation for the injury.

**2. Liability of Corporations in Exemplary Damages.** — It is held that a corporation is liable in exemplary damages only where it expressly authorized the act as it was performed, or ratified it. *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213; *Lexington R. Co. v. Cozine*, 111 Ky. 799, 98 Am. St. Rep. 430; *Tanger v. Southwest Missouri Electric R. Co.*, 85 Mo. App. 28; *Ickenroth v. St. Louis Transit Co.*, 102 Mo. App. 597. See also the title EXEMPLARY DAMAGES, 41. 5.

**3. Badostain v. Grazide**, 115 Cal. 425; *Watson v. Hastings*, 1 Penn. (Del.) 47; *Reizenstein v. Clark*, 104 Iowa 287; *Edwards v. Warnkey*, 63 Kan. 889, 66 Pac. Rep. 987; *Ragsdale v. Ezell*, (Ky. 1899) 49 S. W. Rep. 775; *Wood v. Young*, (Ky. 1899) 50 S. W. Rep. 541; *Ryan v. Quinn*, 71 S. W. Rep. 872, 24 Ky. L. Rep. 1513.

**For Verdicts Held Not to Be Excessive** see *Sabre v. Mott*, 88 Fed. Rep. 780; *Birmingham R., etc., Co. v. Baird*, 130 Ala. 334; *Cross v. Carter*, 100 Ga. 632; *Wood v. Young*, (Ky. 1899) 50 S. W. Rep. 541; *Hollins v. Gorham*, 66 S.



**995. c. EVIDENCE IN AGGRAVATION OR MITIGATION OF DAMAGES —**(1) *Evidence in Aggravation.* — See note 1.**996. Pecuniary Condition of Defendant.** — See notes 1, 2.(2) *Evidence in Mitigation* — When Provocation or Excuse May Be Shown.

— See notes 3, 4.

**997. What May Be Shown in Mitigation or Excuse.** — See notes 1, 2.**998.** See note 2.

Provocation Must Have Been Recent. — See note 4.

**999. VII. EVIDENCE — 1. Generally.** — See notes 3, 4.

W. Rep. 823, 23 Ky. L. Rep. 2185; Faulkner v. Davis, (Ky. 1897) 38 S. W. Rep. 1049; Ragsdale v. Ezell, (Ky. 1899) 49 S. W. Rep. 775; Hirschman v. Emme, 81 Minn. 99; Plonty v. Murphy, 82 Minn. 268; Rauma v. Lamont, 82 Minn. 477; Wagner v. Gibbs, 80 Miss. 53, 92 Am. St. Rep. 598; O'Donnel v. St. Louis Transit Co., 107 Mo. App. 34; Barr v. Post, 56 Neb. 698; Osler v. Walton, 67 N. J. L. 63; Long v. McWilliams, 11 Okla. 562; San Antonio Traction Co. v. Crawford, (Tex. Civ. App. 1902) 71 S. W. Rep. 306; Houston, etc., R. Co. v. Bell, (Tex. Civ. App. 1903) 73 S. W. Rep. 56; St. Louis Southwestern R. Co. v. Johnson, (Tex. Civ. App. 1902) 68 S. W. Rep. 58; Missouri, etc., R. Co. v. Gaines, (Tex. Civ. App. 1904) 79 S. W. Rep. 1104; Doyle v. Com., 100 Va. 808, 4 Va. Sup. Ct. 143; Schmitz v. Kirchan, 32 Wash. 546; Bruske v. Neugent, 116 Wis. 488.

**For Examples of Excessive Damages** see Chicago, etc., R. Co. v. Swadener, 87 Ill. App. 501; Norris v. Whyte, 158 Mo. 20; Grayson v. St. Louis Transit Co., 100 Mo. App. 60; Rees v. Rasmussen, (Neb. 1904) 98 N. W. Rep. 830; Slingerland v. Gillespie, 67 N. J. L. 385; Conlon v. Metropolitan St. R. Co., (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 394.

**995. 1. Maisenbacker v. Society Concordia,** 71 Conn. 369, 71 Am. St. Rep. 213.

**Counsel Fees.** — In Hudson v. Voigt, 9 Ohio Cir. Dec. 35, 15 Ohio Cir. Ct. 391, it was held that the jury might in its discretion include in its award of damages a reasonable attorney fee, though evidence as to the value of attorney's services was inadmissible. See generally the title DAMAGES, vol. 8, p. 673 *et seq.*, and the Supplement thereto.

**996. 1. Courvoisier v. Raymond,** 23 Colo. 113; Hendricks v. Fowler, 9 Ohio Cir. Dec. 209, 16 Ohio Cir. Ct. 597; Willet v. Johnson, 13 Okla. 563. But see Givens v. Berkeley, 108 Ky. 236; Beavers v. Bowen, 70 S. W. Rep. 195, 24 Ky. L. Rep. 882.

**2. Berryman v. Cox,** 73 Mo. App. 67.

**3. Hendle v. Geiler,** (Del. 1895) 50 Atl. Rep. 632; Daniel v. Giles, 108 Tenn. 242. See also Galveston, etc., R. Co. v. La Prelle, 27 Tex. Civ. App. 496.

**Provocation Mitigates Punitive, but Not Actual, Damages.** — Armstrong v. Rhoads, 4 Penn. (Del.) 151; Armstrong v. Little, 4 Penn. (Del.) 255; Osler v. Walton, 67 N. J. L. 63; Barrette v. Carr, 75 Vt. 425.

**4. Provocation in Mitigation of Actual Damages.** — Genung v. Baldwin, 77 N. Y. App. Div. 584.

**997. 1. One Who Punishes the Child of Another** may introduce evidence of the parent's consent as tending to show an absence of un-

lawful intent. Donnelley v. Territory, (Ariz. 1898) 52 Pac. Rep. 368.

**2. Threats.** — In *Nebraska* it is held that threats may not be shown in mitigation of damages. Mangold v. Oft, 63 Neb. 397.

**Insult to Defendant's Wife.** — Evidence that the plaintiff had sent an insulting message to the defendant's wife, and that the defendant learned of this a short time before the assault, has been held to be admissible. Shapiro v. Michelson, 19 Tex. Civ. App. 615.

**Abusive Language** used by the plaintiff may be considered in mitigation of damages. Berkner v. Dannenberg, 116 Ga. 954; Yeager v. Berry, 82 Mo. App. 534.

**998. 2. Evidence of Criminal Conviction for the Same Offense** is held to be inadmissible in some jurisdictions. Armstrong v. Rhoads, 4 Penn. (Del.) 151; Edwards v. Wessinger, 65 S. Car. 161, 95 Am. St. Rep. 789. In other jurisdictions it is held that such evidence is admissible. Jackson v. Wells, 13 Tex. Civ. App. 275.

**4. Provocation Must Have Been Recent.** — Carson v. Singleton, 65 S. W. Rep. 821, 23 Ky. L. Rep. 1626; Munday v. Landry, 51 La. Ann. 303; Genung v. Baldwin, 77 N. Y. App. Div. 195; Davis v. Collins, 69 S. Car. 460, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998; Malone v. State, (Tex. Crim. 1896) 35 S. W. Rep. 991.

**Question of Law.** — What is sufficient cooling time is a question of law for the court. Carson v. Singleton, 65 S. W. Rep. 821, 23 Ky. L. Rep. 1626.

**999. 3. Evidence Held Sufficient to Convict — Arizona.** — Mazzotte v. Territory, (Ariz. 1903) 71 Pac. Rep. 911.

*California.* — People v. Wilson, 119 Cal. 384; People v. Hawkins, 127 Cal. 372; People v. Hite, 135 Cal. 76.

*Florida.* — Peterson v. State, 41 Fla. 285.

*Georgia.* — Price v. State, 118 Ga. 60; Morgan v. State, 119 Ga. 566.

*Illinois.* — Crowell v. People, 190 Ill. 508.

*Indiana.* — Martin v. State, 13 Ind. App. 389; Hornbeck v. State, 16 Ind. App. 484; Anderson v. State, 147 Ind. 445; O'Hara v. State, 21 Ind. App. 320; Lee v. State, 156 Ind. 541.

*Iowa.* — State v. Hoot, 120 Iowa 238, 98 Am. St. Rep. 352.

*Kansas.* — State v. Roberts, 67 Kan. 631.

*Michigan.* — People v. Kalunki, 123 Mich. 110; People v. Bernard, 125 Mich. 550; People v. Townsend, 120 Mich. 661.

*Mississippi.* — Malone v. State, 77 Miss. 812.

*Missouri.* — State v. Wiggins, 152 Mo. 170; State v. Vaughn, 164 Mo. 536; State v. Thornhill, 177 Mo. 691; State v. Sayman, 103 Mo. App. 141.

**1000. 2. Evidence of Intent.** — See note 1.

*Montana.* — State *v.* Broadbent, 19 Mont. 467.  
*New York.* — People *v.* Ametta, 73 N. Y. App. Div. 623; People *v.* Maggio, 74 N. Y. App. Div. 622; People *v.* Hannigan, 42 N. Y. App. Div. 617.

*Rhode Island.* — State *v.* Baker, 20 R. I. 275, 78 Am. St. Rep. 863.

*Texas.* — Thompson *v.* State, 37 Tex. Crim. 448; Whitehead *v.* State, (Tex. Crim. 1896) 37 S. W. Rep. 422; Yawn *v.* State, 37 Tex. Crim. 205; Dominguez *v.* State, (Tex. Crim. 1897) 40 S. W. Rep. 981; Bodeman *v.* State, (Tex. Crim. 1897) 40 S. W. Rep. 981; Davis *v.* State, (Tex. Crim. 1897) 42 S. W. Rep. 290; Howerton *v.* State, (Tex. Crim. 1898) 43 S. W. Rep. 1018; Estes *v.* State, (Tex. Crim. 1898) 44 S. W. Rep. 838; Hanley *v.* State, (Tex. Crim. 1898) 47 S. W. Rep. 371; Henry *v.* State, (Tex. Crim. 1899) 49 S. W. Rep. 96; Rogers *v.* State, 40 Tex. Crim. 355; Scroggins *v.* State, (Tex. Crim. 1899) 51 S. W. Rep. 232; Brister *v.* State, 40 Tex. Crim. 505; Riojos *v.* State, (Tex. Crim. 1900) 55 S. W. Rep. 172; Jay *v.* State, 41 Tex. Crim. 451; Holloway *v.* State, (Tex. Crim. 1900) 59 S. W. Rep. 883; Christian *v.* State, (Tex. Crim. 1901) 62 S. W. Rep. 422; Adams *v.* State, (Tex. Crim. 1901) 62 S. W. Rep. 1059; Furlough *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 1069; Nelson *v.* State, (Tex. Crim. 1902) 66 S. W. Rep. 775; Yeary *v.* State, (Tex. Crim. 1902) 66 S. W. Rep. 1106; Webb *v.* State, (Tex. Crim. 1902) 68 S. W. Rep. 276; Werner *v.* State, (Tex. Crim. 1902) 68 S. W. Rep. 681; Burns *v.* State, (Tex. Crim. 1902) 70 S. W. Rep. 24; Fortenberry *v.* State, (Tex. Crim. 1903) 72 S. W. Rep. 593; Heinen *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 776; Freeman *v.* State, (Tex. Crim. 1903) 77 S. W. Rep. 17; Blain *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 518; Pace *v.* State, (Tex. Crim. 1904) 79 S. W. Rep. 531.

*Utah.* — State *v.* McCune, 16 Utah, 170.

*Virginia.* — Doyle *v.* Com., 100 Va. 808, 4 Va. Sup. Ct. 143.

*Wyoming.* — Bryant *v.* State, 7 Wyo. 311.

**Assault with Intent to Rape.** — Harlan *v.* People, (Colo. 1904) 76 Pac. Rep. 792; State *v.* Alcorn, 137 Mo. 121; Allen *v.* State, 36 Tex. Crim. 381; Berry *v.* State, 44 Tex. Crim. 395.

**999. 4. Evidence Held Insufficient to Convict** — *Arkansas.* — Dillard *v.* State, 65 Ark. 404.

*Georgia.* — Williams *v.* State, 99 Ga. 203; Burton *v.* State, 109 Ga. 134; Penny *v.* State, 114 Ga. 77.

*Illinois.* — Duffy *v.* People, 197 Ill. 357.

*Indiana.* — Manahan *v.* State, 18 Ind. App. 297.

*Nebraska.* — Likens *v.* State, 63 Neb. 249; Smith *v.* State, 58 Neb. 531.

*New York.* — People *v.* Dankberg, 91 N. Y. App. Div. 67; Higgins *v.* Quinn, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 292.

*Texas.* — Thomason *v.* State, (Tex. Crim. 1898) 43 S. W. Rep. 1013; Hawes *v.* State, (Tex. Crim. 1898) 44 S. W. Rep. 1094; Parker *v.* State, (Tex. Crim. 1899) 53 S. W. Rep. 115; McLendon *v.* State, (Tex. Crim. 1902) 66 S. W. Rep. 553; Black *v.* State, (Tex. Crim. 1902) 67 S. W. Rep. 113; Stephens *v.* State, 44 Tex.

Crim. 67; Spradling *v.* State, (Tex. Crim. 1902) 71 S. W. Rep. 17; Barnes *v.* State, (Tex. Crim. 1903) 72 S. W. Rep. 168; Fuller *v.* State, 44 Tex. Crim. 463; Reese *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 511.

*Virginia.* — Montgomery *v.* Com., 99 Va. 833, 3 Va. Sup. Ct. 118.

**Assault with Intent to Rape.** — Gaskin *v.* State, 105 Ga. 632; Jackson *v.* State, 114 Ga. 861; Franey *v.* People, 210 Ill. 206; State *v.* Hayden, 141 Mo. 311; Caddell *v.* State, 44 Tex. Crim. 213; Sirmons *v.* State, 44 Tex. Crim. 488; Davis *v.* State, (Tex. Crim. 1903) 76 S. W. Rep. 466; Dina *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 229; Ross *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 503, 514; Wilcox *v.* State, 102 Wis. 650.

**1000. 1. Evidence Tending to Show Intent.** — State *v.* Jones, 2 Penn. (Del.) 573; State *v.* Di Guglielmo, 4 Penn. (Del.) 336; State *v.* Hoot, 120 Iowa 238, 98 Am. St. Rep. 352; Hart *v.* Com., 60 S. W. Rep. 298, 22 Ky. L. Rep. 1183; State *v.* Hamilton, 170 Mo. 377; Clary *v.* State, 61 Neb. 688; Bolton *v.* State, (Tex. Crim. 1897) 39 S. W. Rep. 672. See also Dudley *v.* State, 121 Ala. 4; Starr *v.* State, 160 Ind. 661.

**Remarks Made After the Assault.** — See Ray *v.* State, (Tex. Crim. 1896) 36 S. W. Rep. 446; Gaines *v.* State, (Tex. Crim. 1896) 37 S. W. Rep. 331. And see the title RES GESTÆ.

**Testimony of Defendant as to His Intention Relevant.** — The defendant may testify as to his motive in doing an act. Jackson *v.* Com., 96 Va. 107.

**Evidence of Nature and Extent of Prosecutor's Injuries.** — State *v.* Foreman, 1 Marv. (Del.) 517; State *v.* Grant, 144 Mo. 56.

**Evidence of Intoxication as Bearing on Intent.** — See Whitten *v.* State, 115 Ala. 72; State *v.* Di Guglielmo, 4 Penn. (Del.) 336; State *v.* Pasnau, 118 Iowa 501; State *v.* Alcorn, 137 Mo. 121; Little *v.* State, 42 Tex. Crim. 551. And see the title INTOXICATION.

**Intoxication as Increasing Probability that Assault Was Committed.** — The intoxication of the defendant and the extent thereof may be shown as increasing the probability that he committed the offense. Bagley *v.* Mason, 69 Vt. 175.

**Intent — Question for Jury.** — The question of intent is one of fact for the jury to determine from all the circumstances and attendant facts. Dudley *v.* State, 121 Ala. 4; Brown *v.* State, 121 Ala. 9; Robinson *v.* State, 118 Ga. 750; Lanier *v.* State, 106 Ga. 368; Ward *v.* State, 58 Neb. 719; Smith *v.* State, 58 Neb. 531; State *v.* Mehaffey, 132 N. Car. 1062.

**Where No Personal Violence or Battery Is Inflicted,** and the sole injury is to the feelings, an intent to injure cannot be presumed. Ward *v.* State, 58 Neb. 719; Chambless *v.* State, (Tex. Crim. 1904) 79 S. W. Rep. 577.

**Excitement and Anger of Defendant.** — The jury should be allowed to consider the anger of the defendant, provoked by a previous assault upon him by the prosecutor, as showing absence of intent to murder. Murray *v.* State, (Tex. Crim. 1896) 35 S. W. Rep. 990; Stevens *v.* State, 38 Tex. Crim. 550.

**1001.** Evidence of Previous Threats. — See note 1.

Evidence of Previous Assaults. — See note 2.

**3. Character in Evidence** — *a. CIVIL ACTION* — (1) *Character of Plaintiff*. — See notes 3, 4.**1002.** (2) *Character of Defendant*. — See note 1.*b. CRIMINAL PROSECUTION* — (1) *Character of Defendant*. — See note 2.(2) *Character of Prosecutor*. — See notes 3, 4.*c. SPECIFIC ACTS*. — See note 5.**1003.** *d. DEFENDANT AS WITNESS*. — See note 1.[ASSAY VALUE. — See note 1*a.*]

**Evidence of Provocation** has been held to be admissible to reduce the degree of the offense. *Heard v. State*, 114 Ga. 90; *Garrett v. State*, 36 Tex. Crim. 230. See also *People v. Townsend*, 120 Mich. 661.

An assault on the defendant is not sufficient, in the absence of proof that it aroused passion, to reduce assault with intent to murder to aggravated assault. *Chatman v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 346.

The question of prior provocation together with cooling time as bearing on intent should be left to the jury. *Mundine v. State*, 37 Tex. Crim. 5.

**An Intent to Commit Rape May Be Inferred** from the conduct of the defendant at the time of the assault. *Brown v. State*, 121 Ala. 9; *Hanes v. State*, 155 Ind. 112.

**Admissions**. — In a prosecution for indecent assault, evidence that the prosecutrix admitted to the defendant that she had had intercourse with other men is admissible as tending to show lack of intent to injure. *Wilson v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 106.

**1001.** 1. *State v. Foreman*, 1 Marv. (Del.) 517; *People v. Bernard*, 125 Mich. 550.

2. **Evidence of Previous Assaults**. — *Hanks v. State*, (Tex. Crim. 1896) 38 S. W. Rep. 173; *Rogers v. State*, 40 Tex. Crim. 355.

The state having introduced evidence of a previous difficulty between the prosecutor and the defendant, the latter may show that the prosecutor was the aggressor in the previous affair. *Morrison v. State*, 37 Tex. Crim. 601.

3. **Civil Action — Character of Plaintiff**. — In an action for unnecessary violence in making an arrest, evidence of the reputation and character of the plaintiff as a dangerous person is admissible. *Beckman v. Souther*, 68 N. H. 381. See also *Houston, etc., R. Co. v. Bell*, (Tex. Civ. App. 1903) 73 S. W. Rep. 56. See generally the title CHARACTER (IN EVIDENCE).

The reputation of the plaintiff as to his quarrelsome nature may be shown in support of a plea of self-defense. *Dannenberg v. Berkner*, 118 Ga. 885; *Golder v. Lund*, 50 Neb. 867; *Henning v. Bartz*, 25 Ohio Cir. Ct. 15.

4. **Character of Plaintiff in Indecent Assault**. — Compare *Sayen v. Ryan*, 6 Ohio Cir. Dec. 732, 9 Ohio Cir. Ct. 631. See generally the titles CHARACTER (IN EVIDENCE); RAPE.

**Assault with Intent to Rape — Character of Prosecutrix**. — Evidence of the bad reputation of the prosecutrix for chastity is no defense, but may be considered by the jury as affecting the credibility of the prosecutrix and as to the

probability of consent. *State v. McCune*, 16 Utah 170.

**Damages**. — Evidence of the plaintiff's character, in an action for indecent assault, is admissible as bearing on the question of damages. *Barton v. Bruley*, 119 Wis. 326.

**1002.** 1. **Civil Action — Character of Defendant**. — *Treschman v. Treschman*, 28 Ind. App. 206; *Lyddon v. Dose*, 81 Mo. App. 64; *Sayen v. Ryan*, 6 Ohio Cir. Dec. 732, 9 Ohio Cir. Ct. 631; *Barton v. Bruley*, 119 Wis. 326. See generally the title CHARACTER (IN EVIDENCE).

**Bad Character of Defendant**. — In a civil action the bad character of the defendant may not be shown, as his character is not in issue. *Barr v. Post*, 56 Neb. 698.

2. **Evidence of the Bad Character of the Defendant** is not admissible except where the defendant has himself placed his character in issue. *Maxwell v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 516. See generally the title CHARACTER (IN EVIDENCE).

3. **Criminal Prosecution — Character of Prosecutor**. — *Rufus v. State*, 117 Ala. 131.

**In a Prosecution for Indecent Assault**, evidence of the good reputation of the prosecutrix for virtue and chastity is admissible. *Wilson v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 106.

4. **Character of Prosecutor for Peaceableness**. — The good character of the prosecutor may be shown where the defendant has testified to previous threats or hostile acts on his part. *Rhea v. State*, 37 Tex. Crim. 138.

**Reputation of Prosecutor for Veracity**. — Where an effort has been made to impeach the prosecuting witness, the state may introduce evidence as to his reputation for truth and veracity, but otherwise such evidence is inadmissible. *Morrison v. State*, 37 Tex. Crim. 601.

**Character of Prosecutor Subsequent to Assault**. — Evidence of the bad character of the prosecutor at a time subsequent to the alleged assault is not admissible. *Burks v. State*, 40 Tex. Crim. 167.

5. **Proof of Another Offense**. — See *Silliman v. Sampson*, 42 N. Y. App. Div. 623; *Maxwell v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 516.

**1003.** 1. *Bolton v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 672.

1*a.* **Assay Value**. — Where by an agreement mill men were to return a certain per cent. of the assay value of gold ore worked in the mill, this was held to mean the standard assay value of gold as known everywhere, and not the value of gold bullion at the place where produced. *Vlotti v. Neabitt*, 22 Nev. 390.

# ASSIGNMENTS.

By LEO GOODMAN.

**1010. II. HISTORY AND DEVELOPMENT** — Equitable Assignments. — See note 6.

**1012. III. PARTIES TO ASSIGNMENT** — 2. Competency — Partners. — See note 9.

**1014. IV. WHAT MAY BE ASSIGNED** — 1. Choses in Action Generally — a. ORIGINAL DOCTRINE — (1) *At Common Law* — Choses in Action Not Assignable. — See note 3.

**1015.** (2) *In Equity* — Choses in Action Assignable in Equity. — See note 7.

**1017. b. MODERN DOCTRINE** — (1) *Generally* — And Courts of Law, Following the Rules of Equity in This Respect. — See note 1.

(2) *Test of Assignability* — The General Test to Be Applied. — See note 4.

**1018. Rights Arising from Contracts Founded on Personal Confidence.** — See note 1.

(3) *Choses ex Contractu*. — See note 2.

**1010. 6.** *Sullivan v. Visconti*, 68 N. J. L. 543.

**1012. 9. Partners.** — *American Hardwood Lumber Co. v. Nickey*, 101 Mo. App. 20; *Sullivan v. Visconti*, 68 N. J. L. 543.

**1014. 3. Choses in Action Not Assignable at Common Law.** — *Lloyd v. Russell* First Nat. Bank, 5 Kan. App. 512; *Sullivan v. Visconti*, 68 N. J. L. 543; *St. Lawrence Boom, etc., Co. v. Price*, 49 W. Va. 432; *McConaughy v. Bennett*, 50 W. Va. 172.

**1015. 7. Choses in Action Assignable in Equity.** — *Pearson v. Luecht*, 199 Ill. 475, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; *Wright v. Hardy*, 76 Miss. 524; *Sullivan v. Visconti*, 68 N. J. L. 543.

**1017. 1. Courts of Law Will Protect Rights of Assignees.** — *Pearson v. Luecht*, 199 Ill. 475; *Doty v. Caldwell*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1025.

**4. Test of Assignability.** — *Edmunds v. Illinois Cent. R. Co.*, 80 Fed. Rep. 78; *Mumford v. Wright*, 12 Colo. App. 214; *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100; *Noble v. Hunter*, 2 Kan. App. 538; *McLeland v. St. Louis Transit Co.*, 105 Mo. App. 473; *Mitchell v. Taylor*, 27 Oregon 377; *Ex p. Hiers*, 67 S. Car. 108, 100 Am. St. Rep. 713; *Taylor v. Sturgis*, 29 Tex. Civ. App. 270; *Lawler v. Jennings*, 18 Utah 35, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1017; *McConaughy v. Bennett*, 50 W. Va. 172; *Ellis v. Southwestern Land Co.*, 94 Wis. 531.

As to What Causes of Action Survive see the following notes, and see generally the title SURVIVAL OF ACTIONS, 21 ENCYC. OF PL. AND PR. 309.

**1018. 1.** *Griffith v. Tower Pub. Co.*, (1897) 1 Ch. 21; *Tifton, etc., R. Co. v. Bedgood*, 116 Ga. 945; *Northwestern Cooperage, etc., Co. v. Byers*, 133 Mich. 534; *Tate v. Security Trust Co.*, 63 N. J. Eq. 559; *Mitchell v. Taylor*, 27 Oregon 377.

**2. Rights of Action ex Contractu May Be Assigned** — *England*. — *Tolhurst v. Associated Portland Cement Manufacturers*, (1903) A. C. 414, 89 L. T. N. 9, 196.

*Georgia*. — *Chattanooga, etc., R. Co. v. Warthen*, 98 Ga. 599; *Tifton, etc., R. Co. v. Bedgood*, 116 Ga. 945.

*Kansas*. — *Atchison, etc., R. Co. v. Kansas Farmers' Ins. Co.*, 7 Kan. App. 447; *Atchison, etc., R. Co. v. Chenoweth*, 5 Kan. App. 810; *Missouri Pac. R. Co. v. Phelps*, 10 Kan. App. 1. *Michigan*. — *Rodgers v. Torrent*, 111 Mich. 680.

*Missouri*. — *Kingsbury v. Joseph*, 94 Mo. App. 298.

*New Jersey*. — *Howe v. Smeeth Copper, etc., Bronze Co.*, (N. J. 1900) 48 Atl. Rep. 24; *Van Pelt v. Schauble*, 68 N. J. L. 638.

*North Carolina*. — *Anniston Nat. Bank v. Durham School Committee*, 121 N. Car. 107.

*Oregon*. — *Mitchell v. Taylor*, 27 Oregon 377.

*Rhode Island*. — *Westminster Bank v. Atherton*, 24 R. I. 334.

*Texas*. — *Raywood Rice Canal, etc., Co. v. Langford*, 32 Tex. Civ. App. 401.

*West Virginia*. — *St. Lawrence Boom, etc., Co. v. Price*, 49 W. Va. 432, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1018.

**The Right of Action for a Breach of Contract Resulting in a Pecuniary Loss.** — *Buffalo Tin Can Co. v. E. W. Bliss Co.*, 118 Fed. Rep. 106.

**An Unliquidated Balance.** — *Lawler v. Jennings*, 18 Utah 35, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1020.

**The Right of Action Against a Street Railway** in favor of the city for street paving is assignable. *Houston City St. R. Co. v. Storrie*, (Tex. Civ. App. 1898) 44 S. W. Rep. 693.

**A Right to Use a Trademark** may be assigned. *Robinson v. Storm*, 103 Tenn. 40.

**A Liquor-tax Certificate** and moneys to be refunded upon its surrender are assignable. *Matter of Jenney*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 244.

**A Ferry Franchise** may be assigned. *Evans v. Kroutingier*, (Idaho 1903) 72 Pac. Rep. 882.

**A Right of Subrogation** is assignable. *San Francisco Sav. Union v. Long*, (Cal. 1898) 53 Pac. Rep. 907.

**County Warrants** are assignable. *People v. Rio Grande County*, 11 Cal. App. 124.

**1020.** (4) *Choses ex Delicto* — The General Doctrine. — See note 1.

Instances of What Assignable. — See note 3.

**1021.** See notes 1, 2.

**1022.** See notes 2, 3.

**1023.** Instances of What Not Assignable. — See note 1.

Fraud and Deceit. — See note 6.

**1024.** The Assignment of a Mere Right to File a Bill in Equity. — See note 2.

**1025.** Qualification. — See note 1.

**1026.** 2. Particular Interests, Rights, and Contracts Considered — *a. FUTURE AND CONTINGENT INTERESTS* — (1) *Generally*. — See note 4.

**1027.** Operation of Assignment in Equity. — See note 1.

The Right of Action of a Creditor of a Corporation to sue the trustees personally under a statute attaching personal liability to them upon their failure to publish a report is assignable. *Fitzgerald v. Weidenbeck*, 76 Fed. Rep. 695.

Assignment Prohibited by Terms of Contract. — See *Sullivan v. Visconti*, 68 N. J. L. 543.

Damages Recovered for Interference with a Contract are included in the terms of an assignment which extends to all moneys which may become payable in respect of the contract. *Graham v. Bourque*, 6 Ont. L. Rep. 428.

**1020.** 1. Right of Action for Tort Not Generally Assignable. — *Dawson v. Great Northern*, etc., R. Co., (1904) 1 K. B. 277, 90 L. T. N. S. 20; *Lloyd v. Russell First Nat. Bank*, 5 Kan. App. 512; *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100.

3. Injuries Affecting Estate Rather than Person Assignable. — *Rucker v. Bolles*, 49 U. S. App. 358, 80 Fed. Rep. 504; *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100; *Ex p. Hiers*, 67 S. Car. 108, 100 Am. St. Rep. 713.

A Right of Action for Injury to Personal Property is assignable. *Bolster v. Ithaca St. R. Co.*, 79 N. Y. App. Div. 239.

**1021.** 1. Conversion of Property. — U. S. v. *Ferguson*, 78 Fed. Rep. 103, 45 U. S. App. 457, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1021; *McCormick v. Friedman*, (Idaho 1904) 76 Pac. Rep. 762; *Noble v. Hunter*, 2 Kan. App. 538; *Jackson v. Sevaton*, 79 Minn. 275; *Robinson v. Kaplan*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 686; *Rothschild v. Allen*, 90 N. Y. App. Div. 233; *Wolff v. Rausch*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 108.

2. Trespass on Lands. — *Hovey v. Grand Trunk Western R. Co.*, (Mich. 1903) 97 N. W. Rep. 398. *Contra*, under the statute in *Georgia*, *Allen v. Macon*, etc., R. Co., 107 Ga. 838.

**1022.** 2. Claim for Money Tortiously Obtained. — *Sellers v. Arie*, 99 Iowa 515.

The Right to Recover Back Usurious Interest. — *Taylor v. Sturgis*, 29 Tex. Civ. App. 270. *Contra*, *Lloyd v. Russell First Nat. Bank*, 5 Kan. App. 512, holding that a claim against a national bank for usurious interest paid is founded in tort, and therefore is not assignable; *Ex p. Hiers*, 67 S. Car. 108, 100 Am. St. Rep. 713.

The Right to Recover Money Deposited on a Wagering Contract is assignable. *Zeltner v. Irwin*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 13.

3. Killing of Stock. — *Henderson v. Detroit*, etc., R. Co., 131 Mich. 438.

**1023.** 1. Actions Strictly Personal Not As-

signable. — *Mumford v. Wright*, 12 Colo. App. 214; *Mitchell v. Taylor*, 27 Oregon 377; *Ex p. Hiers*, 67 S. Car. 108, 100 Am. St. Rep. 713.

A Right of Action Against a Railroad Company. — *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, reversing 58 Ill. App. 572; *Williams v. West Chicago St. R. Co.*, 199 Ill. 57; *Chicago Gen. R. Co. v. Capek*, 82 Ill. App. 168; *McLeland v. St. Louis Transit Co.*, 105 Mo. App. 473; *Marsh v. Western New York*, etc., R. Co., 204 Pa. St. 229; *Yonkers v. Pennsylvania R. Co.*, 18 Lanc. L. Rev. 84, 14 York Leg. Rec. (Pa.) 176; *Southern Pac. Co. v. Winton*, 27 Tex. Civ. App. 503. Compare *Kent v. Chapel*, 67 Minn. 420; *Texas*, etc., R. Co. v. *Vaughan*, 16 Tex. Civ. App. 403; *Gulf*, etc., R. Co. v. *Miller*, 21 Tex. Civ. App. 609; *Lehmann v. Farwell*, 95 Wis. 185, 60 Am. St. Rep. 111.

6. Right of Action for Fraud and Deceit Not Assignable. — *Killen v. Barnes*, 106 Wis. 546.

**1024.** 2. Bill in Equity for Fraud. — *Archer v. Freeman*, 124 Cal. 528; *Smith v. Pacific Bank*, 137 Cal. 363; *Haseltine v. Smith*, 154 Mo. 404; *Marsh v. Western New York*, etc., R. Co., 204 Pa. St. 229; *National Valley Bank v. Hancock*, 100 Va. 101, 93 Am. St. Rep. 933, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1024.

**1025.** 1. Incidental Right to Sue. — *Wimpfheimer v. Perrine*, 61 N. J. Eq. 126; *National Valley Bank v. Hancock*, 100 Va. 101, 93 Am. St. Rep. 933, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1025.

**1026.** 4. Assignment of Mere Possibilities at Law. — *Wellborn v. Buck*, 114 Ala. 277; *Shackelford v. M. C. Kiser Co.*, 131 Ala. 224; *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026; *McCall v. Hampton*, 98 Ky. 166, 56 Am. St. Rep. 335; *Price v. Morning Star Min. Co.*, 83 Mo. App. 470; *Marsh v. Western New York*, etc., R. Co., 204 Pa. St. 229.

A Pension is not assignable until the warrant has been issued. *Gill v. Dixon*, 131 N. Car. 87.

A Trade Secret is assignable. *Vulcan Detinning Co. v. American Can Co.*, (N. J. 1904) 58 Atl. Rep. 290.

**1027.** 1. Assignment of Mere Possibilities, Contingencies, etc., in Equity. — *Brewer v. Griesheimer*, 104 Ill. App. 323; *Price v. Morning Star Min. Co.*, 83 Mo. App. 470; *Hax v. Acme Cement Plaster Co.*, 82 Mo. App. 447; *Omaha v. Standard Oil Co.*, 55 Neb. 337, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027; *McFarland v. Stanton Mfg. Co.*, 53 N. J. Eq. 649, 51 Am. St. Rep. 647; *Bouvier v. Baltimore*, etc., R. Co., 67 N. J. L. 281; *Niles v. Mathusa*,

**1027.** Future Profits. — See note 2.

**1028.** See note 2.

**1029.** Expectancies. — See note 1.

**1030.** See note 1.

**1031.** Interest under a Will. — See note 1.

(2) *Unearned Wages or Salary* — (a) Where There Is Subsisting Contract of Employment. — See note 2.

**1032.** See notes 1, 2, 3.

Where the Service Is Continuous. — See note 4.

(b) Where There Is No Subsisting Contract of Employment. — See note 5.

**1033.** See note 1.

(c) By Public Officers — Unearned Salary of Public Officers Not Assignable. — See note 2.

20 N. Y. App. Div. 483; *Congregation Shomri Anshe, etc., v. Sindrock*, 15 N. Y. App. Div. 82.

**1027. 2. Money to Become Due.** — *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027; *Sullivan v. Visconti*, 68 N. J. L. 543; *Citizen's Trust, etc., Co. v. Howell*, 19 Pa. Super. Ct. 255.

**Money to Become Due on Performance of Non-assignable Contract.** — *Omaha v. Standard Oil Co.*, 55 Neb. 337, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027.

**1028. 2. Future Interests Held Assignable.** — Money to become due upon the completion of a contract is assignable. *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1028.

A judgment to be recovered in a pending action is assignable. *Williams v. West Chicago St. R. Co.*, 101 Ill. App. 291.

Alimony not yet due is not assignable. *Lynde v. Lynde*, 64 N. J. Eq. 736.

See also *Caulfield v. Van Brunt*, 173 Pa. St. 428; *Knight v. Schwandt*, 67 Minn. 71; *Rydson v. Larson*, (Neb. 1903) 93 N. W. Rep. 195.

**1029. 1. Expectancies.** — *Mally v. Mally*, 121 Iowa 169; *Schmidt v. Herberth*, 50 La. Ann. 375; *Niles v. Mathusa*, 20 N. Y. App. Div. 483; *Dutton's Estate*, 181 Pa. St. 426; *Lennig's Estate*, 182 Pa. St. 485, 61 Am. St. Rep. 725; *Hale v. Hollon*, 90 Tex. 427; *Searcy v. Gwaltney*, (Tex. Civ. App. 1904) 81 S. W. Rep. 576; *Hale v. Hollon*, 14 Tex. Civ. App. 96. But see *McCall v. Hampton*, 98 Ky. 166, 56 Am. St. Rep. 335.

**Fraud on Ancestor.** — *Fuller v. Parmenter*, 72 Vt. 362.

**1030. 1. Voluntary Assignment Void.** — *Lennig's Estate*, 182 Pa. St. 485, 61 Am. St. Rep. 725; *Lennig's Estate*, 19 Pa. Co. Ct. 289, 6 Pa. Dist. 249.

**1031. 1. Contingent Bequests and Legacies.** — *Jackson's Estate*, 203 Pa. St. 33.

**2. Assignment of Future Wages Under Existing Employment** — *Alabama.* — *Wellborn v. Buck*, 114 Ala. 277.

*Arkansas.* — *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215

*Colorado.* — *Colorado Fuel, etc., Co. v. Kidwell*, (Colo. App. 1904) 76 Pac. Rep. 922, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1031.

*Connecticut.* — *Berlin Iron Bridge Co. v. Connecticut River Banking Co.*, 76 Conn. 477.

*Illinois.* — *Wenham v. Mallin*, 103 Ill. App. 609, citing 2 AM. AND ENG. ENCYC. OF LAW (2d

ed.) 1031, affirmed 209 Ill. 252; *Brewer v. Griesheimer*, 104 Ill. App. 323.

*Iowa.* — *Peterson v. Ball*, 121 Iowa 544.

*Kentucky.* — *Holt v. Thurman*, 111 Ky. 84, 98 Am. St. Rep. 399, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1031.

*Maine.* — *Whitcomb v. Waterville*, 99 Me. 75.

*Minnesota.* — *Steinbach v. Brant*, 79 Minn. 383, 79 Am. St. Rep. 494.

*Missouri.* — *Hax v. Acme Cement Plaster Co.*, 82 Mo. App. 447, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1031; *Bell v. Mulholland*, 90 Mo. App. 612; *Tolman v. Union Casualty, etc., Co.*, 90 Mo. App. 274.

*New Hampshire.* — *Lamoureux v. Morin*, 72 N. H. 76.

*Pennsylvania.* — *Berresford v. Susquehanna Coal Co.*, 24 Pa. Co. Ct. 557.

*Rhode Island.* — *O'Keefe v. Allen*, 20 R. I. 414, 78 Am. St. Rep. 884; *Dolan v. Hughes*, 20 R. I. 513.

**1032. 1. Hiring from Day to Day.** — *Colorado Fuel, etc., Co. v. Kidwell*, (Colo. App. 1904) 76 Pac. Rep. 922; *Brewer v. Griesheimer*, 104 Ill. App. 323; *Dolan v. Hughes*, 20 R. I. 513.

**2. Wellborn v. Buck**, 114 Ala. 277; *Colorado Fuel, etc., Co. v. Kidwell*, (Colo. App. 1904) 76 Pac. Rep. 922; *Dolan v. Hughes*, 20 R. I. 513.

**3. Wellborn v. Buck**, 114 Ala. 277; *Dolan v. Hughes*, 20 R. I. 513.

**4. Renewal of Employment.** — *Hax v. Acme Cement Plaster Co.*, 82 Mo. App. 447.

**5. No Assignment of Wages by Person Not Employed.** — *Steinbach v. Brant*, 79 Minn. 383, 79 Am. St. Rep. 494; *Hax v. Acme Cement Plaster Co.*, 82 Mo. App. 447, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1032; *Bell v. Mulholland*, 90 Mo. App. 612; *Rydson v. Larson*, (Neb. 1903) 93 N. W. Rep. 195; *Tolman v. Hyndman Steel Roofing Co.*, 9 Ohio Dec. 501, 6 Ohio N. P. 467; *O'Keefe v. Allen*, 20 R. I. 414, 78 Am. St. Rep. 884.

**Seaman's Wages.** — See *The George W. Wells*, 118 Fed. Rep. 761; *The M. M. Morrill*, 78 Fed. Rep. 509.

**1033. 1.** *Steinbach v. Brant*, 79 Minn. 383, 79 Am. St. Rep. 494.

**2. Public Officer Cannot Assign Future Salary.** — *Chicago v. People*, 98 Ill. App. 517, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033; *Holt v. Thurman*, 111 Ky. 84, 98 Am. St. Rep. 399, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033; *In re King*, 110 Mich. 203; *August v. Crane*, (Supm. Ct. App. T.) 28 Misc. (N. Y.)

**1033.** Reason for the Rule. — See note 3.

**1034.** Illustrations. — See notes 4, 11.

**b. EXECUTORY CONTRACTS INVOLVING PERSONAL TRUST OR LIABILITY** — (1) *Generally*. — See note 12.

**1035.** (2) *General Test of Assignability*. — See note 1.

*Parties May Prohibit Assignment*. — See note 2.

(3) *Applications of the General Test* — *Where Delectus Personæ Not Material*. — See note 3.

**1036.** Assignor Will Remain Liable. — See note 2.

**1037.** Where Delectus Personæ Is Material. — See note 1.

549; *Columbus First Nat. Bank v. State*, (Neb. 1903) 94 N. W. Rep. 633; *State v. Barnes*, 10 S. Dak. 306, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033; *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854.

**Cases Apparently Contra.** — See *McGregor v. McGregor*, 130 Mich. 505, 97 Am. St. Rep. 492.

**1033. 3.** *Chicago v. People*, 98 Ill. App. 517, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033; *Holt v. Thurman*, 111 Ky. 84, 98 Am. St. Rep. 399, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033; *State v. Barnes*, 10 S. Dak. 306, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033; *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854.

**1034. 4. County Assessor.** — *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854.

**11. Commissions of Executor.** — *In re King*, 110 Mich. 203.

**12. Leader Printing Co. v. Lowry**, 9 Okla. 89.

**1035. 1. General Test of Assignability.** — *New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co.*, 28 N. Y. App. Div. 411; *Leader Printing Co. v. Lowry*, 9 Okla. 89; *Poling v. Condon-Lane Boom, etc., Co.*, 55 W. Va. 529, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1035.

**2. Parties May Prohibit Assignment.** — *American Bonding, etc., Co. v. Baltimore, etc., R. Co.*, 60 C. C. A. 52, 124 Fed. Rep. 866; *Omaha v. Standard Oil Co.*, 55 Neb. 337; *Zetterlund v. Texas Land, etc., Co.*, 55 Neb. 355; *Leader Printing Co. v. Lowry*, 9 Okla. 89.

**3. Where Delectus Personæ Not Important** — *United States*. — *American Bonding, etc., Co. v. Baltimore, etc., R. Co.*, 124 Fed. Rep. 866, 60 C. C. A. 52.

*Illinois*. — *Mueller v. Northwestern University*, 95 Ill. App. 258.

*Kansas*. — *Campbell v. Summer County*, 64 Kan. 376.

*Kentucky*. — *Baker v. Smith*, (Ky. 1901) 61 S. W. Rep. 1014.

*Michigan*. — *Northwestern Cooperage, etc., Co. v. Byers*, 133 Mich. 534, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1035.

*Nebraska*. — *Alden v. George W. Frank Imp. Co.*, 57 Neb. 67.

*New York*. — *New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co.*, 28 N. Y. App. Div. 411; *Merritt v. Booklovers' Library*, 89 N. Y. App. Div. 454.

*Oklahoma*. — *Leader Printing Co. v. Lowry*, 9 Okla. 89.

*Pennsylvania*. — *Galey v. Mellon*, 172 Pa. St. 443.

*Texas*. — *Missouri, etc., R. Co. v. Carter*, 95 Tex. 461; *Lakeview Land Co. v. San Antonio Traction Co.*, 95 Tex. 252.

*West Virginia*. — *Poling v. Condon-Lane Boom, etc., Co.*, 55 W. Va. 529, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1035.

See also *Hall v. Chitwood*, 106 Mo. App. 568.

**Executory Contracts to Sell.** — *Brassel v. Troxel*, 68 Ill. App. 131.

**Subscription Contracts** are assignable. *Valentine v. Berrien Springs Water-Power Co.*, 128 Mich. 280.

**A Railroad Ticket** is transferable. *International, etc., R. Co. v. Ing*, 29 Tex. Civ. App. 398. See generally the title TICKETS AND FARES.

**A Contract to Purchase** is assignable. *Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co.*, 59 N. Y. App. Div. 353.

**1036. 2. Assignor Still Liable.** — *Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co.*, 59 N. Y. App. Div. 353; *Poling v. Condon-Lane Boom, etc., Co.*, 55 W. Va. 529, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1036.

**1037. 1. Where Delectus Personæ Important** — *England*. — *Griffith v. Tower Pub. Co.*, (1897) 1 Ch. 21, 75 L. T. N. S. 330; *Dr. Jaeger's Sanitary Woollen System Co. v. Walker*, 77 L. T. N. S. 180.

*United States*. — *American Bonding, etc., Co. v. Baltimore, etc., R. Co.*, 60 C. C. A. 52, 124 Fed. Rep. 866; *Bancroft v. Scribner*, (C. C. A.) 72 Fed. Rep. 988; *American Bonding, etc., Co. v. Baltimore, etc., R. Co.*, 60 C. C. A. 52, 124 Fed. Rep. 866; *Colton v. Raymond*, 52 C. C. A. 382, 114 Fed. Rep. 863.

*Indiana*. — *Sprinkle v. Trulove*, 22 Ind. App. 577.

*Iowa*. — *Linn County Abstract Co. v. Beechley*, 124 Iowa 146, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1037.

*Kansas*. — *Campbell v. Summer County*, 64 Kan. 376.

*Louisiana*. — *Grayson v. Whatley*, 15 La. Ann. 525.

*Michigan*. — *Northwestern Cooperage, etc., Co. v. Byers*, 133 Mich. 534, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1037; *Edison v. Babka*, 111 Mich. 235; *Marquette v. Wilkinson*, 119 Mich. 413.

*Missouri*. — *Lathrop v. Mayer*, 86 Mo. App. 355. See also *Hall v. Chitwood*, 106 Mo. App. 568; *Moore v. Thompson*, 93 Mo. App. 336.

*West Virginia*. — *Poling v. Condon-Lane Boom, etc., Co.*, 55 W. Va. 529, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1037.

**Contracts for Personal Services.** — *Northwestern Cooperage, etc., Co. v. Byers*, 133 Mich. 534, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1037.

**Distinction Between Assigning Contract and Assigning Money Due on Contract.** — *Snyder v. New York*, 74 N. Y. App. Div. 421.

**1037.** Responsibility and Solvency Material. — See note 2.

**1038.** *c.* CLAIMS AGAINST THE UNITED STATES — Statutory Enactment. — See note 1.

**1039.** When the Statute Applies. — See note 2.

**1040.** See note 2.

**1042.** *e.* BONDS — Under Modern Statutes. — See note 1.

**1043.** *f.* JUDGMENTS AND DECREES — At Common Law. — See note 1.  
Under the Modern Practice. — See note 4.

**1044.** *h.* CONTRACTS OF GUARANTY. — See note 4.

Special Contract of Guaranty. — See note 5.

**1045.** *j.* INTERESTS IN LANDS — (1) *Generally* — As a General Rule. — See note 1.

**1046.** (3) *Covenants* — Decisions Conflicting. — See note 2.

**1047.** See notes 1, 2.

**The Test.** — The question of personal confidence must be determined from the nature of the rights themselves. *Horst v. Roehm*, 84 Fed. Rep. 565.

**1037. 2. Responsibility and Solvency Material.** — *Sims v. Cordele Ice Co.*, 119 Ga. 597; *Tifton, etc., R. Co. v. Bedgood*, 116 Ga. 945; *Sprinkle v. Trulove*, 22 Ind. App. 577; *Campbell v. Summer County*, 64 Kan. 376; *Pike v. Waltham*, 168 Mass. 581; *Jackson v. Sessions*, 109 Mich. 216.

In *Jenkins v. Columbia Land, etc., Co.*, 13 Wash. 502, it was held that a contract between the city water company and the city, whereby the water company was to supply water to the stations of the city's electric plant and receive pay at the end of each month, involved no question of personal trust where the city's assignee was making no claim to the benefit of that part of the contract which provided for payment at the end of each month.

**A Contract of Scholarship** is not assignable. *Butts v. McMurry*, 74 Mo. App. 526.

**1038. 1. Assignments Void under United States Act of 1853.** — In *Knut v. Nutt*, 83 Miss. 365, 102 Am. St. Rep. 452, a distinction was drawn between a transfer of a one-third interest in a claim and the transfer of an amount equal to such an interest.

**An Assignment of Money Due on Contract**, though accepted by the disbursing agent of the government, is void. *Greenville Sav. Bank v. Lawrence*, 42 U. S. App. 179, 76 Fed. Rep. 545. See also *Ball v. Halsell*, 161 U. S. 72.

**1039. 2. Cases in Which Statute Does Not Apply.** — *Dulaney v. Scudder*, 36 C. C. A. 52, 94 Fed. Rep. 6; *Thayer v. Pressey*, 175 Mass. 225; *Leonard v. Whaley*, 91 Hun (N. Y.) 304.

**1040. 2. Assignment for Creditors.** — *Price v. Forrest*, 54 N. J. Eq. 669.

**1042. 1. Appeal Bonds** may be assigned. *Lewis v. Third St., etc., R. Co.*, 26 Wash. 28.

**1043. 1. Judgments.** — *Price v. Clevenger*, 99 Mo. App. 536.

**4. Present Rule — Right of Assignee to Sue in His Own Name.** — *Price v. Clevenger*, 99 Mo. App. 536.

**The Right to Apply for the Vacation of a Decree**, given by statute, is assignable in *Mississippi*. *Fink v. Henderson*, 74 Miss. 8.

**1044. 4. A Guaranty that a Contractor Will Perform His Contract**, made to the receiver of a railroad, is capable of assignment by such re-

ceiver upon a sale of the road. *American Bonding, etc., Co. v. Baltimore, etc., R. Co.*, 60 C. C. A. 52, 124 Fed. Rep. 866.

**5. Special Contract of Guaranty.** — *American Bonding, etc., Co. v. Baltimore, etc., R. Co.*, 60 C. C. A. 52, 124 Fed. Rep. 866; *Schoonover v. Osborne*, 108 Iowa 453; *Friedlander v. New York Plate Glass Ins. Co.*, 38 N. Y. App. Div. 146.

**1045. 1. Interests in Lands.** — *Fudickar v. East Riverside Irrigation Dist.*, 109 Cal. 29.

"In the law of contracts the word 'assignment' seems to be broad enough to include the transfer of an interest in lands and tenements." *Tiede v. Schneidt*, 105 Wis. 470.

**Assignments of Bounty Lands.** — *Montague v. McCarroll*, 15 Utah 318.

**A Certificate of Purchase.** — *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125; *Williams v. Donnelly*, 54 Neb. 193.

**Rent.** — Rents to accrue are assignable. *Kelly v. Bowerman*, 113 Mich. 446; *Griffith v. Burlingame*, 18 Wash. 429; *Brownson v. Roy*, 133 Mich. 617; *Thomson v. Ludlum*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 801.

**A Right of Entry on Land for Condition Broken.** — *Ohio Iron Co. v. Auburn Iron Co.*, 64 Minn. 404; *Bouvier v. Baltimore, etc., R. Co.*, 67 N. J. L. 281.

**An Entry of Land under the Desert Land Act of 1877** is assignable. *Phillips v. Carter*, 135 Cal. 604, 87 Am. St. Rep. 152.

**A Right to Take Water from a Spring** under a contract is assignable under the *Texas* statutes. *Houston, etc., R. Co. v. Cluck*, 31 Tex. Civ. App. 211.

**Plat and Certificate of Survey.** — An enterer may assign his plat and certificate of survey. *King v. Coleman*, 98 Tenn. 561.

**An Inchoate Right by Incomplete Occupancy** is an assignable interest. *Rose v. Taylor*, 17 Tex. Civ. App. 535.

**A Right of Possession to Public Lands** is assignable. *Wood v. Lowney*, 20 Mont. 273.

**An Equity of Redemption** is assignable. *Cooper v. Maurer*, 122 Iowa 321.

**A Tax Certificate** is assignable. *Green v. Hellman*, 61 Neb. 875.

**1046. 2. Covenants.** — *Wright v. Heidorn*, 6 Ohio Dec. 151, 4 Ohio N. P. 124; *West Virginia Cent., etc., R. Co. v. McIntire*, 44 W. Va. 210.

**1047. 1. Covenants of Seizin, etc., Not Assign.**



**1047.** *Covenant of Warranty.* — See note 3.

(4) *Leases.* — See note 4.

**1048.** *Restriction in Lease as to Assignment.* — See note 3.

**1049.** (5) *Mortgages* — *Equity of Redemption.* — See note 3.

*ℳ. LICENSES.* — See note 4.

**1050.** See note 1.

*License Coupled with Interest Assignable.* — See note 2.

*l. LIENS* — (1) *Generally* — *Common-law Rule.* — See notes 3, 4.

**1051.** (2) *Mechanics' Liens.* — See notes 4, 5.

**1052.** *Right to Create or Perfect Lien Not Assignable.* — See note 1.

**1053.** *V. WHAT CONSTITUTES AN ASSIGNMENT* — 1. *Form of Assignment* —

*a. OF INTERESTS IN LANDS* — *Contracts to Convey Lands.* — See note 1.

*No Express Words of Assignment Necessary.* — See note 5.

**1055.** *b. OF CHATTEL INTERESTS* — (2) *Choses in Action* — (a) *No Particular Form Necessary.* — See note 1.

*able.* — *Waters v. Bagley*, (Neb. 1902) 92 N. W. Rep. 637; *Sears v. Broady*, 66 Neb. 207; *Geiszler v. De Graaf*, 44 N. Y. App. Div. 178; *Clarke v. Priest*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 501; *Ravenal v. Ingram*, 131 N. Car. 549. See also *Clarke v. Priest*, 21 N. Y. App. Div. 174. *Compare Geiszler v. De Graaf*, 166 N. Y. 339, 82 Am. St. Rep. 659. And see generally the title COVENANTS.

**1047.** 2. *Cases Holding Contra.* — *Security Bank v. Holmes*, 68 Minn. 538; *Lescage v. Rickner*, 9 Ohio Cir. Dec. 422, 16 Ohio. Cir. Ct. 461; *Taylor v. Lane*, 18 Tex. Civ. App. 545. And see generally the title COVENANTS.

**3. Covenant of Warranty Is Assignable.** — *Tucker v. McArthur*, 103 Ga. 409; *Beasley v. Phillips*, 20 Ind. App. 182; *Smith v. Ingram*, 132 N. Car. 959, 95 Am. St. Rep. 680.

In *North Carolina* a grantee in a deed containing a covenant of warranty cannot sever his right of action thereunder and assign it while he retains the premises. *Ravenal v. Ingram*, 131 N. Car. 549.

Covenants of warranty and other covenants running with the land are, before a breach occurs, assignable in the sense that they pass with a conveyance of the land. But when a breach occurs, such covenants cease to run, and the right of action vests in the person then owning the land. *McConaughy v. Bennett*, 50 W. Va. 172.

**4. Leases** — *Right of Assignment.* — *Rickard v. Dana*, 74 Vt. 74.

**1048.** 3. *Restriction in Lease as to Assignment.* — *Oil Creek, etc., Petroleum Co. v. Stanton Oil Co.*, 23 Pa. Co. Ct. 153; *Scott v. Slaughter*, (Tex. Civ. App. 1904) 80 S. W. Rep. 643.

*Assignment for Benefit of Creditors and Subsequent Bankruptcy.* — See *In re Bush*, 126 Fed. Rep. 878.

**1049.** 3. In *Alabama* an equity of redemption is not assignable. *Terry v. Allen*, 132 Ala. 657.

**4.** *Bates v. Duncan*, 64 Ark. 339, 62 Am. St. Rep. 190; *Cronin v. Sharp*, 16 Pa. Super. Ct. 76. **1050.** 1. *Bates v. Duncan*, 64 Ark. 339, 62 Am. St. Rep. 190.

2. *Wiseman v. Eastman*, 21 Wash. 163. See also *Tytus-Gardner Paper Co. v. Middletown Hydraulic Co.*, 8 Ohio Cir. Dec. 248, 15 Ohio Cir. Ct. 118.

3. *Clarkson v. Louderback*, 36 Fla. 660; *Glascock v. Lemp*, 26 Ind. App. 175.

**A Vendor's Lien.** — *Contra*, *Schmertz v. Hammond*, 47 W. Va. 527.

4. *Shearer v. Browne*, 102 Wis. 585.

**1051.** 4. *Wisconsin.* — *Shearer v. Browne*, 102 Wis. 585, supporting the first paragraph of the original note.

5. *Mechanic's Lien Held Assignable* — *California.* — *Gibbs v. Tally*, (Cal. 1900) 63 Pac. Rep. 168.

*Colorado.* — *Perkins v. Boyd*, 16 Colo. App. 266.

*Florida.* — *Clarkson v. Louderback*, 36 Fla. 660.

*Indiana.* — *Trueblood v. Shellhouse*, 19 Ind. App. 91.

*Iowa.* — *Peatman v. Centreville Light, etc.*, Co., 105 Iowa 1, 67 Am. St. Rep. 276.

*Kansas.* — *Milwaukee Mechanics' Ins. Co. v. Brown*, 3 Kan. App. 225.

*Massachusetts.* — *Wiley v. Connelly*, 179 Mass. 360.

*Michigan.* — *McAllister v. Des Rochers*, 132 Mich. 381.

*Missouri.* — *Ittner v. Hughes*, 154 Mo. 55.

*Pennsylvania.* — *Keim v. McRoberts*, 18 Pa. Super. Ct. 167.

*Washington.* — *Gilmore v. Westerman*, 13 Wash. 390.

*Laborers' Liens.* — *Clark v. Brown*, 141 Cal. 93.

**1052.** 1. *Right to Create Lien Not Assignable.* — *Jenckes v. Jenckes*, 145 Ind. 624; *Zachary v. Perry*, 130 N. Car. 289.

**1053.** 1. *The Assignment of a Tax Certificate* must be attended with the same solemnities as a deed. *Wilson v. Wood*, 10 Okla. 279. See also the title VERBAL AGREEMENTS (STATUTE OF FRAUDS), 902. 8.

5. *Smithson Land Co. v. Brautigam*, 16 Wash. 174.

**1055.** 1. *England.* — *Re Griffin*, 79 L. T. N. S. 442; *Alexander v. Steinhardt*, (1903) 2 K. B. 208; *Palmer v. Culverwell*, 85 L. T. N. S. 758.

*Canada.* — *Bayard v. Drouin*, 22 Quebec Super. Ct. 420; *Re McRae*, 6 Ont. L. Rep. 238.

*United States.* — *Leonard v. Marshall*, 82 Fed. Rep. 396; *Clark v. Sigua Iron Co.*, (C. A.) 81 Fed. Rep. 310.

*Colorado.* — *Forsyth v. Ryan*, 17 Colo. App. 511.

*Florida.* — *Clarkson v. Louderback*, 36 Fla. 660.

**1056. The Reason.** — See note 1.

Assignment by Separate Writing. — See notes 2, 3.

May Be by Parol. — See note 4.

**1057. See note 1.**

**Georgia.** — *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1055; *Van Pelt v. Hurt*, 97 Ga. 660.

**Illinois.** — *Chamberlain v. Williams*, 62 Ill. App. 423; *Steingrebe v. French Mirror, etc., Co.*, 83 Ill. App. 587.

**Indiana.** — *Baltimore, etc., R. Co. v. Countryman*, 16 Ind. App. 139.

**Iowa.** — *Freeburg v. Eksell*, 123 Iowa 464.

**Kentucky.** — *Beard v. Sharp*, (Ky. 1901) 65 S. W. Rep. 810.

**Maine.** — *Howe v. Howe*, 97 Me. 422; *Harlow v. Bartlett*, 96 Me. 294, 90 Am. St. Rep. 346.

**Michigan.** — *Hovey v. Grand Trunk Western R. Co.*, (Mich. 1903) 97 N. W. Rep. 398.

**Minnesota.** — *Hurley v. Bendel*, 67 Minn. 41.

**Mississippi.** — *Harris v. Hazlehurst Oil Mill, etc., Co.*, 78 Miss. 603.

**Missouri.** — *Macklin v. Kinealy*, 141 Mo. 113, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1055; *Sanguinett v. Webster*, 153 Mo. 343, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1055.

**New Jersey.** — *Weaver v. Atlantic Roofing Co.*, 57 N. J. Eq. 547; *Seyfried v. Stoll*, 56 N. J. Eq. 187; *Sullivan v. Visconti*, 68 N. J. L. 543.

**New York.** — *Crocker v. Muller*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 685.

**Oregon.** — *Commercial Nat. Bank v. Portland*, 37 Oregon 33.

**Pennsylvania.** — *Hercules Ice Mach. Co. v. Segal*, 185 Pa. St. 605; *Caulfield v. Van Brunt*, 173 Pa. St. 428.

**Texas.** — *Galveston, etc., R. Co. v. Ginther*, 96 Tex. 295.

**Virginia.** — *Tatum v. Ballard*, 94 Va. 370.

**West Virginia.** — *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729.

**Wisconsin.** — *Baillie v. Stephenson*, 95 Wis. 500.

**An Assignment of "Money Due"** does not comprehend money which has only a potential existence. *Ryan v. Douglas County*, 47 Neb. 9.

**Assignment by Legatee.** — A mortgage by a legatee on land which is in the hands of an executor, who is to convert the land into money and pay certain legacies, is an equitable assignment of his legacy. *Pollock's Estate*, 20 Pa. 60. Ct. 333.

**Delivery of a Certificate of Stock** coupled with an indorsed blank assignment is a valid assignment. *Brittan v. Oakland Sav. Bank*, 124 Cal. 282, 71 Am. St. Rep. 58.

**A Mistake in the Name of the Debtor** is immaterial. *Colorado School Land Leasing, etc., Co. v. Ponick*, 116 Colo. App. 478.

**1056. 1.** *Beard v. Sharp*, (Ky. 1901) 65 S. W. Rep. 810; *Howe v. Howe*, 97 Me. 422.

**2. Separate Writing.** — *Baylor v. Butterfass*, 82 Minn. 21.

**3. Assignment by Indorsement** — *Adams v. Goodwin*, 99 Ga. 138.

**An Assignment of an Account.** — See *Union Iron Works Co. v. Kilgore*, 65 Minn. 497.

**Indorsement of a Mortgage** is an equitable assignment. *Mallory v. Mallory*, 86 Ill. App. 193.

**4. Parol Assignments** — *Colorado*. — *Forsyth v. Ryan*, 17 Colo. App. 511.

*District of Columbia.* — *Dexter v. Gordon*, 11 App. Cas. (D. C.) 60.

*Illinois.* — *Mason v. Chicago Title, etc., Co.*, 77 Ill. App. 19.

*Iowa.* — *Seymour v. Aultman*, 109 Iowa 297, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056; *Tone v. Shankland*, 110 Iowa 525; *Preston v. Peterson*, 107 Iowa 244.

*Kentucky.* — *Beard v. Sharp*, (Ky. 1901) 65 S. W. Rep. 810.

*Maine.* — *Howe v. Howe*, 97 Me. 422; *Harlow v. Bartlett*, 96 Me. 294, 90 Am. St. Rep. 346.

*Michigan.* — *Harris v. Chamberlain*, 136 Mich. 280.

*Minnesota.* — *Hurley v. Bendel*, 67 Minn. 41.

*Missouri.* — *Price v. Morning Star Min. Co.*, 83 Mo. App. 470, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056; *Boyle v. Clark*, 63 Mo. App. 473; *Whiteside v. Longacre*, 88 Mo. App. 168.

*Montana.* — *Oppenheimer v. Butte First Nat. Bank*, 20 Mont. 192.

*New Hampshire.* — *Pollard v. Pollard*, 68 N. H. 356.

*New Jersey.* — *Sullivan v. Visconti*, 68 N. J. L. 543.

*New York.* — *Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co.*, 59 N. Y. App. Div. 353; *Hanes v. Sackett*, 56 N. Y. App. Div. 610; *Epstein v. U. S. Fidelity, etc., Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 295.

*North Dakota.* — *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 474.

*Ohio.* — *Gamble v. Carlisle*, 6 Ohio Dec. 48, 3 Ohio N. P. 279.

*Tennessee.* — *Allison v. Pearce*, (Tenn. Ch. 1900) 59 S. W. Rep. 192; *Box v. Lanier*, (Tenn. 1904) 79 S. W. Rep. 1042.

*West Virginia.* — *Wilt v. Huffman*, 46 W. Va. 473, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056; *McConaughy v. Bennett*, 50 W. Va. 172, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056; *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729.

*Wisconsin.* — *Baillie v. Stephenson*, 95 Wis. 500.

*Canada.* — *Heyd v. Millar*, 29 Ont. 735; *Todd v. Phoenix*, 3 British Columbia 302; *Trusts Corp. v. Rider*, 27 Ont. 593.

**An Insurance Policy** may be assigned by parol. *Lockett v. Lockett*, (Ky. 1904) 80 S. W. Rep. 1152; *Barnett v. Prudential Ins. Co.*, 91 N. Y. App. Div. 435.

**A Right to a Patent** may be assigned by parol. *Cook v. Sterling Electric Co.*, 118 Fed. Rep. 45; *Pressed Steel Car Co. v. Hansen*, 128 Fed. Rep. 444.

**The Mere Right to Locate a Mining Claim** may be assigned by parol. *Doe v. Waterloo Min. Co.*, 44 U. S. App. 204, 70 Fed. Rep. 455.

**1057. 1.** *Sullivan v. Visconti*, 68 N. J. L.

**1057.** Where Instrument Assigned Is under Seal. — See notes 2, 3.

Delivery of Evidence of Debt. — See note 4.

**1058.** Delivery Not Essential Where There Is No Written Evidence of Debt. — See note 2.

Debt Existing in an Open Account Assignable Without Delivery. — See note 3.

**1059.** Delivery Necessary Where There Is a Note or Other Written Obligation. — See notes 1, 2.

Qualification of Rule. — See note 3.

(b) Operation of Some Particular Forms as Assignments — *aa.* ORDER ON DESIGNATED FUND. — See note 4.

543; *Wilt v. Huffman*, 46 W. Va. 473, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056 [1057].

**Assignment of Account.** — See *Wilt v. Huffman*, 46 W. Va. 473.

**In Georgia.** — *Kirkland v. Dryfus*, 103 Ga. 127. See also *Foster v. Sutlive*, 110 Ga. 297; *St. Paul F. & M. Ins. Co. v. Brunswick Grocery Co.*, 113 Ga. 786; *Steele v. Gatlin*, 115 Ga. 929.

**1057. 2.** *McConaughy v. Bennett*, 50 W. Va. 172, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057.

**3. A Judgment** may be assigned without a writing in *California*. *Smith v. Peck*, 128 Cal. 527. But in *Georgia* the rule is otherwise. *Jones v. Hightower*, 117 Ga. 749.

**4. Delivery of Evidence of Debt.** — *Marsh v. Garney*, 69 N. H. 236. See also *Richie v. Cralle*, 108 Ky. 483.

**An Insurance Policy** may be assigned orally or by delivery. *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335; *German-American Ins. Co. v. Sanders*, 17 Ind. App. 134; *Western Assur. Co. v. McCarty*, 18 Ind. App. 449.

**1058. 2.** *Trueblood v. Shellhouse*, 19 Ind. App. 91; *Ebel v. Piehl*, 134 Mich. 64; *Kenneweg v. Schilansky*, 45 W. Va. 521, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058; *Wilt v. Huffman*, 46 W. Va. 473, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058.

**3.** *Seymour v. Aultman*, 109 Iowa 297, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058; *Wilt v. Huffman*, 46 W. Va. 473, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058.

**1059. 1. Assignments of Notes and Written Obligations.** — See *Hunt v. Bode*, 66 Ohio St. 255.

**Equitable Assignment of Bond.** — A contract to deliver bonds must be absolute and not alternative or indefinite in order for an equitable interest to pass. *Badgerow v. Manhattan Trust Co.*, 74 Fed. Rep. 925.

**A Tax Certificate** may be assigned by indorsement and delivery. *Green v. Hellman*, 61 Neb. 875.

**2. An Assignment Indorsed on a Policy** and a notation on the books of the company, though no delivery, will constitute an assignment. *In re Scully*, 31 Pittsb. Leg. J. N. S. (Pa.) 307.

**3. Delivery of Separate Paper of Assignment.** — *Hilton v. Woodman*, 124 Mich. 326.

**Promissory Note.** — *Cortelyou v. Jones*, (Cal. 1900) 61 Pac. Rep. 918.

**4. Order on Particular Fund as Assignment — United States.** — *Fourth St. Bank v. Yardley*, 165 U. S. 634; *The Elmbank*, 72 Fed. Rep. 610; *Fortier v. Delgado*, (C. C. A.) 122 Fed. Rep. 604; *Philadelphia Third Nat. Bank v. Atlantic City*, 126 Fed. Rep. 413; *In re Hanna*, 105 Fed. Rep. 587.

*Colorado.* — *Central Nat. Bank v. Spratlen*, 7 Colo. App. 430.

*Georgia.* — *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1059.

*Illinois.* — *Schwartz v. Messinger*, 167 Ill. 474; *Dolese v. McDougall*, 182 Ill. 486, affirming 78 Ill. App. 629.

*Iowa.* — *Foss v. Cobler*, 105 Iowa 728.

*Kansas.* — *Continental Ins. Co. v. Pratt*, 8 Kan. App. 424.

*Maine.* — *Jenness v. Wharff*, 87 Me. 307.

*Minnesota.* — *Brady v. Chadbourne*, 68 Minn. 117.

*Montana.* — *State v. Conrow*, 19 Mont. 104; *Merchants', etc., Nat. Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586.

*Nebraska.* — *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316; *Ryan v. Douglas County*, 47 Neb. 9.

*New Hampshire.* — *Pollard v. Pollard*, 68 N. H. 356.

*New Jersey.* — *Weaver v. Atlantic Roofing Co.*, 57 N. J. Eq. 547; *Goldengay v. Smith*, 62 N. J. Eq. 354; *Binns v. Slingerland*, 55 N. J. Eq. 55.

*New York.* — See *Lawrence v. Congregational Church*, 32 N. Y. App. Div. 489; *People v. Westchester County*, 57 N. Y. App. Div. 135; *Izzo v. Ludington*, 79 N. Y. App. Div. 272; *Jaffe v. Bowery Bank*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 778; *Danvers v. Lugar*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 98; *Hafner v. Kirby*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 390; *McDonald v. Ballston Spa*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 496; *Curtis Bros. Lumber Co. v. McLoughlin*, 80 N. Y. App. Div. 636; *Brace v. Gloversville*, 167 N. Y. 452.

*Oregon.* — *Willard v. Bullen*, 41 Oregon 25.

*Pennsylvania.* — *Beaumont v. Lane*, 3 Pa. Super. Ct. 73.

*South Carolina.* — *McGahan v. Lockett*, 54 S. Car. 364, 71 Am. St. Rep. 796.

*Tennessee.* — *Spring City Bank v. Rhea County*, (Tenn. Ch. 1900) 59 S. W. Rep. 442, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1059; *Allison v. Pearce*, (Tenn. Ch. 1900) 59 S. W. Rep. 192.

*Texas.* — *Beaumont Lumber Co. v. Moore*, (Tex. Civ. App. 1897) 41 S. W. Rep. 180; *Neely v. Grayson County Nat. Bank*, 25 Tex. Civ. App. 513.

*Utah.* — *Board of Education v. Salt Lake Pressed Brick Co.*, 13 Utah 211.

*Virginia.* — *Chesapeake Classified Bldg. Assoc. v. Coleman*, 94 Va. 433; *Hicks v. Roanoke Brick Co.*, 94 Va. 741.

*Washington.* — *Dowling v. Seattle*, 22 Wash. 592; *Dickerson v. Spokane*, 26 Wash. 292.

**1060.** See note 1.

Actual Existence of Fund Unnecessary. — See note 2.

**1061.** See note 1.

Where Order Is Given to Agent. — See note 2.

**1062.** *bb.* BILL OF EXCHANGE — When Accepted. — See note 2.

When Not Accepted. — See note 3.

**1063.** Where a Particular Fund for Reimbursement Is Designated. — See note 1.**1065.** *cc.* CHECK — Doctrine in Some Jurisdictions. — See notes 1, 3.

Prevailing Doctrine. — See note 5.

*West Virginia.* — *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854.

*Canada.* — *Quick v. Colchester South Tp.*, 30 Ont. 645.

Order to Be Paid Out of Wages. — See *Brewer v. Griesheimer*, 104 Ill. App. 323; *Harlow v. Bartlett*, 96 Me. 294, 90 Am. St. Rep. 346.

**1060.** 1. Effect as to Drawee. — *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; *Brady v. Chadbourne*, 68 Minn. 117; *Merchants'*, etc., *Nat. Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586; *Pollard v. Pollard*, 68 N. H. 356; *Curtis Bros. Lumber Co. v. McLoughlin*, 80 N. Y. App. Div. 636; *Beaumont v. Lane*, 3 Pa. Super. Ct. 73; *Spring City Bank v. Rhea County*, (Tenn. Ch. 1900) 59 S. W. Rep. 442, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; *Allison v. Pearce*, (Tenn. Ch. 1900) 59 S. W. Rep. 192. See also *Lawrence v. Congregational Church*, 32 N. Y. App. Div. 489.

2. Fund Need Not Have Actual Existence. — *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; *Central Nat. Bank v. Spratlen*, 7 Colo. App. 430; *Merchants'*, etc., *Nat. Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586; *Ryan v. Douglas County*, 47 Neb. 9; *Omaha v. Standard Oil Co.*, 55 Neb. 337; *Thomas v. Schumacher*, 17 N. Y. App. Div. 441; *Gamble v. Carlisle*, 6 Ohio Dec. 48, 3 Ohio N. P. 279; *Wadhams v. Inman*, 38 Oregon 143; *Allison v. Pearce*, (Tenn. Ch. 1900) 59 S. W. Rep. 192; *Beaumont Lumber Co. v. Moore*, (Tex. Civ. App. 1897) 41 S. W. Rep. 180; *Board of Education v. Salt Lake Pressed Brick Co.*, 13 Utah 211; *Chesapeake Classified Bldg. Assoc. v. Coleman*, 94 Va. 433.

**1061.** 1. *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77, *quoting* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1061; *Board of Education v. Salt Lake Pressed Brick Co.*, 13 Utah 211.

2. Mere Delivery of Order to Agent. — *Adams's Estate*, 24 Pa. Co. Ct. 444.

**1062.** 2. See *Gamble v. Carlisle*, 6 Ohio Dec. 48, 3 Ohio N. P. 279.

3. Bill of Exchange When Not Accepted. — *Dexter v. Gordon*, 11 App. Cas. (D. C.) 60; *Fulton v. Gesterding*, (Fla. 1904) 36 So. Rep. 56; *Talladega Mercantile Co. v. Robinson*, etc., Co., 96 Ga. 815; *Kyle v. Chattahoochee Nat. Bank*, 96 Ga. 693; *Johnson-Brinkman Commission Co. v. Missouri Pac. R. Co.*, 72 Mo. App. 437; *Seyfried v. Stoll*, 56 N. J. Eq. 187; *McDonald v. Ballston Spa*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 496; *Izzo v. Ludington*, 79 N. Y. App. Div. 272; *Curtis Bros. Lumber Co. v. McLoughlin*, 80 N. Y. App. Div. 636; *Erick-*

*son v. Inman*, 34 Oregon 44; *Allison v. Pearce*, (Tenn. Ch. 1900) 59 S. W. Rep. 192.

Contrary View. — See *National City Bank v. Gardner*, 4 Ohio Dec. (Reprint) 229, 1 Cleve. L. Rep. 139.

**1063.** 1. Fund for Reimbursement Designated. — *Gamble v. Carlisle*, 6 Ohio Dec. 48, 3 Ohio N. P. 279; *Allison v. Pearce*, (Tenn. Ch. 1900) 59 S. W. Rep. 192.

**1065.** 1. As Between Drawer and Payee. — *Brown v. Schintz*, 202 Ill. 509; *Abt v. American Trust, etc., Bank*, 159 Ill. 467, 50 Am. St. Rep. 175; *Staninger v. Tabor*, 103 Ill. App. 330; *Henderson v. U. S. National Bank*, 59 Neb. 280; *Neely v. Grayson County Nat. Bank*, 25 Tex. Civ. App. 513; *Dillman v. Carlin*, 105 Wis. 14, 76 Am. St. Rep. 902. See also the title CHECKS, **1065**. *z. et seq.*

As Between Checkholder and Assignee of Insolvent Drawer. — *Raesser v. National Exch. Bank*, 112 Wis. 591, 88 Am. St. Rep. 979.

As Between Payee and Drawer and Subsequent Assignee. — See *Doty v. Caldwell*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1025.

3. Payee's Right to Maintain Action at Law Against Drawee. — *Thomas v. Exchange Bank*, 99 Iowa 202; *Columbia Finance, etc., Co. v. First Nat. Bank*, (Ky. 1903) 76 S. W. Rep. 156; *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803; *Henderson v. U. S. National Bank*, 59 Neb. 280; *Doty v. Caldwell*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1025.

Check for Greater Amount than Deposit. — See *Rouse v. Calvin*, 76 Ill. App. 362; *Henderson v. U. S. National Bank*, 59 Neb. 280.

5. Prevailing Doctrine in United States — *United States*. — *Fourth St. Bank v. Yardley*, 165 U. S. 634; *Fortier v. Delgado*, (C. C. A.) 122 Fed. Rep. 604.

*Alabama.* — *Hanchey v. Hurley*, 129 Ala. 306.

*California.* — *Donohoe-Kelly Banking Co. v. Southern Pac. Co.*, 138 Cal. 183, 94 Am. St. Rep. 28.

*Georgia.* — *Georgia Seed Co. v. Talmadge*, 96 Ga. 254; *Reviere v. Chambliss*, 120 Ga. 714.

*Michigan.* — *Sunderlin v. Mecosta County Sav. Bank*, 116 Mich. 281.

*Missouri.* — *Dowell v. Vandalia Banking Assoc.*, 62 Mo. App. 482.

*New York.* — *McDonald v. Ballston Spa*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 496.

*Ohio.* — *Voorhes v. Heskett*, 1 Ohio Cir. Dec. 1.

*Oklahoma.* — *Guthrie Nat. Bank v. Gill*, 6 Okla. 560.

*Tennessee.* — *Spring City Bank v. Rhea County*, (Tenn. Ch. 1900) 59 S. W. Rep. 442.

*Texas.* — *House v. Kountze*, 17 Tex. Civ. App. 402.

**1067.** *dd.* POWER OF ATTORNEY — Where It Is Coupled with an Interest. — See note 1.

**1068.** *ee.* MERE EXECUTORY AGREEMENT TO APPROPRIATE. — See notes 2, 3.

**1069.** (c) Partial Assignments — Rule at Law. — See note 1.

Thus an Order. — See note 2.

**1070.** The Reason of This Principle. — See note 1.

Rule in Equity. — See note 2.

*Wisconsin.* — *Raesser v. National Exch. Bank*, 112 Wis. 591, 88 Am. St. Rep. 979. See also the title CHECKS, 1061. 2. *et seq.*

**As Between Payee and Attaching Creditor.** — *McIntyre v. Farmers, etc., Bank*, 115 Mich. 255, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1065.

**Payee's Right to Sue Drawee.** — *Fourth St. Bank v. Yardley*, 165 U. S. 634; *Reviere v. Chambless*, 120 Ga. 714.

**Missouri.** — Where the check is for the exact amount of the balance, it is held to constitute an assignment. *Muth v. St. Louis Trust Co.*, 77 Mo. App. 493.

**1067.** 1. *National Bank of Republic v. United Security L. Ins., etc., Co.*, 17 App. Cas. (D. C.) 112; *Sanborn v. Maxwell*, 18 App. Cas. (D. C.) 245.

**1068.** 2. *Cushing v. Chapman*, 115 Fed. Rep. 237; *Rufe v. Commercial Bank*, 40 C. C. A. 27, 99 Fed. Rep. 650; *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316; *Fairbanks v. Welshans*, 55 Neb. 362; *Donovan v. Middlebrook*, 95 N. Y. App. Div. 365; *Netling v. Netling*, 60 N. Y. App. Div. 409; *Commercial Nat. Bank v. Portland*, 37 Oregon 33; *Spooner v. Hilbish*, 92 Va. 333. See also *Coppock v. Kuhn*, 2 Ohio Cir. Dec. 347.

**3. Executory Agreement to Pay Out of Particular Fund** — *England.* — *Durham v. Robertson*, (1898) 1 Q. B. 765, 67 L. J. Q. B. 484.

*United States.* — *Cushing v. Chapman*, 115 Fed. Rep. 237; *Commercial Bank v. Rufe*, 92 Fed. Rep. 789, 40 C. C. A. 27, 99 Fed. Rep. 650.

*Alabama.* — *Hanchey v. Hurley*, 129 Ala. 306.

*Georgia.* — *Reviere v. Chambless*, 120 Ga. 714; *Bluthenthal v. Silverman*, 113 Ga. 102; *Hargett v. McCadden*, 107 Ga. 773.

*Illinois.* — *Kelley v. Newman*, 79 Ill. App. 285.

*Iowa.* — *Foss v. Cobler*, 105 Iowa 728.

*Nebraska.* — *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316; *Fairbanks v. Welshans*, 55 Neb. 362; *Phillips v. Hogue*, 63 Neb. 192.

*New York.* — *Matter of Shafer*, (Surrogate Ct.) 35 Misc. (N. Y.) 371; *Donovan v. Middlebrook*, 95 N. Y. App. Div. 365; *Netling v. Netling*, 60 N. Y. App. Div. 409; *Randel v. Vanderbilt*, 75 N. Y. App. Div. 313; *Wemple v. Hauenstein*, 19 N. Y. App. Div. 552; *Addison v. Enoch*, 48 N. Y. App. Div. 111.

*Oregon.* — *Commercial Nat. Bank v. Portland*, 37 Oregon 33.

*Virginia.* — *Hicks v. Roanoke Brick Co.*, 94 Va. 741.

*Contra*, *Allison v. Pearce*, (Tenn. Ch. 1900) 59 S. W. Rep. 192.

**English Doctrine.** — *West v. Newing*, 82 L. T. N. S. 260.

**1069.** 1. **Claim for Wages.** — *Kansas City, etc., R. Co. v. Robertson*, 109 Ala. 296; *Whitcomb v. Waterville*, 99 Me. 75.

**Judgments.** — *Lewis v. Third St., etc., R. Co.*, 26 Wash. 28.

**Where Equity Is Administered in Courts of Law.** — *Sullivan v. Visconti*, 68 N. J. L. 543.

**2. Order for Part of Fund** — *United States.* — *The Elmbank*, 72 Fed. Rep. 610.

*Alabama.* — *Andrews v. Frierson*, 134 Ala. 626.

*Colorado.* — *McMurray v. Marsh*, 12 Colo. App. 95.

*Georgia.* — *Rivers v. Wright*, 117 Ga. 81, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069; *Reviere v. Chambless*, 120 Ga. 714.

*Kentucky.* — *Columbia Finance, etc., Co. v. First Nat. Bank*, (Ky. 1903) 76 S. W. Rep. 156, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069.

*Maine.* — *Whitcomb v. Waterville*, 99 Me. 75.

*Missouri.* — *Dowell v. Vandalia Banking Assoc.*, 62 Mo. App. 482; *Conn v. Long-Bell Lumber Co.*, 66 Mo. App. 483; *Kiddoo v. Ames*, 73 Mo. App. 667.

*Ohio.* — *Pittsburg, etc., R. Co. v. Volkert*, 58 Ohio St. 362.

*Oregon.* — *Commercial Nat. Bank v. Portland*, 37 Oregon 33.

*West Virginia.* — *St. Lawrence Boom, etc., Co. v. Price*, 49 W. Va. 432, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069.

*Wisconsin.* — *Dugan v. Knapp*, 105 Wis. 320; *Skobis v. Ferge*, 102 Wis. 122.

**Where Debtor Assents to Assignment.** — *Allison v. Pearce*, (Tenn. Ch. 1900) 59 S. W. Rep. 192.

**Where No Injury Can Accrue to the Debtor**, the assignment will be held valid. *Evans v. Durango Land, etc., Co.*, 49 U. S. App. 320, 80 Fed. Rep. 433; *Colorado School Land Leasing, etc., Co. v. Ponick*, 16 Colo. App. 478.

**Equitable Doctrine Recognized in Courts of Law.** — *Chambers v. Lancaster*, 3 N. Y. App. Div. 215; *King v. King*, 59 N. Y. App. Div. 128.

An assignment of a part of the proceeds of a judgment will be recognized and enforced in a court of law by virtue of the control of such courts over their own proceedings, judgments, and process. *Sullivan v. Visconti*, 68 N. J. L. 543.

**1070.** 1. *The Elmbank*, 72 Fed. Rep. 610; *Rivers v. Wright*, 117 Ga. 81, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1070; *Whitcomb v. Waterville*, 99 Me. 75; *Pittsburg, etc., R. Co. v. Volkert*, 58 Ohio St. 362; *McMurray v. Marsh*, 12 Colo. App. 95; *Allison v. Pearce*, (Tenn. Ch. 1900) 59 S. W. Rep. 192; *St. Lawrence Boom, etc., Co. v. Price*, 49 W. Va. 432, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1070; *Skobis v. Ferge*, 102 Wis. 122; *Dugan v. Knapp*, 105 Wis. 320.

**2. Rule in Equity** — *United States.* — *Fourth St. Bank v. Yardley*, 165 U. S. 634; *The Elmbank*, 72 Fed. Rep. 610.

*Georgia.* — *Rivers v. Wright*, 117 Ga. 81, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1070.

*Kentucky.* — *Columbia Finance, etc., Co. v.*

**1072.** Check as Assignment Pro Tanto. — See note 3.

**1073.** See note 1.

2. The Consideration — Choses in Action as Between Assignor and Assignee.

— See note 7.

**1074.** See note 1.

**1075.** Security of Debt as Consideration. — See note 2.

As Between Assignee and Party Liable for Chose in Action Assigned. — See note 5.

**1076.** 3. Notice — Choses in Action as Between Assignor and Assignee. — See note 1.

As Between Assignor's Creditor and Assignee. — See note 2.

First Nat. Bank, (Ky. 1903) 76 S. W. Rep. 156, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1070.

*New Jersey.* — Todd v. Meding, 56 N. J. Eq. 83.

*New York.* — Chambers v. Lancaster, 160 N. Y. 342.

*Ohio.* — Pittsburg, etc., R. Co. v. Volkert, 58 Ohio St. 362.

*Oregon.* — Commercial Nat. Bank v. Portland, 37 Oregon 33.

*Tennessee.* — Allison v. Pearce, (Tenn. Ch. 1900) 59 S. W. Rep. 192; Spring City Bank v. Rhea County, (Tenn. Ch. 1900) 59 S. W. Rep. 442.

*Texas.* — Doty v. Caldwell, (Tex. Civ. App. 1897) 38 S. W. Rep. 1025; Harris County v. Donaldson, 20 Tex. Civ. App. 9.

*West Virginia.* — St. Lawrence Boom, etc., Co. v. Price, 49 W. Va. 432, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069 [1070]; McConaughey v. Bennett, 50 W. Va. 172.

*Wisconsin.* — Baillie v. Stephenson, 95 Wis. 500.

**Opposing Doctrine in Some Jurisdictions.** — Kiddoo v. Ames, 73 Mo. App. 667; Dowell v. Vandalia Banking Assoc., 62 Mo. App. 482.

**1072. 3. Checks.** — Sunderlin v. Mecosta County Sav. Bank, 116 Mich. 281; Dowell v. Vandalia Banking Assoc., 62 Mo. App. 482.

**1073. 1. In Equity.** — Raesser v. National Exch. Bank, 112 Wis. 591, 88 Am. St. Rep. 979.

**Consent of Bank Implied.** — In *Texas* it has been held that in the case of a check drawn on a deposit in a bank, the consent of the bank to such partial assignment is implied. Doty v. Caldwell, (Tex. Civ. App. 1897) 38 S. W. Rep. 1025.

**7. Consideration as Between Assignor and Assignee.** — Waterman v. Merrow, 94 Me. 237; Taber v. Wagner, 10 N. Dak. 287.

**1074. 1. Consideration Necessary to Make Order Operative as Assignment.** — Shaw v. Tonns, 20 N. Y. App. Div. 39; Moffatt v. Bailey, 22 N. Y. App. Div. 632.

**1075. 2. Security of Debt as Consideration.** — Bleakley v. Nelson, 56 N. J. Eq. 674; Cochran v. Hyre, 49 W. Va. 315, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1075.

**5. As Between Assignee and Party Liable for Chose in Action Assigned.** — Robinson Reduction Co. v. Johnson, 10 Colo. App. 135; Forsyth v. Ryan, 17 Colo. App. 511; Phipps v. Bacon, 183 Mass. 5; Hicks v. Steele, 126 Mich. 408; Coe v. Hinkley, 109 Mich. 608; Roth v. Continental Wire Co., 94 Mo. App. 236; Rosenthal v. Rudnick, 65 N. Y. App. Div. 519; Grey v.

Craighead, 6 N. Y. App. Div. 463; Toplitz v. King Bridge Co., (Supm. Ct. App. T.) 20 Misc. (N. Y.) 576; Van Dyke v. Gardner, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 113; Walcott v. Hilman, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 459; Gregoire v. Rourke, 28 Oregon 275; Chase v. Dodge, 111 Wis. 70.

**Where Chose in Action Was Assigned for Collection.** — Wiesener v. Rackow, 76 L. T. N. S. 448.

**1076. 1. Notice — As Between Assignor and Assignee.** — Walton v. Horkan, 112 Ga. 814, 81 Am. St. Rep. 77, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1076; Columbia Finance, etc., Co. v. First Nat. Bank, (Ky. 1903) 76 S. W. Rep. 156; Houser v. Richardson, 90 Mo. App. 134.

**2. As Between Assignee and Creditors of Assignor** — *United States.* — Philadelphia Third Nat. Bank v. Atlantic City, 126 Fed. Rep. 413; Young v. Upson, 115 Fed. Rep. 192.

*California.* — McIntyre v. Hauser, 131 Cal. 11.

*Colorado.* — Colorado Fuel, etc., Co. v. Kidwell, (Colo. App. 1904) 76 Pac. Rep. 922.

*District of Columbia.* — Hutchinson v. Brown, 8 App. Cas. (D. C.) 157.

*Georgia.* — Walton v. Horkan, 112 Ga. 814, 81 Am. St. Rep. 77, *citing* 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1076.

*Illinois.* — Knight v. Griffey, 161 Ill. 85; Williams v. West Chicago St. R. Co., 199 Ill. 57.

*Kentucky.* — Beard v. Sharp, (Ky. 1901) 65 S. W. Rep. 810.

*Maine.* — Howe v. Howe, 97 Me. 422.

*Michigan.* — Blumenthal v. Simons, 110 Mich. 42.

*Minnesota.* — Union Iron Works Co. v. Kilgore, 65 Minn. 497.

*Mississippi.* — Harris v. Hazlehurst Oil Mill, etc., Co., 78 Miss. 603.

*Missouri.* — Hendrickson v. Trenton Nat. Bank, 81 Mo. App. 332.

*Montana.* — State v. Conrow, 19 Mont. 104; Oppenheimer v. Butte First Nat. Bank, 20 Mont. 192.

*New Hampshire.* — Marsh v. Garney, 69 N. H. 236; Glauber Mfg. Co. v. Voter, 71 N. H. 68.

*New Jersey.* — Kafes v. McPherson, (N. J. 1895) 32 Atl. Rep. 710.

*New York.* — Columbia Bank v. Equitable L. Assur. Soc., 61 N. Y. App. Div. 594; Niles v. Mathusa, (County Ct.) 19 Misc. (N. Y.) 96.

*Pennsylvania.* — Philipps's Estate, 205 Pa. St. 525, 97 Am. St. Rep. 750; Bechtel v. Lauer Brewing Co., 21 Pa. Co. Ct. 449.

*Washington.* — Griffith v. Burlingame, 18

**1077.** Authorities in United States Conflicting — English Rule Adopted in Some Jurisdictions. — See notes 2, 3.

Rule in Other Jurisdictions. — See note 4.

As Between the Debtor and Assignee. — See note 6.

**1078.** See note 1.

**1079.** Character of Notice Required. — See notes 1, 2.

**VI. EFFECT OF ASSIGNMENT — 1. Generally.** — See note 4.

Wash. 429; Bellingham Bay Boom Co. v. Briscoe, 14 Wash. 173.

As Between Assignee and Attaching Creditor. — See *Reinecke v. Gruner*, 111 Iowa 731.

Contrary View in Some Jurisdictions. — *Rodes v. Haynes*, 95 Tenn. 673.

**1077. 2. In the Federal Courts.** — *Philadelphia Third Nat. Bank v. Atlantic City*, 126 Fed. Rep. 413.

**3. States Adopting English Rule.** — *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 71 Am. St. Rep. 26; *Enochs-Havis Lumber Co. v. Newcomb*, 79 Miss. 462, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1077; *Houser v. Richardson*, 90 Mo. App. 134; *Gamble v. Carlisle*, 6 Ohio Dec. 48, 3 Ohio N. P. 279. See also *Monticello Sav. Bank v. Stuart*, 73 Mo. App. 279.

**4. States Rejecting English Rule.** — *Columbia Finance, etc., Co. v. First Nat. Bank*, (Ky. 1903) 76 S. W. Rep. 156; *Central Trust Co. v. West India Imp. Co.*, 169 N. Y. 314; *Fortunato v. Patten*, 147 N. Y. 277. See *Columbia Bank v. Equitable L. Assur. Soc.*, 61 N. Y. App. Div. 594.

**6. As Between Debtor and Assignee — United States.** — *Young v. Upson*, 115 Fed. Rep. 292.

*California.* — *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 71 Am. St. Rep. 26.

*Illinois.* — *Vance v. Hickman*, 95 Ill. App. 554; *Sheldon v. McNall*, 89 Ill. App. 138.

*Kansas.* — *Chapman v. Steiner*, 5 Kan. App. 326; *Lockrow v. Cline*, 4 Kan. App. 716.

*Kentucky.* — *Columbia Finance, etc., Co. v. First Nat. Bank*, (Ky. 1903) 76 S. W. Rep. 156; *Com. v. Burnett*, (Ky. 1898) 44 S. W. Rep. 966.

*Maine.* — *Howe v. Howe*, 97 Me. 422.

*Minnesota.* — *Nielsen v. Albert Lea*, 91 Minn. 388.

*New Jersey.* — *Miller v. Stockton*, 64 N. J. L. 614.

*New York.* — *Smith v. Kissel*, 92 N. Y. App. Div. 235. See also *Lawrence v. Congregational Church*, 32 N. Y. App. Div. 489.

*Ohio.* — *Clark v. Baltimore, etc., R. Co.*, 4 Ohio Dec. 173.

*Pennsylvania.* — *Com. v. Sides*, 176 Pa. St. 616; *May v. Newingham*, 17 Pa. Super. Ct. 469.

*Tennessee.* — *Allison v. Pearce*, (Tenn. Ch. 1900) 59 S. W. Rep. 192.

*Texas.* — *Gulf, etc., R. Co. v. Eldredge*, (Tex. Civ. App. 1904) 80 S. W. Rep. 556, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1077.

*Wisconsin.* — *Skobis v. Ferge*, 102 Wis. 122.

*Canada.* — *Maple Leaf Rubber Co. v. Brodie*, 18 Quebec Super. Ct. 352.

**1078. 1. United States.** — *Harrisburg Trust Co. v. Shufeldt*, (C. C. A.) 87 Fed. Rep. 669; *Blackford v. Westchester F. Ins. Co.*, 41 C. C. A. 226, 101 Fed. Rep. 90.

*Alabama.* — *Ivy Coal, etc., Co. v. Long*, 139 Ala. 535.

*California.* — *McCarthy v. Mt. Tecarte Land, etc., Co.*, 110 Cal. 687.

*Louisiana.* — *Sintes v. Commerford*, 112 La. 706.

*Minnesota.* — *Cornish, etc., Co. v. Marty*, 76 Minn. 493.

*Mississippi.* — See *American Surety Co. v. U. S.*, 76 Miss. 289.

*Missouri.* — *Ferguson v. Davidson*, 147 Mo. 664.

*New York.* — *Ernst v. Estey Wire Works Co.*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 365; *Matter of Whitbeck*, (Surrogate Ct.) 22 Misc. (N. Y.) 494.

*Ohio.* — *Pittsburg, etc., R. Co. v. Volkert*, 58 Ohio St. 362.

*Texas.* — *Raywood Rice Canal, etc., Co. v. Langford*, 32 Tex. Civ. App. 401; *Maxwell v. Urban*, 22 Tex. Civ. App. 565.

*Wisconsin.* — *Frels v. Little Black Farmers' Mut. Ins. Co.*, 120 Wis. 590.

*Canada.* — *Quick v. Colchester South. Tp.*, 30 Ont. 645.

**Also a Judgment Debtor.** — *Seymour v. Aultman*, 109 Iowa 297.

**1079. 1. Character of Notice Required.** — *Phillips's Estate*, 205 Pa. St. 525, 97 Am. St. Rep. 750; *Allison v. Pearce*, (Tenn. Ch. 1900) 59 S. W. Rep. 192. See also *Sintes v. Commerford*, 112 La. 706; *Skobis v. Ferge*, 102 Wis. 122.

**Placing Judgment [Assignment] upon Files of Court.** — *Steiner v. Scholze*, 114 Ala. 88; *Miller v. Baltimore, etc., R. Co.*, 60 Ohio St. 374; *Clark v. Baltimore, etc., R. Co.*, 4 Ohio Dec. 173; *Yonkers v. Pennsylvania R. Co.*, 18 Lanc. L. Rev. 84, 14 York Leg. Rec. (Pa.) 176.

**Notice to One of a Board of Three Commissioners** is notice to the board. *Spring City Bank v. Rhea County*, (Tenn. Ch. 1900) 59 S. W. Rep. 442.

**Institution of an Action** has been held to be a sufficient signification of the assignment of a chose in action. *Toronto Bank v. St. Lawrence F. Ins. Co.*, (1903) A. C. 59.

**2. Cochrane v. Hyre**, 49 W. Va. 315.

**4. United States.** — *In re Campbell*, 102 Fed. Rep. 686; *McPherson v. Mississippi Valley Trust Co.*, 58 C. C. A. 455, 122 Fed. Rep. 367.

*Colorado.* — *People v. Rio Grande County*, 11 Colo. App. 124.

*Illinois.* — *Second Borrowers, etc., Bldg. Assoc. v. Cochrane*, 103 Ill. App. 29; *Brown v. Morgan*, 84 Ill. App. 233.

*Iowa.* — *Boggs v. Douglass*, 105 Iowa 344.

*Louisiana.* — *Dannenmann v. Charlton*, 113 La. 276.

*Michigan.* — *U. S. Casualty Co. v. Bagley*, 129 Mich. 70, 95 Am. St. Rep. 424.

**1080. 2. Assignee Takes Subject to Equities — a. GENERALLY.** — See note 1.

**1081. b. LATENT EQUITIES OF THIRD PERSONS — Nonnegotiable Securities.** — See note 1.

**1083. New York Doctrine.** — See note 1.

**1084. 3. What Passes by Assignment — a. GENERALLY.** — See notes 3, 4.

*Minnesota.* — Brady v. Chadbourne, 68 Minn.

117.  
*Mississippi.* — Yazoo, etc., R. Co. v. Wilson, 83 Miss. 224.

*New York.* — Hand v. Brooks, 21 N. Y. App. Div. 489; Culmer v. American Grocery Co., 21 N. Y. App. Div. 556; Jones v. Savage, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 158.

*Ohio.* — Meyerfeld v. Strube, 9 Ohio Dec.

514.  
*Oklahoma.* — Gillette v. Murphy, 7 Okla. 91.  
*Pennsylvania.* — Cole v. Taylor, 8 Pa. Super. Ct. 19.

*Texas.* — Muscogee First Nat. Bank v. Campbell, 24 Tex. Civ. App. 160.

*Utah.* — McCornick v. Sadler, 14 Utah 463.

*Canada.* — Meriden Britannia Co. v. Bowell, 4 British Columbia 520.

**1080. 1. Choses in Action — Generally — United States.** — Uehling v. Lyon, 134 Fed. Rep. 703, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1080; Church v. Citizens' St. R. Co., 78 Fed. Rep. 526; Cronin v. Patrick County, 89 Fed. Rep. 79.

*California.* — San José Ranch Co. v. San José Land, etc., Co., 132 Cal. 582; Meyer v. Weber, 133 Cal. 681.

*Colorado.* — Whitehead v. Jessup, 7 Colo. App. 460; Meldrum v. Henderson, 7 Colo. App. 256.

*Georgia.* — Atlanta Third Nat. Bank v. Western, etc., R. Co., 114 Ga. 890; Chattanooga, etc., R. Co. v. Warthen, 98 Ga. 599.

*Idaho.* — Northwestern, etc., Bank v. Rauch, 8 Idaho 50.

*Illinois.* — Anderson v. South Chicago Brewing Co., 173 Ill. 213; Bouton v. Cameron, 205 Ill. 50; Pearson v. Luecht, 199 Ill. 475; Beber v. Moreland, 100 Ill. App. 198; Bouton v. Cameron, 99 Ill. App. 600; Hahn v. Geiger, 96 Ill. App. 104; Hass v. Lobstein, 108 Ill. App. 217; Elser v. Williams, 104 Ill. App. 238; Whiting Paper Co. v. Busse, 95 Ill. App. 288; Yarnell v. Brown, 65 Ill. App. 83; Chicago Title, etc., Co. v. Aff, 84 Ill. App. 552; Denison v. Gambill, 81 Ill. App. 170; Faris v. Briscoe, 78 Ill. App. 242.

*Indiana.* — Anthony v. Masters, 28 Ind. App. 239; Frankel v. Garrard, 160 Ind. 209.

*Iowa.* — Thomas v. Exchange Bank, 99 Iowa 202; Shambaugh v. Current, 111 Iowa 121.

*Kansas.* — City Nat. Bank v. Gunter, 67 Kan. 227.

*Kentucky.* — Murray v. Duffy, (Ky. 1902) 66 S. W. Rep. 1038; Shuttleworth v. Kentucky Coal, etc., Co., 60 S. W. Rep. 534, 22 Ky. L. Rep. 1341; Casteel v. Baugh, (Ky. 1902) 66 S. W. Rep. 996; Pickering v. Beckner, (Ky. 1898) 48 S. W. Rep. 148; Hefferman v. Brierly, (Ky. 1901) 62 S. W. Rep. 852; Bitzer v. Mercke, 111 Ky. 299. See also Richie v. Cralle, 108 Ky. 483.

*Louisiana.* — Pertuit v. Damare, 50 La. Ann. 893.

*Maryland.* — Goldman v. Brinton, 90 Md. 259.

*Minnesota.* — Moffett v. Parker, 71 Minn. 139, 70 Am. St. Rep. 319.

*Mississippi.* — Harris v. Hazlehurst Oil Mill, etc., Co., 78 Miss. 603.

*Nebraska.* — Williams v. Donnelly, 54 Neb. 193, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1080; Hoover v. Columbia Nat. Bank, 58 Neb. 420; Lewis v. Holdrege, 56 Neb. 379.

*New York.* — Chambers v. Lancaster, 160 N. Y. 342; Central Trust Co. v. West India Imp. Co., 169 N. Y. 314; Sparling v. Wells, 24 N. Y. App. Div. 584; Merkle v. Beidleman, 30 N. Y. App. Div. 14; Culmer v. American Grocery Co., 21 N. Y. App. Div. 556; Bernheimer v. Prince, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 831; Parmerter v. Colrick, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 202; Colton Imp. Co. v. Richter, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 26; Wood v. Travis, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 589.

*North Carolina.* — Ricaud v. Alderman, 132 N. Car. 62.

*Oklahoma.* — Gillette v. Murphy, 7 Okla. 91.

*Pennsylvania.* — Myerstown Bank v. Roessler, 186 Pa. St. 431; Galey v. Mellon, 172 Pa. St. 443; Carothers v. Sims, 194 Pa. St. 386; Stockes v. Dewees, 24 Pa. Super. Ct. 471; Bartlett v. Loomis, 16 Montg. Co. Rep. (Pa.) 205, 14 York Leg. Rec. (Pa.) 120.

*South Carolina.* — Westbury v. Simmons, 57 S. Car. 467.

*Tennessee.* — Brannon v. Curtis, (Tenn. Ch. 1898) 53 S. W. Rep. 234.

*Texas.* — Tyler Car, etc., Co. v. Wettermark, 12 Tex. Civ. App. 399; Maxwell v. Urban, 22 Tex. Civ. App. 565; Ellis v. Kerr, 11 Tex. Civ. App. 349; National Oil, etc., Co. v. Teel, 95 Tex. 586.

*West Virginia.* — Billingsley v. Clelland, 41 W. Va. 234.

**1081. 1. Latent Equities as to Nonnegotiable Instruments.** — Williams v. Donnelly, 54 Neb. 193, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; Wright v. Snell, 12 Ohio Cir. Dec. 308, 22 Ohio Cir. Ct. 86; Boyer v. Webber, 22 Pa. Super. Ct. 35.

**1083. 1. New York Doctrine.** — See Dodge v. Manning, 19 N. Y. App. Div. 29; Culmer v. American Grocery Co., 21 N. Y. App. Div. 556; Central Trust Co. v. West India Imp. Co., 169 N. Y. 314; Avrutin v. Hensel, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 160; Groff v. Friedline, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 352; Bernheimer v. Prince, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 308.

The assignee of a mortgage takes it subject to the latent equities of third persons. Mertens v. Wakefield, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 501.

**1084. 3. All Assignor's Interest Passes to Assignee.** — Coonrod v. Kelly, (C. C. A.) 119 Fed. Rep. 841; Tripod Paint Co. v. Hamilton, 111 Ga. 823; Kreider v. Fanning, 74 Ill. App. 230.



**1085. b. MORTGAGES — (1) Mortgages of Land — (a) Legal Assignment —****bb. ASSIGNMENT OF MORTGAGE WITHOUT THE DEBT. —** See note 3.**1086. (b) Equitable Assignment — aa. ASSIGNMENT OF MORTGAGE BY TRANSFER OF DEBT.**

— See note 3.

**1087. bb. ASSIGNMENT OF MORTGAGE WITHOUT TRANSFER OF DEBT. —** See note 1.**(2) Chattel Mortgages — Assignment of Mortgage Without Debt Secured. —**

See note 3.

**Assignment of Debt Alone. —** See note 4.**1088. (3) Partial Assignments — Chattel Mortgages. —** See note 2.**4. Rights of Parties — a. OF THE ASSIGNEE — (2) Against the Assignor — (a) Assignor Loses Control by Assignment. —** See note 5.**1084. 4. Assignment of Debt Carries Remedy — California. —** Warren v. Russell, 129 Cal. 381; Heisen v. Smith, 138 Cal. 216, 94 Am. St. Rep. 39.**Georgia. —** Tripod Paint Co. v. Hamilton, 111 Ga. 823; Van Pelt v. Hurt, 98 Ga. 660.**Illinois. —** Fogle v. Beck, 106 Ill. App. 420.**Indiana. —** Hawkins v. New York Fourth Nat. Bank, 150 Ind. 117, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084; Trueblood v. Shellhouse, 19 Ind. App. 91; Mulky v. Karsell, 31 Ind. App. 595.**Minnesota. —** Spoon v. Frambach, 83 Minn. 301; Woodland Co. v. Mendenhall, 82 Minn. 483, 83 Am. St. Rep. 445.**Mississippi. —** Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co., 72 Miss. 608.**New Jersey. —** Wimpfheimer v. Perrine, 61 N. J. Eq. 126; Wooley v. Moore, 61 N. J. L. 16.**Texas. —** Douglass v. Blount, (Tex. Civ. App. 1901) 62 S. W. Rep. 429.**Washington. —** Lewis v. Third St., etc., R. Co., 26 Wash. 28, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1086 [1084].**West Virginia. —** Briggs v. Enslow, 44 W. Va. 499.**Wyoming. —** Ramsey v. Johnson, 8 Wyo. 476, 80 Am. St. Rep. 948, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084.

**The Assignment of a Judgment carries with it the debt, Commercial Bank v. Rufe, 92 Fed. Rep. 789, 40 C. C. A. 27; the legal title, Martin v. Wilson, 58 C. C. A. 181; an appeal bond, Knight v. Griffey, 161 Ill. 85; Lewis v. Third St., etc., R. Co., 26 Wash. 28; all the rights and remedies of the original plaintiff, Ricaud v. Alderman, 132 N. Car. 62; all right to equitable relief which the assignor possessed, Rogers v. Dimon, 106 Ill. App. 201; and the right to any remedy or means of indemnity, security, or payment possessed by the assignor as against a sheriff. Citizens Nat. Bank v. Loomis, 100 Iowa 266, 62 Am. St. Rep. 571.**

**Equitable Assignment of Vendor's Lien. —** Schmertz v. Hammond, 47 W. Va. 527.**Landlord's Lien. —** See Hatchett v. Miller, (Tex. Civ. App. 1899) 53 S. W. Rep. 357.**The Assignment of a Lease carries with it the right to distrain for rent. Keeley Brewing Co. v. Mason, 102 Ill. App. 381.****The Right of Preference given to the claim of a laborer for wages has been held not to pass to his assignee. Beifeld v. International Cement Co., 79 Ill. App. 318.****1085. 3. Assignment of Mortgage Without Debt. —** Ford v. McDowell, (Tenn. Ch. 1899) 52 S. W. Rep. 694.**1086. 3. Transfer of Debt Without Mortgage — Illinois. —** Romberg v. McCormick, 194 Ill. 205; Mann v. Merchants L. & T. Co., 100 Ill. App. 224; Elgin City Banking Co. v. Center, 83 Ill. App. 405.**Iowa. —** Franklin Sav. Bank v. Colby, 105 Iowa 424.**Kentucky. —** Cincinnati Tobacco Warehouse Co. v. Leslie, (Ky. 1904) 78 S. W. Rep. 413.**Louisiana. —** Perkins v. Gumbel, 49 La. Ann. 653.**Minnesota. —** Mankato First Nat. Bank v. Pope, 85 Minn. 433.**Nebraska. —** Guthrie v. Treat, 66 Neb. 415; Anderson v. Kreidler, 56 Neb. 171; Snell v. Margrit, 64 Neb. 6.**New Jersey. —** Daly v. New York, etc., R. Co., 55 N. J. Eq. 595.**New York. —** Matter of Falls, (Surrogate Ct.) 31 Misc. (N. Y.) 658.**North Dakota. —** Brynjolfson v. Osthus, 12 N. Dak. 42.**Oklahoma. —** Genesee First Nat. Bank v. National Live Stock Bank, 13 Okla. 719.**South Dakota. —** Grether v. Smith, (S. Dak. 1903) 96 N. W. Rep. 93.**Tennessee. —** Union, etc., Bank v. Smith, 107 Tenn. 476; Frame v. Tabler, (Tenn. Ch. 1898) 52 S. W. Rep. 1014; Perrin v. Trimble, (Tenn. Ch. 1898) 48 S. W. Rep. 125.**Texas. —** Brandenburg v. Norwood, (Tex. Civ. App. 1901) 66 S. W. Rep. 587.**Wisconsin. —** Boyle v. Lybrand, 113 Wis. 79.

**Transfer of an Interest Coupon carries with it pro tanto a share of the security. New England L. & T. Co. v. Robinson, 56 Neb. 50, 71 Am. St. Rep. 657; Whitney v. Lowe, 59 Neb. 87; Curtiss v. McCune, (Neb. 1903) 94 N. W. Rep. 984.**

**1087. 1. Mortgage Transferred Without Debt. —** Tweto v. Horton, 90 Minn. 451.**3. Effect of Assignment of Mortgage Without Debt. —** Hilton v. Woodman, 124 Mich. 326.**4. Effect of Assignment of Debt Alone. —** Swift v. Washington Bank, 52 C. C. A. 339, 114 Fed. Rep. 643; Cincinnati Tobacco Warehouse Co. v. Leslie, (Ky. 1904) 78 S. W. Rep. 413; Tilden v. Stilson, 49 Neb. 382; Cutting v. Whittemore, 72 N. H. 107.**1088. 2. Chattel Mortgages. —** Miller v. Campbell Commission Co., 13 Okla. 75.**5. Assignor Can Do Nothing to Defeat Rights of Assignee. —** Howard v. Graybehl, 16 Colo. App. 80; Peck-Hammond Co. v. Williams, 77 Miss. 824; Tilden v. Stilson, 49 Neb. 382; Anderson v. Keidler, 56 Neb. 171; Frels v. Little Black Farmers' Mut. Ins. Co., 120 Wis. 390.

**1090.** Declarations and Admissions. — See note 1.

(b) Right to Recover from Assignor on Failure to Realize on Subject Assigned —

**aa. GENERALLY** — Warranty of Validity of Assigned Claim. — See note 5.

**1092.** *bb. ON DEFAULT OF PARTY LIABLE* — Question of Warranty. — See note 1.

**1093.** See note 2.

**1094.** (3) *Against the Party Liable* — Right to Sue — (a) At Law — Assignee May Sue in Name of Assignor. — See note 2.

**1095.** Assignment a Declaration of Trust. — See note 1.

(b) In Equity — When Assignee of Legal Choses May Sue in Equity. — See note 4.

**1096.** Assignee of Equitable Choses May Sue in His Own Name. — See note 1.

(c) On Promise of Debtor. — See note 2.

**1097.** Express and Implied Promise. — See note 1.

Consideration for Promise. — See note 3.

(d) Under Statutes. — See note 6.

**1090. 1. Admissions of Assignor.** — Oliver v. McDowell, 100 Ill. App. 45; Reinecke v. Gruner, 111 Iowa 731; Barnett v. Prudential Ins. Co., 91 N. Y. App. Div. 435; Westbury v. Simmons, 57 S. Car. 467.

**5. Warranty of Validity of Assigned Claim.** — Waller v. Staples, 107 Iowa 738.

**The Assignor of a Judgment.** — Thompson v. First State Bank, 102 Ga. 696; Emerson v. Knapp, 75 Mo. App. 92; Findley v. Smith, 42 W. Va. 299, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1090.

**The Assignor Warrants the Security** to be as it is described in the assignment. Lieberman v. Reichard, 7 Northam. Co. Rep. (Pa.) 237.

**1092. 1. Assignor Held Liable on Failure to Recover from Obligor.** — Long v. Pence's Committee, 93 Va. 584.

**The Word "Negligence" in the Original Text** is obviously a misprint for "diligence."

**1093. 2. Due Diligence of Assignee.** — Maze v. Owingsville Banking Co., (Ky. 1901) 63 S. W. Rep. 428; National Oil, etc., Co. v. Teel, 95 Tex. 586; Gooch v. Parker, 16 Tex. Civ. App. 256.

**1094. 2. Assignee May Sue in Name of Assignor.** — Mutual L. Ins. Co. v. Allen, 113 Ill. App. 89; Congress Constr. Co. v. Farson, etc., Co., 101 Ill. App. 279; Sullivan v. Visconti, 68 N. J. L. 543; Bouvier v. Baltimore, etc., R. Co., 67 N. J. L. 281; Todd v. Meding, 56 N. J. Eq. 83; Davis, etc., Bldg., etc., Co. v. Cagle, (Tenn. Ch. 1899) 53 S. W. Rep. 240.

**Assignee Cannot Sue in His Own Name.** — Nederland L. Ins. Co. v. Hall, 55 U. S. App. 508, 84 Fed. Rep. 278.

**1095. 1. Assignment a Declaration of Trust.** — Sullivan v. Visconti, 68 N. J. L. 543.

**4. Assignee Having Remedy at Law Cannot Sue in Equity.** — Glenn v. Sothoron, 4 App. Cas. (D. C.) 125, holding, however, that in the case at bar equity was the proper forum.

**1096. 1. Assignee May Sue in Equity in His Own Name.** — O'Shaugnessy v. Humes, 129 Fed. Rep. 953; Gleason, etc., Mfg. Co. v. Hoffman, 168 Ill. 25; Kramer v. Wood, (Tenn. Ch. 1899) 52 S. W. Rep. 1116.

**2. Assignee May Sue in His Own Name on Promise to Pay.** — Nederland L. Ins. Co. v. Hall, 55 U. S. App. 508, 84 Fed. Rep. 278; Bentley v. Standard F. Ins. Co., 40 W. Va. 729; Wilt v. Huffman, 46 W. Va. 473.

**1097. 1. The Statute of Frauds does not**

apply, and the promise need not be in writing. Wilt v. Huffman, 46 W. Va. 473.

**3. Consideration for Promise.** — Bentley v. Standard F. Ins. Co., 40 W. Va. 729.

**6. Statutory Right of Assignee to Sue in His Own Name** — *United States*. — American Bonding, etc., Co. v. Baltimore, etc., R. Co., 60 C. C. A. 52, 124 Fed. Rep. 866; Cronin v. Patrick County, 89 Fed. Rep. 79; Edmunds v. Illinois Cent. R. Co., 80 Fed. Rep. 78; Morrison v. North American Transp., etc., Co., 85 Fed. Rep. 802; American Bonding, etc., Co. v. Baltimore, etc., R. Co., 60 C. C. A. 52, 124 Fed. Rep. 866.

*Arkansas*. — Lanigan v. North, 69 Ark. 62. *California*. — Ingham v. Weed, (Cal. 1897) 48 Pac. Rep. 318; Quan Wye v. Chin Lin Hee, 123 Cal. 185; Heisen v. Smith, 138 Cal. 216, 94 Am. St. Rep. 39.

*Colorado*. — Forsyth v. Ryan, 17 Colo. App. 511. *Illinois*. — Congress Constr. Co. v. Farson, etc., Co., 101 Ill. App. 279.

*Kansas*. — Stewart v. Price, 64 Kan. 191.

*Kentucky*. — Murray v. Duffy, (Ky. 1902) 66 S. W. Rep. 1038.

*Massachusetts*. — Wiley v. Connelly, 179 Mass. 360; Gilman v. American Producers' Controlling Co., 180 Mass. 319.

*Minnesota*. — Hurley v. Bendel, 67 Minn. 41.

*Mississippi*. — Wright v. Hardy, 76 Miss. 524.

*Missouri*. — Campbell v. Harrington, 93 Mo. App. 315; Boyle v. Clark, 63 Mo. App. 473; Guernsey v. Moore, 131 Mo. 650.

*Nebraska*. — Crum v. Stanley, 55 Neb. 351; Hixson Map Co. v. Nebraska Post Co., (Neb. 1904) 98 N. W. Rep. 872.

*New Jersey*. — Howe v. Smeeth Copper, etc., Co., (N. J. 1900) 48 Atl. Rep. 24; Sullivan v. Visconti, 68 N. J. L. 543.

*New York*. — Penhollow v. Lawyers Title Ins. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 778.

*North Carolina*. — Gill v. Dixon, 131 N. Car. 87.

*Tennessee*. — Spring City Bank v. Rhea County, (Tenn. Ch. 1900) 59 S. W. Rep. 442.

*Utah*. — Lawler v. Jennings, 18 Utah 35.

*Virginia*. — Aylett v. Walker, 92 Va. 540.

*Washington*. — Von Tobel v. Stetson, etc., Mill Co., 32 Wash. 683.

*West Virginia*. — St. Lawrence Boom, etc., Co. v. Price, 49 W. Va. 432; Cochrane v. Hyre, 49 W. Va. 315.

**1098.** See note 1.

Effect of the Statutes. — See note 2.

**1099.** *b. OF THE PARTY LIABLE — Before Notice.* — See note 3.

*Wisconsin.* — Chase *v.* Dodge, 111 Wis. 70; Skobis *v.* Ferge, 102 Wis. 122.

**Right of Assignor to Sue.** — Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, supporting the second paragraph of the original note.

**1098. 1. Action in Name of Assignor or of Assignee.** — Sullivan *v.* Visconti, 68 N. J. L. 543.

**2. Question of Assignability Not Affected by Statute.** — McLeland *v.* St. Louis Transit Co., 105 Mo. App. 473.

**1099. 3. Payment.** — Bull *v.* Sink, 8 Kan. App. 860, 57 Pac. Rep. 853.

# ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

By L. C. BOEHM.

5. I. ORIGIN — 2. Common-law Rules as to Validity. — See note 2.
6. II. NATURE — DISTINCTIONS — 2. As a Voluntary Transfer — General or Partial. — See note 3.
7. See note 2.
8. 3. Transfer in Trust to Pay Debts. — See note 1.
9. See note 1.
4. Absolute Transfer of Title Required. — See note 2.
11. 5. Direct Transfers to Creditors Distinguished. — See note 1.
12. The New York Rule. — See note 1.
13. Sales Distinguished from Assignments. — See note 2.
14. Mortgages Distinguished from Assignments. — See note 1.

5. 2. Common-law Rules as to Validity. — *Lucy v. Freeman*, (Minn. 1904) 101 N. W. Rep. 167. See also *Eau Claire Grocer Co. v. Hubbard*, 97 Wis. 661.

6. 3. Voluntary Transfer. — *John P. Kane Co. v. Kinney*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 1, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 6.

Conflict of Laws. — *State Bank v. McElroy*, 106 Iowa 258, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 6.

7. 2. Partial Assignments. — Failure of a debtor to surrender all his property does not render the deed invalid as to the property surrendered. *Rosenberg v. Smith*, (Ky. 1897) 40 S. W. Rep. 243.

8. 1. In Trust. — *Adler-Goldman Commission Co. v. Phillips*, 63 Ark. 40; *Hillis v. Asay*, 105 Ill. App. 667; *Morgan Mach. Co. v. Rauch*, 84 Mo. App. 514; *Young v. Stone*, 61 N. Y. App. Div. 370; *Reed Fertilizer Co. v. Thomas*, 97 Tenn. 478; *Birmingham Drug Co. v. Freeman*, 15 Tex. Civ. App. 451.

Under the *Ohio* statute any transfer in trust for creditors constitutes an assignment. *Wambaugh v. Northwestern Mut. L. Ins. Co.*, 59 Ohio St. 228.

An Insolvent's Trust Deed directing payment of the expenses of the trust, wages for labor, certain creditors in full as they appear on the schedule, another list of creditors *pro rata*, and surplus to the grantor is not a general assignment, but a deed of trust with preferences, and is not subject to the assignment laws. *H. B. Clafin Co. v. Lubke*, 162 Mo. 648.

The Material and Essential Characteristic of a general assignment is the presence of a trust. The assignee is merely trustee, and not absolute owner. He buys nothing and pays nothing, but takes the title for the performance of trust duties. *John P. Kane Co. v. Kinney*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 1.

9. 1. Provision as to Surplus. — *Smith-McCord Dry Goods Co. v. Carson*, 59 Kan. 295, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 8, 9.

Surplus Belongs to Assignor. — *Farnsworth v. Doom*, 109 Ky. 794.

2. Absolute Transfer of Title Necessary. — *Smith-McCord Dry Goods Co. v. Carson*, 59 Kan. 295, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 9.

Title of Assignees Not Affected by Death of Assignor. — *Thaxton v. Smith*, 90 Tex. 589, reversing (Tex. Civ. App. 1896) 38 S. W. Rep. 820.

11. 1. Transfers Directly to Creditors. — *Davidson v. Kahn*, 116 Ala. 427; *Roberts v. Burr*, 135 Cal. 156; *Droop v. Ridenour*, 11 App. Cas. (D. C.) 224; *Deane v. John A. Tolman Co.*, 83 Ill. App. 486; *Oakford v. Fischer*, 75 Ill. App. 544; *Turner Hardware Co. v. Reynolds*, 2 Indian Ter. 49; *Creteau v. Foote*, etc., *Glass Co.*, 54 N. Y. App. Div. 168.

The Conveyance of All a Debtor's Property Except His Homestead to creditors, there being no provision as to any surplus, should not be construed as an assignment for creditors. *McMorrin v. Moore*, 113 Mich. 101.

Where Creditors Were Pressing Claims against an insolvent, payments made to them were held not to operate as an assignment for the benefit of creditors. *Diamond Coal Co. v. Carter Dry-Goods Co.*, (Ky. 1899) 49 S. W. Rep. 438.

12. 1. Rule in New York. — See New York County Nat. Bank *v. American Surety Co.*, 69 N. Y. App. Div. 153. And to the same effect as *Brown v. Guthrie*, 110 N. Y. 441, stated in the original note, see *Delaney v. Valentine*, 154 N. Y. 692.

13. 2. Assignments and Sales Distinguished. — *Tuers v. Tuers*, 131 Cal. 625; *Smith-McCord Dry Goods Co. v. Carson*, 59 Kan. 295; *Appleby v. Lehman*, 51 La. Ann. 473; *Young v. Stone*, 61 N. Y. App. Div. 364, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 13.

*Arkansas*. — *Henry v. Croom*, 63 Ark. 612. *South Carolina*. — An instrument in form a bill of sale is not an assignment. *Ex p. Neal Loan, etc., Co.*, 58 S. Car. 269.

14. 1. Mortgages — Assignments. — *Burchinell v. Koon*, 25 Colo. 59; *Grafe v. Peter*

**16.** Mortgage as Statutory Assignment. — See note 1.

**17.** Judgments on Confession and Attachments Distinguished from Assignments. — See note 2.

**18.** III. ASSIGNMENT STATUTES — 1. As Affecting Voluntary Assignments —  
*a.* IN GENERAL. — See note 1.

*b.* PROHIBITING PREFERENCES. — See note 2.

**19.** *c.* REQUIRING PREFERENCES — WAGES. — See note 1.

Schoenhofen Brewing Co., 78 Ill. App. 570; Morriss v. Blackman, 179 Ill. 103; Manton v. Seiberling, 107 Iowa 534; Independence First Nat. Bank v. Sweet, (Iowa 1899) 81 N. W. Rep. 238; Taylor v. Riggs, 8 Kan. App. 323; Noyes v. Ross, 23 Mont. 425, 75 Am. St. Rep. 543; Sloan v. Thomas Mfg. Co., 58 Neb. 713; Skinner v. Pawnee City First Nat. Bank, 59 Neb. 17; Dearing v. McKinnon Dash, etc., Co., 33 N. Y. App. Div. 31; Smith-M'Cord Dry Goods Co. v. John B. Farwell Co., 6 Okla. 318. See also Pollock v. Sykes, 74 Miss. 700.

*In Georgia* mortgages and assignments of choses in action given to creditors of an insolvent partnership were held not to be governed by the assignment acts of 1881 and 1885, since there was nothing indicating a trust in any one's favor. Fulton v. Gibian, 98 Ga. 224.

*Indian Territory.* — "The test is, has the debtor absolutely disposed of his property for the purpose of raising a fund to pay his debts, without reserving the equity of redemption? If so, the transaction constitutes an assignment; otherwise, a mortgage." Smith v. Moore, 2 Indian Ter. 126. To the same effect see Westchester F. Ins. Co. v. Blackford, 2 Indian Ter. 370.

*Michigan.* — Where a corporation gave mortgages to certain creditors for their benefit and that of certain other creditors, the transaction was held not to constitute a common-law assignment for the benefit of creditors. Longley v. Amazon Hosiery Co., 128 Mich. 194, 8 Detroit Leg. N. 611. See also Belding-Hall Mfg. Co. v. Smith, 125 Mich. 54, 7 Detroit Leg. N. 433.

*Minnesota.* — "Upon principle and authority we hold that if the members of a copartnership, in good faith, solely to secure their debts to one or more but not all of their creditors, transfer to them, by bill of sale or otherwise, the firm property, reserving to themselves the right of redemption, the conveyance is not an assignment for the benefit of creditors, but a mortgage and a valid security, except in insolvency proceedings, even though the debtors were then insolvent, to the knowledge of the mortgagees, and the transfer covers all of the copartnership assets." Dyson v. St. Paul Nat. Bank, 74 Minn. 439, 73 Am. St. Rep. 358.

*Ohio.* — In a partnership consisting of a son who managed the business and of a father who gave a mortgage on all his realty to secure a partnership note, such mortgage was not an assignment for benefit of creditors. Goodman v. Rawson, 25 Ohio Cir. Ct. 696.

*Oregon.* — Where a failing debtor executes mortgages to certain creditors, just prior to a general assignment, and there is good faith, such mortgages are not parts of the assignment so as to render it invalid under a statute which provides that a general assignment

must be for the benefit of all creditors. Inman v. Sprague, 30 Oregon 321.

**A Mortgage to One Creditor Who Agrees to Pay Others** will be construed as an assignment for creditors when the instrument shows that such was the intention. Hill v. Mallory, 112 Mich. 387; Conely v. Collins, 119 Mich. 519; Dahlgren v. Greenwood, 99 Wis. 163.

In Sweet v. Neff, 102 Wis. 482, where a number of mortgages were executed to creditors at the same time and place and providing that each mortgagee might sell and apply to his own debts, it was held to be a general assignment, and the first mortgagee was a trustee for the subsequent ones.

**16. 1. Kentucky Statute.** — Where a debtor executed a chattel mortgage to secure a note due in one day the transaction was held to be an assignment for the benefit of all who were at that time his creditors. Trigg v. Ball, (Ky. 1897) 38 S. W. Rep. 701.

The assignment dates from the date of the attempted mortgage, and is valid against attachments subsequent thereto. Throckmorton v. Monroe, 60 S. W. Rep. 721, 22 Ky. L. Rep. 1450.

**Under the Ohio Statute** also a mortgage made in contemplation of insolvency inures to the benefit of all creditors. State Nat. Bank v. Ellison, 75 Fed. Rep. 354.

**17. 2. Strasburger v. Dodge,** 12 App. Cas. (D. C.) 37; Lee's Case, 9 Kulp (Pa.) 430; Pauksztis's Estate, 9 Pa. Dist. 80.

**By the Kentucky Statutes** a judgment suffered in contemplation of insolvency has effect as an assignment for the benefit of creditors. Laughlin v. Georgetown First Nat. Bank, 103 Ky. 742. See also Rouss v. Lampton-Crane-Ramey Co., 59 S. W. Rep. 506, 22 Ky. L. Rep. 1020.

**Collusive Judgment.** — In Podolski v. Stone, 86 Ill. App. 62, it was held that a judgment secured by collusion has no preference against the assigned estate.

**18. 1. Substantial Compliance with All Statutory Provisions** for voluntary assignments is necessary. Miller v. Waite, 60 Neb. 431.

**2. Iowa.** — Where a party who owes money for goods procured by misrepresentations as to credit mortgages such goods and then makes an assignment for creditors, it will be held that the two instruments constituted a general assignment with a preference, and so the mortgage is void. Creglow v. Creglow, 100 Iowa 276; Elwell v. Kimball, 102 Iowa 720.

**Deed of Trust.** — Where an ordinary deed of trust is given and preferences to certain creditors, it will not be construed as a statutory assignment in the absence of a clear intent that it should be so construed, apparent on its face. Reed Fertilizer Co. v. Thomas, 97 Tenn. 478.

**19. 1. Compulsory Preference of Wages,** —

**19. d. IN EFFECT BANKRUPT LAWS.** — See notes 2, 4.

**21. 3. Excluding Partial Assignments.** — See note 1.

**22. IV. WHO MAY ASSIGN** — 1. General Rule — Mental Capacity — Disabilities. — See note 1.

**23. 2. Agents.** — See note 1.

**3. Corporations** — a. IN GENERAL. — See note 3.

Charter or Statutory Restrictions. — See note 7.

**24. b. CORPORATE ASSIGNMENT** — HOW EXECUTED. — See note 2.

The *Illinois* statute making wages for work done within three months of an assignment for creditors preferred claims refers only to funds properly in the assignee's hands, and not to funds transferred in good faith before the assignment. *Schwartz v. Messinger*, 167 Ill. 474.

The *Pennsylvania* Act of April 22, 1854, providing for the preference of laborers' wages to the extent of one hundred dollars, applies to those not in the actual employment of the concern at the time of the assignment. *Matter of Thompson Glass Co.*, 186 Pa. St. 383.

**One Who Lends Money to Pay Laborers** obtains thereby no right to substitution to their claim for preference when their employer assigns for the benefit of creditors. *Fair Hope North Savage Fire-Brick Co.'s Estate*, 183 Pa. St. 96.

**19. 2. Similarity to Bankrupt Laws.** — See *Howland's Appeal*, 67 N. H. 575; *Segnitz v. Garden City Banking, etc., Co.*, 107 Wis. 171, 81 Am. St. Rep. 830.

**4. Not Suspended by Bankrupt Laws.** — In *Texas* it is held that an assignment for the benefit of creditors has an effect very different from an assignment in bankruptcy, and is not suspended by the Bankruptcy Act, but can be set aside if made within the period forbidden by that statute. *Patty-Joiner, etc., Co. v. Cummins*, (Tex. Civ. App. 1900) 59 S. W. Rep. 297.

**21. 1. Partial Assessments Prohibited.** — *Shepard v. Reeves*, 39 Fla. 53. See also *Kickbusch v. Corwith*, 108 Wis. 634. And see the title FRAUDULENT SALES AND CONVEYANCES, 437. 2 *et seq.*

**22. 1. Common Law — Any Person of Sound Mind.** — *Wambaugh v. Northwestern Mut. L. Ins. Co.*, 59 Ohio St. 228, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 22.

**The Mere Pendency of a Suit in Which a Receivership Is Prayed** does not put a debtor's property in the hands of the court, and so can neither prevent an assignment for the benefit of creditors nor possession by the assignee. *Callahan v. Consumers Ice, etc., Co.*, 7 Ohio Cir. Dec. 349, 13 Ohio Cir. Ct. 479.

**23. 1. Assignment by Agent.** — *Conely v. Collins*, 119 Mich. 519.

**3. Powers of Corporations to Make Assignments.** — *Whithed v. J. Walter Thompson Co.*, 86 Ill. App. 76, affirmed 185 Ill. 454; *Nathan v. Lee*, 152 Ind. 232; *U. S. Building, etc., Assoc. v. Jones*, (Ky. 1901) 64 S. W. Rep. 447; *Boynton v. Roe*, 114 Mich. 401; *Gilroy v. Somerville Woolen Mills*, (N. J. 1904) 58 Atl. Rep. 651; *Goetz v. Knie*, 103 Wis. 366. See also the title CORPORATIONS (PRIVATE), 741. 1 *et seq.*

**Insurance Companies.** — A mutual insurance company organized under the *Kentucky* Act of March 21, 1895, cannot make an assignment for the benefit of creditors. *Beale v. Connecticut F. Ins. Co.*, 57 C. C. A. 158, 120 Fed. Rep. 790.

An insurance company organized in *Missouri* cannot make an assignment for the benefit of creditors in that state. *McCoy v. Connecticut F. Ins. Co.*, 87 Mo. App. 73.

**7. Statutory Restrictions.** — *Battery Park Bank v. Western Carolina Bank*, 127 N. Car. 432.

**24. 2. State Nat. Bank v. Merchants' Bank**, 83 Miss. 610; *Calumet Paper Co. v. Haskell Show Printing Co.*, 144 Mo. 331, 66 Am. St. Rep. 425, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24.

**By Board of Directors.** — See *Blanton v. Kentucky Distilleries, etc., Co.*, 120 Fed. Rep. 318; *Boynton v. Roe*, 114 Mich. 401; *State Nat. Bank v. Merchants' Bank*, 83 Miss. 610; *Calumet Paper Co. v. Haskell Show Printing Co.*, 144 Mo. 331, 66 Am. St. Rep. 425; *Birmingham Drug Co. v. Freeman*, 15 Tex. Civ. App. 451; *Cupit v. Park City Bank*, 20 Utah 293; *Goetz v. Knie*, 103 Wis. 366.

**By President — Authority — Ratification.** — Where an assignment for creditors was executed by the president and secretary of a corporation without authorization by the board of directors, a subsequent approval by the board of directors ratifies the action taken and renders the assignment valid. *Miller v. Matthews*, 87 Md. 464.

And where the board of directors of a corporation resolves upon a general assignment and empowers the president to select an assignee, the power to execute the assignment is implied, and if the president himself becomes the assignee only the corporation itself can object. *Rogers v. Pell*, 154 N. Y. 518.

But in *Schaefer v. Scott*, 40 N. Y. App. Div. 438, a general assignment by the president of a corporation was held to be void as against creditors of the corporation because the board of directors had not authorized it. See also *Hilliard v. Burlington Shoe Co.*, 76 Vt. 57.

**By Vice-president.** — An assignment by a vice-president of a corporation, the president being away and the managing director being dead, is valid if authorized by the directors. *Wagg-Anderson Woolen Co. v. Leshner*, 78 Ill. App. 678.

An unauthorized assignment by a vice-president is not good as against an execution issued on a judgment entered on the same day. *Leshner v. Friedman*, 99 Ill. App. 42, affirmed 198 Ill. 21.

**A General Manager** of a corporation cannot make an assignment for creditors unless so authorized by the board of directors. *O'Brien v. Drayage Transfer Co.*, 81 Mo. App. 664.

But it has been held that a managing agent of a corporation has authority to assign for the benefit of creditors in a case where the corporation had no meetings and the agent managed the entire business. *Conely v. Collins*, 119 Mich. 519.

**Consent of Stockholders Necessary.** — In *West*

- 25.** 4. Partnerships — *a.* IN GENERAL — PERSONALTY. — See note 3.  
**26.** See note 1.  
**27.** *b.* PARTNER'S IMPLIED AUTHORITY TO ASSIGN. — See notes 1, 2.  
**29.** *d.* REQUISITES OF FIRM ASSIGNMENTS. — See note 2.  
**30.** *e.* ASSIGNMENT OF PARTNER'S INTEREST. — See note 1.  
*f.* ASSIGNMENT BY SURVIVING PARTNERS. — See note 2.  
**31.** See note 2.  
**32.** V. WHO MAY BE ASSIGNEE — 2. Assignor's Right to Select. — See note 4.  
 4. See also the title FRAUDULENT SALES AND CONVEYANCES, **396.** 1. *et seq.*  
**33.** 3. Qualifications of Assignee — *b.* RESIDENCE AS QUALIFICATION. — See notes 1, 3.  
 4. Creditors as Assignees. — See note 4.  
 5. Attorneys as Assignees. — See note 6.

*Virginia* the stockholders' consent to an assignment for benefit of creditors is necessary. *Kyle v. Wagner*, 45 W. Va. 349.

And in *Powers v. Blue Grass Bldg., etc., Assoc.*, 86 Fed. Rep. 705, it was held that the directors of a solvent building and loan association cannot assign for the benefit of creditors unless so authorized by the stockholders, and the stockholders may attack an assignment and have a receiver appointed.

**25.** 3. Personal Property of Partnership. — *Parker v. Brown*, (C. C. A.) 85 Fed. Rep. 595.

**Ratification.**—An assignment of firm property by one partner may be ratified by the other partner's acts of assent. *Allen v. Meyer*, (Tex. Civ. App. 1901) 65 S. W. Rep. 645; *Carter-Battle Grocer Co. v. Jackson*, 18 Tex. Civ. App. 353.

A partner who consented individually in writing to a firm assignment will be held to have consented as a partner. *Tait v. Carey*, 3 Indian Ter. 765.

**26.** 1. Authority and Assent of Partners. — In *Pennsylvania* it has been held that an assignment by one partner is good unless the other partners positively dissent. *Matter of Mill Work, etc., Co.*, 4 Pa. Super. Ct. 106.

**27.** 1. Implied Power of Partner. — See generally the title PARTNERSHIP, **155.** 2. And see the title FRAUDULENT SALES AND CONVEYANCES, **424.** 3 *et seq.*

2. First—Where It Was Possible to Consult the Other Partner or Partners. — One member of a firm has no authority to assign if the other members can be easily consulted but are not. *Mills v. Miller*, 109 Iowa 688, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 27.

Third—Where a Partner Has, by Absconding, Relinquished All Control over the Partnership Property. — *In re Grant*, 106 Fed. Rep. 496.

A Partner Who Has in Fact Withdrawn from the Firm. — See *Meyer-Marx Co. v. Masters*, 119 Ala. 186.

Where Partner Was Sole Manager. — *Keller v. Smith*, 20 Tex. Civ. App. 314.

A managing partner in charge of the business may assign for the benefit of creditors, and the assent of a partner out of the state will be presumed. *H. B. Clafflin Co. v. Evans*, 55 Ohio St. 183, 60 Am. St. Rep. 686.

**29.** 2. Firm Assignments — Individual Assets of Partners — *Florida.* — Firm assignments, to be valid, must include individual property. *Sheppard v. Reeves*, 39 Fla. 53.

*Texas.* — *Rogers v. Flournoy*, 21 Tex. Civ. App. 558.

*Utah.* — A firm may assign for benefit of creditors without including the individual assets, but a creditor can proceed against the individual property when the firm property is insufficient. *Wilson v. Sullivan*, 17 Utah 341.

*Wyoming.* — Under the assignment law of Wyoming a firm assignment that does not assign the individual as well as the firm property is void. *Swofford Bros. Dry-Goods Co. v. Mills*, 86 Fed. Rep. 556.

*Canada.* — In British Columbia an assignment of the partnership assets only, to pay the partnership debts, is valid under the Creditor's Trust Deeds Act. *Eastman v. Pemberton*, 7 British Columbia 459.

See also the title FRAUDULENT SALES AND CONVEYANCES, **438.** 3, 4.

**30.** 1. Assignment by Partner of His Individual Interest in Firm. — *Patty v. City Bank*, 15 Tex. Civ. App. 475.

2. Power of Surviving Partner. — *Burchinell v. Koon*, 8 Colo. App. 463; *State v. Withrow*, 141 Mo. 69; *Rogers v. Flournoy*, 21 Tex. Civ. App. 556, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30, 31.

**31.** 2. In Missouri the statutes providing for winding up partnerships after the death of a member, under the probate court, are held to take away the right of the surviving partner to assign for the benefit of creditors. *State v. Withrow*, 141 Mo. 69.

**32.** 4. California — Sheriff Must Be Assignee. — Under Civ. Code Cal., § 3449, the assignment is required to be made to the sheriff, who takes only the same title as his assignor. *San Jose First Nat. Bank v. Menke*, 128 Cal. 103.

**33.** 1. Residence of Assignee — Statutes. — *Lanpher v. Burns*, 77 Minn. 407; *Lucy v. Freeman*, (Minn. 1904) 101 N. W. Rep. 167; *Duryea v. Muse*, 117 Wis. 399.

3. Statute Directory. — The *Texas* statute directing that an assignee shall be a resident of the same county as the assignor is directory. *Burnette v. Foreman*, (Tex. Civ. App. 1895) 36 S. W. Rep. 1032.

4. Creditor as Assignee. — In *Vermont*, when an assignor appoints a creditor as his assignee, the assignment is not valid unless the creditors assent. *Farrar v. Powell*, 71 Vt. 247. See further the title FRAUDULENT SALES AND CONVEYANCES, **396.** 2.

6. Attorney May Be Assignee. — *Hilliard v. Burlington Shoe Co.*, 76 Vt. 57, holding that

**34. 8. Officer of Assigning Corporation as Assignee.** — See note 3.

**35. VI. WHAT PASSES BY THE ASSIGNMENT — 1. In General.** — See note 3.

**36. Only Property Within Assignment's Terms Will Pass.** — See note 2.

**37. 2. Real Property and Interests.** — See note 2.

**39. 3. Personal Estate — a. IN GENERAL.** — See note 1.

**40.** See notes 1, 3.

an attorney who as such has a judgment against an assigned estate is not precluded from being assignee.

**34. 3. Corporate Officer as Assignee.** — Section 48 of the *New York Stock Corporation Law*, providing that no transfer shall be made to a director for the payment of any debt after the corporation has refused to pay any debt or note when due, does not include a general assignment for the benefit of creditors. *Linderman v. Hastings Card, etc., Co.*, 38 N. Y. App. Div. 488.

**35. 3. What Passes by the Assignment — General Rule.** — See *McDowell v. Columbia Bldg., etc., Assoc.*, (Ky. 1899) 51 S. W. Rep. 1013; *Columbia Finance, etc., Co. v. Morgan*, (Ky. 1898) 44 S. W. Rep. 389; *McAllister v. Ohio Valley Banking, etc., Co.*, 114 Ky. 540; *Boynton v. Roe*, 114 Mich. 401; *Howland's Appeal*, 67 N. H. 575; *Loucheim v. Casperson*, 61 N. J. Eq. 529; *Owens v. Taylor*, 23 Ohio Cir. Ct. 612, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36 [35]; *H. B. Claffin Co. v. Evans*, 55 Ohio St. 183, 60 Am. St. Rep. 686; *Cornell v. Sulter*, 23 Ohio Cir. Ct. 384; *Calisher v. Mathias*, (Tex. Civ. App. 1897) 43 S. W. Rep. 265; *Snyder v. Murdock*, 20 Utah 407.

**Rights Fixed as of Date of Assignment.** — See *Parker v. Brown*, (C. C. A.) 85 Fed. Rep. 595; *Storts v. Mills*, 93 Mo. App. 201; *Matter of Hayes*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 264; *Kunkle v. Reeser*, 5 Ohio Dec. 422, 5 Ohio N. P. 401.

A writ of garnishment served after the assignment gives no right to the plaintiff thereunder. *Carter-Battle Grocer Co. v. Jackson*, 18 Tex. Civ. App. 353.

**Distributee's Share in Estate Passes to Assignee.** — *Gatewood v. Gatewood*, 70 S. W. Rep. 284, 24 Ky. L. Rep. 931.

**Dower Rights.** — Where a husband assigned for creditors, and the wife released her dower for one thousand five hundred dollars but died prior to payment, it was held that the husband could not claim the one thousand five hundred dollars, for it belonged to the assigned estate. *Allen v. Patrick*, 97 Va. 521.

**36. 2. Only Property Embraced in Instrument Passes.** — *Owens v. Taylor*, 23 Ohio Cir. Ct. 612, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36.

**Property Excluded from Operation of Assignment Does Not Pass.** — *Armstrong v. Merchant's Mantle Mfg. Co.*, 32 Ont. 387.

**37. 2. Rents.** — Under a trust assignment for the benefit of creditors, possession of the property and the right to collect the rents pass to the grantee. *Reed Fertilizer Co. v. Thomas*, 97 Tenn. 478.

Rents due to the assignor must be applied by the assignee to the payment of liens valid

against the estate. *Matter of Neff*, 185 Pa. St. 98.

**An Equity of Redemption Passes.** — *Sowles v. Lewis*, 75 Vt. 59.

**Partnership Realty.** — In *Ryan v. Ruff*, 90 Minn. 169, it was held that where a member of a firm assigned all of his property the assignment conveyed his realty belonging to the co-partnership when title was held in the individual names.

**Remainders** have been held to pass. *Robbins's Estate*, 199 Pa. St. 500; *Musser's Estate*, 12 York Leg. Rec. (Pa.) 145; *Wilson v. Langhorne*, 102 Va. 631 (under statute). And it is immaterial that the parties were ignorant of such effect. *McAllister v. Ohio Valley Banking, etc., Co.*, 114 Ky. 540.

**A Defeasible Fee passes**, and the assignee can convey what title and estate the assignor was seized of. *Trimble v. Shawhan*, 101 Ky. 403.

**39. 1. Trade Marks and Names.** — Unless a trade name is peculiarly personal to the assignor, it will pass under an assignment for benefit of creditors. *Sarrazin v. W. R. Irby Cigar, etc., Co.*, (C. C. A.) 93 Fed. Rep. 624. *Compare Bellows v. Bellows*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 482. See also the title TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION, 399. 8 *et seq.*, 404. 5, 405. 1.

**Actual Delivery of Personalty Not Essential.** — *Carter-Battle Grocer Co. v. Jackson*, 18 Tex. Civ. App. 353.

**Moneys** belonging to the assignor pass though not mentioned in the assignment. *Tishomingo Sav. Inst. v. Allen*, 76 Miss. 114.

**40. 1. Shares Not Fully Paid Up** do not pass, when expressly excepted from the operation of the assignment. *Armstrong v. Merchant's Mantle Mfg. Co.*, 32 Ont. 387.

**3. Congress Constr. Co. v. Farson, etc., Co.**, 101 Ill. App. 279; *Smith v. Longmire*, 24 Hun (N. Y.) 257.

**Insurance Policy.** — The phrase "all things in action" passes a life-insurance policy, and the assignor cannot thereafter sue on it. *Cohn v. Guardian Assur. Co.*, 68 Mo. App. 376.

So the cash surrender value of a life-insurance policy passes to the assignee. *Burnsides v. National Bank*, 64 S. W. Rep. 520, 23 Ky. L. Rep. 880.

But where an assignee entirely ignored a life-insurance policy on the assignor's life, paid no premiums, and for eight years made no claims against it, he was held to have no valid claim against it on maturity. *Provident Life, etc., Co. v. Fidelity Ins. Trust, etc., Co.*, 203 Pa. St. 82.

And in *Barbour v. Larue*, 106 Ky. 546, it was held that an ordinary life-insurance policy, not being convertible into any money, did not pass to the assignee.



**40.** Uncalled-for and Unpaid Subscriptions to Corporate Stock. — See note 4.

*b.* DEBTS DUE TO THE ASSIGNOR. — See note 5.

**41.** *c.* AS TO PARTNERSHIP PROPERTY. — See notes 1, 2.

**42.** 4. Exempt Property. — See note 3.

**43.** See note 1.

**44.** 5. Subsequently-acquired Property. — See note 1.

6. Trust Funds. — See note 2.

**45.** 7. Effect of Uncertainty in Description of Persons or Property — Assignment to Be Explicit. — See note 3.

**40.** 4. *Corsicana Nat. Bank v. Baum*, (Tex. Civ. App. 1901) 62 S. W. Rep. 812; *Killen v. Barnes*, 106 Wis. 546.

**5. Contingent Debts.** — See *New Jersey Steel, etc., Co. v. Robinson*, 74 N. Y. App. Div. 481.

**41.** 1. Where One Partner Assigned for the Firm and Individually and signed his partner's name, the partner's individual property was held not to pass. *Jackman v. Fortson*, (Tex. Civ. App. 1896) 39 S. W. Rep. 215.

**Individual Doing Business under a Firm Name.** — Where an individual doing business under a firm name assigned for creditors, a judgment in the firm name may be shown to be individual property. *State v. Honousek*, 10 Ohio Cir. Dec. 516, 19 Ohio Cir. Ct. 303.

**When Both Firm and Individual Property Will Pass.** — When an assignment recites that it is made for the payment of firm creditors, but assigns the individual as well as the firm property, both the firm and the individual property will pass. *John Hibben Dry-Goods Co. v. Haley*, (Ky. 1899) 50 S. W. Rep. 252.

**2. Individual Assignment Does Not Pass Firm Property.** — *Raymond v. Schoonover*, 181 Pa. St. 352.

**Individual Assignment for Partnership Debts.** — A member of a banking institution may assign his individual property for the payment of the bank's debts, but unless he is unable to pay his individual debts, such assignment is limited to the debts of the bank. *Heitzenreither v. Long*, 4 Pa. Super. Ct. 524.

**42.** 3. Effect upon Property Exempt by Law. — *Dorr v. Schmidt*, 38 Fla. 354; *Calloway v. Calloway*, (Ky. 1897) 39 S. W. Rep. 241; *McAllister v. Ohio Valley Banking, etc., Co.*, 114 Ky. 540; *Cunningham v. Britson*, 101 Wis. 378. See also the title FRAUDULENT SALES AND CONVEYANCES, 441. 4 *et seq.*

**Crops Planted After the Assignment** are not the subject of exemption. *Columbia Finance, etc., Co. v. Morgan*, (Ky. 1898) 44 S. W. Rep. 389.

**Attachment Not Election.** — An attachment of exempt property is not an election not to take under the assignment. *Patty v. City Bank*, 15 Tex. Civ. App. 475.

**Waiver of Exemption.** — The exemption is not an absolute right, but a privilege, and therefore may be waived as well as lost by laches. The form of the assignment may be such as to operate as a waiver. *In re Ley*, 7 British Columbia 94.

**43.** 1. Exemption of Homestead. — *Armour v. Doig*, (Fla. 1903) 34 So. Rep. 249; *Simpson v. Greenwell*, (Ky. 1898) 44 S. W. Rep. 433; *McNamara v. Schwanger*, 106 Ky. 1; *Matthews v. Matthews*, 79 S. W. Rep. 188, 25 Ky. L. Rep. 1873; *Jordan v. Newsome*, 126 N.

Car. 553; *Robinson v. McDowell*, 133 N. Car. 182, 98 Am. St. Rep. 704; *Kunkle v. Reeser*, 5 Ohio Dec. 422, 5 Ohio N. P. 401; *Starkey v. Wainright*, 9 Ohio Dec. 436, 6 Ohio N. P. 32; *Finley v. Cartwright*, 55 S. Car. 198; *Allen v. Meyer*, (Tex. Civ. App. 1901) 65 S. W. Rep. 645.

**Reference to Statute.** — When a deed for the benefit of creditors reserves "a homestead exemption such as a *bona fide* housekeeper with a family would take under the statute laws of Kentucky," and the statute makes no such provision, the assignor is not entitled to any exemption. *Russell v. Russell*, (Ky. 1897) 38 S. W. Rep. 1041.

**Mortgage Inuring to Creditors.** — Where a court has decreed that a mortgage inures for the benefit of all creditors the mortgagor cannot claim an exemption of his homestead. *Pease v. Schuh*, 4 Ohio Dec. 121, 5 Ohio N. P. 245.

**44.** 1. Property Acquired Subsequently to Assignment. — *Drovers', etc., Nat. Bank v. Roller*, 85 Md. 495, 60 Am. St. Rep. 344.

**2. Trust Funds Do Not Pass.** — *Dickinson v. Champlain First Nat. Bank*, 64 N. Y. App. Div. 254; *Appalachian Bank v. Gatch*, 2 Ohio Dec. 366, 7 Ohio N. P. 307.

**Misappropriation of Trust Funds.** — Whenever an assignor has converted trust funds and such funds have gone to swell the estate, a court of equity may declare that the *cestui que trust* has a preference over all other creditors. *Schwartz Bros. Commission Co. v. Zumbaulen*, 85 Mo. App. 671.

But where the insolvent spent trust funds in such a way that they did not go to swell the general estate, no lien exists against the funds in the hands of the assignee. *Drovers', etc., Nat. Bank v. Roller*, 85 Md. 495, 60 Am. St. Rep. 344. See also *Burrows v. Johnitz*, 57 Kan. 778.

**Assignment by Assignee.** — Where an assignee for the benefit of creditors in turn assigns for the benefit of his own creditors he does not thereby divest himself of the trust estate. *Rutherford v. Loving*, (Tex. Civ. App. 1903) 73 S. W. Rep. 418.

**An Assignment of Property Held in Trust** does not defeat the rights of the *cestui que trust*. *Bank Com'rs v. Security Trust Co.*, 70 N. H. 543.

**To Render an Assignee Liable to Account** to a party who had placed money in the hands of his assignor, as for a trust fund, it must appear either that the fund actually came into the hands of the assignee or that it went to swell the estate of the assignor. *Travellers Ins. Co. v. Caldwell*, 59 Kan. 156; *Wallace v. Caldwell*, 9 Kan. App. 538.

**45.** 3. Illustrations of Descriptions in Assign-

**46.** 8. Assignee Takes Subject to Equities. — See note 1.

**47.** Liens. — See note 2.

**48.** VII. CONFLICT OF ASSIGNMENT LAWS — 1. General Rule of Comity. — See note 3.

**49.** 2. Foreign Law Violated — Residents Protected. — See note 2.

**51.** 3. As Between Parties from Same State. — See note 1.

4. As to Law of Only Domestic Application. — See note 4.

**52.** 5. As to Foreign Debts Due Assignor. — See note 1.

**53.** 8. Assignments of Realty Governed by Law of Situs. — See note 1.

**ments.** — An assignment conveying the entire stock of goods, wares, merchandise, vehicles, and personal property described, all "lying, situate, and being" in the back yard of a store, was held to convey five hay presses on a vacant lot fifty feet back of such yard, where nothing was in the yard and the evident intention was to convey them. *Anderson Mfg. Co. v. Mansur, etc., Implement Co., (C. C. A.)* 85 Fed. Rep. 241.

**As to the Necessity and Sufficiency** of the description generally see the title FRAUDULENT SALES AND CONVEYANCES, 398. 2 *et seq.*

**46.** 1. Subject to Equities. — *Colbert v. Baetjer*, 4 App. Cas. (D. C.) 416; *Leshner v. Friedman*, 99 Ill. App. 42, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 46; *Wheeler v. Home Sav., etc., Bank*, 85 Ill. App. 28; *Byrne v. Ft. Smith Nat. Bank*, 1 Indian Ter. 680; *Billings v. Collins*, 44 Me. 271; *Parlin Orendorf Co. v. Hord*, 78 Mo. App. 279, 2 Mo. App. Rep. 252; *Storts v. Mills*, 93 Mo. App. 201; *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 46. See also *Hetzel v. Sawyer*, 10 Pa. Dist. 29.

**Personalty on Which a Chattel Mortgage Has Been Given** has been held to pass to the assignee where the mortgage was not recorded as required by statute. *Morris v. Ellis*, 16 Ind. App. 679. See also the title RECORDING ACTS, 130. 2 *et seq.*

**47.** 2. *Leshner v. Friedman*, 99 Ill. App. 42, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 47; *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 491, quoting 2 ENCYC. OF PL. AND PR. 879 [3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 47].

**48.** 3. General Rule of Comity Applicable to Assignments — *United States*. — *Security Trust Co. v. Dodd*, 173 U. S. 624; *Parker v. Brown*, (C. C. A.) 85 Fed. Rep. 595; *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 176, 115 Fed. Rep. 96.

*Arkansas*. — *Smead v. Chandler*, 71 Ark. 505.

*California*. — *Fenton v. Edwards*, 126 Cal. 43, 77 Am. St. Rep. 141.

*Illinois*. — *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 76 Am. St. Rep. 51, affirming 86 Ill. App. 76.

*Indiana*. — *Union Sav. Bank, etc., Co. v. Indianapolis Lounge Co.*, 20 Ind. App. 325; *Pitman v. Marquardt*, 20 Ind. App. 431; *Nathan v. Lee*, 152 Ind. 232.

*Iowa*. — *State Bank v. McElroy*, 106 Iowa 261.

*Kentucky*. — *Peach Orchard Coal Co. v. Woodward*, 105 Ky. 790.

*Mississippi*. — *Byers v. Tabb*, 76 Miss. 843.

*New Hampshire*. — *Weston v. Nevers*, 72 N. H. 65.

*New Jersey*. — *In re Browning*, (N. J. 1904) 57 Atl. Rep. 869.

*New York*. — *Dearing v. McKinnon Dash, etc., Co.*, 33 N. Y. App. Div. 31; *Matter of Halsted*, 42 N. Y. App. Div. 101; *Walter v. F. E. McAlister Co.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 747; *Workum v. Caldwell*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 72; *Bloomingtondale v. Maas*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 672.

*Ohio*. — *Wright v. Franklin Bank*, 59 Ohio St. 180.

*Pennsylvania*. — *Zucher v. Froment*, 5 Pa. Dist. 579.

*South Carolina*. — *Ayres v. Desportes*, 56 S. Car. 544.

*Texas*. — *Carter-Battle Grocer Co. v. Jackson*, 18 Tex. Civ. App. 353.

*Washington*. — *Bloomingtondale v. Weil*, 29 Wash. 611.

*West Virginia*. — *Yost v. Graham*, 50 W. Va. 199.

*Canada*. — *Brand v. Green*, 13 Manitoba 101.

**49.** 2. Domestic Creditors Protected. — *Bel-fast Sav. Bank v. Stowe*, (C. C. A.) 92 Fed. Rep. 100; *Zacher v. Fidelity Trust, etc., Co.*, (C. C. A.) 106 Fed. Rep. 593; *Smead v. Chandler*, 71 Ark. 505; *Smith v. Lamson*, 184 Ill. 71; *Bank of Commerce v. Windmuller*, 106 Ky. 395; *Dyson v. St. Paul Nat. Bank*, 74 Minn. 439, 73 Am. St. Rep. 358; *De Yurck v. Woelfel*, 19 Pa. Super. Ct. 265; *Happy v. Prickett*, 24 Wash. 290; *Bloomingtondale v. Weil*, 29 Wash. 611.

**Where Two Assignments Were Made Simultaneously**, one in Connecticut and the other in Kentucky, the Connecticut creditors were not allowed to have dividends in the Kentucky property until the Kentucky creditors had secured as great a dividend in Kentucky as the Connecticut creditors had in Connecticut. *Weller v. Hull*, 74 S. W. Rep. 172, 24 Ky. L. Rep. 2185.

**51.** 1. Effect as Between Parties in Same State. — An assignor cannot set up the *lex rei sitæ* to defeat the rights of creditors to lands situated without the state. *Kendall v. McClure Coke Co.*, 182 Pa. St. 1, 61 Am. St. Rep. 688.

4. See *Barth v. Iroquois Furnace Co.*, 63 Ill. App. 323.

**52.** 1. Effect upon Debts Due Assignor in Foreign State. — *Barth v. Iroquois Furnace Co.*, 63 Ill. App. 323. See also *supra*, this title, 40. 5.

**53.** 1. Assignment of Realty — By What Law Governed. — Where two mortgages are given, on property in two states, the law of each state is applied to the land therein, and the fact that the mortgage in one state operates as an assignment for creditors does not affect the other. *Dunham v. McNatt*, 15 Tex. Civ. App. 552.

**Assignments of Land Governed by Lex Rei Sitæ.** — *Nathan v. Lee*, 152 Ind. 232; *Manton v. Seiberling*, 107 Iowa 534; *Watson v. Holden*,

**55.** 10. State and Federal Decisions — Comity. — See note 1.

VIII. FORMAL REQUISITES OF ASSIGNMENTS — 1. To Be in Writing. —

See note 3.

**56.** 2. Form Not Essential but Important. — See note 2.

**57.** 3. Constructive Assignments. — See note 2.

4. The Approved Form. — See note 3.

5. Informal Writings — Intention. — See note 4.

**58.** 6. Consisting of Several Instruments. — See note 1.

7. As to Directory Provisions — Assignment Bad in Part. — See note 3.

**59.** 8. As to Mandatory Provisions — Schedules or Inventory. — See notes 1, 2.

See also the title FRAUDULENT SALES AND CONVEYANCES, **398**. 2 *et seq.*

**60.** See notes 1, 2.

58 Kan. 657; *Davenport v. Gannon*, 123 N. Car. 362, 68 Am. St. Rep. 827.

**55.** 1. Construction of Statute by State Court Controls. — *Swofford Bros. Dry-Goods Co. v. Mills*, 86 Fed. Rep. 556; *Ontario Bank v. Hurst*, (C. C. A.) 103 Fed. Rep. 231; *Zacher v. Fidelity Trust, etc., Co.*, 45 C. C. A. 480, 106 Fed. Rep. 593.

3. General Rule — Should Be in Writing. — *Lacy v. Gunn*, 144 Cal. 511; *Blackman v. Metropolitan Dairy Co.*, 77 Ill. App. 609; *Lucy v. Freeman*, (Minn. 1904) 101 N. W. Rep. 167.

This Is Usually Required by Statute. — *Sager v. Summers*, 49 Neb. 459.

In *Kentucky* a parol assignment is valid. *Muir v. Samuels*, 110 Ky. 605.

**56.** 2. No Particular Form Necessary. — *Wambaugh v. Northwestern Mut. L. Ins. Co.*, 59 Ohio St. 241.

**57.** 2. Constructive Assignments Not Allowed Where Intention Was Honest. — *People's Deposit Bank v. Campbell*, 59 S. W. Rep. 22, 22 Ky. L. Rep. 983.

But in *Kentucky*, where a partner who is insolvent transfers his individual estate to the firm, also insolvent, the transaction will be construed as an assignment for the benefit of creditors. *Louisville Trust Co. v. Columbia Finance, etc., Co.*, (Ky. 1900) 59 S. W. Rep. 867.

3. Certain Approved Forms. — In *Bradley Fertilizer Co. v. Pace*, (C. C. A.) 80 Fed. Rep. 862, a conveyance to the assignee and his successors, and not to the assignee and his heirs, was held to be the proper form.

4. Informal Writings Upheld Where Intention Clear. — See *Bradley Fertilizer Co. v. Pace*, (C. C. A.) 80 Fed. Rep. 862; *Graham Paper Co. v. Sanderson*, 8 Colo. App. 427.

**58.** 1. May Consist of Several Instruments. — *Ontario Bank v. Hurst*, (C. C. A.) 103 Fed. Rep. 231; *Hargardine-McKittrick Dry Goods Co. v. Bradley*, 1 Indian Ter. 650; *Union, etc., Bank v. Allen*, 77 Miss. 442; *Maas v. Miller*, 58 Ohio St. 483.

Where the Defendant Executed Chattel Mortgages. — Where a chattel mortgage was given to a creditor just prior to an assignment for creditors, but the mortgagee never accepted the mortgage nor claimed rights thereunder, it was held that the assignment was good and the mortgage failed. *Marlin v. Teichgraeber*, 63 Kan. 521.

Notes Given as Preferences with a view to an assignment and followed by an assignment have been construed as a part thereof so as to in-

validate it. *Standard Shoe Co. v. Thompson*, 32 Oregon 30.

3. Strict Compliance Not Always Essential. — Failure to state how or when the property must be sold does not invalidate the assignment, but simply clothes the assignees with discretionary powers. *Silsby v. Strong*, 38 Oregon 36.

**59.** 1. Assignor's Oath Mandatory. — When schedules were not verified for sixty days, and within three days after their filing the holder of a chattel mortgage, unrecorded, brought replevin against the assignor and assignee, the assignment was held to be inoperative. *Keith v. Hamblin*, 7 Kan. App. 456.

2. Instances of Imperative Provisions — *United States*. — *Badgett v. Johnson-Fife Hat Co.*, (C. C. A.) 85 Fed. Rep. 408; *Brown v. Parker*, (C. C. A.) 97 Fed. Rep. 446.

*Indian Territory*. — Where an assignment for creditors was made, but no bond or inventory was filed, the assignment was held to be fraudulent and void. *Hargardine-McKittrick Dry Goods Co. v. Bradley*, 1 Indian Ter. 650. See also *Martin Browne Co. v. Morris*, 1 Indian Ter. 495; *Westchester F. Ins. Co. v. Blackford*, 2 Indian Ter. 370.

*Kansas*. — An assignment does not take effect until the schedules are filed, but a delay of two days will not avoid the assignment when it is made in good faith. *Goodin v. Newcomb*, 6 Kan. App. 431.

*North Carolina*. — *Cooper v. McKinnon*, 122 N. Car. 447; *Brown v. Nimocks*, 124 N. Car. 417; *Martin v. Buffaloe*, 128 N. Car. 305, 83 Am. St. Rep. 679.

*Oklahoma*. — *Hockaday v. Drye*, 7 Okla. 288. *Tennessee*. — *Forshee v. Willis*, 101 Tenn. 450. *Canada*. — *Birks v. Lewis*, 8 Quebec Q. B. 517, affirmed 30 Can. Sup. Ct. 618.

**60.** 1. *Silsby v. Strong*, 38 Oregon 36.

Failure to Attach the Schedules to a deed does not invalidate the instrument when the assignment describes the property sufficiently for identification. *Maul v. Drexel*, 55 Neb. 446.

The Inventory Is Not Conclusive, in *Illinois* and *Iowa*, as to what property passes under the assignment. *Congress Constr. Co. v. Farson, etc., Co.*, 101 Ill. App. 279; *Turrill v. McCarthy*, 114 Iowa 681, holding further that the omission of property title to which was in dispute will not invalidate the assignment.

2. Assignments Given Effect Before Schedules Annexed. — *Pitman v. Marquardt*, 20 Ind. App. 431; *Blair v. Anderson*, 61 Kan. 376; *Hockaday v. Drye*, 7 Okla. 288; *Snyder v. Murdock*, 20 Utah 407.

**60.** Omissions from Schedules. — See note 5.

**62.** 9. Assignee as Party — Acceptance — Acceptance of an Assignment. — See note 2.

**10.** Assent of Creditors. — See note 3. See also the title FRAUDULENT SALES AND CONVEYANCES, **390**. 3. *et seq.*

**63.** When the Assignment Is Manifestly for the Advantage of the Creditors. — See note 1.

**64.** When Express Assent Necessary. — See note 4.

**11.** Acknowledgment. — See note 6.

**66.** 12. Recording — Necessity of Recording. — See notes 2, 3.

**Failure to File Schedules.** — In *Arizona* an assignment for the benefit of creditors is not invalidated by a failure to file an inventory. *Babbitt v. Mandell*, (Ariz. 1898) 53 Pac. Rep. 577. And in *New Hampshire* failure to file schedules within the statutory period of ten days does not invalidate the assignment. *Howland's Appeal*, 67 N. H. 575.

**Supplementary Document — List of Creditors.** — A supplementary list was allowed in *Gordonsville Milling Co. v. Jones*, (Tenn. Ch. 1900) 57 S. W. Rep. 630, when it referred definitely to the former assignment and stated that it was a list of creditors and liabilities.

**60.** 5. Effect of Accidental and Trifling Omissions. — *Phillips, etc., Mfg. Co. v. Whitney*, (C. C. A.) 102 Fed. Rep. 838; *Troesch v. Cosgrove*, 46 N. Y. App. Div. 498.

**62.** 2. Acceptance Essential. — After a deed is signed and recorded a lien that attaches before acceptance by the assignee is valid, as title does not pass until such acceptance. *MacVeagh v. Chase*, 67 Ill. App. 160.

**Where an Assignee Is Also an Attaching Creditor** his acceptance operates to dissolve the attachment. *Ryhiner v. Ruegger*, 19 Ill. App. 156.

**3. Express Assent of Creditors Not Required.** — *Lacy v. Gunn*, 144 Cal. 511; *Billings v. Parsons*, 17 Utah 22.

**When Assent Necessary.** — See *Seiter v. Mowe*, 182 Ill. 351; *Davies v. Dow*, 80 Minn. 223; *Busbey v. Russell*, 10 Ohio Cir. Dec. 23, 18 Ohio Cir. Ct. 12; *In re Roberg*, 5 Ohio Dec. 585, 7 Ohio N. P. 446; *Sweet v. Neff*, 102 Wis. 482.

**Where an Assignor Appoints a Creditor** as his assignee, the assignment is not valid, either at common law or under the *Vermont* statute, unless the creditors assent. *Farrar v. Powell*, 71 Vt. 247.

**An Oral Assent** together with a promise of a written assent is sufficient to make the assignment valid. *Roberts v. Norcross*, 69 N. H. 533.

**Assent in One State Subsequent to Record in Another.** — Where an assignment was recorded in the state where it was made, and subsequently creditors in another state assented, the record was held to be notice to attaching creditors. *Belfast Sav. Bank v. Stowe*, (C. C. A.) 92 Fed. Rep. 100. To the same effect see *Stowe v. Belfast Sav. Bank*, 92 Fed. Rep. 90.

**Assignee Agent for Debtor Alone.** — In *Weston v. Nevers*, 72 N. H. 65, it was held that in the absence of assent of creditors the assignee holds the property as agent of, or trustee for, the debtor alone, and it is therefore subject to attachment by the assignor's creditors.

**Good as to Assenting Creditors, Bad as to Those Dissenting.** — A debtor's trust deed securing specified debts of specified creditors has been

held to be good as to those who assent, but bad at the suit of those who do not assent. *Kingman v. Cornell-Tebbetts Mach., etc., Co.*, 150 Mo. 282.

**In Canada** the assignment is revocable until the creditors either execute or otherwise assent to it. *Rennie v. Block*, 26 Can. Sup. Ct. 356.

**63.** 1. General Rule — Assent of Creditors Presumed. — *Robinson, etc., Co. v. Thomason*, 113 Ala. 526; *Inman v. Schloss*, 122 Ala. 461; *Smith v. Herrell*, 11 App. Cas. (D. C.) 425; *Weiser v. Muir*, 103 Ky. 499; *Fearey v. O'Neill*, 149 Mo. 467, 73 Am. St. Rep. 440; *Kingman v. Cornell-Tebbetts Mach., etc., Co.*, 150 Mo. 282; *Weston v. Nevers*, 72 N. H. 65; *Gonzales v. Batts*, 20 Tex. Civ. App. 421.

**64.** 4. When Creditors Should Execute Assignment. — *Moody v. Templeman*, 23 Tex. Civ. App. 374.

Where a mortgage is made in favor of such creditors as accept, and none accept, the assignment is not valid. *Prouty v. Musquiz*, (Tex. Civ. App. 1900) 59 S. W. Rep. 568.

**Procurement of Assent.** — Where an assignor procures a creditor's assent by giving a second bond for the payment of that creditor's claim, the others have no right to object. *Lobdell v. State Bank*, 180 Ill. 56.

**6. Acknowledgment of Assignments — Minnesota.** — An assignment must be acknowledged before a proper official. *Lucy v. Freeman*, (Minn. 1904) 101 N. W. Rep. 167.

**Nebraska.** — The assignment is void unless witnessed, and must be acknowledged. *Sager v. Summers*, 49 Neb. 459.

**New York.** — An assignment for creditors by a corporation must be acknowledged, and liens accruing prior to a proper acknowledgment have priority. *Matter of High Falls Sulphite Pulp, etc., Co.*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 626. Where the certificate of acknowledgment is defective, it may be shown by proof *aliunde* that the acknowledgment was proper. *Linderman v. Hastings Card, etc., Co.*, 38 N. Y. App. Div. 488.

**Washington.** — An unacknowledged assignment is not void when a creditor had actual knowledge of its terms and the assignee has taken possession of the property. *Smith v. Cullen*, 18 Wash. 398.

**Acknowledgment Before Interested Officer.** — An acknowledgment before a deputy clerk is not invalidated by reason of the fact that he is a beneficiary. *Reed Fertilizer Co. v. Thomas*, 97 Tenn. 478.

**66.** 2. Recording Deed of Assignment. — *McCartney v. Earle*, (C. C. A.) 115 Fed. Rep. 462; *Parker v. Brown*, (C. C. A.) 85 Fed. Rep. 595; *Rogers v. Bailey*, 121 Ala. 314; *Reeves v. Estes*, 124 Ala. 303; *Schloss v. Inman*, 129

**67.** Place of Record. — See note 5.

**68.** Time of Recording. — See note 1.

**13.** Delivery. — See note 3. See generally the titles DEEDS; ESCROW.

**69.** See note 1.

Time of Taking Effect. — See note 2.

**70.** **14.** Assignee's Bond. — See note 5.

Ala. 424; Tait v. Carey, 3 Indian Ter. 765; Gridley v. Myers, 73 Minn. 308; Miller v. Waite, 60 Neb. 431; Huddleson v. Polk, (Neb. 1903) 97 N. W. Rep. 624; Eggleston v. Harrison, 61 Ohio St. 397; Hilliard v. Enders, 196 Pa. St. 587; Colvin v. White, 200 Pa. St. 277; Snyder v. Murdock, 20 Utah 407; Western Twine Co. v. Teasdale, 97 Wis. 652. See Toepfer v. Lampert, 102 Wis. 465.

**Assignment to Single Creditor for His Own Benefit.** — The *Pennsylvania* statute requires all assignments for benefit of creditors to be recorded within thirty days, but this does not apply to an assignment to a single creditor for his own benefit. Earle v. McCartney, 109 Fed. Rep. 13.

**Assignment of Special Fund for Special Debt.** — An assignment of a special fund for the payment of a particular debt is not such a general assignment as the *Kentucky* statute requires to be acknowledged and recorded. Botoms v. McFerran, (Ky. 1897) 43 S. W. Rep. 236.

**As Against a Subsequent Assignee,** an unrecorded assignment for certain creditors is good, but may be avoided by execution creditors of the assignor. Huey v. Prince, 7 Pa. Dist. 110.

**Assignment with Preferences.** — Where, under the *Pennsylvania* statute, a deed of assignment with preferences is construed as a general assignment for all creditors, the deed need not be recorded. Penn Plate Glass Co. v. Jones, 189 Pa. St. 290.

**Registration Not Notice as to Choses in Action.** — Under the *Tennessee* statute the registration of assignments for benefit of creditors is not notice as to choses in action. Chicago Sugar Refining Co. v. Jackson Brewing Co., (Tenn. Ch. 1898) 48 S. W. Rep. 275.

**66. 3. Arkansas.** — In support of the original note see Moore v. Goodbar, 66 Ark. 161.

**Minnesota.** — To the same effect as Paulson v. Clough, 40 Minn. 494, cited in the original note, see Lucy v. Freeman, (Minn. 1904) 101 N. W. Rep. 167.

**Nebraska.** — "The failure to file a deed of assignment for record within the time fixed by statute would not *ipso facto* divest the assignee's ownership of the trust estate. If such failure be regarded as a condition subsequent it would not, under the provisions of section 6 of the assignment law, \* \* \* work a forfeiture of the assignee's title in favor of a creditor who had not acquired a lien on the property." Miller v. Waite, 59 Neb. 319.

**New York.** — Delay of a few days in recording an assignment is not fraudulent when ninety per cent. of the creditors request the assignee to make such delay while they decide whether recordation will be best. Irving Nat. Bank v. Wilson Bros. Woodenware, etc., Co., 34 N. Y. App. Div. 481.

**Ohio.** — When a trust deed is made in contemplation of insolvency, to prefer one or more creditors, it need not be filed with the probate court, unless some creditor applies to have it construed as an assignment for benefit of all the creditors. Mengert v. Brinkerhoff, 67 Ohio St. 472.

**Texas.** — An assignment in another state of personalty in Texas need not be registered in Texas. Carter-Battle Grocer Co. v. Jackson, 18 Tex. Civ. App. 353.

**67. 5. Where Assignments to Be Recorded.** — Under the *Ohio* statute, where an assignor resides in one county and the land is located in another the assignment need not be filed for record in the county where the land lies. Harrison v. Chatfield, 7 Ohio Cir. Dec. 692, 14 Ohio Cir. Ct. 599.

An individual assignment the effect of which is to convey the assignor's interest in partnership property need not necessarily, under the *Florida* statute, be recorded in the county where the partnership assets are situated. Bradley Fertilizer Co. v. Pace, (C. C. A.) 80 Fed. Rep. 862.

**68. 1.** See Maul v. Drexel, 55 Neb. 446; Wambaugh v. Northwestern Mut. L. Ins. Co., 59 Ohio St. 241; Huey v. Prince, 187 Pa. St. 151; Earle v. McCartney, 109 Fed. Rep. 13 (under the *Pennsylvania* statute).

**3. What Constitutes Delivery.** — Where an assignor handed the deed of assignment to the assignee, who indorsed thereon his acceptance, but immediately returned it to the assignor to be filed, it was held not to be good against a chattel mortgage filed before the deed was filed. Matter of Day, 15 Wash. 525.

**Delivery to the Assignor's Attorney** for the purpose of recording has been held to pass title as against the assignor. Wright's Estate, 182 Pa. St. 90.

**69. 1. Conditional Delivery.** — Where a general assignment was signed with the agreement that it should be delivered only in case the assignors could not procure extensions it was held not to be invalidated because not filed until four days after it was signed. Pierce Steam Heating Co. v. Ransom, 16 N. Y. App. Div. 258.

**2. Bloomingdale v. Maas,** (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 672.

**Delivery of Deed Entitles Trustee to Immediate Possession.** — Avery v. Monroe, 172 Mass. 132, 70 Am. St. Rep. 250.

**Title Passes on Delivery,** and an assignment in a sister state duly executed and delivered has preference over an unrecorded mortgage. Wright v. Franklin Bank, 59 Ohio St. 80. See also Carlisher v. Mathias, (Tex. Civ. App. 1897) 43 S. W. Rep. 265.

**70. 5. Bond Necessary.** — Wambaugh v. Northwestern Mut. L. Ins. Co., 59 Ohio St. 241. A bond by the principal in the full amount and by several sureties in small sums aggre-

**70.** Powers of Assignee Before Filing Bond. — See note 6.

**71. IX. PREFERENCES — 1. At Common Law — a. GENERAL RULE. —** See note 3. See also the title FRAUDULENT SALES AND CONVEYANCES.

**72. b. AGREEMENTS TO PREFER. —** See note 2.

**2. Under Statutes — a. IN GENERAL — Preferences Not Favored. —** See note 4.

**73. Present Tendency of Legislation. —** See note 3.

gating the full amount is sufficient. *Bradley Fertilizer Co. v. Pace*, (C. C. A.) 80 Fed. Rep. 862.

An assignment of a claim for a tort, in trust to an attorney, to pay doctors' bills and his own fee and give the surplus to the assignor, is not an assignment for benefit of creditors requiring a bond. *United Railways, etc., Co. v. Rowe*, 97 Md. 656.

**Assignee Out of State.** — One appointed assignee in another state may sue in the *Kentucky* court without filing a bond. *Peach Orchard Coal Co. v. Woodward*, 105 Ky. 790.

**A Bond by a Surety Company** duly authorized by law is sufficient. *Miller v. Matthews*, 87 Md. 464.

**An Omission to State the Penal Sum** in the bond avoids the assignment in *Wisconsin* except as between the parties. *Stannard v. Youmans*, 100 Wis. 275.

**70. 6.** *Badgett v. Johnson-Fife Hat Co.*, 1 Indian Ter. 133; *Westchester F. Ins. Co. v. Blackford*, 2 Indian Ter. 370.

But failure to file a bond does not invalidate an assignment, for the filing of a bond within ten days is a condition subsequent. *Moore v. Goodbar*, 66 Ark. 161.

The *Arkansas* statute is in force in *Indian Territory*, by Act of Congress. *Martin-Browne Co. v. Morris*, 1 Indian Ter. 495.

**Removal of Assignee.** — The *Texas* statute provides that on failure to give a bond a county or district judge must remove the assignee and appoint a competent one on the application of any creditor. *Birmingham Drug Co. v. Freeman*, 15 Tex. Civ. App. 451.

**71. 3. Right to Create Preferences at Common Law — United States.** — *Ontario Bank v. Hurst*, (C. C. A.) 103 Fed. Rep. 231.

*Alabama.* — *Inman v. Schloss*, 122 Ala. 461.

*Arkansas.* — *Phelps v. Wyler*, 67 Ark. 97.

*California.* — *Heath v. Wilson*, 139 Cal. 362.

*Indiana.* — *Nathan v. Lee*, 152 Ind. 232.

*Kentucky.* — *Bank of Commerce v. Windmuller*, 106 Ky. 395.

*Nebraska.* — *Blair State Bank v. Stewart*, 57 Neb. 58.

*New York.* — *Dodge v. McKechnie*, 156 N. Y. 514; *Matter of Dauchy*, 169 N. Y. 460.

*North Carolina.* — *Friedenwald Co. v. Sparger*, 128 N. Car. 446; *City Nat. Bank v. Bridgers*, 128 N. Car. 322.

*Oklahoma.* — *Smith v. Baker*, 5 Okla. 326.

*Oregon.* — *Inman v. Sprague*, 30 Oregon 321.

*Pennsylvania.* — *Miller v. Shriver*, 197 Pa. St. 191.

*West Virginia.* — *Kennewig Co. v. Moore*, 49 W. Va. 323, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 71.

*Wisconsin.* — *Haring v. Hamilton*, 107 Wis. 112.

*Canada.* — *Kirk v. Chisholm*, 26 Can. Sup.

Ct. 111, affirmed *Maguire v. Hart*, 28 Can. Sup. Ct. 272.

**72. 2.** *Little Rock Bank v. Frank*, 63 Ark. 16, 58 Am. St. Rep. 65.

**4. Preferences Regarded with Disfavor. —** *Wright v. Seaman*, 32 N. Y. App. Div. 106; *Mann v. Wakefield*, 179 Pa. St. 398.

**Payment Operating as Assignment.** — Where two partners made payments so as to prefer individual creditors such payments were held to operate as an assignment for the benefit of creditors. *Cheek v. Grahm*, (Ky. 1899) 51 S. W. Rep. 311.

**73. 3. Preferences — Statutes — United States.** — *Beall v. Cowan*, (C. C. A.) 75 Fed. Rep. 139; *O'Connell v. Central Bank*, 78 Fed. Rep. 535; *Sarrazin v. W. R. Irby Cigar, etc., Co.*, (C. C. A.) 93 Fed. Rep. 624; *National Wall-Paper Co. v. Davis*, 98 Fed. Rep. 472; *Ontario Bank v. Hurst*, (C. C. A.) 103 Fed. Rep. 231; *Poliock v. Jones*, (C. C. A.) 124 Fed. Rep. 163; *In re Slomka*, (C. C. A.) 122 Fed. Rep. 630.

*Alabama.* — *Opelika Bank v. Kiser*, 119 Ala. 194; *Lehman-Duir Co. v. Griel Bros. Co.*, 119 Ala. 262; *Morrow v. Campbell*, 118 Ala. 330; *Inman v. Schloss*, 122 Ala. 461; *Merchants, etc., Bank v. Paulk*, 124 Ala. 591; *Smith v. McCadden*, 138 Ala. 284.

*Arizona.* — *Babbitt v. Mandell*, (Ariz. 1898) 53 Pac. Rep. 577.

*Arkansas.* — *Bartlett v. Meyer-Schmidt Grocer Co.*, 65 Ark. 290.

*California.* — *Heath v. Wilson*, 139 Cal. 362.

*Colorado.* — *Bailey v. American Nat. Bank*, 12 Colo. App. 66.

*Connecticut.* — *Newtown Sav. Bank v. Lawrence*, 71 Conn. 358.

*District of Columbia.* — *Droop v. Ridenour*, 11 App. Cas. (D. C.) 224; *Strasburger v. Dodge*, 12 App. Cas. (D. C.) 37.

*Florida.* — *Dorr v. Schmidt*, 38 Fla. 354; *Sheppard v. Reeves*, 39 Fla. 53; *H. B. Clafin Co. v. Harrison*, 44 Fla. 218.

*Illinois.* — *Oakford v. Fischer*, 75 Ill. App. 544; *American Exch. Nat. Bank v. Walker*, 164 Ill. 135; *Friedlander v. Fenton*, 180 Ill. 312, 72 Am. St. Rep. 207.

*Kansas.* — *Smith-McCord Dry Goods Co. v. Carson*, 59 Kan. 295.

*Kentucky.* — *Carson v. Hamilton*, (Ky. 1897) 39 S. W. Rep. 427; *Walker v. Davis*, (Ky. 1897) 43 S. W. Rep. 406; *Oliver v. Sutton*, 102 Ky. 334; *Hall v. Rothchild*, 102 Ky. 582; *Allen v. Dillingham*, 104 Ky. 801; *Bank of Commerce v. Windmuller*, 106 Ky. 395; *Cheek v. Grahm*, (Ky. 1899) 51 S. W. Rep. 311; *Wisdom v. Russell*, (Ky. 1899) 53 S. W. Rep. 284; *Zeman v. Steinberg*, (Ky. 1899) 54 S. W. Rep. 178; *Grable v. Renz*, (Ky. 1900) 55 S. W. Rep. 922; *Planters' State Bank v. Willingham*, 111 Ky. 64; *Mt. Sterling Nat. Bank v. Priest*, 111

**76. And the Form of the Instrument.**—See note 1.**b. PREFERENCES DISTINCT FROM ASSIGNMENT.**—See note 4.

Ky. 886; *Downer v. Porter*, 76 S. W. Rep. 135, 25 Ky. L. Rep. 571; *Stephens v. Wilson*, 76 S. W. Rep. 180, 25 Ky. L. Rep. 662.

*Louisiana*.—*Appleby v. Lehman*, 51 La. Ann. 473.

*Michigan*.—*Geer v. Traders' Bank*, 132 Mich. 215, 9 Detroit Leg. N. 578.

*Mississippi*.—*Byers v. Tabb*, 76 Miss. 843; *Kaufman v. Simon*, 80 Miss. 189.

*Nebraska*.—*Blair State Bank v. Stewart*, 57 Neb. 58.

*New Mexico*.—*Earley Times Distillery Co. v. Zeiger*, (N. Mex. 1902) 67 Pac. Rep. 734.

*New York*.—*Eliassof v. De Wandelaer*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 695; *Shotwell v. Dixon*, 22 N. Y. App. Div. 258; *Eliassof v. Dewandelaer*, 30 N. Y. App. Div. 155; *Wile v. Cauffman*, 39 N. Y. App. Div. 206; *Dudensing v. Jones*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 69; *Matter of Halsted*, 42 N. Y. App. Div. 101; *Matter of Jacobs*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 757; *In re Smith*, (Supm. Ct. Spec. T.) 59 N. Y. Supp. 799; *Matter of Fowler*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 425; *Matter of Dauchy*, 59 N. Y. App. Div. 383; *Dodge v. McKechnie*, 156 N. Y. 514; *Shotwell v. Dixon*, 163 N. Y. 43; *Matter of Dauchy*, 169 N. Y. 460.

*North Carolina*.—*Royster v. Stallings*, 124 N. Car. 55; *Brown v. Nimocks*, 124 N. Car. 417; *Hall v. Cottingham*, 124 N. Car. 402.

*Ohio*.—*Brinkerhoff v. Smith*, 57 Ohio St. 610; *Adair v. Blackburn*, 60 Ohio St. 575; *Matter of Sloan*, 60 Ohio St. 472; *In re Reefer*, 9 Ohio Dec. 326, 6 Ohio N. P. 338; *Hunt v. Bode*, 66 Ohio St. 255; *Mengert v. Brinkerhoff*, 67 Ohio St. 472; *Desmond v. Roth*, 9 Ohio Cir. Dec. 204, 16 Ohio Cir. Ct. 481; *Churchill v. Russell*, 9 Ohio Cir. Dec. 145; *Building Assoc. v. Hyndman*, 8 Ohio Dec. 573, 6 Ohio N. P. 197; *Commercial Nat. Bank v. Cincinnati Nat. Bank*, 2 Ohio Cir. Dec. 295; *Case v. Hewitt*, 10 Ohio Dec. 365, 7 Ohio N. P. 609; *Coppock v. Kuhn*, 2 Ohio Cir. Dec. 347; *Owens v. Taylor*, 23 Ohio Cir. Ct. 612; *Goodman v. Rawson*, 25 Ohio Cir. Ct. 696.

*Oklahoma*.—*Smith v. Baker*, 5 Okla. 326; *El Reno First Nat. Bank v. Sayler*, 4 Okla. 408.

*Oregon*.—*Standard Shoe Co. v. Thompson*, 32 Oregon 30.

*Pennsylvania*.—*Huey v. Prince*, 187 Pa. St. 151; *Penn Plate Glass Co. v. Jones*, 189 Pa. St. 290; *Miller v. Shriver*, 197 Pa. St. 191; *Hart's Estate*, 203 Pa. St. 503.

*Rhode Island*.—*Colt v. Sears Commercial Co.*, 20 R. I. 64.

*South Carolina*.—*Finley v. Cartwright*, 55 S. Car. 198; *Ayres v. Desportes*, 56 S. Car. 544; *Lenhardt v. Ponder*, 64 S. Car. 354.

*Texas*.—*Cleveland v. People's Nat. Bank*, (Tex. Civ. App. 1899) 49 S. W. Rep. 523.

*Utah*.—*National Bank of Republic v. Scott*, 18 Utah 400.

*Wisconsin*.—*Gordon v. Harley*, 98 Wis. 458.

*Canada*.—*Brigham v. La Banque Jacques-Cartier*, 30 Can. Sup. Ct. 429.

**In Alabama** a conveyance to a creditor of substantially all the debtor's property must

inure to all creditors equally. *Gay v. Strickland*, 112 Ala. 567.

**In Indian Territory**.—Where a man owed his wife and son-in-law, he was allowed to prefer them in an assignment for benefit of creditors. *Noble v. Worthy*, 1 Indian Ter. 523.

**The Kansas Courts** will endeavor to uphold assignments and will disregard any effort at fraud, so as to apply the whole estate for the benefit of all creditors. *Marshall v. Van De Mark*, 57 Kan. 304.

Directions in an assignment inconsistent with the general assignment statutes do not invalidate the instrument, but should be disregarded. *Reese v. Platt*, 4 Kan. App. 801.

**It Is Definitely Settled in Michigan** that a debtor has a lawful right to prefer a creditor, and that the courts are not alert to deprive him and the preferred creditor of their rights, where the intention of the debtor is manifest and the instruments do not legally constitute an assignment and there is an absence of fraud. *McMorran v. Moore*, 113 Mich. 101. Compare *Webber v. Hayes*, 117 Mich. 256.

**In New York** a preference clause will be construed, if possible, so as to support the assignment. *Pearson v. Eggert*, 15 N. Y. App. Div. 125.

**Promissory Note Given to Preferred Creditor Void in Canada**.—*Brigham v. La Banque Jacques-Cartier*, 30 Can. Sup. Ct. 429.

**Burden of Proving Secret Preference Is on Complainant Creditor**.—*Langley v. Van Allen*, 32 Ont. 216, affirmed 3 Ont. L. Rep. 5, 32 Can. Sup. Ct. 174.

**Statutory Presumption of Invalidity Rebuttable**.—*Codville v. Fraser*, 14 Manitoba 12, reversing 37 Can. L. J. 671; *Dana v. McLean*, 2 Ont. L. Rep. 466. For evidence held to be insufficient to rebut the presumption, see *Armstrong v. Johnston*, 32 Ont. 15.

**76. 1. Form of Instrument Immaterial**.—*In re Goyer*, 21 Quebec Super. Ct. 502.

**4. Preferences Distinct from Assignment—United States**.—*Beall v. Cowan*, (C. C. A.) 75 Fed. Rep. 139; *Ottenberg v. Corner*, (C. C. A.) 76 Fed. Rep. 263; *Hill v. Ryan Grocery Co.*, (C. C. A.) 78 Fed. Rep. 21; *O'Connell v. Central Bank*, 78 Fed. Rep. 535; *National Wall Paper Co. v. Davis*, 98 Fed. Rep. 472; *McCartney v. Earle*, (C. C. A.) 115 Fed. Rep. 462.

*Alabama*.—*Lehman-Durr Co. v. Griel Bros. Co.*, 119 Ala. 262.

*Arkansas*.—*Lazarus v. Camden Nat. Bank*, 64 Ark. 322; *Smead v. Chandler*, 71 Ark. 505.

*Colorado*.—*Bailey v. American Nat. Bank*, 12 Colo. App. 66.

*Illinois*.—*Baer v. John V. Farwell Co.*, 66 Ill. App. 397; *Oakford v. Fischer*, 75 Ill. App. 544; *Matter of Landfield*, 80 Ill. App. 417; *Ahlgren v. Huntington*, 85 Ill. App. 639; *International Trust Co. v. First Nat. Bank*, 101 Ill. App. 548.

*Indiana*.—*Nathan v. Lee*, 152 Ind. 232.

*Iowa*.—*National State Bank v. Sweeney*, (Iowa 1897) 73 N. W. Rep. 476; *Groetzing v. Wyman*, 105 Iowa 574; *Creglow v. Eichhorn*, (Iowa 1898) 77 N. W. Rep. 526; *Manton*

**78.** No Knowledge of Contemplated Assignment on Part of Creditor. — See note 1.

*c.* PREFERENCES BY LIMITED PARTNERSHIPS AND CORPORATIONS.

— See notes 3, 4.

**79.** First Assignment Void — Second Assignment Without Preferences. — See note 1.

**80.** *e.* PREFERRING WAGES. — See note 3.

*v.* Seiberling, 107 Iowa 534; Diemer *v.* Guernsey, 112 Iowa 393.

*Kansas.* — Smith-McCord Dry Goods Co. *v.* Carson, 59 Kan. 295.

*Kentucky.* — Crouch *v.* Crouch, (Ky. 1900) 56 S. W. Rep. 804.

*Michigan.* — Hill *v.* Mallory, 112 Mich. 387.

*Missouri.* — Kemper, etc., Dry Goods Co. *v.* Kennard Grocer Co., 68 Mo. App. 290.

*Nebraska.* — Blair State Bank *v.* Stewart, 57 Neb. 58.

*New Jersey.* — *In re* King, 5 N. J. L. J. 314.

*New York.* — Shotwell *v.* Dixon, 22 N. Y. App. Div. 258; Koehl *v.* Leibinger, etc., Brewing Co., 26 N. Y. App. Div. 573; National Hudson River Bank *v.* Chaskin, 28 N. Y. App. Div. 311; Andreae *v.* Bourke, 33 N. Y. App. Div. 638; Shotwell *v.* Dixon, 163 N. Y. 43.

*North Carolina.* — Murray *v.* Williamson, 133 N. Car. 318; Sutton *v.* Bessent, 133 N. Car. 559.

*Ohio.* — Matter of Winchell Mfg. Co., 1 Ohio Dec. 310; *In re* Summers, 10 Ohio Dec. 301; First Nat. Bank *v.* Leise, 23 Ohio Cir. Ct. 45.

*Oklahoma.* — Smith-McCord Dry Goods Co. *v.* John B. Farwell Co., 6 Okla. 318; Hockaday *v.* Drye, 7 Okla. 288.

*Oregon.* — See Sabin *v.* Wilkins, 31 Oregon 450.

*Pennsylvania.* — Shafer's Estate, 8 Pa. Dist. 221; Farrell's Estate, 17 Pa. Super. Ct. 240; Penn Plate Glass Co. *v.* Jones, 189 Pa. St. 290; Miller *v.* Shriver, 197 Pa. St. 191.

*South Carolina.* — Finley *v.* Cartwright, 55 S. Car. 198; Finley *v.* Moore, 55 S. Car. 195.

*Tennessee.* — Jones *v.* Cullen, 100 Tenn. 1.

*Wisconsin.* — Ritzinger *v.* Eau Claire Nat. Bank, 103 Wis. 346; Haring *v.* Hamilton, 107 Wis. 112; Kickbusch *v.* Corwith, 108 Wis. 634.

*Canada.* — Codville *v.* Fraser, 14 Manitoba 12, reversing 37 Can. L. J. 671; Beattie *v.* Wengert, 24 Ont. App. 72.

**Illustrations.** — *In* Taylor *v.* Seiter, 199 Ill. 555, a deed by the assignor to a corporation, retained by the assignor as president of the corporation without filing until the very day on which he made an assignment for the benefit of creditors, was held to be voidable by his creditors.

*In* Iowa, where a mortgage was executed and delivered, but not recorded, the fact that the mortgagee learned the next day of the mortgagor's assignment for creditors does not affect the *bona fides* of the mortgage transaction. Matter of Windhorst, 107 Iowa 58.

*In* Kentucky, when a debtor in contemplation of insolvency makes a payment to one creditor for the purpose of preferring him, the other creditors can by suit have the transaction declared an assignment for the benefit of all creditors. Farmers' Bank *v.* Rosenthal, (Ky. 1897) 42 S. W. Rep. 731. See also Oliver *v.* Sutton, 102 Ky. 334; Williams *v.* Borches, 102 Ky. 494.

Under the Ohio statute a chattel mortgage given to secure the fees of an attorney for ser-

vices rendered in connection with the assignment for creditors cannot operate to secure a preference. *In re* Merling, 5 Ohio Dec. 390.

*In* Oklahoma it is held that the rights of a debtor to prefer one or more creditors and to assign for the benefit of all creditors are distinct rights, and any *bona fide* disposal to one creditor will be upheld. Smith *v.* Baker, 5 Okla. 326.

**Validity of Assignment.** — *In* Kansas an attempted preference by means of mortgages executed at the same time as an assignment will not invalidate the assignment; but the fact that the assignor acted in good faith will not validate the mortgage. Sturtevant *v.* Sarbach, 58 Kan. 410.

Where the bulk of assigned property is delivered to the assignee, void chattel mortgages and a comparatively insignificant reservation will not render the assignment void, where it appears that compliance with the statute can be substantially performed. Marshall *v.* Van De Mark, 57 Kan. 304.

*In* New York an attempted preference, ineffectual either because the chattel mortgage was void or because the preference exceeded one-third of the assignor's property, does not invalidate the assignment. Pierce Steam Heating Co. *v.* Ransom, 16 N. Y. App. Div. 258.

*In* Mississippi an assignment that preferred two clerks for more than the wages due to them was held not to be void where the facts showed *bona fides*. Yerger *v.* Carter Dry-Goods Co., (Miss. 1900) 27 So. Rep. 989.

**78. 1. Rule Applies to Payment in Goods.** — Dana *v.* McLean, 2 Ont. L. Rep. 466.

**3. Preferences by Insolvent Limited Partnership.** — Carter-Battle Grocer Co. *v.* Jackson, 18 Tex. Civ. App. 353.

**4. Preferences by Insolvent Corporations.** — Creteau *v.* Foote, etc., Glass Co., 54 N. Y. App. Div. 168. See also Wills Point Mercantile Co. *v.* Southern Rock Island Plow Co., 31 Tex. Civ. App. 94.

**79. 1.** Elizabethton Shoe Co. *v.* Hughes, 122 N. Car. 296.

**80. 3. Wages Preferred by Statute.** — *In re* Excelsior Mfg. Co., 164 Mo. 316; Matter of Ginsburg, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 745; Matter of Jacobs, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 757; Gordon *v.* Harley, 98 Wis. 458.

**What Is Meant by Wages of Laborers, Servants, and Employees.** — For cases illustrating particular claims held to fall within the various statutes and to be entitled to preference, see *In re* Smith, (Supm. Ct. Spec. T.) 59 N. Y. Supp. 799 (traveling salesman's commissions); Hopkins *v.* Cromwell, 89 N. Y. App. Div. 481 (compensation of superintendent based on business done); *In re* Reefer, 9 Ohio Dec. 326, 6 Ohio N. P. 338 (commissions of salesman); *In re* Duhme Co., 6 Ohio Dec. 448, 4 Ohio N. P. 294 (wages of clerk in store).

For illustrations of claims not entitled to



**81. X. RESERVATIONS AND STIPULATIONS — 1. Reservation of Trust or Use for Benefit of Assignor — a. GENERAL RULE.** — See note 4. See also the title FRAUDULENT SALES AND CONVEYANCES, **431. 4. et seq.**

**b. ASSIGNOR'S CONTINUED CONTROL OF THE PROPERTY.** — See note 5.

**83. c. ASSIGNEE'S EMPLOYMENT OF ASSIGNOR.** — See note 1.

**2. Reservation of Exempt Property — a. IN GENERAL.** — See note 5.

**b. UNCERTAIN DESCRIPTION — GENERAL RESERVATION.** — See note 6.

**84. See note 1.**

**3. Reservation of Surplus — The Rule Stated.** — See note 3.

preference, see *Ames v. Sabin*, 107 Fed. Rep. 582 (salary of lawyer employed by the year); *Lawton v. Richardson*, 118 Mich. 669 (money expended by clerk on business trip to buy goods); *Matter of Ripsom, etc., Fur Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 56 (claims of independent contractors); *Matter of Kimberly*, 37 N. Y. App. Div. 106 (claim of trucking contractor not personally engaged in work); *Matter of Sloan*, 60 Ohio St. 472; *In re Reefer*, 9 Ohio Dec. 326, 6 Ohio N. P. 338 (compensation of traveling agent of publishing house).

A blacksmith who has his own shop and runs his own business is not "an operative" within the Ohio statute allowing preference for wages. *In re Lowry*, 7 Ohio Dec. 282, 4 Ohio N. P. 395.

**As to Who Are Laborers** see also **LABOR — LABORER**, vol. 18, p. 71, and the Supplement thereto.

**Statutory Provisions as to the Time** within which the claim for wages must have accrued exist in some jurisdictions. See *Winter v. Howell*, 109 Ky. 163; *In re Sectional Dock Co.*, 80 Mo. App. 56, 2 Mo. App. Rep. 570; *Adair v. Blackburn*, 60 Ohio St. 575; *In re Hobelman*, 5 Ohio Dec. 403, 7 Ohio N. P. 661; *Falconio v. Larsen*, 31 Oregon 137.

**Wages Earned After the Assignment** are not entitled to preference. *Haw v. Burch*, (Iowa 1898) 77 N. W. Rep. 461.

**Preference When Employee Is Also Contractor.** — Where a person contracted with cannery proprietors to supply labor and pack salmon, at a stated price per case, *i. e.*, by piece work, and also to act as foreman of the laborers supplied by him, at a fixed salary per month, and the proprietors subsequently assigned, it was held that his preference must be restricted to the salary. *Tam v. Robertson*, 9 British Columbia 505.

**Mechanics' Liens** filed within the statutory ninety days constitute in *New York* a prior lien against an estate assigned for benefit of creditors. *John P. Kane Co. v. Kinney*, 174 N. Y. 69.

**A Laundry** is not a manufacturing establishment within the meaning of the *Kentucky* statute giving preference to wages for labor done in such an establishment. *Muir v. Samuels*, 110 Ky. 605.

**Burden of Proof.** — A creditor who invokes the aid of a statute giving preference to the wages of employees must show that his claim comes within the statute. *Matter of Fowler*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 425.

**British Columbia Statute.** — See *In re Clayoquot Fishing, etc., Co.*, 9 British Columbia 80.

**81. 4. Reservation of Benefits for Assignor Renders Assignment Void.** — *Ryhiner v. Ruegger*, 19 Ill. App. 156. But see *Bonebrake v. Summers*, 193 Pa. St. 22, holding that a reservation of a lien on an assigned estate for the support of the assignor and his wife is valid, and that at the assignee's sale a purchaser takes subject to the reservation.

**Reservation for Assignor's Own Benefit Void.** — *Smith v. Hunter*, 4 Kan. App. 377.

**Reservation for Benefit of Assignor or Assignee.** — *Kirk v. Chisholm*, 26 Can. Sup. Ct. 111.

**Secret Reservations.** — *Hart v. Maguire*, 29 Nova Scotia 181, affirmed 28 Can. Sup. Ct. 272.

**5. Stipulation for Control of Assigned Property.** — *Adler-Goldman Commission Co. v. Phillips*, 63 Ark. 40. Compare *Hart v. Maguire*, 29 Nova Scotia 181, affirmed 28 Can. Sup. Ct. 272.

**83. 1. Provision for Employment of Assignor.** — See *Hart v. Maguire*, 29 Nova Scotia 181, affirmed 28 Can. Sup. Ct. 272.

**5. Exempt Property Reserved — Effect — Florida.** — *Cator v. Blount*, 41 Fla. 138; *Armour v. Doig*, (Fla. 1903) 34 So. Rep. 249.

**Indian Territory.** — *Robinson v. Belt*, 2 Indian Ter. 360.

**Iowa.** — *Turrill v. McCarthy*, 114 Iowa 681.

**Kentucky.** — *Wilson v. Wilson*, 101 Ky. 731; *Simpson v. Greenwell*, (Ky. 1898) 44 S. W. Rep. 433; *Overley v. Given*, (Ky. 1899) 52 S. W. Rep. 1059; *Maskovitz v. Simon*, 110 Ky. 841.

**Nebraska.** — *Miller v. Waite*, 59 Neb. 319.

**North Carolina.** — *Jordan v. Newsome*, 126 N. Car. 553; *Robinson v. McDowell*, 133 N. Car. 182, 98 Am. St. Rep. 704; *Murray v. Williamson*, 133 N. Car. 318.

**Ohio.** — *Paddock v. Daggett*, 9 Ohio Dec. 371, 6 Ohio N. P. 385; *Kunkle v. Reeser*, 5 Ohio Dec. 422, 5 Ohio N. P. 401.

**Pennsylvania.** — *Shimp's Estate*, 17 Lanc. L. Rev. 185.

**Virginia.** — *Stoneburner v. Motley*, 95 Va. 784.

**Homestead Exemptions.** — *Long v. Campbell*, 133 Ala. 353.

**6. Reservation in General Terms.** — By virtue of a general reservation the debtor is entitled to select the exempt property within a reasonable time and at its market value. *Lazarus v. Camden Nat. Bank*, 64 Ark. 322.

**84. 1. In Pennsylvania**, in reserving to himself the exemptions allowed by law, an assignor must state in some definite way his election of property to retain as exempt. *McFarland's Estate*, 16 Pa. Super. Ct. 152.

**3. Provision for Return of Surplus.** — *Cissell v. Johnston*, 4 App. Cas. (D. C.) 335.

**85.** The Rule Limited. — See note 2.

The New York Rule. — See note 4.

**4. Stipulations for Debtor's Release** — *a.* GENERAL PRINCIPLES. — See note 5. See also the title FRAUDULENT SALES AND CONVEYANCES, **445**.  
*1 et seq.*

**86.** Reasons for the Rule. — See note 1.

On the Other Hand. — See notes 6, 7.

And if It Be a Partnership Assignment. — See note 8.

**87.** *b.* LIMITING TIME FOR ACCEPTANCE AND RELEASE — **Must Be Reasonable.** — See note 4.

**89.** 5. Discretionary Powers to Assignee — *a.* POWER TO CONTINUE ASSIGNOR'S BUSINESS — **When Void.** — See note 1. See further the title FRAUDULENT SALES AND CONVEYANCES, **435**. 3 *et seq.*

**When Valid.** — See note 2.

**90.** *b.* POWER TO EMPLOY ATTORNEYS AND CLERKS. — See note 2. See also the title FRAUDULENT SALES AND CONVEYANCES, **403**. 6.

*c.* POWER TO COMPROMISE DEBTS. — See note 5. See also the title FRAUDULENT SALES AND CONVEYANCES, **430**. 4 *et seq.*

**92.** *e.* POWERS AS TO SALE OF TRUST ESTATE — (2) *As to Sales on Credit* — **And in Some Other States.** — See note 5. See generally the title FRAUDULENT SALES AND CONVEYANCES, **408**. 4 *et seq.*

**93.** (3) *As to Private Sales.* — See note 4. See also the title FRAUDULENT SALES AND CONVEYANCES, **411**. 2 *et seq.*

**85.** 2. Surplus When All Creditors Not Included. — A reservation of the surplus for the assignor will invalidate the assignment when all of the creditors were not named in the deed. *Carter v. Barton*, 2 Indian Ter. 99.

4. See *Wheeler v. Childs*, 22 N. Y. App. Div. 613.

**5.** General Rule as to Stipulations for Release. — *Manhattan L. Ins. Co. v. Hennessy*, 39 C. C. A. 625, 99 Fed. Rep. 64; *Mullen v. Ellington*, 70 Minn. 290; *Nix v. Underhill*, 8 Okla. 123; *McCord-Brady Co. v. Mills*, 8 Wyo. 258, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 85.

**Creditors Ignorant of Release Clause.** — Where the assignment stipulated for a release, and the assignee procured the assent of the creditors without informing them of such clause, it was held that they could avoid the instrument for fraud. *Graves v. Morgan*, 182 Mass. 161.

**86.** 1. Statutes Validating Provisions for a Debtor's Release are to that extent bankrupt laws. *Haijek v. Luck*, 96 Tex. 517.

6. *Robinson v. Belt*, 2 Indian Ter. 360; *McElwee v. McGill*, 57 S. Car. 6; *Long v. Meriden Britannia Co.*, 94 Va. 594; *Hart v. Maguire*, 29 Nova Scotia 181, affirmed 28 Can. Sup. Ct. 272.

7. Assignment Must Be of All the Property. — *McCord-Brady Co. v. Mills*, 8 Wyo. 258, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 86. See also *supra*, this title, **7**. 1, **35**. 3 *et seq.*

8. Partnership Assignment. — In *Wyoming* a firm creditor who releases the firm and who accepts a dividend from the assignee releases the individual liability of the partners. *McCord-Brady Co. v. Mills*, 8 Wyo. 258.

**87.** 4. Limit of Thirty Days Held Valid. — *National Bank of Commerce v. Bailey*, 179 Mass. 415.

**89.** 1. When Provision Prejudicial to Creditors. — *Rosenstein v. Coleman*, 18 Mont. 459; *Wil-*

*loughby v. Reynolds*, 19 Mont. 421, holding that a grant of power to the assignee to sell for cash or on credit in his discretion renders the assignment void.

2. When Provision Beneficial to Creditors. — *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798.

Authority to Make Notes or Accept Bills is not implied from an authority to conduct the business. *Boyd v. Mortimer*, 30 Ont. 290.

Reasonable Dispatch. — A provision that the assignee shall sell with all reasonable dispatch is not void. *Armour v. Doig*, (Fla. 1903) 34 So. Rep. 249.

**90.** 2. Attorney's Fees. — See *Union Nat. Bank v. Mead Mercantile Co.*, 151 Mo. 149; *Berkeley v. Green*, 102 Va. 378.

A reservation making an attorney's fee a preferred claim, if not fraudulent, does not invalidate the assignment as to other matters. *Little Rock Bank v. Frank*, 63 Ark. 16, 58 Am. St. Rep. 65.

5. To Compromise with Debtors. — *O'Gwinn v. Winner*, (Miss. 1899) 25 So. Rep. 354.

**92.** 5. *Lippincott v. Rich*, 19 Utah 140.

**93.** 4. Discretion as to Private or Public Sale. — In *John Hibben Dry-Goods Co. v. Haley*, (Ky. 1899) 50 S. W. Rep. 252, a provision that the assignee might sell at public or private sale, at his discretion, though in violation of the statute, was held not to invalidate the assignment.

Provision for Sale at Public Auction. — A direction concerning the disposition of an assigned estate that the assignee shall "dispose of the same in the manner provided by said law" is not a direction to sell at public auction, and is not void under the *Arkansas* statute. *Adams v. Allen-West Commission Co.*, 64 Ark. 603.

**95. XI. OTHER FEATURES OF ASSIGNMENTS — 3. Provisions for Payment of Debts — a. IN GENERAL.** — See note 4.

**96. b. MISDESCRIBED DEBTS.** — See note 1.

**c. SECURED DEBTS.** — See note 4.

**98. 4. Limiting Time for Execution of Trust.** — See note 3. See also the title FRAUDULENT SALES AND CONVEYANCES, **428. 3 et seq.**

**XII. EFFECT OF ASSIGNMENTS — 1. In General.** — See notes 6, 7.

**99. Assignor's Lessor — How Affected.** — See note 1.

**2. Effect upon Prior Liens — a. IN GENERAL.** — See note 4.

**100. b. VENDORS' AND CONSIGNORS' LIENS.** — See note 1.

**95. 4. Property Held in Trust.** — The *Kentucky* statute provides that "debts due by an assignor as guardian, committee, trustee of an express trust created by deed or will, or as personal representative, shall be paid in full before the general creditors receive anything." *Weiser v. Muir*, 103 Ky. 499.

When a partnership used funds belonging to the ward of one partner such funds constitute a preferred claim upon the firm estate in an assignment for creditors. *Adams v. Allen-West Commission Co.*, 64 Ark. 603.

**96. 1.** See *Sanger v. Burke*, 18 Tex. Civ. App. 106.

**4. Secured Debts.** — A creditor is entitled to hold his securities, whatever they may be, until he gets his pay; but where a claim is partly paid out of the proceeds of collateral, the creditor's claim will be reduced by that amount in the final distribution. *Doolittle v. Smith*, 104 Iowa 403.

**98. 3. The Arkansas Statute** requires the sale of assigned property within one hundred and twenty days of the giving of the bond, and where a reservation in a deed requires the sale to be within one hundred and twenty days of date the assignment is good when the bond was given on that date. *Mansur, etc., Implement Co. v. Wood*, 63 Ark. 362.

**Length of Time Does Not Invalidate.** — A trust assignment is not void on its face by reason of the length of time allowed to the assignee in which to act. *Reed Fertilizer Co. v. Thomas*, 97 Tenn. 478.

**6. Property Cannot Be Reached by Creditors.** — *Forrest v. Letellier*, 24 Quebec Super. Ct. 215.

**The Assignee Stands in His Assignor's Shoes**, and has no better claims against securities than the assignor had. *Hubbard v. Tod*, 171 U. S. 474; *Eastern Trust, etc., Co. v. American Ice Co.*, 14 App. Cas. (D. C.) 304; *San Jose First Nat. Bank v. Menke*, 128 Cal. 103; *George v. Pierce*, 123 Cal. 172; *Home Sav., etc., Bank v. Wheeler*, 74 Ill. App. 261; *Phenix Milling Co. v. Anderson*, 78 Ill. App. 253; *Mills v. Bear*, 95 Ill. App. 586; *Weir v. Mowe*, 182 Ill. 444; *Cunningham v. Estill*, (Ky. 1902) 68 S. W. Rep. 1081; *King v. Nichols*, 138 Mass. 18; *Silby v. Boston, etc., R. Co.*, 176 Mass. 158; *Evans-Snyder-Buell Co. v. Turner*, 143 Mo. 638; *Durfee v. Harper*, 22 Mont. 354; *Lancaster County Bank v. Gillilan*, 49 Neb. 165; *Blair State Bank v. Stewart*, 57 Neb. 58; *Moss v. Lindblomm*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 157; *Hogan's Estate*, 181 Pa. St. 500; *McGuigan v. Boll*, 11 York Leg. Rec. (Pa.) 30; *Ahl's Estate*, 15 Pa. Super. Ct. 224; *Wertheimer-Swartz Shoe Co. v. Faris*, (Tenn. Ch.

1898) 46 S. W. Rep. 336; *Wilson v. Sullivan*, 17 Utah 341; *Lippincott v. Rich*, 19 Utah 140. See also the title ASSIGNMENTS, **1079. 4. et seq.**

**Assignee Not Innocent Purchaser for Value.** — *Smith v. Hunter*, 4 Kan. App. 377; *Walker v. Walker*, (Ky. 1897) 41 S. W. Rep. 315; *Walker v. Walker*, (Ky. 1900) 55 S. W. Rep. 726; *Babcock v. Maxwell*, 29 Mont. 31; *Ocean Beach Assoc. v. Trenton Trust, etc., Co.*, (N. J. 1901) 48 Atl. Rep. 559.

**7. Seizure by Creditors After Assignment.** — After an assignment the creditors of the assignor cannot, in opposition to the curator, seize any of the movable effects, even those of which the curator has not taken possession. *Turcotte v. Jacob*, 16 Quebec Super. Ct. 221.

**Assignee Is Legal Owner.** — *Carey v. Foster*, 7 Wyo. 216. But see *Bartlett v. Meyer-Schmidt Grocer Co.*, 65 Ark. 290, holding that title vests in the court upon an assignment, and the court acts through the assignee.

**Assignor Has No Power over Property After Assignment.** — After a debtor has assigned for benefit of creditors, he has no rights whatever in the assigned estate. *Silby v. Strong*, 38 Oregon 36.

**Assignee Takes Title as Trustee.** — *In re Passmore*, 194 Pa. St. 632.

**Creditor's Right to Sue Not Suspended.** — "The statute governing voluntary assignments of debtors for the benefit of creditors does not suspend the creditor's right to maintain an action at any time for the recovery of a personal judgment against the assignor for the amount due." *New Albany Mfg. Co. v. Sulzer*, 29 Ind. App. 89.

**99. 1.** See *Rand v. Francis*, 168 Ill. 444. Compare *Barnhart's Estate*, 13 York Leg. Rec. (Pa.) 129.

**But a Landlord's Subsisting Lien for Rent** is enforceable against the assignee. *Maverick v. Skinner*, (Tex. Civ. App. 1899) 50 S. W. Rep. 640. See generally the title LANDLORD AND TENANT, **330. 6.**

**4. Sweet, etc., Co. v. Union Nat. Bank**, 149 Ind. 305, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 99; *Re Thompson*, 17 Ont. Pr. 109. See also *Haskell v. Hill*, 169 Mass. 124.

**A Bailor** has a lien unaffected by an assignment for creditors. *Knapp v. McCaffrey*, 178 Ill. 107, 69 Am. St. Rep. 290.

**100. 1.** *Winston v. Miller*, 139 Ala. 259; *In re Wise*, 121 Iowa 359; *National Bank of Deposit v. Rogers*, 166 N. Y. 380; *Linn v. Collins*, 47 W. Va. 250, 81 Am. St. Rep. 788. See also *Schwartz v. Messinger*, 167 Ill. 474; *Co-*

- 100.** *d.* LIENS FOR IMPROVEMENTS. — See note 3.  
*e.* JUDGMENT AND EXECUTION LIENS. — See note 4.  
**101.** *f.* MORTGAGE LIENS. — See note 4.  
**102.** See note 1.  
**3.** Assignments versus Subsequent Attachments. — See note 2.  
**104.** **5.** Jurisdiction over Assignments — Statutory Jurisdiction. — See note 12.

*lumbia Finance, etc., Co. v. Morgan*, (Ky. 1898) 44 S. W. Rep. 389.

**Exempt Property.** — In *Florida*, by statute, a vendor has a claim against property otherwise exempt, and without attacking an assignment for creditors may proceed against the property on which the debt is due. *Cator v. Blount*, 41 Fla. 138.

**Necessity of Recording.** — See *Morgan Mach. Co. v. Rauch*, 84 Mo. App. 514.

**100. 3. Liens for Improvements.** — One who has furnished to the assignee materials that go to improve the estate will have a preference over the general creditors. *Mann v. Wakefield*, 11 Pa. Super. Ct. 18.

**A Mechanic's Lien Filed After an Assignment for the benefit of creditors, but within the ninety days prescribed by statute for the filing of such liens, is effective as against such assignment.** *John P. Kane Co. v. Kinney*, 174 N. Y. 69, reversing 68 N. Y. App. Div. 163, and affirming (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 4; *Armstrong v. Borden's Condensed Milk Co.*, 174 N. Y. 510, reversing 65 N. Y. App. Div. 503.

**4. Judgment and Execution Liens** existing prior to the assignment are not affected thereby. *Glanz v. Smith*, 177 Ill. 156; *Fair Hope North Savage Fire Brick Co.'s Estate*, 183 Pa. St. 96; *Merchants Bank v. Ballou*, 98 Va. 112, 81 Am. St. Rep. 715; *Elliott v. Hamilton*, 4 Ont. L. Rep. 585. See also *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250, holding unconstitutional a statute that provided for the dissolution of a levy by an assignment made within ten days after such levy. So an assignment does not oust a prior attachment. *Re Thompson*, 17 Ont. Pr. 109.

But a judgment recovered after the assignment has no priority over the assignment. *Kaughran v. H. B. Clafin Co.*, 22 N. Y. App. Div. 149; *Irwin v. Lloyd*, 65 Ohio St. 55; *Shimp's Estate*, 197 Pa. St. 128.

**Judgment Creditors — Assignee's Sale.** — A court will not order a sale by an assignee on terms less favorable to a judgment creditor than he could get by a sheriff's sale that he had taken steps to procure. *Bosworth's Assignment*, 7 Pa. Dist. 410.

**Judgment Lien Does Not Attach on Rents Collected by Assignee.** — *Mann v. Poole*, 48 S. Car. 154.

**101. 4. Assignee Takes Subject to Mortgage Liens.** — *Sweet, etc., Co. v. Union Nat. Bank*, 149 Ind. 305, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 101; *Matter of Windhorst*, 107 Iowa 58; *Lancaster County Bank v. Gillilan*, 49 Neb. 165; *Adair v. Blackburn*, 60 Ohio St. 575; *Grube v. Lillenthal*, 51 S. Car. 442; *Stainback v. Junk Bros. Lumber, etc., Co.*, 98 Tenn. 306. See also *Garner v. Fry*, 104 Iowa 515; *Ringen Stove Co. v. Bowers*, 109 Iowa 175.

Where a mortgage pledges the rents, profits, etc., to the mortgagee, the lien of his mortgage,

as against the assignee, extends to such rents and profits to the extent necessary for his security. *Hutchinson v. Straub*, 64 Ohio St. 413, 83 Am. St. Rep. 764.

**Agreement to Sell Free of Lien.** — An assignee and a mortgagee may agree that the assigned estate be sold free of the mortgage lien. *In re McFadden*, 191 Pa. St. 624.

**A Chattel Mortgage Given to Secure Fees of an Attorney** for services rendered in connection with the assignment for creditors has been held to take no priority. *In re Merling*, 5 Ohio Dec. 390.

**Effect of Failure to Record.** — A mortgage not recorded until after the assignment constitutes no lien against the general creditors of the mortgagor assignor. *In re H. G. Andrae Co.*, 117 Fed. Rep. 561. See also *El Reno First Nat. Bank v. Saylor*, 4 Okla. 408.

Where, pursuant to agreement, a mortgage was not recorded for four years, and the purpose was to mislead as to the mortgagor's credit, the creditors under an assignment were held to have preference. *Kickbusch v. Corwith*, 108 Wis. 634.

But an unrecorded chattel mortgage made prior to an assignment is paramount as against an assignee who knew of its existence. *Canfield v. Lathrop*, 4 Ohio Dec. (Reprint) 51, 1 Cleve. L. Rec. 67.

In *Nebraska* it has been held that an unrecorded mortgage is a valid lien against an assigned estate except as against other creditors having recorded mortgages. *Blair State Bank v. Stewart*, 57 Neb. 58.

**102. 1. Equitable Lien.** — See *Textor v. Orr*, 86 Md. 392.

**2. Attachment Before Assignment Recorded.** — Where the assignee took possession before the levy by creditors such possession was held to be good against them although the assignment was not recorded until the next day. *Feltenstein v. Stein*, 157 Ill. 19.

**104. 12. As to the Jurisdiction of Particular Courts,** under the statutes of the various states, see *Sterns Paper Co. v. Williams*, 178 Ill. 626; *Podolski v. Stone*, 186 Ill. 540; *Osborne v. Williams*, 34 Ill. App. 421; *Taylor v. Seiter*, 100 Ill. App. 643; *Smith v. Sulzer Mach. Co.*, (Ky. 1899) 51 S. W. Rep. 449; *Howland's Appeal*, 67 N. H. 575; *Gilroy v. Somerville Woolen Mills*, (N. J. 1904) 58 Atl. Rep. 651; *Matter of Sheldon*, 72 N. Y. App. Div. 625; *Rogers v. Pell*, 166 N. Y. 565; *Standard Home, etc., Assoc. Co. v. Jones*, 64 Ohio St. 147; *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161.

**Effect on Right to Sue.** — The *Illinois* statute giving control of assigned estates to the County Court does not free an assignee from personal liability on contracts made by him in that capacity. *Smith v. Williams*, 178 Ill. 420.

The fact that a corporation has assigned for benefit of creditors under the state laws, and that the estate is in the hands of an assignee,

- 105.** Exclusive Statutory Jurisdiction. — See note 1.  
Concurrent Jurisdiction. — See note 2.  
General Equity Jurisdiction. — See note 3.
- 106.** Federal Jurisdiction. — See note 1.  
6. Assigned Property Not Exempt from Taxation. — See note 2.
- 109.** XIII. DUTIES, POWERS, AND RIGHTS OF ASSIGNEE — 2. As Prescribed by Statute. — See note 5.
- 110.** 3. Duty to Give Bond. — See note 3.
- 111.** 5. Duty to File Inventory. — See note 3.  
6. Right to Take Possession. — See note 4.
- 112.** Actions by Assignee. — See note 2.  
Assignee's Defense of Suits. — See note 3.  
Assignee's Attack upon Assignor's Fraudulent Transfers — At Common Law. — See note 4.

does not prevent the United States courts from entertaining an action against the corporation. *Anglo-American Land Mortg., etc., Co. v. Cheshire Provident Inst.*, 124 Fed. Rep. 464.

**105.** 1. Exclusive Statutory Jurisdiction. — See *American Trust, etc., Bank v. Dawson*, 75 Ill. App. 624; *Brown v. Stewart*, 78 Ill. App. 387; *Weir v. Mowe*, 182 Ill. 444; *Wilson v. Swigart*, 1 Ohio Dec. 418.

2. Concurrent Jurisdiction. — *Matter of Merkle*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 169.

3. Under the New York General Assignment Act. — *Matter of Sheldon*, 173 N. Y. 287.

**106.** 1. The Vesting of an Assigned Estate, under a state statute, in an assignee does not prevent a federal court in a proper case from entering judgment against the assignor. *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161.

**Jurisdiction on Removal.** — A bill having been filed in a state court to administer properties of a trust estate over which such court had jurisdiction, parts of which were in each of two federal districts, upon removal to the federal court it has the same jurisdiction over the land in the other division of the district. *Memphis Sav. Bank v. Houchens*, (C. C. A.) 115 Fed. Rep. 96.

2. Subject to Taxation. — *In re Lewis Invest. Co.*, (Iowa 1902) 89 N. W. Rep. 218; *Youtsey v. Com.*, 110 Ky. 555; *Matter of Ginsburg*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 745; *French v. Bobe*, 64 Ohio St. 323; *Carey v. Foster*, 7 Wyo. 216.

**Delay in Presenting Claim.** — When the tax bill was not presented within two years of the assignment, and was presented subsequent to a motion to confirm a referee's report on an assignee's accounting, the taxes will not be paid until payment of costs, commissions, and expenses. *Matter of Bowlby*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 311.

**109.** 5. Duties of Assignee Prescribed by Statute. — In *Kansas* an assignee is a statutory officer, having no powers except such as are expressly derived from the statutes. *Kohn v. Hine*, 7 Kan. App. 776.

The assignee represents creditors under the *Minnesota* statute in that he can attack all fraudulent transfers. *Thomas Mfg. Co. v. Drew*, 69 Minn. 69.

**110.** 3. Failure to Give Bond. — In *Michigan*, if a bond is not filed within ten days, together with the deed of assignment or a dupli-

cate thereof, and a list of the creditors, the assignee, as such, cannot bring an action. *McCuaig v. City Sav. Bank*, 111 Mich. 356.

**Assignee Has No Right to Possession until Bond Is Filed.** — *Martin Browne Co. v. Morris*, 1 Indian Ter. 495.

**111.** 3. No Right to Possession until Inventory Filed. — *Martin Browne Co. v. Morris*, 1 Indian Ter. 495.

4. Possession by Assignee. — An assignee who has denied that goods in his possession belonged to him may still claim them as a part of the estate. *Lanahan v. Drew*, 72 Ill. App. 203.

If an assignor remains in possession it is an incident from which fraud may be inferred, but proof of good faith overcomes such inference. *Robinson v. Worley*, (Ky. 1897) 42 S. W. Rep. 95.

An assignment for the benefit of creditors must be accompanied by an immediate delivery, followed by an actual and continued change of possession. *Wright v. Lee*, 10 S. Dak. 263. See also *Lindsay v. Union Surety, etc., Co.*, 199 Pa. St. 296.

**112.** 2. United States. — *Blanton v. Kentucky Distilleries, etc., Co.*, 120 Fed. Rep. 318; *Brown v. Parker*, 38 C. C. A. 261, 97 Fed. Rep. 446.

*Connecticut.* — *Newtown Sav. Bank v. Lawrence*, 71 Conn. 358.

*Illinois.* — *Congress Constr. Co. v. Farson, etc., Co.*, 101 Ill. App. 279.

*Iowa.* — *Ringen Stove Co. v. Bowers*, 109 Iowa 175.

*Kansas.* — *Sturtevant v. Sarbach*, 58 Kan. 410; *John Deere Plow Co. v. Emporia Nat. Bank*, 59 Kan. 38.

*Kentucky.* — *Wisdom v. Russell*, (Ky. 1899) 53 S. W. Rep. 284.

*Missouri.* — *Haseltine v. Messmore*, 184 Mo. 298; *Morgan Mach. Co. v. Rauch*, 84 Mo. App. 514; *Brookshier v. Chillicothe Town Mut. F. Ins. Co.*, 91 Mo. App. 599.

*Nebraska.* — *Miller v. Waite*, 59 Neb. 319; *Miller v. Waite*, 60 Neb. 431.

*New York.* — *Sweetser v. Davis*, (Supm. Ct. App. Div.) 5 N. Y. Annot. Cas. 227.

*Ohio.* — *Armstrong v. Grannis*, 4 Ohio Dec. (Reprint) 54, 1 Cleve. L. Rec. 71.

*Texas.* — *Schneider-Davis Co. v. Brown*, (Tex. Civ. App. 1898) 46 S. W. Rep. 108.

*Virginia.* — *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798.

**112. Assignee's Statutory Right.** — See note 5.

**This Right Is Exclusive.** — See note 6.

**113. 7. Performance of Assignor's Contracts.** — See note 2.

**8. Duty to Convert Assigned Property** — *a.* **TO AVOID UNNECESSARY DELAY.** — See note 3.

**Delay Governed by Discretion.** — See note 4.

*c.* **COMPELLING ASSIGNEE TO ACT.** — See note 6.

**114. 9. Sale of the Assigned Property** — *a.* **ASSIGNEE'S DISCRETION AS TO MODE.** — See note 2.

**Consent of Creditors.** — See note 4.

**Sale of Encumbered Realty.** — See note 7.

**115. Sale of Debts Due Assignor.** — See note 3.

*Wisconsin.* — See *Durr v. Wildish*, 100 Wis. 411.

**Assignee's Right as Against Attachments.** — Where an assignee is also an attaching creditor and has accepted, the attachment is dissolved thereby. *Ryhiner v. Ruegger*, 19 Ill. App. 156.

**Assignee May Bring Action for Partition.** — *Hortsman v. Ritter*, 9 Ohio Dec. 413, 6 Ohio N. P. 470.

**Assignee May Compromise Claims.** — *Mitchell v. Stoddard County Bank*, 58 S. W. Rep. 605, 22 Ky. L. Rep. 721.

**112. 3. F. O. Sawyer Paper Co. v. Continental Printing Co.**, 77 Mo. App. 184; *Markell v. Hill*, 64 N. Y. App. Div. 191, 34 Misc. (N. Y.) 133; *Taylor v. Ellis*, 200 Pa. St. 191.

**4. Watson v. Bonfils**, (C. C. A.) 116 Fed. Rep. 157; *Hinkley v. Reed*, 182 Ill. 440; *Austin v. Bruner*, 65 Ill. App. 301; *Wheeler v. Home Sav., etc.*, Bank, 85 Ill. App. 28; *Ross v. Saylor*, 104 Ill. App. 19; *Haseltine v. Messmore*, 184 Mo. 298; *Babcock v. Maxwell*, 29 Mont. 31; *Commonwealth Title Ins., etc., Co. v. Harry*, 9 Pa. Dist. 204, 23 Pa. Co. Ct. 468; *Crocker v. Huntzicker*, 113 Wis. 181.

**5. Assignee's Right to Attack Assignor's Fraudulent Transfers — Statutes.** — *In re H. G. Andrae Co.*, 117 Fed. Rep. 561; *Cooper v. Nolan*, 138 Cal. 248; *Bailey v. American Nat. Bank*, 12 Colo. App. 66; *Taylor v. Seiter*, 100 Ill. App. 643; *Searles v. Little*, 153 Ind. 432; *Boynton v. Roe*, 114 Mich. 401; *Hay v. Tuttle*, 67 Minn. 56; *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549; *Blair State Bank v. Stewart*, 57 Neb. 58; *Loucheim v. Casperson*, 61 N. J. Eq. 529; *Watson v. Rowley*, 63 N. J. Eq. 195; *Sheldon v. Wickham*, 161 N. Y. 500; *Lain v. Sayer*, 50 N. Y. App. Div. 554; *Creteau v. Foote, etc.*, Glass Co., 54 N. Y. App. Div. 168; *Taylor v. Lauer*, 127 N. Car. 157; *Wachtel v. Campbell*, 12 Ohio Cir. Dec. 148, 21 Ohio Cir. Ct. 731; *Momsen v. Noyes*, 105 Wis. 565; *Crocker v. Huntzeker*, 113 Wis. 181.

**Right of Assignor to Attack Preferential Mortgage.** — See *Schwartz v. Winkler*, 13 Manitoba 493.

**6. Harris v. Batjer**, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 702; *Hayes v. Ammon*, 90 N. Y. App. Div. 604.

**113. 2. Assignee's Liability Personal.** — A trustee of an assigned estate is personally liable on contracts entered into as trustee. *Wells-Stone Mercantile Co. v. Grover*, 7 N. Dak. 460. So an assignee who, before his appointment, guaranteed payment for goods ordered before

the assignment cannot thereby charge the estate. *Roozen v. Clonin*, 13 N. Y. App. Div. 190.

**3. Duty as to Converting and Distributing Trust Property.** — *Charles Beck Paper Co. v. Bates Paper Box Co.*, 7 Pa. Dist. 477, 21 Pa. Co. Ct. 401.

**Assignee Has Same Power to Convert Assets as Receiver.** — *Charles Beck Paper Co. v. Bates Paper Box Co.*, 7 Pa. Dist. 477, 21 Pa. Co. Ct. 401.

**Distribution as Ordered by Court.** — In *New Hampshire Trust Co. v. Taggart*, 68 N. H. 557, it was said to be the assignee's duty to preserve the property, convert the assets into cash, and make such distribution as the court may order.

**4. Discretion of Assignee.** — An assignee has the right to complete a house, putting it into such a condition as to sell at a profit. *Messersmith's Estate*, 1 Dauphin Co. Rep. (Pa.) 223.

A court will not set aside a deed of assignment because the assignee seems to have delayed unreasonably in the sale of the property when he shows that there was no market and that he thought best not to sell until conditions were better. *Hull v. Evans*, 59 S. W. Rep. 851, 22 Ky. L. Rep. 1118.

**6. Assignee May Be Compelled to Act.** — *John Deere Plow Co. v. Emporia Nat. Bank*, 59 Kan. 38; *Hall v. Rothchild*, 102 Ky. 582; *West v. Gribben*, 62 S. W. Rep. 869, 23 Ky. L. Rep. 311.

**114. 2. Blanton v. Kentucky Distilleries, etc., Co.**, 120 Fed. Rep. 318; *Matter of Leventritt*, 40 N. Y. App. Div. 429.

**Statutory Provisions.** — See *Peele v. Ohio; etc., Oil Co.*, 158 Ind. 374; *Gibbs v. Montcalm Circuit Judge*, 123 Mich. 615.

**Employment of the Assignor as Clerk in the sale of the goods does not invalidate the assignment.** *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798.

**4. Consent of Creditors.** — When an assignee sells the entire estate under an agreement that the vendor shall assume all the debts, and the creditors consent to the sale on those terms, they cannot object to the transfer of cash in hand, as it is a part of the estate. *Louisville Ins. Co. v. Tate*, 74 S. W. Rep. 722, 25 Ky. L. Rep. 61.

**7. Sale of Realty — Order of Court.** — Where it was doubtful whether the property was sufficient to pay the debts, an order of sale was held to be properly granted, in the sound discretion of the court, and necessary to make the title safe and the sale more advantageous. *In re White*, 178 Pa. St. 280.

**115. 3. Debts Due to Assignor.** — *Pace v. J. S. Merrill Drug Co.*, 2 Indian Ter. 218, holding

- 115.** *b.* NOTICE OF SALE. — See note 4.  
*c.* ASSIGNEE NOT TO BUY AT HIS OWN SALE. — See note 7.  
**116.** 10. Duty as to Incumbrances — Taxes — As to Taxes. — See note 2.  
 11. Duty to Keep and Produce Accounts. — See note 3.  
 Production of Assignor's Books. — See note 4.  
**117.** 12. Assignee Not to Profit by His Position. — See notes 1, 2.  
 13. Right to Reimbursement. — See note 3.

that a provision in the deed of assignment that the assignee should sell choses in action "as required by law" was void, since it was the assignee's duty to collect, not to sell, them.

**115.** 4. Notice of Sale to Creditors. — *Bristol Sav. Bank v. Judd*, 116 Iowa 26.

Where there was not proper notice of sale, and the assignee sold at auction property worth three thousand dollars for a nominal sum, he was surcharged with the value of the property. *Bailey's Assignment*, 27 Pittsb. Leg. J. N. S. (Pa.) 110.

**7.** Assignee May Not Purchase at Sale. — See *Allison's Estate*, 183 Pa. St. 555; *Nabours v. McCord*, (Tex. Civ. App. 1903) 75 S. W. Rep. 827.

In *Durfee v. Harper*, 22 Mont. 354, it was held that an assignee might bid for a third person when all the parties knew the facts.

A sale at which the trustee for creditors purchases is not void as to creditors who claim not under, but in opposition to, the assignment. *Wade v. Odle*, 21 Tex. Civ. App. 656.

**An Inspector of an Insolvent Estate cannot purchase**, on his own account, any part of the estate. *Gastonguay v. Savoie*, 29 Can. Sup. Ct. 613.

**116.** 2. Assignee's Duty as to Taxes. — *Barron v. Whiteside*, 89 Md. 448, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 116; *Starkey v. Wainright*, 9 Ohio Dec. 436.

**3. Duty as to Accounts.** — A failure of the assignee to keep accurate accounts, and to keep the funds of the trust separate from his own, will raise a presumption against him, and furnish a good reason for charging against him all that can be reasonably charged. *Milburn Mfg. Co. v. Wayland*, (Tenn. Ch. 1896) 43 S. W. Rep. 129. See also *Matter of Thoesen*, 62 N. Y. App. Div. 87; *Thompson v. Rich*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 265; *Zivley v. Lampasas First Nat. Bank*, (Tex. Civ. App. 1897) 39 S. W. Rep. 219.

Thus, where an assignee refuses to clear up items charged to expenses he will be charged with the gross amount. *Milton v. Richardson*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 380.

But where a deed of trust provided that the trustee should not be personally liable for errors and mistakes of judgment, a failure to account for a certain sum was held not to make the assignee liable when he was guilty of no dishonest act. *Scott v. Jones*, 9 N. Dak. 551.

An assignee can be made to account in a state court although the assignment has been superseded by bankruptcy proceedings. *Matter of Bieber*, 38 N. Y. App. Div. 639.

**4. Production of Books Enforceable.** — *Matter of Herrmann Lumber Co.*, 21 N. Y. App. Div. 514; *Matter of Meyer*, 29 N. Y. App. Div. 394; *Matter of Workmen's Pub. Assoc.*, 62 N. Y.

App. Div. 604; *In re Lange, etc.*, Mfg. Co., 113 Wis. 3.

**117.** 1. Assignee Making Profit from His Position. — An assignee who buys at his own sale and then sells to one to whom the assignor had contracted to convey must account for the price received from the vendee rather than the amount of the auction bid. *Mitchell v. Tyler*, (Ky. 1899) 49 S. W. Rep. 422.

**Bribe to Inspector of Insolvent Estate.** — An agreement for a payment to an inspector of an insolvent estate to influence his consent to an agreement which is not for the general benefit of the creditors is a bribe which is, in itself, sufficient to render corrupt, fraudulent, and void the transaction to induce which it was given. *Brigham v. La Banque Jacques-Cartier*, 30 Can. Sup. Ct. 429.

**2. Sale of Assignee's Own Property to Assignor Proper.** — *Simpson v. Greenwell*, (Ky. 1898) 44 S. W. Rep. 433.

**3. Assignee's Right to Reimbursement.** — *Armour v. Doig*, (Fla. 1903) 34 So. Rep. 249, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 117; *J. I. Case Plow Works v. Edwards*, 176 Ill. 34; *Hauze v. Powell*, 90 Ill. App. 448; *Louisville Banking Co. v. Etheridge Mfg. Co.*, (Ky. 1897) 43 S. W. Rep. 169; *Columbia Finance, etc., Co. v. Morgan*, (Ky. 1898) 44 S. W. Rep. 389; *Farmers', etc., Bank v. Norton*, (Ky. 1898) 44 S. W. Rep. 428; *Arterburn v. National Surety Co.*, 62 S. W. Rep. 864, 23 Ky. L. Rep. 288; *Matter of Bowlby*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 311; *Wells-Stone Mercantile Co. v. Aultman*, 9 N. Dak. 520; *Re State Bank*, 32 Oregon 84; *Phillips's Estate*, 15 Pa. Super. Ct. 226; *Gibson v. Gray*, 17 Tex. Civ. App. 646.

**Auditor's Fees.** — Ten dollars a day is not an excessive auditor's fee on an estate of one thousand dollars. *Hamme's Estate*, 12 York Leg. Rec. (Pa.) 129.

**The Assignee Must Look to the Assets of the Estate** for reimbursement, and not to the creditors personally, unless on a direct or implied promise of indemnity. *Johnston v. Dulmage*, 30 Ont. 233.

**When Reimbursement Not Allowed.** — Where an assignee disputed a lienor's claim for lumber, and they agreed to sell the lumber, deposit the proceeds, and await the issue, and the lienor obtained the proceeds, the assignee was held not to be entitled to reimbursement for expenses. *Clark v. B. B. Richards Lumber Co.*, 74 Minn. 305.

An assignor who rented an additional warehouse and employed his brother-in-law and the assignor for five months, but not under authority of the court, was held not to be entitled to wages for such clerks. *Hall v. Tarvin*, (Ky. 1898) 47 S. W. Rep. 434.

**The Expense of Contesting Indisputable Claims**

- 118.** For Fees Paid Attorneys. — See note 4.  
**119.** 14. Right to Compensation. — See note 2.  
 Same as Executors. — See note 3.  
**120.** Grading the Compensation. — See note 1.

cannot be charged against the estate. *Pittman v. Hopkins*, 74 Miss. 563.

**118. 4. Attorney's Fees.** — *Emig v. Barnes*, 77 Ill. App. 616; *Louisville Banking Co. v. Etheridge Mfg. Co.*, (Ky. 1897) 43 S. W. Rep. 169; *Stone v. Hart*, 66 S. W. Rep. 191, 23 Ky. L. Rep. 1777; *Mattingly v. Mattingly*, 72 S. W. Rep. 802, 24 Ky. L. Rep. 2029; *Weller v. Hull*, 74 S. W. Rep. 172, 24 Ky. L. Rep. 2185; *National Bank v. Dulaney*, 96 Md. 159; *Davis v. Swedish-American Nat. Bank*, 78 Minn. 408, 79 Am. St. Rep. 400; *Hay v. Bacon*, 80 Minn. 188; *Tishomingo Sav. Inst. v. Allen*, 76 Miss. 114; *Matter of Talmage*, 39 N. Y. App. Div. 466; *Matter of Ginsburg*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 745; *Matter of Reynolds*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 397; *Matter of Bowlby*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 311; *Matter of Dwight*, 61 N. Y. App. Div. 357; *Parkhurst, etc., Co. v. Etna Coal Co.*, (Tenn. Ch. 1899) 54 S. W. Rep. 58; *Morris v. Ellis*, (Tenn. Ch. 1901) 62 S. W. Rep. 250; *Berkeley v. Green*, 102 Va. 378.

Where an attorney for the assignor and for some creditors was also counsel to the assignee, it was held that his fees should not be paid out of the assigned estate. *Wright's Estate*, 182 Pa. St. 90.

On an assignee's defalcation the attorney is entitled to have his fees paid directly out of the estate. *Courier Journal Job-Printing Co. v. Columbia F. Ins. Co.*, (Ky. 1900) 54 S. W. Rep. 966.

**An Assignee Cannot Retain His Own Firm**, but is entitled to reasonable attorney's fees for defending an action. *Matter of Clute*, 14 N. Y. App. Div. 234.

**Clerical Work.** — It has been held that an assignee should do all the clerical work himself, and so has no right to employ an attorney for such purposes and charge the expense thereof to the estate. *Matter of Bicknell*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 302. See also *Matter of Friend*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 300.

**119. 2. Compensation — When Allowed.** — See generally *National Bank v. Dulaney*, 96 Md. 159; *Mann v. Poole*, 48 S. Car. 154; *Matter of Day*, 18 Wash. 359; *Second Ward Sav. Bank v. Schranck*, 100 Wis. 480.

**Compensation to Be Determined by Court.** — *Branch v. American Nat. Bank*, 57 Kan. 282; *Hay v. Bacon*, 80 Minn. 188; *In re H. Penner Co.*, 93 Wis. 655.

**Amount of Compensation.** — Where an estate sold for sixty thousand dollars and the assignee had worked two years and advanced one thousand, he was held to be entitled to two thousand four hundred dollars. *Dunlap v. Fible, etc., Distilling Co.*, 77 S. W. Rep. 173, 25 Ky. L. Rep. 1116.

By rule of the St. Louis Circuit Court in *Missouri* the assignee's commissions and counsel fees may not exceed fifteen per cent. of the estate received and disbursed by him. *Elaine Bldg., etc., Assoc. v. Hill*, 82 Mo. App. 317.

**Prohibition as to Compensation of Nonresident**

**Assignee.** — *Tennant v. Macewan*, 24 Ont. App. 132.

**Though an Assignee Has Allowed Funds to Lie Idle** for six years and has not been charged interest, commissions may nevertheless be allowed to him. *Matter of Bostwick*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 17.

**When an Assignee Is Being Removed for Negligence** and an accounting is demanded the court must have evidence whether or not his conduct will preclude him from commissions, before granting them. *Matter of Reynolds*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 397.

**Where the Assignee Is Indebted to the Assignor** such indebtedness must be deducted from the commissions, in paying the assignee. *In re Excelsior Mfg. Co.*, 164 Mo. 316.

**An Assignee Who Acts Also as Attorney** may be allowed his commission independently of his fees, but where an estate is subject to liens the commissions should be computed only on the amount over and above the liens. *Morris v. Ellis*, (Tenn. Ch. 1901) 62 S. W. Rep. 250.

**The Assignee Cannot Charge the Creditors Personally** with the amount of his compensation, in the absence of an express or implied promise on their part to pay, but must look to the assets of the estate. *Johnston v. Dulmage*, 30 Ont. 233.

**When Compensation Denied.** — An assignee is not entitled to compensation for services to the creditors nor when it appears that full compensation has been allowed. *Reed v. Terhune*, 12 Ohio Cir. Dec. 829, 22 Ohio Cir. Ct. 544.

Where an assignee sells mortgaged land to the mortgagee he is not entitled to commissions on the sale. *Harrison v. Chatfield*, 5 Ohio Cir. Dec. 553, 12 Ohio Cir. Ct. 294.

Where the assigned estate was bid in by a mortgagee for less than the mortgage debt, the assignee was held not to be entitled to compensation from him. *Andrews v. Johns*, 59 Ohio St. 65.

An assignee who refuses to account as to the sums collected by him and as to the expenses is not entitled to commissions. *Caumiser v. Humpich*, 64 S. W. Rep. 851, 23 Ky. L. Rep. 1133.

**3. Rule Similar to that Concerning Executors.** — *Re Woodall*, 33 Oregon 382; *Woodcock v. Reilly*, 16 S. Dak. 198; *Beecher v. Foster*, 51 W. Va. 605.

**Same as Clerks and Masters.** — In *Tennessee*, in the absence of provisions in the trust deed, the compensation of the trustee will ordinarily be the same as that of clerks and masters, but the court may exercise its discretion in the matter. *German Bank v. Haller*, 103 Tenn. 73.

**120. 1. Grading Compensation.** — See *Coleman's Estate*, 200 Pa. St. 29, holding that in fixing the amount of compensation the court should consider the ability, judgment, responsibility, and expenses of the assignee and the size of the estate.

**Compensation of Nominal Assignee.** — See *Tennant v. Macewan*, 24 Ont. App. 132.



**120.** Commissions. — See note 2.

Where the Assignment Is Fraudulent. — See note 3.

**121.** 15. Discharge of Assignee and Sureties. — See note 1.

**XIV. LIABILITIES OF ASSIGNEE AND SURETIES — 1. Assignee's Liability for Neglect and Mismanagement.** — See note 4.

**122.** For Realizing Less than Appraisement. — See note 6.

**124.** 3. Assignee's Liability for Interest — For Delay and Misappropriation. — See note 2.

**125.** 4. Assignee's Liability for Rent. — See note 2.

**120. 2. Where Assignor Effected a Composition.** — Where, upon a composition, the assignee refused to reassign unless he be allowed to retain his statutory fee and be released, it was held that a release given could not be avoided for duress, since the *New York* statute does not prevent an agreement by the assignor to pay more than the statutory fee, provided only that the creditor's interests have been disposed of. *McCann v. O'Brien*, 40 N. Y. App. Div. 193.

Where the Assignee Sold a Creditor's Collateral he was held to be entitled to commissions only on the surplus that went to swell the funds of the estate. *Matter of Talmage*, 39 N. Y. App. Div. 466.

**3. Where the Assignor Became Bankrupt** within four months after the assignment it was held that as the assignment was a violation of the bankruptcy law and the assignee was the agent of the assignor he could recover no allowance over the actual and necessary expense in the management of the estate. *In re Mays*, 114 Fed. Rep. 600.

**121. 1. As to the Right of the Assignee** under the various statutes to final settlement of his account and discharge from his trust, see *Knoedler v. Teegarden*, 72 S. W. Rep. 268, 24 Ky. L. Rep. 1785; *Abner L. Backus, etc., Co. v. Backus*, 9 Ohio Cir. Dec. 789, 18 Ohio Cir. Ct. 341; *Re Murray*, 31 Oregon 173.

**4. Negligence and Mismanagement.** — *Cooper v. Lankford*, 78 S. W. Rep. 197, 25 Ky. L. Rep. 1578; *In re Excelsior Mfg. Co.*, 164 Mo. 316; *Matter of Leventritt*, 40 N. Y. App. Div. 429; *In re Thompson Dry Goods Co.*, 11 Ohio Dec. 303, 8 Ohio N. P. 373; *Milburn Mfg. Co. v. Wayland*, (Tenn. Ch. 1896) 43 S. W. Rep. 129; *Ruhl v. Berry*, 47 W. Va. 824, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 121; *Hill v. American Surety Co.*, 107 Wis. 19.

**Assignee Liable for Conversion.** — *Jones v. McCormick Harvesting Mach. Co.*, (C. C. A.) 82 Fed. Rep. 295.

**Assignor and Assignee in Collusion.** — Where the assignee knows of a collusive judgment confessed by the assignor and enters into the fraud he will be surcharged with the loss thereby sustained by the estate. *In re Bailey*, 188 Pa. St. 590.

**Assignee's Liability to Assignor for Exempt Property.** — Where an assignor is entitled to exemptions a refusal by the assignee to pay over the amount will render him personally liable for the money. *Overley v. Given*, (Ky. 1899) 52 S. W. Rep. 1059.

**When Assignee Not Liable.** — An assignee is not liable for loss resulting from the authorized act of a duly appointed receiver. *D. Keefer Milling Co. v. Covington First Nat. Bank*, (Ky.

1896) 37 S. W. Rep. 265. Nor is he liable for loss caused by an error of judgment where he acted in good faith and with fair discretion. *J. I. Case Plow Works v. Edwards*, 71 Ill. App. 655. So an assignee is not liable on a contract of his assignor when he had no notice of such a contract. *Wallace v. Wold*, 4 Ohio Cir. Dec. 475.

**122. 6. Lacy v. Gunn**, 144 Cal. 511; *J. I. Case Plow Works v. Edwards*, 176 Ill. 34.

**Inventory by Assignor.** — An assignee will not be surcharged with the difference between the inventory value and the sum realized when the assignor filed the inventory. *Matter of Ginsburg*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 745.

**Liability Not for Appraised Value.** — An assignee should not be charged with the appraised value of goods, but the auditor must ascertain the actual value, and that is the right basis for a restatement of the account. *Powell's Estate*, 7 Pa. Dist. 27.

**124. 2. General Rule as to Intent.** — An assignee should try to invest the trust funds, and failing to do so he will be charged interest. *Lane's Appeal*, 24 Pa. St. 487.

**Delay in Paying Dividends.** — An assignee who without any apparent reason delays in the distribution of dividends is chargeable with interest thereon. *Morris v. Ellis*, (Tenn. Ch. 1901) 62 S. W. Rep. 250.

**125. 2. Assignee Not Bound to Accept Leasehold.** — *Judd v. Bennett*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 558; *Wilder v. McDonald*, 63 Ohio St. 383, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125.

**Illinois Rule.** — In Illinois the assignee may elect whether he shall retain the rights under a lease to his assignor, and if he retain the lease his liability therefor is personal. *Reynolds v. Fuller*, 64 Ill. App. 134. The assignee has a reasonable time in which to decide whether he will retain a lease owned by his assignor, but is chargeable with rent *pro rata* for the time he occupies the premises. *Rand v. Francis*, 168 Ill. 444.

**The Mississippi Statute** making a lessor who distrains on an assignee of the lessee for rent liable for contempt does not prevent him from claiming funds accruing from a sale of such goods, in the hands of the assignee. *Rice v. Harris*, 76 Miss. 422.

**Liability on Covenants.** — An assignee who takes a lease as an asset of an estate is not liable on the covenants thereon maturing before his acceptance. *Walton v. Stafford*, 14 N. Y. App. Div. 310.

**Liability Not Avoided by Abandonment.** — Having elected to accept a lease the assignee cannot get rid of his liability by mere abandon-

**125.** Assignee's Election Not to Hold Lease. — See note 3.

**126.** Election to Hold Lease. — See note 1.

Assignee's Personal Liability. — See note 2.

5. Assignee's Liability for Business Risks. — See note 3.

**127.** How Assignee May Be Protected — Consent of Creditors. — See note 2.

**129.** 8. Liability of Sureties. — See note 1.

**XV. RIGHTS OF CREDITORS — 1. Right to Attachment.** — See note 5. See also the title ATTACHMENT, **201. 2 et seq.**

**131.** Foreign Attaching Creditors Without Notice. — See note 1.

**2. Right of Judgment Creditors to Execution — Where Property Not Delivered to Assignee.** — See note 2.

**132. 3. Right to Vacate Assignment — b. WHAT CREDITORS MAY ATTACK ASSIGNMENT — Only Creditors Injured by It.** — See note 4. See generally the title CREDITORS' BILLS AND FRAUDULENT CONVEYANCES, 5 ENCYC. OF PL. AND PR. 388, and the Supplement thereto.

ment. *Thoms v. Meader*, 9 Ohio Dec. 490, 6 Ohio N. P. 242.

**125. 3. When Assignee Elects Not to Hold Lease.** — *Walton v. Stafford*, 162 N. Y. 558.

**126. 1. Illustrations.** — Offering a lease for sale is evidence of an election to accept it. *Rawn v. Hotel Madison Co.*, 25 Ohio Cir. Ct. 737.

An assignee is liable for rent of property that his assignor had leased, if he occupies it, but only for the time that he does occupy it. *Cameron v. Nash*, 41 N. Y. App. Div. 532.

**2. Assignee's Personal Liability.** — *Wilder v. McDonald*, 63 Ohio St. 383, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 126.

**Assignee Liable on Lease in Representative Capacity.** — When a lease is embraced in the properties of an assignee for benefit of creditors the assignee's liability thereon is in his representative capacity. *Man v. Katz*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 645. See also *Tierney v. Peerless Shoe Co.*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 803.

**3. Assignee Continuing the Business.** — Where an assignee allowed the assignor to conduct a business in his name, and he did so for several years at a profit, and the heirs of the assignor, on his decease, allowed the plan to continue and took the benefits accruing, the assignee was held not to be liable for losses suffered in an off year, except as to a minor's share. *Quimby v. Uhl*, 130 Mich. 198, 9 Detroit Leg. N. 1.

**Assignee Liable on Contracts Made as Assignee.** — *Smith v. Williams*, 178 Ill. 420.

**Profits of Business.** — Where an assignee conducts the assignor's business the profits belong to the estate, and the assignee must account for them. *In re Mansfield*, 113 Iowa 104; *Bennett's Estate*, 21 Pa. Co. Ct. 609.

**127. 2. Continuing Business with Consent of Creditors or Order of Court.** — *Smith v. Williams*, 178 Ill. 420.

**Payment into Court on interpleader will protect the assignee.** *Gregg's Assignment*, 74 Mo. App. 58.

**129. 1. Wilson v. Louisville Nat. Banking Co.**, 76 S. W. Rep. 1095, 25 Ky. L. Rep. 1065; *Huddleson v. Polk*, (Neb. 1903) 97 N. W. Rep. 624; *Maverick v. Skinner*, (Tex. Civ. App. 1899) 50 S. W. Rep. 640.

**5. Where Assignment in Fraud of Creditors.** — *Watson v. Bonfels*, (C. C. A.) 116 Fed. Rep.

157; *H. B. Claflin Co. v. Harrison*, 44 Fla. 218; *Louisville Banking Co. v. Etheridge Mfg. Co.*, (Ky. 1897) 43 S. W. Rep. 169; *Stevens v. Bell*, 6 Mass. 339; *Weston v. Nevers*, 72 N. H. 65. Compare *Anderson v. Doak*, 10 Ired. L. (32 N. Car.) 295; *Hockaday v. Drye*, 7 Okla. 288; *Happy v. Prickett*, 24 Wash. 290, a case of foreign assignment and attachment by domestic creditors.

**Preference Not Warranting Attachment.** — On the withdrawal of one partner from an insolvent firm the remaining partners assumed all debts, and one week thereafter assigned for the benefit of creditors with preference of a debt secured by mortgage on the withdrawing member's individual property. It was held that such preference did not furnish ground for an attachment. *Vahlberg v. Birnbaum*, 64 Ark. 207.

**Where No Fraud Inheres in the Assignment itself,** the fact that the debt sued for was fraudulently contracted furnishes no ground for the seizure by attachment of property covered by a deed of general assignment made by the debtor. *Marlin v. Tichgraeber*, 63 Kan. 521.

**An Attaching Creditor May Show that the Assignment Was Invalid** because not authorized by a legal meeting of the directors of the assigning corporation. *Calumet Paper Co. v. Haskell Show Printing Co.*, 144 Mo. 336, 66 Am. St. Rep. 425.

**Creditors Who Have Not Accepted** may attack though assenting creditors may not, in a case of a trust deed to secure certain creditors. *Kingman v. Cornell-Tebbetts Mach., etc., Co.*, 150 Mo. 282.

**131. 1. Foreign Attaching Creditors.** — In *Roberts v. Norcross*, 69 N. H. 533, it was held that a general assignment executed in some other state defeats the rights of subsequent attachments even where the trustee appointed in the deed has no notice of the assignment.

**2. Property Remaining in Possession of Assignor** — See *George v. Pierce*, 123 Cal. 172. See further the title FRAUDULENT SALES AND CONVEYANCES, **311. 4 et seq.**

**132. 4. Partnership Assignment.** — See *Carter-Battle Grocer Co. v. Jackson*, 18 Tex. Civ. App. 353.

**Any Creditor May Attack Assignment.** — See *Martin Browne Co. v. Morris*, 1 Indian Ter. 495.

**In Kentucky,** where an assignee refuses to

**133.** Assenting Creditors. — See note 2.

Creditors Accepting Benefits. — See notes 3, 4.

**134.** *c.* PRIORITY OF ATTACKING CREDITORS — Where Only One Claim Fraudulent. — See note 3.

**4.** Creditors' Claims and Dividends — *a.* PRESENTATION OF CLAIMS. — See note 4.

**136.** *d.* WHAT ACTS OF CREDITOR DEBAR HIS CLAIM. — See note 2.

**137.** See note 1.

bring an action to recover property fraudulently transferred by a debtor, the creditors may bring such an action, and the assignee, being made a party defendant and failing to take advantage of his right to prosecute the action, is precluded from so doing. *Wisdom v. Russell*, (Ky. 1899) 53 S. W. Rep. 284.

A creditor must represent one-fourth of the claims against an assigned estate before he is entitled to bring an action in the Circuit Court for its settlement. *Mattingly v. Elder*, (Ky. 1898) 44 S. W. Rep. 215, holding the statutory provision to be constitutional.

**133.** **2.** Assenting Creditors. — *Memphis Sav. Bank v. Houchens*, (C. C. A.) 115 Fed. Rep. 96; *Smith v. Herrell*, 11 App. Cas. (D. C.) 425.

And *vice versa*, creditors who attack an assignment for fraud cannot claim benefits under it. *Brown's Estate*, 193 Pa. St. 281.

But assenting creditors who reserve their claims against the officers of the assigning corporation may proceed against the officers in equity, after obtaining judgment against the corporation. *Hudson v. J. B. Parker Mach. Co.*, 173 Mass. 242.

**3.** Where Creditor Receives Benefits. — *Keith v. Arthur*, 98 Wis. 189; *Rielle v. Reid*, 26 Ont. App. 54.

But where an assignment reserves as exempt property not exempt because the debt was contracted for the purchase money of that very property, the creditor can proceed against such property. *Cator v. Blount*, 41 Fla. 138.

A creditor who elects to accept the benefit of a provision contained in a deed of assignment cannot attack provisions contained in it in favor of other creditors on the ground of fraud. He must either accept or reject it *in toto*. *Weiser v. Muir*, 103 Ky. 499.

Where a guardian wrongfully deposited moneys belonging to his ward, in a bank which failed, his acceptance of dividends from the assignee does not estop the ward from claiming the full amount. *Matter of Knapp*, 101 Iowa 488.

**4.** See *Matter of Garver*, 84 N. Y. App. Div. 262; *McLaughlin v. Park City Bank*, 22 Utah 473; *In re Gilbert*, 94 Wis. 108.

"The plaintiff cannot at the same time attack the transfer for fraud and claim rights under it." *Smith-McCord Dry Goods Co. v. Carson*, 59 Kan. 295.

**134.** **3.** *National Bank of Commerce v. Ripley*, 161 Mo. 126.

**4.** *Iowa.* — The Iowa statute requiring the filing of claims within three months has no application to the filing of an application for a preference, the claim for payment having been duly filed within the statutory time. *Matter of Knapp*, 101 Iowa 488.

*Illinois.* — To the same effect as *Kean v. Lowe*, 147 Ill. 564, stated in the original note, see *Rassieur v. Jenkins*, 170 Ill. 503; *H. B. Claffin Co. v. Kelley*, 169 Ill. 20; *Manufacturers' Paper Co. v. Royal Trust Co.*, 98 Ill. App. 41. See also *Higinbotham v. Chicago Title, etc., Co.*, 182 Ill. 68.

When the drawee of a draft presented his claim within the statutory period of three months, the payee will be subrogated to his rights. *Joliet Nat. Bank v. O'Donnell*, 165 Ill. 32.

A discontinuance before the period of three months has elapsed does not bar a creditor from his claim when he has not proved it. *Linington v. Dickinson*, 67 Ill. App. 266; *Kelley v. Leith*, 70 Ill. App. 35.

*Kansas.* — See *Barton v. Sticher*, 5 Kan. App. 577.

*New Hampshire.* — Claims against an insolvent should date from the appointment of the assignee. *Bank Com'rs v. Security Trust Co.*, 70 N. H. 543.

*New York.* — In *Matter of Bawly*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 311, a claim filed with the assignee after distribution, but before final decree, was allowed.

*In Texas* the statutes provide that creditors, to be entitled to share under the assignment, must assent thereto within four months. *Patty v. City Bank*, 15 Tex. Civ. App. 475. A creditor who garnishes property of the assignor and then assents within the period, but reserving his rights under the garnishment, is not entitled to participate. *Moody v. Templeman*, 23 Tex. Civ. App. 374.

The Wisconsin Statutes providing for the filing of claims against an assignor's estate do not relate to liabilities incurred by the assignee after the assignment. *Ringenoldus v. Abresch*, 119 Wis. 410.

**136.** **2.** Filing Claims in Bankruptcy. — A creditor who files a claim in bankruptcy proceedings is not thereby debarred from proving his claim against an assignee for the benefit of creditors, but may hold the assignee and his sureties liable on their bond. *Ringenoldus v. Abresch*, 119 Wis. 410.

Obtaining Judgment on a claim does not bar the creditor from proving the claim under an assignment. *Lacy v. Gunn*, 144 Cal. 511.

The Pendency of an Action by creditors on their claims is no bar to an action by them for the settlement of an assigned estate. *Mattingly v. Elder*, (Ky. 1898) 44 S. W. Rep. 215.

A Creditor Who Opposes an Assignment cannot prorate with creditors who complied with the act. *Huddleson v. Polk*, (Neb. 1903) 97 N. W. Rep. 624.

**137.** **1.** Attaching Creditor. — To the same effect as *Valentine v. Decker*, 43 Mo. 583,

- 137.** Contesting Other Claims. — See note 2.  
*e.* PROOF OF CLAIMS. — See note 3.  
**138.** *f.* WHAT CLAIMS ARE PROVABLE. — See note 3.  
 Judgments on Mature Demands. — See note 4.  
**139.** Surety's Payment After Assignment. — See note 1.  
 Claim of Creditor's Transferee. — See note 3.  
*g.* THE ASSIGNEE'S DECISION — STATUTES. — See note 4.  
**140.** 5. Dividends of Partnership Creditors. — See note 1.  
**141.** 6. Dividends of Secured Creditors — The Prevailing Rule. — See note 2.

stated in the original note, see *Adler-Goldman Commission Co. v. People's Bank*, 65 Ark. 380. See also *Kerslake v. Brower Lumber Co.*, 40 Oregon 44.

But when attaching judgment creditors established that an assignment was fraudulent as to them, and as to them it was set aside, but they obtained nothing on their judgments, they were allowed to prove *pro rata* against the estate. *Matter of Garver*, 84 N. Y. App. Div. 262, 176 N. Y. 386.

So a creditor who sues out an attachment in ignorance of the assignment is not precluded from claiming thereunder. *National Bank of Commerce v. Graham*, 16 Colo. App. 498.

**Creditor in Another State.** — In *Wisconsin* it has been held that a creditor in Illinois with whom cash of the assignor had been deposited could apply such cash to his claims and still prove against the estate for the unpaid balance. *Segnitz v. Garden City Banking, etc., Co.*, 107 Wis. 171, 81 Am. St. Rep. 830.

**137.** 2. *Dreyfus v. Union Nat. Bank*, 164 Ill. 83.

**3. The Burden of Proof** is on the claimant. *Rippeimeyer v. P. Hanson Hiss Mfg. Co.*, 90 Md. 386.

**138.** 3. **Debts Capable of Liquidation at Assignment Provable.** — *Hill v. Graham*, 11 Colo. App. 536; *Smith v. Armour*, 1 Penn. (Del.) 361, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 138; *Moore v. Thompson*, 93 Mo. App. 336; *Jones's Estate*, 12 Pa. Super. Ct. 427.

**Illustrations.** — When the maker of a note assigns for benefit of creditors, the holder can prove the full amount against the estate, even though an indorser has made part payment subsequent to the assignment. *Beals v. Mayher*, 174 Mass. 470, 75 Am. St. Rep. 367.

When an indorser on a note assigns all his property for benefit of creditors, before the maturity of the note, the note is none the less a claim against the estate. *In re Voetter*, 7 Pa. Dist. 230, 28 Pittsb. Leg. J. N. S. (Pa.) 355.

A note on which an assignor for creditors is liable, and which matures after the assignment but during pendency of the proceedings, is a provable claim. *In re Sherry*, 101 Wis. 11.

**Damages for Breach of Contract** are provable. *Laclede Power Co. v. Stillwell*, 97 Mo. App. 258.

**Surety.** — In *Alabama* it is held that where the maker of a note assigns for the benefit of creditors a surety is a creditor. *Smith v. McCadden*, 138 Ala. 284.

**A Mortgagee's Claim** against the assigned estate should be filed with the assignee. *In re Lewis Invest. Co.*, (Iowa 1902) 89 N. W. Rep. 218.

**Creditor's Right of Set-off.** — A creditor's right to have a debt due from him to the assignor

set off against his claim upon the assigned estate extends only to claims existing at the date of the assignment, and not to those subsequently accruing. *Matter of Hatch*, 22 N. Y. App. Div. 16.

**Attorney's Fees.** — Creditors are not entitled to attorney's fees incurred in attaching the assignment. *Parkhurst, etc., Co. v. Etna Coal Co.*, (Tenn. Ch. 1899) 54 S. W. Rep. 58.

**Debts to Become Due** as well as debts due may be proved by a creditor, in *Illinois*, against the estate of an assignor for benefit of creditors. *H. B. Claffin Co. v. Kelley*, 169 Ill. 20.

**Debts Incurred Subsequent to the Assignment** cannot be proved against the estate. *Buckler v. Trigg*, 68 S. W. Rep. 637, 24 Ky. L. Rep. 410.

**4. Judgment Subsequent to Assignment.** — In an action *ex delicto* brought before the assignment, judgment obtained after the assignment is provable as a claim against the estate. *Lally v. Farr*, 9 Ohio Dec. 119, 6 Ohio N. P. 73.

**139.** 1. **Payment by Surety After Assignment** — *Markell v. Ray*, 75 Minn. 138, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139.

**3.** *Smith v. Craft*, 58 S. W. Rep. 500, 22 Ky. L. Rep. 643; *Huddleson v. Polk*, (Neb. 1903) 97 N. W. Rep. 624; *Voorhees v. Porter*, 134 N. Car. 591. See also *Matter of Dwight*, 61 N. Y. App. Div. 357.

**4. Missouri.** — See *Rice v. McClure*, 74 Mo. App. 379; *Elsea v. Pryor*, 87 Mo. App. 158.

**Kansas.** — An assignee's decision is binding upon him unless set aside by a competent court. *Matthewson v. Caldwell*, 59 Kan. 126. See also *Kohn v. Hine*, 7 Kan. App. 776.

**140.** 1. *Bartlett v. Meyer-Schmidt Grocer Co.*, 65 Ark. 290; *Matter of Dauchy*, 59 N. Y. App. Div. 383; *Rollins v. Humphrey*, 98 Wis. 66. See also the title **PARTNERSHIP**, 192. 7 *et seq.*

**141.** 2. **Secured Creditors.** — *Palmer v. Culverwell*, 85 L. T. N. S. 758; *Merrill v. National Bank*, 173 U. S. 142, citing 3 Encyclo. of Law and Eq. [AM. AND ENG. ENCYC. OF LAW] (2d ed.) 141; *Hendrie v. Graham*, 14 Colo. App. 13; *Knapp v. McCaffrey*, 178 Ill. 107, 69 Am. St. Rep. 290; *Friedlander v. Fenton*, 180 Ill. 312, 72 Am. St. Rep. 207; *Mead v. Randall*, 68 Minn. 233; *Bank Com'rs v. Security Trust Co.*, 70 N. H. 543; *Matter of Bicknell*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 302; *Williams v. Overholt*, 46 W. Va. 339.

In *Kentucky* secured creditors must first realize on their security and then share *pro rata* for the balance due. *Weller v. Hull*, 74 S. W. Rep. 172, 24 Ky. L. Rep. 2185. See also *Bell, etc., Co. v. Kentucky Glass Works Co.*, 65 S. W. Rep. 802, 23 Ky. L. Rep. 1934.

Where a creditor has a lien on realty and

**141.** The Minority Rule. — See note 3.

**142.** See note 1.

**143.** 7. Priority and Dividends of Preferred Creditors — *a.* ASSIGNEE'S EXPENSES A FIRST LIEN. — See note 1.

*c.* STATE CLAIMS AND TAXES. — See note 4.

**144.** *e.* CLAIMS FOR RENT. — See note 3.

**146.** XVI. RIGHTS AND TITLE OF PURCHASER AT ASSIGNEE'S SALE — 1. In General — No Specific Lien by Creditors. — See note 5.

**148.** 3. Purchaser's Refusal to Consummate Sale — Cloud on Title. — See note 5.

**XVII. DEATH, RESIGNATION, OR REMOVAL OF ASSIGNEE — 1. Death or Resignation.** — See notes 7, 8.

**149.** 2. Removal — *a.* IN GENERAL. — See note 2.

New York Statute. — See note 6.

personalty, payment should be made at the rate of one-half from each fund. *New York Public Library v. Tilden*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 169.

In *New York*, while a secured creditor is allowed to prove his whole claim, regardless of any collateral he may have as security, yet if he realizes on the security and then proves his claim it will be reduced by the amount realized. *Matter of Sawyer*, 33 N. Y. App. Div. 300.

In *Texas* a secured creditor may be required by a suit in equity to exhaust his securities before claiming against the fund that others have in common with him. *Ohio Cultivator Co. v. People's Nat. Bank*, 22 Tex. Civ. App. 643.

**141.** 3. Maryland. — *Matter of Woods*, 52 Md. 520.

Iowa. — *In re Wise*, 121 Iowa 359.

**Mississippi.** — A secured creditor must credit the value of his collateral to the assigned estate before he can share ratably. *Union, etc., Bank v. Duncan*, (Miss. 1904) 36 So. Rep. 690.

**142.** 1. *Doolittle v. Smith*, 104 Iowa 403, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 141 [142].

**143.** 1. Expense of Execution of Trust. — The expense of executing the assignment is a charge upon the assigned property, to be paid before the claims of creditors, while under certain conditions the statutes provide for the return of the assigned property only upon proof being filed of the payment of all proved claims and payment by the assignor of the expenses of executing the trust. *Ringensoldus v. Abresch*, 119 Wis. 410.

**4. State Claims.** — In *New York* claims for personal taxes of the assignor have priority over all other claims. *Matter of Ripson, etc., Fur Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 56.

An assignee who has refused to accept a leasehold of his assignor (see *supra*, this title, **125.** 2) cannot be compelled, under the *Maryland* statutes making lessees liable for taxes and making taxes prior liens, to pay the taxes on such leasehold. *Parlett v. Dugan*, 85 Md. 407.

**144.** 3. Judgment Creditor Has No Lien for Rent Accruing After Assignment. — *Mann v. Poole*, 48 S. Car. 154.

**146.** 5. The Pennsylvania Statute provides that a confirmed sale by an assignee discharges all liens against the realty sold, but a valid

covenant for support running with the land is not discharged thereby. *Bonebrake v. Summers*, 8 Pa. Super. Ct. 55, 43 W. N. C. (Pa.) 568.

**148.** 5. Notice Bars Right to Perfect Title. — Under a sale by order of court, a purchaser is bound by notice that there is a claimant to the land and that such claimant is in possession. *Sayers v. Phillips*, 5 Pa. Super. Ct. 343.

**A Purchaser Has a Right to a Clear Title**; and when he buys property that is subject to a vendor's lien, of which he has been kept in ignorance, he may deduct the amount of such lien from the purchase price. *Linn v. Collins*, 47 W. Va. 250, 81 Am. St. Rep. 788.

**7. Death of Assignee.** — Congress Constr. Co. v. Farson, etc., Co., 101 Ill. App. 279; *Andrews v. Wilson*, 114 Ky. 671.

**An Administrator Does Not Succeed to the rights and duties of a deceased assignee under the New York General Assignment Law.** *Hayne v. Sealy*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 243.

**8. An Accepted Resignation Severs an Assignee's Connection** with the assigned estate, and he cannot be heard in opposition to the appointment of a successor. *State v. Johnson*, 105 Wis. 164.

**149.** 2. Removal of Assignee — General Rule. — *Long v. Campbell*, 133 Ala. 353; *Plotke v. Chicago Title, etc., Co.*, 86 Ill. App. 582; *Congress Constr. Co. v. Farson, etc., Co.*, 101 Ill. App. 279; *Boatmen's Bank Appeal*, 74 Mo. App. 60; *Loucheim v. Casperson*, 61 N. J. Eq. 529; *Havens v. Sibbald*, (N. J. 1898) 41 Atl. Rep. 371; *In re Commercial Bank*, 6 Ohio Dec. 105; *Ahl's Estate*, 192 Pa. St. 370; *Bryson v. Wood*, 187 Pa. St. 366; *Birmingham Drug Co. v. Freeman*, 15 Tex. Civ. App. 451; *Taylor v. Mahoney*, 94 Va. 508; *Morgan v. South Milwaukee Lake View Co.*, 100 Wis. 465. See also *Re Wilson*, 6 Ont. L. Rep. 564.

**Mere Misunderstanding or Ignorance of the Duties Imposed** has been held not to be sufficient ground for removal. *Putnam v. Timothy Dry-Goods, etc., Co.*, 79 Fed. Rep. 454.

**Statutory Grounds Exclusive.** — In *Illinois* the County Court cannot remove an assignee for the benefit of creditors except for the causes specified in the statute. *Vose v. Cratty*, 66 Ill. App. 472.

**6. An Assignee Who Suffered Judgment on a Valid Claim** against the assigned estate will not be removed when fraud or fraudulent in-

- 150.** *b.* FAILURE TO FURNISH BOND AND INVENTORY. — See note 2.
- 152.** XVIII. CLOSE OF TRUST — ASSIGNOR'S RIGHTS — 1. Unexecuted Trust Not to Be Closed — *c.* PRESUMPTION FROM LAPSE OF TIME. — See note 1.
- 154.** 3. Discontinuance — Reconveyance to Assignor. — See note 5.
4. Discharge of Assignor. — See note 6.
- 156.** ASSIGNS. — See note 3.
- 160.** ASSIST — ASSISTANT — ASSISTANCE. — See note 1.
- 161.** ASSISTANCE, WRIT OF. — See note 1.
- 162.** ASSOCIATION. — See note 7.
- 163.** See note 1.
- ASSUME. — See note 3.
- 167.** ASYLUM. — See note 2.
- AT. — See note 3.
- 168.** See note 1.

tent is not shown. *Markell v. Hill*, 64 N. Y. App. Div. 191, 34 Misc. (N. Y.) 133.

**150. 2.** Failure to Furnish Bond and Inventory. — *Brown v. Parker*, (C. C. A.) 97 Fed. Rep. 446.

The *Texas* statute provides for an assignee's removal at the instance of any creditor where no bond has been given. *Birmingham Drug Co. v. Freeman*, 15 Tex. Civ. App. 451.

**Failure to Pay the Premium on a Bond** furnished by a bonding company is ground for removal in *Minnesota*. *American Surety Co. v. Nelson*, 77 Minn. 402.

**152. 1.** Lapse of Time — Presumption. — *Farnsworth v. Doom*, 109 Ky. 794.

**154. 5.** *Illinois* Statute. — *Kelley v. Leith*, 176 Ill. 311; *Manufacturers' Paper Co. v. Royal Trust Co.*, 98 Ill. App. 41.

The *Illinois* statute provides for a discontinuance upon consent of a majority in number and amount of the creditors. *Armour v. Gold*, 185 Ill. 34. But within the three months allowed to creditors for filing claims such discontinuance cannot be allowed so as to bar the claim of a creditor filed thereafter and within the statutory period. *Higinbotham v. Chicago Title, etc., Co.*, 182 Ill. 68; *Linington v. Dickinson*, 67 Ill. App. 266.

Upon a discontinuance the court should not order the assignee to transfer the estate to a person who has bought up a large percentage of the creditor's claims. *Shaw v. Howe*, 66 Ill. App. 550.

**6. Settlement of Accounts — Statutes.** — The *Kentucky* statutes providing for an assignee's settlement of his accounts require a settlement with the court and not with the judge of the county, and a settlement made with the judge alone amounts merely to a filing of claims allowed and not allowed. *McNamara v. Schwanager*, 106 Ky. 1.

**156. 3.** *Glenn v. Caldwell*, 74 Miss. 49.

**Implies Power to Transfer.** — *Johnson v. Morton*, 28 Tex. Civ. App. 296.

**Assignee Equivalent to Assign.** — *Hoffeld v. U. S.*, 186 U. S. 273.

**Devisee.** — A devisee is included in the term *assign*. *Smith v. Baxter*, 62 N. J. Eq. 209.

**Mortgagee.** — *McKibbin v. Williams*, 24 Ont. App. 122; *Nichols v. Tingstad*, 10 N. Dak. 172.

**Swamp Lands.** — The word *assigns*, as used in a swamp land statute, refers to one to whom

the indebtedness was *assigned* and not to the purchaser of the land. *Carpenter v. San Francisco Sav. Union*, 128 Cal. 516.

**Public Lands.** — The word *assigns*, in the Act of Congress providing that where entries of public lands are canceled, the entryman, his heirs or *assigns*, shall be repaid the purchase money, etc., means one who derives from the original entryman by the voluntary act of the latter. *U. S. v. Commonwealth Title Ins., etc., Co.*, 193 U. S. 651.

**Policy of Insurance.** — *Ladd v. Union Mut. L. Ins. Co.*, 116 Fed. Rep. 878.

**160. 1.** Assistant Distinguished from Deputy. — *State v. Longfellow*, 95 Mo. App. 667.

**161. 1.** *Sills v. Goodyear*, 88 Mo. App. 320, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161.

**162. 7.** *Allen v. Stevens*, 33 N. Y. App. Div. 507, reversed in 161 N. Y. 122, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162.

**163. 1.** *Allen v. Stevens*, 33 N. Y. App. Div. 507, reversed in 161 N. Y. 122, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162 [163].

**Distinguished from Corporation for Purposes of Transfer Tax.** — A "corporation" has a definite legal meaning, and differs essentially from an *association*, which may or may not be incorporated. *Matter of Graves*, 171 N. Y. 40.

**3. Assuming Lease.** — See *Springer v. De Wolf*, 194 Ill. 218.

**Mortgages — Whether the Word "Assumes" Imposes a Personal Liability.** — *Petteys v. Comer*, 34 Oregon 36; *Eggleston v. Morrison*, 84 Ill. App. 625.

**167. 2.** *Soldiers' Home.* — *Powell v. Spackman*, 7 Idaho 692; *Lawrence v. Leidigh*, 58 Kan. 594; *Matter of Smith*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 384.

**3.** *Old Ladies' Home v. Hoffman*, 117 Iowa 716.

**"At" in the Sense of "In" — Indictment.** — *Volk v. Westerville*, 11 Ohio Dec. 144, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 168. In this case it was said: "The preposition *at*, used in indictments, informations, and affidavits in criminal prosecutions, is equivalent to the preposition 'in' or 'within.'"

**168. 1.** *Rogers v. Galloway Female College*, 64 Ark. 627; *St. Louis Southwestern R. Co. v. Stringer*, (Ark. 1905) 86 S. W. Rep. 280; *Wood*

**171.** See note 1.

**174.** AT AND FROM A PORT (IN POLICIES OF MARINE INSURANCE).—See note 1.

**175.** AT LEAST.—See note 1.

**177.** AT ONCE.—See note 1.

**179.** [ATLANTIC SEABOARD.—See note 2a.]

ATTACH.—See note 3.

*v. Stafford Springs*, 74 Conn. 437; *Hollmann v. Conlon*, 143 Mo. 369; *Waynesville v. Satterthwait*, 136 N. Car. 226; *Western Union Tel. Co. v. Roberts*, (Tex. Civ. App. 1903) 78 S. W. Rep. 522.

**Notice — Posting.**—*Compare Allen v. Allen*, 114 Wis. 615, *distinguishing Hilgers v. Quinney*, 51 Wis. 62, and holding that posting *at* a public place is substantially equivalent to posting "in" a public place.

**A Mortgage** on certain property *at* Attalla, does not necessarily mean in, but in or near, Attalla. The preposition *at* denotes primarily "nearness, presence, or direction towards." *Webst. Dict. O'Conner v. Nadel*, 117 Ala. 595.

**At the Same Time and Place — Fellow-servant Rule.**—In construing an act providing that to constitute two or more employees fellow servants they must be "working together *at* the same time and place," the court said: "While *at* indicates nearness in time and place, it does not demand an exact coincidence as to either, but only that it shall be sufficiently so to afford the employees a reasonable opportunity of observing the conduct of each other with a view of guarding themselves against injury therefrom. We are of opinion that the engineer and switchman were working together *at* the same time and place at the time of the accident." *Gulf, etc., R. Co. v. Warner*, 89 Tex. 475. And see the title FELLOW SERVANTS.

**At or Near.**—An averment that a person was killed "*at* or near" the private crossing should be construed that she was killed at a place on the track other than the crossing, because pleadings are to be construed most strongly against the pleader. *Davis v. Chesapeake, etc., R. Co.*, (Ky. 1903) 75 S. W. Rep. 275.

**At in the Sense of After.**—*Tacoma Nat. Bank v. Sprague*, 33 Wash. 285.

**171. 1. At or Before.**—Upon an agreement to reimburse a purchaser of stock for any loss incurred *at* or before the expiration of five years before a certain date, it was held that the words "*at* or before" meant the day or the date mentioned, and that an action brought prior thereto on this agreement was premature. *Wilson v. Bicknell*, 170 Mass. 259.

**Filling Blanks — Bills and Notes.**—*Cox v. Alexander*, 30 Oregon 438.

**174. 1.** By a policy on freight "*at* and

from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom" the freight was to be covered "from the time of the engagement of the goods." Goods were engaged for the vessel which was to earn the freight, and were ready for shipment in her at the time of her loss, which occurred before she arrived at her first loading port on the west coast of South America. It was held that the "engagement" clause must be construed with reference to the voyage described in the policy, and, therefore, as the vessel had not arrived *at* her first loading port on the west coast of South America, the risk had not attached. *The Copernicus*, (1896) P. 237.

**175. 1. Attachment.**—*Courson v. Parker*, 39 W. Va. 521.

**177. 1. Reasonable Time.**—Where a machine was sold under a warranty that if not satisfactory it should be returned to the agent *at once*, it was held that such warranty required its return within a reasonable time, under the circumstances of the case. *Warder, etc., Co. v. Horne*, 110 Iowa 285. See also *Hirsch v. Annin*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 228; *McCormick Harvesting Mach. Co. v. Warfield*, 33 N. Y. App. Div. 513.

Where an order expressly stipulated that goods were to be shipped *at once*, and the goods were not shipped until more than two weeks afterwards, and after the occasion for which they were desired had passed, there is such a breach of the contract as to prevent a recovery. *Oklahoma Vinegar Co. v. Hamilton*, 132 Ala. 593.

**179. 2a.** In construing a contract for the sale of a fishing plant together with a covenant not to engage in a like business on the *Atlantic* seaboard for a period of twenty years, the court said: "The term '*Atlantic* seaboard,' in its ordinary interpretation, would seem to be broad enough to include such indentations in the coast as Delaware, New York, or Massachusetts bay, and, at least, such a location on Chesapeake bay as the one occupied by defendants." *Fisheries Co. v. Lennen*, (C. C. A.) 130 Fed. Rep. 533.

**3. Public Lands.**—*Northern Pac. R. Co. v. Colburn*, 164 U. S. 383, *following Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 644.

# ATTACHMENT.

BY LEO GOODMAN.

**183. I. DEFINITION** — Attachment of Property — As Part of Service of Process at Common Law to Compel Appearance. — See note 4.

**II. ORIGIN OF THE PROCEEDING.** — See note 6.

**184. III. NATURE OF THE PROCEEDING** — 1. An Auxiliary Remedy. — See note 3.

2. A Purely Legal Proceeding. — See note 6.

**185. 3. Remedy Extraordinary, Statutory, and in Derogation of the Common Law** — Rule of Construction. — See note 1.

4. Whether the Proceeding Is in Personam or in Rem. — See notes 3, 4.

**186.** See notes 1, 2.

5. Extraterritorial Operation of the Proceeding. — See note 4.

**187. IV. OBJECT OF THE PROCEEDING** — In the United States. — See notes 1, 3.

**188. V. IN WHAT CAUSES ATTACHMENTS MAY BE HAD** — 1. Actions for Money or Damages — *c.* DAMAGES — General Rule — Must Be Capable of Ascertainment. — See note 4.

**183. 4. Attachment of Property as Part of Service of Process at Common Law.** — *Penoyar v. Kelsey*, 150 N. Y. 77.

**6. The Proceeding Unknown at Common Law.** — *Blair v. Morgan*, 59 S. Car. 52, *per* McIver, C. J., *dissenting*, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 183, 184; *Kildare Lumber Co. v. Atlanta Bank*, 91 Tex. 95.

**184. 3. An Auxiliary Remedy.** — *Hoffman v. Henderson*, 145 Ind. 613; *U. S. Capsule Co. v. Isaacs*, 23 Ind. App. 533.

**6. Attachment Proceedings Allowed in Equity in Some States.** — *Bowlby v. De Wit*, 47 W. Va. 323.

**185. 1. Strict Constructions of Statutory Provisions Required Generally.** — *Munger v. Doolan*, 75 Conn. 656; *U. S. Capsule Co. v. Isaacs*, 23 Ind. App. 533; *Sedalia Third Nat. Bank v. Cramer*, 78 Mo. App. 476; *Farak v. Schuyler First Nat. Bank*, (Neb. 1903) 93 N. W. Rep. 682; *Buchanan v. Edmisten*, (Neb. 1901) 95 N. W. Rep. 620; *Clements v. Puckett*, (Neb. 1901) 95 N. W. Rep. 796; *Ireland v. Adair*, 12 N. Dak. 29; *Leonhard v. John Hope*, etc., *Engraving*, etc., Co., 21 R. I. 449, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 184, 185; *Kildare Lumber Co. v. Atlanta Bank*, 91 Tex. 95; *Barth v. Graf*, 101 Wis. 27, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 184; *Maguire v. Bolen*, 94 Wis. 48.

**3. A Remedy in the Nature of a Proceeding in Rem.** — *Calderhead v. Downing*, 103 Fed. Rep. 27, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 185.

**4. When Proceedings Assume Nature of Suit in Personam.** — *Calderhead v. Downing*, 103 Fed. Rep. 27, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 185; *Glendale Fruit Co. v. Hirst*, (Ariz. 1899) 59 Pac. Rep. 103; *Dernburg v. Tefft*, 63 Ill. App. 33; *Yarnell v. Brown*, 170 Ill. 362, 62 Am. St. Rep. 380; *Hartford L. Ins. Co. v. Bryan*, 25 Ind. App. 406; *Raymond v.*

*Nix*, 5 Okla. 656; *Evans v. Breneman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 80.

**Appearance Without Service.** — *Brand v. Brand*, (Ky. 1903) 76 S. W. Rep. 868.

**Effect of Giving Recognizance to Pay Judgment.** — *Hughes v. Foreman*, 78 Ill. App. 460.

**186. 1. Proceeding in Rem in Default of Personal Service or Voluntary Appearance.** — *Munger v. Doolan*, 75 Conn. 656; *Kerns v. McAulay*, 8 Idaho 558; *Southern California Fruit Exch. v. Stamm*, 9 N. Mex. 361; *Grevell v. Whiteman*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 279; *Durkin v. Paten*, 97 N. Y. App. Div. 139; *Parke v. Gay*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 329; *Evans v. Breneman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 80; *Maguire v. Bolen*, 94 Wis. 48.

**2. Judgment Confined to Property Attached.** — *Kerns v. McAulay*, 8 Idaho 558; *Southern California Fruit Exch. v. Stamm*, 9 N. Mex. 361; *Grevell v. Whiteman*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 279; *Maguire v. Bolen*, 94 Wis. 48.

**4. Judgment Not Binding in Another State as to Person, Where Personal Service Has Not Been Made on Defendant.** — *Buck v. Coy*, 73 Ill. App. 160.

**187. 1. Object of Attachment in This Country** — In Some States to Compel Appearance. — *Blair v. Winston*, 84 Md. 356.

**3. Object of Attachment in Most States to Create Lien on Property Attached.** — *Wall v. Norfolk*, etc., R. Co., 52 W. Va. 485, 94 Am. St. Rep. 948, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187.

**188. 4. General Rule — Damages Must Be Liquidated.** — *Hale v. Milliken*, 142 Cal. 134; *Sullivan v. Moffat*, 68 N. J. L. 211; *Farquhar v. Wisconsin Condensed Milk Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 270; *Snowden v. Fulford Planing Mill Co.*, 19 Pa. Co. Ct. 65, 5 Pa. Dist. 720; *Fleming v. Pringle*, 21 Tex. Civ.



**189.** See note 1.

Exceptions. — See note 2.

**2. Actions ex Contractu** — Contract May Be Implied as Well as Express. —

See note 4.

**190.** What Actions Are Included. — See note 1.

Breach of Contract of Marriage. — See note 5.

Actions upon Judgments. — See note 6.

Direct Payment of Money. — See note 7.

**191.** Secured Debts. — See note 4.

Where Security Is Worthless or Has Been Delivered Up. — See note 6.

**3. Actions ex Delicto** — *a.* IN GENERAL. — See note 10.**192.** Waiver of the Tort. — See notes 3, 5.

Attachment Allowed by Statute. — See note 6.

*b.* DEBTS AND OBLIGATIONS CRIMINALLY CONTRACTED OR INCURRED. — See note 7.**193.** **4. Equitable Actions.** — See note 5.**5. Actions to Enforce a Lien.** — See note 6.

App. 225, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188; *Kildare Lumber Co. v. Atlanta Bank*, 91 Tex. 95; *Hereford Cattle Co. v. Powell*, 13 Tex. Civ. App. 496; *Felker v. Douglass*, (Tex. Civ. App. 1900) 57 S. W. Rep. 323; *Evans v. Breneman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 80.

**Reducible to a Certainty.** — *Loeb v. Crow*, 15 Tex. Civ. App. 537; *Cohen v. Grimes*, 18 Tex. Civ. App. 327.

**189. 1. No Attachment if Damages Are Unliquidated.** — *Mallon v. Rothschild*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 8; *Story v. Arthur*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 244; *Mainz v. Lederer*, 24 R. I. 23, 96 Am. St. Rep. 702; *Kildare Lumber Co. v. Atlanta Bank*, 91 Tex. 95; *Atkins v. Loucks*, 107 Wis. 587.

**2. Exceptional Cases.** — See *Smith v. Armour*, 1 Penn. (Del.) 361; *Steuart v. Chappell*, 98 Md. 127; *Landis v. Case*, 7 Ohio Dec. 454, 5 Ohio N. P. 366.

**By Statute in North Carolina** an attachment lies for unliquidated damages arising out of breach of contract. *Judd v. Crawford Gold Min. Co.*, 120 N. Car. 397; *Foushee v. Owen*, 122 N. Car. 360.

**4. Implied Contracts.** — *Lipscomb v. Citizens Bank*, 66 Kan. 243; *Grevell v. Whiteman*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 279; *Hart v. Walter*, 7 Ohio Dec. 409.

**190. 1. What Is an Action of Contract.** — See *Adkins v. Loucks*, 107 Wis. 587. See also ENCYC. OF PL. AND PR., titles ACTIONS, vol. 1, p. 147; CONTRACTS, vol. 4, p. 915; THEORY OF THE CASE, vol. 21, p. 652; and the Supplement to that work.

**5. Mainz v. Lederer**, 24 R. I. 23, 96 Am. St. Rep. 702, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 190. *Contra*, *Albert v. Armstrong*, 7 Ohio Cir. Dec. 705, 14 Ohio Cir. Ct. 296.

**6. Judgments — Cases Holding that Attachment Should Be Issued.** — *Grevell v. Whiteman*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 279. See also *Cord v. Newlin*, (N. J. 1904) 59 Atl. Rep. 22.

**Contra** — *Farak v. Schuyler First Nat. Bank*, (Neb. 1903) 93 N. W. Rep. 682.

**7. Indemnity Bond.** — The obligation of a surety on an indemnity bond is not one for the direct payment of money, and will not support

an attachment. *Ancient Order, etc., v. Sparrow*, 29 Mont. 132.

**191. 4. Secured Debts — Authorities Holding Attachment May Issue.** — *Van Horn v. McInnes Brick Mfg. Co.*, 19 Pa. Co. Ct. 89, 5 Pa. Dist. 701.

**6. Security Worthless.** — *Craig v. California Vineyard Co.*, 30 Oregon 43.

**10. General Rule — Action Must Be Based on Contract.** — *Smith v. Armour*, 1 Penn. (Del.) 361; *Ryles v. Shelley Mfg. Co.*, 93 Mo. App. 178; *Sonnesyn v. Akin*, 12 N. Dak. 227; *Kidd v. Seifert*, 11 Okla. 32, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 190 [191].

**192. 3. Waiver of Tort.** — *May v. Gesellschaft*, 211 Ill. 310; *Felker v. Douglass*, (Tex. Civ. App. 1900) 57 S. W. Rep. 323. See also *Sonnesyn v. Akin*, 12 N. Dak. 227.

**Embezzlement.** — See *Nevada Co. v. Farnsworth*, 89 Fed. Rep. 164; *Lipscomb v. Citizens Bank*, 66 Kan. 243; *Maitland Driving Park Assoc. v. Fish*, 3 Lack. Leg. N. (Pa.) 210; *Barth v. Graf*, 101 Wis. 27.

**5. Brandenstein v. Way**, 17 Wash. 293.

**6. Statutes.** — *Kidd v. Seifert*, 11 Okla. 32; *Chitty v. Pennsylvania R. Co.*, 62 S. Car. 526.

**Slander.** — The *South Carolina* statute allowing attachment in actions for injury done to either person or property does not extend the remedy to actions for slander. *Addison v. Sujette*, 50 S. Car. 192.

**7. Liabilities Criminally Incurred — Statutes.** — *American Surety Co. v. Haynes*, 91 Fed. Rep. 90; *Brandenstein v. Way*, 17 Wash. 293; *Bingham v. Keylor*, 19 Wash. 555.

**193. 5. Statutes Authorizing Attachments in Equitable Actions.** — *Hendrickson v. Brown*, 11 Okla. 41; *Bingham v. Keylor*, 19 Wash. 555; *Roberts v. Burns*, 48 W. Va. 92, 86 Am. St. Rep. 17.

**6. Attachment for Landlord's Rent.** — *Ragsdale v. Kinney*, 119 Ala. 454; *Nicrosi v. Roswald*, 113 Ala. 592; *Weber v. Vernon*, 4 Penn. (Del.) 359; *Smeaton v. Cole*, 120 Iowa 368; *Berry v. Berry*, 8 Kan. App. 584; *Porter v. Sparks*, (Ky. 1897) 43 S. W. Rep. 220; *Ford v. Wycoff*, 73 Mo. App. 144; *McDermott v. Dwyer*, 91 Mo. App. 185; *Greeley v. Greeley*, 122 Okla. 659; *Barnes v. Bamberg*, 55 S. Car. 499.

**194.** See note 1.

**6. Actions for Debts Not Due.** — See notes 2, 3, 4.

**195.** See note 1.

**VI. GROUNDS FOR ATTACHMENT** — 1. In General. — See note 5.

**196.** **2. Absent, Absconding, or Concealed Debtors** — Meaning of "Absconding." — See note 4.

Meaning of "Absence." — See note 7.

**197.** Meaning of "Concealment." — See note 1.

**198.** **3. Nonresident Debtors and Foreign Corporations** — Residence Distinguished from Domicil. — See notes 3, 4. See also the titles DOMICIL; RESIDENCE. RESIDENT, ETC.

Who Is a Resident. — See note 5.

**199.** **Temporary Abode in or Absence from a State.** — See notes 2, 3.

Intention as to Residence. — See note 4.

**200.** Facts and Circumstances Often Decide. — See note 1.

**201.** **4. Fraudulent Conveyance, Assignment, or Secrecion of Property** — Intent. — See notes 6, 7, 8.

**194.** **1. Attachment for Other Liens.** — Schnabel v. Jacobs, 105 Ky. 774; Stapleton v. Ewell, (Ky. 1900) 55 S. W. Rep. 917; Blair v. Morgan, 59 S. Car. 66; Ragon v. Howard, 97 Tenn. 334; De Soto Lumber Co. v. Loeb, 110 Tenn. 251.

**2. Statutes — Before Maturity of the Debt.** — Nelson v. Stull, 65 Kan. 585; *Ex p.* Chase, 62 S. Car. 353; Finch v. Armstrong, 9 S. Dak. 255; Pioneer Sav., etc., Co. v. Peck, 20 Tex. Civ. App. 111; Rabb v. White, (Tex. Civ. App. 1898) 45 S. W. Rep. 850; Roberts v. Burns, 48 W. Va. 92, 86 Am. St. Rep. 17; Miller v. Zeigler, 44 W. Va. 484, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1941 [194]. See also Schnabel v. Jacobs, 105 Ky. 774.

**3. Lederer v. Rosenthal**, 99 Wis. 235.

**4. Debt Must Actually Exist — Contingent Liability.** — Kildare Lumber Co. v. Atlanta Bank, 91 Tex. 95; Aultman v. Smyth, (Tex. Civ. App. 1897) 43 S. W. Rep. 932.

**195.** **1. Rabb v. White**, (Tex. Civ. App. 1898) 45 S. W. Rep. 850; Pioneer Sav., etc., Co. v. Peck, 20 Tex. Civ. App. 111.

**5. Birmingham Dry Goods Co. v. Finley**, 122 Ala. 534; Lyon v. Vance, 46 W. Va. 781.

**196.** **4. Meaning of "Absconding."** — McMorran v. Moore, 113 Mich. 101; Lesage v. Schmitt, 10 N. J. L. J. 10.

**7. Statutory Meaning of "Absence."** — See Tuller v. Howard, (County Ct.) 17 Misc. (N. Y.) 105.

**197.** **1. Concealment.** — Johnson v. Kaufman, 104 Ky. 494; Finn v. Mehrbach, (Municipal Ct.) 30 Civ. Pro. (N. Y.) 242.

**198.** **3. Residence and Domicil Distinguished.** — Stickney v. Chapman, 115 Ga. 759, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 198.

**4. Actual Residence.** — Stickney v. Chapman, 115 Ga. 759; Blair v. Winston, 84 Md. 356; Rosenzweig v. Wood, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 297; Thomson v. Ogden, 23 Ohio Cir. Ct. 185; Southern R. Co. v. McDonald, (Tenn. Ch. 1900) 59 S. W. Rep. 370. See Johnson v. May, 49 Neb. 601.

**5. Residence Defined.** — Jenks v. Rounds, 87 Ill. App. 284; Hatch v. Smith, 61 Kan. App. 645; Garbett v. Mountford, (N. J. 1903) 54

Atl. Rep. 872; State v. Allen, 48 W. Va. 154, 86 Am. St. Rep. 29.

"A nonresident's property is attachable when his residence is not such as to subject him personally to the jurisdiction of the court and thus place him upon equality with the other residents of the state." Thomson v. Ogden, 23 Ohio Cir. Ct. 185.

**199.** **2. Temporary Abode or Absence Does Not Affect Residence.** — Newlon-Hart Grocer Co. v. Peet, 18 Colo. App. 147; Jenks v. Rounds, 87 Ill. App. 284; Johnson v. May, 49 Neb. 601; C. B. Coles, etc., Co. v. Blythe, 69 N. J. L. 203; Mahoney v. Tyler, 136 N. Car. 40; Sibley v. Dougherty, 9 Kulp (Pa.) 185; Lyon v. Vance, 46 W. Va. 781.

A member of Congress is not a resident of the District of Columbia unless he intends to make that district his home. Howard v. Citizens Bank, etc., Co., 12 App. Cas. (D. C.) 222.

**3. Indefinite Absence.** — Thomson v. Ogden, 23 Ohio Cir. Ct. 185.

**4. Intention Does Not Control Question of Residence.** — Sheldon v. Forsman, 14 York Leg. Rec. (Pa.) 102, 17 Lanc. L. Rev. 85, supporting the second paragraph of the original note.

**200.** **1. For decisions as to what does or does not constitute residence see Newlon-Hart Grocer Co. v. Peet**, 18 Colo. App. 147; Stickney v. Chapman, 115 Ga. 759; Barron v. Burke, 82 Ill. App. 116; Witbeck v. Marshall Wells Hardware Co., 188 Ill. 154; Johnson v. May, 49 Neb. 601; C. B. Coles, etc., Co. v. Blythe, 69 N. J. L. 203; Garbett v. Mountford, (N. J. 1903) 54 Atl. Rep. 872; Mahoney v. Tyler, 136 N. Car. 40; Southern R. Co. v. McDonald, (Tenn. Ch. 1900) 59 S. W. Rep. 370; Didier v. Patterson, 93 Va. 534; State v. Allen, 48 W. Va. 154, 86 Am. St. Rep. 29; Lyon v. Vance, 46 W. Va. 781; Barth v. Burnham, 105 Wis. 548.

**201.** **6. Intent May Be Inferred from Acts — Arkansas.** — Semmes v. Underwood, 64 Ark. 415.

*Georgia.* — Hobbs v. Greenfield, 103 Ga. 1. *Kentucky.* — Rice v. Tolbert, (Ky. 1898) 47 S. W. Rep. 323.

*Louisiana.* — Joseph Bowling Co. v. Colvin, 49 La. Ann. 1340; Poitevent, etc., Lumber Co. v. Standard Planing Mills, etc., Co., 49 La. Ann. 72; Abel, etc., Co. v. Duffy, 106 La. 260.

**201.** Threats to Assign, Convey, or Dispose of Property. — See note 11.

**202.** What Amounts to a Secretion or Concealment — Instances. — See notes 2, 5.

Assignment, Conveyance, or Concealment of a Part of the Debtor's Property. — See note 7.

Burden of Proof. — See note 9.

**203.** 5. Debts Fraudulently Contracted. — See note 3.

What Amounts to Fraud. — See notes 5, 9, 11, 12.

**204.** See note 2.

Reports of Mercantile Agencies. — See note 8.

**205.** 6. Removal of Property — Intent. — See note 1.

When a Debtor May Remove Property Out of the State. — See note 6.

**206.** 7. Additional Grounds — Insufficiency of Property. — See note 6.

VII. AFFIDAVIT, BOND, AND WRIT — 1. The Affidavit. — See note 9.

*Michigan.* — *McMorran v. Moore*, 113 Mich. 101.

*New York.* — *V. G. Pfluke Co. v. Papulias*, (Supm. Ct.) 42 Misc. (N. Y.) 15; *Lukens Iron, etc., Co. v. Payne*, 13 N. Y. App. Div. 11; *Levy v. Goldstein*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 639.

*Ohio.* — *Shawnee Commercial, etc., Bank Co. v. Miller*, 24 Ohio Cir. Ct. 198.

*Oklahoma.* — *Ranney-Alton Mercantile Co. v. Watson*, 10 Okla. 675.

*South Dakota.* — *Trebilcock v. Big Missouri Min. Co.*, 9 S. Dak. 206; *German Bank v. Folds*, 9 S. Dak. 295.

*Wisconsin.* — *Senour Mfg. Co. v. Clarke*, 96 Wis. 469.

**201.** 7. Actual Fraud a Necessary Element — *Illinois.* — *McNeil, etc., Co. v. Plows*, 83 Ill. App. 186; *Hanford v. Richart*, 66 Ill. App. 443; *Field v. Stout*, 68 Ill. App. 360; *Margadine-McKittick Dry Goods Co. v. Belt*, 74 Ill. App. 581; *Nelson v. Leiter*, 190 Ill. 414, 83 Am. St. Rep. 142; *Wadsworth v. Laurie*, 164 Ill. 42.

*Louisiana.* — *Poitevent, etc., Lumber Co. v. Standard Planing Mills, etc., Co.*, 49 La. Ann. 72; *Abel, etc., Co. v. Duffy*, 106 La. 260.

*Michigan.* — *McMorran v. Moore*, 113 Mich. 101.

*Missouri.* — *Belcher, etc., Lumber, etc., Co. v. Drane*, 107 Mo. App. 56.

*New York.* — *Wallabout Bank v. Millitary Club*, 36 N. Y. App. Div. 156; *Shuler v. Bird-sall, etc., Mfg. Co.*, 17 N. Y. App. Div. 228; *V. G. Pfluke Co. v. Papulias*, (Supm. Ct.) 42 Misc. (N. Y.) 15; *J. H. Mohlman Co. v. Landwehr*, 87 N. Y. App. Div. 83.

*Ohio.* — *Union Rolling Mill Co. v. Packard*, 1 Ohio Cir. Dec. 46.

*South Dakota.* — *Trebilcock v. Big Missouri Min. Co.*, 9 S. Dak. 206; *Sturgis First Nat. Bank v. McMillan*, 9 S. Dak. 227; *German Bank v. Folds*, 9 S. Dak. 295.

**8.** When Intent Need Not Be Shown. — *McBryan v. Trowbridge*, 125 Mich. 542, 7 Detroit Leg. N. 620; *Glacier v. Walker*, 69 Mo. App. 288.

**11.** Threatened Assignment Held Not Ground for Attachment. — *McLoughlin v. Consumers' Brewing Co.*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 144.

**202.** 2. Secretion or Concealment. — *Dodson-Hills Mfg. Co. v. Payton*, 65 Mo. App. 311.

**5.** Disposal of Proceeds of Sales by Merchant. —

*Union Nat. Bank v. Mead Mercantile Co.*, 151 Mo. 149.

**7.** Disposing or Assigning Part of Debtor's Property. — See *Kurtz v. Lewis Voight, etc., Co.*, 86 Mo. App. 649; *Dixon Nat. Bank v. Western Lumber Co.*, 68 Mo. App. 81.

**9.** Onus on Plaintiff to Show Fraud. — *McMorran v. Moore*, 113 Mich. 101; *Kipp v. Salyer*, 64 N. J. L. 160; *J. H. Mohlman Co. v. Landwehr*, 87 N. Y. App. Div. 83; *Flagg v. Mitchell*, 19 Pa. Co. Ct. 32, 5 Pa. Dist. 774; *Netter v. Harding*, 18 Pa. Co. Ct. 353, 6 Pa. Dist. 169; *Trebilcock v. Big Missouri Min. Co.*, 9 S. Dak. 206; *German Bank v. Folds*, 9 S. Dak. 295.

**203.** 3. Two Separate Debts. — *Sedalia Third Nat. Bank v. Cramer*, 78 Mo. App. 476; *Ross v. Behringer*, 21 Pa. Co. Ct. 260.

**5.** Misrepresentation as to Solvency. — See *Lesser v. Driesen*, 2 Lack. Leg. N. (Pa.) 343.

**9.** Statements Must Be Wilfully False. — *Johnson v. Stockham*, 89 Md. 358, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202; *McGuire v. Louis Snider Paper Co.*, 6 Ohio Dec. 392, 4 Ohio N. P. 262.

**11.** Intention Not to Pay for Purchases. — *Wilson v. Lehman*, 2 Lack. Leg. N. (Pa.) 352.

**12.** Evidence of Intent. — *Johnson v. Stockham*, 89 Md. 358, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202.

**204.** 2. Wrongful Conversion Does Not Amount to Contracting Debt Fraudulently. — *American Surety Co. v. Haynes*, 91 Fed. Rep. 90; *Baxter v. Nash*, 70 Minn. 20; *Bingham v. Keylor*, 19 Wash. 555.

**8.** Statements Must Be Material Inducement. — *Penoyar v. Kelsey*, 150 N. Y. 77.

**205.** 1. Fraudulent Intent Must Be Proved. — *State Bank v. Martin*, 52 La. Ann. 1628; *Liveright v. Greenhouse*, 61 N. J. L. 156; *Bernhard v. Cohen*, (N. Y. City Ct. Gen. T.) 56 N. Y. Supp. 271.

**6.** Shipment for Honest Ends of Business. — *State Bank v. Martin*, 52 La. Ann. 1628.

**206.** 6. Kentucky — Insufficiency of Property. — *Brasher v. Tandy*, (Ky. 1896) 37 S. W. Rep. 1045; *Deposit Bank v. Smith*, 109 Ky. 311; *Downs v. Ringgold*, 101 Ky. 392.

**9.** Britton v. Gregg, 96 Ill. App. 29; *Duxbury v. Dahle*, 78 Minn. 427, 79 Am. St. Rep. 408; *Wood v. Bailly*, 77 Miss. 815; *McElwee v. Steelman*, (Tenn. Ch. 1896) 38 S. W. Rep. 275; *Miller v. White*, 46 W. Va. 67, 76 Am. St. Rep. 791; *Goodman v. Henry*, 42 W. Va. 526; *Maguire v. Bolen*, 94 Wis. 48.

**207. By Whom Made.**— See notes 1, 2.

Form and Contents. — See notes 3, 4, 5, 6, 7.

**2. The Bond.**— See notes 9, 11, 12.**208. 3. The Writ**— In Matters of Form. — See notes 8, 9.

Time of Issuance. — See note 11.

Who May Issue. — See note 12.

**209. Execution of the Writ.**— See note 1.

Return. — See notes 2, 5, 6.

**VIII. WHAT MAY BE ATTACHED**— 1. In General. — See note 7.

**207. 1. By Whom Made.**— Kentucky Jeans Clothing Co. v. Bohn, 104 Ky. 387; Stockbridge v. Fahnestock, 87 Md. 127; Clements v. Puckett, (Neb. 1901) 95 N. W. Rep. 796; Shawnee Commercial, etc., Bank Co. v. Miller, 24 Ohio Cir. Ct. 198; Blyth, etc., Co. v. Swensen, 7 Wyo. 303.

**2. Where Statute Silent**— Agent of Plaintiff. — Silver Peak Mines v. Hanchett, 80 Fed. Rep. 990, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 207; Hanson v. Marcus, 8 N. Y. App. Div. 318; Steele v. R. M. Gilmour Mfg. Co., 77 N. Y. App. Div. 199.

**3. Form of Affidavit.**— Harper v. Turner, 101 Tenn. 686.

**4. Amount of Debt**— Alabama. — Ragsdale v. Kinney, 119 Ala. 454.

Kentucky. — Moore v. Harrod, 101 Ky. 248.

Nebraska. — Grotte v. Nagle, 50 Neb. 363.

New York. — Foster v. Scurich, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 25; Mitchell v. Anderson, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 13.

Ohio. — Hoover v. Haslage, 7 Ohio Dec. 98.

Oklahoma. — Coyle Mercantile Co. v. Nix, 7 Okla. 267.

Tennessee. — Kendrick v. Mason, (Tenn. Ch. 1901) 62 S. W. Rep. 359.

Texas. — Teague v. Lindsey, 31 Tex. Civ. App. 161; Aultman v. Smyth, (Tex. Civ. App. 1897) 43 S. W. Rep. 932; Smith v. Mather, (Tex. Civ. App. 1899) 49 S. W. Rep. 257.

West Virginia. — Kesler v. Lapham, 46 W. Va. 293.

**A Statement of Nominal Damages** is insufficient. Romeo v. Garafolo, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 166.

**5. Nature of Demand.**— Plumner v. Struby-Estabrooke Mercantile Co., 23 Colo. 190; U. S. Capsule Co. v. Isaacs, 23 Ind. App. 533; Altworth v. Flynn, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 106; James v. Signell, 60 N. Y. App. Div. 75; American Audit Co. v. Industrial Federation, 80 N. Y. App. Div. 544; Kendrick v. Mason, (Tenn. Ch. 1901) 62 S. W. Rep. 359; Kesler v. Lapham, 46 W. Va. 293; Sommers v. Allen, 44 W. Va. 120.

**6. Grounds on Which Attachment Asked For**— Illinois. — Syndicate des Cultivators v. Currie, 72 Ill. App. 122.

Minnesota. — Duxbury v. Dahl, 78 Minn. 427, 79 Am. St. Rep. 408.

Nebraska. — Clements v. Puckett, (Neb. 1901) 95 N. W. Rep. 796; American Exch. Bank v. Puckett, (Neb. 1901) 95 N. W. Rep. 796.

New Jersey. — Liveright v. Greenhouse, 61 N. J. L. 156.

New York. — Harroway v. Flint, (County Ct.) 19 Misc. (N. Y.) 411.

North Carolina. — Judd v. Crawford Gold Min. Co., 120 N. Car. 397.

North Dakota. — Severn v. Giese, 6 N. Dak. 523.

Pennsylvania. — Strouse v. Miller, 3 Dauphin Co. Rep. (Pa.) 90; James v. Tenney Co., 23 Pa. Co. Ct., 400, 6 Lack. Leg. N. (Pa.) 155.

Texas. — Smith v. Dye, (Tex. Civ. App. 1899) 51 S. W. Rep. 858.

West Virginia. — Sommers v. Allen, 44 W. Va. 120.

**7. Other Special Allegations.**— See Fisk v. French, 114 Cal. 400; Gatward v. Wheeler, (Idaho 1904) 77 Pac. Rep. 23; Vollmer v. Spencer, 5 Idaho 557; Moore v. Harrod, 101 Ky. 248; Hey v. Harding, (Ky. 1899) 53 S. W. Rep. 33; Mitchell v. Anderson, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 13; People v. St. Nicholas Bank, 44 N. Y. App. Div. 313; Cook v. Olds Gasoline Engine Works, 10 Ohio Cir. Dec. 236.

**9. Necessity for Bond.**— See Schweigel v. L. A. Shakman Co., 78 Minn. 142.

**11. Statutory Requirements as to Form.**— Berry v. Wasserman, 179 Mass. 537.

**12. Amount of Bond.**— Aultman v. Smyth, (Tex. Civ. App. 1897) 43 S. W. Rep. 932; Zachariae v. Swanson, (Tex. Civ. App. 1903) 77 S. W. Rep. 627.

**208. 8. Recitals as to Cause of Action and Grounds of Attachment.**— Fox v. Mays, 46 N. Y. App. Div. 1; Jurgens v. Tum Suden, 32 N. Y. App. Div. 1; Galligan v. Groten, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 428.

**9. Amount of Demand.**— Wilson v. Barbour, 21 Mont. 176.

**11. Time of Issuing.**— Spreen v. Delsignore, 94 Fed. Rep. 71; Sharman v. Hust, 20 Mont. 555, 63 Am. St. Rep. 645; Finn v. Mehrbach, (Municipal Ct.) 30 Civ. Pro. (N. Y.) 242; Furst v. Banks, 101 Va. 208.

**12. By Whom Issued**— Clerk of Court. — Harbour-Pitt Shoe Co. v. Dixon, 60 S. W. Rep. 186, 22 Ky. L. Rep. 1169.

**209. 1. Levy upon Realty.**— Richards v. Harrison, 71 Mo. App. 224.

**2. Return of the Writ.**— Murphy v. Orgill, (Miss. 1898) 23 So. Rep. 305; Winningham v. Trueblood, 149 Mo. 572; Munroe v. St. Germain, 69 N. H. 200; Raymond v. Nix, 5 Okla. 656; Slingluff v. Sisler, 193 Pa. St. 264.

**5. Hiles Carver Co. v. King,** 109 Ga. 180; Dawson v. Kirby, 6 Pa. Dist. 13.

**6. Tuells v. Torras,** 113 Ga. 691; Barton v. Ferguson, 1 Indian Ter. 263; Price v. Taylor, 110 Ky. 589; Price v. Taylor, 108 Ky. 558. See Norfleet v. Logan, (Ky. 1900) 54 S. W. Rep. 713; Ireland v. Adair, 12 N. Dak. 29; Stearns v. Silsby, 74 Vt. 68.

**7. Property Subject to Execution Is Subject to**

**209. 2. Real Property — Equitable Interests. — See note 12.****210. See note 1.**

**Mortgagee's Interest. — See note 2.**

**Tenants in Common and Joint Tenants. — See note 3.**

**Curtsey and Dower. — See note 6.**

**Remainders and Reversions. — See notes 7, 8.**

**211. 3. Personal Property. — See note 2.**

**Shares of Stock. — See notes 4, 5, 6.**

**212. Property in Custodia Legis. — See note 1.**

**Property in the Hands of a Trustee or Assignee. — See note 2.**

**Partnership Property. — See note 4.**

**213. The Salaries of Public Officers. — See note 8.**

**Life-insurance Policy. — See note 9.**

**Property Mortgaged, Pawned, or Bailed. — See note 11.**

**Attachment.**— *Fletcher v. Tuttle*, 97 Me. 491; *Boone v. Waxahachie First Nat. Bank*, 17 Tex. Civ. App. 365.

**209. 12. Equitable Interest in Land Is Attachable.**— *Watson v. Bonfils*, (C. C. A.) 116 Fed. Rep. 157; *Ladd v. Judson*, 174 Ill. 344, 66 Am. St. Rep. 267; *Shanks v. Simon*, 57 Kan. 385; *Wright v. Franklin Bank*, 59 Ohio St. 80; *Coggshall v. Marine Bank Co.*, 63 Ohio St. 88; *Wood v. Watson*, 20 R. I. 223. And in support of the *Tennessee* doctrine, stated in the second paragraph of the original note, see *Gaines v. Nashville Fourth Nat. Bank*, (Tenn. Ch. 1898) 52 S. W. Rep. 467.

**A Leasehold Interest**, where the lessee has not the power to sublet, is not subject to attachment. *Boone v. Waxahachie First Nat. Bank*, 17 Tex. Civ. App. 365.

**210. 1. Equity of Redemption.**— *British, etc., Mortg. Co. v. Norton*, 125 Ala. 522; *Cox v. Harris*, 64 Ark. 213, 62 Am. St. Rep. 187; *Brown v. Allen*, 92 Me. 378.

**2. Interest of Mortgagee in Land Not Attachable.**— See *Fletcher v. Tuttle*, 97 Me. 491.

**3. Tenancy in Common.**— *Price v. Taylor*, 110 Ky. 589, holding that even if a partition proceeding is being had, the interest may be attached.

**6. Dower.**— See *Fletcher v. Tuttle*, 97 Me. 491. *Contra*, *Latourette v. Latourette*, 52 N. Y. App. Div. 192.

**7. Vested Remainder.**— *Ernst v. Northern Bank*, (Ky. 1899) 49 S. W. Rep. 333.

**8. Uncertain Interest Not Attachable.**— *Smith v. Gilbert*, 71 Conn. 149, 71 Am. St. Rep. 163.

**211. 2. What Personal Property Can Be Attached.**— *Williamson v. Eastern Bldg., etc., Assoc.*, 54 S. Car. 582, 71 Am. St. Rep. 822.

**Crops.**— *Sims v. Jones*, 54 Neb. 769, 69 Am. St. Rep. 749.

**Vessels.**— *Dietrich v. Martin*, 24 Mont. 145, 81 Am. St. Rep. 419.

**Liquor Licenses** may be attached. *Quinnipiac Brewing Co. v. Hackbarth*, 74 Conn. 392.

**Funds Raised by a County** for a particular purpose are not attachable. *Van Horn v. Kittitas County*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 333.

**A Note Not Yet Due** may be attached. *Bell v. Philadelphia Binding, etc., Co.*, 10 Pa. Super. Ct. 38, 44 W. N. C. (Pa.) 48.

**4. Corporate Stock Attachable.**— *Pinney v. Nevills*, 86 Fed. Rep. 97; *Francis v. New York*

*Commercial Co.*, 51 U. S. App. 663, 83 Fed. Rep. 769; *Johnson v. Louisville City Nat. Bank*, (Ky. 1900) 56 S. W. Rep. 710; *Cord v. Newlin*, (N. J. 1904) 59 Atl. Rep. 22; *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193; *Lipscomb v. Condon*, (W. Va. 1904) 49 S. E. Rep. 392. See also *Sowles v. National Union Bank*, 82 Fed. Rep. 696.

**5. Equitable Interest in Stock Not Attachable.**— See *Tombler v. Palestine Ice Co.*, 17 Tex. Civ. App. 596.

**6. Where Attachable.**— *Pinney v. Nevills*, 86 Fed. Rep. 97; *New Jersey Sheep, etc., Co. v. Traders' Deposit Bank*, 104 Ky. 90.

**212. 1. Property in Custodia Legis.**— *Jones v. Merchants' Nat. Bank*, 33 U. S. App. 703; *Corbitt v. Farmers Bank*, 114 Fed. Rep. 602; *Missouri Pac. R. Co. v. Love*, 61 Kan. 433; *Dale v. Brumbly*, 98 Md. 468; *Sorzano v. Couderd*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 677; *Woodhull v. Farmers Trust Co.*, 11 N. Dak. 157, 95 Am. St. Rep. 712; *Strouse v. Miller*, 3 Dauphin Co. Rep. (Pa.) 90. See also *Le Roy v. Jacobosky*, 136 N. Car. 443; *Piper v. Piper*, 7 Pa. Dist. 135, 20 Pa. Co. Ct. 372. But see *Williamson v. Nealy*, 119 N. Car. 339.

**2. Property in the Hands of Trustees.**— See *R. T. Davis Mill Co. v. Bangs*, 6 Kan. App. 38; *Andrews v. Steele City Bank*, 57 Neb. 173.

**4. Partnership Property.**— See *Carlisle v. McAlester*, 3 Indian Ter. 164. *Compare* *Horne v. Petty*, 192 Pa. St. 32. And see the title PARTNERSHIP, 102. 4. *et seq.*

**213. 8. Salaries of Public Officers.**— *Overturn v. Gerlach*, 62 Ohio St. 127, 78 Am. St. Rep. 704.

**9. Life-insurance Policies.**— *Amberg v. Manhattan L. Ins. Co.*, 56 N. Y. App. Div. 343. *Compare* *Kratzenstein v. Lehman*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 590.

**11. Property Mortgaged, Pawned, or Bailed.**— *Cox v. Harris*, 64 Ark. 213, 62 Am. St. Rep. 187; *Sabel v. Planters Nat. Bank*, 110 Ky. 299.

**Mortgaged or Pledged Property Attachable by Statute.**— *Johnson v. Louisville City Nat. Bank*, (Ky. 1900) 56 S. W. Rep. 710; *Fife v. Ford*, 67 N. H. 539; *Simpson v. Jersey City Contracting Co.*, 47 N. Y. App. Div. 17, *affirmed* 165 N. Y. 193; *Thum v. Pingree*, 21 Utah 348.

**Goods in Transitu** may be attached in *Michigan* and *New Mexico*. *Stock v. Reynolds*, 121 Mich. 356; *Santa Fe Pac. R. Co. v. Bossut*, 10 N. Mex. 322.

**214. IX. RIGHT OF INTERVENTION — Who May Intervene. —** See note 7.

**215. X. EFFECT OF ATTACHMENT OF PROPERTY — 1. Rights of Plaintiff. —** See note 1.

**2. Rights of Officer — Attachment of Personalty. —** See note 2.

**Attachment of Realty. —** See note 3.

**216. XI. LIEN OF ATTACHMENT — 2. Essentials to Validity of the Lien — A Valid Levy. —** See note 8.

**217. Possession of Property by Attaching Officer — Taking Possession. —** See note 1.

**218. 3. Nature of the Lien — Whether Strictly a Lien. —** See note 1.

**219. An Actual Security. —** See note 2.

**Right of Legislature to Divest Lien of Attachment. —** See note 4.

**220. A Conditional Security. —** See note 1.

**4. When Lien Commences. —** See notes 4, 5.

**221. Where Petition Is Amended. —** See note 1.

**Where Affidavit Is Amended. —** See note 3.

**222. 5. Extent of Lien — a. WHAT PROPERTY BOUND — Interest of Debtor at Time of Levy. —** See note 2.

**6. Duration of Lien. —** See note 8.

**214. 7. Right to Intervene — To Whom Available —** *California*. — *McEldowney v. Madden*, 124 Cal. 108.

*Colorado*. — *Hannan v. Connett*, 10 Colo. App. 171.

*District of Columbia*. — *Daniels v. Solomon*, 11 App. Cas. (D. C.) 163.

*Iowa*. — *Ohde v. Hoffman*, (Iowa 1902) 90 N. W. Rep. 750.

*Kansas*. — *Symms Grocer Co. v. Lee*, 9 Kan. App. 574.

*Maryland*. — *Palmer v. Hughes*, 84 Md. 652. *Missouri*. — *Henry Petring Grocer Co. v. Eastwood*, 79 Mo. App. 270.

*Nebraska*. — *Haines v. Stewart*, (Neb. 1902) 91 N. W. Rep. 539.

*Oklahoma*. — *Miller v. Campbell Commission Co.*, 13 Okla. 75; *Hockaday v. Drye*, 7 Okla. 288.

*Texas*. — *Barkley v. Wood*, (Tex. Civ. App. 1897) 41 S. W. Rep. 717; *Murphy v. Nash*, (Tex. Civ. App. 1898) 45 S. W. Rep. 944; *Boltz v. Engelke*, (Tex. Civ. App. 1897) 43 S. W. Rep. 47.

*West Virginia*. — *Miller v. White*, 46 W. Va. 67, 76 Am. St. Rep. 791.

*Wyoming*. — *Stanley v. Foote*, 9 Wyo. 335.

**Junior Attaching Creditors. —** *Standard Implement Co. v. Lansing Wagon Works*, 58 Kan. 125; *Wichita Nat. Bank v. Wichita Produce Co.*, 8 Kan. App. 40; *Coyle Mercantile Co. v. Nix*, 7 Okla. 267.

**215. 1. Bowlby v. De Wit**, 47 W. Va. 323, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 215.

**2. Laughlin v. Reed**, 89 Me. 226; *Rochester Lumber Co. v. Locke*, 72 N. H. 22.

**3. See** *American Nat. Bank v. Childs*, 49 La. Ann. 1359.

**216. 8. Actual and Valid Levy. —** *Smith v. Packard*, 98 Fed. Rep. 793, 39 C. C. A. 294, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 216.

**217. 1. Smith v. Packard**, 98 Fed. Rep. 793, 39 C. C. A. 294, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 216 [217].

**218. 1. For a Full Discussion of the Nature of an Attachment Lien** see *McFadden v. Blocker*, 2 Indian Ter. 260.

**219. 2. Byers v. McEniry**, 117 Iowa 499, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 218, 219.

**4. Retrospective Laws Affecting Lien of Attachments. —** See *McFadden v. Blocker*, 2 Indian Ter. 260.

**220. 1. Goddard-Peck Grocery Co. v. Adler-Goldman Commission Co.**, 67 Ark. 359, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 219; *Reynolds v. Nesbitt*, 196 Pa. St. 636, 79 Am. St. Rep. 736.

**4. Statute Giving Lien from Delivery of Order for Attachment to Sheriff. —** Under Civ. Code Ky., § 212, and Act Pa., March 17, 1869, P. L. 8, the lien of an attachment begins from the delivery of the writ to the sheriff. *Exchange Bank v. Gillispie*, (Ky. 1897) 43 S. W. Rep. 401; *Rice v. Walinszins*, 12 Pa. Super. Ct. 329.

*Missouri*. — *Winningham v. Trueblood*, 149 Mo. 572.

**8. Lien from Time of Levy. —** *McFadden v. Blocker*, 2 Indian Ter. 260; *Citizen's Nat. Bank v. Converse*, 101 Iowa 307; *Schoonover v. Osborne*, 111 Iowa 140, 82 Am. St. Rep. 496; *R. T. Davis Mill Co. v. Bangs*, 6 Kan. App. 38; *German Looking Glass Plate Co. v. Asheville Furniture, etc., Co.*, 126 N. Car. 888, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 220.

**Lien from Date of Officer's Return. —** By statute in *Arizona* and *Oregon* the lien does not commence until a recording of the levy. *Menager v. Farrell*, (Ariz. 1899) 57 Pac. Rep. 607; *Schlusser v. Beemer*, 40 Oregon 412.

**221. 1. Amendment Curing Merely Formal Defects. —** *Symms Grocer Co. v. Burnham*, 6 Okla. 618.

**3. Amendment of Affidavit. —** See *Goodman v. Henry*, 42 W. Va. 526.

**222. 2. La Salle Pressed Brick Co. v. Coe**, 65 Ill. App. 619; *Chicago, etc., R. Co. v. Omaha First Nat. Bank*, 58 Neb. 548.

**8. Stillman v. Hamer**, (Kan. 1904) 78 Pac. Rep. 836; *Smith v. Parkersburg Co-operative Assoc.*, 48 W. Va. 232.

**Statutory Limitation on Duration of Lien. —** See *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 114 Fed. Rep. 659 (*Connecticut* statute); *Fletcher v. Tuttle*, 97 Me. 491.

**223.** See note 1.

**XII. PRIORITIES — 1. General Principles.** — See note 6.

**224.** 2. Between Attachments — *a.* IN GENERAL. — See note 2.

*b.* SUCCESSIVE ATTACHMENTS — Rule Giving Priority in Order of Levy.

— See note 3.

**226.** Rule Giving Priority in Order of Delivery of Writ to Officer. — See note 1.

Conditional Delivery of Writ to Officer. — See note 2.

*d.* PRIORITY OF JUNIOR ATTACHMENT — By Illegality of Senior Attachments. — See note 5.

**227.** Fraudulent Attachments. — See note 1.

**228.** 3. Between Attachment and Other Liens. — See notes 1, 3, 4.

**229.** 4. Between Attachment and Alienations — *a.* DEEDS AND MORTGAGES. — See note 8.

*b.* SALES OF PERSONALTY. — See notes 9, 10.

*c.* SALES OF STOCK. — See note 11.

**230.** 5. As Affected by the Recording Acts. — See note 2.

**XIII. DISSOLUTION — 1. What Will Effect Dissolution — *a.* BAIL AND FORTHCOMING BONDS — (1) In General.** — See notes 5, 6.

**231.** The Distinction Between a Bail Bond and a Delivery Bond. — See notes 1, 2.

(2) *Estoppel by Execution.* — See note 3.

**Delay in Issuing Execution.** — Where the rights of third parties do not intervene no delay in the execution after judgment ought to destroy the lien unless there is a clear intention to abandon. *Lant v. Manley*, 75 Fed. Rep. 627, 43 U. S. App. 623.

**223.** 1. *Stillman v. Hamer*, (Kan. 1904) 78 Pac. Rep. 836.

6. *In re Kemp*, 101 Fed. Rep. 689.

**Fraudulent Prior Attachment.** — *Interstate Nat. Bank v. Stuart*, (Tex. Civ. App. 1896) 39 S. W. Rep. 963.

**224.** 2. *Lutter v. Grosse*, (Ky. 1904) 82 S. W. Rep. 278.

3. *MacVeagh v. Royston*, 71 Ill. App. 617; *Western Nat. Bank v. National Union Bank*, 91 Md. 613; *R. Wallace, etc., Mfg. Co. v. Sharick*, 15 Wash. 643.

**226.** 1. Under Statutes Directing Levy in the Order of Receiving Writs. — *Atchison, etc., R. Co. v. Schwarzschild, etc., Co.*, 58 Kan. 90, 62 Am. St. Rep. 604.

2. *Connolley v. Eisman*, 60 S. W. Rep. 372, 22 Ky. L. Rep. 1247.

5. **An Attachment of Firm Property for a Firm Debt**, though subsequent in point of time, takes priority of an attachment of firm property for a personal debt of one of the firm. *Putnam v. Loeb*, 1 Ohio Cir. Dec. 391.

**227.** 1. **First Attachment Partly Fraudulent.** — *Hodden v. Dooley*, (C. C. A.) 92 Fed. Rep. 274.

**228.** 1. *Norton v. Hope Milling, etc., Co.*, 101 Ky. 223; *Ruston v. Perry Lumber Co.*, 104 Tenn. 538.

3. **Contract for a Future Lien.** — *Thomas, etc., Co. v. Guenther*, 7 Pa. Dist. 48.

4. *Watson v. Bonfils*, (C. C. A.) 116 Fed. Rep. 157; *Moon Bros. Carriage Co. v. Porter*, 76 Mo. App. 128.

**229.** 8. *Runner v. Scott*, 150 Ind. 441.

9. *Cummings v. Gilman*, 90 Me. 524.

10. *Peycke v. Hazen*, 119 Iowa 641; *H. A. Thierman Co. v. Laupheimer*, (Ky. 1900) 55 S.

W. Rep. 925; *Cady v. Zimmerman*, 20 Mont. 225.

11. See *Tombler v. Palestine Ice Co.*, 17 Tex. Civ. App. 596.

**230.** 2. **Attachment Superior to Unrecorded Conveyance.** — *Southern Bank, etc., Co. v. Folsom*, 43 U. S. App. 713, 75 Fed. Rep. 929; *Fassett v. Wise*, 115 Cal. 316; *Stockton v. National Bank*, (Fla. 1903) 34 So. Rep. 897; *McFadden v. Blocker*, 2 Indian Ter. 260; *D'Arcy v. Mooshkin*, 183 Mass. 382. See *Lyman v. Gaar*, 75 Minn. 207; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okla. 353; *R. E. Bell Hardware Co. v. Riddle*, 31 Tex. Civ. App. 411; *Robertson v. McClay*, 19 Tex. Civ. App. 513; *Caldwell v. Bryan*, 20 Tex. Civ. App. 168.

5. **Bail Bonds.** — *Ebner v. Heid*, 60 C. C. A. 370, 125 Fed. Rep. 680; *Ayres v. Burr*, 132 Cal. 125; *Nichols v. Chittenden*, 14 Colo. App. 49; *Johnson v. Dun*, 75 Minn. 533; *Woolley v. Maynes Wells Co.*, 15 Utah 341.

6. **Forthcoming and Delivery Bonds.** — *Smith v. Packard*, 39 C. C. A. 294, 98 Fed. Rep. 793; *Troy v. Rogers*, 116 Ala. 255, 67 Am. St. Rep. 110; *Rosenthal v. Perkins*, 123 Cal. 240; *Rosenthal v. Perkins*, (Cal. 1898) 53 Pac. Rep. 444; *Nichols v. Chittenden*, 14 Colo. App. 49; *Keith v. Moore*, 2 Ohio Cir. Dec. 245; *Phillips-Buttorff Mfg. Co. v. Williams*, (Tenn. 1900) 63 S. W. Rep. 185. See also the title FORTHCOMING AND DELIVERY BONDS.

**231.** 1. **Effect of Bail Bond.** — *Rosenthal v. Perkins*, 123 Cal. 240. See also *Nichols v. Chittenden*, 14 Colo. App. 49.

2. **Effect of Delivery Bond.** — *Chittenden v. Nichols*, 31 Colo. 202; *Simmons Hardware Co. v. Loewen*, 95 Mo. App. 122; *Allyn v. Cole*, (Neb. 1902) 91 N. W. Rep. 505; *Phillips-Buttorff Mfg. Co. v. Williams*, (Tenn. 1900) 63 S. W. Rep. 185. See also *Nichols v. Chittenden*, 14 Colo. App. 49.

3. **Execution of Bond Operates as Estoppel.** — *Anvil Gold Min. Co. v. Hoxie*, 1 Alaska 604.

**233.** *b.* BANKRUPTCY AND INSOLVENCY OF DEFENDANT — (1) *Bankruptcy* — (a) Statute of 1867 — Under the Federal Bankruptcy Act of 1867. — See note 5. See further the title INSOLVENCY AND BANKRUPTCY, **705**. 5 *et seq.*

**235.** See note 1.

**237.** (2) *Insolvency*. — See note 1. See also the title INSOLVENCY AND BANKRUPTCY, **708**. 3.

Effect of Local Assignment on Foreign Attachments. — See note 3.

*c.* DEATH OF DEFENDANT. — See note 4.

**239.** *e.* ABANDONMENT — (1) *What Acts of Plaintiff Constitute Abandonment*. — See note 2.

**240.** (2) *Abandonment of Possession by Officer*. — See note 1.

**241.** *f.* JUDGMENT FOR DEFENDANT. — See note 3.

**242.** A Personal Judgment for the Plaintiff. — See note 2.

Effect of Appeal. — See note 4.

**243.** *g.* ISSUE AND LEVY ON SUNDAY. — See note 1.

**244.** *i.* REPEAL OF STATUTE. — See note 1.

2. Effect of Dissolution — *a.* WITH RESPECT TO ACTION WHEREIN ISSUED. — See note 2.

**245.** XIV. LIABILITY IN TORT OF ATTACHMENT PLAINTIFF — 2. Attachment Wrongful but Not Malicious — *a.* SUING OUT OF WRIT WITHOUT JUST CAUSE. — See note 6.

**247.** *c.* WRONGFUL ACTS OF OFFICER — Acting under Valid Process. — See notes 1, 3.

*d.* MEASURE OF DAMAGES — Compensatory Damages. — See notes 5, 7.

**233.** 5. Bankruptcy Dissolves Attachment under Statute of 1898. — *Bear v. Chase*, 40 C. C. A. 182, 99 Fed. Rep. 920; *In re Higgins*, 97 Fed. Rep. 775; *Wood v. Carr*, 115 Ky. 303; *Jones v. Stevens*, 94 Me. 582; *Watschke v. Thompson*, 85 Minn. 105; *Wilkinson v. Raymond*, 80 N. Y. App. Div. 378; *Kosches v. Libowitz*, (Tex. Civ. App. 1900) 56 S. W. Rep. 613.

**235.** 1. Final Judgment Within Four Months. — See *In re De Lue*, 91 Fed. Rep. 510.

In states where the lien of an attachment is a perfect lien from its inception and is not dependent upon final judgment, an attachment lien will not be dissolved although judgment is rendered within four months preceding the bankruptcy proceedings. *In re Blair*, 108 Fed. Rep. 529; *In re Beaver Coal Co.*, 110 Fed. Rep. 630; *In re Beaver Coal Co.*, (C. C. A.) 113 Fed. Rep. 889; *Hurlbutt v. Brown*, 72 N. H. 235. But in states where the attachment lien is but an inchoate right and dependent upon judgment to perfect it, such a lien will be dissolved by bankruptcy proceedings when the judgment is rendered within four months before such proceedings. *In re Lesser*, 108 Fed. Rep. 201; *In re Johnson*, 108 Fed. Rep. 373.

**237.** 1. Statutes Avoiding Attachments Pending Insolvency. — *Rosenthal v. Perkins*, (Cal. 1898) 53 Pac. Rep. 444; *Hazen v. Lydonville Nat. Bank*, 70 Vt. 543, 67 Am. St. Rep. 680.

3. *King v. Cross*, 175 U. S. 396; *Rothschild v. Knight*, 184 U. S. 334; *Barth v. Backus*, 140 N. Y. 230, 37 Am. St. Rep. 545.

4. Dissolution by Death of Defendant. — *Reynolds v. Nesbitt*, 196 Pa. St. 636, 79 Am. St. Rep. 736.

Death of Defendant No Dissolution. — *Wartman v. Pecka*, (Ariz. 1902) 68 Pac. Rep. 534; *White v. Ladd*, 34 Oregon 422.

**239.** 2. There Must Be Some Affirmative Act or Conduct inconsistent with the continuance of

the lien. *Stillman v. Hamer*, (Kan. 1904) 78 Pac. Rep. 836.

**240.** 1. Officer's Abandonment of Possession. — See *Inman v. Schloss*, 122 Ala. 461; *Nicholson v. Merstetter*, 68 Mo. App. 441.

**241.** 3. Judgment for Defendant Dissolves Attachment. — *Alpirn v. Goodman*, (Neb. 1902) 91 N. W. Rep. 530; *Friede v. Weissenhanner*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 518.

**242.** 2. Personal Judgment. — See *Farmers Mfg. Co. v. Steinmetz*, 133 N. Car. 192, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 242, as to the rule in some states, but not deciding it as to *North Carolina*.

4. Appeals. — *Friede v. Weissenhanner*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 518.

**243.** 1. Issuance of Attachment on Sunday. — See *Schow v. City Nat. Bank*, (Tex. Civ. App. 1897) 40 S. W. Rep. 166.

**244.** 1. Effect of Repeal. — *McFadden v. Blocker*, 2 Indian Ter. 260. *Contra*, *Day v. Madden*, 9 Colo. App. 464; *Mulnix v. Spratlin*, 10 Colo. App. 390.

2. Where Attachment Is Foundation of Action. — *Dayton Spice-Milk Co. v. Sloan*, 49 Neb. 622.

**245.** 6. Wrongful Suing Out of Writ — Rule of Liability in Some Jurisdictions. — *Swenson v. Erickson*, 90 Ill. App. 358; *Aboshoh v. Buck*, (Ky. 1897) 43 S. W. Rep. 425; *Friel v. Plumer*, 69 N. H. 498, 76 Am. St. Rep. 190.

**247.** 1. Liability for Wrongful Act of Officer Acting under Valid Process. — *Siersema v. Meyer*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 358; *Munns v. Loveland*, 15 Utah 250; *Adams v. Savery House Hotel Co.*, 107 Wis. 109. See also *American Nat. Bank v. Childs*, 49 La. Ann. 1359.

3. Where Attaching Plaintiff Consents to Wrongful Act. — *Adams v. Savery House Hotel Co.*, 107 Wis. 109.

5. Compensation the Measure of Damages. —



**248. Nominal Damages.** — See note 1.

**249. ATTEMPT.** — See note 1.

*Simmons Clothing Co. v. Davis*, 3 Indian Ter. 379; *Farmers, etc., Warehouse Co. v. Gibbons*, 107 Ky. 611; *State Bank v. Martin*, 52 La. Ann. 1628; *Talbott v. Great Western Plaster Co.*, 86 Mo. App. 558; *Reeves v. John*, (Tenn. Ch. 1897) 43 S. W. Rep. 134; *Smith v. Mather*, (Tex. Civ. App. 1899) 49 S. W. Rep. 257; *Weaver v. Goodman*, (Tex. Civ. App. 1899) 51 S. W. Rep. 860; *Scott v. Childers*, 24 Tex. Civ. App. 349.

**Where Goods Wrongfully Attached Are Returned.** — To the same effect as *Munnerlyn v. Alexander*, 38 Tex. 125, stated in the original note,

see *Rice v. Wolff*, 4 Ohio Dec. 265, 3 Ohio N. P. 289.

**247. 7. Counsel Fees and Loss of Business, Etc.** — See *Abohos v. Buck*, (Ky. 1897) 43 S. W. Supp. 425.

**248. 1. Nominal Damages.** — *Chattanooga Fourth Nat. Bank v. Crescent Min. Co.*, (Tenn. Ch. 1897) 52 S. W. Rep. 1021; *Reeves v. John*, (Tenn. Ch. 1897) 43 S. W. Rep. 134; *Low v. Smith*, (Tex. Civ. App. 1903) 77 S. W. Rep. 32.

**249. 1. Distinguished from Intent.** — *State v. Hager*, 50 W. Va. 370; *State v. Daly*, 41 Oregon 515.

# ATTEMPTS TO COMMIT CRIME.

By H. GANNAWAY.

**251. I. DEFINITION.** — See note 1.

**II. NATURE AND DEGREE OF THE CRIME — 2. Classes of Crimes**

**Attempted** — *a. TREASON AND FELONY.* — See note 6.

**252.** Either Common Law or Statutory. — See note 1.

**253.** *b. MISDEMEANORS — Mala in Se.* — See note 1.

**254. III. ELEMENTS OF AN ATTEMPT — 1. General Rule.** — See note 2.

**2. Elements Must Coexist — Both Elements Must Be Alleged and Proved.** — See note 5.

**255.** Conviction for Attempt in Trial for Completed Crime. — See note 1.

**IV. THE INTENT — 1. Specific Intent Essential — a. MATTER OF FACT.** — See note 2.

**256. b. IMPLICATION OF LAW — Rebuttable Presumptions of Fact.** — See note 1.

*c. INSTANCES — (1) Attempt to Murder.* — See note 2.

**251. 1. Attempts Defined — Georgia.** — Groves *v. State*, 116 Ga. 516.

*Illinois.* — Graham *v. People*, 181 Ill. 477, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 250, 251.

*Massachusetts.* — Com. *v. Peaslee*, 177 Mass. 267, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 251.

*Michigan.* — People *v. Youngs*, 122 Mich. 292, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 250; People *v. Webb*, 127 Mich. 29.

*New York.* — People *v. Sullivan*, 173 N. Y. 122, 93 Am. St. Rep. 582; People *v. Mills*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 195.

*North Dakota.* — Cornwell *v. Fraternal Acc. Assc.*, 6 N. Dak. 201, 66 Am. St. Rep. 601.

See also People *v. Oates*, 142 Cal. 12.

"An Attempt to Commit Subornation of Perjury consists in attempting or endeavoring to induce another to do an act which, if committed, would itself amount to perjury." Nicholson *v. State*, 97 Ga. 672.

**6. Suicide.** — See Reg. *v. Stormonth*, 61 J. P. 729.

**Attempts Made Felonies by Statute — Attempt to Commit Arson.** — Benbow *v. State*, 128 Ala. 1; Howard *v. State*, 109 Ga. 137.

*Attempt to Commit Rape.* — State *v. Austin*, 109 Iowa 118.

*Attempt to Commit Sodomy.* — State *v. King*, 9 N. Dak. 149.

**252. 1. The Wisconsin Statute** relating to attempts to commit crimes has been construed as applying only to crimes committed by force (State *v. Goodrich*, 84 Wis. 359), and within this decision an attempt to commit larceny from the person is punishable as a crime, the word "force" being used in the sense of "without the consent of" the person against whom the criminal act is directed. State *v. Lewis*, 113 Wis. 391.

**253. 1. Obstruction and Perversion of Due Course of Justice.** — Rex *v. Tibbits*, (1902) 1 K. B. 77.

**254. 2. Graham v. People**, 181 Ill. 477,

quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 254; People *v. Youngs*, 122 Mich. 292; State *v. Fraker*, 148 Mo. 161; State *v. McGilvery*, 20 Wash. 249.

*Attempting Subornation of Perjury.* — Nicholson *v. State*, 97 Ga. 672.

**5. Intent and Act Must Be Alleged and Proved** — Gaskin *v. State*, 105 Ga. 631; Com. *v. Peaslee*, 177 Mass. 267; Axhelm *v. U. S.*, 9 Okla. 321; Fonville *v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 573.

*Contra.* — A conviction may be had for an attempt to murder, though the intent be not alleged, it being held that the word "attempt" implies "intent." State *v. Hager*, 50 W. Va. 373.

*Attempt to Commit Rape.* — State *v. Russell*, 64 Kan. 798.

*Attempt to Commit Arson.* — See. Com. *v. Peaslee*, 177 Mass. 267.

**255. 1. Assault with Intent to Rape.** — Schang *v. State*, 43 Fla. 561; State *v. Jackson*, 65 N. J. L. 105.

*Attempt to Rape.* — Rookey *v. State*, 70 Conn. 104.

*Attempt to Commit Jail Delivery.* — People *v. Webb*, 127 Mich. 29.

*Attempt to Commit Robbery.* — People *v. Burns*, 138 Cal. 159.

*Attempt to Commit Sodomy.* — State *v. Romans*, 21 Wash. 284.

**2. Intent Must Be Specific.** — Jackson *v. State*, 103 Ga. 417; Gaskin *v. State*, 105 Ga. 631; Patterson *v. State*, 11 Ohio Cir. Dec. 602, 21 Ohio Cir. Ct. 184; Moon *v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 806; State *v. McCune*, 16 Utah 170.

*Intentions Can Only Be Proved by Acts* and must exist as a matter of fact. Dudley *v. State*, 121 Ala. 4.

**256. 1. Where One Accused of Rape.** — Brown *v. State*, 121 Ala. 9.

**2. Completed Act Must Be Murder.** — Davis *v. State*, (Ark. 1904) 82 S. W. Rep. 167; State *v. Hager*, 50 W. Va. 370, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 256.

**258.** (2) *Attempt to Rape* — Intention to Use Force if Necessary. — See note 2.

**259.** Where Force Is Not of the Essence of the Offense. — See note 1.

**260.** See notes 1, 2.

**261.** Assault with Intent to Rape. — See note 1.

(3) *Other Attempts* — Abortion — Arson — Larceny — Maiming — Robbery. —

See note 2.

**262.** See note 5.

**263.** 3. *Felony Not Attempted, Committed.* — See note 2.

V. THE ACT — 1. In General — Overt Act Necessary. — See note 6.

**264.** Solicitations. — See notes 3, 4.

Instances. — See notes 15, 16a.

**258.** 2. No Actual Violence Need Be Shown. — *Dunn v. State*, 58 Neb. 807; *Warren v. State*, 38 Tex. Crim. 152.

*Intention to Use Force if Necessary Must Appear.* — *State v. Hayden*, 141 Mo. 311; *State v. Williams*, 121 N. Car. 628; *Dina v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 229; *Ross v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 503; *State v. McCune*, 16 Utah 170; *Hairston v. Com.*, 97 Va. 754, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 258.

**259.** 1. *Attempts upon Young Girls* — *California*. — *People v. Johnson*, 131 Cal. 511.

*Florida*. — *Schang v. State*, 43 Fla. 561.

*Illinois*. — *Addison v. People*, 193 Ill. 405.

*Indiana*. — *Hanes v. State*, 155 Ind. 112.

*Iowa*. — *State v. Sherman*, 106 Iowa 684.

*Kansas*. — *State v. Russell*, 64 Kan. 798.

*Nebraska*. — *Liebscher v. State*, (Neb. 1903) 95 N. W. Rep. 870.

*Texas*. — *Allen v. State*, 36 Tex. Crim. 381; *Callison v. State*, 37 Tex. Crim. 211; *Blair v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 879.

*Vermont*. — *State v. Sullivan*, 68 Vt. 540.

*Wisconsin*. — *Loose v. State*, 120 Wis. 115.

*The Refusal of the Accused to Be Medically Examined* is not evidence corroborative of the child's testimony, within the meaning of section 4 of the Criminal Law Amendment Act of 1885. *Rex v. Gray*, 68 J. P. 327.

**260.** 1. *Attempts on Insane Female.* — Where the female is insane or too weak to resist, force or violence need not be shown. *State v. Austin*, 109 Iowa 118.

**2.** *An Attempt to Administer Chloroform.* — *Ford v. State*, 41 Tex. Crim. 270, 96 Am. St. Rep. 787.

**261.** 1. *Force a Necessary Element in Assault with Intent to Rape.* — *Jackson v. State*, 114 Ga. 861; *Gaskin v. State*, 105 Ga. 631; *Tiller v. State*, 101 Ga. 782; *State v. Peak*, 130 N. Car. 711; *Taylor v. State*, 44 Tex. Crim. 153. And see the title RAPE.

*Consent of Female.* — *State v. McCune*, 16 Utah 170; *Wilcox v. State*, 102 Wis. 650.

Consent by a grown woman to familiarities with her person, and persuasions and requests for sexual intercourse, does not constitute consent to an assault to have forcible carnal connection with her. *Johnson v. People*, 197 Ill. 48.

*Under Age of Consent* — *Contra.* — *People v. Johnson*, 131 Cal. 511; *People v. Vann*, 129 Cal. 118; *People v. Lourintz*, 114 Cal. 628; *Addison v. People*, 193 Ill. 405; *State v. Sargent*, 32 Oregon 110.

A conviction may be had for the statutory

offense, where the female consented, just as for attempt to rape at common law. *State v. Hunter*, 18 Wash. 670.

**2.** *Attempt to Procure Abortion.* — Evidence that the defendant administered ergot to a pregnant woman and that ergot "is calculated to produce an abortion," is sufficient to show the criminal intent, though there is also evidence that it is only under certain circumstances that ergot will produce an abortion. *Hunter v. State*, 38 Tex. Crim. 61.

*Administering Drug.* — A charge of administering a drug with an intent to produce an abortion is sufficiently shown by proof that the defendant mailed to a pregnant woman a drug which if taken in sufficient quantities would produce an abortion, and that she took some of the drug, but not enough to produce the intended result. *State v. Moothart*, 109 Iowa 130.

*Belief of Woman that Drug Is Noxious.* — If a woman, believing she is taking a noxious thing, does, with intent to procure abortion, take a thing that is in fact harmless, she is guilty of an attempt to procure abortion. *Reg. v. Brown*, 63 J. P. 790.

**262.** 5. *Attempt to Poison.* — *Com. v. Kennedy*, 170 Mass. 18.

**263.** 2. *Felony Not Attempted, Committed.* — *State v. Cross*, 72 Conn. 722; *State v. Brown*, 4 Penn. (Del.) 120; *State v. Williams*, 122 Iowa 115; *People v. Sullivan*, 173 N. Y. 122, 93 Am. St. Rep. 582; *State v. Cole*, 132 N. Car. 1069; *Irvine v. State*, 104 Tenn. 132.

**6.** *Necessity of Overt Act.* — *Jackson v. State*, 103 Ga. 417; *Penny v. State*, 114 Ga. 77; *Groves v. State*, 116 Ga. 516; *State v. Hayden*, 141 Mo. 311; *Cox v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 157.

**264.** 3. *Solicitation* of a detective to commit a crime, with intent to commit it, constitutes the offense of attempt to commit the crime. *People v. Mills*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 195.

**4.** *Solicitations Not Attempts.* — *Ross v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 503; *Hairston v. Com.*, 97 Va. 754.

**15.** *Approaching House with Burglar's Tools.* — *People v. Sullivan*, 173 N. Y. 122, 93 Am. St. Rep. 582.

**16a.** *Further Instances* — *Mailing Drug to Pregnant Woman to Procure Abortion.* — *State v. Moothart*, 109 Iowa 130.

*Putting Poison into a Cup with the Intent that It Shall Be Taken.* — *Com. v. Kennedy*, 170 Mass. 18.

*Offering to Pay Servant to Set Fire to Building.* — *Com. v. Peaslee*, 177 Mass. 267.

**265.** 2. Must Fall Short of Completed Crime. — See notes 4, 5.

3. Must Not Be Too Remote — *a.* IN GENERAL. — See note 9.  
Last Proximate Act. — See note 10.

**266.** *b.* PREPARATIONS — General Rule. — See note 6.

Instances. — See notes 8, 8*a*.

**267.** 4. Adaptation of Means Employed — Means Obviously Unsuitable. — See note 6.

**268.** Instances. — See notes 2, 4, 6.

**269.** VI. ABANDONMENT OF DESIGN. — See note 3.

**270.** VIII. IMPOSSIBLE CRIMES — 1. In General — If the Crime Is Actually and Obviously Impossible. — See note 1.

**272.** ATTEND — ATTENDANCE. — See note 5.

**274.** ATTEST — ATTESTATION. — See note 1.

**276.** ATTORNEY. — See note 3.

*Shooting Through a Window Where Intended Victim Was Supposed to Be.* — State v. Mitchell, 170 Mo. 633, 94 Am. St. Rep. 763.

**265.** 4. Graham v. People, 181 Ill. 477, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 254; People v. Webb, 127 Mich. 29.

If Offense Committed, Jury Cannot Find Guilty of Attempt Only. — Graham v. People, 181 Ill. 488. *Contra*, Axhelm v. U. S., 9 Okla. 321.

To Convict of an Attempt to Commit Rape, the force employed must fall short of that necessary to convict of assault with intent to rape. Moon v. State, (Tex. Crim. 1898) 45 S. W. Rep. 806.

5. An indictment for the completed offense includes an attempt to commit such an offense. Benbow v. State, 128 Ala. 1.

9. Question of Remoteness. — People v. Youngs, 122 Mich. 292, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 265; Cornwell v. Fraternal Acc. Assoc., 6 N. Dak. 201, 66 Am. St. Rep. 601.

10. Need Not Be Last Proximate Act. — Com. v. Peaslee, 177 Mass. 267; People v. Youngs, 122 Mich. 292, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266.

**266.** 6. Preparations Far Removed from the Crime. — Jackson v. State, 103 Ga. 417; Penny v. State, 114 Ga. 77; Groves v. State, 116 Ga. 516; Com. v. Peaslee, 177 Mass. 267; State v. Hayden, 141 Mo. 311; Cornwell v. Fraternal Acc. Assoc., 6 N. Dak. 201, 66 Am. St. Rep. 601; Fonville v. State, (Tex. Crim. 1901) 62 S. W. Rep. 573.

8. Procuring Gun to Shoot a Person. — Where the accused drew a pistol from his hip pocket, and, in consequence of its being caught in the lining of his coat, did not make any actual attempt to inflict an injury, it was held insufficient to convict of attempt. Burton v. State, 109 Ga. 134.

8*a*. Putting Poison into a Well, with the intent that others should drink and be poisoned, was merely a preparation, when the presence of the poison was discovered before any one drank in fact. Peebles v. State, 101 Ga. 585.

**267.** 6. Shooting at One Beyond Range. — Lott v. State, 83 Miss. 609.

**268.** 2. Pointing an Empty Gun. — Where one points a gun at another with felonious intent, the law presumes that it was loaded. McNamara v. People, 24 Colo. 61.

4. Administering Harmless Medicines with Intent to Procure Abortion. — Administering a drug not ordinarily used to procure an abortion, but with that intent, constitutes an attempt to procure an abortion. Hunter v. State, 38 Tex. Crim. 61.

6. Where Poison Was Put into a Cup with intent to kill, it is immaterial whether the dose was sufficient to produce death or not. Com. v. Kennedy, 170 Mass. 18.

**269.** 3. If the Elements of an Attempt Have Once Existed, it makes no difference what causes an abandonment of design, the offense of attempt is committed. State v. Mehaffey, 132 N. Car. 1062. See also State v. Williams, 121 N. Car. 628; State v. McGilvery, 20 Wash. 240, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 269.

**270.** 1. Lott v. State, 83 Miss. 609.

One may be guilty of an attempt to commit murder though the intended victim was not in fact where the accused supposed him to be, and where he fired with intent to kill. State v. Mitchell, 170 Mo. 633, 94 Am. St. Rep. 763.

**272.** 5. Insurance — Medical Attendance — A Person Who Calls at a Physician's Office. — See Billings v. Metropolitan L. Ins. Co., 70 Vt. 477.

Attention. — A promise to give a proposal for the purchase of merchandise prompt attention is not a promise of acceptance; it is no more than a courteous promise to give it consideration. Attention, according to Webster, signifies "the act or state of attending or heeding;" notice; exclusive or special consideration. Manier v. Appling, 112 Ala. 663.

**274.** 1. Boyle v. Lansford School Dist., 7 Pa. Dist. 709, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 274; Donovan v. St. Anthony, etc., Elevator Co., 8 N. Dak. 589, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 274.

Actual Presence. — Tobin v. Haack, 79 Minn. 101.

Attestation Distinguished from Subscription. — Tobin v. Haack, 79 Minn. 101. Compare Skinner v. American Bible Soc., 92 Wis. 209.

**276.** 3. Treat v. Tolman, (C. C. A.) 113 Fed. Rep. 894.

Attorney in Fact and Agent Distinguished. — See White v. Furgeson, 29 Ind. App. 144.

# ATTORNEY AND CLIENT.

By H. O'B. COOPER.

**281. I. DEFINITION — An Attorney in Fact.** — See note 2.

An Attorney at Law. — See note 3.

**283. II. STATUS OF ATTORNEY AS AN OFFICER.** — See notes 1, 3.

**III. ADMISSION — 1. Eligibility — a. PERSONS OF GOOD MORAL CHARACTER.** — See note 4.

**284. The Readmission of an Attorney.** — See note 1.

**b. ALIENS AND NONRESIDENTS — Usage and Comity.** — See note 2.  
Statutes. — See note 3.

**281. 2. Attorney in Fact Defined.** — *White v. Furgeson*, 29 Ind. App. 144.

"By attorney in fact is meant one who is given authority by his principal to do a particular act not of a legal character." *Treat v. Tolman*, (C. C. A.) 113 Fed. Rep. 892.

**3. Attorney at Law Defined.** — *Treat v. Tolman*, (C. C. A.) 113 Fed. Rep. 892; *In re Day*, 181 Ill. 73; *Com. v. Branthoover*, 24 Pa. Co. Ct., 353, 31 Pittsb. Leg. J. N. S. (Pa.) 267.

**Representative of Another.** — "One acts as an attorney at law only when he represents another, not when he appears for himself." *Philbrook v. Superior Ct.*, 111 Cal. 31.

**Twofold Relation.** — An attorney of record stands in a twofold relation: he is the representative of his client and he is an officer of the court. *Delaney v. Husband*, 64 N. J. L. 275.

**283. 1. Attorney an Officer of Court — District of Columbia.** — *Matter of Adriaans*, 17 App. Cas. (D. C.) 39.

*Illinois.* — *In re Day*, 181 Ill. 73.

*Indiana.* — See *Chase v. Chase*, (Ind. 1904) 71 N. E. Rep. 485.

*Kentucky.* — *Com. v. Richie*, 114 Ky. 366.

*Michigan.* — *In re Mains*, 121 Mich. 603.

*New Jersey.* — *Delaney v. Husband*, 64 N. J. L. 275.

*New York.* — *National Press Intelligence Co. v. Brooke*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 373.

*Ohio.* — *Matter of Burke*, 11 Ohio Cir. Dec. 397, 21 Ohio Cir. Ct. 34.

*Pennsylvania.* — *Danville, etc.*, R. Co. v. *Rhodes*, 180 Pa. St. 157; *Com. v. Branthoover*, 24 Pa. Co. Ct. 353, 31 Pittsb. Leg. J. N. S. (Pa.) 267.

*Utah.* — *Morrison v. Snow*, 26 Utah 247.

**Entitled to Equal Protection of the Law.** — *Tomsky v. Superior Ct.*, 131 Cal. 620.

**3. Office of Attorney Distinguished from Ordinary Public Offices.** — *In re Applications for Admission to Practice*, 14 S. Dak. 429, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 283.

**Vested Right.** — *In re Applications for Admission to Practice*, 14 S. Dak. 429, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 283.

**City Trustees Cannot Regulate Practice of Law.** — *Sonora v. Curtin*, 137 Cal. 583.

**Collateral Impeachment.** — The granting of a license to practice law is the exercise of a judicial function, which cannot be collaterally attacked, and can only be collaterally impeached

by what affirmatively appears on the face of the record. *Fish v. St. Louis County Printing, etc.*, Co., 102 Mo. App. 6.

**4. Moral Character of Applicant.** — *People v. George*, 186 Ill. 122; *People v. Smith*, 200 Ill. 442, 93 Am. St. Rep. 206; *In re Swadener*, 5 Ohio Dec. 598, 7 Ohio N. P. 446; *In re Rodgers*, 194 Pa. St. 161.

**Application to Disbarred Attorney.** — *In re Palmer*, 8 Ohio Cir. Dec. 508, 15 Ohio Cir. Ct. 94.

**284. 1. Readmission of Disbarred Attorney — Discretion of Court.** — *In re Boone*, 90 Fed. Rep. 793; *In re Newton*, 27 Mont. 184; *In re Weed*, 28 Mont. 264, 26 Mont. 241. See *In re Forbes*, 33 Can. L. J. 629.

**Reinstatement.** — A court which has the power to suspend or disbar an attorney has the power to reinstate, upon proper and satisfactory proof that, as a result of his discipline, he has become a fit and proper person to be intrusted with the office of an attorney. *In re Simpson*, 11 N. Dak. 526.

"The same authority that empowers this court to strike the names of unworthy attorneys from the roll grants us the power to reinstate." *People v. Essington*, 32 Colo. 168.

**2. Nonresidents — Right to Appear in Particular Cases.** — *In re Admission to Bar*, 61 Neb. 58; *Manning v. Roanoke, etc.*, R. Co., 122 N. Car. 824.

**Nonresident — No Unqualified Right to Practice.** — *Chappell v. Real Estate Pooling Co.*, 89 Md. 260, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 284.

**Rules Applicable Only to Citizens of Other States.** — *In re Brown*, 9 Pa. Dist. 103.

**Nonresident May Assist Prosecution.** — *People v. Thacker*, 108 Mich. 652.

**Attorney Not Member of Bar of Particular County.** — See *Bronson v. Brown*, 8 Pa. Dist. 365.

**3. Statutory Regulations as to Nonresidents.** — *In re Applications for Admission to Practice*, 14 S. Dak. 429.

**Italian Lawyer — Presumed Not Familiar with Common Law.** — *Matter of Maggio*, 27 N. Y. App. Div. 129.

**British Columbia — Attorney from Another Province.** — *Gwillim v. Law Soc.*, 6 British Columbia 147.

**In New York** an exception was made in favor of those who had been admitted to practice in another state and had "remained therein as

**285. One Who Is a Nonresident of a State Is Not Eligible. — See note 1.****Aliens. — See note 2.****c. MINORS. — See note 3.****d. WOMEN — Common-law Rule. — See note 4.****287. e. BY WHOM QUALIFICATIONS ARE PRESCRIBED — Power of Legislature. — See note 3.****Power of Court. — See notes 4, 5.****288. 2. Requisites of Admission — a. EXAMINATION. — See note 2.****b. SERVING CLERKSHIP. — See note 3.****289. c. DIPLOMAS FROM LAW SCHOOLS. — See note 2.****291. IV. PRIVILEGES AND DISABILITIES — 1. In General. — See note 1.****293. 3. Exemption from Arrest. — See notes 4, 5.****295. 4. Liability for Language Used in Argument — The Privilege Rests upon Grounds of Public Policy. — See note 1.**

practicing attorneys for at least one year," provided they had since pursued the study of law one year in New York. *Matter of Simpson*, 167 N. Y. 403.

**Rule of Court in Minnesota — Construction. —** To be admissible in Minnesota, under the rule admitting attorneys of five years' standing in another state, the applicant must be an attorney of that state at the time of application, and have been such continuously for five years immediately preceding such application. *In re Crum*, 72 Minn. 401.

**Women — Maryland Statute. —** Under a Maryland statute admitting the members of the bar from other states on certain conditions, it was held that the whole statute must be read together, and inasmuch as the class of persons of the state for whose admission it provides does not include women, the section relating to the admission of lawyers from other states must be read as not including women. *In re Maddox*, 93 Md. 727.

**285. 1. Nonresident — Change of Residence. —** "An attorney of this court who removes his residence from the state cannot enter appearance and become attorney of record in any action thereafter, but he does not cease to represent his client in actions previously commenced, until his client has substituted another attorney in his place." *Faughman v. Elizabeth*, 58 N. J. L. 309.

**2. Aliens. —** *In re Admission to Bar*, 61 Neb. 58; *Matter of Yamashita*, 30 Wash. 234, 94 Am. St. Rep. 860.

**3. General Rule as to Minors. —** *In re Admission to Bar*, 61 Neb. 58.

**4. Women Ineligible in Absence of Enabling Statute. —** *In re Maddox*, 93 Md. 727.

**287. 3. Power of Legislature to Prescribe Qualifications. —** *In re Day*, 181 Ill. 73; *In re Maddox*, 93 Md. 727.

**Law Must Be General in Its Operation. —** *In re Day*, 181 Ill. 73.

**4. Admission Is Judicial Act. —** *In re Day*, 181 Ill. 73; *Fish v. St. Louis County Printing, etc., Co.*, 102 Mo. App. 6; *Wilson's Application*, 9 Pa. Dist. 102; *Com. v. Branthoover*, 24 Pa. Co. Ct. 353.

**Right to Admission Not a Vested Right. —** *In re Day*, 181 Ill. 73.

**5. Discretion of Court. —** *In re Day*, 181 Ill. 90, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 287; *Com. v. Branthoover*, 24 Pa. Co. Ct. 353.

**288. 2. Examination of Applicant. —** *In re Brown*, 9 Pa. Dist. 103.

**Marking Papers. —** See *People v. Carr*, 21 Colo. 525.

**3. Serving Clerkship. —** *People v. Carr*, 21 Colo. 525; *In re Admission to Bar*, 61 Neb. 58; *Wilson's Application*, 9 Pa. Dist. 102; *McPherson's Case*, 5 Pa. Dist. 22. Compare *Matter of Warde*, 154 N. Y. 342.

**The Practicing Attorney, in whose office study is required in certain instances, in Nebraska, must be one residing and practicing in that state, although the language of the statute does not expressly require it. —** *In re Admission to Bar*, 61 Neb. 58.

**289. 2. Diplomas from Law Schools — Statutes. —** *In re Admission to Bar*, 61 Neb. 58. See *Calder v. Law Soc.*, 9 British Columbia 56; *King v. Law Soc.*, 8 British Columbia 356.

**291. 1. Service of Summons — Attendance at Court in Foreign Jurisdiction. —** *Whitman v. Sheets*, 11 Ohio Cir. Dec. 179, 20 Ohio Cir. Ct. 1.

**Exemption from Service of Subpoena. —** *Central Trust Co. v. Milwaukee St. R. Co.*, 74 Fed. Rep. 442; *Hoffman v. Bay Circuit Judge*, 113 Mich. 109, 67 Am. St. Rep. 458.

**293. 4. Exemption from Arrest. —** At Common Law an attorney was exempt from arrest or being sued during the actual sitting of the court of which he was an officer, if he was employed in some cause pending, and then to be heard in such court, "*eundo, morando, et redeundo*." *National Press Intelligence Co. v. Brooke*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 373.

**The Revised Statutes of New York restricted the privilege, so that an attorney was "exempt from arrest during the sitting of the court of which he is an officer," if he was "employed in some cause pending and then to be heard in such court." —** *National Press Intelligence Co. v. Brooke*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 373.

**Service of Order in Supplementary Proceedings on an attorney engaged in court is legal. —** *National Press Intelligence Co. v. Brooke*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 373.

**5. The Michigan Statute limiting exemption to the time during which the court is actually sitting does not limit the common-law exemption from service of process. —** *Hoffman v. Bay Circuit Judge*, 113 Mich. 109, 67 Am. St. Rep. 458.

**295. 1. Client Not Liable. —** *Monroe v. H. Weston Lumber Co.*, 50 La. Ann. 142.

- 295.** 5. Cannot Represent Conflicting Interests — General Rule. — See note 4.  
**296.** Agreement to Represent Void. — See note 1.  
 Consequence of Former Retainer. — See note 2.  
 Information Acquired by Former Relation, Not to Be Used for New Client to Prejudice of Former One. — See note 3.  
**297.** Limits to This Principle. — See note 1.  
 Acting as Umpire Permissible. — See note 2.  
**298.** Criterion as to Whether Interests Adverse or Inconsistent. — See notes 1, 2.  
**299.** The Duties of Judge of a Court and of a Solicitor Therein. — See note 3.  
**300.** Consequence of Attorney's Representing Conflicting Interests. — See notes 1, 2.

**295.** 4. General Rule as to Representing Conflicting Interests. — *In re* Four Solicitors, (1901) 1 K. B. 187, 70 L. J. K. B. 5; *Kidd v. Huff*, 105 Ga. 209; *Strong v. International Bldg.*, etc., Union, 82 Ill. App. 426, *affirmed* 183 Ill. 97; *Bowman v. Bowman*, 153 Ind. 498; *Asher v. Beckner*, (Ky. 1897) 41 S. W. Rep. 35. See *Harding v. Helmer*, 193 Ill. 109; *Mealer v. Gilbert*, 60 S. W. Rep. 8, 22 Ky. L. Rep. 1523; *Hare v. De Young*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 366; *Smith v. Quarles*, (Tenn. Ch. 1897) 46 S. W. Rep. 1035.

**Attorney Cannot Act as Notary for Depositions.** — *Stewart v. Emerson*, 70 Mo. App. 482.

**Attorney Cannot Take Client's Affidavit.** — *Horkay v. Kendall*, 53 Neb. 522, 68 Am. St. Rep. 623; *Gosselin v. Bergevin*, 11 Quebec Super. Ct. 288.

**Unaccepted Offer to Other Party Does Not Disqualify.** — *Hicks v. Drew*, 117 Cal. 305.

**Bankrupt and Creditor Whose Claim Is Contested.** — *In re* Wooten, 118 Fed. Rep. 670.

**May Deal with Adversary at Arm's Length.** — *Bunel v. O'Day*, 125 Fed. Rep. 303.

**Attorney for Plaintiff Framed Answer for Guardian ad Litem for Infant Defendant.** — *Marcom v. Wyatt*, 117 N. Car. 129.

**Members of Firm.** — When attorneys in partnership permit one member of their firm to make personal contracts for his services, it is upon the implied condition that the other members cannot be employed against their partner's client. *Ostrander v. Capitol Invest.*, etc., Assoc., 130 Mich. 312.

**Where Employment Was Not Complete**, but conditional, and the attorney had not made any investigation of the defendant's case, and sustained towards him no confidential relations from consultations, he may appear for the plaintiff. *State v. Lewis*, 96 Iowa 286.

**A State's Attorney** who renders professional assistance to a defendant in a criminal action violates his duties as state's attorney and as an attorney at law. *In re* Voss, 11 N. Dak. 540.

**296.** 1. Attorney May Represent Two Clients Desiring Same Relief. — *Deering v. Schreyer*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 237.

**Ignorance of Attorney.** — If an agreement was entered into in ignorance of the adverse relation, and was withdrawn from on finding it out, the right to compensation is not forfeited. *Asher v. Beckner*, (Ky. 1897) 41 S. W. Rep. 35.

**2. Former Clients — Rights Of.** — *In re* Boone, 83 Fed. Rep. 944.

**Contract of Release.** — *In re* Boone, 83 Fed. Rep. 944.

**3.** *In re* Boone, 83 Fed. Rep. 944; *Carson v. Fogg*, 34 Wash. 448.

**Disclosure Not Enjoined.** — *Lalance*, etc., Mfg. Co. v. Haberman Mfg. Co., 93 Fed. Rep. 197.

**297.** 1. Extent of Rule. — *Lalance*, etc., Mfg. Co. v. Haberman Mfg. Co., 93 Fed. Rep. 197; *Messenger v. Murphy*, 33 Wash. 353.

**Amicable Adjustment.** — An attorney may represent adverse interests if they are to be amicably adjusted. *Lawall v. Groman*, 180 Pa. St. 532, 57 Am. St. Rep. 662.

**2. May Act as Umpire.** — *Strong v. International Bldg.*, etc., Union, 82 Ill. App. 426, *affirmed* 183 Ill. 97.

**298.** 1. See *Perkins v. West Coast Lumber Co.*, 129 Cal. 427.

**Attorney for Bankrupt and Trustee.** — There is no adverse or conflicting interest between the bankrupt and the trustee in the collection of debts due the estate, and an attorney may represent both in that respect. *Keyes v. McKerrow*, 180 Mass. 261.

**Determination by Court.** — *Asher v. Beckner*, (Ky. 1897) 41 S. W. Rep. 35.

**Double Agency Valid if Interests Not Antagonistic.** — *Stone v. Slattery*, 71 Mo. App. 442.

**Attorney May Represent Both Borrower and Lender if Mutually Understood.** — *Lawall v. Groman*, 180 Pa. St. 532, 57 Am. St. Rep. 662.

**Other Client Having No Adverse Interests and Not a Necessary Party.** — *Matter of Jones*, 118 Cal. 499.

**One Having No Interest in Litigation and Not Necessary Party.** — *McCabe v. Healy*, 138 Cal. 81.

**2. Test of Inconsistency.** — *Messenger v. Murphy*, 33 Wash. 353. See *Bowman v. Bowman*, 153 Ind. 498.

**In an Action to Foreclose** it was held not improper for the defendant's counsel to represent an intervener, where there were no issues developed between them. *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 248.

**299.** 3. Judge Acting as Solicitor. — *Justice v. Lairy*, 19 Ind. App. 272, 65 Am. St. Rep. 405.

**300.** 1. Attorney Representing Adverse Interests — Judgment Obtained Voidable. — *Kannally v. Renner*, 84 Ill. App. 51; *U. S. Blowpipe Co. v. Spencer*, 46 W. Va. 601, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 299. See *In re Cummings*, 120 Iowa 421.

**Acts of Attorney Not Binding.** — *Michigan Stove Co. v. Harwood Hardware Co.*, 71 Ill. App. 240.

**2. Liability of Attorney for Breach of Duty** — *New York Code Civ. Pro.*, § 67. — *Rochester Bar Assoc. v. Dorthy*, 152 N. Y. 596.

**300. V. SUSPENSION AND DISBARMENT — 1. Power of Courts to Disbar.** — See note 5.

**302. How Far Legislature May Limit Such Power.** — See note 2.

**Unprofessional or Disrespectful Conduct on the Part of an Attorney.** — See note 3.

**300. 5. Court's Power to Disbar** — *Colorado*. — *People v. Webster*, 28 Colo. 223; *People v. Keegan*, 30 Colo. 71.

*Connecticut*. — *Matter of Westcott*, 66 Conn.

585.

*Illinois*. — *People v. George*, 186 Ill. 122.

*Iowa*. — *State v. Tracy*, 115 Iowa 71.

*Kansas*. — *In re Norris*, 60 Kan. 649.

*Louisiana*. — *State v. Rightor*, 49 La. Ann.

1015.

*Michigan*. — *In re Mains*, 121 Mich. 603.

*Missouri*. — *State v. Gebhardt*, 87 Mo. App.

542.

*North Dakota*. — *In re Simpson*, 9 N. Dak. 404, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300.

*Ohio*. — *In re Swadener*, 5 Ohio Dec. 598, 7 Ohio N. P. 446.

*Pennsylvania*. — *In re Smith*, 179 Pa. St. 14.

*Utah*. — *In re Evans*, 22 Utah, 366, 83 Am. St. Rep. 794.

*Washington*. — *Matter of Waugh*, 32 Wash. 58, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300.

**Power Inherent and Summary.** — *Moutray v. People*, 162 Ill. 194.

**Disbarment No Punishment — Protection from Persons Unfit to Practice.** — *In re Palmer*, 8 Ohio Cir. Dec. 508, 15 Ohio Cir. Ct. 94; *Ex p. Finn*, 32 Oregon 519, 67 Am. St. Rep. 550; *Scott v. State*, 86 Tex. 321.

"It is not by way of punishment, however, that the offending attorney is disbarred; but the court in such cases exercises its discretion, whether a party whom it has formerly admitted to the privilege of an attorney is a proper person to be continued on the roll or not." *Matter of Adriaans*, 17 App. Cas. (D. C.) 39.

**Jurisdiction in Equity — Proceedings Not Criminal.** — *Com. v. Richie*, 114 Ky. 366; *In re Wellcome*, 23 Mont. 259, 450.

**Discretionary with Court.** — *In re Boone*, 83 Fed. Rep. 944.

**Action Not Triable by Jury.** — *State v. Fourchy*, 106 La. 743.

**Attorney Not Triable by Bar.** — *Matter of Westcott*, 66 Conn. 585.

**Charges Require Clear and Convincing Evidence** — *Colorado*. — *In re Walkey*, 26 Colo. 161.

*Michigan*. — *In re Clink*, 117 Mich. 619.

*Minnesota*. — *In re Dodge*, (Minn. 1904) 100 N. W. Rep. 684.

*Montana*. — *State v. Wines*, 21 Mont. 464.

*New York*. — *Matter of Mashbir*, 44 N. Y. App. Div. 632.

*Utah*. — *In re Evans*, 22 Utah 366, 83 Am. St. Rep. 794.

*West Virginia*. — *State v. Shumate*, 48 W. Va. 359; *State v. Stiles*, 48 W. Va. 425.

*Wisconsin*. — *Flanders v. Keefe*, 108 Wis. 441.

**Power of Federal Courts.** — *In re Boone*, 83 Fed. Rep. 944.

**Disbarment No Deprivation of Constitutional Privilege or Immunity.** — *Philbrook v. Newman*, 85 Fed. Rep. 139.

**Supreme Court — No Original Jurisdiction for Fraud in Superior Court.** — *Matter of Waugh*, 32 Wash. 50.

**The Court of Appeals** has jurisdiction of a writ of error to a judgment of a Circuit Court, disbarring an attorney. *State v. Shumate*, 48 W. Va. 359; *State v. Stiles*, 48 W. Va. 425.

**Jurisdiction of Supreme Court.** — *In re Duncan*, 64 S. Car. 461.

**Concurrent Jurisdiction of Superior and Supreme Courts in California.** — *In re Delmas*, 139 Cal. xix, 72 Pac. Rep. 402.

**Judge in Chambers Cannot Disbar from Courts.** — *State v. Nathans*, 49 S. Car. 199.

**Jurisdiction Not Ousted by Removal After Notice** — *In re Walkey*, 26 Colo. 161.

**Summary Jurisdiction** to strike from roll does not exist on charges merely affecting an attorney's character as a citizen. *Neff v. Kohler Mfg. Co.*, 90 Mo. App. 296.

**Attorney in Contempt May Appear Before Court-martial.** — *State v. Crosby*, 24 Nev. 115, 77 Am. St. Rep. 786.

**Modification of Judgment by Court Which Disbars.** — *Matter of Wharton*, 130 Cal. 486.

**Notice of Proceedings Must Be Given Attorney.** — *McNamee v. Steele*, 8 Idaho 539; *Goode v. Steele*, 8 Idaho 538.

**Louisiana Act — Pecuniary Amount Involved Immaterial.** — *State v. Rightor*, 49 La. Ann. 1015.

**Montana Statute.** — *In re Wellcome*, 23 Mont. 140.

**New York Statute, § 67 Code Civ. Pro. — Surrogate Practising Law Not Within Statute.** — *Matter of Silkman*, 88 N. Y. App. Div. 102.

**In Ohio jurisdiction** is conferred upon the Circuit and Common Pleas Courts by § 563, Rev. Stat. *Disbar v. Dellenbaugh*, 9 Ohio Cir. Dec. 325.

**Jurisdiction by Statute.** — If a statute gives jurisdiction of disbarment proceedings to certain courts, police justices cannot be given the jurisdiction by city ordinance. *State v. Peabody*, 63 Mo. App. 378.

**Utah Statute.** — *Morrison v. Snow*, 26 Utah 247.

**Solicitor's Act 1843, § 32 — Construction.** — *In re Burton*, (1903) 2 K. B. 300, 72 L. J. K. B. 752.

**302. 2. Bar Assoc. v. Greenhood, 168 Mass. 169; *In re Simpson*, 9 N. Dak. 404, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301.**

**Conduct Open to Censure — Disbarment Not Necessary Consequence.** — *State v. Fourchy*, 106 La. 743.

3. "The power of suspension or disbarment of an attorney from the right to practice in the court for cause shown is quite different and distinct from the power to punish for contempt; though it is frequently the case that the causes for removal from the bar may also present ground for punishment as for contempt." *Matter of Adriaans*, 17 App. Cas. (D. C.) 39.



**302. 2. Grounds for Disbarment — a. GENERAL RULE — Misconduct Entailing Criminal or Civil Liability Not Essential.** — See notes 4, 5.

**Misconduct Outside Scope of Professional Duty.** — See note 6.

**303. Any Conduct Which Would Preclude the Admission of an Applicant to the Bar.** — See note 1.

**Contempt of Court.** — See note 2.

**304. b. COMMISSION OF A FELONY — (1) General Rule.** — See note 1.

**302. 4. No Need of Civil or Criminal Liability.** — Disbarment Proceedings *v. Burke*, 9 Ohio Cir. Dec. 350, 17 Ohio Cir. Ct. 315.

**5. Conduct Evidencing Unfitness for Trust or Confidence — United States.** — *U. S. v. Parks*, 93 Fed. Rep. 414.

**California.** — Matter of Haymond, 121 Cal. 385; *Colorado*. — *People v. Webster*, 28 Colo. 223; *People v. Sindlinger*, 28 Colo. 258; *People v. Webster*, 31 Colo. 43.

**Illinois.** — *People v. Smith*, 200 Ill. 444, 93 Am. St. Rep. 206, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 302; *People v. Hahn*, 197 Ill. 137; *People v. Pickler*, 186 Ill. 64.

**Iowa.** — *Hyatt v. Hamilton County*, (Iowa 1902) 90 N. W. Rep. 508, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 302.

**Kentucky.** — *Com. v. Richie*, 114 Ky. 366.

**Louisiana.** — *State v. Fourchy*, 106 La. 743.

**Massachusetts.** — *Bar Assoc. v. Greenhood*, 168 Mass. 169.

**Minnesota.** — *In re Byrnes*, (Minn. 1904) 100 N. W. Rep. 645.

**Montana.** — *In re Weed*, 26 Mont. 241.

**North Dakota.** — *In re Simpson*, 9 N. Dak. 379; *In re Freerks*, 11 N. Dak. 120.

**Oregon.** — *Ex p. Finn*, 32 Oregon 519, 67 Am. St. Rep. 550.

**Pennsylvania.** — *Maires's Disbarment*, 189 Pa. St. 99.

**South Carolina.** — *In re Duncan*, 64 S. Car. 461.

**South Dakota.** — *In re Elliott*, (S. Dak. 1904) 100 N. W. Rep. 431.

**Vermont.** — *In re Enright*, 69 Vt. 317.

See *Sonora v. Curtin*, 137 Cal. 583; *State v. Byrnett*, 4 Ohio Dec. 89; *Ex p. Tongue*, 29 Oregon 48; *Ex p. Miller*, 37 Oregon 304; *In re Jones*, 70 Vt. 71.

An attorney who is unfaithful to his clients' instructions, and obtains money from them for which he neglects to render any adequate service, should be disbarred. *In re McDermit*, 63 N. J. L. 476.

**Clear Proof Required.** — *People v. Robinson*, 32 Colo. 241; Matter of Lundy, 8 Ohio Cir. Dec. 111, 14 Ohio Cir. Ct. 561.

**Deceiving Court.** — Matter of Lundy, 8 Ohio Cir. Dec. 111.

**Deceit and Malpractice.** — Matter of V——, 10 N. Y. App. Div. 491.

**"Malpractice or Other Gross Misconduct"** — Pub. Stat. Mass., c. 159, § 39. — *Cowley v. O'Connell*, 174 Mass. 253.

**Malpractice, Deceit, or Misdemeanor — Missouri Statute.** — Matter of Z——, 89 Mo. App. 426.

**Stifling Evidence.** — *In re Shepard*, 109 Mich. 631.

**Forging Mortgage.** — *Stockwell's Case*, 7 Pa. Dist. 311.

**Employment of Runners — Advancement of Costs — Cheating Client.** — *Maires's Case*, 7 Pa.

Dist. 297, 4 Lack. Leg. N. (Pa.) 139, *affirmed* 189 Pa. St. 99.

**Advising Removal of Goods to Avoid Attachment No Ground for Disbarment.** — *People v. Robinson*, 32 Colo. 241.

**Ohio Statute — Rev. Stat., § 563 — Misconduct in Office.** — *In re Dellenbaugh*, 9 Ohio Cir. Dec. 325.

**Acquittal of Embezzlement** does not affect the question whether an attorney has been guilty of professional misconduct for which he should be disbarred. *People v. Mead*, 29 Colo. 344.

**6. Conduct Not Necessary in Professional Capacity.** — Matter of Adriaans, 17 App. Cas. (D. C.) 39; *In re Wellcome*, 23 Mont. 140, 450; *State v. Bentley*, 4 Ohio Dec. (Reprint) 362, 2 Cleve. L. Rep. 27; *State v. Byrnett*, 4 Ohio Dec. 89.

**Deceit, Fraud, and Dishonesty.** — *In re Duncan*, 64 S. Car. 461.

**Bribery of Legislator.** — *In re Wellcome*, 23 Mont. 213.

**Conspiracy to Procure Confession from Client for Publication, No Ground.** — Matter of Haymond, 121 Cal. 385.

**Misconduct Previous to Admission No Ground.** — *State v. Gebhardt*, 87 Mo. App. 542.

**Revised Statutes U. S., § 487.** — *U. S. v. Bliss*, 12 App. Cas. (D. C.) 485.

**Summary Jurisdiction to strike an attorney from the rolls** cannot be exercised on charges merely affecting his character as a citizen. *Neff v. Kohler Mfg. Co.*, 90 Mo. App. 296.

**Under a Statute prohibiting misbehavior in the office of an attorney, conduct must be perpetrated by the attorney in the line of his office.** *H's Case*, 5 Pa. Dist. 539.

**303. 1. Conduct Which Would Preclude Admission.** — *People v. Essington*, 32 Colo. 168; *People v. Smith*, 200 Ill. 442, 93 Am. St. Rep. 206; *Cowley v. O'Connell*, 174 Mass. 253; *In re Weed*, 26 Mont. 241; *In re Wellcome*, 23 Mont. 213.

**Admission Procured by Fraud.** — *People v. Campbell*, 26 Colo. 481; *People v. Hahn*, 197 Ill. 137; *In re Woodward*, 27 Mont. 355; *In re Olmstead*, 11 N. Dak. 306.

**Admission in Another State Procured by Fraud.** — *In re Brown*, 9 Pa. Dist. 103.

**2. Judgment of Contempt in the Circuit Court suspending an attorney is not conclusive in proceedings in the Supreme Court to disbar the attorney for the same reason.** *People v. O'Brien*, 196 Ill. 250.

**Courts-martial** — *State v. Crosby*, 24 Nev. 115, 77 Am. St. Rep. 786.

**304. 1. England.** — *In re Cooper*, 67 L. J. Q. B. 276.

**Colorado.** — *People v. Adams*, 26 Colo. 412.

**Illinois.** — *People v. George*, 186 Ill. 122;

*Dinsmoor v. Bressler*, 56 Ill. App. 207.

**Iowa.** — *State v. Howard*, 112 Iowa 256.

**304.** Whether Previous Conviction Necessary. — See note 2.

**305.** (2) Effect of Pardon — May Be Disbarred After Pardon. — See note 1.

**306.** d. ASSAILING OR LIBELING A JUDGE — Threatening Judge Out of Court. — See note 1.

Montana. — Matter of Bloor, 21 Mont. 49.

New Jersey. — Matter of Cahill, 66 N. J. L. 527.

Oregon. — *Ex p.* Thompson, 32 Oregon 499. Commission of Crime or Misdemeanor. — *In re* Weed, 26 Mont. 241.

Attorney Guilty of Criminal Offense. — People v. Smith, 200 Ill. 442, 93 Am. St. Rep. 206.

Attorney Guilty of Larceny. — People v. Schintz, 181 Ill. 574.

Guilty of Felony or Infamous Crime — Missouri State. — Matter of Z., 89 Mo. App. 426.

Infamous Offense Involving Moral Turpitude. — *In re* Kirby, 84 Fed. Rep. 606.

Indictable Misconduct in Official Capacity. — Matter of Wharton, 114 Cal. 367.

Conviction Thirteen Years Prior to Proceedings — No Disbarment. — People v. Coleman, 210 Ill. 79.

Criminal Punishment of an attorney will not relieve him of the penalty of suspension or removal for such misconduct. *In re* Swadener, 5 Ohio Dec. 598, 7 Ohio N. P. 446.

Libel is within a statute authorizing removal or suspension for "misdemeanor involving moral turpitude." *Ex p.* Mason, 29 Oregon 18, 54 Am. St. Rep. 772.

Neglect to Prosecute offenders against the prohibition law, when proofs of violations are furnished, is a misdemeanor, under § 7620, Rev. Codes, North Dakota, which involves moral turpitude and authorizes the disbarment or suspension of a state's attorney. *In re* Voss, 11 N. Dak. 540.

Payment of Fine imposed by the court for commission of crime is no defense to disbarment proceedings. People v. Weeber, 26 Colo. 229.

Statutory Provisions that conviction for misdemeanor must be misdemeanor involving moral turpitude. U. S. v. Clark, 76 Fed. Rep. 560.

Under the California Statute, Code Civ. Pro., § 287, authorizing removal or suspension for conviction of misdemeanor involving moral turpitude, an attorney may be disbarred for conviction of attempt to commit extortion. Matter of Coffey, 123 Cal. 522.

Missouri Statute — Rev. Stat. 1899, § 4929. — If an attorney is charged to have been convicted of an indictable offense, the court is authorized to remove or suspend for a limited time. If the charges do not allege conviction of a criminal offense he may only be suspended until the facts are ascertained in the statutory mode. State v. Gebhardt, 87 Mo. App. 542.

Montana Statute. — *In re* Wellcome, 23 Mont. 140.

Former New York Statute. — Under § 67 of the Code of Civil Procedure a convicted attorney might show if he could that the crime of which he had been found guilty was an offense involving no moral turpitude. Matter of Darmstadt, 35 N. Y. App. Div. 285.

Ohio Statute — Rev. Stat., § 563. — Conviction of a crime involving moral turpitude, or unprofessional conduct involving moral turpitude,

is ground for disbarment. *In re* Dellenbaugh, 9 Ohio Cir. Dec. 325.

South Dakota Statute. — *In re* Kirby, 10 S. Dak. 322.

**304. 2.** Whether Conviction Necessary Before Disbarment. — Matter of Cahill, 66 N. J. L. 527. See Morton v. Watson, 60 Neb. 672.

"Where a crime indictable under the statute is charged against an attorney of this court, in disbarment proceedings, the court will not proceed therein until proceedings have been taken in the District Court, or until sufficient time has elapsed to afford the proper authorities opportunity to prosecute the accused in that court." *In re* Tipton, 4 Idaho 513.

"The power of the court to disbar an attorney may be exercised when the act complained of amounts to a crime perpetrated in the line of his profession, or amounts to a crime not perpetrated in the line of his profession, but of which he has been duly convicted." H.'s Case, 5 Pa. Dist. 539.

Client Must First Proceed in Ordinary Tribunal. — *In re* Delmas, 139 Cal. xix, 72 Pac. Rep. 402.

Attempted Criminal Prosecution Held Sufficient. — *In re* Wellcome, 23 Mont. 213.

Indictment for Subornation of Perjury — No Disbarment until Trial Ended. — People v. Comstock, 176 Ill. 192.

Disbarment Though Criminal Prosecution Barred by Limitations. — Stockwell's Case, 7 Pa. Dist. 311.

In New York when the charges proven involve professional misconduct, although it is true that some of the acts complained of are felonies, and indictments may follow, there is no reason why disbarment proceedings should be stayed. Rochester Bar Assoc. v. Dorthy, 152 N. Y. 596.

Under the Montana Statute, Code Civ. Pro., § 402, subd. 5, providing that an attorney, who is guilty of deceit, malpractice, crime, or misdemeanor, may be removed or suspended, unless cogent reasons be furnished by the accusation, or by a showing in support of it, why jurisdiction should be entertained in advance of a criminal prosecution and conviction, it will not be entertained. *In re* Wellcome, 23 Mont. 140.

Authorities in the United States — Indictable Misconduct in Official Capacity. — U. S. v. Parks, 93 Fed. Rep. 414; State v. Howard, 112 Iowa 256; *In re* Norris, 60 Kan. 649; *In re* Weed, 26 Mont. 507; *In re* Wellcome, 23 Mont. 226; Matter of Metropolitan St. R. Co., 58 N. Y. App. Div. 510; *In re* Dellenbaugh, 9 Ohio Cir. Dec. 325.

Evidence Must Be Clear and Convincing. — *In re* Noonan, 65 N. J. L. 142.

Indictable Misconduct Not in Official Capacity. — *In re* Weed, 26 Mont. 507; *In re* Wellcome, 23 Mont. 140; Rochester Bar Assoc. v. Dorthy, 152 N. Y. 596; *In re* Dellenbaugh, 9 Ohio Cir. Dec. 325.

**305.** 1. People v. George, 186 Ill. 122.

**306.** 1. Matter of Snow, 27 Utah 275,

**306.** Reflecting on Character or Integrity of Judge. — See note 2.

**307.** Proceeding to Disbar Attorney for Slandering Judge — Defendant Not Privileged. — See notes 1, 2.

*e.* APPROPRIATING CLIENT'S FUNDS — (1) *In General.* — See note 4.

**308.** What Constitutes Misappropriation — Method of Trial. — See note 2.

**309.** Payment After Proceedings Begun or Threatened. — See note 1.

Disobedience to Order Requiring Payment to Client. — See note 4.

**310.** (2) *Embezzlement by One Partner.* — See note 2.

*f.* OTHER PARTICULAR GROUNDS — Altering Documents. — See note 4.

quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 306.

**Offensive Language.** — It is the duty of attorneys to maintain the respect due to courts of law, and to refrain from offensive language, either towards the court, counsel, or witnesses. *In re Voss*, 11 N. Dak. 540.

**306. 2. Libeling or Slandering Judge.** — *In re Mains*, 121 Mich. 603; *In re Smith*, 179 Pa. St. 14; *Matter of Scouten*, 186 Pa. St. 270; *Matter of Snow*, 27 Utah 275, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 306; *Morrison v. Snow*, 26 Utah 247.

**Offensive and Discourteous Language in Petition.** — *Matter of Lambuth*, 18 Wash. 478.

**Scandalous Abuse in Brief.** — *Kelley v. Boettcher*, 82 Fed. Rep. 794, 49 U. S. App. 620.

**False, Scandalous, and Malicious Libel in Brief.** — *U. S. v. Green*, 85 Fed. Rep. 857.

**Unfounded Charge of Conspiracy and Corruption with Opposing Attorneys.** — *In re Mains*, 121 Mich. 603.

**Slandering Members of Bar.** — *Matter of Adrians*, 17 App. Cas. (D. C.) 39.

**Suspension.** — *Matter of Snow*, 27 Utah 265.

**307. 1. Counsel's Privilege in Cases of Libel and Slander.** — *Matter of Snow*, 27 Utah 275, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 307.

**An Attorney Is Privileged** to go great lengths in the defense of himself or his client in proceedings in court, without being held responsible for what he has said or done. *In re Mains*, 121 Mich. 603.

**2. Privilege Does Not Extend to Proceedings for Disbarment.** — *Matter of Snow*, 27 Utah 275, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 307.

**4. Appropriating or Misappropriating Client's Funds** — *Colorado.* — *People v. Essington*, 32 Colo. 168; *People v. Mead*, 29 Colo. 344; *People v. Kelsey*, 32 Colo. 1; *People v. Walkey*, 26 Colo. 483; *People v. Hays*, 28 Colo. 82; *People v. Betts*, 26 Colo. 521; *People v. Waldron*, 28 Colo. 249; *People v. Selig*, 25 Colo. 505.

*Illinois.* — *Dinsmoor v. Bressler*, 56 Ill. App. 207; *People v. Salomon*, 184 Ill. 490.

*Minnesota.* — *Southworth v. Bearnese*, 88 Minn. 31.

*New Jersey.* — *In re McDermit*, 63 N. J. L. 476.

*North Dakota.* — *In re Simpson*, 9 N. Dak. 379.

*Ohio.* — *Cotton v. Ashley*, 5 Ohio Cir. Dec. 6; *In re Swadener*, 5 Ohio Dec. 598, 7 Ohio N. P. 446.

*Pennsylvania.* — *Kennedy's Disbarment*, 178 Pa. St. 232.

*Canada.* — *Honan v. Bar of Montreal*, 30 Can. Sup. Ct. 1.

**No Presumption of Innocence.** — *People v. Webster*, 28 Colo. 223.

**Misappropriation Without Fraudulent Intent.** — See *In re Lentz*, 65 N. J. L. 134.

**Use of Client's Money When Able to Replace.** — *No Disbarment.* — *In re Duncan*, 64 S. Car. 461.

**Disputed Balance of Accounts — No Ground.** — *People v. Robinson*, 32 Colo. 241.

**Youth and Inexperience No Defense.** — *People v. Waldron*, 28 Colo. 249.

**Retention Due to Negligence Resulting from Alcoholism No Defense.** — *People v. Webster*, 31 Colo. 43.

**Neglect to Notify a Client of Collections,** and neglect to pay over immediately the money collected may in certain cases be reprehensible, but it is not alone sufficient for disbarment if there is no fraud, trickery, or deceit. *In re Veeder*, (N. Mex. 1901) 66 Pac. Rep. 545.

**Demand — Waiver of Necessity by Denial of Collection.** — *People v. Keegan*, 30 Colo. 71.

**Demand and Tender of Fees and Expenses Must Be Made** — *Colorado Statute.* — *People v. Keegan*, 30 Colo. 71.

*Illinois Statute.* — *Hamel v. People*, 97 Ill. App. 527.

*Missouri Statute.* — *Matter of Z.*, 89 Mo. App. 426.

**308. 2. No Trial by Jury.** — *In re Norris*, 60 Kan. 649.

**Dispute as to Value of Services.** — Where there is a *bona fide* dispute as to the value of services or the amount of his lien an attorney should not be disbarred, thus using the proceedings as a substitute for the ordinary remedies for settling controversies between attorney and client. *Southworth v. Bearnese*, 88 Minn. 31.

**309. 1. Effect of Payment or Tender.** — *People v. Selig*, 25 Colo. 505; *People v. Keegan*, 30 Colo. 71.

**Repayment of Large Part No Defense.** — *People v. Waldron*, 28 Colo. 249.

**Payment Prior to Proceedings.** — See *In re Lentz*, 65 N. J. L. 134.

**Settlement of All Claims** by an attorney, which are made the basis of proceedings to remove, will not relieve him from the penalty of suspension or removal for such misconduct. *In re Swadener*, 5 Ohio Dec. 598, 7 Ohio N. P. 446.

**4. Disobeying Order for Payment to Client.** — *People v. Salomon*, 184 Ill. 490.

**Wilful Violation of Any Order of Court** — *Iowa Statute.* — *State v. Howard*, 112 Iowa 256.

**310. 2. Knowledge of Other Partner — Both Disbarred.** — *People v. Betts*, 26 Colo. 522.

**4. Altering or Stealing Documents or Records,**

- 311.** Forging or Concocting False Affidavits or Evidence. — See notes 2, 4. Obtaining Money by False Representations. — See note 6.
- 312.** Bribing or Tampering with a Witness. — See note 1. Representing Conflicting Interests. — See note 2. Improperly Advertising to Secure Divorces. — See note 3.
- 313.** Want or Loss of Moral Character. — See note 3. Numerous Other Particular Instances. — See note 6.
- 315.** 3. Effect of Disbarment. — See note 1.

— *People v. Moutray*, 166 Ill. 630; *In re Nunn*, 73 Minn. 292; *Ex p. St. Rayner*, (Oregon 1902) 70 Pac. Rep. 537.

**Altering Execution.** — *In re Crum*, 7 N. Dak. 316.

**311. 2. Forging Affidavit.** — *People v. Hill*, 182 Ill. 425.

**4. False Affidavits.** — *Matter of Wharton*, 114 Cal. 367; *People v. Hahn*, 197 Ill. 137; *People v. Hill*, 182 Ill. 425; *People v. Moutray*, 166 Ill. 630; *In re Crum*, 7 N. Dak. 316; *Ex p. Finn*, 32 Oregon 519, 67 Am. St. Rep. 550; *Flanders v. Keefe*, 108 Wis. 441.

**6. Obtaining Money by Fraud or False Representations.** — *People v. Sindlinger*, 28 Colo. 258; *People v. George*, 186 Ill. 122; *In re Elliott*, (S. Dak. 1904) 100 N. W. Rep. 431.

**Forgery of Letters and of Indorsement on Note.** — *Ex p. Kindt*, 32 Oregon 474.

**Falsifying Bill of Exceptions and Procuring False Certification of Transcript of Record.** — *People v. Moutray*, 166 Ill. 630.

**312. 1. Tampering with Witness.** — See *In re Catron*, 8 N. Mex. 253.

**2. Reprimand for Representing Conflicting Interests.** — *Matter of Reifschneider*, 60 N. Y. App. Div. 478.

**3. Improperly Advertising to Secure Divorces.** — *People v. Taylor*, 32 Colo. 250; *People v. Smith*, 200 Ill. 442, 93 Am. St. Rep. 206.

**313. 3. Loss of Moral Character.** — *People v. Sindlinger*, 28 Colo. 258; *People v. Smith*, 200 Ill. 442, 93 Am. St. Rep. 206; *People v. Moutray*, 166 Ill. 630 (ignorance no excuse); *Matter of Cahill*, 66 N. J. L. 527; *In re Swadener*, 5 Ohio Dec. 598, 7 Ohio N. P. 446.

**6. Presenting Imperfect and Partial Statement of Facts.** — *Matter of V* —, 10 N. Y. App. Div. 491.

**Deceit and Lack of Good Faith.** — *People v. Mead*, 29 Colo. 344.

**Raising Note — Clear Proof Required.** — *People v. Robinson*, 32 Colo. 241.

**Foreclosing Chattel Mortgage Securing Debt to Attorney — No Ground.** — *People v. Robinson*, 32 Colo. 241.

**Fees Secured — Excessive Charges No Ground.** — *People v. Robinson*, 32 Colo. 241.

**Deceit and Collusion with Intent to Deceive Court or Party — Iowa Statute.** — *State v. Howard*, 112 Iowa 256.

**Fraudulent Representation that Divorce Was Secured.** — *People v. Belinski*, 205 Ill. 564.

**Admission by Mistake.** — *In re Brown*, 9 Pa. Dist. 103.

**Subornation of Perjury.** — *Matter of Metropolitan St. R. Co.*, 58 N. Y. App. Div. 510.

**Champertous Contract.** — *In re Evans*, 22 Utah 366, 83 Am. St. Rep. 794.

**Attempt to Bribe Member of City Council.** — *Cowley v. O'Connell*, 174 Mass. 253.

**Attempt to Extort Money by Blackmailing Client.** — *People v. Varnum*, 28 Colo. 349.

**False Representations to Client and Misappropriation of Funds.** — *People v. Betts*, 26 Colo. 521.

**Forging Client's Name to Order for Money.** — *People v. Walkey*, 26 Colo. 483.

**False Representations to Obtain Employment.** — *In re Boone*, 83 Fed. Rep. 944.

**Deceit, Malpractice, and Gross Misconduct.** — *Bar Assoc. v. Greenhood*, 168 Mass. 169.

**Abusive Language to Former Juror — Disrespectful and Abusive Language to Opposing Counsel.** — *In re Crum*, 7 N. Dak. 316.

**Larceny by Attorney.** — *People v. Schintz*, 181 Ill. 574; *People v. Manns*, 28 Colo. 83.

**Deceiving Court as to the pecuniary ability of client to pay, thereby securing two fees.** *In re Byrnes*, (Minn. 1904) 100 N. W. Rep. 645.

**Infidelity to interest of his client, and withholding material facts from a judge, have been held sufficient grounds for disbarment.** *In re Jones*, 70 Vt. 71.

**False Representations as to Collections.** — Although an attorney falsely represents that no collections have been made on a claim, if the amount collected only equals the minimum fee for collecting the claim, it is no ground for disbarment. *People v. Robinson*, 32 Colo. 241.

**False Levy.** — An attorney who directed a sheriff to take property not included in the writ, and to deliver it to the plaintiff, is guilty of but little less than larceny, and should be disbarred. *Matter of Goldberg*, 49 N. Y. App. Div. 357.

**Unlawfully Procuring the Absence of an Execution Debtor, contrary to the order of the court requiring appearance for examination at a stated time, with intent to cause a failure of justice, is ground for disbarment.** *Ex p. Miller*, 37 Oregon 304.

**Refusal to Proceed with a case until compensation is made, where there was no contract for the compensation which the attorney claimed, is no such lack of faith on the attorney's part in discharge of duty to his client, as authorizes removal.** *Payette v. Willis*, 23 Wash. 299.

**Straw Bonds.** — When a lawyer induces a court to enter an order, allowing an appeal, by presenting an appeal bond with sureties whom he knows to be worthless or fictitious persons, he practices a fraud upon the court for which he may be disbarred. *People v. Pickler*, 186 Ill. 64.

**315. 1. Effect of Disbarment.** — *In re Crum*, 72 Minn. 401.

**State Court Judgment — No Review in Federal Court.** — *Philbrook v. Newman*, 85 Fed. Rep. 139.

**316. 4. Nonliability of Judge for Disbarring an Attorney.** — See note 1.

**5. Suspension.** — See notes 2, 3.

**VI. THE RELATION OF ATTORNEY AND CLIENT — 1. When Relation Exists — Retainer.** — See note 4.

**317. Contract of Employment — Offer — Acceptance.** — See notes 1, 2.

**State Court Judgment Followed in Federal Courts.** — *U. S. v. Green*, 85 Fed. Rep. 857.

**Disbarred Attorney May Prosecute His Own Claim.** — *Philbrook v. Superior Ct.*, 111 Cal. 31.

**Brief by Disbarred Attorney Ignored.** — *Engesser v. Northern Pac. R. Co.*, 18 Mont. 31.

**Cannot Apply for Admission as in First Instance.** — *Matter of King*, 54 Ohio St. 415.

**Disbarment in Colony — No Ground for Disbarment in England.** — *In re A Solicitor*, (1898) 1 Q. B. 331.

**Kansas Statute — County Attorney Need Not Be Attorney at Law — Disbarment Makes No Vacancy.** — *State v. Swan*, 60 Kan. 461.

**A Judgment of a Foreign State Disbarring an attorney may be shown to have been reopened and vacated in that state.** *People v. Miller*, 195 Ill. 621.

**Rights of Attorney Pending Proceedings.** — It is not proper for courts ordinarily to deprive the accused of his rights as an attorney pending the investigation and trial of an application for disbarment. *State v. Goode*, 4 Idaho 730.

**316. 1. No Liability Even Where Jurisdiction Is Exceeded.** — *Philbrook v. Newman*, 85 Fed. Rep. 139.

**2. Suspension of Attorney.** — *Bar Assoc. v. Greenwood*, 168 Mass. 169; *Matter of Cahill*, 66 N. J. L. 527; *Matter of V—*, 10 N. Y. App. Div. 491; *In re Freerks*, 11 N. Dak. 120; *Ex p. Finn*, 32 Oregon 519, 67 Am. St. Rep. 550; *In re Smith*, 179 Pa. St. 14; *Shoemaker's Case*, 5 Pa. Dist. 161, *affirmed* 2 Pa. Super. Ct. 27.

**Signing Sureties' Names in Bond.** — *Ex p. Ditchburn*, 32 Oregon 538.

**Libel Published Without Knowledge.** — *Ex p. Mason*, 29 Oregon 18, 54 Am. St. Rep. 772.

**False Allegations Reflecting on Character of Judge.** — *Matter of Snow*, 27 Utah 265.

**Compounding a Misdemeanor.** — *State v. Eager*, 4 Ohio Dec. (Reprint) 351, 2 Cleve. L. Rep. 1.

**Neglect to Prosecute Offenders Against Prohibition Law.** — *In re Voss*, 11 N. Dak. 540.

**Conviction of Felony — Judgment Superseded on Writ of Error.** — *In re Kirby*, 10 S. Dak. 322.

**Statutory Provision in Massachusetts.** — *Bar Assoc. v. Greenwood*, 168 Mass. 169.

**The Power to Disbar an attorney is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility, but in so doing the court should exercise a sound and just judicial discretion.** *State v. Stiles*, 48 W. Va. 425.

**Under the Missouri Statute, if an attorney is sought to be removed upon the accusation of an indictable offense, and the charge does not allege a conviction, he can only be suspended for six months; if no indictment is found, or if one is found but not prosecuted to a trial in that time, the suspension must be discontinued, unless the delay was produced by the absence or procurement of the accused.** *Matter of Z—*, 89 Mo. App. 426.

When an attorney is not accused of having been convicted of a criminal offense, he may only be suspended until ascertainment of facts according to statute. *State v. Gebhardt*, 87 Mo. App. 542.

**Montana Statute — Discretion of Court.** — *In re Wellcome*, 23 Mont. 140.

**3. Age of Attorney.** — "If he were a young and inexperienced lawyer, who, under stress of temptation, and a failure fully to appreciate his duties to his client, had misappropriated the money of his client, a suspension for a limited term might satisfy the ends of justice." *Southworth v. Beatnes*, 88 Minn. 31.

**Withholding Funds — No Disbarment in First Instance.** — *In re Thresher*, 29 Mont. 11.

**Retention of Money in Good Faith — Error to Suspend.** — *Hendrick v. Posey*, 104 Ky. 8.

**4. Authority Begins from Employment, Not from Institution of Suit.** — *Dentzel v. City, etc., R. Co.*, 90 Md. 442, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 316; *Silver Peak Gold Min. Co. v. Harris*, 116 Fed. Rep. 442, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 316.

**Employment in Anticipation of Suit — Authority to Bind Before Suit.** — *Dentzel v. City, etc., R. Co.*, 90 Md. 434.

**A Retainer is the act of the client in employing his attorney or counselor. It also denotes the fee which is paid, and which prevents the attorney from acting for the client's adversary.** *Union Surety, etc., Co. v. Tenney*, 200 Ill. 349.

**317. 1. Proposal and Acceptance Constitute Relation of Attorney and Client.** — *In re Kerly*, (1901) 1 Ch. 467, 70 L. J. Ch. 189; *Orr v. Brown*, (C. C. A.) 69 Fed. Rep. 216; *Davis v. Walker*, 131 Ala. 204; *Walsh v. Helena School Dist. Number One*, 17 Mont. 413; *Matter of Tracy*, 1 N. Y. App. Div. 113, *affirmed* 149 N. Y. 608; *Williams v. Lewis*, 45 N. Y. App. Div. 623; *Reese v. Resburgh*, 54 N. Y. App. Div. 378. See *Blakey v. New York L. Ins. Co.*, 28 Ind. App. 428; *Matter of Sweeney*, 86 N. Y. App. Div. 547; *Simon v. Sheridan, etc., Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 489; *Lawall v. Groman*, 180 Pa. St. 532, 57 Am. St. Rep. 662; *Norton v. Wingerd*, 9 Pa. Super. Ct. 514; *Calender v. Turpin*, (Tenn. Ch. 1901) 61 S. W. Rep. 1057.

**Question for Jury.** — *Richards v. Washburn*, 14 N. Y. App. Div. 237.

**Admissibility of Evidence — Previous Employment.** — *Mabry v. Cheadle*, (Iowa 1899) 80 N. W. Rep. 312.

**Conflicting Evidence — Question for Jury.** — *Northern Pac. R. Co. v. Clarke*, (C. C. A.) 106 Fed. Rep. 794.

**Casual Questioning as to Law Constitutes No Employment.** — *People v. Varnum*, 28 Colo. 349.

**Agreement with Husband Not Binding on Wife.** — *Whitesell v. New Jersey, etc., R., etc., Co.*, 68 N. Y. App. Div. 82.

**Employment by Director for Trust Company.** — *Germania Safety Vault, etc., Co. v. Hargis*, 64 S. W. Rep. 516, 23 Ky. L. Rep. 874.

**317. Acting Without Retainer or Authority.** — See note 3.

Ordinary Scope of Retainer. — See note 6.

**318. Retainer by Agent.** — See note 3.**319. 2. Who May Act as Attorney — Admission to Bar Is Essential.** — See note 1.

Any One May Appear in His Own Behalf. — See note 3.

**320. Prohibition to Judges to Act as Attorneys.** — See note 1.

Presumption that Practicing Attorney Duly Admitted. — See note 3.

Suit Not Dismissed, although Brought by Disqualified Attorney. — See note 4.

The Legislature Has Power to Restrict the Right of Attorneys to Appear. — See note 5.

**3. Consequences of the Relation — a. NOTICE TO ATTORNEY NOTICE TO CLIENT.** — See note 6.**Receipt for Note for Collection Setting Forth Agreement.** — *Lavenson v. Wise*, 131 Cal. 369.**Employment by One of Several Heirs.** — *Spears v. Ray*, (Ky. 1899) 49 S. W. Rep. 535.**Consent Necessary.** — The relation of attorney and client is a personal relation, and can only be entered into by the consent of both parties. *Currey v. Butcher*, 37 Oregon 386.**Employment Essential to Recover Fee.** — An attorney cannot make another person his debtor by voluntarily rendering services in his behalf without his express or implied consent. *Lamar v. Hall*, (C. C. A.) 129 Fed. Rep. 79, reversing *William Firth Co. v. Millen Cotton Mills*, 129 Fed. Rep. 141.**Appearance and Conduct of Case.** — The fact that an attorney appeared in court with the defendant's counsel, and conducted the case together with him to their knowledge, and without their objection, does not justify the finding of an implied promise to pay, where it appears that the attorney appeared for a codefendant, which was known to the defendant. *White v. Esch*, 78 Minn. 264.**Associate Attorneys.** — Where a client retains two attorneys, and one tells the other to retain his share of the fee for him, it involves no contract establishing the relation of attorney and client. *Downs v. Davis*, 113 Iowa 529.**317. 2. Brennan-Love Co. v. McIntosh**, 62 Neb. 522."When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established *prima facie*." *Perkins v. West Coast Lumber Co.*, 129 Cal. 427.**3. Silver Peak Gold Min. Co. v. Harris**, 116 Fed. Rep. 442, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 317; *Barrie Public School Board v. Barrie*, 19 Ont. Pr. 33. See *Downs v. Davis*, 113 Iowa 529; *Saxton v. Harrington*, 52 Neb. 300; *Whitesell v. New Jersey, etc., R., etc., Co.*, 68 N. Y. App. Div. 82; *British Columbia Land, etc., Agency v. Wilson*, 9 British Columbia 412.**6. Extent of Retainer.** — The retainer for the original suit does not of itself constitute a retainer to bring a writ of error. *Delaney v. Husband*, 64 N. J. L. 275.**318. 3. Retainer by Agent.** — *Miller v. Balserino*, 135 Cal. 566; *Toplitz v. Meyer*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 786; *Fargo Gas Light, etc., Co. v. Greer*, 10 Ohio Cir. Dec. 164, 18 Ohio Cir. Ct. 589; *Fowler v. Iowa Land Co.*, (S. Dak. 1904) 99 N. W. Rep. 1095; *Hanrick**v. Gurley*, 93 Tex. 458; *Tabet v. Powell*, (Tex. Civ. App. 1903) 78 S. W. Rep. 997.**Agent's Authority for Jury.** — *Bissell v. Moore*, 119 Mich. 222.**Unauthorized Employment.** — *Powell v. Concord First Nat. Bank*, 71 Vt. 462.**Retainer by General Officers of Corporation.** — *Lewis v. Pulitzer Pub. Co.*, 77 Mo. App. 434.**Retainer by Managing Partner of Firm.** — *Tomlinson v. Broadsmith*, (1896) 1 Q. B. 386.**Retainer by One of Two Trustees.** — *In re Commercial Bank*, 4 Ohio Dec. 440.**Counsel Retained by Solicitor of Client.** — *Armour v. Kilmer*, 28 Ont. 618.**Unsworn Statement of Agent as to Authority Insufficient.** — *Southern Home Bldg., etc., Assoc. v. Butt*, 77 Miss. 944.**Retainer by Husband for Wife Unauthorized.** — *Davis v. Walker*, 131 Ala. 204.**319. 1. Only Person Properly Admitted Can Appear.** — *Toy v. Haskell*, 128 Cal. 558, 79 Am. St. Rep. 70; *Kaplan v. Berman*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 502; *Thompson v. Stiles*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 334.**Annual Certificate Necessary.** — *Re Clarke*, 32 Ont. 237. See *Wallace v. Harrington*, 34 Nova Scotia 1.**Services Out of Court.** — Services performed out of court, and which could be performed by laymen as well as by attorneys, may be rendered by one not admitted to the bar. *Dunlap v. Lebus*, 112 Ky. 237.**3. Philbrook v. Superior Ct.**, 111 Cal. 31.**320. 1. Judge Cannot Act as Attorney.** — *Justice v. Lairy*, 19 Ind. App. 272, 65 Am. St. Rep. 405.**Surrogate Disqualified from Election.** — *Matter of Silkman*, 88 N. Y. App. Div. 102.**3. Contra.** — *Com. v. Branthoover*, 24 Pa. Co. Ct. 353.**Supreme Court Does Not Take Judicial Notice of Officers of Lower Court.** — *Clark v. Morrison*, (Ariz. 1898) 52 Pac. Rep. 985.**4. Court of Appeals — Briefs Stricken from Files.** — *Ellis v. Bingham County*, 7 Idaho 86.**5. Claim Against Government — Minister to Foreign Country.** — *Fox v. Willis*, 114 Ky. 940.**6. Notice to Attorney Is Notice to Client — England.** — *Dixon v. Winch*, (1900) 1 Ch. 726, 69 L. J. Ch. 465, 82 L. T. N. S. 437, 48 W. R. 612.**California.** — *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255; *Taylor v. Hill*, 115 Cal. 143.

**321.** See note 1.

**322.** Knowledge Must Have Been Acquired During Continuance of Relation. — See notes 1, 2.

Notice to Attorney After Final Judgment. — See note 3.

Rule Does Not Apply where Dealings Are as to Extrinsic Matters. — See note 4.

**323.** Authority to Admit Service of Process. — See notes 1, 2.

**324.** Notice Must Be Served on Attorney of Record. — See note 2.

b. CLIENT BOUND BY ATTORNEY'S ACTS. — See note 5.

*Colorado.* — *Davidson v. La Plata County*, 26 Colo. 549.

*Connecticut.* — *Sweeney v. Pratt*, 70 Conn. 274, 66 Am. St. Rep. 101.

*District of Columbia.* — *Patten v. Warner*, 11 App. Cas. (D. C.) 149.

*Maryland.* — *Shartzer v. Mountain Lake Park Assoc.*, 86 Md. 335.

*Minnesota.* — *Bates v. A. E. Johnson Co.*, 79 Minn. 354.

*New York.* — *Gebhard v. Gebhard*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 1.

*South Carolina.* — *Peeples v. Warren*, 51 S. Car. 560.

*Washington.* — *Deering v. Holcomb*, 26 Wash. 588.

*Wisconsin.* — *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 899.

See *Equitable Securities Co. v. Green*, 113 Ga. 1013.

"The rule seems to be well settled that a client is not ordinarily chargeable with the knowledge which his attorney may have of a particular fact unless it is obtained in the conduct of the case, or in the business of the client, or was present to his mind at the time." *McCutcheon v. Dittman*, 23 N. Y. App. Div. 285, affirmed 164 N. Y. 355.

**Attorney Must Be General Representative.** — *Shainwald v. Davids*, 69 Fed. Rep. 701.

**No Notice When Attorney Acting Adverse to Client.** — *Scotch Lumber Co. v. Sage*, 132 Ala. 598, 90 Am. St. Rep. 932.

**321. 1. Mutual Bldg., etc., Assoc.'s Case**, 19 Pa. Co. Ct. 504.

**Failure to Notify Client Immaterial.** — *Deering v. Holcomb*, 26 Wash. 588.

**322. 1. Knowledge Must Be Acquired During Existence of Relation** — *Alabama.* — *Scotch Lumber Co. v. Sage*, 132 Ala. 598, 90 Am. St. Rep. 932.

*California.* — *Chapman v. Hughes*, 134 Cal. 641; *Pedlar v. Stroud*, 116 Cal. 461.

*New York.* — *Denton v. Ontario County Nat. Bank*, 150 N. Y. 126; *Union Square Bank v. Hellerson*, 90 Hun (N. Y.) 262.

*Pennsylvania.* — *Chester v. Schaffer*, 24 Pa. Super. Ct. 162.

*Tennessee.* — *Kirklin v. Atlas Sav., etc., Assoc.*, (Tenn. Ch. 1900) 60 S. W. Rep. 149.

*Texas.* — *Taylor v. Evans*, 16 Tex. Civ. App. 409; *Beck v. Avondino*, 20 Tex. Civ. App. 330.

**Knowledge Acquired While Acting for Others.** — *Steinmeyer v. Steinmeyer*, 55 S. Car. 9.

**2. Matters Which Attorney Has No Right to Disclose.** — *Wright v. Snell*, 12 Ohio Cir. Dec. 308, 22 Ohio Cir. Ct. 86; *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 899.

**3. Notice After Judgment.** — *Chicago Sugar Refining Co. v. Jackson Brewing Co.*, (Tenn. Ch. 1898) 48 S. W. Rep. 275.

**Notice of Appeal.** — *Magnolia Metal Co. v. Sterlingworth R. Supply Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 63, affirmed 37 N. Y. App. Div. 366.

**Notice of Appeal** is binding though party dies prior to appeal. *Lacoste v. Eastland*, 117 Cal. 673.

**4. Dealings as to Extrinsic Matters.** — *Weil v. Reiss*, 167 Mo. 125; *Neilson v. Weber*, 107 Tenn. 161. See *Olyphant v. Phyfe*, 166 N. Y. 630, affirming 48 N. Y. App. Div. 1.

**323. 1. Authority to Accept Service of Process.** — *In re Kerly*, (1901) 1 Ch. 467, 70 L. J. Ch. 189; *Tomlinson v. Broadsmith*, (1896) 1 Q. B. 386; *Backus v. Burke*, 63 Minn. 272.

**California Statute** — **Service on Attorney's Clerk** — **Waiver.** — *Page v. Superior Ct.*, 122 Cal. 209.

**2. Service of Original Process.** — *Dentzel v. City, etc., R. Co.*, 90 Md. 434; *Ashcraft v. Powers*, 22 Wash. \*440. See *Tomlinson v. Broadsmith*, (1896) 1 Q. B. 386.

**General Appearance by Attorney Stands in Lieu of Service of Process.** — *Famous Mfg. Co. v. Wilcox*, 180 Ill. 246.

**Entry of Appearance for Defendant Before Justice.** — *Chalmers v. Tandy*, 111 Ill. App. 252.

**324. 2. Service Must Be on Attorney of Record.** — *Pike v. Gregory*, (C. C. A.) 94 Fed. Rep. 373; *Lacoste v. Eastland*, 117 Cal. 673; *American Emigrant Co. v. Long*, 105 Iowa 194; *Gebhard v. Gebhard*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 1.

Where attorneys appear and plead the general issue for all the defendants, and subsequently two defendants appear and plead the general issue by other attorneys, notice to the first attorneys is notice to all the defendants, there being no order of substitution. *Landyskowski v. Lark*, 108 Mich. 500.

**5. Acts of Attorney Bind Client** — **No Relief for Negligence** — *United States.* — *Maury v. Fitzwater*, 88 Fed. Rep. 768.

*Arkansas.* — *Foster v. Pitts*, 63 Ark. 387.

*California.* — *Coonan v. Loewenthal*, 129 Cal. 197.

*District of Columbia.* — *In re Starkey*, 21 App. Cas. (D. C.) 519.

*Illinois.* — *Hittle v. Zeimer*, 62 Ill. App. 170, affirmed 164 Ill. 64; *Newman v. Schneek*, 58 Ill. App. 328; *Gross v. Sloan*, 58 Ill. App. 302; *Manufacturers' Paper Co. v. Lindblom*, 80 Ill. App. 267.

*Indiana.* — *Floyd County v. Scott*, 19 Ind. App. 232, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 324.

*Indian Territory.* — *Dorrance v. McAlester*, 1 Indian Ter. 473.

*Kansas.* — *McNeal v. Gossard*, 68 Kan. 113; *Cronkrite v. Evans-Snider-Buel Co.*, 6 Kan. App. 173.

**325.** A Client Is Liable to a Third Party. — See note 5.

**326.** Liability for Unauthorized Acts. — See note 2.

**327.** c. ADMISSIONS BY ATTORNEY. — See notes 1, 2.

4. Termination of Relation. — See note 4.

**328.** Client May Terminate Relation — Attorney Cannot. — See notes 1, 2.

Death of Client — Dissolution of Corporation. — See note 3.

*Minnesota.* — Alden *v.* Dyer, 92 Minn. 134.  
*Tennessee.* — McTeer *v.* Huntsman, (Tenn. Ct. 1898) 49 S. W. Rep. 57.

**Right to Appeal Lost by Negligent Omissions.** — Scroggin *v.* Hammett Grocer Co., 66 Ark. 183.  
**Statements Out of Court** to opposing counsel inadmissible in evidence against client. Smith *v.* Bradhurst, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 546, *affirmed* 31 N. Y. App. Div. 98.

**325. 5. Client Liable to Third Persons.** — Johnson *v.* Dun, 75 Minn. 533.

**Attorney Discharged but Permitted to Remain of Record.** — Beliveau *v.* Amoskeag Mfg. Co., 68 N. H. 225, 73 Am. St. Rep. 577.

**326. 2. Unauthorized Act of Attorney.** — Foster *v.* Pitts, 63 Ark. 387.

**Unauthorized Arrest of Debtor.** — Moore *v.* Cohen, 128 N. Car. 345.

**327. 1. General Retainer — Prejudicial Admissions Not Binding.** — Lytle *v.* Crawford, 69 N. Y. App. Div. 273.

**Written Admission of Fact — Evidence in Subsequent Trial.** — Scaife *v.* Western North Carolina Land Co., (C. C. A.) 90 Fed. Rep. 238.

**Evidence of Authority.** — Stinesville, etc., Stone Co. *v.* White, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 135.

**2. Admissions in Private Conversations.** — Waterbury *v.* Waterbury Traction Co., 74 Conn. 152; Cable Co. *v.* Parantha, 118 Ga. 913; Miller *v.* Palmer, 25 Ind. App. 357, 81 Am. St. Rep. 107; Sullivan *v.* Dunham, 35 N. Y. App. Div. 342; Fosha *v.* O'Donnell, 120 Wis. 336.

**Statements in Trial.** — Missouri, etc., Telephone Co. *v.* Vandevort, 67 Kan. 269; People *v.* Mole, 85 N. Y. App. Div. 33.

**Admissions in Letter Unauthorized.** — McGarry *v.* McGarry, 9 Pa. Super. Ct. 71.

**Unauthorized Affidavit as Admission.** — Gray *v.* Minnesota Tribune Co., 81 Minn. 333.

**Statement as Agent in Presence of Client Admissible.** — Burraston *v.* Nephi First Nat. Bank, 22 Utah 328.

**4. Continues to End of Litigation.** — Smith *v.* Cunningham, 59 Kan. 555, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 327; Stark *v.* Hart, 22 Tex. Civ. App. 544, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 327; Gray *v.* Cooper, 23 Tex. Civ. App. 6, *citing* 30 [3] AM. AND ENG. ENCYC. OF LAW (2d ed.) 327.

**No Authority After Discharge.** — Lynch *v.* Lynch, 99 Ill. App. 454.

**Actions of Attorney After Termination of Relation Invalid.** — Steinkamp *v.* Gaebel, (Neb. 1901) 95 N. W. Rep. 684.

**Termination by Insanity of Client.** — Chase *v.* Chase, (Ind. 1904) 71 N. E. Rep. 485.

**Termination by Transfer of Subject-matter of Litigation.** — Foster *v.* Bookwalter, 152 N. Y. 166.

**By His Refusal to Proceed** with the cause or to permit another to do so the attorney terminates the relation. Halbert *v.* Gibbs, 16 N. Y. App. Div. 126.

**The Fact that Other Attorneys** file amended pleadings, give notice of a motion for a new trial, and make stipulations with respect to the suit, does not prevent the former attorneys who had been acting all through the case from being attorneys of record in the action. Hoppin *v.* Winnemucca First Nat. Bank, 25 Nev. 84.

**Evidence Conflicting — Question for Jury.** — Jinks *v.* Moppin, (Tex. Civ. App. 1904) 80 S. W. Rep. 390.

**328. 1. Attorney Cannot Withdraw Without Client's Consent.** — Glover *v.* Dimmock, 119 Ga. 697, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328.

**2. Authority Revocable at Client's Pleasure.** — Glover *v.* Dimmock, 119 Ga. 697, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328; O'Neal *v.* Spalding, 66 S. W. Rep. 11, 23 Ky. L. Rep. 1729; Com. *v.* Terry, 11 Pa. Super. Ct. 547. See also *infra*, this title, **409. 3.**

**By Transferring Interest in Subject-matter of Litigation.** — Foster *v.* Bookwalter, 152 N. Y. 166.

**3. Death of Client or Dissolution of Corporation.** — Farrand *v.* Land, etc., Imp. Co., (C. C. A.) 86 Fed. Rep. 393; Pedlar *v.* Stroud, 116 Cal. 461; Matter of Turner, 139 Cal. 85 (notice after death of client invalid); Van Campen *v.* Bruns, 54 N. Y. App. Div. 86; Holt *v.* Idleman, 34 Oregon 117, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328; Stark *v.* Hart, 22 Tex. Civ. App. 544, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328; Gray *v.* Cooper, 23 Tex. Civ. App. 6, *citing* 30 [3] AM. AND ENG. ENCYC. OF LAW (2d ed.) 328.

**Termination of Relation by Dissolution of Company — Due Diligence of Attorney.** — Salton *v.* New Beeston Cycle Co., (1900) 1 Ch. 43.

**Insanity of Client.** — Chase *v.* Chase, 163 Ind. 187, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28 (29).

**Death or Insanity.** — The mere fact that a party becomes insane or dies while he is indebted to the attorney who was at the time representing him with respect to his property interests, does not give that attorney the right *per se* to appear as such for the guardian or administrator appointed. State *v.* District Ct., 30 Mont. 8.

**Death of Member of Firm.** — Where a contract is made with an attorney for his particular skill and services, his death terminates the contract, whether he be alone or a member of a firm. And where a client contracts with a firm for the services of both members, and one dies before the completion of the contract, the client has the option of discharging the survivor upon settling for the services previously rendered, and of employing other counsel. Clifton *v.* Clark, 83 Miss. 446, 102 Am. St. Rep. 458.

**Coupled with an Interest — Contingent Fee.** — An attorney's authority is instantly terminated on the death of his client, unless it is coupled with an interest, and an agreement for a contingent fee is not such an interest as will



**329.** Effect of Rendering and Entering Judgment. — See note 2.

**330.** See note 2.

Acts Done in Obtaining Satisfaction of Judgment. — See note 3.

**331.** See note 1.

Client's Right to Settle or Dismiss Action over Attorney's Objection. — See note 4.

**332.** VII. DEALINGS BETWEEN ATTORNEY AND CLIENT — 1. The General Doctrine — Highest Good Faith Required. — See note 3.

prevent the termination of the attorney's authority. *Villhauer v. Toledo*, 5 Ohio Dec. 8.

**329.** 2. Entry of Final Judgment. — *United States*. — *Brown v. Arnold*, (C. C. A.) 131 Fed. Rep. 723.

*California*. — *Knowlton v. Mackenzie*, 110 Cal. 183.

*Nebraska*. — *Lamb v. Wilson*, (Neb. 1903) 97 N. W. Rep. 325.

*New York*. — *Magnolia Metal Co. v. Sterlingworth R. Supply Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 63, *affirmed* 37 N. Y. App. Div. 366, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 329; *Davis v. Solomon*, (Supm. Ct. App. T.) 28 Civ. Pro. (N. Y.) 420, 25 Misc. (N. Y.) 695; *Bergholtz v. Ithaca St. R. Co.*, (County Ct.) 27 Misc. (N. Y.) 176.

*Canada*. — *Tabb v. Beckett*, 9 Quebec Super. Ct. 159.

Relation Exists as Long as Anything Remains to Be Done under Retainer. — *Millar v. Kanady*, 5 Ont. L. Rep. 412.

Confirmation of Judicial Sale. — *Williams v. Maxwell*, 45 W. Va. 297.

Exceptions. — Some of the established exceptions to the rule of the text are, his authority to admit service of citation to review judgment, and to oppose any steps to reverse, taken in a reasonable time; he may also make an agreement within time for procuring a writ of error that the decision of another action, involving the same question and conducted by the same attorneys, shall control. *Brown v. Arnold*, (C. C. A.) 131 Fed. Rep. 723.

**330.** 2. Rule Where Attorney Represents the Plaintiff. — *Brown v. Arnold*, (C. C. A.) 131 Fed. Rep. 723; *Willin v. Burdette*, 172 Ill. 117. See *Magnolia Metal Co. v. Sterlingworth R. Supply Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 63, *affirmed* 37 N. Y. App. Div. 366.

**3.** Enforcement of Lien by Sale. — *Smith v. Cunningham*, 59 Kan. 552.

Foreclosure Proceedings. — "In a large number of cases the entry of judgment ends the litigation; but in foreclosure proceedings it would seem that the end of the litigation is not reached until the lien is enforced by the sale, and confirmation of sale, of the mortgaged property. The understanding of the profession is that the duties and powers of an attorney continue until the final conclusion of the foreclosure proceedings." *Smith v. Cunningham*, 59 Kan. 552.

**331.** 1. Payment to Complainant's Solicitor. — *Brown v. Arnold*, (C. C. A.) 131 Fed. Rep. 723.

**4.** Client May Settle or Compromise. — *Diamond Soda Water Mfg. Co. v. Hegeman*, 74 N. Y. App. Div. 430; *Grantz v. Deadwood Terra Min. Co.*, (S. Dak. 1903) 95 N. W. Rep. 277. See *Davis v. Webber*, 66 Ark. 196, 74 Am. St. Rep. 81.

"It primarily rests with the plaintiff, and not his attorneys, to decide whether or not an amount tendered should be accepted in full satisfaction of a claim for money due." *Ferreira v. Tubbs*, 125 Cal. 687.

**332.** 3. Attorney Dealing with Client — *England*. — *Stokes v. Prance*, (1898) 1 Ch. 212; *In re Haslam*, (1902) 1 Ch. 765.

*United States*. — *Myers v. Luzerne County*, 124 Fed. Rep. 436; *U. S. v. Coffin*, 83 Fed. Rep. 337.

*Alabama*. — *Kidd v. Williams*, 132 Ala. 140. *Georgia*. — *Stubinger v. Frey*, 116 Ga. 396.

*Illinois*. — *Robinson v. Sharp*, 201 Ill. 86, *affirming* 103 Ill. App. 239; *Faris v. Briscoe*, 78 Ill. App. 242; *Miller v. Whelan*, 158 Ill. 544.

*Iowa*. — *Shropshire v. Ryan*, 111 Iowa 677.

*Kansas*. — *Matthews v. Robinson*, 7 Kan. App. 118.

*Louisiana*. — *Brigham v. Newton*, 106 La. 280.

*Minnesota*. — *Klein v. Borchert*, 89 Minn. 377; *Struckmeyer v. Lamb*, 64 Minn. 57.

*Missouri*. — *Barrett v. Ball*, 101 Mo. App. 288.

*New Jersey*. — *Kelley v. Repetto*, 62 N. J. Eq. 246; *Porter v. Bergen*, 54 N. J. Eq. 405; *In re McDermit*, 63 N. J. L. 476.

*New York*. — *Matter of Demarest*, 11 N. Y. App. Div. 156; *Couse v. Horton*, 23 N. Y. App. Div. 198.

*Ohio*. — *Case v. Hewitt*, 10 Ohio Dec. 365, 7 Ohio N. P. 609.

*Oregon*. — *Ah Foe v. Bennett*, 35 Oregon 231.

*Pennsylvania*. — *O'Donnell v. Breck*, 7 Pa. Super. Ct. 26, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 332.

*Wisconsin*. — *Vanasse v. Reid*, 111 Wis. 309, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 332.

See *In re Evans*, 22 Utah 366, 83 Am. St. Rep. 794; *Cullop v. Leonard*, 97 Va. 256; *Dorr v. Camden*, 55 W. Va. 226; *Young v. Murphy*, 120 Wis. 49.

Rule Inapplicable to Contract of Employment. — *Clifford v. Braun*, 71 N. Y. App. Div. 432; *Boyd v. New York Security, etc., Co.*, 176 N. Y. 556, *affirming* 85 N. Y. App. Div. 581.

Rule Inapplicable to Giving of Note for Legal Services Performed. — *Ward v. Yancey*, 78 Ill. App. 368.

Ambiguous Contract for Services. — *Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625.

Assignee of Attorney. — *Goldberg v. Goldstein*, 87 N. Y. App. Div. 516.

Termination of Relation. — The influence acquired by the relation may extend more or less after the period of its termination, and when such is the case the transaction will be scrutinized with the same jealousy as if the relation had continued. *Barrett v. Ball*, 101 Mo. App. 288.

**332.** Equity Will Relieve Against Attorney's Unconscionable Bargains with Client. — See note 1.

Actual Fraud Unnecessary — Burden to Establish Fairness on Attorney. — See note 2.

**334.** Attorney Must Account for Profits — Injunction Against Unconscionable Contract. — See note 1.

Duty to Communicate Information to Client. — See note 3.

When Transactions between Attorney and Client Will Be Sustained. — See note 4.

**335.** What Must Be Shown to Entitle Client to Relief. — See note 2.

Attorney Acquiring Adverse Interest in Subject-matter of Litigation. — See note 3.

2. To Whom Rule Applies. — See note 4.

**336.** Parties Between Whom Relation of Attorney and Client Subsequently Established. — See notes 1, 2.

**337.** 3. Assignments and Conveyances to Attorney. — See notes 1, 2.

**339.** Such Assignments Not Necessarily Invalid. — See note 1.

**340.** 4. Gifts — The Presumption Against Fair Dealing. — See note 1.

5. Purchasing Adversely to Client — *a.* AT JUDICIAL SALE. — See notes 4, 5.

**333.** 1. Relief in Equity. — Robinson v. Sharp, 201 Ill. 86, affirming 103 Ill. App. 239; Matter of Demarest, 11 N. Y. App. Div. 156; Gillespie v. Weiss, 8 Pa. Dist. 171, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 333.

Contract Valid to Amount Justly Due. — Porter v. Bergen, 54 N. J. Eq. 405.

2. Actual Fraud Unnecessary — Burden of Proof — Alabama. — Kidd v. Williams, 132 Ala. 140. Illinois. — Willin v. Burdette, 172 Ill. 117. Iowa. — Shropshire v. Ryan, 111 Iowa 677. Kentucky. — Beale v. Barnett, 64 S. W. Rep. 838, 23 Ky. L. Rep. 1118.

Minnesota. — Klein v. Borchert, 89 Minn. 377.

New Jersey. — Porter v. Bergen, 54 N. J. Eq. 405.

Oregon. — Ah Foe v. Bennett, 35 Oregon 234, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 333.

Wisconsin. — Vanasse v. Reid, 111 Wis. 303; Young v. Murphy, 120 Wis. 49.

Attorney's Assignee. — Goldberg v. Goldstein, 87 N. Y. App. Div. 516.

**334.** 1. Making Profits Out of Dealings with Client — Liability to Account. — Matter of Demarest, 11 N. Y. App. Div. 156; Beale v. Barnett, (Ky. 1901) 64 S. W. Rep. 838; O'Donnell v. Breck, 7 Pa. Super. Ct. 24.

3. Duty to Give Client Information. — Stanwood v. Wishard, 128 Fed. Rep. 499; Truitt v. Darnell, 65 N. J. Eq. 221; Dorr v. Camden, 55 W. Va. 226.

Duty to Render Itemized Accounts. — Kelley v. Repetto, 62 N. J. Eq. 246.

4. Prohibition of Attorney to Deal with Client Not Absolute — Transactions Closely Scrutinized. — Myers v. Luzerne County, 124 Fed. Rep. 436; Kidd v. Williams, 132 Ala. 144, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 334; Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81; Tippet v. Brooks, 28 Tex. Civ. App. 107; Vanasse v. Reid, 111 Wis. 303; Bell v. Cochran, 5 British Columbia 211.

**335.** 2. Dealings at Arm's Length Valid. — Beale v. Barnett, (Ky. 1901) 64 S. W. Rep. 838.

3. Acquisition of Adverse Interest in Litigation. — Stubinger v. Frey, 116 Ga. 396; *In re Freerks*, 11 N. Dak. 134, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 335.

4. Rule Applies to One Fraudulently Representing Himself to Be an Attorney. — Miller v. Whelan, 158 Ill. 544.

**336.** 1. Contract Creating Relation. — Dockery v. McLellan, 93 Wis. 381.

Transaction After Relation Terminated — Burden of Proving Fraud on Client. — Jinks v. Moppin, (Tex. Civ. App. 1904) 80 S. W. Rep. 390.

2. Contract Creating Relation. — Dockery v. McLellan, 93 Wis. 381.

**337.** 1. Assignments by Client to Attorney. — Brooks v. Pratt, (C. C. A.) 118 Fed. Rep. 725; Faris v. Briscoe, 78 Ill. App. 242.

Assignment After Termination of Relation — Close Scrutiny. — Barrett v. Ball, 101 Mo. App. 288.

Property Taken in Settlement of Fees and Loans — No Fraud Presumed. — Lindt v. Linder, 117 Iowa 110.

2. Titles and Assignments Taken by Attorneys Subjected to Equitable Rights of Client. — Ah Foe v. Bennett, 35 Oregon 231; Liles v. Terry, (1895) 2 Q. B. 679.

**339.** 1. Good Faith and Full Knowledge Validate Transaction. — Tippet v. Brooks, 28 Tex. Civ. App. 107, writ of error denied 95 Tex. 335.

**340.** 1. Donatio Mortis Causa — Absence of Other Persons and Independent Advice — Gift Invalid. — Davis v. Walker, 5 Ont. L. Rep. 173.

4. Fisher v. McInerney, 137 Cal. 28, 92 Am. St. Rep. 68. See also *supra*, this title, **345.** 3.

5. Attorney Purchasing at Judicial Sale Treated as Trustee for Client. — Holmes v. Holmes, 106 Ga. 860, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 340; Phillips v. Phillips, (Ky. 1904) 80 S. W. Rep. 826, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 340; Aultman v. Loring, 76 Mo. App. 66; Olson v. Lamb, 56 Neb. 115, 71 Am. St. Rep. 670, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 340; Johnstone v. O'Connor, 162 N. Y. 639, affirming 21 N. Y. App. Div. 77; Carson v. Fogg, 34 Wash. 448. See Gaffney v. Jones, 18 Wash. 311.

**341.** Rule Extends to Tax Sales and Others of Similar Character. — See notes 1, 2.

**342.** When Purchase by Attorney Valid. — See note 2.

Diligence Required of Client. — See note 3.

*b.* IN OTHER CASES. — See note 4.

**343.** Attorney Purchasing Litigated Property as a Result of Special Information Obtained as Attorney. — See note 1.

Attorney Using Knowledge Acquired through Professional Relation. — See note 2.

**344.** Attorney Employed to Protect or Examine Title, Buying Outstanding Adverse Title. — See note 1.

**345.** VIII. GENERAL AUTHORITY OF ATTORNEYS — 1. How Determined. — See note 3.

Purchase with Client's Consent. — *Fisher v. McInerney*, 137 Cal. 28, 92 Am. St. Rep. 68.

**341.** 1. Includes Tax Sales. — *Brigham v. Newton*, 49 La. Ann. 1539. But see *Payette v. Willis*, 23 Wash. 299.

2. *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670.

Purchase at Private Sale from Judgment Debtor. — *Gaffney v. Jones*, 18 Wash. 311.

Outstanding Judgments. — *Garinger v. Palmer*, (C. C. A.) 126 Fed. Rep. 906.

**342.** 2. Rule Against Purchase by Attorney Not Inexorable. — *Herr v. Payson*, 157 Ill. 244; *Clark v. Robertson*, (Ky. 1897) 43 S. W. Rep. 245; *McKenna v. Van Blarcom*, 109 Wis. 271, 83 Am. St. Rep. 895.

Purchase Against Former Client. — *Smith v. Craft*, 58 S. W. Rep. 500, 22 Ky. L. Rep. 643.

Purchase After Termination of Relation. — *Grantz v. Deadwood Terra Min. Co.*, (S. Dak. 1903) 95 N. W. Rep. 277.

3. Client's Right Lost by Delay. — *Johnstone v. O'Connor*, 162 N. Y. 639, affirming 21 N. Y. App. Div. 77.

4. Acts of Attorney Held for Client's Benefit. — *Gilbert v. Murphey*, 103 Fed. Rep. 520; *Matter of Demarest*, 11 N. Y. App. Div. 156; *Hare v. De Young*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 366; *Albright v. Mercer*, 14 Pa. Super. Ct. 63. See *McKenna v. Van Blarcom*, 109 Wis. 271, 83 Am. St. Rep. 895.

Lien of Client Lost by Attorney's Negligence. — When the negligence of the attorney causes client to lose his lien, the former is not estopped to deny it upon subsequently purchasing the land. *Farrand v. Land*, etc., Imp. Co., (C. C. A.) 86 Fed. Rep. 393.

**343.** 1. Purchase of Litigated Property Impressed with Trust. — *Stanwood v. Wishard*, 128 Fed. Rep. 499; *Aultman v. Loring*, 76 Mo. App. 66.

Assumpsit by Client for Profits. — *Albright v. Mercer*, 14 Pa. Super. Ct. 63.

2. *Carson v. Fogg*, 34 Wash. 448.

**344.** 1. Attorney Partly Interested — Client May Elect to Treat Purchase as Joint. — *Thomas v. Morrison*, 92 Tex. 329.

Purchase at Execution Sale — Subsequent Purchase of Outstanding Title. — *Aultman v. Loring*, 76 Mo. App. 66.

**345.** 3. General Rule as to Attorney's Authority. — *In re Blankfein*, 97 Fed. Rep. 192, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345; *Haseton v. Florentine Marble Co.*, 94 Fed. Rep. 701; *Williams v. State*, 65 Ark. 159; *Houghton v. Ellis*, (Colo. App. 1903) 73 Pac.

Rep. 752; *Spinks v. Athens Sav. Bank*, 108 Ga. 376; *Ratican v. Union Depot Co.*, 80 Mo. App. 528; *Callaway v. Equitable Trust Co.*, 67 N. J. L. 44; *Spaulding v. Allen*, 10 Ohio Cir. Dec. 397, 19 Ohio Cir. Ct. 608; *Garrett v. Han-shue*, 53 Ohio St. 482; *Gray v. Howell*, 205 Pa. St. 211; *Fox v. Deering*, 7 S. Dak. 443; *Hast v. Piedmont*, etc., R. Co., 52 W. Va. 396; *W. W. Kimball Co. v. Payne*, 9 Wyo. 444, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345; *Foreman v. Seeley*, 2 N. Bruns. Eq. Rep. 341.

Illustrations — What Authority Is or Is Not Implied — Only Lawful Acts Authorized. — *Hamel v. Brooklyn Heights R. Co.*, 59 N. Y. App. Div. 135.

Attorney as Agent Liable When Principal Undisclosed. — *Good v. Rumsey*, 50 N. Y. App. Div. 280.

Liability of Client to Attorney for Necessary Disbursements. — *Hazeltine v. Mahan*, 8 Kan. App. 857, 55 Pac. Rep. 467; *Sibley v. Rice*, 58 Neb. 785; *Badger v. Celler*, 41 N. Y. App. Div. 599; *Tyrrel v. Hammerstein*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 505.

Authority to Advance Costs — Client Liable. — *Shuck v. Pfenningshausen*, 101 Mo. App. 697.

Client Not Liable for Printing Brief. — *Livingston Middleditch Co. v. New York College of Dentistry*, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 831.

Client Not Liable for Unauthorized Libelous Publication. — *Hall v. Baker*, 66 N. Y. App. Div. 131.

Cannot Bind Client as to Collateral Matters. — *Meriden Hydro-Carbon Arc Light Co. v. Anderson*, 111 Ill. App. 449.

Client Not Bound by Unauthorized Agreement. — *Chicago Gen. R. Co. v. Murray*, 174 Ill. 259.

May Sign Notice of Appeal and Perfect Appeal. — *Taylor v. McCormick*, 7 Idaho 524; *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111.

Attorney May Sign Appeal Bond. — *De Roberts v. Stiles*, 24 Wash. 611.

Attorney Cannot Make Contract Enforceable Against Corporation. — *Nutting v. Kings County El. R. Co.*, 91 Hun (N. Y.) 251.

Condemnation Suit — No Authority to Stipulate as to Plans or Methods of Construction. — *Du Pont v. Sanitary Dist.*, 203 Ill. 170.

General Authority to Represent — Signing Stay Bond Unauthorized. — *Anderson v. Hendrickson*, (Neb. 1901) 95 N. W. Rep. 844.

Authority to Collect — No Authority to Regulate Distribution of Fund. — *Lyon v. Hires*, 91 Md. 411.

Employment of Expert by Attorney for Accident

**346.** An Attorney Employed to Collect a Debt. — See note 3.

**347.** Object of Employment Determines Scope of Powers. — See note 2.

An Attorney Is Not a Mere Agent. — See note 3.

**349.** When Those Dealing with Attorney Chargeable with Notice of Limitations of Powers. — See notes 1, 2.

**2.** To Appear and Act as Counsel — Authority Depends on Retainer. — See note 3.

Presumption of Authority. — See notes 4, 5.

Relief for Unauthorized Appearance — Authority Cannot Be Attacked Collaterally. — See note 6.

**350.** See note 1.

**Insurance Company to Examine Collapsed Building.** — *Brown v. Travelers L., etc., Ins. Co.*, 21 N. Y. App. Div. 42.

**Attorney as Agent.** — An attorney is the same as any other agent, and is not liable as such personally, when he keeps within the limits of his authority, and discloses the name of his principal. *Livingston Middleditch Co. v. New York College of Dentistry*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 259, 7 N. Y. Annot. Cas. 398.

**Attorney to Prepare Mortgage** may receive it after execution. *Jones v. Howard*, 99 Ga. 451.

**Contracts Relating to Future.** — An attorney is not authorized, by virtue of his employment, to settle a suit against his client by entering into life contracts, or any contract affecting the future status between the claimant and the client. *Nephew v. Michigan Cent. R. Co.*, 128 Mich. 599, 8 Detroit Leg. N. 784.

**Criminal Contempt.** — The implied authority of an attorney does not extend to permit him to bind the client to a liability for a criminal contempt without the actual privity of the client. *Matter of Feehan*, (Surrogate Ct.) 36 Misc. (N. Y.) 614.

**In Pennsylvania** the retainer authorizes the attorney to do all acts affecting, not the cause of action, but the remedy only. *Locher v. Rice*, 8 Pa. Dist. 404.

**346. 3. Attorney to Collect — No Authority to Keep Judgment Alive.** — *Cullison v. Lindsay*, 108 Iowa 124.

**347. 2. General Scope of Attorney's Powers.** — *Lyon v. Hires*, 91 Md. 411; *Kissick v. Hunter*, 184 Pa. St. 174; *Fowler v. Iowa Land Co.*, (S. Dak. 1904) 99 N. W. Rep. 1095.

**Notice of Appeal by Attorney Not of Record.** — *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111.

**Necessary Expenses.** — The relation of attorney and client, where the attorney has general authority over the subject of his employment, implies authority to incur such expenses in the professional undertaking as are usual and reasonably necessary, under all the circumstances, to carry out the object of the employment. *Vilas v. Bundy*, 106 Wis. 168. See also *supra*, this title, **345. 3.**

**Employment to Prosecute — Agreement as to Payment at Judicial Sale.** — An attorney by virtue of his employment to prosecute a case has no authority to bind his client by an agreement that the purchaser at the judicial sale shall pay the amount of his bid to a third person instead of to the officer making the sale. *Fire Assoc. v. Ruby*, 58 Neb. 730.

**3. Employment of Expert Witness — Client Liable.** — *Mulligan v. Cannon*, (Supm. Ct.) 25 Civ. Pro. (N. Y.) 348.

**Services of Stenographers.** — *Palmer v. Miller*, 19 Ind. App. 624; *Miller v. Palmer*, 25 Ind. App. 357, 81 Am. St. Rep. 107; *Osmond v. Mutual Cycle, etc., Supply Co.*, (1899) 2 Q. B. 488.

**Printing Expenses on Appeal.** — *Tyrrel v. Hammerstein*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 505.

**349. 1.** *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478.

**2. Secret Limitations on Attorney's Powers.** — *W. W. Kimball Co. v. Payne*, 9 Wyo. 441.

**3. Power to Appear Depends on Retainer.** — *Bell v. Farwell*, 89 Ill. App. 638; *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209.

**No Authority Prior to Retainer.** — *Stone v. Bank of Commerce*, 174 U. S. 412.

**Unauthorized Appearance Confers No Jurisdiction.** — *Du Bois v. Clark*, 12 Colo. App. 220.

**Unauthorized Appearance for Nonresident Invalid in Rem.** — *Myers v. Prefontaine*, 40 N. Y. App. Div. 603.

**Addition of Party as Plaintiff — Consent in Writing.** — *Fricker v. Van Grutten*, (1896) 2 Ch. 649.

**Authority to Appear Specially.** — Where an attorney is directed by his client to enter only a special appearance for him in an action, yet in so doing the attorney honestly pleads matters which would operate as a general appearance, the client is bound by such general appearance. *McNeal v. Gossard*, 68 Kan. 113.

**4.** *Salton v. New Beeston Cycle Co.*, (1900) 1 Ch. 43; *Gage v. Bell*, 124 Fed. Rep. 380, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 349; *Bell v. Farwell*, 189 Ill. 414. See also *supra*, this title, **375. 4.**

**5.** *Danville, etc., R. Co. v. Rhodes*, 180 Pa. St. 157.

**6. Relief from Judgment Obtained upon Unauthorized Appearance.** — *Longman v. Bradford*, 108 Ga. 572; *Mortgage Trust Co. v. Cowles*, 3 Kan. App. 660; *National Exch. Bank v. Wiley*, (Neb. 1902) 92 N. W. Rep. 582.

**Motion to Dismiss.** — *Bell v. Farwell*, 189 Ill. 414.

**Dismissal by Court Sua Sponte.** — *Bell v. Farwell*, 89 Ill. App. 638.

**Unauthorized Institution of Suit — Dismissal at Costs of Attorney.** — *Falor v. Beery*, 8 Ohio Dec. 306.

**350. 1. Authority Cannot Be Attacked Collaterally or on Appeal.** — *Donohue v. Hungerford*, 1 N. Y. App. Div. 528.

**350.** Conditions of Relief — Promptness — Case Clear on Merits. — See note 2.

**351.** Retainer in Suit No Authority to Appear in Other Litigation. — See note 3.  
Appearance Equivalent to Service of Process. — See note 4.

**352.** 3. To Employ Associate Counsel or Assistants — Delegation of Authority. — See note 1.

Reason of Rule against Delegation. — See note 2.

Employment of Assistant Counsel — Ratification. — See notes 3, 4.

**353.** Attorney to Collect — Effect of Payment to Substitute. — See note 2.

**354.** 4. To Make Stipulations or Agreements. — See notes 1, 2.

Stipulation that One Trial Shall Determine Cases Involving Same Issues. — See note 3.

**350.** 2. Immediate Action on Discovering Lack of Authority Sufficient. — *Bell v. Farwell*, 189 Ill. 414.

**351.** 3. Writ of Error. — *Delaney v. Husband*, 64 N. J. L. 275.

4. Flint *v. Comly*, 95 Me. 251; *Dentzel v. City*, etc., R. Co., 90 Md. 434; *Rothschild v. Knight*, 176 Mass. 48.

Authorized to Appear Specially — General Appearance Binding. — *Kramer v. Gerlach*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 525.

**352.** 1. Delegation of Authority by Attorney. — *Northern Pac. R. Co. v. Clarke*, 106 Fed. Rep. 794, 45 C. C. A. 635; *Hewes v. Erie*, etc., Transp. Co., 31 Pa. Co. Ct. 75, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 352; *Hearn v. McNeil*, 32 Nova Scotia 210.

2. *Hewes v. Erie*, etc., Transp. Co., 31 Pa. Co. Ct. 75, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 352.

3. Assistant Counsel. — *Miller v. Ballerino*, 135 Cal. 566, 571; *Lathrop v. Hallett*, (Colo. App. 1904) 77 Pac. Rep. 1095; *White v. Esch*, 78 Minn. 264; *Kingsbury v. Joseph*, 94 Mo. App. 298; *Meany v. Rosenberg*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 520; *Matter of Borkstrom*, 63 N. Y. App. Div. 7.

Local Counsel — Fees Chargeable as Expenses. — *Dillon v. Watson*, (Neb. 1902) 92 N. W. Rep. 156.

Knowledge of Client. — *McCarthy v. Crump*, 17 Colo. App. 110.

Assistant's Services Included. — An attorney, at his own expense and risk, may employ an assistant and charge his client with the reasonable value of the entire services, and this does not militate against the rule that he cannot employ another attorney at his client's expense. *Vilas v. Bundy*, 106 Wis. 168.

4. When Client Bound for Fees of Assistant Counsel. — *Northern Pac. R. Co. v. Clarke*, (C. C. A.) 106 Fed. Rep. 794.

When No Ratification. — *Swayne v. Union Mut. L. Ins. Co.*, 92 Tex. 575.

Knowledge Alone of Employment No Ratification. — *Lathrop v. Hallett*, (Colo. App. 1904) 77 Pac. Rep. 1095.

Agreement of Attorney to Pay All Expenses — Knowledge of Employment of Assistant Not Binding. — *Porter v. Elizalde*, 125 Cal. 204.

Conflicting Evidence of Agreement — Question for Jury. — *Cullison v. Lindsay*, 108 Iowa 124.

**353.** 2. Cannot Authorize Clerk of Court to Accept Payment of Claim. — *Hendry v. Benlisa*, 37 Fla. 609.

**354.** 1. Stipulations in Progress of the Cause. — *Wadsworth v. Montgomery First Nat. Bank*,

124 Ala. 440; *Matter of Ross*, 136 Cal. 629; *Grand Lodge*, etc., *v. Ohnstein*, 110 Ill. App. 312; *American Emigrant Co. v. Long*, 105 Iowa 194; *People v. Westchester County*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 580; *Fox v. Deering*, 7 S. Dak. 443; *Fowler v. Iowa Land Co.*, (S. Dak. 1904) 99 N. W. Rep. 1095.

"It would be a narrow limit within which to place the authority of counsel in the prosecution of causes of this kind to say that there must be special authority given to him by his client for every action that he takes by which he might release the matter of costs or damages in order to protect his client's more substantial interests." *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842.

Agreement for Amicable Action. — *Kissick v. Hunter*, 184 Pa. St. 174.

Agreement to Amend. — *Rothschild v. Knight*, 176 Mass. 48.

Agreement Giving Judge Additional Time for Decision. — *Litt v. Stewart*, (Supm. Ct. Spec. T.) 62 N. Y. Supp. 1114.

Agreement Collateral to and Independent of Suit not binding. *Wonderly v. Martin*, 69 Mo. App. 84.

Limits of Authority. — The attorney's authority to bind his client extends only to acts and agreements necessary to the control and prosecution of the suit or defense and affecting the remedy only. *Ratican v. Union Depot Co.*, 80 Mo. App. 528, 2 Mo. App. Rep. 760.

A Local Attorney for the taking of testimony of distant witnesses is not authorized to make an agreement affecting the management of the case. *Earhart v. U. S.*, 30 Ct. Cl. 343.

South Dakota Statute. — *Gibson v. Allen*, (S. Dak. 1904) 100 N. W. Rep. 1096.

Iowa Statute — Evidence Thereunder. — *Baily v. Birkhofer*, 123 Iowa 59.

2. Agreement for Special Judge. — *State v. Downs*, 164 Mo. 471.

3. Several Actions Involving Same Issues — Stipulation for One Trial. — *Brown v. Arnold*, (C. C. A.) 131 Fed. Rep. 723. See *Grand Lodge*, etc., *v. Ohnstein*, 110 Ill. App. 312.

Decision in Another Case Binding. — The power of an attorney to bind his client by consenting that a decision in another case shall be binding upon him in the case in question can only exist where the two cases involve the same questions. *Louisville Trust Co. v. Stone*, 88 Fed. Rep. 407, affirmed 174 U. S. 429.

An Agreement that the Decision of the Supreme Court in a Pending Case shall be conclusive on the question of negligence in both cases is binding. *Southern Kansas R. Co. v. Payey*, 37 Kan. 521.

**355.** Instances of Stipulations within the Power of an Attorney. — See notes 2, 5, 6

**357.** Stipulation Waiving Right of Appeal. — See note 1.

A Stipulation as to the Law of the Case. — See note 2.

Effect of Stipulations — How Far Conclusive. — See note 3.

5. To Exclusive Control of Proceedings. — See note 7.

**358.** 6. To Compromise Client's Rights — *a.* THE GENERAL RULE. — See note 1.

**359.** See note 1.

**360.** An Executory Agreement to Compromise or Settle. — See note 2.

**355.** 2. *Bonnifield v. Thorp*, 71 Fed. Rep. 924.

5. Stipulations as to Evidence. — *American Emigrant Co. v. Long*, 105 Iowa 194; *Garrett v. Hanshue*, 53 Ohio St. 482; *Thompson v. Ft. Worth, etc., R. Co.*, 31 Tex. Civ. App. 583.

Time of Taking Evidence — Use in Case of Death of Witness. — *Ludeman v. Third Ave. R. Co.*, 72 N. Y. App. Div. 26.

6. Agreement for Compensation for Opposing Counsel. — *People v. Westchester County*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 580.

**357.** 1. Agreement Not to Appeal. — *Locher v. Rice*, 8 Pa. Dist. 404, 16 Lanc. L. Rev. 92.

2. Estoppel. — A client cannot be divested of four thousand dollars' worth of real estate by the verbal admission and conclusion of law of an attorney that a plea of estoppel by the other party was well founded, without any evidence in the record back of the admission. *Harvin v. Blackman*, 108 La. 426.

3. Admissions Binding. — *Pratt v. Conway*, 148 Mo. 291, 71 Am. St. Rep. 602.

Admissions by Attorney Need Not Be Proven. — *Preston v. Davis*, 112 Ill. App. 636.

Acting Contrary to Client's Wishes. — An agreement is not binding when the court and the adverse party both know the attorney is acting in direct opposition to his client's instructions or wishes. *Knowlton v. Mackenzie*, 110 Cal. 183.

7. Attorney's Right to Control Proceedings. — *Bonnifield v. Thorp*, 71 Fed. Rep. 924; *Earhart v. U. S.*, 30 Ct. Cl. 343; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134; *Toy v. Haskell*, 128 Cal. 558, 79 Am. St. Rep. 70; *O'Rourke v. Rourke*, 5 Quebec Pr. 405. But see *Sheridan County v. Hanna*, 9 Wyo. 368.

Withdrawal of Answer by Client. — *Reeder v. Lockwood*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 531.

Extension of Time for Answer by Client Invalid. — *Wylie v. Sierra Gold Co.*, 120 Cal. 485.

Tender May Be Made to Attorney. — *Ferre v. Tubbs*, 125 Cal. 687.

Principal Attorney Controls Assistant. — *Sheridan County v. Hanna*, 9 Wyo. 368.

May Decide in What Court Suit Shall Be Instituted. — *McGeorge v. Bigstone Gap Imp. Co.*, 88 Fed. Rep. 599.

Attorney's Lien — Withdrawal of Writ of Error. — A plaintiff in error cannot withdraw a writ of error over counsel's objection, where the latter would have a lien on property for fees if successful. *Walker v. Equitable Mortg. Co.*, 114 Ga. 862.

**358.** 1. Attorney Cannot Compromise — *United States*. — *Humphrey v. Thorp*, 89 Fed. Rep. 66.

*Georgia*. — *Sonneborn v. Moore*, 105 Ga. 497.

*Illinois*. — *McClintock v. Helberg*, 168 Ill. 392, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 358; *Danziger v. Pittsfield Shoe Co.*, 107 Ill. App. 47, affirmed 204 Ill. 145. See *Strong v. Smith*, 98 Ill. App. 522.

*Iowa*. — *Kilmer v. Gallaher*, 112 Iowa 583, 84 Am. St. Rep. 358.

*Kentucky*. — *Cox v. Adelsdorf*, (Ky. 1899) 51 S. W. Rep. 616; *Brown v. Bunger*, (Ky. 1897) 43 S. W. Rep. 714; *Benedict v. Wilhoite*, (Ky. 1904) 80 S. W. Rep. 1155.

*Missouri*. — *Schlemmer v. Schlemmer*, 107 Mo. App. 487; *Bay v. Trusdell*, 92 Mo. App. 377.

*Montana*. — *Harris v. Root*, 28 Mont. 168, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 358.

*New Jersey*. — *Faughnan v. Elizabeth*, 58 N. J. L. 309.

*New York*. — *Smith v. Bradhurst*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 546, affirmed 31 N. Y. App. Div. 98; *McKechnie v. McKechnie*, 3 N. Y. App. Div. 91.

*Ohio*. — *Holdern v. Lippert*, 4 Ohio Cir. Dec. 527.

*Pennsylvania*. — *Gray v. Howell*, 205 Pa. St. 211; *Callahan v. Quigley*, 6 Pa. Dist. 494.

*Tennessee*. — *Conley v. Whitthorne*, (Tenn. Ch. 1899) 58 S. W. Rep. 380.

*Texas*. — *Cook v. Greenberg*, (Tex. Civ. App. 1896) 34 S. W. Rep. 687.

*Washington*. — *Budlong v. Budlong*, 31 Wash. 228; *Timm v. Timm*, 34 Wash. 228.

*Wisconsin*. — *Fosha v. O'Donnell*, 120 Wis. 336.

*Canada*. — *Benner v. Edmonds*, 19 Ont. Pr. 9.

Contra. — *Strattner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 453.

Client May Authorize Compromise. — *Diamond Soda Water Mfg. Co. v. Hegeman*, 74 N. Y. App. Div. 430; *High v. Emerson*, 23 Wash. 103.

Agreement Not to Settle Suit Without Attorney's Consent Invalid. — *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81.

Corporation Counsel of New York May Compromise. — *Bush v. Coler*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 368.

Unauthorized Agreement Not to Enforce Judgment Invalid. — *Richardson Drug Co. v. Dunagan*, 8 Colo. App. 308.

Power Coupled with Interest — Not Revocable at Will. — *Gulf, etc., R. Co. v. Miller*, 21 Tex. Civ. App. 609.

An Attorney of a Trustee cannot contract to waive the rights of an estate which his clients only hold as trustee. *Spaulding v. Allen*, 10 Ohio Cir. Dec. 397, 19 Ohio Cir. Ct. 608.

**359.** 1. Client May Collect Balance Due. — *Holden v. Lippert*, 4 Ohio Cir. Dec. 527.

**360.** 2. Executory Agreements to Compromise.

**360.** *Retraxit* — Discontinuance — Remittitur. — See note 5.

The Courts Are Reluctant to Set Aside a Compromise. — See note 8.

**362.** The English Doctrine. — See note 1.

Ratification of Unauthorized Compromise. — See note 2.

**363.** *b.* CANNOT ACCEPT PAYMENT IN ANYTHING BUT MONEY. — See note 1.

Cannot Accept Notes in Absolute Payment. — See note 2.

**364.** *c.* CANNOT ACCEPT LESS THAN FULL AMOUNT DUE. — See notes 2, 3.

**365.** 7. To Receive Payment and Enter Satisfaction of Judgment — Authority to Receive Payment. — See note 2.

**366.** Presumption Arises from Possession of Claim. — See note 1.

**368.** Satisfaction of Judgment. — See notes 1, 2.

— McClintock *v.* Helberg, 168 Ill. 392, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 360.

**360.** 5. *Retraxit*. — Forest Coal Co. *v.* Doolittle, 54 W. Va. 210.

**8.** Ratification of Unauthorized Compromise. — Van Campen *v.* Bruns, 54 N. Y. App. Div. 86.

**Specific Performance of Agreement.** — The objection that an attorney was not authorized to make the compromise cannot be made for the first time in the Supreme Court. Collins *v.* Fidelity Trust Co., 33 Wash. 136.

**362.** 1. Compromise Before Action Invalid. — Macaulay *v.* Polley, (1897) 2 Q. B. 122.

**2.** Ratification of Unauthorized Compromise. — Danziger *v.* Pittsfield Shoe Co., 204 Ill. 145; Timm *v.* Timm, 34 Wash. 228; Fosha *v.* O'Donnell, 120 Wis. 336.

**Eight Years' Delay to Object.** — Bay *v.* Trussell, 92 Mo. App. 377.

**363.** 1. Payment Must Be in Money. — McMurray *v.* Marsh, 12 Colo. App. 95; Kaiser *v.* Hancock, 106 Ga. 217; McClintock *v.* Helberg, 168 Ill. 392, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 363; Smith *v.* Jones, 47 Neb. 108; Cram *v.* Sickel, 51 Neb. 828, 66 Am. St. Rep. 478; Barr *v.* Rader, 31 Oregon 231, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 363; Gray *v.* Howell, 205 Pa. St. 211; Pioneer Press Co. *v.* Gossage, 13 S. Dak. 626, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 363.

**Check of Opposing Solicitor.** — Blumberg *v.* Life Interests, etc., Corp., (1897) 1 Ch. 171, 66 L. J. Ch. 127, 75 L. T. N. S. 627, 45 W. R. 246.

**2. Notes Accepted in Payment.** — Cram *v.* Sickel, 51 Neb. 828, 66 Am. St. Rep. 478; Finlay *v.* Heyward, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 266.

**364.** 2. Accepting Part Payment in Discharge. — Wood *v.* Bangs, 2 Penn. (Del.) 435; Kaiser *v.* Hancock, 106 Ga. 217; Cox *v.* Adelsdorf, (Ky. 1899) 51 S. W. Rep. 616; Bay *v.* Trussell, 92 Mo. App. 377; Smith *v.* Jones, 47 Neb. 108, 53 Am. St. Rep. 519. See Kilmer *v.* Gallaher, 112 Iowa 583, 84 Am. St. Rep. 358.

**3. Satisfaction of Judgment Without Full Payment.** — Faughman *v.* Elizabeth, 58 N. J. L. 309; Tito *v.* Seabury, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 283; Wood *v.* New York, 44 N. Y. App. Div. 299.

**Assignment of Judgment.** — Smiley *v.* U. S. Building, etc., Assoc., (Ky. 1901) 62 S. W. Rep. 853.

**Cannot Object to Compromise by Client.** — Homans *v.* Tyng, 56 N. Y. App. Div. 383.

**365.** 2. Implied Power to Receive Payment of

**Claim to Be Collected.** — Williams *v.* State, 65 Ark. 159; Hendry *v.* Benlisa, 37 Fla. 609; Selz *v.* Guthman, 62 Ill. App. 624; Rhinehart *v.* New Madrid Banking Co., 99 Mo. App. 381; Beliveau *v.* Amoskeag Mfg. Co., 68 N. H. 225, 73 Am. St. Rep. 577; Conner *v.* Watson, (Supm. Ct. Spec. T.) 29 Civ. Pro. (N. Y.) 153, 27 Misc. (N. Y.) 444; Boyd *v.* Daily, 85 N. Y. App. Div. 581, *affirmed* 176 N. Y. 556; Tito *v.* Seabury, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 283. See Central Trust Co. *v.* Folsom, 26 N. Y. App. Div. 40.

**The Mere Relation of Solicitor and Client** does not authorize the former to receive payment of either interest or principal due the client on a mortgage. The question is one of agency, and to discharge the paying mortgage from further liability there must be express or implied authority. Foreman *v.* Seeley, 2 N. Bruns. Eq. Rep. 341.

**Authority to Receive Interest** given an attorney confers no authority to receive the principal. Foreman *v.* Seeley, 2 N. Bruns. Eq. Rep. 341.

**May Receive Tender of Damages** for trespass under the Vermont statute, § 1692 (R. L., § 1450). Brown *v.* Mead, 68 Vt. 215.

**Indorsement of Draft.** — An attorney who has authority to collect a claim from a corporation, and who, in the adjustment thereof, receives a draft from the adjusting agent of the corporation, drawn on the paying agent for the amount of the claim, has implied authority to bind his client by indorsing the draft in order to receive the amount thereof. National F. Ins. Co. *v.* Eastern Bldg., etc., Assoc., 63 Neb. 698.

**366.** 1. *Contra.* — In Canada the mere possession of securities by an attorney is no evidence of an authority to collect or receive money due on them. Foreman *v.* Seeley, 2 N. Bruns. Eq. Rep. 341.

**Possession of Note and Mortgage Is Not Essential** to authorize an agent and attorney to make collection. Orient Ins. Co. *v.* Hayes, 61 Neb. 173.

**368.** 1. **To Acknowledge Satisfaction of Judgment.** — McMurray *v.* Marsh, 12 Colo. App. 95; Tito *v.* Seabury, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 283.

**2. Unauthorized Satisfaction.** — Faughnan *v.* Elizabeth, 58 N. J. L. 309; Wood *v.* New York, 44 N. Y. App. Div. 299; Conley *v.* Whitthorne, (Tenn. Ch. 1899) 58 S. W. Rep. 380, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 368. See Patterson *v.* McGovern, 44 N. Y. App. Div. 310.

**368.** 8. To Confess Judgment. — See note 3.

**369.** 9. To Transfer Notes, Judgments, or Securities — Notes. — See notes 4, 5.

Judgments. — See note 6.

**370.** Where, However, the Assignment Is for the Full Value. — See note 2.

10. To Submit Case to Arbitration. — See note 3.

11. To Dismiss a Suit. — See note 4.

**371.** Authority Does Not Extend to Compromising Client's Rights. — See note 1.

13. To Issue Execution and Direct Levy. — See note 3.

Directing Levy on Particular Property. — See note 6.

**372.** 14. To Release Lien of Attachment, Execution, or Other Security — No Implied Power to Release Lien of Judgment. — See note 3.

**373.** See note 1.

**374.** Releasing Attachments. — See note 2.

15. Ratification of Unauthorized Acts. — See note 5.

**Vacation of Unauthorized Satisfaction — Terms.** — An unauthorized satisfaction of a judgment by an attorney for less than its amount will be vacated only on terms that the plaintiff release and discharge the defendant to the extent of the payment made to the attorney. *Faughnan v. Elizabeth*, 58 N. J. L. 309.

**368.** 3. Attorney's Power to Confess Judgment. — *Meriden Hydro-Carbon Arc Light Co. v. Anderson*, 111 Ill. App. 449; *Hairston v. Garwood*, 123 N. Car. 345; *Kissick v. Hunter*, 184 Pa. St. 174.

**Before Justice of the Peace.** — *Chalmers v. Tandy*, 111 Ill. App. 252.

**369.** 4. Transfer of Notes by Attorney. — *Feiner v. Puetz*, 77 Mo. App. 405; *Gordon v. Sanborn*, (Tex. Civ. App. 1896) 35 S. W. Rep. 291; *Hazeltine v. Keenan*, 54 W. Va. 603, 102 Am. St. Rep. 953, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369.

**No Authority to Bind Client by Indorsing Negotiable Paper.** — *National F. Ins. Co. v. Eastern Bldg., etc., Assoc.*, 63 Neb. 698.

**Sale of Notes.** — *Hazeltine v. Keenan*, 54 W. Va. 603, 102 Am. St. Rep. 953, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369.

**5. Check Indorsed for Collection.** — *National Bank of Republic v. Old Town Bank*, (C. C. A.) 112 Fed. Rep. 726.

**6. To Assign a Judgment.** — *Mayer v. Sparks*, 3 Kan. App. 602; *Wyatt v. Fromme*, 70 Mo. App. 613; *Henry, etc., Co. v. Halter*, 58 Neb. 685.

**370.** 2. Cannot Assign Except on Payment of Full Amount. — *Smiley v. U. S. Building, etc., Assoc.*, (Ky. 1901) 62 S. W. Rep. 853.

**3. To Submit Case to Arbitration.** — *Stinesville, etc., Stone Co. v. White*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 135, reversing (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 314; *Henry v. Hilliard*, 120 N. Car. 479.

**Contra.** — *Lew v. Nolan*, 8 Pa. Dist. 531, 17 Lanc. L. Rev. 21 (where the question was of title to property); *King v. King*, 104 La. 420 (*Louisiana* statute).

**No Authority Against Client's Wishes.** — *Neale v. Gordon-Lennox*, (1902) A. C. 465, 71 L. J. K. B. 939.

**4. Attorney's Dismissal or Discontinuance of Suit.** — *Compare Jubilee Placer Co. v. Hossfeld*, 20 Mont. 234.

**Contra.** — *Rhutasel v. Rule*, 97 Iowa 20; *Brown v. Mead*, 68 Vt. 215.

**No Authority to Dismiss When Client Objects.** — *Steinkamp v. Gaebel*, (Neb. 1901) 95 N. W. Rep. 684.

**Unauthorized Discontinuance Invalid.** — *Brown v. Mead*, 68 Vt. 215.

**371.** 1. *Forest Coal Co. v. Doolittle*, 54 W. Va. 225, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370.

**3. May Cause Execution to Issue.** — *Parker v. Home Mut. Bldg., etc., Assoc.*, 114 Ga. 702.

**Attorney Not Enrolled in District.** — In *Pennsylvania* an attorney who is not a member of the bar of a county, has no authority to cause scire facias to be issued upon his præcipe, or to prosecute the same to judgment as an attorney of the court therein. *Bronson v. Brown*, 8 Pa. Dist. 365.

**6.** *Parker v. Home Mut. Bldg., etc., Assoc.*, 114 Ga. 702. See *Guilfoyle v. Seeman*, 41 N. Y. App. Div. 516.

**372.** 3. To Release Lien of Execution or Judgment. — *Ludden v. Sumter*, 45 S. Car. 186, 55 Am. St. Rep. 761; *Engelbach v. Simpson*, 12 Tex. Civ. App. 188. See *Rogers v. Rogers*, (Tenn. Ch. 1895) 35 S. W. Rep. 890.

**373.** 1. To Release Securities. — *Lowry v. Clark*, 20 Pa. Super. Ct. 357.

**374.** 2. Release of Property. — *Muir v. Orear*, 87 Mo. App. 38.

**5. Ratification** — *England*. — *Marsh v. Joseph*, (1897) 1 Ch. 213.

*United States*. — *Hughes County v. Ward*, 81 Fed. Rep. 314.

*Alabama*. — *Florence Cotton, etc., Co. v. Louisville Banking Co.*, 138 Ala. 588, 100 Am. St. Rep. 50.

*Colorado*. — *Roberts v. Denver, etc., R. Co.*, 8 Colo. App. 504.

*Delaware*. — *Wood v. Bangs*, 2 Penn. (Del.) 435.

*District of Columbia*. — *Hazleton v. LeDuc*, 10 App. Cas. (D. C.) 379.

*Georgia*. — *Ewing v. Freeman*, 103 Ga. 811.

*Illinois*. — *Hickox v. Fels*, 86 Ill. App. 216.

*Kentucky*. — *Fisher v. Musick*, (Ky. 1903) 72 S. W. Rep. 787.

*Nebraska*. — *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670. See *Saxton v. Harrington*, 52 Neb. 300.

*New York*. — *Van Campen v. Bruns*, 54 N. Y. App. Div. 86; *Johnstone v. O'Connor*, 21 N.



**374.** Express or Implied Ratification — See note 6.

**375.** See note 1.

Acquiescence with Knowledge. — See notes 2, 3.

16. Presumption of Attorney's Authority. — See note 4.

**377.** Cannot Be Compelled to Produce Authority in First Instance. — See note 1.

Y. App. Div. 77; *Steinson v. Board of Education*, 76 N. Y. App. Div. 612.

*North Carolina.* — *Christian v. Yarborough*, 124 N. Car. 76, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 374.

*Washington.* — *Lambert v. Gillette*, 24 Wash. 726.

**Finding of Lower Court Conclusive on Appeal.** — *Hays v. Merkle*, 70 Mo. App. 509.

**374. 6. Express or Implied Ratification.** — *King v. Smith*, (1900) 2 Ch. 425; *Wood v. Bangs*, 2 Penn. (Del.) 435; *Johnstone v. O'Connor*, 21 N. Y. App. Div. 77, affirmed 162 N. Y. 639.

**Satisfaction of Judgment — Indorsement of Check and Receipt of Money.** — *Patterson v. McGovern*, 44 N. Y. App. Div. 310.

**375. 1.** *Wilson v. Kenwood*, 13 Quebec Super. Ct. 390.

"In order to estop a principal because of his ratification of the unauthorized act of his agent, it is not enough to show that he has in some manner approved of such act, but it must also appear that the principal made the approval with knowledge of what the agent had done and promised in the premises in his behalf." *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478.

**Illustrations — Five Years' Acquiescence.** — *Finlay v. Heyward*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 266.

**Silence Not Conclusive of Ratification.** — *Hammond v. Evans*, 23 Ind. App. 501.

**Acceptance and Retention of Proceeds of Judgment.** — *Julier v. Julier*, 62 Ohio St. 90, 78 Am. St. Rep. 597.

**Cancellation of Mortgage — Retention of Consideration.** — *Christian v. Yarborough*, 124 N. Car. 72.

**Signing Appeal Bond After Dismissal of Suit.** — The fact that after an order of dismissal was entered by the Superior Court, because of the attorney's want of authority to bring the suit, the plaintiff signed an appeal bond, does not amount to a ratification of authority to bring the suit. *Bell v. Farwell*, 189 Ill. 414.

**2. Failure to Object Within Reasonable Time.** — *Selz v. Guthman*, 62 Ill. App. 624; *Lockner v. Holland*, (County Ct.) 81 N. Y. Supp. 730.

**3. Knowledge of Material Facts Essential.** — *Marsh v. Joseph*, (1897) 1 Ch. 213; *Hammond v. Evans*, 23 Ind. App. 501; *Wonderly v. Martin*, 69 Mo. App. 84; *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478; *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670; *Bassford v. Swift*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 149.

**4. Presumption in Favor of Attorney's Authority — United States.** — *In re Blankfein*, 97 Fed. Rep. 192, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 375; *Gage v. Bell*, 124 Fed. Rep. 380, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 375; *Brown v. Arnold*, (C. C. A.) 131 Fed. Rep. 723, reversing 127 Fed. Rep. 387; *In re Gasser*, 104 Fed. Rep. 537, 44 C. C. A. 20; *Bonfield v. Thorp*, 71 Fed. Rep. 924.

*Arizona.* — *Clark v. Morrison*, (Ariz. 1898) 52 Pac. Rep. 985.

*California.* — *Pacific Paving Co. v. Vizelech*, 141 Cal. 8, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 375; *Woodbury v. Nevada Southern R. Co.*, 120 Cal. 367; *San Francisco Sav. Union v. Long*, 123 Cal. 107; *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255.

*Georgia.* — *Planters' Mut. F. Assoc. v. DeLoach*, 113 Ga. 802; *Bigham v. Kistler*, 114 Ga. 453.

*Illinois.* — *Famous Mfg. Co. v. Wilcox*, 180 Ill. 246.

*Iowa.* — *Uehlein v. Burk*, 119 Iowa 742.

*Kentucky.* — *Bourbon Stock-Yards Co. v. Louisville*, 63 S. W. Rep. 285, 23 Ky. L. Rep. 420.

*Louisiana.* — *New Orleans v. Steinhart*, 52 La. Ann. 1043.

*Maine.* — *Flint v. Comly*, 95 Me. 251.

*Maryland.* — *Dentzel v. City, etc., R. Co.*, 90 Md. 434.

*Michigan.* — *Hirsh v. Fisher*, (Mich. 1904) 101 N. W. Rep. 48.

*Minnesota.* — *Alden v. Dyer*, 92 Minn. 134.

*Missouri.* — *Patterson v. Yancey*, 97 Mo. App. 681; *Davis v. Cohn*, 96 Mo. App. 587. See *State v. Crumb*, 157 Mo. 545.

*Nebraska.* — *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

*New York.* — *Bennett v. Weed*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 290; *Austen v. Columbia Lubricants Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 362.

*North Carolina.* — *Henry v. Hilliard*, 120 N. Car. 479.

*Pennsylvania.* — *Danville, etc., R. Co. v. Rhodes*, 180 Pa. St. 157; *Kissick v. Hunter*, 184 Pa. St. 174.

*Rhode Island.* — *Wilson v. Wilson*, 25 R. I. 446.

*South Carolina.* — *Sanders v. Price*, 56 S. Car. 1.

*Washington.* — *Seattle v. McDonald*, 26 Wash. 106, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 375.

**To Appeal.** — *Friar v. Curry*, 119 Ga. 908.

**Authority to Appeal Not Questioned in Lower Court.** — *Hallam v. Tillinghast*, 19 Wash. 20.

**Collateral Attack Illegal.** — *Donohue v. Hungerford*, 1 N. Y. App. Div. 528.

**No Judicial Notice Taken by Supreme Court of Officers of Lower Court.** — *Clark v. Morrison*, (Ariz. 1898) 52 Pac. Rep. 985.

**Answer Filed by Attorney.** — *Union Mut. L. Ins. Co. v. Thomas*, 83 Fed. Rep. 803, 48 U. S. App. 575.

**Termination of Relation.** — The authority of an attorney of record to represent one whom he avers is his client will not be decreed to be at an end on the averment of another attorney, not of record, unsupported by an oath or its equivalent. *Gigand v. New Orleans*, 52 La. Ann. 1259.

**377. 1. Want of Authority Must Be Shown**

**377. Presumption Not Conclusive — Laches.** — See notes 2, 3.

**Statutory Requirement of Written Authority.** — See note 4.

**378. Court May Demand Proof of Authority.** — See note 3.

**379. IX. LIABILITY OF ATTORNEY TO CLIENT — 1. For Negligence Generally — a. UNDERTAKING OF ATTORNEY — Reasonable Skill and Diligence Required.** — See note 1.

**380. An Attorney, However, Is Not Liable for Every Mistake.** — See note 1.

**Prima Facie Before Proof Thereof Demanded.** — *Gage v. Bell*, 124 Fed. Rep. 371, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 377; *State v. Beardsley*, 108 Iowa 396; *Austen v. Columbia Lubricants Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 362.

"It is not the law, and never has been, that an attorney at law is required, every time he appears in a court to prosecute or defend a cause, to show a warrant of attorney or other special authority to appear." *Davis v. Cohn*, 96 Mo. App. 587.

**Rule upon Attorney Supported by Affidavit.** — *Gage v. Bell*, 124 Fed. Rep. 380, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 377.

**377. 2. Presumption Not Conclusive.** — *Daughdrill v. Daughdrill*, 108 Ala. 321; *Bigbam v. Kistler*, 114 Ga. 453; *Patterson v. Yancey*, 97 Mo. App. 681.

**Valid until Disproved.** — *Brown v. Arnold*, (C. C. A.) 131 Fed. Rep. 723, reversing 127 Fed. Rep. 387.

**Unauthorized Appearance — Client Dead.** — *Maury v. Fitzwater*, 88 Fed. Rep. 768.

**The Presumption Is Conclusive** in the absence of countervailing evidence or statutory prohibition. *In re Gasser*, (C. C. A.) 104 Fed. Rep. 537.

**3. Laches.** — *Kissick v. Hunter*, 184 Pa. St. 174.

**4. The Bankrupt Act** requires no written authority for an attorney representing a creditor. *In re Gasser*, (C. C. A.) 104 Fed. Rep. 537.

**New York Code. § 2890 — Justice's Court — Recital in Complaint Verified.** — *Barnes v. Sutliff*, (County Ct.) 24 Misc. (N. Y.) 526.

**378. 3. Court May Demand Proof of Authority.** — *San Francisco Sav. Union v. Long*, 123 Cal. 107; *Lester v. McIntosh*, 101 Ga. 675.

**Statute in Iowa — Stay of Proceedings.** — *State v. Beardsley*, 108 Iowa 396.

**Oath of Attorney — Alabama Statute.** — Section 868 of the Code of 1886 provides that, when required by the court to produce his authority "the oath of the attorney is presumptive evidence of his authority." *Daughdrill v. Daughdrill*, 108 Ala. 321.

**379. 1. Attorney Bound to Use Reasonable Care and Skill — California.** — *Matter of Kruger*, 130 Cal. 621. See *Siddall v. Haight*, 132 Cal. 320.

**Colorado.** — *Rosebud Min., etc., Co. v. Hughes*, 16 Colo. App. 162.

**Illinois.** — *Newman v. Schueck*, 58 Ill. App. 328; *Morrison v. Burnett*, 56 Ill. App. 129.

**Kentucky.** — *Humboldt Bldg. Assoc. Co. v. Ducker*, 111 Ky. 759.

**Maryland.** — *Watson v. Calvert Bldg., etc., Assoc.*, 91 Md. 25.

**New York.** — *Gardner v. Wood*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 93.

**Oregon.** — *Currey v. Butcher*, 37 Oregon 380.  
**Pennsylvania.** — *Lawall v. Groman*, 180 Pa. St. 532, 57 Am. St. Rep. 662. See *Harkness v. Caven*, 199 Pa. St. 267.

**Rhode Island.** — *Forrow v. Arnold*, 22 R. I. 306, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) [379] 398.

**South Dakota.** — *Cranmer v. Brothers*, 15 S. Dak. 234.

**Tennessee.** — *Gaar v. Hughes*, (Tenn. Ch. 1895) 35 S. W. Rep. 1092; *Hill v. Mynatt*, (Tenn. Ch. 1900) 59 S. W. Rep. 163.

**Texas.** — *Lynch v. Munson*, (Tex. Civ. App. 1901) 61 S. W. Rep. 140, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 379; *Patterson v. Frazer*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1077.

**Wisconsin.** — *Malone v. Gerth*, 100 Wis. 166. See *Eberhardt v. Harkless*, 115 Fed. Rep. 816; *Reumping v. Wharton*, 56 Neb. 536; *W. W. Kimball Co. v. Payne*, 9 Wyo. 441.

**Liability Same as Agent's.** — *Asher v. Beckner*, (Ky. 1897) 41 S. W. Rep. 35.  
**Client Estopped to Plead Negligence by Acquiescence.** — *Carr v. Glover*, 70 Mo. App. 242.

**Employed by Manager of Firm — No Negligence in Failing to Notify Other Members of Progress of Suit.** — *Tomlinson v. Broadsmith*, (1896) 1 Q. B. 386.

**Measure of Damages in Injury Sustained.** — *Goldzier v. Poole*, 82 Ill. App. 469.

**Nominal Damages** only will be allowed for negligence of an attorney, unless it appears that the client's demand was valid, and that one against whom the demand was made was solvent. *Goldzier v. Poole*, 82 Ill. App. 469.

**Not Insurer.** — An attorney is not required to insure a client as to the ultimate result of the proceedings which he had advised. *Harri-man v. Baird*, 6 N. Y. App. Div. 518, affirmed 158 N. Y. 691.

**Admissibility of Evidence.** — Where the alleged negligence was failure to appeal, evidence of the amount involved, and costs paid, is not admissible to estimate damages. *Cornelissen v. Ort*, 132 Mich. 294, 9 Detroit Leg. N. 604.

**380. 1. Attorney Not Liable Where Reasonable Skill and Diligence Employed.** — *Morrison v. Burnett*, 56 Ill. App. 129; *Humboldt Bldg. Assoc. Co. v. Ducker*, 111 Ky. 759; *Patterson v. Powell*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 250; *Malone v. Gerth*, 100 Wis. 166.

**Client Advised According to Established Decisions — No Negligence When Decisions Subsequently Overruled.** — *Taylor v. Robertson*, 31 Can. Sup. Ct. 615.

**Expression of Opinion as to Probable Sum Property Will Bring — Not Liable for Mistaken Estimate.** — *Reumping v. Wharton*, 56 Neb. 536.

**An Attorney Is Not Required to Insure a client** as to the ultimate result of the proceedings which he had advised, nor is the client justifi-

**380.** Liability for Error on Question of Law. — See notes 2, 3.

**381.** *b.* DUTY OF ATTORNEY — Duty to Prosecute — Abandoning Case. — See note 1.

**382.** See note 1.

Duty to Prepare Pleadings and Take Necessary Steps in Case. — See note 2.

**384.** *d.* PRESUMPTIONS — PROOF OF NEGLIGENCE. — See note 6.

**385.** Proximate Cause. — See note 5.

**386.** 2. Giving Improper Advice — *b.* ADVISING AS TO TITLES OR SECURITIES. — See note 2.

An Attorney Undertaking to Invest Money for His Client. — See note 4.

**387.** 3. In Preparing and Recording Contracts or Conveyances. — See note 3.

**388.** Duty as to Recording Deeds. — See note 2.

4. In Making Collections. — See note 4.

**392.** What Must Be Proved Against Attorney. — See note 1.

Attorney's Duty in Paying Over Money Collected. — See note 4.

**393.** 5. For Money Collected and Not Paid Over — *a.* IN GENERAL. — See note 1

fied in refusing to compensate him because in the subsequent development of affairs it appears that a course other than that adopted would have resulted more advantageously for the client. *Harriman v. Baird*, 158 N. Y. 691, *affirming* 6 N. Y. App. Div. 518.

**380.** 2. Error as to Doubtful Questions of Law. — *Eberhardt v. Harkless*, 115 Fed. Rep. 816; *Morrison v. Burnett*, 56 App. 129; *Patterson v. Powell*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 253, *affirmed* 56 N. Y. App. Div. 624, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 380; *Hill v. Mynatt*, (Tenn. Ch. 1900) 59 S. W. Rep. 163.

3. Error as to Well-settled Point of Law. — *Kissam v. Bremerman*, 44 N. Y. App. Div. 588.

**381.** 1. *Bullis v. Easton*, 96 Iowa 513. See *Lord v. Hamilton*, 34 Oregon 443.

Advice Concerning Compromise. — *Bunel v. O'Day*, 125 Fed. Rep. 303.

**382.** 1. Abandonment on Failure to Provide Fees. — *Payette v. Willis*, 23 Wash. 299.

2. Duty to Prepare Pleadings and Take Necessary Steps. — *Drury v. Butler*, 171 Mass. 171.

Failure to Appeal — Contributory Negligence of Client. — *Childs v. Comstock*, 69 N. Y. App. Div. 160.

Limitation on Duty of Attorney. — A lawyer is under no duty to maintain positions which do not accord with his own notions of law and justice, simply because they tend to his client's advantage. *Sprague v. Moore*, (Mich. 1904) 99 N. W. Rep. 377, 11 Detroit Leg. N. 72.

**384.** 6. *Keith v. Marcus*, 181 Mass. 377.

**385.** 5. Proximate Cause. — *Forrow v. Arnold*, 22 R. I. 305; *Patterson v. Frazer*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1077.

**386.** 2. Advice as to Validity of Titles or Securities. — *Humboldt Bldg. Assoc. Co. v. Ducker*, 111 Ky. 759, (Ky. 1904) 82 S. W. Rep. 969; *Watson v. Calvert Bldg., etc., Assoc.*, 91 Md. 25; *Renkert v. Title Guaranty Trust Co.*, 102 Mo. App. 267.

Relation of Attorney and Client Must Exist. — *Currey v. Butcher*, 37 Oregon 380.

Failure to Examine Title Recommended as Good. — *Byrnes v. Palmer*, 18 N. Y. App. Div. 1, *affirmed* 160 N. Y. 699.

Measure of Damages — Sum Paid in Removing Incumbrances. — *Fay v. McGuire*, 162 N. Y. 644, *affirming* 20 N. Y. App. Div. 569

4. Investment of Money. — *Humboldt Bldg. Assoc. Co. v. Ducker*, (Ky. 1904) 82 S. W. Rep. 969.

Mortgage Represented as First Lien. — *Fay v. McGuire*, 20 N. Y. App. Div. 569, *affirmed* 162 N. Y. 644.

**387.** 3. Preparation of Papers. — *Aiken v. Van Wert*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 379.

**388.** 2. Recordation of Papers. — *Gardner v. Wood*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 93; *Lawall v. Groman*, 180 Pa. St. 532, 57 Am. St. Rep. 662.

4. Loss of Notes. — *Gould v. Blanchard*, 29 Nova Scotia 361.

**392.** 1. *Lynch v. Munson*, (Tex. Civ. App. 1901) 61 S. W. Rep. 140, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392.

4. Duty in Transmitting Money to Client. — *Dinsmoor v. Bressler*, 56 Ill. App. 207.

**393.** 1. Attorney's Liability for Money Collected for Client. — *Uhl v. Kohlmann*, 52 N. Y. App. Div. 455; *Reed v. Hayward*, 82 N. Y. App. Div. 416. See *Wellenbrock v. Spekert*, (Ky. 1900) 55 S. W. Rep. 200.

Application to Debt Due Attorney Barred by Limitations. — *Blair v. Blanton*, (Tex. Civ. App. 1899) 54 S. W. Rep. 321.

Payment of Attorney's Debt with Client's Funds. — *Kent v. Rockwell*, 89 Hun (N. Y.) 88.

Collection by Instalments — Payments Must Be Made as Collected. — *Matter of Tracy*, 1 N. Y. App. Div. 113, *affirmed* 149 N. Y. 608.

Claim Barred by Statute — Knowledge of Client. — *Leigh v. Williams*, 64 Ark. 165; *Schofield v. Woolley*, 98 Ga. 548, 58 Am. St. Rep. 315.

No Jurisdiction in Equity — Adequate Remedy at Law. — *Pfau v. Fullenwider*, 102 Ill. App. 499.

Defense that Money Was Garnished. — *Ewing v. Freeman*, 103 Ga. 811.

Accounting — Reasonable Fees and Disbursements. — Attorneys are liable to account to their clients for all moneys received for them

- 394.** Attorney Liable as Trustee for Custody of Money Collected. — See note 4.  
**395.** Where an Attorney Collects Claim through Another Attorney. — See note 2.  
**396.** *c.* CLIENT MUST PROVE DEMAND. — See note 3.  
**397.** 6. For Unauthorized Acts. — See note 5.  
**398.** 7. For Acts of Substitutes or Partners — Clerks. — See note 2.  
**399.** 9. Damage Must Be Proven. — See note 4.  
**400.** 10. Defenses to Action for Negligence — *b.* STATUTE OF LIMITATIONS — As to Matters of Account. — See notes 1, 2.  
**402.** X. LIABILITY OF ATTORNEY TO THIRD PERSONS — 1. In General — Not Liable where He Acts under Client's Direction. — See note 2.  
**403.** Malicious Prosecution. — See notes 3, 4.  
**405.** 3. For Officers' and Witness Fees — *a.* THE GENERAL RULE — Fees of Officers. — See note 4.  
**406.** Witness Fees — Stenographer's Fees. — See note 1.  
**407.** Liability by Statutes or Rules of Practice. — See note 1.

in that capacity, except a reasonable sum for counsel fees and disbursements. *Matter of Keen*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 374.

**Account in Detail.** — Where an attorney has collected money for his client, and is called on to account, he must show in detail what he has done with it, to justify its retention or expenditure. *Matter of Raby*, 29 N. Y. App. Div. 225.

The attorney of an executrix, who has rendered to his client an account of all moneys or other assets of the succession coming to his hands, has fulfilled his entire duty to account, and owes no further account. *Hernandez v. Dart*, 109 La. 880.

**394.** 4. Liable as Trustee for Preservation of Collections. — See *Schofield v. Woolley*, 98 Ga. 548, 58 Am. St. Rep. 315.

**395.** 2. The General Rule is that where an attorney is employed to collect a claim and he places it in the hands of another attorney, through whose negligence or misconduct the claim is lost, he is liable therefor to the principal in the absence of an agreement or assent that such other attorney should be employed. *Dentzel v. City, etc., R. Co.*, 90 Md. 434. See *Mussey v. Vanstone*, 82 Mo. App. 353.

**Contra.** — *Madden v. Watts*, 59 S. Car. 81.

**Consent of Client.** — But where the client consents to the placing of the claim with another attorney for collection, payment to the latter is a valid discharge of the debt. *Dentzel v. City, etc., R. Co.*, 90 Md. 434.

**396.** 3. Necessity of Demand. — *Banner v. D'Auby*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 525; *Madden v. Watts*, 59 S. Car. 85, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 396. See *Leigh v. Williams*, 64 Ark. 165.

**Action for Breach of Duty — No Demand Necessary.** — *Vooth v. McEachen*, 91 N. Y. App. Div. 30.

**Action to Recover Chose in Action — Demand Unnecessary.** — *Metz v. Abney*, 64 S. Car. 254.

**5. Attorney Liable for Loss from Unauthorized Acts.** — *Salton v. New Beeston Cycle Co.*, (1900) 1 Ch. 43; *Harbin v. Masterman*, (1896) 1 Ch. 351 (costs of appeal in interest of solicitor).

**Wrongfully Making Client Party — Liable for Costs.** — *Fricker v. Van Grutten*, (1896) 2 Ch. 649.

**398.** 2. Clerks. — *Matter of McGuinness*, 69 N. Y. App. Div. 606.

**4. Actual and Exemplary Damages Recoverable.** — *Patterson v. Frazer*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1077.

**Withdrawal of Attorney — No Presumption Without Evidence that Adverse Result Was Caused Thereby.** — *Cullison v. Lindsay*, 108 Iowa 124.

**400.** 1. Written Contract. — *Sanborn v. Plowman*, 20 Tex. Civ. App. 484.

**2. Negligence.** — In order to render an attorney liable for negligence in the examination of a title, the relation of attorney and client must exist; he is not liable to a third person. *Currey v. Butcher*, 37 Oregon 380.

**Advice to Client to Commit Wrongful Act — Clear Proof Required.** — *Heffner v. Wise*, 51 La. Ann. 1637.

**402.** 2. Not Liable in Trespass in Seizing Goods. — *Arnold v. Phillips*, 59 Ill. App. 213.

**403.** 3. Malicious Prosecution. — *Liquid Carbonic Acid Mfg. Co. v. Convert*, 82 Ill. App. 39.

**4. What Is Malice.** — *Ahrens, etc., Mfg. Co. v. Hoeher*, 106 Ky. 692.

**405.** 4. Principle of Agency Applicable. — *Livingston Middleditch Co. v. New York College of Dentistry*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 260, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405.

**Liable When Unauthorized Suit Is Brought.** — *Geilinger v. Gibbs*, (1897) 1 Ch. 479.

**Some of Clients Residents.** — *Berrie v. Atkinson*, 114 Ga. 708.

**Poundage Fees — Laws 1892, p. 868, c. 418 of New York.** — *Gadski-Tauscher v. Graff*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 418.

**406.** 1. For Witness Fees. — See *Ross v. Niles*, (Supm. Ct. App. T.) 84 N. Y. Supp. 142.

**Expert Witness — Special Promise — Attorney Interested.** — An attorney may make himself liable by a special promise for the compensation of an expert witness called to testify for the client, especially if there be evidence to warrant the jury in believing that the attorney had a personal financial interest in the result of the trial. *Pessano v. Eyre*, 13 Pa. Super. Ct. 157.

**407.** 1. New York Statute. — *Code Civ. Pro. N. Y.*, § 3278, does not apply to the Surrogate's Court. *Rasch's Estate*, (Surrogate Ct.) 28 Civ. Pro. (N. Y.) 98, 26 Misc. (N. Y.) 459.

**408.** *c.* ON GROUND OF MISCONDUCT OR NEGLIGENCE — Ignorance or Carelessness. — See note 6.

**409.** **XI. CHANGE OF ATTORNEYS** — 1. Client's Right to Change. — See note 3.

**410.** Vested Interest in Cause of Action — Contingent Fee. — See note 1.  
Entry of Final Judgment — Change of Attorney Without Formal Order. — See note 3.

2. By Withdrawal of Attorney — Leave of Court. — See note 7.

**411.** Consent of Client — Just Cause for Withdrawal. — See note 1.

What Is Sufficient Cause for Withdrawal. — See note 5.

3. Effect of Substitution. — See note 7.

**408.** 6. Mistake of Solicitor — Client Alleged Lunatic — *Ex Parte* Order. — *In re* Armstrong, (1896) 1 Ch. 536.

**409.** 3. General Rule as to Client's Right to Change Attorneys — *California*. — *Gage v. Atwater*, 136 Cal. 170.

*Kentucky*. — *Breathitt Coal, etc., Co. v. Gregory*, (Ky. 1904) 78 S. W. Rep. 148; *Henry v. Vance*, 111 Ky. 72; *Joseph v. Lapp*, 78 S. W. Rep. 1119, 25 Ky. L. Rep. 1875; *Root v. McIlvaine*, (Ky. 1900) 56 S. W. Rep. 498.

*Montana*. — *State v. District Ct.*, 30 Mont. 8.  
*New Jersey*. — *Hudson Trust, etc., Inst. v. Carr-Curran Paper Mills*, (N. J. 1899) 44 Atl. Rep. 638; *Delaney v. Husband*, 64 N. J. L. 275.

*New York*. — *Philadelphia v. Postal Tel. Cable Co.*, 1 N. Y. App. Div. 387; *O'Connor v. Hendrick*, 90 N. Y. App. Div. 432; *Kane v. Rose*, 177 N. Y. 557, *affirming* 87 N. Y. App. Div. 101; *Jeffards v. Brooklyn Heights R. Co.*, 49 N. Y. App. Div. 45; *Bryant v. Brooklyn Heights R. Co.*, 64 N. Y. App. Div. 542; *Yuengling v. Betz*, 58 N. Y. App. Div. 8; *Matter of Mitchell*, 57 N. Y. App. Div. 22; *O'Sullivan v. Metropolitan St. R. Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 268. See *Whitman v. Seibert*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 814, 59 N. Y. Supp. 185.

*Utah*. — *Sandberg v. Victor Gold, etc., Min. Co.*, 18 Utah 77, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409.

*Washington*. — *Schultheis v. Nash*, 27 Wash. 250.

*Wyoming*. — *Sheridan County v. Hanna*, 9 Wyo. 374, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409.

See *Gulf, etc., R. Co. v. Miller*, 24 Tex. Civ. App. 395.

Leave of Court Necessary. — *Felt v. Nichols*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 404.

Jurisdiction of Court — Limited to Pending Proceedings. — *Matter of Krakauer*, (Surrogate Ct.) 33 Misc. (N. Y.) 674.

Contract for Fee as Evidence. — *Schultheis v. Nash*, 27 Wash. 250.

Order of Reference to Ascertain Compensation — Referee Bound by Contract. — *Matter of Jerome Ave.*, 58 N. Y. App. Div. 459.

Substitution by Assignee of Cause of Action. — *Sandberg v. Victor Gold, etc., Min. Co.*, 18 Utah 66.

Dissolution of Firm — Substitution of Partner. — *Schneible v. Travelers' Ins. Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 522.

Appointment by Court to Represent Absent Heirs — Arbitrary Discharge Denied. — *Lee v. Superior Ct.*, 112 Cal. 354.

No Compensation Where Attorney Was Improper and Neglectful. — *Barkley v. New Cent., etc., R. Co.*, 35 N. Y. App. Div. 167.

Statutory Right in *California*. — *Woodbury v. Nevada Southern R. Co.*, 121 Cal. 165; *Lee v. Superior Ct.*, 112 Cal. 354.

Statute in *Washington*. — *Payette v. Willis*, 23 Wash. 299.

In *Wisconsin* by Rule of Court no order of substitution will be granted unless consent in writing be obtained, signed by the party and his attorney; or for cause shown on due notice to the court or presiding judge. *McMahon v. Snyder*, 117 Wis. 463.

**410.** 1. Attorney's Right under Contract for Contingent Fee. — *Such v. New York Bank*, 121 Fed. Rep. 202; *Joseph v. Lapp*, (Ky. 1904) 78 S. W. Rep. 1119; *Henry v. Vance*, 111 Ky. 72. See *Breathitt Coal, etc., Co. v. Gregory*, (Ky. 1904) 78 S. W. Rep. 148; *Root v. McIlvaine*, (Ky. 1900) 56 S. W. Rep. 498.

3. When Formal Order of Substitution Unnecessary. — *Magnolia Metal Co. v. Sterlingworth R. Supply Co.*, 37 N. Y. App. Div. 366.

7. Leave of Court Necessary to Withdrawal. — *Hickox v. Fels*, 86 Ill. App. 216; *McInnes v. Sutton*, 35 Wash. 389, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 410.

Withdrawal After General Appearance Does Not Affect Jurisdiction of Court. — *Famous Mfg. Co. v. Wilcox*, 180 Ill. 246.

**411.** 1. Consent of Client — Cause for Withdrawal. — *Hickox v. Fels*, 86 Ill. App. 216; *Schuykill River Road*, 20 Pa. Co. Ct. 559; *Adams v. Rathbun*, 14 S. Dak. 556, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 411.

Withdrawal Without Cause — Other Attorneys Substituted. — *Cary v. Cary*, 97 N. Y. App. Div. 471.

5. Failure of Client to Provide for Fees on Request. — *Silver Peak Gold Min. Co. v. Harris*, 116 Fed. Rep. 439; *Cullison v. Lindsay*, 108 Iowa 124.

7. Effect of Substitution. — *Mitchell v. Piqua Club Assoc.*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 366. See *Bittiner v. Goldman*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 330.

Right to Compensation — Death of First Attorney. — *Matter of Redmond*, 54 N. Y. App. Div. 454; 8 N. Y. Annot. Cas. 309.

Where the Attorney Consents to the substitution of another by signing a consent in blank, the former is incapacitated from further acting in the cause. *Felt v. Nichols*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 404.

**411. XII. SUMMARY JURISDICTION OVER ATTORNEYS — 1. To Compel Payment Over of Money — a. GENERAL RULE.** — See note 8.

**412. Power Inherent in Courts of Record.** — See note 1.

Statutes — Penal in Character. — See note 2.

Defenses. — See note 4.

Money Retained as Proper Compensation. — See note 5.

**b. APPLIES ONLY AS BETWEEN ATTORNEY AND CLIENT — General Rule Stated.** — See note 6.

**413. Relation of Attorney and Client Must Exist.** — See note 1.

If Merely the Relation of Debtor and Creditor Exists. — See note 2.

**414. 2. Jurisdiction in Other Respects.** — See note 1.

Delivery of Client's Papers. — See note 2.

Limits of Rule. — See notes 4, 6.

**411. 8. Power of Court to Compel Attorney to Pay Over Moneys — England.** — *In re Carroll*, (1902) 2 Ch. 175.

*California.* — *Brunings v. Townsend*, 139 Cal. 137.

*Georgia.* — *Haygood v. McKenzie*, 119 Ga. 466.

*Iowa.* — *Downs v. Davis*, 113 Iowa 531, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 411; *Union Bldg., etc., Assoc. v. Soderquist*, 115 Iowa 695.

*New Jersey.* — *Lynde v. Lynde*, 64 N. J. Eq. 736, 97 Am. St. Rep. 692. See *Lynde v. Lynde*, (N. J. 1901) 50 Atl. Rep. 659.

*New York.* — *Matter of Curtis*, 51 N. Y. App. Div. 434; *Shotwell v. Dixon*, 66 N. Y. App. Div. 123.

*Ohio.* — *Cotton v. Ashley*, 5 Ohio Cir. Dec. 6. **Relation as Attorney at Law Must Exist.** — *Matter of Hillebrandt*, 33 N. Y. App. Div. 191.

**Amount of Verdict Against Attorney.** — *Gabriel v. Schillinger Fire Proof Cement, etc., Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 313.

**The Purpose of the Summary Proceeding** is merely to afford a speedier and possibly more adequate remedy because of the obligations of the attorney as an officer of the court. *Downs v. Davis*, 113 Iowa 529.

**412. 1. Exercise of Power Is Discretionary with Court.** — *Keeney v. Tredwell*, 71 N. Y. App. Div. 521.

**2. Statutory Regulation.** — See *Union Bldg., etc., Assoc. v. Soderquist*, 115 Iowa 695.

**4. Defenses.** — The attorney must do more than make assertions by way of counterclaim, and such assertions should be sufficiently supported to call for more formal investigation. *Matter of Tracy*, 1 N. Y. App. Div. 113, affirmed 149 N. Y. 608. See *Union Bldg., etc., Assoc. v. Soderquist*, 115 Iowa 695.

**5. Money Held by Attorney as Proper Compensation.** — *Union Bldg., etc., Assoc. v. Soderquist*, 115 Iowa 695.

**Under a Valid Contract for Services** a judge cannot arbitrarily order an attorney to refund a retainer for the mere reason that in his opinion it had not been earned. *Tomsky v. Superior Ct.*, 131 Cal. 620.

**6. Remedy Available to Client Only.** — *Haygood v. Haden*, 119 Ga. 463; *Matter of Dailey*, 65 N. Y. App. Div. 523. See *Brunings v. Townsend*, 139 Cal. 137.

**Statement of Rule.** — "The rule upon this subject is that when the employment of an attor-

ney is so connected with his professional character as to afford a presumption that it formed the ground of his employment, the court will interfere in a summary way to compel him to execute the trust reposed in him; but where an attorney is employed in a matter wholly unconnected with his professional character the court will not exercise this jurisdiction over him, but will leave the applicant to his remedy by an ordinary action to right the wrong to which he has been subjected." *Matter of Hammann*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 417.

**413. 1. Relation of Attorney and Client Necessary.** — *Haygood v. McKenzie*, 119 Ga. 466, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 413; *Haygood v. Haden*, 119 Ga. 463; *Matter of Hillebrandt*, 33 N. Y. App. Div. 191; *Taylor v. Long Island R. Co.*, 38 N. Y. App. Div. 595; *Matter of Langslow*, 167 N. Y. 314; *Matter of Hirshbach*, 72 N. Y. App. Div. 79; *Re McBrady*, 19 Ont. Pr. 37.

**Claim of One Attorney Against Another Not Within Rule.** — *Matter of Dailey*, 65 N. Y. App. Div. 523.

**2. When Relation Is that of Debtor and Creditor Simply.** — *Matter of Neville*, 71 N. Y. App. Div. 102.

**Rule Does Not Apply Between Attorney and Associate.** — *Haygood v. Haden*, 119 Ga. 463.

**414. 1. Summary Jurisdiction in Other Matters.** — *Matter of Barkley*, 42 N. Y. App. Div. 597; *Falor v. Beery*, 8 Ohio Dec. 306, 6 Ohio N. P. 290; *In re Evans*, 22 Utah 366, 83 Am. St. Rep. 794. See *Lynde v. Lynde*, (N. J. 1901) 50 Atl. Rep. 659.

**To Make Good Negligent Loss.** — *Marsh v. Joseph*, (1897) 1 Ch. 213.

**Compelling Extension of Time to Mortgagor.** — *Robertson v. Clocke*, 18 N. Y. App. Div. 363.

**Relief from Fraudulent Bill.** — *Tate v. Field*, 60 N. J. Eq. 42.

**2. Power to Compel Delivery of Documents to Client.** — *Cotton v. Ashley*, 5 Ohio Cir. Dec. 6.

**4. Matter of Krakauer**, (Surrogate Ct.) 33 Misc. (N. Y.) 674.

**6. Disbarment — Charges Affecting Character as Citizen.** — While a court may exercise a summary jurisdiction to correct professional abuses of attorneys, and may for self-protection strike an attorney from the roll in extreme cases, it cannot do so on charges merely affecting his character as a citizen. *Neff v. Kohler Mfg. Co.*, 90 Mo. App. 296.

**414. XIII. COMPENSATION — 1. Right to Compensation — a. GENERALLY**  
— In the United States. — See note 10.

**415. b. WHO ENTITLED TO RECOVER COMPENSATION — Only Attorney**  
Duly Admitted May Recover. — See note 1.

**416. c. ATTORNEYS FOR INFANTS, MARRIED WOMEN, ETC. — See**  
notes 3, 4.

**417. Guardian May Contract for Attorney for Infant. — See note 3.**

**d. SERVICES TO ESTATES OF DECEDENTS. — See note 5.**

**418. e. SERVICES IN DEFENDING POOR PERSONS — Duty to Defend Gratul-**  
tously. — See note 1.

**Indiana and Wisconsin Doctrine. — See note 3.**

**Statutes Providing for Compensation. — See note 4.**

**414. 10. United States — Fees Recoverable.**

*Muller v. Kelly*, 116 Fed. Rep. 545; *Rogers v. Polytechnic Institute*, 87 N. Y. App. Div. 81; *Bennett v. Donovan*, 83 N. Y. App. Div. 95; *Thomas v. Morrison*, (Tex. Civ. App. 1898) 46 S. W. Rep. 46; *Camden v. McCoy*, 48 W. Va. 377.

**Contract Enforced Without Proof of Fairness and Reasonableness.** — *Union Surety, etc., Co. v. Tenney*, 102 Ill. App. 95, *affirmed* 200 Ill. 349.

**Attorney Entitled to Fee as Per Contract.** — *Townsend v. Rhea*, (Ky. 1897) 38 S. W. Rep. 865.

**Bad Bargain Binding on Attorney.** — *Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625.

**Contract Binding — No Recovery in Quantum Meruit.** — Matter of Public Works Department, 167 N. Y. 501.

**Amount of Services Immaterial.** — *Browder v. Long*, 66 S. W. Rep. 600, 23 Ky. L. Rep. 2068.

**Hard Contract Enforced.** — *Deering v. Schreyer*, 58 N. Y. App. Div. 322.

**Unfair Contract with Woman Disregarded.** — Matter of *Pieris*, 176 N. Y. 566, *affirming* 82 N. Y. App. Div. 466.

**Provision in Mortgage in Event of Foreclosure.** — *Nathan v. Brand*, 167 Ill. 607.

**Contract to Procure Reduction of Assessment — Ownership of Lot Immaterial.** — *Hudson v. Sanders*, 10 Ohio Cir. Dec. 342, 19 Ohio Cir. Ct. 615.

**Agreement for Compensation Out of Recovery — Personal Judgment Against Client.** — *Hazeltine v. Brockway*, 26 Colo. 291.

**Employment Necessary.** — The mere sending of an account to an alleged client, and the retention of that account, do not give an attorney a cause of action, unless the employment stated in the account is established. *Kellogg v. Rowland*, 40 N. Y. App. Div. 416.

**Reasonableness of Fee.** — A fee for the collection of a claim of \$19,017.05 by suit, when the claim was litigated for a fee of \$500 certain, and \$1,000 additional in case of success, is not unreasonable. *Fox v. Willis*, 114 Ky. 940.

**415. 1. Unlicensed Attorney Cannot Recover Fees.** — *Hughes v. Dougherty*, 62 Ill. App. 464.

**State Laws Do Not Apply to Persons Appearing Before Land Department.** — *Mulligan v. Smith*, (Colo. 1904) 76 Pac. Rep. 1063.

**Persons Other than Attorneys.** — "There is nothing in law prohibiting persons other than attorneys from recovering the reasonable value of their services when performed at the request of another." *Miller v. Ballerino*, 135 Cal. 566.

**Evidence.** — Where it was contended that before an attorney could recover for legal services he should have produced a license authorizing him to practice law, it was sufficient evidence of his admission when he testified that he had been a practicing lawyer for over twenty-five years. *Goldsmith v. St. Louis Candy Co.*, 85 Mo. App. 595.

**416. 3. See Dunham v. Bentley, 103 Iowa 136.**

**Divorce Suit — Contract by Married Woman Valid.** — *McCurdy v. Dillon*, (Mich. 1904) 98 N. W. Rep. 746.

**4. Bradford v. Mackenzie**, 89 Md. 763, 43 Atl. Rep. 923; *Crafts v. Carr*, 24 R. I. 397, 96 Am. St. Rep. 721.

**417. 3. Tomskey v. Superior Ct.**, 131 Cal. 620; *Schultheis v. Nash*, 27 Wash. 250.

**California Statute — Contract Without Order of Court Invalid.** — *Morse v. Hinckley*, 124 Cal. 154.

**5. Amount of Fees.** — *Rickel v. Chicago, etc., R. Co.*, 112 Iowa 148; Matter of *Ludeke*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 676; *Lynch v. Spicer*, 53 W. Va. 426. See *Blount County Bank v. Smith*, (Tenn. Ch. 1898) 48 S. W. Rep. 296.

**Liability of Next of Kin for Professional Services in Administration.** — *Johnson v. Williams*, 96 Tenn. 339.

**418. 1. Counsel Must Serve Gratuitously.** — *Hyatt v. Hamilton County*, (Iowa 1902) 90 N. W. Rep. 508, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 418; *De Long v. Muskegon County*, 111 Mich. 568; *Yates v. Taylor County Ct.*, 47 W. Va. 385, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 417, 418.

**3. Rule in Indiana and Wisconsin.** — *Houk v. Montgomery County*, 14 Ind. App. 662.

**Construction of Wisconsin Statute — Time Spent Out of Court.** — *Green Lake County v. Waupaca County*, 113 Wis. 425.

**4. Iowa Statute.** — *State v. Behrens*, 109 Iowa 58.

Under a joint indictment the attorney is entitled to two fees. *Clark v. Osceola County*, 107 Iowa 502.

**The Michigan Statute.** — *De Long v. Muskegon County*, 111 Mich. 568.

**Court Fixes Compensation.** — *Withey v. Osceola Circuit Judge*, 108 Mich. 168.

**New York Statute.** — *People v. Foster*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 19; *People v. Heiselbetz*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 100, 5 N. Y. Annot. Cas. 165.

**Applies to Trial and Appellate Courts Separately.** — *People v. Ferraro*, 162 N. Y. 545.

**419.** Rule in Civil Cases. — See note 1.

**420.** 2. Amount — *a.* GENERALLY — Reasonable Compensation — Absence of Contract. — See note 1.

**Amount of Fee.** — Matter of Monfort, 78 N. Y. App. Div. 567.

**Maximum Fee Thereunder.** — People v. Heiselbetz, 30 N. Y. App. Div. 199.

**Fee of Associate Counsel.** — Matter of Waldheimer, 84 N. Y. App. Div. 366.

**Reappointment to Try Appeal — One Fee.** — Matter of Purdy, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 303.

**419. 1. In Civil Cases.** — See Mathieu v. Beauchamp, 11 Quebec Super. Ct. 307.

**Suing in Forma Pauperis — Quantum Meruit.** — Whelan v. Manhattan R. Co., 86 Fed. Rep. 219.

**Sufficiency of Affidavit.** — The plaintiff's affidavit that he is unable to give a prosecution bond of two hundred dollars or to deposit that amount for that purpose is not sufficient, as it does not necessarily follow that he is unable to compensate his counsel in some way other than by a division of the amount of recovery, or that his counsel had not assumed the prosecution of the suit without compensation. Allison v. Southern R. Co., 129 N. Car. 336.

**The Michigan Statute.** — De Long v. Muskegon County, 111 Mich. 568.

**420. 1. Recovery on Quantum Meruit — United States.** — Herman v. Metropolitan St. R. Co., 121 Fed. Rep. 184.

*Alabama.* — Davis v. Walker, 131 Ala. 204.

*Arizona.* — De Mund Lumber Co. v. Stillwell, (Ariz. 1902) 68 Pac. Rep. 543.

*Colorado.* — Fairbanks v. Weeber, 15 Colo. App. 268.

*Georgia.* — Wells v. Haynes, 101 Ga. 841.

*Illinois.* — Metheny v. Bohn, 164 Ill. 495; Bingham v. Spruill, 97 Ill. App. 374.

*Indiana.* — Cleveland, etc., R. Co. v. Shrum, 24 Ind. App. 96.

*Kansas.* — Allen v. Parish, 65 Kan. 496.

*Kentucky.* — Warren Deposit Bank v. Barclay, (Ky. 1901) 60 S. W. Rep. 853; Germania Safety Vault, etc., Co. v. Hargis, 64 S. W. Rep. 516, 23 Ky. L. Rep. 874.

*Louisiana.* — Rabasse's Succession, 51 La. Ann. 590.

*Massachusetts.* — Cooke v. Plaisted, 176 Mass. 374.

*Missouri.* — Goldsmith v. St. Louis Candy Co., 85 Mo. App. 595; Ottofy v. Keyes, 91 Mo. App. 146; Rumsey v. People's R. Co., 84 Mo. App. 508; Brownrigg v. Massengale, 97 Mo. App. 190; Kingsbury v. Joseph, 94 Mo. App. 298.

*Montana.* — Forrester v. Boston, etc., Consol. Copper, etc., Min. Co., 29 Mont. 409, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420.

*Nebraska.* — Brennan-Love Co. v. McIntosh, 62 Neb. 522.

*New York.* — Schlesinger v. Dunne, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 531, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420; Allen v. Baker, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 337; Cooper v. Cooper, 51 N. Y. App. Div. 595; British Empire Typesetting Mach. Co. v. Spellissy, 83 N. Y. App. Div. 640; Matter of Pieris, 176 N. Y. 566, affirming 82 N. Y. App. Div. 466; Ferdon v. Ferdon, 11 N. Y.

App. Div. 629. See Reynolds v. Kaplan, 3 N. Y. App. Div. 420.

*Oklahoma.* — Gillette v. Murphy, 7 Okla. 91. *Pennsylvania.* — McGee's Estate, 205 Pa. St. 590.

*Rhode Island.* — Gorman v. Banigan, 22 R. I. 22.

*Tennessee.* — American Lead Pencil Co. v. Davis, (Tenn. 1902) 67 S. W. Rep. 864. See Pickett v. Gore, (Tenn. Ch. 1900) 58 S. W. Rep. 402.

*Texas.* — Tindol v. Beasley, (Tex. Civ. App. 1897) 40 S. W. Rep. 155; Herndon v. Lambers, (Tex. Civ. App. 1900) 55 S. W. Rep. 414.

*Virginia.* — Howard v. Charleston First Nat. Bank, (Va. 1897) 27 S. E. Rep. 492.

*Washington.* — Payette v. Willis, 23 Wash. 299.

**Express Contract — No Quantum Meruit.** — Roche v. Baldwin, 135 Cal. 522.

**No Employment, No Compensation.** — Whitesell v. New Jersey, etc., R., etc., Co., 68 N. Y. App. Div. 82.

**Void Contract — Recovery for Services Performed.** — Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81; Buck v. Eureka, 124 Cal. 61; McCurdy v. Dillon, (Mich. 1904) 98 N. W. Rep. 746, 10

Detroit Leg. N. 927; Gammons v. Johnson, 69 Minn. 488; Dorr v. Camden, 55 W. Va. 226.

**Contract Limiting Maximum Fee.** — Russell v. Young, 94 Fed. Rep. 45, 36 C. C. A. 71.

**Client's Fix Fee by Contract — Amount Determined Binding When Made in Good Faith.** — Tennant v. Fawcett, 94 Tex. 111; Tennant v. Fawcett, (Tex. Civ. App. 1900) 55 S. W. Rep. 611.

**Agreement Not to Sue until Value Fixed No Defense.** — Roche v. Baldwin, 135 Cal. 522.

**Services Not Legal — Business Transactions.** — Warder v. Seitz, 157 Mo. 140.

**Services Performed by Attorney and Assistant.** — Vilas v. Bundy, 106 Wis. 168.

**Fee Against Weight of Evidence as to Value.** — Whallen v. Hallam, 76 S. W. Rep. 860, 25 Ky. L. Rep. 965.

**Value Not Affected by Agreement to Charge Nothing if Unsuccessful.** — Walbridge v. Barrett, 118 Mich. 433.

**Apportionment of Compensation Where Certain Cases Selected from Several as Test Cases.** — Greeff v. Miller, 87 Fed. Rep. 33.

**Liberal Allowance Not Disturbed on Appeal.** — Central Trust Co. v. Ingersoll, (C. C. A.) 87 Fed. Rep. 427.

**Auditor's Finding Approved by Court Not Reversed on Appeal unless Clearly Erroneous.** — Com. v. Order of Solon, 192 Pa. St. 487.

**Obtaining Option of Purchase.** — Aylen v. Lindsay, 23 Quebec Super. Ct. 345.

**Attorney Employed by Agent.** — Fargo Gaslight, etc., Co. v. Greer, 10 Ohio Cir. Dec. 164, 18 Ohio Cir. Ct. 589.

**No Recovery for Unnecessary Services Due to Negligence or Inexperience.** — Leo v. Leyser, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 549.

**Recovery on Quantum Meruit — Attorney Appointed by Court to defend the interest of non-resident legatees.** Lee v. Superior Ct., 112 Cal. 354; Williams v. Sapięha, 94 Tex. 430,



**421.** The Circumstances to Be Considered in Determining the Compensation. — See notes 1, 2, 3.

**422.** See notes 1, 2, 3.

**Determination by Court — Action on Notes.** — *Burns v. Staacke*, (Tex. Civ. App. 1899) 53 S. W. Rep. 354.

**Evidence.** — *Herndon v. Lammers*, (Tex. Civ. App. 1900) 55 S. W. Rep. 414.

**Evidence of Reasonable Value Admissible.** — *People's Casualty Claim Adjustment Co. v. Darrow*, 172 Ill. 62.

**Evidence of Attorneys — Fee Not Less than Lowest Estimate.** — *Reed v. Reed*, (Ky. 1903) 74 S. W. Rep. 207.

**Retaining Fee.** — In estimating the value of an attorney's services it is proper to include in the consideration a reasonable retaining fee. *Roche v. Baldwin*, 143 Cal. 186.

**Two Attorneys.** — Where two attorneys are severally employed in a cause, each is entitled to recover for the reasonable value of his own services, in the absence of any different contract. One is not entitled to recover severally one-half of the value of the services of both attorneys. *MacDonald v. Tittmann*, 96 Mo. App. 536.

**421. 1. Amount and Character of Services — United States.** — *Sanders v. Graves*, 105 Fed. Rep. 849; *Glidden v. Cowen*, (C. C. A.) 123 Fed. Rep. 48.

**Illinois.** — *Watson v. Jones*, 101 Ill. App. 572.

**Iowa.** — *Clark v. Ellsworth*, 104 Iowa 442.

**Louisiana.** — *Fenner v. McCan*, 49 La. Ann. 600.

**New York.** — *Tinney v. Pierrepont*, 18 N. Y. App. Div. 627.

**Ohio.** — *In re Commercial Bank*, 4 Ohio Dec. 440.

**Rhode Island.** — *Gorman v. Banigan*, 22 R. I. 22.

**Tennessee.** — *Taylor v. Badoux*, (Tenn. Ch. 1899) 58 S. W. Rep. 919.

**Virginia.** — *Parsons v. Maury*, 101 Va. 516.

**Advice to Sheriffs as to Levying Attachment.** — *People's Nat. Bank v. Geisthardt*, 55 Neb. 232.

**Abstracts of Separate Titles.** — *In re Margetts*, (1896) 2 Ch. 263.

**Sale of Separate Lots.** — *In re Thomas*, (1900) 1 Ch. 454.

**Several Arguments on Appeal — Reargument.** — *Matter of Kellogg*, 96 N. Y. App. Div. 608.

**The Procurement of Franchises** may not involve a legal question, but it is frequently performed by lawyers, and is generally regarded as in the line of professional employment, and compensation may be recovered therefor. *Breen v. Union R. Co.*, 9 N. Y. App. Div. 122.

**2. Labor, Time, and Trouble Involved — United States.** — *Tuttle v. Clafin*, 86 Fed. Rep. 964; *Sanders v. Graves*, 105 Fed. Rep. 849.

**Illinois.** — *McMannomy v. Chicago*, etc., R. Co., 167 Ill. 497.

**Montana.** — *Forrester v. Boston*, etc., Consol. Copper, etc., Min. Co., 29 Mont. 409, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421.

**New York.** — *Schlesinger v. Dunne*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 531, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420 et seq.; *Tinney v. Pierrepont*, 18 N. Y. App. Div. 627.

**Ohio.** — *In re Commercial Bank*, 4 Ohio Dec. 440.

**Tennessee.** — *Butler v. King*, (Tenn. Ch. 1898) 48 S. W. Rep. 697; *Callender v. Turpin*, (Tenn. Ch. 1901) 61 S. W. Rep. 1057; *Wright v. Knoxville Livery, etc., Co.*, (Tenn. Ch. 1900) 59 S. W. Rep. 677; *Vinson v. Cantrell*, (Tenn. Ch. 1900) 56 S. W. Rep. 1034.

**Virginia.** — *Parsons v. Maury*, 101 Va. 516.

**Of Associate Counsel.** — *Calhoun v. Akceley*, 82 Minn. 354.

**Investigation of Title — All Necessary Services.** — *Brownrigg v. Massengale*, 97 Mo. App. 190.

**3. Character and Importance of Litigation.** — *Clark v. Ellsworth*, 104 Iowa 442; *Fenner v. McCan*, 49 La. Ann. 600; *Forrester v. Boston*, etc., Consol. Copper, etc., Min. Co., 29 Mont. 409, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421; *Schlesinger v. Dunne*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 531, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420 et seq. See *Combs v. Combs*, (Ky. 1904) 82 S. W. Rep. 298.

**422. 1. Amount Involved — Arkansas.** — *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81.

**Illinois.** — *McMannomy v. Chicago*, etc., R. Co., 167 Ill. 497.

**Kentucky.** — *Fryer v. Dicken*, (Ky. 1898) 4 S. W. Rep. 341. See *Warren Deposit Bank v. Barclay*, 60 S. W. Rep. 853, 22 Ky. L. Rep. 1555; *Combs v. Combs*, (Ky. 1904) 82 S. W. Rep. 298.

**Montana.** — *Forrester v. Boston*, etc., Consol. Copper, etc., Min. Co., 29 Mont. 409, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421.

**New York.** — *Schlesinger v. Dunne*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 531, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420 et seq.; *In re Thomasson*, 63 N. Y. App. Div. 408.

**Rhode Island.** — *Gorman v. Banigan*, 22 R. I. 22.

**Tennessee.** — *Wright v. Knoxville Livery, etc., Co.*, (Tenn. Ch. 1900) 59 S. W. Rep. 677; *Butler v. King*, (Tenn. Ch. 1898) 48 S. W. Rep. 697; *Vinson v. Cantrell*, (Tenn. Ch. 1900) 56 S. W. Rep. 1034; *Gribble v. Ford*, (Tenn. Ch. 1898) 52 S. W. Rep. 1007.

**Evidence — Admissibility as to Value.** — *Graves v. Sanders*, (C. C. A.) 125 Fed. Rep. 690.

**Claim of \$2,224.70 — Fee of \$200 Is Reasonable for Dissolving Attachment.** — *Billington v. Poitevent*, etc., Lumber Co., 52 La. Ann. 1397.

**2. Skill and Experience Required.** — *Levinson v. Sands*, 74 Ill. App. 273; *McMannomy v. Chicago*, etc., R. Co., 167 Ill. 497; *Clark v. Ellsworth*, 104 Iowa 442; *Forrester v. Boston*, etc., Consol. Copper, etc., Min. Co., 29 Mont. 409, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421; *Schlesinger v. Dunne*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 531, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420 et seq.; *Gorman v. Banigan*, 22 R. I. 22; *Parsons v. Maury*, 101 Va. 516.

**Of Associate Counsel.** — *Calhoun v. Akceley*, 82 Minn. 354.

**Abstracting Title.** — *Wright v. Union Cent.*

**423.** See notes 1, 2, 3.

*The Opinions of Members of the Bar.* — See note 4.

**424.** *Local Usage as to Fees.* — See note 1.

*Fees of Other Attorneys.* — See note 2.

**425.** *b. WHERE EMPLOYMENT IS PREMATURELY ENDED* — (1) *General Rule.* — See notes 1, 2.

(2) *By Act of Client* — (a) *General Rule.* — See note 3.

L. Ins. Co., 11 Ohio Dec. 131, 8 Ohio N. P. 232.

**422. 3. Professional Standing of Plaintiff.** — Clark v. Ellsworth, 104 Iowa 442; Fenner v. McCan, 49 La. Ann. 600; Forrester v. Boston, etc., Consol. Copper, etc., Min. Co., 29 Mont. 409, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421; Schlesinger v. Dunne, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 531, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420 et seq.

**423. 1. Whether Fee Contingent or Absolute.** — McMannomy v. Chicago, etc., R. Co., 167 Ill. 497.

**2. Result Attained.** — Clarke v. Ellsworth, 104 Iowa 442; Forrester v. Boston, etc., Consol. Copper, etc., Min. Co., 29 Mont. 409, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 423; Hempstead v. New York, 86 N. Y. App. Div. 300; Gorman v. Banigan, 22 R. I. 22.

**3. Financial Condition of Client.** — Clark v. Ellsworth, 104 Iowa 442.

**4. Opinion of Attorneys as Evidence** — Alabama. — Brown v. Prude, 97 Ala. 639.

Colorado. — Hazeltine v. Brockway, 26 Colo. 291.

Illinois. — McMannomy v. Chicago, etc., R. Co., 167 Ill. 497; Beall v. Robinson, 91 Ill. App. 247; Sexton v. Bradley, 110 Ill. App. 495.

Iowa. — Clark v. Ellsworth, 104 Iowa 442. Kentucky. — Louisville Gas Co. v. Hargis, (Ky. 1896) 33 S. W. Rep. 946.

Missouri. — Kingsbury v. Joseph, 94 Mo. App. 298; Brownrigg v. Massengale, 97 Mo. App. 190.

Tennessee. — Butler v. King, (Tenn. Ch. 1898) 48 S. W. Rep. 697; Pickett v. Gore, (Tenn. Ch. 1900) 58 S. W. Rep. 402. See Taylor v. Badoux, (Tenn. Ch. 1899) 58 S. W. Rep. 919.

**Expert Evidence — Independent Judgment of Court or Jury.** — Schlesinger v. Dunne, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 531, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 423.

**Jury to Consider Expert Testimony in Light of Their Own Knowledge.** — Greeff v. Miller, 87 Fed. Rep. 33; Sanders v. Graves, 105 Fed. Rep. 849; Willard v. Williams, 10 Colo. App. 140.

**Question for Jury.** — Beard v. Morgan, 71 Ill. App. 564.

**Expert Opinion Advisory.** — Walbridge v. Barrett, 118 Mich. 433.

**Expert Testimony Merely Advisory — Juries Proper Judges.** — Cosgrove v. Leonard, 134 Mo. 419.

**Expert Evidence — Whether True Is Question for Jury.** — Coonan v. Loewenthal, 129 Cal. 197.

**Attorney's Evidence Considered by Jury.** — Sexton v. Bradley, 110 Ill. App. 495.

**All Facts and Circumstances in Evidence.** — Forrester v. Boston, etc., Consol. Copper, etc.,

Min. Co., 29 Mont. 409, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 423.

**Question for Jury and Judge.** — National Home Bldg., etc., Assoc. v. Fifer, 71 Ill. App. 295.

**Question for Court — Binding on Appeal unless Manifestly Erroneous.** — Farmers' L. & T. Co. v. McClure, (C. C. A.) 78 Fed. Rep. 209; Richards' Succession, 49 La. Ann. 1115.

**Fee Allowed in Another Suit — Presumed Reasonable.** — Ramage v. Littlejohn, 17 Wash. 386.

**Services Not Legal — Expert Testimony Inadmissible.** — Warder v. Seitz, 157 Mo. 140.

**Professional Standing and Experience of Expert.** — In considering expert testimony the jury must take into consideration the professional standing and experience of the witness. Cosgrove v. Burton, 104 Mo. App. 698.

**424. 1. Usage of Lawyers in Locality.** — Bingham v. Spruill, 97 Ill. App. 374; Sexton v. Bradley, 110 Ill. App. 495; Metheny v. Bohn, 164 Ill. 495; Nathan v. Brand, 167 Ill. 607; Gorman v. Banigan, 22 R. I. 22. See Warren Deposit Bank v. Barclay, 60 S. W. Rep. 853, 22 Ky. L. Rep. 1555.

**Local Usage as to Expenses.** — Clark v. Ellsworth, 104 Iowa 442.

**Trip to Another State — County Schedule of Fees Inadmissible.** — Gaither v. Dougherty, (Ky. 1896) 38 S. W. Rep. 2.

**2. Evidence of Fees Paid Other Attorneys.** — Forrester v. Boston, etc., Consol. Copper, etc., Min. Co., 29 Mont. 413, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 424.

**425. 1. Contingent Fee upon Obtaining Judgment — Settlement by Client.** — De Graffenreid v. St. Louis Southwestern R. Co., 66 Ark. 260.

**2. Compromise by Client Is Termination.** — Bogert v. Adams, 8 Colo. App. 185.

**3. Recovery on Quantum Meruit — United States.** — Such v. New York Bank, 121 Fed. Rep. 202.

Indiana. — French v. Cunningham, 149 Ind. 639, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 425.

Kentucky. — Bowser v. Patrick, 65 S. W. Rep. 824, 23 Ky. L. Rep. 1578; Henry v. Vance, 111 Ky. 72; Breathitt Coal, etc., Co. v. Gregory, 78 S. W. Rep. 148, 25 Ky. L. Rep. 1507.

Missouri. — Jordan v. Davis, 172 Mo. 599; Cosgrove v. Burton, 104 Mo. App. 698.

Montana. — Harris v. Root, 28 Mont. 159; Foley v. Kleinschmidt, 28 Mont. 198.

New York. — Naumer v. Gray, 41 N. Y. App. Div. 361; Bryant v. Brooklyn Heights R. Co., 64 N. Y. App. Div. 542; Whitesell v. New Jersey, etc., R., etc., Co., 68 N. Y. App. Div. 82; O'Neill v. Crane, 65 N. Y. App. Div. 358; Yuells v. Hyman, (Supm. Ct. App. T.) 84 N. Y. Supp. 460.

Pennsylvania. — Powers v. Rich, 184 Pa. St. 325, 41 W. N. C. (Pa.) 407.

Tennessee. — Rogers v. O'Mary, 95 Tenn. 514.

**426.** See notes 1, 2.

(b) Discharge of Attorney Without Cause — Action on a Quantum Meruit. — See note 3.

Action for Damages for Breach of Contract. — See note 4.

Measure of Damages. — See note 5.

**427.** Rule of Damages Where Fee Is Agreed upon Contingently. — See note 1.

Remedy by Action to Enforce Contract — Compensation Actually Earned. — See note 2.

Compensation for Constructive Service. — See note 3.

**428.** (c) Discharge of Attorney for Cause. — See notes 2, 3.

**429.** (3) By Act of Attorney — Abandonment of Employment by Attorney — For Cause. — See note 1.

Without Cause. — See note 2.

**430.** (4) By Combined Act of Client and Attorney. — See note 2.

*Texas.* — Southern Nat. Bank v. Curtis, (Tex. Civ. App. 1896) 36 S. W. Rep. 911.

*Wyoming.* — Sheridan County v. Hanna, 9 Wyo. 374, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 425.

Contract for Services Measure of Damages. — Matter of Jerome Ave., 58 N. Y. App. Div. 459.

Client Liable for Retainer. — Union Surety, etc., Co. v. Tenney, 102 Ill. App. 95, affirmed 200 Ill. 349.

Proper to Send Matter to Referee to Determine Amount. — Philadelphia v. Postal Tel. Cable Co., 1 N. Y. App. Div. 387.

Compromise — Contingent Fee. — Harris v. Root, 28 Mont. 159.

**426.** 1. Action for Damages. — French v. Cunningham, 149 Ind. 639, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 425-427; Copp v. Colonial Coal, etc., Co., (Supm. Ct. App. T.) 33 Misc. (N. Y.) 773; Johnston v. Cutchin, 133 N. Car. 119.

2. Action to Enforce Contract. — Reynolds v. Clark County, 162 Mo. 680.

Compromise of Cause by Client. — Bogert v. Adams, 8 Colo. App. 185.

3. Recovery on Quantum Meruit. — Weil v. Finneran, 70 Ark. 509; Joseph v. Lapp, (Ky. 1904) 78 S. W. Rep. 1119.

Completion of Contract Prevented by Client. — French v. Cunningham, 149 Ind. 632.

Completion of Cause. — If upon the completion of the litigation the client repudiates his contract, the attorney may recover on a quantum meruit. Dailey v. Devlin, 21 N. Y. App. Div. 62.

4. Discharge Without Cause — Action for Damages. — Watson v. Columbia Min. Co., 118 Ga. 603; Jordan v. Davis, 172 Mo. 599; Copp v. Colonial Coal, etc., Co., (Supm. Ct. App. T.) 33 Misc. (N. Y.) 773. See Weil v. Finneran, 70 Ark. 509.

No Services Performed. — Henry v. Vance, 111 Ky. 72.

5. Measure of Damages. — Reynolds v. Clark County, 162 Mo. 680; Graut v. Langley, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 776, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 426; Sheridan County v. Hanna, 9 Wyo. 374, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 426.

**427.** 1. Rule of Damages in Case of Contingent Fees. — French v. Cunningham, 149 Ind. 639, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 427; Breathitt Coal, etc., Co. v. Gregory, (Ky.

1904) 78 S. W. Rep. 148; Joseph v. Lapp, (Ky. 1904) 78 S. W. Rep. 1119; Harris v. Root, 28 Mont. 169, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 427; Yuells v. Hyman, (Supm. Ct. App. T.) 84 N. Y. Supp. 460.

Contra. — "It is held in certain cases that where by contract the fee of the attorney is contingent upon the amount recovered, the client may at any time, without cause, discharge him and revoke his agency, subject to the right of the attorney to recover his compensation, as if his contract of employment was fully performed. It is said in these cases that such a contract is to be construed as fixing the mode of compensation only." Villhauer v. Toledo, 5 Ohio Dec. 8.

Elements of Damage. — In estimating the damages the jury should consider the extent of the services rendered, and the fact that the attorney's employment prevented his accepting employment from the other side. Henry v. Vance, 111 Ky. 72.

2. Recovery on Contract for Past Services. — French v. Cunningham, 149 Ind. 635, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 427.

3. Wrongful Discharge — Entire Compensation. — Graut v. Langley, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 776, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 427; Herndon v. Lambers, (Tex. Civ. App. 1900) 55 S. W. Rep. 414, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 427.

**428.** 2. No Recovery for Services Subsequent to Discharge. — Bassford v. Swift, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 149.

Neglect to Enforce Verdict. — Matter of Barkley, 42 N. Y. App. Div. 597.

3. Henry v. Vance, 111 Ky. 72.

**429.** 1. Abandonment for Cause. — Campbell v. Goodman, 23 Pa. Co. Ct. 609; Thomas v. Morrison, (Tex. Civ. App. 1898) 46 S. W. Rep. 46.

Performance Prevented by Attorney. — Richards v. Washburn, 163 N. Y. 585, affirming 28 N. Y. App. Div. 109.

2. Abandonment Without Cause — No Recovery. — Justice v. Lairy, 19 Ind. App. 276, 65 Am. St. Rep. 405, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 429; Blanton v. King, 73 Mo. App. 148; Cary v. Cary, 97 N. Y. App. Div. 471. See Bullis v. Easton, 96 Iowa 513; Halbert v. Gibbs, 16 N. Y. App. Div. 126.

**430.** 2. Justice v. Lairy, 19 Ind. App. 276,

**430.** (5) *By Act of Law.* — See note 3.

(6) *By Act of God* — *Death of Attorney.* — See note 4.

**431.** *Effect upon Contingent Fee.* — See notes 2, 3.

*c.* **FEE FIXED IN MORTGAGE OR NOTE** — *Mortgage.* — See note 4.

**432.** *Notes.* — See note 1.

*Statutes.* — See note 2.

**433.** **3. Contracts for Compensation After Relation Established** — *Such Contracts Jealously Guarded.* — See note 1.

*Contracts After Litigation Ended.* — See note 3.

**434.** **Contracts for Compensation Necessary** — *Not Disturbed unless Unfair.* — See note 1.

**The Construction of Special Contracts.** — See note 5.

65 Am. St. Rep. 405, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 430.

**430.** **3. Service Prevented by Act of Law.** — *Justice v. Lairy*, 19 Ind. App. 274, 65 Am. St. Rep. 405, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 430. See *Warren Deposit Bank v. Barclay*, (Ky. 1901) 60 S. W. Rep. 853.

**Contract to Recover Property — Property Vested in Client by Operation of Law.** — *Moran v. L'Etourneau*, 118 Mich. 159.

**4. Services Terminated by Death of Attorney.** — *Johnston v. Bernalillo County*, (N. Mex. 1904) 78 Pac. Rep. 43; *Boyd v. Daily*, 85 N. Y. App. Div. 581, *affirmed* 176 N. Y. 556.

**Substitution of Attorneys — Death of First Attorney of No Effect.** — *Matter of Redmond*, 54 N. Y. App. Div. 454, 8 N. Y. Annot. Cas. 309.

**Contingent Fee — No Recovery.** — *Badger v. Celler*, 41 N. Y. App. Div. 599.

**Fee Paid in Advance.** — Where the fee was paid in advance, the client may recover the unearned portion. *McCammon v. Peck*, 3 Ohio Dec. 232.

**431.** **2.** *French v. Cunningham*, 149 Ind. 635, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 431.

**3.** *Harris v. Root*, 28 Mont. 169, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 431.

**4. Stipulations for Fees in Mortgages.** — *Dorn v. Ross*, 177 Ill. 225; *Salomon v. Stoddard*, 107 Ill. App. 227; *Gallagher v. Stern*, 8 Pa. Super. Ct. 628; *Vermont L. & T. Co. v. Greer*, 19 Wash. 611. See *Sun Ins. Co. v. White*, 123 Cal. 196.

**Stipulation Against Public Policy.** — *Kentucky Trust Co. v. Louisville Third Nat. Bank*, 106 Ky. 232.

**Fee Fixed in Mortgage — Mortgagor Old, Feeble, and Ignorant — Recovery on Quantum Meruit.** — *Turnbull v. Banks*, 22 N. Y. App. Div. 508.

**Excessive Fee.** — A grantee of real estate who takes it subject to a mortgage thereon is not required upon foreclosure to pay the fee specified therein, when it exceeds that allowed by law. *Grand Forks First M. E. Church v. Fad-dem*, 8 N. Dak. 162.

**Fee No Part of Debt.** — In a suit upon a usurious contract, it is error to allow the plaintiff, under the stipulations of a mortgage securing the debt, an attorney's fee, as it is no part of the debt. *Fidelity Sav. Assoc. v. Shea*, 6 Idaho 405.

**432.** **1. Agreed Fee — No Agreement — Reasonable Fee.** — *Kenner v. Whitelock*, 152 Ind. 635.

**2. Washington Statute.** — *Vermont L. & T. Co. v. Greer*, 19 Wash. 611.

**433.** **1. Contract Must Be Reasonable and Fair** — *Alabama.* — *Kidd v. Williams*, 132 Ala. 140; *White v. Tolliver*, 110 Ala. 300.

*Illinois.* — *Robinson v. Sharp*, 201 Ill. 89, 92, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433.

*Indiana.* — *French v. Cunningham*, 149 Ind. 638, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433.

*Michigan.* — *Coveney v. Pattullo*, 130 Mich. 280, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433.

*Pennsylvania.* — *Maires's Case*, 7 Pa. Dist. 297, *affirmed* 189 Pa. St. 99. See *Filon's Estate*, 7 Pa. Dist. 316.

*West Virginia.* — *Dorr v. Camden*, 55 W. Va. 226.

**Contract for Additional Compensation Without Consideration.** — *Matter of Jackson*, 48 N. Y. App. Div. 628.

**Additional Contract for Increased Compensation Without Consideration.** — *Kahle v. Plummer*, (Tex. Civ. App. 1903) 74 S. W. Rep. 786.

**Additional Compensation.** — A solicitor may not accept from his client, while the relation lasts, remuneration for his professional services beyond that to which he is legally entitled. *In re Haslam*, (1902) 1 Ch. 765.

**3.** *Kidd v. Williams*, 132 Ala. 140.

**434.** **1. Contracts for Compensation Supported if Fair.** — *French v. Cunningham*, 149 Ind. 632.

**5. Per Cent. of Amount "Collected" — Costs Included.** — *McIlvaine v. Steinson*, 90 N. Y. App. Div. 77; *Taylor v. Long Island R. Co.*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 11, 28 Civ. Pro. (N. Y.) 118, 6 N. Y. Annot. Cas. 334.

**Contingent Fee.** — Where an agreement with an attorney provided that he was to receive fifty per cent. of a sum "allowed, recovered, or confirmed on account of said loss and damage," and is silent as to incumbrances on the property, which had been taken by condemnation, the amount of recovery should not be reduced by a mortgage and taxes upon the property. *Deering v. Schreyer*, 58 N. Y. App. Div. 322.

**Certain Fee if Certain Amount Realized.** — Where clients agree to pay their attorneys a certain fee in case they realize "not less than" a certain sum from the claim, and the clients compromise for a sum less than the amount named, the attorneys cannot recover unless there is fraud. *Bittiner v. Gomprecht*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 218.

**435.** 4. Attorney Must Prove His Employment. — See note 2.

**437.** Promise to Pay Presumed. — See notes 1, 2.

**439.** 5. Attorney Must Prove Performance. — See note 2.

**440.** 6. Contingent Fees. — See note 1.

**Personal-injury Claim on Contingent Fee — Death of Client.** — Where attorneys take a personal-injury case for one-half of any settlement, and the client dies before settlement, the attorney has no claim upon the fund paid the executors, as it is for damages to the estate, not to the decedent. *Matter of Carrig*, (Surrogate Ct.) 36 Misc. (N. Y.) 612.

**One-third of Adjustment.** — Where a client agrees to give his attorney one-third of the sum for which the claim was adjusted, the sum for which the claim was compromised determines the attorney's fee. *Pilkington v. Brooklyn Heights R. Co.*, 49 N. Y. App. Div. 22, 30 Civ. Pro. (N. Y.) 276.

**Percentage of Award — Interest.** — Where by the terms of the retainer an attorney is to receive for his services ten per cent. of whatever award may be obtained for his client's land, he is entitled to part of the interest when the award was postponed for several years. *Matter of Bassford*, 172 N. Y. 488, *modifying* 71 N. Y. App. Div. 617.

**435.** 2. Collection Agency — No Recovery of Fee on Plaintiff. — *Mussey v. Vanstone*, 82 Mo. App. 353.

**437.** 1. Promise to Pay Implied from Request. — *Taussig v. St. Louis, etc.*, R. Co., 166 Mo. 33, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437.

2. *Taussig v. St. Louis, etc.*, R. Co., 166 Mo. 33, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437.

**439.** 2. Performance. — *Warren Deposit Bank v. Barclay*, 60 S. W. Rep. 853, 22 Ky. L. Rep. 1555; *Asher v. Beckner*, (Ky. 1897) 41 S. W. Rep. 35; *Walbridge v. Barrett*, 118 Mich. 433; *Dennison v. Lawrence*, (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 99, 29 Civ. Pro. (N. Y.) 176. See *Southern Nat. Bank v. Curtis*, (Tex. Civ. App. 1896) 36 S. W. Rep. 911.

Where attorneys agreed to collect a claim on a contingent fee, and it does not appear that they neglected the claim or that the contract was ended in any way, the mere fact that the client employed another attorney, who assisted in enforcing a judgment the first attorneys had obtained, will not prevent collection of compensation. *Raley v. Smith*, (Tex. Civ. App. 1903) 73 S. W. Rep. 54.

**Settlement Without Suit.** — *Stoutenburgh v. Fleer*, (Supm. Ct. App. T.) 87 N. Y. Supp. 504.

**Agreement for Half of "Any Judgment" Obtained — Settlement by Client.** — *De Graffenreid v. St. Louis Southwestern R. Co.*, 66 Ark. 260.

**Discharge of Attorney — Right to Compensation Accrues Immediately.** — *Com. v. Terry*, 11 Pa. Super. Ct. 547.

**Right to Compensation Accrues on Termination of Suit.** — *McCrea v. Scofield*, (Supm. Ct. App. T.) 86 N. Y. Supp. 10.

**Employment to Test Validity of Will — Decree that Client Entitled to Share on Death of Beneficiary Without Issue.** — *Dennison v. Lawrence*, 44 N. Y. App. Div. 287.

**Payment of Fee in Full — Attorney Willing to**

**Proceed — No Abandonment by Client and Recovery of Fee.** — *Riehl v. Levy*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 59.

**The Presumption** is that the compensation is due when the services are performed. *MacMahon v. Duffy*, 36 Oregon 150.

**Attempt to Wreck Corporation.** — Where it appears that the services charged for were rendered on behalf of members of a corporation, who attempted, for fraudulent purposes, to wreck it, there can be no recovery from the corporation. *Baxter v. Lowe*, 93 Fed. Rep. 358, 35 C. C. A. 344.

**Performance Prevented by Attorney.** — Where acts of the attorney, against instructions of the client, prevented performance of the contract, there can be no recovery for services. *Richards v. Washburn*, 28 N. Y. App. Div. 109, *affirmed* 163 N. Y. 585.

**440.** 1. Contingent Fees — *United States*. — *Herman v. Metropolitan St. R. Co.*, 121 Fed. Rep. 184; *Muller v. Kelly*, 116 Fed. Rep. 545.

*Arkansas*. — *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81.

*California*. — *Bergen v. Frisbie*, 125 Cal. 168.

*Iowa*. — *Rickel v. Chicago, etc.*, R. Co., 112 Iowa 148.

*Maryland*. — *Wheeler v. Harrison*, 94 Md. 147.

*New York*. — *Bennett v. Donovan*, 83 N. Y. App. Div. 95; *Serwer v. Serwer*, 91 N. Y. App. Div. 538; *Matter of Fitzsimmons*, 174 N. Y. 15; *Matter of Fitzsimmons*, 77 N. Y. App. Div. 345, 12 N. Y. Annot. Cas. 250.

*Ohio*. — *Hinman v. Rogers*, 4 Ohio Dec. (Reprint) 303, 1 Cleve. L. Rep. 267.

*Pennsylvania*. — *Fellows v. Smith*, 190 Pa. St. 301; *Williams v. Philadelphia*, 208 Pa. St. 282; *Filon's Estate*, 7 Pa. Dist. 316.

*Texas*. — *Ft. Worth, etc.*, R. Co. v. Carlock, (Tex. Civ. App. 1903) 75 S. W. Rep. 931; *Ca-hill v. Dickson*, (Tex. Civ. App. 1903) 77 S. W. Rep. 281.

*Washington*. — *Schultheis v. Nash*, 27 Wash. 258, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 440.

*West Virginia*. — *Camden v. McCoy*, 48 W. Va. 377; *Dorr v. Camden*, 55 W. Va. 226.

"Contracts for contingent fees paid attorneys were not tolerated at all at common law, but in [California] and perhaps most of the states such contracts are allowed, if not favored. This is on the ground that otherwise a party, without the means to employ an attorney and pay his fee certain, and having a meritorious cause of action or defense, would find himself powerless to protect his rights." *Newman v. Freitas*, 129 Cal. 283.

**Validity of Contract Question for Jury.** — *Muller v. Kelly*, (C. C. A.) 125 Fed. Rep. 212.

**Burden of Proving Unreasonableness on Client.** — *Tabet v. Powell*, (Tex. Civ. App. 1903) 78 S. W. Rep. 997.

**Assignment of Interest in Cause of Action.** — *Missouri, etc.*, R. Co. v. Bacon, (Tex. Civ. App. 1904) 80 S. W. Rep. 572.

- 441.** 8. Fees of Associate Counsel — Obligation of Client. — See note 1.  
**442.** If the Client Himself Employs Additional Counsel. — See note 2.  
 9. Extra Compensation — None for Incidental Services. — See note 3.  
**443.** May Be Recovered where Services Not within Original Agreement. — See note 1.  
 10. When Entitled to Interest. — See note 2.

**No Recovery on Contract Champertous and Barratrous.** — *Gammons v. Johnson*, 76 Minn. 76.

**Divorce Cases — Contingent Fees Not Allowed.** — *Newman v. Freitas*, 129 Cal. 283.

**Where an Attorney's Fee Is Contingent upon the Recovery of Land**, if he regains it, the manner in which it is done and the character of the legal proceedings are immaterial. *McIntosh v. Bach*, 110 Ky. 701.

**Elements of Champerty.** — "An agreement that one not previously interested, and who agrees to prosecute a suit, upon recovery shall have a share of the thing recovered is not for that reason alone champertous. The bargain to be illegal must have the further element that the attorney's services shall not constitute a debt due him from the client, and that his prospective share is to be the only compensation which the attorney shall receive." *Hadlock v. Brooks*, 178 Mass. 425.

**One-half of Recovery.** — Under an agreement to pay attorneys one-half of what they recover, the client is liable for that portion of what he obtains, and not for one-half of the amount of the judgment. *Leslie v. York*, 112 Ky. 712.

**Percentage of Alimony.** — A contract in a divorce suit giving the attorney a percentage of the alimony obtained is void as against public policy, being calculated to prevent reconciliation. *McCurdy v. Dillon*, (Mich. 1904) 98 N. W. Rep. 746.

**Rescission — Estoppel.** — Where an attorney agrees to collect a note on a contingent fee if the note is not contested, he may promptly rescind if its validity is contested, but it is too late after trial and without notice. *Lavenson v. Wise*, 131 Cal. 369.

**Property Taken in Satisfaction — Measure of Recovery.** — Where property is taken by a client in satisfaction of a claim prosecuted under an agreement for a contingent fee, the amount of the attorney's fee should be estimated by a fair valuation of the property as distinguished from the price at which it was actually taken. *Barcus v. Gates*, 130 Fed. Rep. 364.

**Indian Depredation Act March 3, 1891.** — The Indian Depredation Act fixes the amount to be paid attorneys for prosecuting claims thereunder, and an agreement for an additional contingent fee is void. *Lynch v. Pollard*, 26 Tex. Civ. App. 103.

**441. 1. Client Not Liable for Fees of Associate Counsel Employed by Attorney.** — *Northern Pac. R. Co. v. Clarke*, (C. C. A.) 106 Fed. Rep. 794; *Porter v. Elizalde*, 125 Cal. 204; *Whitlow v. Whitlow*, 109 Ky. 573; *Dillon v. Watson*, (Neb. 1902) 92 N. W. Rep. 156; *Matter of Borkstrom*, 63 N. Y. App. Div. 7; *Denison First Nat. Bank v. Hodges*, (Tex. Civ. App. 1901) 62 S. W. Rep. 827; *Augé v. Filiatrault*, 10 Quebec Super. Ct. 157; *Taylor v. Alexander*, 12 Quebec Super. Ct. 159.

**Attorney's Declarations Not Sufficient Evidence of Authority Where There Is Evidence of No Authority.** — *Porter v. Elizalde*, 125 Cal. 204.

**Associate Bound by Attorney's Agreement as to Fee.** — *Herndon v. Lammers*, (Tex. Civ. App. 1900) 55 S. W. Rep. 414.

**When the Client Agrees with His Attorney Not to Compromise a claim**, which the attorney takes on a contingent fee, the agreement is invalid, and upon compromise the defendant is not liable to the attorney. *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100.

**Exchange of Services.** — Where two attorneys having similar cases agree to assist each other, and the client of one was told of the agreement and acquiesced in it, he is liable to his own attorney for the value of the services rendered by the other attorney. *Calhoun v. Akeley*, 82 Minn. 354.

**442. 2. Nevin v. Masonic Sav. Bank, (Ky. 1899) 52 S. W. Rep. 811; *Pate v. Maples*, (Tenn. Ch. 1897) 43 S. W. Rep. 740.**

**3. No Extra Compensation for Services Within Scope of Retainer.** — *Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625; *Gorrell v. Payson*, 170 Ill. 213; *Schamberg v. Auxier*, 101 Ky. 292; *Walsh v. Helena School Dist. Number One*, 17 Mont. 413; *Niagara F. Ins. Co. v. Hart*, 13 Wash. 651; *Surveyer v. Drainville*, 18 Quebec Super. Ct. 527. See *Cranmer v. Brothers*, 15 S. Dak. 234. *Compare Sparks v. Walden*, 79 S. W. Rep. 248, 25 Ky. L. Rep. 1937.

"Whether the attorney may charge any extra compensation for his services is dependent upon the fact as to whether or not the agreement measured the whole amount for the whole service that he was entitled to receive." *Matter of Martin*, 73 N. Y. App. Div. 505.

**Client Liable for Necessary Expenses.** — *Clark v. Ellsworth*, 104 Iowa 442.

**Contract Without Consideration.** — *Matter of Jackson*, 48 N. Y. App. Div. 628.

**443. 1. Services Entitling to Extra Compensation.** — *Barcus v. Gates*, 130 Fed. Rep. 364; *Gorrell v. Payson*, 170 Ill. 213; *Allen v. Baker*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 337; *Clarke v. Faver*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1009.

**Additional Party Represented.** — *Howard v. Charleston First Nat. Bank*, (Va. 1897) 27 S. E. Rep. 492.

**Additional Agreement Without Consideration.** — Where the parties had agreed upon a stipulated fee and what services were to be performed, and after the performance of the services had been entered upon a second agreement was made, for additional compensation, but contemplating no additional services, the second contract is without consideration and invalid. *Kahle v. Plummer*, (Tex. Civ. App. 1903) 74 S. W. Rep. 786.

**2. When Attorney Entitled to Interest.** — *Remington v. Eastern R. Co.*, 109 Wis. 154.

**Allowance of Interest Discretionary — Amount of Fee and Time of Payment Not Fixed.** — *Gribble v. Ford*, (Tenn. Ch. 1898) 52 S. W. Rep. 1007.

**Discharge of Attorney — Interest Accrues from**

**443.** 11. Defenses to Action for Compensation — *a.* NEGLIGENCE OR IGNORANCE OF ATTORNEY. — See note 3.

**445.** *c.* CONTRACT OPPOSED TO PUBLIC POLICY. — See notes 1, 3.

Prosecuting Claims Against Government. — See note 4.

*d.* STATUTE OF LIMITATIONS. — See notes 5, 6.

**446.** 12. Costs — English Practice — Former and Present United States Practice. — See note 1.

Taxed Costs Not Property of Attorney. — See note 2.

**447.** XIV. LIEN OF ATTORNEYS — 1. General Character. — See notes 2, 3.

Lien on Judgments. — See notes 5, 6.

Distinction Between Lien on Judgment and That on Money, Papers, Etc. — See note 7.

**Date.** — *Com. v. Terry*, 11 Pa. Super. Ct. 547.

**Interest from Date of Judgment.** — *Louisville Gas Co. v. Hargis*, (Ky. 1896) 33 S. W. Rep. 946.

**Under the Illinois Statute** no interest is recoverable unless there is not only money due the plaintiff, but also withheld by the defendant "by an unreasonable and vexatious delay of payment." *Levinson v. Sands*, 74 Ill. App. 273.

**443.** 3. Negligence or Ignorance of Attorney as Defense. — *Matter of Kruger*, 130 Cal. 621.

**Unreasonable Delay in Prosecuting Suit.** — *Farwell v. Colman*, 35 Wash. 308.

**Want of Success No Defense in Absence of Negligence or Bad Faith.** — *French v. Cunningham*, 149 Ind. 632.

**445.** 1. Contract for Divorce on Contingent Fee. — *Newman v. Freitas*, 129 Cal. 283.

**Agreement to Procure Claims for Attorney.** — See *Irwin v. Curie*, 56 N. Y. App. Div. 514.

**3. Influencing Public Officials.** — See *Mulligan v. Smith*, (Colo. 1904) 76 Pac. Rep. 1063.

**4. Minister to Foreign Country.** — When subsequent to agreeing to prosecute a claim against the government, an attorney accepts the position of minister to a foreign country, he cannot recover from his partner any fees for his services. *Fox v. Willis*, 114 Ky. 940.

**5. Statute of Limitations.** — *Coburn v. Colledge*, (1897) 1 Q. B. 702; *Johnson v. Lake Bank*, 125 Cal. 6; *Meyer v. McCumber*, 75 Ill. App. 119; *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161; *Dailey v. Devlin*, 21 N. Y. App. Div. 62; *McCrea v. Scofield*, (Supm. Ct. App. T.) 86 N. Y. Supp. 10; *Tarr's Estate*, 21 Pa. Co. Ct. 358, *affirmed* 10 Pa. Super. Ct. 554.

**6. Right of Action Accrues on Judgment.** — *Greek v. McDonald*, (Neb. 1903) 94 N. W. Rep. 518.

**Several Suits One Continuous Transaction — Statute Runs from Termination of Last.** — *Meyer v. McCumber*, 75 Ill. App. 119.

**Burden of Proof on Defendant.** — *Pickett v. Gore*, (Tenn. Ch. 1900) 58 S. W. Rep. 402.

**446.** 1. Fees Taxed as Costs. — See *Cubison v. Mayo*, (1896) 1 Q. B. 246; *In re Gray*, (1901) 1 Ch. 239, 70 L. J. Ch. 133; *Re Hanbury*, 75 L. T. N. S. 449; *In re Briggs*, (1903) 2 K. B. 156, 72 L. J. K. B. 644; *In re Collyer-Bristow*, (1901) 2 K. B. 839; *In re Bowes*, (1900) 2 Ch. 251; *In re National Bank*, (1902) 2 Ch. 412, 71 L. J. Ch. 679; *In re Wellborne*, (1900) 1 Ch. 857; *In re Raphael*, (1899) 1 Ch. 853; *In re Landor*, (1899) 1 Ch. 818; *White-*

*ley Exerciser v. Gamage*, (1898) 2 Ch. 405; *In re Sweeting*, (1898) 1 Ch. 268; *In re Pomeroy*, (1897) 1 Ch. 284; *In re Hellard*, (1896) 2 Ch. 229; *In re Margetts*, (1896) 2 Ch. 263; *In re Baylis*, (1896) 2 Ch. 107; *Turiff v. McDonald*, 13 Manitoba 577; *Rabb v. Pillot*, 52 La. Ann. 1534; *Bacon v. Combes*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 704; *In re Aldan School Dist.*, 23 Pa. Co. Ct. 416; *Kaufman v. Kirker*, 22 Pa. Super. Ct. 201; *Williams v. Sapieta*, 94 Tex. 430.

**Attorney Entitled to Taxed Costs for Services.** — *Kult v. Nelson*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 238.

**Disbursements by Attorney — Client Insolvent.** — *Gibbs v. Prindle*, 11 N. Y. App. Div. 470.

**Repealing Act in South Carolina.** — *Durham Fertilizer Co. v. Glenn*, 48 S. Car. 494.

**2. Costs Belong to Party, Not to Attorney.** — *Schnitker v. Schnitker*, 109 Iowa 349; *Taylor v. Long Island R. Co.*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 11, 28 Civ. Pro. (N. Y.) 118; *Fromme v. Gray*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 77; *Barry v. Third Ave. R. Co.*, 87 N. Y. App. Div. 543; *McIlvaine v. Steinson*, 90 N. Y. App. Div. 77; *Bronson v. Brown*, 8 Pa. Dist. 365.

**Payment of Costs to Solicitor — Repayment.** — *Barrs v. Crossman*, (1897) A. C. 172.

**A Judgment for Costs Only** belongs to the attorney for the successful party. *Adams v. Niagara Cycle Fittings Co.*, (Supm. Ct. Spec. T.) 10 N. Y. Annot. Cas. 401.

**447.** 2. General Nature of Attorney's Lien. — *In re Rude*, 101 Fed. Rep. 805, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447.

**3. Lien Defined.** — *Sweeley v. Sieman*, 123 Iowa 183.

**5. Anderson v. Brackeleer**, (Supm. Ct. Spec. T.) 28 Civ. Pro. (N. Y.) 308, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447 to 473; *Fenwick v. Mitchell*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 617; *Victor Gold, etc.*, Min. Co. v. National Bank, 18 Utah 96, 72 Am. St. Rep. 767, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447.

**6. Lien on Judgment for Costs.** — *Victor Gold, etc.*, Min. Co. v. National Bank, 18 Utah 87, 72 Am. St. Rep. 767.

**Lien for Costs Absolute.** — *Publisher's Printing Co. v. Gillen Printing Co.*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 464.

**7. Charging and Retaining Lien.** — *Anderson v. Brackeleer*, (Supm. Ct. Spec. T.) 28 Civ. Pro. (N. Y.) 308, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447-473.

**448. 2. To What Extent Lien Exists — An Attorney's Lien on Papers.** — See note 1.

But His Equitable Lien on a Judgment. — See note 2.

Even Where there Are Several Suits. — See note 3.

**449. Amount Actually Due — Professional Services.** — See notes 2, 3.

Costs and Disbursements — Former Rule. — See note 4.

But the Rule Is Otherwise Now. — See note 5.

**3. In Whose Favor Lien Exists — Associate Counsel.** — See note 6.

**450. If there Are Several Attorneys.** — See note 1.

Where there Is Substitution of Attorneys. — See note 3.

**4. On What Lien Exists — a. ON JUDGMENTS, DECREES, AND AWARDS — At Common Law.** — See note 6.

**451. But by Statute.** — See notes 1, 2.

In Illinois. — *Cameron v. Boeger*, 200 Ill. 84, 93 Am. St. Rep. 165.

**448. 1. Rule as to Extent of Lien on Papers, Etc.** — *Anderson v. Brackeleer*, (Supm. Ct. Spec. T.) 28 Civ. Pro. (N. Y.) 306, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447-473; *Krone v. Klotz*, 3 N. Y. App. Div. 587.

In New York the statutory lien given an attorney on land does not extend to any general indebtedness of the client. *West v. Bacon*, 13 N. Y. App. Div. 371, affirmed 164 N. Y. 425.

**2. Extent of Lien on Judgment.** — *Pride v. Smalley*, 66 N. J. L. 578.

**Fund in Attorney's Hands.** — *Martin v. Throckmorton*, 15 Pa. Super. Ct. 632.

**3. Several Suits Intimately Connected.** — *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81.

**The Lien Does Not Extend** to all the real and personal property of the client involved in pending suits in charge of the attorney. *Hinman v. Devlin*, 40 N. Y. App. Div. 234.

**449. 2. Amount Actually Due.** — *Anderson v. Brackeleer*, (Supm. Ct. Spec. T.) 28 Civ. Pro. (N. Y.) 306, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447-473.

**Dismissal of Suit — Lien for Services Rendered.** — *Gibson v. Chicago, etc., R. Co.*, 122 Iowa 565.

**Excessive Charges Not Included.** — Where charges appear excessive experts should be produced on the question of the value and necessity of the services rendered. *Matter of Raby*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 240.

**3. Expenses in Rendering Services Included.** — *McDougall v. Hazelton Tripod-Boiler Co.*, 88 Fed. Rep. 217, 60 U. S. App. 209.

**4. Former Practice as to Lien on Judgments.** — *Anderson v. Brackeleer*, (Supm. Ct. Spec. T.) 28 Civ. Pro. (N. Y.) 306, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447-473. See *Re Hanbury*, 75 L. T. N. S. 449.

**5. Anderson v. Brackeleer, (Supm. Ct. Spec. T.) 28 Civ. Pro. (N. Y.) 306, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447-473. See *Collins v. Campbell*, 97 Me. 23, 94 Am. St. Rep. 458.**

**6. Lien of Associate Counsel on Judgment.** — *People v. Pack*, 115 Mich. 669.

**No Lien in Favor of Associate Employed by Attorney at His Own Expense.** — *Lathrop v. Hallett*, (Colo. App. 1904) 77 Pac. Rep. 1095.

**450. 1. Nonresident Attorney.** — *Taylor v. Badoux*, (Tenn. Ch. 1899) 58 S. W. Rep. 919.

**3. Sandberg v. Victor Gold, etc., Min. Co.**, 18 Utah 66.

**6. No Lien at Common Law.** — *German v. Browne*, 137 Ala. 437, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 450; *Merchants Nat. Bank v. Armstrong*, 107 Ga. 479; *Anderson v. Brackeleer*, (Supm. Ct. Spec. T.) 28 Civ. Pro. (N. Y.) 308, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447-473. But see *Matter of Regan*, (Surrogate Ct.) 29 Misc. (N. Y.) 527.

**Common-Law Rule in California.** — *Gage v. Atwater*, 136 Cal. 170.

**No Lien in Illinois.** — *Cameron v. Boeger*, 200 Ill. 84, 93 Am. St. Rep. 165.

**Missouri.** — *Kersey v. O'Day*, 173 Mo. 560.

**Lien a Creature of Statute.** — *Stoddard v. Lord*, 36 Oregon 412.

In Ohio an attorney has no lien as such for his services upon a judgment which he has obtained for his client, in the absence of any contract giving him such lien. *Villhauer v. Toledo*, 5 Ohio Dec. 8.

In Illinois in the absence of an express agreement out of which an equitable assignment arises, an attorney acquires no lien upon a judgment or decree rendered in an action prosecuted by him, or upon the money or fund recovered by means of legal services. *Dougherty v. Hughes*, 165 Ill. 384.

**451. 1. By Statute — Georgia.** — *Hodnett v. Bonner*, 107 Ga. 452.

**Indiana.** — *Koons v. Beach*, 147 Ind. 137.

**Iowa.** — *Gibson v. Chicago, etc., R. Co.*, 122 Iowa 565. See *Barbee v. Aultman*, 102 Iowa 278.

**Kentucky.** — *Hubble v. Dunlap*, 101 Ky. 419; *Central Trust Co. v. Richmond, etc., R. Co.*, 105 Fed. Rep. 803, 45 C. C. A. 60 (construing Kentucky statute). The Kentucky statute does not give an attorney a lien in a contest for office before a legislative body. *Hallam v. Coulter*, 115 Ky. 313.

**Minnesota.** — *Weicher v. Cargill*, 86 Minn. 271.

**Missouri — No Lien Prior to Act of 1901.** — *Young v. Renshaw*, 102 Mo. App. 173.

**New York.** — *People v. Fitzpatrick*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 456; *Serwer v. Serwer*, 91 N. Y. App. Div. 538.

**Fund Must Come Within Terms.** — *Matter of Rowland*, 55 N. Y. App. Div. 66, 8 N. Y. Annot. Cas. 397.

**Lien Extends to Whole Judgment.** — *Barry v. Third Ave. R. Co.*, 87 N. Y. App. Div. 543.

**Attorney of Record.** — *The New York Statute* gives a lien only to the attorney who appears for a party. *Kennedy v. Carrick*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 38.



**452.** See note 1.

**453.** What Judgments Embraced. — See note 1.

The Assignee of a Judgment. — See note 2.

b. ON LAND BEING PARTITIONED. — See note 6.

**454.** Special Contract. — See note 4.

c. ON PAPERS, NOTES, BONDS, AND THE LIKE. — See note 5.

**455.** See note 2.

**456.** It Is of Common-law Origin. — See note 2.

Actual Possession or the Right of Possession Is Essential. — See note 3.

*Oregon.* — Hill's Ann. Laws, § 1044, gives a lien to an attorney for his compensation, upon money in the hands of the adverse party from the time of giving notice of the lien to such party. *Stoddard v. Lord*, 36 *Oregon* 412.

*No Lien in Texas by Statute.* — *Dutton v. Mason*, 21 *Tex. Civ. App.* 389.

*Washington.* — *Payette v. Willis*, 23 *Wash.* 299.  
*Canadian Statutes.* — See *Turiff v. McDonald*, 13 *Manitoba* 577.

**451. 2. United States.** — *Tuttle v. Claffin*, 86 *Fed. Rep.* 964.

*Indiana.* — *Peterson v. Struby*, 25 *Ind. App.* 19.  
*Kentucky.* — *Warren Deposit Bank v. Barclay*, (Ky. 1901) 60 *S. W. Rep.* 853; *Louisville, etc., R. Co. v. Procter*, (Ky. 1899) 51 *S. W. Rep.* 591.

*Michigan.* — *Heavenrich v. Alpena Circuit Judge*, 111 *Mich.* 163.

*Nebraska.* — *Finney v. Gallop*, (Neb. 1902) 89 *N. W. Rep.* 276.

*New Jersey.* — *Delaney v. Husband*, 64 *N. J. L.* 275; *Pride v. Smalley*, 66 *N. J. L.* 578.

*New York.* — *Anderson v. Brackeleer*, (Supm. Ct. Spec. T.) 28 *Civ. Pro.* (N. Y.) 308, citing 3 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 447-473; *Matter of Regan*, 167 *N. Y.* 338, reversing 58 *N. Y. App. Div.* 1.

*Ohio.* — *Hinman v. Rogers*, 4 *Ohio Dec.* (Reprint) 303, 1 *Cleve. L. Rep.* 267.

*Washington.* — *Niagara F. Ins. Co. v. Hart*, 13 *Wash.* 651.

*Wisconsin.* — *Stanley v. Bouck*, 107 *Wis.* 225.

**Charging Lien.** — *Parker v. Parker*, 71 *Vt.* 387.

**Independent of Statute.** — *Matter of Lazelle*, (Surrogate Ct.) 16 *Misc. (N. Y.)* 515.

**Judgment Must Be Recovered by Him.** — *Allden v. White*, 32 *Ind. App.* 393.

**Lien of Associate Counsel.** — *People v. Pack*, 115 *Mich.* 669.

**452. 1. Attorney Regarded as Equitable Assignee.** — *Davis v. Ferrin*, 97 *Me.* 146; *Coombe v. Knox*, 28 *Mont.* 202; *Finney v. Gallop*, (Neb. 1902) 89 *N. W. Rep.* 276; *Stoddard v. Lord*, 36 *Oregon* 412; *Loofbourrow v. Hicks*, 24 *Utah* 49. But see *Bruce v. Anderson*, 176 *Mass.* 161.

**Contra.** — *Cameron v. Boeger*, 200 *Ill.* 84, 93 *Am. St. Rep.* 165.

**Lien Subject to Equity.** — An attorney's lien is so far subject to the equities arising out of and existing between the parties that a judgment on appeal for costs against the plaintiff may be set off *pro tanto* against a similar judgment in the same action in the plaintiff's favor, without regard to the attorney's lien. *Lindsay v. Pettigrew*, 8 *S. Dak.* 244.

**Agreement for Contingent Fee.** — *Deering v. Schreyer*, 58 *N. Y. App. Div.* 322.

**Priority of Lien.** — *Montgomery v. Gaar*, (Ky. 1896) 37 *S. W. Rep.* 580.

**453. 1. Hazeltine v. Keenan**, 54 *W. Va.* 600, 102 *Am. St. Rep.* 953.

In *Kentucky*, where the attorney is given by statute a lien on the "money due," he is entitled to a lien for his actual services rendered, upon giving proper notice, if he was duly employed, although the suit was subsequently dismissed, and the recovery was due to another action by different attorneys. *Gibson v. Chicago, etc., R. Co.*, 122 *Iowa* 565.

**2. Lien Exists Against Assignee of Judgment.** — *Central Trust Co. v. Richmond, etc., R. Co.*, (C. C. A.) 105 *Fed. Rep.* 803; *Peterson v. Struby*, 25 *Ind. App.* 24, citing 3 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 453; *Hinman v. Rogers*, 4 *Ohio Dec.* (Reprint) 303, 1 *Cleve. L. Rep.* 267.

**Lien by Agreement — Prior to Judgment After Agreement.** — *Palmer v. Palmer*, (Supm. Ct. Spec. T.) 24 *Misc. (N. Y.)* 217.

**6. Partition Proceedings.** — See *Cooper v. Cooper*, 51 *N. Y. App. Div.* 595.

**454. 4. See Boyle v. Boyle**, 116 *Fed. Rep.* 764.

**5. Lien on Notes of Client.** — *Cones v. Brooks*, 60 *Neb.* 698; *Hazeltine v. Keenan*, 54 *W. Va.* 607, 102 *Am. St. Rep.* 953, citing 3 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 454.

**455. 2. Contracts, Receipts, Deeds, and the Like.** — *In re Ward*, (1896) 2 *Ch.* 31; *Davis v. Davis*, 90 *Fed. Rep.* 791; *Merchants Nat. Bank v. Armstrong*, 107 *Ga.* 479; *Dinsmoor v. Bressler*, 56 *Ill. App.* 207; *Delaney v. Husband*, 64 *N. J. L.* 275; *Hinman v. Devlin*, 40 *N. Y. App. Div.* 234; *Quakertown, etc., R. Co. v. Guarantor's Liability Indemnity Co.*, 206 *Pa. St.* 350.

**Will.** — Although an attorney claims a lien upon a will in his possession for professional services rendered the testator, he must produce it for probate upon citation at the instance of the executrix. *Matter of Bracher*, 60 *N. J. Eq.* 350. See *Bracher v. Olds*, 60 *N. J. Eq.* 449.

**Life-insurance Policy.** — *Matter of Sweeney*, 86 *N. Y. App. Div.* 547.

**By Statute in Minnesota.** — *Weicher v. Car-gill*, 86 *Minn.* 271.

**South Dakota Statute — Possession in Course of Professional Employment Necessary.** — *Winans v. Grable*, (S. Dak. 1904) 99 *N. W. Rep.* 1110.

**456. 2. Of Common-law Origin.** — *Cones v. Brooks*, 60 *Neb.* 698.

**3. Possession Requisite to Existence of Lien.** — *Gottstein v. Harrington*, 25 *Wash.* 512, citing 3 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 456; *Hazeltine v. Keenan*, 54 *W. Va.* 600, 102 *Am. St. Rep.* 953.

**Possession as Agent or Messenger Insufficient.** — *Bracher v. Olds*, 60 *N. J. Eq.* 449.

**456.** This Particular Lien Is Personal to the Attorney. — See note 4.

The Lien Is a Mere Right to Retain the Papers. — See note 5.

d. IN DIVORCE CASES — ALIMONY. — See note 7.

e. ON MONEY OR A FUND. — See note 8.

**457.** This Lien Is Extended by Statute. — See note 1.

Funds Must Be in Hands of Attorney or of the Adverse Party. — See note 2.

**458.** See notes 1, 2.

**456. 4. Lien Does Not Pass to Assignee.** — *Gottstein v. Harrington*, 25 Wash. 512, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 456.

**5.** *Foss v. Cobler*, 105 Iowa 728; *Gottstein v. Harrington*, 25 Wash. 512, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 456.

**Rights of Third Persons.** — As between the solicitor and third parties, he has no right to refuse to produce documents, upon which he claims a lien, although he can do so as between himself and his client. *In re Hawkes*, (1898) 2 Ch. 1.

**7. In Divorce Suits — Lien on Alimony.** — See *Canney v. Canney*, 131 Mich. 363, 9 Detroit Leg. N. 356. See *Payne v. Payne*, 106 Tenn. 467.

"It is settled by authority that the sums awarded as alimony cannot be appropriated by the attorney in payment of legal services or disbursements connected therewith." *Matter of Bolles*, 78 N. Y. App. Div. 180.

**The Retention of a Fund in Court as Security** against a possible claim upon it, which might thereafter arise, in no way affects the husband's present ownership, and the wife's attorney is entitled to no lien thereon. *Mooney v. Mooney*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 707.

**8. Funds of Client** — *United States*. — *Tuttle v. Claffin*, 88 Fed. Rep. 122, 59 U. S. App. 602. *Alabama*. — *German v. Browne*, 137 Ala. 429. *Minnesota*. — *Washington County v. Clapp*, 83 Minn. 512.

*Mississippi*. — *Halsell v. Turner*, (Miss. 1904) 36 So. Rep. 531.

*Nebraska*. — *Cones v. Brooks*, 60 Neb. 698.

*New Jersey*. — *Sparks v. McDonald*, (N. J. 1898) 41 Atl. Rep. 369. See *Delaney v. Husband*, 64 N. J. L. 275.

*New York*. — *Cooper v. Cooper*, 51 N. Y. App. Div. 595; *Arkenburgh v. Little*, 49 N. Y. App. Div. 636, 64 N. Y. Supp. 742; *Anderson v. De Brackeleer*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 343, 28 Civ. Pro. (N. Y.) 306. See *Matter of Rowland*, 166 N. Y. 641, affirming 55 N. Y. App. Div. 66.

*Pennsylvania*. — *Quakertown, etc., R. Co. v. Guarantors' Liability Indemnity Co.*, 206 Pa. St. 350; *Com. v. Terry*, 11 Pa. Super. Ct. 547; *Martin v. Throckmorton*, 15 Pa. Super. Ct. 632. See also *The Paris*, (1896) P. 77; *Kersey v. O'Day*, 173 Mo. 560.

**Contra.** — *Dinsmoor v. Bressler*, 56 Ill. App. 207; *Cameron v. Boeger*, 200 Ill. 84, 93 Am. St. Rep. 165.

**Only Extends to Suit Involved.** — *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81.

**Rule Inapplicable to Funds of State.** — *Hendrick v. Posey*, 104 Ky. 8.

**Collection from Defaulting State Officer — No Lien** — *Tennessee Statute*. — *State v. Spurgeon*, 99 Tenn. 699.

**Sum Erroneously Allowed by Court.** — *Cooper v. Cooper*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 595.

**Excessive Charges Not Protected.** — *Matter of Raby*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 240.

**Attorney for Minor.** — *American Lead Pencil Co. v. Davis*, (Tenn. 1902) 67 S. W. Rep. 864.

**Order of Reference to Ascertain Value of Services.** — *Matter of Ernst*, 54 N. Y. App. Div. 363.

**By Statute in Alaska.** — *Nodine v. Hannum*, 1 Alaska 302.

**By Statute in Minnesota.** — *Weicher v. Car-gill*, 86 Minn. 271.

**Extent of Lien.** — An attorney's charging lien for his fee is confined to the fund recovered by him as attorney. *Hazeltine v. Keenan*, 50 W. Va. 600, 102 Am. St. Rep. 953.

**Liability to Account.** — Although an attorney may have a lien upon money in his hands, he is not thereby freed from liability to account therefor to his client. *McCracken v. Harned*, 59 N. J. Eq. 190.

**Retention of Funds from Administratrix — Debt of Deceased.** — It is irregular for an attorney to withhold from an administratrix money collected by him for the estate, because the deceased, in his lifetime, had become indebted to him. *In re Thresher*, 29 Mont. 111.

**457. 1. General Balance Due Attorney.** — *Noftzger v. Moffett*, 63 Kan. 354; *Krone v. Klotz*, 3 N. Y. App. Div. 587.

**2.** *Halsell v. Turner*, (Miss. 1904) 36 So. Rep. 531; *Cones v. Brooks*, 60 Neb. 698; *Weller v. Jersey City, etc., R. Co.*, (N. J. 1904) 57 Atl. Rep. 730; *Aber's Petition*, 18 Pa. Super. Ct. 110; *Seybert v. Salem Tp.*, 22 Pa. Super. Ct. 459; *Schmertz v. Hammond*, 51 W. Va. 408.

**Fund in Hands of Third Person — No Lien under Nebraska Statute.** — *Phillips v. Hogue*, 63 Neb. 192.

**458. 1. In Hands of Adverse Party.** — *Gibson v. Chicago, etc., R. Co.*, 122 Iowa 565; *Ward v. Sherbondy*, 96 Iowa 477; *Noftzger v. Moffett*, 63 Kan. 354. See *Connell v. Brumback*, 10 Ohio Cir. Dec. 149, 18 Ohio Cir. Ct. 502.

**No Lien in Common-law Action.** — *Quakertown, etc., R. Co. v. Guarantor's Liability Indemnity Co.*, 206 Pa. St. 350.

**Operation as Equitable Assignment Pro Tanto** — *Stoddard v. Lord*, 36 Oregon 412.

**By Statute in Minnesota.** — *Weicher v. Car-gill*, 86 Minn. 271.

The section of the statute which gives a lien upon money in the hands of the adverse party implies that the cause of action shall ripen into, and become vested in, a judgment. *Anderson v. Itasca Lumber Co.*, 86 Minn. 480.

**2.** *Aber's Petition*, 18 Pa. Super. Ct. 110; *Seybert v. Salem Tp.*, 22 Pa. Super. Ct. 459; *New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 89 Am. St. Rep. 880.

**458.** Money in Hands of Sheriff. — See note 4.

*f.* ON A PARTICULAR FUND IN EQUITY. — See note 5.

**459.** Services Must Have Operated to Secure the Fund. — See notes 2, 3.  
Where Client Is Executor or Administrator. — See note 4.

**460.** See note 1.

Where Fund Exhausted by Prior Claims. — See note 3.

Compensation Out of Trust Estate. — See note 4.

**461.** *g.* ON LAND. — See note 2.

**458.** 4. Money in Hands of Sheriff. — Barry *v.* Third Ave. R. Co., 87 N. Y. App. Div. 543.

5. England. — *In re* Graydon, (1896) 1 Q. B. 417; *In re* Wright, (1901) 1 Ch. 317; *In re* Born, (1900) 2 Ch. 433, 69 L. J. Ch. 669.

Canada. — *Bell v. Wright*, 24 Can. Sup. Ct. 656. See *Turner v. Drew*, 17 Ont. Pr. 475.

United States. — *In re* Rude, 101 Fed. Rep. 806, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 452; *Tuttle v. Clafin*, 86 Fed. Rep. 964; *U. S. v. Boyd*, 79 Fed. Rep. 858. See *Central Trust Co. v. Ingersoll*, (C. C. A.) 87 Fed. Rep. 427.

District of Columbia. — *Hutchinson v. Worthington*, 7 App. Cas. (D. C.) 548.

Georgia. — *Merchants' Nat. Bank v. Armstrong*, 107 Ga. 486, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 458.

Missouri. — *Young v. Renshaw*, 102 Mo. App. 173.

Ohio. — *Kirk v. Breed*, 4 Ohio Dec. 403; *Byrnes v. Cincinnati*, 7 Ohio Dec. 430, 5 Ohio N. P. 426.

Tennessee. — *Campbell v. Provident Sav., etc., Soc.*, (Tenn. Ch. 1900) 61 S. W. Rep. 1090. See *New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 80 Am. St. Rep. 880.

Virginia. — *Fitzgerald v. Irby*, 99 Va. 81, 3 Va. Sup. Ct. 1.

West Virginia. — *Weigand v. Alliance Supply Co.*, 44 W. Va. 161, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 458.

"There is no warrant for the proposition that at law an attorney's claim for services, for a sum not judicially ascertained nor assented to by other claimants, is a lien upon the fund attached as against such claimants."

\* \* \* However desirable it may be to allow claims of counsel for services out of funds which those services secured, it cannot be done, in the absence of legislation permitting it, to the prejudice of other creditors who have liens upon the moneys." *Patrick v. Smith*, 2 Pa. Super. Ct. 113.

Agreement Not to Compensate Attorney. — See *Oliver v. South Carolina Interstate, etc., Exposition Co.*, 68 S. Car. 568.

Securities in Hands of Reorganization Committee — Priority of Liens. — *Needles v. Smith*, (C. C. A.) 87 Fed. Rep. 316.

Contract for Contingent Fee. — *Kennedy v. Steele*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 105.

Money Impounded as Security — No Lien. — *Mooney v. Mooney*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 707.

No Lien in Common-law Action. — *Quakertown, etc., R. Co. v. Guarantor's Liability Indemnity, etc., Co.*, 206 Pa. St. 350.

Insolvent Estate — Attorneys of Creditors Have

No Lien. — *Rives v. Patty*, 74 Miss. 381, 60 Am. St. Rep. 510.

Missouri — No Lien. — *Kersey v. O'Day*, 173 Mo. 560.

An Attorney for an Insolvent Debtor, employed to resist the claims of creditors, has no lien on the fund in court for his compensation, nor is he entitled to be paid therefrom. *Ford v. Gilbert*, 44 Oregon 259.

Active and Passive Lien. — Where an attorney has rendered services in court, and thereby is entitled to a fee, the court will protect him in the lien which he has on any funds coming into court; but where the services are rendered out of court the attorney has only what might be termed a passive lien, and not an active one, and the court cannot interfere to enforce a lien. *Wood v. Biddle, etc., Co.*, 8 Ohio Dec. 707, 7 Ohio N. P. 225.

**459.** 2. Attorney's Services Must Have Produced or Preserved Fund. — *McLean v. Lerch*, 105 Tenn. 693; *Raley v. Hancock*, (Tex. Civ. App. 1903) 77 S. W. Rep. 658; *Schmertz v. Hammond*, 51 W. Va. 414, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 459; *Hazeltine v. Keenan*, 54 W. Va. 600, 102 Am. St. Rep. 953.

Removal from Another Jurisdiction Not a Collection. — *Manson v. Stacker*, (Tenn. Ch. 1896) 36 S. W. Rep. 188.

3. No Lien Where Fund Never Paid in Court, and No Actual or Constructive Possession. — *Anderson v. De Braekeleer*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 343, 28 Civ. Pro. (N. Y.) 306.

4. After Executor or Administrator Appointed. — *Foss v. Cobler*, 105 Iowa 733, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 459; *Arkenburgh v. Arkenburgh*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 760, affirmed 176 N. Y. 551.

**460.** 1. *Arkenburgh v. Little*, 176 N. Y. 551, affirming (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 760.

3. Client Must Share in Fund. — *Sloan v. Smith*, (Conn. 1904) 58 Atl. Rep. 712; *Mooney v. Mooney*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 707; *Adee v. Adee*, 55 N. Y. App. Div. 63; *Schmertz v. Hammond*, 51 W. Va. 408. See *Weiss v. Gullett*, 18 Colo. App. 122; *Joseph v. Lapp*, (Ky. 1904) 78 S. W. Rep. 1119.

Bankrupt Fund — Solicitor of Trustee. — *In re Humphreys*, (1898) 1 Q. B. 520.

4. Compensation Out of Trust Estate. — *Abend v. Endowment Fund Commission, etc.*, 174 Ill. 96.

**461.** 2. Rule as to Real Estate. — *McIntosh v. Bach*, 110 Ky. 701; *West v. Bacon*, 13 N. Y. App. Div. 371, affirmed 164 N. Y. 425; *McGillis v. McGillis*, 154 N. Y. 532; *Hill v. Hill*, (Tenn. Ch. 1901) 62 S. W. Rep. 209; *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763. See *Loofbourow v. Hicks*, 24 Utah 49.

**462.** *h.* ON CAUSE OF ACTION. — See note 1.

**463.** 5. Waiver of Lien — Release — Assignment — Laches — Withdrawal from Case. — See notes 1, 2, 3, 4.

**464.** See note 1.

Accepting Client's Note. — See note 2.

But the Acceptance of Any Other Security for His Compensation. — See note 4.

6. Enforcement of Lien — What Law Governs. — See note 6.

No Lien at Common Law — Iowa Rule. — Keehn *v.* Keehn, 115 Iowa 467.

Lien by Contract — Binding on Purchaser with Notice. — Kilbourne *v.* Wiley, 124 Mich. 370.

No Lien for Partitioning Land. — Gladney *v.* Rush, 68 Ark. 80.

Arkansas Statute. — Under § 4225, Sand. & H. Dig., giving a lien upon "the recovery of real estate," an allotment of land in partition is not a recovery. Gibson *v.* Buckner, 65 Ark. 84.

Georgia Statute. — Lovett *v.* Moore, 98 Ga. 158.

This statute applies to the successful defense of an action to recover land, and the grantee pending litigation takes subject to the attorney's lien. Lovett *v.* Moore, 98 Ga. 158.

No Lien for Resisting Recovery — Kentucky Statute. — Thompson *v.* Thompson, 65 S. W. Rep. 457, 23 Ky. L. Rep. 1535.

**462.** 1. Lien upon Cause of Action. — Smelker *v.* Chicago, etc., R. Co., 106 Wis. 135; Stanley *v.* Bouck, 107 Wis. 225.

No Lien at Common Law. — Sherry *v.* Oceanic Steam Nav. Co., 72 Fed. Rep. 565; Fenwick *v.* Mitchell, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 617; Sandberg *v.* Victor Gold, etc., Min. Co., 18 Utah 66.

No Lien Before Judgment. — Sandberg *v.* Victor Gold, etc., Min. Co., 18 Utah 66.

Statute Creating Lien Constitutional. — Illinois Cent. R. Co. *v.* Wells, 104 Tenn. 706.

The Georgia Statute gives a lien upon suits, and it does not attach to the cause of action until the institution of the suit. Brown *v.* Georgia, etc., R. Co., 101 Ga. 80.

In Louisiana attorneys have no lien for their fees prior to judgment. Smith *v.* Vicksburg, etc., R. Co., 112 La. 985.

Missouri Statute. — Young *v.* Renshaw, 102 Mo. App. 173.

New York Statute, § 66, Code Civ. Pro. — Lien on Cause of Action. — Morehouse *v.* Brooklyn Heights R. Co., (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 414; McKay *v.* Morris, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 571; Matter of Regan, (Surrogate Ct.) 29 Misc. (N. Y.) 527, 7 N. Y. Annot. Cas. 165.

"The only change in the law effected by this section [66] is to give attorneys liens upon causes of action before they are perfected into judgments." Adams *v.* Niagara Cycle Fittings Co., (Supm. Ct. Spec. T.) 10 N. Y. Annot. Cas. 401.

Includes Unassignable Cause of Action for Tort. — Astrand *v.* Brooklyn Heights R. Co., (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 92, 28 Civ. Pro. (N. Y.) 113.

Lien Attaches to Whole Judgment — Costs and Damages. — Barry *v.* Third Ave. R. Co., 87 N. Y. App. Div. 543.

Municipal Court of New York. — Section 66 of the New York Code of Civ. Pro. is held not

to apply to the municipal court of New York city. People *v.* Fitzpatrick, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 456.

New York Statute — § 66, Code Civ. Pro., Amended by c. 61, Laws 1899 — Statute Strictly Construed. — Matter of Rowland, 166 N. Y. 641, affirming 55 N. Y. App. Div. 66.

Lien on Special Proceeding Adjusting Constable's Fees. — Perry *v.* Myer, (Supm. Ct. Spec. T.) 89 N. Y. Supp. 347.

**463.** 1. Waiver — By Taking Assignment to Himself. — Whitehead *v.* Jessup, 7 Colo. App. 460.

Agreement to Purchase Land Involved as Trustee. — Teller *v.* Hill, 18 Colo. App. 509.

Transcript of Judgment Sent Client for Collection. — Barnabee *v.* Holmes, 115 Iowa 581.

Order Directing Delivery of Securities and Bill for Services Expressing Desire Not to Impress Lien Held No Waiver. — Matter of King, 168 N. Y. 53.

Declaration of Trust in Favor of Client. — West *v.* Bacon, 164 N. Y. 425.

2. Assignment by Judgment Debtor No Waiver. — Hutchinson *v.* Worthington, 7 App. Cas. (D. C.) 548.

Attorney Taking Assignment of Judgment. — Whitehead *v.* Jessup, 7 Colo. App. 460.

3. The Bella, 91 Fed. Rep. 540; Nielson *v.* Albert Lea, 91 Minn. 388.

Judgment Proceeded on in Another State. — Barnabee *v.* Holmes, 115 Iowa 581.

4. Laches. — Winans *v.* Grable, (S. Dak. 1904) 99 N. W. Rep. 1110.

Settlement with Client. — Cooper *v.* Cooper, 51 N. Y. App. Div. 595.

**464.** 1. Withdrawal from Case. — Fargo *v.* Paul, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 568. See Farwell *v.* Colman, 35 Wash. 308.

By Refusal to Proceed with the case, or to permit another to represent the client, the attorney loses his lien. Halbert *v.* Gibbs, 16 N. Y. App. Div. 126. But see Payette *v.* Willis, 23 Wash. 299, holding that refusal to proceed with the case until compensation is made, where there was no contract as to the amount, will not deprive the attorney of a lien for the services rendered.

Consent to Substitution of Attorneys. — Cooper *v.* Cooper, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 595; Randel *v.* Vanderbilt, 75 N. Y. App. Div. 313.

2. Johnson *v.* Johnson R. Signal Co., 57 N. J. Eq. 79.

By Acceptance of Contract. — Matter of Cattus, 42 N. Y. App. Div. 134.

4. *In re* Norman, (1898) 1 Ch. 199.

Accepting Written Promise of Client. — Cantrell *v.* Ford, (Tenn. Ch. 1898) 46 S. W. Rep. 581.

6. Conflict of Laws. — See Matter of King 168 N. Y. 53.

**464.** Amount Must Be Ascertained. — See note 7.

"Retaining Lien" — Effect. — See note 9.

**465.** 7. How Affected by Settlement Between the Parties — *a.* BEFORE JUDGMENT. — See note 2.

Compromise Pending Appeal — Reinstatement. — See note 3.

**466.** Where, by Special Contract, Fee Payable Out of Proceeds of Suit. — See note 2.

By Summary Proceedings in Action Where Services Rendered. — *Weicher v. Cargill*, 86 Minn. 271.

Georgia — Foreclosure of Mortgage on Land. — *Ray v. Hixon*, 107 Ga. 768.

**464.** 7. Collection of Judgment by Attorney Restrained — Extent of Lien Fixed by Chancellor. — *O'Neal v. Spaulding*, 66 S. W. Rep. 11, 23 Ky. L. Rep. 1729.

**9.** Lien on Papers — How Enforced. — *Foss v. Cobler*, 105 Iowa 733, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464; *Cones v. Brooks*, 60 Neb. 700, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464; *Gottstein v. Harrington*, 25 Wash. 511, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464.

"An attorney's lien is simply the right to hold or retain in the attorney's possession the money or property of the client until his proper charges have been adjusted and paid." *Sweeley v. Sieman*, 123 Iowa 183.

**465.** 2. Parties May Compromise and Exclude Attorney's Lien — Georgia. — *Brown v. Georgia*, etc., R. Co., 101 Ga. 80; *Haygood v. Dannenberg Co.*, 102 Ga. 24.

Illinois. — *Cameron v. Boeger*, 200 Ill. 90, 93 Am. St. Rep. 165, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464.

Indiana. — *Koons v. Beach*, 147 Ind. 137.

Iowa. — *Barnabee v. Holmes*, 115 Iowa 581.

Louisiana. — *Russ v. Union Oil Co.*, 113 La. 196.

Minnesota. — *Anderson v. Itasca Lumber Co.*, 86 Minn. 480.

New York. — Publishers' Printing Co. v. Gillin Printing Co., (Supm. Ct. App. T.) 16 Misc. (N. Y.) 558.

North Carolina. — *Johnston v. Cutchin*, 133 N. Car. 119.

Tennessee. — *Carden v. Carden*, (Tenn. Ch. 1896) 37 S. W. Rep. 1022.

See also *Lareau v. Marineau*, 21 Quebec Super. Ct. 469. But see *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706.

The Law Favors and Encourages Settlements of Litigation, and settlements fairly made between the parties, even though the attorneys be not consulted or informed thereof, where not fraudulently entered into for the purpose of depriving the attorneys of their compensation, should be sustained. *Nielson v. Albert Lea*, 91 Minn. 388, 392.

Honest Compromise. — A compromise made in an honest and straightforward way for the sake of peace, and not with a view of depriving the solicitor of his costs, is binding and valid. *In re Margetson*, (1897) 2 Ch. 314.

Fraudulent Compromise Ineffective to Deprive Attorney of Lien. — *Hubble v. Dunlap*, 101 Ky. 419.

Attorney for Defendant. — "The idea that an attorney can acquire a lien of either a legal or equitable character upon the mere right of his client to defend against the claim or cause of

action of the plaintiff, precluding the parties from settling the litigation independently of him, regardless of their motives therefor, is without support in principle or authority." *Garvin v. Crowley*, 116 Wis. 496.

Under the Georgia Act the lien does not arise until there has been service of process or actual notice of the filing of the petition, and where a settlement is had when the defendant is ignorant that the petition has been filed, the plaintiff cannot recover fees due by him under a contract with his attorney. *Florida Cent., etc., R. Co. v. Ragan*, 104 Ga. 353.

By Statute in Kentucky, § 107. — *Wathen v. Russell*, (Ky. 1898) 47 S. W. Rep. 437.

Dismissal of Action. — In Kentucky, where by statute an attorney is given a lien on "money due" the client, the latter cannot defeat the lien of the attorney for services rendered under his contract, by dismissing the action, and employing another attorney. *Gibson v. Chicago, etc., R. Co.*, 122 Iowa 565.

In Louisiana it was held that where attorneys had rendered a valuable service to their client, the latter had no right to enter into a compromise of the proceeding without consulting them. *Smith v. Vicksburg, etc., R. Co.*, 112 La. 985.

Missouri Statute Protects Attorney. — *Young v. Renshaw*, 102 Mo. App. 173.

New York Statute — Lien Extends to Proceeds. — *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492.

New York Rule. — Where the client is financially responsible, and the attorney is in no danger of being defrauded of his fees and disbursements, the client may settle the case on the eve of trial, without the knowledge or consent of his attorney, and without arranging for his fee. The lien attaches to the fund procured by the settlement. *Witmark v. Perley*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 14.

The Statutory Lien in New York makes a settlement without notice to the attorney at the risk of the party so doing. *Peri v. New York Cent., etc., R. Co.*, 152 N. Y. 521.

3. Compromise Pending an Appeal — Contra. — *Wallace v. Chicago, etc., R. Co.*, 112 Iowa 565.

**466.** 2. Contingent Fee. — *Stilwell v. Armstrong*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 546; *Ft. Worth, etc., R. Co. v. Carlock*, (Tex. Civ. App. 1903) 75 S. W. Rep. 931; *Potter v. Ajax Min. Co.*, 19 Utah 421. See *Topeka Water-Supply Co. v. Root*, 56 Kan. 187; *Zaitz v. Metropolitan St. R. Co.*, 52 N. Y. App. Div. 626. But see *Johnston v. Cutchin*, 133 N. Car. 110.

Contra — Action for Personal Injuries — Tennessee Act Giving Lien. — *Tompkins v. Nashville, etc., R. Co.*, 110 Tenn. 157, 100 Am. St. Rep. 795.

Assignment of Part of Cause of Action. — *Gulf, etc., R. Co. v. Eldredge*, (Tex. Civ. App. 1904) 80 S. W. Rep. 556.

**466. b. AFTER JUDGMENT — General Rule Stated. —** See note 3.

**467.** See note 1.

**468. When Judgment Considered in Existence for Purposes of Lien. —** See note 2.

**c. ATTORNEY'S REMEDIES. —** See note 4.

**New York Rule. —** See note 5.

**Agreement for Payment Out of Compromise. —** *Koons v. Beach*, 147 Ind. 137.

**Burden and Amount of Proof Required of Attorney. —** *Lynch v. Munson*, (Tex. Civ. App. 1900) 59 S. W. Rep. 603.

**466. 3. Settlement or Compromise — After Judgment. —** *Flint v. Hubbard*, 16 Colo. App. 464; *Louisville, etc., R. Co. v. Proctor*, (Ky. 1899) 51 S. W. Rep. 591; *Heavenrich v. Alpena Circuit Judge*, 111 Mich. 163; *Anderson v. Itasca Lumber Co.*, 86 Minn. 480; *Jones v. Duff Grain Co.*, (Neb. 1903) 95 N. W. Rep. 1; *Vrooman v. Pickering*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 277, *affirmed* 42 N. Y. App. Div. 630.

**Not Affected by Assignment. —** *Leighton v. Serveson*, 8 S. Dak. 350.

**Gratuitous Assignment. —** *Peterson v. Struby*, 25 Ind. App. 19.

**Plaintiff Solvent — No Lien Against Judgment Debtor. —** *Gurley v. Gruenstein*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 268.

**Missouri Statute. —** *Young v. Renshaw*, 102 Mo. App. 173.

**467. 1. Defendant Satisfying Judgment with Notice of Lien. —** *Flint v. Hubbard*, 16 Colo. App. 464; *Peri v. New York Cent., etc., R. Co.*, 152 N. Y. 521.

**468. 2. When Judgment Begins to Exist. —** *Morrison v. Green*, 96 Ga. 754.

**4. Original Suit Continued. —** *Counsman v. Modern Woodmen of America*, (Neb. 1904) 98 N. W. Rep. 414, *affirming* (Neb. 1903) 96 N. W. Rep. 673; *Potter v. Ajax Min. Co.*, 19 Utah 421; *Potter v. Ajax Min. Co.*, 23 Utah 273; *Smelker v. Chicago, etc., R. Co.*, 106 Wis. 135.

**Recovery Dependent on Client's Right. —** *Atlanta R., etc., Co. v. Owens*, 119 Ga. 833.

**Intervening Petition. —** When a judgment to which an attorney's lien has attached has been compromised in fraud of the attorney's rights, the proper method of procedure is for the attorney to file an intervening petition, and have the amount and extent of his lien judicially determined, before any other steps are taken for its enforcement. *Jones v. Duff Grain Co.*, (Neb. 1903) 95 N. W. Rep. 1.

**Intervening Petition — Attorney Assignee of Part of cause of action. —** *Missouri, etc., R. Co. v. Bacon*, (Tex. Civ. App. 1904) 80 S. W. Rep. 572.

**Assignment of Part of Claim to Attorney. —** *Powell v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 78 S. W. Rep. 975.

**Tennessee Statute. —** Under § 1, c. 243, Acts 1899, which gives attorneys of record a lien upon the plaintiff's right of action from the filing of the suit, they cannot prosecute the suit to termination, when the plaintiff dismisses it without their consent. *Tompkins v. Nashville, etc., R. Co.*, 110 Tenn. 157, 100 Am. St. Rep. 795.

**Canadian Decisions — Judgment Maintained for Costs. —** *Soder v. Yorke*, 5 British Columbia 133. But see *Beaudry v. Lusher*, 13 Quebec Super. Ct. 294.

*Settlement in Good Faith — Solicitor Deprived of Costs — No Proceeding with Action. —* *Rideout v. McLeod*, 6 British Columbia 161.

*Reservation of Right to Proceed by Court. —* *Delaney v. Lionais*, 19 Quebec Super. Ct. 288.

**5. New York Code. —** *Peri v. New York Cent., etc., R. Co.*, 152 N. Y. 521; *Vrooman v. Pickering*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 277, *affirmed* 42 N. Y. App. Div. 630; *Bamberger v. Oshinsky*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 716; *Reeder v. Lockwood*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 531; *Schriever v. Brooklyn Heights R. Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 145, 30 Civ. Pro. (N. Y.) 67; *Herman v. Metropolitan St. R. Co.*, 121 Fed. Rep. 184, a case arising under the New York rule.

**Inapplicable to Special Proceeding. —** Matter of Opening Lexington Ave., 30 N. Y. App. Div. 602, *affirmed* 157 N. Y. 678.

**Section 66 Not Applicable to Municipal Courts of New York City. —** *People v. Fitzpatrick*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 456.

**Surrogate's Court — Probate Proceedings — Satisfaction of Decree Vacated — Prior to Amendment. —** Matter of Regan, 167 N. Y. 338.

**Code Civ. Pro., § 66, Amended by Laws 1899, c. 61, Applies to Proceedings in Surrogate's Court. —** Matter of Rowland, 55 N. Y. App. Div. 66, 8 N. Y. Annot. Cas. 397.

**Statute Not Applicable to Municipal Court of Buffalo Prior to Amendment of 1895. —** *Drago v. Smith*, 92 Hun (N. Y.) 536.

**Code Civ. Pro., § 66 — Interest in Estate Not Within Statute. —** *Adee v. Adee*, 55 N. Y. App. Div. 63.

**Lien of Defendant's Attorney Dependent in Claiming Affirmative Relief. —** *Saranac, etc., R. Co. v. Arnold*, 72 N. Y. App. Div. 620, *affirming* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 514.

**Equitable Action Against Mortgaged Property. —** *Skinner v. Busse*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 265, 11 N. Y. Annot. Cas. 156.

**Proceeds from Sale of Judgment by Assignee. —** Matter of Gates, 51 N. Y. App. Div. 350.

**Vacation of Satisfaction of Decree by Surrogate Disregarding Attorney's Lien. —** Matter of Regan, 167 N. Y. 338, *reversing* 58 N. Y. App. Div. 1.

**Statute Does Not Prevent Honest Settlement — Proceeds Followed. —** *Cohn v. Polstein*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 431; *Fenwick v. Mitchell*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 617.

"If the cause of action is settled by the plaintiff, the attorney is bound by the settlement, and his lien necessarily continues on to the amount agreed upon in settlement, and the defendant cannot defeat the lien by paying the money to the party." *Morehouse v. Brooklyn Heights R. Co.*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 414.

**Collusive Agreement to Discontinue — Protection of Attorney by Court. —** National Exhibition Co. v. Crane, 54 N. Y. App. Div. 175, 8 N. Y. Annot. Cas. 231.

**469. Continuing Action in Name of Client.** — See note 1.

"A collusive settlement, made to defraud an attorney, will be set aside in favor of the attorney where that is necessary to enable him to foreclose his lien; an honest settlement will not be interfered with." *Gurley v. Gruenstein*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 268.

**Lien Fraudulently Impaired.** — "It is well settled that under section 66 of the Code the lien attaching to the cause of action and to the judgment in the attorney's favor cannot be impaired or destroyed by collusion or fraud, and in cases where this is made to appear, the court has undoubted power, and will exercise it to set aside a judgment, if such has been procured in the action, to the end that an attorney may proceed and enforce the lien." *Bollar v. Schoenwirt*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 224.

**The Lien of the Defendant's Attorney** is dependent upon his answer containing a counterclaim, and it is upon that counterclaim that he is given a lien. *Fromme v. Union Surety, etc., Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 105.

**Statute Not Applicable to Opposite Party.** — The summary method for the court on petition to fix the amount and enforce the lien provided by § 66, Code Civ. Pro., is between the attorney and his client, and has no reference to the opposite party to the action. *Zimmer v. Metropolitan St. R. Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 262.

**Lien Is Security.** — Where a client is solvent the lien only operates as a security, and the client may collect the claim without interference, there being a dispute as to the value of the services. *Corbit v. Watson*, 88 N. Y. App. Div. 467.

**469. 1. Continuance of Suit in Name of Client.** — *Herman v. Metropolitan St. R. Co.*, 121 Fed. Rep. 184; *Publishers' Printing Co. v. Gillin Printing Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 558; *O'Brien v. Metropolitan St. R. Co.*, 27 N. Y. App. Div. 1, 27 Civ. Pro. (N. Y.) 152; *Pilkington v. Brooklyn Heights R. Co.*, 49 N. Y. App. Div. 22, 30 Civ. Pro. (N. Y.) 276.

"The parties had the right to settle their cases; and it follows from the right of the parties to settle an action that neither nor both of the attorneys can keep it going and try it in spite of the parties. Not even the plaintiff can do that to enforce his lien on the cause of action; his lien is subordinate to the right of the parties to settle, and it is necessarily gone when the action is settled." *Pomeranz v. Marcus*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 442, *appeal dismissed* 86 N. Y. App. Div. 321.

**Contra.** — *Burpee v. Townsend*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 681; *Schriever v. Brooklyn Heights R. Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 146.

**New York Statute Construed.** — The effect of the statute, § 66, Code Civ. Pro., is to continue the lien to the fund paid in settlement, and where such settlement was *bona fide*, no action could be continued by the attorney to judgment. *Dolliver v. American Swan Boat Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 264; *Burpee v. Townsend*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 681; *Schriever v. Brooklyn Heights R. Co.*,

(Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 145, *denying rehearing* 30 Civ. Pro. (N. Y.) 67.

**Rights of Attorney Must Be Prejudiced.** — The lien will be enforced whenever it is necessary to protect the attorney's legal claims, but a settlement is not affected by the statute unless it operates to the prejudice of the attorney's claim. Thus where there is no claim of collusion, and the client is able to pay, the enforcement of the lien is not necessary. *Young v. Howell*, 64 N. Y. App. Div. 246.

**Lien for Protection of Attorney.** — "The lien which the law gives the attorney is simply for his protection, and when the courts allow an action to be prosecuted for the purpose of the attorney securing his costs, it is because the client is irresponsible, and there is no other manner in which the attorney can be protected in the lien which he had." *McKay v. Morris*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 571.

**Code Civ. Pro., § 66, Unaffected by Amendment of 1899.** — *Rochfort v. Metropolitan St. R. Co.*, 50 N. Y. App. Div. 261, 30 Civ. Pro. (N. Y.) 285.

**Statute Should Have Liberal Construction.** — *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, *reversing* 63 N. Y. App. Div. 356.

**Rule Not Followed in Federal Court.** — *Sherry v. Oceanic Steam Nav. Co.*, 72 Fed. Rep. 565.

**Fraudulent Settlement.** — *Fenwick v. Mitchell*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 617.

**Settlement by Client — Enforcement of Lien — Satisfaction Set Aside.** — *Corbit v. Watson*, 88 N. Y. App. Div. 467.

"The lien of the attorney, whether on the cause of action or on the judgment, is subject to the absolute right of the client to settle, and the attorney cannot go on with the action after it is settled, unless the settlement be collusive and fraudulent." *Morehouse v. Brooklyn Heights R. Co.*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 414.

**Inherent Power of Court to Protect Attorneys Against Fraudulent Settlement.** — *Saranac, etc., R. Co. v. Arnold*, 72 N. Y. App. Div. 620, *affirming* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 514.

"Section 66 of the Code of Civil Procedure gives the attorney for the plaintiff a lien upon his client's cause of action, etc., but does not prevent the parties to the action from settling the same or the client from releasing a judgment in his favor; and \* \* \* if a release has the effect to defraud the attorney, the court may and should set it aside in order to protect the lien." *Rook v. Dickinson*, (County Ct.) 38 Misc. (N. Y.) 690, 11 N. Y. Annot. Cas. 454.

**Compromise Cannot Be Enforced by Summary Order.** — *Pilkington v. Brooklyn Heights R. Co.*, 49 N. Y. App. Div. 22, 30 Civ. Pro. (N. Y.) 276; *Schriever v. Brooklyn Heights R. Co.*, 49 N. Y. App. Div. 629.

**Amendment to § 66, Code Civ. Pro., by c. 61, Laws 1899 — Petition by Client or Attorney.** — *Matter of Rowland*, 55 N. Y. App. Div. 66, 8 N. Y. Annot. Cas. 397, *affirmed* 166 N. Y. 641; *Matter of King*, 168 N. Y. 53; *In re Thomasson*, 63 N. Y. App. Div. 408.

**470.** Leave of Court. — See note 1.

Georgia Rule. — See note 3.

**8. Notice of Lien — a. AS BETWEEN ATTORNEY AND JUDGMENT DEBTOR —** (1) *Necessity of Notice.* — See note 4.

**471.** Where Judgment Is Given for Costs Only. — See note 2.

(2) *Character of Notice Required — Actual Notice Unnecessary.* — See note 4.

Notice of Existence of Contract Between Attorney and Client Insufficient. — See note 5.

Notice in Writing — Statement of Amount Claimed. — See note 6.

**472.** Filing Lien. — See note 1.

**Petition — Applies Only as Between Attorney and Client.** — *Dumowith v. Marks*, (Supm. Ct. App. T.) 84 N. Y. Supp. 453.

**Remedy by Petition — Cumulative and Not Exclusive.** — *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492; *Matter of Pieris*, 82 N. Y. App. Div. 466, *affirmed* 176 N. Y. 566.

**Code Civ. Pro., § 66 — No Enforcement of Lien by Equitable Action.** — *Fromme v. Union Surety, etc., Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 105.

**Statute Not Applicable Where No Action Commenced.** — *Millis v. Pentelow*, 92 Hun (N. Y.) 284.

**No Lien upon Defense Not a Counterclaim.** — *White v. Sumner*, 16 N. Y. App. Div. 70.

**Express Contract Allowing Clients to Compromise — No Right to Proceed with Action.** — *Matter of Evans*, (Surrogate Ct.) 33 Misc. (N. Y.) 567.

**Agreement Allowing Compromise by Client — Attorney Cannot Object.** — *Matter of Evans*, (Surrogate Ct.) 34 Misc. (N. Y.) 37.

**Knowledge by Opposing Party of Lien — Attorney's Remedy Against Party.** — *Matter of Evans*, 58 N. Y. App. Div. 502, *rehearing denied* 65 N. Y. App. Div. 610.

**Application to Set Aside Settlement in Original Action and Continuance of Action.** — *Fischer-Hansen v. Brooklyn Heights R. Co.*, 63 N. Y. App. Div. 356.

**Order of Reference.** — *In re Thomasson*, 63 N. Y. App. Div. 408.

**470. 1. Leave of Court to Prosecute.** — *Compare Peri v. New York Cent., etc., R. Co.*, 152 N. Y. 521.

**3. Georgia Statute.** — *Atlanta R., etc., Co. v. Owens*, 119 Ga. 833; *Johnson v. McCurry*, 102 Ga. 471. See *Swift v. Register*, 97 Ga. 446.

**Contra.** — *Morrison v. Green*, 96 Ga. 754.

**4. Necessity for Notice — Colorado.** — *Colorado State Bank v. Davidson*, 7 Colo. App. 91; *Davidson v. La Plata County*, 26 Colo. 549; *Teller v. Hill*, 18 Colo. App. 509.

**Georgia.** — *Coleman v. Austin*, 99 Ga. 629.

**Iowa.** — *Ward v. Sherbondy*, 96 Iowa 477.

**Oregon.** — *Stoddard v. Lord*, 36 Oregon 412; *Day v. Larsen*, 30 Oregon 247.

**Tennessee.** — *Cantrell v. Ford*, (Tenn. Ch. 1898) 46 S. W. Rep. 581.

**West Virginia.** — *Bent v. Lipscomb*, 45 W. Va. 183, 72 Am. St. Rep. 815.

**Statute in Wisconsin.** — *Smelker v. Chicago, etc., R. Co.*, 106 Wis. 135; *Stanley v. Bouck*, 107 Wis. 225.

**By Statute in Minnesota.** — *Weicher v. Car-*

*gill*, 86 Minn. 271; *Nielsen v. Albert Lea*, 91 Minn. 388, 392.

**Missouri Statute.** — *Young v. Renshaw*, 102 Mo. App. 173.

**New York — Notice Unnecessary.** — *Vrooman v. Pickering*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 277, *affirmed* 42 N. Y. App. Div. 630; *Peri v. New York Cent., etc., R. Co.*, 152 N. Y. 521.

**New York Statute, § 66 Code Civ. Pro. — Attorney's Lien Prior to Defendant's Equities Regardless of Notice.** — *Barry v. Third Ave. R. Co.*, 87 N. Y. App. Div. 543.

**Notice Unnecessary as Between Attorney and Client.** — *Coleman v. Austin*, 99 Ga. 629.

**471. 2. Judgment Given for Costs Only.** — *Victor Gold, etc., Min. Co. v. National Bank*, 18 Utah 87, 72 Am. St. Rep. 767.

**4. Actual Notice Unnecessary.** — *Suwannee Turpentine Co. v. Baxter*, 109 Ga. 597.

**Written Notice Is Sufficient.** — *Noftzger v. Moffett*, 63 Kan. 354.

**Statute Prohibiting Defeat of Lien by Settlement Is Notice.** — *Schriever v. Brooklyn Heights R. Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 145.

**Lien by Statute — Notice Unnecessary.** — *Fenwick v. Mitchell*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 617; *Barry v. Third Ave. R. Co.*, 87 N. Y. App. Div. 543.

**Entry of Notice in Judgment Book — Opposite Judgment.** — *Stoddard v. Lord*, 36 Oregon 412.

**Entry Opposite Judgment on Docket.** — *Ward v. Sherbondy*, 96 Iowa 477.

**Indorsement of Notice in Summons No Notice.** — *Cobbey v. Dorland*, 50 Neb. 373.

**The Commencement of Proceedings**, of which the judgment debtor has notice, to enforce a lien, while a sufficient amount of the judgment remains unpaid to cover it, is sufficient notice of the lien to the judgment debtor. *Greek v. McDaniel*, (Neb. 1903) 94 N. W. Rep. 518.

**Signature.** — Where the notice given the other party is signed by the attorney as plaintiff's attorney instead of for himself, the defendant could not have misunderstood the object of the notice. *Gibson v. Chicago, etc., R. Co.*, 122 Iowa 565.

**5. Smelker v. Chicago, etc., R. Co.**, 106 Wis. 135.

**6. Notice in Writing.** — *Ward v. Sherbondy*, 96 Iowa 477.

**472. 1. Filing Lien.** — *Coleman v. Austin*, 99 Ga. 629; *Day v. Larsen*, 30 Oregon 247 (where *bona fide* settlement before filing notice defeated attorney's lien). See *Gillette v. Murphy*, 7 Okla. 91.

**Filing of Notice with County Clerk is suffi-**



**472.** (4) *To Whom Notice Should Be Given.* — See note 4.

*b.* AS BETWEEN ATTORNEY AND ASSIGNEES OF JUDGMENT. — See note 5.

**473.** *c.* AS BETWEEN ATTORNEY AND CREDITORS OF CLIENT. — See note 1.

**XV. LAW PARTNERSHIPS — Joint Contract.** — See note 3.

*Retainer of One, Retainer of All.* — See note 4.

*The Acts and Admissions.* — See note 5.

*Notice to One Member.* — See note 6.

*Power to Bind Firm by Negotiable Paper.* — See note 7.

*Compensation of Survivors — From Estate of Deceased Partner.* — See note 8.

**474.** *Where Contract Was for Services of Partner Since Deceased.* — See note 2.

cient to charge the judgment debtor with notice. *Davidson v. La Plata County*, 26 Colo. 549.

Where No Statute authorizes the filing of the notice with the clerk, such filing is no notice. *Colorado State Bank v. Davidson*, 7 Colo. App. 91.

**472. 4. Notice to Attorney.** — *Missouri, etc., R. Co. v. Bacon*, (Tex. Civ. App. 1904) 80 S. W. Rep. 572.

*Notice Given to Attorney of Record.* — *Noftzger v. Moffett*, 63 Kan. 354.

*Missouri Statute — Service on Defendant's Attorney Insufficient.* — *Young v. Renshaw*, 102 Mo. App. 173.

**5. As Between Attorney and Assignee of Judgment.** — *Colorado State Bank v. Davidson*, 7 Colo. App. 91; *Peterson v. Struby*, 25 Ind. App. 19; *Maloney v. Douglas County*, (Neb. 1902) 89 N. W. Rep. 248; *Bent v. Lipscomb*, 45 W. Va. 184, 72 Am. St. Rep. 815, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 472.

**473. 1. As Between Attorney and Creditors of Client.** — *Berneski v. Tourangeau*, 18 Ont. Pr. 263.

*Priority — Preparation and Defense of Deed of Trust on Goods.* — The attorney's lien is superior to the seller's rights in suing for a rescission of the contract for fraud. *Meyers v. Bloon*, 20 Tex. Civ. App. 554.

**3. Death of Member of Firm.** — *Wright v. Canadian Pac. R. Co.*, 19 Quebec Super. Ct. 105.

*Death of One Partner No Release.* — *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458.

*Retainer Prior to Partnership.* — *Ostrander v. Capitol Invest., etc., Assoc.*, 130 Mich. 312, 9 Detroit Leg. N. 34.

**4. Retainer of One, Retainer of All.** — *Woodmen of the World v. Rutledge*, 133 Cal. 640; *Ostrander v. Capitol Invest., etc., Assoc.*, 130

Mich. 312, 9 Detroit Leg. N. 34; *Glass v. Eveleigh*, 18 Quebec Super. Ct. 531. See *Dennis v. Seattle First Nat. Bank*, 33 Wash. 161.

*General Contract — Client Not Entitled to Demand Services of Particular Member.* — *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458.

*Addition of New Member — Authority Must Be Shown.* — *Landry v. Pacaud*, 19 Quebec Super. Ct. 171.

**5. Acts and Admissions.** — See *People v. Betts*, 26 Colo. 521.

*Must Be in Scope of Authority.* — *Mara v. Browne*, (1896) 1 Ch. 199.

*Contract for Services.* — *Knight v. Whitmore*, 125 Cal. 198.

*Agreement to Represent Gratuitously.* — *Stone v. Hart*, 66 S. W. Rep. 191, 23 Ky. L. Rep. 1777.

**A Settlement by One Partner** will not conclude the firm, if obviously unreasonable, nor if the consideration, other than money, moves primarily to the personal benefit of the settling partner. In either case the opposite party is chargeable with notice of want of authority, and is held to act subject to the actual consent or approval of the absent partners. *Remington v. Eastern R. Co.*, 109 Wis. 154.

**6. Notice.** — *Hirsh v. Fisher*, (Mich. 1904) 101 N. W. Rep. 48, 11 Detroit Leg. N. 483.

**7. Power to Bind Firm by Negotiable Paper.** — *Worster v. Forbush*, 171 Mass. 423.

**8. Lamb v. Wilson, (Neb. 1902) 92 N. W. Rep. 167.**

**474. 2. Rights of Estate of Deceased Partner.** — See *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458.

*Death of Particular Partner Terminates Contract* — *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458.

# ATTORNEY-GENERAL.

By H. GANNAWAY.

**476. I. DEFINITION AND HISTORY** — In the Several States of the Union. — See note 1.

**477. II. POWERS AND DUTIES** — **2. United States Attorney-General** — *a.* IN GENERAL. — See note 1.

**479. 3. State Attorney-General** — *a.* GENERALLY. — See note 3.

**480. General Statutory Authority.** — See note 1.

**481. b. RIGHT TO MAINTAIN ACTION** — (1) *Generally* — *Test.* — See note 1.

*When Injury Public as Well as Private.* — See note 2.

(2) *To Enjoin or Abate a Nuisance.* — See note 3.

*May Enjoin Erection of Purpresture.* — See note 4.

**482. (3) Against Usurper of Public Office.** — See note 1.

**476. 1.** *People v. Oakland Water Front Co.*, 118 Cal. 234; *People v. Kramer*, (Ct. Gen. Sess.) 33 Misc. (N. Y.) 209.

**477. 1. Duties and Powers** — *In General.* — See *U. S. v. Denison*, 80 Fed. Rep. 370, 49 U. S. App. 352; *U. S. v. Rosenthal*, 121 Fed. Rep. 862.

**479. 3. Common-law Powers.** — *Atty.-Gen. v. Williams*, 174 Mass. 476; *People v. Kramer*, (Ct. Gen. Sess.) 33 Misc. (N. Y.) 209.

**Common-law Powers as Affected by a Statute Conferring Express Authority.** — *State v. Seattle Gas, etc., Co.*, 28 Wash. 488.

**Substitution as to Successive Incumbents in Office.** — *Nance v. People*, 25 Colo. 252..

**480. 1. General Statutory Authority.** — For various statutory provisions see the following cases:

*California.* — *Toland v. Ventura County*, 135 Cal. 412.

*Colorado.* — *Nance v. People*, 25 Colo. 252.

*Georgia.* — *Ansley v. Hooper*, 101 Ga. 231.

*Indiana.* — *Crawford v. State*, 155 Ind. 692.

*Iowa.* — *State v. Grimmell*, 116 Iowa 596.

*Kansas.* — *State v. Crilly*, 69 Kan. 802.

*Montana.* — *State v. District Ct.*, 22 Mont. 25.

*New York.* — *People v. Nussbaum*, 55 N. Y. App. Div. 245, *reversing* (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 1; *People v. Manhattan Real Estate, etc., Co.*, 175 N. Y. 133, *reversing* 74 N. Y. App. Div. 535.

*North Carolina.* — *Atty.-Gen. v. Holly Shelter R. Co.*, 134 N. Car. 481.

*Ohio.* — *State v. Preble County*, 6 Ohio Dec. 268, 4 Ohio N. P. 177.

*Pennsylvania.* — *Cheetham v. McCormick*, 178 Pa. St. 186.

*South Dakota.* — *State v. Welbes*, 11 S. Dak. 86; *State v. Marshall County*, 14 S. Dak. 149.

*Texas.* — *Moore v. Bell*, 95 Tex. 151.

*Washington.* — *State v. Seattle Gas, etc., Co.*, 28 Wash. 488.

*Wisconsin.* — *Emery v. State*, 101 Wis. 627.

**Right to Engage in Private Practice.** — There

is no constitutional or statutory inhibition against the attorney-general's practicing law during his term of office. *Masten v. Indiana Car, etc., Co.*, 25 Ind. App. 175.

**481. 1. Right to Maintain Action** — **Criterion.** — *People v. Oakland Water-Front Co.*, 118 Cal. 234; *Crawford v. State*, 155 Ind. 692; *Sims v. Com.*, 74 S. W. Rep. 1097, 25 Ky. L. Rep. 282; *Atty.-Gen. v. Williams*, 174 Mass. 476; *People v. Murray Hill Bank*, 10 N. Y. App. Div. 328; *Com. v. State Treasurer*, 29 Pa. Co. Ct. 545, 13 Pa. Dist. 232, *affirmed* 209 Pa. St. 372, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480, 481; *State v. Marshall County*, 14 S. Dak. 149; *State v. Seattle Gas, etc., Co.*, 28 Wash. 488; *Emery v. State*, 101 Wis. 627.

**Private Wrongs.** — *People v. General Electric R. Co.*, 172 Ill. 129; *Atty.-Gen. v. Clark*, 167 Mass. 201.

**2. When Injury Public as Well as Private.** — *Com. v. State Treasurer*, 29 Pa. Co. Ct. 545, 13 Pa. Dist. 232, *affirmed* 209 Pa. St. 372, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 481; *State v. Leischer*, 117 Wis. 475.

**3. May Enjoin or Abate a Nuisance.** — *People v. Truckee Lumber Co.*, 116 Cal. 397, 58 Am. St. Rep. 183; *Revell v. People*, 177 Ill. 468, 69 Am. St. Rep. 257; *Atty.-Gen. v. Williams*, 174 Mass. 476.

**May Restrain Erection of Pier** — **Public Waters.** — *Revell v. People*, 177 Ill. 468, 69 Am. St. Rep. 257.

**4. May Enjoin Erection of Purpresture.** — *Revell v. People*, 177 Ill. 468, 69 Am. St. Rep. 257; *Atty.-Gen. v. Williams*, 174 Mass. 476.

**482. 1. Action Against Usurper of Public Office.** — *People v. Sutter St. R. Co.*, 117 Cal. 604; *State v. Seymour*, 69 N. J. L. 606.

The attorney-general may sue on the official bond of a public officer. *State v. Welbes*, 11 S. Dak. 86.

The attorney-general may maintain an action against a usurper, and when he refuses to act a property owner and taxpayer may bring the action. *State v. Leischer*, 117 Wis. 475.

**482.** (4) *For Protection of Public Trusts and Charities.* — See note 2.

(5) *To Restrain Unlawful Exercise of Power by Corporation* —

(a) **Municipal Corporations.** — See note 3.

**483.** (b) **Private Corporations.** — See note 1.

**484.** c. **MAY ENTER A NOLLE PROSEQUI.** — See note 1.

d. **NO POWER TO EMPLOY COUNSEL.** — See note 2.

**Contract Void.** — See note 3.

e. **COURTS WILL NOT CONTROL DISCRETION.** — See note 4.

**482. 2. Protection of Public Trusts and Charities.** — Atty.-Gen. v. Clark, 167 Mass. 201.

**3. May Restrain Unlawful Exercise of Power by a Municipal Corporation.** — State v. Leischer, 117 Wis. 475.

**483. 1. Private Corporations.** — People v. Sutter St. R. Co., 117 Cal. 604; State v. Debenture Guarantee, etc., Co., 51 La. Ann. 1874; People v. Manhattan Real Estate, etc., Co., 175 N. Y. 133; Atty.-Gen. v. Holly Shelter R. Co., 134 N. Car. 481; Cheetham v. McCormick, 178 Pa. St. 186; State v. Red River Turnpike Co., (Tenn. 1904) 79 S. W. Rep. 798; Moore v. Bell, 95 Tex. 151.

**Action to Declare Association Not a Corporation.** — State v. Debenture Guarantee, etc., Co., 51 La. Ann. 1874; Atty.-Gen. v. Holly Shelter R. Co., 134 N. Car. 481.

**An Action to Dissolve a corporation** may be brought by the attorney-general. Morenci Copper Co. v. Freer, 127 Fed. Rep. 199; People v. Murray Hill Bank, 10 N. Y. App. Div. 328; People v. Manhattan Real Estate, etc., Co., 74 N. Y. App. Div. 535.

**484. 1. May Enter a Nolle Prosequi.** — Rogers v. Hill, 22 R. I. 496; State v. Red River Turnpike Co., (Tenn. 1904) 79 S. W. Rep. 798.

**Cannot Dismiss an Information Filed for Forfeiture of Franchise.** — An information filed for forfeiture of franchises cannot be dismissed by the attorney-general without an order of the

court. People v. Sutter St. R. Co., 117 Cal. 604.

**2. Statutory Power to Employ Council.** — Garter v. U. S., 31 Ct. Cl. 344; Toland v. Ventura County, 135 Cal. 412; Rogers v. Bradley, 100 Ky. 344; Coulter v. Denny, 67 S. W. Rep. 65, 23 Ky. L. Rep. 1619; Rogers v. Bradley, 100 Ky. 344.

**Common-law Power to Appoint Deputy.** — People v. Kramer, (Ct. Gen. Sess.) 33 Misc. (N. Y.) 209.

**3. Contract for Services Void.** — Gibboney v. Chosen Freeholders, (C. C. A.) 122 Fed. Rep. 46.

**4. Courts Will Not Review Discretion.** — Matter of Atty.-Gen., (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 1; Rogers v. Hill, 22 R. I. 496; State v. Red River Turnpike Co., (Tenn. 1904) 79 S. W. Rep. 798.

**When Positive Duty Imposed.** — State v. Withers, 121 N. Car. 376; Cheetham v. McCormick, 178 Pa. St. 186.

**Action Against Private Corporation.** — People v. General Electric R. Co., 172 Ill. 129.

In *North Carolina*, by statute, the attorney-general has no power to bring an action to annul the act of incorporation or to sue to vacate the charter of a corporation, unless the legislature shall so direct in the former case, or leave is given by a justice of the Supreme Court in the latter. Atty.-Gen. v. Holly Shelter R. Co., 134 N. Car. 481.



**498. VI. THE AUCTION — 1. Catalogues or Particulars of Sale — a. GENERALLY — Contract of Sale.** — See note 7.

*b. DESCRIPTION OF PROPERTY — (1) In General.* — See note 8.

**499. (2) Misdescription.** — See note 1.

**501. 3. Retraction of Bids.** — See notes 1, 3.

Statute of Frauds. — See note 5.

**4. The Deposit — Definition.** — See note 6.

**502. Duty of Auctioneer as to Deposit.** — See notes 3, 5.

**503. 5. Completion of the Sale — Time of Completion.** — See note 5:

Property After Sale. — See note 6.

**6. Resale.** — See note 7.

**504. Liability of Former Purchaser.** — See note 2.

**VII. EFFECT OF FRAUD OR OTHER IMPROPER CONDUCT UPON THE SALE**

**— 1. Bidder Using Improper Influence.** — See note 3.

**2. Puffing — Definition.** — See note 6.

**505. United States Doctrine.** — See note 3.

St. Rep. 503. See *Swift v. Herkness*, 21 Pa. Super. Ct. 523.

**498. 7. Johnston v. Boyes, (1899) 2 Ch. 73, 68 L. J. Ch. 425; *Van Praagh v. Everidge*, (1903) 1 Ch. 434, 72 L. J. Ch. 260.**

**8. Hudson v. Fuller, (Tenn. Ch. 1895) 35 S. W. Rep. 575. And see *Matter of Hamilton*, 120 Cal. 421.**

**499. 1. Misdescription in Material Point.** — *Clay v. Kagelmacher*, 98 Ga. 149; *Korbel v. Skocpol*, (Neb. 1903) 96 N. W. Rep. 1022.

**501. 1. The Seller May Withdraw** the property from sale, even after bids have been received and cried; and this rule applies to sales by executors and administrators and to judicial sales, in the absence of any restriction in the order of sale. *Tillman v. Dunman*, 114 Ga. 406, 88 Am. St. Rep. 28.

**3. Tillman v. Dunman, 114 Ga. 406, 88 Am. St. Rep. 28, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 501.**

**5. Revocation in Cases under Statute of Frauds.** — *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741.

**6. Title Does Not Pass on Payment of Deposit.** — *Hand v. Matthews*, 208 Pa. St. 149.

**Check in Payment of Deposit.** — Where the terms of sale provided that the highest bidder should be the purchaser, and that he should immediately pay a deposit of ten per cent. of the price bid, the vendor is not obliged to accept the purchaser's check for the deposit. *Johnston v. Boyes*, (1899) 2 Ch. 73.

**502. 3. Disposition of Deposit.** — *McKiernan v. Valteau*, 23 R. I. 501.

**5. Fraud or Misrepresentation.** — *McKeag v. Piednor*, 74 Mo. App. 593.

**503. 5. Sirk v. Emery, 184 Mass. 22.**

"Where personal property is put up for sale at public auction, and knocked off to the highest bidder, the purchaser, upon complying with the terms of the sale, is entitled to have such property delivered to him, under the implied contract on the part of the vendor to make such delivery. It is a breach of such implied contract for the vendor to refuse to make such delivery. For such breach the purchaser may sue and recover whatever damages he may have sustained thereupon." *Gruell v. Clark*, 4 Penn. (Del.) 321. See also *Johnston v. Boyes*, (1899) 2 Ch. 73.

**6. The Vendor Must Deliver.** — The vendor's failure to deliver is a breach of contract on which the purchaser may rescind or support an action. *Gruell v. Clark*, 4 Penn. (Del.) 321.

**Purchaser Not Complying with Terms of Sale — Resale.** — *State v. Hoboken Second Nat. Bank*, 84 Md. 325.

**7. Lowry v. Haberlin, 8 Pa. Dist. 382; *McKiernan v. Valteau*, 23 R. I. 501.**

**504. 2. Liability of Purchaser at First Sale.** — *Lowry v. Haberlin*, 8 Pa. Dist. 382.

**3. Collusion Between Auctioneer and Purchaser.** — *Clay v. Kagelmacher*, 98 Ga. 149; *Flannery v. Jones*, 180 Pa. St. 338, 57 Am. St. Rep. 648.

**Discount.** — An allowance made by discount on the purchase price to induce the purchaser to buy is not earned where the purchase is made through a broker. *Nixon v. Zuricalday*, 12 N. Y. App. Div. 287.

**6. Puffer.** — *McMillan v. Harris*, 110 Ga. 72, 78 Am. St. Rep. 93, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504, 505; *Flannery v. Jones*, 180 Pa. St. 338, 57 Am. St. Rep. 648.

**Though the Price Is Not Increased by the puffer**, it is held that his employment vitiates the sale. *Rafferty v. Norris*, 12 Pa. Super. Ct. 450.

**505. 3. McMillan v. Harris, 110 Ga. 72, 78 Am. St. Rep. 93, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504, 505; *Bowman v. McClenahan*, 20 N. Y. App. Div. 346, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504; *Flannery v. Jones*, 180 Pa. St. 338, 57 Am. St. Rep. 648.**

**Right of Vendor to Prevent Sacrifice.** — "There is no doubt that it is competent for the owner of property who puts it up at auction to use some means to protect his interests and to see that his property is not sacrificed. It is conceded that he may do this either by fixing a price below which the property shall not be sold, and announcing that at the sale, or by publicly reserving to himself the right to make one or more bids if his interests shall require it." *Bowman v. McClenahan*, 20 N. Y. App. Div. 346.

**Puffing Not Sustainable as a Custom.** — Evidence is not admissible to show that puffing or fictitious bidding at auction sales is and has been customary, because a fraud cannot be

**506.** See note 1.

**3. Agreements Not to Bid — When Invalid.** — See note 3.

**507.** When Valid. — See note 1.

**508.** VIII. STATUTE OF FRAUDS — I. In General. — See notes 1, 2.

**509.** 2. Auctioneer Agent for Both Vendor and Vendee — When Agent of Vendee. — See note 3.

**510.** 3. What the Memorandum of Sale Must Contain. — See note 1.

**511.** 4. Memorandum Signed by Auctioneer's Clerk. — See notes 1, 2.

IX. COMPENSATION OF AUCTIONEER — 1. Commission. — See note 3.

**512.** When Amount Fixed by Statute. — See note 1.

Where there Is neither Agreement nor Statute. — See note 2.

**513.** AUDIT. — See note 3.

AUDITA QUERELA. — See note 4.

**514.** AUDITOR. — See notes 1, 3.

**516.** AUTHORITY — AUTHORIZE. — See note 5.

legalized by custom. *Flannery v. Jones*, 180 Pa. St. 338, 57 Am. St. Rep. 648.

**Puffer Employed by Person Interested in Proceeds of Sale.** — The rule that the employment of puffers by the owner of the property sold vitiates the sale, does not apply where the person interested in the proceeds of the sale employs a third person to bid for the purpose of enhancing the price. *McMillan v. Harris*, 110 Ga. 72, 78 Am. St. Rep. 93.

**506.** 1. Purchaser Must Be Prejudiced by Actual Collusion. — *Locke v. Willingham*, 99 Ga. 297.

**3. Agreements Not to Bid — Sales Invalid When Object Is to Chill the Bidding.** — *Ney v. Ladd*, (Tex. Civ. App. 1902) 68 S. W. Rep. 1014; *Barnes v. Morrison*, 97 Va. 372, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 506.

**Contract Void as Between Purchasers.** — A contract by a purchaser to convey a part of the land to another in consideration of his not bidding is invalid as against public policy. *Kine v. Turner*, 27 Oregon 356.

**Consideration of Note.** — A promissory note in consideration of not bidding at an auction sale is not valid except in the hands of one who got it without notice. *Atlas Nat. Bank v. Holm*, 71 Fed. Rep. 489, 34 U. S. App. 472.

**507.** 1. Legal Agreements Not to Bid. — *Barnes v. Morrison*, 97 Va. 372, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 507.

**508.** 1. Statute of Frauds — Sales by Order of Court. — *Chandler v. Morey*, 195 Ill. 596.

**2. Statute of 'Frauds — What Auction Sales Within.** — *Johnston v. Boyes*, (1899) 2 Ch. 73, 68 L. J. Ch. 425; *Van Praagh v. Everidge*, (1903) 1 Ch. 434, 72 L. J. Ch. 260; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427; *McKeag v. Piednor*, 74 Mo. App. 593.

**509.** 3. Auctioneer as Agent of Vendee. — *White v. Dahlquist Mfg. Co.*, 179 Mass. 427.

An auctioneer selling land is not the agent for the purchaser where the statute of frauds requires the authority of an agent to be in writing in order to bind his principal on the contract for the sale of land. *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741.

And where the purchaser refuses to sign the contract, the auctioneer has no authority to sign it as the purchaser's agent. *Van Praagh v. Everidge*, (1903) 1 Ch. 434, reversing (1902) 2 Ch. 266.

**Agent of Vendor as Auctioneer's Clerk cannot bind the vendee by a memorandum under the statute of frauds.** *Howell v. Shewell*, 96 Ga. 454, 51 Am. St. Rep. 148.

**A Trustee who sells under the trust deed, though he acts as auctioneer, is not the agent for the purchaser.** *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741.

**510.** 1. Contents of Memorandum of Sale. — *McKeag v. Piednor*, 74 Mo. App. 593; *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741; *Proctor v. Finley*, 119 N. Car. 536.

**Memorandum Signed After Revocation of Authority.** — An auctioneer cannot bind a vendor by a memorandum signed some time after the sale and after his authority is revoked with the vendee's knowledge. *Schmidt v. Quinzel*, 55 N. J. Eq. 792.

**511.** 1. Signing by Clerk. — *Howell v. Shewell*, 96 Ga. 454, 51 Am. St. Rep. 148.

**2. The Time When the Memorandum Must Be Signed.** — If the bidder retracts before the memorandum is signed, there is no authority to sign it. *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741.

**3. Compensation of Auctioneer.** — *Duffy v. Smith*, 132 N. Car. 38.

**512.** 1. *Barry v. American White Lead, etc.*, Works, 107 La. 236.

**Adjournment.** — The *New York* statutes do not provide for paying an auctioneer fees for an adjournment of a foreclosure sale. *Harrington v. Bayles*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 388.

**2. Smith v. Olcott, 19 App. Cas. (D. C.) 61.**

**513.** 3. *People v. Jefferson County*, 35 N. Y. App. Div. 242, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 513; *State v. Morris*, 67 S. Car. 167, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 513.

**Judicial Discretion.** — *State v. Morris*, 67 S. Car. 167, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 513, notes under this heading. See also *People v. Town Board*, 27 N. Y. App. Div. 478.

**4.** See *Fischer v. Johnson*, 74 Mo. App. 68.

**514.** 1. *Sawyer v. Mayhew*, 10 S. Dak. 20.

**3. Master Distinguished from Auditor.** — *Fenno v. Primrose*, (C. C. A.) 119 Fed. Rep. 801.

**516.** 5. "Power and Authority" Synonymous

- 517. AUTOMATIC.**— See note 1.  
 [AUTOPSY.— See note 1a.]  
**AVAILABLE.**— See note 2.  
**522. [AVERTING.**— See note 1a.]  
**523. AVULSION.**— See note 4.  
**524. [AWARE.**— See note a.]  
**BACK.**— See note 1.  
**525. BAD.**— See note 3.  
**527. BADGE OF FRAUD.**— See note 3.

with "Duty and Obligation."— *Magaha v. Hagerstown*, 95 Md. 62. See also *Angel v. Methodist Protestant Church*, 47 N. Y. App. Div. 462.

**Discretion.**— *Seeds v. Burk*, 181 Pa. St. 281.

**Authority—Legal Decision.**—"By an *authority* we mean a clear and definite decision upon a question actually before the court for decision. And of course it is well understood that nothing is decided in the ruling of a court except those matters which are actually before the court." *Grand Lodge, etc. v. Furman*, 6 Okla. 658.

**Authority and Appointment Distinguished.**— *Vaughn v. Kansas City Northwestern R. Co.*, 65 Kan. 685. See also the title POWERS.

**517. 1.** See *Cleveland Target Co. v. Empire Target Co.*, 97 Fed. Rep. 44.

**1a. Autopsy** is defined to be an examination of a dead body by dissection. *Sudduth v. Travelers' Ins. Co.*, 106 Fed. Rep. 823.

**2. Available Assets.**— The ordinary meaning of *available* is "usable," capable of being used to advantage; "and we suppose when the word qualifies assets, as here, it must mean property that can be sold or turned into cash with which to pay debts within a reasonable time." *Hamilton v. Menominee Falls Quarry Co.*, 106 Wis. 352. See also *Rice v. Milwaukee*, 100 Wis. 516.

**The Words "Available Coal,"** in a contract for the sale of coal land, are broad enough to cover coal under a creek and railroad which could to a large extent be mined out by leaving proper supports, but at a greatly enhanced cost. *Redstone Oil, etc., Co.'s Dissolution*, 207 Pa. St. 125.

**522. 1a. Averting Not Equivalent to Escaping** in an instruction as to self-defense in a murder trial. *Barnes v. Com.*, 110 Ky. 348.

And see *Utterback v. Com.*, (Ky. 1900) 59 S. W. Rep. 515.

**523. 4.** See *Chicago v. Ward*, 169 Ill. 392.

**524. a. Becoming Aware.**— Upon a policy of fidelity guaranty insurance providing that "the employer shall at once notify the company on his becoming *aware* of the said employee being engaged in speculation, etc.," the court, *per Fuller, C. J.*, construing the phrase "becoming *aware*," said: "It seems to us that the obvious meaning of 'becoming *aware*,' as used in this bond, is 'to be informed of,' or 'to be apprised of,' or 'to be put on one's guard in respect to,' and that no other meaning is equally admissible under the terms of the instrument. These are the definitions of the lexicographers, distinctly deducible from the derivation of the word *aware*, and that is the sense in which they are here employed. It is used in the same sense in the cashier's certificate on the renewals of the teller's bond. To be *aware* is not the same as to have knowledge. The bond itself distinguishes between the two phrases and uses them as not synonymous with each other. And, in view of the plain object of the clause, we cannot regard the words equivalent to 'becoming satisfied,' though perhaps they may be to 'having reason to believe.'" *Guarantee Co. of North America v. Mechanics' Sav. Bank, etc., Co.*, 183 U. S. 402.

**1. The "Back" in Human Beings** is the hinder part of the body extending from the neck to the end of the spine. *Ft. Worth, etc., R. Co. v. Rogers*, 21 Tex. Civ. App. 605.

**525. 3. Libel and Slander — Bad Woman.**— *Paladino v. Gustin*, 17 Ont. Pr. 553.

**527. 3.** See *Phelps, etc., Co. v. Samson*, 113 Iowa 150; *Royster v. Stallings*, 124 N. Car. 55.

# BAGGAGE.

By A. W. VARIAN.

**529. I. DEFINITION.** — See note 1.

**II. WHAT CONSTITUTES BAGGAGE** — 1. In General — General Criterion. — See note 2.

**530.** Articles of Personal Comfort and Convenience. — See note 1.  
Rule in Case of Immigrant. — See note 3.

**531.** Illustrations. — See note 1.

**533.** Property of Other Persons. — See note 1.

2. Drummers' Samples. — See note 3.

Acceptance by Carrier with Knowledge. — See note 4.

**534.** Custom. — See note 1.

**535.** 4. Money — Reasonable Expenses. — See note 3.

**536.** Money in Excess of Expenses, Etc. — See note 2.

Illustrations. — See note 3.

**537.** Articles Retained in Passenger's Possession. — See note 1.

5. Particular Articles. — See note 3.

**529. 1. Baggage Defined and Illustrated.** — The definition of Chief Justice Cockburn is quoted and approved in *Kansas City, etc., R. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111; *State v. Missouri Pac. R. Co.*, 71 Mo. App. 385.

The definitions in *Oakes v. Northern Pac. R. Co.*, 20 Oregon 392, and in *Story on Bailments*, § 499, are quoted with approval in *Illinois Cent. R. Co. v. Matthews*, 114 Ky. 973, 102 Am. St. Rep. 316; *Bullard v. Delaware, etc., R. Co.*, 21 Pa. Super. Ct. 583.

"Luggage." — *Choctaw, etc., R. Co. v. Zwirtz*, 13 Okla. 411.

2. *Kansas City, etc., R. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111; *Choctaw, etc., R. Co. v. Zwirtz*, 13 Okla. 411; *Yazoo, etc., R. Co. v. Baldwin*, (Tenn. 1904) 81 S. W. Rep. 599; *Missouri, etc., R. Co. v. Meek*, (Tex. Civ. App. 1903) 75 S. W. Rep. 317, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 529.

**530. 1. Articles of Personal Convenience.** — *Amory v. Wabash R. Co.*, 130 Mich. 404; *Runyan v. Central R. Co.*, 61 N. J. L. 537, 68 Am. St. Rep. 711; *Galveston, etc., R. Co. v. Fales*, (Tex. Civ. App. 1903) 77 S. W. Rep. 234.

The carrier cannot restrict the right of the passenger to carry baggage necessary for his comfort or convenience by calling it "wearing apparel." *Mexican Nat. R. Co. v. Ware*, (Tex. Civ. App. 1900) 60 S. W. Rep. 343.

It cannot be assumed as a matter of law that a heavy winter overcoat carried by a passenger when going on a short journey in a warm climate during the summer season comes within the definition of baggage. It is a question for the jury. *Missouri, etc., R. Co. v. Meek*, (Tex. Civ. App. 1903) 75 S. W. Rep. 317.

3. **Articles to Be Used at End of Journey.** — *Yazoo, etc., R. Co. v. Baldwin*, (Tenn. 1904) 81 S. W. Rep. 599, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 530.

**531. 1. Runyan v. Central R. Co.**, 61 N. J. L. 537, 68 Am. St. Rep. 711; *Yazoo, etc., R. Co. v. Baldwin*, (Tenn. 1904) 81 S. W. Rep. 599, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 531; *Missouri, etc., R. Co. v. Meek*, (Tex. Civ. App. 1903) 75 S. W. Rep. 317.

**533. 1. Property of Other Person Not Included.** — *Cattaraugus Cutlery Co. v. Buffalo, etc., R. Co.*, 24 N. Y. App. Div. 267, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 533; *Jacobs v. Central R. Co.*, 19 Pa. Super. Ct. 13; *Bullard v. Delaware, etc., R. Co.*, 21 Pa. Super. Ct. 583.

3. **Samples Carried by Traveling Salesmen.** — *Illinois Cent. R. Co. v. Matthews*, 114 Ky. 973, 102 Am. St. Rep. 316. But see *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287.

4. **Recovery Had in Some Cases — Ground of Liability.** — *Trimble v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 403.

**534. 1. Custom of Drummers to Carry Merchandise Unimportant.** — See *McKibbin v. Great Northern R. Co.*, 78 Minn. 232.

**535. 3. Money as Baggage.** — *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163, 56 Am. St. Rep. 616.

**536. 2. Amount Beyond Reasonable Expenses.** — *Williams v. Webb*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 513.

3. **Money with Which to Buy Stock of Merchandise.** — *Levins v. New York, etc., R. Co.*, 183 Mass. 175, 97 Am. St. Rep. 434.

**537. 1. Articles Not Delivered into Company's Keeping.** — Where the passenger retains the custody and possession of money which is not intended for use on the journey, the carrier assumes no liability whatsoever, and is not liable for a theft thereof even though committed by its own servant. *Levins v. New York, etc., R. Co.*, 183 Mass. 175, 97 Am. St. Rep. 434.

3. **Special Cases — What Has Been Held to Con-**



**538.** 6. When a Question for the Jury. — See note 2.

**539.** 7. Merchandise as Baggage — Liability of Carrier. — See note 1.

**540.** Acceptance by Carrier with Knowledge of Character of Articles. — See notes 2, 3.

**541.** Proof of Actual Knowledge. — See notes 1, 2.

**stitute Baggage.** — Record books of a professional nurse. *Werner v. Evans*, 94 Ill. App. 328.  
A camera. *Atwood v. Mohler*, 108 Ill. App. 416.

Opera glasses, compass, razor and strap, nasal syringe, and a satchel. *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368.

A passenger's rubber shoes, gloves, catalogues, and memoranda carried for the purpose of the journey. *Runyan v. Central R. Co.*, 61 N. J. L. 537, 68 Am. St. Rep. 711.

A woman's jewelry, and every article pertaining to her wardrobe that may be necessary or convenient to her traveling. *Galveston, etc., R. Co. v. Fales*, (Tex. Civ. App., 1903) 77 S. W. Rep. 234.

Three hundred pieces of sheet music used by a theatrical company and two thousand title pages for sheet music. *Texas, etc., R. Co. v. Morrison Faust Co.*, 20 Tex. Civ. App. 144.

A woman may carry as baggage her husband's and children's clothing, a saving bank and contents, and a key to a zither. *Yazoo, etc., R. Co. v. Baldwin*, (Tenn. 1904) 81 S. W. Rep. 599.

**Articles Not Baggage.** — A letter-file and a package of nails, where it does not appear that either the letter-file or the nails had any connection with the personal use of the passenger on the journey or were appropriate to the accomplishment of the purpose of the journey. *Runyan v. Central R. Co.*, 61 N. J. L. 537, 68 Am. St. Rep. 711.

A piece of embroidery. *Bullard v. Delaware, etc., R. Co.*, 21 Pa. Super. Ct. 583.

Theatrical costumes and scenery. *Saunders v. Southern R. Co.*, (C. C. A.) 128 Fed. Rep. 15.  
Butcher's tools. *Choctaw, etc., R. Co. v. Zwirtz*, 13 Okla. 411.

Perishable fruit. *Georgia R. Co. v. Johnson*, 113 Ga. 589.

Bicycles. *State v. Missouri Pac. R. Co.*, 71 Mo. App. 385. And see the title BICYCLES.

A revolver. *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368.

Packages of groceries. *Bullock v. Delaware, etc., R. Co.*, 60 N. J. L. 24.

Specimens of gold quartz, legal documents, insurance papers, mining stocks, inventories, a will, family pictures, a marriage certificate. *Galveston, etc., R. Co. v. Fales*, (Tex. Civ. App. 1903) 77 S. W. Rep. 234.

Books purchased by a woman for her husband and with his money. *Hurwitz v. Hamburg-American Packet Co.*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 814.

Household goods cannot be included as part of the baggage of a married woman, although she is moving her abode from one city to another. *Yazoo, etc., R. Co. v. Baldwin*, (Tenn. 1904) 81 S. W. Rep. 599.

**538.** 2. Question for the Jury. — *Choctaw, etc., R. Co. v. Zwirtz*, 13 Okla. 411; *Yazoo, etc., R. Co. v. Baldwin*, (Tenn. 1904) 81 S. W. Rep. 599; *Missouri, etc., R. Co. v. Meek*, (Tex. Civ. App. 1903) 75 S. W. Rep. 317,

citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 538; *Galveston, etc., R. Co. v. Fales*, (Tex. Civ. App. 1903) 77 S. W. Rep. 234.

**539.** 1. Articles Carried for Purposes of Trade. — *Saunders v. Southern R. Co.*, (C. C. A.) 128 Fed. Rep. 15, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 539; *Weber Co. v. Chicago, etc., R. Co.*, 113 Iowa 188; *Amory v. Wabash R. Co.*, 130 Mich. 404; *McKibbin v. Great Northern R. Co.*, 78 Minn. 232; *Runyan v. Central R. Co.*, 61 N. J. L. 537, 68 Am. St. Rep. 711; *Simpson v. New York, etc., R. Co.*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 613; *Toledo, etc., R. Co. v. Bowler, etc., Co.*, 63 Ohio St. 274; *Choctaw, etc., R. Co. v. Zwirtz*, 13 Okla. 411. See also *Toledo, etc., R. Co. v. Dages*, 57 Ohio St. 38, 63 Am. St. Rep. 702; *Bullard v. Delaware, etc., R. Co.*, 21 Pa. Super. Ct. 583.

**540.** 2. Acceptance with Notice of Character of Articles — Waiver. — *Saunders v. Southern R. Co.*, (C. C. A.) 128 Fed. Rep. 15; *Kansas City, etc., R. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111; *Lake Shore, etc., R. Co. v. Hochstim*, 67 Ill. App. 514; *Illinois Cent. R. Co. v. Matthews*, 114 Ky. 973, 102 Am. St. Rep. 316; *Amory v. Wabash R. Co.*, 130 Mich. 404; *Sherlock v. Chicago, etc., R. Co.*, 85 Mo. App. 46.

**3. Waiver by Carrier.** — *Toledo, etc., R. Co. v. Dages*, 57 Ohio St. 38, 63 Am. St. Rep. 702.

**541.** 1. Carrier Must Have Actual Knowledge of Character of Alleged Baggage. — See *Illinois Cent. R. Co. v. Matthews*, 114 Ky. 973, 102 Am. St. Rep. 316.

But actual knowledge on the part of an agent of the carrier, as to the true character of goods checked as baggage, will not make the carrier liable where it has a regulation, known to the shipper, which prohibits its agents from accepting that particular class of goods as baggage. *Weber Co. v. Chicago, etc., R. Co.*, 113 Iowa 188.

Where the ticket and baggage agent of the carrier, from personal transactions had with the passenger, learns of the contents of the passenger's baggage before checking it, this will not be notice to the carrier. *Central of Georgia R. Co. v. Joseph*, 125 Ala. 313.

It seems that if the carrier's agent who receives a valise as baggage knows that the passenger is a traveling merchant and that the baggage belongs to him, the carrier will be liable as such, although the valise contains merchandise solely, and there is nothing about its external appearance which would tend to disclose its contents. *Snaman v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1023.

**Connecting Carrier.** — Knowledge on the part of the initial carrier is not sufficient to bind a connecting carrier in the absence of proof that the agents of the initial carrier had authority to check merchandise as baggage so as to bind the connecting carrier. *Toledo, etc., R. Co. v. Bowler, etc., Co.*, 63 Ohio St. 274.

**2. Notice from Outward Appearance of Package**

**541.** Necessity of Inquiry by Carrier. — See note 3.

**542.** Authority of Agents. — See note 2.

**543.** Warehouseman. — See note 1.

Deception by Passenger. — See note 4.

The Mere Payment of Extra Charges. — See note 5.

**III. DUTY TO CARRY—COMPENSATION—1. In General.** — See note 6.

**544.** May Limit Amount of Baggage. — See note 2.

When Carrier in Fault. — See note 4.

**546.** 4. Lien on Baggage. — See note 1.

**IV. LIABILITY OF CARRIER FOR LOSS OF BAGGAGE—1. Character of Liability.** — See note 3.

—Amory v. Wabash R. Co., 130 Mich. 404; Trimble v. New York Cent., etc., R. Co., 162 N. Y. 84. See also Kansas City, etc., R. Co. v. McGahey, 63 Ark. 344, 58 Am. St. Rep. 111.

**541. 3. Carrier Need Not Make Inquiry as to Nature of Property.** — Toledo, etc., R. Co. v. Dages, 57 Ohio St. 38, 63 Am. St. Rep. 702; Toledo, etc., R. Co. v. Bowler, etc., Co., 63 Ohio St. 274.

**542. 2. Acts of Agents—Proof of Authority.** — Sherlock v. Chicago, etc., R. Co., 85 Mo. App. 46; Trimble v. New York Cent., etc., R. Co., 162 N. Y. 84.

**543. 1. For Merchandise Stored.** — Toledo, etc., R. Co. v. Bowler, etc., Co., 9 Ohio Cir. Dec. 465.

Where there is a regulation of the carrier, known to the passenger, which prohibits the carrier's agents from accepting a particular class of goods, the carrier assumes no liability whatsoever for such goods delivered to one of its agents and checked as baggage. Weber Co. v. Chicago, etc., R. Co., 113 Iowa 188.

And see Missouri, etc., R. Co. v. Meek, (Tex. Civ. App. 1903) 75 S. W. Rep. 317, holding that the carrier is not liable as warehouseman for any article for which he would not be liable as carrier if lost while it retained the character of baggage.

**4. Concealment by Passenger of Full Value of Articles.** — Saunders v. Southern R. Co., (C. C. A.) 128 Fed. Rep. 15; Illinois Cent. R. Co. v. Matthews, 114 Ky. 973, 102 Am. St. Rep. 316. See also Toledo, etc., R. Co. v. Dages, 57 Ohio St. 38, 63 Am. St. Rep. 702; Toledo, etc., R. Co. v. Bowler, etc., Co., 63 Ohio St. 274.

**5. Payment of Overweight in Merchandise.** — Illinois Cent. R. Co. v. Matthews, 114 Ky. 973, 102 Am. St. Rep. 316.

But in such case the carrier is liable for negligence, and the failure to deliver is presumptive evidence of negligence. Trimble v. New York Cent., etc., R. Co., 39 N. Y. App. Div. 403.

**6. Carriage of Baggage Incident to Carriage of Passenger—United States.** — Saunders v. Southern R. Co., (C. C. A.) 128 Fed. Rep. 15, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 543.

*Kentucky.* — Illinois Cent. R. Co. v. Matthews, 114 Ky. 973, 102 Am. St. Rep. 316.

*Maine.* — Wood v. Maine Cent. R. Co., 98 Me. 98, 99 Am. St. Rep. 339.

*Minnesota.* — McKibbin v. Great Northern R. Co., 78 Minn. 232.

*Oklahoma.* — Choctaw, etc., R. Co. v. Zwirtz, 13 Okla. 411.

*Tennessee.* — Yazoo, etc., R. Co. v. Baldwin, (Tenn. 1904) 81 S. W. Rep. 599.

*Vermont.* — Ranchau v. Rutland R. Co., 71 Vt. 142, 76 Am. St. Rep. 761, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 543.

**544. 2. Extra Compensation for Excess.** — Jacobs v. Central R. Co., 19 Pa. Super. Ct. 13.

The ordinary provision contained on tickets limiting the amount of baggage which the passenger is entitled to have carried does not restrict or affect the common-law right of the passenger to carry personal baggage with him, but simply limits the accommodation the passenger may have with respect to baggage committed to the custody of the carrier. Runyan v. Central R. Co., 61 N. J. L. 537, 68 Am. St. Rep. 711.

**4. Baggage Must Go on Train with Passenger.**

—A carrier is bound, where baggage is presented to it to be checked accompanied by a ticket, to send the baggage on the same train with the passenger, unless the passenger gives some direction, or does something, or omits to do something, which authorizes the carrier to send the baggage on some other train. Wald v. Pittsburg, etc., R. Co., 162 Ill. 545, 53 Am. St. Rep. 332.

But see St. Louis Southwestern R. Co. v. Ray, 13 Tex. Civ. App. 628, holding that the carrier is not bound to ship the baggage on the same train with the passenger, but merely to transport it within a reasonable time after it has been received and checked.

**546. 1. When No Lien on Baggage.** — Where a party becomes a passenger pursuant to a ticket obtained in due and regular course, on a prepaid certificate procured for him, and the party who purchased such certificate for him obtains a refund of the money without notice or knowledge on his part, the carrier has no lien on his baggage. Moszkowitz v. International Nav. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 297.

**3. Liable as Insurer for Baggage—United States.** — Saunders v. Southern R. Co., (C. C. A.) 128 Fed. Rep. 15.

*Kansas.* — Kansas City, etc., R. Co. v. Paten, 3 Kan. App. 338.

*Maine.* — Wood v. Maine Cent. R. Co., 98 Me. 98, 99 Am. St. Rep. 339.

*Missouri.* — Blackmore v. Missouri Pac. R. Co., 162 Mo. 455; Aiken v. Wabash R. Co., 80 Mo. App. 8.

*Nebraska.* — Ringwalt v. Wabash R. Co., 45 Neb. 760.

*New York.* — Williams v. Central R. Co., 93 N. Y. App. Div. 582; Adams v. New Jersey

**547.** Losses by Act of God or Public Enemy. — See notes 2, 3.

**548.** 2. Where Passenger Retains Custody of Property — *a.* GENERALLY. — See note 1.

**549.** Carrier Liable Only for Negligence in Absence of Exclusive Control. — See note 2. Articles Left on Train by Passenger. — See note 3.

**551.** *b.* IN CASE OF STEAMSHIP COMPANIES. — See note 3.

**553.** 3. Passenger on Different Train from Baggage — No Compensation — Gratuitous Bailment. — See note 2.

**554.** V. LIMITATION OF LIABILITY — 1. As to Amount. — See note 2.

**555.** Reasonableness of Regulation. — See note 2.

2. As to Character of Liability. — See note 3.

**556.** Free Passes. — See note 1.

**557.** 3. Limitation Must Be by Special Contract. — See note 1.

Steamboat Co., 151 N. Y. 163, 56 Am. St. Rep. 616.

*North Carolina.* — Thomas v. Southern R. Co., 131 N. Car. 590.

*Oklahoma.* — Choctaw, etc., R. Co. v. Zwirtz, 13 Okla. 411.

*Pennsylvania.* — Jacobs v. Central R. Co., 19 Pa. Super. Ct. 13; Bullard v. Delaware, etc., R. Co., 21 Pa. Super. Ct. 583.

*Tennessee.* — Nashville, etc., R. Co. v. Lillie, (Tenn. 1904) 78 S. W. Rep. 1055.

*Texas.* — Houston, etc., R. Co. v. Seale, 28 Tex. Civ. App. 364, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 546.

*Wisconsin.* — Goldberg v. Ahnapee, etc., R. Co., 105 Wis. 1, 76 Am. St. Rep. 899.

**547.** 2. Loss by Inevitable Accident. — A common carrier is not exempt from liability for injury because of an act of God, where he has been guilty of a previous negligence or misconduct which brings the property in contact with the destructive force of the *actus Dei*. Edson v. Pennsylvania Co., 70 Ill. App. 654; Wald v. Pittsburg, etc., R. Co., 162 Ill. 545, 53 Am. St. Rep. 332, affirming 60 Ill. App. 460.

3. The Majestic, 166 U. S. 375.

The carrier must show that the act of God was the sole cause of the loss. Sonneborn v. Southern R. Co., 65 S. Car. 502.

Though the injury results from an act of God it is incumbent on the carrier to show that it could not have been prevented by any foresight, pains, or care reasonably to be expected. Harzburg v. Southern R. Co., 65 S. Car. 539.

**548.** 1. Rule Where Passenger Retains Possession and Control of Property. — The Humboldt, 97 Fed. Rep. 656, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 547-552; Defrier v. The Nicaragua, 81 Fed. Rep. 745; Dawley v. Wagner Palace Car Co., 169 Mass. 315; Nashville, etc., R. Co. v. Lillie, (Tenn. 1904) 78 S. W. Rep. 1055.

The carrier is under no liability whatsoever for articles in the sole custody and possession of the passenger which do not come within the category of baggage. Levins v. New York, etc., R. Co., 183 Mass. 175, 97 Am. St. Rep. 434.

**549.** 2. Passenger Retaining Custody of Baggage — Liable Only for Negligence. — The Humboldt, 97 Fed. Rep. 656, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 549; Dawley v. Wagner Palace Car Co., 169 Mass. 315.

For a passenger's baggage lost in a sleeping car after the passenger had retired, the carrier is liable where the article lost was not

easily susceptible of exclusive custody by the passenger under such circumstances. Nashville, etc., R. Co. v. Lillie, (Tenn. 1904) 78 S. W. Rep. 1055. And see the title SLEEPING-CAR COMPANIES.

3. Articles Left in the Train. — Where articles are left in a sleeping car by a passenger it is the duty of the company to use at least ordinary care in discovering, taking care of, and restoring the property. Kates v. Pullman's Palace Car Co., 95 Ga. 810.

**551.** 3. Rule as to Liability in Case of Carriers by Water. — Adams v. New Jersey Steamboat Co., 151 N. Y. 163, 56 Am. St. Rep. 616. But see The Humboldt, 97 Fed. Rep. 656.

Wanton Injury by Ship's Servants. — A steamship company is liable to a passenger for baggage left by him on deck and thrown overboard by employees of the company. De Felice v. Compagnie Francaise De Navigation, etc., 83 N. Y. App. Div. 73.

**553.** 2. Where No Compensation Is Paid — Gratuitous Bailment. — Wood v. Maine Cent. R. Co., 98 Me. 98, 99 Am. St. Rep. 339; Marshall v. Pontiac, etc., R. Co., 126 Mich. 45.

**554.** 2. Right to Limit Liability as to Amount of Baggage. — The Kensington, 88 Fed. Rep. 331; Aiken v. Wabash R. Co., 80 Mo. App. 8; Tewes v. North German Lloyd Steamship Co., (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 148; Jacobs v. Central R. Co., 19 Pa. Super. Ct. 13; Jacobs v. Central R. Co., 208 Pa. St. 535; Ranchau v. Rutland R. Co., 71 Vt. 142, 76 Am. St. Rep. 761, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 554.

**555.** 2. Unreasonable Regulations. — A limitation of liability for baggage of a first-cabin passenger on a transatlantic steamer, to the value of fifty dollars, is unreasonable. The New England, 110 Fed. Rep. 415.

3. May Limit Its Liability as Insurer. — Jacobs v. Central R. Co., 19 Pa. Super. Ct. 13.

No Exemption from Liability for Negligence. — Merrill v. Pacific Transfer Co., 131 Cal. 582; Thomas v. Southern R. Co., 131 N. Car. 590.

**556.** 1. Conditions Held Valid in Free Pass. — In Georgia a carrier may by stipulation exempt itself from any liability to one traveling on a free pass. Holly v. Southern R. Co., 119 Ga. 767. And see The Stella, (1900) P. 162, 82 L. T. N. S. 390.

**557.** 1. Necessity for Special Contract. — Aiken v. Wabash R. Co., 80 Mo. App. 8; Ranchau v. Rutland R. Co., 71 Vt. 142, 76 Am. St. Rep. 761.

**557.** Assent — Burden of Proof. — See note 2.

**558.** When Passenger Must Have Notice. — See note 1.  
Indorsement of Ticket. — See note 2.

**559.** Special Excursion Train — Reduced Rate of Fare. — See note 1.  
Receipt for Baggage. — See note 2.

**560.** Rule of Construction. — See note 1.  
4. Contract Tickets. — See note 3.

**561.** VI. BEGINNING AND TERMINATION OF LIABILITY — 1. When Liability Begins — *a.* IN GENERAL — Delivery. — See note 1.

Purchase of Ticket Unnecessary. — See note 2.

Baggage Left at Depot Subject to Further Orders. — See note 4.

**563.** *b.* WHAT CONSTITUTES DELIVERY — Custom. — See note 4.

**564.** 2. When Liability Ends — Reasonable Time for Delivery. — See note 3.

**565.** What Constitutes Reasonable Time. — See note 1.

**557.** 2. Ticket Containing Restriction — Notice — Assent. — The *Majestic*, 166 U. S. 375; *Wiegand v. Central R. Co.*, 75 Fed. Rep. 370; *The New England*, 110 Fed. Rep. 415; *Williams v. Central R. Co.*, 93 N. Y. App. Div. 582; *Ranchau v. Rutland R. Co.*, 71 Vt. 142, 76 Am. St. Rep. 761. See also *Engberman v. North German Lloyd Steamship Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 201.

If the limitation is brought to the knowledge of the passenger, he is bound by it, whether he assents or not. *Jacobs v. Central R. Co.*, 19 Pa. Super. Ct. 13.

It must be shown that the passenger read a notice printed on the back of a ticket or that his attention was directly called to it, in order to relieve the carrier from liability. *Aiken v. Wabash R. Co.*, 80 Mo. App. 8.

Where the passenger is not furnished with a ticket containing the limitation and has had no opportunity of reading it, he is not bound by its terms. *Wamsley v. Atlas Steamship Co.*, 50 N. Y. App. Div. 199.

Notice of a provision of a ticket limiting the liability of the carrier is chargeable to the passenger where he had possession of the ticket a week before delivering the baggage to the carrier. *The Kensington*, 88 Fed. Rep. 331.

**Passenger Held Bound by Notice on Ticket.** — *Aiken v. Wabash R. Co.*, 80 Mo. App. 8.

**558.** 1. Passenger Must Assent Before Cars Start. — See *Saunders v. Southern R. Co.*, (C. C. A.) 128 Fed. Rep. 15.

He must have such knowledge at the time he pays for his ticket. *Ranchau v. Rutland R. Co.*, 71 Vt. 142, 76 Am. St. Rep. 761.

**The Presumption** is that a notice prominently printed on the face of the ticket, limiting the liability of the carrier, has been read by the passenger. *Jacobs v. Cent. R. Co.*, 208 Pa. St. 535.

**2.** *Saunders v. Southern R. Co.*, (C. C. A.) 128 Fed. Rep. 15, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 558. See also *The Minnetonka*, 132 Fed. Rep. 52.

**559.** 1. Notice in Advertisement of Special Excursion Train. — See *Jacobs v. Central R. Co.*, 19 Pa. Super. Ct. 13.

**2. Acceptance of Receipt for Baggage — Question for Jury.** — *Merrill v. Pacific Transfer Co.*, 131 Cal. 582; *Malone v. Metropolitan Express Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 1039. See also *Ranchau v. Rutland R. Co.*, 71 Vt. 142, 76 Am. St. Rep. 761.

**560.** 1. See *Upperton v. Union Castle Mail Steamship Co.*, 89 L. T. N. S. 289.

**3. Passenger Contract Tickets.** — *Jacobs v. Central R. Co.*, 19 Pa. Super. Ct. 13, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 560.

**561.** 1. Liability Begins with Delivery. — But see *Goldberg v. Ahnapee, etc.*, R. Co., 105 Wis. 1, 76 Am. St. Rep. 899, where it is held that the owner of baggage about to be forwarded cannot impose on a carrier the liability as such by a delivery of his baggage prior to such time as may be reasonably necessary for obtaining a ticket, checking the baggage, etc. A rule of a carrier prohibiting the checking of baggage until thirty minutes before train time is not, as a matter of law, an unreasonable limitation.

**Proof of Delivery** must be made in order to make the carrier liable. *Lustig v. International Nav. Co.*, (N. Y. City Ct. Gen. T.) 38 Misc. (N. Y.) 802.

**2. Ticket Unnecessary — Good Faith.** — *Coffee v. Louisville, etc.*, R. Co., 76 Miss. 569, 71 Am. St. Rep. 535.

But a carrier assumes no liability to a traveler who, by mistake, delivers his baggage to it for transportation but who never expected to become a passenger or to pay for the carriage, except for wilful or intentional injury to the baggage. *Beers v. Boston, etc.*, R. Co., 67 Conn. 417, 52 Am. St. Rep. 293.

**4. Baggage Brought to Station Prematurely.** — *Murray v. International Steamship Co.*, 170 Mass. 166, 64 Am. St. Rep. 290. See also *Goldberg v. Ahnapee, etc.*, R. Co., 105 Wis. 1, 76 Am. St. Rep. 899.

**563.** 4. See *McKibbin v. Great Northern R. Co.*, 78 Minn. 232.

**564.** 3. General Rule as to Termination of Liability. — *Wiegand v. Central R. Co.*, 75 Fed. Rep. 370; *Kansas City, etc.*, R. Co. *v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111; *Pennsylvania Co. v. Liveright*, 14 Ind. App. 518; *Indianá, etc.*, R. Co. *v. Zilly*, 20 Ind. App. 569; *Kansas City, etc.*, R. Co. *v. Patten*, 3 Kan. App. 338; *Marshall v. Pontiac, etc.*, R. Co., 126 Mich. 45; *Felton v. Chicago, etc.*, R. Co., 86 Mo. App. 332; *Blackmore v. Missouri Pac. R. Co.*, 162 Mo. 455; *Graves v. Fitchburg R. Co.*, 29 N. Y. App. Div. 591; *St. Louis, etc.*, R. Co. *v. Terrell*, (Tex. Civ. App. 1903) 72 S. W. Rep. 430.

**565.** 1. What Constitutes Reasonable Time.

**566.** Baggage Remaining in Depot by Carrier's Fault. — See note 1.

**567.** Passenger's Duty. — See notes 2, 3.

**570.** 3. Liability as Warehouseman — When Storage Charged. — See note 1.  
Want of Ordinary Care — Burden of Proof. — See note 3.

**571.** Duty as to Watchman, Fire-proof Rooms, and the Like. — See note 1.

It Is a Condition Precedent. — See note 4.

**572.** VII. CONNECTING LINES AND THROUGH TICKETS — 1. Liability Generally — But Where the Connecting Lines Are Distinct. — See note 1.

**574.** 2. Liability of Initial Carrier — *a.* VIEW THAT INITIAL CARRIER IS LIABLE THROUGHOUT THE JOURNEY — Where Baggage Checked Through under Through Ticket. — See note 1.

**575.** Through Tickets with Separate Coupons — Release of Connecting Carrier. — See note 3.

**576.** *b.* VIEW THAT INITIAL CARRIER IS LIABLE ONLY FOR LOSSES ON ITS OWN LINE. — See note 1.

Liability Extended by Contract. — See note 3.

**577.** *c.* CONDITIONS ON TICKETS LIMITING LIABILITY. — See note 1.

**579.** 4. Liability of Last Carrier. — See note 4.

Where Receipt by Last Carrier Shown, It Must Prove Condition When Received. — See note 5.

— *Felton v. Chicago, etc., R. Co.*, 86 Mo. App. 332; *Graves v. Fitchburg R. Co.*, 29 N. Y. App. Div. 591. See also *Kansas City, etc., R. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111; *Pennsylvania Co. v. Liveright*, 14 Ind. App. 518; *Kansas City, etc., R. Co. v. Patten*, 3 Kan. App. 338.

In *Kansas City, etc., R. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111, it was held that the plaintiff had a reasonable time in which he might, with the use of diligence, have removed his baggage before it was destroyed by fire, where he arrived at the station with the baggage at eleven o'clock at night, and the fire occurred two hours later, and no excuse was given for his failure to remove the baggage, except the lateness of the hour and the fact that no vehicles were that night at the station, which was a mile from the nearest town. Such facts merely show that it was inconvenient to remove the baggage.

It Is a Question for the Court as to what is a reasonable time when the facts are undisputed. *Felton v. Chicago, etc., R. Co.*, 86 Mo. App. 332.

**566.** 1. When Carrier in Fault. — *Felton v. Chicago, etc., R. Co.*, 86 Mo. App. 332.

**567.** 2. Passenger's Duty to Call for and Remove His Baggage. — *Kansas City, etc., R. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111; *Indiana, etc., R. Co. v. Zilly*, 20 Ind. App. 569; *Hurwitz v. Hamburg-American Packet Co.*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 814; *St. Louis, etc., R. Co. v. Terrell*, (Tex. Civ. App. 1903) 72 S. W. Rep. 430.

**3.** What Is Reasonable Time. — In *Kansas City, etc., R. Co. v. Patten*, 3 Kan. App. 338, it was held that a passenger should have called for his baggage on the evening of its arrival or during the business hours of the succeeding day.

**570.** 1. Storing Baggage at Owner's Expense. — *Kansas City, etc., R. Co. v. Patten*, 3 Kan. App. 338.

**3.** Want of Ordinary Care — Burden of Proof. — *Indiana, etc., R. Co. v. Zilly*, 20 Ind. App. 569;

*Goldberg v. Ahnapee, etc., R. Co.*, 105 Wis. 1, 76 Am. St. Rep. 899.

**571.** 1. Precautions Carrier Should Take. — It is not necessary to keep a night watchman about a baggage room, when it appears that no baggage is delivered at the station from the night trains. *Indiana, etc., R. Co. v. Zilly*, 20 Ind. App. 569.

**4.** Baggage Must First Be Safely Stored. — *Kansas City, etc., R. Co. v. Patten*, 3 Kan. App. 338.

**572.** 1. Connecting Lines Distinct and Independent. — *Texas, etc., R. Co. v. Berry*, 31 Tex. Civ. App. 3.

**574.** 1. Carrier May Contract for Through Liability. — *Talcott v. Wabash R. Co.*, 159 N. Y. 461.

**575.** 3. See *Talcott v. Wabash R. Co.*, 159 N. Y. 461.

**576.** 1. Initial Carrier Not Generally Liable for Loss on Connecting Line. — *Talcott v. Wabash R. Co.*, 89 Hun (N. Y.) 492; *Talcott v. Wabash R. Co.*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 443. See also *Moore v. New York, etc., R. Co.*, 173 Mass. 335, 73 Am. St. Rep. 298. In *Oklahoma*, under *Wilson's Rev. & Annot. Stat.*, § 724, the carrier's liability is limited to its own line. *Choctaw, etc., R. Co. v. Zwirtz*, 13 Okla. 411.

**3.** Liability over Whole Route by Special Contract. — See *Lessard v. Boston, etc., R. Co.*, 69 N. H. 648.

**577.** 1. Conditions on Tickets. — See *Askew v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 846.

A valid limitation as to the amount of liability contained in a ticket limits the liability of the connecting carriers to the same extent as the initial carrier. *Aiken v. Wabash R. Co.*, 80 Mo. App. 8.

**579.** 4. See *Fox v. Wabash R. Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 370.

**5.** *Moore v. New York, etc., R. Co.*, 173 Mass. 335, 73 Am. St. Rep. 298; *Fox v. Wabash R. Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 370; *Askew v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 846.

**579.** Failure to Deliver Without Proof of Receipt Not Sufficient. — See note 6.

**580.** VIII. BAGGAGE CHECKS, THEIR NATURE AND EFFECT — Presumptions Arising from Possession of Check. — See note 3.

**581.** IX. TRANSFER COMPANIES. — See note 6.

**582.** X. SLEEPING-CAR COMPANIES. — See note 1.

**XI. EVIDENCE — 1. Admissibility in Certain Particulars — Party May Testify as to Contents of Trunk.** — See notes 2, 4.

**583.** Admissions of Agents of Carrier. — See note 1.

**584.** XII. MEASURE OF DAMAGES. — See note 5.

**585.** See notes 1, 2, 3.

**586.** [BAG OF OATS. — See note 6.]

**579.** 6. *Romero v. McKernan*, (Supm. Ct. App. T.) 88 N. Y. Supp. 365.

**580.** 3. Check Is Prima Facie Evidence of Receipt and Nondelivery. — *Chicago, etc., R. Co. v. Stear*, 53 Neb. 95, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 580.

**581.** 6. Limiting Liability. — See *Merrill v. Pacific Transfer Co.*, 131 Cal. 582.

Where a transfer company took the check of a passenger and placed it on the strap with the duplicate check while the trunk was in the baggage car of the railroad company, the railroad company thereupon became charged with the safety of the trunk and liable to the passenger for loss occurring while it was in the possession of the railroad; the railroad became the transfer company's bailee in respect to the trunk. *Springer v. Westcott*, 166 N. Y. 117.

**582.** 1. Sleeping-car Companies — *Alabama*. — *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368; *Pullman Palace Car Co. v. Adams*, 120 Ala. 581, 74 Am. St. Rep. 53.

*Georgia*. — *Kates v. Pullman's Palace Car Co.*, 95 Ga. 810; *Pullman's Palace Car Co. v. Hall*, 106 Ga. 765, 71 Am. St. Rep. 293.

*Illinois*. — *McMurray v. Pullman's Palace Car Co.*, 86 Ill. App. 619.

*Indiana*. — *Voss v. Wagner Palace Car Co.*, 16 Ind. App. 271.

*Kentucky*. — *Pullman Palace Car Co. v. Hunter*, 107 Ky. 519.

*Missouri*. — *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351.

*Ohio*. — *Falls River, etc., Co. v. Pullman Palace Car Co.*, 6 Ohio Dec. 85.

*Texas*. — *Pullman Palace Car Co. v. Hatch*, 30 Tex. Civ. App. 303; *Belden v. Pullman Palace Car Co.*, (Tex. Civ. App. 1897) 43 S. W. Rep. 22. See also *Pullman Palace Car Co. v. Arents*, 28 Tex. Civ. App. 71.

And see generally the title SLEEPING-CAR COMPANIES.

2. A person is presumed to know the value of his own belongings and may testify thereto. *Hebard v. Riegel*, 67 Ill. App. 584.

4. The plaintiff cannot testify as to his or her opinion as to the amount of damage sustained by reason of an injury to his or her baggage. *Atchison, etc., R. Co. v. Wilkinson*, 55 Kan. 83.

**583.** 1. *Atchison, etc., R. Co. v. Wilkinson*, 55 Kan. 83.

**584.** 5. Actual Value Alone Recoverable. — *Houston, etc., R. Co. v. Seale*, 28 Tex. Civ. App. 364, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 584; *Galveston, etc., R. Co. v. Fales*, (Tex. Civ. App. 1903) 77 S. W. Rep. 234.

**Partial Injury.** — Where a violin was broken it was held that the measure of damages embraced the expense of restoring the property to soundness, compensation for its loss during the period of disability, and the difference between its value before injury and after being repaired. *Schalscha v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 141.

**585.** 1. *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368; *Simpson v. New York, etc., R. Co.*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 613. See also *Werner v. Evans*, 94 Ill. App. 328.

2. Expenses of Searching Not Recoverable. — But see *Wiegand v. Central R. Co.*, 75 Fed. Rep. 370.

3. Delay. — Living expenses for one week were allowed where the owner had spent a much longer time in waiting at a point *en route* for lost baggage. *Atwood v. Mohler*, 108 Ill. App. 416.

**586.** 6. Bag of Oats. — In an action on a contract for the price of oats sold and delivered by the bag it was held that evidence is admissible of a trade usage that the term *bag of oats* meant sixty-four pounds of oats not including the bag, or two bushels of thirty-two pounds each. *Eldridge v. McDermott*, 178 Mass. 256.

## BAIL (IN CIVIL CASES).

BY THEODOR MEGAARDEN.

**595. III. APPEARANCE BAIL — 5. Obligation of Defendant to Enter Special Bail — Breach of Obligation. — See note 3.**

**598. IV. BAIL TO THE ACTION — STATUTORY SPECIAL BAIL — 1. Right to Hold to Bail — *b.* IN WHAT CASES. — See note 7.**

**600. *c.* PREREQUISITES — (2) *A Legal Arrest* — (*b*) Giving Bond When Arrest Is Illegal — Sufficiency of Affidavit. — See note 1.**

**606. 4. Amount for Which Bail Undertake — Reduction of Amount. — See note 1.**

**608. 5. Putting in and Perfecting Bail — *e.* RENDERING THE BAIL ABSOLUTE — (4) *Justification by Bail.* — See note 1.**

**609. 6. The Recognizance or Bail Bond — *b.* THE BAIL BOND — (2) *The Obligors.* — See note 6.**

**610. (5) *The Condition* — (*a*) In General. — See note 7.**

**611. (b) Recitals in Condition — Recital of Nature of Action. — See note 4.**

**612. (c) The Conditions Proper — Terms of the Condition — At Common Law. — See note 5.**

**615. 7. Rights and Liabilities of Bail — *a.* LIABILITIES OF BAIL — (2) *In What Cases.* — See note 6.**

**595. 3. Relief Against Obligation to Enter Special Bail. —** Where it appeared that the principal was in custody and that the defendant had lost nothing by the failure to put in special bail, the bail was discharged without a formal surrender of the principal. *Loewenthal v. Wagner*, 69 N. J. L. 129.

**598. 7. Right to Hold to Bail. —** Under the Georgia Act of 1879 (3 Code Ga. 1895, § 3420a) which provides that the plaintiff in an action to recover personal property must make affidavit "that the property is in the possession, custody, or control of the defendant," it has been held that where a defendant, imprisoned under an action of trover where bail was required, petitioned the judge of the court in which the suit was pending for his discharge, and it satisfactorily appeared that he was unable to produce the property or to give security for the eventual condemnation money, there was no error in discharging the defendant on his own recognizance, and awarding the cost of the proceeding against the plaintiff. *Garrett v. Underwood*, 102 Ga. 558. See also *Shinholser v. Jordan*, 115 Ga. 462.

**Special Bail Required Before Appearing or Pleading. —** The Connecticut statute (Gen. Stat. Conn., § 957) prescribing that no defendant in a civil action while at large on bail given to the officer shall "be admitted to appear and plead or defend any such action" until he has given special bail, has been held to apply to an appearance for the purpose of pleading in abatement. *Bergkofski v. Ruzofski*, 74 Conn. 204.

**600. 1. Affidavit by One Plaintiff in Behalf of All. —** Under a statute providing that the affidavit shall be made by the "plaintiff or some person in his behalf," it has been held that an affidavit made by one of the plaintiffs is good

if it purports to be made on behalf of the plaintiffs in the action. *Gorgorian v. Prood*, 167 Mass. 31.

**606. 1. Reduction of Excessive Bail. —** *Sibley v. Smith*, 67 N. Y. App. Div. 514.

**608. 1. Justification. —** *Ludwick v. Perkins*, (Mich. 1904) 101 N. W. Rep. 66.

**609. 6. Omission of Name of Principal in One Clause. —** Where the name of the defendant as principal appeared in the different recitals, but was omitted in the statement of the condition, it was held that, since the instrument itself furnished the means of supplying the missing word with absolute certainty, the bond was valid. *Reeg v. Adams*, 113 Wis. 175.

**610. 7. Construction of Condition. —** The court cannot, by construction, give to the condition a broader scope than is clearly expressed in the bond. *Bristol v. Graff*, 79 N. Y. App. Div. 426, affirmed without opinion 179 N. Y. 551.

**611. 4. Misrecital of Nature of Action. —** By a clerical mistake a bond recited that the principal was in custody by virtue of a *capias ad respondendum* when it should have read *capias ad satisfaciendum*, but the mistake was promptly corrected, by the consent of all the parties interested, who treated the bond as a valid bond. It was held that the original error did not invalidate the bond. *In re Friedrich*, 113 Mich. 468.

**612. 5. Condition Merely to Abide Order of Court. —** Where a bond given in a *replevin* suit to secure the discharge of the defendant from arrest was conditioned that he should abide the order of the court in the action, it was held that the bail were not liable for the value of the property in controversy and the costs of the suit. *Eddings v. Boner*, 1 Indian Ter. 173.

**615. 6. Liability of Different Sets of Bail in**

**616.** (3) *Extent of Liability* — Interest on Judgment Against Principal. — See note 1.

**623.** *b. FIXING BAIL* — (3) *Sheriff's Return Conclusive upon Bail*. — See note 2.

**624.** *c. RIGHTS OF BAIL* — (5) *Right to Arrest Principal*. — See note 3.

**626.** *8. Discharge or Exoneration of Bail* — *b. BY PERFORMANCE OF THE CONDITIONS* — (2) *What Constitutes Performance* — (a) *In General*. — See note 9.

**628.** (6) *Surrender of Principal*. — See note 4.

**632.** *c. WITHOUT PERFORMANCE* — (3) *By Act of Law* — (a) *Discharge of Principal*. — See note 5.

**633.** *Under Bankruptcy or Insolvency Laws*. — See note 4.

**634.** See note 1.

**635.** (4) *By Act of the Obligee* — *Laches*. — See note 1.

**639.** *9. Surrender of Principal* — *a. BY WHOM MADE* — (1) *Right of Bail to Surrender Principal* — *At Common Law*. — See note 3.

**642.** *c. TIME OF SURRENDER* — (2) *In the United States* — *Surrender Before Execution*. — See note 4.

**644.** *d. MODE OF SURRENDER*. — See notes 1, 2.

**Same Cause.** — When there are different sets of bail in the different stages of the same cause, the primary liability rests upon the last set. *Cullifford v. Walser*, 158 N. Y. 65, 70 Am. St. Rep. 437, reversing 3 N. Y. App. Div. 266.

**616.** 1. *Byron v. Flagg*, 18 N. Bruns. 396; *Keith v. Coates*, 17 Can. L. T. 33.

**623.** 2. *Return of Sheriff Conclusive in Action Against Bail*. — *Yatter v. Pitkin*, 72 Vt. 258, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

**624.** 3. *An Order Discharging the Principal from Arrest* extinguishes the right of the bail to take him into actual custody. *People v. Hathaway*, 206 Ill. 42, affirming 102 Ill. App. 628.

**626.** 9. *Sufficiency of Appearance*. — When the condition of a common-law bond for the appearance of a judgment debtor in supplementary proceedings was to the effect that the defendant would appear before the county judge at a specified day and hour to answer as a witness, etc., and he did appear at that time, and appeared by attorney on an adjourned day, but absconded before the day set for a further hearing, it was held that there had been no breach of the condition, the defendant not having assented to either adjournment. *Straw v. Kromer*, 114 Wis. 91.

**628.** 4. *Effect of Surrender* — *Discharges Bail*. — *People v. Hathaway*, 206 Ill. 42, affirming 102 Ill. App. 628.

**632.** 5. *Discharge of Principal Releases Bail*. — *People v. Hathaway*, 206 Ill. 42, affirming 102 Ill. App. 628 (vacation of order of arrest); *McClary Mfg. Co. v. Morin*, 14 Quebec Super. Ct. 423.

**Illegal Discharge from Arrest** has been held not to release the bail. *Sowle Mfg. Co. v. Bernard*, 100 Ky. 658.

**633.** 4. *Principal's Discharge in Bankruptcy Releases Bail*. — *Bryant v. Kinyon*, 127 Mich. 152.

**634.** 1. *Commencement of Insolvency Proceedings*. — Although a principal in a poor debtor's recognizance has commenced insolvency proceedings before the day appointed for the examination, he is not thereby excused from

appearing, and if he defaults the surety on the recognizance is liable notwithstanding the fact that the principal obtains a discharge in the insolvency proceedings. *Demelman v. Hunt*, 168 Mass. 102.

**Proof of Claim in Insolvency by Plaintiff.** — The fact that the plaintiff had proved a claim in insolvency upon a judgment against a judgment debtor is not a bar to a suit against a surety on a recognizance to appear for examination as a poor debtor, entered into by the same debtor when execution issued against him. *Harris v. Hayes*, 171 Mass. 275.

**635.** 1. *Entry of Writ After Return Day*. — It has been held that a surety on a poor debtor's recognizance is not relieved from liability on the bond for the reason that the original writ was not entered on the return day, but was filed two days thereafter by permission of the court. *Gorgorian v. Prood*, 167 Mass. 31.

**639.** 3. *Right of Bail to Surrender* — *Common Law*. — See *People v. Hathaway*, 206 Ill. 42, affirming 102 Ill. App. 628.

**642.** 4. *Surrender After Return Day of Fieri Facias*. — Under the *Michigan* statute it has been held that the principal may be surrendered at any time, either before or after the return of the fieri facias. *Umphrey v. Emery*, 121 Mich. 184.

**644.** 1. *Mode of Surrender*. — In *New York* the mode of surrender is prescribed by statute, and the statutory mode must be pursued. *Stransky v. Harris*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 691, reversing (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 15.

**Producing Capias of Bail Piece.** — Under the *Michigan* statute providing that there shall be produced to the officer authorized to accept the surrender of the principal by his bail two copies of the bail piece, it has been held that it is sufficient to produce copies which are sworn to by one of the signers of the bail piece to be true copies of the original; the copies need not be certified. *Morgan v. Jones*, 117 Mich. 59.

2. *Instance of Insufficient Surrender*. — Where the condition of a bond for the appearance of debtors who had been arrested on a ca. sa. was



**645.** Where Principal Is Imprisoned for a Crime. — See note 1.

**646.** V. DEPOSIT OF MONEY IN LIEU OF BAIL — Repayment of Money Deposited by Third Person. — See note 5.

**649.** VIII. INSTRUMENTS EXECUTED IN LIEU OF BAIL BONDS. — See note 10.

that if they failed in obtaining their discharge as insolvent debtors they would surrender themselves to the jail of the county, it was held that they did not comply with the condition when, instead of surrendering themselves to the county jail, they appeared at the bar of the court and through their counsel made application for an order to commit them, which order the court refused to make. *Stout v. Quinn*, 9 Pa. Super. Ct. 179.

**645.** 1. Habeas Corpus Not Always Essential. — The courts may, under some circumstances, dispense with a formal surrender through habeas corpus. *Loewenthal v. Wagner*, 69 N. J. L. 129.

**646.** 5. Ownership of Money Deposited. — Money deposited in lieu of bail in accordance

with Code Civ. Pro. N. Y., § 586, with a direction for its return to a specified third person, is deemed to be the property of such third person unless it is shown that it was the property of the defendant which should be applied to the payment of his debts, and that the direction was given for the purpose of hindering, delaying, or defrauding his creditors. *Finelite v. Sonberg*, 75 N. Y. App. Div. 455. But money deposited under the above-cited section by a third person cannot be returned to him before the determination of the proceedings in which the bail was given. *Alexander v. Creamer*, 46 N. Y. App. Div. 211.

**649.** 10. Instruments in Lieu of Bail Bonds. — *Straw v. Kromer*, 114 Wis. 91.

## BAIL AND RECOGNIZANCE. (IN CRIMINAL CASES.)

By J. M. GREENFIELD.

**653.** I. DEFINITIONS. — See note 1.

**651.** II. POWER TO TAKE BAIL — 1. In General. — See note 3.

**655.** 2. Courts of Record — *a.* IN GENERAL. — See note 5.

**657.** *b.* EFFECT OF STATUTORY AND CONSTITUTIONAL PROVISIONS. — See note 1.

3. Justices of the Peace. — See note 3.

**658.** Authority Strictly Construed. — See note 2.

**659.** 4. Clerks of Court — Delegation of Power. — See note 1.

**653.** 1. Matter of Nottingham, (1897) 2 Q. B. 510; *State v. Crosby*, 114 Ala. 11, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 653; *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230; *State v. Davis*, 27 Utah 368; *State v. Dwyer*, 70 Vt. 96.

**654.** 3. Presumption of Jurisdiction. — See *State v. Eyermann*, 172 Mo. 294; *State v. Abel*, 170 Mo. 59.

Prior to Arrest a court has no authority to take a recognizance for the release of the accused. *Clute v. Ionia Circuit Judge*, 131 Mich. 203.

Power to Require New Recognizance. — *Com. v. Abbott*, 168 Mass. 471.

United States Court After Cause Remanded to State Courts. — After an appeal taken from a United States Circuit Court has been dismissed and the prisoner remanded to the state officers, the United States court has no power to grant bail. *In re Bissert*, 113 Fed. Rep. 12.

United States Circuit Court of Appeals Has Power. — *McKnight v. U. S.*, (C. C. A.) 113 Fed. Rep. 451.

**655.** 5. Authority to Take Bail in Vacation. — See *State v. Vette*, 179 Mo. 408.

After Adjournment for the Day the judge of the court has authority to take a recognizance in a pending prosecution. *State v. Eyermann*, 172 Mo. 294.

**657.** 1. Constitutional Provision in Case Proof Evident or Presumption Great. — See *State v. Farris*, 51 S. Car. 176.

3. Justice of the Peace. — *Crumpecker v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 564.

In *New York* a justice of the peace has no authority to grant bail to a person accused of a crime punishable by a term of imprisonment of more than five years. *Sutherland v. St. Lawrence County*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 38.

**658.** 2. *Huston v. People*, 12 Colo. App. 271; *Com. v. Phillips*, (Ky. 1903) 76 S. W. Rep. 118; *State v. Bartlett*, 70 Minn. 199. See also *State v. Lagoni*, 30 Mont. 472.

Statutory Authority of Municipal Officer to Be Strictly Followed. — *Howlett v. Turner*, 93 Mo. App. 20; *Scio v. Hollis*, 10 Ohio Dec. 99.

Bail Taken by One Justice where the statute requires two is void. *People v. Cook*, 68 Ill. App. 202.

**659.** 1. Under the Missouri Statute authoriz-

**660.** 5. Sheriffs — *b.* IN THE UNITED STATES. — See note 5.

**661.** See note 2.

**662.** 6. Commissioners — *a.* UNITED STATES COMMISSIONERS. — See note 3.

**664.** III. RIGHT TO GIVE BAIL — 1. At Common Law — Matter of Judicial Discretion. — See note 3.

**665.** 2. Under State Constitutions — Bail a Matter of Right — Constitutional Provisions. — See notes 2, 3.

**667.** IV. CONSIDERATIONS GOVERNING THE GRANTING OF BAIL — 1. Considerations Generally Applicable — *b.* GRAVITY OF THE OFFENSE — Homicide. — See note 4.

**668.** *c.* STRENGTH OF THE EVIDENCE — (2) *When Proof Is Evident or Presumption Strong.* — See notes 3, 4.

ing the clerk to fix the amount of the bail, if the judge is out of the county, it must appear by indorsement that bail fixed by the clerk was ordered by the judge or that the judge was absent. *State v. Woodward*, 159 Mo. 680; *State v. Pratt*, 148 Mo. 402.

**660.** 5. Of Statutory Origin. — *State v. Fraser*, 165 Mo. 242.

**661.** 2. Approving Bail After Amount Indorsed on Writ. — *Havis v. State*, 62 Ark. 500; *Dunlap v. State*, 66 Ark. 105; *State v. Pratt*, 148 Mo. 402; *State v. Woodward*, 159 Mo. 680; *State v. Fraser*, 165 Mo. 242. See *Cox v. State*, 5 Kan. App. 539.

The Sheriff of a County from Which the Venue Has Been Moved has no authority to take bail. *Harbolt v. State*, 39 Tex. Crim. 129.

Where Amount Not Indorsed on Process. — *State v. Austin*, 69 Mo. App. 377, affirmed 141 Mo. 481.

**662.** 3. United States Commissioners. — U. S. *v. Dunbar*, (C. C. A.) 83 Fed. Rep. 151.

**664.** 3. Bail a Matter of Discretion. — *Jernagin v. State*, 118 Ga. 307.

**665.** 2. Constitutional Provisions. — See *Ex p. Gainey*, 42 Fla. 607; *Ex p. Majors*, (Miss. 1903) 34 So. Rep. 151; *State v. Hartzell*, (N. Dak. 1904) 100 N. W. Rep. 745.

Refusal of Bail by Police Officer Unauthorized. — *Markey v. Griffin*, 109 Ill. App. 212.

3. Bail a Matter of Right. — *Rigdon v. State*, 41 Fla. 308; *Markey v. Griffin*, 109 Ill. App. 212; *State v. Start*, (Kan. App. 1898) 54 Pac. Rep. 22; *State v. Madison County Ct.*, 136 Mo. 323; *State v. Collins*, 10 N. Dak. 464; *Martin v. State*, 9 Ohio Cir. Dec. 621; *Ex p. Newman*, 38 Tex. Crim. 164; *Ex p. Wright*, 39 Tex. Crim. 193; *Ex p. Darter*, (Tex. Crim. 1897) 38 S. W. Rep. 770.

Rape Bailable. — *Ex p. Arthur*, (Tex. Crim. 1898) 47 S. W. Rep. 365.

Constitutional Provisions Not Prohibitive. — In *State v. Collins*, 10 N. Dak. 464, the court expressed an opinion that a constitutional provision allowing bail in capital cases, except where the proof of guilt is evident or the presumption great, did not prohibit the granting of bail where the proof is evident or the presumption great.

**667.** 4. Homicide — Bill Accepted unless Killing Premeditated and Deliberate. — *State v. Start*, (Kan. App. 1898) 54 Pac. Rep. 22; *State v. Bell*, (Kan. App. 1898) 54 Pac. Rep. 504; *State v. Bartlett*, 70 Minn. 199; *Ex p. Patter-*

*son*, (Miss. 1897) 22 So. Rep. 186; *Ex p. Jack*, (Miss. 1897) 22 So. Rep. 188; *Ex p. Majors*, (Miss. 1903) 34 So. Rep. 151; *State v. Collins*, 10 N. Dak. 464; *State v. Hartzell*, (N. Dak. 1904) 100 N. W. Rep. 745; *Ex p. Cosby*, (Tex. Crim. 1899) 54 S. W. Rep. 587; *Ex p. Locklin*, (Tex. Crim. 1903) 72 S. W. Rep. 585; *Ex p. Smith*, (Tex. Crim. 1903) 76 S. W. Rep. 917.

Murder in Second Degree Bailable. — See *Ex p. Moore*, (Tex. Crim. 1904) 80 S. W. Rep. 620.

Manslaughter Bailable. — *Territory v. Cooper*, 11 Okla. 699.

Rape is not bailable in Texas when the proof shows that the crime was committed. *Ex p. Cotton*, (Tex. Crim. 1899) 53 S. W. Rep. 632.

Granting Bail in Capital Cases Discretionary. — *Jernagin v. State*, 118 Ga. 307.

Agreement with State's Attorney to Turn State's Evidence. — One guilty of a capital offense is not entitled to bail because he turns state's evidence, and an agreement between the accused and the state's attorney that he is to be admitted to bail upon his giving state's evidence is *ultra vires* and cannot be enforced. *Ex p. Greenhaw*, 41 Tex. Crim. 278.

The Burden of Proof is on the accused on an application for bail. *Rigdon v. State*, 41 Fla. 308; *Brown v. State*, 147 Ind. 28. *Contra*, *Ex p. Newman*, 38 Tex. Crim. 164.

It Will Be Presumed on Appeal, where bail has been refused, that the proof is evident and the presumption great. *State v. Madison County Ct.*, 136 Mo. 323.

**668.** 3. Rule for Determining "When Proof Is Evident or Presumption Great." — See *State v. Start*, (Kan. App. 1898) 54 Pac. Rep. 22; *State v. Bell*, (Kan. App. 1898) 54 Pac. Rep. 504; *State v. Collins*, 10 N. Dak. 464; *State v. Hartzell*, (N. Dak. 1904) 100 N. W. Rep. 745; *Ex p. Wright*, 39 Tex. Crim. 193; *Ex p. Cotton*, (Tex. Crim. 1899) 53 S. W. Rep. 632; *Ex p. Cosby*, (Tex. Crim. 1899) 54 S. W. Rep. 587.

4. Rule Criticised. — See *Ex p. Majors*, (Miss. 1903) 34 So. Rep. 151; *Ex p. Locklin*, (Tex. Crim. 1903) 72 S. W. Rep. 585.

"Probability" of Guilt. — Where the proof goes no further than to establish a "probability" of guilt, bail should not be denied. *Ex p. Gainey*, 42 Fla. 607.

Evidence Examined and Accused Held Entitled to Bail. — See *Ex p. Patterson*, (Miss. 1897) 22 So. Rep. 186; *Ex p. Jack*, (Miss. 1897) 22 So. Rep. 188.

- 671.** *e.* STAGE OF THE PROCEEDING WHEN APPLICATION MADE —  
(3) *After Indictment* — (a) Rule at Common Law. — See note 3.  
(b) Rule in the United States. — See note 5.  
**672.** See note 1.  
Effect of Presumption Raised by Indictment. — See notes 2, 3.  
**673.** See note 1.  
(4) *After Conviction* — Power of Court to Bail. — See note 3.  
**675.** When Bail Allowable After Conviction — In the United States. — See note 5.  
**676.** See note 1.  
**677.** 2. Extraordinary Considerations Controlling Particular Cases — *a.*  
ILLNESS OF THE PRISONER. — See note 4.  
Illness Must Be Serious. — See note 5.  
**678.** See note 1.  
**680.** *c.* EXTRADITION — Bail Not Allowable. — See note 1.  
V. AMOUNT OF BAIL — 1. In General. — See notes 3, 4.  
**681.** 2. Excessive Bail. — See notes 1, 2.

**671. 3. After Indictment — Rule at Common Law.** — At common law, bail might, in proper cases, be granted at any stage of the case in the court's sound discretion, either before or after indictment. *Ex p. Hill*, 51 W. Va. 536, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 671.

5. Rule in America — Court May Examine Evidence Before Grand Jury. — See *Markey v. Griffin*, 109 Ill. App. 212.

**672. 1. Presumption of Guilt Raised by Indictment.** — *State v. Madison County Ct.*, 136 Mo. 323.

2. Indictment Justifying Denial of Hearing. — *Martin v. State*, 9 Ohio Cir. Dec. 621.

3. **Hearing Allowed in Discretion of Court.**—*Martin v. State*, 9 Ohio Cir. Dec. 621.

**673. 1. Burden upon Applicant to Produce Exculpatory Evidence.**—*State v. Madison County Ct.*, 136 Mo. 323.

**3. After Conviction—Power of Court to Bail.**—State *ex rel.* Collette, 106 La. 221; State *v.* Murphy, 23 Nev. 390; Territory *v.* Cooper, 11 Okla. 699; *Ex p.* Hill, 51 W. Va. 536, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 673.

**Federal Courts.** — McKnight v. U. S., (C. C. A.) 113 Fed. Rep. 451.

**675. 5. Bail Allowed with Caution After Conviction of Felony.**—*Ex p. Williams*, 114 Ala. 29; *Territory v. Cooper*, 11 Okla. 699; *Ex p. Hill*, 51 W. Va. 536, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 675. See also *Matter of Raidler*, 4 Okla. 417. *Compare McKnight v. U. S.*, (C. C. A.) 113 Fed. Rep. 451.

In Louisiana a defendant is not entitled to bail after conviction of a felony punishable by death or imprisonment at hard labor and before sentence is pronounced. If a sentence other than death or imprisonment at hard labor has been pronounced, the accused is entitled to bail. State *ex rel.* Collette, 106 La. 221.

**676. 1. Circumstances Warranting Bail After Conviction.** — See *Ex p. Hill*, 51 W. Va. 536.

**677. 4. Illness of Prisoner — Grounds for Bail.**—*In re Ward*, 127 Cal. 489; *Ex p. Wheeler*, (Miss. 1898) 24 So. Rep. 261; *Ex p. Tittle*, 37 Tex. Crim. 597; *Ex p. Hill*, 51 W. Va. 536, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 677.

**5. Illness Must Threaten Life or Permanent Injury to Health.**—*Ex p.* Hill, 51 W. Va. 536.

**678. 1. Bail Should Be Granted Where Illness Likely to Terminate Fatally.**—*Ex p. Hill*, 51 W. Va. 536, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 677 [678].

**680. 1. Extradition.** — *Matter of Foye*, 21 Wash. 250.

3. *Ex p. Arthur*, (Tex. Crim. 1898) 47 S. W. Rep. 365.

4. **Question for Judicial Decision.**—*Ex p.* Title, 37 Tex. Crim. 597; *Ex p.* Arthur, (Tex. Crim. 1898) 47 S. W. Rep. 365; *Hernandez v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 549.

**Bail in Less than the Statutory Amount** has been held to defeat the jurisdiction of the court on appeal. *Xydias v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 761.

**681. 1. Not Excessive—Examples.**—A bond not exceeding in amount the fine with which the offense charged is punishable has been held not to be excessive. *Ex p. Smith*, 79 Miss. 373.

Bail in the sum of six hundred dollars for a defendant charged with assault with intent to commit rape is not excessive. *Ex p. Scott*, (Tex. Crim. 1901) 62 S. W. Rep. 568.

A bond of two hundred and fifty dollars on a charge of burglary is not excessive, but on the contrary quite small. *Ex p. Bishop*, (Tex. Crim. 1901) 61 S. W. Rep. 308.

Where the punishment prescribed is a fine of not less than fifty dollars nor more than five hundred dollars, a bond of one hundred and fifty dollars would ordinarily not be excessive. *Ex p. Ferrell*, (Tex. Crim. 1896) 37 S. W. Rep. 328.

**Example of Excessive Bail.**—Where the complaint charged the defendant with the larceny of eighteen cattle worth thirty dollars each, bail in the sum of five thousand dollars was held to be excessive. *Ex p. Douglas*, 25 Nev. 425.

**The Amount of Bail May Be Increased** when, in the judgment of the court, it is necessary. *State v. Eyermann*, 172 Mo. 294. But the *Texas* statute does not authorize a District Court to increase the amount of bail after indictment. *Jenkins v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 224.

2. Review by Higher Court. — See *Ex p. Bishop*, (Tex. Crim. 1901) 61 S. W. Rep. 308.

**681.** 3. Reduction of Amount. — See note 3.

**682.** VI. MONEY IN LIEU OF BAIL — Authority to Take Is Statutory. — See notes 1, 2.

How Regarded. — See note 3.

Title to Deposit. — See note 5.

**683.** VII. NUMBER AND QUALIFICATION OF SURETIES — Qualification of Sureties. — See note 4.

**684.** VIII. JUSTIFICATION OF SURETIES. — See note 2.

**686.** X. THE UNDERTAKING — 1. Definitions — A Recognizance. — See note 3.

**687.** A Bail Bond. — See note 1.

A Recognizance Differs from a Bail Bond. — See note 2.

**688.** A Recognizance, or Bail Bond, Dates. — See note 1.

2. Essentials to Validity — *a.* AUTHORITY AND PROCESS UNDER WHICH TAKEN. — See note 2.

**689.** See note 1.

**681.** 3. Reduction on Habeas Corpus. — *Ex p. Douglas*, 25 Nev. 425; *Sancedo v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 546; *Hernandez v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 549; *Ex p. Choynski*, 42 Tex. Crim. 586.

**682.** 1. Money as Bail. — *Savannah v. Kassell*, 115 Ga. 310; *State v. Owens*, 112 Iowa 403; *State v. Anderson*, 119 Iowa 711; *Arnsperger v. Norman*, 101 Ky. 208; *Com. v. Leech*, 103 Ky. 389; *State v. Ross*, 100 Tenn. 303.

2. Appellate *v. Young*, 62 Kan. 100, reversing 9 Kan. App. 493; *Brusoe v. The Retreat*, 25 Ohio Cir. Ct. 193.

3. Deposit Released by Subsequent Bond. — *State v. Anderson*, 119 Iowa 711, holding further that after an unauthorized deposit by a third person has been restored, it cannot be subsequently recovered by the state.

Interest Is Not Payable until after the final disposition of the case, and demand. *Savannah v. Kassell*, 115 Ga. 310.

5. Title to Deposit in Accused. — *State v. Owens*, 112 Iowa 403; *State v. Ross*, 100 Tenn. 303. See also *Com. v. Leech*, 103 Ky. 389; *People v. Gould*, 75 N. Y. App. Div. 524, in which case it was held that money deposited by a third person is regarded as belonging to the accused so far as the pending proceeding is concerned, but not for any other purpose.

A Deposit Made on Appeal by One Convicted of Abandonment was ordered to be applied to the year's support of the wife, in an amount which had been adjudged. *People v. Burke*, (Ct. Gen. Sess.) 38 Misc. (N. Y.) 566.

Discharge of Accused on Deposit by Third Person Unlawful. — *State v. Anderson*, 119 Iowa 711.

Money Unlawfully Taken Recoverable. — *Brusoe v. The Retreat*, 25 Ohio Cir. Ct. 193.

**683.** 4. Qualifications of Bail — At Common Law. — *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230.

The Illinois Statute requires each surety to be worth the amount of bail expressed in the recognizance over and above the amount exempt from execution, unless more than two sureties are accepted, in which case they may justify severally in smaller amounts if the aggregate qualification be equivalent to two sufficient bails. *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230.

**684.** 2. Justification Discretionary with Officer. — See *Pierce v. State*, 39 Tex. Crim. 343.

**686.** 3. *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230; *People v. Cook*, 68 Ill. App. 202; *State v. Taylor*, 136 Mo. 462; *Maxey v. State*, 41 Tex. Crim. 556.

Nature of Recognizance. — See *State v. Lambert*, 44 W. Va. 308.

The Object of a Recognizance. — *State v. Martin*, 49 La. Ann. 752.

A Recognizance Is "Process" within Rev. Stat. U. S., § 602, providing for the continuance of all process when the office of a judge of any District Court is vacant. *U. S. v. Murphy*, 82 Fed. Rep. 898.

**687.** 1. Matter of Nottingham, (1897) 2 Q. B. 510; *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230.

A Bail Bond Is a Contract entered into between the state, by its governor on the one part, and the named principal and sureties on the other. *Adams v. Candler*, 114 Ga. 151; *Hesselgrave v. State*, 63 Neb. 809. See also *Fossett v. State*, 43 Tex. Crim. 117.

2. Bond and Recognizance Distinguished. — *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 687.

**688.** 1. Fixed by Date of Acknowledgment. — *Huston v. People*, 12 Colo. App. 271.

2. Bail Bond Taken Without Authority Is Void. — *Huston v. People*, 12 Colo. App. 271; *People v. Cook*, 68 Ill. App. 202; *Cox v. State*, 5 Kan. App. 539; *Com. v. Phillips*, (Ky. 1903) 76 S. W. Rep. 118; *Clute v. Ionia Circuit Judge*, 131 Mich. 203; *State v. Bartlett*, 70 Minn. 199; *State v. Pratt*, 148 Mo. 402; *State v. Woodward*, 159 Mo. 680; *State v. Fraser*, 165 Mo. 242; *State v. Lagoni*, 30 Mont. 472; *State v. Murphy*, 23 Nev. 390; *Harbolt v. State*, 39 Tex. Crim. 129.

Presumption that Officers Acted Within Their Authority. — *Lindsay v. State*, 39 Tex. Crim. 468.

That the Offense Charged Was Barred by Statute does not invalidate the bond or release the sureties. *U. S. v. Dunbar*, (C. C. A.) 83 Fed. Rep. 151.

**689.** 1. Unauthorized Bond Not Good as Common-law Obligation. — *People v. Cook*, 68 Ill. App. 202; *State v. Fraser*, 165 Mo. 242; *Scio v. Hollis*, 10 Ohio Dec. 99.

**689.** Authority Must Be Strictly Pursued. — See note 2.

**690.** *b.* FORMAL REQUISITES OF THE INSTRUMENT — (1) *In General.* — See note 2.

**691.** See note 1.

A Bail Bond, Being of Statutory Origin. — See note 2.

Conditions Generally. — See note 3.

Conditions More Onerous. — See note 4.

**692.** Immaterial Omissions or Additions. — See note 1.

(2) *Name of Accused.* — See note 2.

**693.** (3) *Appearance* — (a) *In General.* — See note 1.

(b) *Time and Place.* — See notes 2, 3.

**694.** Term. — See note 1.

The Court or Place. — See note 2.

**695.** See note 1.

**696.** (4) *Offense Charged* — (a) *In General.* — See notes 2, 3.

**689.** 2. Bond Must Conform to Order of Court — Amount. — *Scio v. Hollis*, 10 Ohio Dec. 99.

Surety Released by Failure of Officer to Require Proper Signature of Cosurety. — *Com. v. Belt*, (Ky. 1899) 51 S. W. Rep. 431.

**690.** 2. Name of Prosecutor Unnecessary. — *State v. Fuller*, 128 Ala. 45.

Irregularities in Bond Cured by Statute. — *Hardesty v. State*, 5 Kan. App. 780.

**691.** 1. Defects Cured by Statute. — *Allen v. Com.*, (Ky. 1903) 73 S. W. Rep. 1027.

Taken "In Open Court." — A statutory requirement that the recognizance state that it was taken "in open court" is sufficiently complied with by a recital that it was taken "before the court in session." *Haley v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 38.

Recognizance Not Declared Void "On Close Technical Grounds." — *State v. Quattlebaum*, 67 S. Car. 203.

2. *State v. Fuller*, 128 Ala. 45; *Herbert v. State*, 44 Tex. Crim. 524; *Adams v. State*, 44 Tex. Crim. 534; *Anderson v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 470; *Cater v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 12; *Cooper v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 346; *Robertson v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 517; *Com. v. Fulks*, 94 Va. 585; *Cannon v. Com.*, 96 Va. 573. See also *Haley v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 38.

3. Conditions in Instrument. — *Howlett v. Turner*, 93 Mo. App. 20.

Words of Similar Import Sufficient. — *Reed v. Police Ct.*, 172 Mass. 427.

4. *Stanly v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 345; *Robertson v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 517. But see *Kansas City v. Hescher*, 4 Kan. App. 782.

**692.** 1. *State v. Lambert*, 44 W. Va. 308.

2. Name of Accused Essential. — *State v. Fuller*, 128 Ala. 45; *Cox v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 838.

Slight Error in Name Does Not Invalidate. — *State v. Ballentine*, 106 Mo. App. 190; *State v. Porter*, (S. Dak. 1904) 99 N. W. Rep. 80.

**693.** 1. *Appearance.* — *Martin v. State*, 44 Tex. Crim. 197.

Under the Virginia Statute (Code Va., § 4093), the recognizance must require the appearance of the accused at a stated time to answer the offense with which such person is charged. *Cannon v. Com.*, 96 Va. 573.

2. *Appearance from Term to Term.* — A recognizance requiring the accused to appear "from time to time," instead of "from term to term" as provided by statute, is fatally defective. *Samamiego v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 996; *Fulton v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 227.

3. Reasonable Certainty Sufficient. — *Jedlicka v. State*, 4 Ohio Dec. (Reprint) 463, 2 Cleve. L. Rep. 196; *Camp v. State*, 39 Tex. Crim. 142.

**694.** 1. Must Require Appearance at "Next" Term. — *Tolleson v. State*, 139 Ala. 159; *Baxstrum v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 748; *Marshall v. State*, 44 Tex. Crim. 273.

2. Court or Place of Appearance. — *Ex f. Hays*, 43 Tex. Crim. 268. See also *Com. v. Meeser*, 19 Pa. Super. Ct. 1.

Sufficient Description. — See *State v. Murphy*, 23 Nev. 390; *Ex p. Hays*, 43 Tex. Crim. 268.

**695.** 1. *Moseley v. State*, 37 Tex. Crim. 18; *Sloan v. State*, 39 Tex. Crim. 63; *Mackey v. State*, 38 Tex. Crim. 24.

**696.** 2. Statement of Offense. — *State v. Moore*, 2 Penn. (Del.) 299; *Candler v. Kirksey*, 113 Ga. 309; *State v. Murphy*, 23 Nev. 390; *Ramsey v. State*, 36 Tex. Crim. 392; *Mara v. State*, 39 Tex. Crim. 183; *Wade v. State*, 41 Tex. Crim. 580; *Loveless v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 361. See also *Com. v. Fulks*, 94 Va. 585. *Contra*, *Kinney v. State*, 7 Ohio Cir. Dec. 97.

Parol Evidence as to Offense Not Admissible. — *State v. Moore*, 2 Penn. (Del.) 299.

In Kansas by Statute the validity of the recognizance does not depend on its stating the exact offense charged, if it appears that the accused is lawfully in custody charged with a public offense. *Kansas City v. Hescher*, 4 Kan. App. 782.

3. Accuracy Necessary in Indictment Not Required. — *State v. Reiman*, 3 Penn. (Del.) 73; *Vaughan v. Candler*, 113 Ga. 9, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 696; *Main v. Com.*, (Ky. 1900) 56 S. W. Rep. 979; *State v. Ruthing*, 49 La. Ann. 909; *Collins v. State*, 39 Tex. Crim. 30; *Camp v. State*, 39 Tex. Crim. 142; *Lewis v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 988.

Assault with Intent to Kill. — *Vaughan v. Candler*, 113 Ga. 9.

A Conspiracy to Defraud the United States stated as that the accused "conspired to de-

- 697.** (b) *Specific Name.* — See note 1.  
**698.** See note 1.  
 (c) *Must Be Punishable by Law.* — See note 2.  
**699.** (d) *Variance between Charge and Recognizance.* — See note 1.  
 (e) *After Indictment.* — See note 2.  
**700.** (f) *After Conviction.* — See note 1.  
 (g) *Disjunctive Statement.* — See note 2.  
 (5) *Amount of Penalty.* — See notes 3, 4, 5.  
**701.** (c) *Designation of Cognizee or Obligee.* — See note 1.  
 c. *SIGNING AND SEALING* — (1) *Recognizance.* — See note 2.  
*The Statutes of Some States.* — See note 4.

fraud the United States" is sufficient, without stating the date of the offense, the persons defrauded, or the section of the Revised Statutes violated. *U. S. v. Dunbar*, (C. C. A.) 83 Fed. Rep. 151.

**Offense Sufficiently Described by Reference to Complaint.** — *Kansas City v. Garnier*, 57 Kan. 412.

**An Omission to Recite the Offense**, when no substantial right is affected, has been held not to invalidate the recognizance. *People v. Russell*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 765.

**Whether the Offense Is a Misdemeanor or a Felony** need not be stated. *White v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 770.

**"Abortion" Synonymous with "To Procure a Miscarriage."** — *State v. Davis*, 27 Utah 368.

**697. 1. Specific Name of Offense Sufficient.** — *Jones v. State*, 38 Tex. Crim. 364; *Loveless v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 361.

**Abbreviations.** — The letters "V. L. O. L." in a recognizance, as an abbreviation of the offense of violating local option laws, have been held not to release the sureties. *Allen v. Com.*, (Ky. 1903) 73 S. W. Rep. 1027.

**698. 1. Statutory Ingredients.** — *Ramsey v. State*, 36 Tex. Crim. 392; *Hardin v. State*, 36 Tex. Crim. 460; *Johnson v. State*, 38 Tex. Crim. 26; *Coggin v. State*, 38 Tex. Crim. 40; *Youngman v. State*, 38 Tex. Crim. 459; *Salmon v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 995; *Duffer v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 997; *Strain v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 383; *Loveless v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 361; *Fikes v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 248; *Mitchell v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 594.

**Offense Charged in Language of Statute.** — *U. S. v. Dunbar*, (C. C. A.) 83 Fed. Rep. 151; *Collins v. State*, 39 Tex. Crim. 30; *Robinson v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 678.

**2. Must State Punishable Offense.** — *Vaughan v. Candler*, 113 Ga. 9, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 698; *Candler v. Kirksey*, 113 Ga. 309; *Hardin v. State*, 36 Tex. Crim. 460; *Cannady v. State*, 37 Tex. Crim. 123; *McClure v. State*, 37 Tex. Crim. 129; *McMeans v. State*, 37 Tex. Crim. 130; *Johnson v. State*, 38 Tex. Crim. 26; *Coggin v. State*, 38 Tex. Crim. 40; *Mara v. State*, 39 Tex. Crim. 183; *Wade v. State*, 41 Tex. Crim. 580; *Swain v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 609; *Wilson v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 279; *Jackson v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 287; *Strain v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 383; *Fikes v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 248; *Anderson v.*

*State*, (Tex. Crim. 1903) 72 S. W. Rep. 593; *Mitchell v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 594; *State v. Davis*, 27 Utah 368.

**699. 1. Variance.** — *Wilson v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 279; *Hargrove v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 926.

**2. After Indictment.** — *Jackson v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 287; *Youngman v. State*, 38 Tex. Crim. 459.

**Immaterial Variance.** — Where the indictment charged an assault with intent to murder, a recognizance stating that the accused was charged with an aggravated assault and convicted of that offense was held to be sufficient. *Morrison v. State*, 37 Tex. Crim. 601.

**Where the Indictment Charges Several Offenses** in different counts, it is sufficient if the recognizance describes one of such offenses. *Foster v. State*, 38 Tex. Crim. 374.

**700. 1. After Conviction.** — *Coggin v. State*, 38 Tex. Crim. 40; *Teague v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 290; *Horton v. State*, 43 Tex. Crim. 600; *Allen v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 308; *Angel v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 379.

**2. Disjunctive Statement.** — *Lowery v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 609; *Strey v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 279; *Polly v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 283; *Young v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 564; *Davidson v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 488.

**3. Amount of Bail Must Be Stated.** — *Angel v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 379.

**4. A Requirement that the Parties Be Severally Bound** is not violated by the fact that the recognizance states that the principal is bound in the full amount and that each surety is bound in the same sum. *Haley v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 38.

**5. Bond Void When Taken for Sum in Excess of that Ordered.** — *Com. v. Riffe*, (Ky. 1899) 49 S. W. Rep. 772.

**Less than Statutory Requirement.** — *Ward v. State*, 38 Tex. Crim. 545. See also *Shields v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 670.

**701. 1. Recognizance May Run to City Instead of State.** — *Kansas City v. Garnier*, 57 Kan. 412; *Kansas City v. Hescher*, 4 Kan. App. 782.

**2. Signature Unnecessary.** — *McNamara v. People*, 183 Ill. 164; *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230.

**4. Kansas City v. Fagan**, 4 Kan. App. 796; *State v. Pratt*, 148 Mo. 402; *Teague v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 290.

**Signature in Body of Instrument.** — *Nelson v.*

**702.** See note 1.

(2) *Bail Bonds*. — See note 3.

d. ACKNOWLEDGMENT. — See note 4.

**703.** A Verbal Acknowledgment. — See note 1.

f. APPROVAL. — See note 5.

**704.** g. FILING AND RECORDING — (1) *In General*. — See note 2.

**705.** (3) *Time of Filing* — *Statutes Directory*. — See note 3.

h. BONDS ON APPEAL FROM CONVICTION. — See notes 4, 5.

**706.** See notes 1, 2, 3, 5.

*State*, 44 Tex. Crim. 595; *McHowell v. State*, 41 Tex. Crim. 227.

**Principal Need Not Sign — Sureties Bound.** — *State v. Ballentine*, 106 Mo. App. 190.

**Statute Directory.** — The *South Carolina* statute requiring the signature of the accused is merely directory. *State v. Quattlebaum*, 67 S. Car. 203.

**702. 1. Names of Sureties to Be Recited in Bond.** — See *Herbert v. State*, 44 Tex. Crim. 524.

**3. Bail Bond.** — *Nelson v. State*, 44 Tex. Crim. 595.

**What Sufficient Signature.** — See *Whitener v. State*, 38 Tex. Crim. 146.

**Agent Signing Bond Must Have Written Authority.** — *Com. v. Belt*, (Ky. 1899) 51 S. W. Rep. 431.

**4. In Kansas** it is not required that the recognizance be acknowledged as at common law. *Kansas City v. Fagan*, 4 Kan. App. 796.

**703. 1. Statute Dispensing with Signing Constitutional.** — *McNamara v. People*, 183 Ill. 164.

**5. Approval.** — *Crumpecker v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 564.

**704. 2. Filing Recognizance.** — *State v. Pratt*, 148 Mo. 402. See also *Com. v. Meeser*, 19 Pa. Super. Ct. 1. Compare *State v. Lagom*, 30 Mont. 472.

**Record on Day of Entry Not Essential.** — *McNamara v. People*, 183 Ill. 164.

**705. 3. On Appeal.** — In *Texas* the recognizance on appeal must be entered of record during the term to which the appeal is returnable. *Maxey v. State*, 41 Tex. Crim. 556.

**4. Name of Court.** — *Kazda v. State*, 52 Neb. 499; *Adams v. State*, 44 Tex. Crim. 534; *Fincher v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 732; *Skidmore v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 859; *Guill v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 303; *McRay v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 161; *Nix v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 161; *Satterwhite v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 396; *Angel v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 379.

**5. Offense Charged.** — *Nunn v. State*, 40 Tex. Crim. 435; *Wade v. State*, 41 Tex. Crim. 580; *Stewart v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 513; *McGough v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 712; *Boyettt v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 495; *Horton v. State*, 43 Tex. Crim. 600; *Angel v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 379.

**706. 1. Must Require Appearance.** — *Bigelow v. State*, 36 Tex. Crim. 402; *Henry v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 609; *Martin v. State*, 44 Tex. Crim. 197; *Anderson v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 470.

**Appearance from Day to Day and from Term to Term "of the Same"** (the quoted words referring to the court) is essential to the validity of the recognizance under the *Texas* statute. *Meeks v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 910.

**2. Amount of Indebtedness to Be Specified.** — *Teague v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 290.

**3. Bigelow v. State**, 36 Tex. Crim. 402; *Nunn v. State*, 40 Tex. Crim. 435; *Wade v. State*, 41 Tex. Crim. 580; *Bolton v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 525; *Allen v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 308; *Angel v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 379.

**Material Mistake in Recital of Conviction.** — *Bennett v. State*, 37 Tex. Crim. 244; *Chappell v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 928; *Sturgeon v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1067; *Roberts v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 272; *Horton v. State*, 43 Tex. Crim. 600; *Buck v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 12.

**Punishment Imposed Must Be Stated.** — Under the *Texas* statute (Code Crim. Pro. Tex. 1895, art. 887) the recognizance must show the punishment or amount of fine adjudged against the defendant. *May v. State*, 40 Tex. Crim. 196; *Herrington v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 402; *Davis v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 403; *Davis v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 580; *Barchinsky v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 583; *Still v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 594; *Johnson v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 594; *Bird v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 715; *Swope v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 715; *Perry v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 229; *Donnelly v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 228; *Howard v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 229; *Peck v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 229; *Fikes v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 248; *Westfall v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 629; *Allen v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 103; *Dickerson v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 104; *Ishmael v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 107; *Whitmore v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 125; *Newbury v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 638; *Brewer v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 859; *Secrest v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 630; *Johnson v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 587; *Johnson v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 176; *Jordan v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 176; *Chumley v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 492; *Cooper v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 494; *Boyettt*

*v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 495; *Woolridge v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 818; *Morse v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 819; *Clark v. State*, 41 Tex. Crim. 635; *Walker v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 913; *McDade v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 916; *Beck v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 917; *McCormack v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1006; *Cartwright v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1008; *Luke v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 44; *Allred v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 273; *Cauthern v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 273; *Bowen v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 552; *Erwin v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 961; *Wellborn v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 306; *Moore v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 395; *Murphy v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 405; *Seguin v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 753; *Lovic v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 748; *Weber v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 269; *Austin v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1041; *Lindsey v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 905; *Waits v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 917; *Standifer v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 550; *Tinkle v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 555; *Waldrip v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 555; *Crowley v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 559; *De Valeria v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 1020; *Horton v. State*, 43 Tex. Crim. 600; *Roberts v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 272; *Bolton v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 525; *Greer v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 23; *Kapps v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 83; *Hogue v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 217; *Bertoni v. State*, (Tex. Crim. 1903) 71 S. W. Rep. 963; *Lee v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 186; *Anderson v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 593; *Doran v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 585; *Floyd v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 969; *Hannon v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1053; *Jackson v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1055; *Bean v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 759; *Bourland v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 455.

**Texas Statute — Conviction of "Misdemeanor" to Be Stated.** — *Horton v. State*, 43 Tex. Crim. 600; *Roberts v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 272; *Kapps v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 83; *Anderson v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 593; *Mitchell v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 594; *Hannon v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1053; *Cater v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 12; *Holcomb v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 231; *Perkins v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 346; *Robertson v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 517.

**Naming the Offense as an "Aggravated Assault,"** which is a misdemeanor, has been held sufficient. *Kees v. State*, 44 Tex. Crim. 543.

**Information or Complaint.** — In *Texas*, by statute, the bond on an appeal from a justice must state that the appellant was convicted "on an

information or complaint." *Day v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 373.

**A Variance between the recognizance and the fine and sentence actually imposed vitiates the recognizance.** *Hargrove v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 926.

**Identification of Judgment and Sentence Sufficient.** — *Minden v. McCrary*, 108 La. 518.

**Conviction "In This Case" to Be Stated.** — *Meeks v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 910.

**Bond Must Be in Accordance with Judgment.** — *Sparr v. State*, 42 Tex. Crim. 416.

**An Alteration Showing the Punishment Assessed,** made after the transcript was sent up by the lower court, does not validate the instrument. *Ward v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 496.

**Misstatement of Punishment Fatal.** — *Driggs v. State*, 43 Tex. Crim. 406.

**Case Sufficiently Identified Without File Number.** — Where the bond shows the parties, the title of the court, the date of the judgment, and the amount of the fine, the case is sufficiently identified without the file number. *Thielen v. State*, 43 Tex. Crim. 310.

**Statement of Offense for Which Convicted.** — *Stewart v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 513; *Hall v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 838.

**706. 5. Condition to Abide Judgment of Appellate Court.** — *Bigelow v. State*, 36 Tex. Crim. 402; *Nunn v. State*, 40 Tex. Crim. 435; *Guill v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 303; *Teague v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 290; *Satterwhite v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 396; *McGough v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 712; *Harkey v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 559; *Bolton v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 525; *Angel v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 379.

**Condition Not to Depart Without Leave.** — The *Texas* statute prescribing that the recognizance shall require that the accused shall "not depart without leave of this court," must be complied with. *Robertson v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 517; *Cooper v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 346.

**"Not Depart Without Leave of the Court"** is a sufficient compliance with the statutory "not depart without leave of this court." *Kees v. State*, 44 Tex. Crim. 543.

**Omission of Concluding Words.** — A recognizance which binds the accused not to "depart without leave of this court in order to abide the judgment of the Court of Criminal Appeals of this state," but omits the concluding words "in this case," as prescribed by the Code Crim. Pro. Tex., art. 887, is insufficient. *Herbert v. State*, 44 Tex. Crim. 524; *Fortenberry v. State*, 44 Tex. Crim. 535; *Adams v. State*, 44 Tex. Crim. 534; *Cryer v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 753; *Duffer v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 997; *Lively v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 997; *Tucker v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 1001; *Fortenberry v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 586; *Brock v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 599; *Mason v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 25; *Pigford v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 323; *Heinen*



**706. 3. Execution — a. IN GENERAL.** — See note 6.

Execution on Sunday. — See note 9.

**707. b. ESTOPPEL BY EXECUTION.** — See note 1.

4. Amendments. — See note 5.

6. Construction. — See note 8.

**708. XI. RIGHTS AND LIABILITY OF BAIL — 1. Rights — a. IN GENERAL.** — See note 1.**b. ARREST AND SURRENDER OF PRINCIPAL — (1) In General.** — See note 2.(2) *The Arrest* — Authority to Make. — See note 3.**709. Extent of Authority.** — See note 3.(3) *The Surrender* — Manner of Making. — See note 4.**710. To Whom Made.** — See note 1.

Effect of Surrender. — See note 2.

*v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 776; *Parker v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 30; *Franklin v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 759; *Armstrong v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 446; *Gaither v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 234; *Lockett v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 234.

**Conditions Not Violated.** — Where the obligation is that the accused will surrender himself in execution of the judgment upon its being affirmed, modified, or dismissed, or upon the judgment being reversed and the cause remanded for a new trial, the condition is not broken by the failure of the accused to appear where the judgment was reversed on the ground that the lower court was without jurisdiction. *State v. Candland*, 25 Utah 172.

**706. 6. Joint Recognizance.** — A recognizance which is joint and not several is defective and insufficient under the *Texas* statute. *Standifer v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 550; *McHam v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 911.

In *Stanly v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 345, it was held that a joint recognizance by eight sureties given by eight defendants who were tried and convicted jointly, which makes the breach of one principal the breach of all, is onerous and will not support an appeal.

**Separate Bonds by Defendants Jointly Convicted Required.** — *Lee v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 97; *Stanly v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 345.

**A Presumption that Two Principals Were Jointly Charged** and that their joint bond is therefore valid will be indulged in *Kentucky*. *Lawrence v. Com.*, (Ky. 1903) 76 S. W. Rep. 10.

**9. Effect of Execution on Sunday.** — *Lindsay v. State*, 39 Tex. Crim. 468.

In *Georgia*. — *Adams v. Candler*, 114 Ga. 151.

**707. 1. Bail Estopped from Denying Truth of Recitals in Instrument.** — See *Com. v. Blair County Jail Warden*, 8 Pa. Dist. 159.

**Sureties Estopped to Set Up Insufficient Description of Offense.** — *People v. Russell*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 765.

**5. After Appeal.** — *Xydias v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 761. See also *Charles v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 668.

**8. Construction According to Laws of Jurisdiction Where Given.** — *State v. Lewis*, 35 Wash. 261.

**708. 1. Rights of Bail.** — *Bartling v. State*, (Neb. 1903) 93 N. W. Rep. 1047; *State v. Dwyer*, 70 Vt. 96.

**2. Right of Bail to Arrest and Surrender Principal** — *Alabama*. — *Ex p. Williams*, 114 Ala. 29. *Arkansas*. — *Dunlap v. State*, 66 Ark. 105. *Colorado*. — *Huston v. People*, 12 Colo. App. 271.

*Georgia*. — *Freeman v. State*, 112 Ga. 648; *Wiggins v. Tyson*, 112 Ga. 744.

*Illinois*. — *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230; *Kuhle v. People*, 65 Ill. App. 378.

*Iowa*. — *State v. Anderson*, 119 Iowa 711.

*Kentucky*. — *Combs v. Com.*, 103 Ky. 385.

*Louisiana*. — *State v. Miller*, 109 La. 27.

*Nebraska*. — *Bartling v. State*, (Neb. 1903) 93 N. W. Rep. 1047.

*Texas*. — *Talley v. State*, 44 Tex. Crim. 162.

*Washington*. — *State v. Lewis*, 35 Wash. 261.

*West Virginia*. — *State v. Lambert*, 44 W. Va. 308.

**On Appeal from Conviction.** — Under the *Texas* statutes there is no authority for the surrender of a principal pending an appeal from conviction for a misdemeanor. *Tally v. State*, 44 Tex. Crim. 162.

**3. Bail May Arrest Principal Without Warrant.** — *State v. Dwyer*, 70 Vt. 96.

**One Who Has Made an Unauthorized Deposit in Lieu of Bail** has no authority to surrender the accused. *State v. Owens*, 112 Iowa 403.

**709. 3. A Warrant for the Arrest of the Principal** may be required by the bail, and such warrant may issue to any county of the state. *Whitener v. State*, 38 Tex. Crim. 146.

**4. Surrender of Principal While in Custody.** — See *Combs v. Com.*, 103 Ky. 385; *Havis v. State*, 62 Ark. 500.

**Surrender Within Four Walls of Prison Necessary.** — *State v. Miller*, 109 La. 27.

**Sufficiency of Evidence of Proper Surrender.** — See *People v. Mahoney*, (Supm. Ct. Spec. T.) 89 N. Y. Supp. 424.

**710. 1. Surrender in Open Court Compliance with Obligation.** — *State v. Miller*, 109 La. 27.

**2. Sureties Released by Surrender.** — *Huston v. People*, 12 Colo. App. 271.

**710.** 2. Liability — *a.* WHO MAY BE LIABLE — Married Women. — See note 8.

*b.* EXTENT OF OBLIGATION — (1) *In General.* — See notes 9, 10. Principal Leaving State. — See note 11.

**711.** See note 2.

(2) *Appearance of Principal* — (a) Court and Term Designated. — See notes 3, 4, 5.

**712.** Time of Appearance. — See notes 1, 2.

(b) Indictment Against Principal. — See note 3.

**713.** Sufficiency of Indictment. — See note 3.

**714.** (c) Appearance from Day to Day. — See note 1.

(d) Appearance from Term to Term. — See note 2.

**710.** 8. Common-law Rule Changed by Statute. — *Com. v. Abbott*, 168 Mass. 471.

9. Obligation of Bail. — *State v. Crosby*, 114 Ala. 11, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 710; *Ex p. Williams*, 114 Ala. 29; *State v. Osborn*, 155 Ind. 385, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 710; *State v. Zimmerman*, 112 Iowa 5; *State v. Bordelon*, 113 La. 21; *Bartling v. State*, (Neb. 1903) 93 N. W. Rep. 1047.

Liability Limited by Terms of Bond. — *Humphries v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 527.

Formal Defects in Bond Not Available as Defense. — *State v. Austin*, 141 Mo. 481; *Territory v. Cooper*, 11 Okla. 699.

10. *State v. Crosby*, 114 Ala. 11, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 710.

11. Liability for Principal Leaving State. — *State v. Osborn*, 155 Ind. 385, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 710.

**711.** 2. Liability for Removal of Insane Principal from State. — *State v. Osborn*, 155 Ind. 385, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 711.

3. *In re Tomer*, 3 Penn. (Del.) 31; *State v. Zimmerman*, 112 Iowa 5; *Louisiana Soc., etc., v. Moody*, 111 La. 199; *Perkins v. Milton*, 64 Neb. 848; *State v. Candland*, 25 Utah 172.

Conditions of Bond Complied With. — When the undertaking was that the prisoner would appear "during the said examination," a subsequent adjournment of the case by the magistrate without notice to the prisoner or surety was held to release the surety. *People v. McKenna*, 62 N. Y. App. Div. 327.

Appearance upon Notice to Produce. — The condition of the recognizance being that the accused shall appear "whenever required to do so," notice to the sureties in open court at the time set for trial to produce their principal is sufficient to fix their liability. *U. S. v. Dunbar*, (C. C. A.) 83 Fed. Rep. 151.

Obligation Fixed in Part by Statute. — While the liability of the surety is to be strictly construed under the terms of the recognizance, existing statutes relevant thereto are to be considered as expressly incorporated therein. *U. S. v. Murphy*, 82 Fed. Rep. 898.

4. Liability Limited to Court Designated. — *Fortenberry v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 538. See *infra*, this title, **714.** 3.

Two Branches of Same Court. — Where, in the city of St. Louis, there were two divisions of the criminal court, and the recognizance did not specify the one before which the accused should

appear, it was held that he was bound to appear before either division in which the prosecution was pending. *State v. Curtis*, 67 Mo. App. 431.

5. Term and Time of Holding Court. — *In re Tomer*, 3 Penn. (Del.) 31; *Lane v. State*, 6 Kan. App. 106; *State v. Murdock*, 59 Neb. 521; *Hesselgrave v. State*, 63 Neb. 807; *Fortenberry v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 538.

**712.** 1. If Stipulated in Undertaking Principal Must Appear on First Day of Term. — *State v. Crosby*, 114 Ala. 11.

2. Appearance When Notified — Notice Must Be Given. — *Louisiana Soc., etc. v. Moody*, 111 La. 199.

3. Failure to Indict Principal Not an Excuse for Nonappearance. — *State v. Hoeffner*, 68 Mo. App. 164; *Com. v. Schultz*, 29 Pa. Co. Ct. 228, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 712. See also *State v. Fuller*, 128 Ala. 45.

**713.** 3. Bail Cannot Question Sufficiency of Indictment. — *State v. Osborn*, 155 Ind. 385, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 713; *State v. Ruthing*, 49 La. Ann. 909; *State v. Austin*, 141 Mo. 481; *State v. Eyermann*, 172 Mo. 294; *State v. Hoeffner*, 68 Mo. App. 164.

Sufficiency of Proof. — It is no defense in an action on a forfeited recognizance to allege and prove that any one or all of the allegations of the criminal charge were in fact false. *State v. Osborn*, 155 Ind. 385.

**714.** 1. Liability of Bail for Appearance of Principal from Day to Day. — *Kirk v. U. S.*, 131 Fed. Rep. 331; *State v. Crosby*, 114 Ala. 11; *State v. Ballentine*, 106 Mo. App. 190. See also *Lawrence v. Com.*, (Ky. 1903) 76 S. W. Rep. 10.

Appearance Before Magistrate's Court from Day to Day. — See *State v. Jenkins*, 121 N. Car. 637.

2. Appearance from Term to Term. — *State v. Crosby*, 114 Ala. 11, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714; *State v. Fuller*, 128 Ala. 45; *Bartling v. State*, (Neb. 1903) 93 N. W. Rep. 1047; *State v. Ballentine*, 106 Mo. App. 190.

Failure to Hold Term. — The recognizance is not discharged by the failure to hold the term or by the adjournment of the term. *U. S. v. Murphy*, 82 Fed. Rep. 893; *Bartling v. State*, (Neb. 1903) 93 N. W. Rep. 1047; *State v. Horton*, 123 N. Car. 695.

Appearance for One Term Only. — *Lane v. State*, 6 Kan. App. 106; *State v. Murdock*, 59 Neb.

**714.** (e) *Change of Venue*. — See note 3.

**715.** *Misdemeanors*. — See note 1.

(3) *Abiding Order of Court*. — See note 2.

(4) *Liability for Fine Imposed*. — See notes 3, 4.

c. *AMOUNT OF LIABILITY*. — See note 5.

**716.** d. *JOINT AND SEVERAL NATURE OF LIABILITY* — (1) *Fixed by the Undertaking*. — See note 4.

(2) *Fixed by Statute*. — See note 5.

**717.** XII. *EXONERATION OF BAIL* — 1. *In General* — *General Rule*. — See notes 3, 4.

2. *Act of God* — *Death of Principal*. — See note 5.

3. *Act of Obligee* — *Executive Act*. — See note 6.

**718.** 4. *Act of Law* — a. *IN GENERAL*. — See note 2.

b. *STATE AUTHORITY* — (1) *Subsequent Arrest of Principal* —

(a) *On Same Charge*. — See notes 3, 4.

*Rearrest Must Be Legal*. — See note 7.

**719.** (b) *On Different Charge*. — See notes 1, 2, 4, 5.

521; *Hesselgrave v. State*, 63 Neb. 807; *Perkins v. Milton*, 64 Neb. 848. See also *State v. Roop*, 1 Marv. (Del.) 535.

A *Continuance* does not necessitate the taking of a new recognizance, or release of the sureties. *Kuhle v. People*, 65 Ill. App. 378; *State v. Ballentine*, 106 Mo. App. 190.

**714.** 3. *Change of Venue*. — *State v. Curtis*, 67 Mo. App. 431. See *supra*, this title, **711.** 4.

Where the *Order Changing the Venue Is Set Aside*, and the accused had not, after the order granting the change, given new bail as required by statute, his first bail is still liable for his appearance. *Gray v. Com.*, 100 Ky. 645.

**715.** 1. *Misdemeanors*. — *Kenworthy v. El Dorado*, 7 Kan. App. 643; *People v. Miller*, 63 N. Y. App. Div. 11; *People v. Welsh*, 88 N. Y. App. Div. 65.

2. *Abiding Order of Court*. — *Hardesty v. State*, 5 Kan. App. 780; *Gray v. Com.*, 100 Ky. 645; *State v. Ruthing*, 49 La. Ann. 909; *State v. Hoeffner*, 68 Mo. App. 164; *Silvers v. State*, 59 N. J. L. 428. See also *Fossett v. State*, 43 Tex. Crim. 117.

3. *Where the Principal Stands Ready to Pay the fine and costs*, it is error for the court to forfeit the bond. *Humphries v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 527.

*Effect of Court's Permission to Leave*. — Where the court gave permission to the defendant, after sentence and remand to the custody of the sheriff, to leave the court room to get money to pay his fine, it was held that the bail was thereby released, and could not be compelled to pay the fine on the defendant's failure to return. *State v. Zimmerman*, 112 Iowa 5.

4. *Sureties Released by Conviction of Principal*. — *Howlett v. Turner*, 93 Mo. App. 20.

5. *Interest runs from the time of the forfeiture*. *State v. Frazier*, 52 La. Ann. 1305; *Kinney v. State*, 7 Ohio Cir. Dec. 97.

**716.** 4. *Joint and Several*. — See *State v. Abel*, 170 Mo. 59.

5. *Status of Obligors Fixed by Statute*. — *State v. Crosby*, 114 Ala. 11.

**717.** 3. *In re Beavers*, 131 Fed. Rep. 366; *State v. Crosby*, 114 Ala. 11, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 717; *Ringeman*

*v. State*, 136 Ala. 131, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 717.

*Bail Released by Supersedeas Appeal Bond*. — *Bailey v. State*, 71 Ark. 498.

4. *Bailey v. State*, 71 Ark. 498.

5. *Ringeman v. State*, 136 Ala. 131, holding, however, that the illness of the accused, making it necessary for him to seek a different climate in another state, is not such an act of God as will discharge his bail.

6. *In re Beavers*, 131 Fed. Rep. 366.

**718.** 2. *Hall v. Com.*, (Ky. 1898) 45 S. W. Rep. 458.

3. *Rearrest of Principal*. — *State v. Osborn*, 155 Ind. 385, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 718; *State v. Zimmerman*, 112 Iowa 5; *Foster v. State*, 38 Tex. Crim. 372; *Carleton v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1044.

*Giving Second Bail*. — *Thompson v. People*, 73 Ill. App. 258; *State v. Eyermann*, 172 Mo. 294.

*After Forfeiture the capture of the principal does not invalidate the judgment of forfeiture or release the bail*. *Reed v. Police Ct.*, 172 Mass. 427.

*Arrest in Another District for Federal Offense*. — *In re Beavers*, 131 Fed. Rep. 366.

4. *Bailey v. State*, 71 Ark. 498; *State v. Osborn*, 155 Ind. 385, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 718; *State v. Zimmerman*, 112 Iowa 5; *Carleton v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1044.

7. *Illegal Rearrest Not a Discharge*. — *State v. Osborn*, 155 Ind. 385, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 718.

**719.** 1. *State v. Crosby*, 114 Ala. 11; *Havis v. State*, 62 Ark. 500; *State v. Osborn*, 155 Ind. 385, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 719.

*An Arrest under a Second Indictment for the Same Offense* is no more than an arrest for a second offense, and does not release the sureties. *Foster v. State*, 38 Tex. Crim. 372.

2. *Huston v. People*, 12 Colo. App. 271. *Compare Combs v. Com.*, 103 Ky. 385.

4. *State v. Crosby*, 114 Ala. 11; *Havis v. State*, 62 Ark. 500.

*When the Defendant Was in Custody for an*

- 720.** (2) *Inconsistent Agreement with Principal.* — See note 1.  
 (3) *Failure to Indict Principal.* — See notes 2, 3.  
 (4) *Quashing Indictment or Entry of Nolle Prosequi.* — See note 4.  
**721.** (5) *Discharge of Principal by Court.* — See note 1.  
 (6) *Acquittal or Conviction of Principal* — Acquittal. — See note 2.  
 Conviction. — See notes 3, 4.

**722.** XIII. FORFEITURE OF BAIL — 1. Power to Adjudge. — See notes 4, 5.

**723.** 2. Grounds of Forfeiture. — See note 2.

**724.** XIV. REMISSION OF FORFEITURE — 1. In General — Remission in Part. — See note 1.

2. Power to Remit — *a.* COURTS — In the United States. — See notes 3, 4.

**725.** *b.* GOVERNOR. — See note 2.

3. Grounds of Remission — *a.* SURRENDER OF PRINCIPAL — Statutory Relief. — See note 3.

other offense at the time of the execution of his bail bond, and was kept in such custody, but subsequently escaped, his bail was nevertheless liable. *Dunlap v. State*, 66 Ark. 105. See also *Combs v. Com.*, 103 Ky. 385.

**719.** 5. Giving Bail on Second Arrest — Rights and Liabilities of Former Bail. — See *Foster v. State*, 38 Tex. Crim. 372.

**720.** 1. The Signature of a Second Surety is necessary to bind the surety who first signs when it is agreed that the bond is not binding until signed by another person. *People v. Cleaver*, 74 Ill. App. 210.

2. Prosecution Barred by Prescription. — A failure to indict the principal until the prosecution is barred by prescription releases the bondsmen. *Louisiana Soc., etc., v. Moody*, 111 La. 199.

**Insufficiency of Indictment.** — Liability on a bond cannot be resisted on the ground that the indictment was insufficient, unless it was totally void. *Williams v. Candler*, 119 Ga. 179.

3. Discharge by Court at End of Term. — See *Braxton v. Candler*, 112 Ga. 459.

**Release of Sureties by Failure to File Information in Statutory Period.** — *State v. Lewis*, 35 Wash. 261.

4. Quashing Indictment or Entry of Nol. Pros. — *Silvers v. State*, 59 N. J. L. 428.

**721.** 1. Discharge by Court. — *State v. Clerk*, 16 Ind. App. 137.

**Discharge on Habeas Corpus.** — *State v. Adler*, 67 Ark. 469.

2. *Savannah v. Kassell*, 115 Ga. 310; *State v. Martin*, 50 La. Ann. 1157. See also *Com. v. Real Estate Title, etc., Co.*, 22 Pa. Super. Ct. 235.

**Reversal of Conviction on Appeal Discharge under Original Bond.** — *Jenkins v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 464.

3. *Ex p. Williams*, 114 Ala. 29.

4. *State v. Ruthing*, 49 La. Ann. 909. Compare *State v. Zimmerman*, 112 Iowa 5, stated *supra*, this title, 715. 3.

**722.** 4. Forfeiture — Power to Adjudge. — See *People v. Rich*, 36 N. Y. App. Div. 60.

**A Municipal Court in Georgia cannot adjudge a forfeiture unless a system of procedure therefor has been adopted by the proper municipal authorities.** *Koger v. Madison*, 108 Ga. 543.

**A Judgment of Forfeiture for a Smaller Sum than the amount of the bond is unauthorized.** *State v. Connolly*, 72 Conn. 607.

**Jurisdiction of United States District Courts to**

**Enforce Forfeited Recognizance.** — See *Kirk v. U. S.*, 131 Fed. Rep. 331.

**The Recognizance Is Presumed to Have Been Before the Court when the judgment of forfeiture was made.** *Com. v. Meeser*, 19 Pa. Super. Ct. 1.

5. *State v. Quattlebaum*, 67 S. Car. 203.

**Upon Change of Venue.** — *State v. Baughman*, (Mo. App. 1903) 74 S. W. Rep. 433; *Harbolt v. State*, 39 Tex. Crim. 129.

**Forfeiture in Term Time Only.** — *State v. Hindman*, 159 Ind. 586.

**Competency of Evidence — Recognizance Supplemented by Parol on Forfeiture Proceeding.** — See *Kirkland v. Candler*, 114 Ga. 739.

**In South Carolina jurisdiction rests exclusively with the Court of General Sessions.** *State v. Quattlebaum*, 67 S. Car. 203.

**723.** 2. Breach of Conditions the Ground of Forfeiture. — *State v. Crosby*, 114 Ala. 11; *State v. Osborn*, 155 Ind. 385.

**724.** 1. Remission May Be in Whole or in Part — *Hall v. Com.*, (Ky. 1898) 45 S. W. Rep. 458; *Com. v. Cohen*, 22 Pa. Super. Ct. 55.

3. The Collection of a Forfeited Recognizance May Be Enjoined under proper circumstances. *Kirk v. U. S.*, (C. C. A.) 130 Fed. Rep. 112.

4. Statutes — Power of Court to Remit Forfeitures. — *State v. Hayes*, 104 La. 461; *State v. Bongard*, 89 Minn. 426; *Matter of Sayles*, 84 N. Y. App. Div. 210; *People v. Pernetti*, 95 N. Y. App. Div. 510; *Com. v. Real Estate Title, etc., Co.*, 22 Pa. Super. Ct. 235; *State v. Quattlebaum*, 67 S. Car. 203.

**Statutory Method of Relief Must Be Pursued.** — *State v. Bordonel*, 113 La. 21.

**Appeal by Prosecutor.** — The prosecutor of the criminal charge has no interest in a forfeited recognizance, and he cannot prosecute an appeal from an order remitting the forfeiture. *Com. v. Real Estate Title, etc., Co.*, 22 Pa. Super. Ct. 235.

**Review by Appellate Court.** — See *Matter of Sayles*, 84 N. Y. App. Div. 210.

**725.** 2. Pardon of Principal Does Not Remit Forfeiture. — *Dale v. Com.*, 101 Ky. 612.

3. Surrender of Principal — Statutory Relief. — See *Hardesty v. State*, 5 Kan. App. 780.

**Requisites of Surrender.** — The surrender must be made in open court or within the four walls of the prison. *State v. Bordonel*, 113 La. 21.

**The Burden of Proof that the prisoner was**

**726.** Discretionary Relief. — See notes 1, 2, 3, 4.

**727.** Effect of Subsequent Trial. — See note 2.

**728.** See note 1.

Costs. — See note 2.

**XV. TITLE TO FORFEITED PENALTY — Rights of Counties.** — See note 5.  
Commonwealth Attorney. — See note 6.

**730. BAILIFF.** — See note 3.

surrendered into the proper custody is upon the surety. *People v. Mahoney*, (Supm. Ct. Spec. T.) 89 N. Y. Supp. 424.

**An Appearance under the Coercive Influence of the Court**, and too late for trial at the term, does not entitle the sureties to a remission of the forfeiture. *State v. Martin*, 49 La. Ann. 752.

**726. 1. Surrender — Right to Remission Not Thereby Established.** — *State v. Martin*, 50 La. Ann. 1157.

**2. Relief After Forfeiture Discretionary.** — *Hall v. Com.*, (Ky. 1898) 45 S. W. Rep. 458; *Matter of Sayles*, 84 N. Y. App. Div. 210; *Com. v. Fogelman*, 3 Pa. Super. Ct. 566; *Com. v. Cohen*, 22 Pa. Super. Ct. 55.

**3. Sickness of Principal.** — Compare *Ringeman v. State*, 136 Ala. 131; *State v. Bordelon*, 111 La. 105.

**4. Good Excuse for Nonappearance Essential.** — *Hardesty v. State*, 5 Kan. App. 780.

**727. 2. Remission Not Granted until After Trial of Principal.** — *State v. Bordelon*, 111 La. 105, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 727. See also *State v. Taylor*, 136 Mo. 462. And in support of the second paragraph

of the original note, see *State v. Martin*, 50 La. Ann. 1157.

**728. 1. Equitable Considerations**, together with the fact that a fugitive defendant was secured and acquitted, may warrant a court in the exercise of its discretion in remitting a forfeiture. *Com. v. Real Estate Title, etc., Co.*, 22 Pa. Super. Ct. 235.

**2. Payment of Costs a Condition of Remission.** — *Hardesty v. State*, 5 Kan. App. 780.

**5. Title to Forfeited Penalty.** — *Russell v. State*, (Tex. Civ. App. 1897) 40 S. W. Rep. 69.  
**Title to Forfeited Deposit in Commonwealth.** — *Com. v. Leech*, 103 Ky. 389.

**Title in County in Which Forfeiture Was Incurred.** — *State v. June*, 63 Kan. 5.

**Upon Reversal of a Judgment of Forfeiture** money collected and paid to the county under such judgment must be refunded. *Metschan v. Grant County*, 36 Oregon 117.

**6.** See *Williams v. Shelbourne*, 102 Ky. 579.

**The Attorney in Office at the Time of the Forfeiture** and the vesting of the title to the money deposited in lieu of bail is entitled to the percentage. *Arnsperger v. Norman*, 101 Ky. 208.

**730. 3.** See *Nicholson v. State*, 38 Fla. 99.

# BAILMENTS.

By W. B. ROBINSON.

**733. II. DEFINITION AND NATURE OF BAILMENT — 1. Definition.** — See note 1.

**736. 2. Bailment Distinguished from Sale — The Fundamental Distinction.** — See note 1.

**Application of the Rule.** — See note 2.

**Return of Goods in Kind — Mutuum.** — See note 3.

**733. 1. For Various Definitions of "bailment" see the following cases:**

*Alabama.* — *Cartlidge v. Sloan*, 124 Ala. 596, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 733.

*Delaware.* — *State v. Sienkiewicz*, 4 Penn. (Del.) 59.

*Georgia.* — *Massillon Engine, etc., Co. v. Akerman*, 110 Ga. 570; *Atlantic Coast Line R. Co. v. Baker*, 118 Ga. 809.

*Illinois.* — *McCaffrey v. Knapp*, 74 Ill. App. 80, affirmed 178 Ill. 112, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 733.

*Maryland.* — *Blondell v. Consolidated Gas Co.*, 89 Md. 732.

*Missouri.* — *Potter v. Mt. Vernon Roller Mill Co.*, 101 Mo. App. 581; *O'Neal v. Stone*, 79 Mo. App. 279.

*New Jersey.* — *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338.

*Pennsylvania.* — *Morgan-Gardner Electric Co. v. Brown*, 193 Pa. St. 351.

*South Carolina.* — *McGee v. French*, 49 S. Car. 454.

*Texas.* — *Mafz v. State*, 36 Tex. Crim. 447.

*Utah.* — *Haskins v. Dern*, 19 Utah 97, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 733.

*Vermont.* — *James Smith Woollen Mach. Co. v. Holden*, 73 Vt. 396, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 733.

*West Virginia.* — *Coulter v. Blatchley*, 51 W. Va. 166, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 733; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574.

**A Lease of Chattels.** — See *Rapid Safety Fire Extinguisher Co. v. Hay-Budden Mfg. Co.*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 556, affirmed 77 N. Y. App. Div. 643.

**The Charter of a Boat.** — *Lake Michigan Car Ferry Transp. Co. v. Crosby*, 107 Fed. Rep. 723. See also *Gannon v. Consolidated Ice Co.*, (C. C. A.) 91 Fed. Rep. 539.

**Vendor Retaining Possession After Sale Is Bailee of Vendee.** — *Strong v. Morgan*, 8 Idaho 269.

**To Make Out a Case of Bailment There Must Be a Contract.** — Where the defendant became possessed of certain goods by the fraudulent representation to the plaintiff of a third party that he was the defendant, thereby inducing the plaintiff to deliver to the defendant, and subsequently the third party presented at the defendant's place a forged order for the goods purporting to be from the plaintiff, whereupon the

defendant delivered, it was held that the defendant was not a bailee. *Krumsky v. Lörser*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 504.

**Contract of Bailment Independent One.** — The bailee is independent of the bailor in the use of the thing bailed, and the bailor is not responsible to third parties for damage resulting from a wrongful or negligent use by the bailee. *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338. But see *Illinois Cent. R. Co. v. Sims*, 77 Miss. 325.

**Possession — Independent and Exclusive.** — In order to constitute a bailment there must be an independent and temporarily exclusive possession in the bailee. *Atlantic Coast Line R. Co. v. Baker*, 118 Ga. 809.

**Delivery of a Mare to a Blacksmith to have her shod is a bailment.** *Pusey v. Webb*, 2 Penn. (Del.) 490.

**The Deposit of a Draft on a third party in the absence of a special understanding is a bailment.** *Perth Amboy Gas Light Co. v. Middlesex County Bank*, 60 N. J. Eq. 84.

**One Who Executes a Bill of Sale of certain crops and agrees to hold them for the creditor and subject to his order is a bailee of such crops.** *Baston v. Rabun*, 115 Ga. 378.

**736. 1. Distinction Between Bailment and Sale.** — *In re Galt*, (C. C. A.) 120 Fed. Rep. 64; *Genobia Aragon de Jaramillo v. U. S.*, 37 Ct. Cl. 208; *Westphal v. Sipe*, 62 Ill. App. 111; *David Bradley Mfg. Co. v. Raynor*, 70 Ill. App. 639; *Steward v. Sears*, 89 Ill. App. 454; *Fleet v. Hertz*, 98 Ill. App. 564; *Singer Mfg. Co. v. Ellington*, 103 Ill. App. 517; *Scott Min., etc., Co. v. Shultz*, 67 Kan. 605, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 734; *O'Neal v. Stone*, 79 Mo. App. 279.

**2. For Contracts Held to Be Bailments and Not Sales,** see *Johnson v. Allen*, 70 Conn. 738; *Harris v. Coe*, 71 Conn. 157; *Wiggins v. Tumlin*, 96 Ga. 753; *Seelig v. Dumas*, 48 La. Ann. 1494; *Weiland v. Krejnick*, 63 Minn. 314; *Weiland v. Sunwall*, 63 Minn. 320; *State v. Barry*, 77 Minn. 128; *Baker v. Priebe*, 59 Neb. 597; *Sattler v. Hallock*, 160 N. Y. 291, 73 Am. St. Rep. 686; *Stimpson Computing Scale Co. v. Schetrompf*, 13 Pa. Super. Ct. 377; *Woodward v. Edmunds*, 20 Utah 118.

**For Contracts Held to Be Sales and Not Bailments,** see *Hagey v. Schroeder*, 30 Ind. App. 151; *Norwegian Plow Co. v. Clark*, 102 Iowa 31; *Weiland v. Sunwall*, 63 Minn. 320.

**3. Where a Man Hires or Leases Animals, —**

**737.** Exception — Delivery of Grain to Warehouse. — See note 1.

**738.** See note 1.

Return of Bailed Article in Altered Form. — See note 2.

**739.** See note 1.

3. Bailment with Provision for Sale. — See note 2.

**741.** See note 1.

III. THE VARIOUS KINDS OF BAILMENTS — 2. Bailments for Benefit of

Bailor — *a.* DEPOSIT. — See note 4.

*b.* MANDATE. — See note 5.

**742.** 4. Bailments for Benefit of Both Parties — *b.* BAILMENTS FOR HIRE. — See note 2.

**743.** IV. DUTIES, LIABILITIES, AND RIGHTS OF PARTIES — 1. Of the Bailee in Respect to the Bailor — *a.* RESPONSIBILITY FOR CARE OF THING BAILED — (2) *The Several Degrees of Diligence and Negligence Considered — Degrees of Negligence.* — See note 3.

**744.** Diligence or Negligence Question of Fact. — See notes 1, 2.

Genobia Aragon de Jaramillo *v.* U. S., 37 Ct. Cl. 208. But see Woodward *v.* Edmunds, 20 Utah 118; Turnbow *v.* Beckstead, 25 Utah 468.

**737.** 1. Grain in Warehouse. — Mayer *v.* Springer, 95 Ill. App. 173, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 737; Baker *v.* Born, 17 Ind. App. 422; Drudge *v.* Leiter, 18 Ind. App. 694, 63 Am. St. Rep. 359; Barrows *v.* Wampler, 24 Ind. App. 472; McGrew *v.* Thayer, 24 Ind. App. 578; Jackson *v.* Sevaton, 79 Minn. 275; Potter *v.* Mt. Vernon Roller Mill Co., 101 Mo. App. 581.

Character of Transaction Shown by Extrinsic Evidence. — Leiter *v.* Emmons, 20 Ind. App. 26, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 737.

**738.** 1. Option to Pay the Market Price. — Potter *v.* Mt. Vernon Roller Mill Co., 101 Mo. App. 581; O'Neal *v.* Stone, 79 Mo. App. 279. See also McGrew *v.* Thayer, 24 Ind. App. 578; Weiland *v.* Sunwall, 63 Minn. 320; Lawlor *v.* Nicol, 12 Manitoba 224.

2. Where Wheat Is Delivered to a Miller. — O'Neal *v.* Stone, 79 Mo. App. 279.

Delivery of Farm Products to be manufactured by the plaintiff into pickles, sauerkraut, and similar articles, and the net profits to be divided between the plaintiff and the defendants, is a bailment and not a sale of such products. Sattler *v.* Hallock, 160 N. Y. 291, 73 Am. St. Rep. 686, affirming 15 N. Y. App. Div. 500.

**739.** 1. Contract a Bailment as to Materials Not Used. — See Roesch *v.* Wren, 12 Montg. Co. Rep. (Pa.) 213.

2. Bailment with Provision for Sale. — Case *v.* L'oeble, 84 Fed. Rep. 582; *In re* Galt, (C. C. A.) 120 Fed. Rep. 64; Furst *v.* Commercial Bank, 117 Ga. 472; Donnelly *v.* Mitchell, 119 Iowa 432.

Bailment or Conditional Sale — Pennsylvania Cases. — For cases held to be bailments, see Collins *v.* Bellefonte Cent. R. Co., 171 Pa. St. 243; Lippincott *v.* Scott, 198 Pa. St. 283, 82 Am. St. Rep. 801; Jones *v.* Wands, 1 Pa. Super. Ct. 269; Rieker *v.* Koehling, 4 Pa. Super. Ct. 286; Lippincott *v.* Holden, 11 Pa. Super. Ct. 15; Harris *v.* Shaw, 17 Pa. Super. Ct. 1; Painter *v.* Snyder, 22 Pa. Super. Ct. 603; Porter *v.* Duncan, 23 Pa. Super. Ct. 58.

For cases held to be conditional sales, see Briggs Carriage Co. *v.* Mfg. Co., 30 Pittsb.

Leg. J. N. S. (Pa.) 95; Harper *v.* Hogue, 10 Pa. Super. Ct. 624.

Bailment Convertible into Sale. — When the bailee of a leased chattel, under a contract that title shall pass when the payments of rent amount to a certain sum, has defaulted in payment, but the bailor has the option to affirm and continue the lease and does so affirm, the bailment becomes a sale. Stiles *v.* Seaton, 200 Pa. St. 114.

**741.** 1. Herring-Hall-Marvin Co. *v.* Smith, 43 Oregon 315; Morgan-Gardner Electric Co. *v.* Brown, 193 Pa. St. 351; Henderson *v.* Mahoney, 31 Tex. Civ. App. 539; Nye *v.* Daniels, 75 Vt. 81.

4. Deposit. — Bissell *v.* Harris, (Neb. 1901) 95 N. W. Rep. 779.

5. Mandate. — See Beugnot *v.* Tremoulet, 52 La. Ann. 454.

**742.** 2. Whether a Bailment Is Gratuitous or Not Is a Question of Fact. — See Voss *v.* Wagner Palace Car Co., 16 Ind. App. 271, holding further that a porter of a sleeping car removing baggage for passengers in the course of his duty and in pursuance of a custom of the company is not a mere gratuitous bailee, and the company is liable for loss owing to his negligence.

**743.** 3. Degrees of Negligence Defined and Distinguished. — Mason *v.* St. Louis Union Stock Yards Co., 60 Mo. App. 93.

Gross Negligence has been defined as the entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the interest and welfare of others. Texas Cent. R. Co. *v.* Flanary, (Tex. Civ. App. 1898) 45 S. W. Rep. 214.

**744.** 1. Diligence or Negligence Question of Fact. — Southern Pac. Co. *v.* Von Schmidt Dredge Co., 118 Cal. 368; Saunders *v.* Hartsook, 85 Ill. App. 55; Schneps *v.* Sturm, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 168; Whalen *v.* New York, etc., Electric Co., 63 N. Y. App. Div. 615. See also Standard Brewery Co. *v.* Hales, etc., Malting Co., 70 Ill. App. 363; Pelton *v.* Nichols, 180 Mass. 245; Vroman *v.* Kryn, (Supm. Ct. App. T.) 86 N. Y. Supp. 94.

2. What Constitutes Diligence Dependent on Circumstances. — King *v.* National Oil Co., 81 Mo. App. 155; Schneps *v.* Sturm, (Supm. Ct.

**745.** (3) *General Liability of the Several Classes of Bailees* — (b) *Responsibilities of the Several Classes Distinguished* — When the Bailment Is for the Sole Benefit of the Bailor. — See note 2.

**746.** When the Bailment Is for the Sole Benefit of the Bailee. — See note 1.

When the Bailment Is Reciprocally Beneficial to Both Parties. — See note 2.

**747.** (c) *Bailee Not an Insurer*. — See note 1.

App. T.) 25 Misc. (N. Y.) 168. See also French Republic v. World's Columbian Exposition, 83 Fed. Rep. 109, reversing (C. C. A.) 91 Fed. Rep. 64; Cantancarito v. Siegel-Cooper Co., (Supm. Ct. App. T.) 23 Misc. (N. Y.) 664.

**Using Barge After It Had Become Unseaworthy**, with knowledge of its defective condition, was held to render the user liable for the loss of the barge. Higman v. Camody, 112 Ala. 267, 57 Am. St. Rep. 33.

**745. 2. Gratuitous Bailee Liable for Gross Negligence Only** — *Arkansas*. — St. Louis Southwestern R. Co. v. Henson, 61 Ark. 302.

*Kentucky*. — Anderson v. Heile, 64 S. W. Rep. 849, 23 Ky. L. Rep. 1115.

*Michigan*. — Marshall v. Pontiac, etc., R. Co., 126 Mich. 45, 7 Detroit Leg. N. 715.

*Missouri*. — Mason v. St. Louis Union Stock Yards Co., 60 Mo. App. 93; McKenna v. Walker, 85 Mo. App. 570.

*Nebraska*. — Bissell v. Harris, (Neb. 1901) 93 N. W. Rep. 779.

*New Hampshire*. — Gagnon v. Dana, 69 N. H. 264, 76 Am. St. Rep. 170.

*New York*. — De Lemos v. Cohen, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 579; McKillop v. Reich, 76 N. Y. App. Div. 334; Hoffman v. Roessle, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 787.

*Texas*. — Texas Cent. R. Co. v. Flanary, (Tex. Civ. App. 1898) 45 S. W. Rep. 214.

*Canada*. — Leggo v. Welland Vale Mfg. Co., 2 Ont. L. Rep. 45.

See also Dinsmore v. Abbott, 89 Me. 373; Campbell v. Watson, 62 N. J. Eq. 396; Smith v. Elizabethport Banking Co., 69 N. J. L. 288. But see Serry v. Knepper, 101 Iowa 372.

**746. 1. Borrower Liable for Slight Negligence**. — See Cartledge v. Sloan, 124 Ala. 596.

**2. Bailee for Hire Liable for Ordinary Negligence** — *United States*. — Gannon v. Consolidated Ice Co., (C. C. A.) 91 Fed. Rep. 539; Lake Michigan Car Ferry Transp. Co. v. Crosby, 107 Fed. Rep. 723; Smith v. Britain Steamship Co., 123 Fed. Rep. 176.

*Alabama*. — Louisville, etc., R. Co. v. Bufington, 131 Ala. 623, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 746; Higman v. Camody, 112 Ala. 267, 57 Am. St. Rep. 33; Davis v. Hurt, 114 Ala. 146.

*Arkansas*. — Union Compress Co. v. Nunnally, 67 Ark. 284, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 746.

*California*. — Barrere v. Soms, 113 Cal. 97. *Connecticut*. — Gillette v. Goodspeed, 69 Conn. 363.

*Delaware*. — Pusey v. Webb, 2 Penn. (Del.) 490.

*Illinois*. — Standard Brewery Co. v. Bemis, etc., Maltng Co., 171 Ill. 602; Mayer v. Brensinger, 180 Ill. 110, 72 Am. St. Rep. 196.

*Iowa*. — Wisecarver v. Long, 120 Iowa 59.

*Kentucky*. — Kimball v. Dahoney, (Ky. 1896) 38 S. W. Rep. 3.

*Massachusetts*. — Lincoln v. Gay, 164 Mass. 537, 49 Am. St. Rep. 480.

*Michigan*. — Knights v. Piella, 111 Mich. 9. *Montana*. — Shropshire v. Sidebottom, 30 Mont. 406.

*Nebraska*. — Purnell v. Minor, 49 Neb. 555. *New Jersey*. — New York, etc., R. Co. v. New Jersey Electric R. Co., 60 N. J. L. 338.

*New York*. — Waterman v. American Pin Co., (Supm. Ct. App. T.) 19 Misc. (N. Y.) 638; Lynch v. Kluber, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 601; Moeran v. New York Poultry, etc., Assoc., (Supm. Ct. App. T.) 28 Misc. (N. Y.) 537; Snell v. Cornwell, 93 N. Y. App. Div. 136.

*Texas*. — Phillips v. Hughes, (Tex. Civ. App. 1895) 33 S. W. Rep. 157.

*Canada*. — Dunn v. Prescott Elevator Co., 4 Ont. L. Rep. 103; McKeage v. Pope, 10 Quebec Super. Ct. 459.

**Illustrations — Liability of Shopkeepers**. — McAllister v. Simon, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 214. See also Powers v. O'Neill, 89 Hun (N. Y.) 129.

The proprietor of a clothing store is liable to a customer for money taken from his clothes left in a dressing room while he was being fitted; but the liability is limited to the amount and the kind of property that a person would naturally and ordinarily be expected to carry about with him. It was therefore held that there was no liability for a diamond taken from the customer's clothes. Hunter v. Reed, 12 Pa. Super. Ct. 112.

**The Keeper of a Bathing Establishment**. — Sulpho-Saline Bath Co. v. Allen, 66 Neb. 295. See also Schneps v. Sturm, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 168.

**Breach of Contract as to Place of Keeping**. — Butler v. Greene, 49 Neb. 280.

It seems that where the bailee changes the place of keeping in order the better to carry out the bailor's instruction and to facilitate the purpose of the bailment, the bailee is not responsible for injury that happens without his negligence. Saunders v. Hartsook, 85 Ill. App. 55.

**Negligence of the Bailee** cannot be imputed to the bailor. New York, etc., R. Co. v. New Jersey Electric R. Co., 60 N. J. L. 338. But see Illinois Cent. R. Co. v. Sims, 77 Miss. 325.

**The Acts of Servants** do not render the bailee liable when such servants are not acting within the scope of their employment. Sanderson v. Collins, (1904) 1 K. B. 628, 90 L. T. N. S. 243. Compare Coupé Co. v. Maddick, (1891) 2 Q. B. 413; Sanderson v. Collins, 89 L. T. N. S. 42.

**747. 1. Bailee Not an Insurer**. — World's Columbian Exposition Co. v. Republic of France, (C. C. A.) 91 Fed. Rep. 64; Lake Michigan Car Ferry Transp. Co. v. Crosby, 107 Fed. Rep. 723; Louisville, etc., R. Co. v. Bufington, 131 Ala. 623, citing 3 AM. AND ENG.



**748.** By Inevitable Accident Is Meant. — See note 1.

**749.** By Irresistible Force Is Meant. — See note 5.

(4) *Liability by Special Agreement* — **Agreements Enlarging Liability.** —

See note 6.

**750.** Contract Limiting Liability. — See note 5.

(5) *Burden of Proof of Negligence* — (b) *Burden upon Bailor to Establish Negligence.* — See note 6.

**751.** (c) *Presumption Raised by Loss of or Injury to Goods* — *bb.* MORE MODERN RULE. — See note 1.

**Proof of Loss from Inevitable Accident or Irresistible Force.** — See notes 2, 3, 5, 7.

ENCYC. OF LAW (2d ed.) 747; *Gillette v. Goodspeed*, 69 Conn. 363; *Standard Brewery Co. v. Bemis, etc.*, *Malting Co.*, 171 Ill. 602; *Saunders v. Hartsook*, 85 Ill. App. 55; *Drudge v. Leiter*, 18 Ind. App. 694, 63 Am. St. Rep. 359; *Shropshire v. Sidebottom*, 30 Mont. 406; *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163, 56 Am. St. Rep. 616; *McKenzie v. Lewis*, 31 Nova Scotia 408. See also *Rapid Safety Fire Extinguisher Co. v. Hay-Budden Mfg. Co.*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 560, *per Greenbaum, J., dissenting, quoting 3 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 746, 747; *Dinsmore v. Abbott*, 89 Me. 373.

**748. 1. Losses from Inevitable Accident — Fire.** — *World's Columbian Exposition Co. v. Republic of France*, (C. C. A.) 91 Fed. Rep. 64; *Leggo v. Welland Vale Mfg. Co.*, 2 Ont. L. Rep. 45.

**749. 5. Burglary.** — *Louisville, etc., R. Co. v. Buffington*, 131 Ala. 623, *citing 3 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 749.

**6. Enlarging Liability by Special Agreement.** — *Barrere v. Soms*, 113 Cal. 97; *Rapid Safety Fire Extinguisher Co. v. Hay-Budden Mfg. Co.*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 556, *affirmed 77 N. Y. App. Div. 643*; *National Cash Register Co. v. Caillias*, (Supm. Ct. App. T.) 84 N. Y. Supp. 66; *Direct Nav. Co. v. Davidson*, 32 Tex. Civ. App. 492. See also *Standard Brewery Co. v. Bemis, etc., Malting Co.*, 171 Ill. 602; *S. E. Olson Co. v. Brady*, 76 Minn. 8; *Wells v. Porter*, 169 Mo. 252, 92 Am. St. Rep. 637; *Butler v. Greene*, 49 Neb. 280; *Cohen v. Moshkowitz*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 389.

**750. 5.** See *Bermel v. New York, etc., R. Co.*, 172 N. Y. 639. And see generally the titles wherein particular forms of bailment are discussed, such as **CARRIERS OF GOODS**, **307. 1 et seq.**; **CARRIERS OF LIVE STOCK**, **458. 3 et seq.**; **CARRIERS OF PASSENGERS**, **651. 1 et seq.**

**6. Burden of Proof on Bailor.** — *James v. Orrell*, 68 Ark. 284, 82 Am. St. Rep. 293, *citing 3 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 750; *Bradbury v. Lawrence*, 91 Me. 457.

**751. 1. Modern Rule — Loss or Damage Raises Presumption of Negligence — Alabama.** — *Higman v. Camody*, 112 Ala. 267, 57 Am. St. Rep. 33; *Davis v. Hurt*, 114 Ala. 146.

*Delaware.* — *Pusey v. Webb*, 2 Penn. (Del.) 490.

*Illinois.* — *Brewster v. Weir*, 93 Ill. App. 588.

*Iowa.* — *Ware Cattle Co. v. Anderson*, 107 Iowa 234, *citing 3 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 750.

*Michigan.* — *Baehr v. Downey*, 133 Mich. 163, 10 Detroit Leg. N. 153, *citing 3 AM. AND*

*ENG. ENCYC. OF LAW* (2d ed.) 750; *Knights v. Piella*, 111 Mich. 9.

*Missouri.* — *Casey v. Donovan*, 75 Mo. App. 665; *Hadley v. Orchard*, 77 Mo. App. 141; *Clark v. Shrimski*, 77 Mo. App. 166; *Dailey v. Black*, 92 Mo. App. 228; *Dixon v. McDonnell*, 92 Mo. App. 479.

*Montana.* — *Shropshire v. Sidebottom*, 30 Mont. 406.

*Nebraska.* — *Bissell v. Harris*, (Neb. 1901) 95 N. W. Rep. 779, *citing 3 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 750; *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295.

*Nevada.* — *Donlan v. Clark*, 23 Nev. 203.

*New Jersey.* — *Jackson v. McDonald*, 70 N. J. L. 594, *citing 3 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 750.

*New York.* — *Rutherford v. Krause*, 55 N. Y. App. Div. 211, *citing 3 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 750; *Kafka v. Levensohn*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 202; *Campbell v. Muller*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 189; *Waterman v. American Pin Co.*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 638; *Rhind v. Stake*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 177; *Lyons v. Thomas*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 175; *Rothoser v. Cosel*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 337; *Snell v. Cornwell*, 93 N. Y. App. Div. 136.

*Texas.* — *Hislop v. Ordner*, 28 Tex. Civ. App. 540, *citing 3 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 750; *Cochran v. Walker*, (Tex. Civ. App. 1899) 49 S. W. Rep. 403.

*Wisconsin.* — *Hildebrand v. Carroll*, 106 Wis. 324, *citing 3 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 750.

*In Georgia*, by statute, in all cases of bailment after proof of loss the burden of proof is on the bailee to show proper diligence. *Massillon Engine, etc., Co. v. Akerman*, 110 Ga. 570; *Concord Variety Works v. Beckham*, 112 Ga. 242.

**When Presumption Does Not Prevail.** — The presumption will not prevail where the bailor's servant is also charged with the duty and has the same opportunity to care for the bailed article as the bailee's servant. *Wall v. Gillin Printing Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 649.

**2. Burglary.** — *Knights v. Piella*, 111 Mich. 9; *Hadley v. Orchard*, 77 Mo. App. 141; *Kafka v. Levensohn*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 202; *Hoffmann v. Coughlin*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 24; *Rothoser v. Cosel*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 337. See also *Donlan v. Clark*, 23 Nev. 203; *Geist v. Pollock*, 58 Ill. App. 429.

**3. Fire.** — *James v. Orrell*, 68 Ark. 284, 82

- 752.** Proof that Bailee Took Same Care of Bailed Goods as of His Own. — See notes 1, 3.  
**b. LIABILITY FOR CONVERSION** — (1) *Generally*. — See note 4.  
 (2) *What Constitutes Conversion* — (a) *Unauthorized Use of Chattel*. — See note 5.  
**753.** See notes 1, 2, 3.  
**754.** The Subsequent Return of the Chattel. — See note 1.  
 (b) *Unauthorized Sale of the Chattel*. — See note 2.  
 (d) *Destruction of Chattel*. — See note 8.  
**755.** (e) *Misdelivery of Chattel* — *aa. IN GENERAL*. — See note 1.  
**756.** Delivery to True Owner. — See note 1.  
*bb. DELIVERY UNDER PROCESS OF LAW*. — See note 3.  
**757.** (f) *Wrongful Detention of Chattel* — *aa. IN GENERAL* — *Duty of Bailee to Return or Deliver*. — See note 4.  
**758.** Duty Implied by Law. — See note 2.

Am. St. Rep., 293, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 751; Standard Brewery Co. v. Hales, etc., Malting Co., 70 Ill. App. 363, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 751.

**751.** 5. Death of Animal Bailed. — Hislop v. Ordner, 28 Tex. Civ. App. 540.

**7.** If Bailee Show Inevitable Accident, Bailor Must Prove Negligence. — Dinsmore v. Abbott, 89 Me. 373. See also Higman v. Camody, 112 Ala. 267, 57 Am. St. Rep. 33; Knights v. Piella, 111 Mich. 9; Koch v. National Express Co., 1 Lack. Leg. N. (Pa.) 289.

**752.** 1. See Smith v. Elizabethport Banking Co., 69 N. J. L. 288, per Dixon, J., dissenting.

**3.** See Cochran v. Walker, (Tex. Civ. App. 1899) 49 S. W. Rep. 403.

**4. Fraudulent Conversion of Bailed Property as a Crime.** — Shafer v. Lacy, 121 Cal. 574; State v. Sienkiewicz, 4 Penn. (Del.) 59; State v. Fitzpatrick, 9 Houst. (Del.) 385; State v. Barry, 77 Minn. 128; People v. Hazard, 28 N. Y. App. Div. 304, 158 N. Y. 727; Malz v. State, 36 Tex. Crim. 447.

**5. Unauthorized Use a Conversion.** — Keiner v. Folsom, (Supm. Ct. App. T.) 79 N. Y. Supp. 1099 (conversion of check); Evertson v. Frier, (Tex. Civ. App. 1898) 45 S. W. Rep. 201, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752.

**Where Brokers Held Stock** pending payment of a balance due thereon under an agreement that the stock was not to be transferred, it was held that a pledge of the stock constituted conversion by the bailees. Chew v. Louchheim, 39 U. S. App. 619, 80 Fed. Rep. 500.

**753.** 1. Use in Another Way than Authorized. — Cartledge v. Sloan, 124 Ala. 596; Hassett v. Sanborn, 62 N. Y. App. Div. 588; Kahaley v. Haley, 15 Wash. 678.

**2. Using Chattel to Greater Extent than Authorized.** — Evertson v. Frier, (Tex. Civ. App. 1898) 45 S. W. Rep. 201.

**3. Using Chattel Beyond Time Embraced by the Authority.** — Ledbetter v. Thomas, 130 Ala. 299; Whalen v. New York, etc., Electric Co., 63 N. Y. App. Div. 615; Cochran v. Walker, (Tex. Civ. App. 1899) 49 S. W. Rep. 403.

**754.** 1. Return of Chattel After Misuse — Mitigation of Damages. — Wilson v. Press Pub. Co., (C. Pl. Gen. T.) 14 Misc. (N. Y.) 514. See also Cartledge v. Sloan, 124 Ala. 596.

**2. Unauthorized Sale a Conversion.** — United Shoe Machinery Co. v. Holt, 185 Mass. 97; Nichols v. Monjeau, 132 Mich. 582, 10 Detroit Leg. N. 1; Mohr v. Langan, 77 Mo. App. 481; Usher v. Van Vranken, 48 N. Y. App. Div. 417, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754. See also Lucas v. Rader, 29 Ind. App. 287; Ball-Barnhart-Putman Co. v. Lane, (Mich. 1903) 97 N. W. Rep. 727, 10 Detroit Leg. N. 724; Oyler v. Renfro, 86 Mo. App. 321.

**8. Destruction of the Chattel a Conversion.** — Bain v. Ganzer, 74 N. Y. App. Div. 621. See also May v. Georger, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 622.

**755.** 1. Misdelivery of Chattel a Conversion. — Sonn v. Smith, 57 N. Y. App. Div. 372, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754; Markoe v. Tiffany, 163 N. Y. 565, affirming 26 N. Y. App. Div. 95; McKillop v. Reich, 76 N. Y. App. Div. 334.

**756.** 1. Delivery to the True Owner a Defense to Demand of Bailor. — See Sedgwick v. Macy, 24 N. Y. App. Div. 1.

**3. Delivery under Process of Law.** — Ross v. Edwards, 73 L. T. N. S. 100, 11 Reports 574; Walter A. Wood Harvester Co. v. Dobry, 59 Neb. 590, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 756. See also Sedgwick v. Macy, 24 N. Y. App. Div. 1.

The bailee may excuse failure to deliver by showing that the property bailed was taken by valid process of law and that he gave notice thereof within a reasonable time to the bailor. Glass v. Hauser, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 661.

**757.** 4. Duty of Bailee to Return or Deliver. — Donlan v. Clark, 23 Nev. 203; Snell v. Cornwell, 93 N. Y. App. Div. 136; Gleason v. Morrison, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 320; Jones v. Wands, 1 Pa. Super. Ct. 269; Cochran v. Walker, (Tex. Civ. App. 1899) 49 S. W. Rep. 403. See also New York, etc., R. Co. v. New Jersey Electric R. Co., 60 N. J. L. 338; Municipal Imp. Co. v. Uvalde Asphalt Co., (Tex. Civ. App. 1903) 76 S. W. Rep. 448.

Where the bailee follows the express directions of the bailor, and has delivered to the place where he is directed, he has fully performed on his part. Stearns v. Farrant, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 292.

**758.** 2. Duty to Return Arises by Implication of Law. — Coulter v. Blatchley, 51 W. Va. 166.

**758.** Refusal to Deliver — Evidence of Conversion. — See note 4.

*cc.* DENYING BAILOR'S TITLE — (*aa*) *General Rule*. — See note 7.

**759.** Setting Up Title in Self. — See note 1.

*c.* COMPENSATION AND LIEN — (1) *Right of Bailee to Compensation*. — See note 5.

(2) *Right to Lien for Compensation*. — See note 6.

**760.** Agreement for Compensation Necessary to Create Lien. — See note 1.

Future Day of Payment. — See note 2.

Extent of Lien. — See note 4.

Extinction of Lien — Loss of Possession. — See note 6.

**2. Of the Bailor in Respect to the Bailee** — *a.* RIGHT TO COMPENSATION FOR USE OF CHATTEL. — See note 10.

**761.** *b.* LIABILITY FOR EXPENSES INCURRED BY BAILEE — A Gratuitous Bailee. — See note 1.

A Bailee for Hire. — See note 4.

**3. Of the Bailee in Respect to Third Persons** — *a.* INJURY OR LOSS OF CHATTEL. — See notes 7, 8.

**762.** Measure of Damages. — See note 1.

**758.** 4. Refusal to Deliver as Evidence of Conversion. — Gleason *v.* Morrison, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 320, *affirming* (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 4; Coulter *v.* Blatchley, 51 W. Va. 166, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 758. See Davis *v.* Hurt, 114 Ala. 146; Smith *v.* Durham, 127 N. Car. 417; Tindall *v.* McCarthy, 44 S. Car. 487.

**7.** Bailee Cannot Dispute Bailor's Title. — Wheeler, etc., Mfg. Co. *v.* Brookfield, 70 N. J. L. 703, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 758; Sedgwick *v.* Macy, 24 N. Y. App. Div. 1. See also Ross *v.* Edwards, 73 L. T. N. S. 100, 11 Reports 574; Texas Standard Cotton-Oil Co. *v.* National Cotton-Oil Co., (Tex. Civ. App. 1897) 40 S. W. Rep. 159.

**759.** 1. Bailee Cannot Set Up Title in Himself. — Wheeler, etc., Mfg. Co. *v.* Brookfield, 70 N. J. L. 703, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 759.

5. James Smith Woolen Mach. Co. *v.* Holden, 73 Vt. 396.

**6.** Bailee's Lien for Compensation. — Pallen *v.* Bogy, 78 Mo. App. 88; Drummond Carriage Co. *v.* Mills, 54 Neb. 417, 69 Am. St. Rep. 719; Davidson *v.* Fankuchen, (Supm. Ct. App. T.) 88 N. Y. Supp. 196. See also Amazon Irrigating Co. *v.* Briesen, 1 Kan. App. 758; Cohen *v.* Moshkowitz, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 389; Kafka *v.* Levensohn, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 202.

The Bailee Has a Lien for Taxes Paid on the bailment as required by law. Fowble *v.* Kemp, 92 Md. 630.

**Right to Resort to Equity.** — A bailee in possession, where his lien is disputed and there is danger that he will be deprived of possession by the bailor, may interpose the jurisdiction of equity to protect and enforce his lien. Knapp *v.* McCaffrey, 178 Ill. 112.

The Bailee Has No Lien where by express contract the bailor is authorized to take possession any time he sees fit. Sheaffer *v.* Senenig, 182 Pa. St. 634. And it has been held that a bailee has no lien for labor expended in keeping a carriage clean, as it does not enhance the value of the carriage. Robinson *v.* Kaplin, (Summ. Ct. App. T.) 21 Misc. (N. Y.) 686.

**760.** 1. Lien Cannot Exist Independent of

Agreement for Compensation. — Whitlock Mach. Co. *v.* Holway, 92 Me. 414; Pallen *v.* Bogy, 78 Mo. App. 88; Lyungstrandh *v.* William Haaker Co., (Supm. Ct. App. T.) 16 Misc. (N. Y.) 387. See also Dinsmore *v.* Abbott, 89 Me. 373.

**2.** See Rollins *v.* Sidney B. Bowman Cycle Co., 96 N. Y. App. Div. 365, holding that where, under an agreement to repair and deliver an article, the plaintiff repaired but refused to deliver until paid for his services, such refusal constituted a wrongful holding.

**4.** Extends to All Goods Delivered under One Contract. — McCaffrey *v.* Knapp, 74 Ill. App. 80, *affirmed* 178 Ill. 112, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 760.

**6.** Loss of Possession. — Burrow *v.* Fowler, 68 Ark. 178; Pallen *v.* Bogy, 78 Mo. App. 88; Block *v.* Dowd, 120 N. Car. 402.

**10.** Right of Bailor to Compensation. — See Palmer *v.* Smith, 76 Conn. 210.

**761.** 1. An Involuntary Bailee can recover reimbursement for preserving chattels. Moline, etc., Co. *v.* Neville, 52 Neb. 574.

**4.** Where the Bailee Insures the Bailment and subsequently the property is destroyed by fire, the bailee is entitled only to what he has advanced, holding any surplus for the benefit of the bailor. McDonald *v.* Palmer, (Tenn. Ch. 1898) 48 S. W. Rep. 338.

**7.** Bailee Has Right of Action for Injury to Chattel. — The Winkfield, (1902) P. 42, 85 L. T. N. S. 668, *overruling* Claridge *v.* South Staffordshire Tramway Co., (1892) 1 Q. B. 422; Chicago *v.* Pennsylvania Co., (C. C. A.) 119 Fed. Rep. 497; Allen *v.* Barrett, 100 Iowa 16; Baggett *v.* McCormack, 73 Miss. 552, 55 Am. St. Rep. 554; Schoenholtz *v.* Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 14 Misc. (N. Y.) 461; Masterson *v.* International, etc., R. Co., (Tex. Civ. App. 1900) 55 S. W. Rep. 577, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 761.

**8.** Bailee Has Right to Sue for Conversion. — National Surety Co. *v.* U. S., (C. C. A.) 129 Fed. Rep. 70; Nashville, etc., R. Co. *v.* Dale, 68 Kan. 108, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 761; Vermillion *v.* Parsons, 101 Mo. App. 602; Sowden *v.* Kessler, 76 Mo. App. 581.

**762.** 1. Measure of Damages. — Masterson

- 762.** *b. LIABILITY TO TRUE OWNER OF CHATTEL.* — See note 3.  
**763.** *4. Of Bailor in Respect to Third Persons — a. IN GENERAL.*—See note 7.  
*Bailment Terminable at Will of Bailor — Unlawful Act of Bailee.* — See note 9.  
**764.** *V. TERMINATION OF BAILMENT — Accomplishment of Object.* — See note 3.  
*By Act of Parties.* — See note 4.  
*By Destruction of Subject-matter.* — See note 5.  
*By Conversion.* — See notes 6, 7.  
**765.** *By Operation of Law.* — See note 1.  
*Dissolution of Contract Does Not Affect Antecedent Liabilities.* — See note 2.

**BAKER.** — See note 4.

**BALANCE.** — See note 5.

- 767.** See note 1.

**BALANCE SHEET.** — See note 2.

- 768.** **BALLOT.** — See note 4.

- 770.** **BAND.** — See note 2.

**BANKABLE.** — See note 5.

- 784.** **BANK OF A RIVER.** — See note 5.

- 785.** **BANKRUPT — BANKRUPTCY.** — See note 2.

*v. International, etc., R. Co., (Tex. Civ. App. 1900) 55 S. W. Rep. 577.*

**762.** *3. Redelivery to Bailor After Notice of Third Party's Right.*—*McGee v. French*, 49 S. Car. 454. See also *supra*, this title, **755.** 2, **756.** 1, 2.

**763.** *7. Permanent Injury to Chattel.*—*New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, *affirmed* 61 N. J. L. 287, supporting the whole next paragraph.

*9. Where Bailment Determined by Unauthorized Act of Bailee.*—*Shafer v. Lacy*, 121 Cal. 574.

**764.** *3. By Accomplishment of Object.*—*Stearns v. Farrand*, (N. Y. City Ct. Gen. T.) 59 N. Y. Supp. 384.

*4. By Act of Parties.*—*Learned-Letcher Co. v. Fowler*, 109 Ala. 169; *Gleason v. Morrison*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 4.

*5. By Destruction of Subject-matter.*—See *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, *affirmed* 61 N. J. L. 287; *Stiles v. Seaton*, 200 Pa. St. 114.

*6. Unauthorized Sale Terminates Bailment.*—See *Morris v. Lowe*, 97 Tenn. 243.

*7. Mere Misuse of Chattel.*—See *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, holding that misuse rendering the article bailed unsuitable for the uses for which it was hired terminates the contract of bailment.

**765.** 1. See *Knights v. Piella*, 111 Mich. 9.

*2. Where a Gratuitous Bailee Died* it was held that the bailment terminated by the death of the bailee, and no trust could be impressed upon the *res* in the hands of his widow. *Morris v. Lowe*, 97 Tenn. 243.

*4. The Term "Bakery Property"* may properly include not only those parts of the estate in which baking is carried on or intended to be carried on, but also other parts which are used, or intended to be used, for storage, distributing, or other purposes connected with that business. *York v. Barstow*, 175 Mass. 167.

*5. Amount in Controversy.*—*Prairie Grove Cheese Mfg. Co. v. Luder*, 115 Wis. 20, *overruling* the earlier *Wisconsin* cases and holding that the words "*balance due*" in such a stat-

ute are used in their ordinary sense and mean the remainder after deducting proper credits.

**767.** 1. See *Lynch v. Spicer*, 53 W. Va. 426; *Davis v. Hutchings*, 8 Ohio Cir. Dec. 52, 15 Ohio Cir. Ct. 174.

*2. A Balance Sheet* is nothing more or less than a summation and balance of accounts. It states and shows in a concise manner what is stated and shown by the books of account. It briefly exhibits their contents. It does not purport to be a true statement of the actual condition of affairs in a mercantile house, but a summary of what the books disclose the condition to be. *Maxfield v. Seabury*, 75 Minn. 93.

**768.** 4. See *State v. Anderson*, 100 Wis. 530.

In *Murdoch v. Strange*, 99 Md. 108, the court said: "A *ballot* is a form of expression for a candidate to be voted for. If the paper falls short of expressing such a wish, it is defective; certainly, if it expresses nothing, it lacks all of the essential elements of a *ballot*."

The Term "*Ballot Paper*" as used in a statute punishing the personation of a voter is synonymous with *ballot* in an indictment under such a statute. *State v. Timothy*, 147 Mo. 535.

**770.** 2. *Band of Indians.*—In *Connors v. U. S.*, 180 U. S. 275, the court said: "To constitute a *band* we do not think it necessary that the Indians composing it be a separate political entity, recognized as such, inhabiting a particular territory, and with whom treaties had been or might be made. These peculiarities would rather give them the character of tribes. The word *band* implies an inferior and less permanent organization, though it must be of sufficient strength to be capable of initiating hostile proceedings."

*5. Bankable Paper.*—See *Edw. P. Allis Co. v. Madison Electric Light, etc., Co.*, 9 S. Dak. 464.

**784.** 5. *Boundaries.*—See *Proctor v. Maine Cent. R. Co.*, 96 Me. 458; *Ventura Land, etc., Co. v. Meiners*, 136 Cal. 284, *following* *Howard v. Ingersoll*, 13 How. (U. S.) 381.

**785.** 2. *Insolvency and Bankruptcy.*—See *Bernhardt v. Curtis*, 109 La. 171.

*Bankrupt Law and Insolvent Law.*—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181.

# BANKS AND BANKING.

By B. L. CAPELL.

**789.** II. DEFINITION AND GENERAL PRINCIPLES — 1. Definition. — See note 1.

**792.** 3. How Far Banks Are Subject to State Control — As to the Issuance of Banknotes. — See note 3.

**794.** State Control over Banking Corporations. — See note 1.

**795.** III. POWERS AND FUNCTIONS — 1. Powers in General — a. GENERAL STATUTORY LIMITATIONS ON BANKING POWERS — Banking Corporations. — See note 1.

**796.** b. VARIOUS POWERS CONSIDERED — (2) *To Borrow Money and Secure the Same* — Implied Power to Borrow. — See note 3.

**798.** (3) *To Purchase and Hold Property and Deal Therein* — Acquiring and Conveying Personal Property. — See note 5.

**799.** With Regard to Real Property. — See note 1.

**800.** (4) *To Lend Credit or Become Guarantor.* — See note 2.

**801.** See notes 1, 2, 3.

(5) *To Act as Agent or Broker in Purchases and Loans* — The Practice among Banks of Negotiating Loans for Customers. — See note 5.

**789.** 1. *Kiggins v. Munday*, 19 Wash. 236, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789.

Obtaining, Negotiating, and Guaranteeing Mortgage Loans is not a banking business. *Kiggins v. Munday*, 19 Wash. 233.

**792.** 3. Constitutional Provision Requiring Assent of Voters to Confer "Banking Powers." — See *State v. Union Stock Yards State Bank*, 103 Iowa 549.

**794.** 1. Constitutional Provisions Affecting Banking Corporations. — In *Minnesota* all laws for the organization of banks of issue must be passed by a two-thirds vote of the legislature. *Palmer v. Zumbrota Bank*, 72 Minn. 266.

Right of Legislature to Modify Charter. — In *New York* it is held that the charter of a bank incorporated under a general law may be modified or repealed by the legislature. *Barnes v. Arnold*, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 197, affirmed 45 N. Y. App. Div. 314, 169 N. Y. 611.

**795.** 1. A Grant of a Portion of the Ordinary Banking Powers. — A power given to an insurance company to receive moneys in trust, etc., and to lend surplus funds by its charter does not authorize it to do a general banking business. *Memphis City Bank v. Tennessee*, 161 U. S. 186.

**796.** 3. Authority to Borrow Money. — *Heironimus v. Sweeney*, 83 Md. 146, 55 Am. St. Rep. 333.

Power to Make Loans is implied in general banking powers. *Johnston Fife Hat Co. v. National Bank*, 4 Okla. 17.

**798.** 5. Acquisition and Disposal of Chattels — *Purchase of Its Own Stock.* — To prevent loss its own stock may be purchased by the bank, and such stock does not constitute a re-

duction of the capital stock. *Draper v. Blackwell*, 138 Ala. 182.

*Purchasing and Selling Stocks.* — *Schofield v. Goodrich Bros. Banking Co.*, 39 C. C. A. 76, 98 Fed. Rep. 271; *Latimer v. Citizens State Bank*, 102 Iowa 162.

A private bank may accept its own stock as security for an indebtedness, and such a transaction is not regarded as a purchase of its own stock. *Dalzell v. Commercial Bank*, 82 Mo. App. 264. But see *contra*, in *Colorado*, *Kassler v. Kyle*, 28 Colo. 374.

**799.** 1. Holding Real Estate and Dealing Therein. — For a bank to accept real estate transferred to it by a stockholder to cover a deficit in the capital is not an *ultra vires* act. *Brown v. Bradford*, 103 Iowa 378.

In *Tennessee* banks may receive real estate as security for loans. *Alexander v. Brummett*, (Tenn. Ch. 1896) 42 S. W. Rep. 63.

**800.** 2. Accommodation Indorsement by Bank. — *Bacon v. Farmers' Bank*, 79 Mo. App. 406; *Sturdevant v. Farmers', etc., Bank*, 62 Neb. 472, (Neb. 1903) 95 N. W. Rep. 819.

**801.** 1. Guaranty by Bank. — Banks have no authority to guarantee commercial paper. *Bacon v. Farmers' Bank*, 79 Mo. App. 406.

2. Bank May Become Guarantor to Protect Its Rights. — *Central R., etc., Co. v. Farmers' L. & T. Co.*, 114 Fed. Rep. 263, 52 C. C. A. 149.

3. *Central R., etc., Co. v. Farmers' L. & T. Co.*, 52 C. C. A. 149.

5. Lending Money for Others is within a bank's power unless prohibited by its charter, and where officers show the depositor the books of the bank and show him the investments, it will be presumed that it is the bank's action and not the individual act of the officer. *Bobb v. Savings Bank*, (Ky. 1884) 64 S. W. Rep. 494.

- 802.** (7) *Prohibition on General Trading and Speculation.* — See note 1.
- 2. Collections** — *a. THE BANK'S AGENCY TO COLLECT* — (1) *Collecting Commercial Paper an Incident of Banking.* — See note 2.
- (2) *Consideration of Contract to Collect.* — See note 3.
- 803.** (3) *Authority of the Bank to Receive Payment* — (a) *Generally.* — See note 1.
- (b) *Paper Payable at a Particular Bank* — *aa. BANK AS PAYEE'S AGENT.* — See note 3.
- bb. BANK AS MAKER'S OR ACCEPTOR'S AGENT.* — See note 4.
- 804.** (a) *Must Accept Only Money in Payment.* — See note 2.
- 805.** *b. BANK'S DUTIES AND LIABILITIES IN MAKING COLLECTIONS* — (1) *General Statement — Skill and Diligence Required.* — See note 4.

**802. 1. Buying, Selling, and Exchanging Stock** is no part of a legitimate banking business. *Preston v. Marquette County Sav. Bank*, 122 Mich. 696.

A bank cannot purchase stock in other corporations. *Schofield v. Goodrich Bros. Banking Co.*, 39 C. C. A. 76, 98 Fed. Rep. 271; *May v. Genesee County Sav. Bank*, 120 Mich. 330.

But a bank may become the owner of stock in another bank if it received such stock as security for a loan and became the owner from such a transaction. *Latimer v. Citizens State Bank*, 102 Iowa 162; *Batley v. Eureka Bank*, 62 Kan. 384.

**2. The Power to Collect Need Not Be Expressly Granted.** — *Knapp v. Saunders*, 15 S. Dak. 464. See also *Birmingham First Nat. Bank v. Newport First Nat. Bank*, 116 Ala. 520, holding that the court will take judicial notice that banks receive paper for collection and collaterals accompanying them during the usual course of business.

**3. Consideration.** — *Birmingham First Nat. Bank v. Newport First Nat. Bank*, 116 Ala. 532, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 802; *Kershaw v. Ladd*, 34 Oregon 375.

**803. 1. Lowenstein v. Bresler, 109 Ala. 326.**

**3. Bank Named as Place of Payment Not Payee's Agent.** — *Montreal Bank v. Ingerson*, 105 Iowa 361, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 803, and holding that in order for a bank to become the payee's agent of paper payable at that bank, such paper must be deposited in the bank for collection.

**Right of One Bank to Send to Another for Collection.** — It is held in *South Dakota* that a bank to which paper payable at that bank has been sent for collection has no implied authority to send it to a bank in another city as its subagent to collect the paper so as to make a payment to the subagent a payment to the original holder. *Sherman v. Port Huron Engine, etc., Co.*, 8 S. Dak. 343.

**4. State Bank v. McCabe**, (Mich. 1904) 98 N. W. Rep. 20, holding that funds on deposit at the time when a note matures may be applied to the payment of that note, but funds deposited thereafter cannot be so applied.

**Advance of Money by Bank.** — A bank which in effect purchases a note made payable at that bank, by advancing payment thereof, has no right of action against the holder of the note because it was paid under a mistake as to the state of the maker's account. *Riverside Bank*

*v. Shenandoah First Nat. Bank*, (C. C. A.) 74 Fed. Rep. 276.

So where a bank to which paper was sent for collection issued and mailed a draft to the drawer, it was held that upon discovering the insolvency of the drawee it could not intercept the draft *in transitu*. *Canterbury v. Sparta Bank*, 91 Wis. 53, 51 Am. St. Rep. 870.

**804. 2. May Accept Only Money in Payment.** — *O'Leary v. Abeles*, 68 Ark. 262, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 804; *Montreal Bank v. Ingerson*, 105 Iowa 349; *National Bank of Commerce v. American Exch. Bank*, 151 Mo. 320. See also *Citizens' Bank v. Houston*, 98 Ky. 139.

**A Bank May Accept Certified Checks** in payment of drafts if such has been the custom. *Jefferson County Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337.

**Partial Payment.** — It is not within the scope of authority for the agent for collection to accept a partial payment. *Lowenstein v. Bresler*, 109 Ala. 326.

**805. 4. Reasonable Skill and Ordinary Diligence.** — *Bay Biscayne Bank v. Monongahela Nat. Bank*, 126 Fed. Rep. 437, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 805; *Watson v. Fagner*, 105 Ill. App. 52, affirmed 208 Ill. 136; *Merchants State Bank v. State Bank*, 94 Wis. 444.

No custom, unknown to depositor, will excuse the bank from the exercise of reasonable skill and ordinary diligence. *Bank of Commerce v. Miller*, 105 Ill. App. 224, dismissed 202 Ill. 410.

A bank, having used reasonable skill and diligence in collecting a paper held by it for collection, is not forbidden to obtain a preference for a debt to itself from the same debtor. *U. S. National Bank v. Westervelt*, 55 Neb. 424, distinguishing *Dern v. Kellogg*, 54 Neb. 560.

**Duty to Follow Instructions.** — Where instructions are given to a bank in which a draft is deposited to "collect and credit," the bank should place the deposit to the credit of the depositor, and if it credits the indorser therefor it is liable. *Long v. Bank of Commerce*, (Ky. 1897) 38 S. W. Rep. 886.

**Diligence in Making Inquiries for Draft Not Heard From.** — *Louisville Second Nat. Bank v. Merchants' Nat. Bank*, 111 Ky. 936, 98 Am. St. Rep. 439, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 805.

**Must Act in Good Faith.** — In making collections a bank must act in good faith. *Dern v. Kellogg*, 54 Neb. 560.

**806.** (2) *Duty as to Presentment, Demand, Protest, and Notice.* — See note 1.

**807.** To Whom Notice of Nonpayment Must Be Given. — See notes 1, 2.

**808.** (5) *Liability for Conduct of Notary.* — See note 3.

**809.** (6) *Liability for Acts of Correspondent Bank* — (b) Selection of Correspondent Bank. — See notes 2, 3.

**810.** (c) Default of Correspondent Bank — View that Forwarding Bank Is Responsible for Default of Correspondent. — See note 1.

**812.** See note 1.

View that Collecting Bank Is Liable Directly to Depositor. — See note 3.

**814.** c. MEASURE OF DAMAGES FOR NEGLIGENCE. — See notes 2, 3, 4.

**Liability for Breach of Warranty.** — A bank does not, by collecting a draft attached to a bill of lading, make itself liable for a breach of warranty of the quality of the merchandise represented by the bill of lading. *Commerce Milling, etc., Co. v. Morris*, 27 Tex. Civ. App. 553.

**806. 1. Presentment, Demand, Etc.** — *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 61 Am. St. Rep. 550; *Hitchcock v. Suspension Bridge Bank*, 57 N. Y. App. Div. 458; *Morris v. Union Nat. Bank*, 13 S. Dak. 329. See also *Aransas Pass First Nat. Bank v. St. Charles Sav. Bank*, (Tex. Civ. App. 1896) 37 S. W. Rep. 768. And see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, **410. 2 et seq.**

**807. 1. The Bank Must Notify the Principal or holder of the note.** *Sprague v. Farmers' Nat. Bank*, 63 Kan. 12.

**Bank Required to Notify All Parties.** — *Citizens Nat. Bank v. Greensburg Third Nat. Bank*, 19 Ind. App. 69.

**2. Special Contract.** — *Howard v. Bank of Metropolis*, 95 N. Y. App. Div. 342.

**808. 3. Bank Liable Only for Care in Selection of Notary.** — *Manning First Nat. Bank v. German Bank*, 107 Iowa 545, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 808.

**809. 2. Due Care Requisite in Selecting Correspondent.** — *Herider v. Phenix Loan Assoc.*, 82 Mo. App. 427; *Louisville Second Nat. Bank v. Merchants Nat. Bank*, 111 Ky. 930, 98 Am. St. Rep. 439.

**3. Selection of Drawee Bank as Agent.** — *Minneapolis Sash, etc., Co. v. Metropolitan Bank*, 76 Minn. 143, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 809; *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 61 Am. St. Rep. 550; *Givan v. Alexandria Bank*, (Tenn. Ch. 1898) 52 S. W. Rep. 923. See also *Corsicana First Nat. Bank v. City Nat. Bank*, 12 Tex. Civ. App. 318.

**In the Absence of Instructions to select the drawee bank as agent, such an act is negligent.** *Chicago First Nat. Bank v. Citizens' Sav. Bank*, 123 Mich. 336.

**Where the Depositor Had Knowledge that the remitting bank would send the paper for collection directly to the drawee bank and then availed himself of such collection facilities the remitting bank is not liable.** *Wilson v. Carlinville Nat. Bank*, 187 Ill. 222.

**A Banking Custom may be shown to give to a bank the right to send an unindorsed check directly to the drawee bank.** *Kershaw v. Ladd*, 34 Oregon 375.

**810. 1. Forwarding Bank Liable for Correspondent Bank.** — *Girard First Nat. Bank v. Craig*, 3 Kan. App. 166, distinguishing *Lindsborg Bank v. Ober*, 31 Kan. 599, cited to the contrary proposition in 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 812; *Kirkham v. Bank of America*, 165 N. Y. 132; *National Revere Bank v. National Bank of Republic*, 172 N. Y. 102; *Morris v. Allegheny First Nat. Bank*, 201 Pa. St. 160; *Schumacher v. Trent*, 18 Tex. Civ. App. 17. See also *Bedell v. Harbine Bank*, 62 Neb. 339. But see *Kelley v. Phenix Nat. Bank*, 17 N. Y. App. Div. 496, wherein the circumstances were held to constitute the collecting bank the agent of the holder.

**812. 1. Limitation of Liability by Express Agreement.** — Where the depositor of a draft for collection ordered the bank of deposit to send the draft to a certain bank for identification of indorsement the forwarding bank is not liable for loss of the draft. *Davis v. Fresno First Nat. Bank*, 118 Cal. 600.

**As to the Effect of Commercial Usage.** — A forwarding bank is bound by the usages and customs of banks at the place of collection, regardless of knowledge of such usages. *Jefferson County Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337.

**3. Correspondent Bank Liable Directly to Depositor** — *United States*. — Holder v. Western German Bank, 132 Fed. Rep. 187 (by interpretation given to special contract of collection).

*Alabama.* — *Eufaula Grocery Co. v. Missouri Nat. Bank*, 118 Ala. 413, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 809-813.

*Illinois.* — *Wilson v. Carlinville Nat. Bank*, 187 Ill. 224, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 810, 812; *Waterloo Milling Co. v. Kuenster*, 158 Ill. 259, 40 Am. St. Rep. 156.

*Indiana.* — *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 111, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 810, but adopting the view stated on page 812.

*Kentucky.* — *Louisville Second Nat. Bank v. Merchants Nat. Bank*, 111 Ky. 930, 98 Am. St. Rep. 439.

*Massachusetts.* — *Lord v. Hingham Nat. Bank*, 186 Mass. 161.

*Tennessee.* — *Givan v. Alexandria Bank*, (Tenn. Ch. 1898) 52 S. W. Rep. 923.

**814. 2. Measure of Damages.** — *People's Nat. Bank v. Brogden*, (Tex. 1904) 83 S. W. Rep. 1098, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 814.

**Agents.** — The bank receiving paper for collection is liable for the defalcation of its agent.

**815.** *d.* TITLE TO PAPER DEPOSITED FOR COLLECTION — (1) *As Between Bank and Depositor.* — See note 1.

**816.** (2) *Where the Rights of Third Parties Intervene* — (a) *Generally.* — See note 1.

(b) *Paper Indorsed "For Collection."* — See note 2.

**817.** (c) *Effect of Crediting Paper when Received as Cash.* — See note 1.

**818.** (d) *Insolvency of Forwarding Bank* — *bb.* VIEW THAT COLLECTING BANK IS ENTITLED TO CREDIT ON PAST INDEBTEDNESS. — See note 1.

State Nat. Bank *v.* Thomas Mfg. Co., 17 Tex. Civ. App. 214.

**814.** 3. *Amount of Note Measures Loss Prima Facie.* — Gray's Harbor Commercial Co. *v.* Continental Nat. Bank, 74 Mo. App. 633; National Revere Bank *v.* National Bank of Republic, 172 N. Y. 102; Howard *v.* Bank of Metropolis, 95 N. Y. App. Div. 342; Merchants State Bank *v.* State Bank, 94 Wis. 444.

4. *Plaintiff Must Make Out Probable Case to Recover Whole Amount.* — See *Dern v. Kellogg*, 54 Neb. 560.

**815.** 1. *Richardson v. New Orleans Coffee Co.*, 43 C. C. A. 583; *American Exch. Nat. Bank v. Thummmler*, 94 Ill. App. 622, *reversed* 195 Ill. 90, 88 Am. St. Rep. 177; *Citizens' Nat. Bank v. City Nat. Bank*, 111 Iowa 215, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815; *Pickering v. Cameron*, 103 Iowa 186; *Blair v. Hill*, 165 N. Y. 672, 50 N. Y. App. Div. 33; *Oppenheim v. West Side Bank*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 722.

*Recovery of Money Paid to Collecting Bank under Mistake of Fact.* — Supporting Canal Bank *v.* Albany Bank, 1 Hill (N. Y.) 287, stated in the original note, see *Onondaga County Sav. Bank v. U. S.*, (C. C. A.) 64 Fed. Rep. 703, *distinguished* in *U. S. v. American Exch. Nat. Bank*, 70 Fed. Rep. 232.

Money paid to the collecting bank under mistake of fact may be recovered from such bank. *Metropolitan Nat. Bank v. Merchants Nat. Bank*, 182 Ill. 367, 74 Am. St. Rep. 180.

*Bank Cannot Recover on Note Assigned to It for Collection Only.* — *Ft. Worth First Nat. Bank v. Payne*, (Ky. 1897) 42 S. W. Rep. 736.

*Deposit of a Forged Check for Collection.* — Where the plaintiff deposited for collection a check on which the payee's name was forged and it was remitted to a correspondent bank and paid, and afterwards the forgery discovered, it was held that the plaintiff was indebted to the receiving bank in the amount of the check. *Green v. Purcell Nat. Bank*, 1 Indian Ter. 270. See further the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, 502, 1, 4.

**816.** 1. *Where Money Is Innocently Advanced to Bank on Credit of Draft Received for Collection.* — It is held in *Nebraska* that where a bank credits the amount of the remitting bank by the amount of paper sent to it for collection it cannot interpose this credit as an equity in defense to an action brought against it by the original holder for the proceeds of collection. *Branch v. U. S. National Bank*, 50 Neb. 470.

2. *Indorsement "For Collection."* — *Doppelt v. National Bank of Republic*, 74 Ill. App. 429, *affirmed* 175 Ill. 432; *Branch v. U. S. National Bank*, 50 Neb. 470; *National Citizens' Bank v. Citizens' Nat. Bank*, 119 N. Car. 307; *Boykin v. Fayetteville Bank*, 118 N. Car. 566.

*Check Indorsed "For Deposit."* — See *Lanternman v. Travous*, 73 Ill. App. 670, *affirmed* 174 Ill. 459; *American Exch. Nat. Bank v. Loretta Gold, etc.*, Min. Co., 165 Ill. 103, 56 Am. St. Rep. 233.

**817.** 1. *Philadelphia v. Eckels*, 98 Fed. Rep. 485; *Dymoch v. Midland Nat. Bank*, 67 Mo. App. 97; *Hendley v. Globe Refinery Co.*, 106 Mo. App. 20; *Armour Packing Co. v. Davis*, 118 N. Car. 548; *Union Safe Deposit Bank v. Strauch*, 20 Pa. Super. Ct. 196; *Givan v. Alexandria Bank*, (Tenn. Ch. 1898) 52 S. W. Rep. 923.

*Crediting Check Deposited in Bank Where Payable.* — The auditing of a check deposited in the bank where it is payable amounts to a payment. *Bryan v. McKees Rocks First Nat. Bank*, 205 Pa. St. 7. See also *Bartley v. State*, 53 Neb. 310.

*Title to Check Deposited — Effect of Bank Custom to Credit as Cash.* — In *Walton v. Riverside Bank*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 304, it was held that a bank had no right to charge back against a customer's account the amount of a check deposited with it and credited as cash, and afterwards lost before presentment.

In *New Jersey* it is held that where a check is indorsed generally by the payee and deposited in a bank other than that on which it is drawn, and by that bank credited at once to the depositor as cash, the transaction is in effect a sale of the paper to the bank, not a deposit for collection; and where such check is paid by mistake by the bank on which it is drawn, against the instructions of the maker, and the proceeds are remitted to the bank of deposit, the drawee bank has no right of recovery against the payee. *National Bank v. Berrall*, 70 N. J. L. 757, 103 Am. St. Rep. 821, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 817, but holding that the language of the text is limited by the force of the words "taken for collection."

And in *Massachusetts* it is held that crediting a depositor's account with a check deposited for collection and afterwards paying checks more than the amount of his deposit without such credit, knowing that the check had been lost in transmission to the collecting bank, amounts to an absolute sale of the check to the bank. *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363.

The United States Circuit Court of Appeals has held that after a bank failed a check uncollected which had been received as cash could be charged back. *Staplyton v. Cie Des Phosphates De France*, (C. C. A.) 88 Fed. Rep. 53. *Compare* *Brusegaard v. Ueland*, 72 Minn. 283.

**818.** 1. *Collecting Bank May Assert Lien or Title Against Depositor.* — *American Exch. Nat. Bank v. Thummmler*, 195 Ill. 90, 88 Am. St.



**819.** *cc.* VIEW THAT COLLECTING BANK CANNOT CREDIT ON PAST INDEBTEDNESS. — See note 1.

(a) Title After Collection Completed — *aa.* RELATION OF DEBTOR AND CREDITOR ESTABLISHED. — See notes 2, 3.

**821.** *bb.* FORWARDING BANK HAS NO PREFERENCE ON INSOLVENCY OF COLLECTING BANK. — See note 1.

**822.** 3. Deposits — *a.* DEPOSITS FOR SPECIFIC PURPOSE. — (1) *In General* — Revocability of the Agency. — See note 2.

Bank May Not Apply Deposit to Another Purpose. — See note 3.

Such Deposits Are Sometimes Termed Special Deposits. — See notes 4, 5.

**823.** (3) *Deposit of Collateral.* — See note 2.

**824.** (4) *Deposit to Meet Maturing Indebtedness.* — See note 1.

(6) *Special Deposits for Safe Keeping* — Defined. — See note 4. See generally the title DEPOSIT.

Rep. 177; *Doppelt v. National Bank of Republic*, 175 Ill. 432; *Guignon v. Helena First Nat. Bank*, 22 Mont. 145, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 818; *Winfield Nat. Bank v. McWilliams*, 9 Okla. 499, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 818; *Studebaker Bros. Mfg. Co. v. Sulphur Springs First Nat. Bank*, (Tex. Civ. App. 1897) 42 S. W. Rep. 573.

**819.** 1. Rights of Collecting Bank No Greater than Those of Forwarding Bank. — *Morris v. Alabama Carbon Co.*, 139 Ala. 620; *National Citizens' Bank v. Citizens Nat. Bank*, 119 N. Car. 307.

Where Collecting Bank Has Notice of Transmitting Bank's Want of Title. — Where the collecting bank credited an intermediary bank with the amount of the paper collected and afterwards became insolvent, the intermediary bank was held to be liable to the original forwarding bank. *Omaha First Nat. Bank v. Moline First Nat. Bank*, 55 Neb. 303.

2. Relation of Agency Before Collection. — *Richardson v. Denegre*, 35 C. C. A. 452; *Richardson v. Louisville Banking Co.*, (C. C. A.) 94 Fed. Rep. 442; *Richardson v. Continental Nat. Bank*, (C. C. A.) 94 Fed. Rep. 450.

3. After Collection Relation of Debtor and Creditor Exists. — *Richmond First Nat. Bank v. Wilmington, etc., R. Co.*, (C. C. A.) 77 Fed. Rep. 401; *Sayles v. Cox*, 95 Tenn. 579, 49 Am. St. Rep. 940; *Peters Shoe Co. v. Murray*, 31 Tex. Civ. App. 259; *Hallam v. Tillinghast*, 19 Wash. 20.

Where the relation of debtor and creditor is established by a custom of previous dealing between the parties, there is no trust relation so as to secure the deposit upon the insolvency of the collecting bank. *McCormick Harvesting Mach. Co. v. Yankton Sav. Bank*, 15 S. Dak. 196.

**821.** 1. Insolvency of Collecting Bank — Forwarding Bank a General Creditor. — *Union Nat. Bank v. Citizens' Bank*, 153 Ind. 44; *Continental Nat. Bank v. West Point First Nat. Bank*, (Miss. 1904) 36 So. Rep. 189.

So the holder is a general creditor. *Ober, etc., Co. v. Cochran*, 118 Ga. 396.

View that Collecting Bank Is a Trustee. — In support of the general view that the collecting bank is a trustee. *Windstanley v. Louisville Second Nat. Bank*, 13 Ind. App. 544; *Kansas State Bank v. First State Bank*, 62 Kan. 788; *Wallace v. Stone*, 107 Mich. 190; *Midland Nat.*

*Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608; *State v. Bank of Commerce*, 61 Neb. 181; *Lapeer First Nat. Bank v. Sanford*, 62 Mo. App. 394.

*In Plano Mfg. Co. v. Auld*, 14 S. Dak. 512, 86 Am. St. Rep. 769, it was held that a trust is impressed on money in the bank, but not on the general assets of the bank.

**822.** 2. *McGorray v. Stockton Sav., etc., Soc.*, 131 Cal. 321.

*In re Davis*, 119 Fed. Rep. 956, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 822; *El Paso Nat. Bank v. Fuchs*, (Tex. Civ. App. 1895) 34 S. W. Rep. 203.

4. Contingency. — A deposit on a contingency may be received by a bank and not paid out until the happening of contingency. *American Nat. Bank v. Presnall*, 58 Kan. 69.

5. Preference in Case of Failure of Bank. — *Anderson v. Pacific Bank*, 112 Cal. 598, 53 Am. St. Rep. 228; *American Exch. Nat. Bank v. Loretta Gold, etc.*, Min. Co., 165 Ill. 103, 56 Am. St. Rep. 233; *Woodhouse v. Crandall*, 197 Ill. 104; *Ryan v. Phillips*, 3 Kan. App. 704.

The deposit of money in a bank to the account of another, coupled with directions to telegraph the amount to a third bank, creates a special deposit and may be recovered upon the bank's failure. *Montagu v. Pacific Bank*, 81 Fed. Rep. 602.

Where Moneys Not Capable of Identification. — See *Lanternman v. Travous*, 73 Ill. App. 670, affirmed 174 Ill. 459.

**823.** 2. Securities Deposited as Collateral. — *Dearborn v. Washington Sav. Bank*, 13 Wash. 345.

A bank receiving notes as collateral is presumed to hold such notes for value. *Black v. Westminster First Nat. Bank*, 96 Md. 399.

**824.** 1. Deposits to Meet Maturing Indebtedness. — *Moreland v. Brown*, (C. C. A.) 86 Fed. Rep. 257.

A Parol Direction is sufficient to create a special deposit to meet maturing indebtedness. *Cambridge First Nat. Bank v. Hall*, 119 Ala. 64.

Preference on Insolvency. — In *Moore v. Chesebrough*, (Iowa 1900) 81 N. W. Rep. 469, it was held that where money is deposited to pay a mortgage, and the bank applies the money to its own debt and becomes insolvent, the deposit cannot be made a preferred claim, because its assets have not been augmented.

4. Special Deposit Defined. — For definitions of

**826. Title to Deposit.** — See note 3.

Deposits in Particular Cases — As Clerk — As Trustee — As Judge of Probate. —

See note 5.

(7) *General Deposits* — (a) *In General* — Relation Between Bank and General Depositor. — See note 11.**828. The Obligation of the Bank.** — See note 3.

Set-off. — See note 4.

Presumption. — See note 6.

**829. Interest.** — See notes 2, 3.

Obligation to Repay Deposits. — See note 5.

**830. (c) How Transferred and Withdrawn** — Bank May Demand Writing. — See note 3.

Remittance by Mail. — See note 6.

Negligence of Bank. — See note 8.

Deposit in Name of Husband and Wife. — See note 10.

**831. Deposit by Married Woman.** — See note 1.

a special deposit and a discussion of what constitutes a special deposit, see *Gerrish v. Muskegon Sav. Bank*, (Mich. 1904) 100 N. W. Rep. 1000; *Blackwell Bank v. Dean*, 9 Okla. 626.

**826. 3. Title Remains in Depositor.** — *Niblack v. Cosler*, 74 Fed. Rep. 1000; *Woodhouse v. Crandall*, 197 Ill. 104; *Blackwell Bank v. Dean*, 9 Okla. 626; *Gibson v. Erie*, 196 Pa. St. 7.

**5. Compare Officer v. Officer**, (Iowa 1902) 90 N. W. Rep. 826, holding that a bank receiving a deposit from an executor, knowing it to be such, makes it a special deposit.

**11. Relation Between Bank and General Depositor** — *United States*. — *Randolph v. Allen*, 41 U. S. App. 117; *Durkee v. National Bank*, 42 C. C. A. 674.

*Florida*. — *Camp v. Ocala First Nat. Bank*, 44 Fla. 497.

*Illinois*. — *American Exch. Nat. Bank v. Loretta Gold*, etc., Min. Co., 165 Ill. 103, 56 Am. St. Rep. 233; *Lanternman v. Travous*, 73 Ill. App. 670, affirming 174 Ill. 459; *Bayor v. American Trust*, etc., Bank, 157 Ill. 62.

*Indiana*. — *Union Sav. Bank*, etc., Co. v. *Indianapolis Lounge Co.*, 20 Ind. App. 325; *Hamilton v. Toner*, 17 Ind. App. 389.

*Iowa*. — *Mereness v. Charles City First Nat. Bank*, 112 Iowa 13, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 826.

*Missouri*. — *Quattrochi v. Farmers'*, etc., Bank, 89 Mo. App. 500; *Sharon First Nat. Bank v. City Nat. Bank*, 102 Mo. App. 357; *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474.

*Nebraska*. — *Nichols v. State*, 46 Neb. 715; *Nehawka Bank v. Ingersoll*, (Neb. 1902) 89 N. W. Rep. 618.

*New Jersey*. — *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84; *Campbell v. Watson*, 62 N. J. Eq. 396.

*Oregon*. — *Shute v. Hinman*, 34 Oregon 578.

*Tennessee*. — *Williams v. Cox*, 97 Tenn. 555; *Winslow v. Harriman Iron Co.*, (Tenn. Ch. 1897) 42 S. W. Rep. 698.

*Virginia*. — *Nolting v. National Bank*, 99 Va. 54.

**828. 3. A Bank's Obligation** is to pay the depositor's checks to the payee or one holding through the payee. *United Security L. Ins.*, etc., Co. v. *Central Nat. Bank*, 185 Pa. St. 586. See also *Goshorn v. People's Nat. Bank*, 32 Ind. App. 428, 102 Am. St. Rep. 248.

**Knowledge that a Draft Had Been Drawn on the Depositor's Account** is no excuse for failure to pay a deposit on demand of the depositor. *Nehawka Bank v. Ingersoll*, (Neb. 1902) 89 N. W. Rep. 618.

**4. Colton v. Drovers' Perpetual Bldg.**, etc., Assoc., 90 Md. 94, 78 Am. St. Rep. 431, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 828; *Winslow v. Harriman Iron Co.*, (Tenn. Ch. 1897) 42 S. W. Rep. 698.

**6. Deposit Deemed to Be General.** — *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447; *Nichols v. State*, 46 Neb. 715; *Blackwell Bank v. Dean*, 9 Okla. 630, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 828; *Shute v. Hinman*, 34 Oregon 578.

**The Burden of Proving that a Deposit Is Special** is on the depositor, as against the bank. *Sharon First Nat. Bank v. City Nat. Bank*, 102 Mo. App. 357.

**829. 2. Interest.** — *American Trust*, etc., Co. v. *Boone*, 102 Ga. 202, 66 Am. St. Rep. 167; *Bank of Commerce v. Harrison*, (N. Mex. 1901) 66 Pac. Rep. 460.

**3. James Reynolds Elevator Co. v. Merchants' Nat. Bank**, 55 N. Y. App. Div. 1.

**Where a Bank Suspends**, no demand is necessary, and interest begins to run on the deposit from the time of the suspension. *Ex p. Stockman*, (S. Car. 1904) 48 S. E. Rep. 736.

**5. Bank's Obligation to Repay Money Deposited.** — *Hutchinson First Nat. Bank v. Kansas Grain Co.*, 60 Kan. 30.

**830. 3. Bank May Require Written Authority.** — *Hamilton v. Toner*, 17 Ind. App. 389.

**6. McBee v. Purcell Nat. Bank**, 1 Indian Ter. 288.

**8. Negligence of Bank.** — Payment of a forged check or a check with a forged indorsement is deemed to be negligence rendering the bank liable. *Henderson Trust Co. v. Ragan*, (Ky. 1899) 52 S. W. Rep. 848; *Kenneth Invest. Co. v. National Bank of Republic*, 103 Mo. App. 613; *Morris v. Beaumont Nat. Bank*, (Tex. Civ. App. 1904) 83 S. W. Rep. 36.

A bank paying out deposits after notice of a suit does so at its peril. *Pearce v. Dill*, 149 Ind. 136.

**10. See Matter of Brown**, 113 Iowa 351.

**Joint Deposit of Father and Daughter.** — See *Wood v. Zornstorff*, 59 N. Y. App. Div. 538.

**831. 1. A Deposit by the Husband of the**

**831. Form of Check Should Conform to Terms of Deposit.** — See note 3.

Conflicting Claimants. — See note 5.

When Bank Has No Notice of Assignment. — See note 7.

(d) Deposits by Trustees, Agents, and Officials — Presumption of Ownership. —

See note 8.

**832. How the Presumption Is Overthrown.** — See notes 1, 2.

**Wife's Separate Funds** in the name of the wife may, in *Texas*, be drawn by the husband, and the bank will not be liable for conversion unless it colludes with the husband in the conversion. *Coleman v. Waxahachie First Nat. Bank*, (Tex. Civ. App. 1901) 64 S. W. Rep. 93. But see *Brown v. Daugherty*, 120 Fed. Rep. 526. And see the titles **HUSBAND AND WIFE; SEPARATE PROPERTY OF MARRIED WOMEN.**

**831. 3. Joint Deposit.** — Upon the wrongful paying out of a joint deposit to one of the joint depositors the bank is liable to the other depositor to the amount of his interest in the joint deposit at the time when the payment by the bank was made. *Neiman v. Beacon Trust Co.*, 170 Mass. 452, 64 Am. St. Rep. 315.

5. *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474.

**7. Bank Without Notice of Assignment.** — *Atlanta Nat. Bank v. George*, 109 Ga. 682.

**8. Presumption in Favor of Depositor as Owner.** — *Booth v. Oakland Sav. Bank*, 122 Cal. 19; *Detroit Sav. Bank v. Haines*, 128 Mich. 38; *Sparrow v. State Exch. Bank*, 103 Mo. App. 338; *Woodbridge v. Saratoga Springs First Nat. Bank*, 45 N. Y. App. Div. 166, *affirming* 166 N. Y. 238.

A bank may pay out the proceeds of the sale of mortgaged property, which have been deposited, upon the check of the depositor, and is not obligated to apply such proceeds to known liens. *Cox v. Beck*, 83 Fed. Rep. 269.

Trust funds of an administrator deposited in his own name and mingled with the funds of the bank cannot be recovered as trust deposits. *Shute v. Hinman*, 34 Oregon 578.

The relation of debtor and creditor is established by an attorney depositing the funds of his client in his own name. The bank need not investigate such deposits, and is not liable for paying the attorney's checks. *Rhinehart v. New Madrid Banking Co.*, 99 Mo. App. 381.

A deposit by an agent in his own name of funds of his principal and paid to the agent upon his check cannot be recovered by the principal, the bank not knowing the true ownership. *Martin v. Kansas Nat. Bank*, 66 Kan. 655. See also *Kimmel v. Bean*, 68 Kan. 598.

Where an insolvent factor deposited money in a bank which knew of the insolvency it was held that the relation of debtor and creditor was established and the bank must honor his checks. *Interstate Nat. Bank v. Claxton*, 97 Tex. 569.

**Deposit in Name of Another.** — Where a deposit is made in the name of the depositor's daughter, but notice is given by the depositor at the same time that the money is to be withdrawn by checks signed by him, the bank is not liable in a suit by the daughter to recover the amount of the deposit. *Greene v. Camas Prairie Bank*, 7 Idaho 576.

"A depositor contracting with a bank for

the care of his money can control his funds until he has disposed of them, no matter in what name the account is kept, so long as it is understood to be his account, and has not been put beyond his control by some act that he cannot revoke." *Greene v. Camas Prairie Bank*, 7 Idaho 580, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832, 834.

But where an agent deposits money of his principal in a bank in his principal's name, the relation of debtor and creditor is established between the bank and the principal. Authority given to an agent to deposit his principal's money is not authority to withdraw it. *Heath v. New Bedford Safe Deposit, etc., Co.*, 184 Mass. 481.

**The Presumption Is Only Prima Facie**, and not conclusive. *Bessemer Sav. Bank v. Anderson*, 134 Ala. 343, 92 Am. St. Rep. 38.

**832. 1. How Presumption Overcome.** — *Union Stock Yards Nat. Bank v. Moore*, (C. C. A.) 79 Fed. Rep. 705; *Greene v. Camas Prairie Bank*, 7 Idaho 580, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832; *Blackwell Bank v. Dean*, 9 Okla. 626.

A deposit by a postmaster, under his power to deposit money, in a national bank, creates a trust deposit. *U. S. v. National Bank*, 73 Fed. Rep. 379.

**Notice to Bank by Principal.** — *Bessemer Sav. Bank v. Anderson*, 134 Ala. 343, 92 Am. St. Rep. 38; *Hanna v. Drovers' Nat. Bank*, 194 Ill. 252; *Drumm Flato Commission Co. v. Gerlack Bank*, 92 Mo. App. 326.

**Parol Evidence** is admissible to show the different ownership. *Anniston Nat. Bank v. Howell*, 116 Ala. 375.

**2. Form of Deposit as Notice.** — *Duckett v. National Mechanic's Bank*, 86 Md. 400, 63 Am. St. Rep. 513, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832; *Lindsay v. Continental Nat. Bank*, 82 Mo. App. 301, *citing*, in a separate opinion by Bland, P. J., 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832.

**Deposit by Partnership.** — A deposit in the name of A. B. P. & Co. is charged with notice that A. B. P. & Co. is a partnership rather than an individual. *Willey v. Crocker-Woolworth Nat. Bank*, (Cal. 1903) 72 Pac. Rep. 832.

**Deposit in Name of One as "County Treasurer."** — Where a county treasurer deposits money in an incorporated bank, and the bank becomes insolvent, such deposits are under Civ. Code S. Car., § 2538, due to the public, and have a preference over other debts of the banker. *Lockwood v. Lockwood*, 68 S. Car. 328.

**Adding the Words "Attorney for B."** does not make the deposit special, and it may be withdrawn by the depositor by signing the check in such form, and the bank is not liable for any misappropriation by the attorney. *Pennsylvania Title, etc., Co. v. Meyer*, 201 Pa. St. 299.

- 832.** Misappropriation — Participation Therein by Bank. — See note 3.
- 833.** Following Trust Deposits. — See note 1.  
Owner as Between Bank and Depositor. — See note 3.
- 834.** (a) Overdrafts. — See note 3.  
Right of Action in Bank to Recover Excess. — See note 4.
- 835.** Insufficiency of Funds — Claim on Actual Balance. — See note 1.  
(f) Bank's Lien or Set-off. — See note 2.
- 836.** Check Outstanding — Assignment for Creditors. — See note 2.  
Before Maturity of Debt. — See note 3.

**832. 3. Bank Participating in Misappropriation.** — *McNulta v. West Chicago Park Com'r's*, 40 C. C. A. 155; *Carroll County Bank v. Rhodes*, 69 Ark. 43; *American Trust, etc., Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167; *Shepard v. Meridian Nat. Bank*, 149 Ind. 532; *Columbia Finance, etc., Co. v. First Nat. Bank*, 76 S. W. Rep. 156, 25 Ky. L. Rep. 561; *Duckett v. National Mechanics Bank*, 86 Md. 410, 63 Am. St. Rep. 513, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832; *James Reynolds Elevator Co. v. Merchants' Nat. Bank*, 55 N. Y. App. Div. 1; *Interstate Nat. Bank v. Claxton*, 97 Tex. 569; *Skipwith v. Hurt*, 94 Tex. 322.

**833. 1. Following Trust Deposits.** — *Cleveland, etc., R. Co. v. Hawkins*, 79 Fed. Rep. 29; *Leonard v. Latimer*, 67 Mo. App. 138; *Mayer v. Citizens Bank*, 86 Mo. App. 422; *Union Stock Yards Nat. Bank v. Haskell*, (Neb. 1902) 90 N. W. Rep. 233; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, affirmed on rehearing 49 Neb. 125; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 59 Am. St. Rep. 572. See also *Merchants Nat. Bank v. School Dist.*, 36 C. C. A. 432; *State v. Midland State Bank*, 52 Neb. 1, 66 Am. St. Rep. 484. Compare *Officer v. Officer* 120 Iowa 389, 98 Am. St. Rep. 365.

**3. Question of Ownership as Between Depositor and Bank.** — *Sharon First Nat. Bank v. Valley State Bank*, 60 Kan. 621; *Duckett v. National Mechanics' Bank*, 86 Md. 406, 63 Am. St. Rep. 513, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 833. See also *State v. Thomas*, 53 Neb. 464.

**834. 3. Overdrafts by Depositors.** — A bank is not liable on a check given by a person who has no funds on deposit because it has frequently allowed such person to overdraw. *Schoonmaker v. Gilmore*, 84 Ill. App. 17.

**Deposit May Be Applied to Overdraft.** — There is a presumption of law that where a customer makes a deposit in a bank wherein he has overdrawn his account the deposit was made to pay the overdraft. *Nichols v. State*, 46 Neb. 715. See also *supra*, this title, **828. 5**; *infra*, this title, **835. 2 et seq.**

**4. Recovery of Excess.** — An action is maintainable upon a demand note given for the overdraft, and interest is allowable from the time of settlement. *Hennessy Bros., etc., Co. v. Memphis Nat. Bank*, (C. C. A.) 129 Fed. Rep. 557.

**835. 1. Drawer's Insufficiency of Funds — Partial Payment by Bank.** — *Henderson v. U. S. National Bank*, 59 Neb. 280, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835, and supporting also the point that the bank would be un-

der no obligation to pay since it would have no voucher for the payment made.

**2. Bank's Lien or Set-off — General Rule — United States.** — *Durkee v. National Bank*, (C. C. A.) 102 Fed. Rep. 849, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835; *Wheaton v. Daily Tel. Co.*, (C. C. A.) 124 Fed. Rep. 61.

*Arkansas.* — *Cockrill v. Joyce*, 62 Ark. 216. *Florida.* — See *Camp v. Ocala First Nat. Bank*, 44 Fla. 497.

*Indiana.* — *Aurora Nat. Bank v. Dils*, 18 Ind. App. 319; *State v. Beach*, 147 Ind. 74.

*Kentucky.* — *Little v. City Nat. Bank*, 115 Ky. 630, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835; *Mt. Sterling Nat. Bank v. Green*, 99 Ky. 262.

*Maryland.* — *Colton v. Drovers' Perpetual Bldg., etc., Assoc.*, 90 Md. 94, 78 Am. St. Rep. 431, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835.

*Michigan.* — *Citizens' Sav. Bank v. Vaughan*, 115 Mich. 156.

*Missouri.* — *Sharon First Nat. Bank v. City Nat. Bank*, 102 Mo. App. 357.

*New York.* — *Delahunty v. Central Nat. Bank*, 63 N. Y. App. Div. 177; *People v. St. Nicholas Bank*, 44 N. Y. App. Div. 313. See also *Hatch v. New York Fourth Nat. Bank*, 147 N. Y. 184.

*In Louisiana.* — *Gragard's Succession*, 106 La. 298.

**Necessity of Notice.** — In *South Carolina* it has been held by a divided court that a bank was liable in damages to a depositor for refusing, without notice to such depositor, to pay his check on the ground that he was indebted to the bank on past-due notes in a sum exceeding the amount of his deposits. *Callahan v. Anderson Bank*, 69 S. Car. 374, in which case *Jones, J., dissenting*, cited 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835.

**Where a Depositor Died** on the day before his note fell due the *Kentucky* court permitted the bank to set off the deposits against the note of the depositor. *Little v. City Nat. Bank*, 115 Ky. 629.

**836. 2. Check Outstanding.** — There is no right of set-off where a check has been given and presented before set-off is made by the bank. *Niblack v. Park Nat. Bank*, 169 Ill. 517, 61 Am. St. Rep. 203.

**3. Debt Must Be Due.** — *Kortjohn v. Continental Nat. Bank*, 63 Mo. App. 166; *Homer v. National Bank of Commerce*, 140 Mo. 225; *Hodgin v. Peoples' Nat. Bank*, 124 N. Car. 540; *Ellis v. Woonsocket First Nat. Bank*, 22 R. I. 565. See also *Bradley v. Seaboard Nat. Bank*, 46 N. Y. App. Div. 550, reversed 167 N. Y. 427.

- 836.** Insolvency of Depositor. — See note 4.  
**837.** Firm Indebtedness — Individual Account of Member. — See note 2.  
 Trust Deposits. — See note 4.  
**838.** Deposit of Guarantor of Note. — See note 3.  
 Deposits Subsequent to Indebtedness. — See note 4.  
 Duty of the Bank to Apply Deposits — See notes 5, 6.  
**839.** (g) Necessity of Demand. — See note 1.  
 When Demand Dispensed With. — See notes 3, 4.  
**840.** 4. The Bank's Books of Account. — See note 1.  
 Correction of Errors — Acquiescence. — See note 2.  
 Depositor Must Use Due Diligence. — See note 3.

**836.** 4. Set-off Allowed on Insolvency of Depositor. — *Georgia Seed Co. v. Talmadge*, 96 Ga. 254; *Stolze v. State Bank*, 67 Minn. 172; *Sweetser v. People's Bank*, 69 Minn. 196; *Hodgin v. Peoples' Nat. Bank*, 124 N. Car. 540; *Nashville Trust Co. v. Nashville Fourth Nat. Bank*, 91 Tenn. 336; *Winslow v. Harriman Iron Co.*, (Tenn. Ch. 1897) 42 S. W. Rep. 698; *Neely v. Grayson County Nat. Bank*, 25 Tex. Civ. App. 513.

But in *Missouri* even upon the insolvency of the depositor the rule does not permit a set-off until the debt is due. *Homer v. National Bank of Commerce*, 140 Mo. 225.

A Bank Is Not Liable for Damages for protesting a check of a depositor, when that depositor is insolvent and owes to the bank a larger amount than he then has on deposit. *Owen v. American Nat. Bank*, (Tex. Civ. App. 1904) 81 S. W. Rep. 988.

A Deposit by an Agent in His Own Name of money of his principal may be set off by a bank which does not know the real nature of the deposit. *Kimmel v. Bean*, 68 Kan. 598.

**837.** 2. Partnership Indebtedness — Deposits of Member on Individual Account. — *Hodgin v. Peoples' Nat. Bank*, 124 N. Car. 540. Compare *Owsley v. Cumberland Bank*, 66 S. W. Rep. 33, 23 Ky. L. Rep. 1726.

So a Bank Cannot Set Off Firm Deposits against the indebtedness of an individual member. *Hodgin v. Peoples' Nat. Bank*, 124 N. Car. 540.

4. No Set-off Against Trust Deposits. — *U. S. v. National Bank*, 73 Fed. Rep. 379; *Union Stock Yards Nat. Bank v. Moore*, (C. C. A.) 79 Fed. Rep. 705; *American Trust, etc., Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206; *Smith v. Des Moines Nat. Bank*, 107 Iowa 620; *State Bank v. McCabe*, (Mich. 1904) 98 N. W. Rep. 20; *Mayer v. Citizens Bank*, 86 Mo. App. 422; *Nehawka Bank v. Ingersoll*, (Neb. 1902) 89 N. W. Rep. 618; *Globe Sav. Bank v. National Bank of Commerce*, 64 Neb. 413; *Hodgin v. Peoples' Nat. Bank*, 125 N. Car. 503; *Custer County v. Walker*, 10 S. Dak. 594; *Akin v. Williamson*, (Tenn. Ch. 1895) 35 S. W. Rep. 569.

But in *England* it has been held that in the absence of fraud a banker may set off what is due to a depositor on one account against what is due from him on another, although what is due to the depositor may in fact belong to other persons. *New South Wales Bank v. Goulburn Valley Butter Co.*, (1902) A. C. 543, 71 L. J. P. C. 112.

**838.** 3. Deposit of Guarantor — No Set-off Before Accrual of Liability. — *Mt. Sterling Nat. Bank v. Green*, 99 Ky. 262.

The same rule applies to the indorser of a check. *O'Grady v. Stotts City Bank*, 106 Mo. App. 366.

4. Deposits Received After Indebtedness Incurred — *Cockrill v. Joyce*, 62 Ark. 216.

5. Duty of Bank to Apply Deposits — Sureties and Indorsers. — *Lock Haven First Nat. Bank v. Peltz*, 176 Pa. St. 513, 53 Am. St. Rep. 686.

6. Lock Haven First Nat. Bank v. Peltz, 176 Pa. St. 513, 53 Am. St. Rep. 686; *Alexandria Bank v. Turney*, (Tenn. Ch. 1898) 52 S. W. Rep. 762.

**839.** 1. Demand Necessary Before Right of Action Accrues. — *Tobias v. Morris*, 126 Ala. 535; *Colton v. Drovers' Perpetual Bldg., etc., Assoc.*, 90 Md. 90, 78 Am. St. Rep. 431, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 838; *Sickles v. Herold*, 149 N. Y. 332.

Statute of Limitations. — *Schinotti v. Whitney*, 130 Fed. Rep. 780.

Nature of the Demand. — The presentation of a check for a greater amount than is on deposit is insufficient as a demand necessary to support an action for money on deposit. *Aurora Nat. Bank v. Dils*, 18 Ind. App. 319.

3. Where Bank Suspends. — *Schinotti v. Whitney*, 130 Fed. Rep. 780; *Wheeler v. Commercial Bank*, 5 Idaho 15; *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447; *Arnold v. Hart*, 176 Ill. 442; *White v. Meadowcroft*, 91 Ill. App. 293; *Colton v. Drovers' Perpetual Bldg., etc., Assoc.*, 90 Md. 85, 78 Am. St. Rep. 431, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 839; *Kilby v. Carthage First Nat. Bank*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 370; *Ex p. Stockman*, (S. Car. 1904) 48 S. E. Rep. 736.

The Appointment of a Temporary Receiver does not denote suspension sufficient to relieve from the necessity of demand. *Sickles v. Herold*, 149 N. Y. 332.

4. Where Demand Would Be Futile. — It has been held that where deposits have been misapplied *ab initio*, no demand is necessary. *James Reynolds Elevator Co. v. Merchants' Nat. Bank*, 55 N. Y. App. Div. 1.

**840.** 1. *Quattrochi v. Farmers, etc., Bank*, 89 Mo. App. 500; *Andrews v. State Bank*, 9 N. Dak. 325.

2. *Kemble v. National Bank*, 94 N. Y. App. Div. 544.

3. Depositor Must Use Due Diligence. — *Cole v. Charles City Nat. Bank*, 114 Iowa 635, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 840, and holding further that the question whether

**841. Admissibility as Evidence.** — See note 1.

**5. Loans and Discounts — The Term "Discounting" Considered.** — See note 2.

**843. IV. OFFICERS AND EMPLOYEES — 2. General Principles as to Authority and Liability** — Presumed Knowledge of Officers. — See note 9.

**844. Acts Within Scope of Usage and Duty Bind Bank.** — See note 1.

**845. Responsibility for Abuse of Powers.** — See note 1.

**Notice to Officer Is Notice to Bank.** — See note 3.

due diligence has been exercised is one of fact for the jury.

**Ten Days' Delay** cannot be said to establish negligence. *Kenneth Invest. Co. v. National Bank of Republic*, 103 Mo. App. 613.

**841. 1. Admissibility as Evidence.** — See *Arnold v. Hart*, 176 Ill. 442 (depositor's pass-book); *Globe Sav. Bank v. National Bank of Commerce*, 64 Neb. 413. And see the title DOCUMENTARY EVIDENCE.

**2. Discounting — What Is Meant by the Term.** — In *Kentucky* it is held that deducting the interest to maturity from the face of a note at the time of execution amounts to a discount. *Eastin v. Cincinnati Third Nat. Bank*, 102 Ky. 64.

The rediscounting by a bank of its bills receivable is not a borrowing of money, but is more in the nature of a sale. *U. S. National Bank v. Little Rock First Nat. Bank*, (C. C. A.) 79 Fed. Rep. 296.

See further DISCOUNT.

**843. 9. James Clark Co. v. Colton**, 91 Md. 195; *Eads v. Orcutt*, 79 Mo. App. 511; *Wolfe v. Parkersburg Second Nat. Bank*, 54 W. Va. 693, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 843.

**844. 1. Alabama.** — *Birmingham First Nat. Bank v. Newport First Nat. Bank*, 116 Ala. 520. *California.* — *Abbott v. Jack*, 136 Cal. 510; *Burnell v. San Francisco Sav. Union*, 136 Cal. 499.

*Indiana.* — *Hawkins v. New York Fourth Nat. Bank*, 150 Ind. 125, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 843, 844; *Indianapolis First Nat. Bank v. New*, 146 Ind. 411.

*Indian Territory.* — *Duncan First Nat. Bank v. Anderson*, (Indian Ter. 1904) 82 S. W. Rep. 693.

*Missouri.* — *Hill v. Seneca Bank*, 87 Mo. App. 590; *Roe v. Versailles Bank*, 167 Mo. 406.

*New Hampshire.* — *Hanson v. Heard*, 69 N. H. 190.

*Oklahoma.* — *Johnston Fife Hat Co. v. National Bank*, 4 Okla. 17.

*Rhode Island.* — *Ellis v. Woonsocket First Nat. Bank*, 22 R. I. 565.

**Apparent Authority.** — A bank is liable for fraud and embezzlement by its cashier while acting within the scope of his apparent duty and according to the general course of business. *Goshorn v. People's Nat. Bank*, 32 Ind. App. 428, 102 Am. St. Rep. 248.

**Irregular Acts of Officers — Declarations.** — *American Surety Co. v. Pauly*, 170 U. S. 133; *Bullard v. Madison Bank*, 121 Ga. 527. See also *Ft. Dearborn Nat. Bank v. Seymour*, 71 Minn. 81.

**When Payment to Officer Binds Bank.** — Payment to a bank's president outside of the usual course of business will not bind the bank if the bank never received the payment. *Tulley v. Citizen's State Bank*, 18 Ind. App. 249.

**Authority of a Teller to Discount Notes** may be shown by proof of his acting in that capacity on previous occasions and of ratification of such acts by the bank. *Iowa Nat. Bank v. Sherman*, (S. Dak. 1903) 97 N. W. Rep. 12.

**Offer of Reward.** — The president of a bank has authority to offer a reward for a defaulting teller. *Minneapolis Bank v. Griffin*, 168 Ill. 314.

**Ultra Vires Acts**, such as representations by a bank that an insurance company had a certain amount of capital stock paid up, do not bind the bank. *Hindman v. Louisville First Nat. Bank*, 86 Fed. Rep. 1013. See generally the title ULTRA VIRES.

**Contract for Attorney's Services.** — The president has no ex-officio power to bind the bank for the services of an attorney. *Pacific Bank v. Stone*, 121 Cal. 202.

**Offering Usurious Interest.** — A cashier has no authority to offer usurious interest on a deposit. *Hanson v. Heard*, 69 N. H. 190.

**845. 1. Officers Liable to Bank for Abuse of Powers.** — *Commercial Bank v. Chatfield*, 121 Mich. 641; *Seventeenth Ward Bank v. Smith*, 51 N. Y. App. Div. 259; *Killen v. Barnes*, 106 Wis. 546. See also *Hanna v. Lyon*, 179 N. Y. 107.

**Liability to Depositors.** — *Stone v. Rottman*, 183 Mo. 552; *Campbell v. Watson*, 62 N. J. Eq. 396; *Tate v. Bates*, 118 N. Car. 287, 54 Am. St. Rep. 719.

Directors who receive deposits after known insolvency are individually liable to depositors. *Cassidy v. Uhlmann*, 170 N. Y. 505.

**Necessity of Showing Fraud.** — Where there is no statute making directors liable for deposits in an insolvent bank in order to recover the deposits it must be shown that the deposits were induced by the fraudulent conduct of the directors. *Minton v. Stahlman*, 96 Tenn. 98.

**3. Notice to President.** — For cases wherein notice to the president was held to be notice to the bank, see *Louisville Trust Co. v. Louisville, etc., R. Co.*, 43 U. S. App. 550; *Ditty v. Dominion Nat. Bank*, (C. C. A.) 75 Fed. Rep. 769; *Campbell v. Denver First Nat. Bank*, 22 Colo. 177; *Wilson v. Pauly*, 37 U. S. App. 642, 72 Fed. Rep. 129.

**Notice to the Cashier** is notice to the bank. *Niblack v. Cosler*, 74 Fed. Rep. 1000, affirmed (C. C. A.) 80 Fed. Rep. 596; *Citizens' Sav. Bank v. Walden*, (Ky. 1899) 52 S. W. Rep. 953; *Grant County Deposit Bank v. Points*, (Ky. 1900) 56 S. W. Rep. 662; *Farmers', etc., Bank v. Loyd*, 89 Mo. App. 262; *Iowa Nat. Bank v. Sherman*, (S. Dak. 1903) 97 N. W. Rep. 12. See also *Leonard v. Latimer*, 67 Mo. App. 138.

**Notice to the Teller** under direction of the cashier of the nature of certain collaterals will bind the bank. *Zeis v. Potter*, 44 C. C. A. 665.

**How Far Notice to Director Is Notice to Bank,**

**846.** See note 1.

**847.** Contracts by Officer in His Own Interest. — See note 1.

# V. INSOLVENCY AND DISSOLUTION — 1. What Constitutes Insolvency. —

See note 2.

**2.** Contracts and Deposits Pending Insolvency. — See note 4.

**849.** **3.** Assignments — Receiverships — Receivers. — See note 1.

— See *Home Sav., etc., Bank v. Peoria Agricultural, etc., Soc.*, 206 Ill. 9, 99 Am. St. Rep. 132; *Black v. Westminster First Nat. Bank*, 96 Md. 399; *Boston Commercial Bank v. Heppes*, 23 Pa. Co. Ct. 447; *Spring City Bank v. Rhea County*, (Tenn. Ch. 1900) 59 S. W. Rep. 442.

**846. 1. Facts Must Be Within Sphere of Officer's Duty.** — *American Surety Co. v. Pauly*, 170 U. S. 133; *Jones v. Lincoln First Nat. Bank*, (Neb. 1902) 90 N. W. Rep. 912. See also *Overtown Bank v. Thompson*, (C. C. A.) 118 Fed. Rep. 798, holding that a cashier dealing with the bank in his individual interest cannot charge the bank with his uncommunicated knowledge of facts showing want of title; *Brady v. Mt. Morris Bank*, 65 N. Y. App. Div. 212, holding that notice possessed by a cashier of an infirmity in a certificate of stock did not bind the bank.

**847. 1. The Cashier Cannot Make a Loan to Himself.** — *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737.

Under the *Wisconsin* statutes the cashier cannot make a loan to himself without the authority of directors and stockholders, but with their consent such a loan can be made. *Barth v. Koetting*, 99 Wis. 242.

**Individual Transactions of Cashier for His Own Benefit.** — A cashier of a bank who is also a director of a manufacturing company is not, in making false statements concerning the financial condition of the company in order to defraud the bank, an agent of the bank so as to effect the validity of its claim against the company. *Hadden v. Dooley*, 63 U. S. App. 173.

A cashier under his general authority has no right to issue drafts of the bank for himself or for his private business. *Mendel v. Boyd*, (Neb. 1904) 99 N. W. Rep. 493.

The fact that the cashier is personally interested is sufficient to put the creditor upon inquiry of the cashier's authority. *Hier v. Miller*, 68 Kan. 258.

In such a transaction the knowledge of the cashier cannot be imputed to the bank. *Central Bank v. Thayer*, 184 Mo. 61.

But it has been held that where a cashier issues a draft to his individual creditor and the draft is paid, the amount so paid cannot be recovered by the bank if it is shown that such was the custom of the bank. *Campbell v. National Broadway Bank*, (C. C. A.) 130 Fed. Rep. 699.

**2. What Constitutes Insolvency.** — A bank is insolvent when it is unable to meet the ordinary demands against it in the usual and ordinary course of business. *Eads v. Orcutt*, 79 Mo. App. 511; *Minton v. Stahlman*, 96 Tenn. 98, holding further that an act of insolvency takes place when the condition is demonstrated and the bank has actually failed to meet some of its obligations.

**4. Deposits Pending Insolvency — Title Remains in Depositor.** — *Hallett v. Fish*, 120 Fed. Rep. 988, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 847; *Richardson v. Olivier*, 44 C. C. A. 468; *Richardson v. New Orleans Debenture Redemption Co.*, 42 C. C. A. 619; *Quin v. Earle*, 95 Fed. Rep. 728; *Higgins v. Hayden*, 53 Neb. 61; *Harris v. Johnson City First Nat. Bank*, (Tenn. Ch. 1897) 41 S. W. Rep. 1084.

**Depositor Must Identify Securities or Their Proceeds.** — The deposit may be recovered if it can be followed and if it augmented the assets of the bank. *Perth Amboy Gas Light Co. v. Middlesex County Bank*, 60 N. J. Eq. 84; *Williams v. Cox*, 99 Tenn. 403.

**Responsibility of Officer Receiving Deposit.** — As to the civil and criminal liability, under the statutes of the various states, of officers and directors who receive deposits with knowledge of the insolvency of the bank, see *Lanternman v. Travous*, 73 Ill. App. 670, affirmed 174 Ill. 459; *Brown v. People*, 173 Ill. 34; *Forbes v. Mohr*, 69 Kan. 342; *State v. Tomblin*, 57 Kan. 841; *Ashley v. Frame*, 4 Kan. App. 265, reversed 59 Kan. 477; *State v. Clements*, 82 Minn. 434; *Baxter v. Coughlin*, 70 Minn. 1; *Cassidy v. Uhlmann*, 54 N. Y. App. Div. 205, affirmed 170 N. Y. 505; *Townsend v. Williams*, 117 N. Car. 330; *Showalter v. Cox*, 97 Tenn. 547; *Friberg v. Cox*, 97 Tenn. 550; *Klepper v. Cox*, 97 Tenn. 534, 56 Am. St. Rep. 823; *Bruner v. Johnson City First Nat. Bank*, 97 Tenn. 540; *Miller v. Howard*, 95 Tenn. 407; *Mallon v. Hyde*, 76 Fed. Rep. 388 (under the *Washington* statute); *Killen v. Barnes*, 106 Wis. 546; *State v. Shove*, 96 Wis. 1, 65 Am. St. Rep. 17.

**A Depositor May by His Acts Affirm the Deposit or obligation made upon the eve of suspension.** *Davis v. Butters Lumber Co.*, 132 N. Car. 233.

So a depositor by filing his account with a receiver in insolvency of a bank waives his right to rescind the deposit upon the ground of fraud in receiving the deposit after known insolvency. *Pott v. Schmucker*, 84 Md. 535, 57 Am. St. Rep. 415.

**Trust Deposits received when a bank is insolvent may be recovered while in the hands of the receiver.** *Philadelphia v. Eckels*, 98 Fed. Rep. 485.

**Payments to a Depositor During a Run on the Bank,** the cashier believing that sufficient funds were on hand to satisfy the depositors, cannot be recovered by the receiver. *Stone v. Jenison*, 111 Mich. 592.

**849. 1. Title of Receivers.** — A receiver holds the assets of an insolvent bank to secure the claims of creditors and depositors of that bank. *State v. Hemingford Bank*, 58 Neb. 818.

A receiver is not a *bona fide* purchaser of the bank assets. *Colton v. Drovers' Perpetual Bldg., etc., Assoc.*, 90 Md. 85, 78 Am. St. Rep. 431.

**Appointment of Receivers.** — In *Dickerson v.*

**850.** 5. Forfeiture — Violations of Charter. — See note 6.

**851.** Forfeiture Available to State Only. — See note 1.

[**BANQUETTE.** — See note 1a.]

**BAR.** — See note 4.

**852.** **BARGAIN.** — See note 3.

**855.** **BARGE.** — See note 1.

**856.** **BARN.** — See note 2.

Cass County Bank, 95 Iowa 392, it was held that if creditors acquiesce in the appointment of a receiver for two or three months they are estopped thereafter to question the legality of the appointment.

**The Receiver May Compromise a Doubtful Claim** against a stockholder's double liability under the *Nebraska* statute. *State v. German Sav. Bank*, 65 Neb. 416.

**Right of Set-off.** — In an action by a receiver to collect money due to an insolvent bank, the defendant may set off a claim which he has against the bank. *Colton v. Drivers' Perpetual Bldg., etc., Assoc.*, 90 Md. 85, 78 Am. St. Rep. 431; *Mechanics' Bank v. Stone*, 115 Mich. 648; *Becker v. Seymour*, 71 Minn. 394; *Bernstein v. Coburn*, 49 Neb. 734.

And such set-off may be permitted although the indebtedness due to the bank had not matured at the time when the bank failed. *Jack v. Klepser*, 196 Pa. St. 187, 79 Am. St. Rep. 699. See also *Thompson v. Union Trust Co.*, 130 Mich. 508, 97 Am. St. Rep. 494.

But a debtor to a defunct bank cannot set off a claim against the bank which he secured after the insolvency of the bank. *Dyer v. Sebrell*, 135 Cal. 597.

And it has been held that a debtor of an insolvent bank cannot set off a check delivered to him against such bank before the assignment. *Greenebaum v. American Trust, etc., Bank*, 70 Ill. App. 407.

**Damages for Loss of Rent**, by reason of failure to carry out the lease of the premises, cannot, it has been held, be set off by the lessor of a banking house against a note which he owes to the bank. *McGraw v. Union Trust Co.*, (Mich. 1904) 98 N. W. Rep. 390.

**850.** 6. An Act of Insolvency or failure to

comply with the insolvency laws is ground for decreeing a forfeiture in *Louisiana*. *State v. Bank of Commerce*, 49 La. Ann. 1060.

**851.** 1. *Fargason v. Oxford Mercantile Co.*, 78 Miss. 65.

1a. To *banquette* a street means to construct on one side or on both sides of it a sidewalk such as will conform with the city ordinances on the subject. *Redersheimer v. Bruning*, 113 La. 343.

4. **Act of Congress — Bar Iron — Iron in Bars.** — *Milne v. U. S.*, 115 Fed. Rep. 410; *Moorhead v. U. S.*, 127 Fed. Rep. 779.

**The Terms "Barred and Barricaded"** in an ordinance prohibiting gambling in places *barred* and *barricaded* from the police do not include an ordinary private residence or room, where doors are sometimes locked or bolted in the ordinary method. *Matter of Ah Cheung*, 136 Cal. 678.

**852.** 3. **Statute of Frauds.** — The word *bar-gain* is broad enough in its meaning to include "contract" in an answer setting up the statute of frauds to a bill for specific performance. *Koenig v. Dohm*, 209 Ill. 468.

**855.** 1. **A Scow** is a *barge* within the meaning of the *New York* statute classifying vessels for the payment of different rates of wharfage. *The Scow No. 15*, 88 Fed. Rep. 305, *affirmed* (C. C. A.) 92 Fed. Rep. 1008.

**856.** 2. **Arson.** — *Saylor v. Com.*, (Ky. 1900) 57 S. W. Rep. 615.

**Wills.** — The phrase "all the contents of *barns*," as used in a will, does not include cotton stored in a house built and primarily used for the shelter of carriages. The court defined *barns* as in the original text. *Johnson v. Johnson*, 48 S. Car. 408.



## BARRATRY.

**861. II. IN CRIMINAL LAW — 3. Who May Commit — Attorney at Law.** — See note 6.

**862. III. IN MARITIME LAW — 1. The Essentials — a. THE WRONGFUL ACT.** — See note 1.

*b. THE WRONGFUL INTENT.* — See note 3.

Acts with Fraudulent Intent towards the Owner. — See note 9.

**863. Acts of Known Illegality.** — See note 3.

Criminal Acts Intended to Advance Owner's Interest. — See note 4.

**866. 3. By Whom It May Be Committed — General Rule — The Owner.** — See note 6.

**867. Where Master Is Owner.** — See note 1.

**868. BARRICADE.** — See note 3.

**BARRROOM.** — See note 4.

**869. BASE BALL.** — See note 3.

**BASE FEE.** — See note 4.

**861. 6. Under the Texas Statute** evidence that an attorney did not seek or obtain employment by personal solicitation, and did not before employment directly or indirectly give or loan money to the client to induce his employment, is insufficient to show barratry. *Missouri, etc., R. Co. v. Bacon*, (Tex. Civ. App. 1904) 80 S. W. Rep. 572.

**862. 1. Wrongful Act Necessary.** — *Compania La Flecha v. Brauer*, 168 U. S. 104.

**For Definition and Elements of Offense under United States Statutes** see Act Aug. 6, 1894, c. 227, 28 Stat. L. 233.

**3. Act Must Be Wrongfully Intended.** — There is no barratry where there is neither intentional fraud nor breach of trust, nor wilful violation of law, one of which at least is necessary to constitute barratry. Thus the wrongful jettison of sound cattle by the master through an unfounded apprehension of danger was held not to be barratry, so as to exempt the carrier under a contract providing against liability for loss occasioned "by barratry of the master" or crew. *Compania La Flecha v. Brauer*, 168 U. S. 104.

**9. Act with Fraudulent Intent.** — *Compania La Flecha v. Brauer*, 168 U. S. 104.

**863. 3. Acts of Known Illegality.** — *Compania La Flecha v. Brauer*, 168 U. S. 104.

**4. Casting Away Vessel.** — See Act Aug. 6, 1894, c. 227, 28 Stat. L. 233.

**866. 6. As to Barratry by Owners or Others**

**under United States Statutes** see Act Aug. 6, 1894, c. 227, 28 Stat. L. 233.

**867. 1. When Master Is Equitable Owner.** — It being alleged by way of defense to an action on a policy of insurance by the executors of the mortgagee that the ship had been wilfully cast away by her captain, the mortgagor, it was held, on the argument of a preliminary question in the action, that, assuming the ship to have been so cast away, the mortgagee was nevertheless entitled to recover in respect of a loss by perils of the sea, if he had nothing to do with the appointment of the mortgagor as captain; or in respect of a loss by barratry of the master, if he had taken part in his appointment. *Small v. United Kingdom Marine Mut. Ins. Assoc.*, (1897) 2 Q. B. 311.

**868. 3. Barred and Barricaded.** — See *Matter of Ah Cheung*, 136 Cal. 678, noted *ante*, under BAR.

**4. Barroom.** — *Army, etc., Club v. District of Columbia*, 8 App. Cas. (D. C.) 544; *Leesburg v. Putnam*, 103 Ga. 110.

**Hotel Bar.** — "The hotel *bar* meant the room in which liquors were sold. The lexicographers define *bar* to be an enclosed place of a tavern, inn, or coffee house, where the landlord or his servants deliver out liquors and wait upon customers." *Latta v. Bell*, 122 N. Car. 641.

**869. 3. Not Gaming** within a Sunday law. *Ex p. Neet*, 157 Mo. 527.

**4. Knight v. Pottgieser**, 176 Ill. 368.

# BASTARDY.

By JOHN SIMPSON.

**872. I. WHO ARE BASTARDS**—1. In General—At Common Law.—See note 1.

**873. 3. Children of Void Marriages.**—See notes 1, 2.

**II. EVIDENCE**—1. Presumption of Legitimacy.—See note 3.

**874. Nature of Bastardy Proceedings.**—See note 1.

**872. 1. Who Are Bastards by the Common Law.**—*In re Walker*, (Ariz. 1896) 46 Pac. Rep. 67; *Swinney v. Klippert*, (Ky. 1899) 50 S. W. Rep. 841; *Parker v. Nothomb*, 65 Neb. 308; *Campion v. Lattimer*, (Neb. 1903) 97 N. W. Rep. 290.

The Louisiana Code denominates as "natural children" illegitimate children who have been acknowledged by their father. Illegitimate children not acknowledged by their father, or whose parents were incapable of contracting marriage at the time of conception, are called bastards. *Vance's Succession*, 110 La. 760.

**873. 1. Void Marriage.**—*In re Walker*, (Ariz. 1896) 46 Pac. Rep. 67; *Banks v. Galbraith*, 149 Mo. 529; *McBean v. McBean*, 37 Oregon 195.

Contra under the Kentucky statute, and this is not qualified by the statute providing for legitimacy where the marriage has been contracted in good faith. *Leonard v. Braswell*, 99 Ky. 528.

**2. Children of Void Marriages—Good Faith—Statutes.**—*Swinney v. Klippert*, (Ky. 1899) 50 S. W. Rep. 841; *Fortier's Succession*, 51 La. Ann. 1562; *Benton's Succession*, 106 La. 494.

In Illinois both parties must have acted in good faith. *Baird v. People*, 66 Ill. App. 671.

**3. Presumption of Legitimacy.**—*Adger v. Ackerman*, (C. C. A.) 115 Fed. Rep. 124; *Metheny v. Bohn*, 160 Ill. 263; *Smith v. Henline*, 174 Ill. 184; *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180; *Bethany Hospital Co. v. Hale*, 64 Kan. 367; *Swinney v. Klippert*, (Ky. 1899) 50 S. W. Rep. 841; *Johnson v. State*, 55 Neb. 781; *Mace v. Mace*, 24 N. Y. App. Div. 291; *Matter of Matthews*, 153 N. Y. 443; *Matter of Seabury*, 1 N. Y. App. Div. 231; *Bell v. Territory*, 8 Okla. 75; *Kennington v. Catoe*, 68 S. Car. 470.

**Every Child in a Civilized Community Is Presumed to Be Legitimate.**—*Franklin v. Lee*, 30 Ind. App. 31; *Lewis v. Sizemore*, (Ky. 1904) 78 S. W. Rep. 122; *Canaan v. Avery*, 72 N. H. 591; *Tracy v. Frey*, 95 N. Y. App. Div. 579; *Ossman v. Schmitz*, 24 Ohio Cir. Ct. 709; *Johnson v. Dudley*, 4 Ohio Dec. 243; *Wile's Estate*, 6 Pa. Dist. 384. But see *Divvers's Estate*, 22 Pa. Super. Ct. 436.

Evidence of a certificate of baptism in a foreign country, stating that the mother was an unmarried woman, was held sufficient to overcome the presumption of legitimacy existing in favor of all children, where such presumption was unsupported by other evidence. *Sandberg v. State*, 113 Wis. 578.

**Onus Probandi.**—*Bunel v. O'Day*, 125 Fed. Rep. 303; *Sergeant v. North Cumberland Mfg. Co.*, 112 Ky. 888; *Matter of Seabury*, 1 N. Y. App. Div. 231.

**Conflicting Presumptions.**—*Johnson v. Dudley*, 4 Ohio Dec. 243.

**Admission of Paternity by Third Person** does not overthrow the presumption. *Bethany Hospital Co. v. Hale*, 64 Kan. 367.

**874. 1. Proceedings of a Civil Nature—Alabama.**—*Williams v. State*, 117 Ala. 199; *Bell v. State*, 124 Ala. 94; *Lusk v. State*, 129 Ala. 1.

*Arkansas.*—*State v. Blackburn*, 61 Ark. 407. *Connecticut.*—*Camp v. Carroll*, 73 Conn. 247.

*Illinois.*—*Rose v. People*, 81 Ill. App. 128; *Gehm v. People*, 87 Ill. App. 158.

*Indiana.*—*State v. Carlisle*, 21 Ind. App. 438; *Dehler v. State*, 22 Ind. App. 383.

*Iowa.*—*State v. Lowell*, 123 Iowa 427.

*Massachusetts.*—*Jennings v. Browne*, 167 Mass. 543; *Conefy v. Holland*, 175 Mass. 469. *Michigan.*—*People v. Cole*, 113 Mich. 83.

*Nebraska.*—*Davison v. Cruse*, 47 Neb. 829; *In re Walker*, 61 Neb. 803; *Parker v. Nothomb*, 65 Neb. 308; *Priel v. Adams*, (Neb. 1902) 91 N. W. Rep. 536; *McNeal v. Hunter*, (Neb. 1904) 101 N. W. Rep. 236; *Stoppert v. Nierle*, 45 Neb. 105.

*New York.*—*People v. McFarlane*, 50 N. Y. App. Div. 95, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 874.

*North Carolina.*—*State v. Liles*, 134 N. Car. 735, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 874, and overruling the earlier cases in the jurisdiction holding otherwise. The earlier cases which held the contrary doctrine are *State v. Ballard*, 122 N. Car. 1024 (but see dissenting opinion holding that bastardy is a civil proceeding, and citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 897); *State v. Bruce*, 122 N. Car. 1040; *State v. Mitchell*, 119 N. Car. 784; *State v. Nelson*, 119 N. Car. 797; *State v. Rogers*, 119 N. Car. 793; *State v. White*, 125 N. Car. 674. See also *State v. Perry*, 122 N. Car. 1043; *State v. Hedgepeth*, 122 N. Car. 1039, holding that the limitation of three years and not of two years nevertheless applies to bastardy proceedings.

*Oklahoma.*—*Bell v. Territory*, 8 Okla. 75; *Matter of Comstock*, 10 Okla. 299.

*South Dakota.*—*State v. Knowles*, 10 S. Dak. 471; *State v. Patterson*, (S. Dak. 1904) 100 N. W. Rep. 162; *State v. Knutson*, (S. Dak. 1904) 101 N. W. Rep. 33.

- 876.** Modification of Rule. — See notes 2, 3.  
**877.** 2. Presumption of Intercourse. — See note 1.  
**878.** Nonaccess Not Provable by Husband or Wife. — See note 1.  
**879.** 3. Declarations of Mother — *a.* IN GENERAL. — See notes 1, 2.  
 Impeachment of Mother's Testimony. — See note 3.  
**880.** See note 1.  
*b.* DURING TRAVAIL. — See note 2.  
**881.** 5. Hearsay Evidence. — See note 2.  
**882.** Marital Contract. — See note 1.  
 6. Character of Parents — *a.* OF MOTHER. — See notes 2, 3.  
**883.** Intercourse with Other Men. — See note 1.

*Washington.* — State *v.* Tieman, 32 Wash. 294, 98 Am. St. Rep. 854.

**Quasi Criminal.** — Vail *v.* State, 1 Penn. (Del.) 8; State *v.* Baker, 65 Kan. 117; Simis *v.* Alwang, 48 N. Y. App. Div. 529, 61 N. Y. App. Div. 426; Standing *v.* Moore, (County Ct.) 16 Misc. (N. Y.) 106; People *v.* Abrahams, 96 N. Y. App. Div. 27; State *v.* Scott, 7 S. Dak. 619; Barry *v.* Niessen, 114 Wis. 256. See also Suckow *v.* State, (Wis. 1904) 99 N. W. Rep. 440.

**Quasi Criminal — Preponderance of Evidence Sufficient.** — State *v.* Bunker, 7 S. Dak. 639.

**876.** 2. Where No Possibility of Access, Presumption Does Not Prevail. — Robinson *v.* Ruprecht, 191 Ill. 424.

See, as to exceptions from presumption, Sergeant *v.* North Cumberland Mfg. Co., 112 Ky.

**3.** Robinson *v.* Ruprecht, 191 Ill. 424, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 876, 877; Bunel *v.* O'Day, 125 Fed. Rep. 303; Matter of Mills, 137 Cal. 302; Kennington *v.* Catoe, 68 S. Car. 470.

Legitimacy or illegitimacy is now an issue of fact resting upon proof of the impotency or nonaccess of the husband. State *v.* Liles, 134 N. Car. 735.

**Strength of Evidence.** — The presumption can only be overcome by the clearest and most conclusive evidence of nonaccess of the husband. Bethany Hospital Co. *v.* Hale, 64 Kan. 367.

**877.** 1. Matter of Mills, 137 Cal. 302; Sergeant *v.* North Cumberland Mfg. Co., 112 Ky. 888.

**878.** 1. Matter of Mills, 137 Cal. 298, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 878; Bell *v.* Territory, 8 Okla. 75.

**Proved by Evidence Aliunde.** — Erwin *v.* Bailey, 123 N. Car. 628.

**879.** 1. The declarations of the complainant in a bastardy proceeding are not admissible to prove that the defendant is the father of her bastard child. Dehler *v.* State, 22 Ind. App. 383; State *v.* Lowell, 123 Iowa 427; State *v.* Spencer, 73 Minn. 101.

**2.** Declarations of a deceased parent recognizing an illegitimate child are admissible as against interest in an action by the child to be allowed to inherit under the Iowa statute authorizing an illegitimate child to inherit from the father if recognized publicly and notoriously; but declarations denying paternity are not admissible. Britt *v.* Hall, 116 Iowa 564.

**3.** People *v.* Schildwachter, 5 N. Y. App. Div. 346.

**880.** 1. Credibility of Mother. — Gatzmeyer *v.* Peterson, (Neb. 1903) 94 N. W. Rep. 974.

The mother as well as the putative father has a direct interest in the result of the proceeding, and the credibility of each in this respect is a question for the jury, and therefore an instruction that "so far as the pecuniary interest in the result of this suit is concerned, the complainant and the defendant are not equal," is erroneous as invading the province of the jury. State *v.* Nestaval, 72 Minn. 415.

**2.** Burns *v.* Donoghue, 185 Mass. 71.

In Maine constancy in the accusations is also a condition precedent to the maintenance of a bastardy suit. Palmer *v.* McDonald, 92 Me. 125.

**Evidence as to Accusation.** — State *v.* Saidell, 70 N. H. 174, 85 Am. St. Rep. 627.

The mother is not confined to her statements made during travail, but may give in evidence her statements both before and after the birth of the child. Harty *v.* Malloy, 67 Conn. 339.

**Declarations Provable by Mother.** — Baxter *v.* Gormley, (Mass. 1904) 71 N. E. Rep. 575.

**881.** 2. Jennings *v.* Webb, 8 App. Cas. (D. C.) 43; Metheny *v.* Bohn, 160 Ill. 263; Shorten *v.* Judd, 56 Kan. 43, 54 Am. St. Rep. 587; Matter of Seabury, 1 N. Y. App. Div. 231.

**General Reputation of Illegitimacy Is Inadmissible.** — Erwin *v.* Bailey, 123 N. Car. 628.

In a Succession Case the declarations of a decedent are admissible to show that he was the father of a child and also to show that it was illegitimate. Matter of Heaton, 135 Cal. 385.

**Exception.** — The declarations of persons who have adopted the child for a consideration are admissible. Alston *v.* Alston, 114 Iowa 29.

**882.** 1. Townsend *v.* Van Buskirk, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 287; McBean *v.* McBean, 37 Oregon 195; Divvers's Estate, 22 Pa. Super. Ct. 436.

**Evidence Held Sufficient.** — State *v.* Miller, 3 Penn. (Del.) 518.

**2. Evidence of Character of Mother for Chastity Held Admissible.** — State *v.* Seevers, 108 Iowa 738; State *v.* Saidell, 70 N. H. 174, 85 Am. St. Rep. 627.

The liberality of the presumption of marriage may be more freely indulged in the case of slave marriages. Jennings *v.* Webb, 8 App. Cas. (D. C.) 43.

**3. Proof of Reputation — Held Inadmissible.** — Hobson *v.* People, 72 Ill. App. 436; People *v.* Wilson, (Mich. 1904) 99 N. W. Rep. 6; Davison *v.* Cruse, 47 Neb. 829.

**883.** 1. Intercourse with Others than Defendant. — Williams *v.* State, 113 Ala. 58; Kelly *v.* State, 133 Ala. 195, 91 Am. St. Rep. 25; Hobson *v.* People, 72 Ill. App. 436; Rinehart *v.* State, 23 Ind. App. 419; Erickson *v.*

**884.** See note 1.

**7. Impregnation and Gestation.** — See notes 4, 5, 6.

**885.** Testimony of Experts. — See note 1.

But upon a Question as to Premature Birth. — See note 2.

**8. Baptismal Register.** — See note 3.

**9. Resemblance of Child to Putative Father.** — See note 4.

**886.** See note 1.

**10. Previous Affiliation Proceedings.** — See note 2.

**11. Corroborative Evidence — Necessity For.** — See note 3.

**887.** Previous Intimacy and Intercourse of Parties. — See note 1.

Letters of the Respondent. — See note 2.

**888.** [Letters from Friends of the Mother of an Illegitimate Child.] — See note 1a.

**III. CUSTODY AND CONTROL.** — See note 2.

Schmill, 62 Neb. 368; Guthrie v. State, (Neb. 1901) 96 N. W. Rep. 243; State v. Warren, 124 N. Car. 807; State v. McKnight, 7 N. Dak. 444; Wilkins v. Metcalf, 71 Vt. 103; Suckow v. State, (Wis. 1904) 99 N. W. Rep. 440.

**Confined Within Period of Gestation.** — Hobson v. People, 72 Ill. App. 436.

**884. 1. Mother Compellable to Testify — Cross-examination.** — Williams v. State, 113 Ala. 58; Lusk v. State, 129 Ala. 1; Dehler v. State, 22 Ind. App. 383.

The cross-examination can be carried further when its purpose is to impeach the complainant's credibility. People v. Schildwachter, 5 N. Y. App. Div. 346.

**4. Time of Conception.** — Rinehart v. State, 23 Ind. App. 419; Ankeny v. Rawhouser, (Neb. 1901) 95 N. W. Rep. 1053; State v. Peoples, 9 N. Dak. 146.

**5. Kirkpatrick v. Crowley, (County Ct.) 20 Misc. (N. Y.) 160.**

**6. Period of Gestation.** — Lusk v. State, 129 Ala. 1; Stahl v. State, 67 Kan. 864.

That the possible period may exceed three hundred days is a fact which courts are not bound to know and act on. Erickson v. Schmill, 62 Neb. 368.

The period of gestation is a question of fact, to be determined upon evidence in each particular case. Davison v. Cruse, 47 Neb. 829.

And it is error for the court to arbitrarily fix a period within which the child must have been born to show the guilt of a defendant in bastardy proceedings. Peterson v. People, 74 Ill. App. 178.

**885. 1. Expert Testimony.** — See Rinehart v. State, 23 Ind. App. 419; State v. Ryan, 78 Minn. 218.

2. See Metheny v. Bohn, 160 Ill. 263.

3. See Sandberg v. State, 113 Wis. 578, where evidence of a certificate of baptism in a foreign country, stating that the mother was an unmarried woman, was held sufficient to overcome the presumption of legitimacy.

4. Rose v. People, 81 Ill. App. 128; State v. Harvey, 112 Iowa 416, 84 Am. St. Rep. 350; State v. Brathoyde, 81 Minn. 501; State v. Neel, 23 Utah 541, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 885.

**A Doctrine Contrary to the Statement in the Text.** — Kelly v. State, 133 Ala. 195, 91 Am. St. Rep. 25; Shorten v. Judd, 56 Kan. 43, 54 Am. St. Rep. 587; Stahl v. State, 67 Kan. 864; People v. Wing, 115 Mich. 698, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 885, 886.

And the rule was held not to apply where the defendant had introduced a photograph of the child. State v. Patterson, (S. Dak. 1904) 100 N. W. Rep. 162.

**886. 1. Where Race Involved.** — State v. Harvey, 112 Iowa 416, 84 Am. St. Rep. 350; State v. Saidell, 70 N. H. 174, 85 Am. St. Rep. 627.

**2. Admissibility of Examination.** — Stahl v. State, 67 Kan. 864; Morgan v. Stone, (Neb. 1903) 93 N. W. Rep. 743.

On a prosecution for failure to support an illegitimate child the record of a previous proceeding in which the defendant was adjudged to be the father of the child is not admissible in evidence; the principle being that in a criminal proceeding the record of a civil action cannot be introduced to establish the facts on which it was rendered. Gee v. State, 60 Ohio St. 485.

**3. Corroborative Evidence — Necessity For.** — Harvey v. Anning, 87 L. T. N. S. 687. And see People v. McKay, 72 N. Y. App. Div. 527. See also as to rebuttal of evidence impeaching the prosecutrix, Lusk v. State, 129 Ala. 1.

**No Necessity for Corroboration.** — State v. Meares, 60 S. Car. 527.

**887. 1. Intimacy of Parties.** — Harty v. Malloy, 67 Conn. 339; Gemmill v. State, 16 Ind. App. 154; People v. Schilling, 110 Mich. 412; Wilkins v. Metcalf, 71 Vt. 103.

**Both Before and After the Time the Child Was Begotten.** — People v. Jamieson, 124 Mich. 164.

**Sufficiency of Evidence of Intercourse and Corroborative Circumstances.** — Wurdeman v. Schultz, 54 Neb. 404.

**2. Letters of Defendant.** — Williams v. State, 113 Ala. 58; Kirkpatrick v. Crowley, (County Ct.) 20 Misc. (N. Y.) 160.

**The Contents of a Letter** from the defendant to the prosecutrix may be proved, though the letter is destroyed. Miller v. State, 110 Ala. 69.

**Conversations** between complainant and defendant as to naming the child are admissible as showing he thought he was the father of it. Hobson v. People, 72 Ill. App. 436.

**An Offer of Marriage** by the putative father to the mother to settle a bastardy action is inadmissible in evidence. Lisy v. State, 50 Neb. 226.

**888. 1a. Letters from Friends of Mother Inadmissible.** — Wilkins v. Metcalf, 71 Vt. 103.

**2. Mother's Right to Custody and Control of Child.** — Perry v. State, 113 Ga. 936; Dehler v. State, 22 Ind. App. 383; State v. Nestaval, 72

**889.** See note 1.

**IV. MAINTENANCE AND SUPPORT** — 1. At Common Law. — See note 2.  
2. By Statute. — See note 4.

**890.** See note 1.

3. Contract of Maintenance by Father — Consideration. — See note 3.

**891.** 6. Liability of Public for Maintenance. — See note 5.

**V. RIGHTS AND DISABILITIES** — 1. In General. — See note 6.

**892.** 2. Marriage Within Prohibited Degrees. — See note 2.

Minn. 415, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888; *Rousseau v. Rouss*, 91 N. Y. App. Div. 230.

**A Transfer by the Mother to the Father** of her right of custody is valid as against her. *Ousset v. Euvrard*, (N. J. 1902) 52 Atl. Rep. 1110.

**A Contract** whereby the mother gives up her right of custody of the child to a stranger is illegal and void. *Humphrys v. Polak*, (1901) 2 K. B. 385.

**889.** 1. *Aycock v. Hampton*, 84 Miss. 204, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888.

**2. Maintenance and Support** — Common-law Rule. — *State v. Miller*, 3 Penn. (Del.) 518; *State v. Nestaval*, 72 Minn. 415, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 889; *Sponsable v. Owens*, 92 Mo. App. 174; *People v. Shulman*, 8 N. Y. App. Div. 514; *State v. Tie-man*, 32 Wash. 294, 98 Am. St. Rep. 854.

**What Term "Maintenance" Includes.** — Burial expenses are not included in expense of lying in and nursing. *Harty v. Malloy*, 67 Conn. 339. But see *Sullivan v. State*, 114 Ga. 520.

**4. Statutes in Regard to Maintenance** — *Alabama*. — *Laney v. State*, 109 Ala. 34.

*Arkansas*. — *Dobson v. State*, 69 Ark. 376.

*Illinois*. — *Lewis v. People*, 87 Ill. App. 588.

*Indiana*. — *Armstrong v. State*, 24 Ind. App. 289.

*Massachusetts*. — *Conefy v. Holland*, 175 Mass. 469.

*Michigan*. — *Hollenbeck v. Breakey*, 127 Mich. 555.

*Nebraska*. — *In re Walker*, 61 Neb. 803; *Myers v. Baughman*, 61 Neb. 818.

*New York*. — *People v. Ogden*, 8 N. Y. App. Div. 464; *Constable v. Kennedy*, 21 N. Y. App. Div. 97; *Kirkpatrick v. Crowley*, (County Ct.) 20 Misc. (N. Y.) 160; *New York v. Celia*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 138.

*North Dakota*. — *Ingwaldson v. Skrivseth*, 7 N. Dak. 388.

*West Virginia*. — *Billingsley v. Clelland*, 41 W. Va. 234.

The decision is not that the defendant is the father, but only that he is the "reputed father." *Moore v. Baughman*, 8 Ohio Dec. 396, 7 Ohio N. P. 149.

If the child was begotten within the state the fact that it was born outside the state is immaterial. *State v. Patterson*, (S. Dak. 1904) 100 N. W. Rep. 162.

**The Object of Such Statutes** is to secure the state against the expense of the child's maintenance. *Davis v. Carpenter*, 172 Mass. 167; *Com. v. Allen*, 2 Pa. Super. Ct. 175.

But in *Illinois* it is held that the purpose of the proceeding is for the benefit of the child,

not to determine whether the defendant is its father. *People v. Wheeler*, 60 Ill. App. 351.

**Subsequent Marriage of Parties.** — It is no defense to an action to enforce a judgment against the putative father for support of a bastard child that the defendant has married the mother and so legitimized the child. *Alderson v. Alderson*, 113 Ky. 830.

**Nature of Judgment.** — A judgment ordering payment for support of a bastard is not a debt, but a penalty. *Ex p. Bridgforth*, 77 Miss. 418, 78 Am. St. Rep. 532.

**Form of Bond.** — A bond taken from the defendant for maintenance must be in terms of the statute. *Johnson v. State*, 102 Ga. 613.

**"Maintenance" in the Statute Construed.** — *Harshman v. Ingwerson*, 52 Neb. 116.

**Who May Maintain Proceeding.** — In *Indiana* the action is by and for the benefit of the state. *Dehler v. State*, 22 Ind. App. 383.

In *New York* the mother cannot institute a proceeding against the father. *People v. Shulman*, 8 N. Y. App. Div. 514.

In *West Virginia* a bastardy proceeding can only be instituted by the mother. *Billingsley v. Clelland*, 41 W. Va. 234.

**Proceeding by Nonresident.** — In *Illinois* the proceeding may be maintained by a woman who at the time is not a resident of the state. *La Plant v. People*, 60 Ill. App. 340.

**890.** 1. **By Some Statutes Mother Must Be Single in Order to Make the Complaint.** — *Terry v. People*, 81 Ill. App. 27; *Campion v. Lattimer*, (Neb. 1903) 97 N. W. Rep. 290.

It is necessary to prove that the mother was an unmarried woman at the time of the birth of the child. *Johnson v. State*, 55 Neb. 781; *Parker v. Nothomb*, 65 Neb. 308.

**Evidence that Complainant Was Unmarried — Sufficiency.** — *La Plant v. People*, 60 Ill. App. 340.

**Complaint Not Competent Evidence that Complainant Was Unmarried.** — *Harrison v. People*, 81 Ill. App. 93.

3. **Contract by Father for Maintenance — Consideration.** — *Beach v. Voegtlen*, 68 N. J. L. 472; *Rousseau v. Rouss*, 91 N. Y. App. Div. 230; *Humberston v. Detwiler*, 7 Pa. Super. Ct. 587; *Billingsley v. Clelland*, 41 W. Va. 234.

**Contra in the Absence of a Statute.** — *Sponsable v. Owens*, 92 Mo. App. 174.

**891.** 5. *Kirkpatrick v. Crowley*, (County Ct.) 20 Misc. (N. Y.) 160.

6. *Johnstone v. Taliaferro*, 107 Ga. 6, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 891; *Reynolds v. Hitchcock*, 72 N. H. 340; *Voorhees v. Sharp*, 63 N. J. Eq. 216; *Moore v. Baughman*, 8 Ohio Dec. 396, 7 Ohio N. P. 149; *State v. Tieman*, 32 Wash. 294, 98 Am. St. Rep. 854.

**892.** 2. **Adultery.** — *Robinson v. Ruprecht*, 191 Ill. 424.

**892.** 3. Rights of Inheritance. — See notes 3, 4.

**893.** 4. As Legatee or Devisee. — See note 1.

**894.** See note 1.

5. Name of Bastard. — See note 2.

**895.** VII. LEGITIMATION — 1. Defined. — See note 1.

2. By General Law. — See note 2.

**892.** 3. Succession — *Arizona*. — *In re Walker*, (Ariz. 1896) 46 Pac. Rep. 67.

*Georgia*. — *Johnstone v. Taliaferro*, 107 Ga. 6.

*Illinois*. — *Robinson v. Ruprecht*, 191 Ill. 424, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 892; *Meadowcroft v. Winnebago County*, 181 Ill. 504; *Hudnall v. Ham*, 183 Ill. 486, 75 Am. St. Rep. 124.

*Massachusetts*. — *Sanford v. Marsh*, 180 Mass. 210.

*Missouri*. — *Banks v. Galbraith*, 149 Mo. 529.

*Nebraska*. — *Lind v. Burke*, 56 Neb. 785.

*New York*. — *Matter of Barringer*, (Surrogate Ct.) 29 Misc. (N. Y.) 457.

*Ohio*. — *Moore v. Baughman*, 8 Ohio Dec. 396, 7 Ohio N. P. 149.

*Oregon*. — *McBean v. McBean*, 37 Oregon 195.

*Pennsylvania*. — *McCully's Estate*, 12 Pa. Super. Ct. 78.

*Tennessee*. — *Laughlin v. Johnson*, 102 Tenn. 455.

And see the title SUCCESSION.

4. *Alabama*. — *Ward v. Mathews*, 122 Ala. 188.

*Georgia*. — *Johnstone v. Taliaferro*, 107 Ga. 6.

*Illinois*. — *Hudnall v. Ham*, 183 Ill. 486, 75 Am. St. Rep. 124.

*Iowa*. — *Alston v. Alston*, 114 Iowa 29.

*Kentucky*. — *Cherry v. Mitchell*, 108 Ky. 1.

*Maine*. — *Messer v. Jones*, 88 Me. 349; *Lawton v. Lane*, 92 Me. 170.

*Missouri*. — *Moore v. Moore*, 169 Mo. 432.

*Ohio*. — *Moore v. Baughman*, 8 Ohio Dec. 396, 7 Ohio N. P. 149.

*Pennsylvania*. — *Turner's Estate*, 5 Pa. Dist. 360; *Seitzinger's Estate*, 170 Pa. St. 500.

*Tennessee*. — *Murphy v. Portrum*, 95 Tenn. 605; *Laughlin v. Johnson*, 102 Tenn. 455; *Dennis v. Dennis*, 105 Tenn. 86; *Lewis v. Mynatt*, 105 Tenn. 508.

*Texas*. — *Ford v. Boone*, 32 Tex. Civ. App. 550.

And see the title SUCCESSION.

The mother inherits from the child to the exclusion of the father's heirs at law, although the child has been legitimized by the father. *Scott v. Wilson*, 110 Tenn. 175.

**Statutes Strictly Construed** — *Hogan v. Hogan*, (Ky. 1898) 44 S. W. Rep. 953; *Sanford v. Marsh*, 180 Mass. 210; *Giles v. Wilhoit*, (Tenn. Ch. 1898) 48 S. W. Rep. 268.

The *New Hampshire* statute does not permit a bastard or his issue to inherit from his mother's collateral kindred. *Reynolds v. Hitchcock*, 72 N. H. 340.

Under the *New Jersey* statute, if the bastard outlives his mother there is no succession from him through her. *McCully v. Warrick*, 61 N. J. Eq. 606. See also *Voorhees v. Sharp*, 63 N. J. Eq. 216.

**Adoption by the Father** does not defeat the rights of inheritance from the illegitimate child through the mother. *Matter of Lutz*, (Surrogate Ct.) 43 Misc. (N. Y.) 230.

**Collaterals**. — Legitimate children of a woman cannot inherit from a bastard child of their deceased mother. *McCully's Estate*, 12 Pa. Super. Ct. 78.

**893.** 1. Bastards as Legatees and Devisees. — *Johnstone v. Taliaferro*, 107 Ga. 6; *Matter of Gorkow*, 20 Wash. 563; *Scholl's Will*, 100 Wis. 650. But see *In re Du Bochet*, (1901) 2 Ch. 441.

**Contra in Louisiana**. — *Vance's Succession*, 110 La. 760.

**A Gift to a Bastard's Next of Kin** goes to those who would have been his next of kin had he been legitimate. *In re Wood*, (1902) 2 Ch. 542, reversing (1901) 2 Ch. 578.

**A Conveyance of Land** by a father to his bastard son is valid. *State v. Knutson*, (S. Dak. 1904) 101 N. W. Rep. 33.

**Statutes Construed**. — The word "nephews" means *prima facie* legitimate nephews. *Lyon v. Lyon*, 88 Me. 395.

**894.** 1. *Johnstone v. Taliaferro*, 107 Ga. 6.

2. **Name of Bastard**. — *State v. Cunningham*, 111 Iowa 233, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 894.

**895.** 1. **Legitimation and Adoption Distinguished** — **Statute Construed**. — *Morton v. Morton*, 62 Neb. 420.

2. **Statutes Abrogating Common-law Rule** — *United States*. — *Adger v. Ackerman*, (C. C. A.) 115 Fed. Rep. 124.

*Connecticut*. — *Simsbury v. East Granby*, 69 Conn. 302.

*Illinois*. — *Robinson v. Ruprecht*, 191 Ill. 424.

*Indiana*. — *Binns v. Dazey*, 147 Ind. 536; *Franklin v. Lee*, 30 Ind. App. 31.

*Louisiana*. — *Fortier's Succession*, 51 La. Ann. 1562.

*Massachusetts*. — *Irving v. Ford*, 183 Mass. 448, 97 Am. St. Rep. 447.

*Missouri*. — *Gates v. Seibert*, 157 Mo. 254, 80 Am. St. Rep. 625.

*New York*. — *Wissel v. Ott*, 34 N. Y. App. Div. 159.

*North Carolina*. — *Fowler v. Fowler*, 131 N. Car. 169, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 895.

*Ohio*. — *Ives v. McNicoll*, 59 Ohio St. 402, 69 Am. St. Rep. 780; *McNicol v. Ives*, 4 Ohio Dec. 75; *Law v. Cline*, 9 Ohio Cir. Dec. 106.

A testator bequeathed a fund in trust to his son A for life, remainder to the "lawful issue" of A. At the time the will was made the testator knew that A was the father of a bastard child. Afterwards a statute (Laws N. Y. 1896, c. 272, § 18) was enacted, providing that an illegitimate child whose parents marry shall thereby become legitimized "for all purposes;" and A married the mother of his bastard child. On these facts it was held that the words "lawful issue," as used in the will, did not include such child. *U. S. Trust Co. v. Maxwell*, (Supm. St. Spec. T.) 26 Misc. (N. Y.) 276.

**896.** See note 1.

3. By Special Act. — See note 2.

**897.** 4. By Acknowledgment Without Marriage. — See notes 1, 2.

5. Effect of Legitimation. — See notes 3, 4.

**898.** BATTERY. — See note 1.

**900.** BAY WINDOW. — See note 1.

**Presumption of Common-law Marriage.** — *Robinson v. Ruprecht*, 191 Ill. 424; *Matter of Schmidt*, (Surrogate Ct.) 42 Misc. (N. Y.) 463.

**Where the Father Was Married to Another Woman** when the illegitimate child was begotten, the statute does not apply. *Hall v. Hall*, (Ky. 1904) 82 S. W. Rep. 300.

**896.** 1. *Marionneaux v. Depuy*, 48 La. Ann. 496; *Smith v. Lansing*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 566; *Davis v. Davis*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 455.

And it makes no difference to the child's right of inheritance that the parents afterwards died domiciled abroad. *In re Oliver*, 184 Pa. St. 306.

**Legitimizing Statutes Not Retroactive.** — *Matter of Barringer*, (Surrogate Ct.) 29 Misc. (N. Y.) 457.

**Actual Marriage Required.** — *U. S. Trust Co. v. Maxwell*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 276.

**2. At Common Law.** — *Robinson v. Ruprecht*, 191 Ill. 424, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 896.

**897.** 1. **Legitimation by Public Acknowledgment.** — *Garner v. Judd*, 136 Cal. 394; *Heaton's Estate*, 139 Cal. xix, 73 Pac. Rep. 186; *Van Horn v. Van Horn*, 107 Iowa 247; *Britt v. Hall*, 116 Iowa 564; *Bourriague v. Charles*, 107 La. 217; *Lind v. Burke*, 56 Neb. 785; *Eddie v. Eddie*, 8 N. Dak. 376, 73 Am. St. Rep. 765; *Matter of Gorkow*, 20 Wash. 563.

The recognition required from the father is not a recognition of the child as entitled to inherit, but only as his child. *Alston v. Alston*, 114 Iowa 29.

To be recognized in *Massachusetts*, where marriage is also required, such a legitimation must be made by a father domiciled in the state allowing it, and not in *Massachusetts*. *Irving v. Ford*, 183 Mass. 448, 97 Am. St. Rep. 447.

**In California** the father's acts of legitimation refer only to illegitimate minor children. *Matter of Heaton*, 135 Cal. 385.

**Must Be Received into Family as Well as Acknowledged.** — *Garner v. Judd*, (Cal. 1901) 64 Pac. Rep. 1076.

**Sufficiency of Acknowledgment.** — Statements by a person that he had a boy somewhere, that the mother was pregnant by him, and that he intended to send her money, are not sufficient recognition to entitle the child to inherit from him. *McCorkendale v. McCorkendale*, 111 Iowa 314.

Evidence that a person was reared in the home of his alleged father in Ireland, came to live with him for two years in Illinois, and was furnished by him with money for clothes and introduced to others as his son, is not a sufficient acknowledgment under the *Iowa* statute. *Markey v. Markey*, 108 Iowa 373.

**Burden of Proof on Child Claiming Inheritance.** — *Watson v. Richardson*, 110 Iowa 673.

**Collateral Acknowledgment Sufficient.** — *In re Rohrer*, 22 Wash. 151.

**Written Acknowledgment.** — No intention to make the child heir, or statement that he is illegitimate, need appear in the writing. *Thomas v. Thomas*, 64 Neb. 581.

In *Iowa* a letter from the father to the mother, with whom he was living, referring to "our boys," was held a sufficient acknowledgment under the statute. *Brown v. Iowa Legion of Honor*, 107 Iowa 439.

**Statute Retroactive.** — *Moen v. Moen*, 16 S. Dak. 210.

**Acknowledgment by Will.** — A will which remained in the possession of the testator's brother till the latter's death is not a public acknowledgment within the meaning of the *California* statute. *Matter of De Laveaga*, 142 Cal. 158.

2. *Matter of De Laveaga*, 142 Cal. 158; *Duffy v. Duffy*, 114 Iowa 581.

The proof must show that the father habitually called the child his own, and a single reference to it as his is not sufficient. *Vance's Succession*, 110 La. 760.

**3. Object and Effect of Statutes of Legitimation.** — *Adger v. Ackerman*, (C. C. A.) 115 Fed. Rep. 124; *Britt v. Hall*, 116 Iowa 564; *Marionneaux v. Dupuy*, 48 La. Ann. 496; *Fortier's Succession*, 51 La. Ann. 1562; *Gates v. Seibert*, 157 Mo. 254, 80 Am. St. Rep. 625; *Lind v. Burke*, 56 Neb. 785; *Morton v. Morton*, 62 Neb. 420; *Smith v. Lansing*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 566; *Eddie v. Eddie*, 8 N. Dak. 376, 73 Am. St. Rep. 765; *Ives v. McNicoll*, 59 Ohio St. 402, 69 Am. St. Rep. 780; *McNicoll v. Ives*, 4 Ohio Dec. 75; *Scott v. Wilson*, 110 Tenn. 175.

The status cannot afterwards be changed by proof that the father did not beget the child. *Binns v. Dazey*, 147 Ind. 536.

**Inheritance Through Legitimized Bastard.** — *Johnson v. Bodine*, 108 Iowa 594.

**4. Law of Domicil.** — *Irving v. Ford*, 183 Mass. 448, 97 Am. St. Rep. 447; *Bates v. Violet*, 33 N. Y. App. Div. 436, affirmed 34 N. Y. App. Div. 629; *Matter of Hall*, 61 N. Y. App. Div. 266; *Fowler v. Fowler*, 131 N. Car. 169, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 895, 896.

**898.** 1. **Battery Transmitter — Telephone.** — "A battery transmitter is one in which a battery or strong current is utilized for the transmission of speech, as distinguished from a magneto transmitter, in which only a feeble current is generated by induction." *American Bell Telephone Co. v. National Telephone Mfg. Co.*, (C. C. A.) 119 Fed. Rep. 893.

**900.** 1. **A Bay Window** has been described as a window forming a recess in a room, and

- 900.** BE—BEING.— See note 2.  
**901.** BEACH.— See notes 1, 2.  
**905.** [BEDDING.— See note 3a.]  
**BED OF A RIVER.**— See note 4.  
**906.** BEDROOM.— See note 1.  
**907.** BEER.— See note 1.  
**908.** BEFORE.— See note 3.  
**910.** BEGIN—BEGINNING.— See note 1.  
**BEGOTTEN.**— See note 2.  
**BEHALF.**— See note 5.  
**911.** BELIEF—BELIEVE.— See note 7.  
**915.** BELONG—BELONGING.— See note 5.  
**916.** See note 1.

projecting outward from the wall either in a rectangular, polygonal, or semicircular form. The mere fact that the *bay window* rises from a foundation in the ground, instead of being a mere projection outward from the wall some distance from the ground, does not make it any the less a *bay window* within the ordinary meaning of that term. *Keith v. Goldsmith*, 194 Ill. 488.

**900.** 2. Be and Is Hereby Granted.— See *Southern Pac. R. Co. v. Wood*, 124 Cal. 475.

**901.** 1. *Bell v. Hayes*, 60 N. Y. App. Div. 387, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901.

**Synonymous with Shore.**— *Coburn v. San Mateo County*, 75 Fed. Rep. 531.

2. *Bell v. Hayes*, 60 N. Y. App. Div. 387, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901.

**Boundaries.**— See *Coburn v. San Mateo County*, 75 Fed. Rep. 531.

**Does Not Necessarily Denote Land Between High and Low Water Mark.**— *Wakeman v. Glover*, 75 Conn. 23.

**905.** 3a. The "Bedding" privileged from distress for rent under the Law of Distress Amendment Act, 1888, and the County Courts Act, 1888, includes a bedstead used by the tenant as a part of his sleeping accommodation. *Davis v. Harris*, (1900) 1 Q. B. 729.

4. **Bed Distinguished from Shore.**— See *Pearce v. Bunting*, (1896) 2 Q. B. 360.

**Bed of Thames.**— Section 87 of the Thames Conservancy Act, 1894, makes it unlawful for any person other than the conservators, their agents, etc., to dredge or raise any gravel, sand, ballast, or other substance from "the bed of the Thames," except with the license of the conservators. It was held that the expression "bed of the Thames," in the section, as applied to the tidal portion of the river, means the soil between the ordinary high-water mark on one side and the ordinary high-water mark on the other side; and the right of the owner of the soil to take gravel, etc., between high and low water mark is not preserved by section 238 of the Act. *Conservators v. Smeed*, (1897) 2 Q. B. 334.

**Boundaries.**— *Hindson v. Ashby*, (1896) 2 Ch. 25, following *Alabama v. Georgia*, 23 How. (U. S.) 515. And see to the same effect *Conservators v. Smeed*, (1897) 2 Q. B. 338.

**906.** 1. See *Matter of Place*, 27 N. Y. App. Div. 569, affirmed 156 N. Y. 691, as to what constitutes a *bedroom* under the *New York*

*Liquor Tax Law* requiring that a hotel shall have at least ten *bedrooms*.

**907.** 1. *State v. Bixman*, 162 Mo. 1.

The word *beer* is a general term, and includes both alcoholic liquors and a class of non-intoxicants made from the roots or other parts of various plants, such as spruce *beer*, ginger *beer*, and the like. Lager *beer* is known as a malt liquor. *Johnson v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 553.

**Judicial Notice.**— *Williams v. State*, 72 Ark. 19; *State v. Currie*, 8 N. Dak. 548, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 906 [907]; *Du Vall v. Augusta*, 115 Ga. 813; *Douglas v. State*, 21 Ind. App. 302; *Matter of Hunter*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 389.

**908.** 3. **Before an Officer.**— An averment that an oath was taken *before* an officer is equivalent to a statement that it was administered by the officer. *People v. Ennis*, 137 Cal. 263.

**Not Equivalent to Next Preceding.**— Under a divorce statute requiring a residence of one year "next preceding" the filing of the petition, an allegation that defendant has resided one year *before* the filing is insufficient, as the word *before* is not equivalent to "next preceding." *Johnson v. Johnson*, 95 Mo. App. 329.

**910.** 1. **Beginning of a Suit.**— *Chicago City R. Co. v. Hackendahl*, 188 Ill. 300.

2. *Granger v. Granger*, 147 Ind. 95.

5. *Hill County v. Atchison*, 19 Tex. Civ. App. 664.

**911.** 7. **Libel and Slander.**— *Alcorn v. Bass*, 17 Ind. App. 500.

**Knowledge Distinguished from Belief—Master and Servant—Action for Injuries.**— *Ohio Valley Coffin Co. v. Goble*, 28 Ind. App. 362.

**Believe Synonymous with Rely.**— *Spencer v. Hersam*, (Mont. 1904) 77 Pac. Rep. 418. And see *RELY*.

**915.** 5. *Sumpter v. Carter*, 115 Ga. 893, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 915.

**Ownership—Wills.**— See *Paget v. Melcher*, 26 N. Y. App. Div. 19, modified 156 N. Y. 399; *Matter of Hitchins*, (Surrogate Ct.) 43 Misc. (N. Y.) 485.

**916.** 1. **"Belonging with" in the Sense of "Pertaining to"—Insurance Policy.**— *Robinson v. Pennsylvania Ins. Co.*, 87 Me. 399.

**Belonging and Appertaining to.**— "It is undoubtedly true that the word *belonging* may mean ownership, and very often does. But that is not its only meaning. Webster's Interna-



**919.** [BELT RAILROAD. — See note 2a.]

**920.** [BENEATH. — See note 1a.]

**BENEFICIAL — BENEFICIALLY.** — See note 3.

tional dictionary defines it: '(2) That which is connected with a principal or greater thing; an appendage; an appurtenance. It was held, where a charter provided for the exemption of property *belonging* and appertaining to a corporation, that the manifest purpose of it was to exempt property owned by the corporation, but that it did not follow that the intention was to include in that exemption all property owned by it used for purposes of the school. *People v. Chicago Theological Seminary*, 174 Ill. 177, *affirmed* in 188 U. S. 662.

**Inhabitaney — Maine.** — *Machias v. Wesley*, 99 Me. 17.

**919. 2a.** "A *belt railroad*, as it is now commonly known, is a railroad encircling a city, or other restricted territory, intersected by other railroads, not having a common right of way into the territory, for the purpose of transferring and switching cars from one railroad to another with which it is not otherwise connected, or of transferring cars between such

railroads and industrial plants located in the neighborhood of, but not on, such railroads." *South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co.*, 117 Ala. 395.

**920. 1a. Beneath**, as a preposition, means "lower in place, with something directly over or on; under." *Webst. Dict.* It had this meaning in a patent claim for a footboard sustained *beneath* the axle by straps. *Truman v. Deere Implement Co.*, 80 Fed. Rep. 116.

**3. Beneficial Devise — Beneficially Interested.** — *Trinitarian Cong. Church, etc., Appellant*, 91 Me. 416.

**Prohibition — Libel — Beneficially Interested.** — A libeled party who has instituted a prosecution is not a person "*beneficially* interested," under Code Civ. Pro. Cal., § 1103, to entitle him to a writ of prohibition against the prosecution of the same libel instituted by a third party in another jurisdiction in the state. *Gage v. Fritz*, 137 Cal. 108.

## BENEFICIARIES (IN INSURANCE).

BY L. C. DARLINGTON.

**926. I. IN GENERAL — 2. Definition.** — See note 1.

**929. II. WHO MAY BECOME BENEFICIARIES — 2. Beneficiary Contracting with Insurer Must Have an Insurable Interest** — *a. GENERAL DOCTRINE STATED.* — See note 1.

**930.** When Question for Court. — See note 6.

**932. *b. ORIGIN OF THE DOCTRINE — (2) English Statutes — Insurable Interest in Life Policies.*** — See note 2.

Territorial Operation of Statute. — See note 4.

**933. *c. INSURABLE INTEREST DEFINED.*** — See note 11.

**934.** Pecuniary Element. — See note 1.

Reasons for the Rule. — See note 3.

**936. *d. BASIS OF INSURABLE INTEREST — (1) In General.*** — See note 4.  
**(2) Consanguineal Relationships — (a) In General.** — See note 6.

**937. (b) Instances — aa. FATHER'S INTEREST IN LIFE OF CHILD — Rule in England.** — See note 1.

**926. 1. Union Fraternal League v. Walton,** 109 Ga. 1, 77 Am. St. Rep. 350, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 926.

**929. 1. Insurable Interest Required — England.** — *Ancil v. Manufacturers' L. Ins. Co.*, (1899) A. C. 604, 68 L. J. P. C. 123, 81 L. T. N. S. 279, holding an insurable interest necessary though the policy be of the so-called "incontestable" kind.

*United States.* — *Gordon v. Ware Nat. Bank*, (C. C. A.) 132 Fed. Rep. 444.

*Indiana.* — *American Mut. L. Ins. Co. v. Bertram*, (Ind. 1904) 70 N. E. Rep. 258; *Davis v. Brown*, 159 Ind. 644; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 69 Am. St. Rep. 380.

*New Hampshire.* — *Lanouette v. Laplante*, 67 N. H. 118; *Mechanicks' Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650.

*New York.* — *Reed v. Provident Sav. L. Assur. Soc.*, 36 N. Y. App. Div. 250.

*Oregon.* — *Brett v. Warnick*, 44 Oregon 511, 102 Am. St. Rep. 639.

*South Carolina.* — *Crosswell v. Connecticut Indemnity Assoc.*, 51 S. Car. 103.

*Tennessee.* — *Clement v. New York L. Ins. Co.*, 101 Tenn. 22, 70 Am. St. Rep. 650, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 929.

*Texas.* — *Wilton v. New York L. Ins. Co.*, (Tex. Civ. App. 1904) 78 S. W. Rep. 403.

An Applicant for insurance on the life of another need not have an insurable interest in the life of the insured where not the applicant but the estate of the insured is named as beneficiary. *Prudential Ins. Co. v. Leyden*, (Ky. 1898) 47 S. W. Rep. 767.

**Policy Void Ab Initio Where No Insurable Interest.** — *Reynolds v. Prudential Ins. Co.*, 88 Mo. App. 679.

**930. 6. Question of Law.** — *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 69 Am. St. Rep. 380.

**932. 2. This Statute Applies to Endowment Policies.** — *Brophy v. North American L. Assur. Co.*, 32 Can. Sup. Ct. 261.

**4. In Canada** this statute has been applied. *Brophy v. North American L. Assur. Co.*, 32 Can. Sup. Ct. 261.

**933. 11. Insurable Interest Defined.** — *Mechanicks' Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650.

**934. 1. Interest Must Be Pecuniary.** — *Life Ins. Clearing Co. v. O'Neill*, (C. C. A.) 106 Fed. Rep. 800; *Chicago Guaranty Fund L. Soc. v. Dyon*, 79 Ill. App. 100. But see *Crosswell v. Connecticut Indemnity Assoc.*, 51 S. Car. 103, where it is said: "But we think the view which limits an insurable interest with respect to life insurance to a mere pecuniary interest is too narrow."

**3. Reasons for Rule as to Insurable Interest.** — *Gordon v. Ware Nat. Bank*, (C. C. A.) 132 Fed. Rep. 444; *Wilton v. New York L. Ins. Co.*, (Tex. Civ. App. 1904) 78 S. W. Rep. 403; *Reed v. Provident Sav. L. Assur. Soc.*, 36 N. Y. App. Div. 250, wherein it is said that the reason for the rule in *New York* is that contracts of insurance where the beneficiary has no insurable interest in the life of the insured are wagering contracts, and not, as stated by the Supreme Court of the United States in *Warnock v. Davis*, 104 U. S. 775, because such contracts are against public policy in tending to give one person an interest in another's death.

**936. 4. "Protégé" Excluded.** — *Compare Berdan v. Milwaukee Mut. L. Ins. Co.*, (Mich. 1904) 99 N. W. Rep. 411, holding that a founding dependent on the insured and recognized by her as her sister's nephew has an insurable interest in the insured's life.

**6. Mere Affinity Insufficient.** — *Wilton v. New York L. Ins. Co.*, (Tex. Civ. App. 1904) 78 S. W. Rep. 403.

**937. 1. In Canada** it has been held that a

- 937.** *bb.* MOTHER'S INTEREST IN LIFE OF CHILD. — See note 5.  
**938.** *cc.* SON'S INTEREST IN LIFE OF PARENT. — See note 3.  
     In England. — See note 7.  
**939.** *dd.* DAUGHTER'S INTEREST IN LIFE OF PARENT. — See note 2.  
**940.** *ff.* BROTHER'S INTEREST IN LIFE OF BROTHER. — See note 1.  
**941.** *hh.* GRANDCHILD'S INTEREST IN LIFE OF GRANDFATHER. — See note 2.  
     *ii.* UNCLE'S INTEREST IN LIFE OF NEPHEW. — See note 6.  
     *jj.* NEPHEW'S INTEREST IN LIFE OF AUNT OR UNCLE. — See note 8.  
     *kk.* COUSIN'S INTEREST IN LIFE OF COUSIN. — See note 10.  
     (3) *Marital Relationships* — (a) Husband and Wife. — See note 11.  
**942.** (b) Illegal Wife's Interest. — See note 4.  
**943.** Bigamous Marriage. — See note 1.  
     (c) Divorced Wife's Interest. — See note 4.  
**944.** (d) Matrimonial Contract — Intended Wife's Interest. — See note 1.  
     Certificate Payable "to His Wife" — Fiancée's Right to Recover. — See note 2.  
     Society Intended for Benefit of Those "Dependent" on Members. — See note 4.  
**945.** (f) Other Relationships Arising from Marriage — A Son-in-Law. — See note 6.  
     Nor a Mother-in-Law. — See note 9.

parent has an insurable interest in the life of a child. *Wakeman v. Metropolitan L. Ins. Co.*, 30 Ont. 705.

**937.** 5. *Crosswell v. Connecticut Indemnity Assoc.*, 51 S. Car. 103. But see *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 69 Am. St. Rep. 380.

**938.** 3. *Illinois Rule*. — *Chicago Guaranty Fund L. Soc. v. Dyon*, 79 Ill. App. 100.

In *Pennsylvania* the same rule is applied. *Life Ins. Clearing Co. v. O'Neil*, (C. C. A.) 106 Fed. Rep. 800.

7. See *Harse v. Pearl L. Assur. Co.*, (1903) 2 K. B. 92, 72 L. J. K. B. 638, 89 L. T. N. S. 94, holding that a son has no insurable interest in the life of his mother.

**939.** 2. *Iowa*. — *Farmers, etc., Bank v. Johnson*, 118 Iowa 282.

**940.** 1. *Rule as Between Brothers*. — *Reynolds v. Prudential Ins. Co.*, 88 Mo. App. 679.

**941.** 2. In *New York* a granddaughter has an insurable interest in the life of her grandfather. *Breese v. Metropolitan L. Ins. Co.*, 37 N. Y. App. Div. 152.

In *Ohio* a Grandfather has an insurable interest in the life of his grandchild. *Hilliard v. Sanford*, 6 Ohio Dec. 449, 4 Ohio N. P. 363.

6. An Aunt Has an Insurable Interest in the life of a niece whom she supports and who has resided with her from time to time. *Cronin v. Vermont L. Ins. Co.*, 20 R. I. 570.

8. *Niece's Interest in Life of Uncle*. — Where the evidence shows that an orphan niece was brought up by her uncle; had lived with him until her marriage, and since her marriage had lived next door to him, and had always helped to support him, the question of her insurable interest in his life should be submitted to the jury. *McGraw v. Metropolitan L. Ins. Co.*, 5 Pa. Super. Ct. 488.

But a niece not supported by her uncle and without the expectation of pecuniary benefit from him other than a mere probability that she might be the recipient of an occasional gift or bounty from him has not an insurable interest in his life. *Wilton v. New York L. Ins.*

*Co.*, (Tex. Civ. App. 1904) 78 S. W. Rep. 403.

10. *Rule as to Cousins*. — *Brett v. Warnick*, 44 Oregon 511, 102 Am. St. Rep. 639.

11. *Wife May Insure Life of Husband*. — *Overhiser v. Overhiser*, 63 Ohio St. 77, 81 Am. St. Rep. 612.

**942.** 4. *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249.

**943.** 1. *Bigamous Wife*. — *Crosby v. Ball*, 4 Ont. L. Rep. 496. See also *Scott v. Scott*, (Ky. 1904) 77 S. W. Rep. 1122.

4. *After Divorce — Other Jurisdictions — New York*. — See *Steinback v. Diepenbrock*, 158 N. Y. 24, 70 Am. St. Rep. 424.

*Ohio*. — In *re Insurance Policy*, 5 Ohio Dec. 561, 7 Ohio N. P. 527; *Overhiser v. Overhiser*, 63 Ohio St. 77, 81 Am. St. Rep. 612; *Supreme Commandery, etc., v. Everding*, 11 Ohio Cir. Dec. 419, 20 Ohio Cir. Ct. 689.

In *Texas* it is held that the divorced wife of the insured, who is the assignee of the policy, has no further interest therein than to be reimbursed for premiums paid by her subsequent to the assignment. *Hatch v. Hatch*, (Tex. Civ. App. 1904) 80 S. W. Rep. 411.

**944.** 1. *Fiancée Has Insurable Interest*. — *Taylor v. Travelers' Ins. Co.*, 15 Tex. Civ. App. 254; *Opitz v. Karel*, 118 Wis. 527.

*Fiancée Declared Beneficiary by Statute*. — *Wallace v. Madden*, 168 Ill. 356.

2. *Bogart v. Thompson*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 581, where the certificate was made payable to "his wife, Mrs. Emma L. Thompson."

4. *Those "Dependent" upon Members*. — See *Ownby v. Supreme Lodge, etc.*, 101 Tenn. 16, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 944.

**945.** 6. *A Son-in-Law* has no insurable interest in the life of his father-in-law. *Ramsay v. Myers*, 6 Pa. Dist. 468.

9. *Mother-in-Law and Son-in-Law*. — See *Adams v. Reed*, (Ky. 1896) 38 S. W. Rep. 420, reversing the decision of this case in (Ky. 1896) 36 S. W. Rep. 568, set out in the original note.

**946.** (4) *Contractual Relationships* — (a) *Creditor's Interest in Life of Debtor.* — See note 4.

*Interest in Life of Debtor's Wife.* — See note 6.

**947.** *Mutual Benefit Certificates.* — See note 2.

*Enforceability of Debt.* — See note 7.

**949.** *Discharge in Bankruptcy.* — See note 1.

*Policy Must Not Be Disproportionate to Debt.* — See note 3.

**951.** *Some of the Pennsylvania Decisions.* — See note 5.

*Measure of Creditor's Recovery.* — See note 6.

**953.** (b) *Principal and Surety.* — See note 6.

**955.** (a) *Partnership.* — See note 6.

**957.** *e. EFFECT OF DESIGNATING BENEFICIARY WITHOUT INSURABLE INTEREST.* — See notes 3, 4.

*Beneficiary as Trustee.* — See note 5.

**958.** *Who May Raise the Objection.* — See note 2.

*f. PROOF OF INTEREST.* — See note 3.

*g. QUALIFICATIONS OF THE DOCTRINE* — (1) *In General.* — See note 8.

**959.** (2) *Generally Inapplicable to Contracts Between Insurer and Insured.* — See note 2.

**946. 4. Creditor Has Insurable Interest.** — *Gordon v. Ware Nat. Bank, (C. C. A.) 132 Fed. Rep. 444; Manhattan L. Ins. Co. v. Hennessy, (C. C. A.) 99 Fed. Rep. 64; Exchange Bank v. Loh, 104 Ga. 446; Reed v. Provident Sav. L. Assur. Soc., 36 N. Y. App. Div. 250; Hinton v. Mutual Reserve Fund L. Assoc., 135 N. Car. 314, 102 Am. St. Rep. 545.*

**Creditor's Interest in Life of Debtor Corporation's Manager.** — In *Mechanicks' Nat. Bank v. Comins, 72 N. H. 12, 101 Am. St. Rep. 650*, the court refused to hold as a matter of law that one who had advanced funds to a corporation had not an insurable interest in the life of its manager.

**A Building Association** has no insurable interest in the life of one of its stockholders who is not indebted to it. *Tate v. Commercial Bldg. Assoc., 97 Va. 74, 75 Am. St. Rep. 770.*

**6. Creditor's Interest in Life of Debtor's Wife.** — See *Wheeland v. Atwood, 7 Pa. Super. Ct. 86.*

**A Creditor of the Community Estate** of a husband and wife has no insurable interest in the life of the wife, since she is under no personal liability. *Cameron v. Barcus, 31 Tex. Civ. App. 46.*

**947. 2. Mutual Benefit Insurance.** — *Belknap v. Johnston, 114 Iowa 265.*

**7. Cessation of Interest.** — *Manhattan L. Ins. Co. v. Hennessy, (C. C. A.) 99 Fed. Rep. 64.*

**949. 1. A Creditor Accepting the Benefit of a General Assignment** of the assignor of a policy to such creditor may maintain suit on the policy where part of the debt remains unpaid. *Manhattan L. Ins. Co. v. Hennessy, (C. C. A.) 99 Fed. Rep. 64.*

**3. Disproportion Between Debt and Policy.** — *Exchange Bank v. Loh, 104 Ga. 446.*

**951. 5.** See a criticism of this rule in *Exchange Bank v. Loh, 104 Ga. 446.*

**6. Limit of Recovery.** — *Exchange Bank v. Loh, 104 Ga. 446; Strode v. Meyer Bros. Drug. Co., 101 Mo. App. 627; Tate v. Commercial Bldg. Assoc., 97 Va. 74, 75 Am. St. Rep. 770; Roanoke First Nat. Bank v. Terry, 99 Va. 194.*

**953. 6. Surety's Interest in Life of Principal.** — See *Embry v. Harris, 107 Ky. 61.*

**955. 6. Partners.** — *Powell v. Dewey, 123 N. Car. 103, 68 Am. St. Rep. 818.*

**957. 3. Beneficiary Without Insurable Interest — No Forfeiture of Policy.** — *Farmers, etc., Bank v. Johnson, 118 Iowa 282; Beard v. Sharp, 100 Ky. 606.*

**4. Beard v. Sharp, 100 Ky. 606,** overruling a demurrer to a complaint filed in an action by a qualified beneficiary to recover the proceeds of a benefit certificate in the hands of an unqualified cobeneficiary. But see *Powell v. Dewey, 123 N. Car. 103, 68 Am. St. Rep. 818.*

**5. Beard v. Sharp, 100 Ky. 606; Lanouette v. Laplante, 67 N. H. 118.**

**958. 2. In Rhode Island** the same rule is applied. *John Hancock Mut. L. Ins. Co. v. Lawder, 22 R. I. 416.*

**A Beneficiary Who Has Assigned** the policy and received money on the strength thereof cannot raise the question of her insurable interest therein. *Farmers, etc., Bank v. Johnson, 118 Iowa 282.*

**An Attaching Creditor** of the beneficiary in a policy, the proceeds of which have been paid to another creditor of the beneficiary, to whom the policy had been assigned to secure an antecedent debt, has no standing to claim that the policy was a wagering contract. *Wheeland v. Atwood, 20 Pa. Co. Ct. 367.*

**3. Company Estopped to Demand Proof.** — Even though the policy provides that "all claims under this policy shall be subject to proof of interest," no proof is necessary on behalf of a beneficiary whose lack of interest was known to the insurer at the time of entering into the contract. *Foster v. Preferred Acc. Ins. Co., 125 Fed. Rep. 536.* See also *U. S. Mutual Acc. Assoc. v. Hodgkin, 4 App. Cas. (D. C.) 516.*

**8. Foster v. Preferred Acc. Ins. Co., 125 Fed. Rep. 536, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 958.**

**959. 2. Not Applicable to Contract Solely Between Insured and Insurer — United States.** — *Foster v. Preferred Acc. Ins. Co., 125 Fed. Rep.*

**959.** Application to Mutual Insurance. — See note 3.

**960.** Exceptions. — See note 2.

### 3. Beneficiary Must Be of the Prescribed Class. — See note 7.

536, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 959.

*Connecticut.* — Allen v. Hartford L. Ins. Co., 72 Conn. 693.

*District of Columbia.* — U. S. Mutual Acc. Assoc. v. Hodgkin, 4 App. Cas. (D. C.) 516.

*Indiana.* — Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 69 Am. St. Rep. 380; Davis v. Brown, 159 Ind. 644.

*Maryland.* — Preston v. Connecticut Mut. L. Ins. Co., 95 Md. 101, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 929.

*Missouri.* — Ashford v. Metropolitan L. Ins. Co., 80 Mo. App. 638; Van Cleave v. Union Casualty, etc., Co., 82 Mo. App. 668.

*New York.* — Ruoff v. John Hancock Mut. L. Ins. Co., 86 N. Y. App. Div. 447.

*North Carolina.* — Albert v. Mutual L. Ins. Co., 122 N. Car. 92, 65 Am. St. Rep. 693.

*Oregon.* — Brett v. Warnick, 44 Oregon 511, 102 Am. St. Rep. 639.

*South Carolina.* — Crosswell v. Connecticut Indemnity Assoc., 51 S. Car. 103.

*Tennessee.* — Clement v. New York L. Ins. Co., 101 Tenn. 22, 70 Am. St. Rep. 650, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 959.

**Assured as Agent of Beneficiary.** — But where the insured procures the insurance virtually as the agent of the beneficiary the latter must have an insurable interest in the insured's life to render the policy valid. *Cisna v. Sheibley*, 88 Ill. App. 385; *Lanouette v. Laplante*, 67 N. H. 118.

Also a policy taken out by the insured, payable to his estate, under an agreement to assign it to one having no insurable interest in the insured's life, is void as a wagering contract. *Hinton v. Mutual Reserve Fund L. Assoc.*, 135 N. Car. 314, 102 Am. St. Rep. 545.

**959. 3. Applicable to Fraternal Insurance.** — Supreme Assembly, etc., v. Adams, 107 Fed. Rep. 335; Ancient Order United Workmen v. Brown, 112 Ga. 545; Union Fraternal League v. Walton, 209 Ga. 1, 77 Am. St. Rep. 350; Belknap v. Johnston, 114 Iowa 265.

**960. 2. Exception — Virginia.** — Tate v. Commercial Bldg. Assoc., 97 Va. 74, 75 Am. St. Rep. 770.

In *Georgia* recovery was denied a beneficiary, without insurable interest, in whose favor a policy had been issued at the instance of the insured on the beneficiary's promise to pay the premiums on that and another policy in the proceeds of which he was to share. *West v. Sanders*, 104 Ga. 727.

**7. Beneficiary Named in Certificate Must Be of Class Prescribed in Statute or By-law — Colorado.** — Love v. Clune, 24 Colo. 237.

*Georgia.* — Union Fraternal League v. Walton, 112 Ga. 545.

*Illinois.* — Danielson v. Wilson, 73 Ill. App. 287; Kirkpatrick v. Modern Workmen of America, 103 Ill. App. 468; Baldwin v. Begley, 185 Ill. 180; Norwegian Old People's Home Soc. v. Wilson, 176 Ill. 94.

*Kansas.* — Gillam v. Dale, (Kan., 1904) 76 Pac. Rep. 861.

*Maryland.* — Dale v. Brumbly, 96 Md. 674.

*Massachusetts.* — Brierly v. Equitable Aid Union, 170 Mass. 218; Lavigne v. Ligue des Patriotes, 178 Mass. 25.

*Nebraska.* — Fisher v. Donovan, 57 Neb. 361; Warner v. Modern Workmen of America, (Neb. 1903) 93 N. W. Rep. 397.

*New Jersey.* — Grand Lodge, etc., v. Gandy, 63 N. J. Eq. 692.

*New York.* — Kult v. Nelson, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 20; Matter of Smith, (Surrogate Ct.) 42 Misc. (N. Y.) 639.

*Ohio.* — Supreme Council, etc., v. McGinness, 59 Ohio St. 531.

*Pennsylvania.* — Stark v. Byers, 24 Pa. Co. Ct. 517.

*Tennessee.* — Ownby v. Supreme Lodge, etc., 101 Tenn. 16.

*Texas.* — Williams v. Fletcher, 26 Tex. Civ. App. 85; Grand Lodge, etc., v. Iselt, (Tex. Civ. App. 1896) 37 S. W. Rep. 377.

*Wisconsin.* — Groth v. Central Verein, etc., 95 Wis. 140.

**By-law Narrowing Class Defined by Statute.** — It has been held that where the statute prescribes who may become beneficiaries under a certificate issued by a beneficial society, the society cannot by by-law deny recognition as beneficiaries to any of the classes mentioned in the statute. *Wallace v. Madden*, 168 Ill. 356. But see *Halle v. District Grand Lodge, etc.*, 24 Ohio Cir. Ct. 717.

**No Restriction — Object of Society.** — Where the by-laws of a beneficial society give to a member "the right to leave his death benefit to whomsoever he desires" a member may name his brother as beneficiary, though the member leave surviving him a wife and children, notwithstanding the fact that the purpose of the society, as stated in the by-laws, is "to assist the families of the deceased by paying them the death benefits." *Menovsky v. Menovsky*, 19 Pa. Super. Ct. 427. See also *Union Fraternal League v. Walton*, 109 Ga. 1, 77 Am. St. Rep. 350; *Independent Order, etc., v. Allen*, 76 Miss. 326, 71 Am. St. Rep. 532.

**A Statute Passed Subsequent to the Issuance of the Certificate**, restricting the class to which beneficiaries must belong, cannot affect the right to name beneficiaries given by such certificate. *Voight v. Kersten*, 164 Ill. 314; *Delaney v. Delaney*, 175 Ill. 187; *Moore v. Chicago Guaranty Fund L. Soc.*, 178 Ill. 202; *Schoales v. Order of Sparta*, 206 Pa. St. 11; *Thomeuf v. Knights of Birmingham*, 12 Pa. Super. Ct. 195.

Nor can a subsequent amendment of a by-law of a benefit society restrict the class of beneficiaries. *Ancient Order United Workmen v. Brown*, 112 Ga. 545; *Roberts v. Cohen*, 60 N. Y. App. Div. 259, affirmed (N. Y. 1902) 65 N. E. Rep. 1122; *Swain v. Grand Lodge, etc.*, 22 Pa. Co. Ct. 548, 8 Pa. Dist. 407.

But where the certificate provides that the member shall be bound by by-laws subsequently enacted a by-law adopted subsequently restricting the class of beneficiaries and the manner of designating them is binding. *Baldwin v. Begley*, 185 Ill. 180.

**Beneficiary Not Expressly Excluded.** — In *Gruber*

**961.** See note 1.

**No Forfeiture for Invalid Designation.** — See note 2.

**To Whom Insurance Payable.** — See note 3.

**Waiver by Company.** — See note 4.

**Ultra Vires.** — See note 6.

**Certificates Issued in Another State.** — See note 7.

**III. DESIGNATION — 1. Form of Designation — a. GENERALLY —**  
**Intention.** — See note 8.

**962.** **Amendment of Society's Constitution — Prospective Operation.** — See note 8.

**963.** **b. TESTAMENTARY DESIGNATION — By-laws.** — See notes 1, 2.

*v. Grand Lodge, etc.*, 79 Minn. 59, it was held that where the by-laws of a benefit society made benefits payable only "to the person designated in the certificate, when designated by name, and a person related to the deceased, or a member of his family, or dependent upon him," a beneficiary named who was not within the above classes was entitled to the fund, since he was not expressly excluded, there being no fraud practiced and the society having acquiesced in the designation for a long time.

**Special Contract.** — When permitted by the by-laws a beneficial association may enter into a special contract of insurance whereby one other than the wife or children of the insured member is designated as beneficiary. *Wolpert v. Grand Lodge, etc.*, 2 Pa. Super. Ct. 564, 39 W. N. C. (Pa.) 264.

**Estoppel.** — Where a beneficial society has acquiesced in the designation of a beneficiary and for fifteen years received dues from the member insured, it will be estopped to claim that the issuance of the certificate was *ultra vires* because the beneficiary was not in the eligible class. *Tramblay v. Supreme Council, etc.*, 90 N. Y. App. Div. 39. See also *Coulson v. Flynn*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 186.

**Beneficiary as Trustee for One Outside of Class.** — A beneficiary named with the understanding that she will pay the proceeds to one who could not be named as beneficiary is a trustee of the fund and must pay over the money in accordance with the trust. *Peek v. Peek*, 101 Ky. 423.

**Member as His Own Beneficiary.** — In *Brierly v. Equitable Aid Union*, 170 Mass. 218, it was held that a member of a beneficial association could become his own beneficiary.

**961.** 1. *Wolpert v. Grand Lodge, etc.*, 2 Pa. Super. Ct. 564.

2. **Insurance Not Forfeited by Invalid Designation.** — *Baldwin v. Begley*, 185 Ill. 180; *Doherty v. A. O. H. Widows, etc.*, Fund, 176 Mass. 285.

3. *Knights of Columbus v. Rowe*, 70 Conn. 545; *Grand Lodge, etc. v. Gandy*, 63 N. J. Eq. 692; *Carson v. Vicksburg Bank*, 75 Miss. 167, 65 Am. St. Rep. 596.

**Substitution of Improper Beneficiary — Payment to Original.** — Where a benefit certificate is surrendered and another issued in lieu thereof, in which an improper beneficiary is named, the fund will be paid to the beneficiary properly named in the original certificate. *Groth v. Central Verein, etc.*, 95 Wis. 140.

4. **Waiver.** — *Tepper v. Supreme Council, etc.*, 61 N. J. Eq. 638; *Ledebruh v. Wisconsin*

*Trust Co.*, 112 Wis. 657. See also *Union Fraternal League v. Walton*, 112 Ga. 315, where the facts were held not to constitute a waiver.

**Who May Question Eligibility.** — The eligibility of a designated beneficiary, in whose designation the benefit society has acquiesced, cannot be contested by a third party even though, in the absence of such designation, he would have been entitled to the fund. *Supreme Lodge, etc. v. Terrell*, 99 Fed. Rep. 330. See also *Taylor v. Hair*, 112 Fed. Rep. 913; *Maguire v. Maguire*, 59 N. Y. App. Div. 143; *Markey v. Supreme Council, etc.*, 70 N. Y. App. Div. 4.

6. *Tepper v. Supreme Council, etc.*, 61 N. J. Eq. 638, where it is said to be "settled that these beneficial societies cannot create funds for the benefit of persons outside of the classes mentioned in the statute." But see *Ledebruh v. Wisconsin Trust Co.*, 112 Wis. 657.

7. **Society Subsequently Domiciled.** — Where, after the issuance of a certificate of insurance, a foreign benefit society became domiciled in another state and thereafter laws were passed in the latter state narrowing the class of beneficiaries, a beneficiary properly designated in accordance with the laws of the society's home state will take, though not qualified by the laws of the second state. *Belknap v. Johnston*, 114 Iowa 265.

8. *Scully v. Ætna L. Ins. Co.*, 132 N. Car. 30, 95 Am. St. Rep. 615, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 961; *Thomeuf v. Knights of Birmingham*, 12 Pa. Super. Ct. 195.

**Enumerated Classes Not Mutually Restrictive.** — Where a by-law enumerates the classes of beneficiaries as uncle, niece, next of kin who would be distributee of the member's personal estate, if he died intestate, etc., an uncle may take as beneficiary though not nearest of kin or distributee. *Maxwell v. Family Protective Union*, 115 Ga. 475.

**962.** 8. **Amendment of Constitution — Continued to Operate Prospectively.** — *Peterson v. Gibson*, 191 Ill. 365, 85 Am. St. Rep. 263; *Tepper v. Supreme Council, etc.*, 61 N. J. Eq. 638.

**963.** 1. **By-laws — Invalid Designation.** — *High Court Catholic Order, etc. v. Malloy*, 169 Ill. 58; *Hunter v. Firemen's Relief, etc., Assoc.*, 20 Pa. Super. Ct. 605. Compare *Kunkel v. Workmen's Sick, etc., Ben. Fund*, 68 N. Y. App. Div. 385.

**Certificate Prevails over Conflicting By-law.** — *Ledebruh v. Wisconsin Trust Co.*, 112 Wis. 657.

2. **Sufficient Designation.** — Where, in a book kept by a beneficial society for the entry of names of beneficiaries, the beneficiary was designated as "such parties as provided for

- 964.** 2. Terms of the Designation — *a.* FAMILY. — See note 1.  
 An Adult Son. — See note 2.  
 "Families and Heirs." — See notes 3, 4, 5.
- 965.** Designation Refers to Time of Consummation of Contract. — See note 2.  
 A Brother of the Insured, Not Dependent upon Him. — See note 4.  
*b.* CHILDREN. — See notes 9, 11.
- 966.** Issue of Other Marriages. — See note 1.  
 Wife and Children — To What Time Designation Refers. — See notes 4, 5.
- 967.** Adopted Child. — See note 2.
- 968.** *c.* WIFE — WIDOW — Confined to Lawful Marital Relations — Illustrations. — See note 2.
- Divorce a Mensa. — See note 3.  
 Separation. — See note 4.
- 969.** A Divorce a Vinculo. — See note 1.

in my will," a will leaving to the plaintiff "the balance of my estate, being real, personal and such amount as be derived from life insurance," was held a sufficient designation. *Grand Lodge, etc., v. Ohnstein*, 85 Ill. App. 355. See also *Vance v. Park*, 7 Ohio Dec. 564, 7 Ohio N. P. 138.

**964.** 1. In *Hoffman v. Grand Lodge, etc.*, 73 Mo. App. 47, it was said that the term "family," as used in the constitution of a benefit society defining who may become beneficiaries, meant persons habitually residing under one roof and forming one domestic circle, or who are dependent upon each other for support. See also *Knights of Columbus v. Rowe*, 70 Conn. 545; *O'Neal v. O'Neal*, 109 Ky. 113; *Ferbrache v. Grand Lodge, etc.*, 81 Mo. App. 268. And see generally the title FAMILY.

A Child by a Former Wife is included by the term "family." *Hutson v. Jensen*, 110 Wis. 26.

**Infant to Be Adopted.** — An infant given into the hands of the insured on his promise to adopt it, and that is cared for and educated by him though not formally adopted, is a member of the insured's family within the meaning of the statute authorizing fraternal benefit associations to provide for the relief of families of deceased members. *Grand Lodge, etc., v. McKinstry*, 67 Mo. App. 82.

**Servants Not Included.** — Servants employed by a member are not members of his family. *Grand Lodge, etc., v. Gandy*, 63 N. J. Eq. 692.

**2. Adult Son Included.** — See *Brower v. Supreme Lodge, etc.*, 87 Mo. App. 614, holding that the father of a son who has left the former's family may not be a beneficiary of a certificate taken out by his son.

**Stepchildren Living Apart** from their stepfather are to be considered members of his family. *Tepper v. Supreme Council, etc.*, 61 N. J. Eq. 638.

**A Married Daughter** of a member of a benefit society, though not living with him, is comprehended in the term "immediate family." *Danielson v. Wilson*, 73 Ill. App. 287.

**3. Mother Included.** — See *Manley v. Manley*, 107 Tenn. 191.

**4. Mother Not Living with Insured Excluded.** — *Lister v. Lister*, 73 Mo. App. 99.

**5. Sister Not Living with Insured Excluded.** — *Smith v. Boston, etc., R. Relief Assoc.*, 168 Mass. 213.

**965.** 2. *Brown v. Ancient Order of United Workmen*, 208 Pa. St. 101, affirmed 208 Pa. St. 107; *Knights of Columbus v. Rowe*, 70 Conn. 545; *Lister v. Lister*, 73 Mo. App. 99. But see *Courtois v. Grand Lodge, etc.*, 135 Cal. 552, 87 Am. St. Rep. 137, wherein it was held that the wife of the insured named as beneficiary in a certificate was entitled to the fund though she had subsequently been divorced.

**4. Brother Excluded.** — *Supreme Council, etc., v. McGinness*, 59 Ohio St. 531. But see *Norwegian Old People's Home Soc. v. Wilson*, 176 Ill. 94; *Danielson v. Wilson*, 73 Ill. App. 287.

**9. An Illegitimate Child Not Entitled to Take as Beneficiary.** — *Lavigne v. Ligue des Patriotes*, 178 Mass. 25.

**11.** *State L. Ins. Co. v. Redman*, 91 Mo. App. 49.

**966.** 1. "Their Children" Ordinarily Means Common Issue. — *Ætna Mut. L. Ins. Co. v. Clough*, 68 N. H. 298.

**4.** *Roquemore v. Dent*, 135 Ala. 292, 93 Am. St. Rep. 33; *Helmken v. Meyer*, 118 Ga. 657; *Scully v. Ætna L. Ins. Co.*, 132 N. Car. 30, 95 Am. St. Rep. 615.

**5.** *Helmken v. Meyer*, 118 Ga. 657.

**967.** 2. **Adopted Child Included — Intention.** — *Virgin v. Marwick*, 97 Me. 578.

**Illegitimate Children.** — Beneficiaries described as "adopted children" are entitled to the fund though they are illegitimate. *Hanley v. Supreme Tent Knights, etc.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 161.

**968.** 2. **Bigamous Wife — Estoppel of Company.** — *Supreme Tent, etc., v. McAllister*, 132 Mich. 69, 102 Am. St. Rep. 382. See also *Ducksbury v. Supreme Lodge, etc.*, 4 Lack. Leg. N. (Pa.) 172.

**3. In Other Jurisdictions** the same rule has been applied. *Brown v. Grand Lodge of United Workmen*, 208 Pa. St. 101, affirmed 208 Pa. St. 107.

**4. Wife Living Apart from Husband.** — *Compare Smith v. Boston, etc., R. Relief Assoc.*, 168 Mass. 213, where a wife living apart from her husband was allowed to take the fund, there being nothing to show that he had ceased to support her.

**969.** 1. **Absolute Divorce.** — See *Courtois v. Grand Lodge, etc.*, 135 Cal. 552, 87 Am. St. Rep. 137; *Overhiser v. Overhiser*, 14 Colo. App. 1, holding a divorced wife entitled to the benefit fund.

- 969.** Payable to Wife by Name — Second Marriage. — See note 2.  
*d.* DEPENDENTS — Strictly Construed. — See note 6.  
 Fiancée of Insured. — See note 7.
- 970.** See note 1.  
 Creditors. — See note 3.  
 Concubine. — See note 4.  
*e.* RELATIVES — RELATIONS — Liberal Construction. — See note 5.  
 The Relationship Need Not Be Consanguineal. — See notes 6, 7.
- 971.** *f.* HEIRS — Statute of Descent and Distribution Referred to. — See note 1.  
 Children — Widow. — See note 2.
- 973.** "Heirs" — "Next of Kin" — "Dependents." — See note 5.  
 Executors. — See note 6.

A Divorced Wife remaining dependent on her former husband and receiving alimony under the decree of divorce is entitled to the proceeds of insurance on his life. *Martin v. Modern Woodmen of America*, 111 Ill. App. 99.

A Certificate Payable to a Wife by Name will entitle her to the insurance fund though divorced from her husband, the insured. *White v. Brotherhood of American Yeomen*, 124 Iowa 293.

**969. 2. Second Wife Included.** — Supreme Council, etc., *v. Bevis*, 106 Mo. App. 429.

**6. Term "Dependents" Defined.** — See *Martin v. Modern Woodmen of America*, 111 Ill. App. 99.

**Instances — Illegitimate Children.** — *Hanley v. Supreme Tent Knights*, etc., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 161. But see *Lavigne v. Ligue des Patriotes*, 178 Mass. 25.

*A Sister and Nieces.* — *Wolf v. Pearce*, (Ky. 1898) 45 S. W. Rep. 865.

**Persons Held Not Dependents** — *A Landlady.* — *Faxon v. Grand Lodge*, etc., 87 Ill. App. 262.  
*A Father of an Adult Son.* — *Brower v. Supreme Lodge*, etc., 87 Mo. App. 614.

*A Servant.* — *Grand Lodge*, etc., *v. Gandy*, 63 N. J. Eq. 692.

**Dependents a Separate Class.** — Under the by-laws of a beneficial society making benefits payable to the wife, husband, children, dependent, mother, father, etc., of the insured member, a father may receive such benefits though not dependent on the member, since dependents constitute a class by themselves. *Earley v. Earley*, 23 Ohio Cir. Ct. 618.

**7. The Fiancée of a Married Man** is, as against the man's wife, entitled to the fund due on a benefit certificate where she has been properly designated. *Woodmen of the World v. Rutledge*, 133 Cal. 640.

**970. 1. Ownby v. Supreme Lodge, etc., 101 Tenn. 16, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 970.**

**3. A Creditor Paying a Member's Dues** does not come in the class designated dependents. *Fodell v. Royal Arcanum*, 44 W. N. C. (Pa.) 498.

**4. West v. Grand Lodge, etc., 14 Tex. Civ. App. 471.**

**An Illegal Wife** believing herself the lawful wife of a member is entitled to the benefit where named as beneficiary. *Crosby v. Ball*, 4 Ont. L. Rep. 496; *Senge v. Senge*, 106 Ill. App. 140; *James v. Supreme Council*, etc., 130 Fed. Rep. 1014.

But an illegal wife, though innocent when

the relation began, having knowledge of the illegality and continuing it at the time she was named as beneficiary in a benefit certificate, is not a dependent of the insured member. *Grand Lodge*, etc., *v. Hanses*, 81 Mo. App. 545.

**5. Grand Lodge, etc., *v. Fisk*, 126 Mich. 356; *Tepper v. Supreme Council*, etc., 61 N. J. Eq. 638. And see RELATIVE — RELATION — RELATIONSHIP.**

**"Relatives" Need Not Be Dependent on the Member Insured.** — *Lane v. Lane*, 99 Tenn. 639.

**"Next Living Relative" Construed.** — *Mattison v. Sovereign Camp, Woodmen of the World*, 25 Tex. Civ. App. 214.

**Illegitimate Child Held Not a Relative.** — *Lavigne v. Ligue des Patriotes*, 178 Mass. 25.

**6. Special Contract — Fiancée.** — Though a by-law of a beneficial association limits the class of beneficiaries to those persons related by consanguinity or affinity to the insured member, the designation of a member's fiancée may be made by special contract. *Jacobs v. Most Excellent Assembly*, etc., 9 Pa. Dist. 54.

**Stepmother.** — *Faxon v. Grand Lodge*, etc., 87 Ill. App. 262.

**Stepchildren** are included by the term "relatives." *Tepper v. Supreme Council*, etc., 61 N. J. Eq. 638.

**7. Adopted Child as Next of Kin.** — *Kemp v. New York Produce Exch.*, 34 N. Y. App. Div. 175.

**971. 1. "Heirs" Has Its Statutory Meaning.** — *Knights Templars*, etc., *Mut. Aid Assoc. v. Greene*, 79 Fed. Rep. 461; *Brown v. Iowa Legion of Honor*, 107 Iowa 439, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 971; *In re Andress*, 6 Ohio Dec. 174, 5 Ohio N. P. 253. See also title HEIR, HEIRS, AND THE LIKE.

**Legal Heirs — Child Not Legally Adopted.** — Under a policy payable to the insured's legal heirs a child who has not been legally adopted by the insured is not entitled to take. *Merchant v. White*, 77 N. Y. App. Div. 539.

**2. Widow Generally Excluded.** — See *Janda v. Bohemian Roman Catholic First Cent. Union*, 71 N. Y. App. Div. 150, where "legal heirs" was held to include the widow and children of the deceased; *Knights Templars*, etc., *Mut. Aid Assoc. v. Greene*, 79 Fed. Rep. 461. But see *Pleimann v. Hartung*, 84 Mo. App. 283.

**973. 5. In re Andress, 6 Ohio Dec. 174; *House v. Northwestern L. Assur. Co.*, 10 Pa. Dist. 41.**

**6. Executors.** — A provision in a certificate of a benevolent society that the benefit is to be paid to the "legal heirs as designated by her



**974.** Survivorship in Common Disaster. — See note 4.

**975.** Purpose of Association to Be Considered. — See note 1.

Nonliability for Debts of Insured. — See note 2.

**977.** *h.* DEVISEES. — See note 2.

**978.** 3. Absence, Ambiguity, or Failure of Designation — *a.* IN GENERAL — Nature of Insured's Interest — Power of Appointment. — See note 5.

Failure of Insured to Exercise the Power. — See notes 6, 7.

**979.** See notes 1, 2.

Payment Subject to Insured's Will. — See note 3.

**980.** *b.* EVIDENCE TO EXPLAIN DESIGNATION — And Proof of Oral Declarations. — See note 5.

Beneficiary Named in Application — Application Excluded at Trial — Parol Evidence. — See note 7.

Estate as Beneficiary — Ambiguity — Parol Evidence. — See note 9.

**IV. NATURE OF BENEFICIARY'S INTEREST — 1. In Ordinary Life Insurance Policies — *a.* GENERAL DOCTRINE — A VESTED RIGHT. — See note 10.**

will" renders inoperative a bequest of such benefit to the executors. *Griffith v. Howes*, 5 Ont. L. Rep. 439.

**974.** 4. Insured and Beneficiary Dying Instantaneously — Presumption. — *Southwell v. Gray*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 740.

**975.** 1. "Issue," Construed as Lineal Descendants. — *Hemenway v. Draper*, 91 Minn. 235.

2. *In re* Address, 6 Ohio Dec. 174, 5 Ohio N. P. 253.

**977.** 2. *People v. Petrie*, 191 Ill. 497, 85 Am. St. Rep. 268, where "devisee" was taken to mean "legatee."

**Devisee May Be a Stranger.** — In *Delaney v. Delaney*, 175 Ill. 187, it was held that a mere creditor not included in the classes of relatives, dependents, etc., could be named as beneficiary.

**978.** 5. *Georgia*. — Union Fraternal League *v.* Walton, 109 Ga. 1, 77 Am. St. Rep. 350.

*Nebraska*. — *Warner v. Modern Woodmen of America*, (Neb. 1903) 93 N. W. Rep. 397; *Fisher v. Donovan*, 57 Neb. 361.

*New Jersey*. — Supreme Council, etc., *v.* Murphy, (N. J. 1903) 55 Atl. Rep. 497.

*New York*. — *Fink v. Fink*, 171 N. Y. 616; *Matter of Smith*, (Surrogate Ct.) 42 Misc. (N. Y.) 639; *Eagan v. Eagan*, 58 N. Y. App. Div. 253; *O'Brien v. Supreme Council, etc.*, 81 N. Y. App. Div. 1, affirmed (N. Y. 1903) 68 N. E. Rep. 1120.

*Texas*. — *Grand Lodge, etc., v. Cleghorn*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1043.

*Virginia*. — *Leftwich v. Wells*, 101 Va. 255, 99 Am. St. Rep. 865..

**6. Company Held Not Liable.** — *Grand Lodge, etc., v. Cleghorn*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1043; *West v. Grand Lodge, etc.*, 14 Tex. Civ. App. 471.

**A Rule Requiring the Beneficiary to Be Named in the Certificate** is not complied with where the certificate declares the sum therein mentioned to be payable to the executors of the person in favor of whom such certificate is issued. *Johnston v. Catholic Mut. Benev. Assoc.*, 24 Ont. App. 88.

**Fund Paid to Administrator — Who Entitled Thereto.** — Where the fund accruing under a certificate directing payment to be made to those dependent upon the insured, but failing

further to specify the beneficiaries, has been paid by the society to the administrator of the insured, distribution should be made to the heirs and not merely to those claiming to be dependents. *Wolf v. Pearce*, (Ky. 1898) 45 S. W. Rep. 865.

7. See *Boyden v. Massachusetts Masonic L. Assoc.*, 167 Mass. 242, where though no designation of a second beneficiary was made after the death of the first the fund was held payable to the representatives of the insured.

**Death of Beneficiary — Failure to Make New Designation.** — In the absence of provisions in the constitution or by-laws of a beneficial society giving a right of recovery on a life certificate in case of the death of the designated beneficiary, a child of a beneficiary cannot recover on a certificate without showing the death of the insured before that of the beneficiary. *Screwmen's Benev. Assoc. v. Whitridge*, 95 Tex. 539.

**979.** 1. See *Warner v. Modern Woodmen of America*, (Neb. 1903) 93 N. W. Rep. 397, where there was a failure of heirs named as beneficiaries.

**2. No Designation — Recovery by One Paying Premiums.** — *John Hancock Mut. L. Ins. Co. v. Lawder*, 22 R. I. 416.

3. *Chicago Guaranty Fund L. Soc. v. Wheeler*, 79 Ill. App. 241.

**980.** 5. *Hogan v. Wallace*, 166 Ill. 328.

**7. Where a Beneficiary Named in an Application** is, by mutual mistake, not named in the policy, such beneficiary is entitled to the insurance. *Cornwall v. Halifax Banking Co.*, 32 Can. Sup. Ct. 442.

9. *Hogan v. Wallace*, 166 Ill. 328; *Wolf v. Pearce*, (Ky. 1898) 45 S. W. Rep. 865.

**10. Beneficiary in Ordinary Life Policy Has a Vested Right** — *Arkansas*. — *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980.

*Illinois*. — *Mutual L. Ins. Co. v. Allen*, 212 Ill. 134, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980; *Delaney v. Delaney*, 175 Ill. 187.

*Indiana*. — *Penn Mut. Life Ins. Co. v. Norcross*, 163 Ind. 390, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980.

**983.** *d.* CONTRARY DOCTRINE — In Wisconsin. — See note 3.

**984.** In Missouri. — See note 1.

*e.* EFFECT OF THE PREVAILING DOCTRINE — (1) *Assignment by Insured Forbidden* — Illustrations. — See note 9.

**985.** (2) *Surrender Prohibited*. — See notes 2, 3.

(3) *Change of Beneficiaries*. — See note 5.

*f.* RULE APPLIED TO ENDOWMENT POLICIES. — See note 6.

**986.** *Assignment*. — See note 4.

**987.** *h.* EFFECT OF BENEFICIARY'S PREDECEASE — (1) *Prevailing Rule*. — See note 1.

*Iowa*. — Haerther *v.* Mohr, 114 Iowa 636, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980.

*Louisiana*. — Lambert *v.* Penn Mut. L. Ins. Co., 50 La. Ann. 1027.

*Maryland*. — Preston *v.* Connecticut Mut. L. Ins. Co., 95 Md. 101, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980.

*Massachusetts*. — Millard *v.* Brayton, 177 Mass. 533.

*Minnesota*. — Schoenau *v.* Grand Lodge, etc., 85 Minn. 349.

*Mississippi*. — Grego *v.* Grego, 78 Miss. 443, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980; Jackson Bank *v.* Williams, 77 Miss. 398, 78 Am. St. Rep. 530.

*Missouri*. — U. S. Casualty Co. *v.* Kacer, 169 Mo. 301, 92 Am. St. Rep. 641, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980.

*Nebraska*. — Warner *v.* Modern Woodmen of America, (Neb. 1903) 93 N. W. Rep. 397; Fisher *v.* Donovan, 57 Neb. 361.

*New Hampshire*. — Supreme Council, etc., *v.* Adams, 68 N. H. 236.

*New Jersey*. — Locomotive Engineers' Mut. L., etc., Ins. Assoc. *v.* Winterstein, 58 N. J. Eq. 189.

*New York*. — Merchant *v.* White, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 376, affirmed 77 N. Y. App. Div. 539; Sangunitto *v.* Goldey, 88 N. Y. App. Div. 78; Carpenter *v.* Negus, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 172; Shipman *v.* Protected Home Circle, 174 N. Y. 398; Sterrit *v.* Lee, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 324.

*North Carolina*. — Herring *v.* Sutton, 129 N. Car. 107; Scull *v.* Aetna L. Ins. Co., 132 N. Car. 30, 95 Am. St. Rep. 615.

*Texas*. — Irwin *v.* Travelers Ins. Co., 16 Tex. Civ. App. 683.

*Vermont*. — Atkins *v.* Atkins, 70 Vt. 565.

*Wisconsin*. — Ellison *v.* Straw, 116 Wis. 207.

**Provision Allowing Change.** — In Bilbro *v.* Jones, 102 Ga. 161, it was held that where a policy provided that the insured might, at any time, change the beneficiary, such change could be made without the consent of the beneficiary who had paid no premium.

**983.** 3. Opitz *v.* Karel, 118 Wis. 527.

**984.** 1. *Missouri Rule*. — See U. S. Casualty Co. *v.* Kacer, 169 Mo. 301, 92 Am. St. Rep. 641, overruling Gamba *v.* Covenant Mut. L. Ins. Co., 50 Mo. 44.

9. Preston *v.* Connecticut Mut. L. Ins. Co., 95 Md. 101, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 984, holding that the insured cannot assign the policy without the consent of the beneficiary.

**Husband Cannot Divest Wife's Interest.** — Lambert *v.* Penn Mut. L. Ins. Co., 50 La. Ann. 1027; Jackson Bank *v.* Williams, 77 Miss. 398, 78 Am. St. Rep. 530.

**985.** 2. *Surrender of Policy.* — Preston *v.* Connecticut Mut. L. Ins. Co., 95 Md. 101, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985; McGlynn *v.* Curry, 82 N. Y. App. Div. 431.

**Forfeiture of Original Policy.** — Premiums paid on a policy substituted for one wrongfully surrendered without the beneficiary's consent cannot be considered as having been paid on the surrendered policy. Weatherbee *v.* New York L. Ins. Co., 178 Mass. 575.

3. *Substituted Policy Belongs to Original Beneficiary.* — Carpenter *v.* Negus, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 172.

5. *Arkansas.* — Franklin L. Ins. Co. *v.* Galligan, 71 Ark. 295, 100 Am. St. Rep. 73.

*Maine.* — Virgin *v.* Marwick, 97 Me. 578.

*Maryland.* — Preston *v.* Connecticut Mut. L. Ins. Co., 95 Md. 101, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985.

*New York.* — McGlynn *v.* Curry, 82 N. Y. App. Div. 431.

*Canada.* — Bunnell *v.* Shilling, 28 Ont. 336. Compare National Trust Co. *v.* Hughes, 14 Manitoba 41; Gunter *v.* Williams, 1 N. Bruns. Eq. Rep. 401.

**Insurer Cannot Make Change — Estoppel.** — Preston *v.* Connecticut Mut. L. Ins. Co., 95 Md. 101.

In Ontario the right of the insured to change the beneficiary is regulated by statute. *Re Harrison*, 31 Ont. 314; *Potts v. Potts*, 31 Ont. 452; *Re Cheesborough*, 30 Ont. 639; *Lints v. Lints*, 6 Ont. L. Rep. 100; *Book v. Book*, 32 Ont. 206; *Re Travellers Ins. Co.*, 7 Ont. L. Rep. 30.

**A Divorce Decree Canceling a Wife's Interest** as beneficiary in a policy on her husband's life was held erroneous in *Grego v. Grego*, 78 Miss. 443.

6. *Endowment Policies Included.* — Lambert *v.* Penn Mut. L. Ins. Co., 50 La. Ann. 1027; Preston *v.* Connecticut Mut. L. Ins. Co., 95 Md. 101. But see *Travelers' Ins. Co. v. Healey*, 25 N. Y. App. Div. 53.

**986.** 4. *Pledge.* — The same rule applies to a pledge of the policy for a debt of the husband and wife. *Travelers' Ins. Co. v. Healey*, 25 N. Y. App. Div. 53.

**Assignment of Insured's Interest.** — The assignment of an endowment policy by the insured is good as to his interest therein. *McDonough v. Aetna L. Ins. Co.*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 625.

**987.** 1. *Laughlin v. Norcross*, 97 Me. 33,

**987.** The Proceeds of the Policy. — See notes 2, 4, 5.

**988.** (2) *Children as Contingent Beneficiaries.* — See note 1.

When Interest Becomes Fixed. — See notes 4, 5, 6.

Rights of Grandchildren. — See notes 7, 10.

**989.** (3) *Wife and Children as Joint Beneficiaries.* — See note 2.

**990.** 2. In Mutual Benefit Certificates — *a.* GENERAL DOCTRINE — A MERE EXPECTANCY. — See note 2.

citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987.

**987.** 2. When Proceeds Go to Personal Representative. — *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73, citing AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Millard v. Brayton*, 177 Mass. 533; *U. S. Casualty Co. v. Kacer*, 169 Mo. 301, 92 Am. St. Rep. 641, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Brown v. Murray*, 54 N. J. Eq. 594; *John Hancock Mut. L. Ins. Co. v. Lawder*, 22 R. I. 416. See also *Sterrit v. Lee*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 324, where the insured, having paid the premiums and obtained an assignment from the administrator of the deceased beneficiary, was compelled to refund the proceeds to such administrator.

**4. Proceeds Belong to Devises in Case of Will.** — *Laughlin v. Norcross*, 97 Me. 33.

**5.** *Preston v. Connecticut Mut. L. Ins. Co.*, 95 Md. 101, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Gass v. U. S. Life Ins. Co.*, 4 Ohio Dec. 234, 3 Ohio N. P. 216, holding that the executors of a deceased beneficiary had such an interest in the policy as to defeat the insured's attempt to require the insurer to declare that the policy had insured to him.

**988.** 1. An assignment by a wife of a policy payable to her, but in case of her death before that of the insured then to her children, is defeated upon her death before that of the insured. *Stevens v. Germania L. Ins. Co.*, 26 Tex. Civ. App. 156.

But on the death of the insured before that of the wife the title of the wife's assignor becomes absolute though the children did not join in the assignment. *Herr v. Reineohl*, 209 Pa. St. 483.

In *Colorado* an assignment of such a policy by the wife does not affect the vested interest of the children therein. *Mutual L. Ins. Co. v. Hagerman*, (Colo. 1903) 72 Pac. Rep. 889.

**4. When Children's Interest Becomes Fixed.** — *Smith v. Aetna L. Ins. Co.*, 68 N. H. 405; *Aetna Mut. L. Ins. Co. v. Clough*, 68 N. H. 298; *Fidelity Trust Co. v. Marshall*, 178 N. Y. 468.

**5.** *Roquemore v. Dent*, 135 Ala. 292, 93 Am. St. Rep. 33; *Fidelity Trust Co. v. Marshall*, 178 N. Y. 468.

**6.** *D'Arcy v. Mutual L. Ins. Co.*, 108 Tenn. 567.

**7. In Other Jurisdictions** the same rule is applied. *Voss v. Connecticut Mut. L. Ins. Co.*, 119 Mich. 161; *Glenn v. Burns*, 100 Tenn. 295.

**10. In Other Jurisdictions** the New York rule is followed. *Elgar v. Equitable L. Assur. Soc.*, 113 Wis. 90; *D'Arcy v. Mutual L. Ins. Co.*, 108 Tenn. 567.

**989.** 2. *Clark v. Dawson*, 195 Pa. St. 137; *Bickel v. Bickel*, (Ky. 1904) 79 S. W. Rep. 215, holding that the second wife of the in-

sured is not entitled to share in the proceeds of the policy.

**Provision for Reversion—Construction of Policy.** — The proceeds of a policy providing for payment to the wife and children of the insured, "or, if they are not living" at his death, then to his personal representative, are not payable to such personal representative if either the wife or any of the children are living at the insured's death. *Fish v. Massachusetts Mut. L. Ins. Co.*, 186 Mass. 358. See also *Clark v. Dawson*, 195 Pa. St. 137.

**990.** 2. Beneficiary Has No Vested Right in Mutual Benefit Certificate. — *Fischer v. Fischer*, 99 Tenn. 629, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990.

**Reasons for Rule.** — *Schoenau v. Grand Lodge*, etc., 85 Minn. 349.

**See to the Same Effect** — *United States*. — *Lamb v. Mutual Reserve Fund L. Assoc.*, 106 Fed. Rep. 637.

*California*. — *Supreme Council, etc., v. Gehrenbeck*, 124 Cal. 43.

*Colorado*. — *Overhiser v. Overhiser*, 14 Colo. App. 1. But see *Hill v. Groesbeck*, 29 Colo. 161; *Love v. Clune*, 24 Colo. 237.

*Connecticut*. — *Masonic Mut. Ben. Assoc. v. Tolles*, 70 Conn. 537.

*Illinois*. — *Voigt v. Kersten*, 164 Ill. 314; *Kirkpatrick v. Modern Woodmen of America*, 103 Ill. App. 468; *McGrew v. McGrew*, 190 Ill. 604; *Peterson v. Gibson*, 191 Ill. 365, 85 Am. St. Rep. 263; *Delaney v. Delaney*, 175 Ill. 187, affirming 70 Ill. App. 130.

*Indiana*. — *Bunyan v. Reed*, (Ind. App. 1904) 70 N. E. Rep. 1002.

*Iowa*. — *Belknap v. Johnston*, 114 Iowa 265; *White v. Brotherhood of American Yeomen*, 124 Iowa 293; *Schmidt v. Northern L. Assoc.*, 112 Iowa 41.

*Michigan*. — *Allgemeiner Arbeiter Bund v. Adamson*, 132 Mich. 86.

*Minnesota*. — *Gruber v. Grand Lodge, etc.*, 79 Minn. 59.

*Mississippi*. — *Carson v. Vicksburg Bank*, 75 Miss. 167, 65 Am. St. Rep. 596.

*Missouri*. — *St. Louis Police Relief Assoc. v. Strode*, 103 Mo. App. 694; *Supreme Council, etc., v. Kacer*, 96 Mo. App. 93; *Callies v. Modern Woodmen of America*, 98 Mo. App. 521; *Grand Lodge, etc., v. Reneau*, 75 Mo. App. 402.

*Nebraska*. — *Fisher v. Donovan*, 57 Neb. 361; *Warner v. Modern Woodmen of America*, (Neb. 1903) 93 N. W. Rep. 397; *Woodmen Acc. Assoc. v. Hamilton*, (Neb. 1904) 97 N. W. Rep. 1017.

*New Hampshire*. — *Supreme Council, etc., v. Adams*, 68 N. H. 236.

*New Jersey*. — *Spengler v. Spengler*, 65 N. J. Eq. 176; *Golden Star Fraternity v. Martin*, 59 N. J. L. 207.

*New York*. — *Fink v. Delaware, etc., Mut.*

**991. Grounds of the Doctrine.** — See note 2.

**Charter Prohibiting Change of Beneficiary.** — See note 3.

**Language Construed as Authorizing Change of Beneficiary.** — See note 4.

**Amendment of By-laws — Retrospective Operation.** — See note 6.

**992. See note 1.**

**b. INCIDENTS OF THE DOCTRINE — Beneficiary Paying Assessments.** —

See note 2.

**Original Beneficiary Paying Assessments in Ignorance of a Substitution.** — See note 3.

**Possession of Certificate by Beneficiary.** — See note 4.

**993. Where Substitute Not Entitled to Become Beneficiary.** — See note 1.

*Aid Soc.*, 57 N. Y. App. Div. 507; *O'Brien v. Supreme Council, etc.*, 81 N. Y. App. Div. 1, *affirmed* (N. Y. 1903) 68 N. E. Rep. 1120; *Moan v. Normile*, 37 N. Y. App. Div. 614; *Bogart v. Thompson*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 581; *Southwell v. Gray*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 740; *Pollak v. Supreme Council, etc.*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 274; *Fanning v. Supreme Council, etc.*, 84 N. Y. App. Div. 205; *Fink v. Fink*, 171 N. Y. 616; *Shipman v. Protected Home Circle*, 174 N. Y. 398; *Collins v. Collins*, 30 N. Y. App. Div. 341.

*Oregon.* — *Independent Foresters v. Keliher*, 36 Oregon 501, petition for rehearing denied 36 Oregon 513, 78 Am. St. Rep. 785; *Stringham v. Dillon*, 42 Oregon 63.

*Pennsylvania.* — *Heasley v. Heasley*, 191 Pa. St. 539; *Pennsylvania R. Co. v. Wolfe*, 203 Pa. St. 269; *Brown v. Ancient Order of United Workmen*, 208 Pa. St. 101, *affirmed* 208 Pa. St. 107; *Hamilton v. Royal Arcanum*, 189 Pa. St. 273; *Brubaker v. Brubaker*, 18 Lanc. L. Rev. 156.

*Tennessee.* — *Lane v. Lane*, 99 Tenn. 639; *Schardt v. Schardt*, 100 Tenn. 276; *Sofge v. Supreme Lodge, etc.*, 98 Tenn. 446.

*Washington.* — *Cade v. Head Camp, etc.*, 27 Wash. 218.

*Wisconsin.* — *Strike v. Wisconsin Odd Fellows Mut. L. Ins. Co.*, 95 Wis. 583; *Stoll v. Mutual Ben. L. Ins. Co.*, 115 Wis. 558; *Berg v. Damkoehler*, 112 Wis. 587; *Hutson v. Jensen*, 110 Wis. 26.

**No Authorizing By-law or Statute Necessary.** — "In the absence of any provisions in the certificate, by-laws, articles of incorporation, or statute either providing expressly for a change of beneficiary or prohibiting such change, by reason of the character and purposes of such associations, it should be held that the power to change the beneficiary is vested in the member assured during his lifetime." *Carpenter v. Knapp*, 101 Iowa 712. But see *Locomotive Engineers Mut. L., etc., Ins. Assoc. v. Winterstein*, 58 N. J. Eq. 189, holding that a certificate issued by a beneficial insurance association invests the beneficiary with a vested interest in the certificate which cannot be defeated by the member insured where neither the constitution or the by-laws of the society nor the certificate confers on the members the power to change the beneficiary.

**Charging the Fund with Payment of a Debt.** — A member of a benefit association may charge the fund payable to the beneficiary previously designated with the payment of a debt owing

by such member. *Woodruff v. Tilman*, 112 Mich. 188.

**Consent of the Beneficiary.** — The power to change the beneficiary is not limited by a provision indorsed on the certificate of a benefit association that "in case of assignment of the within certificate, the beneficiary must consent thereto, and said assignment must be approved by the secretary." *Carpenter v. Knapp*, 101 Iowa 712.

**A Revocation by an Insured Non Compos Mentis** and the appointment of a new beneficiary is invalid and the original beneficiaries are entitled to the fund. *Cason v. Owens*, 100 Ga. 142.

**991. 2. Fischer v. Fischer**, 99 Tenn. 629, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 991.

**3. Subsequent Change of Charter.** — Where a member of a beneficial association had no power to change the beneficiary at the time the certificate was issued, a subsequently adopted by-law authorizing a change of the beneficiary has no retrospective effect. *Locomotive Engineers Mut. L., etc., Ins. Assoc. v. Winterstein*, 58 N. J. Eq. 189. See also *Mason v. Mason*, (Ind. App. 1902) 63 N. E. Rep. 578.

**4. See Strike v. Wisconsin Odd Fellows Mut. L. Ins. Co.**, 95 Wis. 583.

**6. Amendment to By-laws — Construction.** — See *Hill v. Groesbeck*, 29 Colo. 161; *Pittinger v. Pittinger*, 28 Colo. 308, 89 Am. St. Rep. 193.

**992. 1. See West v. Grand Lodge, etc.**, 14 Tex. Civ. App. 471, holding that a by-law prescribing the classes of beneficiaries passed after the issuance of the certificate is binding on the insured where a provision to that effect is inserted in the certificate.

**2. Effect of Beneficiary Paying Assessments.** — *Grand Lodge, etc., v. McGrath*, 133 Mich. 626; *Spengler v. Spengler*, 65 N. J. Eq. 176; *Heasley v. Heasley*, 191 Pa. St. 539; *Fischer v. Fischer*, 99 Tenn. 629; *Cade v. Head Camp, etc.*, 27 Wash. 218; *Strike v. Wisconsin Odd Fellows Mut. L. Ins. Co.*, 95 Wis. 583, where one assessment was paid by a beneficiary, the rest being paid by the insured.

**3. See Spengler v. Spengler**, 65 N. J. Eq. 176.

**4. Effect of Possession of Certificate by Beneficiary.** — *Delaney v. Delaney*, 175 Ill. 187; *Allgemeiner Arbeiter Bund v. Adamson*, 132 Mich. 86; *Grand Lodge, etc., v. McGrath*, 133 Mich. 626; *Spengler v. Spengler*, 65 N. J. Eq. 176; *Fink v. Delaware, etc., Mut. Aid. Soc.*, 57 N. Y. App. Div. 507; *Lahey v. Lahey*, 174 N. Y. 146, 95 Am. St. Rep. 554; *Heasley v. Heasley*, 191 Pa. St. 539.

**993. 1. Where the person substituted was**

**993.** *c.* MODIFICATIONS OF THE DOCTRINE — *Special Agreement.* — See note 4.

*d.* EXERCISE OF THE RIGHT OF DIVESTITURE — (1) *Prescribed Form Generally Imperative* — (a) *In General.* — See note 8.

(b) *Company's Consent Required.* — See note 9.

**994.** (c) *Indorsement on Certificate.* — See note 1.

*Signature — Attestation — Acknowledgment.* — See notes 3, 5.

(d) *Surrender of Certificate.* — See note 6.

**995.** (f) *Entry on Record of Designated Official.* — See note 1.

(h) *Testamentary Changes — Compliance with Prescribed Formalities.* — See note 5.

not within any of the classes from which a designation of a beneficiary could be made, such substituted designation is void and the previous designation remains in force. *Smith v. Boston, etc., R. Relief Assoc.*, 168 Mass. 213.

**993.** 4. *Vested Right by Paying Assessments — Special Agreement—California.* — *Grimbley v. Harrold*, 125 Cal. 24, 73 Am. St. Rep. 19.

*Colorado.* — *Hill v. Groesbeck*, 29 Colo. 161.

*Illinois.* — *McGrew v. McGrew*, 190 Ill. 604; *Supreme Council, etc., v. Tracy*, 169 Ill. 123.

*New Jersey.* — *Spengler v. Spengler*, 65 N. J. Eq. 176; *Supreme Council, etc., v. Murphy*, (N. J. 1903) 55 Atl. Rep. 497.

*New York.* — See also *Webster v. Welch*, 57 N. Y. App. Div. 558.

*Oregon.* — *Brett v. Warnick*, 44 Oregon 511, 102 Am. St. Rep. 639.

*Pennsylvania.* — *Krause's Estate*, 28 Pittsb. Leg. J. N. S. (Pa.) 29.

*South Dakota.* — *Benard v. Grand Lodge, etc.*, 13 S. Dak. 132.

See also *Pennsylvania R. Co. v. Wolfe*, 203 Pa. St. 269, where it was said that a member of a beneficial society promising to substitute his intended wife as beneficiary on consummation of their marriage, and in consideration thereof, would, after the marriage, have no power to substitute another in her place.

The agreement or contract must, however, be fully performed on the part of the beneficiary, so that where the beneficiary failed to pay all the insured's dues, as he agreed to in consideration of his being named as beneficiary, he cannot claim the fund. *Masonic Mut. Ben. Assoc. v. Tolles*, 70 Conn. 537.

**8.** *Illinois.* — *Delaney v. Delaney*, 70 Ill. App. 130.

*Iowa.* — *Shuman v. Ancient Order of United Workmen*, 110 Iowa 642.

*Massachusetts.* — *Clark v. Supreme Council, etc.*, 176 Mass. 468.

*Michigan.* — *Grand Lodge, etc., v. Fisk*, 126 Mich. 356.

*New Jersey.* — *Grand Lodge, etc., v. Connolly*, 58 N. J. Eq. 180.

*Ohio.* — *Charch v. Charch*, 57 Ohio St. 561.

*Oregon.* — *Independent Foresters v. Keliher*, 36 Oregon 501, 78 Am. St. Rep. 785, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 993.

*Pennsylvania.* — *Stark v. Byers*, 24 Pa. Co. Ct. 517; *Brown v. Ancient Order of United Workmen*, 208 Pa. St. 101, affirmed 208 Pa. St. 107.

*Texas.* — *Bollman v. Supreme Lodge, etc.*, (Tex. Civ. App. 1899) 53 S. W. Rep. 722.

*Wisconsin.* — *McGowan v. Supreme Ct., etc.*, 104 Wis. 173.

**Where No Method Is Prescribed** by the association for changing the beneficiary, then "any mode of procedure which clearly indicates the intention of the member and the nature of the change desired will operate to effect that change." *Fink v. Delaware, etc., Mut. Aid Soc.*, 57 N. Y. App. Div. 507.

**Payment of Fee Required.** — *Fink v. Fink*, 171 N. Y. 616. See also *Stringham v. Dillon*, 42 Oregon 63.

**Revocation Essential.** — *Grand Lodge, etc., v. Gandy*, 63 N. J. Eq. 692.

**Failure to Effect a Change** of beneficiary does not result in the revocation of a prior designation. *Coyne v. Bowe*, 23 N. Y. App. Div. 261.

**9.** *Dale v. Brumbly*, 96 Md. 674; *Tillman v. John Hancock Mut. L. Ins. Co.*, 27 N. Y. App. Div. 392; *Murphy v. Metropolitan St. R. Assoc.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 751.

**Where No Provision for Consent** of the association is made, as prescribed by the statute, the insured can make the change without such consent. *Collins v. Collins*, 30 N. Y. App. Div. 341.

**Consent Presumed from Delivery of Certificate.** — *Collins v. Collins*, 30 N. Y. App. Div. 341.

Consent will also be presumed from the company's giving notice of assessments to the assignee, and receiving payments of assessments from him. *Strike v. Wisconsin Odd Fellows L. Ins. Co.*, 95 Wis. 583.

**994.** 1. *Grand Lodge, etc., v. Ross*, 89 Mo. App. 621; *Grand Lodge, etc., v. Gandy*, 63 N. J. Eq. 692.

3. *Grand Lodge, etc., v. Gandy*, 63 N. J. Eq. 692.

5. *Grand Lodge, etc., v. Gandy*, 63 N. J. Eq. 692; *Berg v. Damkoehler*, 112 Wis. 587.

**6. Surrender of Certificate Essential.** — *Modern Woodmen of America v. Little*, 114 Iowa 109; *Dale v. Brumbly*, 96 Md. 674; *Eagan v. Eagan*, 58 N. Y. App. Div. 253; *Wilson v. Bryce*, 43 N. Y. App. Div. 491; *Smith v. Supreme Council, etc.*, 127 N. Car. 138; *Hamilton v. Royal Arcanum*, 189 Pa. St. 273.

**Presentation of Certificate — Presumption of Compliance.** — *Shryock v. Shryock*, 50 Neb. 886.

**A Written Petition** setting forth the change of beneficiary desired must be duly filed where so required by a rule of the association. *Independent Foresters v. Keliher*, 36 Oregon 501, petition for rehearing denied 36 Oregon 513, 78 Am. St. Rep. 785.

**995.** 1. See *Loewenthal v. District Grand Lodge, etc.*, 19 Ind. App. 377.

5. **Method of Changing Beneficiary — Provision**

**996. Residuary Clause.** — See note 2.

(2) *Exceptions* — (a) *Substantial Compliance Rule* — Illustrations. — See note 5.

**997. A Merely Customary Mode of Substitution.** — See note 4.

(b) *Waiver — Acts Amounting to Waiver by Association.* — See note 5.

**998. With Reference to Third Parties.** — See notes 3, 4.

*After Member's Death.* — See note 6.

(c) *Impossibility of Compliance.* — See note 7.

**999. (d) Death of Member Pending Change.** — See note 3.

(3) *Who May Question Mode of Divestiture.* — See note 5.

**V. RIGHTS, POWERS, AND PREROGATIVES OF BENEFICIARIES — 1. In General.** — See note 10.

**1001. 2. Right of Disposition — a. IN GENERAL.** — See note 7.

**of By-laws Exclusive.** — *Fink v. Fink*, 171 N. Y. 616. See also *Schardt v. Schardt*, 100 Tenn. 276.

**996. 2. Hutson v. Jenson, 110 Wis. 26. But see *High Court Catholic Order, etc., v. Malloy*, 169 Ill. 58, where, however, the insurance fund was specifically mentioned.**

5. See *St. Louis Police Relief Assoc. v. Strode*, 103 Mo. App. 694.

**997. 4. Fink v. Delaware, etc., Mut. Aid Soc.**, 57 N. Y. App. Div. 507.

**"In the Absence of Any Charter or Constitutional Restrictions,** by-laws, rules, or regulations governing the revocation or change of beneficiaries in mutual benefit associations, the same may be done in any way the member may choose, so long as he expresses a clear intent so to do." *Schoenau v. Grand Lodge, etc.*, 85 Minn. 349.

5. *Schoenau v. Grand Lodge, etc.*, 85 Minn. 349; *Grand Lodge, etc., Reneau*, 75 Mo. App. 402; *St. Louis Police Relief Assoc. v. Strode*, 103 Mo. App. 694, holding it improper to exclude evidence of waiver by the insurer; *Supreme Council, etc., v. Murphy*, (N. J. 1903) 55 Atl. Rep. 497; *Brett v. Warnick*, 44 Oregon 511, 102 Am. St. Rep. 639; *Pennsylvania R. Co. v. Wolfe*, 203 Pa. St. 269; *Schardt v. Schardt*, 100 Tenn. 276; *Berg v. Damkoehler*, 112 Wis. 587. In *Independent Foresters v. Keliher*, 36 Oregon 501, petition for rehearing denied 36 Oregon 513, 78 Am. St. Rep. 785, the facts were held not to constitute a waiver.

**Intent and Authority to Waive Essential.** — *Grand Lodge, etc., v. Gandy*, 63 N. J. Eq. 692.

**Filing Interpleader Not a Waiver.** — Where a benefit society has done nothing in recognition of the rights of one attempted to be substituted as beneficiary, the filing of an interpleader and payment of the fund into court by it does not constitute a waiver of the observance of prescribed formalities in making the substitution so as to prevent the original beneficiary from questioning the validity thereof. *Grand Lodge, etc., v. Connolly*, 58 N. J. Eq. 180.

**998. 3. Waiver by Receiving and Retaining Unacknowledged Will.** — *Allison v. Stevenson*, 51 N. Y. App. Div. 626.

4. *Delaney v. Delaney*, 175 Ill. 187; *Supreme Ct., etc., v. Davis*, 129 Mich. 318; *Allgemeiner Arbeiter Bund v. Adamson*, 132 Mich. 86; *Fanning v. Supreme Council, etc.*, 84 N. Y. App. Div. 205; *Moan v. Normile*, 37 N. Y. App. Div. 614.

6. *Modern Woodmen of America v. Little*, 114 Iowa 109. See also *Shuman v. Ancient Order of United Workmen*, 110 Iowa 642; *Smith v. Harman*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 681; *Independent Foresters v. Keliher*, 36 Oregon 501, petition for rehearing denied 36 Oregon 513, 78 Am. St. Rep. 785; *Stoll v. Mutual Ben. L. Ins. Co.*, 115 Wis. 558.

7. *Berg v. Damkoehler*, 112 Wis. 587.

Compliance was held not impossible in *Stringham v. Dillon*, 42 Oregon 63; *Independent Foresters v. Keliher*, 36 Oregon 501, petition for rehearing denied 36 Oregon 513, 78 Am. St. Rep. 785.

**999. 3. United States.** — *Supreme Lodge, etc., v. Terrell*, 99 Fed. Rep. 330.

*Kansas.* — *Hlydorf v. Conrack*, 7 Kan. App. 202.

*New Hampshire.* — *Sanborn v. Black*, 67 N. H. 537.

*New Jersey.* — *Supreme Council, etc., v. Murphy*, (N. J. 1903) 55 Atl. Rep. 497.

*New York.* — *Donnelly v. Burnham*, 86 N. Y. App. Div. 226, affirmed (N. Y. 1904) 69 N. E. Rep. 1122; *Fink v. Fink*, 171 N. Y. 616.

*Wisconsin.* — *Waldum v. Homstad*, 119 Wis. 312; *McGowan v. Supreme Ct., etc.*, 104 Wis. 173; *Berg v. Damkoehler*, 112 Wis. 587.

5. *Berry v. Wood*, 106 Iowa 327; *Earley v. Earley*, 23 Ohio Civ. Ct. 618; *Pennsylvania R. Co. v. Wolfe*, 203 Pa. St. 269; *Schardt v. Schardt*, 100 Tenn. 276.

*Compare Grand Lodge, etc., v. Connolly*, 58 N. J. Eq. 180.

**The Mental Capacity of an Insured Member** of a beneficial society at the time of designating a new beneficiary may be questioned by the original beneficiary. *Grand Lodge, etc., v. McGrath*, 133 Mich. 626.

**10. Statute Passed After Original Designation but Before Change of Beneficiary.** — A statute passed intermediate the issuance of a benefit certificate and a change in designation of the beneficiary is controlling as to the rights of the new beneficiary. *Grand Lodge, etc., v. McKinstry*, 67 Mo. App. 82.

**1001. 7. Policy Generally Assignable.** — *Manhattan L. Ins. Co. v. Hennessy*, (C. C. A.) 99 Fed. Rep. 64; *Steele v. Gatlin*, 115 Ga. 929; *Farmers, etc., Bank v. Johnson*, 118 Iowa 282; *King v. Cram*, 185 Mass. 103; *Reed v. Provident Sav. L. Assur Soc.*, 36 N. Y. App. Div. 250.

**1002.** *b. METHODS OF DISPOSITION*—(2) *Pledge as Collateral*.—See note 4.

Surplus After Payment of Debtor Belongs to Pledgor.—See note 5.

**1004.** (4) *Gift*.—See note 9.

**1005.** See note 1.

*c. EXERCISE OF THE RIGHT OF DISPOSITION*—(1) *Insurer's Consent*—Effect of Failure to Obtain Consent.—See notes 2, 4.

A Provision Requiring Notice.—See note 6.

Waiver as to Form of Assignment.—See note 7.

**1006.** (2) *Manner of Exercise*—Writing Not Always Essential.—See notes 1, 2.

No Delivery—Direction to Company—Intention.—See note 3.

Delivery Not Always Necessary.—See notes 4, 6.

Where Assignment in Writing—No Particular Form Necessary.—See note 7.

**1007.** See note 1.

**1002.** 4. *Assignment as Collateral Valid*.—*Embry v. Harris*, 107 Ky. 61; *Corcoran v. Mutual L. Ins. Co.*, 183 Pa. St. 443; *Herr v. Reinehl*, 209 Pa. St. 483; *Dusenberry v. Mutual L. Ins. Co.*, 188 Pa. St. 454, upholding an assignment by a wife of her beneficial interest as security for her husband's debt.

5. *Creditor Entitled to Amount of Debt Only*.—*Widaman v. Hubbard*, 88 Fed. Rep. 806; *Culver v. Guyer*, 129 Ala. 602; *Morris v. Georgia Loan, etc., Banking Co.*, 109 Ga. 12; *Barbour v. Larue*, 106 Ky. 546; *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 318; *Roanoke First Nat. Bank v. Terry*, 99 Va. 194.

**1004.** 9. *Gift Inter Vivos*.—*Hani v. Germania L. Ins. Co.*, 197 Pa. St. 276, 80 Am. St. Rep. 819; *McGlynn v. Curry*, 82 N. Y. App. Div. 431; *Lord v. New York L. Ins. Co.*, 27 Tex. Civ. App. 139, *affirmed* 95 Tex. 216, 93 Am. St. Rep. 827; *Opitz v. Karel*, 118 Wis. 527.

**1005.** 1. *Lehr v. Jones*, 74 N. Y. App. Div. 54; *Newman v. Bost*, 122 N. Car. 524.

2. *Company's Consent*.—*Wallace v. Bankers L. Assoc.*, 80 Mo. App. 102.

*Acts Constituting Consent*.—A letter from an insurance company, acknowledging the receipt of an assignment of a policy issued by it, in which letter the company states that it will place the assignment "on file for such attention as it may deserve when such policy becomes a claim," is a sufficient indication of the company's consent to the assignment. *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521.

Also a provision in a policy requiring the insurer's consent to an assignment is waived by the insurer paying the fund into court, and failure to comply with such provision cannot be set up by the assignor to invalidate the assignment. *Fuller v. Kent*, 13 N. Y. App. Div. 529. See also *John Hancock Mut. L. Ins. Co. v. White*, 20 R. I. 457.

*Want of Consent—Who May Set Up*.—Want of the insurer's consent to the assignment cannot be set up by the assured or his attacking creditors after payment by the insurer to the assignee. *Ramsay v. Myers*, 6 Pa. Dist. 468.

4. *Notice of Assignment*.—*Stoll v. Mutual Ben. L. Ins. Co.*, 115 Wis. 558.

*When Not Necessary*.—Notice, though re-

quired by the insured, is not necessary as between the assignor and assignee, the company not objecting. *Richardson v. White*, 167 Mass. 58.

6. *Notice of Assignment—Certified Copy*.—*Corcoran v. Mutual L. Ins. Co.*, 79 Pa. St. 132. 7. *Opitz v. Karel*, 118 Wis. 527.

**1006.** 1. *Assignment Need Not Be Written*.—*State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335; *Barnett v. Prudential Ins. Co.*, 91 N. Y. App. Div. 435; *McGlynn v. Curry*, 82 N. Y. App. Div. 431; *Hani v. Germania L. Ins. Co.*, 197 Pa. St. 276, 80 Am. St. Rep. 819; *Hancock v. Fidelity Mut. L. Ins. Co.*, (Tenn. Ch. 1899) 53 N. W. Rep. 181; *Opitz v. Karel*, 118 Wis. 527. But see *Steele v. Gatlin*, 115 Ga. 929.

2. *Embry v. Harris*, 107 Ky. 61.

*Pledge*.—A provision in a policy requiring an assignment to be in writing will not render ineffectual a pledge thereof not in writing. *Travelers' Ins. Co. v. Healey*, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 584, *affirmed* 25 N. Y. App. Div. 53.

3. *Colburn's Appeal*, 74 Conn. 463, 92 Am. St. Rep. 231; *Burges v. New York L. Ins. Co.*, (Tex. Civ. App. 1899) 53 S. W. Rep. 602. See also *Weaver v. Weaver*, 80 Ill. App. 370. But see *Weaver v. Weaver*, 182 Ill. 287, 74 Am. St. Rep. 173; *McDonough v. Aetna L. Ins. Co.*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 625, holding that filing assignments of a policy with the insurer company is equivalent to delivery to the assignee.

4. *Richardson v. White*, 167 Mass. 58; *McDonough v. Aetna L. Ins. Co.*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 625; *Scully's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 307.

6. *Williams v. Chamberlain*, 165 Ill. 210.

7. *Written Designation of Beneficiary as Assignment*.—In *O'Grady v. Prudential Ins. Co.*, 3 Pa. Super. Ct. 548, it was held that a delivery by the insured to his daughter of a policy of insurance together with a writing designating her as beneficiary was a sufficient assignment of the policy to enable the daughter to bring suit thereon under Act March 17, 1843, permitting the bringing of actions by assignees of life insurance policies in their own names.

**1007.** 1. *Request by Insured to Pay After His Death Held Not an Assignment*.—*Alvord v. Luckenbach*, 106 Wis. 537.

**1007.** Delivery to Representative of Assignee. — See note 3.  
Acquiescence — Estoppel. — See note 4.

(3) *Beneficiary's Consent.* — See note 8.

**1008.** *d.* EXCEPTIONS — WIFE'S POLICY — *New York Rule.* — See notes 5, 6.

Want of Consideration. — See note 8.

**3. Right to Damages and Attorneys' Fees upon Insurer's Failure to Pay Loss.** — See note 12.

**1009.** The Constitutionality of These Enactments. — See note 2.

**1012.** **4. Right to Recover Interest** — *a.* WHEN INTEREST IS ALLOWABLE. — See note 3.

**1013.** *b.* WHEN INTEREST BEGINS TO RUN. — See note 8.

Where Policy Provides for Payment a Certain Period After Furnishing Proofs of Loss. — See note 9.

**1014.** **5. Shares of Joint Beneficiaries.** — See note 9.

**1015.** In Kentucky. — See note 1.

**6. Beneficiaries' Rights as Affected by Acts and Omissions of the Insured** — *a.* REQUIREMENT OF ARBITRATION — *General Rule.* — See note 5.

**1007.** **3. Delivery to a Third Person** on behalf of and in the presence of the assignee has been held sufficient. *Stoll v. Mutual Ben. L. Ins. Co.*, 115 Wis. 538. See also *Lord v. New York L. Ins. Co.*, 27 Tex. Civ. App. 139, *affirmed* 95 Tex. 216, 93 Am. St. Rep. 827.

**4. The Administrator of the Assignor** of a life insurance policy cannot set up that the assignment was not made in compliance with the rules of the insurer. *Burges v. New York L. Ins. Co.*, (Tex. Civ. App. 1899) 53 S. W. Rep. 602.

**8. Duress.** — *Plant v. Plant*, 76 Miss. 560.

**1008.** **5. Spencer v. Myers**, 150 N. Y. 269, 55 Am. St. Rep. 675, holding that the statute, Laws 1879, c. 248, applies as well to policies issued within the state by foreign corporations as to those issued by domestic corporations.

**Policy Assigned to Wife Not Included.** — *Morschauer v. Pierce*, 64 N. Y. App. Div. 558.

A paid-up policy payable to the wife of the insured which has been substituted for one payable to the insured's representatives is but a continuation of the latter and not a "wife's policy" within the meaning of the Act of 1879, so that an assignment by the wife without the written consent of her husband is sufficient to divest her of her rights thereunder. *Dannhauser v. Wallenstein*, 169 N. Y. 199, *reversing* 52 N. Y. App. Div. 312.

**6. Fuller v. Kent**, 13 N. Y. App. Div. 529; *Sherman v. Allison*, 77 N. Y. App. Div. 49, *affirmed* (N. Y. 1904) 69 N. E. Rep. 1131.

**8. Sufficiency of Consideration — Benefit to Husband.** — *Dusenberry v. Mutual L. Ins. Co.*, 188 Pa. St. 455.

**12. Texas Act.** — *Cameron v. Barcus*, 31 Tex. Civ. App. 46; *Supreme Council, etc., v. Story*, 97 Tex. 264.

**No Penalties Imposed Where Interpleader Granted.** — *Stevens v. Germania L. Ins. Co.*, 26 Tex. Civ. App. 156.

**1009.** **2. These Acts Constitutional.** — *Washington L. Ins. Co. v. Gooding*, 19 Tex. Civ. App. 490; *Farmers Mut. Ins. Co. v. Cole*, (Neb. 1903) 93 N. W. Rep. 730.

**Statute Applying Only to One Class of Companies Unconstitutional.** — A statute (Rev. Stat. Texas

1895, art. 3071) imposing a liability on health and life insurance companies alone has been held unconstitutional as in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States. *New York L. Ins. Co. v. Smith*, (Tex. Civ. App. 1897) 41 S. W. Rep. 680.

**1012.** **3. Interest on Proceeds of Policy.** — *Grand Lodge, etc., v. Orrell*, 109 Ill. App. 422; *Knights Templars, etc., L. Indemnity Co. v. Crayton*, 209 Ill. 550.

**1013.** **8. Glaser v. New York Physicians Mut. Aid Assoc.**, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 67.

**Interest Allowed from the Death of the Insured.** — *Fanning v. Supreme Council, etc.*, 84 N. Y. App. Div. 205.

**9. Payment Certain Time After Furnishing Proofs of Death.** — *Knights Templars, etc., L. Indemnity Co. v. Crayton*, 209 Ill. 550.

**1014.** **9. Joint Beneficiaries — Equal Shares.** — *Bell v. Kinneer*, 101 Ky. 271, 42 Am. St. Rep. 410; *Tepper v. Supreme Council, etc.*, 61 N. J. Eq. 638; *Watt v. Gideon*, 8 Pa. Dist. 395, 22 Pa. Co. Ct. 499.

**In Indiana** the same rule is applied. *Bunyan v. Reed*, (Ind. App. 1904) 70 N. E. Rep. 1002.

**1015.** **1. Johnson v. Johnson**, (Ky. 1900) 57 S. W. Rep. 469. Compare *Bell v. Kinneer*, 101 Ky. 271, 72 Am. St. Rep. 410.

**5. Maxwell v. Family Protective Union**, 115 Ga. 475.

**Trustee Suing for Beneficiaries Not Bound.** — *Schiff v. Supreme Lodge, etc.*, 64 Ill. App. 341.

**Waiver by Answer.** — A by-law requiring submission of certain controversies to the society's tribunals before resorting to the courts is waived by its failure to set up in its answer noncompliance of the beneficiary with such by-law. *Wuerfler v. Grand Grove, etc.*, 116 Wis. 19, 96 Am. St. Rep. 940.

**A Denial of All Liability** by a beneficial order under a certificate constitutes a waiver of its right under a by-law to insist that the beneficiary submit her claim to the benefit to tribunals of the order before resorting to the



- 1015.** Refers to Disputes Between Members Within the Society. — See note 6.  
 Provision that Directors' Decision Shall Be Final. — See note 7.  
 When Beneficiary Bound. — See note 8.
- 1016.** *b.* PREMIUMS PAID WITH STOLEN MONEY — Recovery of Beneficiary. — See note 5.  
*c.* SUICIDE OF THE INSURED — Rule Stated. — See note 6.
- 1018.** *d.* EVIDENCE OF INSURED'S DECLARATIONS — It Is the General Rule. — See note 6.
- 1019.** See note 2.  
*Res Gestæ.* — See note 3.  
 Fraudulent Intent. — See note 4.
- 1020.** The Testimony of an Attending Physician. — See note 4.
- 1021.** 7. Rights of Beneficiary where Accrual of Policy Is Effected by His Own Act — Forfeiture by Murder. — See note 2.  
 Recovery by Insured's Representatives. — See note 5.

courts. *Wuerfler v. Grand Grove, etc.*, 116 Wis. 19, 96 Am. St. Rep. 940.

**1015.** 6. Question of Membership Not Included. — *Wuerfler v. Grand Grove, etc.*, 116 Wis. 19, 96 Am. St. Rep. 940.

7. Provision that Decision of Directors Shall Be Final. — See *Baltimore, etc., R. Co. v. Stankard*, 56 Ohio St. 224, 60 Am. St. Rep. 745, holding a similar provision not to cut off appeal to the courts. See also *Grimbley v. Harrold*, 125 Cal. 24, 73 Am. St. Rep. 19.

8. Beneficiary Bound. — *Weigand v. Fraternities Acc. Order*, 97 Md. 443; *Hoag v. Supreme Lodge, etc.*, 134 Mich. 87; *Russell v. North American Ben. Assoc.*, 116 Mich. 699; *Cotter v. Grand Lodge, etc.*, 23 Mont. 82.

**1016.** 5. See *Dayton v. H. B. Claflin Co.*, (Supm. Ct. Tr. T.) 41 N. Y. Supp. 839, where an employer recovered the proceeds of a policy on the life of his employee, the premiums of which had been paid with money stolen from the employer.

6. No Forfeiture by Implication for Suicide — *Illinois*. — *Supreme Lodge, etc., v. Kutscher*, 72 Ill. App. 462.

*Iowa*. — *Parker v. Des Moines L. Assoc.*, 108 Iowa 117; *Seiler v. Economic L. Assoc.*, 105 Iowa 87.

*Minnesota*. — *Robson v. United Order of Foresters*, (Minn. 1904) 100 N. W. Rep. 381.

*Nebraska*. — *Supreme Lodge, etc., v. Underwood*, (Neb. 1902) 92 N. W. Rep. 1051.

*New Jersey*. — *Campbell v. Supreme Conclave, etc.*, 66 N. J. L. 274, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1016.

*Pennsylvania*. — *Morris v. State Mut. L. Assur. Co.*, 183 Pa. St. 563.

*Wisconsin*. — *Patterson v. Natural Premium Mut. L. Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 899, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1016.

But see *Hopkins v. Northwestern L. Assur. Co.*, 94 Fed. Rep. 729; *Ritter v. Mutual L. Ins. Co.*, 169 U. S. 139; *Mooney v. Ancient Order, etc.*, 114 Ky. 950.

**Subsequent By-law.** — Where no mention of suicide is made in a contract of insurance with a beneficial society, but the member seeking insurance agrees to be bound by subsequently enacted by-laws, a subsequently enacted by-law declaring suicide a cause of forfeiture of the benefit is binding on the insured and his bene-

ficiary. *Shipman v. Protected Home Circle*, 174 N. Y. 398.

**1018.** 6. Beneficiary Not Affected by Remote Acts and Declarations of the Insured. — *Callies v. Modern Woodmen of America*, 98 Mo. App. 521.

**Declaration Subsequent to Assignment.** — A declaration of the assignor of a life-insurance policy made subsequently to the assignment is not admissible against the assignee. *Barnett v. Prudential Ins. Co.*, 91 N. Y. App. Div. 435.

**To Show False Statement Intentionally Made.** — Where there is independent proof tending to show falsity of the statements in the application, evidence of declarations of the insured made a year prior to the application is admissible to show his knowledge of the falsity of answers therein. *McGowan v. Supreme Ct.*, etc., 104 Wis. 173.

**1019.** 2. Declarations After Issue of Certificate. — *Callies v. Modern Woodmen of America*, 98 Mo. App. 521; *Foxhever v. Order of Red Cross*, 24 Ohio Cir. Ct. 56.

3. *Res Gestæ.* — *Sutcliffe v. Iowa State Traveling Men's Assoc.*, 119 Iowa 220, 97 Am. St. Rep. 298.

4. International Misstatement of Age. — *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 64 Am. St. Rep. 715.

**1020.** 4. See *Sutcliffe v. Iowa State Traveling Men's Assoc.*, 119 Iowa 220, 97 Am. St. Rep. 298; *McGowan v. Supreme Ct.*, etc., 104 Wis. 173.

**1021.** 2. Forfeiture by Murder. — *Supreme Lodge, etc., v. Menkhausen*, 209 Ill. 277, 101 Am. St. Rep. 239; *Schmidt v. Northern L. Assoc.*, 112 Iowa 41.

5. Recovery by the Heirs of the Insured has been allowed in a case where the assured was assassinated by the beneficiary. *Standard L. Assur. Co. v. Trudeau*, 9 Quebec Q. B. 499, affirmed 31 Can. Sup. Ct. 376.

The same rule is applied in other jurisdictions. *Supreme Lodge, etc., v. Menkhausen*, 209 Ill. 277, 101 Am. St. Rep. 239; *Schmidt v. Northern L. Assoc.*, 112 Iowa 41. See also *New York L. Ins. Co. v. Davis*, 96 Va. 737.

**Benefit Certificate** — *Illinois*. — On the murder of a member of a beneficial society by the beneficiary, those persons may recover the benefit who are entitled thereto on failure or disqualification of the designated beneficiary. **Su-**

**1023. 8. Relative Rights of Beneficiaries and Creditors—***a. AT COMMON LAW—Endowment Policies.*—See note 3.

*b. UNDER THE STATUTES—What Persons Included.*—See note 8.

**1024. Liberal Construction.**—See note 2.

*Applicable to Mutual Insurance.*—See note 4.

*Insured Himself the Beneficiary.*—See note 6.

*Subject to Claims of Beneficiary's Creditors.*—See note 11.

**1025. VI. BENEFICIARIES BY ASSIGNMENT—1. Who May Become Assignees—***a. PREVAILING RULE.*—See note 3.

**1028. b. CONTRARY DOCTRINE—(1) In General.**—See note 2.

preme Lodge, etc., *v. Menkhausen*, 209 Ill. 277, 101 Am. St. Rep. 239.

**1023. 3.** See *Studebaker Bros. Mfg. Co. v. Welch*, 51 Neb. 228, holding that proceeds of an endowment policy received by the wife of the insured while the latter was solvent is not subject to the claims of his creditors on his subsequently becoming insolvent; *distinguishing* *Talcott v. Field*, cited in the original note.

**8. Statutes Protecting Rights of Beneficiaries—United States.**—*Masonic Mut. L. Assoc. v. Paisley*, 111 Fed. Rep. 32.

*Connecticut.*—*Miles v. Odd Fellows' Mut. Aid Assoc.*, 76 Conn. 132.

*Georgia.*—*Brooke v. Morris*, 111 Ga. 879.

*Iowa.*—*Larrabee v. Palmer*, 101 Iowa 132. See also *Murdy v. Skyles*, 101 Iowa 549, 63 Am. St. Rep. 411.

*Kentucky.*—*Morehead v. Mayfield*, 109 Ky. 51.

*Maine.*—Statute construed in *Pulsifer v. Hussey*, 97 Me. 434.

*Mississippi.*—*Dobbs v. Chandler*, (Miss. 1904) 36 So. Rep. 388.

*Missouri.*—*Pietri v. Seguenot*, 96 Mo. App. 258; *Sternberg v. Levy*, 159 Mo. 617, *reversing* 76 Mo. App. 590.

*New York.*—*Kittel v. Domeyer*, 175 N. Y. 205.

*Ohio.*—*In re Andress*, 6 Ohio Dec. 174, 5 Ohio N. P. 253.

*Pennsylvania.*—*Shafer's Estate*, 8 Pa. Dist. 221.

**Benefits Already Paid** to the beneficiary are exempt from payment of the deceased's debts as well as benefits not yet paid. *Ettenson v. Schwartz*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 669.

**1024. 2.** *Cook v. Allee*, 119 Iowa 226; *Ellison v. Straw*, 119 Wis. 502.

**4.** *Klinckhamer Brewing Co. v. Cassman*, 12 Ohio Cir. Dec. 141, 21 Ohio Cir. Ct. 465.

**Right to Change Beneficiary Not Affected.**—The right of the insured to change the beneficiary is not affected by statutes providing that funds payable to a wife as beneficiary are to be exempt from the debts of the insured. *Strike v. Wisconsin Odd Fellows Mut. L. Ins. Co.*, 95 Wis. 583.

**6.** *Murdy v. Skyles*, 101 Iowa 549, 63 Am. St. Rep. 411.

**Dividend Accumulations** payable to the insured are not within the statutes exempting proceeds of life-insurance policies payable to the wife of the insured from payment of the latter's debts. *Ellison v. Straw*, 119 Wis. 502.

**11.** *Amberg v. Manhattan L. Ins. Co.*, 171 N.

Y. 314; *Klinckhamer Brewing Co. v. Cassman*, 12 Ohio Cir. Dec. 141, 21 Ohio Cir. Ct. 465, on appeal from 9 Ohio Dec. 599. See also *Murdy v. Skyles*, 101 Iowa 549, 63 Am. St. Rep. 411. But see *Emmert v. Schmidt*, 65 Kan. 31.

**Not Subject to Beneficiary's Debts.**—By section 1805 of the Iowa Code it is provided that "the avails of all policies of life or accident insurance payable to the surviving widow shall be exempt from liability from all debts of such beneficiary contracted prior to the death of the assured." *Cook v. Allee*, 119 Iowa 226. See also *Ellison v. Straw*, 116 Wis. 207.

**1025. 3. Prevailing Rule—Assignee Need Not Have Insurable Interest—United States.**—*Widaman v. Hubbard*, 88 Fed. Rep. 806; *Gordon v. Ware Nat. Bank*, (C. C. A.) 132 Fed. Rep. 444.

*Illinois.*—*Moore v. Chicago Guaranty Fund L. Soc.*, 178 Ill. 202, *affirming* 76 Ill. App. 433.

*Iowa.*—*Farmers, etc., Bank v. Johnson*, 118 Iowa 282.

*Massachusetts.*—*Brown v. Greenfield L. Assoc.*, 172 Mass. 498; *King v. Cram*, 185 Mass. 103; *Dixon v. National L. Ins. Co.*, 168 Mass. 48.

*Nebraska.*—*Chamberlain v. Butler*, 61 Neb. 730, 87 Am. St. Rep. 478.

*New Hampshire.*—*Mechanicks Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650.

*New York.*—*Steinback v. Diepenbrock*, 158 N. Y. 24, 70 Am. St. Rep. 424; *McDonough v. Aetna L. Ins. Co.*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 625; *Reed v. Provident Sav. L. Assur. Soc.*, 36 N. Y. App. Div. 250; *Fuller v. Kent*, 13 N. Y. App. Div. 529.

*Oregon.*—*Brett v. Warnick*, 44 Oregon 511, 102 Am. St. Rep. 639.

*South Carolina.*—*Crosswell v. Connecticut Indemnity Assoc.*, 51 S. Car. 103.

*Tennessee.*—*Clement v. New York L. Ins. Co.*, 101 Tenn. 22, 70 Am. St. Rep. 650, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1025.

See also *Clogg v. McDaniel*, 89 Md. 416. But see *Thornburg v. Aetna L. Ins. Co.*, 30 Ind. App. 682, holding an insurable interest of an assignee in the life of the insured necessary, and *Quinn v. Catholic Knights*, 99 Tenn. 80, holding void an assignment to one not having an insurable interest and who paid the premiums on the policy.

**1028. 2. Minority Rule—Insurable Interest Requisite to Recover Full Amount of Policy.**—*Manhattan L. Ins. Co. v. Hennessy*, (C. C. A.) 99 Fed. Rep. 64; *Schlamp v. Berner*, (Ky. 1899) 51 S. W. Rep. 312; *Hatch v. Hatch*, (Tex. Civ. App. 1904) 80 S. W. Rep. 411; *Wilton v. New*

**1028.** Mutual Benefit Certificates — Michigan. — See note 3.

**1029.** (2) *Criticisms of the Doctrine* — See note 8.

**1030.** (3) *Qualifications of the Doctrine* — (a) Effect of Assignment to One Without Interest — Who May Object. — See note 1.

(b) Assignee Without Interest Entitled to Reimbursement. — See note 5.

**1031.** Assignee Entitled to Interest. — See note 2.

**2. Rights and Liabilities of Assignees — a. IN GENERAL — Subject to Equities.** — See note 6.

**1032.** Right of Survivorship. — See note 1.

Amount of Recovery. — See note 7.

**1033.** b. RIGHT OF ACTION. — See note 6.

**1034.** BENEFIT. — See note 2.

**1038.** BENEVOLENT. — See note 5.

York L. Ins. Co., (Tex. Civ. App. 1904) 78 S. W. Rep. 403.

**1028.** 3. Right as to Mutual Benefit Certificate. — See *Quinn v. Catholic Knights*, 99 Tenn. 80.

**1029.** 8. *Chamberlain v. Butler*, 61 Neb. 730, 87 Am. St. Rep. 478.

**1030.** 1. Insurer Alone May Object. — *Groff v. Mutual L. Ins. Co.*, 92 Ill. App. 207; *Clogg v. McDaniel*, 89 Md. 416; *Mechanicks Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650; *Ramsay v. Myers*, 6 Pa. Dist. 468.

**5. Expenses and Consideration Money Must Be Repaid.** — *Mutual L. Ins. Co. v. Richards*, 99 Mo. App. 88; *Wheeland v. Atwood*, 42 W. N. C. (Pa.) 178; *Quinn v. Catholic Knights*, 99 Tenn. 80; *New York L. Ins. Co. v. Davis*, 96 Va. 737; *Tate v. Commercial Bldg. Assoc.*, 97 Va. 74, 75 Am. St. Rep. 770.

**1031.** 2. Assignee Entitled to Interest. — *Wheeland v. Atwood*, 42 W. N. C. (Pa.) 178.

**6.** *Culmer v. American Grocery Co.*, 21 N. Y. App. Div. 556; *Westbury v. Simmons*, 57 S. Car. 467. See also *Brown v. Equitable L. Assur. Soc.*, 75 Minn. 412, holding that the second assignee of a policy of life insurance took subject to the equities existing between the insured and the first assignee; but on rehearing, 75 Minn. 427, holding that the insured by his laches was estopped to set up his equities.

**Assignment Defeated — Recovery by Assignee of Premiums Paid.** — Where an assignment, valid when made, is defeated by a subsequent event, the assignee is entitled to be reimbursed out of the proceeds of the policy for premiums paid by him with interest thereon from the date of payment. *Stevens v. Germania L. Ins. Co.*, 26 Tex. Civ. App. 156.

**Rights of Equitable Assignee.** — Where a beneficiary in a policy issued on her husband's life assigns her interest therein with the understanding that her son is to be substituted as beneficiary by the husband, but the latter instead has himself made beneficiary, his personal representatives, after his death, hold the proceeds as trustees for the son. *Cockrell v. Cockrell*, 79 Miss. 569.

**1032.** 1. Husband and Wife — Joint Assignees. — A husband and wife, to whom a policy of insurance has been assigned, take as joint assignees with the right of survivorship so that an assignee of the wife may recover the proceeds of the policy collected by the husband's administrator. *Arn v. Arn*, 81 Mo. App. 133.

**7. Assignment as Security Only.** — An assignee of an insurance policy under an assignment absolute on its face but in fact intended only as security for a debt owing by the insured to the assignee, must, after reimbursing himself for his outlay and money loaned, turn over the proceeds of the policy to the representative of the insured. *Jones v. New York L. Ins. Co.*, 15 Utah 522.

**Recovery Limited by Policy — Collateral Security.** — A provision of a policy limiting recovery by an assignee thereof to the amount of the indebtedness of the assignor to the assignee together with payments made by the latter to the company applies to an assignment as collateral security as well as to an absolute assignment. *McQuillan v. Mutual Reserve Fund L. Assoc.*, 112 Wis. 665, 88 Am. St. Rep. 986.

**1033.** 6. Statutes. — *Farmers, etc., Bank v. Johnson*, 118 Iowa 282. See also *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521.

**1034.** 2. Trust — Payment of Debts. — See *In re Pollard*, (1896) 2 Ch. 552.

**Absolute Title — Benefit and Support.** — See *Mitchell v. Van Allen*, 75 N. Y. App. Div. 297; *Winthrop Co. v. Clinton*, 196 Pa. St. 472, 79 Am. St. Rep. 729.

**1038.** 5. Charities — Benevolent and Charitable Distinguished — Void. — *Mason v. Perry*, 22 R. I. 475; *Murdock v. Bridges*, 91 Me. 124.

Valid. — *In re Murphy*, 184 Pa. St. 310.

**Taxation — Exemption.** — A corporation chartered to disseminate theosophical ideas held not a benevolent institution under *Massachusetts* statute. *New England Theosophical Corp. v. Boston*, 172 Mass. 62.

# BENEVOLENT OR BENEFICIAL ASSOCIATIONS.

BY O. D. ESTEE.

**1043. I. DEFINITION AND DISTINCTIONS.**— See note 1.

The Essential Difference. — See note 5.

**1048. IV. ORGANIZATION — 2. When Incorporated — c. CHARTER AND ARTICLES** — (1) *In General.* — See note 4.

**1050. d. GENERAL LAWS** — Compliance with the General Laws of the State. — See note 1.

**1055. 3. When Unincorporated — b. STATUS OF UNINCORPORATED ASSOCIATIONS** — (1) *Whether Partnerships.* — See note 6.

**1056. (2) Associate Purposes.** — See note 2.

**1059. (4) Amendment and Repeal of Articles.** — See note 1.

**V. GOVERNMENT — 1. Constitution.** — See note 2.

The Constitution Is the Fundamental Law. — See note 5.

**1060. 2. By-laws — b. POWER TO ENACT** — (1) *Corporate Bodies.* — See note 4.

**1061. c. LIMITATIONS OF POWER** — (1) *Existing Laws — Public Policy* — See notes 1, 2.

**1062. (2) Must Be Consistent with Associate Purposes.** — See notes 1, 4.

**(3) Must Be Reasonable.** — See note 7.

**1043. 1. A Workmen's Benefit Society Is Not a Commercial Body** where the object of such society is to pay to its members a certain sum periodically in case of illness, such sum to be secured by regular contributions of the members. *Vincent v. Gaudry*, 9 Quebec Super. Ct. 415.

**5. State v. Dunn**, 134 N. Car. 663, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1043, and supporting the whole text paragraph.

**1048. 4. Charter and Articles the Measure of Powers.** — Acts not within the scope of the charter of a beneficial association are *ultra vires* and void. *Banker's Union, etc., v. Crawford*, 67 Kan. 449, 100 Am. St. Rep. 465.

**1050. 1. Compliance with General Laws.** — *Knights of Maccabees, etc., v. Nitsch*, (Neb. 1903) 95 N. W. Rep. 626.

**1055. 6.** See *Jones v. Thistle Lodge*, 10 Kulp (Pa.) 52.

Under the Pennsylvania Statute providing that members of organizations paying periodical or funeral benefits shall not be individually liable, but that such payments shall be payable only out of the treasury of the organization (Act Pa. April 28, 1876), it has been held that the bodies described are placed "in a middle ground between *quasi* partnerships and corporations." *Fletcher v. Gawanese Tribe, etc.*, 9 Pa. Super. Ct. 393.

**1056. 2. Martin v. Northern Pac. Beneficial Assoc.**, 68 Minn. 521, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1055.

**1059. 1. Provision for Alteration or Repeal Contained in Articles.** — Amendments must be made strictly in accordance with the provisions therefor in order to be binding. *Deuble v. Grand Lodge, etc.*, 66 N. Y. App. Div. 323, affirmed 172 N. Y. 665.

**2. Constitution of Association.** — See *Kane v. Shields*, 167 Mass. 392.

**5. Emmons v. Hope Lodge No. 21, etc.**, 1 Marv. (Del.) 187; *Kocher v. Supreme Council, etc.*, 65 N. J. L. 649; *Cunniff v. Jamour*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 729.

**Alteration of Constitution.** — Where a beneficiary certificate contains a condition, agreed to by the beneficiary, that such beneficiary is bound by the constitution, rules, and regulations of the order then existing or that may thereafter be enacted, an alteration in the constitution affecting the amount to be paid to the beneficiary is binding upon him. *Doidge v. Dominion Council*, 4 Ont. L. Rep. 423.

**1060. 4. Farmers' Mut. Hail Ins. Assoc. v. Slattery**, 115 Iowa 410, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060.

**1061. 1. Must Not Violate United States Constitution.** — *Mazurkiewicz v. St. Adelbertus Aid Soc.*, 127 Mich. 145.

**By-laws and Rules Inconsistent with the Ontario Insurance Act** will be modified and controlled by such act. *Re Harrison*, 31 Ont. 314; *Gillie v. Young*, 1 Ont. L. Rep. 368.

**2. Public Policy.** — *Mazurkiewicz v. St. Adelbertus Aid Soc.*, 127 Mich. 145; *L'Union St. Joseph, etc., v. Cabana*, 10 Quebec K. B. 324.

**1062. 1. Must Be Within Purposes of Society.** — See *Hart v. Adams Cylinder, etc., Press Printer's Assoc.*, 69 N. Y. App. Div. 578.

**4. By-laws Forfeiting Benefits Illegal.** — See *Bottjer v. Supreme Council, etc.*, 78 N. Y. App. Div. 546.

**7. Unreasonable By-laws Are Invalid.** — *Mazurkiewicz v. St. Adelbertus Aid Soc.*, 127 Mich. 145; *Swaine v. Miller*, 72 Mo. App. 446; *Zinna v. Saveria Friscia Soc.*, (Supm. Ct. App. T.) 88

**1063.** See note 1.

**1064.** (4) *Must Operate Uniformly.* — See note 3.

**1065.** *d.* ALTERATION AND AMENDMENT — Power Implied. — See note 1.

Limitations. — See notes 3, 4.

**1066.** The True Criterion. — See notes 1, 2.

**1068.** *e.* CONSTRUCTION OF BY-LAWS — Rights of Members. — See note 2.

**1069.** 3. Officers — *b.* POWERS. — See note 3.

**1071.** *e.* AMOTION. — See note 2.

**1072.** 4. Jurisdiction of the Association — *b.* SUSPENSION AND EXPULSION — (1) *For Specified Causes.* — See note 6.

(2) *For Causes Not Specified.* — See note 10.

**1073.** *c.* NOTICE OF PROCEEDINGS. — See notes 2, 3.

N. Y. Supp. 404; *Graftstrom v. Frost Council*, No. 21, etc., (Supm. Ct. App. T.) 19 Misc. (N. Y.) 180; *Bottjer v. Supreme Council*, etc., 78 N. Y. App. Div. 546; *Kennedy v. Local Union No. 726*, 75 N. Y. App. Div. 243; *Hart v. Adams Cylinder*, etc., Press Printers' Assoc., 69 N. Y. App. Div. 578; *L'Union St. Joseph*, etc., *v.* Cabana, 10 Quebec K. B. 324.

**1063.** 1. Objects of Association to Be Considered. — *Cowan v. New York Caledonian Club*, 46 N. Y. App. Div. 288.

**By-laws Held Reasonable.** — A by-law imposing the penalty of suspension for a definite period because of default in the timely payment of dues which the member has obligated himself to pay is not unreasonable. *Rubino v. Fraterna Assoc.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 339.

**1064.** 3. Uniformity of Operation Essential. — *Pinsler v. Protestant Board*, etc., 23 Quebec Super. Ct. 365, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1064; *Lavigueur v. L'Union*, etc., 16 Quebec Super. Ct. 588.

**1065.** 1. Power to Alter Implied from Power to Enact. — *Covenant Mut. L. Assoc. v. Kentner*, 188 Ill. 431, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1064 [1065].

3. Must Follow Method Prescribed in Constitution. — *In re Ontario Ins. Act*, 31 Ont. 154.

4. No Impairment of Vested Rights. — *Tebo v. Supreme Council*, etc., 89 Minn. 3; *Zinna v. Saveria Friscia Soc.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 404; *Marshall v. Pilots' Assoc.*, 206 Pa. St. 182.

**1066.** 1. A Contrary View. — *Hipple v. Supreme Ruling*, etc., 10 Pa. Dist. 318, 26 Pa. Co. Ct. 174, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1065, and following the *Pennsylvania* case set out in the original note.

2. Agreement of Member — Acquiescence. — *Richmond v. Supreme Lodge*, etc., 100 Mo. App. 8; *Chambers v. Supreme Tent*, etc., 200 Pa. St. 244, 86 Am. Rep. 716, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1065 [1066]. See further the title BY-LAWS, 97. 1 *et seq.*

Where the original contract provides for the alteration of the rules, a member is bound by any subsequent alteration that is made within the power thus conferred. *Pain v. Société St. Jean Baptiste*, 172 Mass. 319, 70 Am. St. Rep. 287.

**Suicide.** — *Knights of Maccabees*, etc., *v.* Nitsch, (Neb. 1903) 95 N. W. Rep. 626. See

also *Eversberg v. Supreme Tent*, etc., (Tex. Civ. App. 1903) 77 S. W. Rep. 246.

**1068.** 2. *Warwick v. Supreme Conclave*, etc., 107 Ga. 115, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1067, 1068, and supporting the whole text paragraph.

**1069.** 3. Power to Waive By-laws. — *Kocher v. Supreme Council*, etc., 65 N. J. L. 649, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069.

**1071.** 2. Removal of Officers. — See *Tanner v. Ranken*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 488.

**1072.** 6. Conviction of Felony. — *Berkhout v. Supreme Council*, etc., 62 N. J. L. 103.

10. Excessive Punishment. — *Weiss v. Musical Mut. Protective Union*, 189 Pa. St. 446, 69 Am. St. Rep. 820.

**1073.** 2. Proper Notice and Right to Be Heard. — *Supreme Lodge*, etc., *v.* Taylor, (Ala. 1897) 24 So. Rep. 247; *Doljanin v. Austrian Benev. Soc.*, 137 Cal. 165; *Rogers v. Union Benev. Soc.*, 111 Ky. 598; *Slater v. Supreme Lodge*, etc., 76 Mo. App. 387; *Seehorn v. Supreme Council*, etc., 95 Mo. App. 233; *Supreme Lodge*, etc., *v.* Eskholme, 59 N. J. L. 255; *St. Patrick's Alliance of America v. Byrne*, 59 N. J. Eq. 26; *Schmidt v. Social Turnverein*, 6 N. J. L. J. 57; *Fay v. Supreme Tent*, etc., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 427; *Kohler v. Klein*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 353; *Rhule v. Diamond Colliery Acc. Fund*, 5 Lack. Leg. N. (Pa.) 101; *Langnecker v. Grand Lodge*, etc., 111 Wis. 279.

**Service of Notice.** — Where the constitution of a beneficial association provides that a member must be personally notified by a messenger in case of a trial for expulsion, failure to give such notice is not excused by the fact that the member has gone out of the country. *Zangen v. Krakauer Young Men's Assoc. No. 1*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 332.

**Suspension for Nonpayment of Dues.** — See *Weinberg v. Independent Order*, etc., (Supm. Ct. App. T.) 36 Misc. (N. Y.) 205.

**Requirements of By-laws Must Be Observed.** — Where the by-laws of an association provide that an accused member shall have the right to cross-examine his accusers on a trial for expulsion from membership, a failure to observe this requirement renders the expulsion invalid. *Modern Woodmen of America v. Deters*, 65 Ill. App. 368.

3. Failure to Object to the Sufficiency of a

**1074.** *d.* PROPERTY RIGHTS OF MEMBERS — Right to Sue. — See notes 2, 3, 4.

**1075.** 5. Jurisdiction of Courts — *a.* INTERFERENCE WITH ASSOCIATE TRIBUNALS. — See note 1.

**1076.** — See notes 1, 2.

**1077.** Matters of Discipline. — See note 1.

**Notice.** — *Moore v. National Council, etc.*, 65 Kan. 452.

**1074.** 2. Restrictions on Right to Sue. — *Myers v. Jenkins*, 63 Ohio St. 101, 81 Am. St. Rep. 613; *Pepin v. Societe St. Jean Baptiste*, 23 R. I. 81, holding that an agreement in advance to submit all matters in dispute that may arise to the tribunals within the association and to abide by their decision is invalid as against public policy, since it ousts the courts of their jurisdiction.

**3. Majority Rule.** — *Robinson v. Templar Lodge*, No. 17, 117 Cal. 370, 59 Am. St. Rep. 193; *Berlin v. Eureka Lodge*, No. 9, etc., 132 Cal. 294; *Delaware Lodge*, No. 1, *v. Allmon*, 1 Penn. (Del.) 160; *Roxbury Lodge*, No. 184, etc., *v. Hocking*, 60 N. J. L. 439; *Smith v. Ocean Castle*, No. 11, etc., 59 N. J. L. 198; *Schryver v. Columbia Lodge*, etc., 2 Ohio Cir. Dec. 238; *Dahmé v. Supreme Ct. of Foresters*, 21 Quebec Super. Ct. 439.

**Appeal a Condition Precedent.** — *Johansen v. Blume*, 53 N. Y. App. Div. 526.

**4. Power Not Reserved — Benefits.** — Voluntary Relief Dept., etc., *v. Spencer*, 17 Ind. App. 123, following the case set out in the original note.

**Provisions Will Be Strictly Construed.** — *Grand Lodge*, etc., *v. Orrell*, 97 Ill. App. 246.

**Appeal.** — Where the constitution and by-laws of a beneficial association require a claimant of a benefit to submit his case to an associate tribunal, but do not expressly require him to appeal from an adverse decision as a condition precedent to maintaining an action at law, such action may be commenced at once after an unfavorable decision by the lower associate tribunal. *Supreme Lodge*, etc., *v. Dey*, 58 Kan. 283.

**1075.** 1. To the Same Effect. — *Crichton v. Dalry Myrtle Lodge*, Sc. Ct. of Sess. 6 F. 398; *Baker v. Forest City Lodge*, 28 Ont. 238, affirming 24 Ont. App. 585; *Re Supreme Legion*, etc., 29 Ont. 708; *Moore v. National Council*, etc., 65 Kan. 452; *Derby v. Great Hive*, etc., (Mich. 1904) 98 N. W. Rep. 23; *Froelich v. Musicians' Mut. Ben. Assoc.*, 93 Mo. App. 383; *Slater v. Supreme Lodge*, etc., 88 Mo. App. 177; *Myers v. Jenkins*, 63 Ohio St. 101, 81 Am. St. Rep. 613; *Sanderson v. Brotherhood of Railroad Trainmen*, 204 Pa. St. 182; *Myers v. Fritchman*, 6 Pa. Super. Ct. 580; *Bartlett v. L. Bartlett*, etc., Co., 116 Wis. 450.

**1076.** 1. The Procedure Prescribed by the Constitution. — *Berlin v. Eureka Lodge*, No. 9, etc., 132 Cal. 294; *State v. Grand Lodge*, etc., 70 Mo. App. 456; *Langnecker v. Grand Lodge*, etc., 111 Wis. 279.

**Notice.** — A member expelled without notice may appeal to the courts. *Kohler v. Klein*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 353.

**2. Associate Remedy — California.** — *Lawson v. Hewell*, 118 Cal. 613; *Robinson v. Templar*

*Lodge*, No. 17, 117 Cal. 370, 59 Am. St. Rep. 193; *Berlin v. Eureka Lodge*, No. 9, etc., 132 Cal. 294; *Schou v. Sotoyome Tribe*, No. 12, etc., 140 Cal. 254.

*Illinois.* — *People v. Grand Lodge*, etc., 166 Ill. 71.

*Iowa.* — *Finnerty v. Supreme Counsel*, etc., 115 Iowa 398, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1076.

*New Hampshire.* — *Mullen v. Order of Foresters*, 70 N. H. 327.

*New Jersey.* — *Grand Castle*, etc., *v. Bridgeton Castle*, No. 13, etc., (N. J. 1898) 40 Atl. Rep. 849.

*New York.* — *Shirtcliffe v. Wall*, 68 N. Y. App. Div. 375.

*Pennsylvania.* — *Brubaker v. Denlinger*, 17 Lanc. L. Rev. 212; *Miller v. Wolf*, 18 Lanc. L. Rev. 105; *Toll v. Crimean*, 13 Montg. Co. Rep. (Pa.) 33.

*Rhode Island.* — *Whitty v. McCarthy*, 20 R. I. 792; *Wood v. What Cheer Lodge*, 20 R. I. 795.

*Wisconsin.* — *Loeffler v. Modern Woodmen of America*, 100 Wis. 79.

*Canada.* — *Godin v. Independent Order of Foresters*, 14 Quebec Super. Ct. 12.

**Failure to Appeal — Waiver.** — Where a member of a benevolent society fails to exercise his right of appeal to a higher tribunal within the association and acquiesces in a decision denying a sick benefit, the widow of such member cannot recover. Where, however, the society has rendered no decision as to the status of the member, his widow may maintain an action for the benefits to which she is entitled as the widow of "a member in good standing." *Dale v. Weston Lodge*, 24 Ont. App. 351.

**Inadequate Relief — Property Rights.** — Where property rights are involved and the procedure in the associate tribunals is unreasonably burdensome, a member may resort to the courts in the first instance. *Brown v. Supreme Ct.*, etc., 66 N. Y. App. Div. 259, affirming 176 N. Y. 132; *Weiss v. Musical Mut. Protective Union*, 189 Pa. St. 446, 69 Am. St. Rep. 820.

**Limitation of Rule.** — Where the right to appeal is not absolute, but depends on the favor of some individual, a member may resort to the courts at once without seeking to appeal within the order from the unfavorable decision of the lower tribunal. *Holomany v. National Slavonic Soc.*, 39 N. Y. App. Div. 573.

**1077.** 1. Effects of Lawful Discipline. — *Josich v. Austrian Benev. Soc.*, 119 Cal. 74.

Courts are reluctant to interfere with the disciplinary powers of beneficial associations. *People v. Grand Lodge*, etc., 166 Ill. 71.

In matters of discipline, not involving property rights, a party must exhaust his means of seeking redress inside the order, before appealing to the courts. *Roxbury Lodge*, No. 184, etc., *v. Hocking*, 60 N. J. L. 439.

- 1077.** *b.* RESTORATION TO MEMBERSHIP — Property Rights. — See note 3. Privileges, Rights, and Immunities Generally. — See note 4.
- 1078.** See note 1.
- 1079.** VI. MEMBERSHIP — 2. Admission — Requirements — Estoppel. — See note 1.
- 1080.** Fraud on the Part of the Applicant. — See notes 1, 3.
- 1081.** 3. Contract of Membership — *b.* WHAT THE CONTRACT INCLUDES — (1) *Constitution and By-laws.* — See note 2.
- 1084.** *c.* EFFECT OF CONTRACT — (2) *Subsequent Acts — Retroactive By-laws.* — See note 3.
- (3) *Internal Regulations.* — See note 6.
- 1086.** 4. Forfeiture of Membership — *a.* GENERAL PRINCIPLES. — See notes 5, 6.

**1077. 3. An Action for Damages.**—Supporting *Ludowski v. Polish Roman Catholic Benev. Soc.*, 29 Mo. App. 337, stated in the original note, see *Slater v. Supreme Lodge, etc.*, 76 Mo. App. 387. See also *Wuerthner v. Workingmen's Benev. Soc.*, 121 Mich. 90, 80 Am. St. Rep. 477.

**Courts Will Protect Property Rights.**—Where property rights are involved, a member of a beneficial association may appeal to the courts without first appealing to the tribunals within the order, unless such a course is expressly prohibited by the constitution of the association. *Modern Woodmen of America v. Deters*, 65 Ill. App. 368; *Froelich v. Musicians' Mut Benev. Assoc.*, 93 Mo. App. 383; *Swaine v. Miller*, 72 Mo. App. 446; *Roxbury Lodge, No. 184, etc.*, *v. Hocking*, 60 N. J. L. 439; *Supreme Lodge, etc.*, *v. Eskholme*, 59 N. J. L. 255; *Fay v. Supreme Tent, etc.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 427; *Gray v. Chapter Gen.*, etc., 70 N. Y. App. Div. 155; *Myers v. Jenkins*, 63 Ohio St. 101, 81 Am. St. Rep. 613; *Benson v. Grand Lodge, etc.*, (Tenn. Ch. 1899) 54 S. W. Rep. 132; *Bartlett v. L. Bartlett, etc., Co.*, 116 Wis. 450.

**4. Reinstatement of Members.**—*Radice v. Italian-American Christopher Columbus Soc.*, 67 N. J. L. 196.

**1078. 1.** *Clark v. Wallace*, (Ky. 1898) 45 S. W. Rep. 504; *Wellenvoss v. Grand Lodge, etc.*, 103 Ky. 415.

**1079. 1. Constitutional Provisions** must be followed. *Bretzlaff v. Evangelical Lutheran St. John's Sick Ben. Soc.*, 125 Mich. 39, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079; *Mazurkiewicz v. St. Adelbertus Aid Soc.*, 127 Mich. 145, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079; *McLendon v. Woodmen of the World*, 106 Tenn. 695, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079.

**1080. 1.** *Supreme Council, etc.*, *v. Brashears*, 89 Md. 624, 73 Am. St. Rep. 244.

**False Representations as to Age.**—*Reis v. Arbeiter Unterstuetzung Verein*, No. 2, 111 Mich. 127; *Johansen v. Blume*, 53 N. Y. App. Div. 526; *Alta Friendly Soc. v. Brown*, 8 Pa. Super. Ct. 267.

**Good Faith.**—Where a person obtains admission to a benefit society by a false statement as to his age his certificate of insurance will be avoided although such statement is made in good faith. *Cerri v. Ancient Order of Foresters*, 25 Ont. App. 22, reversing 28 Ont. 111;

*Mason v. Massachusetts Ben. L. Assoc.*, 30 Ont. 716.

But where the insured's age is not material to the contract an erroneous statement in regard thereto, if made in good faith, will not affect the certificate of insurance. *Hargrove v. Royal Templars*, 2 Ont. L. Rep. 79.

**3. Waiver of Fraud.**—Where a beneficial association receives dues and treats a party as a member after full knowledge that his application contained fraudulent statements as to his physical condition, the association will be estopped from setting up that defense in an action for benefits. *Grimaldi v. Associazione Fraterna Italiana*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 745.

**1081. 2. Members Must Take Notice of Laws of Association.**—*Hayden v. Franklin L. Ins. Co.*, (C. C. A.) 136 Fed. Rep. 285, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Hass v. Mutual Relief Assoc.*, 108 Cal. 6; *Delaware Lodge, No. 1, v. Allmon*, 1 Penn. (Del.) 160; *Emmons v. Hope Lodge, No. 21, etc.*, 1 Marv. (Del.) 187; *Covenant Mut. L. Assoc. v. Kentner*, 188 Ill. 431, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Union Benev. Soc. No. 8 v. Martin*, 113 Ky. 25, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Supreme Council, etc.*, *v. Brashears*, 89 Md. 624, 73 Am. St. Rep. 244, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Bretzlaff v. Evangelical Lutheran St. John's Sick Ben. Soc.*, 125 Mich. 39, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081-1083; *Hess v. Johnson*, 41 N. Y. App. Div. 465; *Jennings v. Chelsea Div. Ben. Fund Soc.*, etc., (Supm. Ct. App. T.) 28 Misc. (N. Y.) 556; *McLendon v. Woodmen of the World*, 106 Tenn. 695, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Loeffler v. Modern Woodmen of America*, 100 Wis. 79.

**1084. 3. Contract Cannot Be Impaired by By-law.**—*Farmers' Mut. Hail Ins. Assoc. v. Slatery*, 115 Iowa 410; *Union Benev. Soc. No. 8 v. Martin*, 113 Ky. 25; *Pokrefsky v. Detroit Firemen's Fund Assoc.*, 121 Mich. 456; *McNeil v. Southern Tier Masonic Relief Assoc.*, 40 N. Y. App. Div. 581, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084.

**6. Internal Regulations.**—*Union Benev. Soc.*, No. 8 *v. Martin*, 113 Ky. 25.

**1086. 5. Forfeitures Not Favored — Intention Must be Clear.**—*Albrecht v. People's L., etc., Assoc.*, 129 Mich. 444; *Seehorn v. Supreme*

- 1086.** *b. DIFFERENCE BETWEEN FORFEITURE AND EXPULSION.* — See note 8.  
**1087.** See note 1.  
**1089.** *d. WAIVER OF FORFEITURE* — (1) *Express Waiver.* — See note 1.  
 (2) *Estoppel.* — See note 2.  
**1090.** (3) *Acceptance of Arrearages.* — See note 1.  
**1091.** *Unwarranted Acceptance.* — See note 1.  
**1093.** VII. ASSESSMENTS — 1. *Generally.* — See note 2.  
**1096.** 3. *Notice of Assessment* — *a. NECESSITY OF NOTICE* — *When Notice Necessary.* — See note 4.

Council, etc., 95 Mo. App. 233; Leahy v. Mooney, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 829; Grand Lodge, etc., v. Furman, 6 Okla. 649, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1086; Woodmen of the World v. Gilliland, 11 Okla. 384.

**1086.** 6. *Facts Must Be Satisfactorily Proved.* — Railway Pass., etc., Mut. Aid, etc., Assoc. v. Thompson, 91 Ill. App. 580; Grand Lodge, etc., v. Furman, 6 Okla. 649, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1086.

**8. Necessity for Affirmative Action.** — Warwick v. Supreme Conclave, etc., 107 Ga. 115; Independent Order of Foresters v. Haggerty, 86 Ill. App. 31; Murphy v. Independent Order, etc., 77 Miss. 830; Seehorn v. Supreme Council, etc., 95 Mo. App. 233; American Council, No. 107, etc., v. National Council, etc., 63 N. J. L. 52; Rhule v. Diamond Colliery Acc. Fund, 5 Lack. Leg. N. (Pa.) 101; Wheeler v. Lackawanna Coal Co., 5 Lack. Leg. N. (Pa.) 97.

**The New York Rule** is that a beneficiary can recover nothing if a member was in arrears at the time of his death, where the contract of membership exempts a beneficial association from liability for such a cause. Anthony v. Carl, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 200; Hess v. Johnson, 41 N. Y. App. Div. 465; Paster v. Nagelsmith, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 791; Cowan v. New York Caledonian Club, 46 N. Y. App. Div. 288; McNeil v. Southern Tier Masonic Relief Assoc., 40 N. Y. App. Div. 581; Phillips v. U. S. Grand Lodge, etc., (Supm. Ct. App. T.) 39 Misc. (N. Y.) 296.

**In Nebraska**, where the by-laws of a benevolent society provide that a member shall stand suspended on his failure to pay his dues, such failure causes a suspension without affirmative action on the part of the society. Field v. National Council, etc., 64 Neb. 226.

**In Wisconsin** it has been held that a by-law providing that if a member shall engage in certain kinds of prohibited business he shall at once forfeit all rights to benefits is self-executing and is a defense to an action to recover benefits, although the association took no affirmative action in the matter. Langnecker v. Grand Lodge, etc., 111 Wis. 279.

**1087.** 1. *Suspension of Member.* — Where the suspension of a member of a beneficial association works a forfeiture, the forfeiture does not take place till the member is legally suspended. Lewis v. Western Funeral Ben. Assoc., 77 Mo. App. 586.

**1089.** 1. *Intention to Waive a Question of Fact.* — *Re Supreme Legion*, etc., 29 Ont. 798.

**2. To Constitute a Waiver.** — Flicke v. High Ct., etc., 90 Ill. App. 344.

**1090.** 1. *Acceptance of Arrearages.* — Independent Order of Foresters v. Haggerty, 86 Ill. App. 31; Order of Chosen Friends v. Austerlitz, 75 Ill. App. 74; Campbell v. Supreme Lodge, etc., 168 Mass. 397; Lord v. National Protective Soc., 129 Mich. 335; American Council, No. 107, etc., v. National Council, etc., 63 N. J. L. 52; Gray v. Chapter Gen., etc., 70 N. Y. App. Div. 155; Wheeler v. Lackawanna Coal Co., 5 Lack. Leg. N. (Pa.) 97. See also La Société, etc., v. Moisan, 7 Quebec Q. B. 128, *reversing* 12 Quebec Super. Ct. 189, and *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.), title BENEVOLENT OR BENEFICIAL ASSOCIATIONS, but holding that in the case at bar, in view of the express provisions of the society's constitution and laws, to which the member had assented, the member's own act or default expelled him *ipso facto* from membership, and nothing but affirmative action on the part of the directors in the form of a resolution could reinstate him as a member and restore his privileges.

In *People v. Sciacca Assoc.*, 56 N. Y. App. Div. 341, where an association imposed a fine, but the member refused to pay, and the association thereafter accepted the payment of his regular dues, it was held that it was estopped from afterwards expelling the member for non-payment of his fine.

**Knowledge of Breach of Condition.** — Modern Woodmen of America v. Wieland, 109 Ill. App. 340; Supreme Lodge, etc., v. Quinn, 78 Miss. 525, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1091.

**Special Regulations as to Reinstatement.** — Acceptance of assessments after a forfeiture by reason of nonpayment will not effect a reinstatement if the constitution and by-laws of the association impose other conditions as prerequisites to such reinstatement. La Société, etc., v. Moisan, 7 Quebec Q. B. 128, *reversing* 12 Quebec Super. Ct. 189.

**1091.** 1. *No Estoppel Against Provision of By-law.* — State v. Grand Lodge, etc., 70 Mo. App. 456. See also Kimbrough v. Hoffman, 6 Pa. Super. Ct. 60.

**1093.** 2. *Constitution and By-laws to Be Followed.* — Smith v. Covenant Mut. Ben. Assoc., 16 Tex. Civ. App. 593, *citing* 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093.

**1096.** 4. *Funeral Assessment.* — A beneficial association cannot claim a forfeiture of membership from a failure to pay a funeral assessment unless the member had notice of such assessment. Reynolds v. Fidelity Lodge, 14 Pa. Super. Ct. 515.



**1097.** *b.* SUFFICIENCY OF NOTICE — If a Prescribed Form. — See note 3.

**1099.** The Manner of Giving Notice. — See note 3.

**1100.** 4. Payment of Assessments — *a.* NATURE OF LIABILITY. — See note 1.

*c.* MODE OF PAYMENT — Rules. — See note 4.

**1102.** Waiver. — See note 1.

**1108.** VIII. PAYMENT OF BENEFITS — 1. Generally — When Beneficiary Becomes Entitled. — See note 2.

**1109.** Performance of Conditions Precedent. — See notes 1, 2.

**1097.** 3. Notice Must Follow Prescribed Form. — Cronin *v.* Supreme Council, etc., 199 Ill. 228, 93 Am. St. Rep. 127, quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1097.

**Notice in Conflict with By-laws.** — A notice is invalid which requires a member to pay an assessment before it is due and within a shorter time than that prescribed in the by-laws. Railway Pass., etc., Mut. Aid, etc., Assoc. *v.* Thompson, 91 Ill. App. 580. See also District Grand Lodge No. 4, etc., *v.* Menken, 67 Ill. App. 576.

**Notice with Official Seal.** — The requirement of a by-law which provides that assessment notices "shall bear the official stamp of the collector, or the seal of the council," is substantial, and the officer giving the notice has no right to dispense with it, and therefore a notice of assessment without either such stamp or seal, is invalid. Cronin *v.* Supreme Council, etc., 199 Ill. 228, 93 American State Rep. 127, reversing 101 Ill. App. 479, and quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1097.

**1099.** 3. Proof of Notice. — Distribution of the official paper of the society by a distributing agency does not prove that notice of an assessment was given to members. Actual delivery to the individual members must be shown. *In re* Ontario Ins. Act, 31 Ont. 154.

**1100.** 1. Liberty to Pay or Not. — *In re* Ontario Ins. Act, 31 Ont. 154.

**4. Payment Must Be Within Time Specified.** — Ellis *v.* Alta Friendly Soc., 16 Pa. Super. Ct. 607.

**Computation of Time — Date of Notice — Mailing.** — That the computation of time should be so made as to protect rights and prevent forfeiture, if possible, see Cronin *v.* Supreme Council, etc., 199 Ill. 228, 93 Am. St. Rep. 127, reversing 101 Ill. App. 479, and quoting 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1101.

**1102.** 1. So the Acceptance of an Order. — Where not prohibited by the constitution or by-laws, a contract to furnish supplies may be accepted in lieu of assessments. Bixby *v.* Grand Lodge, etc., 101 Iowa 505.

**1108.** 2. Payment to Be to Beneficiary Directly. — People *v.* Petrie, 191 Ill. 497, 85 Am. St. Rep. 268, quoting 3 AM. AND ENG.

ENCYC. OF LAW (2d ed.) 1108; Radiant Temple No. 2, etc., *v.* Piper, 62 N. J. Eq. 565.

**1109.** 1. Proof of Death. — Worthen *v.* Massachusetts Ben. L. Assoc., (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 437, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1109.

**Due Proof of Death Is Waived** where the officer before whom proof is to be made refuses to perform his duties. Murphy *v.* Independent Order, etc., 77 Miss. 830.

**2. Proof of Disability or Sickness.** — Worthen *v.* Massachusetts Ben. L. Assoc., (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 437, citing 3 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1109.

**Notice of Sickness Must Be Given Within Prescribed Time.** — A by-law of a society which provides that in order to entitle a member to sick benefits in case he does not employ the physician designated by the society, he must notify the secretary within twenty-four hours, so that the secretary can immediately notify the physician of the society, who will then visit the sick member within six hours, and if he finds that the member is sick, will leave with him a memorandum, and that no other certificate will be recognized by the society, is not unreasonable. Falcone *v.* Societa Sarti Italiani, etc., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 106.

**Application for Benefits Must Be Made Within Time Prescribed.** — There is nothing unreasonable in a regulation of a mutual benefit society which requires an application for benefits to be made within five weeks after the benefits have accrued, even though the society may construe such regulation to mean that in case of chronic illness, the application must be renewed every five weeks. As to such matters, the society has a right to control its procedure. Robinson *v.* Templars Lodge, No. 17, 117 Cal. 370, 59 Am. St. Rep. 193.

**Certificate of Attending Physician.** — Where a by-law provided that the certificate of the attending physician as to the nature of the insured's sickness must be approved by the physician of the association, it was held that this was a condition precedent which must be complied with before there could be a recovery of sick benefits. McVoy *v.* Keller, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 803.

1. **BENZINE.** — See note 1.
- BEQUEATH — BEQUEST.** — See note 2.
3. **BERRIES.** — See note 3.
- BEST.** — See note 7.
5. **[BESTOWED.]** — See note 1a.]
- BET — BETTING.** — See notes 2, 3.
9. **BETWEEN — Computation of Time.** — See note 1.
- Among. — See note 2.
11. **1. BEVERAGE.** — See note 1.
12. **BEYOND THE SEAS.** — See note 2.
13. **BIAS.** — See note 2.

1. 1. *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54.  
 2. *Matter of Stumpfenhausen*, 108 Iowa 555;  
*In re Davis*, 103 Wis. 457; *Haug v. Schumacher*, 166 N. Y. 506; *Cramer v. Cramer*,  
 (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 17.

"In common acceptation, *bequest* and 'legacy' are synonymous terms, but *bequeath* is the term generally by which a gift of personalty is made in a will, and a legacy is the money or personal property *bequeathed*. The words 'devise,' *bequest*, and 'legacy' are not infrequently used in wills in a sense different from their strict legal meaning. \* \* \* None of these words have so fixed a legal meaning, however, that a gift will fail because testator does not use the words descriptive of the gift or the act of giving with technical accuracy. A devise is often misnamed a *bequest*, or *bequest* is often used to include both realty and personalty, or is used of a gift of money alone." *Per Baskin, C. J.*, in *Matter of Campbell*, 27 Utah 361.

**Lands — Bequeath Absolutely.** — "By the words '*bequeath* absolutely,' he [the testator] unquestionably intended to devise to his said son his whole estate in said lands. These words are ample for that purpose in a will." *Gantt, J.*, in *Yocum v. Siler*, 160 Mo. 289. See also *Roth v. Rauschenbusch*, 173 Mo. 582.

"**Will and Bequeath**" as commonly understood means that the testator intended to give to the legatee the particular property described, whether it be real estate or personal property, and not that it was intended to give only a part or an interest in it, or a life estate, because technically the word *bequeath* may relate to personalty more properly than to realty. *Mills v. Franklin*, 128 Ind. 447.

3. **3. Customs Duties.** — See *Boak v. U. S.*, (C. C. A.) 125 Fed. Rep. 599.

7. **Best — Rent.** — See *Chandler v. Bradley*, (1897) 1 Ch. 315.

5. 1a. **Bestowed — Mechanic's Lien.** — In construing the *California Mechanic's Lien Law*, the court said: "If it had been intended by the legislature that a subcontractor should have a lien for nothing except his own personal labor, they should have made the statute read, 'shall have a lien upon the property upon which they have performed labor.' Instead of the word '*performed*' the legislature used the word *bestowed*, which means 'used' or 'placed,' and never means '*performed*.' This language shows that it was intended to give a subcontractor a lien for the labor that he caused his employees to perform on the building." *Macomber v. Bigelow*, 126 Cal. 14.

2. *Jacobus v. Hazlett*, 78 Ill. App. 239; *Win-*

*ward v. Lincoln*, 23 R. I. 492, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 5; *Rich v. State*, 38 Tex. Crim. 200, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 5.

**Wagering, Playing, Gaming, and Betting Interchangeable.** — In *Thrower v. State*, 117 Ga. 753, the court said: "The words wagering, playing, gaming, and betting, though each having a meaning more or less different from the other, are often used one for the other."

3. **When Complete.** — *Rich v. State*, 38 Tex. Crim. 199.

**Distinguished from Purse or Premium.** — *Treacy v. Chinn*, 79 Mo. App. 651; *Morrison v. Bennett*, 20 Mont. 560.

**Place of Betting.** — Paying at the bar of a beer house debts previously made elsewhere is not using the bar for the purpose of betting with persons resorting thereto, within the meaning of the Betting Act 1853, § 1. *Bradford v. Dawson*, (1897) 1 Q. B. 307.

**Purchase of Options.** — See *Winward v. Lincoln*, 23 R. I. 476.

9. **1. Computation of Time.** — *People v. Hornbeck*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 212.

**Service of Process.** — *Winans v. Thorp*, 87 Ill. App. 297, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 9.

2. **Implies but Two Parties.** — *Records v. Fields*, 155 Mo. 314; *McIntire v. McIntire*, 192 U. S. 116; *Hutchinson v. La Fortune*, 28 Ont. 329.

**Not Invariable.** — See *Matter of Morrison*, 138 Cal. 401; *Faloon v. Flannery*, 74 Minn. 38; *Edwards v. Kelly*, 83 Miss. 144.

11. **1. In Maddox v. State**, 118 Ga. 72, the court said: "Webster's International Dictionary defines a beverage to be a 'liquid for drinking; drink; — usually applied to drink artificially prepared and of an agreeable flavor. \* \* \* Specifically, a name applied to various kinds of drinks.' For a judge in charging the jury to use the word '*beverage*' is in no sense an expression of opinion that the drink referred to is intoxicating. It is as proper to apply the word '*beverage*' to a cup of coffee or a glass of lemonade as to a glass of beer or whiskey."

12. **2. In Ontario.** — The expression "beyond the seas" in 4 & 5 Anne, c. 3, § 19, is not to be construed literally, but means, when applied to a defendant sued in this province, "out of the Province of Ontario." *Boulton v. Langmuir*, 24 Ont. App. 618.

13. **2. Gulf, etc., R. Co. v. Gilvin**, (Tex. Civ. App. 1900) 55 S. W. Rep. 985; *Mitchell v. State*, 36 Tex. Crim. 278.

**Jury and Jury Trial — Actual Bias — Washington.** — See *State v. Stentz*, 30 Wash. 134.

# BICYCLES.

BY F. G. BAMMAN.

- 16. II. LEGAL STATUS OF THE BICYCLE ON THE HIGHWAY — 1. Present Doctrine** — Deemed a Carriage or Vehicle. — See notes 1, 3.
- 17. Modifications of Rule.** — See notes 2, 3.
- 19. III. USE OF HIGHWAY — 1. Right to Safe Roads — Municipal Corporations Proper.** — See note 1. See also generally the title **HIGHWAYS**.
- Quasi Corporations.** — See notes 3, 7.
- Contributory Negligence.** — See note 8.
- 20. Prevailing Rule.** — See note 2.
- 2. Riding on Sidewalks.** — See note 3.
- Ordinances — Statutes — Bicycles Need Not Be Expressly Mentioned.** — See note 4.
- 21. See note 1.**
- 22. Qualification of Rule.** — See note 1.
- Ordinance Imposing Fine — Criminal Arrest and Prosecution.** — See note 2.

**16. 1. The Bicycle Is a Carriage or Vehicle.** — *Cannan v. Abingdon*, (1900) 2 Q. B. 66, 82 L. T. N. S. 382; *O'Donoghue v. Moon*, 90 L. T. N. S. 843; *Roberts v. Parker*, 117 Iowa 389, 94 Am. St. Rep. 316; *Spring v. Williamstown*, (Mass. 1904) 71 N. E. Rep. 949; *Gagnier v. Fargo*, 11 N. Dak. 73, 95 Am. St. Rep. 705; *Simpson v. Whatcom*, 33 Wash. 397, 99 Am. St. Rep. 951, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 16.

**3. Subject to Burdens of Other Vehicles.** — *Cannan v. Abingdon*, (1900) 2 Q. B. 66, 82 L. T. N. S. 382; *North Chicago St. R. Co. v. Cossar*, 203 Ill. 608.

**17. 2. Tolls.** — *Simpson v. Teignmouth*, etc., *Bridge Co.*, 85 L. T. N. S. 726, affirmed (1903) 1 K. B. 405; *Smith v. Kynnersley*, 66 J. P. 679; *Murfin v. Detroit*, etc., *Plank-Road Co.*, 113 Mich. 675; *Gloucester*, etc., *Turnpike Co. v. Leppe*, 62 N. J. L. 92.

**3. See Gagnier v. Fargo, 11 N. Dak. 73, 95 Am. St. Rep. 705.**

**19. 1. Injury Caused by Depression in Street.** — Where the plaintiff was injured by being thrown from her wheel because of a depression in the asphalt pavement, which defect was not noticeable before the plaintiff was near it, the city was held to be liable. *Curry v. Erie City*, 209 Pa. St. 283.

**Negligent Construction of Bicycle Path.** — If a city exercises its option and builds a bicycle path, the same rules of law apply to its construction and maintenance as if the duty were imposed by law, and the city will therefore be liable to one injured because of the negligent construction of such a path. *Prather v. Spokane*, 29 Wash. 549, 92 Am. St. Rep. 923.

**3. Under the Massachusetts Statute** requiring highways to be kept in a reasonably safe condition for travelers with horses, teams, and carriages, one injured while riding a bicycle is entitled to maintain an action for damages. *Spring v. Williamstown*, (Mass. 1904) 71 N. E. Rep. 949.

**7. Richardson v. Danvers**, 176 Mass. 413, 79

Am. St. Rep. 320; *Leslie v. Grand Rapids*, 120 Mich. 28. See also *Gagnier v. Fargo*, 11 N. Dak. 77, 95 Am. St. Rep. 705.

**8. Contributory Negligence of Wheelman.** — See *Anderson v. Wilmington*, 2 Penn. (Del.) 28.

**Evidence of a Previous Habit of the plaintiff to ride on a particular part of the highway, e. g., the sidewalk, is admissible, on an issue of contributory negligence, to show by natural inference that at the time of the accident the plaintiff was riding on that part of the highway.** *Kenney v. Hampton*, (N. H. 1904) 58 Atl. Rep. 1046.

**20. 2. Prevailing Rule — No Bar to Recovery.** — *Eaton v. Atlas Acc. Ins. Co.*, 89 Me. 570.

**3. Riding on Sidewalk — General Rule.** — *Gagnier v. Fargo*, 11 N. Dak. 73, 95 Am. St. Rep. 705, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 20, as to the general rule, which, however, was not applicable in the case at bar because of an ordinance expressly permitting the use of bicycles on sidewalks; *Ordway v. Cornelius*, 23 Pa. Co. Ct. 282, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 20, and holding unreasonable and void an ordinance giving to certain persons, on certain conditions, the right to ride on sidewalks. See also *Howard v. Brooklyn*, 30 N. Y. App. Div. 217.

**4. Ordinances Prohibiting Bicycles on Sidewalk.** — See *Whiting v. Doob*, 152 Ind. 157; *State v. Aldrich*, 70 N. H. 391.

**The Ordinance Should Be Construed Reasonably so as to secure the rights of all.** *Thomas v. Fremont*, 12 Ohio Dec. 604, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 20, 21.

**21. 1. Bicycle Included in Term "Vehicles."** — *People v. Meyer*, (County Ct.) 26 Misc. (N. Y.) 117.

**22. 1. Wheeler v. Boone**, 108 Iowa 235.

**2. Liability of City for Wrongful Arrest.** — In *Simpson v. Whatcom*, 33 Wash. 397, 99 Am. St. Rep. 951, it was held that a city was not liable in damages to one arrested under an invalid ordinance prohibiting the use of bicycles of a certain size on the streets without a

**23.** Municipality Licensing Bicycles on Sidewalk. — See note 1.

**24.** 4. Riding on Car Tracks. — See notes 1, 2.

**25.** 5. Leaving Wheel in Street. — See note 2.

6. Meeting Other Travelers. — See note 5.

**27.** Qualifications of Rule. — See notes 1, 5.

Objective Point on Left-hand Side of Road — Degree of Care Required — Question of Fact. — See note 7.

**29.** 8. Frightening Horses. — See note 1.

9. Duty to Use Moderate Speed. — See note 4.

10. Duty to Use Bells and Lamps. — See note 11.

**30.** See note 1.

**31.** IV. THE BICYCLE AS PROPERTY — 1. Transportation. — See note 1.

2. Taxation. — See note 4.

license. See further the title FALSE IMPRISONMENT, 776. 6.

**23.** 1. Municipality May License Bicycles on Sidewalks. — *Lechner v. Newark*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 452. See also *Custer v. New Philadelphia*, 11 Ohio Cir. Dec. 9, 20 Ohio Cir. Ct. 177; *Gagnier v. Fargo*, 11 N. Dak. 77, 95 Am. St. Rep. 705. But see *Ordway v. Cornelius*, 23 Pa. Co. Ct. 282.

**24.** 1. Riding on Car Tracks — Contributory Negligence. — *Medcalf v. St. Paul City R. Co.*, 82 Minn. 18; *Bacon v. Traction Co.*, 30 Pittsb. L. J. N. S. (Pa.) 431.

For Other Cases discussing the question of contributory negligence, in view of the particular facts, in riding bicycles on and about car tracks, see *Louisville R. Co. v. Blaydes*, (Ky. 1899) 51 S. W. Rep. 820, modified (Ky. 1899) 52 S. W. Rep. 960; *Gagne v. Minneapolis St. R. Co.*, 77 Minn. 171; *Rawitzer v. St. Paul City R. Co.*, (Minn. 1904) 100 N. W. Rep. 664; *Brown v. Metropolitan St. R. Co.*, 60 N. Y. App. Div. 184, affirmed without opinion, 171 N. Y. 699; *Rooks v. Houston, etc.*, *Ferry R. Co.*, 10 N. Y. App. Div. 98; *Roberts v. Spokane St. R. Co.*, 23 Wash. 325. See also the titles CONTRIBUTORY NEGLIGENCE; STREET RAILWAYS.

**2.** Crossing Car Tracks. — See *Palmer v. Cedar Rapids, etc.*, R. Co., 124 Iowa 424; *Passman v. West Jersey, etc.*, R. Co., 68 N. J. L. 719, 96 Am. St. Rep. 573; *Lurie v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 81; *Kierzenkowski v. Philadelphia Traction Co.*, 184 Pa. St. 459; *Kimball v. Friend*, 95 Va. 125.

**25.** 2. Leaving Wheel in Street — Injury to Wheel. — *Wagner v. New York Condensed Milk Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 62.

**5.** Duty to Turn to Right. — *Diehl v. Roberts*, 134 Cal. 164; *Cook Brewing Co. v. Ball*, 22 Ind. App. 656; *Foot v. American Product Co.*, 195 Pa. St. 190, 78 Am. St. Rep. 806; *Pick v. Thurston*, 25 R. I. 36. See also *Quinn v. Pietro*, 38 N. Y. App. Div. 484. And see the title LAW OF THE ROAD.

**27.** 1. *Taylor v. Union Traction Co.*, 184 Pa. St. 465.

**5.** Duty of Lighter Vehicle to Give Way. — *Rowland v. Wanamaker*, 20 Pa. Co. Ct. 621.

**7.** Crossing Road Suddenly. — It is for the jury to determine whether a driver was guilty of negligence in suddenly crossing from the right to the left of the road, thereby colliding with a bicyclist approaching from the opposite direction. *Hershinger v. Pennsylvania R. Co.*, 25 Pa. Super. Ct. 147.

**29.** 1. Compare *Meek v. Barton*, 123 Iowa 601; *Corey v. Havener*, 182 Mass. 250, in which latter case two persons, each on a motor cycle emitting smoke, etc., and running at a high rate of speed, were held to be joint wrongdoers in frightening a horse and causing him to run away.

**4.** Rapid Riding Not Negligence per Se. — *Morhart v. North Jersey St. R. Co.*, 64 N. J. L. 236; *Foot v. American Product Co.*, 201 Pa. St. 510.

**Exceeding Speed Ordinance — Liability of City.** — Where one was injured by a bicyclist going at a greater rate of speed than permitted by an ordinance, it was held that the city was liable in damages, since it had neglected its duty by failing to enforce the ordinance and by allowing bicycle racing to become general on the highways. *Hagerstown v. Klotz*, 93 Md. 437, 86 Am. St. Rep. 437.

**11.** Bell and Lamp Ordinance. — See *Massinger v. Millville*, 63 N. J. L. 123.

**Negligence in Absence of Ordinance.** — It has been held that though the law may not require the use of bells or lamps, one injured while riding on a public thoroughfare at night without such signal of his movements is guilty of negligence. *Cook v. Fogarty*, 103 Iowa 500.

**30.** 1. *Cook v. Fogarty*, 103 Iowa 500; *Des Moines v. Keller*, 116 Iowa 648, 93 Am. St. Rep. 268; *Emporia v. Wagoner*, 6 Kan. App. 659.

**31.** 1. Bicycles Not Baggage in England. — *Britten v. Great Northern R. Co.*, (1899) 1 Q. B. 243, 79 L. T. N. S. 640.

**4.** License Tax Declared Invalid. — See *Davis v. Petrinovich*, 112 Ala. 654; *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224; *Ellis v. Frazier*, 38 Oregon 462; *Keeler v. Westgate*, 10 Pa. Dist. 240; *Densmore v. Erie*, 20 Pa. Co. Ct. 513, overruling *Green v. Erie*, 19 Pa. Co. Ct. 491.

# BIGAMY.

BY JOHN SIMPSON.

- 35. I. DEFINITION.** — See note 1.  
Distinct Offense from Adultery. — See note 3.
- 36. III. ELEMENTS OF THE OFFENSE — 1. Prior Marriage — a. SUBSISTING PRIOR MARRIAGE — (2) Divorce from First Husband or Wife.** — See note 8.
- 37. When Divorce Must Be Obtained.** — See note 1.  
Guilty Party Forbidden to Remarry. — See note 5.  
English Law as to a Foreign Divorce. — See note 6.  
*b. VALIDITY OF PRIOR MARRIAGE — Prior Marriage Must Be Valid.* — See note 8.  
When Prior Marriage Valid. — See note 9.  
Form of Ceremony. — See note 12.
- 38. Voidable Marriages.** — See notes 1, 2.  
Former Slaves. — See note 4.  
Three Marriages. — See note 5.  
*c. EFFECT OF PLACE OF PRIOR MARRIAGE.* — See notes 7, 8.
- 39. 2. Subsequent Marriage — b. WHAT CONSTITUTES — Present Doctrine.** — See note 4.  
Parties Incompetent. — See note 6.  
*c. EFFECT OF PLACE OF SUBSEQUENT MARRIAGE — In England.* — See note 9.
- 35. 1. Definition.** — See *State v. Hayes*, 105 La. 352.
- 3. Distinct Offense from Adultery.** — *Com. v. Bernard*, 11 Pa. Dist. 159.
- 36. 8. Divorce Is a Defense.** — *Com. v. Josselyn*, 186 Mass. 186.  
Statutes exist in some jurisdictions providing that persons who marry a second time within a certain number of months from the date of a decree of divorce are guilty of bigamy. *Niece v. Territory*, 9 Okla. 535; *Turpin v. Turpin*, (Tenn. Ch. 1899) 58 S. W. Rep. 763, the latter case holding that such a statute has no extraterritorial effect, and a person divorced in Washington is not guilty of bigamy by marrying again in Tennessee within the time prohibited by the Washington statute.
- 37. 1. Divorce Must Precede Second Marriage.** — *Rogers v. Com.*, (Ky. 1902) 68 S. W. Rep. 14.
- 5. Guilty Party May Remarry in Another State.** — See *State v. Bentley*, 75 Vt. 163. See also the titles **DIVORCE**, 854. 2; **MARRIAGE**, 1215. 6.
- 6. English Law as to Foreign Divorce.** — *Russell's Trial*, (1901) A. C. 446, 20 Cox C. C. 51.
- 8. Void Prior Marriages.** — *Com. v. Bernard*, 11 Pa. Dist. 159, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 37.  
A prior foreign marriage absolutely void for the want of legal age of both parties, by the laws of the country where it was celebrated, will not sustain a conviction. *Canale v. People*, 177 Ill. 219.
- A Marriage Solemnized in Good Faith Is Not Void** merely because the contracting parties may at some prior time have entered into an agreement or understanding that it shall be invalid. *Hills v. State*, 61 Neb. 589.
- 9. Parties Must Consent to Make Marriage Valid.** — *State v. Hansbrough*, 181 Mo. 348.
- 12. Form of Ceremony Immaterial.** — *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800; *Waldrop v. State*, 41 Tex. Crim. 194.
- 38. 1. Marriage Voidable from Intoxication Will Support Indictment.** — *Barber v. People*, 203 Ill. 546, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38.
- 2. Parties Marrying under Legal Age May Avoid Marriage.** — See *Canale v. People*, 177 Ill. 219.
- 4. Slaves.** — *State v. Melton*, 120 N. Car. 591.
- 5. Cases of Three Marriages.** — *People v. Goodrode*, 132 Mich. 542; *Lane v. State*, 82 Miss. 557, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38; *People v. Corbett*, 49 N. Y. App. Div. 514; *Keneval v. State*, 107 Tenn. 581; *State v. Sherwood*, 68 Vt. 414. See also *Com. v. Josselyn*, 186 Mass. 186.
- 7. Place of Prior Marriage Immaterial.** — *State v. Bentley*, 75 Vt. 163. See also *supra*, this title, **37. 8.**
- 8. Marriage Valid Where Contracted Generally Valid Elsewhere.** — *Hills v. State*, 61 Neb. 589. See generally the title **MARRIAGE**, 1211. 6 *et seq.*
- 39. 4. Meaning of Word "Marries" — Present Doctrine.** — *People v. Mendenhall*, 119 Mich. 404, 75 Am. St. Rep. 408.
- 6. Parties Incompetent or Ceremony Not Binding.** — *Cox v. State*, 117 Ala. 103, 67 Am. St. Rep. 166.
- 9. In England — Present Statute.** — *Russell's Trial*, (1901) A. C. 446, 20 Cox C. C. 51.

**40.** Defendant May Be Tried Where Cohabitation Takes Place. — See note 2.

**3.** Intent. — See note 4.

**41.** *a.* BELIEF IN DEATH OF ABSENT CONSORT. — See notes 1, 2.

*b.* BELIEF IN A LEGAL DIVORCE. — See note 3.

**IV. DEFENSES — STATUTES — 1.** Absence for Statutory Period. — See note 8.

**42.** "Beyond the Seas." — See note 1.

**2.** Statutes of Limitation — When the Statute of Limitation Begins to Run. — See notes 3, 4.

**V. EVIDENCE — 1. Marriage — a.** PRIOR MARRIAGE. — See note 6.

*b.* HOW THE MARRIAGES ARE PROVED — (1) *Records and Witnesses — Records.* — See note 7.

*License.* — See note 8.

**43.** *Witnesses — Officiating Clergyman.* — See note 1.

(2) *Circumstantial Evidence.* — See notes 2, 3.

**40.** **2.** Defendant May Be Tried in Place of Cohabitation. — *Cox v. State*, 117 Ala. 103, 67 Am. St. Rep. 166; *State v. Steupper*, 117 Iowa 591. See also the title BIGAMY, 3 ENCYC. OF PL. AND PR. 322, 323, and the Supplement thereto.

In Tennessee the cohabitation is an offense distinct from bigamy proper under the statute. *Keneval v. State*, 107 Tenn. 581.

**4.** Intent Necessary to Convict of Bigamy. — *Eldridge v. State*, 126 Ala. 63; *State v. Cain*, 106 La. 708, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 40.

Intent as to Bigamy Defined. — See *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800.

**41.** **1.** *State v. Goulden*, 134 N. Car. 743. The doctrine was questioned in *Reynolds v. State*, 58 Neb. 49. See further the titles MARRIAGE, 1207. 7, 1208. 1; PRESUMPTIONS, 1245. 2 *et seq.*

Evidence to Show that the Defendant Had Made Inquiries as to whether his former wife was dead was excluded in *Rand v. State*, 129 Ala. 119.

**2.** Inquiries Must Be Made and Proper Care Exercised. — *Welch v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 50. See also *Circus v. Independent Order Ahawas Israel*, 55 N. Y. App. Div. 534.

**3.** Contra. — *Eldridge v. State*, 126 Ala. 63; *Russell v. State*, 66 Ark. 185, 74 Am. St. Rep. 78; *Rogers v. Com.*, (Ky. 1902) 68 S. W. Rep. 14.

The Burden Is on the Defendant to establish, to the satisfaction of the jury, that he had reasonable grounds for his belief that a valid divorce existed, and did in fact so believe. *State v. Cain*, 106 La. 708.

**8.** Statutes of Presumption. — *State v. Goulden*, 134 N. Car. 743. See also the title PRESUMPTIONS, 1245. 2 *et seq.*

**42.** **1.** "Beyond the Seas." — *State v. St. John*, 94 Mo. App. 220. But see *Knight v. U. S.*, 6 App. Cas. (D. C.) 1.

**3.** When Statute of Limitations Begins to Run. — *State v. Hansbrough*, 181 Mo. 348.

**4.** See *Cox v. State*, 117 Ala. 103, 67 Am. St. Rep. 166.

**6.** Marriage Must Be Proved. — *Lowery v. People*, 172 Ill. 466, 64 Am. St. Rep. 50.

When a marriage in fact has been proved by the prosecution, a prior marriage set up by the

defendant to defeat it must also be proved as a fact, like the other, and the legal presumption of marriage arising from cohabitation and repute is not sufficient to establish the prior marriage. *State v. Sherwood*, 68 Vt. 414.

A prior marriage in fact being proved, with cohabitation following, the presumption will be raised that no legal impediment to it existed. *Ferrell v. State*, (Fla. 1903) 34 So. Rep. 220.

**7.** Record. — *Ferrell v. State*, (Fla. 1903) 34 So. Rep. 220; *State v. Edmiston*, 160 Mo. 500.

The Record Book of Marriages for the County is admissible. *State v. Melton*, 120 N. Car. 591.

Record Evidence Unnecessary. — In Illinois it is provided by statute that in prosecutions for bigamy it shall not be necessary to prove either of the marriages by the register or certificate or other record evidence, but they may be proved by such evidence as is admissible to prove a marriage in other cases. *Lowery v. People*, 172 Ill. 466, 64 Am. St. Rep. 50.

**8.** License. — *Ferrell v. State*, (Fla. 1903) 34 So. Rep. 220; *State v. Pendleton*, 67 Kan. 180; *State v. Melton*, 120 N. Car. 591; *De Lucenay v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 796.

Certified Copies of the marriage license are admissible. *Eldridge v. State*, 126 Ala. 63.

An Undated Marriage Certificate is not admissible in evidence. *Hanley v. State*, 5 Ohio Cir. Dec. 488, 12 Ohio Cir. Ct. 584.

**43.** **1.** Officiating Minister Is Competent Witness. — *Hearne v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1009; *Kuehn v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 526, the latter case holding further that, the identity of the defendant being otherwise established, the fact that the clergyman who performed the bigamous marriage cannot identify him does not render his testimony as to the marriage inadmissible.

**2.** Circumstantial Evidence. — *State v. Pendleton*, 67 Kan. 180; *Swartz v. State*, 7 Ohio Cir. Dec. 43, 13 Ohio Cir. Ct. 62, affirmed 9 Ohio Cir. Dec. 855, 18 Ohio Cir. Ct. 892 (holding that the same kind of evidence as will establish a marriage in a civil case is sufficient); *State v. Sherwood*, 68 Vt. 414.

General Repute and Cohabitation Coupled with Admissions. — *People v. Hartman*, 130 Cal. 487.

Circumstantial Evidence Coupled with Admissions. — *State v. Jenkins*, 139 Mo. 535; *Waldrop v. State*, 41 Tex. Crim. 194.

**3.** Cohabitation and Reputation Merely will not

- 43.** (3) *Admissions* — United States. — See note 5.
- 44.** *c. FOREIGN MARRIAGES.* — See notes 1, 2.
- 45.** *A Clergyman or a Lawyer as Competent Witness.* — See note 3.
- 2. Divorce** — The Defendant Must Prove All Matters of Defense. — See note 6. Evidence. — See note 7.
- 46.** **3. Absence for Statutory Period** — *a. WHAT PROSECUTION MUST PROVE* — (1) *The Life of the Absent Husband or Wife* — *Conflicting Presumptions of Life and Innocence.* — See note 1.
- (2) *The Defendant's Knowledge of the Absent Party's Life.* — See note 3.
- 4. Witnesses** — *a. FIRST HUSBAND OR WIFE* — Incompetent for the Prosecution. — See note 5.
- 47.** See note 1.
- Wife Competent by Statute.* — See note 3.
- Incompetent for Defendant.* — See note 7.
- b. SECOND HUSBAND OR WIFE.* — See note 9.
- Cannot Testify as to First Marriage.* — See note 10.
- 48.** **5. Identity** — Identity of First Wife. — See note 1.
- VII. UNLAWFUL COHABITATION** — Federal Statute — Construction of the Statute. — See note 5.
- 49.** *Desertion of Legal Wife.* — See note 2.
- Evidence.* — See note 4.
- BILATERAL.** — See note 8.
- 50. BILL** — In Legislation. — See note 5.

suffice. *Lowery v. People*, 172 Ill. 466, 64 Am. St. Rep. 50.

**43. 5. Admissions as Evidence.** — *People v. Hartman*, 130 Cal. 487; *McSein v. State*, 120 Ga. 175; *Lowery v. People*, 172 Ill. 466, 64 Am. St. Rep. 50; *People v. Goodrode*, 132 Mich. 542; *State v. Jenkins*, 139 Mo. 535; *State v. Goulden*, 134 N. Car. 743; *State v. Melton*, 120 N. Car. 591; *State v. Gallagher*, 20 R. I. 266; *Waldrop v. State*, 41 Tex. Crim. 194.

**44. 1. Valid Marriage Must Be Proved.** — *Canale v. People*, 177 Ill. 219; *Hills v. State*, 61 Neb. 589.

**2. Foreign Marriage Is Presumed to Be Valid.** — See *Canale v. People*, 177 Ill. 219.

**45. 3. Foreign Lawyer Allowed to Testify.** — See *Canale v. People*, 177 Ill. 219.

**6. The State Is Not Bound to prove that the defendant and his first wife were not divorced.** *Hanley v. State*, 5 Ohio Cir. Dec. 488, 12 Ohio Cir. Ct. 584.

**7. Divorce Must Be Proved by Record.** — *Reynolds v. State*, 58 Neb. 49, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 45.

**46. 1. Presumption as to Life of Absent Party.** — See *Eldridge v. State*, 126 Ala. 63.

**3. Contra.** — *State v. Goulden*, 134 N. Car. 743.

**5. First Husband or Wife Not Competent Witness for Prosecution.** — *Hiler v. People*, 156 Ill. 511, 47 Am. St. Rep. 221; *Barber v. People*, 203 Ill. 546. See also the title WITNESSES, 952. 7.

Letters from the Defendant to His First Wife do not come within the prohibition of Rev. Stat. Ohio, § 7284, and are admissible against

the defendant. *Hanley v. State*, 5 Ohio Cir. Dec. 488, 12 Ohio Cir. Ct. 584.

**47. 1. Not Competent Though Defendant Fails to Object.** — *Barber v. People*, 203 Ill. 546.

**3. Competent by Statute.** — *Hills v. State*, 61 Neb. 589; *State v. Melton*, 120 N. Car. 591.

**7. Not Competent to Prove First Marriage Invalid.** — *State v. Sherwood*, 68 Vt. 414.

**9. Second Husband or Wife Competent Witness.** — *Barber v. People*, 203 Ill. 546. See also the title WITNESSES, 952. 4.

**10. Second Husband or Wife Not Competent Witness to Testify to First Marriage.** — *Lowery v. People*, 172 Ill. 466, 64 Am. St. Rep. 50, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 47; *Barber v. People*, 203 Ill. 546. See also the title WITNESSES, 952. 5, 6.

**48. 1. Both First and Second Wives May Be Brought into Court for identification by the accused.** *Hearne v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1009.

**5. Construction of Statute.** — *State v. Graham*, (Utah 1901) 64 Pac. Rep. 557.

**49. 2. Cohabitation with Lawful Wife Is Presumed.** — *State v. Graham*, (Utah 1901) 64 Pac. Rep. 557.

**4. Evidence of Prior Relation.** — *State v. Graham*, (Utah 1901) 64 Pac. Rep. 557.

**49. 8. Bilateral Contract.** — See *Montpelier Seminary v. Smith*, 69 Vt. 382.

**Records — Bilateral and Unilateral.** — See *Colligan v. Cooney*, 107 Tenn. 221.

**50. 5. State v. Hegeman**, 2 Penn. (Del.) 147; *Cohn v. Kingsley*, 5 Idaho 416.

## BILL AND NOTE BROKERS.

**51. I. DEFINITION**—Exchange Brokers. — See note 1.

**II. RIGHTS AND LIABILITIES** — Where Principal Disclosed. — See note 2.

Undisclosed Principal — Genuineness of Paper — Implied Warranty. — See note 3.

**51. 1. The Word "Broker"** sometimes means in ordinary speech a dealer in money, notes, bills of exchange, etc. *Schau v. Charlotte*, 118 N. Car. 733.

Bill and note brokers negotiate the purchase and sale of bills of exchange and promissory notes. No person is considered a broker who buys for himself a note, bill, or debt due from any person or government. *Gast v. Buckley*, (Ky. 1901) 64 S. W. Rep. 632, wherein it was

held that a person who purchased for himself claims against a city was not a broker within the meaning of a city ordinance requiring a license tax.

**2. Principal Disclosed.** — *Bailey v. Galbreath*, 100 Tenn. 599, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 51.

**3. Undisclosed Principal.** — See *Bailey v. Galbreath*, 100 Tenn. 599.

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## BILLS OF CREDIT.

**61. II. CONSTITUTIONAL PROHIBITION** — 1. In General. — See note 2.

**62. 2. What Constitutes Bills of Credit** — Specific Instances. — See note 4.

**63. Coupons Issued by a State.** — See note 1.

Contracts. — See note 2.

**61. 2. Origin — Reason for Prohibition.** — See *Houston, etc., R. Co. v. Texas*, 177 U. S. 66.

**62. 4. What Necessary to Constitute Bill of Credit.** — *Houston, etc., R. Co. v. Texas*, 177 U. S. 66; *Wesley v. Eells*, 90 Fed. Rep. 151, affirmed 177 U. S. 370; *Robinson v. Lee*, 122 Fed. Rep. 1012.

**63. 1. Coupons — Scrip.** — In *Wesley v. Eells*, 90 Fed. Rep. 151, affirmed 177 U. S. 370, the court in distinguishing the Virginia coupon cases said: "There are certain resemblances and several marked differences between the Virginia coupons, which were held not to be bills of credit, and the South Carolina bond scrip. The coupons and the scrip are alike in that they are obligations and indebtedness of the state. They are receivable by the state treasurer in payment of taxes and other dues to the state. Their dissimilarity lies in the fact that the coupons are to be paid on a day certain, while the scrip is not payable at any particular time, but is only to be redeemed or retired from year to year. The coupons are receivable in payment of taxes and other dues to the state only at and after maturity, while the scrip may be used for these purposes from the date of its issue. The coupons are paid and retired when received by the state, but the scrip may be re-issued from the state treasury as often as received, in satisfaction of all claims against the state, except for paying interest on the public debt."

**2. State Warrants.** — "A warrant drawn by the state authorities in payment of an appropriation made by the legislature, where the warrant is payable upon presentation, if there be funds in the treasury, and which has been issued to

an individual in payment of the debt of the state to him, cannot \* \* \* be properly called a bill of credit or a treasury warrant intended to circulate as money. Although the state directed its officers to receive the warrants as money, in payment of certain dues to the state, and to deliver them to those who would receive them as money in payment of dues from the state to such persons, yet \* \* \* this direction was only another mode of expressing the idea that, as between the state and the individual, the delivery of the warrant should operate as a payment of the debt for which the delivery was made. When the warrants once came back to the treasurer of the state, they were not to be reissued. The decisions of this court have shown great reluctance, under this provision as to bills of credit, to interfere with or reduce the very important and necessary power of the states to pay their debts by delivering to their creditors their written promises to pay them on demand, and in the meantime to receive the paper as payment of debts due the state for taxes and other like matters." *Houston, etc., R. Co. v. Texas*, 177 U. S. 66.

**Revenue Bond Scrip** issued by the state of South Carolina under the Act of March 2, 1872, printed or engraved in form similar to that of the treasury note of the United States, and in various denominations, bearing no interest, and whenever received in the state treasury re-issued at pleasure, is in law and in fact a bill of credit, and in conflict with section 10, article I., of the Constitution of the United States. *Robinson v. Lee*, 122 Fed. Rep. 1012; *Wesley v. Eells*, 90 Fed. Rep. 151, affirmed 177 U. S. 370.



# BILLS OF EXCHANGE AND PROMISSORY NOTES.

BY BASIL JONES.

**76. 1. DEFINITIONS AND GENERAL CONSIDERATIONS — 1. Definitions — A Bill of Exchange.** — See note 1.

**77. A Promissory Note.** — See note 1.

Negotiability. — See note 4.

**78. 2. Parties to Bills and Notes — Original Parties to Bill of Exchange.** — See note 1.

The Original Parties to a Promissory Note. — See note 2.

Parties Introduced by Transfer. — See note 3.

**3. Inland and Foreign Bills.** — See note 6.

Bills Drawn and Payable in Different States of Union. — See note 7.

**79. 4. Origin of Bills and Notes — Negotiability of Notes — Statute of Anne.** — See note 3.

**5. Analogy Between Bills and Notes.** — See note 4.

**76. 1. Bill of Exchange Defined.** — See also *Shutt Imp. Co. v. Erwin*, 66 Kan. 261.

**Definition under Negotiable Instruments Law.** — *Westberg v. Chicago Lumber, etc., Co.*, 117 Wis. 589 (under Neg. Inst. Law); *Torpey v. Tebo*, 184 Mass. 307 (under Rev. Laws, c. 73, § 18).

**77. 1. Promissory Note Defined.** — See the following cases:

*Alabama.* — *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120.

*Illinois.* — *Miller v. Western College*, 71 Ill. App. 587, affirmed 177 Ill. 280, 69 Am. St. Rep. 242; *Gehlbach v. Carlinville Nat. Bank*, 83 Ill. App. 129; *Clarke v. Hunter*, 83 Ill. App. 100, affirmed 184 Ill. 158, 75 Am. St. Rep. 160; *Smith v. Myers*, 107 Ill. App. 412, affirmed 207 Ill. 131, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77.

*Indiana.* — *Nicely v. Winnebago Nat. Bank*, 18 Ind. App. 30.

*Iowa.* — *Jenckes v. Rice*, 119 Iowa 451.

*Massachusetts.* — *Cherry v. Sprague*, 187 Mass. 113.

*Michigan.* — *Walker v. Thompson*, 108 Mich. 686.

*Mississippi.* — *Greenwood Lodge*, No. 135, etc., v. *Priebatsch*, 83 Miss. 120.

*New York.* — *Baker v. Leland*, 9 N. Y. App. Div. 365.

*Oklahoma.* — *Randolph v. Hudson*, 12 Okla. 516; *Sivils v. Taylor*, 12 Okla. 47.

*Oregon.* — *Sears v. Daly*, 43 Oregon 346.

*South Carolina.* — *Sylvester Bleckley Co. v. Alewine*, 48 S. Car. 308, citing 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 314; *White v. Harris*, 69 S. Car. 65.

**Definition under Negotiable Instruments Law.** — *Hickok v. Bunting*, 67 N. Y. App. Div. 560.

**Definition under Mont. Civ. Code, § 3991.** — *Stadler v. Helena First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582; *Cornish v. Woolverton*, (Mont. 1905) 81 Pac. Rep. 4.

**Definition under Okla. Stat. 1893, § 3389.** — *Outcalt v. Collier*, 8 Okla. 473.

**Definition under S. Dak. Rev. Civ. Code, § 2274.** — *Davis v. Brady*, (S. Dak. 1903) 97 N. W. Rep. 719.

**Definition under S. Dak. Comp. Laws, §§ 4456, 4562.** — *Schmitz v. Hawkeye Gold Min. Co.*, 8 S. Dak. 544.

**4. Negotiability.** — *Jenkins v. Jones*, 108 Ga. 556; *Kimmel v. Nagele*, 84 Ill. App. 22; *Wilcox v. Tetherington*, 103 Ill. App. 404; *Allen v. Harris*, 79 Mo. App. 490; *National Bank of Commerce v. Pick*, (N. Dak. 1904) 99 N. W. Rep. 63; *Hurlburt v. Straub*, 54 W. Va. 303. See also *Jurden v. Ming*, 98 Mo. App. 205.

**A Purchaser of a Note from a Building and Loan Association** takes it with all the incidents which attach to it under *Missouri Rev. Stat.* 1889, § 2813, in the hands of the association. *Sappington v. Aetna Loan Co.*, 76 Mo. App. 242.

**78. 1. "Drawer" Defined.** — *Winnebago County State Bank v. Hustel*, 119 Iowa 116.

**2. "Payee" Defined.** — *Seastrunk v. Pioneer Sav., etc., Co.*, (Tex. Civ. App. 1896) 34 S. W. Rep. 466.

**"Drawer" and "Payee" Not Synonymous.** — *Winnebago County State Bank v. Hustel*, 119 Iowa 116.

**3. Indorser — Indorsee.** — See also *Sibley v. American Exch. Nat. Bank*, 97 Ga. 126.

**6. At Common Law.** — *Gray Tie, etc., Co. v. Farmers' Bank*, 109 Ky. 694.

**7. Bills Drawn in One State and Payable in Another.** — *Nelson v. Killingley, First Nat. Bank*, (C. C. A.) 69 Fed. Rep. 798; *Morrison v. Farmers', etc., Bank*, 9 Okla. 697.

**79. 3. Cause of the Statute of Anne.** — *Wirt v. Stubblefield*, 17 App. Cas. (D. C.) 283; *Northrup v. Chambers*, 90 Mo. App. 61.

**Origin of Negotiability.** — *De Hass v. Dibert*, (C. C. A.) 70 Fed. Rep. 227.

**Statute of Anne Declaratory of Common Law.** — *State Nat. Bank v. Cudahy Packing Co.*, 126 Fed. Rep. 543, affirming (C. C. A.) 134 Fed. Rep. 538.

**4. Winnebago County State Bank v. Hustel,**

**80.** 6. Nonnegotiable Bills and Notes. — See notes 2, 3, 5, 6.

**81.** II. THE CONTRACT EVIDENCED BY A BILL OR NOTE — 1. Form and Interpretation — a. FORMAL ESSENTIALS — (2) *As to Writing* — (a) Necessity of Writing. — See note 2.

(3) *As to Order or Promise* — (a) The Order Contained in a Bill of Exchange. — See note 5.

**82.** See note 3.

(b) The Promise Contained in a Promissory Note. — See note 4.

**83.** See note 1.

**84.** (c) Order or Promise in the Alternative. — See note 1.

(4) *As to Payment* — (a) Certainty of Payment — *bb. CERTAIN IN FACT* — (aa)

*General Principles* — No Contingency Other than Failure of Credit Allowed. — See note 4.

**85.** Contingent Instruments. — See notes 1, 2.

**86.** See note 1.

119 Iowa 116, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 79.

**80.** 2. Effect of Indorsement "Nonnegotiable." — See *Barker v. Barth*, 192 Ill. 460.

**3.** Nonnegotiable Notes Import a Consideration. — *Lowrey v. Danforth*, 95 Mo. App. 441; *Madison First Nat. Bank v. Spear*, 12 S. Dak. 108.

**5.** Indorsement — Indorser Liable to Indorsee. — *Merchants' Nat. Bank v. Gregg*, 107 Mich. 146.

**6.** Indorsee Cannot Sue Maker. — *Harrisburg Trust Co. v. Shufeldt*, (C. C. A.) 87 Fed. Rep. 669. See also *Chicago Trust, etc., Bank v. Chicago Title, etc., Co.*, 190 Ill. 404, 83 Am. St. Rep. 138.

**Statute — Title Subject to Equities.** — *Power v. Hambrick*, (Ky. 1903) 74 S. W. Rep. 660.

**81.** 2. Louisville Banking Co. v. Gray, 123 Ala. 251, 82 Am. St. Rep. 120; *Merchants, etc., Bank v. Pizor*, 24 Pa. Co. Ct. 273; *Thorpe v. Mindeman*, (Wis. 1904) 101 N. W. Rep. 417 (under Negotiable Instruments Law).

**5.** Bill of Exchange Must Contain an Order to Pay. — *Bowes v. Industrial Bank*, 58 Ill. App. 498; *Miers v. Coates*, 57 Ill. App. 216; *Knefel v. Flanner*, 66 Ill. App. 209; *Torpey v. Tebo*, 184 Mass. 307.

**A Mere Written Admission of Indebtedness** in which it is provided that the voucher attached thereto when signed by the creditor shall become a draft, is not sufficient to constitute the voucher commercial paper. *Louisville, etc., R. Co. v. Johnson*, 128 Ala. 634.

**82.** 3. Words of Civility. — See *Knefel v. Flanner*, 66 Ill. App. 209.

**4.** Note Must Contain a Promise to Pay — *United States*. — *Crider v. Shelby*, 95 Fed. Rep. 212.

*Alabama*. — *Anniston L. & T. Co. v. Stickney*, 108 Ala. 146; *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120.

*Illinois*. — *Gehlbach v. Carlinville Nat. Bank*, 83 Ill. App. 129.

*Indiana*. — *Nicely v. Commercial Bank*, 15 Ind. App. 563, 57 Am. St. Rep. 245; *Nicely v. Winnebago Nat. Bank*, 18 Ind. App. 30.

*Kentucky*. — *Quigley v. Arteburn*, (Ky. 1895) 32 S. W. Rep. 165.

*Maine*. — *White v. Cushing*, 88 Me. 339, 51 Am. St. Rep. 402.

*Missouri*. — *Crawford v. Johnson*, 87 Mo. App. 478.

*Montana*. — *Clarke v. Marlow*, 20 Mont. 249.

*Pennsylvania*. — *Post v. Kinzua Hemlock R. Co.*, 171 Pa. St. 615; *Merchants', etc., Bank v. Pizor*, 24 Pa. Co. Ct. 273.

*South Dakota*. — *Schmitz v. Hawkeye Gold Min. Co.*, 8 S. Dak. 544.

**Sufficiency in Form.** — *De Hass v. Dibert*, 70 Fed. Rep. 227, 28 U. S. App. 559; *Woodbridge v. Drought*, 118 Ga. 671.

**83.** 1. Acknowledgment of Indebtedness Not Sufficient. — *In re McGuire*, 132 Fed. Rep. 394, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 83; *Maze v. Baird*, 89 Mo. App. 348.

**What Constitutes Due Bill.** — *Taylor Water Co. v. Kelley*, 11 Tex. Civ. App. 339.

**Due Bills Negotiable Instruments.** — *Benson v. Keller*, 37 Oregon 120.

**Due Bills Distinguished from Notes.** — *In re McGuire*, 132 Fed. Rep. 394.

**Note in Form of Certificate of Deposit.** — *Baker v. Leland*, 9 N. Y. App. Div. 365.

**84.** 1. Alternative Order or Promise. — *Gazlay v. Riegel*, 16 Pa. Super. Ct. 501.

**4.** *Alabama*. — *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120.

*Illinois*. — *Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 160.

*Missouri*. — *Maze v. Baird*, 89 Mo. App. 348.

*Montana*. — *Cornish v. Woolverton*, (Mont. 1905) 81 Pac. Rep. 4.

*Oklahoma*. — *Randolph v. Hudson*, 12 Okla. 516; *Cotton v. John Deere Plow Co.*, 14 Okla. 605.

*Pennsylvania*. — *Merchants, etc., Bank v. Pizor*, 24 Pa. Co. Ct. 273.

*Wisconsin*. — *Thorpe v. Mindeman*, (Wis. 1904) 101 N. W. Rep. 417 (under Negotiable Instruments Law).

*Canada*. — *Jacques Cartier Bank v. Reg.*, 25 Can. Sup. Ct. 84; *Angers v. Dillon*, 15 Quebec Super. Ct. 435.

See also *Nicely v. Winnebago Nat. Bank*, 18 Ind. App. 30.

**Performance of Condition Must Be Shown.** — *Bowman v. Horr*, 63 Minn. 400.

**85.** 1. Instruments to Be Void upon Condition — Illustrations. — *Jenckes v. Rice*, 119 Iowa 451.

**2. Notes Payable upon Condition — Illustrations.** — *White v. Cushing*, 88 Me. 339, 51 Am. St. Rep. 402.

**86.** 1. Instrument Subject to Conditions of Another Agreement. — *Chicago Trust, etc., Bank v. Chicago Title, etc., Co.*, 190 Ill. 404, 83 Am. St. Rep. 138.

**87.** (bb) *Particular Fund.* — See notes 1, 2.

**88.** The Addition of Words Which Refer to the Whole Estate of the Maker. — See note 2.

(cc) *Reference to Method of Reimbursement or Payment* — *Method of Drawee's Reimbursement Indicated.* — See note 3.

**89.** Test: Does General Credit Accompany Instrument. — See note 2.

(dd) *Statement of Consideration.* — See note 3.

**90.** Executory Consideration. — See note 2.

cc. CERTAIN IN TIME — (aa) *General Principles.* — See notes 4, 5.

**91.** (bb) *Contingency as to Time.* — See notes 1, 2, 5.

**92.** (cc) *Payment Ultimately Certain.* — See notes 2, 3, 4, 5.

**87. 1. Bills Between Governments.** — *Heflin Gold-Min. Co. v. Hilton*, 124 Ala. 365; *Morrison v. Austin State Bank*, 213 Ill. 472, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 87; *Conroy v. Ferree*, 68 Minn. 325; *Street v. Robertson*, 28 Tex. Civ. App. 222; *Thompson v. Wheatland Mercantile Co.*, 10 Wyo. 95, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 87.

**2. Instruments Payable Out of Particular Funds.** — *Heflin Gold-Min. Co. v. Hilton*, 124 Ala. 365; *National Sav. Bank v. Cable*, 73 Conn. 568; *Matter of Mahaska Coal Co.*, 95 Iowa 456; *White v. Cushing*, 88 Me. 339, 51 Am. St. Rep. 402; *Street v. Robertson*, 28 Tex. Civ. App. 222; *Woodward v. Smith*, 104 Wis. 365.

**88. 2. Words Referring to Whole Estate.** — *Maze v. Baird*, 89 Mo. App. 348.

**3. Note Chargeable to Particular Account Negotiable.** — *White v. Cushing*, 88 Me. 339, 51 Am. St. Rep. 402.

**89. 2. Heflin Gold-Min. Co. v. Hilton, 124 Ala. 365, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 89.**

**3. Statement of Consideration.** — *Fox v. Citizens' Bank, etc., Co.*, (Tenn. Ch. 1896) 37 S. W. Rep. 1102; *Beatty v. Western College*, 177 Ill. 290, 69 Am. St. Rep. 242, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 89.

**90. 2. Note Conditioned upon Realization of Executory Consideration.** — *Post v. Kinzua Hemlock R. Co.*, 171 Pa. St. 615.

**4. Alabama.** — *Anniston L. & T. Co. v. Stickney*, 108 Ala. 146; *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120.

**Colorado.** — *Campbell v. Equitable Securities Co.*, 17 Colo. App. 417.

**Illinois.** — *Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 160; *Chicago Trust, etc., Bank v. Chicago Title, etc., Co.*, 190 Ill. 404, 83 Am. St. Rep. 138; *Gehlbach v. Carlinville Nat. Bank*, 83 Ill. App. 129.

**Indiana.** — *Nicely v. Commercial Bank*, 15 Ind. App. 563, 57 Am. St. Rep. 245; *Nicely v. Winnebago Nat. Bank*, 18 Ind. App. 30.

**Kansas.** — *Clark v. Skeen*, 61 Kan. 526, 78 Am. St. Rep. 337; *City Nat. Bank v. Gunter*, 67 Kan. 227.

**Maine.** — *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246.

**Massachusetts.** — See also *Moore v. Edwards*, 167 Mass. 74.

**Minnesota.** — *Phelps v. Sargent*, 69 Minn. 118.

**Missouri.** — *Maze v. Baird*, 89 Mo. App. 348; *Crawford v. Johnson*, 87 Mo. App. 478; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 133.

**Nebraska.** — *Specht v. Beindorf*, 56 Neb. 553.

**New Mexico.** — *Joseph v. Catron*, (N. Mex. 1905) 81 Pac. Rep. 439.

**New York.** — *Petrie v. Miller*, 57 N. Y. App. Div. 17, affirmed 173 N. Y. 596 (under Negotiable Instruments Law).

**Pennsylvania.** — *Merchants, etc., Bank v. Pizor*, 24 Pa. Co. Ct. 273.

**Texas.** — *National Bank of Commerce v. Kenney*, (Tex. 1904) 83 S. W. Rep. 368, reversing (Tex. Civ. App. 1904) 80 S. W. Rep. 555.

**Wisconsin.** — *Wisconsin Yearly Meeting, etc., v. Babler*, 115 Wis. 289; *Thorpe v. Mindeman*, (Wis. 1904) 101 N. W. Rep. 417 (under Negotiable Instruments Law).

**Canada.** — *Thomson v. Huggins*, 23 Ont. App. 191.

**Time Must Be Certain at Inception of Instrument.** — The certainty of maturity must be of the date of the instrument, and cannot derive support from any subsequent event. *Joseph v. Catron*, (N. Mex. 1905) 81 Pac. Rep. 439.

**5. Notes Payable in Instalments, as Payee Shall Direct.** — *Commercial Nat. Bank v. Consumers' Brewing Co.*, 16 App. Cas. (D. C.) 203, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 90.

**91. 1. After Marriage or Majority.** — See *Specht v. Beindorf*, 56 Neb. 553.

**Instrument Payable at Twenty-one.** — *Rice v. Rice*, 43 N. Y. App. Div. 458.

**2. Happening of Uncertain Event.** — *Hovorka v. Henner*, 108 Ill. App. 443; *Joseph v. Catron*, (N. Mex. 1905) 81 Pac. Rep. 439; *Specht v. Beindorf*, 56 Neb. 553; *Thompson v. Huggins*, 23 Ont. App. 191.

**5. When Maker May Extend Time Indefinitely.** — *Mitchell v. St. Mary*, 148 Ind. 111; *City Nat. Bank v. Gunter*, 67 Kan. 227; *Sykes v. Citizen's Nat. Bank*, 69 Kan. 134. Compare *National Bank of Commerce v. Kenney*, (Tex. 1904) 83 S. W. Rep. 368, reversing (Tex. Civ. App. 1904) 80 S. W. Rep. 555.

**92. 2. Where Event Must Happen Sooner or Later.** — *United States.* — *Crider v. Shelby*, 95 Fed. Rep. 212; *Linton v. National L. Ins. Co.*, (C. C. A.) 104 Fed. Rep. 584.

**Illinois.** — *Miller v. Western College*, 71 Ill. App. 587, affirmed 177 Ill. 281, 69 Am. St. Rep. 242; *Clarke v. Hunter*, 83 Ill. App. 100, affirmed 184 Ill. 158, 75 Am. St. Rep. 160.

**Kansas.** — *City Nat. Bank v. Gunter*, 67 Kan. 227.

**Maine.** — *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246.

**Massachusetts.** — *Lowell Trust Co. v. Pratt*,

**93.** See notes 1, 2.

**94. Provisions Which May Extend Time.** — See note 1.

(*dd*) *Payment by Instalments.* — See notes 2, 3, 5, 6.

183 Mass. 379 (under Mass Stat. 1888, c. 329, p. 267).

*Nebraska.* — Specht *v.* Beindorf, 56 Neb. 553. *New York.* — Petrie *v.* Miller, 57 N. Y. App. Div. 17, affirmed 173 N. Y. 596 (under Negotiable Instruments Law).

*Texas.* — National Bank of Commerce *v.* Kenney, (Tex. 1904) 83 S. W. Rep. 368.

*Washington.* — Poncin *v.* Furth, 15 Wash. 201.

*Wisconsin.* — Thorpe *v.* Mindeman, (Wis. 1904) 101 N. W. Rep. 417 (under Negotiable Instruments Law).

**Notes Payable At or After Death** — *United States.* — Crider *v.* Shelby, 95 Fed. Rep. 212.

*Delaware.* — Standard Sewing Mach. Co. *v.* Smith, 1 Marv. (Del.) 330.

*Illinois.* — Safford *v.* Graves, 56 Ill. App. 499; Miller *v.* Western College, 71 Ill. App. 587, affirmed 177 Ill. 280, 69 Am. St. Rep. 242; Shaw *v.* Camp, 160 Ill. 425; Beatty *v.* Western College, 177 Ill. 290, 69 Am. St. Rep. 242.

*Indiana.* — Woodworth *v.* Veitch, 29 Ind. App. 589.

*Maryland.* — Feeser *v.* Feeser, 93 Md. 726, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92.

*Missouri.* — Maze *v.* Baird, 89 Mo. App. 348.

*Pennsylvania.* — Brown's Estate, 4 Pa. Dist. 587.

**92. 3. At or Before Certain Date** — *Colorado.* — Cowing *v.* Cloud, 16 Colo. App. 326; Frost *v.* Fisher, 13 Colo. App. 322.

*District of Columbia.* — Bowie *v.* Hume, 13 App. Cas. (D. C.) 286; Commercial Nat. Bank *v.* Consumers' Brewing Co., 16 App. Cas. (D. C.) 186.

*Illinois.* — Clarke *v.* Hunter, 83 Ill. App. 100, affirming 184 Ill. 158, 75 Am. St. Rep. 160, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92; Gehlbach *v.* Carlinville Nat. Bank, 83 Ill. App. 129; Beatty *v.* Western College, 177 Ill. 280, 69 Am. St. Rep. 242.

*Maine.* — Leader *v.* Plante, 95 Me. 339, 85 Am. St. Rep. 415.

*Minnesota.* — Phelps *v.* Sargent, 69 Minn. 118.

*Missouri.* — Fogg *v.* School Dist., 75 Mo. App. 159; Sappington *v.* Aetna Loan Co., 76 Mo. App. 242.

*Texas.* — Brookshire *v.* Allen, (Tex. Civ. App. 1895) 32 S. W. Rep. 164; Brainerd *v.* Bute, (Tex. Civ. App. 1898) 44 S. W. Rep. 575; Gill *v.* First Nat. Bank, (Tex. Civ. App. 1898) 47 S. W. Rep. 751; Cunningham *v.* McDonald, (Tex. 1904) 83 S. W. Rep. 372; National Bank of Commerce *v.* Kenney, (Tex. 1904) 83 S. W. Rep. 368.

*Wisconsin.* — Thorpe *v.* Mindeman, (Wis. 1904) 101 N. W. Rep. 417.

*Canada.* — Prescott *v.* Garland, 34 N. Bruns. 291.

**Note Maturing upon Failure to Comply with Terms of Mortgage.** — A provision in a mortgage, which by the terms of the note to secure which it is given is made a part thereof, that on failure to comply with any of the conditions of the mortgage the whole debt shall be-

come due and payable without notice to the mortgagor, does not affect the negotiability of the note. Kendall *v.* Selby, 66 Neb. 60, 103 Am. St. Rep. 697.

4. Anniston L. & T. Co. *v.* Stickney, 108 Ala. 146; Redden *v.* Lambert, 112 La. 740; Leader *v.* Plante, 95 Me. 339, 85 Am. St. Rep. 415.

5. Brainerd *v.* Bute, (Tex. Civ. App. 1898) 44 S. W. Rep. 575; Pagal *v.* Nickel, 107 Wis. 471.

**93. 1. Notes Payable at Day Certain or on Happening of Some Event, Held Negotiable.** — Crocker-Woolworth Nat. Bank *v.* Carle, 133 Cal. 409; Crawford *v.* Johnson, 87 Mo. App. 478.

**Payment at Day Certain or on Maker's Death.** — Beatty *v.* Western College, 177 Ill. 290, 69 Am. St. Rep. 242.

2. **An Option Given the Holder to Appropriate Money in His Hands** belonging to the maker, to the payment of the note, does not render it non-negotiable: Louisville Banking Co. *v.* Gray, 123 Ala. 251, 82 Am. St. Rep. 120.

**94. 1. A Provision Which Authorizes the Payee or Holder to Extend the Time of Payment Without Notice** destroys the negotiability of the note. Rosenthal *v.* Rambo, 28 Ind. App. 265; Matchett *v.* Anderson Foundry, etc., Works, 29 Ind. App. 207, 94 Am. St. Rep. 272.

**Note Containing Waiver of Defenses Arising from Extension of Payment Nonnegotiable.** — Evans *v.* Odem, 30 Ind. App. 207.

**Provision for Renewal Does Not Affect Negotiability.** — Anniston L. & T. Co. *v.* Stickney, 108 Ala. 146.

**A Provision Authorizing an Extension of the Time of Payment** has been held in *Missouri* not to affect the negotiability of the note. City Nat. Bank *v.* Goodloe-McClelland Commission Co., 93 Mo. App. 123.

2. **Notes Due by Instalments.** — Commercial Nat. Bank *v.* Consumers' Brewing Co., 16 App. Cas. (D. C.) 186.

3. Roblee *v.* Union Stockyards Nat. Bank, (Neb. 1903) 95 N. W. Rep. 61.

5. **Whole Amount to Be Due on Failure of Instalment.** — Commercial Nat. Bank *v.* Consumers' Brewing Co., 16 App. Cas. (D. C.) 186; Clarke *v.* Hunter, 83 Ill. App. 100, affirmed 184 Ill. 158, 75 Am. St. Rep. 160; Markey *v.* Corey, 108 Mich. 184, 62 Am. St. Rep. 698; Thorpe *v.* Mindeman, (Wis. 1904) 101 N. W. Rep. 417.

**When Delay in Declaring Note Due Not a Waiver of Right.** — Glas *v.* Glas, 114 Cal. 566, 55 Am. St. Rep. 90.

6. **Whole Amount Due on Failure of Interest** — *California.* — Meyer *v.* Weber, 133 Cal. 681.

*Colorado.* — Campbell *v.* Equitable Securities Co., 17 Colo. App. 417.

*Illinois.* — Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224.

*Iowa.* — Jurgensen *v.* Carlsen, 97 Iowa 627.

*Kansas.* — Clark *v.* Skeen, 61 Kan. 526, 78 Am. St. Rep. 337. See also Evans *v.* Baker, 5 Kan. App. 68. Compare Warren *v.* Gruwell, 5 Kan. App. 523; Gilbert *v.* Nelson, 5 Kan. App. 528.

*Minnesota.* — Phelps *v.* Sargent, 69 Minn. 118.

**95.** *dd.* CERTAIN IN AMOUNT—(*aa*) *General Principles.*—See notes 1, 2.

**96.** *Instances.*—See notes 2, 3.

*North Carolina.*—See also *Battery Park Bank v. Loughran*, 122 N. Car. 668.

*North Dakota.*—*Hollinshead v. Stuart*, 8 N. Dak. 35.

*Texas.*—*Wright v. Morgan*, (Tex. Civ. App. 1896) 37 S. W. Rep. 627; *Robertson v. Parrish*, (Tex. Civ. App. 1897) 39 S. W. Rep. 646; *Cunningham v. McDonald*, (Tex. 1904) 83 S. W. Rep. 372. See also *Dieter v. Bowers*, (Tex. Civ. App. 1905) 84 S. W. Rep. 847.

**Effect of Stipulation Where Extension Is Granted.**—Where the original note had attached to it coupon notes for the payment of interest annually to accrue thereon, and contained a stipulation that, upon the failure to pay any of the interest notes within thirty days after due, the principal sum should, at the option of the holder, become due, and upon the maturity of such note an extension is granted to the maker, who delivers to the payee other notes for the annual interest to accrue, the stipulation contained in the original note applies to the new interest notes, and upon the failure to pay one of these within the specified time after its maturity, the holder of the original note may declare the same due at once. *Heath v. Achey*, 96 Ga. 438.

**Rights of Assignee.**—Where such a note contained a stipulation that the principal should become due *instantly* on thirty days' default in the payment of any interest instalment, and before any default in the payment of interest had occurred the payee assigned to another the principal only of the note, reserving the interest and the right to collect the same, such payee could, as between himself and the maker of the note, lawfully extend the time of paying any annual instalment of interest; and his so doing would not, as to the assignee, render the principal of the note immediately due, so as to authorize the latter to bring suit thereon in advance of the time fixed in the note itself for the payment of the principal in case there was no default in the payment of interest. *Scott v. Liddell*, 98 Ga. 24.

**Waiver of Forfeiture by Subsequent Acceptance of Interest.**—*Mason v. Luce*, 116 Cal. 232.

**95. 1. Certainty in Amount Essential.**—*Alabama.*—*Anniston L. & T. Co. v. Stickney*, 108 Ala. 146; *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120.

*Colorado.*—*Campbell v. Equitable Securities Co.*, 17 Colo. App. 417.

*Illinois.*—*Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 160; *Gehlbach v. Carlinville Nat. Bank*, 83 Ill. App. 129; *Smith v. Myers*, 107 Ill. App. 410, *affirmed* 207 Ill. 126.

*Indiana.*—*Nicely v. Winnebago Nat. Bank*, 18 Ind. App. 30; *Nicely v. Commercial Bank*, 15 Ind. App. 563, 57 Am. St. Rep. 245.

*Kansas.*—*Clark v. Skeen*, 61 Kan. 526, 78 Am. St. Rep. 337.

*Maine.*—*Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246.

*Massachusetts.*—*Moore v. Edwards*, 167 Mass. 74.

*Michigan.*—*Carmody v. Crane*, 110 Mich. 508.

*Minnesota.*—*Loring v. Anderson*, (Minn.

1905) 103 N. W. Rep. 722; *Smith v. Tyler First State Bank*, (Minn. 1905) 104 N. W. Rep. 369.

*Missouri.*—*Chandler v. Calvert*, 87 Mo. App. 368; *Maze v. Baird*, 89 Mo. App. 348; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123. See also *Brown v. Vossen*, (Mo. App. 1905) 87 S. W. Rep. 577.

*Nebraska.*—*Garnett v. Meyers*, 65 Neb. 280; *Roblee v. Union Stockyards Nat. Bank*, (Neb. 1903) 95 N. W. Rep. 61.

*Oklahoma.*—*Randolph v. Hudson*, 12 Okla. 516; *Cotton v. John Deere Plow Co.*, 14 Okla. 605.

*Pennsylvania.*—*Merchants, etc., Bank v. Pizer*, 24 Pa. Co. Ct. 273.

*South Carolina.*—*Sylvester Bleckley Co. v. Alewine*, 48 S. Car. 308.

*South Dakota.*—*National Bank of Commerce v. Feeney*, 9 S. Dak. 550.

*Texas.*—*Jones v. Laturnus*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1010.

*Wisconsin.*—*Thorpe v. Mindeman*, (Wis. 1904) 101 N. W. Rep. 417.

**Mathematical Certainty Not Requisite.**—Where, in an action on a cattle note, it was agreed that the plaintiff became the owner and holder for value of the note and mortgage, and on the back of the note was an indorsement that the mortgage securing it bore the amount of revenue stamps required by law, duly canceled, which indorsement was signed by the payees, such stipulation and memorandum sufficiently indicated an intent to pass the mortgage as a part of the assignment of the note, without regard to the latter's negotiability. *State Nat. Bank v. Cudahy Packing Co.*, 126 Fed. Rep. 543, *affirmed* (C. C. A.) 134 Fed. Rep. 538.

**Amount Capable of Being Rendered Certain.**—Where there is a promise to pay a stated sum of money, plus or minus a definite amount or discount, the amount called for by the note is certain. *Loring v. Anderson*, (Minn. 1905) 103 N. W. Rep. 722.

**2. Capability of Being Ascertained Not Sufficient.**—*Loring v. Anderson*, (Minn. 1905) 103 N. W. Rep. 722, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 96; *Smith v. Tyler First State Bank*, (Minn. 1905) 104 N. W. Rep. 369; *Chandler v. Calvert*, 87 Mo. App. 368; *Roblee v. Union Stockyards Nat. Bank*, (Neb. 1903) 95 N. W. Rep. 61; *Randolph v. Hudson*, 12 Okla. 516; *Cotton v. John Deere Plow Co.*, 14 Okla. 605; *National Bank of Commerce v. Feeney*, 9 S. Dak. 550; *Daves v. Brady*, (S. Dak. 1903) 97 N. W. Rep. 719.

**96. 2. Sum Certain Plus Indefinite Charges.**—*Smith v. Myers*, 107 Ill. App. 412, *affirmed* 207 Ill. 126; *Carmody v. Crane*, 110 Mich. 508; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123; *Johnson v. Schar*, 9 S. Dak. 536; *Baird v. Vines*, (S. Dak. 1904) 99 N. W. Rep. 89; *Davis v. Brady*, (S. Dak. 1903) 97 N. W. Rep. 719; *Donaldson v. Grant*, 15 Utah 231.

**Provision for Payment of Protest Fees Does Not Affect Negotiability.**—*White v. Harris*, 69 S. Car. 65.

**Provision for Payment of Interest and "Taxes" — Instrument Not Negotiable.**—*Smith v. Myers*, 207 Ill. 131,

**96.** (bb) *Payable with Exchange.* — See note 5.

**97.** See notes 1, 2.

**98.** See note 1.

(cc) *Increase of Interest After Maturity.* — See notes 2, 4, 5, 6, 7.

(dd) *Attorney's Fees and Costs of Collection.* — See note 8.

**Doctrine of Negotiability.** — See note 9.

**Note Containing Agreement to Pay All Taxes** assessed against certain real estate and the interest of a person therein is not negotiable. *Walker v. Thompson*, 108 Mich. 686.

**96.** 3. *Moore v. Edwards*, 167 Mass. 74; *Roblee v. Union Stockyards Nat. Bank*, (Neb. 1903) 95 N. W. Rep. 61; *National Bank of Commerce v. Feeney*, 9 S. Dak. 550; *Jones v. Laturnus*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1010.

**5. Stipulation for Exchange Destroys Negotiability.** — *Nicely v. Winnebago Nat. Bank*, 18 Ind. App. 30; *John Church Co. v. Spurrer*, 20 Ind. App. 39; *Loring v. Anderson*, (Minn. 1905) 103 N. W. Rep. 722, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 96; *Smith v. Tyler First State Bank*, (Minn. 1905) 104 N. W. Rep. 369; *Chandler v. Calvert*, 87 Mo. App. 368; *White v. Harris*, 69 S. Car. 65.

**97.** 1. **Authorities Holding Provision for Exchange Not Destructive of Negotiability.** — *Clark v. Skeen*, 61 Kan. 526, 78 Am. St. Rep. 337; *Galva First Nat. Bank v. Nordstrom*, (Kan. 1904) 78 Pac. Rep. 804; *Brooklyn First Nat. Bank v. Slette*, 67 Minn. 425, 64 Am. St. Rep. 429; *Haslach v. Wolf*, 66 Neb. 600, 103 Am. St. Rep. 736. See also *Bovier v. McCarthy*, (Neb. 1903) 94 N. W. Rep. 965.

**A Provision for the Payment of Exchange and Collection Charges** renders the amount uncertain and destroys the negotiability of the note. *Smith v. Tyler First State Bank*, (Minn. 1905) 104 N. W. Rep. 369.

**2. Provision for Exchange Without More.** — *Clark v. Skeen*, 61 Kan. 526, 78 Am. St. Rep. 337.

**98.** 1. *Chandler v. Calvert*, 87 Mo. App. 368.

**2. Eccles v. Herrick, 15 Colo. App. 350; *Clark v. Skeen*, 61 Kan. 526, 78 Am. St. Rep. 337; *Sanford v. Litchenberger*, 62 Neb. 501; *Hollinshead v. Stuart*, 8 N. Dak. 35; *Cherry v. Sprague*, 187 Mass. 113. But see *Kendall v. Selby*, 66 Neb. 60, 103 Am. St. Rep. 697, in which case it was held that the stipulation being in the nature of a penalty is nonenforceable and does not affect the negotiability of the note.**

**A Provision for Interest Higher than the Legal Rate** from date, if the note is not paid at maturity, renders it nonnegotiable. *Randolph v. Hudson*, 12 Okla. 516.

**Compound Interest.** — The provision in a note for compounding interest semiannually upon the failure of the maker to pay any instalment of interest, does not render it nonnegotiable. *Brown v. Vossen*, (Mo. App. 1905) 87 S. W. Rep. 577.

**4. Note Providing for Payment of Interest on Interest After Maturity Negotiable.** — *Gilmore v. Hirst*, 56 Kan. 626.

**5. Cornish v. Woolverton, (Mont. 1905) 81 Pac. Rep. 4.**

**6. Provision for Interest After Maturity Valid.** — *Hallam v. Telleren*, 55 Neb. 255; *Haywood v. Miller*, 14 Wash. 660.

**7. Provision for Higher Rate from Date.** — A provision for a legal rate until maturity, and, if the note should not then be paid, a higher rate from the date of the note, is, so far as it provides for a higher rate before maturity, in the nature of a penalty, and will not be enforced. *Hallam v. Telleren*, 55 Neb. 255.

**8. "Costs of Collection" Includes Attorney's Fees.** — *Reeves v. Estes*, 124 Ala. 303.

**9. Provision for Attorney's Fees Does Not Affect Negotiability.** — *United States.* — *State Nat. Bank v. Cudahy Packing Co.*, 126 Fed. Rep. 543, affirmed (C. C. A.) 134 Fed. Rep. 538.

*Alabama.* — *Stephenson v. Allison*, 123 Ala. 439; *Reeves v. Estes*, 124 Ala. 303; *Cowan v. Campbell*, 131 Ala. 211. See also *Brown v. Bamberger*, 110 Ala. 342.

*Arkansas.* — *Clark v. Porter*, 90 Mo. App. 143 (construing Arkansas contract).

*Colorado.* — *Byers v. Bellan-Price Invest. Co.*, 10 Colo. App. 74; *Cowing v. Cloud*, 16 Colo. App. 326.

*Georgia.* — *Jones v. Crawford*, 107 Ga. 318.

*Illinois.* — *Mumford v. Tolman*, 157 Ill. 258; *Condon v. Bruse*, 58 Ill. App. 254; *Clarke v. Hunter*, 83 Ill. App. 100, affirmed 184 Ill. 158, 75 Am. St. Rep. 160; *Gehlbach v. Carlinville Nat. Bank*, 83 Ill. App. 129.

*Massachusetts.* — *Cherry v. Sprague*, 187 Mass. 113.

*Mississippi.* — *Clifton v. Aberdeen Bank*, 75 Miss. 929.

*Montana.* — By Montana Code of 1895, notes containing a provision for attorney's fees were made nonnegotiable. By the Laws of 1899, p. 124, the provision of the Code on this subject was repealed, and notes containing a stipulation for fees were declared negotiable. The constitutionality of this statute has been upheld. *Bullard v. Smith*, 28 Mont. 387. See also *Morrison v. Ornbau*, 30 Mont. 111. See also *Cornish v. Woolverton*, (Mont. 1905) 81 Pac. Rep. 4.

*Oregon.* — *Cox v. Alexander*, 30 Oregon 438.

*Pennsylvania.* — *Milton Nat. Bank v. Beaver*, 25 Pa. Super. Ct. 494 (under Negotiable Instruments Law).

*South Carolina.* — *White v. Harris*, 69 S. Car. 65.

*South Dakota.* — Under S. Dak. Laws 1889, c. 16, § 1, which declares such provisions void, it is held that they do not affect the negotiability of the note. *Chandler v. Kennedy*, 8 S. Dak. 56; *Johnson v. Schar*, 9 S. Dak. 536; *National Bank of Commerce v. Feeney*, 9 S. Dak. 550; *Baird v. Vines*, (S. Dak. 1904) 99 N. W. Rep. 89.

*Tennessee.* — *Tyler v. Walker*, 101 Tenn. 306.

*Utah.* — *Donaldson v. Grant*, 15 Utah 231; *Salisbury v. Stewart*, 15 Utah 308, 62 Am. St. Rep. 934. See also *Keokuk Falls Imp. Co. v. Kingsland*, etc., Mfg. Co., 5 Okla. 32.

- 99.** See notes 1, 2, 3.  
**100.** Doctrine of Nonnegotiability. — See notes 3, 4.  
**101.** Arguments Against Negotiability. — See note 2.  
**102.** Validity of the Stipulation. — See notes 1, 2.

But the amount of the fee must be definitely fixed, else the note is rendered nonnegotiable. *Lippincott v. Rich*, 22 Utah 196.

**Indiana.** — *Shoup v. Snepp*, 22 Ind. App. 30; *Nicely v. Winnebago Nat. Bank*, 18 Ind. App. 30; *Rouyer v. Miller*, 16 Ind. App. 519.

**Nebraska.** — *Haslach v. Wolf*, 66 Neb. 600, 103 Am. St. Rep. 736. See also *Mutual Ben. L. Ins. Co. v. Daniels*, (Neb. 1903) 93 N. W. Rep. 134.

**Texas.** — Stipulation is valid and enforceable. *Mays v. Sanders*, (Tex. Civ. App. 1896) 36 S. W. Rep. 108; *Chicago Cottage Organ Co. v. Waddell*, (Tex. Civ. App. 1896) 35 S. W. Rep. 408; *Wright v. Morgan*, (Tex. Civ. App. 1896) 37 S. W. Rep. 627; *Robertson v. Parrish*, (Tex. Civ. App. 1897) 39 S. W. Rep. 646; *Sinclair v. Weekes*, (Tex. Civ. App. 1897) 41 S. W. Rep. 107; *Martin v. Berry*, 1 Indian Ter. 399 (in which case the court was construing a contract governed by the law of Texas).

**99. 1. Stipulation Enforceable.** — *Alexander v. McDow*, 108 Cal. 25; *Ray v. Pease*, 97 Ga. 618; *Stone v. Billings*, 167 Ill. 170; *Gehlbach v. Carlinville Nat. Bank*, 83 Ill. App. 129. See also *Poncin v. Furth*, 15 Wash. 201. See also *Warnock v. Itawis*, (Wash. 1905) 80 Pac. Rep. 297.

**Stipulation Not Enforceable Where No Recovery Is Had on Note.** — *Branch v. Traylor*, (Tex. Civ. App. 1896) 36 S. W. Rep. 592.

**Burden of Showing that Stipulation Was Intended as Usury on Defendant.** — *Mumford v. Tolman*, 157 Ill. 258.

**2. Stipulation Void.** — *Gilmore v. Hirst*, 56 Kan. 626; *Clark v. Tanner*, 100 Ky. 275; *Chandler v. Kennedy*, 8 S. Dak. 56; *Johnson v. Schar*, 9 S. Dak. 536; *National Bank of Commerce v. Feeny*, 9 S. Dak. 550.

**3. Stipulation Available to Holder.** — *Cummings v. Irvin*, (Tenn. Ch. 1900) 59 S. W. Rep. 153; *Chicago Cottage Organ Co. v. Waddell*, (Tex. Civ. App. 1896) 35 S. W. Rep. 408; *Mays v. Sanders*, (Tex. Civ. App. 1896) 36 S. W. Rep. 108; *Smith v. Richardson Lumber Co.*, (Tex. Civ. App. 1898) 47 S. W. Rep. 386.

**One Ratifying an Unauthorized Note** without notice that it contains a stipulation for attorney's fees is not bound thereby. *Brown v. Bamberger*, 110 Ala. 342.

**100. 3. Stipulation for Attorney's Fees Destroy's Negotiability** — *California.* — *Mason v. Luce*, 116 Cal. 232; *Findlay v. Pott*, 131 Cal. 385; *Meyer v. Weber*, 133 Cal. 681.

*Maine.* — *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246.

*Missouri.* — *Creasy v. Gray*, 88 Mo. App. 454. See *Law v. Crawford*, 67 Mo. App. 150.

*Montana.* — *Stadler v. Helena First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582. See cases cited **98. 9, supra.**

*Oklahoma.* — *Randolph v. Hudson*, 12 Okla. 516; *Cotton v. John Deere Plow Co.*, 14 Okla. 605.

*Pennsylvania.* — *Benny v. Dunn*, 2 Lack. Leg. N. (Pa.) 135. See the cases cited **98. 9, supra.**  
*South Carolina.* — *Sylvester Bleckley Co. v. Alewine*, 48 S. Car. 308. See the cases cited **98. 9, supra.**

**4.** See *Mason v. Luce*, 116 Cal. 232.

**101. 2. Argument that Such Provision Renders Note Nonnegotiable.** — *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120; *Sylvester Bleckley Co. v. Alewine*, 48 S. Car. 308.

**102. 1. Conflict of Laws.** — *Clark v. Tanner*, 100 Ky. 275; *Hallam v. Telleren*, 55 Neb. 255; *Exchange Bank v. Apalachian Land, etc., Co.*, 128 N. Car. 193. *Compare* *Lockwood v. Lindsey*, 6 App. Cas. (D. C.) 396.

**A Suit to Foreclose a Mortgage Given for Collateral Security** is a collection of the note by suit within the meaning of a stipulation for fees "in case of collection by suit." *Hand v. Simpson*, 99 Ill. App. 269.

**2. Stipulation Held Valid.** — *Cowan v. Campbell*, 131 Ala. 211; *Shoup v. Snepp*, 22 Ind. App. 30; *Duggan v. Champlin*, 75 Miss. 441; *Morrison v. Ornbaun*, 30 Mont. 111; *Cox v. Alexander*, 30 Oregon 438; *Dunovant v. Stafford*, (Tex. Civ. App. 1904) 81 S. W. Rep. 101; *Dieter v. Bowers*, (Tex. Civ. App. 1905) 84 S. W. Rep. 847; *In re Keeton*, 126 Fed. Rep. 426 (construing Texas contract). See also *Texas Land, etc., Co. v. Robertson*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1020.

**Where the Purpose of the Stipulation Is to Collect Usurious Interest** it is not enforceable. *Tyler v. Walker*, 101 Tenn. 306.

**Stipulation Valid When Bona Fide.** — *Stephenson v. Allison*, 123 Ala. 439.

**Stipulation a Contract for Indemnity.** — The stipulation in a note for the payment of attorneys' fees is a contract for indemnity, and not one for the payment of agreed damages. In the absence of an agreement between the holder and the attorney employed by him to collect, the holder can only recover such amount for attorneys' fees as will constitute a reasonable payment for the value of the attorneys' services, and this is true even though the note provides for the recovery of a ten per cent. fee. *Texas Land, etc., Co. v. Robertson*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1020.

**Georgia.** — Under the Civil Code (§ 3667), as it stood before the Act of 1900, an obligation to pay attorney's fees upon a note, in addition to the stipulated rate of interest, whether such obligation be contained in the note or in a deed given to secure the note, is unenforceable unless to a suit upon the note the defendant files a plea which is not sustained. *Demere v. Germania Bank*, 116 Ga. 317; *Stoner v. Pickett*, 115 Ga. 653.

A plea of *plene administravit* filed in a suit by "A., administrator," is a plea by the defendant as an individual, and is an insufficient answer to the suit. When such a plea is stricken on demurrer, the defendant is liable for attorney's fees where the note provides for

**102. Not Conclusive in Amount.** — See note 3.

**103. How Recoverable.** — See notes 1, 2.

the payment of attorney's fees and was executed prior to the passage of the act approved Dec. 12, 1900 (Acts 1900, p. 53; Van Epps's Code Supp., § 6185). *Glisson v. Weil*, 117 Ga. 842.

An indorser who files a plea seeking to be discharged and fails to sustain it is liable for the attorney's fees even though the principal files no plea. *Hall v. Pratt*, 103 Ga. 255.

**Series Maturing on Failure to Pay One.** — Where provision is made that the whole of a series of notes shall mature upon the failure to pay any one of the notes at maturity, and each note contains a stipulation for the payment of an attorney's fee, the holder may recover attorney's fees, upon the failure of the maker to pay one of the notes at maturity, although the holder makes no demand and the maker was ready to pay them on demand. *Dieter v. Bowers*, (Tex. Civ. App. 1905) 84 S. W. Rep. 847.

**Indorser Without Notice of Dishonor Not Liable for Fees.** — *Robinson v. Aird*, 43 Fla. 30.

**102. 3. Not Conclusive in Amount.** — *Pattillo v. Alexander*, 96 Ga. 60; *Jones v. Harrell*, 110 Ga. 373; *Cramer v. Huff*, 114 Ga. 981; *Rouyer v. Miller*, 16 Ind. App. 519; *Warren v. Syfers*, 23 Ind. App. 167; *Bay v. Trusdell*, 92 Mo. App. 377; *Vermont L. & T. Co. v. Greer*, 19 Wash. 611; *Morrison v. Ornbaun*, 30 Mont. 111. See also *Cox v. Alexander*, 30 Oregon 438; *Lay v. Cardwell*, (Tex. Civ. App. 1896) 33 S. W. Rep. 595; *Salisbury v. Stewart*, 15 Utah 308, 62 Am. St. Rep. 934. Compare *Stephenson v. Allison*, 123 Ala. 439.

**What Constitutes Bringing Suit Within Meaning of Provision.** — *Hall v. Read*, 28 Tex. Civ. App. 18.

**Proof of Value of Services Essential.** — *Orr v. Sparkman*, 120 Ala. 9.

**Burden of Proving Amount on Plaintiff.** — *Shoup v. Snepp*, 22 Ind. App. 30.

**Proof of Reasonableness of Amount.** — *Hillsboro First Nat. Bank v. Mack*, 35 Oregon 122.

**Ascertainment of Reasonable Amount.** — *McIlhenny v. Planters*, etc., Nat. Bank, (Tex. Civ. App. 1898) 46 S. W. Rep. 282.

**Amount Stipulated Presumed Reasonable.** — *Stephenson v. Allison*, 123 Ala. 439; *Rouyer v. Miller*, 16 Ind. App. 519; *Haywood v. Miller*, 14 Wash. 660; *Cowan v. Campbell*, 131 Ala. 211.

**Judicial Notice as to Reasonableness of Amount.** — *Warnock v. Itawis*, (Wash. 1905) 80 Pac. Rep. 297.

**No Amount Stipulated.** — *Ray v. Pease*, 97 Ga. 618. See also *Stone v. Billings*, 167 Ill. 170.

**Manner of Ascertaining Where No Amount Stipulated.** — *Keokuk Falls Imp. Co. v. King-land*, etc., Mfg. Co., 5 Okla. 32.

The stipulation being a contract for indemnity and not one for the payment of agreed damage, where no agreement has been made between the holders and the attorney employed by him to collect, the holder can recover on the note only such amount for attorneys' fees as his attorney can recover from him for his services, which is, in the absence of agreement, their reasonable value. *Texas Land, etc., Co. v. Robertson*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1020.

**Where No Amount Is Stipulated** the burden is on the plaintiff to establish that a fee alleged by him to be reasonable is such. *Woodruff v. Hensley*, 26 Ind. App. 592.

**Power of Court to Fix Amount.** — *Burns v. Staacke*, (Tex. Civ. App. 1899) 53 S. W. Rep. 354; *Hellier v. Russell*, 136 Cal. 143; *Jones v. Stoddart*, 8 Idaho 210.

**Amount Determined by Court in Absence of Express Stipulation.** — *Fowler v. Bell*, (Tex. Civ. App. 1896) 35 S. W. Rep. 822.

**Mode of Ascertainment Provided by Iowa Code, § 3869.** — *Bankers' Iowa State Bank v. Jordan*, 111 Iowa 324.

**Fees Determined by Clerk under Cal. Code Civ. Proc. § 585, subd. 1.** — *Alexander v. McDow*, 108 Cal. 23.

**Stipulation Controlling Before Wash. Act of 1895.** — *McDougall v. Walling*, 19 Wash. 80.

**Stipulation as to Amount Conclusive.** — *Gordan v. Decker*, 19 Wash. 188; *Dunovant v. Stafford*, (Tex. Civ. App. 1904) 81 S. W. Rep. 101; *Robertson v. Holman*, (Tex. Civ. App. 1904) 81 S. W. Rep. 326; *Carver v. J. S. Mayfield Lumber Co.*, 29 Tex. Civ. App. 434.

**The Giving of a New Note** does not constitute such a payment as to authorize the recovery of attorney's fees under a stipulation providing for such fees if the note is collected by an attorney. *Davis v. Cochran*, 76 Miss. 439.

**The Notes Must Be Placed in an Attorney's Hands for Collection** to warrant a judgment for fees. *Smith v. Board*, 21 Tex. Civ. App. 213.

**Question Whether Note Placed in Attorney's Hands for Collection One of Fact.** — *Rogers v. O'Barr*, (Tex. Civ. App. 1903) 76 S. W. Rep. 593.

**Appearance of Attorney Sufficient Proof.** — *Bonnell v. Prince*, 11 Tex. Civ. App. 399.

**103. 1. How Recoverable.** — *Mason v. Luce*, 116 Cal. 232.

**Separate Suit Essential.** — *Hand v. Simpson*, 99 Ill. App. 269. See also *Dearlove v. Edwards*, 166 Ill. 619.

**Bringing of Suit Condition Precedent to Recovery, under Ga. Civ. Code, § 3667.** — *Jones v. Crawford*, 107 Ga. 318.

**Fees Recoverable in Suit on Note.** — *Byers v. Bellan-Price Invest. Co.*, 10 Colo. App. 74; *Williams v. Harrison*, 27 Tex. Civ. App. 179. See also *Harris v. Scrivener*, (Tex. Civ. App. 1903) 78 S. W. Rep. 705. See *McAnally v. Vickry*, (Tex. Civ. App. 1904) 79 S. W. Rep. 857.

**Where the Fee Is Due "When the Note Is Placed in the Hands of an Attorney for Collection,"** it may be recovered in the same suit. *National Bank v. Danahy*, 89 Ill. App. 92.

**Suit on Note Not Prerequisite.** — *Morrison v. Ornbaun*, 30 Mont. 111.

**When Attachment Levied Before Maturity.** — Where notes provided that if not paid at maturity the maker should pay a reasonable attorney's fee, if collected by an attorney, it was held that he was liable for such fee, upon nonpayment at maturity, notwithstanding the fact that an attachment was sued out before the maturity of one of the notes. *Munn v. Planters, etc., Bank*, 109 Ala. 215.



- 103.** (b) Medium of Payment — *aa*. GENERAL PRINCIPLES. — See note 3.
- 104.** Provision for Payment in Particular Denomination of Money. — See note 4.
- 105.** Instruments Payable in Specific Articles or Securities. — See notes 1, 2, 3.
- 108.** (5) *As to Parties* — (a) Certainty of Parties in General. — See note 3.
- 109.** (b) Signature of Drawer or Maker — *aa*. IN GENERAL. — See note 1.
- Need Not Be Subscribed. — See note 2.
- Mark or Initials. — See note 6.
- Adopted Name — Matter of Description. — See note 8.
- Proof of Signature. — See note 10.
- 110.** *bb*. JOINT AND SEVERAL NOTES. — See note 1.
- Joint Note. — See notes 2, 3, 4.

**Georgia Statute.** — When suit is brought on a promissory note containing the usual stipulation as to the payment of attorney's fees, and one of the defenses upon which the defendant relies is sustained, the plaintiff is not entitled to collect any amount as attorney's fees. *Trent-ham v. Blumenthal*, 118 Ga. 530.

**103. 2. Tender Before Suit.** — See also *Rose v. McCracken*, 20 Tex. Civ. App. 637.

**Note Prerequisite under Georgia Statute.** — *Holcomb v. Cable Co.*, 119 Ga. 466.

**3. Money the Only Medium of Payment.** — *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120; *Meyer v. Weber*, 133 Cal. 681 (under Cal. Civ. Code, § 3088); *Clarke v. Hunter*, 83 Ill. App. 100, *affirmed* 184 Ill. 158, 75 Am. St. Rep. 160; *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246; *Brooklyn First Nat. Bank v. Slette*, 67 Minn. 425, 64 Am. St. Rep. 429; *Chandler v. Calvert*, 87 Mo. App. 368; *Stadler v. Helena First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582; *Cornish v. Woolverton*, (Mont. 1905) 81 Pac. Rep. 4; *Randolph v. Hudson*, 12 Okla. 516; *Merchants, etc., Bank v. Pizor*, 24 Pa. Co. Ct. 273.

**104. 4. Provision for Payment in "Gold Coin or Its Equivalent in Currency of the United States"** *Valid.* — *Wright v. Morgan*, (Tex. Civ. App. 1896) 37 S. W. Rep. 627.

**105. 1. Promise to Pay in Specific Articles.** — *Chandler v. Calvert*, 87 Mo. App. 368; *Atlanta Guano Co. v. Hunt*, 100 Tenn. 89.

**2. Payable in Securities.** — *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120.

**Note Payable by "New York or Chicago Exchange" Not Negotiable.** — *Brooklyn First Nat. Bank v. Slette*, 67 Minn. 425, 64 Am. St. Rep. 429; *Chandler v. Calvert*, 87 Mo. App. 368.

**3. Payment in Chattels of Uncertain Value.** — *Buford v. Ward*, 108 Ala. 307.

**108. 3. Crider v. Shelby**, 95 Fed. Rep. 212; *Gehlbach v. Carlinville Nat. Bank*, 83 Ill. App. 129; *Randolph v. Hudson*, 12 Okla. 516; *Merchants, etc., Bank v. Pizor*, 24 Pa. Co. Ct. 273.

**109. 1. Signing Essential.** — *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120; *Merchants, etc., Bank v. Pizor*, 24 Pa. Co. Ct. 273. See also *Randolph v. Hudson*, 12 Okla. 516.

**The Misspelling of His Name by the Maker** in signing a note payable to him is immaterial when it appears that he executed the note and that he spelled his name properly in indorsing it. *Lassen County Bank v. Sherer*, 108 Cal. 513.

**Maker Not Disclosed.** — No party can be charged as a principal on a negotiable note,

unless his name is therein disclosed. *Lewis v. Cambridge First Nat. Bank*, (Neb. 1901) 95 N. W. Rep. 355.

**2. Need Not Be Subscribed.** — *Miers v. Coates*, 57 Ill. App. 216; *Dow Law Bank v. Godfrey*, 126 Mich. 521, 86 Am. St. Rep. 559; *Pearl v. Cortright*, 81 Miss. 300.

**Signature on Back of Note Sufficient.** — *Eudora Min., etc., Co. v. Barclay*, 122 Ala. 506.

**6. Signature by Mark.** — *Wright v. Forgy*, 126 Ala. 389; *Farmers', etc., Bank v. Copsey*, 134 Cal. 287; *Sivils v. Taylor*, 12 Okla. 47; *Remillard v. Moisan*, 15 Quebec Super. Ct. 622.

**Signature by Agent in the Maker's Presence** is sufficient even though it appears that the original intention of the maker was to sign by mark. *Spearman v. Equitable Mortg. Co.*, 115 Ga. 670.

**Signing of Maker's Name by Another in Maker's Presence Sufficient.** — *Crumrine v. Crumrine*, 14 Ind. App. 641.

**8. Adopted Business Name.** — *Stony Island Hotel Co. v. Johnson*, 57 Ill. App. 608. See also *Jones v. Home Furnishing Co.*, 9 N. Y. App. Div. 103.

**Assumed Name.** — *Karoly Electrical Constr. Co. v. Globe Sav. Bank*, 64 Ill. App. 225.

One who signs a promissory note in the name of another, by himself as attorney in fact, but who, to the knowledge of the payee and a subsequent indorsee, had no authority to use the other's name, and who refuses their solicitation to sign his own name and bind himself personally, is not liable upon the note as his contract, notwithstanding the fact that it was given in a transaction of his own, and that he was generally using the name signed to the note as a trade-name. *Kansas Nat. Bank v. Bay*, 62 Kan. 692, 84 Am. St. Rep. 417.

**10. Proof of Signature.** — *Wright v. Forgy*, 126 Ala. 389.

**Mode of Proof under Cal. Civ. Code, § 14.** — *Farmers', etc., Bank v. Copsey*, 134 Cal. 287.

**Proof by Payee Insufficient.** — *Chadwell v. Chadwell*, 98 Ky. 643.

**Mode of Proving Signature Made by Third Person and Adopted by Maker of Note.** — *Harris v. Tinder*, 109 Mo. App. 563.

**110. 1. Note Signed by Two.** — *Weirick v. Graves*, 73 Ill. App. 266.

**2. Taylor v. Reger**, 18 Ind. App. 469, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110; *Crépeau v. Beauchesne*, 14 Quebec Super. Ct. 495; *Noble v. Forgrave*, 17 Quebec Super. Ct. 234.

**Under Cal. Civ. Code, § 1659.** — *Farmers' Exch. Bank v. Morse*, 129 Cal. 239.

**110.** Joint and Several Note. — See notes 5, 7.

**111.** Relation of Suretyship Between Makers. — See notes 1, 2.

Note Signed by Several in Representative Capacity. — See note 5.

(c) Direction to Drawee — Necessity of Drawee — Accepted Bill Without Drawee.

— See note 6.

**112.** (d) Designation of Payee — *aa.* IN GENERAL — Payee Must Be Ascertained. — See note 7.

**113.** See note 1.

Note to A or B. — See note 3.

Note Presumed Joint and Several, under Okla. Stat. 1893, § 851. — *Outcalt v. Collier*, 8 Okla. 473.

**110. 3.** *Taylor v. Reger*, 18 Ind. App. 469, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110.

**4.** Note in Terms Joint May Be Shown to Be Several. — *Hecker v. Mahler*, 64 Ohio St. 398. "I or We" Promise to Pay Signed by Several Held Joint and Several Note. — *Harris v. Coleman*, etc., *White Lead Co.*, 58 Ill. App. 366.

Joint and Several Notes under Cal. Civ. Code, § 1659. — *Leonard v. Leonard*, 138 Cal. xix, 70 Pac. Rep. 1071.

**5** American Nat. Bank v. Omaha Coffin Mfg. Co., (Neb. 1901) 95 N. W. Rep. 672.

**7.** "I Promise," Signed by Two or More. — *Ullery v. Brohm*, (Colo. 1904) 79 Pac. Rep. 180; *Dow Law Bank v. Godfrey*, 126 Mich. 521, 86 Am. St. Rep. 559; *Dodge v. Chessman*, 10 Pa. Super. Ct. 604.

**111. 1.** *Alabama*. — *Jackson v. Wood*, 108 Ala. 209; *Alabama Nat. Bank v. Hunt*, 125 Ala. 512; *Ross v. De Campi*, 140 Ala. 327.

*Georgia*. — *Trammell v. Swift Fertilizer Works*, 121 Ga. 778; *Hall v. Rogers*, 114 Ga. 357.

*Missouri*. — *McPherson v. Andes*, 75 Mo. App. 204; *Hardester v. Tate*, 85 Mo. App. 624.

*New York*. — *Fitch v. Fraser*, 84 N. Y. App. Div. 119.

*Ohio*. — *Hecker v. Mahler*, 64 Ohio St. 398.

*West Virginia*. — *Parsons v. Harrold*, 46 W. Va. 122.

See also *Redmond v. Smith*, 22 Tex. Civ. App. 323.

Relative Position of Signatures as Evidence of Nature of Relation. — *Shed v. Moore*, 31 Wash. 283.

The Addition of the Word "Surety" after the name of one of the makers does not alter his liability to the payee as a joint maker. *Galloway v. Bartholomew*, 44 Oregon 75.

Sufficiency of Evidence to Show Relation of Suretyship. — *Bettinger v. Scully*, 36 Wash. 596.

**2.** *Trammell v. Swift Fertilizer Works*, 121 Ga. 778; *Compton v. Smith*, 120 Ala. 233; *Peterson v. Stege*, 67 Ill. App. 147; *Hardester v. Tate*, 85 Mo. App. 624; *Hecker v. Mahler*, 64 Ohio St. 398. See also *Shed v. Moore*, 31 Wash. 283.

Burden of Proof on Defendant. — *Jennison v. Sceets*, 60 Ill. App. 607.

**5.** *California*. — *Savings Bank v. Central Market Co.*, 122 Cal. 28.

*Illinois*. — *Miers v. Coates*, 57 Ill. App. 216; *Williams v. Harris*, 198 Ill. 501.

*Kentucky*. — *Warford v. Temple*, (Ky. 1903) 73 S. W. Rep. 1022.

*Maine*. — *Gleason v. Sanitary Milk-Supply Co.*, 93 Me. 544, 74 Am. St. Rep. 370.

*Massachusetts*. — *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577.

*New York*. — *Bush v. Gilmore*, 45 N. Y. App. Div. 89; *Union Nat. Bank v. Scott*, 53 N. Y. App. Div. 65.

*Pennsylvania*. — *Williams v. Hipple*, 17 Pa. Super. Ct. 81.

*Wisconsin*. — *Nunnebmacher v. Poss*, 116 Wis. 444.

See *Wilson v. Fite*, (Tenn. Ch. 1897) 46 S. W. Rep. 1056. See also *Luster v. Robinson*, (Ark. 1905) 88 S. W. Rep. 896; *Daniel v. Buttner*, (Wash. 1905) 80 Pac. Rep. 811.

**6.** Direction to Drawee Essential. — *McPherson v. Johnston*, 3 British Columbia 465.

**112. 7.** Payee Must Be Pointed Out. — *Weeger v. Mueller*, 102 Ill. App. 258; *Crawford v. Johnson*, 87 Mo. App. 478; *Randolph v. Hudson*, 12 Okla. 516; *Merchants, etc., Bank v. Pizor*, 24 Pa. Co. Ct. 273; *Smith v. Willing*, (Wis. 1904) 101 N. W. Rep. 692. See also *Clarke v. Marlow*, 20 Mont. 249.

Where the Payee's Name Is Not Designated the note is treated as being made to a fictitious payee and is payable to bearer. *Simmons v. Brown*, 4 Ohio Dec. (Reprint) 29, 1 Cleve. L. Rec. 33.

*Mich. Comp. Laws*, § 6081, requiring that the full name of partnership associations be given in promissory notes, has reference only to papers made by such associations and not to those made to them. *Shaw v. Brown*, 128 Mich. 573.

Warrant of Attorney to Confess Judgment in Favor of Holder does not remedy the omission of the payee's name and render the note payable to bearer. *Smith v. Willing*, (Wis. 1904) 101 N. W. Rep. 692.

"Bearer" a Sufficient Designation. — *Merchants, etc., Bank v. Pizor*, 24 Pa. Co. Ct. 273.

**113. 1.** Payee Must Be Ascertainable. — *Stern v. Eichberg*, 83 Ill. App. 442; *Clarke v. Marlow*, 20 Mont. 249.

Illustrations. — An instrument payable to a particular person, "trustee," sufficiently designates the payee. *Central State Bank v. Spurlin*, 111 Iowa 187, 82 Am. St. Rep. 511.

An indorsement on a note, "I hereby assume and agree to pay the principal of the within note," sufficiently designates the payee. *Clarke v. Marlow*, 20 Mont. 249.

Renewal Note Payable to Dead Person. — *Dark v. Middlebrook*, (Tex. Civ. App. 1898) 45 S. W. Rep. 963.

"Estate of A" as Payee Sufficient Designation. — *Stern v. Eichberg*, 83 Ill. App. 442.

**3.** Payable to One of Two. — *Collyer v. Cook*, 28 Ind. App. 272.

**114.** See note 1.

**115.** *bb.* FICTITIOUS PAYEES. — See notes 5, 6.

**116.** Intention and Knowledge Control. — See notes 1, 2.

**117.** Estoppel in Favor of Bona Fide Holder. — See note 1.

**119.** (e) Instrument Defective as to Parties — *bb.* DRAWER AND DRAWEE SAME PERSON. — See note 7.

**120.** *cc.* DRAWER OR MAKER AND PAYEE SAME PERSON — Bills of Exchange. — See note 1.

Promissory Notes. — See notes 4, 5, 6.

**121.** Notes by a Firm to Partner, or Corporation to Officer. — See note 4.

**122.** See note 1.

**123.** (6) *Absence of Seal.* — See notes 6, 9.

**124.** Corporation Paper. — See note 2.

(7) *Not Coupled with Collateral Agreements* — (a) General Principles. —

See note 5.

**125.** See note 1.

**114.** 1. Note Payable to Husband or Wife — Action Maintainable by Either. — *Carr v. Bauer*, 61 Ill. App. 504.

**115.** 5. Who May Not Claim the Benefit of the Rule. — *Lumley v. Kinsella Glass Co.*, 85 Ill. App. 412.

6. Fictitious Payee Equivalent to Bearer. — *Clutton v. Attenborough*, (1895) 2 Q. B. 707; *Security Bank v. Lucas*, 69 Minn. 46; *Odell v. Clyde*, 38 N. Y. App. Div. 333. See also *Jones v. Home Furnishing Co.*, 9 N. Y. App. Div. 103.

Knowledge Requisite under Michigan Statute. — *Peninsular Sav. Bank v. Hosie*, 112 Mich. 351.

Under Mich. Comp. Laws, § 4870, providing that notes made payable to a fictitious person shall be as though made to bearer, the same effect will be given to a note to a partnership association which fails to designate the association properly. *Shaw v. Brown*, 128 Mich. 573.

Under Minn. Gen. Stat., 1894, § 2236, the same rule is applied to a promissory note payable to the order of the maker and negotiated by him without indorsement. *Security Bank v. Lucas*, 69 Minn. 46.

Under 1 N. Y. Rev. Stat., p. 768, § 5, providing that a note payable to the order of the maker shall, if negotiated by the maker, have the same effect as if payable to bearer, it is necessary that the note shall be negotiated by the maker, in order that it shall have this effect. *Odell v. Clyde*, 38 N. Y. App. Div. 333.

**116.** 1. Test as to Fictitious Character of Payee. — *Clutton v. Attenborough*, (1897) A. C. 90.

2. Name of Real Person Inserted by Pretense. — *Clutton v. Attenborough*, (1897) A. C. 90.

**117.** 1. Forged Indorsement Passes No Title. — *Commercial Nat. Bank v. Waggeman*, 87 Ill. App. 171, affirmed 187 Ill. 227.

**119.** 7. *Gray Tie, etc., Co. v. Farmers' Bank*, 109 Ky. 694.

**120.** 1. *Jenkins v. Coomber*, (1898) 2 Q. B. 168, 67 L. J. Q. B. 780, 78 L. T. N. S. 752, 47 W. R. 48.

4. Indorsed Note Payable to Maker. — *In re Edson*, 119 Fed. Rep. 487; *Odell v. Clyde*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 735, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.)

120, affirmed 38 N. Y. App. Div. 333; *Pettyjohn v. National Exch. Bank*, 101 Va. 111.

5. Same — Indorsement in Blank. — *Meyer v. Foster*, (Cal. 1905) 81 Pac. Rep. 402; *Pettyjohn v. National Exch. Bank*, 101 Va. 111; *Walker v. Sims*, 9 Kan. App. 890, 64 Pac. Rep. 81.

6. Under 2 N. Y. Rev. Stat. (9th ed.) p. 1851, § 5 — *Odell v. Clyde*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 735, affirmed 38 N. Y. App. Div. 333.

**121.** 4. *Pettyjohn v. National Exch. Bank*, 101 Va. 111; *Fisher v. Diehl*, 94 Md. 114, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 121.

**122.** 1. Indorsed Note of Firm to Partner. — *Pettyjohn v. National Exch. Bank*, 101 Va. 111.

**123.** 6. *Breitling v. Marx*, 123 Ala. 222; *McLaughlin v. Braddy*, 63 S. Car. 438, 90 Am. St. Rep. 681, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 123, 124.

9. *Stevenson v. Bethea*, 68 S. Car. 246. See also *Sclauch v. O'Hare*, 22 Pa. Co. Ct. 384.

Written Promise under Seal Cannot Be Declared on as Promissory Note. — *Breitling v. Marx*, 123 Ala. 222.

Under S. Dak. Comp. Laws, § 3549, abolishing all distinctions between sealed and unsealed instruments, the fact that the note is sealed does not render it nonnegotiable. *Landauer v. Sioux Falls Imp. Co.*, 10 S. Dak. 205.

**124.** 2. Modern Doctrine — Corporate Paper. — *Clark v. Read*, 12 App. Cas. (D. C.) 343; *Chase Nat. Bank v. Faurot*, 149 N. Y. 532; *McLaughlin v. Braddy*, 63 S. Car. 438, 90 Am. St. Rep. 681, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 123, 124.

Corporate Seal Does Not Render a Note Nonnegotiable under S. Dak. Comp. Laws, c. 3549. *Landauer v. Sioux Falls Imp. Co.*, 10 S. Dak. 205.

5. Instruments Encumbered with Collateral Stipulations. — *Meyer v. Weber*, 133 Cal. 681 (under Cal. Civ. Code, § 3093); *Cornish v. Woolverton*, (Mont. 1905) 81 Pac. Rep. 4; *Randolph v. Hudson*, 12 Okla. 516; *Thorpe v. Mindeman*, (Wis. 1904) 101 N. W. Rep. 417.

Under Mont. Civ. Code, § 3997. — *Stadler v. Helena First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582.

**125.** 1. Independent Stipulations. — *Doe v.*

- 125.** Such a Multiplication of Independent Provisions. — See note 2.
- 126.** Where the Collateral Act Is One Which the Law Would Supply. — See note 1.  
 (b) Ancillary Provisions as to Payment. — See note 2.  
 Waiver of Exemption and Valuation Laws. — See note 3.  
 Authority to Confess Judgment. — See note 4.
- 127.** See note 1.  
 Deposit of Security. — See notes 2, 3.  
 Notes for Purchase of Chattel — Title in Payee. — See notes 4, 5.
- 128.** See note 2.

Callow, 10 Kan. App. 581, 63 Pac. Rep. 603; Prescott v. Garland, 34 N. Bruns. 291. See also Cornish v. Woolverton, (Mont. 1905) 81 Pac. Rep. 4.

**Provision for Demanding Increased Collateral.** — Commercial Nat. Bank v. Consumers' Brewing Co., 16 App. Cas. (D. C.) 186.

**125. 2. Reasons Why Such Provisions Destroy Negotiability.** — Commercial Nat. Bank v. Consumers' Brewing Co., 16 App. Cas. (D. C.) 186; Chapman v. Steiner, 5 Kan. App. 326; Thorpe v. Mindeman, (Wis. 1904) 101 N. Y. Rep. 417.

**126. 1.** Cuyahoga Steam-Furnace Co. v. Lewis, 4 Ohio Dec. (Reprint) 17, Cleve. L. Rec. 15. See also Phelps, etc., Windmill Co. v. Honeywell, 7 Kan. App. 645; Kendall v. Selby, 66 Neb. 60, 103 Am. St. Rep. 697; Anderson v. Poirier, 13 Quebec Super. Ct. 283.

**2. Ancillary Provisions About Payment.** — Commercial Nat. Bank v. Consumers' Brewing Co., 16 App. Cas. (D. C.) 186; Lasher v. Union Cent. L. Ins. Co., 115 Iowa 231; Phelps, etc., Windmill Co. v. Honeywell, 7 Kan. App. 645; Buffalo Third Nat. Bank v. Bowman Spring, 50 N. Y. App. Div. 66. See also Kirkwood v. Carroll, (1903) 1 K. B. 531, 72 L. J. K. B. 208, 88 L. T. N. S. 52, 51 W. R. 374; Frost v. Fisher, 13 Colo. App. 322.

**Provisions Limiting Remedies.** — A written agreement made by the payee of a promissory note with the maker thereof contemporaneously with the execution and delivery of the note to the former, and evidencing a part of the contract then entered into between the parties, stipulating that the maker is "not to be sued on said note, and it is entirely discretionary with him whether he pays said note or not," in effect relieves the maker from all liability upon the note, as to the payee thereof or his legal representative. Martin v. Monroe, 107 Ga. 330.

**3. Waiver of Exceptions, etc.** — Levy, etc., Mule Co. v. Kauffman, (C. C. A.) 114 Fed. Rep. 170; Clarke v. Hunter, 83 Ill. App. 100, affirmed 184 Ill. 158, 75 Am. St. Rep. 160; Nicely v. Winnebago Nat. Bank, 18 Ind. App. 30.

**Right Passes to Transferee.** — Gilmore v. German Sav. Bank, 89 Ill. App. 442.

**4. Judgment Notes.** — Clarke v. Hunter, 83 Ill. App. 100, affirmed 184 Ill. 158, 75 Am. St. Rep. 160; Gehlbach v. Carlinville Nat. Bank, 83 Ill. App. 129; Mann v. Merchants' L. & T. Co., 100 Ill. App. 224; Baker v. Nipple, 16 Pa. Co. Ct. 659.

**Authority Passes with Note When Conferred on Holder.** — Simmons v. Brown, 4 Ohio Dec. (Reprint) 29, 1 Cleve. L. Rec. 33.

**Provision Authorizing Judgment Before Ma-**

**turity Renders Note Nonnegotiable.** — Milton Nat. Bank v. Beaver, 25 Pa. Super. Ct. 494 (under Negotiable Instruments Law).

**The Provision of the Negotiable Instruments Law** that the negotiable character of an instrument is not affected by a provision which authorizes a confession of judgment if the instrument be not paid at maturity, does not render negotiable an instrument which authorizes judgment to be entered thereon at any time after its date, whether due or not. Wisconsin Yearly Meeting, etc., v. Babler, 115 Wis. 289.

**Note Held Negotiable on Ground that Provision Is Void.** — Tolman v. Janson, 106 Iowa 455.

**127. 1.** Baker v. Nipple, 16 Pa. Co. Ct. 659; Schlauch v. O'Hare, 22 Pa. Co. Ct. 384; Weaver v. Paul, 4 Pa. Dist. 492. See also Law v. Crawford, 67 Mo. App. 150.

**2. Provision that Security Has Been Deposited.** — Mumford v. Tolman, 157 Ill. 258; Mann v. Merchants' L. & T. Co., 100 Ill. App. 224; Cornish v. Woolverton, (Mont. 1905) 81 Pac. Rep. 4; Roblee v. Union Stockyards Nat. Bank, (Neb. 1903) 95 N. W. Rep. 61; Rathburn v. Jones, 47 S. Car. 206. See also Metcalf v. Draper, 98 Ill. App. 399; Biegler v. Merchants' L. & T. Co., 164 Ill. 197.

**Authority to Require Additional Collateral — Effect on Negotiability.** — A provision authorizing a third party, not otherwise connected with the transaction, to demand additions to the collateral or the payment of money on account, whenever in its opinion the collateral shall have depreciated in value, and to sell the collateral in case of failure to comply with the demand, renders the note nonnegotiable. Commercial Nat. Bank v. Consumers' Brewing Co., 17 App. Cas. (D. C.) 100.

**3. Stipulation for Sale of Collateral Before Maturity Destroys Negotiability.** — Commercial Nat. Bank v. Consumers' Brewing Co., 16 App. Cas. (D. C.) 186.

**4. Notes for Chattels — Vendor Retaining Title.** — Cooper v. Chicago Cottage Organ Co., 58 Ill. App. 248; Choate v. Stevens, 116 Mich. 28; Buffalo Third Nat. Bank v. Bowman Spring, 50 N. Y. App. Div. 66; Pyron v. Ruohs, 120 Ga. 1060.

**Retention of Title by Vendor Renders the Note Nonnegotiable.** — Gazlay v. Riegel, 16 Pa. Super. Ct. 501.

**Note Nonnegotiable under Canadian Bills of Exchange Act, 1890, § 82, subs. 3.** — Hamilton Bank v. Gillies, 12 Manitoba 495; Prescott v. Garland, 34 N. Bruns. 291.

**5. Provision by Which Note May Be Declared Due Before Maturity.** — Prescott v. Garland, 34 N. Bruns. 291.

**128. 2.** Commercial Nat. Bank v. Con-

- 128.** *b. ORDERLY PARTS AND SPECIAL CLAUSES IN BILLS AND NOTES*  
 — (1) *Expression of Date of Making — Not Essential.* — See notes 3, 4.  
**129.** *Expressed Date — How Far Conclusive.* — See note 1.  
*Antedating and Postdating.* — See notes 4, 5.  
**130.** (3) *Expression of Amount — The Marginal Figures.* — See notes 5, 6.  
*Variance Between Amount in Body and Margin.* — See notes 7, 8.  
**131.** *Where the Amount Is Left Blank.* — See notes 1, 2.  
*Omissions of Words Expressing Denomination of Figures.* — See note 3.  
 (4) *Expression of Place of Payment.* — See note 8.  
**132.** See note 1.  
*Statutes as to Notes Payable at Banks.* — See notes 3, 4, 5, 7.

sumers' Brewing Co., 16 App. Cas. (D. C.) 186.

**128.** 3. *Date Not Essential.* — Breckenridge First State Sav. Bank v. Webster, 121 Mich. 149.

*Holder May Insert Proper Date.* — Breckenridge First State Sav. Bank v. Webster, 121 Mich. 149.

4. Breckenridge First State Sav. Bank v. Webster, 121 Mich. 149.

**129.** 1. *Date Evidence of Time of Execution.* — McFall v. Murray, 4 Kan. App. 554.

4. *Notes and Bills Antedated.* — An antedated note takes effect as of the date of its delivery unless the equities between the parties require that the date of its inception shall prevail. Button v. Belding, 22 N. Y. App. Div. 618.

*Postdated Bills and Notes.* — McFall v. Murray, 4 Kan. App. 554.

5. Hackett v. Louisville, First Nat. Bank, 114 Ky. 193.

**130.** 5. *Marginal Figures Not Part of Instruments.* — Prim v. Hammel, 134 Ala. 652, 92 Am. St. Rep. 52, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 130; Vinson v. Palmer, (Fla. 1903) 34 So. Rep. 276; Merritt v. Boyden, 191 Ill. 152, 85 Am. St. Rep. 246, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 130; Sexton v. Barrie, 102 Ill. App. 586; Weaver v. Paul, 4 Pa. Dist. 492; Kimball v. Costa, 76 Vt. 294, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 130.

6. *Object and Effect of Marginal Figures.* — Vinson v. Palmer, (Fla. 1903) 34 So. Rep. 276; Merritt v. Boyden, 191 Ill. 152, 85 Am. St. Rep. 246, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 130; Weaver v. Paul, 4 Pa. Dist. 492; Kimball v. Costa, 76 Vt. 289, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 130.

7. Prim v. Hammel, 134 Ala. 652, 92 Am. St. Rep. 52; Merritt v. Boyden, 93 Ill. App. 613, affirmed 191 Ill. 136, 85 Am. St. Rep. 246; Central Nat. Bank v. Pipkin, 66 Mo. App. 592; Kimball v. Costa, 76 Vt. 294, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 130.

8. Prim v. Hammel, 134 Ala. 652, 92 Am. St. Rep. 52.

**131.** 1. *Filling in Amount.* — Weaver v. Paul, 4 Pa. Dist. 492; Kimball v. Costa, 76 Vt. 294, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 130.

2. Vinson v. Palmer, (Fla. 1903) 34 So. Rep. 276. See Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246.

3. *Supplying Denominational Word.* — Louisville Banking Co. v. Gray, 123 Ala. 251, 82 Am. St. Rep. 120.

8. Anniston L. & T. Co. v. Stickney, 108 Ala. 146; Holmes v. Ft. Gaines Bank, 120 Ala. 493.

*Where the Place of Payment Is Omitted,* the note is presumed to be payable where the maker resides; and where a bank is named it will be presumed, in the absence of evidence appearing on the face of the note to the contrary, that it is situated in the town where the maker resides. Baily v. Birkhofer, 123 Iowa 59.

*Holder May Supply Omission.* — Cox v. Alexander, 30 Oregon 438.

**132.** 1. Holmes v. Ft. Gaines Bank, 120 Ala. 493.

3. *Alabama Statute.* — Carroll v. Warren, (Ala. 1904) 37 So. Rep. 687. See also Scott v. Taul, 115 Ala. 529.

*Sufficiency of Designation of Place of Payment.* — Anniston L. & T. Co. v. Stickney, 108 Ala. 146.

4. *Indiana Statute.* — Bradley v. Whicker, 23 Ind. App. 380; Mitchell v. St. Mary, 148 Ind. 111; Rhodes v. Webb-Jameson Co., 19 Ind. App. 195; La Follette Coal, etc., Co. v. Whiting Foundry Equipment Co., 25 Ind. App. 647; Huntington First Nat. Bank v. Henry, 156 Ind. 1; Midland Steel Co. v. Citizens' Nat. Bank, 26 Ind. App. 71; Young v. Baker, 29 Ind. App. 130; Midland Steel Co. v. Citizens' Nat. Bank, (Ind. App. 1904) 72 N. E. Rep. 290; Petersburg First Nat. Bank v. Beach, (Ind. App. 1904) 72 N. E. Rep. 287; Nicely v. Commercial Bank, 15 Ind. App. 563, 57 Am. St. Rep. 245.

5. *Kentucky.* — McCarty v. Louisville Banking Co., 100 Ky. 4; Tranter v. Hibbard, 108 Ky. 265; Gaines v. Deposit Bank, (Ky. 1897) 39 S. W. Rep. 438; Graham v. Louisville City Nat. Bank, 103 Ky. 641; M. V. Monarch Co. v. Terre Haute First Nat. Bank, 105 Ky. 336; Louisville Banking Co. v. Asher, 112 Ky. 138, 99 Am. St. Rep. 283; Magoffin v. Boyle Nat. Bank, (Ky. 1902) 69 S. W. Rep. 702; Brown v. Crofton, 76 S. W. Rep. 372, 25 Ky. L. Rep. 753; Davis v. Boone County Deposit Bank, 80 S. W. Rep. 161, 25 Ky. L. Rep. 2078; Burns v. Sparks, 82 S. W. Rep. 425, 26 Ky. L. Rep. 688. *Sufficiency of Statement of Bank's Name.* — Graham v. Louisville City Nat. Bank, 103 Ky. 641.

*Location of Bank in the State Presumed.* — Graham v. Louisville City Nat. Bank, 103 Ky. 641.

*Note Must Be Discounted at Bank Incorporated under State Laws.* — Cunningham v. Potter, (Ky. 1901) 64 S. W. Rep. 493.

- 132.** (5) *Expression of Time of Payment.* — See note 8.  
*How Time of Payment Usually Expressed.* — See notes 9, 10.
- 133.** *Variance Between Note and Marginal Memorandum.* — See note 2.  
*No Time of Payment Specified.* — See note 3.
- 134.** (7) *Words of Negotiability.* — See note 1.  
*Any Expression Is Sufficient.* — See note 2.  
*Statutes.* — See note 3.
- 135.** (8) *Expression of Consideration — Value Received.* — See note 3.
- 136.** *By Statute in Missouri.* — See note 4.  
*Patent-right Notes.* — See note 6.

**132.** 7. *Barger v. Farnham*, 130 Mich. 487 (construing *West Virginia* contract).

**8. Necessity of Expressing Time of Payment, under Negotiable Instruments Law.** — *Westberg v. Chicago Lumber, etc., Co.*, 117 Wis. 589 (under Negotiable Instruments Law).

**9.** *Brookshire v. Allen*, (Tex. Civ. App. 1895) 32 S. W. Rep. 164. See also *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246.

**On Call.** — *Bacon v. Bacon*, 94 Va. 686.

**Sufficiency of Expression of Time.** — *Moreland v. Citizens' Nat. Bank*, 114 Ky. 577, 102 Am. St. Rep. 293.

**10.** A note dated the 7th of November, 1895, and payable "21st of November next," is payable on the 21st of November, 1896, and not on the 21st of November, 1895. *Drapeau v. Pomerville*, 11 Quebec Super. Ct. 326.

**133.** 2. *Dark v. Middlebrook*, (Tex. Civ. App. 1898) 45 S. W. Rep. 963.

**3. No Time of Payment Expressed — Payable on Demand — Georgia.** — *Morrison v. Morrison*, 102 Ga. 170; *Hotel Lanier Co. v. Johnson*, 103 Ga. 604.

*Louisiana.* — *Nott v. State Nat. Bank*, 51 La. Ann. 871.

*Montana.* — *Clarke v. Marlow*, 20 Mont. 249.

*New Jersey.* — *Adams v. Adams*, 55 N. J. Eq. 42.

*New York.* — *Niles v. Bradley*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 172; *McLeod v. Hunter*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 558, *affirmed* 49 N. Y. App. Div. 131.

*Pennsylvania.* — *Messmore v. Morrison*, 172 Pa. St. 300.

*Texas.* — *Brookshire v. Allen*, (Tex. Civ. App. 1895) 32 S. W. Rep. 164.

*Wisconsin.* — *Westberg v. Chicago Lumber, etc., Co.*, 117 Wis. 589.

*Canada.* — *McPherson v. Johnston*, 3 British Columbia 465.

**134.** 1. *Necessity of Negotiable Words.* — *Murphy v. Arkansas, etc., Land, etc., Co.*, 97 Fed. Rep. 723; *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246; *Petrie v. Miller*, 57 N. Y. App. Div. 17 (under Neg. Inst. Law), *affirmed* 173 N. Y. 596; *Ellis v. Hahn*, 29 Tex. Civ. App. 395. See also *Rhodes v. Webb-Jameson Co.*, 19 Ind. App. 195; *Ryals v. Johnson County Sav. Bank*, 106 Ga. 525; *Stadler v. Helena First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582.

**Under Mo. Rev. Stat. 1889, § 733.** — *Jacobs v. Gibson*, 77 Mo. App. 244.

**Under the Negotiable Instruments Law**, to be negotiable, the instrument must be payable to order or to bearer. *Zander v. New York Security, etc., Co.*, (Supm. Ct. Spec. T.) 39 Misc.

(N. Y.) 98, *affirmed* 81 N. Y. App. Div. 635, 178 N. Y. 208; *Westberg v. Chicago Lumber, etc., Co.*, 117 Wis. 589 (under Neg. Inst. Law).

**"Bearer" Defined.** — *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159 (under Neg. Inst. Law).

**2. What Are Sufficient Words of Negotiability.** — *Whitney Nat. Bank v. Cannon*, 52 La. Ann. 1484. See also *Boley v. Lake St. El. R. Co.*, 64 Ill. App. 305.

**Illustrations.** — Note payable to A "or his assignee" is negotiable. *Murphy v. Arkansas, etc., Land, etc., Co.*, 97 Fed. Rep. 723.

**3. In Colorado.** — *Patent Title Co. v. Stratton*, 89 Fed. Rep. 174.

**Illinois Statute.** — *Russell v. Bosworth*, 106 Ill. App. 314.

**In Georgia.** — *Ryals v. Johnson County Sav. Bank*, 106 Ga. 525.

**Canadian Statute.** — See *Désy v. Daly*, 12 Quebec Super. Ct. 183.

**135.** 3. *Instrument Need Not Express Consideration.* — *Choate v. Stevens*, 116 Mich. 28; *Clarke v. Marlow*, 20 Mont. 249; *McLeod v. Hunter*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 558, *affirmed* 49 N. Y. App. Div. 131; *Larraway v. Harvey*, 14 Quebec Super. Ct. 97.

**The Expression "for Value Received"** is sufficient to place the note without the statute of frauds. *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369.

**"For Value Received" in Guaranty, Sufficient Expression of Consideration.** — *Osborne v. Gullickson*, 64 Minn. 218.

**136.** 4. *Missouri Statutes.* — *Harkness v. Jones*, 71 Mo. App. 289; *Crawford v. Johnson*, 87 Mo. App. 478; *Lowrey v. Danforth*, 95 Mo. App. 441.

**6. Arkansas Statute.** — Under the provisions of Sand. & H. Dig., § 493, that a negotiable instrument given by a citizen of the state in payment for an interest in a patent right shall be absolutely void unless it shall show upon its face that it was executed for such a consideration, a note given by a citizen of the state for an interest in a patent right which fails to comply with this requirement is void, although in the hands of a *bona fide* holder. *Wyatt v. Wallace*, 67 Ark. 575; *Woods v. Carl*, (Ark. 1905) 87 S. W. Rep. 621.

The purpose of this statute is to save to the vendee of a patent right all the defenses he may have to an action on his note given therefor and to prevent the loss of these defenses by a transfer of the note to an innocent holder before maturity. The failure to comply with this statute does not affect the validity of the sale, but only renders the note absolutely void, and the vendor may recover whatever may be

**137.** See note 1.

**138.** (12) *Attestation*. — See note 2.

**139.** (13) *Effect of Omissions and Irregularities Merely Formal*. — See note 1.

due him on the contract of sale from the vendee. *Roth v. Merchants', etc., Bank*, 70 Ark. 200, 91 Am. St. Rep. 80.

**Georgia.** — Under Van Epps's Code Supp., § 6650 *et seq.*, a note given for the purchase price of a patent right is not void in the hands of a *bona fide* purchaser for failure to express the consideration. *Smith v. Wood*, 111 Ga. 221; *Parr v. Erickson*, 115 Ga. 873.

It is only where the consideration is expressed in the note that the indorsee, before maturity and for value, takes it subject to all defenses. *Parr v. Erickson*, 115 Ga. 873.

**Indiana Statute — Failure to State Consideration Renders Note Voidable.** — *Lofland v. Goben*, 16 Ind. App. 67.

Under Burns's Annot. Stat. 1901, §§ 8130, 8131, the statute is extended to the sale of the right to manufacture, use, or sell a patented article whether the right, or either of them, be by sale, grant, or license, exclusive or nonexclusive, or shall form the whole or any part of the consideration, and requires the additional indorsement, "Given for the right to manufacture a patented article," or words which clearly state the consideration for which the note was given. *Petersburg First Nat. Bank v. Beach*, (Ind. App. 1904) 72 N. E. Rep. 287; *Kniss v. Holbrook*, 16 Ind. App. 229.

A *bona fide* purchaser for value without notice that the note was given for a patent right may recover on it. *Pape v. Hartwig*, 23 Ind. App. 333.

The maker of a note given for a patent right, who fails to place on the note the requisite words, is guilty of negligence and cannot defend against it in the hands of a *bona fide* holder for value without notice and before maturity. *Pape v. Hartwig*, 23 Ind. App. 333.

**A Sale of the Exclusive Right to Sell a Patented Article** is not within the purview of the statute. *People's State Bank v. Jones*, 26 Ind. 583, 84 Am. St. Rep. 310.

**Kansas Statute.** — The taking of a promissory note, the consideration of which is the sale of a patent right, or what is claimed by the vendor to be a patent right, without inserting therein the words, "Given for a patent right," is, under the Kansas statute, a misdemeanor, punishable by fine or imprisonment; and no recovery can be had thereon by one who violates the statute, nor by a transferee of the note who has knowledge that the law was violated. *Pinney v. Concordia First Nat. Bank*, 68 Kan. 223. See also *Pinney v. Concordia First Nat. Bank*, (Kan. 1904) 78 Pac. Rep. 151.

**Kentucky Statute — Peddler's Notes.** — Under Ky. Stat., § 4223, requiring all notes given for articles or rights sold by a peddler to bear the words "peddler's note" on the face, a note not bearing such words is void in the hands of the payee or third persons. *Nunn v. Citizens' Bank*, 107 Ky. 262. See also *Bohon v. Brown*, 101 Ky. 354, 72 Am. St. Rep. 420; *Burns v. Sparks*, 82 S. W. Rep. 425, 26 Ky. L. Rep. 688. The failure to place the words upon the note

is no defense where the note has indorsed upon it the express assurance of the maker that there is no defense. And a *bona fide* purchaser without notice of the consideration may enforce the note against the maker. *Billington v. McColpin*, (Ky. 1900) 60 S. W. Rep. 923.

**Note Not Enforceable by Purchaser with Notice.** — *Hays v. Walker*, (Ky. 1903) 76 S. W. Rep. 1099.

**Missouri Statute Not Applicable to Notes Given Before Its Enactment.** — *Clark v. Porter*, 90 Mo. App. 143.

**Under New York Laws of 1877, c. 65**, a note given for a patent right which does not contain the statutory words is not for that reason illegal, but in the hands of a *bona fide* purchaser for value before maturity, without notice of the consideration, is entitled to the protection accorded to commercial paper by the law merchant. *Paddock v. Coates*, (County Ct.) 19 Misc. (N. Y.) 305.

**Ohio Statute.** — *Allen v. Johnson*, 11 Ohio Cir. Dec. 42, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 136.

**Pennsylvania Statute.** — An omission of the statement of the consideration renders the note subject to the same defenses in the hands of a purchaser with notice as in the hands of the original holder. *Troxell v. Malin*, 9 Pa. Super. Ct. 483.

The note is merely voidable, however, and is enforceable in the hands of a *bona fide* purchaser without notice. *Brown v. Pegram*, (C. C. A.) 125 Fed. Rep. 577.

**No Recovery under Tennessee Statute.** — *Webb v. Tarver*, 2 Tenn. Ch. App. 366.

**Canadian Statute — Effect of Omission of Words "Given for Patent Right."** — *Craig v. Samuel*, 24 Can. Sup. Ct. 278.

**Subsequent Inscription of the Words on the Note Does Not Validate It.** — *Lefebvre v. Titmore*, 16 Quebec Super. Ct. 248.

**137. 1. Constitutionality of Statutes.** — *Kentucky* statute (§ 4223) constitutional. *Bohon v. Brown*, 101 Ky. 354, 72 Am. St. Rep. 420; *Nunn v. Citizens' Bank*, 107 Ky. 262; *Hays v. Walker*, 76 S. W. Rep. 1099, 25 Ky. L. Rep. 1045.

*Arkansas Statute Constitutional.* — *Woods v. Carl*, (Ark. 1905) 87 S. W. Rep. 621.

The *Pennsylvania* statute is unconstitutional as obstructing exercise of right granted by federal statute. *Pegram v. American Alkali Co.*, 122 Fed. Rep. 1000, affirmed 125 Fed. Rep. 577, 60 C. C. A. 383.

**138. 2. Attestation Necessary under Okla. Stat., § 2690, to Note Signed by Mark.** — *Sivils v. Taylor*, 12 Okla. 47.

**Failure to Attest Note Signed by Mark Does Not Invalidate It.** — *Wright v. Forgy*, 126 Ala. 389.

**Attestation After Death of Maker by Witness Who Is Also Payee Is Not Sufficient.** — *Chadwell v. Chadwell*, 98 Ky. 643.

**139. 1. Durant v. Murdock**, 3 App. Cas. (D. C.) 114.

**Omission of Words "After Date" in Interest**

**139. c. MEMORANDA ON BILLS AND NOTES — (1) General Principles**

— Parol Evidence as to Circumstances of Making Memorandum. — See note 3.

**140.** Presumption as to Time of Making. — See note 2.

(2) *Contemporaneous Memoranda Modifying Instrument — When a Part of the Instrument.* — See notes 4, 5, 6.

**141.** Illustrations of Effect of Memoranda. — See notes 4, 8.

**142.** See notes 1, 2.

Adding Memorandum as to Place of Payment. — See note 8.

(3) *Memoranda Not Affecting the Instrument — Intended as Earmarks, Etc.* — See note 9.

**143.** Illustrations. — See note 1.

**144. d. SEPARATE WRITTEN AND ORAL AGREEMENTS — (1) Separate Written Agreements to Control Bills and Notes — General Rule as to Construing Together Separate Instruments. — See note 2.**

Rule Applied to Bills and Notes. — See note 3.

Clause Supplied. — *Durant v. Murdock*, 3 App. Cas. (D. C.) 114.

Omission of Word "Date" Supplied. — *Miller v. Cavanaugh*, 99 Ky. 377, 59 Am. St. Rep. 463.

Omission of Word "Days" May Be Supplied. — *Weems v. Parker*, 60 Ill. App. 167.

**139. 3. Parol Evidence as to Memorandum.** — *Bowie v. Hume*, 13 App. Cas. (D. C.) 286.

**140. 2. Memorandum Presumed Contemporary.** — *Bowie v. Hume*, 13 App. Cas. (D. C.) 286; *National Bank of Commerce v. Feeney*, 9 S. Dak. 550.

**4. Contract to Be Gathered from All Within Its Corners.** — *Anniston L. & T. Co. v. Stickney*, 108 Ala. 146; *Specht v. Beindorf*, 56 Neb. 553.

**5. D'Esterre v. Brooklyn**, 90 Fed. Rep. 593, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139-142; *Swan v. Craig*, (Neb. 1905) 102 N. W. Rep. 471.

**Memorandum on Back of Note.** — *Bowie v. Hume*, 13 App. Cas. (D. C.) 286; *Heaton v. Ainley*, 108 Iowa 112; *Western Mfg. Co. v. Rogers*, 54 Neb. 456; *Waldorf v. Simpson*, 15 N. Y. App. Div. 297; *Gazlay v. Riegel*, 16 Pa. Super. Ct. 501; *National Bank of Commerce v. Feeney*, 9 S. Dak. 550.

**6. Contemporaneous Memorandum Enters into Contract — District of Columbia.** — *Bowie v. Hume*, 13 App. Cas. (D. C.) 286.

*Iowa.* — *Heaton v. Ainley*, 108 Iowa 112.

*Kansas.* — See also *Bliss v. Young*, 7 Kan. App. 728.

*Missouri.* — *Black v. Epstein*, 93 Mo. App. 459.

*Nebraska.* — *Western Mfg. Co. v. Rogers*, 54 Neb. 456; *Specht v. Beindorf*, 56 Neb. 553.

*New York.* — *Waldorf v. Simpson*, 15 N. Y. App. Div. 297.

*Pennsylvania.* — *Coates v. Potts*, 184 Pa. St. 618; *Gazlay v. Riegel*, 16 Pa. Super. Ct. 501.

*South Dakota.* — *National Bank of Commerce v. Feeney*, 9 S. Dak. 550.

**Memorandum "Negotiable or Transferable" Renders Note Negotiable.** — *Herrick v. Edwards*, 106 Mo. App. 633.

**141. 4. Memorandum as to Terms of Payment.** — *Bowie v. Hume*, 13 App. Cas. (D. C.) 286; *Black v. Epstein*, 93 Mo. App. 459; *Coates v. Potts*, 184 Pa. St. 618.

**8. Memoranda Introducing Contingency.** — *Biegler v. Merchants' L. & T. Co.*, 62 Ill. App. 560, affirmed 164 Ill. 197.

An indorsement made by the payee upon the note at the time that it was delivered to him, that the note should become void at the payee's death, does not affect the right of recovery of the payee's intestate, where the indorsement was made without consideration. *Dimon v. Keery*, 54 N. Y. App. Div. 318.

**142. 1. Aspen First Nat. Bank v. Mineral Farm Consol. Min. Co.**, 17 Colo. App. 461, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 141, 142. See also *Biegler v. Merchants' L. & T. Co.*, 164 Ill. 197.

**2. Aspen First Nat. Bank v. Mineral Farm Consol. Min. Co.**, 17 Colo. App. 461, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 141, 142; *Biegler v. Merchants' L. & T. Co.*, 164 Ill. 197.

**8. Addition of Place of Payment a Material Alteration.** — *Carroll v. Warren*, (Ala. 1904) 37 So. Rep. 687.

**9. Hudson v. Emmons**, 107 Mich. 549. See *Hathaway v. Rogers*, 112 Iowa 638.

**Memoranda Showing Credits Do Not Affect Negotiability.** — *Smith v. Shippey*, 182 Pa. St. 24.

**143. 1. Memorandum by Indorser Limiting Transferability of No Effect.** — *Herrick v. Edwards*, 106 Mo. App. 633.

**144. 2. Separate Instruments Construed Together.** — *Clarke v. Hunter*, 83 Ill. App. 100, affirmed 184 Ill. 158, 75 Am. St. Rep. 160. See also *Zimmer v. Chew*, 34 N. Y. App. Div. 504.

**3. Separate Instruments Construed with Bill or Note — United States.** — *Levy, etc.*; *Mule Co. v. Kauffman*, (C. C. A.) 114 Fed. Rep. 170.

*Alabama.* — *Murphy v. Farley*, 124 Ala. 279.

*California.* — *Meyer v. Weber*, 133 Cal. 681.

*Colorado.* — *Frost v. Fisher*, 13 Colo. App. 322.

*District of Columbia.* — See *Brewer v. Slater*, 18 App. Cas. (D. C.) 48.

*Georgia.* — *Montgomery v. Hunt*, 99 Ga. 499.

*Illinois.* — *Boley v. Lake St. El. R. Co.*, 64 Ill. App. 305; *Clarke v. Hunter*, 83 Ill. App. 100, affirmed 184 Ill. 158, 75 Am. St. Rep. 160.

*Adams v. Long*, 114 Ill. App. 277, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 144.

*Indiana.* — *Middaugh v. Wilson*, 30 Ind. App. 112.

*Kansas.* — *Solomon Solar Salt Co. v. Barber*, 58 Kan. 419; *Cabbell v. Knote*, 2 Kan. App. 68; *Piersol v. Shelley*, 3 Kan. App. 386.



**145.** Provisions of Contemporary Writings Held Controlling. — See notes 1, 2, 3, 5.  
Repugnant Provisions in Contemporary Instruments. — See note 6.

**146.** See note 1.

Trust Deeds or Mortgages and Notes. — See notes 2, 3.

**147.** (2) *Parol Agreements Intended to Control Bills and Notes* — (a) *Contemporary Parol Agreements Controlling Terms Inadmissible.* — See note 1.

*Kentucky.* — *Tranter v. Hibbard*, 108 Ky. 265.

*Maine.* — *American Gas, etc., Mach. Co. v. Wood*, 90 Me. 516.

*Montana.* — See *Cornish v. Woolverton*, (Mont. 1905) 81 Pac. Rep. 4.

*Nebraska.* — *Garnett v. Meyers*, 65 Neb. 280; *Consterdine v. Moore*, 65 Neb. 292, 296, 101 Am. St. Rep. 620; *Kendall v. Selby*, 66 Neb. 60, 103 Am. St. Rep. 697; *Roblee v. Union Stockyards Nat. Bank*, (Neb. 1903) 95 N. W. Rep. 61; *Allen v. Dunn*, (Neb. 1904) 99 N. W. Rep. 680.

*North Carolina.* — *Battery Park Bank v. Loughran*, 122 N. Car. 668.

*Oregon.* — *Haines v. Cadwell*, 40 Oregon 229.  
*Texas.* — *Robertson v. Parrish*, (Tex. Civ. App. 1897) 39 S. W. Rep. 646.

*Wisconsin.* — *Thorpe v. Mindeman*, (Wis. 1904) 101 N. W. Rep. 417.

*Canada.* — *MacArthur v. MacDowall*, 1 N. W. Ter. 345.

*Indorsee Without Notice Not Bound.* — *Gilmore v. Hirst*, 56 Kan. 626.

*Persons Taking with Notice Bound by Conditions in Collateral Security.* — *Roblee v. Union Stockyards Nat. Bank*, (Neb. 1903) 95 N. W. Rep. 61.

**145. 1.** See also *Glass v. Adoue*, (Tex. Civ. App. 1905) 86 S. W. Rep. 798. Compare *Ferris v. Johnson*, (Mich. 1904) 98 N. W. Rep. 1014, 10 Detroit Leg. N. 982.

*Contemporaneous Contract Providing for Falling Due of All of Series of notes on default in payment of one admissible:* *Markey v. Corey*, 108 Mich. 184, 62 Am. St. Rep. 698.

**2.** See also *Boley v. Lake St. El. R. Co.*, 64 Ill. App. 305; *Robertson v. Parrish*, (Tex. Civ. App. 1897) 39 S. W. Rep. 646.

**3.** *Martin v. Monroe*, 107 Ga. 330.

*Contemporary Mortgage Showing Representative Capacity of Maker of Note.* — *Cabbell v. Knote*, 2 Kan. App. 68.

*Note and Mortgage — Stipulation in Mortgage that Mortgagor Shall Pay Taxes, Etc.* — In *Nebraska* it was formerly held that the negotiability of a note was not affected by a stipulation in the mortgage that the mortgagor should pay taxes, assessments, insurance, etc. *Bradbury v. Kinney*, 63 Neb. 754; *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620; *Garnett v. Meyers*, 65 Neb. 280; *Kendall v. Selby*, 66 Neb. 60, 103 Am. St. Rep. 697.

The recent decisions do not, however, follow this view, and it is now held that such stipulations render the note nonnegotiable. *Allen v. Dunn*, (Neb. 1904) 99 N. W. Rep. 680; *Consterdine v. Moore*, 65 Neb. 296, 101 Am. St. Rep. 620, vacating judgment 65 Neb. 292; *Garnett v. Meyers*, 65 Neb. 288, vacating judgment 65 Neb. 283. See also *Roblee v. Union Stockyards Nat. Bank*, (Neb. 1903) 95 N. W. Rep. 61.

In *Kansas* such stipulations are also held to render the note nonnegotiable. *Wistrand v. Parker*, 7 Kan. App. 562; *Wright v. Shimek*, 8

Kan. App. 350; *Jones v. Dulick*, 8 Kan. App. 855, 55 Pac. Rep. 522.

And in *Montana*. *Cornish v. Woolverton*, (Mont. 1905) 81 Pac. Rep. 4.

And in *Utah* also. *Donaldson v. Grant*, 15 Utah 231.

In *Other Jurisdictions* it is held that the stipulation does not affect the negotiability of the note. *Frost v. Fisher*, 13 Colo. App. 322; *Clarke v. Hunter*, 83 Ill. App. 100, affirmed 184 Ill. 158, 75 Am. St. Rep. 160; *Thorpe v. Mindeman*, (Wis. 1904) 101 N. W. Rep. 417 (under the *Negotiable Instruments Law*). See also *Cox v. Cayan*, 117 Mich. 599, 72 Am. St. Rep. 585.

**5. Agreement Rendering Note Conditional.** — *MacArthur v. MacDowall*, 1 N. W. Ter. 345.

*Agreement Executed Before Note* is admissible where it is part of the transaction. *Smith v. Adams*, (Ky. 1895) 33 S. W. Rep. 531.

**6. Repugnant Provisions.** — *Hamilton v. Fowler*, (C. C. A.) 99 Fed. Rep. 18; *Bull v. Edward Thompson Co.*, 99 Ga. 134; *Hawes v. Mulholland*, 78 Mo. App. 493; *Kennedy v. Gibson*, 68 Kan. 612. See also *American Gas, etc., Mach. Co. v. Wood*, 90 Me. 516.

*Validity of Note Not Affected by Invalidity of Mortgage.* — In an action upon a note and a mortgage securing the same, the plaintiff is entitled to judgment for the amount of the note, regardless of the decision of the court as to the validity of the mortgage, when it is conceded that the note was executed by the defendant, that the plaintiff is the owner and holder thereof, and that it is due and unpaid. *Moors v. Sanford*, 2 Kan. App. 243.

**146. 1.** *Western Mfg. Co. v. Rogers*, 54 Neb. 456; *Remington v. Detroit Dental Mfg. Co.*, 101 Wis. 307. See also *Hawes v. Mulholland*, 78 Mo. App. 493.

**2. Notes Due for All Purposes.** — *Evans v. Baker*, 5 Kan. App. 68; *Consterdine v. Moore*, 65 Neb. 296, 101 Am. St. Rep. 620. See also *Battery Park Bank v. Loughran*, 122 N. Car. 668.

**3.** *Owings v. McKenzie*, 133 Mo. 323; *Westminster College v. Peirsol*, 161 Mo. 270; *Lawson v. Cundiff*, 81 Mo. App. 169; *McMillan v. Grayston*, 83 Mo. App. 425; *Consterdine v. Moore*, 65 Neb. 292, 101 Am. St. Rep. 620. See also *Hibernia Sav., etc., Soc. v. Thornton*, 117 Cal. 481.

*Effect of Provision in Mortgage for Payment of Costs and Taxes.* — See *Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 160.

**147. 1. Parol Agreement Varying Note or Bill Inadmissible** — *United States.* — *Calm v. Dolley*, 105 Fed. Rep. 836; *Levy, etc., Mule Co. v. Kauffman*, (C. C. A.) 114 Fed. Rep. 170; *Franklin v. Browning*, 117 Fed. Rep. 226, 54 C. C. A. 258; *Earle v. Enos*, 130 Fed. Rep. 467.

*Alabama.* — *Blanks v. Moore*, 139 Ala. 624; *Brewton v. Glass*, 116 Ala. 629.

**147.** Illustrations of the Rule Against Parol Agreements. — See notes 2, 3.

**149.** See notes 1, 2.

**150.** See note 3.

*Arkansas.* — *Graham v. Rimmel*, (Ark. 1905) 88 S. W. Rep. 899.

*California.* — *Henehan v. Hart*, 127 Cal. 656; *Easton Packing Co. v. Kennedy*, 131 Cal. xviii, 63 Pac. Rep. 130.

*Colorado.* — *Champion Empire Min. Co. v. Bird*, 7 Colo. App. 523; *Cooper v. German Nat. Bank*, 9 Colo. App. 169; *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393; *Scott v. Wood*, 14 Colo. App. 341.

*Connecticut.* — *Trumbull v. O'Hara*, 71 Conn. 172; *Burns, etc., Lumber Co. v. Doyle*, 71 Conn. 742, 71 Am. St. Rep. 235.

*District of Columbia.* — *Metzerott v. Ward*, 10 App. Cas. (D. C.) 514.

*Georgia.* — *Johnson v. Cobb*, 100 Ga. 139; *Union Cent. L. Ins. Co. v. Wynne*, (Ga. 1905) 51 S. E. Rep. 389.

*Illinois.* — *Mumford v. Tolman*, 157 Ill. 258; *Moore v. Prussing*, 165 Ill. 319; *Sexton v. Barrie*, 102 Ill. App. 586.

*Indiana.* — *McCormick Harvesting Mach. Co. v. Yoeman*, 26 Ind. App. 415; *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291.

*Iowa.* — *Marsh v. Chown*, 104 Iowa 556.

*Kentucky.* — *Gray Tie, etc., Co. v. Farmers' Bank*, 109 Ky. 694; *Crane v. Williamson*, 111 Ky. 271; *Beattyville Bank v. Roberts*, 78 S. W. Rep. 901, 25 Ky. L. Rep. 1796.

*Massachusetts.* — *Torpey v. Tebo*, 184 Mass. 307; *Henry Wood's Sons Co. v. Schaefer*, 173 Mass. 443, 73 Am. St. Rep. 305.

*Michigan.* — *Citizens' Sav. Bank v. Vaughan*, 115 Mich. 156. See *Breckenridge First State Sav. Bank v. Webster*, 121 Mich. 149; *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 102 Am. St. Rep. 433.

*Missouri.* — *Barnard State Bank v. Fesler*, 89 Mo. App. 217; *Holmes v. Farris*, 97 Mo. App. 305; *Milan First Nat. Bank v. Wells*, 98 Mo. App. 573; *St. Louis Third Nat. Bank v. Reichert*, 101 Mo. App. 242; *Poindexter v. McDowell*, (Mo. 1905) 84 S. W. Rep. 1133.

*Nebraska.* — *Western Mfg. Co. v. Rogers*, 54 Neb. 456; *Aultman v. Hawk*, (Neb. 1903) 95 N. W. Rep. 695.

*New York.* — *Mead v. National Bank*, 89 Hun (N. Y.) 102; *McLeod v. Hunter*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 558, *affirmed* 49 N. Y. App. Div. 131; *Block v. Stevens*, 72 N. Y. App. Div. 246.

*North Carolina.* — *Jones v. Rhea*, 122 N. Car. 721; *Western Carolina Bank v. Moore*, 138 N. Car. 529.

*Ohio.* — *Lillie v. Bates*, 2 Ohio Cir. Dec. 54.

*Pennsylvania.* — *Weaver v. Paul*, 4 Pa. Dist. 492; *Wolf v. Rosenbach*, 2 Pa. Super. Ct. 587; *Wolf v. Wolf*, 2 Pa. Super. Ct. 590; *Dodge v. Chessman*, 10 Pa. Super. Ct. 604; *Plunkett v. Roehm*, 12 Pa. Super. Ct. 83; *Gazley v. Riegel*, 16 Pa. Super. Ct. 501; *Mahanoy City First Nat. Bank v. Dick*, 22 Pa. Super. Ct. 445.

*South Dakota.* — *Schmitz v. Hawkeye Gold Min. Co.*, 8 S. Dak. 544.

*Texas.* — *Ablowich v. Greenville Nat. Bank*, 22 Tex. Civ. App. 273; *Bailey v. Rockwall County Nat. Bank*, (Tex. Civ. App. 1901) 61 S.

W. Rep. 530; *Citizens' Nat. Bank v. Cammer*, (Tex. Civ. App. 1905) 86 S. W. Rep. 625.

*Washington.* — *Shuey v. Adair*, 18 Wash. 188, 63 Am. St. Rep. 879.

*Wisconsin.* — *Milwaukee First Nat. Bank v. Finck*, 100 Wis. 446; *Bohn Mfg. Co. v. Reif*, 116 Wis. 471.

*Canada.* — *MacArthur v. MacDowall*, 1 N. W. Ter. 345; *Hamilton v. Jones*, 10 Quebec Super. Ct. 496; *Letellier v. Cantin*, 11 Quebec Super. Ct. 64.

**147. 2. Note Intended as a Memorandum or Receipt.** — *Arkansas.* — *Graham v. Rimmel*, (Ark. 1905) 88 S. W. Rep. 899.

*Colorado.* — *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393.

*Connecticut.* — *Trumbull v. O'Hara*, 71 Conn. 172; *Burns, etc., Lumber Co. v. Doyle*, 71 Conn. 742, 71 Am. St. Rep. 235.

*Michigan.* — *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 102 Am. St. Rep. 433.

*Missouri.* — *Barnard State Bank v. Fesler*, 89 Mo. App. 217; *Holmes v. Farris*, 97 Mo. App. 305.

*Nebraska.* — *Aultman v. Hawk*, (Neb. 1903) 95 N. W. Rep. 695.

*North Carolina.* — *Western Carolina Bank v. Moore*, 138 N. Car. 529.

*Ohio.* — *Lillie v. Bates*, 2 Ohio Cir. Dec. 54.

*Pennsylvania.* — *Plunkett v. Roehm*, 12 Pa. Super. Ct. 83; *Gazley v. Riegel*, 16 Pa. Super. Ct. 501; *Mahanoy City First Nat. Bank v. Dick*, 22 Pa. Super. Ct. 445.

**An Additional Verbal Agreement**, by which under certain circumstances the note given for an insurance policy was to be canceled and another note given for a smaller policy, is admissible. *Bresee v. Crumpton*, 121 N. Car. 122.

**3. Agreement Making Payment Contingent.** — *Johnson v. Cobb*, 100 Ga. 139; *Union Cent. L. Ins. Co. v. Wynne*, (Ga. 1905) 51 S. E. Rep. 389; *Moore v. Prussing*, 165 Ill. 319; *St. Louis Third Nat. Bank v. Reichert*, 101 Mo. App. 242.

**149. 1.** *Moore v. Prussing*, 165 Ill. 319; *Beattyville Bank v. Roberts*, 78 S. W. Rep. 901, 25 Ky. L. Rep. 1796; *Wooley v. Cobb*, 165 Mass. 503; *Pratt, etc., Co. v. American Pneumatic Tool Co.*, 50 N. Y. App. Div. 369, *affirmed* 166 N. Y. 588; *Block v. Stevens*, 72 N. Y. App. Div. 246; *Wolf v. Rosenbach*, 2 Pa. Super. Ct. 587; *Wolf v. Wolf*, 2 Pa. Super. Ct. 590; *Letellier v. Cantin*, 11 Quebec Super. Ct. 64. See also *Citizens' Sav. Bank v. Vaughan*, 115 Mich. 156; *Stone v. Billings*, 167 Ill. 170.

**Agreement for Renewal** — *California Statute.* — *Henehan v. Hart*, 127 Cal. 656.

**2. Parol Condition as to Amount.** — *Scott v. Wood*, 14 Colo. App. 341; *Ablowich v. Greenville Nat. Bank*, 22 Tex. Civ. App. 273.

**150. 3.** *Beattyville Bank v. Roberts*, 78 S. W. Rep. 901, 25 Ky. L. Rep. 1796; *Henry Wood's Sons Co. v. Schaefer*, 173 Mass. 443, 73 Am. St. Rep. 305. *Compare National Bank v. Byrnes*, 84 N. Y. App. Div. 100, *affirmed* 178 N. Y. 561; *Draper v. Horton*, 22 R. I. 592.

**150.** (b) Limitations of the Rule Against Parol Agreements — *aa*. GENERAL STATEMENT. — See notes 5, 6, 9.

**151.** See note 1.

*bb*. PAROL EVIDENCE TO SHOW FAILURE OF, OR CONDITIONAL, DELIVERY. — See notes 3, 4.

**152.** *cc*. EXECUTED PAROL AGREEMENTS AS TO SATISFACTION. — See note 2.

*dd*. PAROL EVIDENCE AS TO INCOMPLETE, ERRONEOUSLY FRAMED, OR AMBIGUOUS INSTRUMENTS. — See note 4.

**153.** Omissions and Erroneous Terms in Bills and Notes — Correction in Equity. — See note 1.

Mistake Not Provable at Law. — See note 2.

**154.** Ambiguous Instruments. — See note 2.

*ee*. PAROL EVIDENCE AS TO MATTERS OR AGREEMENTS COLLATERAL TO INSTRUMENT. — See note 6.

(3) Subsequent Written or Oral Agreements Controlling Bills and Notes. — See notes 8, 9.

**150.** 5. *Connecticut*. — Trumbull *v.* O'Hara, 71 Conn. 172; Burns, etc., Lumber Co. *v.* Doyle, 71 Conn. 742, 71 Am. St. Rep. 235.

*District of Columbia*. — Randle *v.* Davis Coal, etc., Co., 15 App. Cas. (D. C.) 357.

*Missouri*. — Poindexter *v.* McDowell, (Mo. 1905) 84 S. W. Rep. 1133.

*New York*. — Simmons *v.* Thompson, 29 N. Y. App. Div. 559.

*North Dakota*. — Drinkall *v.* Movius State Bank, 11 N. Dak. 10, 95 Am. St. Rep. 693.

*South Carolina*. — Copeland *v.* Copeland, 64 S. Car. 251.

*Canada*. — MacArthur *v.* MacDowall, 1 N. W. Ter. 345.

6. MacArthur *v.* MacDowall, 1 N. W. Ter. 345.

9. Martin *v.* McCune, 42 W. N. C., (Pa.) 511.

**151.** 1. See also Burns, etc., Lumber Co. *v.* Doyle, 71 Conn. 742, 71 Am. St. Rep. 235.

3. Instrument Never Delivered. — Hurt *v.* Ford, (Mo. 1896) 36 S. W. Rep. 671; Hagan *v.* Bigler, 5 Okla. 575.

4. Instrument Conditionally Delivered — *Arkansas*. — Coffin *v.* Black, 67 Ark. 219.

*Colorado*. — See Champion Empire Min. Co. *v.* Bird, 7 Colo. App. 523.

*Connecticut*. — New Haven Mfg. Co. *v.* New Haven Pulp, etc., Co., 76 Conn. 126; Trumbull *v.* O'Hara, 71 Conn. 172; Burns, etc., Lumber Co. *v.* Doyle, 71 Conn. 742, 71 Am. St. Rep. 235.

*District of Columbia*. — Randle *v.* Davis Coal, etc., Co., 15 App. Cas. (D. C.) 357.

*Illinois*. — Moore *v.* Prussing, 165 Ill. 319.

*Michigan*. — Jordan *v.* Newton, 116 Mich. 674.

*Minnesota*. — Mendenhall *v.* Ulrich, (Minn. 1905) 101 N. W. Rep. 1057.

*Missouri*. — Hurt *v.* Ford, (Mo. 1896) 36 S. W. Rep. 671.

*New York*. — Megowan *v.* Peterson, 173 N. Y. 1; Williams *v.* Syracuse First Nat. Bank, 45 N. Y. App. Div. 239, affirmed 167 N. Y. 594; Pratt, etc., Co. *v.* American Pneumatic Tool Co., 50 N. Y. App. Div. 369, affirmed 166 N. Y. 588; Utica City Nat. Bank *v.* Tallman, 63 N. Y. App. Div. 480, affirmed 172 N. Y. 642; Andrews *v.* Hess, 20 N. Y. App. Div. 194; Twelfth Ward Bank *v.* Rogers, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 602.

*South Dakota*. — McCormick Harvesting Mach. Co. *v.* Faulkner, 7 S. Dak. 363, 58 Am. St. Rep. 839.

*Canada*. — MacArthur *v.* MacDowall, 1 N. W. Ter. 345.

Parol Evidence to Show Purpose of Delivery Admissible. — Pattillo *v.* Alexander, 96 Ga. 60.

Parol Evidence Admissible to Show Delivery as Escrow. — Daggett *v.* Simonds, 173 Mass. 340.

**152.** 2. Executed Agreement in Satisfaction. — Indianapolis First Nat. Bank *v.* New, 146 Ind. 411; McQuarrie *v.* Brand, 28 Ont. 69.

4. Crane *v.* Williamson, 111 Ky. 271; Keokuk Falls Imp. Co. *v.* Kingsland, etc., Mfg. Co., 5 Okla. 32; Andrews *v.* Robertson, 111 Wis. 334, 87 Am. St. Rep. 870. See also Vliet *v.* Simanton, 63 N. J. L. 458.

**153.** 1. Prescott *v.* Hixon, 22 Ind. App. 139, 72 Am. St. Rep. 291; Jurgensen *v.* Carlsen, 97 Iowa 627; Turpin *v.* Gresham, 106 Iowa 187; Beland *v.* Anheuser-Busch Brewing Assoc., 157 Mo. 593. See also Capital Sav. Bank, etc., Co. *v.* Swan, 100 Iowa 718.

Interest. — Where both the maker and the payee intended that the note should bear no interest and supposed that this would result from an omission to insert any reference to interest, equity will, at the instance of the maker, in an action upon the note by a third person to whom it had been indorsed, correct the mistake, where the indorsee has notice and is not a purchaser for value. Loudermilk *v.* Loudermilk, 98 Ga. 780.

2. See Hackemack *v.* Wiebrock, 172 Ill. 98, affirming 71 Ill. App. 170.

Amount — Parol Evidence Admissible to Prove Mistake. — Henry *v.* Sansom, (Tex. Civ. App. 1896) 36 S. W. Rep. 122.

**154.** 2. Carr *v.* Jones, 29 Wash. 78.

6. Proof of Collateral Agreement. — Drescher *v.* Fulham, 11 Colo. App. 62; Carlton *v.* White, 99 Ga. 384; Sloan *v.* Gibbs, 56 S. Car. 480, 76 Am. St. Rep. 559; Citizens' Nat. Bank *v.* Cammer, (Tex. Civ. App. 1905) 86 S. W. Rep. 625. See also Mader *v.* Cool, 14 Ind. App. 299, 56 Am. St. Rep. 304; Fisher *v.* Diehl, 94 Md. 114; Storz *v.* Kinzler, 73 N. Y. App. Div. 372; Clinch Valley Coal, etc., Co. *v.* Willing, 180 Pa. St. 165, 57 Am. St. Rep. 626.

8. Heath *v.* Achey, 96 Ga. 438; Wellington Nat. Bank *v.* Thomson, 9 Kan. App. 667;

**155.** See notes 1, 2, 3, 4.

**158.** *f.* STAMPS—General and Historical. — See note 7.

Requirements of the Statute — Affixing the Stamp. — See notes 10, 11.

**160.** Constitutionality — Whether Applicable to State Courts. — See note 6.

*Fisher v. Stevens*, 143 Mo. 191, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 154; *Swan v. Craig*, (Neb. 1905) 102 N. W. Rep. 471; *Foster v. Furlong*, 8 N. Dak. 282. See *Bitter v. Butchers, etc.*, Ice Mfg. Assoc., (Tex. Civ. App. 1903) 77 S. W. Rep. 423..

**Acceptance of Offer to Extend Essential.** — *Travis v. Watson*, 134 Mich. 249.

**Signature of Both Parties Essential to Agreement.** — *Hass v. Lobstein*, 108 Ill. App. 217.

**Retention of Title to Interest.** — The payee of a note which provides for the payment of interest annually may in writing assign to another the principal and reserve to himself the interest with the right to collect the same, and this although the note provides that the principal shall become due on default in the payment of any interest instalment. In such a case a grant by the payee of an extension of time for the payment of the interest does not render the principal immediately due. *Scott v. Liddell*, 98 Ga. 24.

**154. 9. California.** — *Hubboldt Sav., etc., Soc. v. Dowd*, 137 Cal. 408.

**District of Columbia.** — *Reed v. Tierney*, 12 App. Cas. (D. C.) 165; *Walker v. Washington Title Ins. Co.*, 19 App. Cas. (D. C.) 575.

**Georgia.** — *Heath v. Achey*, 96 Ga. 438.

**Indiana.** — *McCormick Harvesting Mach. Co. v. Yoeman*, 26 Ind. App. 415; *Bucklen v. Johnson*, 19 Ind. App. 406. See *Hodges v. Truax*, 19 Ind. App. 651.

**Iowa.** — *Marshall Field Co. v. Oren Ruffcorn Co.*, 117 Iowa 157.

**Kansas.** — *Lorimer v. Fairchild*, 68 Kan. 328; *Ott v. Anderson*, 9 Kan. App. 320; *Wellington Nat. Bank v. Thomson*, 9 Kan. App. 667.

**Missouri.** — *Fisher v. Stevens*, 143 Mo. 191, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 154.

**Nebraska.** — *Swan v. Craig*, (Neb. 1905) 102 N. W. Rep. 471.

**North Dakota.** — *Foster v. Furlong*, 8 N. Dak. 282.

**South Dakota.** — *Whiffen v. Hollister*, 12 S. Dak. 68.

**Texas.** — See *Aiken v. Posey*, 13 Tex. Civ. App. 607. See also *Tunstall v. Clifton*, (Tex. Civ. App. 1898) 49 S. W. Rep. 244.

**Canada.** — *McGregor v. McKenzie*, 30 Nova Scotia, 214.

**Consideration Essential.** — *Howe v. Klein*, 89 Me. 376; *Peachy v. Witter*, 131 Cal. 316; *Conklin v. Lorimer*, 10 Kan. App. 550.

**Consideration Essential to Support Agreement.** — *Price v. Mitchell*, 23 Wash. 742. See the title CONSIDERATION.

**Release of Joint Maker.** — An agreement to release one of two makers of a joint note from liability thereon is not binding unless such agreement is supported by a consideration. *Fowler v. Coker*, 107 Ga. 817.

**Sufficiency of Consideration.** — *Ferris v. Johnson*, (Mich. 1904) 98 N. W. Rep. 1014, 10 Detroit Leg. N. 982. See also *Kearby v. Hopkins*, 14 Tex. Civ. App. 166.

**Agreement for Extension Not Presumed from Payments of Interest Made after Maturity.** — *Amberg v. Nachtway*, 92 Ill. App. 608.

**Payment of Interest in Advance Sufficient Consideration.** — *Wyatt v. Dufrene*, 106 Ill. App. 214.

**155. 1.** *Reed v. Tierney*, 12 App. Cas. (D. C.) 165.

**Person Not Taking with Notice Not Bound.** — *Lemoore Bank v. Gulart*, (Cal. 1898) 54 Pac. Rep. 1111.

**Effect on Negotiability.** — Where, at or about the maturity of a negotiable instrument, the time of payment of the indebtedness evidenced thereby is extended by a written agreement of the parties upon a valid consideration, the agreement being independent of and collateral to the original contract, such extension does not continue the commercial characteristics of the note as live unmaturing negotiable paper. *Swan v. Craig*, (Neb. 1905) 102 N. W. Rep. 471.

**2.** *Walker v. Washington Title Ins. Co.*, 19 App. Cas. (D. C.) 575; *McCormick Harvesting Mach. Co. v. Yoeman*, 26 Ind. App. 415; *Swan v. Craig*, (Neb. 1905) 102 N. W. Rep. 471; *Foster v. Furlong*, 8 N. Dak. 282; *McGregor v. McKenzie*, 30 Nova Scotia 214. Compare *Swan v. Craig*, (Neb. 1905) 102 N. W. Rep. 471.

**Where Indorser Does Not Consent.** — An indorser of a negotiable note is not bound by a contract, entered into without his consent, between the maker and a subsequent indorsee, which changes the time when the note may mature, and his liability as indorser must be determined and fixed in accord with the original contract of indorsement. *Evans v. Baker*, 5 Kan. App. 68.

**Proof of Agreement for Extension.** — *Marshall, etc., Bank v. Child*, 76 Minn. 173.

**Burden of Proving Such an Agreement on the Defendant.** — *Haines v. Snedigar*, 110 Cal. 18.

**An Extension for More than a Year must be in writing.** *Tunstall v. Clifton*, (Tex. Civ. App. 1898) 49 S. W. Rep. 244.

**Extension Must Be for Definite Time.** — *Union Nat. Bank v. Cross*, 100 Wis. 174.

**Agreement for Extension — Tender of Renewal Note.** — *White v. Sabiston*, 12 Quebec Super. Ct. 345.

**3. Sufficiency of Evidence to Show Agreement for Extension.** — *Walley v. Deseret Nat. Bank*, 14 Utah 305.

**4. Medium of Payment.** — *Dunklee v. Goodnough*, 68 Vt. 113.

**158. 7.** The most recent of these statutes is the U. S. Internal Rev. Act 1898. *Ebert v. Gitt*, 95 Md. 186.

**10. U. S. Rev. Stat., § 3226 — Instruments to Which Applicable.** — *Granby Mercantile Co. v. Webster*, 98 Fed. Rep. 604.

**11. By Whom and When Stamp Affixed.** — *Granby Mercantile Co. v. Webster*, 98 Fed. Rep. 604.

**160. 6. Stamp Act Does Not Apply to State Courts.** — *Dillingham v. Parks*, 30 Ind. App. 61; *Rowe v. Bowman*, 183 Mass. 488.

**161.** Omission of Stamp — Intent. — See notes 1, 2, 3.

**162.** How, and by Whom, the Want of Stamp May Be Set Up. — See notes 3, 6.

**2. Capacity and Authority of Parties — a. GENERAL STATEMENT.**

— See note 10.

**163.** c. PERSONS UNDER DISABILITY OR WITH LIMITED POWER —

(1) **Lunatics** — General Doctrine of Lunatic's Contracts. — See notes 4, 5, 6, 7.

**164.** Liability of Lunatic on Negotiable Paper. — See notes 1, 2.

Rights of Innocent Holder. — See notes 3, 4.

**165.** (2) **Drunken Persons.** — See notes 2, 5.

(3) **Infants.** — See note 8.

**166.** See note 2.

**167.** **Infant Payee.** — See note 3.

Liability of Adults on Instruments to Which Infants Are Parties. — See note 4.

**168.** (5) **Married Women** — (a) Generally. — See note 3.

**169.** By Modern Statutes. — See note 5.

(b) **Bills and Notes Between Husband and Wife.** — See notes 8, 9.

**170.** See note 1.

(a) **Instruments Payable or Indorsed to Wife.** — See note 9.

**171.** See note 1.

**174.** (7) **Executors and Administrators.** — See notes 5, 6.

**161.** 1. **Stamp Innocently Omitted.** — Ebert v. Gitt, 95 Md. 186 (under the Act of 1898).

**2. Burden of Proof.** — Ebert v. Gitt, 95 Md. 186; Rowe v. Bowman, 183 Mass. 488.

**3. Instruments Admissible Without Stamps Where Omission Innocent.** — Pierpont v. Johnson, 104 Ill. App. 27; Rowe v. Bowman, 183 Mass. 488 (under U. S. Int. Rev. Act of 1898).

**162.** 3. See Ebert v. Gitt, 95 Md. 186.

6. See Ebert v. Gitt, 95 Md. 186.

**10.** Nichols, etc., Co. v. Hardman, 62 Mo. App. 153.

**163.** 4. Hosler v. Beard, 54 Ohio St. 398, 56 Am. St. Rep. 720.

5. Hosler v. Beard, 54 Ohio St. 398, 56 Am. St. Rep. 720.

6. Hosler v. Beard, 54 Ohio St. 398, 56 Am. St. Rep. 720; Atwood v. Lester, 20 R. I. 660; Navasota First Nat. Bank v. McGinty, 29 Tex. Civ. App. 539.

7. **Subsequent Insanity** does not invalidate a note which is valid in other respects. Atwood v. Lester, 20 R. I. 660.

**164.** 1. Milligan v. Pollard, 112 Ala. 465; Hosler v. Beard, 54 Ohio St. 398, 56 Am. St. Rep. 720.

2. **Note for Necessaries.** — Milligan v. Pollard, 112 Ala. 465; Hosler v. Beard, 54 Ohio St. 398, 56 Am. St. Rep. 720.

**Burden of Proving Consideration on Plaintiff.** — Hosler v. Beard, 54 Ohio St. 398, 56 Am. St. Rep. 720.

**Recovery of Amount Used for Necessaries or Protection of Estate Allowed.** — Navasota First Nat. Bank v. McGinty, 29 Tex. Civ. App. 539.

**Note Void in Hands of Payee Without Notice.** — Milligan v. Pollard, 112 Ala. 465.

3. **Recovery Limited to Consideration Shown.** — Hosler v. Beard, 54 Ohio St. 398, 56 Am. St. Rep. 720.

4. **Lunatic's Paper Voidable Only.** — See also School Dist. v. Sheidley, 138 Mo. 672, 60 Am. St. Rep. 576.

**165.** 2. Strickland v. Parlin, etc., Co., 118 Ga. 213.

**Drunkenness at Time of Execution.** — Where

one enters into a binding contract to give certain promissory notes for named amounts, and subsequently gives them, fraud in procuring him to sign the notes, or drunkenness at the time of their execution, is no defense, when the notes amount to no more than a compliance with his previous valid contract. Strickland v. Parlin, etc., Co., 118 Ga. 213.

5. More v. Finger, 128 Cal. 313.

8. **Infant's Contracts Voidable.** — See also Des Moines Ins. Co. v. McIntire, 99 Iowa 50; Waterman v. Waterman, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 195; Wise v. Loeb, 15 Pa. Super. Ct. 601.

**166.** 2. **Infant's Bills and Notes Validated Ab Initio by Ratification.** — Waterman v. Waterman, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 195.

**167.** 3. **Infant Payee.** — Yarwood v. Trusts, etc., Co., 94 N. Y. App. Div. 47.

4. **Surety on Infant's Note** is discharged by the disaffirmance of the contract and return of the property by the infant. Keokuk County State Bank v. Hall, 106 Iowa 540.

**168.** 3. **Bills and Notes of Married Women Void.** — Thompson v. Hudgins, 116 Ala. 93; Vliet v. Eastburn, 63 N. J. L. 452, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 168.

**169.** 5. Sater v. Hunt, 66 Mo. App. 527.

8. **Instruments Between Husband and Wife.** — National Bank of Republic v. Delano, 185 Mass. 424.

9. **Note from Husband to Wife Valid, under Pa. Act of June 8, 1893.** — Haun v. Trainer, 7 Pa. Dist. 235.

**170.** 1. **Title of Note Through Wife to Husband.** — See also Wisdom v. Shanklin, 74 Mo. App. 428.

9. **Married Woman's Paper Vests in Husband.** — Vann v. Edwards, 128 N. Car. 425.

**171.** 1. See also Kemper v. Huddleston, 90 Tex. 182.

**174.** 5. **Estate Not Bound by Executor's or Administrator's Note.** — Hopson v. Johnson, 110 Ga. 283; Jenkins v. Phillips, 41 N. Y. App. Div. 389; Sutherland v. St. Lawrence County, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 38, re-

**175.** See notes 1, 2.

**176.** (g) *Partners* — (b) *Trading Partnerships* — *Authority to Issue Negotiable Paper Implied*. — See note 3.

*Authority Limited by Agreement*. — See note 5.

**177.** *Bills and Notes Issued in Fraud of the Firm*. — See notes 1, 2, 3.

*Burden of Proof*. — See note 4.

**178.** *Subsequent Holder — Burden of Proof*. — See note 1.

(e) *Nontrading Partnerships*. — See note 2.

*The Burden of Proof*. — See note 3.

**179.** (a) *Form of Partnership Paper — Joint and Several Notes Signed by Partner in Firm Name*. — See note 5.

**180.** *Paper Signed by One Partner in His Own Name — Where Partner's Name Is Firm Name*. — See note 4.

*versed* 101 N. Y. App. Div. 299; *Morehead Banking Co. v. Morehead*, 122 N. Car. 318.

**174. 6. Executor or Administrator Bound Personally.** — *Morehead Banking Co. v. Morehead*, 122 N. Car. 318; *Jenkins v. Phillips*, 41 N. Y. App. Div. 389; *Darling v. Powell*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 240.

**175. 1. Title to Paper of Decedent Passes to Representative.** — *Harnish v. Miles*, 111 Ill. App. 105; *Marshall v. Meyers*, 96 Mo. App. 643. 2, *Marshall v. Meyers*, 96 Mo. App. 643.

**176. 3. Implied Power of Partner in Trading Partnership — United States.** — *Andrews v. Congar*, 131 U. S. (Appendix) clxxxiii, 26 U. S. (L. ed.) 90.

*Georgia*. — *Haskins v. Throne*, 101 Ga. 126.

*Illinois*. — *Adams v. Long*, 114 Ill. App. 277.

*Kentucky*. — *Fordville Banking Co. v. Thompson*, (Ky. 1904) 82 S. W. Rep. 251.

*Michigan*. — *Stevens v. McLachlan*, 120 Mich. 289, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 176; *Citizens' Commercial, etc., Bank v. Platt*, (Mich. 1903) 97 N. W. Rep. 694, 10 Detroit Leg. N. 743.

*Ohio*. — *Union Nat. Bank v. Wickham*, 6 Ohio Cir. Dec. 790, 18 Ohio Cir. Ct. 685.

*Texas*. — *Ft. Dearborn Nat. Bank v. Berrott*, 23 Tex. Civ. App. 662.

*Virginia*. — *Pettyjohn v. National Exch. Bank*, 101 Va. 111.

See also *Ferguson v. Fairchild*, 1 N. W. Ter. 329; *Johnson v. Bonfield*, (Ky. 1897) 40 S. W. Rep. 697. Compare *Lowry v. Tivy*, 70 N. J. L. 457.

**Power Limited by Michigan Statute.** — *Citizens' Sav. Bank v. Vaughan*, 115 Mich. 156.

**Burden of Proving Lack of Authority on Defendant.** — *Ft. Dearborn Nat. Bank v. Berrott*, 23 Tex. Civ. App. 662.

**Ratification by Firm.** — *Richards v. Jefferson*, 20 Wash. 166.

**5. Limitation of Partner's Authority Does Not Affect Innocent Taker.** — *Andrews v. Congar*, 131 U. S. (Appendix) clxxxiii, 26 U. S. (L. ed.) 90; *Adams v. Long*, 114 Ill. App. 277; *Union Nat. Bank v. Wickham*, 6 Ohio Cir. Dec. 790, 18 Ohio Cir. Ct. 685.

**177. 1. Paper in Partnership Name Presumed Partnership Transaction.** — *Adams v. Long*, 114 Ill. App. 277; *Stevens v. McLachlan*, 120 Mich. 285; *Union Nat. Bank v. Doherty*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 247, affirmed (Supm. Ct. App. T.) 32 Misc. (N. Y.) 496; *Loeb v. Mellinger*, 17 Lanc. L. Rev. 129, 12 Pa. Super. Ct. 592,

**The Presumption Is Not Affected by the fact** that the paper is payable to a member of the firm. *Stevens v. McLachlan*, 120 Mich. 285.

**2. Persons Taking with Notice Cannot Recover.** — *King v. Mecklenburg*, 17 Colo. App. 312; *Haskins v. Throne*, 101 Ga. 126; *Adams v. Long*, 114 Ill. App. 277; *Monongahela Valley Bank v. Weston*, 172 N. Y. 259; *Lucker v. Iba*, 54 N. Y. App. Div. 566; *Ft. Dearborn Nat. Bank v. Berrott*, 23 Tex. Civ. App. 662; *Masterson v. Mansfield*, 25 Tex. Civ. App. 262.

**3. Contra, as to Innocent Holder.** — *Haskins v. Throne*, 101 Ga. 126; *Reed v. Bacon*, 175 Mass. 407; *Stevens v. McLachlan*, 120 Mich. 285; *Elmira Second Nat. Bank v. Weston*, 161 N. Y. 520, 76 Am. St. Rep. 283; *Monongahela Valley Bank v. Weston*, 172 N. Y. 259; *Union Nat. Bank v. Wickham*, 6 Ohio Cir. Dec. 790, 18 Ohio Cir. Ct. 685; *Loeb v. Mellinger*, 17 Lanc. L. Rev. 129, 12 Pa. Super. Ct. 592; *Ft. Dearborn Nat. Bank v. Berrott*, 23 Tex. Civ. App. 662. Compare *Tradesmen's Nat. Bank v. Bacheneheimer*, 5 Pa. Dist. 218; *Lowry v. Tivy*, 70 N. J. L. 457.

**The Fact that a Married Woman Is a Member of the Partnership** does not alter the general rule. *Loeb v. Mellinger*, 17 Lanc. L. Rev. 129, 12 Pa. Super. Ct. 592.

**4. King v. Mecklenburg**, 17 Colo. App. 312; *Stevens v. McLachlan*, 120 Mich. 285.

**178. 1. Burden of Proof as to Subsequent Holder.** — *Stevens v. McLachlan*, 120 Mich. 285; *Union Nat. Bank v. Doherty*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 247, affirmed (Supm. Ct. App. T.) 32 Misc. (N. Y.) 496; *Smith v. Weston*, 159 N. Y. 194; *Union Nat. Bank v. Wickham*, 6 Ohio Cir. Dec. 790, 18 Ohio Cir. Ct. 685.

**2. Nontrading Firms.** — *Haskins v. Throne*, 101 Ga. 126; *Adams v. Long*, 114 Ill. App. 277; *Teed v. Parsons*, 202 Ill. 460, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

**Authority Given by Ga. Civ. Code, § 2643.** — *Haskins v. Throne*, 101 Ga. 126.

**3. Teed v. Parsons**, 202 Ill. 460, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

**179. 5. Whether Individual Partner Who Signs Severally Is Bound.** — Where promissory notes are signed by a firm as makers, a person who holds himself out to the payees as a member of such firm, though he may not be so in fact, is liable as a maker. *Isbester v. Ray*, 26 Can. Sup. Ct. 79.

**180. 4. Monongahela Valley Bank v. Weston**, 159 N. Y. 201,

**182.** Notes Signed by Partners as Individuals. — See note 3.

(f) Dissolution of Firm. — See note 7.

**183.** See notes 1, 2.

(10) Corporations — (b) Validity of Corporation Paper — American Doctrine.

— See notes 4, 7.

Reason of the American Authorities. — See note 9.

**184.** English Doctrine. — See note 2.

(c) Paper Issued Ultra Vires — Total Want of Authority. — See note 5.

When Power Exists, but Issue Is for Unauthorized Purpose. — See note 6.

**185.** See note 1.

(d) Authority of Officers and Agents. — See notes 3, 4.

(11) Municipal Corporations. — See note 6.

**186.** 3. The Consideration — a. NECESSITY OF CONSIDERATION. — See note 1.

**182.** 3. Partners Indorsing Firm Note as Individuals Liable Individually. — *Faneuil Hall Nat. Bank v. Meloon*, 183 Mass. 66, 97 Am. St. Rep. 416.

7. *Brown v. Bamberger*, 110 Ala. 342; *Merrick v. Merchants' Nat. Bank*, 11 Ohio Dec. 293; *Tarver v. Evansville Furniture Co.*, 20 Tex. Civ. App. 66.

Notes Issued After Firm Dissolves — Necessity of Notice of Dissolution. — *Monongahela Valley Bank v. Weston*, 159 N. Y. 201.

Note Binding in Absence of Notice of Dissolution. — *Pyrton v. Ruohs*, 120 Ga. 1060.

Notes Issued After Dissolution, but Antedated. may be enforced by a bona fide purchaser for value without notice. *Elmira Second Nat. Bank v. Weston*, 161 N. Y. 520, 76 Am. St. Rep. 283.

**183.** 1. Authority Specially Continued. — *Brown v. Bamberger*, 110 Ala. 342.

2. Ratification. — *Brown v. Bamberger*, 110 Ala. 342.

Ratification Does Not Include Stipulations in Note of Which Partner Had No Knowledge. — *Brown v. Bamberger*, 110 Ala. 342.

4. Corporation Notes. — *Grommes v. Sullivan*, (C. C. A.) 81 Fed. Rep. 45; *Reade v. Pacific Coast Home Supply Assoc.*, 40 Oregon 60; *Midland Steel Co. v. Citizens' Nat. Bank*, (Ind. App. 1904) 72 N. E. Rep. 290.

7. Corporation Indorsements. — *Hiawatha Iron Co. v. John Strange Paper Co.*, 106 Wis. 111.

Indorsement by Bank Before Authority Given to Do Business. — *Kellogg v. Douglas County Bank*, 58 Kan. 43, 62 Am. St. Rep. 596.

9. Incident of Power to Borrow. — *Grommes v. Sullivan*, (C. C. A.) 81 Fed. Rep. 45.

**184.** 2. *Grommes v. Sullivan*, (C. C. A.) 81 Fed. Rep. 45.

5. Under the Negotiable Instruments Law an indorsement by a corporation passes the property in the instrument, notwithstanding the corporation may from want of capacity incur no liability thereon. *Oppenheim v. Simon Reigel Cigar Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 355.

6. Bona Fide Holder's Right as to Paper Issued Ultra Vires. — *Grommes v. Sullivan*, (C. C. A.) 81 Fed. Rep. 45; *M. V. Monarch Co. v. Hardinsburg Bank*, 103 Ky. 276; *American Trust, etc., Bank v. Gluck*, 68 Minn. 129; *Hiawatha Iron Co. v. John Strange Paper Co.*, 106 Wis. 111. See also *Dexter Sav. Bank v. Friend*, 90

Fed. Rep. 703; *Willard v. Crook*, 21 App. Cas. (D. C.) 237; *Union Bank v. Eureka Woolen Mfg. Co.*, 33 Nova Scotia 302.

**185.** 1. One Who Knows that Paper Is Ultra Vires. — *Thompson v. West*, 59 Neb. 677. See also *Solomon Solar Salt Co. v. Barber*, 58 Kan. 419.

3. Persons Must Know Officer's General Authority. — *Klein v. German Nat. Bank*, 69 Ark. 140, 86 Am. St. Rep. 183.

4. See *Standard Cement Co. v. Windham Nat. Bank*, 71 Conn. 668; *Jones v. Stoddart*, 8 Idaho 210; *Black v. Westminster First Nat. Bank*, 96 Md. 399; *American Trust, etc., Bank v. Gluck*, 68 Minn. 129. See also *Imperial Bank v. Farmer's Trading Co.*, 13 Manitoba 412.

6. Power of Municipal Corporations. — *Grommes v. Sullivan*, (C. C. A.) 81 Fed. Rep. 45.

Power to Issue Nonnegotiable Notes. — *Richmond, etc., Land, etc., Co. v. West Point*, 94 Va. 668.

**186.** 1. A Consideration for a Bill or Note Necessary — *Alabama*. — *Oldacre v. Stuart*, 122 Ala. 405.

*California*. — *Hardison v. Davis*, 131 Cal. 635.

*Colorado*. — *Currier v. Clark*, 15 Colo. App. 6.

*Georgia*. — *Russell v. Smith*, 97 Ga. 287.

*Illinois*. — *Vehon v. Vehon*, 70 Ill. App. 40.

*Indiana*. — *Shirk v. Neible*, 156 Ind. 66, 83

Am. St. Rep. 150; *Mader v. Cool*, 14 Ind. App. 299, 56 Am. St. Rep. 304.

*Iowa*. — *Farmers' Sav. Bank v. Hansmann*, 114 Iowa 49.

*Kansas*. — *Bowling v. Floyd*, 5 Kan. App. 879, 48 Pac. Rep. 875.

*Kentucky*. — *Boblett v. Barlow*, 83 S. W. Rep. 145, 26 Ky. L. Rep. 1076.

*Michigan*. — *Graham v. Alexander*, 123 Mich. 168; *Nowack v. Lehmann*, (Mich. 1905) 102 N. W. Rep. 992.

*Minnesota*. — *Wildermann v. Donnelly*, 86 Minn. 184.

*Missouri*. — *Anderson v. Stapel*, 80 Mo. App. 115.

*Nebraska*. — *Ricketts v. Scothorn*, 57 Neb. 51, 73 Am. St. Rep. 491.

*New Jersey*. — *Vliet v. Eastburn*, 63 N. J. L. 450.

*New York*. — *Addison v. Enoch*, 48 N. Y. App. Div. 111, affirmed 168 N. Y. 658; *Farmers', etc., Bank v. Hawn*, 79 N. Y. App. Div. 640; *Harvey v. Ayres*, (Supm. Ct. Tr. T.) 37 Misc.

**186. Consideration for Signing or Indorsing — After Negotiation. — See note 2.**

Before Negotiation. — See note 3.

**b. PRESUMPTION OF CONSIDERATION. — See note 4.**

Negotiable Bills and Notes. — See note 5.

(N. Y.) 164; *Tyler v. Jaeger*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 84.

*Pennsylvania*. — *Baker v. Nipple*, 16 Pa. Co. Ct. 659.

*Vermont*. — *Montpelier Seminary v. Smith*, 69 Vt. 382.

*Wisconsin*. — *Remington v. Detroit Dental Mfg. Co.*, 101 Wis. 307.

*Wyoming*. — *Swinney v. Edwards*, 8 Wyo. 54, 80 Am. St. Rep. 916.

*Canada*. — *Banque Provinciale v. Arnoldi*, 2 Ont. L. Rep. 624.

**Consideration for Indorsement.** — The consideration expressed in the note will support the contract of indorsement, and it need express none other than the consideration which the note upon its face implies to have passed between the original parties. *Carter v. Odom*, 121 Ala. 162.

**Consideration Essential to Support Agreement for Extension.** — *Norris v. Graham*, (Tex. Civ. App. 1897) 42 S. W. Rep. 575.

**Renewal Note.** — Where the original note was given for an adequate consideration, no new or additional consideration is necessary to give validity to the renewal note. *Lockner v. Holland*, (County Ct.) 81 N. Y. Supp. 730.

**186. 2. Effect of Signing or Indorsing after Negotiation.** — *Gieseke v. Vollmer*, 88 Mo. App. 462; *Tucker v. Gentry*, 93 Mo. App. 655; *Brown v. James*, 2 N. Y. App. Div. 105; *Monticello Bank v. Dooly*, 113 Wis. 590.

**Consideration Independent of That Passing Between Original Parties Essential.** — *Adams v. Huggins*, 78 Mo. App. 219.

**3. Effect of Signing or Indorsing Before Negotiation.** — *Duncanson v. Kirby*, 90 Ill. App. 15; *Hill v. Coombs*, 93 Mo. App. 264; *Tucker v. Gentry*, 93 Mo. App. 655; *Cordes v. Lindeman*, 6 Ohio Cir. Dec. 53, 18 Ohio Cir. Ct. 882; *Monticello Bank v. Dooly*, 113 Wis. 590.

**4. Black v. Westminster First Nat. Bank**, 56 Md. 399; *Blanshan v. Russell*, 32 N. Y. App. Div. 103, affirmed 161 N. Y. 629; *Monticello Bank v. Dooly*, 113 Wis. 590; *Kramer v. Kramer*, 90 N. Y. App. Div. 176.

**5. Negotiable Notes Import a Consideration — Alabama.** — *Brown v. Fowler*, 133 Ala. 310; *Brown v. Johnston*, 135 Ala. 608.

*California*. — *Younglove v. Cunningham*, (Cal. 1896) 43 Pac. Rep. 755.

*Colorado*. — *Reed v. Pueblo First Nat. Bank*, 23 Colo. 380; *Currier v. Clark*, 15 Colo. App. 6; *St. Joe, etc., Consol. Min. Co. v. Aspen First Nat. Bank*, 10 Colo. App. 339; *Gambrell v. Brown Hotel Co.*, 11 Colo. App. 529.

*District of Columbia*. — *Towles v. Tanner*, 21 App. Cas. (D. C.) 530.

*Illinois*. — *Martin v. Martin*, 202 Ill. 386, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 186; *Chicago Title, etc., Co. v. Ward*, 113 Ill. App. 327; *Board v. O'Donovan*, 82 Ill. App. 163; *Perry State Bank v. Elledge*, 109 Ill. App. 179.

*Indiana*. — *Spurgeon v. Swain*, 13 Ind. App. 188; *Woodworth v. Veitch*, 29 Ind. App. 589.

*Iowa*. — *Shaulis v. Buxton*, 115 Iowa 425; *Luke v. Koenen*, 120 Iowa 103.

*Kansas*. — *Wright v. McKittrick*, 2 Kan. App. 508.

*Kentucky*. — *Flowers v. Flowers*, (Ky. 1896) 34 S. W. Rep. 1071; *Hey v. Harding*, (Ky. 1899) 53 S. W. Rep. 33; *Kiesewetter v. Kress*, (Ky. 1902) 70 S. W. Rep. 1065; *Power v. Hambrick*, (Ky. 1903) 74 S. W. Rep. 660; *Beattyville Bank v. Roberts*, 78 S. W. Rep. 901, 25 Ky. Rep. 1796; *Cox v. Cox*, 79 S. W. Rep. 220, 25 Ky. L. Rep. 1934; *Carman v. Carrico*, (Ky. 1904) 80 S. W. Rep. 216; *Day v. Long*, 80 S. W. Rep. 774, 26 Ky. L. Rep. 123.

*Maryland*. — *Spies v. Rosenstock*, 87 Md. 14.

*Michigan*. — *Young v. Shepard*, 124 Mich. 552; *Taylor v. Taylor*, (Mich. 1904) 101 N. W. Rep. 832, 11 Detroit Leg. N. 711; *Union Trust Co. v. Morgans*, (Mich. 1905) 103 N. W. Rep. 568, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 186.

*Missouri*. — *Cox v. Sloan*, 158 Mo. 430; *Wood v. Flanery*, 89 Mo. App. 632; *Lowrey v. Danforth*, 95 Mo. App. 441; *Tapley v. Herman*, 95 Mo. App. 537; *Holmes v. Farris*, 97 Mo. App. 305; *Hugumin v. Hinds*, 97 Mo. App. 346.

*Montana*. — *Clarke v. Marlow*, 20 Mont. 249.

*New York*. — *Riverside Bank v. Woodhaven Junction Land Co.*, 34 N. Y. App. Div. 359; *Bringman v. Von Glahn*, 71 N. Y. App. Div. 537 (under Negotiable Instruments Law); *McLeod v. Hunter*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 558, affirmed 49 N. Y. App. Div. 131; *Moak v. Stevens*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 147; *Durland v. Durland*, 153 N. Y. 67; *Benedict v. Kress*, 97 N. Y. App. Div. 65; *Hickok v. Bunting*, 92 N. Y. App. Div. 167; *Harris v. Buchanan*, 100 N. Y. App. Div. 403.

*North Dakota*. — *Peckham v. Van Bergen*, 10 N. Dak. 43.

*Ohio*. — *Dalrymple v. Wyker*, 60 Ohio St. 108; *Eagle Ins. Co. v. Blymyer*, 10 Ohio Dec. 417, 8 Ohio N. P. 275.

*Oklahoma*. — *Berry v. Barton*, 12 Okla. 221.

*Oregon*. — *Kenny v. Walker*, 29 Oregon 41; *Sears v. Daly*, 43 Oregon 346.

*Pennsylvania*. — *Messmore v. Morrison*, 172 Pa. St. 300; *Danner v. Hess*, 19 Pa. Super. Ct. 182.

*West Virginia*. — *Cheuvront v. Bee*, 44 W. Va. 103.

*Canada*. — *McGregor v. McKenzie*, 30 Nova Scotia 214; *Larraway v. Harvey*, 14 Quebec Super. Ct. 97.

**Note under Seal — Consideration Presumed.** — *Wester v. Bailey*, 118 N. Car. 193.

**Consideration for Extension of Note Presumed.** — *Corbett v. Clough*, 8 S. Dak. 176.

**Consideration Imported from Use of Words "for Value Received."** — *Beatty v. Western College*, 177 Ill. 280, 69 Am. St. Rep. 242.

**Indorsement by Payee — Consideration Presumed.** — *Scribner v. Hanke*, 116 Cal. 613.

**Joint Notes.** — *Chambers v. McLean*, 24 Pa. Super. Ct. 567.



**187. Nonnegotiable Bills.** — See note 1.

**Nonnegotiable Notes.** — See note 2.

**188. c. SUFFICIENCY OF CONSIDERATION.** — See notes 1, 2, 3.

**Joint Consideration.** — *Pearl v. Cortwright*, 81 Miss. 300.

**Indorsement of Bill Imports Consideration.** — *Iselin v. Chemical Nat. Bank*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 437.

**Consideration Specified.** — In *Kentucky*, where it appears from the face of the note that it was given for a specific consideration, there can be no recovery unless it appears from the evidence that it was given for the consideration stated. *Smith v. Doherty*, 109 Ky. 616.

**187. 1. Order on Special Fund Does Not Import Consideration**, even though it is accepted. *Conroy v. Ferree*, 68 Minn. 325.

**2. Nonnegotiable Note Imports Consideration under Missouri Rev. Stat., 1899, § 894.** — *Lowrey v. Danforth*, 95 Mo. App. 441.

**Nonnegotiable Notes Held Not to Import Consideration.** — *Deyo v. Thompson*, 53 N. Y. App. Div. 9 (under Negotiable Instruments Law). *Compare Bradt v. Krank*, 164 N. Y. 515, 79 Am. St. Rep. 662.

**Under Vermont Neg. Inst. Law, §§ 1, 3**, a non-negotiable instrument does not import a consideration. *National Sav. Bank v. Cable*, 73 Conn. 568.

**188. 1. General Statement as to Sufficiency of Consideration — Alabama.** — *Alabama Nat. Bank v. Halsey*, 109 Ala. 196; *McCollum v. Edmonds*, 109 Ala. 322; *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369.

*California.* — *Placer County Bank v. Freeman*, 126 Cal. 90; *Baldwin v. Hart*, 136 Cal. 222; *Muller v. Swanton*, 140 Cal. 249.

*Colorado.* — *Reed v. Pueblo First Nat. Bank*, 23 Colo. 380.

*Connecticut.* — *New Haven Mfg. Co. v. New Haven Pulp, etc., Co.*, 76 Conn. 127.

*Georgia.* — *Russell v. Smith*, 97 Ga. 287.

*Illinois.* — *Hart v. Strong*, 183 Ill. 349; *Wall v. Stapleton*, 177 Ill. 357; *Miller v. Western College*, 71 Ill. App. 587, affirmed 177 Ill. 280, 69 Am. St. Rep. 242; *Harris v. Harris*, 80 Ill. App. 310, affirmed 180 Ill. 157; *Schoepfer v. Tommack*, 97 Ill. App. 562.

*Indiana.* — *Woodworth v. Veitch*, 29 Ind. App. 589.

*Iowa.* — *Riegel v. Ormsby*, 111 Iowa 10.

*Kansas.* — *Claffin Bank v. Rowlinson*, 2 Kan. App. 82; *Wright v. McKittrick*, 2 Kan. App. 508; *Bowling v. Floyd*, 5 Kan. App. 879, 48 Pac. Rep. 875.

*Kentucky.* — *Flowers v. Flowers*, (Ky. 1896) 34 S. W. Rep. 1071; *Citizens' Bank v. Millet*, 103 Ky. 1, 82 Am. St. Rep. 546; *Deering v. Veal*, 78 S. W. Rep. 886, 25 Ky. L. Rep. 1809; *Day v. Long*, 80 S. W. Rep. 774, 26 Ky. L. Rep. 123; *Akers v. Phillips*, (Ky. 1900) 58 S. W. Rep. 790; *Congleton v. Garrard*, (Ky. 1900) 58 S. W. Rep. 791.

*Maine.* — *Mathias v. Kirsch*, 87 Me. 523; *Waterville Trust Co. v. Libby*, 98 Me. 241.

*Maryland.* — *Black v. Westminster First Nat. Bank*, 96 Md. 399.

*Massachusetts.* — *Wooley v. Cobb*, 165 Mass. 593; *Nashua Sav. Bank v. Sayles*, 184 Mass.

520, 100 Am. St. Rep. 573; *Equitable Marine Ins. Co. v. Adams*, 173 Mass. 436.

*Minnesota.* — *Cooper v. Hayward*, 67 Minn. 92; *St. Cloud First Nat. Bank v. Lang*, (Minn. 1905) 102 N. W. Rep. 700.

*Mississippi.* — *Hooker v. McIntosh*, 76 Miss. 693.

*Missouri.* — *Brown v. Croy*, 74 Mo. App. 462; *Madison County Bank v. Graham*, 74 Mo. App. 251; *Adams v. Huggins*, 78 Mo. App. 219; *Provinces v. Wilder*, 87 Mo. App. 162; *School Dist. v. Sheidley*, 138 Mo. 672, 60 Am. St. Rep. 576; *St. Louis Third Nat. Bank v. Reichert*, 101 Mo. App. 242.

*Nebraska.* — *Ricketts v. Scothorn*, 57 Neb. 51, 73 Am. St. Rep. 491.

*New York.* — *Slade v. Montgomery*, 53 N. Y. App. Div. 343; *Brown v. Spohr*, 180 N. Y. 201; *Fitch v. Fraser*, 84 N. Y. App. Div. 119; *Flour City Nat. Bank v. Shire*, 88 N. Y. App. Div. 401, affirmed 179 N. Y. 587; *Matter of Flagg*, (Surrogate Ct.) 27 Misc. (N. Y.) 401; *McLeod v. Hunter*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 558, affirmed 49 N. Y. App. Div. 131; *Gansevoort Bank v. Altshul*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 6; *General Electric Co. v. Nassau Electric R. Co.*, 36 N. Y. App. Div. 510, affirmed 161 N. Y. 656. See also *Waterman v. Waterman*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 195; *Warshawsky v. Grand Theatre Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 522.

*North Carolina.* — *Johnson v. Rodeger*, 119 N. Car. 446.

*Ohio.* — *Dalrymple v. Wyker*, 60 Ohio St. 108.

*Pennsylvania.* — *Fink v. Farmers' Bank*, 178 Pa. St. 154, 56 Am. St. Rep. 746.

*South Carolina.* — *Brown v. Chandler*, 50 S. Car. 385.

*Canada.* — *MacArthur v. MacDowall*, 1 N. W. Ter. 345.

**Absence of Advantage or Detriment — Consideration Insufficient.** — *Turle v. Sargent*, 63 Minn. 211, 56 Am. St. Rep. 475.

**The Transfer of a Right of Occupancy of Real Property**, the title to which is in another, is a sufficient consideration. *Tye v. Chickasha Town Co.*, 2 Indian Ter. 113.

**Release of Judgment Against Maker.** — *Blythe v. Cordingly*, (Colo. App. 1905) 80 Pac. Rep. 495.

**The Relinquishment by a Married Woman of Dower and homestead rights in her husband's land** is a sufficient consideration for the execution to her of a note and mortgage representing a portion of the price for which such land was sold. *Gruver v. Walkup*, 55 Neb. 544.

**Release of Dower Right Sufficient Consideration.** — *Southern L. & T. Co. v. Benbow*, 135 N. Car. 303.

**A Note Given in Consideration of Marriage**, based upon an agreement entered into after the engagement, is supported by sufficient consideration. *Kramer v. Kramer*, 90 N. Y. App. Div. 176.

**Rescission of Contract Sufficient Consideration.** — *McLeod v. Hunter*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 558, affirmed 49 N. Y. App. Div. 131,

**188. Services.** — See notes 4, 5.  
**Forbearance.** — See note 6.

**Satisfaction of Judgment Sufficient Consideration.** — *Blair v. Hagemeyer*, 26 N. Y. App. Div. 219.

**Note Given to Prevent Trouble.** — A note which is given for the purpose of preventing interference by the payee with the removal of goods by the maker is not supported by sufficient consideration where it does not appear that the payee had no interest in or title to the goods involved. *Vehon v. Vehon*, 70 Ill. App. 40.

**Note Given for Advancement Void for Want of Consideration.** — *Marsh v. Chown*, 104 Iowa 556.

**Sufficiency of Consideration to Support Guaranty.** — *Osborne v. Gullikson*, 64 Minn. 218.

**Payment of Interest in Advance Sufficient Consideration for Extension of Note.** — *Armendt v. Perkins*, (Ky. 1895) 32 S. W. Rep. 270.

**188. 2.** *Carter v. Long*, 125 Ala. 280; *Cobb v. Heron*, 180 Ill. 49; *Adams v. Huggins*, 78 Mo. App. 219; *American Boiler Co. v. Foutham*, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351, *reversed* 34 N. Y. App. Div. 294.

**3. The Consideration Need Not Benefit the Promisor** — *Alabama*. — *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369.

*Illinois*. — *Harris v. Harris*, 80 Ill. App. 310, *affirmed* 180 Ill. 157.

*Kentucky*. — *Dye v. Grover*, (Ky. 1895) 32 S. W. Rep. 294; *William Glenny Glass Co. v. Taylor*, 99 Ky. 24; *Flowers v. Flowers*, (Ky. 1896) 34 S. W. Rep. 1071; *Deering v. Veal*, 78 S. W. Rep. 886, 25 Ky. L. Rep. 1809.

*Nebraska*. — *Ricketts v. Scothorn*, 57 Neb. 51, 73 Am. St. Rep. 491.

*New York*. — *Kramer v. Kramer*, 90 N. Y. App. Div. 176; *Hickok v. Bunting*, 92 N. Y. App. Div. 167.

*Ohio*. — *Dalrymple v. Wyker*, 60 Ohio St. 108.

*Pennsylvania*. — *Mahanoy First Nat. Bank v. Dick*, 22 Pa. Super. Ct. 445.

*Canada*. — *Small v. Henderson*, 27 Ont. App. 492.

**Consideration to One Joint Maker Binds the Other.** — *Bowling v. Floyd*, 5 Kan. App. 879, 48 Pac. Rep. 875.

**4.** *Wood v. Flanery*, 89 Mo. App. 632; *Lowrey v. Danforth*, 95 Mo. App. 441; *Yarwood v. Trusts, etc., Co.*, 94 N. Y. App. Div. 47; *Matter of Flagg*, (Surrogate Ct.) 27 Misc. (N. Y.) 401; *Sutch's Estate*, 201 Pa. St. 305; *Strevell v. Jones*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 627.

**Casual Friendly Services Not Sufficient Consideration.** — *Blanshan v. Russell*, 32 N. Y. App. Div. 103, *affirmed* 161 N. Y. 629.

**Services Gratuitously Rendered.** — See *Strevell v. Jones*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 627.

"While mere gratuitous services are an insufficient consideration for an executory agreement or promise, the performance of services and furnishing of board and valuable things, not as a gratuity but in expectation of being compensated therefor, is sufficient to sustain a promissory note for an amount in excess of the real value of the services performed or things furnished." *Matter of Bradbury*, 105 N. Y. App. Div. 250.

**Services of Child to Parent Are Not sufficient**

consideration, in the absence of an express promise. *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 777.

**Services of Emancipated Minor Sufficient Consideration.** — *Phelps, etc., Co. v. Hopkinson*, 61 Ill. App. 400.

**5. Future Services as a Consideration.** — *Catterlin v. Lusk*, 98 Mo. App. Div. 182; *Strevell v. Jones*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 627.

**Promise to Perform Services.** — A note given by one person to pay another a certain amount at a fixed time, for the performance of personal services in the future, is valid and binding upon the maker. The promise to pay and the promise to perform the services are sufficient consideration. A plea of total failure of consideration filed to an action upon such note is not good when the time for the performance of the services has not expired, although the note has matured. *Morrison v. Hart*, 122 Ga. 660.

**6. Extension of Time as a Consideration** — *United States*. — *Safe-Deposit, etc., Co. v. Wright*, (C. C. A.) 105 Fed. Rep. 155.

*California*. — *Whelan v. Swain*, 132 Cal. 389; *Emery v. Lowe*, 140 Cal. 379; *Lyon v. Robertson*, 127 Cal. xviii, 59 Pac. Rep. 990; *Rohrbacher v. Aitken*, 145 Cal. 485.

*District of Columbia*. — *Metzerott v. Ward*, 10 App. Cas. (D. C.) 514.

*Georgia*. — *Hollingshead v. American Nat. Bank*, 104 Ga. 250.

*Illinois*. — *McMicken v. Safford*, 197 Ill. 540; *Harris v. Harris*, 80 Ill. App. 310, *affirmed* 180 Ill. 157; *Joseph Wolf Co. v. Bank of Commerce*, 107 Ill. App. 58.

*Indiana*. — *McCormick Harvesting Mach. Co. v. Yoeman*, 26 Ind. App. 415; *Brannon v. Irons*, 19 Ind. App. 305.

*Kentucky*. — *Brandenburgh v. Three Forks Deposit Bank*, (Ky. 1898) 45 S. W. Rep. 108; *Hillenbrand v. Shippen*, (Ky. 1900) 58 S. W. Rep. 525; *Whitt v. Bailey*, (Ky. 1900) 59 S. W. Rep. 514; *Murphy v. Citizens' Sav. Bank*, 110 Ky. 930; *Deering v. Veal*, 78 S. W. Rep. 886, 25 Ky. L. Rep. 1809.

*Maine*. — See *Mathias v. Kirsch*, 87 Me. 523.

*Massachusetts*. — *Torpey v. Tebo*, 184 Mass. 307.

*Michigan*. — *Union Banking Co. v. Martin*, 113 Mich. 521.

*Minnesota*. — *Minneapolis Land Co. v. McMillan*, 79 Minn. 287; *O'Gara v. Hansing*, 88 Minn. 401.

*Missouri*. — *Cox v. Sloan*, 158 Mo. 430; *Allen v. Harris*, 79 Mo. App. 490; *Corbyn v. Brokmeyer*, 84 Mo. App. 649; *Wolz v. Parker*, 134 Mo. 458.

*Nebraska*. — *Saunders v. Bates*, 54 Neb. 209; *Murphy v. Illinois Trust, etc., Bank*, 57 Neb. 519.

*New York*. — *Porter v. Thom*, 30 N. Y. App. Div. 363; *Central Trust Co. v. West India Imp. Co.*, 48 N. Y. App. Div. 147, *reversed* 169 N. Y. 314; *J. H. Mohlman Co. v. McKane*, 60 N. Y. App. Div. 547, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188; *American Boiler Co. v. Foutham*, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351, *reversed* 34 N. Y. App. Div. 294; *Chapman*

**188.** The Surrender or Cancellation of a Note or Bill of a Third Person. — See note 7. Other Sufficient Considerations — Illustrations. — See note 9.

**189.** See notes 1, 2.

Moral Considerations. — See notes 6, 8.

*v. Ogden*, 37 N. Y. App. Div. 355, *affirmed* 165 N. Y. 642; *Utica City Nat. Bank v. Tallman*, 63 N. Y. App. Div. 480, *affirmed* 172 N. Y. 642; *Kelly v. Theiss*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 311; *McCammon v. Shantz*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 476.

*North Dakota*. — *Hastings First Nat. Bank v. Lamont*, 5 N. Dak. 393.

*Ohio*. — *Colver v. Wheeler*, 5 Ohio Cir. Dec. 278, 11 Ohio Cir. Ct. 604.

*Oregon*. — *Williams v. Culver*, 30 Oregon 375.

*Pennsylvania*. — *Fink v. Farmers' Bank*, 178 Pa. St. 154, 56 Am. St. Rep. 746.

*Tennessee*. — *Chattanooga First Nat. Bank v. Reid*, (Tenn. Ch. 1900) 58 S. W. Rep. 1124.

*Texas*. — *Aiken v. Posey*, 13 Tex. Civ. App. 607.

*Vermont*. — *Stevens v. Hill*, 74 Vt. 164.

*Washington*. — *Merchants' Bank v. Bussell*, 16 Wash. 546.

*Wyoming*. — *Bolln v. Metcalf*, 6 Wyo. 1, 71 Am. St. Rep. 898.

*Canada*. — *McGregor v. McKenzie*, 30 Nova Scotia 214.

**Extension Sufficient Consideration though Demand Note Is Given.** — *Porter v. Thom*, 30 N. Y. App. Div. 363.

**Forbearance Not Sufficient Consideration if Right of Action Has Ceased.** — *Corbyn v. Brokmeyer*, 84 Mo. App. 649.

**188. 7. Cancellation or Surrender of the Note of a Third Person** — *California*. — *Schribner v. Hanke*, 116 Cal. 613; *Whelan v. Swain*, 132 Cal. 389.

*Iowa*. — *German Sav. Bank v. Geneser*, 116 Iowa 119.

*Kansas*. — *Wright v. McKittrick*, 2 Kan. App. 508.

*Kentucky*. — *Gray Tie, etc., Co. v. Farmers' Bank*, 109 Ky. 694; *Murphey v. Citizens Sav. Bank*, 110 Ky. 225.

*Michigan*. — *Crampton v. Newton*, 132 Mich. 149.

*Missouri*. — *Siemens, etc., Electric Co. v. Ten Broek*, 97 Mo. App. 173; *Zuendt v. Doerner*, 101 Mo. App. 528.

*Nebraska*. — *McCormal v. Redden*, 46 Neb. 776.

*New Hampshire*. — *New York L. Ins. Co. v. McKellar*, 68 N. H. 326.

*New York*. — *Dykman v. Northridge*, 1 N. Y. App. Div. 26, *affirmed* 153 N. Y. 662; *Western Nat. Bank v. Flannagan*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 317; *Crompton, etc., Loom Works v. Brown*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 319, *affirmed* (Supm. Ct. App. T.) 28 Misc. (N. Y.) 513.

*Tennessee*. — *Manard v. Cawood*, 1 Tenn. Ch. App. 36.

*Texas*. — *Reuter v. Sullivan*, (Tex. Civ. App. 1898) 47 S. W. Rep. 683.

*Wisconsin*. — *Union, etc., Bank v. Jefferson*, 101 Wis. 452.

**Promise to Pay Antecedent Debt of Another Without Other Consideration a Nudum Pactum.** — *Richardson v. Fields*, 124 Ala. 535.

**9. Compromise of Suits and Claims** — *United States*. — *Tollman v. Quincy*, 129 Fed. Rep. 974.

*California*. — *Spielberger v. Thompson*, 131 Cal. 55; *Sharp v. Bowie*, 142 Cal. 462; *Rohrbacher v. Aitken*, 145 Cal. 485.

*Colorado*. — *Currier v. Clark*, 15 Colo. App. 6; *Murphy v. Gumaer*, 18 Colo. App. 183.

*Georgia*. — *Tyson v. Woodruff*, 108 Ga. 368.

*Illinois*. — *Smith v. McLennan*, 101 Ill. App. 196.

*Iowa*. — *Morey v. Laird*, 108 Iowa 670.

*Kentucky*. — *Rains v. Lee*, (Ky. 1896) 36 S. W. Rep. 176; *Power v. Hambrick*, (Ky. 1903) 74 S. W. Rep. 660.

*Michigan*. — *Barger v. Farnham*, 130 Mich. 487.

*Minnesota*. — *Northern Pac. R. Co. v. Holmes*, 88 Minn. 389.

*Nebraska*. — *Stitzer v. Whittaker*, (Neb. 1902) 91 N. W. Rep. 713.

*New York*. — *West v. Banigan*, 51 N. Y. App. Div. 328, *affirmed* 172 N. Y. 622; *Mack v. Austin*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 839; *Creveling v. Saladino*, 97 N. Y. App. Div. 202; *General Electric Co. v. Nassau Electric R. Co.*, 36 N. Y. App. Div. 510, *affirmed* 161 N. Y. 656; *Wesselman v. Stuart*, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 808.

*Pennsylvania*. — *Fink v. Farmers' Bank*, 178 Pa. St. 154, 56 Am. St. Rep. 746.

*Tennessee*. — *Taylor v. Clark*, (Tenn. Ch. 1895) 35 S. W. Rep. 442; *Roth v. Holmes*, (Tenn. Ch. 1899) 52 S. W. Rep. 699.

*Texas*. — *Reed v. Brewer*, (Tex. Civ. App. 1896) 36 S. W. Rep. 99.

*Canada*. — *Worrall v. Peters*, 35 Nova Scotia 26.

**The Dismissal of a Suit Based on an Illegal and Immoral Consideration** is not sufficient consideration. *Reed v. Brewer*, (Tex. Civ. App. 1896) 36 S. W. Rep. 99.

**Notes Given to a Third Party** for the compromise of a suit are not based upon sufficient consideration where it is not within the power of such party to effect the compromise. *Currier v. Clark*, 15 Colo. App. 6.

**Satisfaction of Judgment Sufficient Consideration.** — *Snyder v. Knight*, 23 Pa. Super. Ct. 309.

**189. 1. Cross Bills or Notes.** — *Newmarket Sav. Bank v. Hanson*, 67 N. H. 501; *State Bank v. Smith*, 155 N. Y. 185; *Mutual Loan Assoc. v. Brandt*, (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 400; *Shannon v. Horley*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 623, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188; *State Bank v. Hayes*, 16 S. Dak. 365; *Milius v. Kauffmann*, 104 N. Y. App. Div. 442.

**2.** See also *Badger v. Stephens*, 61 Mo. App. 387.

**Written Contract to Convey Land Sufficient Consideration.** — *Cunningham v. Holmes*, 66 Neb. 723.

**Agreement for Reconveyance Sufficient Consideration.** — *Hart v. Strong*, 183 Ill. 349.

**6.** *Thompson v. Hudgins*, 116 Ala. 93; *Hickok v. Bunting*, 67 N. Y. App. Div. 560. See also *Deyo v. Thompson*, 53 N. Y. App. Div. 9.

**189.** Good Considerations. — See note 10.

*d.* INADEQUACY OF CONSIDERATION. — See notes 11, 12.

*e.* ILLEGAL, IMMORAL, AND FRAUDULENT CONSIDERATIONS —

(1) *Illegality Avoiding Instruments Between Immediate Parties* — (a) *In General.* — See note 13.

**190.** (b) *Statutory Illegalities — Gaming.* — See note 1.

*Futures or Options.* — See note 2.

*Wagers.* — See notes 3, 4.

*Money Lent for Gaming.* — See notes 5, 6.

*Usury.* — See note 8.

**191.** *Illegal Liquor Dealing.* — See note 2.

**Moral Obligation to Pay Pre-existing Legal Obligation Sufficient Consideration.** — *Cadiz Fourth Nat. Bank v. Craig*, (Neb. 1901) 96 N. W. Rep. 185.

**Moral Consideration Alone Insufficient.** — *Hart v. Strong*, 183 Ill. 349.

**Sufficiency of Moral Obligation under S. Dak. Comp. Laws, § 3531.** — *Rankin v. Matthiesen*, 10 S. Dak. 628.

**189.** 8. See also *Bédard v. Chaput*, 15 Quebec Super. Ct. 572.

**10. Natural Love and Affection.** — *Kline's Estate*, 9 Pa. Dist. 386; *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 777, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 189.

**Existence of Marriage Engagement Not Sufficient Consideration.** — *Blanshan v. Russell*, 32 N. Y. App. Div. 103, affirmed 161 N. Y. 629.

**11. Inadequacy Does Not Invalidate the Consideration.** — *Yarwood v. Trusts, etc., Co.*, 94 N. Y. App. Div. 47; *Matter of Flagg*, (Surrogate Ct.) 27 Misc. (N. Y.) 401; *Helvie v. McKain*, 32 Ind. App. 507.

**Knowledge of Inadequacy as Waiver.** — One who gives a note with full knowledge of facts which would relieve him from liability for a portion of the debt represented in such note, cannot, in defense of an action thereon, subsequently set up those facts. *Atlantic Consol. Bottling Co. v. Hutchinson*, 109 Ga. 550.

**12. Inadequacy of Consideration Admissible to Show Fraud.** — *Shirk v. Neible*, 156 Ind. 66, 83 Am. St. Rep. 150; *Furber v. Fogler*, 97 Me. 585; *Macpherson v. McLean*, 34 N. Bruns. 361.

**13. Effect of Illegal Considerations** — *United States*. — *Atlas Nat. Bank v. Holm*, (C. C. A.) 71 Fed. Rep. 489.

*Alabama*. — *Wadsworth v. Dunnam*, 117 Ala. 661; *Meyer-Marx Co. v. Ensley*, (Ala. 1904) 37 So. Rep. 639.

*Georgia*. — *Benson v. Dublin Warehouse Co.*, 99 Ga. 303.

*Maryland*. — *Spies v. Rosenstock*, 87 Md. 14.

*Michigan*. — *Heffron v. Daly*, 133 Mich. 613.

*North Dakota*. — *Mooney v. Williams*, 9 N. Dak. 329.

*Texas*. — *Reed v. Brewer*, (Tex. Civ. App. 1896) 36 S. W. Rep. 99; *Columbia Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120.

*Canada*. — *Club Canadien v. Jacotel*, 16 Quebec Super. Ct. 312.

**Illegality of Consideration an Affirmative Defense.** — *Stanton v. Strong*, 94 Ill. App. 486.

**Note for Costs Exacted by County Officers, without authority of law, as condition of prisoner's release, is for an illegal consideration and**

**void.** *Horner v. Simpson*, 10 Kan. App. 582, 63 Pac. Rep. 604.

**Validity Not Affected by Illegal Assignment of Collateral.** — *Bowery Bank v. Gerety*, 153 N. Y. 411.

**190.** 1. *Notes Executed for a Gaming Consideration Are Invalid.* — *Wirt v. Stubblefield*, 17 App. Cas. (D. C.) 283; *Birdsall v. Wheeler*, 62 N. Y. App. Div. 625, affirmed 173 N. Y. 590; *Ash v. Clark*, 32 Wash. 390.

**Note Given in Repayment of Money Contributed to Illegal Organization Valid.** — *Roth v. Holmes*, (Tenn. Ch. 1899) 52 S. W. Rep. 699.

**2. Futures as a Consideration.** — *Metropolitan Nat. Bank v. Jansen*, (C. C. A.) 108 Fed. Rep. 572; *Benson v. Dublin Warehouse Co.*, 99 Ga. 303; *Winward v. Lincoln*, 23 R. I. 476; *Askegaard v. Dalen*, (Minn. 1904) 101 N. W. Rep. 503. *Compare Northern Nat. Bank v. Arnold*, 187 Pa. St. 356.

**3. Wagers at Common Law Not Illegal.** — *Drinkall v. Movius State Bank*, 11 N. Dak. 10, 95 Am. St. Rep. 693.

**4. Wagers — Statutory Illegality.** — *Specht v. Beindorf*, 56 Neb. 553; *Mobley v. Porter*, (Tex. Civ. App. 1899) 54 S. W. Rep. 655.

**5. Notes for Money Lent for Gambling.** — *Spies v. Rosenstock*, 87 Md. 14; *Drinkall v. Movius State Bank*, 11 N. Dak. 10, 95 Am. St. Rep. 693. See also *Club Canadien v. Jacotel*, 16 Quebec Super. Ct. 312.

**6.** See also *Long v. Jones*, 69 Ill. App. 615.

**8. Usury as an Illegal Consideration.** — *Smith v. Mohr*, 64 Mo. App. 39; *Jennings v. Kosmak*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 300. See also *Hamilton v. Fowler*, (C. C. A.) 99 Fed. Rep. 18; *Hudson v. Equitable Mortg. Co.*, 100 Ga. 83.

**Usury Preceding the Inception of the Note** does not affect it. *Thames L. & T. Co. v. Hagemeyer*, 17 N. Y. App. Div. 533.

**Unauthorized Act of Payee's Agent in Exact-ing Usurious Consideration Invalidated Note.** — *Stephens v. Olson*, 62 Minn. 295.

**191.** 2. *Illegal Sales of Liquor.* — *Oakes v. Merrifield*, 93 Me. 297. See also *Wadsworth v. Dunnam*, 117 Ala. 661; *Wing v. Ford*, 89 Me. 140. *Compare McWhorter v. Bluthenthal*, 136 Ala. 568.

**Under the Maine Statute** it is incumbent upon the defendant to prove that the note was given for liquor sold in violation of the statute or for liquor purchased outside of the state with the intention to sell it, or some part of it, in violation of the statute. *Wing v. Martel*, 95 Me. 535.

**Note for Liquor Enforceable by Bona Fide**

**191.** (o) Considerations Against Public Policy. — See notes 3, 4, 6.

**192.** See note 1.

(2) *Illegality Rendering Instrument Absolutely Void.* — See note 2.

**Holder in Due Course.** — *Sheary v. O'Brien*, 75 N. Y. App. Div. 121.

**191. 3. Compounding Felonies.** — U. S. Fidelity, etc., *Co. v. Charles*, 131 Ala. 658; *Jones v. Dannenberg Co.*, 112 Ga. 426; *Rosenbaum v. Levitt*, 109 Iowa 292 (under Iowa Code, § 4889); *Malone v. Fidelity, etc., Co.*, 71 Mo. App. 1; *Mexico First Nat. Bank v. Gregg*, 74 Mo. App. 639; *Davis v. Smith*, 68 N. H. 253; *Peckham v. Van Bergen*, 10 N. Dak. 43. See also *Shaulis v. Buxton*, 109 Iowa 355; *Leggatt v. Brown*, 30 Ont. 225, *affirming* 29 Ont. 530.

**Release from Imprisonment as Consideration.** — Release from imprisonment in default of payment of a fine is a good consideration for a note to secure payment of the fine and costs. *Proctor v. Parker*, 12 Manitoba 528.

**Compounding Misdemeanors.** — *Jones v. Dannenberg Co.*, 112 Ga. 426.

**Threats of Prosecution.** — *Beath v. Chapoton*, 115 Mich. 506, 69 Am. St. Rep. 589.

**Note Given by Father for Support of Bastard.** — Where a woman has sued out a warrant against a man, charging him with being the father of her bastard child, they may settle the case by his paying her money or giving his promissory note. If such note be given, there is sufficient consideration, both moral and legal, to authorize a recovery thereon. *Jones v. Peterson*, 117 Ga. 58.

**Note Given for Consideration Against Public Policy Void.** — *Hubbard v. Freiburger*, 133 Mich. 139.

**Same — Wager on Election.** — *Specht v. Beindorf*, 56 Neb. 553.

**Same — Note Given to Secure Election of Corporate Officer.** — *Dickson v. Kittson*, 75 Minn. 168, 74 Am. St. Rep. 447.

**A Note Given to a Broker Trading Without a License** in violation of a valid ordinance is unenforceable. *Douthart v. Congdon*, 197 Ill. 356.

**Note Given Merchant Who Has Not Paid Privilege Tax.** — A note given in payment of an account contracted with a merchant during a year when he has not paid the taxes required by statute cannot be enforced. *Puckett v. Fore*, 77 Miss. 391.

**A Note Given an Unlicensed Physician** for medical services is not void in the hands of a *bona fide* purchaser, although the practicing of medicine without a license is prohibited by statute. *Citizens' State Bank v. Nore*, (Neb. 1903) 93 N. W. Rep. 160.

**Note Not Illegal Because Given for Goods Sold by Peddler Trading Without License.** — *Banks McCosker*, 82 Md. 518, 51 Am. St. Rep. 478.

**4. Repayment of Money Embezzled or Stolen.** — See *Turle v. Sargent*, 63 Minn. 211, 56 Am. St. Rep. 475. *Compare* *Largent v. Beard*, (Tex. Civ. App. 1899) 53 S. W. Rep. 90.

**A Note Given for the Restitution of Embezzled Funds**, and not for the suppression of a prosecution for embezzlement, is valid. *Powell v. Flanary*, 109 Ky. 342.

**6. Withdrawal of Opposition to Insolvent's Discharge.** — *Fisher v. Genser*, 15 Quebec Super. Ct. 605.

**Note Given in Consideration of Creditor's Agreement to Composition Void.** — *Budden v. Rochon*, 13 Quebec Super. Ct. 322.

It is otherwise where the note is in the hands of a *bona fide* holder without notice. *Bellemare v. Gray*, 16 Quebec Super. Ct. 581.

**192. 1. For Similar Devices which have been held to render the note void as against public policy**, see *Hubbard v. Freiburger*, 133 Mich. 139. See also *Loudenback v. Lowry*, 2 Ohio Cir. Dec. 422.

**2. Notes Void by Statute — United States.** — *Lauter v. Jarvis-Conklin Mortg. Trust Co.*, (C. C. A.) 85 Fed. Rep. 894; *Hamilton v. Fowler*, (C. C. A.) 99 Fed. Rep. 23, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 192.

*Alabama.* — *Kuhl v. M. Gally Universal Press Co.*, 123 Ala. 452, 82 Am. St. Rep. 135. See also *Orr v. Sparkman*, 120 Ala. 9.

*Colorado.* — *McMann v. Walker*, 31 Colo. 261; *Western Nat. Bank v. State Bank*, 18 Colo. App. 128. See also *Cooper v. Hunter*, 8 Colo. App. 101.

*District of Columbia.* — *Wirt v. Stubblefield*, 17 App. Cas. (D. C.) 283.

*Georgia.* — *Jenkins v. Jones*, 108 Ga. 556; *Smith v. Wood*, 111 Ga. 221.

*Illinois.* — *Long v. Jones*, 69 Ill. App. 615; *Hopmeyer v. Frederick*, 74 Ill. App. 301.

*Indiana.* — *Kniss v. Holbrook*, 16 Ind. App. 229. See also *Pinney v. Concordia First Nat. Bank*, 68 Kan. 223.

*Iowa.* — See also *Rosenbaum v. Levitt*, 109 Iowa 292.

*Kentucky.* — *Bohon v. Brown*, 101 Ky. 354, 72 Am. St. Rep. 420.

*Michigan.* — *Union Trust Co. v. Preston Nat. Bank*, (Mich. 1904) 99 N. W. Rep. 399, 11 Detroit Leg. N. 61.

*Mississippi.* — *Montjoy v. Delta Bank*, 76 Miss. 402.

*Missouri.* — *Swing v. Clarksville Cider, etc., Co.*, 77 Mo. App. 391; *Morris v. White*, 83 Mo. App. 194.

*Nebraska.* — *Larson v. Pender First Nat. Bank*, 62 Neb. 303.

*New York.* — See *McWhirter v. Longstreet*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 831.

*Pennsylvania.* — *Northern Nat. Bank v. Arnold*, 187 Pa. St. 356.

*Tennessee.* — *Bradshaw v. Van Valkenburg*, 97 Tenn. 316.

*Texas.* — *Marshall Nat. Bank v. O'Neal*, 11 Tex. Civ. App. 640; *Roach v. Davis*, (Tex. Civ. App. 1900) 54 S. W. Rep. 1070.

*Wyoming.* — *Swinney v. Edwards*, 8 Wyo. 54, 80 Am. St. Rep. 916.

**Assignee of Illegal Note Cannot Recover Original Consideration.** — *Webb v. Tarver*, 2 Tenn. Ch. App. 366.

In *Nebraska* a statute will not be construed so as to make a negotiable instrument void in the hands of a *bona fide* purchaser, unless the act so specifically declares. *Citizens' State Bank v. Nore*, (Neb. 1903) 93 N. W. Rep. 160.

**Usury — Gaming.** — *Angier v. Smith*, 101 Ga. 844; *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629;

**192.** (3) *Partial Illegality*. — See note 3.

**193.** (4) *Immoral Considerations*. — See note 1.

(5) *Fraudulent Considerations*. — See note 3.

*Fraud upon Creditors*. — See note 4.

*f. WANT OR FAILURE OF CONSIDERATION* — (1) *Total Want* —

(a) *Generally*. — See note 5.

Maine Mile-Track Assoc. v. Hammond, 127 Mich. 690; Specht v. Beindorf, 56 Neb. 553; Faison v. Grandy, 128 N. Car. 438, 83 Am. St. Rep. 693; Smith v. Mason, (Tex. Civ. App. 1897) 39 S. W. Rep. 188; Morris v. White, 83 Mo. App. 194.

**The Negotiable Instruments Law** does not render invalid a note given in payment of money due in a gaming transaction where the note is held by a *bona fide* purchaser. Wirt v. Stubblefield, 17 App. Cas. (D. C.) 283.

**Subsequent Promise of Payment**. — A note payable to the winner in a gaming transaction is void, and no suit can be maintained thereon, even by an innocent holder for value, unless the maker has induced the purchase thereof by promising payment. In such case the maker is estopped, as against such innocent holder, from setting up the gaming consideration for such note. Hurlburt v. Straub, 54 W. Va. 303.

**A Verbal Promise to Pay a Note Void for Illegality** is without consideration and not enforceable. Swinney v. Edwards, 8 Wyo. 54, 80 Am. St. Rep. 916.

**Usurious Note Void as to Interest**. — Miles v. Kelley, 16 Tex. Civ. App. 147.

**Violation of Liquor Laws**. — Notes given for intoxicating liquors are enforceable in the hands of *bona fide* purchasers, under Me. Rev. Stat., c. 27, § 56. Oakes v. Merrifield, 93 Me. 297; Wing v. Ford, 89 Me. 140.

**Note for Race Horse**. — Biegler v. Merchants' L. & T. Co., 164 Ill. 197.

**The Nebraska Statute** providing that contracts made by foreign corporations which have failed to comply with the statutory prerequisites for doing business in the state shall be void as to such corporations and their "assigns," does not render void, in the hands of a holder in due course, a note given to a foreign corporation which has failed to comply with the statute, and by it transferred to such holder. National Bank of Commerce v. Pick, (N. Dak. 1904) 99 N. W. Rep. 63.

**Notes of Foreign Corporation Which Has Not Complied with Local Statutes Void**. — Massillon First Nat. Bank v. Coughron, (Tenn. Ch. 1899) 52 S. W. Rep. 1112.

**Failure of Foreign Corporation to Comply with Statutory Provisions** does not invalidate note in hands of *bona fide* purchaser. McMann v. Walker, 31 Colo. 261.

**192. 3. Effect of Partial Illegality**. — Wadsworth v. Dunnam, 117 Ala. 661; Douthart v. Congdon, 197 Ill. 356, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 192; Chaulis v. Buxton, 109 Iowa 355; Mobley v. Porter, (Tex. Civ. App. 1899) 54 S. W. Rep. 655; Padget v. O'Connor, (Neb. 1904) 98 N. W. Rep. 870.

**193. 1. Future Illicit Cohabitation**. — Roberts v. Million, (Ky. 1895) 32 S. W. Rep. 220.

**Note Given for Immoral Consideration Not Enforceable by Bona Fide Holder**. — Jenkins v. Jones, 108 Ga. 556.

**3. Fraud Invalidates a Bill or Note**. — McCighe v. McKee, 70 Ark. 293; Clay County Bank v. Keith, 85 Mo. App. 409. See also Chamberlin v. Keeler, 15 Pa. Super. Ct. 236.

**Estoppel to Plead Fraud as Defense**. — New England F. Ins. Co. v. Haynes, 71 Vt. 307.

**4. Maker Estopped to Plead that Note Was Given to Defraud His Creditors**. — Collins v. Collins, 22 Pa. Co. Ct. 596.

**Note Given by Insolvent to Preferred Creditor Void under Canada Statute**. — Clay v. Gill, 12 Manitoba 465.

**The Note Will Be Enforced Between the Parties** where the enforcement will not have the effect of upholding the fraudulent agreement. Harcrow v. Gardiner, 69 Ark. 6.

**5. Entire Want of Consideration** — *Alabama*. — McCollum v. Edmonds, 109 Ala. 322; Oldacre v. Stuart, 122 Ala. 405.

*Arkansas*. — Hencke v. Standiford, 66 Ark. 535.

*Colorado*. — Currier v. Clark, 15 Colo. App. 6.

*Georgia*. — Carithers v. Levy, 111 Ga. 740; Wells v. Gress, 118 Ga. 566.

*Illinois*. — Meguiar v. Rainey, 70 Ill. App. 447; Taft v. Myerscough, 92 Ill. App. 560, reversed 197 Ill. 600; Morgan v. Bean, 100 Ill. App. 114.

*Iowa*. — Storm Lake First Nat. Bank v. Felt, 100 Iowa 680; Plano Mfg. Co. v. Farrell, 110 Iowa 577.

*Kansas*. — Hale v. Aldaffer, 5 Kan. App. 40.

*Kentucky*. — Flowers v. Flowers, (Ky. 1896) 34 S. W. Rep. 1071.

*Maine*. — Furber v. Fogler, 97 Me. 585.

*Michigan*. — Brown v. Smedley, (Mich. 1904) 98 N. W. Rep. 856, 857, 10 Detroit Leg. N. 960.

*Minnesota*. — Turle v. Sargent, 63 Minn. 211, 56 Am. St. Rep. 475; Wildermann v. Donnelly, 86 Minn. 184.

*Mississippi*. — Robertshaw v. Britton, (Miss. 1898) 24 So. Rep. 307.

*Missouri*. — Chicago Title, etc., Co. v. Brady, 165 Mo. 197; Bales v. Heer, 91 Mo. App. 426.

*Nebraska*. — Fellers v. Penrod, 57 Neb. 463.

*New Jersey*. — Mueller v. Buch, (N. J. 1904) 58 Atl. Rep. 1092.

*New York*. — Block v. Stevens, 72 N. Y. App. Div. 246; Manhattan Brass Co. v. Gilman, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 690; American Boiler Co. v. Foutham, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351, reversed 34 N. Y. App. Div. 294; Chapman v. Ogden, 37 N. Y. App. Div. 355, affirmed 165 N. Y. 642.

*North Dakota*. — Andrews v. Schmidt, 10 N. Dak. 1.

*Ohio*. — Clark v. Clark, 8 Ohio Cir. Dec. 752, 16 Ohio Cir. Ct. 103.

*Oklahoma*. — Hagan v. Bigler, 5 Okla. 575; Frick v. Reynolds, 6 Okla. 638.

*Texas*. — Mayes v. McElroy, (Tex. Civ. App. 1904) 81 S. W. Rep. 344.

*Washington*. — Huntington v. Lombard, 22 Wash. 202.

- 194.** (b) Gifts of Bills and Notes — Note or Bill of the Donor. — See notes 1, 2.  
Note or Bill of the Donee or of a Third Person. — See note 3.  
Delivery. — See note 5.

- 195.** See note 1.  
(2) *Partial Want*. — See note 2.  
Invalidity of One of Several Considerations. — See note 3.  
(3) *Total Failure*. — See note 4.

**Worthlessness of Consideration.** — Clayton v. Cavender, 1 Marv. (Del.) 191; Leonard v. Draper, 187 Mass. 536.

**A Note Given in Payment of an Open Account** is not invalidated on the ground of failure of consideration by reason of the account being barred by the statute of limitations at the time suit is brought on the note. Carter v. Bolin, 11 Tex. Civ. App. 283.

**Waiver of Failure of Consideration.** — Edison Gen. Electric Co. v. Blount, 96 Ga. 272; Hogan v. Brown, 112 Ga. 662.

**Renewal Note.** — Where the connection between the first note, for which valid consideration was received, and the notes given in renewal thereof is clearly established, want of consideration is not a valid defense to an action by the payee against the maker on a renewal note in which the latter acknowledges to have received value. Ross v. Western L. & T. Co., 11 Quebec K. B. 292.

**Patent Right Notes.** — The proof that the maker of a note given in consideration of the patent right received nothing from the patent is not sufficient to render the note invalid on the ground of failure of consideration. Paddock v. Coates, (County Ct.) 19 Misc. (N. Y.) 305.

**194. 1. Donor's Own Note or Bill Not a Valid Gift** — *Alabama*. — Thompson v. Hudgins, 116 Ala. 93.

*Illinois*. — Beatty v. Western College, 177 Ill. 280, 69 Am. St. Rep. 242.

*Louisiana*. — See Rabasse's Succession, 49 La. Ann. 1405.

*Maryland*. — Selby v. Case, 87 Md. 459.  
*Massachusetts*. — Mason v. Gardner, 186 Mass. 515.

*Michigan*. — Graham v. Alexander, 123 Mich. 168.

*Missouri*. — School Dist. v. Sheidley, 138 Mo. 672, 60 Am. St. Rep. 576.

*Nebraska*. — Ricketts v. Scothorn, 57 Neb. 51, 73 Am. St. Rep. 491.

*New York*. — Deyo v. Thompson, 53 N. Y. App. Div. 9; Mandan First Nat. Bank v. Gilmor, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 614; Matter of Flagg, (Surrogate Ct.) 27 Misc. (N. Y.) 401; Strevel v. Jones, (Supm. Ct. App. Div.) 94 N. Y. Supp. 627.

*Pennsylvania*. — Kline's Estate, 9 Pa. Dist. 386.

*Tennessee*. — Shugart v. Shugart, 111 Tenn. 179, 102 Am. St. Rep. 777.

*Texas*. — Hatchett v. Hatchett, 28 Tex. Civ. App. 33.

*Vermont*. — Montpelier Seminary v. Smith, 69 Vt. 382.

**Gift of Nonnegotiable Note Invalid.** — Ricketts v. Scothorn, 57 Neb. 51, 73 Am. St. Rep. 491.

**2. Donor's Own Note a Mere Promise.** — Thompson v. Hudgins, 116 Ala. 93; Beatty v. Western College, 177 Ill. 290, 69 Am. St. Rep. 242;

Safford v. Graves, 56 Ill. App. 499; School Dist. v. Sheidley, 138 Mo. 672, 60 Am. St. Rep. 576; Matter of Flagg, (Surrogate Ct.) 27 Misc. (N. Y.) 401; Shugart v. Shugart, 111 Tenn. 179, 102 Am. St. Rep. 777; Hatchett v. Hatchett, 28 Tex. Civ. App. 33; Ricketts v. Scothorn, 57 Neb. 51, 73 Am. St. Rep. 491.

**Estoppel to Plead Want of Consideration.** — Beatty v. Western College, 177 Ill. 280, 69 Am. St. Rep. 242.

**3. Note or Bill of Any Other Person May Be a Valid Gift.** — Edwards v. Wagner, 121 Cal. 376; Shugart v. Shugart, 111 Tenn. 179, 102 Am. St. Rep. 777.

**5. Delivery Is Necessary.** — Edwards v. Wagner, 121 Cal. 376.

**195. 1. Delivery May Be Made to a Third Person.** — School Dist. v. Sheidley, 138 Mo. 672, 60 Am. St. Rep. 576.

**2. Taft v. Myerscough**, 92 Ill. App. 560, reversed 197 Ill. 600; Plano Mfg. Co. v. Farrell, 110 Iowa 577; Furber v. Fogler, 97 Me. 585; Brown v. Roberts, 90 Minn. 316, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 195; Holmes v. Farris, 97 Mo. App. 305.

**Note Not Void Where Consideration Partially Fictitious, in Absence of Fraud.** — Phelps, etc., Co. v. Hopkinson, 61 Ill. App. 400.

**Want of Consideration as to Unpaid Balance.** — Where a note is given for a certain sum, a part of which is for a good consideration and the balance is without consideration, and afterwards the amount that is for a legal consideration is paid and indorsed on the note, the note then being without consideration as to the unpaid balance, no recovery can be had upon it. Littlefield v. Perkins, (Me. 1905) 60 Atl. Rep. 707.

**3. Amount of Recovery When One or More of Several Considerations Is Valid.** — Jones v. Harrell, 110 Ga. 373.

**4. Total Failure of Consideration as a Defense** — *United States*. — Hatzel v. Moore, 125 Fed. Rep. 828.

*Arkansas*. — Gale v. Harp, 64 Ark. 462.

*California*. — See also Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co., 120 Cal. 521, 65 Am. St. Rep. 186.

*Illinois*. — Taft v. Myerscough, 92 Ill. App. 560, reversed 197 Ill. 600.

*Indiana*. — Kenney v. Wells, 23 Ind. App. 490.

*Iowa*. — Plano Mfg. Co. v. Farrell, 110 Iowa 577.

*Kansas*. — Hale v. Aldaffer, 5 Kan. App. 40.

*Maine*. — Furber v. Fogler, 97 Me. 585; Hathorn v. Wheelwright, 97 Me. 351.

*Michigan*. — Perkins v. Brown, 115 Mich. 41; McBryan v. Universal Elevator Co., 130 Mich. 111, 97 Am. St. Rep. 453.

*Minnesota*. — Conroy v. Logue, 87 Minn. 289.

*New York*. — Ewing v. Wightman, 52 N. Y. App. Div. 416, affirmed 167 N. Y. 107; Richard-

**195.** (4) *Partial Failure.* — See note 5.

**196.** See note 1.

(5) *When Want or Failure May Be Shown* — (a) *Immediate Parties.* — See note 2.

*Original Parties.* — See note 3.

son, etc., *Co. v. Gudewill*, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 818.

*North Carolina.* — *Jones v. Rhea*, 122 N. Car. 721.

*Pennsylvania.* — *Wertz v. Klinger*, 25 Pa. Super. Ct. 523.

*Texas.* — *Brown v. Viscaya*, (Tex. Civ. App. 1897) 42 S. W. Rep. 309; *Saldumbere v. Hadlock*, 19 Tex. Civ. App. 653.

**The Nonperformance of an Agreement** forming the consideration of a note is not a failure of consideration unless the agreement be rescinded. *Monahan v. Lovece*, 70 Ill. App. 69.

**Where the Maker Is Indemnified against Loss** the failure of the consideration is not a defense. *Myers v. Hettinger*, (C. C. A.) 94 Fed. Rep. 370.

**A Failure Formally to Discontinue a Suit** is not a defense to an action on a note the consideration for which is the discontinuance of the suit, where the suit has been abandoned. *West v. Banigan*, 51 N. Y. App. Div. 328, affirmed 172 N. Y. 622.

**195. 5. Partial Failure Is a Defense Pro Tanto** — *United States.* — *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

*California.* — *Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co.*, 120 Cal. 521, 65 Am. St. Rep. 186.

*Colorado.* — See also *Brevoort v. Hughes*, 10 Colo. App. 379.

*Georgia.* — *Otis v. Holmes*, 109 Ga. 775.

*Illinois.* — *Taft v. Myerscough*, 92 Ill. App. 560, reversed 197 Ill. 600.

*Indiana.* — *Mader v. Cool*, 14 Ind. App. 299, 56 Am. St. Rep. 304.

*Iowa.* — *Plano Mfg. Co. v. Farrell*, 110 Iowa 577.

*Maine.* — *Hathorn v. Wheelwright*, 99 Me. 351, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 195.

*Minnesota.* — *Nichols, etc., Co. v. Soderquist*, 77 Minn. 509; *Brown v. Roberts*, 90 Minn. 314, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 195.

*Missouri.* — *Robinson v. Powers*, 63 Mo. App. 290.

*North Carolina.* — See *Jones v. Rhea*, 122 N. Car. 721.

*Oklahoma.* — *Hagan v. Bigler*, 5 Okla. 575.

*Texas.* — See *Henry v. Sansom*, (Tex. Civ. App. 1896) 36 S. W. Rep. 122.

*Washington.* — *Bay View Brewing Co. v. Tecklenberg*, 19 Wash. 471, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 195.

**Recovery Pro Tanto by Holder with Notice, under Delaware Sess. Laws, 1897, c. 598, p. 706.** — *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511.

**Waiver of Failure — Notice of Defects.** — *Means v. Subers*, 115 Ga. 371.

**Partial Failure of Consideration a Defense Pro Tanto in Action Against One of the Makers of Joint and Several Note.** — *Nichols, etc., Co. v. Soderquist*, 77 Minn. 509.

**Early Doctrine.** — *Danforth v. Crookshanks*, 68 Mo. App. 311.

**Illinois Statute.** — *Rev. Stat., c. 98, § 13.* — *Day v. Milligan*, 72 Ill. App. 324; *Redden v. Slimpert*, 70 Ill. App. 460.

**Missouri Statute.** — Proof of want or failure in part admissible. *Danforth v. Crookshanks*, 68 Mo. App. 311.

**Amount of Failure Must Be Definite.** — *Goldie, etc., Co. v. Harper*, 31 Ont. 284.

**Incumbrance on Realty Paid by the Vendee.** — See also *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

**196. 1. Partial Failure Unliquidated.** — *American Nat. Bank v. Watkins*, (C. C. A.) 119 Fed. Rep. 545; *Hathorn v. Wheelwright*, 99 Me. 351, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 195.

**2. Between Immediate Parties** — *Alabama.* — *Parker v. Bond*, 121 Ala. 529.

*Georgia.* — *Carithers v. Levy*, 111 Ga. 740; *Wells v. Gress*, 118 Ga. 566; *Butler v. McCall*, 119 Ga. 503.

*Iowa.* — *Storm Lake First Nat. Bank v. Felt*, 100 Iowa 680; *Plano Mfg. Co. v. Farrell*, 110 Iowa 577; *Farmers Sav. Bank v. Hansmann*, 114 Iowa 49.

*Maryland.* — *Spies v. Rosenstock*, 87 Md. 14.

*Massachusetts.* — *White v. Dodge*, 187 Mass. 449.

*Michigan.* — *Kelley v. Guy*, 116 Mich. 43; *Brown v. Smedley*, (Mich. 1904) 98 N. W. Rep. 856, 857, 10 Detroit Leg. N. 960.

*Minnesota.* — *Brown v. Roberts*, 90 Minn. 314; *Wildermann v. Donnelly*, 86 Minn. 184.

*Mississippi.* — *Robertshaw v. Britton*, (Miss. 1898) 24 So. Rep. 307.

*Missouri.* — *Chicago Title, etc., Co. v. Brady*, 165 Mo. 197; *Holmes v. Farris*, 97 Mo. App. 305; *Catterlin v. Lusk*, 98 Mo. App. 182.

*Nebraska.* — *Fellers v. Penrod*, 57 Neb. 463.

*New Jersey.* — *Mueller v. Buch*, (N. J. 1904) 58 Atl. Rep. 1092.

*New York.* — *American Boiler Co. v. Foutham*, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351, reversed 34 N. Y. App. Div. 294; *Chapman v. Ogden*, 37 N. Y. App. Div. 355, affirmed 165 N. Y. 642; *Batterman v. Butchner*, 95 N. Y. App. Div. 213.

*North Dakota.* — *Andrews v. Schmidt*, 10 N. Dak. 1.

*Pennsylvania.* — *Hubbard v. French*, 1 Pa. Super. Ct. 218; *Danner v. Hess*, 19 Pa. Super. Ct. 182; *Moore v. Phillips*, 13 Montg. Co. Rep. (Pa.) 173.

*Texas.* — *Mayer v. McElroy*, (Tex. Civ. App. 1904) 81 S. W. Rep. 344.

*Wisconsin.* — *Remington v. Detroit Dental Mfg. Co.*, 101 Wis. 307; *Cawker v. Seamans*, 92 Wis. 328.

**Maker and Receiver of Payee are Immediate Parties.** — *Chicago Title, etc., Co. v. Brady*, 165 Mo. 197.

**3. Original Parties** — *Alabama.* — *Parker v. Bond*, 121 Ala. 529.



**197.** Indorsee and Indorser. — See note 1.

**198.** (b) Remote Parties. — See notes 1, 2.

Consideration Given by Intermediate Party. — See notes 3, 4.

*Georgia.* — Carithers *v.* Levy, 111 Ga. 740.

*Iowa.* — Storm Lake First Nat. Bank *v.* Felt, 100 Iowa 680; Farmers Sav. Bank *v.* Hansmann, 114 Iowa 49.

*Minnesota.* — Conroy *v.* Logue, 87 Minn. 289; Wildermann *v.* Donnelly, 86 Minn. 184.

*Missouri.* — Holmes *v.* Farris, 97 Mo. App. 305.

*New Jersey.* — Mueller *v.* Buch, (N. J. 1904) 58 Atl. Rep. 1092.

*New York.* — American Boiler Co. *v.* Foutham, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351, reversed 34 N. Y. App. Div. 294; Batterman *v.* Butchner, 95 N. Y. App. Div. 213.

*North Dakota.* — Andrews *v.* Schmidt, 10 N. Dak. 1.

*Pennsylvania.* — Danner *v.* Hess, 19 Pa. Super. Ct. 182.

*Texas.* — Mayes *v.* McElroy, (Tex. Civ. App. 1904) 81 S. W. Rep. 344.

*Wisconsin.* — Cawker *v.* Seamans, 92 Wis. 328.

**Between Payee and Maker.** — Lewis *v.* Clay, 67 L. J. Q. B. 224, 77 L. T. N. S. 653, 46 W. R. 319; Parker *v.* Bond, 121 Ala. 529; Wells *v.* Gress, 118 Ga. 566; White *v.* Dodge, 187 Mass. 449; Brown *v.* Smedley, (Mich. 1904) 98 N. W. Rep. 856, 857, 10 Detroit Leg. N. 960; Robertshaw *v.* Britton, (Miss. 1898) 24 So. Rep. 307; Mueller *v.* Buch, (N. J. 1904) 58 Atl. Rep. 1092; Batterman *v.* Butchner, 95 N. Y. App. Div. 213; Russell *v.* Rood, 72 Vt. 238.

**Between Payee's Personal Representative and Maker.** — Aldrich *v.* Whitaker, 70 N. H. 627.

**Note Made Payable to Third Person.** — The rule applies where the note has been made payable to a third person at the request of the one from whom the consideration passed. Bradshaw *v.* Miners' Bank, (C. C. A.) 81 Fed. Rep. 902.

**197. 1. Between Indorsee and Immediate Indorser.** — Peabody *v.* Munson, 211 Ill. 327, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 196, 197; Sloan *v.* Gibbes, 56 S. Car. 480, 76 Am. St. Rep. 559.

**198. 1. The Consideration May Not Be Inquired into Between Remote Parties.** — *Alabama.* — Bunzel *v.* Maas, 116 Ala. 68; Breitling *v.* Marx, 123 Ala. 222; Bomar *v.* Rosser, 123 Ala. 641; King *v.* Peoples Bank, 127 Ala. 266.

*Arkansas.* — Reynolds *v.* Roth, 61 Ark. 317.

*California.* — McDonald *v.* Randall, 139 Cal. 246; Muller *v.* Swanton, 140 Cal. 249.

*Colorado.* — Statton *v.* Stone, 15 Colo. App. 237; Beach *v.* Bennett, 16 Colo. App. 459; Parsons *v.* Parsons, 17 Colo. App. 154.

*Georgia.* — Post *v.* Abbeville, etc., R. Co., 99 Ga. 232; Montgomery *v.* Hunt, 99 Ga. 499; Burch *v.* Pope, 114 Ga. 334; Parr *v.* Erickson, 115 Ga. 873; Johnson County Sav. Bank *v.* Wootten, 118 Ga. 927; Keith *v.* Fork, 105 Ga. 511; Graham *v.* Campbell, 105 Ga. 839; Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12.

*Illinois.* — Mahon *v.* Gaither, 59 Ill. App. 583; Redden *v.* Slimpert, 70 Ill. App. 460; Rockford Nat. Bank *v.* Young Men's Christian Assoc. Gymnasium Co., 78 Ill. App. 180, af-

firmed 179 Ill. 599, 70 Am. St. Rep. 135; Gilmore *v.* German Sav. Bank, 89 Ill. App. 442.

*Indiana.* — People's State Bank *v.* Ruxer, 31 Ind. App. 245; Midland Steel Co. *v.* Citizens' Nat. Bank, (Ind. App. 1904) 72 N. E. Rep. 290.

*Iowa.* — Graff *v.* Adams, 100 Iowa 481; Plano Mfg. Co. *v.* Farrell, 110 Iowa 577.

*Kansas.* — Overhoff *v.* Trusdell, 5 Kan. App. 881, 49 Pac. Rep. 331.

*Kentucky.* — Beattyville Bank *v.* Roberts, 78 S. W. Rep. 901, 25 Ky. L. Rep. 1796.

*Massachusetts.* — Produce Exch. Trust Co. *v.* Bieberbach, 176 Mass. 577; White *v.* Dodge, 187 Mass. 449.

*Minnesota.* — Wildermann *v.* Donnelly, 86 Minn. 184.

*Missouri.* — Adams County Bank *v.* Hainline, 67 Mo. App. 483; Clark *v.* Porter, 90 Mo. App. 143.

*Nebraska.* — Fellers *v.* Penrod, 57 Neb. 463; Chapman *v.* Snyder, (Neb. 1901) 95 N. W. Rep. 346.

*New York.* — Douai *v.* Lutjens, 21 N. Y. App. Div. 254; Bernstein *v.* Crow, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 99; American Boiler Co. *v.* Foutham, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351, reversed 34 N. Y. App. Div. 294; Chapman *v.* Ogden, 37 N. Y. App. Div. 355, affirmed 165 N. Y. 642.

*North Dakota.* — Mooney *v.* Williams, 9 N. Dak. 329.

*Ohio.* — Wisenogle *v.* Powers, 4 Ohio Dec. (Reprint) 232, 1 Cleve. L. Rep. 141.

*Oregon.* — U. S. National Bank *v.* Floss, 38 Oregon 68, 84 Am. St. Rep. 752; Brown *v.* Feldwert, (Oregon 1905) 80 Pac. Rep. 414.

*Tennessee.* — Merchants', etc., Bank *v.* Penland, 101 Tenn. 445, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 198; Trigg *v.* Saxton, (Tenn. Ch. 1896) 37 S. W. Rep. 567.

*Texas.* — Brainerd *v.* Bute, (Tex. Civ. App. 1898) 44 S. W. Rep. 575; Raatz *v.* Gordon, (Tex. Civ. App. 1899) 51 S. W. Rep. 651.

*Vermont.* — Craigue *v.* Hall, 73 Vt. 104.

**Injunction Will Not Lie to Prevent Enforcement of Liability** on note held by *bona fide* purchaser, on the ground of failure of consideration. Porter *v.* English, 17 N. Y. App. Div. 432.

**Under Mississippi Code, 1892, § 3503,** a want or failure of consideration is available against a *bona fide* holder. Robertshaw *v.* Britton, 74 Miss. 873.

**Where the Maker Has Been Indemnified** the failure of the consideration is no defense to an action by a *bona fide* holder. Hettinger *v.* Meyers, 81 Fed. Rep. 805, affirmed 94 Fed. Rep. 370, 37 C. C. A. 369.

**Failure of Consideration a Defense to Non-negotiable Note.** — Woodward *v.* Smith, 104 Wis. 365.

**2. Greer *v.* Bently,** (Ky. 1897) 43 S. W. Rep. 219; Merchants', etc., Bank *v.* Penland, 101 Tenn. 445, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 198; Russell *v.* Rood, 72 Vt. 238.

**3. Gilmore *v.* German Sav. Bank,** 89 Ill. App. 442; Lockner *v.* Holland, (County Ct.) 81 N. Y. Supp. 730.

**198. But if Value Has Never Been Given. — See note 5.****A Remote Party Who Has Notice. — See note 6.****199. Knowledge of Contingent Character of Consideration. — See note 1.****Payee and Acceptor. — See note 2.****g. PAROL EVIDENCE AS TO CONSIDERATION. — See note 5.**

**A Transfer of the Note by the Payee** in payment of a debt by which he is not legally bound does not relieve the maker. *Gould v. Leavitt*, 92 Me. 416.

**198. 4.** *Gilmore v. German Sav. Bank*, 89 Ill. App. 442; *Gould v. Leavitt*, 92 Me. 416; *Black v. Westminster First Nat. Bank*, 96 Md. 399 (under *Neg. Inst. Law*); *Tradesmen's Nat. Bank v. Curtis*, 167 N. Y. 194.

**5.** *Howe v. Raymond*, 74 Conn. 68; *Towle v. Greenberg*, 6 N. Dak. 37. *Compare Russell v. Rood*, 72 Vt. 238.

**Where the Holder Admits Want or Failure of Consideration**, he cannot recover. *Breitling v. Marx*, 123 Ala. 222.

**6.** *Alabama*. — See *Bomar v. Rosser*, 123 Ala. 641.

*Connecticut*. — *Howe v. Raymond*, 74 Conn. 68.

*Georgia*. — *Montgomery v. Hunt*, 99 Ga. 499; *Steed v. Groves*, 103 Ga. 550; *Hudson v. Best*, 104 Ga. 131.

*Illinois*. — *Taft v. Myerscough*, 197 Ill. 600. *Indiana*. — *Midland Steel Co. v. Citizens' Nat. Bank*, (Ind. App. 1904) 72 N. E. Rep. 290.

*Kansas*. — *Hale v. Aldaffer*, 5 Kan. App. 40; *Roberts v. Tomlinson*, 9 Kan. App. 85.

*Minnesota*. — *Wildermann v. Donnelly*, 86 Minn. 184.

*New York*. — *Scott v. Scott*, 2 N. Y. App. Div. 240.

*Ohio*. — *Suhr v. Hoover*, 8 Ohio Cir. Dec. 738, 15 Ohio Cir. Ct. 690; *Wisenogle v. Powers*, 4 Ohio Dec. (Reprint) 232, 1 Cleve. L. Rep. 141.

*Texas*. — *National Exch. Bank v. Jackson*, (Tex. Civ. App. 1895) 33 S. W. Rep. 277; *Webb v. Moseley*, 30 Tex. Civ. App. 311; *Van Winkle Gin, etc., Co. v. Citizens' Bank*, 89 Tex. 147; *Mayes v. McElroy*, (Tex. Civ. App. 1904) 81 S. W. Rep. 344. See also *Morris v. Brown*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1015.

**199. 1.** *Hudson v. Best*, 104 Ga. 131; *Tradesmen's Nat. Bank v. Curtis*, 167 N. Y. 194; *Fox v. Citizens' Bank, etc., Co.*, (Tenn. Ch. 1896) 37 S. W. Rep. 1102. See also *American Boiler Co. v. Foutham*, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351, *reversed* 34 N. Y. App. Div. 294.

**Note Given for Future Services.** — Where the consideration of a negotiable promissory note was certain services to be performed by the payee to the maker, failure of performance of the services was no defense to an action on the note brought by a purchaser thereof for value and before its maturity, though he knew of the consideration, but not of its failure, when he purchased. *Wienksky v. Morrison*, 122 Ga. 664.

**2. Payee and Acceptor Are Remote Parties.** — *Lamson v. Beard*, (C. C. A.) 94 Fed. Rep. 30; *American Nat. Bank v. Western Hay, etc., Co.*, 69 Ill. App. 268; *American Boiler Co. v. Foutham*, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351, *reversed* 34 N. Y. App. Div. 294; *Morrison v. Farmers', etc., Bank*, 9 Okla. 697; *S. Blaidsell, Jr., Co. v. Citizens' Nat. Bank*, 96 Tex. 626.

**5. Evidence as to the Consideration** — *United States*. — *Hoopes v. Northern Nat. Bank*, (C. C. A.) 102 Fed. Rep. 448; *Metropolitan Nat. Bank v. Jansen*, (C. C. A.) 108 Fed. Rep. 572; *American Nat. Bank v. Watkins*, (C. C. A.) 119 Fed. Rep. 545.

*Alabama*. — *Garner v. Hall*, 114 Ala. 166; *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369; *Ragsdale v. Gresham*, (Ala. 1904) 37 So. Rep. 367.

*Arkansas*. — *Boone v. Goodlett*, 71 Ark. 577.

*California*. — *Hardison v. Davis*, 131 Cal. 635.

*Georgia*. — *Pinson v. Bass*, 114 Ga. 575; *Butler v. McCall*, 119 Ga. 503; *Reviere v. Evans*, 103 Ga. 169; *Dooley v. Gorman*, 104 Ga. 767. See also *Dwelle v. Blackwood*, 106 Ga. 486; *Heard v. De Loach*, 105 Ga. 500.

*Illinois*. — *Beatty v. Western College*, 177 Ill. 280, 69 Am. St. Rep. 242; *Peabody v. Munson*, 211 Ill. 324; *Overstreet v. Dunlap*, 56 Ill. App. 486; *Neville v. Jennings*, 75 Ill. App. 503, *reversed* 180 Ill. 270.

*Indiana*. — *Baltes Land, etc., Co. v. Sutton*, 32 Ind. App. 14; *Foster v. Honan*, 22 Ind. App. 252; *Bucklen v. Johnson*, 19 Ind. App. 406; *Pritchett v. Sheridan*, 29 Ind. App. 81.

*Iowa*. — *Marsh v. Chown*, 104 Iowa 556; *Farmers Sav. Bank v. Hansmann*, 114 Iowa 49; *Pembroke v. Hayes*, 114 Iowa 576.

*Kentucky*. — *McGlasson v. McGlasson*, (Ky. 1900) 56 S. W. Rep. 510; *Carman v. Carrico*, (Ky. 1904) 80 S. W. Rep. 216; *Burns v. Sparks*, 82 S. W. Rep. 425, 26 Ky. L. Rep. 688.

*Maine*. — *Gould v. Leavitt*, 92 Me. 416.

*Michigan*. — *Kelley v. Guy*, 116 Mich. 43; *Brown v. Smedley*, (Mich. 1904) 98 N. W. Rep. 856, 857, 10 Detroit Leg. N. 960.

*Missouri*. — *Holmes v. Farris*, 97 Mo. App. 305; *Poindexter v. McDowell*, (Mo. 1905) 84 S. W. Rep. 1133.

*New Hampshire*. — *Aldrich v. Whitaker*, 70 N. H. 627.

*New York*. — *Megowan v. Peterson*, 173 N. Y. 1; *Mutual Loan Assoc. v. Brandt*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 270; *Andrews v. Hess*, 20 N. Y. App. Div. 194; *Utica City Nat. Bank v. Tallman*, 63 N. Y. App. Div. 480. *affirmed* 172 N. Y. 642; *Dunk v. Dunk*, 95 N. Y. App. Div. 617. See also *Harding v. Jenkins*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 827, 829.

*North Carolina*. — *Jones v. Rhea*, 122 N. Car. 721. See also *Bresee v. Crumpton*, 121 N. Car. 122.

*Oregon*. — *Williams v. Culver*, 30 Oregon 375; *Burkhart v. Hart*, 36 Oregon 586.

*Pennsylvania*. — *Sutch's Estate*, 201 Pa. St. 305; *Danner v. Hess*, 19 Pa. Super. Ct. 182.

*Texas*. — *Seay v. Fennell*, 15 Tex. Civ. App. 261; *McCormick v. Kampmann*, (Tex. Civ. App. 1896) 36 S. W. Rep. 130; *Norris v. Graham*, (Tex. Civ. App. 1897) 42 S. W. Rep. 575; *Turner v. Grobe*, (Tex. Civ. App. 1898) 44 S. W. Rep. 898; *Street v. Robertson*, 28 Tex.

**200.** See note 1.

*h.* BURDEN OF PROOF AS TO CONSIDERATION — Want of Consideration. — See note 2.

Failure of Consideration. — See note 3.

**4. Execution of the Instrument** — *a.* IN GENERAL. — See note 4.

*b.* SIGNING — Signature Must Be Affixed with Intention to Effectuate Contract. — See notes 5, 7.

Civ. App. 222; *Morris v. Brown*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1015.

*Vermont.* — *Ellis v. Watkins*, 73 Vt. 371; *Limerick Nat. Bank v. Adams*, 70 Vt. 132.

*Wisconsin.* — *Remington v. Detroit Dental Mfg. Co.*, 101 Wis. 307.

*Canada.* — *MacArthur v. MacDowall*, 1 N. W. Ter. 345; *In re Boutin*, 12 Quebec Super. Ct. 186.

**Parol Evidence to Show Failure Inadmissible in Action by Innocent Holder for Value.** — *Mahon v. Gaither*, 59 Ill. App. 583.

**Parol Evidence as to Nature of Consideration Admissible.** — *University Bank v. Tuck*, 96 Ga. 456.

**200. 1. A Difference of Consideration May Be Shown.** — *Burns v. Sparks*, 82 S. W. Rep. 425, 26 Ky. L. Rep. 688; *Vliet v. Eastburn*, 63 N. J. L. 450; *Red River Valley Nat. Bank v. Monson*, 11 N. Dak. 423; *Haines v. Cadwell*, 40 Oregon 229; *Street v. Robertson*, 28 Tex. Civ. App. 222; *MacArthur v. MacDowall*, 1 N. W. Ter. 345. See also *McCormick v. Kampmann*, (Tex. Civ. App. 1896) 36 S. W. Rep. 130.

**2. Plaintiff Must Prove Consideration if Put in Issue** — *Alabama.* — *Brown v. Johnston*, 135 Ala. 608; *Ragsdale v. Gresham*, (Ala. 1904) 37 So. Rep. 367.

*California.* — *Frace v. Brown*, 117 Cal. 324; *Gasquet v. Pechin*, 143 Cal. 515.

*Colorado.* — *Murphy v. Gumaer*, 12 Colo. App. 472.

*District of Columbia.* — *Towles v. Tanner*, 21 App. Cas. (D. C.) 530.

*Georgia.* — *Gallagher v. Kiley*, 115 Ga. 420.

*Illinois.* — *Bemis v. Horner*, 165 Ill. 347; *Chicago Title, etc., Co. v. Ward*, 113 Ill. App. 327.

*Iowa.* — *Luke v. Koenen*, 120 Iowa 103.

*Kansas.* — See *Bradbury v. Van Pelt*, 4 Kan. App. 571.

*Kentucky.* — *Kiesewetter v. Kress*, (Ky. 1902) 70 S. W. Rep. 1065; *Cox v. Cox*, 79 S. W. Rep. 220, 25 Ky. L. Rep. 1934; *Carman v. Carrico*, (Ky. 1904) 80 S. W. Rep. 216.

*Massachusetts.* — *Huntington v. Shute*, 180 Mass. 371, 91 Am. St. Rep. 309.

*Michigan.* — *Taylor v. Taylor*, (Mich. 1904) 101 N. W. Rep. 832, 11 Detroit Leg. N. 711.

*Missouri.* — *Cox v. Sloan*, 158 Mo. 430; *Wood v. Flanery*, 89 Mo. App. 632; *Holmes v. Farris*, 97 Mo. App. 305; *School Dist. v. Sheidley*, 138 Mo. 672, 60 Am. St. Rep. 576.

*New York.* — *Durland v. Durland*, 153 N. Y. 67; *Douai v. Lutjens*, 21 N. Y. App. Div. 254; *Moak v. Stevens*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 147; *Bringman v. Von Glahn*, 71 N. Y. App. Div. 537; *Scott v. Scott*, 2 N. Y. App. Div. 240; *McGrath v. Pitkin*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 862; *Harris v. Buchanan*, 100 N. Y. App. Div. 403. See also

*Staiger v. Theiss*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 170.

*North Dakota.* — *Peckham v. Van Bergen*, 10 N. Dak. 43; *Mooney v. Williams*, 9 N. Dak. 329.

*Ohio.* — *Dalrymple v. Wyker*, 60 Ohio St. 108.

*Oregon.* — *Kenny v. Walker*, 29 Oregon 41; *Owens v. Snell*, 29 Oregon 483.

*Pennsylvania.* — *Knee v. McDowell*, 25 Pa. Super. Ct. 641.

*Texas.* — *Masterson v. Heitmann*, (Tex. Civ. App. 1905) 87 S. W. Rep. 227.

*Vermont.* — *Limerick Nat. Bank v. Adams*, 70 Vt. 132.

**Sufficiency of Evidence to Show Consideration.** — *Redding v. Redding*, 69 Vt. 500.

**The Fact that the Note Contains the Words "Value Received" Is Not Sufficient** to relieve the plaintiff from proving consideration where evidence has been introduced showing a want of consideration. *Huntington v. Shute*, 180 Mass. 371, 91 Am. St. Rep. 309.

**Presumption Rebutted by Proof of Insufficiency of Consideration.** — *Blanshan v. Russell*, 32 N. Y. App. Div. 103, affirmed 161 N. Y. 629.

**Where a Particular Consideration Is Pleaded, the Burden Is on Plaintiff.** — *Paducah First Nat. Bank v. Wisdon*, 111 Ky. 135.

**3. Failure of Consideration Must Be Shown by the Defendant** — *Alabama.* — *Brown v. Bamberger*, 110 Ala. 342; *Brown v. Johnston*, 135 Ala. 608.

*Colorado.* — See *Cooper v. Hunter*, 8 Colo. App. 101.

*Georgia.* — *Gould v. Small*, 121 Ga. 747.

*Illinois.* — *Ewen v. Wilbor*, 208 Ill. 492;

*Evans v. Murphy Varnish Co.*, 59 Ill. App. 87; *Heimann v. Hainz*, 65 Ill. App. 316.

*Indiana.* — *Kern v. Saul*, 14 Ind. App. 72.

*Kansas.* — *Topeka Bank v. Nelson*, 58 Kan. 815, 49 Pac. Rep. 155; *Bradbury v. Van Pelt*, 4 Kan. App. 571.

*Nebraska.* — *Crosby v. Ritchey*, 47 Neb. 924.

*New York.* — *Pratt, etc., Co. v. American Pneumatic Tool Co.*, 50 N. Y. App. Div. 369, affirmed 166 N. Y. 588; *McGrath v. Pitkin*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 862.

*Texas.* — See *Branch v. McReynolds*, (Tex. Civ. App. 1896) 38 S. W. Rep. 625.

**4. Execution Includes Signing and Delivery.** — *Crumrine v. Crumrine*, 14 Ind. App. 641; *Bowen v. Woodfield*, 33 Ind. App. 687; *Lomax v. Haskell First Nat. Bank*, (Tex. Civ. App. 1897) 39 S. W. Rep. 655.

**Signing at Date of Instrument Presumed.** — *Wells v. Hobson*, 91 Mo. App. 379.

**Delivery as Adoption of Signature.** — *Harris v. Tinder*, 109 Mo. App. 563.

**5. Ratification of Unauthorized Signature.** — *Brown v. Bamberger*, 110 Ala. 342.

**7. Lewis v. Clay**, 67 L. J. Q. B. 224, 77 L. T. N. S. 653, 46 W. R. 319; *Banque Jacques-Cartier v. Lalande*, 20 Quebec Super. Ct. 43.

**200.** Signature Affixed in Ignorance of Character of Paper. — See note 8.

**201.** Negligence in Signing. — See note 1.

*c.* DELIVERY — (1) *Essential to Validity of Bill or Note.* — See notes 2, 3, 4.

**202.** (2) *What Is a Sufficient Delivery.* — See notes 1, 2.

**200.** 8. Instrument Signed in Ignorance of Its Character. — *Lewis v. Clay*, 67 L. J. Q. B. 224, 77 L. T. N. S. 653, 46 W. R. 319; *Hansford v. Freeman*, 99 Ga. 376; *Davis Sewing Mach. Co. v. Crutchfield*, 117 Ga. 873; *Beard v. Hill*, 131 Mich. 246; *Broyles v. Absher*, 107 Mo. App. 168; *Banque Jacques-Cartier v. Lalande*, 20 Quebec Super. Ct. 43.

The Negligence of the Maker in Failing to Read the Instrument renders him liable, in the absence of fraud. *Placer County Bank v. Freeman*, 126 Cal. 90.

**Maker Liable in the Absence of Fraud.** — *Graham v. Mercantile Town Mut. Ins. Co.*, (Mo. App. 1904) 84 S. W. Rep. 93; *Poindexter v. McDowell*, (Mo. 1905) 84 S. W. Rep. 1133.

**201.** 1. Must Be Absence of Negligence. — *Schneider v. Lebanon Dairy, etc., Co.*, 73 Ill. App. 612; *Yeomans v. Lane*, 101 Ill. App. 228; *Salley v. Terrill*, 95 Me. 553, 85 Am. St. Rep. 433; *Lewiston Sav. Bank v. Lawson*, 87 Mo. App. 42; *Catterlin v. Lusk*, 98 Mo. App. 182.

2. *California.* — *Gasquet v. Pechin*, 143 Cal. 515.

*Georgia.* — *Reese v. Fidelity Mut. L. Assoc.*, 111 Ga. 482, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201.

*Hawaii.* — *Kellett v. Damon*, 13 Hawaii 425, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201.

*Illinois.* — *Schneider v. Lebanon Dairy, etc., Co.*, 73 Ill. App. 612; *Merritt v. Boyden*, 93 Ill. App. 613, affirmed 191 Ill. 136, 85 Am. St. Rep. 246.

*Maine.* — *Salley v. Terrill*, 95 Me. 553, 85 Am. St. Rep. 433.

*Missouri.* — *Fogg v. School Dist.*, 75 Mo. App. 159.

*New York.* — *Button v. Belding*, 22 N. Y. App. Div. 618; *Odell v. Clyde*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 734, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201, affirmed 38 N. Y. App. Div. 333.

*Pennsylvania.* — *Kline's Estate*, 9 Pa. Dist. 386.

*Texas.* — *Montgomery v. Montgomery*, (Tex. Civ. App. 1899) 54 S. W. Rep. 414, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201.

*West Virginia.* — *Cann v. Cann*, 45 W. Va. 563.

**Delivery Presumed under Negotiable Instruments Law.** — *Moak v. Stevens*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 147.

**Valid Delivery Presumed Where Note Is Held by Holder in Due Course.** — *Greaser v. Sugarman*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 799 (under Negotiable Instruments Law).

3. **Revocable until Delivery.** — *Reese v. Fidelity Mut. L. Assoc.*, 111 Ga. 482, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201; *Kellett v. Damon*, 13 Hawaii 425, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201; *Odell v. Clyde*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 734, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201, affirmed 38 N. Y. App. Div. 333;

*Massachusetts Nat. Bank v. Snow*, 187 Mass. 159.

4. **Promissory Note — Delivery by Maker Essential — Georgia.** — *Hansford v. Freeman*, 99 Ga. 376; *Reese v. Fidelity Mut. L. Assoc.*, 111 Ga. 482, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201.

*Illinois.* — *Merritt v. Boyden*, 93 Ill. App. 613, affirmed 191 Ill. 136, 85 Am. St. Rep. 246.

*Maine.* — *Salley v. Terrill*, 95 Me. 553, 85 Am. St. Rep. 433.

*Nebraska.* — *Harnett v. Holdrege*, (Neb. 1903) 97 N. W. Rep. 443.

*New York.* — *Button v. Belding*, 22 N. Y. App. Div. 618; *Odell v. Clyde*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 734, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201, affirmed 38 N. Y. App. Div. 333.

*North Dakota.* — *Nichols, etc., Co. v. Hillsboro First Nat. Bank*, 6 N. Dak. 404.

*Pennsylvania.* — *Kline's Estate*, 9 Pa. Dist. 386.

*South Dakota.* — *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. Dak. 363, 58 Am. St. Rep. 839.

*Texas.* — *Blackman v. Houssels*, (Tex. Civ. App. 1896) 35 S. W. Rep. 511; *Montgomery v. Montgomery*, (Tex. Civ. App. 1899) 54 S. W. Rep. 414, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201.

**Production by Payee Prima Facie Evidence of Delivery.** — *Pastene v. Pardini*, 135 Cal. 431.

**Possession by Payee Prima Facie Evidence of Delivery.** — *Schallehn v. Hibbard*, 64 Kan. 601.

**Note Payable to Named Person or Bearer Negotiated to Person Other than Payee — Surety Released from Liability.** — *Battle v. Cushman*, (Tex. Civ. App. 1896) 33 S. W. Rep. 1037.

**Delivery by One of Several Joint Makers Sufficient.** — *Barton v. Hughes*, 117 Ga. 867.

**Delivery Through Negligence of the Maker** is sufficient to convey title to a bona fide purchaser, though it was made fraudulently and without authority. *Fogg v. School Dist.*, 75 Mo. App. 159.

**202.** 1. **Meaning of Delivery — Colorado.** — See also *National Bank of Commerce v. Graham*, 10 Colo. App. 373.

*Georgia.* — *Hansford v. Freeman*, 99 Ga. 376.

*Illinois.* — *Gross v. Arnold*, 177 Ill. 575.

*Indiana.* — *Wickhizer v. Bolin*, 22 Ind. App. 1; *Indiana Trust Co. v. Byram*, (Ind. App. 1904) 72 N. E. Rep. 670.

*Iowa.* — *In re Reeve*, 111 Iowa 260; *Moehn v. Moehn*, 105 Iowa 710.

*Minnesota.* — *Streissguth v. Kroll*, 86 Minn. 327, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202; *Enneking v. Woebkenberg*, 88 Minn. 259.

*Missouri.* — *Roe v. Annan*, 80 Mo. App. 198; *Hurt v. Ford*, (Mo. 1896) 36 S. W. Rep. 671.

*West Virginia.* — *Galloway v. Standard F. Ins. Co.* 45 W. Va. 240, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202; *Rowan v. Chenoweth*, 49 W. Va. 295.

**203.** See notes 1, 2.

Illustrations. — See notes 4, 5, 7.

(3) *Delivery as Controlling Inception and Validity of Instrument.* —

See notes 8, 9.

**204.** Parol Evidence. — See note 2.

Lex Loci Contractus. — See note 4.

Presumption as to Place of Delivery. — See note 5.

(4) *Conditional Delivery* — May Be in Escrow or to Promisee in Person. —

See notes 6, 7.

*Intent to Transfer Title Essential.* — Gross v. Arnold, 177 Ill. 575; Wickhizer v. Bolin, 22 Ind. App. 1.*Intent to Deliver Not Equivalent to Delivery.* — Montgomery v. Montgomery, (Tex. Civ. App. 1899) 54 S. W. Rep. 414.*Where the Notes Remain in the Maker's Control* there is no delivery, even though they are placed in the hands of the payee's agent. Nichols, etc., Co. v. Hillsboro First Nat. Bank, 6 N. Dak. 404.*Delivery to Payee's Agent Sufficient.* — Schultz v. Kosbab, (Wis. 1905) 103 N. W. Rep. 237.*Delivery Made by Mail Sufficient.* — Tharp v. Thero, 112 Iowa 573; Garrigue v. Keller, (Ind. 1905) 74 N. E. Rep. 523.**202. 2. Acceptance.** — Whyte v. Rosencrantz, 123 Cal. 634, 69 Am. St. Rep. 90; Streissguth v. Kroll, 86 Minn. 327, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202. See also National Bank of Commerce v. Graham, 10 Colo. App. 373.**203. 1. Manual Transfer Not Essential.** — Hansford v. Freeman, 99 Ga. 376; Reese v. Fidelity Mut. L. Assoc., 111 Ga. 482; Hensley v. Tuttle, 17 Ind. App. 253; Indiana Trust Co. v. Byram, (Ind. App. 1904) 72 N. E. Rep. 670; School Dist. v. Sheidley, 138 Mo. 672, 60 Am. St. Rep. 576; Odell v. Clyde, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 734, affirmed 38 N. Y. App. Div. 333; Callahan v. Crow, 157 N. Y. 695; Rowan v. Chenoweth, 49 W. Va. 295, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202.*Delivery to Payee's Agent Sufficient.* — Shaw v. Camp, 160 Ill. 425, affirmed 61 Ill. App. 62; Callahan v. Crow, 91 Hun (N. Y.) 346, affirmed 157 N. Y. 695.**2. Constructive Delivery — Intention to Make Instrument Enforceable Necessary.** — Reese v. Fidelity Mut. L. Assoc., 111 Ga. 482; Indiana Trust Co. v. Byram, (Ind. App. 1904) 72 N. E. Rep. 670; In re Reeve, 111 Iowa 260; Enneking v. Woebkenberg, 88 Minn. 259; School Dist. v. Sheidley, 138 Mo. 672, 60 Am. St. Rep. 576; Rowan v. Chenoweth, 49 W. Va. 295, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202.**4.** Wood v. Flanery, 89 Mo. App. 632.**5.** See also Hensley v. Tuttle, 17 Ind. App. 253.**7.** In re Reeve, 111 Iowa 260.**8. Takes Effect from Delivery.** — Johnson v. Franklin Bank, 173 Mo. 181, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 203.**9.** Swedish-American Nat. Bank v. Germania Bank, 76 Minn. 411, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 203, note 9.*Bills and Notes Executed and Delivered on Sunday.* — According to some authorities there can be no recovery on a bill or note executed

on Sunday. Cook v. Forker, 193 Pa. St. 461, 74 Am. St. Rep. 699; Waverly First Nat. Bank v. Furman, 4 Pa. Super. Ct. 415.

This is true, even though they are antedated. Brown v. Gates, 120 Wis. 351, rehearing denied 120 Wis. 353.

It has, however, been held that a mere delivery on Sunday will not invalidate the note. Steere v. Trebilcock, 108 Mich. 464.

*Note Signed on Sunday Valid, if Delivered on Secular Day.* — Barger v. Farnham, 130 Mich. 487.*Where the Note Is Dated on a Secular Day* the maker is estopped, as against a bona fide holder without notice, to plead that the note was signed and delivered on Sunday. Waverly First Nat. Bank v. Furman, 4 Pa. Super. Ct. 415. *ratification of Note Delivered on Sunday.* — Cook v. Forker, 193 Pa. St. 461, 74 Am. St. Rep. 699.**204. 2. Actual Time of Delivery May Be Shown.** — Elyton Co. v. Hood, 121 Ala. 373.**4. United States.** — Phipps v. Harding, (C. C. A.) 70 Fed. Rep. 468.

Arkansas. — Kelley v. Telle, 66 Ark. 464.

Illinois. — Smith v. Myers, 207 Ill. 131.

Massachusetts. — Cherry v. Sprague, 187 Mass. 113.

Michigan. — Strawberry Point Bank v. Lee, 117 Mich. 122.

Nebraska. — Benton v. German-American Nat. Bank, 45 Neb. 850.

New Hampshire. — New York L. Ins. Co. v. McKellar, 68 N. H. 326.

New York. — Ueland v. Hibbard, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 749.

Rhode Island. — Winward v. Lincoln, 23 R. I. 476.

Tennessee. — Carnegie Steel Co. v. Chattanooga Constr. Co., (Tenn. Ch. 1896) 38 S. W. Rep. 102.

Texas. — See Holt v. McCann, (Tex. Civ. App. 1897) 42 S. W. Rep. 310.

**5.** Strawberry Point Bank v. Lee, 117 Mich. 122. See also Roads v. Webb, 91 Me. 406, 64 Am. St. Rep. 246.**6. Delivery upon Condition Is Effectual — Connecticut.** — Trumbull v. O'Hara, 71 Conn. 172.

Georgia. — Hansford v. Freeman, 99 Ga. 376. Massachusetts. — Daggett v. Simonds, 173 Mass. 348, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204.

Missouri. — Wood v. Flanery, 89 Mo. App. 632.

Nebraska. — Cunningham v. Holmes, 66 Neb. 723; Gandy v. Bissell, (Neb. 1904) 100 N. W. Rep. 803.

New York. — Utica City Nat. Bank v. Tall-

**205.** See note 1.

Invalid Inter Partes until Condition Performed. — See note 3.

**206.** Delivery Through Agent of Transferrer. — See note 1.

Instrument Signed by Surety and Given to Principal to Be Delivered Conditionally.

— See note 2.

**207.** (5) *Delivery of Inchoate Bill or Note.* — See note 1.

As Between Parties, the Authority Must Be Followed. — See note 2.

Estoppel to Allege Want of Authority as Against Bona Fide Holders. — See note 4.

**III. ACCEPTANCE OF A BILL OF EXCHANGE** — 1. Definition. — See note 5.

man, 63 N. Y. App. Div. 480, *affirmed* 172 N. Y. 642.

*Canada.* — MacArthur v. MacDowall, 1 N. W. Ter. 345; Commercial Bank v. Morrison, 32 Can. Sup. Ct. 98.

**Delivery to an Agent of the Payee Having No Authority to Accept the Note Conditionally** is delivery to the payee, where the maker has knowledge that the agent cannot accept conditional delivery. Hardin v. Sweeney, 14 Wash. 129.

**204. 7. Formal Delivery in Escrow.** — Daggett v. Simonds, 173 Mass. 348, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204; Wood v. Flanery, 89 Mo. App. 632.

**A Note Delivered in Escrow Is Delivered Before Maturity**, where it is placed in escrow before maturity, even though it is not placed in the hands of the promisee until after maturity. Cunningham v. Holmes, 66 Neb. 723.

**205. 1. Conditional Delivery to Promisee.** — Hurt v. Ford, (Mo. 1896) 36 S. W. Rep. 671; Williams v. Syracuse First Nat. Bank, 45 N. Y. App. Div. 239, *affirmed* 167 N. Y. 594.

**3. Until Condition Happens Invalid Between Parties** — Connecticut. — Trumbull v. O'Hara, 71 Conn. 172.

*Georgia.* — Hansford v. Freeman, 99 Ga. 376.

*Illinois.* — Schneider v. Lebanon Dairy, etc., Co., 73 Ill. App. 612.

*Kansas.* — Highland University Co. v. Long, 7 Kan. App. 173.

*Missouri.* — Hurt v. Ford, (Mo. 1896) 36 S. W. Rep. 671.

*Nebraska.* — Gandy v. Bissell, (Neb. 1904) 100 N. W. Rep. 803; Brumback v. German Nat. Bank, 46 Neb. 540.

*New York.* — Utica City Nat. Bank v. Tallman, 63 N. Y. App. Div. 480, *affirmed* 172 N. Y. 642; Frankenstein v. Levini, (Supm. Ct. App. T.) 65 N. Y. Supp. 562.

*North Dakota.* — Porter v. Andrus, 10 N. Dak. 558.

*South Dakota.* — McCormick Harvesting Mach. Co. v. Faulkner, 7 S. Dak. 363, 58 Am. St. Rep. 839.

*Canada.* — MacArthur v. MacDowall, 1 N. W. Ter. 345; Commercial Bank v. Morrison, 32 Can. Sup. Ct. 98.

**Waiver of Condition.** — Bucklen v. Johnson, 19 Ind. App. 406.

**Condition May Be Subsequently Waived.** — Witmer Bros. Co. v. Weid, 108 Cal. 569.

**Notes Delivered to Payee to Obtain Sureties' Signatures.** — Hurt v. Ford, (Mo. 1896) 36 S. W. Rep. 671.

**Burden of Proving Performance.** — Beeler v. Highland University Co., 8 Kan. App. 89.

**The Death of the Maker** before the performance of the condition does not affect the validity of the note. Gandy v. Bissell, (Neb. 1904) 100 N. W. Rep. 803.

**206. 1. Deering v. Veal**, 78 S. W. Rep. 886, 25 Ky. L. Rep. 1809. See also Hurt v. Ford, (Mo. 1896) 36 S. W. Rep. 671.

**Delivery to Joint Agent of Payee and Maker.** — Hansford v. Freeman, 99 Ga. 376.

**2. Notes Given by Surety to Maker to Obtain Additional Security.** — Meyer v. Foster, (Cal. 1905) 81 Pac. Rep. 402, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 206; Deering v. Veal, 78 S. W. Rep. 886, 25 Ky. L. Rep. 1809; German-American Nat. Bank v. People's Gas, etc., Co., 63 Minn. 12; Brumback v. German Nat. Bank, 46 Neb. 540; Porter v. Andrus, 10 N. Dak. 558. See also Commercial Bank v. Smith, 37 Can. L. J. 472.

**207. 1. Meyer v. Foster**, (Cal. 1905) 81 Pac. Rep. 402, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 207; Vinson v. Palmer, (Fla. 1903) 34 So. Rep. 276; Weaver v. Paul, 4 Pa. Dist. 492; Keyser v. Warfield, (Md. 1904) 59 Atl. Rep. 189; Smith v. Willing, (Wis. 1904) 101 N. W. Rep. 692; Humphrey Hardware Co. v. Herrick, (Neb. 1904) 101 N. W. Rep. 1016; Burton v. Goffin, 5 British Columbia 454. See also Cox v. Alexander, 30 Oregon 438.

**Holder Not Allowed to Insert Name of Payee After Suit Brought.** — Keyser v. Warfield, (Md. 1904) 59 Atl. Rep. 189.

**Authority to Supply the Payee's Name Is Not Implied**, where no blank is left for the purpose. Smith v. Willing, (Wis. 1904) 101 N. W. Rep. 692.

**Ratification by Principal Validates Note.** — Bremner v. Fields, (Tex. Civ. App. 1896) 34 S. W. Rep. 447.

**Payee's Name in Blank — Ratification by Maker of Insertion.** — Wester v. Bailey, 118 N. Car. 193.

**An Alteration of the Rate of Interest** made by the principal after the note has been signed and returned to him by the surety releases the surety even though the payee takes the note without notice. Hill v. O'Neill, 101 Ga. 832.

**2. Weaver v. Paul**, 4 Pa. Dist. 492.

**4. Burton v. Goffin**, 5 British Columbia 454.

**5. Acceptance Defined.** — Kervan v. Townsend, 25 N. Y. App. Div. 258, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 207.

**Definition under Washington Statute.** — Wadhams v. Portland, etc., R. Co., (Wash. 1905) 79 Pac. Rep. 597.

**Unauthorized Acceptance by Third Person Not Binding on Drawee.** — Craig v. Matheson, 32 Nova Scotia 452.

**208.** 2. General Principles — *a.* PRELIMINARY — When Facts Are Established Acceptance Is Question of Law. — See note 4.

**211.** *d.* WHO MAY ACCEPT — Acceptance by Agent. — See note 5.

**212.** *e.* WHEN THE CONTRACT OF ACCEPTANCE IS COMPLETE — Revocable until Redelivery. — See note 1.

Acceptance Is Contract of Place Where Name Written. — See note 2.

**213.** 3. Written and Verbal Acceptances — *a.* WRITTEN ACCEPTANCES — (1) *On the Bill Itself* — (a) In General. — See note 6.

Statutes Requiring Acceptances in Writing on Bill. — See note 8.

**214.** Not to Be Varied by Parol. — See notes 1, 2.

**215.** (b) Expression of the Date — Presumption as to Date Where Date Omitted. — See note 3.

**217.** (d) Signature of Drawee. — See notes 2, 3.

(2) *On a Paper Other than the Bill Itself*. — See note 6.

*b.* VERBAL ACCEPTANCES AT COMMON LAW — (1) *Validity of Parol Acceptances*. — See note 9.

**218.** (2) *What Words Amount to an Acceptance*. — See note 3.

**219.** 4. Implied and Constructive Acceptances — *a.* IN GENERAL. — See note 10.

What Sufficient Generally. — See note 11.

**220.** *b.* EFFECT OF RETENTION OF BILL BY DRAWEE — *Mere Retention Not Sufficient*. — See note 6.

**221.** See note 1.

**208.** 4. Burden of Proving Acceptance on Plaintiff. — *Dillon v. Moratz*, 97 Ill. App. 1.

**211.** 5. Authority to Accept. — *Shepard v. Abbott*, 179 Mass. 300.

Agent Must Produce Authority. — *Lewin v. Greig*, 115 Ga. 127.

Acceptance by Agent in His Own Name Not Binding on Principal. — *Winburn v. Fidelity Loan, etc., Assoc.*, 110 Iowa 374.

**212.** 1. *Guthrie Nat. Bank v. Gill*, 6 Okla. 566, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 212.

2. Verbal Acceptance Governed by Law of Place Where Made. — *Hubbard v. Exchange Bank*, 72 Fed. Rep. 234, 38 U. S. App. 289.

**213.** 6. *Kervan v. Townsend*, 25 N. Y. App. Div. 260.

8. Statutes in the United States. — *Lewin v. Greig*, 115 Ga. 127; *Shutt Imp. Co. v. Erwin*, 66 Kan. 261; *Eakin v. Citizens' State Bank*, 67 Kan. 338; *Haerberle v. O'Day*, 61 Mo. App. 390; *Erickson v. Inman*, 34 Oregon 44; *Baltimore, etc., R. Co. v. Alexandria First Nat. Bank*, 102 Va. 753 (under Negotiable Instruments Law); *Indian Territory Bank v. Buchanan County First Nat. Bank*, 109 Mo. App. 665; *Wadhams v. Portland, etc., R. Co.*, (Wash. 1905) 79 Pac. Rep. 597.

Canadian Statute. — *McPherson v. Johnston*, 3 British Columbia 465.

Pennsylvania Statute — Acceptance in Writing Required Where Amount Exceeds Twenty Dollars. — *Woodhouse v. Brown*, 15 Montg. Co. Rep. (Pa.) 179, 23 Pa. Co. Ct. 54, 8 Pa. Dist. 643.

The Negotiable Instruments Law specifically provides that the acceptance must be in writing and signed by the drawee. *Izzo v. Ludington*, 79 N. Y. App. Div. 272, *affirmed* 178 N. Y. 621.

**214.** 1. *Levy, etc., Mule Co. v. Kauffman*, (C. C. A.) 114 Fed. Rep. 170; *Kervan v.*

*Townsend*, 25 N. Y. App. Div. 260, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 214.

2. *Kervan v. Townsend*, 25 N. Y. App. Div. 260.

**215.** 3. *House v. Schulze*, 21 Tex. Civ. App. 249, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 215.

**217.** 2. Acceptance Signed by Receiver Does Not Create Personal Liability. — *Orpherts v. Smith*, (Supm. Ct. Tr. T.) 62 N. Y. Supp. 409.

3. *Levy, etc., Mule Co. v. Kauffman*, (C. C. A.) 114 Fed. Rep. 170.

6. Acceptance by Telegram Sufficient under Pennsylvania Statute. — *Ravenswood Bank v. Reneker*, 18 Pa. Super. Ct. 192.

9. Verbal Acceptance. — *Durkee v. Conklin*, 13 Colo. App. 313; *Heitschmidt v. McAlpine*, 59 Ill. App. 231; *Davis v. Rittenhouse, etc., Co.*, 72 Ill. App. 58; *Spurgeon v. Swain*, 13 Ind. App. 188; *Putnam Nat. Bank v. Snow*, 172 Mass. 569; *O'Connell v. Mt. Holyoke College*, 174 Mass. 513, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 219; *Kervan v. Townsend*, 25 N. Y. App. Div. 260; *House v. Schulze*, 21 Tex. Civ. App. 249, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 217.

**218.** 3. Promise to Pay. — See also *Dillon v. Moratz*, 109 Ill. App. 17.

**219.** 10. *Guthrie Nat. Bank v. Gill*, 6 Okla. 566, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 219.

11. What Amounts to a Constructive Acceptance. — *Guthrie Nat. Bank v. Gill*, 6 Okla. 566, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 210.

**220.** 6. Acceptance Not Inferred from Mere Retention. — *Westberg v. Chicago Lumber, etc., Co.*, 117 Wis. 589 (under Neg. Inst. Law).

**221.** 1. Under Statute Requiring Written Acceptance. — *Westberg v. Chicago Lumber, etc., Co.*, 117 Wis. 589.

**221.** Retention in Connection with Statement of Drawee. — See note 6.

The Course of Dealing Between the Parties. — See note 7.

**222.** *c.* REFUSAL TO RETURN, OR WILFUL DESTRUCTION OF BILL — Statutory Provisions. — See note 4.

**223.** Period of Retention. — See note 1.

*d.* RETENTION OF FUNDS OR PROPERTY AGAINST WHICH BILL IS DRAWN. — See note 4.

**224.** *g.* PART PAYMENT OR PAYMENT AS ACCEPTANCE — The Payment of a Bill or Draft on an Unauthorized Indorsement. — See note 2.

**5. Qualified and Conditional Acceptances — a. DEFINITIONS.** — See note 4.

A Conditional Acceptance. — See note 5.

**225.** Bills Drawn or Indorsed Conditionally. — See note 1.

*b.* QUALIFICATION OR CONDITION MUST BE DISTINCT. — See note 3.

**226.** Written Acceptance Cannot Be Proved Conditional by Parol. — See note 3.

**227.** *c.* NECESSITY OF ASSENT OF ANTECEDENT PARTIES. — See note 1.

The Liability of the Acceptor to the Holder. — See note 2.

*d.* INSTANCES OF QUALIFICATIONS AND CONDITIONS — (1) *Qualifications as to Time, Amount, and Mode of Payment* — Time of Payment. — See note 3.

**228.** Amount of Acceptance. — See note 2.

**229.** (4) *Acceptances Payable When in Funds.* — See note 4.

(5) *Acceptances Payable on Happening of Independent Event.* — See note 6.

So Promises to Accept. — See note 10.

**221.** 6. *Bell v. Pletscher*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 746. See also *Westberg v. Chicago Lumber, etc., Co.*, 117 Wis. 589.

7. *Westberg v. Chicago Lumber, etc., Co.*, 117 Wis. 589.

**222.** 4. *Westberg v. Chicago Lumber, etc., Co.*, 117 Wis. 589.

**223.** 1. Retention for Reasonable Time Allowed. — *Westberg v. Chicago Lumber, etc., Co.*, 117 Wis. 589.

4. Where the Drawer Is Indebted to the Drawee, acceptance is not implied from the fact that the latter disposes of the property against which the draft is drawn, and retains the amount of his debt, delivering the balance to the payee. *Johnson v. Clark*, 20 Ind. App. 247.

**224.** 2. Payment of Draft on Unauthorized Indorsement. — *Indian Territory Bank v. Buchanan County First Nat. Bank*, 109 Mo. App. 665.

4. *Grotian v. Guaranty Trust Co.*, 105 Fed. Rep. 566, *affirmed* 114 Fed. Rep. 433, 52 C. C. A. 235.

5. Conditional Acceptance Construed. — *F. A. Drew Glass Co. v. O'Malley*, 67 Mo. App. 639.

**225.** 1. Bill Drawn on Specified Fund — Acceptance Limited to Fund Designated. — *McMurray v. Sisters of Charity*, 68 N. J. L. 312.

3. Qualification of Acceptance Must Be Distinct. — *Posey v. Denver Nat. Bank*, 7 Colo. App. 108, *affirmed* 24 Colo. 199; *Burns, etc., Lumber Co. v. Doyle*, 71 Conn. 742, 71 Am. St. Rep. 235; *Shepard v. Abbott*, 179 Mass. 300; *Levy, etc., Mule Co. v. Kauffman*, (C. C. A.) 114 Fed. Rep. 170. See also *Fletcher v. Simms*, (Ark. 1905) 86 S. W. Rep. 993.

Authority to Draw at a Particular Place. — Authority given by the drawee for the drawer to make the draft at a particular place does

not constitute a conditional acceptance where it does not appear from the letter authorizing the draft that the authority so given is limited to the place specified. *Posey v. Denver Nat. Bank*, 7 Colo. App. 108, *affirmed* 24 Colo. 199.

**226.** 3. See *Fletcher v. Simms*, (Ark. 1905) 86 S. W. Rep. 993. *Compare Burns, etc., Lumber Co. v. Doyle*, 71 Conn. 742, 71 Am. St. Rep. 235.

Parol Condition Binding on Purchaser with Notice. — *Greer v. Bently*, (Ky. 1897) 43 S. W. Rep. 219.

**227.** 1. Necessity of Assent of Antecedent Parties. — *Pearson v. Gooch*, 69 N. H. 571.

2. Qualified Acceptance Binds as Between Holder and Acceptor. — *Kervan v. Townsend*, 25 N. Y. App. Div. 260, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 227.

3. Acceptance Variant as to Time of Payment. — *Woodhouse v. Brown*, 15 Montg. Co. Rep. (Pa.) 179, 23 Pa. Co. Ct. 54, 8 Pa. Dist. 643. See also *American Boiler Co. v. Fontham*, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351, *reversed* 34 N. Y. App. Div. 294.

**228.** 2. Acceptance for Part. — *Williams v. Gallyon*, 107 Ala. 439.

**229.** 4. *Kervan v. Townsend*, 25 N. Y. App. 260. See also *Knefel v. Flanner*, 66 Ill. App. 209.

6. *Hogan v. Globe Mut. Bldg., etc., Assoc.*, 140 Cal. 610; *Burns, etc., Lumber Co. v. Doyle*, 71 Conn. 742, 71 Am. St. Rep. 235; *Barber v. Johnson*, 5 App. Cas. (D. C.) 305; *Thomson v. Huggins*, 23 Ont. App. 191. See also *F. A. Drew Glass Co. v. O'Malley*, 67 Mo. App. 639. *Compare Hogan v. Globe Mut. Bldg., etc., Assoc.*, (Cal. 1903) 71 Pac. Rep. 706.

10. *Morrison v. Lamson*, 176 Mass. 536.



**230. e. NECESSITY FOR FULFILMENT OF CONDITION — (1) Generally.**

— See note 1.

**231. (2) Fulfilment Rendered Impossible — By Act of God or of the Law. —**

See note 3.

**232. (3) Burden of Proof to Show Performance. — See note 1.****235. 7. Promises to Accept — c. AUTHORITIES IN THE UNITED STATES**— (1) *Virtual Acceptance by Written Promise to Accept Nonexisting Bill. —*

See notes 3, 5.

**236. Requisites for the Application of the Rule. — See notes 1, 2, 3.****237. (2) Written Promises to Accept Nonexisting Bills Not Amounting to Acceptances. — See note 1.**— *Action Held Maintainable by Holder. — See note 2.***238. (3) Verbal Promises to Accept Nonexisting Bills. — See notes 2, 3.****230. 1. Conditional Acceptance Absolute When Condition Performed — England. —** Chartered Bank v. Macfadyen, 15 Reports 333.*Canada. —* Thomson v. Huggins, 23 Ont. App. 191.*United States. —* Grotian v. Guaranty Trust Co., 105 Fed. Rep. 566, affirmed 114 Fed. Rep. 433, 52 C. C. A. 235.*Alabama. —* See Garner v. Hall, 114 Ala. 166. *California. —* Pohlman v. Wilcox, (Cal. 1905) 80 Pac. Rep. 625.*Colorado. —* Posey v. Denver Nat. Bank, 7 Colo. App. 108, affirmed 24 Colo. 199.*Connecticut. —* National Sav. Bank v. Cable, 73 Conn. 568.*District of Columbia. —* Barber v. Johnson, 5 App. Cas. (D. C.) 305.*Kentucky. —* See Greer v. Bently, (Ky. 1897) 43 S. W. Rep. 219.*Massachusetts. —* Glidden v. Massachusetts Hospital L. Ins. Co., 187 Mass. 538.*Minnesota. —* Aberdeen First State Bank v. Thuet, 88 Minn. 364.*New York. —* Kervan v. Townsend, 25 N. Y. App. Div. 260, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 229; Vanderbeek v. Hemmel, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 714.*Pennsylvania. —* Bellefonte First Nat. Bank v. Rogers, 198 Pa. St. 627; Woodhouse v. Brown, 15 Montg. Co. Rep. (Pa.) 179, 23 Pa. Co. Ct. 54, 8 Pa. Dist. 643.*West Virginia. —* Barnett v. Boone Lumber Co., 43 W. Va. 441.**Waiver of Condition by Acceptor. —** Aberdeen First State Bank v. Thuet, 88 Minn. 364; Kervan v. Townsend, 25 N. Y. App. Div. 260.**Performance of Condition under Subsequent Contract. —** Where the acceptance is conditional upon the performance by the drawer of certain acts under an agreement, and this agreement is not performed, the fact that the same conditions are performed under a new agreement does not entitle the payee to enforce payment. Glidden v. Massachusetts Hospital L. Ins. Co., 187 Mass. 538.**231. 3. Conditional Draft — Performance Rendered Impossible by Act of Acceptor — Liability. —** Hogan v. Globe Mut. Bldg., etc., Assoc., (Cal. 1903) 71 Pac. Rep. 706; Robinson v. Gray, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 341.**Acceptance upon Completion of Building — Discharge by Destruction of Building Before Completion. —** Hogan v. Globe Mut. Bldg., etc., Assoc., 140 Cal. 610.**232. 1. Burden of Proof. —** Taylor v. Insley,

7 Colo. App. 175; National Sav. Bank v. Cable, 73 Conn. 568; Cummings v. Hummer, 61 Ill. App. 393.

**235. 3. Fowler v. McPhee, 13 Colo. App. 185.****5. Virtual Acceptance in Writing of Nonexisting Bill. —** James v. E. G. Lyons Co., 134 Cal. 189; Posey v. Denver Nat. Bank, 24 Colo. 199; Fowler v. McPhee, 13 Colo. App. 185; Atchison County Bank v. Bohart Commission Co., 84 Mo. App. 421; Deposit Bank v. Turner-Looker Co., 3 Ohio Dec. 581; Ravenswood Bank v. Reneker, 18 Pa. Super. Ct. 192.**Under California Statutes of 1850, p. 248,** conditional promise in writing to accept a bill before it is drawn constitutes an actual acceptance in favor of any person who, upon the faith thereof, has received the bill for a valuable consideration. James v. E. G. Lyons Co., 134 Cal. 189.**Effect of General Promise to Accept. —** Gambrell v. Brown Hotel Co., 11 Colo. App. 529.**Admissibility of Evidence to Show Promise. —** James v. E. G. Lyons Co., (Cal. 1905) 81 Pac. Rep. 275.**236. 1. What Constitutes Reasonable Time. —** Posey v. Denver Nat. Bank, 24 Colo. 199.**2. Bill Must Be Described in Letter. —** Gambrell v. Brown Hotel Co., 11 Colo. App. 529; Atchison County Bank v. Bohart Commission Co., 84 Mo. App. 421.**Sufficiency of Description. —** Posey v. Denver Nat. Bank, 24 Colo. 199.**Draft Must Be Drawn in Accordance with Promise. —** Sherwin v. Brigham, 4 Ohio Dec. (Reprint) 482, 2 Cleve. L. Rep. 228.**General Promise to Accept Insufficient. —** Atchison County Bank v. Bohart Commission Co., 84 Mo. App. 421.**3. Credit Must Be Imparted by the Promise. —** See also Posey v. Denver Nat. Bank, 24 Colo. 199; Gambrell v. Brown Hotel Co., 11 Colo. App. 529. See also Fowler v. McPhee, 13 Colo. App. 185.**237. 1. The Evidence Necessary to Support an Action. —** See also Atchison County Bank v. Bohart Commission Co., 84 Mo. App. 421; Deposit Bank v. Turner-Looker Co., 3 Ohio Dec. 581.**2. Holder's Action for Breach of Promise to Accept. —** Deposit Bank v. Turner-Looker Co., 3 Ohio Dec. 581.**238. 2. By Pennsylvania Act of May 10, 1881,** the acceptance must be in writing, signed by the party or his legal agent, when the amount

**239.** (4) *Written and Verbal Promises to Accept Existing Bills* — View that Credit Must Be Imparted by Promise. — See note 3.

An Action for the Breach of a Promise to Accept. — See note 5.

**242.** *e.* CONSTRUCTION OF PROMISES TO PAY OR ACCEPT — Generally. — See note 2.

**243.** *f.* VARIANCE BETWEEN AUTHORITY AND BILL. — See note 2.

**244.** 8. Verbal Acceptances and Promises to Accept as Affected by Statute of Frauds. — See notes 1, 2.

**245.** See note 1.

**246.** IV. TRANSFER — 1. Methods of Transfer Generally — Negotiation of Bills and Notes. — See note 3.

2. Negotiation, Time of — *b.* OVERDUE PAPER — (1) *In General.* — See note 8.

**247.** But After the Bill or Note Becomes Due. — See note 1.

(2) *When Paper Deemed Overdue* — (a) *In General.* — See note 2.

Notes Bearing Interest. — See notes 3, 4.

exceeds twenty dollars. *Ravenswood Bank v. Reneker*, 18 Pa. Super. Ct. 192.

**238.** 3. Acceptance in Writing Requisite under Mo. Rev. Stat. 1889, § 721. — *Atchison County Bank v. Bohart Commission Co.*, 84 Mo. App. 421.

*Failure to Draw.* — Where goods are sold on the faith of a promise by a third party to accept a bill drawn for the amount thereof, the seller cannot recover the price of the goods where the bill is never drawn. *Pake v. Wilson*, 127 Ala. 240.

**239.** 3. An Unconditional Verbal Promise to Pay a Written Order is an acceptance of the order, and, if founded on a sufficient legal consideration, is binding on the acceptor. *Barnett v. Boone Lumber Co.*, 43 W. Va. 441.

*Illinois Statute.* — *Vannatta v. Lindley*, 98 Ill. App. 327, affirmed 198 Ill. 40, 92 Am. St. Rep. 270.

5. Breach of Promise to Accept Existing Bill. — *Putnam Nat. Bank v. Snow*, 172 Mass. 576, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 238, 239.

**242.** 2. *Posey v. Denver Nat. Bank*, 24 Colo. 199.

*Language Construed Against Person Using It.* — *Posey v. Denver Nat. Bank*, 24 Colo. 199.

A Statement in Writing that the Draft Will Be "Duly Protected" constitutes an unconditional acceptance. — *James v. E. G. Lyons Co.*, 134 Cal. 189.

Condition Contained in Promise Must Be Clearly Expressed. — *Posey v. Denver Nat. Bank*, 24 Colo. 199.

**243.** 2. Bill Must Conform to Authority. — *Posey v. Denver Nat. Bank*, 24 Colo. 199.

**244.** 1. Statutes Requiring Written Acceptance. — See also *Haeberle v. O'Day*, 61 Mo. App. 390.

2. The Statute of Frauds Not Applicable to Obligations under Law Merchant. — *Durkee v. Conklin*, 13 Colo. App. 313; *Ragsdale v. Gresham*, (Ala. 1904) 37 So. Rep. 367.

**245.** 1. Verbal Promise to Accept Without New Consideration Is Within the Statute. — *O'Connell v. Mt. Holyoke College*, 174 Mass. 511; *Barnett v. Boone Lumber Co.*, 43 W. Va. 441.

*In Alabama*, if credit is extended solely on the promise, the promise is original and not

within the statute. If, however, credit is given to the drawer, the promise is collateral and within the statute. *Pake v. Wilson*, 127 Ala. 240.

Unauthorized Verbal Acceptance by Agent. — *Winburn v. Fidelity Loan, etc., Assoc.*, 110 Iowa 374.

**246.** 3. "Discount" Defined. — *Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105.

8. Overdue Paper. — *McDonnell v. Burns*, (C. C. A.) 83 Fed. Rep. 866; *Young Men's Christian Assoc. Gymnasium Co. v. Rockford Nat. Bank*, 179 Ill. 599, 70 Am. St. Rep. 135; *Kimmel v. Weil*, 95 Ill. App. 15; *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246; *Jacobs v. Gibson*, 77 Mo. App. 244; *Moore v. Alexander*, 63 N. Y. App. Div. 100; *Capwell v. Machon*, 21 R. I. 522, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 246, note 8.

Effect of Extension. — Where, at or about the maturity of a negotiable instrument, the time of payment of the indebtedness evidenced thereby is extended by a written agreement of the parties upon a valid consideration, the agreement being independent of and collateral to the original contract, such extension does not continue the commercial characteristics of the note as live, unmatured negotiable paper. *Swan v. Craig*, (Neb. 1905) 102 N. W. Rep. 471.

Negotiability of Overdue Note as Affected by Iowa Code, § 2546. — *Leach v. Funk*, 97 Iowa 576.

**247.** 1. Payable on Demand after Maturity. — *McNair v. Moore*, 55 S. Car. 435, 74 Am. St. Rep. 760.

2. Maturity Before Certain Date. — Where the note provides that it shall mature before the performance of a specified condition by the payee, and that should the payee fail to perform this condition by a fixed date the note shall be void, the note matures before the performance of the condition by the payee before the time specified. *Garner v. Hall*, 114 Ala. 166.

An Option to Renew contained in the note will not be presumed to have been exercised, but the burden is on the defendant to show that such is the case. *California State Bank v. Webber*, 110 Cal. 538.

3. Demand Notes with Interest. — *Harrisburg Nat. Bank v. Moffitt*, 10 Pa. Dist. 22.

Apparent Maturity. — S. Dak. Comp. Laws, §

**248.** Note Payable in Instalments. — See note 1.

(b) Maturity of Paper Payable at Sight or on Demand. — See note 2.

**249.** (c) Paper Transferred on Last Day of Grace. — See note 2.

**250.** See note 1.

### 3. Negotiation and Assignment by Delivery — a. OF INSTRUMENTS

PAYABLE TO BEARER OR INDORSED IN BLANK — Instruments Payable to Bearer. — See note 2.

**4492**, providing that the apparent maturity of a negotiable instrument, payable at a particular time, is the day on which by its terms it becomes due, or, when that is a holiday, the next business day, has no application to instruments entitled to days of grace, but only to instruments not entitled to grace. *Morris v. Bailey*, 10 S. Dak. 507.

**247.** 4. *Harrisburg Nat. Bank v. Moffitt*, 10 Pa. Dist. 22.

**Provisions for Interest of No Effect.** — See also *Leonard v. Olson*, 99 Iowa 162, 61 Am. St. Rep. 230.

**248.** 1. See also *Sweeney v. Kaufmann*, 168 Ill. 233; *Stoy v. Bledsoe*, 31 Ind. App. 643; *Waverly First Nat. Bank v. Forsyth*, 67 Minn. 257, 64 Am. St. Rep. 415; *McCorkle v. Miller*, 64 Mo. App. 153; *Vette v. La Barge*, 64 Mo. App. 179. Compare *Hinton v. Jones*, 136 N. Car. 53.

**Instalment Due Before Delivery.** — Though a note providing for the payment of interest in instalments and for the maturity of principal and interest upon default in any payment is transferred after an instalment is due and unpaid, having been retained in the maker's possession, the indorsee takes it free from equities, as the note could not mature before delivery. *Beach v. Bennett*, 16 Colo. App. 459.

**Overdue Instalments of Interest.** — The fact that instalments of interest on a note are due and unpaid does not render the note nonnegotiable. *Cooper v. Hocking Valley Nat. Bank*, 21 Ind. App. 358, 69 Am. St. Rep. 365.

**Default in Interest on a Note Payable in Instalments** does not render it overdue. *U. S. National Bank v. Floss*, 38 Oregon 68, 84 Am. St. Rep. 752.

**Payment of Instalment Does Not Affect Negotiability.** — *Vette v. La Barge*, 64 Mo. App. 179.

**Interest Payable in Instalments.** — Where a series of notes provides for the payment of interest in instalments, and that all shall fall due upon the default in the payment of any instalment, upon failure to pay the interest when due all of the notes mature. *Battery Park Bank v. Loughran*, 122 N. Car. 668; *Piersol v. Shelley*, 3 Kan. App. 386. See also *Guckian v. Newbold*, 22 R. I. 279.

**2. Paper at Sight or on Demand** — *United States*. — *McDougall v. Hazelton Tripod-Boiler Co.*, (C. C. A.) 88 Fed. Rep. 217.

*Colorado*. — *Aspen First Nat. Bank v. Mineral Farm Consol. Min. Co.*, 17 Colo. App. 452.

*Connecticut*. — *Connecticut Pub. Acts*, 1884, c. 83, providing that the blank indorsement of the note by the person who is neither its maker nor payee shall import the contract of an ordinary indorsement as between the indorser and payee or the subsequent holder, does not affect Gen. Stat., § 1850, requiring that negotiable demand notes shall be presented in four

months from date. *Oley v. Miller*, 74 Conn. 304.

*Iowa*. — *Leonard v. Olson*, 99 Iowa 162, 61 Am. St. Rep. 230.

*Louisiana*. — See *Nott v. State Nat. Bank*, 51 La. Ann. 871.

*Massachusetts*. — *Wylie v. Cotter*, 170 Mass. 356, 64 Am. St. Rep. 305, construing New York statute; *Merritt v. Jackson*, 181 Mass. 69.

*Montana*. — *Oleson v. Wilson*, 20 Mont. 544, 63 Am. St. Rep. 639.

*New Jersey*. — *Foley v. Emerald, etc., Brewing Co.*, 61 N. J. L. 428.

*New York*. — *Brink v. Stratton*, 64 N. Y. App. Div. 331, reversed 176 N. Y. 150; *Cincinnati Fifth Nat. Bank v. Woolsey*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 757.

*Ohio*. — *Smith v. Merchants', etc., Bank*, 8 Ohio Cir. Dec. 176, 14 Ohio Cir. Ct. 199.

*Rhode Island*. — *McLean v. Bryer*, 24 R. I. 599; *Guckian v. Newbold*, 23 R. I. 553.

*Texas*. — *Brookshire v. Allen*, (Tex. Civ. App. 1895) 32 S. W. Rep. 164.

*Virginia*. — *Bacon v. Bacon*, 94 Va. 686.

**The Addition of the Words "After Date"** does not postpone the prosecution of a note given after date. *Cincinnati Fifth Nat. Bank v. Woolsey*, (Sump. Ct. Tr. T.) 21 Misc. (N. Y.) 757.

**Payment of Interest as Affecting Maturity of Demand Note.** — *McLean v. Bryer*, 24 R. I. 599.

**249.** 2. **Transfer on Last Day of Grace.** — *Haug v. Riley*, 101 Ga. 372; *Holton v. Hubbard*, 49 La. Ann. 715. See also *Farmers' Nat. Bank v. Salina Paper Mfg. Co.*, 58 Kan. 207.

**Under Ga. Civ. Code, § 3679**, the last day of grace is the date of maturity. *Haug v. Riley*, 101 Ga. 372.

**First or Second Day of Grace.** — *Lehman v. Press*, 106 Iowa 389; *Holton v. Hubbard*, 49 La. Ann. 715.

**250.** 1. **Massachusetts Doctrine.** — See also *McKamy v. McNabb*, 97 Tenn. 236.

**2. Instruments Payable to Bearer Negotiable by Delivery** — *United States*. — *Lyman v. Warner*, (C. C. A.) 113 Fed. Rep. 90, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 250.

*Alabama*. — *Brewton v. Glass*, 116 Ala. 629.

*Arkansas*. — *Paris Bank v. Pearson*, 66 Ark. 312, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 250.

*Georgia*. — *Jenkins v. Jones*, 108 Ga. 556.

*Illinois*. — *Mann v. Merchants' L. & T. Co.*, 100 Ill. App. 224.

*Minnesota*. — *Ames, etc., Co. v. Smith*, 65 Minn. 304.

*North Carolina*. — See *Bresee v. Crumpton*, 121 N. Car. 122.

*North Dakota*. — *Dunham v. Peterson*, 5 N. Dak. 414, 57 Am. St. Rep. 556.

*Ohio*. — *Lenhart v. Ramey*, 2 Ohio Cir. Dec. 77.

**251.** See note 1.

Instruments Indorsed in Blank. — See note 2.

**252.** See note 1.

The Indorsement of a Note Originally Payable to Bearer. — See notes 2, 3.

**b. OF INSTRUMENTS PAYABLE TO ORDER** — (1) *Delivery Passes Equitable Title* — Indorsement Necessary to Pass Legal Title. — See note 5.

**253.** Delivery Sufficient to Pass Equitable Title. — See notes 1, 2, 3.

*Vermont.* — Buck v. Troy Aqueduct Co., 76 Vt. 75.

*Washington.* — Swenson v. Stoltz, 36 Wash. 318.

*Canada.* — Vanier v. Kent, 11 Quebec K. B. 373.

Under 2 N. Y. Rev. Stat. (9th ed.), p. 1851, § 5, notes payable to the order of the maker have the same effect as notes payable to bearer and are valid without indorsement, if negotiated by the maker, and are to be deemed payable to bearer. Odell v. Clyde, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 734, affirmed 38 N. Y. App. Div. 333.

**251. 1. Instruments Payable to A or Bearer Not Negotiable by Delivery** — *Alabama.* — Slaughter v. Montgomery First Nat. Bank, 109 Ala. 157.

*Illinois.* — Gilmore v. German Sav. Bank, 89 Ill. App. 442.

**2. Instruments Indorsed in Blank Negotiable by Delivery** — *Alabama.* — See Berney v. Steiner, 108 Ala. 111, 54 Am. St. Rep. 144.

*California.* — Lassen County Bank v. Sherer, 108 Cal. 513; O'Connor v. Clarke, (Cal. 1896) 44 Pac. Rep. 482; Meyer v. Foster, (Cal. 1905) 81 Pac. Rep. 402.

*Georgia.* — Pattillo v. Alexander, 96 Ga. 60; Heard v. De Loach, 105 Ga. 500.

*Illinois.* — Young Men's Christian Assoc. Gymnasium Co. v. Rockford Nat. Bank, 179 Ill. 599, 70 Am. St. Rep. 135; McAuliff v. Reuter, 61 Ill. App. 32; Central School Supply House v. Donovan, 70 Ill. App. 208.

*Indiana.* — Brown v. Fisher, (Ind. App. 1905) 74 N. E. Rep. 632.

*Kansas.* — Graham v. Troth, 69 Kan. 861.

*Kentucky.* — Martin Bank v. Cassidy, 103 Ky. 363.

*Maine.* — Yates v. Goodwin, 96 Me. 90.

*Massachusetts.* — Massachusetts Nat. Bank v. Snow, 187 Mass. 159.

*Minnesota.* — Ames, etc., Co. v. Smith, 65 Minn. 304.

*Mississippi.* — Kendrick v. Kyle, 78 Miss. 278.

*Missouri.* — Hawes v. Mulholland, 78 Mo. App. 493; Allen v. Harris, 79 Mo. App. 490; Kuch v. Cornett, 79 Mo. App. 574; Crawford v. Johnson, 87 Mo. App. 478.

*Nebraska.* — Consterdine v. Moore, 65 Neb. 292, 101 Am. St. Rep. 620.

*New York.* — Beall v. General Electric Co., (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 611.

*Pennsylvania.* — Cooper v. Kyte, 10 Kulp (Pa.) 22.

*Rhode Island.* — Capwell v. Machon, 21 R. I. 520.

*Tennessee.* — Unaka Nat. Bank v. Butler, (Tenn. 1904) 83 S. W. Rep. 655.

*Texas.* — Jones v. Butler, (Tex. Civ. App. 1897) 42 S. W. Rep. 367.

*West Virginia.* — Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., (W. Va. 1905) 50 S. E. Rep. 880.

*Canada.* — See also Creelman v. Stewart, 28 Nova Scotia 185.

**252. 1.** Downing v. Wheeler, 93 Me. 570; Henninger v. Wager, 4 Ohio Dec. (Reprint) 242, 1 Cleve. L. Rep. 156.

**2. Indorsement of Note Payable to Bearer.** — Edwards v. Wagner, 121 Cal. 376, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252.

**3. Indorsement of Instrument Indorsed in Blank.** — Edwards v. Wagner, 121 Cal. 376, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252.

**5. California.** — Hays v. Plummer, 126 Cal. 107, 77 Am. St. Rep. 153; Edwards v. Wagner, 121 Cal. 376, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252.

*Georgia.* — Haug v. Riley, 101 Ga. 372; Burch v. Daniel, 101 Ga. 228.

*Illinois.* — Schoepfer v. Tommack, 97 Ill. App. 562.

*Nebraska.* — Gaylord v. Nebraska Sav., etc., Bank, 54 Neb. 104, 69 Am. St. Rep. 705.

*North Dakota.* — Vickery v. Burton, 6 N. Dak. 245.

*Ohio.* — Ewan v. Brooks-Waterfield Co., 55 Ohio St. 596, 60 Am. St. Rep. 719; Louisville Banking Co. v. McDonald, 4 Ohio Dec. (Reprint) 255, 1 Cleve. L. Rep. 173.

*Texas.* — Ft. Dearborn Nat. Bank v. Berrott, 23 Tex. Civ. App. 662.

**253. 1. Equitable Title Passes by Mere Delivery** — *United States.* — Harrisburg Trust Co. v. Shufeldt, (C. C. A.) 87 Fed. Rep. 669; Council Bluffs First Nat. Bank v. Moore, (C. C. A.) 137 Fed. Rep. 505.

*California.* — Edwards v. Wagner, 121 Cal. 376, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252.

*Colorado.* — Gumaer v. Sowers, 31 Colo. 164.

*Georgia.* — Haug v. Riley, 101 Ga. 372; Burch v. Daniel, 101 Ga. 228.

*Idaho.* — Warren v. Stoddart, 6 Idaho 692.

*Illinois.* — Schoepfer v. Tommack, 97 Ill. App. 562; Gilmore v. German Sav. Bank, 89 Ill. App. 442, applying the rule to a note made payable to A "or bearer," which, under Ill. Annot. Stat., c. 98, par. 4, cannot be negotiated by delivery alone.

*Indiana.* — Huntington First Nat. Bank v. Henry, 156 Ind. 1.

*Kentucky.* — Gray Tie, etc., Co. v. Farmers' Bank, 109 Ky. 694.

*Nebraska.* — Sackett v. Montgomery, 57 Neb. 424, 73 Am. St. Rep. 522.

*North Carolina.* — Bresee v. Crumpton, 121 N. Car. 122.

**2. Holder May Sue in Name of Party Holding Legal Title.** — Cowan v. Campbell, 131 Ala. 211; Burch v. Daniel, 101 Ga. 228; Weeger v. Mueller, 102 Ill. App. 258. See also Commercial

**253.** Extent of Title Acquired. — See notes 4, 5.

**254.** Subsequent Indorsement. — See note 2.

(2) Right to Compel Indorsement. — See note 4.

**255.** (3) Delivery to Prior Holder or Person Discharging Instrument for Honor — Delivery to Prior Holder. — See note 1.

**256.** 4. Negotiation by Indorsement — a. DEFINITION OF INDORSEMENT — In Its Most General and Literal Signification. — See note 3.

Nat. Bank v. Consumers' Brewing Co., 16 App. Cas. (D. C.) 186.

**253.** 3. Holder May Sue in His Own Name under Statutes — *United States*. — Harrisburg Trust Co. v. Shufeldt, (C. C. A.) 87 Fed. Rep. 669.

*Colorado*. — Gumaer v. Sowers, 31 Colo. 164. *Indiana*. — Huntington First Nat. Bank v. Henry, 156 Ind. 1.

*Kansas*. — See Vanarsdale v. Hax, (C. C. A.) 107 Fed. Rep. 878.

*Missouri*. — Lowrey v. Danforth, 95 Mo. App. 441.

*New York*. — Callahan v. Crow, 91 Hun (N. Y.) 346, affirmed 157 N. Y. 695; Barkley v. Wolfskehl, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 420.

*North Carolina*. — Bresee v. Crumpton, 121 N. Car. 122.

*Washington*. — See Seattle Nat. Bank v. Emmons, 16 Wash. 585.

**Assignment by Payee Without Indorsement — Action Against Subsequent Indorser by Indorsee** — De Hass v. Dibert, (C. C. A.) 70 Fed. Rep. 227.

**4. Holder Has Same Title as Assignee of Chose in Action** — *California*. — More v. Finger, 128 Cal. 313. See also Hays v. Plummer, 126 Cal. 107, 77 Am. St. Rep. 153.

*Iowa*. — Hecker v. Boylan, (Iowa 1904) 101 N. W. Rep. 755.

*Kansas*. — Hale v. Hitchcock, 3 Kan. App. 23; Snyder v. Moon, 5 Kan. App. 447.

*Kentucky*. — Gray Tie, etc., Co. v. Farmers' Bank, 109 Ky. 694.

*Minnesota*. — De Kalb Nat. Bank v. Thompson, 79 Minn. 151.

*Montana*. — Cornish v. Woolverton, (Mont. 1905) 81 Pac. Rep. 4.

*North Carolina*. — Bresee v. Crumpton, 121 N. Car. 122.

*North Dakota*. — Vickery v. Burton, 6 N. Dak. 245.

*Utah*. — Lebcher v. Lambert, 23 Utah 1.

*Wisconsin*. — Galusha v. Sherman, 105 Wis. 263.

**5. Holder Takes Only Title of Transferee — United States**. — De Hass v. Dibert, (C. C. A.) 70 Fed. Rep. 227; Council Bluffs First Nat. Bank v. Moore, (C. C. A.) 137 Fed. Rep. 505. *California*. — Hays v. Plummer, 126 Cal. 107, 77 Am. St. Rep. 153.

*Colorado*. — Gumaer v. Sowers, 31 Colo. 164. *Idaho*. — Warren v. Stoddart, 6 Idaho 692.

*Illinois*. — Gilmore v. German Sav. Bank, 89 Ill. App. 442, applying the rule to a note made payable to A "or bearer," which, under Ill. Annot. Stat., c. 98, par. 4, cannot be negotiated by delivery alone.

*Indiana*. — Huntington First Nat. Bank v. Henry, 156 Ind. 1.

*Iowa*. — Hecker v. Boylan, (Iowa 1904) 101 N. W. Rep. 755.

*Kansas*. — Hale v. Hitchcock, 3 Kan. App. 23. *Kentucky*. — Gray Tie, etc., Co. v. Farmers' Bank, (Ky. 1903) 74 S. W. Rep. 174.

*Maine*. — Mathias v. Kirsch, 87 Me. 523.

*Minnesota*. — De Kalb Nat. Bank v. Thompson, 79 Minn. 151.

*Mississippi*. — Kennedy v. Jones, (Miss. 1901) 29 So. Rep. 819.

*Missouri*. — Bishop v. Chase, 156 Mo. 158, 79 Am. St. Rep. 515.

*Montana*. — Cornish v. Woolverton, (Mont. 1905) 81 Pac. Rep. 4.

*Nebraska*. — Sackett v. Montgomery, 57 Neb. 424, 73 Am. St. Rep. 522; Menzie v. Smith, 63 Neb. 666.

*North Carolina*. — Bresee v. Crumpton, 121 N. Car. 123, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 253.

*North Dakota*. — Vickery v. Burton, 6 N. Dak. 245.

*Ohio*. — Henninger v. Wager, 4 Ohio Dec. (Reprint) 242, 1 Cleve. L. Rep. 156; Merrick v. Merchants' Nat. Bank, 11 Ohio Dec. 293.

*Utah*. — Lebcher v. Lambert, 23 Utah 1.

*Washington*. — Swenson v. Stolz, 36 Wash. 318.

*Wisconsin*. — Galusha v. Sherman, 105 Wis. 263.

**Under the Texas Statute** (Sayles's Rev. Civ. Stat., art. 307), a transferee by delivery before maturity, for value and without notice, takes subject only to just discounts against himself. Prouty v. Musquiz, (Tex. Civ. App. 1900) 59 S. W. Rep. 568, 94 Tex. 87. See also National Bank of Commerce v. Kenney, (Tex. 1904) 83 S. W. Rep. 368..

The burden is on one claiming to be a *bona fide* transferee within the protection of the statute to show that he is such. Prouty v. Musquiz, (Tex. Civ. App. 1900) 59 S. W. Rep. 568.

**254.** 2. Indorsement After Maturity or Notice — Reese v. Bell, 138 Cal. xix, 71 Pac. Rep. 87.

**Indorsement Relating Back**. — Notice is not necessary to bind an indorser who transfers the note before maturity, but does not actually indorse it until after maturity, as in such case the indorsement relates back to the time of delivery. Schoepfer v. Tommack, 97 Ill. App. 562.

**4. Court of Equity May Compel Indorsement**. — Schoepfer v. Tommack, 97 Ill. App. 562.

**Right to Compel Indorsement under Washington Statute**. — Swenson v. Stolz, 36 Wash. 318.

**255.** 1. Delivery to Prior Holder. — Haug v. Riley, 101 Ga. 372; Garrett v. Findlater, 21 Tex. Civ. App. 635; Dunlap v. Kelly, 105 Mo. App. 1. See also Atlanta Guano Co. v. Hunt, 100 Tenn. 89.

**256.** 3. Hathway v. Rogers, 112 Iowa 640, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 256; Daily v. Bartholomew, 5 Kan. App. 148.

**256.** In Commercial Law. — See note 4.

**257.** *b.* WHAT PAPER PASSES BY INDORSEMENT — (1) *Instruments Payable to Order* — Instruments Payable to Order Negotiable by Indorsement. — See notes 5, 6.

**258.** (3) *Indorsement of Nonnegotiable Instruments.* — See notes 4, 5, 6.

*c.* FORM AND ESSENTIALS OF CONTRACT OF INDORSEMENT — (1) *Formal Essentials* — (a) *As to Writing* — *aa.* INDORSEMENT MUST BE IN WRITING. — See note 7.

**259.** *bb.* POSITION OF INDORSEMENT — ALLONGE. — See notes 1, 2.

Indorsement Properly on Back of Instrument. — See notes 3, 4.

Indorsement May Be on Face. — See note 5.

**260.** (c) What Language Amounts to an Indorsement — Signature — No Particular Form of Words Required. — See note 4.

Actual Indorsement Necessary. — See note 5.

**261.** (2) *Parties to Indorsement* — (a) *Who May Be Indorser* — *aa.* INDORSEMENT MUST BE MADE BY LEGAL HOLDER — In General. — See note 6.

See also *Farmers' Trust Co. v. Schenuit*, 83 Ill. App. 267.

**256.** 4. *O'Connor v. Clarke*, (Cal. 1896) 44 Pac. Rep. 482; *Sibley v. American Exch. Nat. Bank*, 97 Ga. 126; *Hathaway v. Rogers*, 112 Iowa 640, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 256; *Daily v. Bartholomew*, 5 Kan. App. 148; *Gray Tie, etc., Co. v. Farmers' Bank*, 109 Ky. 694; *Markey v. Corey*, 108 Mich. 184, 62 Am. St. Rep. 698. See also *Bowler v. Braun*, 63 Minn. 32, 56 Am. St. Rep. 449.

**257.** 5. *Indorsement Necessary to Pass Title.* — *Pattillo v. Alexander*, 96 Ga. 60; *Haug v. Riley*, 101 Ga. 375, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 255-257; *Mann v. Merchants' L. & T. Co.*, 100 Ill. App. 224; *Fox v. Cipra*, 5 Kan. App. 312. See also *Rabasse's Succession*, 49 La. Ann. 1405; *Petrie v. Miller*, 57 N. Y. App. Div. 17, affirmed 173 N. Y. 596 (under Neg. Inst. Law). *Martin v. Martin*, 5 Ohio Dec. 394; *Swenson v. Stoltz*, 36 Wash. 318.

*Notes Payable to Maker's Order* and indorsed by him pass by delivery. *Lassen County Bank v. Sherer*, 108 Cal. 513.

*Indorsement Essential to Pass Title to Note Payable to Maker's Order.* — *Benedict v. Berger*, 64 Ill. App. 173.

*Sufficiency of Indorsement to Pass Legal Title a Question of Law.* — *Everett v. Sullivan*, 102 Ill. App. 133.

*Mode of Transfer Prescribed by Ill. Rev. Stat., c. 98, § 4, Exclusive.* — *Everett v. Sullivan*, 102 Ill. App. 133.

*Notes Payable on Demand.* — *Nott v. State Nat. Bank*, 51 La. Ann. 871.

6. *Haug v. Riley*, 101 Ga. 375, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 255-257.

**258.** 4. *No Indorsement of Nonnegotiable Paper.* — *Herrick v. Edwards*, 106 Mo. App. 633.

*Nonnegotiable Paper Assignable by Indorsement under Cal. Civ. Code, § 1459.* — *Alexander v. McDow*, 108 Cal. 25.

5. *Beall v. General Electric Co.*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 611.

6. *Steere v. Trebilcock*, 108 Mich. 464. See also *Heckler v. Frankenbush*, 76 Miss. 780.

7. *An Indorsement Ex Vi Termini Must Be in Writing.* — *Huston v. Fatka*, 30 Ind. App. 693. See also *Rabasse's Succession*, 49 La. Ann. 1405.

**259.** 1. *Indorsement Must Be on Instrument.*

— *Haug v. Riley*, 101 Ga. 380, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 259; *Bishop v. Chase*, 156 Mo. 158, 79 Am. St. Rep. 515; *Swenson v. Stoltz*, 36 Wash. 318.

2. *Allonge.* — *Hays v. Plummer*, 126 Cal. 107, 77 Am. St. Rep. 153; *Haug v. Riley*, 101 Ga. 372; *Farmers' Trust Co. v. Schenuit*, 83 Ill. App. 267; *Bishop v. Chase*, 156 Mo. 158, 79 Am. St. Rep. 515; *Swenson v. Stoltz*, 36 Wash. 318.

3. *Haug v. Riley*, 101 Ga. 375, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 255-257.

4. *Hays v. Plummer*, 126 Cal. 107, 77 Am. St. Rep. 153; *Haug v. Riley*, 101 Ga. 375, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 255-257; *Herrick v. Edwards*, 106 Mo. App. 633.

5. *Indorsement on Face of Note.* — *Hinsey v. Studebaker Bros. Mfg. Co.*, 73 Ill. App. 278; *Farmers' Trust Co. v. Schenuit*, 83 Ill. App. 267; *Herrick v. Edwards*, 106 Mo. App. 633.

**260.** 4. *No Particular Words Essential to Indorsement.* — *Farmers' Trust Co. v. Schenuit*, 83 Ill. App. 267; *Gray Tie, etc., Co. v. Farmers' Bank*, 109 Ky. 694; *Markey v. Corey*, 108 Mich. 184, 62 Am. St. Rep. 698; *Brook v. Vannest*, 58 N. J. L. 162; *Dunham v. Peterson*, 5 N. Dak. 414, 57 Am. St. Rep. 556; *Thorpe v. Mindeman* (Wis. 1904) 101 N. W. Rep. 417; *Swenson v. Stoltz*, 36 Wash. 318.

*A Signature of the Payee to a Collateral Memorandum on the back of the bill does not constitute an indorsement.* *Gray Tie, etc., Co. v. Farmers' Bank*, 109 Ky. 694.

*Signature of Payee to Receipt on Instrument Not Sufficient Indorsement.* — *Everett v. Sullivan*, 102 Ill. App. 133.

5. See also *Sachs v. Fuller Bros. Toll, etc., Co.*, 69 Ark. 270.

*Liability on Agreement to Indorse.* — *Levy v. Wagner*, 29 Tex. Civ. App. 98.

**261.** 6. *Indorsement Must Be by Payee or Legal Holder.* — *Ct. Valhalla, No. 16, etc., v. Olson*, 14 Colo. App. 243; *Pattillo v. Alexander*, 96 Ga. 60.

*Indorsement May Be by Agent under Oral Authority.* — *Northwestern Sav. Bank v. International Bank*, 90 Mo. App. 205.

*Indorsement by Receiver — Burden of Proving Authority on Holder.* — *St. Johns Table Co. v. Brown*, 126 Mich. 592.

**262.** *bb.* JOINT PAYEES NOT PARTNERS. — See notes 2, 4, 5.

**263.** (b) Who May Be Indorsee — Indorsement to Prior Indorser. — See note 3.

(3) *Delivery* — (a) *Delivery Necessary to Complete Indorsement*. — See note 4.

**265.** (b) What Is Sufficient Delivery — An Executor or Executrix. — See note 3.  
Acceptance by the Indorsee. — See note 4.

**266.** *d.* THE VARIOUS KINDS OF INDORSEMENT — (2) *Indorsement in Full* — (a) *Definition* — Use of the Words "Or Order" Not Essential. — See note 4.

(3) *Indorsement in Blank* — (a) *Definition*. — See note 10.

**267.** (b) *Effect* — The Prevailing Doctrine. — See note 3.

**268.** (c) *Right to Fill Up Indorsement* — *aa.* INDORSEMENT MAY BE FILLED UP WITH ANY CONSISTENT CONTRACT. — See notes 2, 3, 4.

*Holder May Change Blank Indorsement to Indorsement in Full*. — See note 5.

**269.** *Necessity for This Change*. — See notes 2, 3.

**270.** *Holder Cannot Enlarge Liability of Indorser*. — See note 2.

**271.** *Nonnegotiable Notes*. — See note 6.

*bb.* TIME OF FILLING UP INDORSEMENT — At Trial. — See note 10.

**262.** 2. *Joint Payees*. — *Heard v. Kennedy*, 116 Ga. 36; *Allen v. Corn Exch. Bank*, 87 N. Y. App. Div. 335.

4. *Indorsement by One Payee with Authority of Other*. — *Allen v. Corn Exch. Bank*, 87 N. Y. App. Div. 335.

*Ratification of Unauthorized Indorsement a Question of Fact*. — *Allen v. Corn Exch. Bank*, 87 N. Y. App. Div. 335.

5. *Express Authority Required*. — *Allen v. Corn Exch. Bank*, 87 N. Y. App. Div. 335.

**263.** 3. *Indorsement to Prior Indorser*. — *Henderson v. Davisson*, 157 Ill. 379.

4. *French v. French*, (C. C. A.) 133 Fed. Rep. 491; *Louisville Coal Min. Co. v. International Trust Co.*, 18 Colo. App. 345; *Pattillo v. Alexander*, 96 Ga. 60; *Pettyjohn v. National Exch. Bank*, 101 Va. 111; *Swenson v. Stoltz*, 36 Wash. 318.

**265.** 3. *Delivery During Life of Indorser Essential*. — *Lowrey v. Danforth*, 95 Mo. App. 441.

4. *Acceptance*. — *Monticello Bank v. Dooly*, 113 Wis. 590.

**266.** 4. *Use of Words "Or Order" Not Essential*. — *Halbert v. Ellwood*, 1 Kan. App. 95; *Hale v. Hitchcock*, 3 Kan. App. 23.

10. *What Constitutes Indorsement in Blank*. — *Byers v. Bellan-Price Invest. Co.*, 10 Colo. App. 74.

*Indorsement Not Naming Indorsee*. — *Daniel v. Royce*, 96 Ga. 566.

**267.** 3. *Blank Indorsement Transfers Legal Title*. — *Frost v. Fisher*, 13 Colo. App. 322; *Illinois Conference, etc., v. Plagge*, 177 Ill. 431, 69 Am. St. Rep. 252; *Farmers Trust Co. v. Schenuit*, 83 Ill. App. 267; *Keller v. Alexander*, 24 Tex. Civ. App. 186; *Hiawatha Iron Co. v. John Strange Paper Co.*, 106 Wis. 111; *Smoot v. McGraw*, 48 W. Va. 144. See also *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596, 60 Am. St. Rep. 719.

*Blank Indorsement by Payee Through His Attorney in Fact* passes the legal title to a promissory note or a note under seal. *McLaughlin v. Braddy*, 63 S. Car. 433, 90 Am. St. Rep. 681.

*Indorsement for Collection — Effect*. — *Illinois Conference, etc., v. Plagge*, 177 Ill. 431, 69 Am. St. Rep. 252.

*Right to Sue*. — *Illinois Conference, etc., v. Plagge*, 177 Ill. 431, 69 Am. St. Rep. 252.

**268.** 2. *Holder May Fill Up Blank with Consistent Contract*. — *Brown v. Wilcox*, 73 Conn. 100; *Holmes v. Williams*, 69 Ill. App. 114; *Duncanson v. Kirby*, 90 Ill. App. 15; *Iowa Valley State Bank v. Sigstad*, 96 Iowa 491; *Jacobs v. Gibson*, 77 Mo. App. 244; *Consterdine v. Moore*, 65 Neb. 292, 101 Am. St. Rep. 620; *Beall v. General Electric Co.*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 611; *Willard Mfg. Co. v. Tierney*, 133 N. Car. 639, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 268; *Smoot v. McGraw*, 48 W. Va. 144.

3. *Guaranty*. — *Brown v. Wilcox*, 73 Conn. 100; *Condon v. Bruse*, 58 Ill. App. 254; *Holmes v. Williams*, 69 Ill. App. 114; *Duncanson v. Kirby*, 90 Ill. App. 15; *Iowa Valley State Bank v. Sigstad*, 96 Iowa 491; *Willard Mfg. Co. v. Tierney*, 133 N. Car. 639, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 268. See also *Crissey v. Inter State L. & T. Co.*, 59 Kan. 561.

*Writing in Guaranty and Waiver of Presentment and Notice a Material Alteration*. — *Harnett v. Holdrege*, (Neb. 1903) 97 N. W. Rep. 443.

4. *Assignment*. — *Illinois Conference, etc., v. Plagge*, 177 Ill. 431, 69 Am. St. Rep. 252; *Gregory v. Pike*, 94 Me. 27.

5. *Holder May Fill Up Blank Indorsement with Indorsement in Full*. — *Vanarsdale v. Hax*, (C. C. A.) 107 Fed. Rep. 880, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266 *et seq.*; *Frost v. Fisher*, 13 Colo. App. 322; *Consterdine v. Moore*, 65 Neb. 292, 101 Am. St. Rep. 620.

**269.** 2. *Indorsement in Full Necessary*. — See *Barret v. Ft. Pitt Nat. Bank*, (Ky. 1898) 44 S. W. Rep. 97.

3. *Indorsement in Full Not Necessary*. — *Vanarsdale v. Hax*, (C. C. A.) 107 Fed. Rep. 880, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266 *et seq.*; *Condon v. Bruse*, 58 Ill. App. 254. See also *Smoot v. McGraw*, 48 W. Va. 144.

**270.** 2. *Insertion of Waiver of Exemptions*. — The unauthorized insertion of a waiver of exemption from execution, over the name of an indorser in blank, constitutes a perfect defense to an action against the indorser, notwithstanding the fact that the note, when indorsed, contained such a waiver on its face. *Jordan v. Long*, 109 Ala. 414.

**271.** 6. *Brown v. Wilcox*, 73 Conn. 100.  
10. *Time of Filling Indorsement*. — *Brown v. Wilcox*, 73 Conn. 100; *Bramblett v. Caldwell*,

**272.** (4) *Restrictive Indorsement* — (a) *Definition*. — See note 10.

**273.** *Examples of Restrictive Indorsements*. — See note 2.

(b) *Effect* — *In General*. — See note 6.

**274.** *Indorsee Agent of Indorser*. — See notes 1, 2.

**275.** *Right of the Indorsee to Sue*. — See notes 1, 2, 3.

*Notice to Subsequent Holders*. — See note 4.

**276.** (5) *Qualified Indorsement* — *Definition*. — See note 1.

*Indorsement Without Recourse*. — See notes 2, 3.

*Effect on Negotiability*. — See note 4.

105 Ky. 202; *Consterdine v. Moore*, 65 Neb. 292, 101 Am. St. Rep. 620. See also *Barret v. Ft. Pitt Nat. Bank*, (Ky. 1898) 44 S. W. Rep. 97.

*Under Ky. Stat.*, § 480, the purchaser of a note indorsed in blank may fill out the indorsement even after he has transferred it to another. *Bramblett v. Caldwell*, 105 Ky. 203.

**272.** 10. See also *Jacobs v. Gibson*, 77 Mo. App. 244.

**273.** 2. *Examples of Restrictive Indorsements*. — "For deposit in the First National Bank" of a specified place. *Lloyd v. Campbell*, 21 Pa. Co. Ct. 207.

*Indorsement "for Deposit \* \* \* to Credit of" Is Restrictive*. — *Haskell v. Avery*, 181 Mass. 106, 92 Am. St. Rep. 401.

6. *Effect of Restrictive Indorsement*. — *Murphy v. Arkansas, etc., Land, etc., Co.*, 97 Fed. Rep. 723; *Rossi v. National Bank of Commerce*, 71 Mo. App. 150; *Lloyd v. Campbell*, 21 Pa. Co. Ct. 207. See also *Weber Wagon Co. v. City Nat. Bank*, 66 Ill. App. 502; *Downing v. Wheeler*, 93 Me. 570; *Cussen v. Brandt*, 97 Va. 1, 75 Am. St. Rep. 762.

**274.** 1. *Indorsee Mere Agent of Indorser*. — *New Haven Mfg. Co. v. New Haven Pulp, etc., Co.*, 76 Conn. 126; *Barnard State Bank v. Fesler*, 89 Mo. App. 217; *Boyer v. Richardson*, 52 Neb. 156; *Branch v. U. S. National Bank*, 50 Neb. 470; *Peoples, etc., Bank v. Craig*, 63 Ohio St. 374, 81 Am. St. Rep. 639; *Smith v. Bayer*, (Oregon 1905) 79 Pac. Rep. 497, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 274; *City Bank v. Traders' Nat. Bank*, 2 Lack. Leg. N. (Pa.) 213; *Indian Territory Bank v. Buchanan County First Nat. Bank*, 109 Mo. App. 665. See also *Welch v. Kinney*, (Oregon 1905) 80 Pac. Rep. 648.

2. *Indorsee Cannot Transfer Instrument*. — *Boyer v. Richardson*, 52 Neb. 156; *People's, etc., Bank v. Craig*, 63 Ohio St. 374, 81 Am. St. Rep. 639.

*Indorsee Cannot Compromise Claim in Absence of Authority*. — *Torbit v. Heath*, 11 Colo. App. 492; *Holden v. Lippert*, 4 Ohio Cir. Dec. 527, 12 Ohio Cir. Ct. 767.

*Indorsee May Transfer for Purpose of Collection*. — *Haskell v. Avery*, 181 Mass. 106, 92 Am. St. Rep. 401.

**275.** 1. *Indorser Not Liable on Indorsement*. — *City Bank v. Traders' Nat. Bank*, 2 Lack. Leg. N. (Pa.) 213. See also *Welch v. Kinney*, (Oregon 1905) 80 Pac. Rep. 648.

2. *Indorsee May Sue* — *California*. — *Ft. Collins First Nat. Bank v. Hughes*, (Cal. 1896) 46 Pac. Rep. 272.

*Illinois*. — *Weber Wagon Co. v. City Nat. Bank*, 66 Ill. App. 502.

*Iowa*. — *Lehman v. Press*, 106 Iowa 389.

*Maine*. — *Hunt v. Bessey*, 96 Me. 429.

*Massachusetts*. — *Haskell v. Avery*, 181 Mass. 106, 92 Am. St. Rep. 401.

*Missouri*. — *West Plains Bank v. Edwards*, 84 Mo. App. 462.

*Oregon*. — *Smith v. Bayer*, (Oregon 1905) 79 Pac. Rep. 497. See also *Welch v. Kinney*, (Oregon 1905) 80 Pac. Rep. 648.

*Rhode Island*. — *Cross v. Brown*, 19 R. I. 220, affirmed 175 U. S. 396.

*Texas*. — *Griffin v. Parrish*, (Tex. Civ. App. 1896) 38 S. W. Rep. 383.

*Compare Lloyd v. Campbell*, 21 Pa. Co. Ct. 207; *Alexander v. Jamieson*, 56 S. Car. 409.

*In Kansas* such an indorsee cannot maintain an action in his own name, not being the real party in interest. *J. C. Bohart Commission Co. v. Buckingham*, 62 Kan. 658.

*Transferee by Delivery for Purpose of Collection May Maintain Action on Note Indorsed in Blank*. — *Meyer v. Foster*, (Cal. 1905) 81 Pac. Rep. 402.

3. *Saunders v. Whitcomb*, 177 Mass. 457; *Smith v. Bayer*, (Oregon 1905) 79 Pac. Rep. 497. See also *Welch v. Kinney*, (Oregon 1905) 80 Pac. Rep. 648.

4. *Notice to Subsequent Holders*. — *Haskell v. Avery*, 181 Mass. 106, 92 Am. St. Rep. 401; *Hastings First Nat. Bank v. Farmers', etc., Bank*, (Neb. 1901) 95 N. W. Rep. 1062. See *Belmont First Nat. Bank v. Barnesville First Nat. Bank*, 58 Ohio St. 207, 65 Am. St. Rep. 748.

**276.** 1. *Frost v. Fisher*, 13 Colo. App. 322; *Ellsworth v. Varney*, 83 Ill. App. 94.

*Indorsement Excluding Liability for Attorney's Fee Valid*. — *Cole v. Tuck*, 108 Ala. 227.

2. *Indorsement Without Recourse*. — *Beach v. Bennett*, 16 Colo. App. 459.

*Position of Qualifying Words* — *Parol Evidence to Explain*. — *Corbett v. Fetzer*, 47 Neb. 269.

*Qualified Indorsement Accompanying Blank Indorsement*. — Where a note indorsed without recourse appears to have been twice signed by the payee and indorser, the exact nature of the undertaking is ambiguous, and parol evidence is admissible to show the construction to be placed upon the indorsement. *Goodrich v. Stanton*, 71 Conn. 418.

3. *Cressey v. Kimmel*, 78 Ill. App. 27; *M. Rumley Co. v. Dollarhide*, 86 Ill. App. 476; *Wilcoxon v. Morse*, (Ky. 1898) 44 S. W. Rep. 142; *Wilhelm v. Loop*, 8 Ohio Dec. 444, 6 Ohio N. P. 270; *Carroll v. Nodine*, 41 Oregon 412, 93 Am. St. Rep. 743.

4. *Qualified Indorsement Does Not Restrict Negotiability*. — *Hamilton v. Fowler*, (C. C. A.) 99 Fed. Rep. 18; *Frost v. Fisher*, 13 Colo. App. 322; *Beach v. Bennett*, 16 Colo. App.



**276.** Nor Does Such an Indorsement Cast Any Suspicion on the Character of the Paper. — See note 5.

**277.** An Indorsement Transferring All the Rights of the Indorser. — See note 1.  
Indorsement Enlarging Liability — Facultative Indorsement. — See note 2.  
Qualification Must Be Express. — See note 4.  
(6) *Conditional Indorsement*. — See note 6.

**279.** *e.* RIGHT TO STRIKE OUT INDORSEMENTS. — See note 3.  
Instruments Indorsed in Blank. — See note 4.  
Instruments Returned to Indorser. — See note 5.

**280.** Cancellation of Indorsement Not Necessary. — See note 2.

**281.** *f.* TIME OF INDORSEMENT — Date. — See note 2.

An Indorsement Is Not Usually Dated. — See notes 5, 6.

5. Transfer by Assignment. — See note 11.

459; *Hudson v. Shepard*, 90 Ill. App. 626; *Hamilton v. Fowler*, (C. C. A.) 99 Fed. Rep. 18; *Thorpe v. Mindeman*, (Wis. 1904) 101 N. W. Rep. 417.

**276.** 5. *Hamilton v. Fowler*, (C. C. A.) 99 Fed. Rep. 18.

**277.** 1. *Indorsement Transferring All Rights of Indorser*. — *Spencer v. Halpern*, 62 Ark. 595; *Ellsworth v. Varney*, 83 Ill. App. 94. See also *Bond v. Holloway*, 18 Ind. App. 251. Compare *Lenhart v. Ramey*, 2 Ohio Cir. Dec. 77; *Citizens Nat. Bank v. Walton*, 96 Va. 435.

The Negotiability of the Note Is Not Affected, however, where the indorsement, though seemingly qualified, purports to transfer the whole note. *Coddington Sav. Bank v. Anderson*, 64 Neb. 205.

2. *Indorsement with Enlarged Liability*. — See *Maddox v. Duncan*, 143 Mo. 613, 65 Am. St. Rep. 678.

4. *Purpose to Restrict Not Presumed*. — One who promises to make a payment by the note of a third party drawn to his own order and indorsed by him is *prima facie* bound to indorse without restriction. *Goodrich v. Stanton*, 71 Conn. 418.

6. *German-American Nat. Bank v. People's Gas, etc., Co.*, 63 Minn. 12.

*Conditional Indorsement — Failure to Comply with Condition — Ratification by Indorser*. — *German-American Nat. Bank v. People's Gas, etc., Co.*, 63 Minn. 12.

**279.** 3. *Kendrick v. Kyle*, 78 Miss. 278.

4. *Berney v. Steiner*, 108 Ala. 111, 54 Am. St. Rep. 144. See also *Crosby v. Wright*, 70 Minn. 251; *Chapman v. Niantic Nat. Bank*, (R. I. 1904) 57 Atl. Rep. 934.

5. *Holder May Strike Out His Own or Subsequent Indorsements — Alabama*. — *Berney v. Steiner*, 108 Ala. 111, 54 Am. St. Rep. 144.

*Connecticut*. — *New Haven Mfg. Co. v. New Haven Pulp, etc., Co.*, 76 Conn. 126.

*Illinois*. — *Gilmore v. German Sav. Bank*, 89 Ill. App. 442; *McAyeal v. Gullett*, 105 Ill. App. 155, affirmed 202 Ill. 214.

*Missouri*. — See *Dunlap v. Kelly*, 105 Mo. App. 1.

*Oregon*. — *Spreckels v. Bender*, 30 Oregon 577.

*Tennessee*. — See *Atlanta Guano Co. v. Hunt*, 100 Tenn. 89.

*Texas*. — *Garrett v. Findlater*, 21 Tex. Civ. App. 635; *House v. Security Mortg., etc., Co.*, (Tex. Civ. App. 1896) 38 S. W. Rep. 227;

*Swenson v. Heidenheimer*, (Tex. Civ. App. 1899) 52 S. W. Rep. 989.

*West Virginia*. — See *Spencer Bank v. Simmons*, 43 W. Va. 79.

**280.** 2. *Cancellation of Indorsement Unnecessary*. — *New Haven Mfg. Co. v. New Haven Pulp, etc., Co.*, 76 Conn. 126; *Bomar v. Equitable Mortg. Co.*, 111 Ga. 145, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 280; *Menzie v. Smith*, 63 Neb. 666.

**281.** 2. *Jacobs v. Gibson*, 77 Mo. App. 244.

*Indorsement Before Acceptance Valid*. — *Iselin v. Chemical Nat. Bank*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 437.

5. *Parol Evidence to Show Time of Indorsement Admissible*. — *Redden v. Lambert*, 112 La. 740; *Inkiel v. Laforest*, 7 Quebec Q. B. 456, affirming 11 Quebec Super. Ct. 534.

6. *St. Joe, etc., Consol. Min. Co. v. Aspen First Nat. Bank*, 10 Colo. App. 339; *Duncanson v. Kirby*, 90 Ill. App. 15; *Mann v. Merchants' L. & T. Co.*, 100 Ill. App. 224; *Rosenthal v. Rambo*, 28 Ind. App. 265; *Crawford v. Johnson*, 87 Mo. App. 478; *Owens v. Snell*, 29 Oregon 483; *Murto v. Lemon*, (Colo. App. 1903) 75 Pac. Rep. 160; *Scott v. Geiser Mfg. Co.*, (Kan. 1904) 78 Pac. Rep. 823.

*Indorsement Before Maturity Presumed under S. Dak. Comp. Laws, § 4470*. — *Landauer v. Sioux Falls Imp. Co.*, 10 S. Dak. 205.

*Time of Indorsement a Question of Fact Where Evidence Is Conflicting*. — *Thompson v. Brennan*, 104 Wis. 564.

*An Indorsement Extending the Time of Payment* is presumed to have been made before maturity. *St. Joe, etc., Consol. Min. Co. v. Aspen First Nat. Bank*, 10 Colo. App. 339.

11. *Separate Assignment Not an Indorsement*. — *Gaylord v. Nebraska Sav., etc., Bank*, 54 Neb. 104, 69 Am. St. Rep. 705.

*Transfer by Assignment and Indorsement*. — The contract of assignment of a negotiable promissory note and the contract of indorsement may both be made at or near the same time, by the same person, in connection with the sale and transfer of the note and the mortgage securing the same. *Daily v. Bartholomew*, 5 Kan. App. 148.

*The Subsequent Indorsement After Maturity* of a note which had passed by assignment before maturity does not relate back so as to cut off defenses. *Huntington v. Lombard*, 22 Wash. 202.

**282. 6. Transfer by Operation of Law — Execution and Attachment. —** See notes 6, 7.

**V. RIGHTS OF HOLDER — 2. What Constitutes a Holder in Due Course —**

**a. IN GENERAL. —** See note 9.

**283. b. VALUE — (1) In General. —** See note 1.

**284. But if Value Has at Any Time Been Given for the Paper. —** See note 1.

**285. (3) Payment of Pre-existing Debt — (a) In General. —** See note 2.

**282. 6. New Orleans v. Stempel, 175 U. S. 321, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 282. Compare Girard v. Cyrs, 5 British Columbia 45.**

**7. New Orleans v. Stempel, 175 U. S. 321, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 282.**

**9. Holder in Due Course — Arkansas. — Reynolds v. Roth, 61 Ark. 317.**

**California. — Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co., 120 Cal. 521, 65 Am. St. Rep. 186.**

**Delaware. — Maher v. Moore, (Del. 1898) 42 Atl. Rep. 721.**

**Georgia. — English-American L. & T. Co. v. Hiers, 112 Ga. 823.**

**Illinois. — Hunter v. Clarke, 184 Ill. 158, 75 Am. St. Rep. 160.**

**Iowa. — Keegan v. Rock, (Iowa 1905) 102 N. W. Rep. 805.**

**Massachusetts. — Boston Steel, etc., Co. v. Steuer, 183 Mass. 140, 97 Am. St. Rep. 426 (under Negotiable Instruments Law); Massachusetts Nat. Bank v. Snow, 187 Mass. 159 (under Negotiable Instruments Law).**

**Minnesota. — Stephens v. Olson, 62 Minn. 295.**

**New York. — Packard v. Windholz, 88 N. Y. App. Div. 365, affirming (County Ct.) 40 Misc. (N. Y.) 347; Petrie v. Miller, 57 N. Y. App. Div. 17, affirmed 173 N. Y. 596; Benedict v. Kress, 97 N. Y. App. Div. 65; Goetting v. Day, (Supm. Ct. App. T.) 87 N. Y. Supp. 510; Greaser v. Sugarman, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 799; Hyman v. American Electric Forge Co., (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 381; Union Nut, etc., Co. v. Doherty, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 247, affirmed (Supm. Ct. App. T.) 32 Misc. (N. Y.) 496; Simpson v. Hefter, (N. Y. City Ct. Tr. T.) 42 Misc. (N. Y.) 482.**

**North Carolina. — Toms v. Jones, 127 N. Car. 464.**

**North Dakota. — Christianson v. Farmers' Warehouse Assoc., 5 N. Dak. 438.**

**Oklahoma. — Hagan v. Bigler, 5 Okla. 575.**

**Tennessee. — Whiteside v. Chattanooga First Nat. Bank, (Tenn. Ch. 1898) 47 S. W. Rep. 1108.**

**Texas. — Kersey v. Fuqua, (Tex. Civ. App. 1903) 75 S. W. Rep. 56.**

**Wisconsin. — Burnham v. Merchants' Exch. Bank, 92 Wis. 277.**

**Canada. — See also Bellemare v. Gray, 16 Quebec Super. Ct. 581.**

**Definition under Cal. Code Civ. Proc., § 3123. — More v. Finger, 128 Cal. 313; Reese v. Bell, 138 Cal. xix, 71 Pac. Rep. 87.**

**Definition under N. Dak. Rev. Codes, § 4884. — St. Thomas First Nat. Bank v. Flath, 10 N. Dak. 281.**

**Definition under Wash. Sess. Laws, 1899, p. 350. — McNamara v. Jose, 28 Wash. 461.**

**283. 1. Necessity of Value — Alabama. — See Bunzel v. Maas, 116 Ala. 68. See also Holmes v. Ft. Gaines Bank, 120 Ala. 493.**

**Illinois. — Kimmel v. Nagele, 84 Ill. App. 22.**

**Iowa. — Cable v. Buchanan, 109 Iowa 661.**

**Maine. — Oakes v. Merrifield, 93 Me. 297.**

**Missouri. — Wright Invest. Co. v. Fillingham, 85 Mo. App. 534; American Valley Co. v. Wyman, 92 Mo. App. 294.**

**New York. — Brown v. James, 2 N. Y. App. Div. 105; Sutherland v. Mead, 80 N. Y. App. Div. 103; Morgantown Second Nat. Bank v. Weston, 172 N. Y. 250; Monongahela Valley Bank v. Weston, 172 N. Y. 259. See also Callahan v. Crow, 157 N. Y. 695.**

**North Dakota. — Porter v. Andrus, 10 N. Dak. 558; Drinkall v. Movius State Bank, 11 N. Dak. 10, 95 Am. St. Rep. 693.**

**Tennessee. — See Campbell v. Brown, 100 Tenn. 245.**

**Washington. — McNamara v. Jose, 28 Wash. 461.**

**Value Defined. — Under the N. Y. Neg. Inst. Law value is defined to consist in any consideration sufficient to support a simple contract. Citizens' Nat. Bank v. Lilienthal, 40 N. Y. App. Div. 609.**

**Under the Negotiable Instruments Law, § 53, where the holder has a lien on the instrument arising either from contract or by implication of law, he is a holder for value to the extent of his lien. Petrie v. Miller, 57 N. Y. App. Div. 17, affirmed 173 N. Y. 596.**

**Under English Bills of Exchange Act — Payee Not Holder in Due Course. — Lewis v. Clay, 67 L. J. Q. B. 224, 77 L. T. N. S. 653, 46 W. R. 319.**

**Value as Evidence of Good Faith. — Knowlton v. Schultz, 6 N. Dak. 417.**

**Payment by Check does not constitute one a bona fide purchaser for value unless it is shown that the check was accepted as payment. Harrington v. Johnson, 7 Colo. App. 483.**

**The Mere Fact that the Note Is Purchased at a Discount does not prevent the purchaser from being a bona fide purchaser for value so as to be protected against the equities existing between the maker and payee. King v. Peoples Bank, 127 Ala. 266.**

**Usurious Consideration. — The holder of a commercial paper acquired by a usurious consideration is not a bona fide holder. Hart v. Adler, 109 Ala. 467.**

**One Who Is Merely a Note Broker, selling the notes on commission, is not a bona fide holder for value, freed from the equities of the one for whom he is acting. American Valley Co. v. Wyman, 92 Mo. App. 294.**

**284. 1. Petrie v. Miller, 57 N. Y. App. Div. 17, affirmed 173 N. Y. 596 (under Negotiable Instruments Law).**

**285. 2. Absolute Payment and Extinguishment — No Forbearance or Release of Collateral — United States. — Levy, etc., Mule Co. v. Kauffman, (C. C. A.) 114 Fed. Rep. 170.**

**286.** Parting with Value at Time of Transfer.— See note 1.

**287.** (b) Debt of Maker or Drawer — *bb.* EFFECT OF ACCEPTANCE OF DEBTOR'S BILL OR NOTE.— See note 3.

**288.** (c) Debt of Third Person.— See note 1.

(d) Nominal Payment.— See note 2.

**289.** (4) *Collateral for Contemporaneously Contracted Debt.*— See note 1.

**290.** So Where the Bill or Note of a Third Person Is Given by Him as Collateral Security.— See note 1.

*Alabama.*—Carter *v.* Odom, 121 Ala. 162.

*Arkansas.*—Evans *v.* Speer Hardware Co., 65 Ark. 204, 67 Am. St. Rep. 919.

*Colorado.*—Murphy *v.* Gumaer, 12 Colo. App. 472; Beach *v.* Bennett, 16 Colo. App. 459.

*Georgia.*—Lee *v.* Johnson, 110 Ga. 286.

*Illinois.*—Mexican Asphalt Paving Co. *v.* Love, 73 Ill. App. 250.

*Indiana.*—Warren *v.* Syfers, 23 Ind. App. 167; Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69.

*Maryland.*—Black *v.* Westminster First Nat. Bank, 96 Md. 399.

*Massachusetts.*—Holden *v.* Phoenix Rattan Co., 168 Mass. 570; Boston Steel, etc., Co. *v.* Steuer, 183 Mass. 140, 97 Am. St. Rep. 426.

*Michigan.*—Maynard *v.* Davis, 127 Mich. 571.

*Minnesota.*—Rea *v.* McDonald, 68 Minn. 187; Selover *v.* Minneapolis First Nat. Bank, 77 Minn. 144, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 285.

*Mississippi.*—Pollock *v.* Simmons, 76 Miss. 198.

*Missouri.*—Langford *v.* Varner, 65 Mo. App. 370.

*Nebraska.*—Smith *v.* Thompson, (Neb. 1903) 93 N. W. Rep. 678.

*New Jersey.*—Mechanic's Bank *v.* Chardavoyne, 69 N. J. L. 256, 101 Am. St. Rep. 701.

*New York.*—Central Trust Co. *v.* West India Imp. Co., 48 N. Y. App. Div. 147, reversed 169 N. Y. 314; Eleventh Ward Bank *v.* New York, etc., Fireproofing Co., 53 N. Y. App. Div. 631; Rosenwald *v.* Goldstein, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 827; Citizens' Nat. Bank *v.* Liffenthal, 40 N. Y. App. Div. 609; Petrie *v.* Miller, 67 N. Y. App. Div. 17, affirmed 173 N. Y. 596 (under Negotiable Instruments Law); Hyman *v.* American Electric Forge Co., (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 381.

*North Dakota.*—Dunham *v.* Peterson, 5 N. Dak. 414, 57 Am. St. Rep. 556.

*South Dakota.*—Iowa Nat. Bank *v.* Sherman, 17 S. Dak. 396, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 285.

*Texas.*—Raatz *v.* Gordon, (Tex. Civ. App. 1899) 51 S. W. Rep. 651.

*Virginia.*—Payne *v.* Zell, 98 Va. 294.

*Wisconsin.*—Mack *v.* Prang, 104 Wis. 1, 76 Am. St. Rep. 848.

**286.** 1. Parting with Value.—St. Thomas First Nat. Bank *v.* Plath, 10 N. Dak. 281.

**287.** 3. Bill or Note of Debtor—*Alabama.*—Anniston L. & T. Co. *v.* Stickney, 108 Ala. 146; Elyton Co. *v.* Hood, 121 Ala. 373. See also Steiner *v.* Jeffries, 118 Ala. 573.

*California.*—Savings Bank *v.* Central Market Co., 122 Cal. 28.

*Illinois.*—Union Nat. Bank *v.* Post, 93 Ill.

App. 339, affirmed 192 Ill. 385; Bradford *v.* Neill, etc., Constr. Co., 76 Ill. App. 488; Ross *v.* Skinner, 107 Ill. App. 579. See also Tyler *v.* Hyde, 80 Ill. App. 123.

*Indiana.*—Sponhaur *v.* Malloy, 21 Ind. App. 287.

*Kansas.*—Bradbury *v.* Van Pelt, 4 Kan. App. 573.

*Nebraska.*—Chicago, etc., R. Co. *v.* Burns, 61 Neb. 793.

*New Jersey.*—State *v.* Giese, 59 N. J. L. 130. See also Asbury Park First Nat. Bank *v.* White, 60 N. J. Eq. 487.

*New York.*—Schmidt *v.* Livingston, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 554.

*Pennsylvania.*—See also Mechanics' Nat. Bank *v.* Kielkopf, 22 Pa. Super. Ct. 128.

*West Virginia.*—Parkersburg First Nat. Bank *v.* Handley, 48 W. Va. 690.

*Wisconsin.*—Willow River Lumber Co. *v.* Luger Furniture Co., 102 Wis. 636. See also Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446.

**Rule in Indiana.**—Rhodes *v.* Webb-Jameson Co., 19 Ind. App. 195.

**Renewal Note as Payment.**—Kendall *v.* Equitable L. Assur. Soc., 171 Mass. 568.

**288.** 1. Discharge of Debt of Another.—Russell *v.* Smith, 97 Ga. 287; Harris *v.* Harris, 180 Ill. 157.

**Necessity of Consideration.**—Sponhaur *v.* Malloy, 21 Ind. App. 287.

**2.** Nominal Payment Does Not Constitute Value.—Robertson *v.* McKibbin, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 658; Spring Brook Chemical Co. *v.* Dunn, 39 N. Y. App. Div. 130; Sutherland *v.* Mead, 80 N. Y. App. Div. 103, in which case it was stated that the rule existing before the Negotiable Instruments Law was not changed by section 50 of that law which provides that an antecedent or pre-existing debt constitutes value. See also Andrews *v.* Hess, 20 N. Y. App. Div. 194; Kelly *v.* Theiss, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 311.

**289.** 1. Collateral for Contemporaneously Contracted Debt.—Thompson *v.* Maddux, 117 Ala. 468; Murphy *v.* Gumaer, 12 Colo. App. 472; Niles First Nat. Bank *v.* Shue, 119 Mich. 560; Jones *v.* Wiesen, 50 Neb. 243; Connecticut Trust, etc., Co. *v.* Fletcher, 61 Neb. 166; White-side *v.* Chattanooga First Nat. Bank, (Tenn. Ch. 1898) 47 S. W. Rep. 1108, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300-302; Newman *v.* Aultman, (Tenn. Ch. 1899) 51 S. W. Rep. 198, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 289. See also Mahoney *v.* Barber, 67 Minn. 308; Blue Springs Min. Co. *v.* McIlvren, 97 Tenn. 225.

**290.** 1. Indemnity as Consideration for Transfer—Measure of Damage—Burden of Proof.—Wright *v.* Hardie, 88 Tex. 653.

**290.** (5) *Collateral for Pre-existing Debt* — (b) *History of Conflict* — *This Doctrine Was Subsequently Repudiated.* — See note 4.

**292.** See note 2.

**290. 4. Collateral Security — Pre-existing Debt a Valuable Consideration** — *United States.* — *Doe v. Northwestern Coal, etc., Co.*, 78 Fed. Rep. 62; *D'Esterre v. Brooklyn*, 90 Fed. Rep. 593; *Hamilton v. Fowler*, (C. C. A.) 99 Fed. Rep. 18.

*California.* — *Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co.*, 120 Cal. 621, 65 Am. St. Rep. 186.

*Colorado.* — *Murphy v. Gumaer*, 12 Colo. App. 472.

*Georgia.* — *Kaiser v. U. S. National Bank*, 99 Ga. 258; *Johnston v. Gullede*, 115 Ga. 981.

*Illinois.* — *Bemis v. Horner*, 62 Ill. App. 38, affirmed 165 Ill. 347.

*Indiana.* — *Warren v. Syfers*, 23 Ind. App. 167; *National Exch. Bank v. Berry*, 21 Ind. App. 261.

*Indian Territory.* — *Barton v. Ferguson*, 1 Indian Ter. 263.

*Kansas.* — *Birket v. Elward*, 68 Kan. 295. See also *Clafin Bank v. Rowlinson*, 2 Kan. App. 82; *Fox v. Harrison Nat. Bank*, 6 Kan. App. 682.

*Maryland.* — *Buchanan v. Mechanics' Loan, etc., Inst.*, 84 Md. 430; *Black v. Westminster First Nat. Bank*, 96 Md. 399.

*Missouri.* — It seems to be the rule in Missouri that where the note is given as collateral and no new consideration is given, the holder takes it subject to all equities existing between the parties. *Loewen v. Forsee*, 137 Mo. 29, 59 Am. St. Rep. 489; *Cox v. Sloan*, 158 Mo. 411; *Allen v. Harris*, 79 Mo. App. 490; *Dymock v. Midland Nat. Bank*, 67 Mo. App. 97.

*Montana.* — *Yellowstone Nat. Bank v. Gagnon*, 19 Mont. 402, 61 Am. St. Rep. 520.

*Nebraska.* — *Connecticut Trust, etc., Co. v. Trumbo*, (Neb. 1902) 90 N. W. Rep. 216; *Lashmett v. Prall*, (Neb. 1902) 96 N. W. Rep. 152.

*New York.* — *Brewster v. Shrader*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 480; *Petrie v. Miller*, 57 N. Y. App. Div. 17, affirmed 173 N. Y. 596 (under Negotiable Instruments Law); *Milius v. Kauffmann*, 104 N. Y. App. Div. 442 (under Negotiable Instruments Law). Compare *Sutherland v. Mead*, 80 N. Y. App. Div. 103, in which case it is stated that the rule formerly existing in New York is not changed by the Negotiable Instruments Law.

*North Carolina.* — See *Brooks v. Sullivan*, 129 N. Car. 190 (under Negotiable Instruments Law).

*Rhode Island.* — *Randall v. Rhode Island Lumber Co.*, 20 R. I. 625.

*Tennessee.* — See *Charleston Bank v. Johnston*, 105 Tenn. 521 (under Negotiable Instruments Law).

*Texas.* — *Alexander v. Lebanon Bank*, 19 Tex. Civ. App. 620; *Watzlavzick v. Oppenheimer*, (Tex. Civ. App. 1905) 85 S. W. Rep. 855; *Bruce v. Weatherford First Nat. Bank*, 25 Tex. Civ. App. 295. Compare *Van Burkleo v. Southwestern Mfg. Co.*, (Tex. Civ. App. 1896) 39 S. W. Rep. 1085; *Studebaker Bros. Mfg. Co. v. Sulphur Springs First Nat. Bank*, (Tex. Civ. App. 1897) 42 S. W. Rep. 573.

*Virginia.* — *Payne v. Zell*, 98 Va. 294 (under Negotiable Instruments Law, § 25).

*West Virginia.* — *Mercantile Bank v. Boggs*, 48 W. Va. 293, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 290-293.

*Canada.* — *Belanger v. Robert*, 21 Quebec Super. Ct. 518.

**Where the Note Has Been Fraudulently Diverted**, the mere fact that it was given as collateral security for an antecedent indebtedness is not sufficient, without more, to constitute the holder a *bona fide* holder for value. *Sutherland v. Mead*, 80 N. Y. App. Div. 103.

**Pledgee Bona Fide Holder to Amount of Debt.** — *Yellowstone Nat. Bank v. Gagnon*, 19 Mont. 402, 61 Am. St. Rep. 520.

**292. 2. Pre-existing Debt Held Not a Valuable Consideration** — *Alabama.* — *Thompson v. Maddux*, 117 Ala. 468.

In *Prim v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52, there is a dictum apparently to the contrary effect, the court citing in support thereof *Louisville Banking Co. v. Howard*, 123 Ala. 380, 82 Am. St. Rep. 126. This latter case, however, is merely to the effect that the transferee is a *bona fide* holder where an extension of time is granted in consideration of the transfer, and it would seem that this statute still adheres to the minority doctrine.

*Arkansas.* — *Bank of Commerce v. Wright*, 63 Ark. 604.

*Iowa.* — *Noteboom v. Watkins*, 103 Iowa 580; *Keokuk County State Bank v. Hall*, 106 Iowa 540.

*Michigan.* — *Maynard v. Davis*, 127 Mich. 571.

*New York.* — *Central Trust Co. v. West India Imp. Co.*, 48 N. Y. App. Div. 147, reversed 169 N. Y. 314. But see the cases cited *supra*, **290. 4.**

*North Carolina.* — *Brooks v. Sullivan*, 129 N. Car. 190 (the rule is now otherwise by statute, Laws 1899, c. 733, §§ 25-27). See also the cases cited *supra*, **290. 4.**

*North Dakota.* — *Porter v. Andrus*, 10 N. Dak. 558.

*Tennessee.* — *Atlanta Guano Co. v. Hunt*, 100 Tenn. 92, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 290-293; *Merchants, etc., Bank v. Penland*, 101 Tenn. 445; *Alabama Marble, etc., Co. v. Chattanooga Marble, etc., Co.*, (Tenn. Ch. 1896) 37 S. W. Rep. 1004; *Newman v. Aultman*, (Tenn. Ch. 1899) 51 S. W. Rep. 108, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293. But see the late case cited *supra*, **290. 4.**

*Wisconsin.* — *Burnham v. Merchants Exch. Bank*, 92 Wis. 277.

**Effect of Delivery of Unindorsed Note as Collateral.** — *Chadron Bank v. Anderson*, 6 Wyo. 518.

**Not Subject to Subsequent Equities.** — The rule in *Tennessee* would seem to be that negotiable paper transferred as collateral for an existing debt is subject to all equities then existing, but not to defenses and equities arising after the transfer. *Trigg v. Saxton*, (Tenn. Ch. 1896) 37 S. W. Rep. 567.

**294.** Argumentis Pro and Con — On the One Hand. — See note 1.

**296.** (c) Right of Holder Against Subsequent Attaching Creditor of Payee — Where Some New and Valuable Consideration Passes at the Time the Collateral Is Given. — See note 1.

**297.** Debt of Third Person. — See note 1.

(6) *Nominal Payment and Collateral Security Distinguished.* — See note 2.

**298.** (7) *Crediting Depositor with Proceeds of Discounted Paper.* — See note 1.

**299.** (8) *Accommodation Paper* — But Where Accommodation Paper Is Diverted. — See note 1.

c. BONA FIDES — (3) *Circumstances of Suspicion.* — See note 3.

**300.** Rule of American Courts. — See note 3.

**294.** 1. Reason of Doctrine that Giving as Collateral Constitutes Value. — *Bryan v. Harr*, 21 App. Cas. (D. C.) 190.

**296.** 1. New Consideration at Time of Transfer — *Alabama.* — *Louisville Banking Co. v. Howard*, 123 Ala. 380, 82 Am. St. Rep. 126.

*Arkansas.* — *Bank of Commerce v. Wright*, 63 Ark. 604.

*Colorado.* — *Murphy v. Gumaer*, 12 Colo. App. 472.

*Iowa.* — See also *Noteboom v. Watkins*, 103 Iowa 580.

*Michigan.* — *Maynard v. Davis*, 127 Mich. 571.

*Missouri.* — *Loewen v. Forsee*, 137 Mo. 29, 59 Am. St. Rep. 489; *Cox v. Sloan*, 158 Mo. 430.

*New York.* — *Central Trust Co. v. West India Imp. Co.*, 48 N. Y. App. Div. 147, reversed 169 N. Y. 314; *Kelly v. Theiss*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 311; *McCammon v. Shantz*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 476; *Milius v. Kauffmann*, 104 N. Y. App. Div. 442.

*North Dakota.* — *Red River Valley Nat. Bank v. Barnes*, 8 N. Dak. 432.

*Tennessee.* — *Atlanta Guano Co. v. Hunt*, 100 Tenn. 97, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295-296; *Merchants', etc., Bank v. Penland*, 101 Tenn. 445; *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830; *Newman v. Aultman*, (Tenn. Ch. 1899) 51 S. W. Rep. 198, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296.

*Texas.* — *Mansur, etc., Implement Co. v. Beer*, 19 Tex. Civ. App. 311.

*Wisconsin.* — *Burnham v. Merchants' Exch. Bank*, 92 Wis. 277.

*Wyoming.* — *Genesee County Sav. Bank v. Kindt*, 7 Wyo. 321.

**Express Agreement to Forbear Suit.** — See also *Loewen v. Forsee*, 137 Mo. 29, 59 Am. St. Rep. 489.

**Consideration a Question of Fact.** — *Elisberg v. Marks*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 617.

Where Collateral Originally Given to Secure a Contemporaneous Loan is afterwards applied by the holder to a subsequent loan which it was also used to secure, it being insufficient to protect both, the holder does not thereby lose his standing as a bona fide holder. *Strong v. Bowes*, 102 Wis. 542.

**297.** 1. Collateral for Debt of Third Person. — *Turle v. Sargent*, 63 Minn. 211, 56 Am. St. Rep. 475.

2. Distinction Between Nominal Payment and Collateral Security. — See also *Bradford v. Neill*, etc., Constr. Co., 76 Ill. App. 488. See also *Bour v. Pinney*, 80 Ill. App. 51; *Tyler v. Hyde*, 80 Ill. App. 123.

**298.** 1. Entry upon Books Not a Purchase for Value. — *Warman v. Akron First Nat. Bank*, 185 Ill. 65, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 298; *City Deposit Bank Co. v. Green*, (Iowa 1905) 103 N. W. Rep. 96; *Drovers' Nat. Bank v. Blue*, 110 Mich. 31, 54 Am. St. Rep. 327; *Albany County Bank v. People's Co-operative Ice Co.*, 92 N. Y. App. Div. 53, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 298; *Consolidation Nat. Bank v. Kirkland*, 99 N. Y. App. Div. 121; *Morrison v. Farmers', etc., Bank*, 9 Okla. 697. See also *Spring Brook Chemical Co. v. Dunn*, 39 N. Y. App. Div. 130; *Citizens' State Bank v. Cowles*, 180 N. Y. 346 (under Negotiable Instruments Law. Compare *Dymock v. Midland Nat. Bank*, 67 Mo. App. 97.

**N. Y. Neg. Inst. L., § 93**, seems to bear out the rule stated in the text. *Albany County Bank v. People's Co-operative Ice Co.*, 92 N. Y. App. Div. 47.

**Discounting Draft Before Acceptance** and crediting drawer with proceeds does not constitute a bank a holder for value. *Monroe First Nat. Bank v. Wills Creek Coal Co.*, 110 Mich. 447.

**Bank a Holder in Due Course Where Credit Is Drawn Out Though Subsequent Deposit Is Made.** — *Fredonia Nat. Bank v. Tommei*, 131 Mich. 674.

**Effect of Withdrawal of Deposit Before Notice to Bank.** — *Morrison v. Farmers', etc., Bank*, 9 Okla. 697.

**Sufficiency of Evidence to Show Withdrawal of Proceeds.** — *Fulton Nat. Bank v. Gosline*, 168 Mass. 86.

**State of Accounts Must Be Shown.** — *Morrison v. Farmers', etc., Bank*, 9 Okla. 697.

**299.** 1. *Accommodation Paper.* — See *Martin Bank v. Cassidy*, 103 Ky. 369, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 299.

3. *Circumstances of Suspicion.* — *Tradesmen's Nat. Bank v. Bachenheimer*, 5 Pa. Dist. 218.

**300.** 3. *American Cases Following Tenderden's Rule* — *Indiana.* — *Shirk v. Neible*, 156 Ind. 66, 83 Am. St. Rep. 150; *Warren v. Syfers*, 23 Ind. App. 167; *Pope v. Branch County Sav. Bank*, 23 Ind. App. 210.

*North Carolina.* — *Loftin v. Hill*, 131 N. Car. 105.

*South Dakota.* — *Kirby v. Berguin*, 15 S. Dak. 444.

*Vermont.* — *Limerick Nat. Bank v. Howard*,

**301.** See note 1.

**302.** Where, However, the Circumstances Are Very Strong. — See note 1.

71 N. H. 13, 93 Am. St. Rep. 489 (construing Vermont contract); Limerick Nat. Bank v. Adams, 70 Vt. 132. See also Capital Sav. Bank, etc., Co. v. Montpelier Sav. Bank, etc., Co., (Vt. 1905) 59 Atl. Rep. 827.

**Statutory Enactment in Georgia.** — Montgomery v. Hunt, 108 Ga. 240. See also Kaiser v. U. S. National Bank, 99 Ga. 258; Montgomery v. Hunt, 99 Ga. 499; Morrison v. Hart, 122 Ga. 660.

**Circumstances Sufficient to Put Holder on Notice.** — Setzer v. Deal, 135 N. Car. 428.

**301. 1. American Cases Repudiating Gill v. Cubit** — *United States*. — Atlas Nat. Bank v. Holm, (C. C. A.) 71 Fed. Rep. 489; Doe v. Northwestern Coal, etc., Co., 78 Fed. Rep. 62; Kaiser v. Brandon First Nat. Bank, (C. C. A.) 78 Fed. Rep. 281; Greenway v. William D. Orthwein Grain Co., (C. C. A.) 85 Fed. Rep. 536.

*Alabama*. — See Bunzel v. Maas, 116 Ala. 68.

*California*. — Sinkler v. Siljan, 136 Cal. 356.

*Colorado*. — Brown v. Tourtelotte, 24 Colo. 204; Solomon v. Brodie, 10 Colo. App. 353; St. Joe, etc., Consol. Min. Co. v. Aspen First Nat. Bank, 10 Colo. App. 339.

*Connecticut*. — Standard Cement Co. v. Windham Nat. Bank, 71 Conn. 668.

*District of Columbia*. — Brewer v. Slater, 18 App. Cas. (D. C.) 48.

*Illinois*. — Bemis v. Horner, 165 Ill. 347; Warman v. Akron First Nat. Bank, 185 Ill. 60; Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246; Lampson v. Illinois Trust, etc., Bank, 62 Ill. App. 371, affirmed 166 Ill. 162; Gray v. Goode, 72 Ill. App. 504; Kent v. Barnes, 72 Ill. App. 617; Kimmel v. Nagele, 84 Ill. App. 22; Weaver v. Leseure, 89 Ill. App. 628; Merritt v. Boyden, 93 Ill. App. 613, affirmed 191 Ill. 136, 85 Am. St. Rep. 246; Mann v. Merchants' L. & T. Co., 100 Ill. App. 224; Fidler v. Paxton, 101 Ill. App. 107; Dewey v. Merritt, 106 Ill. App. 156. See also Metcalf v. Draper, 98 Ill. App. 399.

*Iowa*. — Derr v. Keaough, 96 Iowa 397; Lehman v. Press, 106 Iowa 394, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301; Haggard v. Petterson, 107 Iowa 417; Central State Bank v. Spurlin, 111 Iowa 187, 82 Am. St. Rep. 511.

*Kentucky*. — McCarty v. Louisville Banking Co., 100 Ky. 4; Brown v. Boone, (Ky. 1897) 41 S. W. Rep. 18.

*Maine*. — Wing v. Ford, 89 Me. 140.

*Maryland*. — Buchanan v. Mechanics' Loan, etc., Inst., 84 Md. 430; Ebert v. Gitt, 95 Md. 186; Black v. Westminster First Nat. Bank, 96 Md. 399 (under Negotiable Instruments Law); Barroll v. Foreman, 86 Md. 675; Valley Sav. Bank v. Mercer, 97 Md. 458.

*Massachusetts*. — Massachusetts Nat. Bank v. Snow, 187 Mass. 159.

*Michigan*. — Stevens v. McLachlan, 120 Mich. 285; Drovers' Nat. Bank v. Potvin, 116 Mich. 474.

*Minnesota*. — Tourtelot v. Reed, 62 Minn. 384; Merchants' Nat. Bank v. Sullivan, 63 Minn. 468; Gale v. Birmingham, 64 Minn. 555; Collins v. McDowell 65 Minn. 110.

*Missouri*. — Leavitt v. Taylor, 163 Mo. 158; Borgess Invest. Co. v. Vette, 142 Mo. 560, 64

Am. St. Rep. 567; Wright Invest. Co. v. Friscoe Realty Co., 178 Mo. 72; Central Nat. Bank v. Pipkin, 66 Mo. App. 592; Brown v. Hoffmeyer, 74 Mo. App. 385; Wright Invest Co. v. Fillingham, 85 Mo. App. 534; Wilson v. Riddler, 92 Mo. App. 335; Corwith First State Bank v. Hammond, 104 Mo. App. 403; Indian Territory Bank v. Buchanan County First Nat. Bank, 109 Mo. App. 665.

*Nebraska*. — Cobleskill First Nat. Bank v. Pennington, 57 Neb. 406, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300-301, note 1; Crosby v. Ritchey, 56 Neb. 336.

*New Hampshire*. — Limerick Nat. Bank v. Howard, 71 N. H. 13, 93 Am. St. Rep. 489; Hallock v. Young, 72 N. H. 417.

*New Jersey*. — Blake v. Domestic Mfg. Co., 64 N. J. Eq. 480.

*New York*. — Elmira Second Nat. Bank v. Weston, 161 N. Y. 520, 76 Am. St. Rep. 283; Perth Amboy Mut. Loan, etc., Assoc. v. Chapman, 178 N. Y. 558, affirming 80 N. Y. App. Div. 556; Morgantown Second Nat. Bank v. Weston, 172 N. Y. 250; Friendship First Nat. Bank v. Weston, 25 N. Y. App. Div. 414; Blair v. Hagemeyer, 26 N. Y. App. Div. 219; Cheever v. Pittsburgh, etc., R. Co., 28 N. Y. App. Div. 81; Wright v. Bartholomew, 66 N. Y. App. Div. 357; Hay v. Jaecle, 90 Hun (N. Y.) 114; Union Nut, etc., Co. v. Doherty, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 496; Goetting v. Day, (Supm. Ct. App. T.) 87 N. Y. Supp. 510; Hamilton Nat. Bank v. Upton, 100 N. Y. App. Div. 105.

*North Dakota*. — St. Thomas First Nat. Bank v. Flath, 10 N. Dak. 281.

*Pennsylvania*. — Lancaster County Nat. Bank v. Garber, 178 Pa. St. 91; Tradesmen's Nat. Bank v. Bachenheimer, 5 Pa. Dist. 218; Snyder v. Hancock, 9 Pa. Dist. 159.

*Tennessee*. — Unaka Nat. Bank v. Butler, (Tenn. 1904) 83 S. W. Rep. 655 (under Negotiable Instruments Law).

*Texas*. — Hynes v. Winston, (Tex. Civ. App. 1897) 40 S. W. Rep. 1025; Turner v. Grobe, (Tex. Civ. App. 1898) 44 S. W. Rep. 898; Mulberger v. Morgan, (Tex. Civ. App. 1898) 47 S. W. Rep. 379; Rotan v. Maedgen, 24 Tex. Civ. App. 558. See also American Nat. Bank v. Cruger, 91 Tex. 446, (Tex. Civ. App. 1898) 44 S. W. Rep. 1057.

*Virginia*. — Greever v. Graham Bank, 99 Va. 547.

*Washington*. — McNamara v. Jose, 28 Wash. 461.

*West Virginia*. — Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., (W. Va. 1905) 50 S. E. Rep. 880.

**Rule Applies in Equity as Well as at Law.** — Borgess Invest. Co. v. Vette, 142 Mo. 560, 64 Am. St. Rep. 567.

**A Question of Fact for the Jury.** — See Salamanca First Nat. Bank v. Weston, 24 N. Y. App. Div. 230; Cheever v. Pittsburgh, etc., R. Co., 28 N. Y. App. Div. 81; Western Nat. Bank v. Flannagan, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 317; Cunningham v. Scott, 90 Hun (N. Y.) 410.

**302. 1. Circumstances Indicating Bad Faith,**

**302.** *d. NOTICE*—(1) *In General*.—See notes 2, 3.

**303.** *What Term Imports*.—See note 1.

*The Notice Need Not Particularize the Defect*.—See note 2.

—Wright Invest. Co. *v.* Fillingham, 85 Mo. App. 534. See also Randall *v.* Rhode Island Lumber Co., 20 R. I. 625; Merchants' Nat. Bank *v.* Sullivan, 63 Minn. 468.

**Circumstances Warranting Finding by Court of Bad Faith**.—Watkins *v.* Goessler, 65 Minn. 118.

**302. 2. Notice of Dishonor**.—Citizens State Bank *v.* Cowles, 180 N. Y. 346; Merchants', etc., Nat. Bank *v.* Ohio Valley Furniture Co., (W. Va. 1905) 50 S. E. Rep. 880.

**3. Fraud, Illegality, and Defect of Title**—United States.—Bowen *v.* Needles Nat. Bank, 87 Fed. Rep. 430, affirmed 94 Fed. Rep. 925; Williams *v.* Neely, (C. C. A.) 134 Fed. Rep. 1.

*Alabama*.—Alabama Nat. Bank *v.* Halsey, 109 Ala. 196.

*Arkansas*.—McTighe *v.* McKee, 70 Ark. 293.

*California*.—Hays *v.* Plummer, 126 Cal. 107, 77 Am. St. Rep. 153; Russ Lumber, etc., Co. *v.* Muscupiabe Land, etc., Co., 120 Cal. 521, 65 Am. St. Rep. 186; More *v.* Finger, 128 Cal. 313.

*Colorado*.—Kinkel *v.* Harper, 7 Colo. App. 45.

*Delaware*.—Journal Printing Co. *v.* Maxwell, 1 Penn. (Del.) 511.

*Georgia*.—Montgomery *v.* Hunt, 99 Ga. 499; Davis *v.* Mims, 111 Ga. 851.

*Illinois*.—Brueggstradt *v.* Ludwig, 184 Ill. 24; Taft *v.* Meyerscough, 197 Ill. 600; Chicago Title, etc., Co. *v.* Brugger, 196 Ill. 96; Pick *v.* Ellinger, 66 Ill. App. 570; Schneider *v.* Lebanon Dairy, etc., Co., 73 Ill. App. 612.

*Indiana*.—Pape *v.* Hartwig, 23 Ind. App. 333; Roane Iron Co. *v.* Bell-Armstead Mfg. Co., 24 Ind. App. 250; Irwin *v.* Guthrie, 28 Ind. App. 341; Fudge *v.* Marquell, (Ind. 1904) 72 N. E. Rep. 565.

*Iowa*.—Skinner *v.* Raynor, 95 Iowa 536; Haggin *v.* Garwood, 96 Iowa 683; Brown *v.* Holden, 120 Iowa 203, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 302.

*Kansas*.—National Bank *v.* Mackey, 5 Kan. App. 437; Roberts *v.* Tomlinson, 9 Kan. App. 85.

*Kentucky*.—Dunn *v.* Duncan, (Ky. 1901) 61 S. W. Rep. 1011.

*Louisiana*.—Littell's Estate, 50 La. Ann. 299.

*Maryland*.—Banks *v.* McCosker, 82 Md. 518, 51 Am. St. Rep. 478; Barroll *v.* Forman, 88 Md. 188.

*Michigan*.—Beath *v.* Chapoton, 115 Mich. 506, 69 Am. St. Rep. 589; Beath *v.* Chapoton, 124 Mich. 508.

*Minnesota*.—Wildermann *v.* Donnelly, 86 Minn. 184; Robbins *v.* Swinburne Printing Co., 91 Minn. 492, rehearing denied 91 Minn. 493.

*Missouri*.—Booher *v.* Allen, 153 Mo. 613; Burk *v.* White, 61 Mo. App. 521; Corwith First State Bank *v.* Hammond, 104 Mo. App. 403.

*Nevada*.—Swinney *v.* Patterson, 25 Nev. 411.

*New York*.—Lucker *v.* Iba, 54 N. Y. App. Div. 566; Perth Amboy Mut. Loan, etc., Assoc. *v.* Chapman, 178 N. Y. 558, affirming 80 N. Y. App. Div. 556; Citizens' State Bank *v.* Cowles, 180 N. Y. 346; Wright *v.* Bartholomew, 66 N. Y. App. Div. 357; Scott *v.* Scott, 2 N. Y. App.

Div. 240; Citizens Bank *v.* Rung Furniture Co., 76 N. Y. App. Div. 471; Sutherland *v.* Mead, 80 N. Y. App. Div. 103; Moquin *v.* Bennett, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 157; Orr *v.* South Amboy Terra Cotta Co., (Supm. Ct. App. T.) 94 N. Y. Supp. 524.

*North Dakota*.—Security Bank *v.* Kingsland, 5 N. Dak. 263; Drinkall *v.* Movius State Bank, 11 N. Dak. 10, 95 Am. St. Rep. 693; St. Thomas First Nat. Bank *v.* Flath, 10 N. Dak. 281.

*Ohio*.—Wisnogle *v.* Powers, 4 Ohio Dec. (Reprint) 232, 1 Cleve. L. Rec. 141.

*Oklahoma*.—Hagan *v.* Bigler, 5 Okla. 575.

*Pennsylvania*.—Tradesmen's Nat. Bank *v.* Bachenheimer, 5 Pa. Dist. 218; Troxell *v.* Malin, 9 Pa. Super. Ct. 483.

*Texas*.—Edmonds *v.* Iron City Nat. Bank, (Tex. Civ. App. 1895) 32 S. W. Rep. 1067; National Exch. Bank *v.* Jackson, (Tex. Civ. App. 1895) 33 S. W. Rep. 277; Blackman *v.* Houssels, (Tex. Civ. App. 1896) 35 S. W. Rep. 511; Reed *v.* Brewer, (Tex. Civ. App. 1896) 36 S. W. Rep. 99. See Turner *v.* Grobe, (Tex. Civ. App. 1898) 44 S. W. Rep. 898; Alexander *v.* Lebanon Bank, 19 Tex. Civ. App. 620; Webb *v.* Moseley, 30 Tex. Civ. App. 311; J. I. Case Threshing Mach. Co. *v.* Hall, 32 Tex. Civ. App. 214; Mayes *v.* McElroy, (Tex. Civ. App. 1904) 81 S. W. Rep. 344.

*Virginia*.—Andrews *v.* Fidelity L. & T. Co., (Va. 1904) 48 S. E. Rep. 884.

*Washington*.—McNamara *v.* Jose, 28 Wash. 461.

*West Virginia*.—Roberts *v.* Tavenner, 48 W. Va. 632; Merchants', etc., Nat. Bank *v.* Ohio Valley Furniture Co., (W. Va. 1905) 50 S. E. Rep. 880.

*Wisconsin*.—Woodward *v.* Smith, 104 Wis. 365.

*Canada*.—Bellemare *v.* Gray, 16 Quebec Super. Ct. 581.

**One of Several Holders Who Has Notice of the Want of Consideration** for notes given for the benefit of all cannot recover in an action brought in his individual interest, though the holders had no notice. Scott *v.* Scott, 2 N. Y. App. Div. 240.

**303. 1. Notice Defined**.—Haggard *v.* Peterson, 107 Iowa 417; Wright Invest. Co. *v.* Fillingham, 85 Mo. App. 534. See also Commercial Bank *v.* Maguire, 89 Minn. 394; Teutonia Ins. Co. *v.* Bussell (Tenn. Ch. 1897) 48 S. W. Rep. 703; Blackman *v.* Houssels, (Tex. Civ. App. 1896) 35 S. W. Rep. 511.

**Notice as Affected by Subsequent Statement of Interested Party**.—One who has destroyed his *prima facie* title to negotiate paper, arising from the fact of possession, by admitting that he has no title, cannot restore it by a mere verbal claim that he has since obtained title or the right to discount the paper for his own benefit. A purchaser who is put on inquiry by sufficient knowledge cannot rely upon information imparted by one whose interest it is to deceive him. Merchants', etc., Nat. Bank *v.* Ohio Valley Furniture Co., (W. Va. 1905) 50 S. E. Rep. 880.

**2. Notice Need Not Be Explicit**.—Perth Am

**303.** (2) *Express Notice*. — See note 4.

**304.** (3) *Constructive Notice* — (a) *In General*. — See note 1.

(b) *Notice Implied from Face of Paper* — *In General*. — See notes 2, 5, 6.

**305.** *The Statement of the Consideration*. — See notes 1, 2.

boy Mut. Loan, etc., Assoc. *v.* Chapman, 80 N. Y. App. Div. 556, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303, *affirmed* 178 N. Y. 558; Robbins *v.* Swinburne Printing Co., 91 Minn. 492, *rehearing denied* 91 Minn. 493. See also Citizens' Bank *v.* Rung Furniture Co., 76 N. Y. App. Div. 471; Hynes *v.* Winston, (Tex. Civ. App. 1897) 40 S. W. Rep. 1025.

**303.** 4. *Explicit Notice*. — Russ Lumber, etc., Co. *v.* Muscupiabe Land, etc., Co., 120 Cal. 521, 65 Am. St. Rep. 186; Wildermann *v.* Donnelly, 86 Minn. 184; Johnson *v.* Suburban Realty Co., 62 Mo. App. 156; Drinkall *v.* Movius State Bank, 11 N. Dak. 10, 95 Am. St. Rep. 693; Woodward *v.* Smith, 104 Wis. 365; Roberts *v.* Tavenner, 48 W. Va. 632; Merchants', etc., Nat. Bank *v.* Ohio Valley Furniture Co., (W. Va. 1905) 50 S. E. Rep. 880. See also Montgomery *v.* Hunt, 99 Ga. 499. And see Bristol Bank, etc., Co. *v.* Jonesburg Banking, etc., Co., 101 Tenn. 545.

**304.** 1. *Constructive Notice*. — Auten *v.* U. S. National Bank, 174 U. S. 125; Lamson *v.* Beard, (C. C. A.) 94 Fed. Rep. 30; Montgomery *v.* Hunt, 99 Ga. 499; Pape *v.* Hartwig, 23 Ind. App. 333; Stewart *v.* Andes, (Mo. App. 1905) 84 S. W. Rep. 1134; Wright Invest. Co. *v.* Fillingham, 85 Mo. App. 534; Stewart *v.* Andes, 110 Mo. App. 243; St. Thomas First Nat. Bank *v.* Flath, 10 N. Dak. 281; Teutonia Ins. Co. *v.* Bussell, (Tenn. Ch. 1897) 48 S. W. Rep. 703.

*Notice by Payee to Indorsee Does Not Charge Bona Fide Purchaser for Value Before Maturity*. — Briggs *v.* Cushing, 168 Mass. 71.

*Publication of Articles in Newspaper* is not alone sufficient to charge one purchasing notes with notice. Gehlbach *v.* Carlinville Nat. Bank, 83 Ill. App. 129.

**2.** *Form of Indorsement*. — Knight *v.* Finney, 59 Neb. 274; Cussen *v.* Brandt, 97 Va. 1, 75 Am. St. Rep. 762.

*Use of Word "Nonnegotiable"*. — Where the note expressly states on its face that it is non-negotiable an assignee thereof is charged with notice of every fact which inquiry of the maker would have revealed. Hines *v.* Union Nat. Bank, 69 Ill. App. 518.

*Position of Indorsement — When Not Notice*. — Marshall Nat. Bank *v.* O'Neal, 11 Tex. Civ. App. 640.

**5.** *Compare* Collins *v.* McDowell, 65 Minn. 110.

**6.** *Illustrations*. — Jones *v.* Stoddart, 8 Idaho 210; Merritt *v.* Boyden, 93 Ill. App. 613, *affirmed* 191 Ill. 136, 85 Am. St. Rep. 246; Commercial Bank *v.* Maguire, 89 Minn. 394; American Exch. Nat. Bank *v.* Ulm, 21 Mont. 440; Loftin *v.* Hill, 131 N. Car. 105; Drinkall *v.* Movius State Bank, 11 N. Dak. 10, 95 Am. St. Rep. 693; Wisconsin Yearly Meeting, etc., *v.* Babler, 115 Wis. 289. See also Norfolk Nat. Bank *v.* Nenow, 50 Neb. 429; Citizens' Bank *v.* Rung Furniture Co., 76 N. Y. App. Div. 471; Randall *v.* Rhode Island Lumber Co., 20 R. I. 625,

*Name of Maker — Whether Corporation or Partnership*. — New York Nat. Exch. Bank *v.* Crowell, 177 Pa. St. 313.

*The Fact that One of the Signers Is a Married Woman* is not sufficient to charge the holder with notice that she signed as surety merely. Venable *v.* Lippold, 102 Ga. 208; Southern Mut. Bldg., etc., Assoc. *v.* Perry, 103 Ga. 800.

*Advertising Note*. — Publishing in a newspaper an advertisement warning the public not to purchase a described promissory note, does not bind one who neither saw the advertisement nor had any knowledge of its contents. English-American L. & T. Co. *v.* Hiers, 112 Ga. 823.

*Sufficiency of Facts to Put Purchaser on Inquiry*. — Friendship First Nat. Bank *v.* Weston, 25 N. Y. App. Div. 414.

*Overdue Note*. — One taking a note after maturity is not thereby charged with notice that it was given for an illegal consideration. Wing *v.* Ford, 89 Me. 140.

*The Direction in a Bill to Pay "as Advised"* is not sufficient to put a purchaser before acceptance on notice where he has knowledge of the custom of the drawer to draw and accept such bills. American Trust, etc., Bank *v.* Gluck, 68 Minn. 129.

*Difference Between Amount in Margin and Body Not Sufficient*. — Central Nat. Bank *v.* Pipkin, 66 Mo. App. 592.

*Alteration Rendering Joint Instrument Joint and Several*. — Landauer *v.* Sioux Falls Imp. Co., 10 S. Dak. 205.

*Corporation Note*. — One who buys a corporation note unlawfully issued is not an innocent purchaser where it appears on the face of the note that the payee therein named, and the officer by whom it was executed, are the same person. Stough *v.* Ponca Mill Co., 54 Neb. 500.

*Default in Payment of First of Series of Notes* does not charge a purchaser before maturity with notice of a failure of consideration. Alexander *v.* Lebanon Bank, 19 Tex. Civ. App. 620.

*Partnership Note — Sufficiency of Notice from Name*. — Lucker *v.* Iba, 54 N. Y. App. Div. 566.

*Notice Implied from Face of Paper — Question of Fact*. — Collins *v.* McDowell, 65 Minn. 110.

**305.** 1. *Recital of Consideration*. — Barrell *v.* Lake View Land Co., 122 Cal. 129; Post *v.* Abbeville, etc., R. Co., 99 Ga. 232; McCarty *v.* Louisville Banking Co., 100 Ky. 4; Beattyville Bank *v.* Roberts, 78 S. W. Rep. 901, 25 Ky. L. Rep. 1796; Black *v.* Westminster First Nat. Bank, 96 Md. 399; Tradesmen's Nat. Bank *v.* Curtis, 167 N. Y. 194; U. S. National Bank *v.* Floss, 38 Oregon 68, 84 Am. St. Rep. 752; Fox *v.* Citizens' Bank, etc., Co., (Tenn. Ch. 1896) 37 S. W. Rep. 1102.

**2.** *Executory Consideration*. — Black *v.* Westminster First Nat. Bank, 96 Md. 399; Tradesmen's Nat. Bank *v.* Curtis, 167 N. Y. 194; U. S. National Bank *v.* Floss, 38 Oregon 68, 84 Am. St. Rep. 752; Fox *v.* Citizens' Bank, etc., Co., (Tenn. Ch. 1896) 37 S. W. Rep. 1102. *Compare* Heard *v.* Shedden, 113 Ga. 162,



**305.** Overdue Interest. — See note 3.

Paper Indorsed in Official Capacity. — See note 4.

**306.** In Missouri, However, a Different Rule Has Been Adopted. — See note 1.

So, too, Where One Takes Paper Accepted or Indorsed by Procuration. — See note 2.

(c) Extrinsic Facts as Notice — In General. — See note 3.

Notice to Agent. — See notes 4, 5.

**305. 3. Overdue Interest.** — *Cooper v. Merchants', etc.*, Nat. Bank, 25 Ind. App. 341; *U. S. National Bank v. Floss*, 38 Oregon 68, 84 Am. St. Rep. 752. Compare *Waverly First Nat. Bank v. Forsyth*, 67 Minn. 257, 64 Am. St. Rep. 415.

**Interest Payable in Instalments.** — The fact that instalments of interest are overdue on a note which provides for the payment of interest in instalments does not render the note non-negotiable. *Cooper v. Merchants', etc.*, Nat. Bank, 25 Ind. App. 341.

**That the Payment of the Previous Instalments Is Not Credited on the Note** does not prevent the purchaser of a note payable in instalments from being a *bona fide* purchaser. *McCorkle v. Miller*, 64 Mo. App. 153.

**4. Indorsement by Trustee, Syndic, or Guardian.** — *Chicago Title, etc., Co. v. Brugger*, 196 Ill. 96; *Lang v. Metzger*, 86 Ill. App. 117; *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830; *Hazeltine v. Keenan*, 54 W. Va. 603, 102 Am. St. Rep. 953, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 305; *Wisconsin Yearly Meeting, etc., v. Babler*, 115 Wis. 289. See also *Johnson v. Suburban Realty Co.*, 62 Mo. App. 156; *Orr v. South Amboy Terra Cotta Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 524. Compare *Fox v. Citizens' Bank, etc., Co.*, (Tenn. Ch. 1896) 37 S. W. Rep. 1102.

**Indorsement by Probate Judge.** — *Freeman v. Bailey*, 50 S. Car. 241.

**Inquiry Required Limited to Extent of Trustee's Authority.** — *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830.

**306. 1. Contra in Missouri.** — *Moquin v. Bennett*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 157.

**Addition of Word "Curator" to Indorsement Not Notice.** — *Mayer v. Columbia Sav. Bank*, 86 Mo. App. 108.

**2. Paper Signed or Indorsed by Procuration.** — *Eldridge v. Husted*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 177; *Security Bank v. Kingsland*, 5 N. Dak. 263. See also *Banque Ville Marie v. Mayrand*, 10 Quebec Super. Ct. 460.

**Right to Rely on Apparent Authority.** — A bank discounting negotiable paper, with knowledge that the person from whom it is taken holds it as agent only, is bound to ascertain the extent of the authority of the agent; but in the absence of knowledge of any limitation upon the authority apparently conferred by the principal, it may rely upon such apparent authority. *Merchants', etc.*, Nat. Bank *v. Ohio Valley Furniture Co.*, (W. Va. 1905) 50 S. E. Rep. 880.

**Extent to Which Power May Be Presumed.** — Absolute ownership of a thing, and agency respecting it, in the same person, are incompatible, the latter being merged in the former. Hence a negotiable note in the hands of an agent, indorsed in blank by the principal, cannot be regarded by a stranger, having notice of the agency, as both *prima facie* proof of title in the agent and a power of attorney, con-

ferring upon the agent all the power and authority that are incident to ownership; but he may deal with the agent as such, and rely upon the note as conferring apparent authority to sell it and receive payment on behalf of the principal. *Merchants', etc.*, Nat. Bank *v. Ohio Valley Furniture Co.*, (W. Va. 1905) 50 S. E. Rep. 880.

**3. General Principles as to Extrinsic Facts.** — See also *Montgomery v. Hunt*, 99 Ga. 499; *Cuyahoga Steam-Furnace Co. v. Lewis*, 4 Ohio Dec. (Reprint) 17, Cleve. L. Rec. 15. See also *Fuller v. Goodnow*, 62 Minn. 163; *Citizens' Bank v. Rung Furniture Co.*, 76 N. Y. App. Div. 471; *Randall v. Rhode Island Lumber Co.*, 20 R. I. 625.

**Extrinsic Facts Constituting Notice.** — *National Exch. Bank v. Berry*, 21 Ind. App. 261.

**4. Notice to Agent — United States.** — *Levy, etc., Mule Co. v. Kauffman*, (C. C. A.) 114 Fed. Rep. 170.

*Georgia.* — *Morris v. Georgia Loan, etc., Co.*, 109 Ga. 12.

*Iowa.* — *Brown v. Holden*, 120 Iowa 191.

*Kansas.* — *Hardy v. Newton First Nat. Bank*, 56 Kan. 493.

*North Carolina.* — See *Bresee v. Crumpton*, 121 N. Car. 122.

*Texas.* — *Hutches v. J. I. Case Threshing Mach. Co.*, (Tex. Civ. App. 1896) 35 S. W. Rep. 60. See also *American Nat. Bank v. Cruger*, 91 Tex. 446.

*Washington.* — *Haynes v. Gay*, (Wash. 1905) 79 Pac. Rep. 794.

*Wisconsin.* — *Andrews v. Robertson*, 111 Wis. 334, 87 Am. St. Rep. 870.

*Canada.* — *Commercial Bank v. Smith*, 34 Nova Scotia 426; *Commercial Bank v. Smith*, 37 Can. L. J. 472.

**Constructive Notice to Agent Not Notice for Principal.** — *Central Trust Co. v. West India Imp. Co.*, 48 N. Y. App. Div. 147, reversed 169 N. Y. 314.

**Knowledge of Attorneys Acquired by Representing One Party in Another Transaction** will not be imputed to one whom they represent in another transaction. *Union Square Bank v. Hel-ler-son*, 90 Hun (N. Y.) 262.

**Notice to Attorney.** — *Bexar Bldg., etc., Assoc. v. Lockwood*, (Tex. Civ. App. 1899) 54 S. W. Rep. 253.

**Notice to Subagent Is Notice to General Agent.** — *Webb v. Moseley*, 30 Tex. Civ. App. 311.

**Agent Acting in His Own Interest.** — The principal is affected by notice to the agent unless it appears that the agent was actually implicated in a fraud upon the principal, and it is not sufficient for the holder to show that the agent had an interest in deceiving his principal. *Commercial Bank v. Morrison*, 32 Can. Sup. Ct. 68.

**5. Notice to Officer Notice to Corporation.** — *Dickson v. Kittson*, 75 Minn. 168, 74 Am. St. Rep. 447.

**307.** Notice to Bank Officer. — See note 1.

Where the Officer Procures the Discount for His Own Benefit. — See note 3.

Partnership Transaction. — See note 4.

Public Records, Lis Pendens, Attachment, Etc. — See note 7.

**308.** Collateral Security. — See note 1.(4) *Refrainment by Holder to Make Inquiry.* — See note 2.(5) *Purchaser with Notice from Holder in Due Course.* — See note 3.**309.** Repurchase by Payee of Note Originally Subject to Defense. — See note 1.**Notice to Promoter as Notice to Corporation.** —

— New Mexico Ensor Remedy Co. v. Hobson, 4 Idaho 689.

**307. 1. Notice to Bank Officials** — *United States*. — Hatch v. Johnson L. & T. Co., 79 Fed. Rep. 828; Zeis v. Potter, (C. C. A.) 105 Fed. Rep. 671. See also Stapylton v. Teague, (C. C. A.) 85 Fed. Rep. 407.*Colorado*. — Murphy v. Gumaer, 12 Colo. App. 472.*Georgia*. — English-American L. & T. Co. v. Hiers, 112 Ga. 823; Morris v. Georgia Loan, etc., Co., 109 Ga. 12.*Iowa*. — Indiana State Bank v. Mentzer, (Iowa 1904) 100 N. W. Rep. 69.*Maryland*. — Black v. Westminster First Nat. Bank, 96 Md. 399.*Missouri*. — Central Nat. Bank v. Pipkin, 66 Mo. App. 592.*Oregon*. — Farmers' Bank v. Saling, 33 Oregon 394.*Tennessee*. — Merchants', etc., Bank v. Penland, 101 Tenn. 445.**Whether Notice to Cashier Is Notice to Bank a Question of Fact.** — National Bank v. Stever, 169 Pa. St. 574.**Relationship of Cashier to Payee Not Sufficient to Affect Bank with Notice.** — Stewart County Bank v. Adams, 96 Ga. 529.**The Fact that the Cashier Is a Stockholder in the corporation offering the notes for discount is not sufficient to charge the bank with notice.** World Mfg. Co. v. Hamilton-Kenwood Cycle Co., 123 Mich. 620; Iowa Nat. Bank v. Sherman, (S. Dak. 1903) 97 N. W. Rep. 12.**Notice to Director Not Notice to Bank.** — Boston Commercial Bank v. Heppes, 23 Pa. Co. Ct. 447, 9 Pa. Dist. 352.**Notice at Time of Discount Essential.** — Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577.**3. Discount for Officer's Benefit** — *United States*. — Holm v. Atlas Nat. Bank, (C. C. A.) 84 Fed. Rep. 119. See also Levy, etc., Mule Co. v. Kauffman, (C. C. A.) 114 Fed. Rep. 170.*Arkansas*. — See City Electric St. R. Co. v. Little Rock First Nat. Bank, 65 Ark. 543.*California*. — McDonald v. Randall, 139 Cal. 246.*Georgia*. — English-American L. & T. Co. v. Hiers, 112 Ga. 823.*Illinois*. — Metcalf v. Draper, 98 Ill. App. 399.*Kentucky*. — Davis v. Boone County Deposit Bank, 80 S. W. Rep. 161, 25 Ky. L. Rep. 2078.*Massachusetts*. — Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577.*Missouri*. — National Bank of Commerce v. Fitze, 76 Mo. App. 356.*South Dakota*. — National Bank of Commerce v. Feeney, 9 S. Dak. 550.**Where the Officer for Whose Benefit the Discount Is Made actively participates in the transaction**

the bank is affected with notice. Morris v. Georgia Loan, etc., Co., 109 Ga. 12.

**4. Notice to Partner.** — Frick v. Reynolds, 6 Okla. 638; Adams v. Ashman, 203 Pa. St. 536.**Notice to Firm Is Notice to Partner.** — Reed v. Brewer, (Tex. Civ. App. 1896) 36 S. W. Rep. 99; Vezina v. Piché, 13 Quebec Super. Ct. 213.**7. Lis Pendens, Attachment, Etc.** — Pittsburgh, etc., R. Co. v. Lynde, 55 Ohio St. 23.**308. 1.** Hamilton v. Fowler, (C. C. A.) 99 Fed. Rep. 18. See also Brewer v. Slater, 18 App. Cas. (D. C.) 48.**In Illinois** the fact that the note appears upon its face to be secured by collateral does not require inquiry on the part of the holder. Metcalf v. Draper, 98 Ill. App. 399.**2.** Doe v. Northwestern Coal, etc., Co., 78 Fed. Rep. 62; Shirk v. Neible, 156 Ind. 66, 83 Am. St. Rep. 150; Wright Invest. Co. v. Fillingham, 85 Mo. App. 534; Knowlton v. Schultz, 6 N. Dak. 417; McNamara v. Jose, 28 Wash. 461. See also Beath v. Chapoton, 124 Mich. 508.**3. Purchaser with Notice from Holder in Due Course** — *Subrogation* — *Georgia*. — Weil v. Carswell, 119 Ga. 873; Pyron v. Ruohs, 120 Ga. 1060.*Illinois*. — Central School Supply House v. Donovan, 70 Ill. App. 208.*Iowa*. — Riegel v. Ormsby, 111 Iowa 10. See also Indiana State Bank v. Mentzer, (Iowa 1904) 100 N. W. Rep. 69.*Kansas*. — McFarland v. State Bank, 7 Kan. App. 722.*Louisiana*. — Hillard v. Taylor, (La. 1905) 38 So. Rep. 594.*Maryland*. — Black v. Westminster First Nat. Bank, 96 Md. 399.*Massachusetts*. — Symonds v. Riley, (Mass. 1905) 74 N. E. Rep. 926.*Minnesota*. — Robbins v. Swinburne Printing Co., 91 Minn. 492, rehearing denied 91 Minn. 493.*Missouri*. — Langford v. Varner, 65 Mo. App. 370; Griswold v. Buechle, 72 Mo. App. 53; Crawford v. Johnson, 87 Mo. App. 478.*Nebraska*. — Jones v. Wiesen, 50 Neb. 243.*Texas*. — Malsch v. Heller, (Tex. Civ. App. 1896) 37 S. W. Rep. 384; Hollimon v. Karger, 30 Tex. Civ. App. 558.*Wisconsin*. — Andrews v. Robertson, 111 Wis. 334, 87 Am. St. Rep. 870; Prentiss v. Strand, 116 Wis. 647.**Where the Indorser Is Merely the Indorsee's Agent.** — See McFarland v. State Bank, 7 Kan. App. 722.**309. 1.** Hatch v. Johnson L. & T. Co., 79 Fed. Rep. 828; Arnau v. Florida First Nat. Bank, 36 Fla. 398; Dollarhide v. Hopkins, 72 Ill. App. 509; Booher v. Allen, 153 Mo. 613; Hoye v. Kalashian, 22 R. I. 102, citing 4 Am.

**310.** (6) *Time of Notice.* — See note 1.

Where the Contract Is Merely Executory. — See note 2.

But where He Has Already Paid a Part. — See note 3.

*c.* DUE COURSE OF TRADE — (1) *In General.* — See note 4.**311.** (2) *What Transactions Within Rule* — (a) *Transfer Without Delivery.* — See note 1.(b) *Transfer Without Indorsement.* — See note 2.

But where the Paper Is Payable to Payee or Bearer. — See note 3.

(c) *Transfer by Operation of Law.* — See note 5.**312.** 3. *Paper Transferred Overdue* — *a.* *HOLDER TAKES SUBJECT TO EQUITIES AND DEFENSES.* — See note 4.

AND ENG. ENCYC. OF LAW (2d ed.) 309; Lebcher v. Lambert, 23 Utah 1; Andrews v. Robertson, 111 Wis. 334, 87 Am. St. Rep. 870; Weil v. Carswell, 119 Ga. 873.

Where the Transferee Is One on Whose False Representations the Note Was Given, he is not protected although he receives it from a *bona fide* purchaser without notice. Wray v. Warner, 111 Iowa 64.

Repurchase by Agent of Payee Does Not Release Note from Equities. — Battersbee v. Calkins, 128 Mich. 569.

**310. 1. Notice Must Precede Completion of Purchase** — *Alabama.* — Hillard v. Taylor, (La. 1905) 38 So. Rep. 594.

*California.* — Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co., 120 Cal. 521, 65 Am. St. Rep. 186.

*Georgia.* — Heard v. Shedden, 113 Ga. 162.

*Kentucky.* — Coyne v. Anderson, (Ky. 1903) 73 S. W. Rep. 753; Beattyville Bank v. Roberts, 78 S. W. Rep. 901, 25 Ky. L. Rep. 1796.

*Maryland.* — Black v. Westminster First Nat. Bank, 96 Md. 399.

*Mississippi.* — See Gillespie v. Planters' Oil Mill, etc., Co., (Miss. 1895) 18 So. Rep. 120.

*Missouri.* — Borgess Invest. Co. v. Vette, 142 Mo. 560, 64 Am. St. Rep. 567.

*Ohio.* — Loudenback v. Lowry, 2 Ohio Cir. Dec. 422.

*Tennessee.* — Merchants', etc., Bank v. Penland, 101 Tenn. 445.

*Virginia.* — Payne v. Zell, 98 Va. 294.

*Washington.* — National Bank of Commerce v. Galland, 14 Wash. 502.

In Texas it is held that a bank, which is holder in due course, and without notice, before the maturity of the note, of the failure of the consideration, cannot recover of the maker where, after dishonor and before suit instituted, it had notice of the failure of consideration and had in its possession sufficient funds of its indorser, who was also the payee, to pay the note. State Bank v. Blakey, (Tex. Civ. App. 1904) 79 S. W. Rep. 331; Van Winkle Gin, etc., Co. v. Citizens' Bank, 89 Tex. 147.

**2. Incompleted Purchase.** — Hays v. Plummer, 126 Cal. 107, 77 Am. St. Rep. 153; Shedden v. Heard, 110 Ga. 461; Citizens' State Bank v. Cowles, 180 N. Y. 346; Benson v. Keller, 37 Oregon 120. See also Mankato First Nat. Bank v. Buchan, 79 Minn. 322.

**3. Part Payment Before Notice.** — New England Trust Co. v. New York Belting, etc., Co., 166 Mass. 42. See also Mankato First Nat. Bank v. Buchan, 79 Minn. 322; Albany County Bank v. Peoples Co-operative Ice Co., 92 N. Y.

App. Div. 47; Goetting v. Day, (Supm. Ct. App. T.) 87 N. Y. Supp. 510 (under Negotiable Instruments Law).

**4. What Constitutes Due Course of Trade.** — Burnham v. Merchants' Exch. Bank, 92 Wis. 277; St. Thomas First Nat. Bank v. Flath, 10 N. Dak. 281.

Tests as to "Due Course of Trade." — Kinkel v. Harper, 7 Colo. App. 45.

Expert Evidence as to "Due Course of Trade" Inadmissible. — Merchants', etc., Sav. Bank v. Cross, 65 Minn. 154.

Transfer by Payee Firm to New Partnership composed in part of members of the old firm does not constitute the new firm a *bona fide* holder in due course of trade. Stephens v. Olson, 62 Minn. 295.

**311. 1. Paper Not in Possession of Transferor.** — Burnham v. Merchants' Exch. Bank, 92 Wis. 277.

**2.** Lyon v. Sioux City First Nat. Bank, (C. C. A.) 85 Fed. Rep. 120; Harrisburg Trust Co. v. Shufeldt, (C. C. A.) 87 Fed. Rep. 669; More v. Finger, 128 Cal. 313; Huntington First Nat. Bank v. Henry, 156 Ind. 1; Menzie v. Smith, 63 Neb. 666; Lebcher v. Lambert, 23 Utah 1.

Indorsement under Power of Attorney Sufficient. — German-American Bank v. Carondelet Real Estate Co., 150 Mo. 570.

**3. Failure of Payee to Indorse.** — Paris Bank v. Pearson, 66 Ark. 310.

**Paper Never in Hands of Payee.** — Where the maker delivers to a third person a note payable to another person or bearer, it is not taken in the due course of business, and it is the duty of the purchaser to make inquiry. Battle v. Cushman, (Tex. Civ. App. 1896) 33 S. W. Rep. 1037.

**5. Receivers.** — Hatch v. Johnson L. & T. Co., 79 Fed. Rep. 828. See also Stapylton v. Teague, (C. C. A.) 85 Fed. Rep. 407.

**Purchaser at Execution or Attachment Sale Takes No Better Title than Attachment Defendant.** — Jones v. Wiesen, 50 Neb. 243.

**Purchaser at Judicial Sale Takes Subject to Equities.** — Neale v. Head, 133 Cal. 42.

**312. 4. Paper Transferred when Overdue — Equities and Defenses — England.** — Hedfern v. Rosenthal, 86 L. T. N. S. 855.

*Canada.* — Young v. MacNider, 25 Can. Sup. Ct. 272; MacArthur v. MacDowall, 1 N. W. Ter. 345; Clay v. Gill, 12 Manitoba 465.

*United States.* — Ferree v. New York Security, etc., Co., (C. C. A.) 74 Fed. Rep. 769; Murphy v. Arkansas, etc., Land, etc., Co., 97 Fed. Rep. 723; Zeis v. Potter, (C. C. A.) 105

**314.** See notes 1, 2, 3, 4, 5.

Fed. Rep. 671; Metropolitan Nat. Bank v. Jansen, (C. C. A.) 108 Fed. Rep. 572.

*Alabama.*—Anniston L. & T. Co. v. Stickney, 108 Ala. 146; Marshall v. Shift, 130 Ala. 548, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 312.

*California.*—Scribner v. Hanke, 116 Cal. 613; San José Ranch Co. v. San José Land, etc., Co., 132 Cal. 582.

*Delaware.*—Journal Printing Co. v. Maxwell, 1 Penn. (Del.) 511.

*District of Columbia.*—Commercial Nat. Bank v. Consumers' Brewing Co., 16 App. Cas. (D. C.) 186.

*Georgia.*—Harrell v. Citizens Banking Co., 111 Ga. 846; Johnson County Sav. Bank v. Wootten, 118 Ga. 927.

*Illinois.*—Young Men's Christian Assoc. Gymnasium Co. v. Rockford Nat. Bank, 179 Ill. 599, 70 Am. St. Rep. 135; Barker v. Barth, 192 Ill. 460; Mahon v. Gaither, 70 Ill. App. 434; Rockford Nat. Bank v. Young Men's Christian Assoc. Gymnasium Co., 78 Ill. App. 180, affirmed 179 Ill. 599, 70 Am. St. Rep. 135; Morgan v. Bean, 100 Ill. App. 114.

*Indiana.*—Wolf v. Shelton, 159 Ind. 531; Campbell v. Nixon, 25 Ind. App. 90; Huntington First Nat. Bank v. Henry, 156 Ind. 1.

*Iowa.*—Leach v. Funk, 97 Iowa 576.

*Kansas.*—Linney v. Thompson, 3 Kan. App. 718.

*Louisiana.*—State v. Sutherland, 111 La. 381.

*Maine.*—Roads v. Webb, 91 Me. 406, 64 Am. St. Rep. 246.

*Maryland.*—Avirett v. Barnhart, 86 Md. 545.

*Minnesota.*—Decorah First Nat. Bank v. Holan, 63 Minn. 525.

*Missouri.*—Loewen v. Forsee, 137 Mo. 29, 59 Am. St. Rep. 489; Booher v. Allen, 153 Mo. 613; Bishop v. Chase, 156 Mo. 158, 79 Am. St. Rep. 515; Saline Bank v. Wingfield, 68 Mo. App. 335; Gemmell v. Hueben, 71 Mo. App. 291; Williams v. Baker, 100 Mo. App. 284; Mayer v. Columbia Sav. Bank, 86 Mo. App. 108.

*Nebraska.*—Root v. Fast, 58 Neb. 498; Swan v. Craig, (Neb. 1905) 102 N. W. Rep. 471; May v. Mendota First Nat. Bank, (Neb. 1905) 104 N. W. Rep. 184.

*New Hampshire.*—Quimby v. Stoddard, 67 N. H. 283; Whittaker v. Ordway, 69 N. H. 182.

*New Mexico.*—Lee v. Field, 9 N. Mex. 435.

*New York.*—Michel v. Ellwanger, 58 N. Y. App. Div. 616; Citizens' State Bank v. Cowles, 180 N. Y. 346; Elisberg v. Marks, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 617; Mundy v. Pritchard, (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 22; Callahan v. Crow, 157 N. Y. 695.

*North Carolina.*—Battery Park Bank v. Loughran, 126 N. Car. 814; Causey v. Snow, 122 N. Car. 326.

*Ohio.*—Cuyahoga Steam-Furnace Co. v. Lewis, 4 Ohio Dec. (Reprint) 17, Cleve. L. Rec. 15; Sherman v. Peoples Invest. Co., 10 Ohio Cir. Dec. 33, 19 Ohio Cir. Ct. 26; Holden v. Lippert, 4 Ohio Cir. Dec. 527, 12 Ohio Cir. Ct. 767.

*Oklahoma.*—Keokuk Falls Imp. Co. v. Kingsland, etc., Mfg. Co., 5 Okla. 32; Hagan v. Bigler, 5 Okla. 575.

*Pennsylvania.*—Newbold v. Boon, 6 Pa. Super. Ct. 511; Loucks v. Lightner, 11 Pa. Super. Ct. 499; Haun v. Trainor, 190 Pa. St. 1; Liebig Mfg. Co. v. Hill, 43 W. N. C. (Pa.) 497.

*Rhode Island.*—Guckian v. Newbold, 23 R. I. 553, 594.

*South Carolina.*—Freeman v. Bailey, 50 S. Car. 241.

*Texas.*—Seay v. Fennell, 15 Tex. Civ. App. 261; Van Winkle Gin, etc., Co. v. Citizens' Bank, 89 Tex. 147; Ft. Dearborn Nat. Bank v. Berrott, 23 Tex. Civ. App. 662; National Exch. Bank v. Jackson, (Tex. Civ. App. 1895) 33 S. W. Rep. 277; Branch v. Traylor, (Tex. Civ. App. 1896) 36 S. W. Rep. 592; Lybrand v. Fuller, 30 Tex. Civ. App. 116.

*Utah.*—Salisbury v. Stewart, 15 Utah 308, 62 Am. St. Rep. 934; Lebcher v. Lambert, 23 Utah 1.

*Vermont.*—Compare Russell v. Rood, 72 Vt. 238.

*Virginia.*—Cussen v. Brandt, 97 Va. 1, 75 Am. St. Rep. 762.

*Washington.*—Murray v. Reed, 17 Wash. 1; Shuey v. Adair, 18 Wash. 188, 63 Am. St. Rep. 879; Gordon v. Decker, 19 Wash. 188.

**Several Notes Constituting One Transaction—Nonpayment of One Notice as to All.**—Stoy v. Bledsoe, 31 Ind. App. 643; Lybrand v. Fuller, 30 Tex. Civ. App. 116; Ferguson v. Wiede, (Tex. Civ. App. 1898) 46 S. W. Rep. 392; Harrington v. Clafin, 91 Tex. 294.

**Effect of Extension of Time by Maker.**—Where the maker of a note, by an undated indorsement thereon, extends the time of payment thereof after maturity, to a specified date, a *bona fide* purchaser of the note without notice of the time when the extension was made, or of equities and defenses between the parties, takes it free from such equities and defenses. Whitney Nat. Bank v. Cannon, 52 La. Anni. 1484.

**One Taking a Note Extended Without Authority and fraudulently transferred after its maturity takes it subject to all equities and defenses.** Merchants' L. & T. Co. v. Welter, 205 Ill. 647.

**Delivery in Escrow.**—Where a negotiable promissory note has been, before its maturity, duly indorsed and delivered in escrow, with the contract of its purchaser to convey in consideration of it certain land, and proceedings were necessary to enable the purchaser of the note to convey the land and carry out the contract for which the note was taken, the fact that such proceedings were not completed, and the contract not fulfilled, and the note not delivered by the depository to the purchaser until after it matured, will not deprive the buyer of the rights of a *bona fide* purchaser before maturity, where he has completed the transaction in ignorance of any defense. Cunningham v. Holmes, 66 Neb. 725.

**314. 1. Illustrations—Payment.**—Bishop v. Chase, 156 Mo. 158, 79 Am. St. Rep. 515; Gemmell v. Hueben, 71 Mo. App. 291; Whittaker v. Ordway, 69 N. H. 182; Michel v. Ellwanger, 58 N. Y. App. Div. 616; Branch v. Traylor, (Tex. Civ. App. 1896) 36 S. W. Rep. 592.

**315.** But Where the Transferrer Himself Had a Good Title. — See note 1.

An Exception to This Rule Is Made in the Case of the Payee. — See note 2.

**b. TO WHAT EQUITIES SUBJECT — (1) Rule that Only Inherent Equities Attach.** — See note 3.

**316.** Where There Is an Absolute Lack of Title. — See note 1.

(2) *Collateral Equities and Set-offs Allowed.* — See note 2.

**317.** But These Defenses Must Exist at the Time of the Transfer. — See note 1.

(3) *Equities Against Intermediate Holders.* — See note 2.

**318.** 4. Presumptions in Holder's Favor, and Burden of Proof — *a. IN GENERAL.* — See note 1.

**Burden of Proving Payment on Defendant.** — *Grant v. Roberts*, (Tex. Civ. App. 1897) 38 S. W. Rep. 650.

**Payment of Forged Note before Transfer of Overdue Genuine Note a Defense.** — *Leach v. Funk*, 97 Iowa 576.

**Payment Before Assignment as Defense.** — *University Bank v. Tuck*, 96 Ga. 456.

**314. 2. Fraud.** — *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511.

**Fraud in Inception.** — *Gemmell v. Hueben*, 71 Mo. App. 291.

**3. Illegality.** — *Gemmell v. Hueben*, 71 Mo. App. 291.

**4. Want of Consideration.** — *Mahon v. Gaither*, 70 Ill. App. 434; *Gemmell v. Hueben*, 71 Mo. App. 291; *Freittenberg v. Rubel*, 123 Iowa 154.

**5. Failure of Consideration.** — *National Exch. Bank v. Jackson*, (Tex. Civ. App. 1895) 33 S. W. Rep. 277.

**315. 1. Transferee Succeeds to Rights of Transferer** — *United States*. — See *McDonnell v. Burns*, (C. C. A.) 83 Fed. Rep. 866.

*California.* — *Reese v. Bell*, 138 Cal. xix, 71 Pac. Rep. 87.

*Colorado.* — *Statton v. Stone*, 15 Colo. App. 237.

*Georgia.* — *Haug v. Riley*, 101 Ga. 372.

*Illinois.* — *Central School Supply House v. Donovan*, 70 Ill. App. 208.

*Massachusetts.* — *Edgerly v. Lawson*, 176 Mass. 551.

*Missouri.* — *Langford v. Varner*, 65 Mo. App. 370; *Crawford v. Johnson*, 87 Mo. App. 478.

*Nebraska.* — *Jones v. Wiesen*, 50 Neb. 243; *Knight v. Finney*, 59 Neb. 274; *Shabata v. Johnston*, 53 Neb. 12.

*New York.* — *Beall v. General Electric Co.*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 611; *Lockner v. Holland*, (County Ct.) 81 N. Y. Supp. 730; *Jennings v. Carlucci*, (Supm. Ct. App. T.) 87 N. Y. Supp. 475.

*Ohio.* — *Sherman v. Peoples Invest. Co.*, 10 Ohio Cir. Dec. 33, 19 Ohio Cir. Ct. 26, holding that Ohio Rev. Stat., § 3173, does not change the general rule.

*Washington.* — *Donnerberg v. Oppenheimer*, 15 Wash. 290.

2. See also *Nash v. De Freville*, (1900) 2 Q. B. 72, 69 L. J. Q. B. 484, 82 L. T. N. S. 642, 48 W. R. 434.

**3. English Rule** — *California.* — *Mohr v. Byrne*, 135 Cal. 87.

*Georgia.* — See *Harrell v. Citizens' Banking Co.*, 111 Ga. 846.

*Illinois.* — See *Rockford Nat. Bank v. Young Men's Christian Assoc. Gymnasium Co.*, 78 Ill.

App. 180, affirmed 179 Ill. 599, 70 Am. St. Rep. 135.

*Missouri.* — *Bishop v. Chase*, 156 Mo. 158, 79 Am. St. Rep. 515; *Gemmell v. Hueben*, 71 Mo. App. 291; *Crawford v. Johnson*, 87 Mo. App. 478; *Caldwell v. Dismukes*, (Mo. App. 1905) 86 S. W. Rep. 270.

*Ohio.* — *Allen v. Johnson*, 11 Ohio Cir. Dec. 42.

*Pennsylvania.* — *Ludwig v. Dearborn*, 8 Pa. Dist. 69.

**Latent Equities of Third Person Not Protected.** — *Mohr v. Byrne*, 135 Cal. 87.

**Texas Statute.** — Under Sayles's Civ. Stat., art. 307, when a negotiable instrument has been assigned to a person before its maturity, for a valuable consideration, without notice of any discount or defense against it, he shall be compelled to allow only just discounts against himself, and this is true even though the actual indorsement is not made until after maturity. *Ft. Dearborn Nat. Bank v. Berrott*, 23 Tex. Civ. App. 662.

**316. 1.** *Gemmell v. Hueben*, 71 Mo. App. 291.

**2. Holder Subject to Counterclaim.** — *Shepard v. Hanson*, 10 N. Dak. 196, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 316; *Gordon v. Decker*, 19 Wash. 188. See also *Little v. Sturgis*, (Iowa 1905) 103 N. W. Rep. 205.

**Under N. Y. Code Civ. Proc., § 502.** — *Hunter v. Fiss*, 92 N. Y. App. Div. 164.

**317. 1. Equities Arising Subsequent to Transfer.** — *Murphy v. Arkansas, etc., Land, etc., Co.*, 97 Fed. Rep. 723; *State Bank v. Hayes*, 16 S. Dak. 365, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 317; *Whims v. Grove*, 1 Ohio Cir. Dec. 59.

**2. Equities Against Intermediate Parties.** — *Mohr v. Byrne*, 135 Cal. 87; *Rockford Nat. Bank v. Young Men's Christian Assoc. Gymnasium Co.*, 78 Ill. App. 180, affirmed 179 Ill. 599, 70 Am. St. Rep. 135; *Lillie v. Bates*, 2 Ohio Cir. Dec. 54; *Ludwig v. Dearborn*, 8 Pa. Dist. 69.

**318. 1. Presumption as to Title** — *United States.* — *Atlas Nat. Bank v. Holm*, (C. C. A.) 71 Fed. Rep. 489; *Doe v. Northwestern Coal, etc., Co.*, 78 Fed. Rep. 62.

*Alabama.* — *Scott v. Taul*, 115 Ala. 529; *Berney v. Steiner*, 108 Ala. 111, 54 Am. St. Rep. 144.

*Arkansas.* — *Paris Bank v. Pearson*, 66 Ark. 310; *Hays v. Dickey*, 67 Ark. 169.

*California.* — *Scribner v. Hanke*, 116 Cal. 613; *State Bank v. J. L. Mott Iron Works*, 113 Cal. 409; *Reese v. Bell*, 138 Cal. xix, 71 Pac. Rep. 87.

*Colorado*. — Reed *v.* Pueblo First Nat. Bank, 23 Colo. 380; Gumaer *v.* Sowers, 31 Colo. 164; Champion Empire Min. Co. *v.* Bird, 7 Colo. App. 523; Aspen First Nat. Bank *v.* Mineral Farm Consol. Min. Co., 17 Colo. App. 452; Byers *v.* Bellan-Price Invest. Co., 10 Colo. App. 74; Solomon *v.* Brodie, 10 Colo. App. 353; Gambrill *v.* Brown Hotel Co., 11 Colo. App. 529; Murphy *v.* Gumaer, 12 Colo. App. 472; Cowing *v.* Cloud, 16 Colo. App. 326; McKinley *v.* Beggs, 17 Colo. App. 23; King *v.* Mecklenburg, 17 Colo. App. 312; Murto *v.* Lemon, (Colo. App. 1903) 75 Pac. Rep. 160.

*Connecticut*. — New Haven Mfg. Co. *v.* New Haven Pulp, etc., Co., 76 Conn. 126; Arnold *v.* Lane, 71 Conn. 61.

*Delaware*. — Journal Printing Co. *v.* Maxwell, 1 Penn. (Del.) 511.

*District of Columbia*. — Cropley *v.* Eyster, 9 App. Cas. (D. C.) 373; Bryan *v.* Harr, 21 App. Cas. (D. C.) 190 (under Negotiable Instruments Law); Towles *v.* Tanner, 21 App. Cas. (D. C.) 530; Green *v.* Stewart, 23 App. Cas. (D. C.) 570.

*Georgia*. — Stewart County Bank *v.* Adams, 96 Ga. 529; McDonald *v.* Mayer, 97 Ga. 281; Tanner *v.* Gude, 100 Ga. 157; Walters *v.* Palmer, 110 Ga. 776; Bomar *v.* Equitable Mortg. Co., 111 Ga. 143; Parr *v.* Erickson, 115 Ga. 873; Hudson *v.* Equitable Mortg. Co., 100 Ga. 83; Loughridge *v.* Wilson, 102 Ga. 524; Kelly *v.* Keese, 102 Ga. 700; Keith *v.* Fork, 105 Ga. 511; Stanford *v.* New England Mortg. Security Co., 110 Ga. 274; Pyron *v.* Ruohs, 120 Ga. 1060. See also Johnson *v.* Cobb, 100 Ga. 139.

*Idaho*. — Yates *v.* Spofford, 7 Idaho 742, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318; Jones *v.* Stoddard, 8 Idaho 210.

*Illinois*. — Henderson *v.* Davisson, 157 Ill. 379; Warman *v.* Akron First Nat. Bank, 185 Ill. 60; Barker *v.* Barth, 192 Ill. 460; Ewen *v.* Wilbor, 208 Ill. 492; Muhlike *v.* Hegerness, 56 Ill. App. 322; Bemis *v.* Horner, 62 Ill. App. 38, affirmed 165 Ill. 347; Central School Supply House *v.* Donovan, 70 Ill. App. 208; Adams *v.* Adams, 81 Ill. App. 637, affirmed 181 Ill. 210; Gehlbach *v.* Carlinville Nat. Bank, 83 Ill. App. 129; Frorer *v.* Rowley, 84 Ill. App. 446; Wellman *v.* Highland, 87 Ill. App. 405; Arnold *v.* Mangan, 89 Ill. App. 327; Morris *v.* Calumet, etc., Canal, etc., Co., 91 Ill. App. 437, affirmed 195 Ill. 101; Merritt *v.* Boyden, 93 Ill. App. 613, affirmed 191 Ill. 136, 85 Am. St. Rep. 246; Surine *v.* Winterbotham, 96 Ill. App. 123; Metcalf *v.* Draper, 98 Ill. App. 405, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318; Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 236, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318; Ryan *v.* Illinois Trust, etc., Bank, 100 Ill. App. 251, affirmed 199 Ill. 76; Dewey *v.* Merritt, 106 Ill. App. 156; Perry State Bank *v.* Elledge, 109 Ill. App. 179.

*Indiana*. — Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69; Ayres *v.* Foster, 25 Ind. App. 99.

*Iowa*. — Tolman *v.* Janson, 106 Iowa 455; James *v.* Dalbey, 107 Iowa 463; Tolerton, etc., Co. *v.* Anglo-California Bank, 112 Iowa 706; Shaulis *v.* Buxton, 115 Iowa 425; Moody *v.* Dilleuth, 119 Iowa 372; Bennett State Bank *v.* Schloesser, 101 Iowa 571; Tullis *v.* McClary, (Iowa 1905) 104 N. W. Rep. 505. See also In-

diana State Bank *v.* Cook, (Iowa 1904) 100 N. W. Rep. 72.

*Kansas*. — Hardy *v.* Newton First Nat. Bank, 56 Kan. 493; Clark *v.* Skeen, 61 Kan. 532, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318; Kennedy *v.* Gibson, 68 Kan. 612; Scott *v.* Geiser Mfg. Co., (Kan. 1904) 78 Pac. Rep. 823; Halbert *v.* Ellwood, 1 Kan. App. 95; Challiss *v.* Woodburn, 2 Kan. App. 652; Carnahan *v.* Lloyd, 4 Kan. App. 605; Parker *v.* Gilmore, 10 Kan. App. 527.

*Kentucky*. — McCarty *v.* Louisville Banking Co., 100 Ky. 4.

*Louisiana*. — Pan Handle Nat. Bank *v.* Alexander, 49 La. Ann. 1590; Hillard *v.* Taylor, (La. 1905) 38 So. Rep. 594.

*Maine*. — Wing *v.* Ford, 89 Me. 140. See also Downing *v.* Wheeler, 93 Me. 570.

*Maryland*. — Banks *v.* McCosker, 82 Md. 518, 51 Am. St. Rep. 478; McCosker *v.* Banks, 84 Md. 292; Ebert *v.* Gitt, 95 Md. 186; Black *v.* Westminster First Nat. Bank, 96 Md. 399.

*Massachusetts*. — Holden *v.* Phoenix Rattan Co., 168 Mass. 570; Huntington *v.* Shute, 180 Mass. 371, 91 Am. St. Rep. 309. See also Williams *v.* Holt, 170 Mass. 351; Massachusetts Nat. Bank *v.* Snow, (Mass. 1905) 72 N. E. Rep. 959.

*Michigan*. — Hogan *v.* Dreifus, 121 Mich. 453; Battersbee *v.* Calkins, 128 Mich. 569; Citizens' Commercial, etc., Bank *v.* Platt, (Mich. 1903) 97 N. W. Rep. 694, 10 Detroit Leg. N. 743; Taylor *v.* Taylor, (Mich. 1904) 101 N. W. Rep. 832, 11 Detroit Leg. N. 711.

*Minnesota*. — Thorson *v.* Sauby, 68 Minn. 166; Mouat *v.* Wells, 76 Minn. 438; Richmond First Nat. Bank *v.* Schmitz, 90 Minn. 45; Huntley *v.* Hutchinson, 91 Minn. 244; Askegaard *v.* Dalen, (Minn. 1904) 101 N. W. Rep. 503.

*Mississippi*. — Gillespie *v.* Planters' Oil Mill, etc., Co., 76 Miss. 406; Kendrick *v.* Kyle, 78 Miss. 278.

*Missouri*. — Long *v.* Long, 141 Mo. 352; Borgess Invest. Co. *v.* Vette, 142 Mo. 560, 64 Am. St. Rep. 567; Johnson *v.* Suburban Realty Co., 62 Mo. App. 156; Smith *v.* Mohr, 64 Mo. App. 39; Langford *v.* Varner, 65 Mo. App. 370; Central Nat. Bank *v.* Pipkin, 66 Mo. App. 592; Adams County Bank *v.* Hainline, 67 Mo. App. 483; Hawes *v.* Mulholland, 78 Mo. App. 493; Kuch *v.* Cornett, 79 Mo. App. 574; Lewiston Sav. Bank *v.* Lawson, 87 Mo. App. 42; Ladonia Bank *v.* Friar, 88 Mo. App. 39; Lowrey *v.* Danforth, 95 Mo. App. 441; Marshall *v.* Meyers, 96 Mo. App. 643; Holmes *v.* Farris, 97 Mo. App. 305; Hugumin *v.* Hinds, 97 Mo. App. 346; Milan First Nat. Bank *v.* Wells, 98 Mo. App. 573; Catterlin *v.* Lusk, 98 Mo. App. 182.

*Montana*. — Rossiter *v.* Loeber, 18 Mont. 372; Bullard *v.* Smith, 28 Mont. 387.

*Nebraska*. — Dubuque First Nat. Bank *v.* McKibben, 50 Neb. 513; Saunders *v.* Bates, 54 Neb. 209; Sanford *v.* Litchenberger, 62 Neb. 501; Saunders *v.* Bates, 54 Neb. 209; New England L. & T. Co. *v.* Robinson, 56 Neb. 50, 71 Am. St. Rep. 657; Crosby *v.* Ritchey, 56 Neb. 336; Stockham Bank *v.* Alter, 61 Neb. 359; Ryan *v.* West, 63 Neb. 894; Michigan Mut. L. Ins. Co. *v.* Klatt, (Neb. 1902) 92 N. W. Rep. 325; Moores *v.* Jones, (Neb. 1903) 93 N. W. Rep. 1016; Gandy *v.* Bissell, (Neb. 1904)

100 N. W. Rep. 803; Haslach v. Wolf, (Neb. 1905) 103 N. W. Rep. 317.

*New Hampshire.*—Newmarket Sav. Bank v. Hanson, 67 N. H. 501.

*New Jersey.*—Allerton v. Grundy, 67 N. J. L. 55.

*New York.*—Friendship First Nat. Bank v. Weston, 25 N. Y. App. Div. 414; Zimmer v. Chew, 34 N. Y. App. Div. 508, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318; McCammon v. Shantz, 49 N. Y. App. Div. 460; Luckner v. Iba, 54 N. Y. App. Div. 566; Strickland v. Henry, 66 N. Y. App. Div. 23; Cahen v. Everitt, 67 N. Y. App. Div. 86; Mutual Loan Assoc. v. Lesser, 76 N. Y. App. Div. 614; Maccarone v. Hayes, 85 N. Y. App. Div. 41; Mitchell v. Baldwin, 88 N. Y. App. Div. 265; German-American Bank v. Cunningham, 97 N. Y. App. Div. 244; Orr v. South Amboy Terra Cotta Co., (Supm. Ct. App. T.) 45 Misc. (N. Y.) 350; Western Nat. Bank v. Flannagan, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 317; Lincoln Nat. Bank v. Butler, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 566; Mandan First Nat. Bank v. Gilmor, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 614; Wisner v. Osteyee, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 123; Harding v. Jenkins, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 398; Greaser v. Sugarman, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 799; Simpson v. Heffter, (N. Y. City Ct. Tr. T.) 42 Misc. (N. Y.) 482; Gerding v. Welch, 30 N. Y. App. Div. 623; Wisner v. Osteyee, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 704; McGrath v. Pitkin, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 862; New York Fourth Nat. Bank v. Mahon, 38 N. Y. App. Div. 198; Benedict v. Kress, 97 N. Y. App. Div. 65; Levy v. Avery, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 647; Smith v. Weston, 159 N. Y. 194; Citizens' Nat. Bank v. Weston, 162 N. Y. 113; Strickland v. Henry, 175 N. Y. 372; Perth Amboy Mut. Loan, etc., Assoc. v. Chapman, 178 N. Y. 558, affirming 80 N. Y. App. Div. 556.

*North Carolina.*—Causey v. Snow, 120 N. Car. 279; Vann v. Edwards, 128 N. Car. 425; Loftin v. Hill, 131 N. Car. 105; Beaman v. Ward, 132 N. Car. 68.

*North Dakota.*—Ravicz v. Nickells, 9 N. Dak. 536; Drinkall v. Movius State Bank, 11 N. Dak. 10, 95 Am. St. Rep. 693; St. Thomas First Nat. Bank v. Flath, 10 N. Dak. 281; Massachusetts L. & T. Co. v. Twichell, 7 N. Dak. 440; Mooney v. Williams, 9 N. Dak. 329; Brynjolfson v. Osthus, 12 N. Dak. 42.

*Ohio.*—Allen v. Johnson, 11 Ohio Cir. Dec. 42.

*Oklahoma.*—Morrison v. Farmers, etc., Bank, 9 Okla. 697; Berry v. Barton, 12 Okla. 221; Price v. Winnebago Nat. Bank, 14 Okla. 268.

*Oregon.*—Kenny v. Walker, 29 Oregon 41; J. D. Spreckels, etc., Co. v. Bender, 30 Oregon 577; Owens v. Snell, etc., Co., 29 Oregon 483.

*Pennsylvania.*—Lett v. Kunkle, 178 Pa. St. 273; Reeper v. Greevy, 5 Pa. Super. Ct. 316; Loeb v. Mellinger, 17 Lanc. L. Rev. 129, 12 Pa. Super. Ct. 592; Dexter v. Powell, 14 Pa. Super. Ct. 162; Howie v. Lewis, 14 Pa. Super. Ct. 232; Chambers v. McLean, 24 Pa. Super. Ct. 567.

*Rhode Island.*—Hutchings v. Reinhalter, 23 R. I. 518.

*South Carolina.*—Watford v. Windham, 64 S. Car. 509.

*South Dakota.*—Landauer v. Sioux Falls Imp. Co., 10 S. Dak. 205; Baker v. Warner, 16 S. Dak. 292; Iowa Nat. Bank v. Sherman, (S. Dak. 1903) 97 N. W. Rep. 12.

*Texas.*—Garrett v. Findlater, 21 Tex. Civ. App. 635; Malsch v. Heller, (Tex. Civ. App. 1896) 37 S. W. Rep. 384; Griffin v. Parrish, (Tex. Civ. App. 1896) 38 S. W. Rep. 383; Van Burkleo v. Southwestern Mfg. Co., (Tex. Civ. App. 1896) 39 S. W. Rep. 1085; Hynes v. Winston, (Tex. Civ. App. 1897) 40 S. W. Rep. 1025; Ricker Nat. Bank v. Brown, (Tex. Civ. App. 1897) 43 S. W. Rep. 909; Jones v. Butler, (Tex. Civ. App. 1897) 42 S. W. Rep. 367; Graham v. Lawrence, (Tex. Civ. App. 1898) 44 S. W. Rep. 558, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318; Brainerd v. Bute, (Tex. Civ. App. 1898) 44 S. W. Rep. 575; Griffin v. Boyd, (Tex. Civ. App. 1898) 46 S. W. Rep. 664; Mulberger v. Morgan, (Tex. Civ. App. 1898) 47 S. W. Rep. 379; Ricker Nat. Bank v. Brown, (Tex. Civ. App. 1901) 60 S. W. Rep. 810.

*Vermont.*—Buck v. Troy Aqueduct Co., 76 Vt. 75; Limerick Nat. Bank v. Adams, 70 Vt. 132.

*Virginia.*—Piedmont Bank v. Hatcher, 94 Va. 229.

*Washington.*—Brooks v. James, 16 Wash. 335; Lodge v. Lewis, 32 Wash. 191.

*West Virginia.*—Spencer Bank v. Simmons, 43 W. Va. 79; Mercantile Bank v. Boggs, 48 W. Va. 289; Tower v. Whip, 53 W. Va. 158; Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., (W. Va. 1905) 50 S. E. Rep. 880.

*Wisconsin.*—Burnham v. Merchants' Exch. Bank, 92 Wis. 277.

*Canada.*—Farmer v. Ellis, 2 Ont. L. Rep. 544; Ontario Bank v. Young, 2 Ont. L. Rep. 761; Ridgeway v. Dansereau, 17 Quebec Super. Ct. 176; Flour City Bank v. Connery, 12 Manitoba 305.

**Rebuttable Presumption.**—Cropley v. Eyster, 9 App. Cas. (D. C.) 373; Hogan v. Dreifus, 121 Mich. 453; Gerding v. Welch, 30 N. Y. App. Div. 623.

**Indorsement in Form of Guaranty—Presumption in Favor of Holder.**—Ewen v. Wilbor, 99 Ill. App. 132, affirmed 208 Ill. 492.

**On the Production of the Note Having Payments Indorsed upon It,** the holder's right to recover the balance is *prima facie* established. Romines v. McFarland, 103 Ill. App. 269.

**In Kentucky** it seems that a blank indorsement must be filled in by the holder, where his title is denied by the answer, before the presumption can arise. Barret v. Ft. Pitt Nat. Bank, (Ky. 1898) 44 S. W. Rep. 97.

**Possession by Joint Maker Prima Facie Evidence in Action Against Other Makers.**—Alderton v. Williams, 130 Mich. 626.

**Possession by Executor of Note Payable to Decedent Prima Facie Evidence.**—Tapley v. Herman, 95 Mo. App. 537.

**Presumption Obtains in Action Against Administrator of Maker.**—Poncin v. Furth, 15 Wash. 201.

**Possession by Payor Prima Facie Evidence of Ownership.**—Vann v. Edwards, 130 N. Car. 70.

**319.** See note 1.

**320.** Note Payable to Order and Not Indorsed. — See note 1.

Overdue Paper. — See note 2.

Nonnegotiable Notes. — See note 3.

b. BURDEN OF PROOF — (1) *In General.* — See note 4.

**Purchaser of Draft After Acceptance Entitled to Benefit of Presumption.** — *Morrison v. Farmers', etc.*, Bank, 9 Okla. 697.

**Possession by Attorney Presumed to Be for Client.** — *Lodge v. Lewis*, 32 Wash. 191.

**When Indorsement to Holder Is Denied.** — A presumption that the owner of negotiable paper is an innocent purchaser does not arise until he has proved the indorsement by the original payee where such indorsement is denied under oath. *James v. Blackman*, 68 Kan. 723.

**319. 1. Presumption of Transference at Date** — *Colorado.* — *St. Joe, etc.*, Consol. Min. Co. v. Aspen First Nat. Bank, 10 Colo. App. 339; *Murto v. Lemon*, (Colo. App. 1903) 75 Pac. Rep. 160, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 319.

*Georgia.* — *Parr v. Erickson*, 115 Ga. 873.

*Idaho.* — *Jones v. Stoddart*, 8 Idaho 210.

*Illinois.* — *Board v. O'Donovan*, 82 Ill. App. 163.

*Indiana.* — *Bradley v. Whicker*, 23 Ind. App. 380; *Rosenthal v. Rambo*, 28 Ind. App. 265.

*Iowa.* — See *Graff v. Adams*, 100 Iowa 481.

*Kansas.* — *Hardy v. Newton First Nat. Bank*, 56 Kan. 493; *Scott v. Geiser Mfg. Co.*, (Kan. 1904) 78 Pac. Rep. 823; *Challiss v. Woodburn*, 2 Kan. App. 652.

*Missouri.* — *Edelen v. Worth*, 69 Mo. App. 124; *Crawford v. Johnson*, 87 Mo. App. 478.

*Nebraska.* — *Dubuque First Nat. Bank v. McKibben*, 50 Neb. 513; *Haslach v. Wolf*, (Neb. 1905) 103 N. W. Rep. 317.

*North Dakota.* — *Vickery v. Burton*, 6 N. Dak. 245.

*Oregon.* — *Owens v. Snell, etc., Co.*, 29 Oregon 483.

*Texas.* — *Ricker Nat. Bank v. Brown*, (Tex. Civ. App. 1897) 43 S. W. Rep. 909.

*Wisconsin.* — *Thompson v. Brennan*, 104 Wis. 564.

**Admissibility of Evidence to Rebut Presumption.** — *Graff v. Adams*, 100 Iowa 481.

**320. 1. No Presumption from the Possession of a Note Payable to Order and Not Indorsed** — *United States.* — *Sneed v. Sabinal Min., etc., Co.*, (C. C. A.) 73 Fed. Rep. 925.

*District of Columbia.* — *Durant v. Murdock*, 3 App. Cas. (D. C.) 114.

*Idaho.* — *Yates v. Spofford*, 7 Idaho 737.

*Kentucky.* — *Turner v. Mitchell*, (Ky. 1901) 61 S. W. Rep. 468.

*Michigan.* — *St. Johns Table Co. v. Brown*, 126 Mich. 592.

*Minnesota.* — *Red River Valley Invest. Co. v. Cole*, 62 Minn. 457.

*New York.* — *Zimmer v. Chew*, 34 N. Y. App. Div. 504; *Frankenstein v. Levini*, (Supm. Ct. App. T.) 65 N. Y. Supp. 562.

*North Dakota.* — *Shepard v. Hanson*, 9 N. Dak. 251, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 319; *Shepard v. Hanson*, 10 N. Dak. 194.

*South Dakota.* — *Baker v. Warner*, 16 S. Dak. 292.

*Compare Martin v. Martin*, 174 Ill. 371, 66 Am. St. Rep. 290; *Lebcher v. Lambert*, 23 Utah 1.

**Equitable Ownership.** — Possession of a note not indorsed by one other than the payee is *prima facie* evidence that he is the equitable owner. *Frorer v. Rowley*, 84 Ill. App. 446.

**Possession by One Shown on the Face of the Note to Be a Joint Payee** merely is only *prima facie* evidence of the title there disclosed. *Frorer v. Rowley*, 84 Ill. App. 446.

**Possession by Personal Representative.** — *Shea v. Doyle*, 65 Ill. App. 471.

**Possession by Payee's Sole Legatee Prima Facie Evidence.** — *Sturgis v. Baker*, 39 Oregon 541.

**Unindorsed Note In Effects of Decedent — Ownership Not Presumed.** — *Hair v. Edwards*, 104 Mo. App. 213.

**Possession of Note Not Indorsed Prima Facie Evidence of Ownership.** — *Carnahan v. Lloyd*, 4 Kan. App. 605.

**Effect of Proof of Delivery.** — If a payee indorses the note to one person but delivers it to another, and such other brings action thereon, his possession of the note, with proof that he paid the payee therefor, will raise a presumption that the note was never delivered to the first person and is sufficient *prima facie* evidence of such other person's ownership of the note. *Menzie v. Smith*, 63 Neb. 666.

**2. Presumption as to Overdue Paper.** — *Mohr v. Byrne*, 135 Cal. 87; *Gumaer v. Sowers*, 31 Colo. 164; *Marshall v. Meyers*, 96 Mo. App. 643. *Compare MacArthur v. MacDowall*, 1 N. W. Ter. 345.

*3. Young v. Brewster*, 62 Mo. App. 628. See also *Massachusetts L. & T. Co. v. Twichell*, 7 N. Dak. 440. *Compare Madison First Nat. Bank v. Spear*, 12 S. Dak. 108.

**No Presumption of Ownership from Possession of Due Bill.** — *Robinson v. Texas Pine Land Assoc.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 620.

**4. Defendant Must Prove Illegality, Fraud, or Loss** — *Alabama.* — *Bunzel v. Maas*, 116 Ala. 68; *Slaughter v. Montgomery First Nat. Bank*, 109 Ala. 157; *Berney v. Steiner*, 108 Ala. 111, 54 Am. St. Rep. 144; *Holmes v. Ft. Gaines Bank*, 120 Ala. 493.

*California.* — *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195.

*Colorado.* — *Solomon v. Brodie*, 10 Colo. App. 353; *Murphy v. Gumaer*, 12 Colo. App. 472; *Murto v. Lemon*, (Colo. App. 1903) 75 Pac. Rep. 160.

*Delaware.* — *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511.

*Georgia.* — *Jenkins v. Jones*, 108 Ga. 556; *English-American L. & T. Co. v. Hiers*, 112 Ga. 823; *Burt v. Bennett*, 116 Ga. 430; *Hudson v. Equitable Mortg. Co.*, 100 Ga. 83; *Kelly v. Keese*, 102 Ga. 700; *Keith v. Fork*, 105 Ga. 511; *Gould v. Small*, 121 Ga. 747.



**321. (2) When the Burden Shifts — Effect of Fraud, Illegality, Etc. — In the Inception of the Instrument. — See note 1.**

*Illinois.* — *Mumford v. Tolman*, 157 Ill. 258; *Bemis v. Horner*, 165 Ill. 347; *Cuiver v. Benson*, 65 Ill. App. 107; *Gray v. Goode*, 72 Ill. App. 504; *Chicago Trust, etc., Bank v. Landfield*, 73 Ill. App. 173; *Gehlbach v. Carlinville Nat. Bank*, 83 Ill. App. 129; *Julian v. Lucas*, 84 Ill. App. 470; *Merritt v. Boyden*, 93 Ill. App. 613, *affirmed* 191 Ill. 136; *Dewey v. Merritt*, 106 Ill. App. 156; *Perry State Bank v. Elledge*, 109 Ill. App. 179.

*Indiana.* — *Ayres v. Foster*, 25 Ind. App. 99; *Pritchett v. Sheridan*, 29 Ind. App. 81; *Fudge v. Marquell*, (Ind. 1904) 72 N. E. Rep. 565.

*Iowa.* — *Graff v. Adams*, 100 Iowa 481; *Tolman v. Janson*, 106 Iowa 455; *James v. Dalbey*, 107 Iowa 463; *Shaulis v. Buxton*, 115 Iowa 425; *Moody v. Dilleuth*, 119 Iowa 372; *Smith v. Griswold*, 95 Iowa 684. See also *Bennett State Bank v. Schloesser*, 101 Iowa 571.

*Kansas.* — *Topeka Bank v. Nelson*, 58 Kan. 815, 49 Pac. Rep. 155; *Bank of Commerce v. Schlegel*, 66 Kan. 509; *Walker v. Land, etc., Co.*, 59 Kan. 777, 53 Pac. Rep. 476; *Lee v. Ryder*, 1 Kan. App. 293; *Challiss v. Woodburn*, 2 Kan. App. 652; *Overhoff v. Trusdell*, 5 Kan. App. 881, 49 Pac. Rep. 331; *Stout v. Judd*, 10 Kan. App. 579, 63 Pac. Rep. 662.

*Kentucky.* — *American Harrow Co. v. Twedde*, (Ky. 1897) 43 S. W. Rep. 409; *Powell v. Flanary*, 109 Ky. 342.

*Maine.* — *Wing v. Ford*, 89 Me. 140; *Wing v. Martel*, 95 Me. 535.

*Maryland.* — *McCosker v. Banks*, 84 Md. 292.

*Massachusetts.* — *Holden v. Phoenix Rattan Co.*, 168 Mass. 570. See also *Fulton Nat. Bank v. Gosline*, 168 Mass. 86.

*Michigan.* — *Drovers' Nat. Bank v. Blue*, 110 Mich. 31, 64 Am. St. Rep. 327; *Stevens v. McLachlan*, 120 Mich. 285; *Beath v. Chapoton*, 124 Mich. 508; *Young v. Shepard*, 124 Mich. 552.

*Mississippi.* — *Kendrick v. Kyle*, 78 Miss. 278.

*Missouri.* — *Robinson v. Powers*, 63 Mo. App. 290; *Langford v. Varner*, 65 Mo. App. 370; *Emmert v. Meyer*, 65 Mo. App. 609; *Central Nat. Bank v. Pipkin*, 66 Mo. App. 592; *Adams County Bank v. Hainline*, 67 Mo. App. 483; *Madison County Bank v. Graham*, 74 Mo. App. 251; *Kuch v. Cornett*, 79 Mo. App. 574; *Hurt v. Ford*, (Mo. 1896) 36 S. W. Rep. 671.

*Montana.* — *Bullard v. Smith*, 28 Mont. 387.

*Nebraska.* — *Dubuque First Nat. Bank v. McKibben*, 50 Neb. 513; *Crosby v. Ritchey*, 56 Neb. 336; *Stockham Bank v. Alter*, 61 Neb. 359.

*New Jersey.* — *Allerton v. Grundy*, 67 N. J. L. 55.

*New York.* — *Perth Amboy Mut. Loan, etc., Assoc. v. Chapman*, 178 N. Y. 558, *affirming* 80 N. Y. App. Div. 556; *Stifter v. Boggs*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 623; *Beall v. General Electric Co.*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 611; *Mandan First Nat. Bank v. Gilmor*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 614; *Wisner v. Osteyee*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 123; *Poess v. Twelfth Ward Bank*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 48, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 320; *Iselin v. Chemical Nat. Bank*, 6 N. Y. App. Div. 532; *McGrath*

*v. Pitkin*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 862; *Citizens' Nat. Bank v. Weston*, 162 N. Y. 113; *Ferguson v. Bien*, (Supm. Ct. App. T.) 94 N. Y. Supp. 459.

*North Carolina.* — *Vann v. Edwards*, 128 N. Car. 425, 130 N. Car. 70; *Lottin v. Hill*, 131 N. Car. 105; *Beaman v. Ward*, 132 N. Car. 68.

*North Dakota.* — *Ravicz v. Nickells*, 9 N. Dak. 536; *St. Thomas First Nat. Bank v. Flath*, 10 N. Dak. 281.

*Oklahoma.* — *Morrison v. Farmers, etc., Bank*, 9 Okla. 697; *Berry v. Barton*, 12 Okla. 221; *Price v. Winnebago Nat. Bank*, 14 Okla. 268.

*Oregon.* — *Sears v. Daly*, 43 Oregon 346.

*Texas.* — *Wright v. Hardie*, 88 Tex. 653; *Malsch v. Heller*, (Tex. Civ. App. 1896) 37 S. W. Rep. 384; *Griffin v. Parrish*, (Tex. Civ. App. 1896) 38 S. W. Rep. 383; *Ricker Nat. Bank v. Brown*, (Tex. Civ. App. 1897) 43 S. W. Rep. 909; *Graham v. Lawrence*, (Tex. Civ. App. 1898) 44 S. W. Rep. 558, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318; *Griffin v. Boyd*, (Tex. Civ. App. 1898) 46 S. W. Rep. 664; *Mulberger v. Morgan*, (Tex. Civ. App. 1898) 47 S. W. Rep. 379; *Prouty v. Musquiz*, 94 Tex. 87; *Gill v. First Nat. Bank*, (Tex. Civ. App. 1901) 61 S. W. Rep. 146. See also *Rosenfield v. Rosenthal*, (Tex. Civ. App. 1897) 39 S. W. Rep. 193.

*Canada.* — *Ridgeway v. Dansereau*, 17 Quebec Super. Ct. 176; *Bellemare v. Gray*, 16 Quebec Super. Ct. 581.

**As to Payment.** — *Ewing v. Ewing*, 82 S. W. Rep. 292, 26 Ky. L. Rep. 580; *Sarraille v. Calmon*, 142 Cal. 651; *Taylor v. Taylor*, (Mich. 1904) 101 N. W. Rep. 832, 11 Detroit Leg. N. 711; *F. S. Royster Guano Co. v. Marks*, 135 N. Car. 59; *Eastham v. Patty*, (Tex. Civ. App. 1904) 83 S. W. Rep. 885. See also *Locke v. Klunker*, 123 Cal. 231; *Flint First Nat. Bank v. Union Cent. L. Ins. Co.*, 107 Mich. 543.

**Pennsylvania Rule.** — *Gittings v. Loper*, 84 Fed. Rep. 102; *Hoopes v. Northern Nat. Bank*, (C. C. A.) 102 Fed. Rep. 448; *Earle v. Miller*, 102 Fed. Rep. 600; *Lett v. Kunkle*, 178 Pa. St. 273; *Kennett Square Nat. Bank v. Shaw*, 209 Pa. St. 313; *Hauv v. Trainer*, 190 Pa. St. 1; *Tradesmen's Nat. Bank v. Bachheimer*, 5 Pa. Dist. 218; *Southwark Nat. Bank v. Smith*, 7 Pa. Dist. 182; *Waverly First Nat. Bank v. Furman*, 4 Pa. Super. Ct. 415; *Louchheim v. Maguire*, 6 Pa. Super. Ct. 635; *Long v. Long*, 208 Pa. St. 368; *Manhattan Mercantile Co. v. Tennant*, 10 Kulp (Pa.) 21; *Ross v. McConnell*, 13 York Leg. Rec. (Pa.) 21; *Louchheim v. Maguire*, 186 Pa. St. 311. See also *Galey v. Fitzpatrick*, 171 Pa. St. 50.

**District of Columbia Rule.** — The Pennsylvania rule seems to obtain in the District of Columbia also. *St. Clair v. Conlon*, 12 App. Cas. (D. C.) 161.

In Oregon, it seems that where denials in the answer controvert the plaintiff's allegations of ownership of the note the burden is put upon the plaintiff to establish his ownership. *Overholt v. Dietz*, 43 Oregon 194; *Sturgis v. Baker*, 43 Oregon 236.

**321. 1. Burden Shifted by Proof of Fraud, Illegality, Etc. — United States.** — *Atlas Nat.*

*Bank v. Holm*, (C. C. A.) 71 Fed. Rep. 489; *Sneed v. Sabinal Min., etc., Co.*, (C. C. A.) 73 Fed. Rep. 925; *Doe v. Northwestern Coal, etc., Co.*, 78 Fed. Rep. 62.

**Alabama.**—*Alabama Nat. Bank v. Halsey*, 109 Ala. 196; *Henderson v. J. B. Brown Co.*, 125 Ala. 566. See also *Thompson v. Maddux*, 117 Ala. 468.

**California.**—*Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195; *Sinkler v. Siljan*, 136 Cal. 356.

**Colorado.**—*Harrington v. Johnson*, 7 Colo. App. 483; *Bottom v. Barton*, (Colo. App. 1904) 75 Pac. Rep. 153. See also *Brown v. Tourtelotte*, 24 Colo. 204.

**District of Columbia.**—*Cropley v. Eyster*, 9 App. Cas. (D. C.) 373.

**Illinois.**—*Hide, etc., Nat. Bank v. Alexander*, 184 Ill. 419, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321; *Barker v. Barth*, 192 Ill. 460; *Chicago Title, etc., Co. v. Brugger*, 196 Ill. 96; *Taft v. Myerscough*, 197 Ill. 600; *Merchants' L. & T. Co. v. Welter*, 205 Ill. 647; *Hide, etc., Nat. Bank v. Alexander*, 82 Ill. App. 387, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321, affirmed 184 Ill. 416; *Mann v. Merchants' L. & T. Co.*, 100 Ill. App. 228, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321. See also *Metcalfe v. Draper*, 98 Ill. App. 402, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321.

**Indiana.**—*Shirk v. Neible*, 156 Ind. 66, 83 Am. St. Rep. 150; *Kniss v. Holbrook*, 16 Ind. App. 229; *Pope v. Branch County Sav. Bank*, 23 Ind. App. 210; *Bradley v. Whicker*, 23 Ind. App. 380; *Ray v. Baker*, (Ind. 1905) 74 N. E. Rep. 619.

**Iowa.**—*Skinner v. Raynor*, 95 Iowa 536; *Bennett State Bank v. Schlosser*, 101 Iowa 571; *State Bank v. Gates*, 114 Iowa 323; *Indiana State Bank v. Cook*, (Iowa 1904) 100 N. W. Rep. 72; *Keegan v. Rock*, (Iowa 1905) 102 N. W. Rep. 805.

**Kansas.**—*Bradbury v. Van Pelt*, 4 Kan. App. 571; *Kennedy v. Gibson*, 68 Kan. 612.

**Kentucky.**—*Neale v. Neale*, (Ky. 1896) 36 S. W. Rep. 526.

**Maine.**—*Wing v. Ford*, 89 Me. 140; *Wing v. Martel*, 95 Me. 535.

**Maryland.**—*Banks v. McCosker*, 82 Md. 518, 51 Am. St. Rep. 478; *McCosker v. Banks*, 84 Md. 292; *Ebert v. Gitt*, 95 Md. 186; *Valley Sav. Bank v. Mercer*, 97 Md. 458.

**Massachusetts.**—*Holden v. Phoenix Rattan Co.*, 168 Mass. 570; *Savage v. Goldsmith*, 181 Mass. 420; *J. Regester's Sons Co. v. Reed*, 185 Mass. 226.

**Michigan.**—*Drovers' Nat. Bank v. Blue*, 110 Mich. 31, 64 Am. St. Rep. 327; *Fredonia Nat. Bank v. Tommei*, 131 Mich. 674; *Glines v. State Sav. Bank*, 132 Mich. 638.

**Minnesota.**—*Decorah First Nat. Bank v. Holan*, 63 Minn. 525; *Thorson v. Sauby*, 68 Minn. 166; *De Kalb Nat. Bank v. Thompson*, 79 Minn. 151; *Askegaard v. Dalen*, (Minn. 1904) 101 N. W. Rep. 503; *Robbins v. Swinburne Printing Co.*, 91 Minn. 492, rehearing denied 91 Minn. 493; *Mendenhall v. Ulrich*, (Minn. 1905) 101 N. W. Rep. 1057.

**Missouri.**—*Johnson v. Suburban Realty Co.*, 62 Mo. App. 156; *Smith v. Mohr*, 64 Mo. App. 39; *Goodwin v. Buhler*, 65 Mo. App. 288; *Lang-*

*ford v. Varner*, 65 Mo. App. 370; *Ganz v. Weisenberger*, 66 Mo. App. 110; *Adams County Bank v. Hainline*, 67 Mo. App. 483; *American Valley Co. v. Wyman*, 92 Mo. App. 294; *Hahn v. Bradley*, 92 Mo. App. 399; *Corwith First State Bank v. Hammond*, 104 Mo. App. 403; *Stewart v. Andes*, (Mo. App. 1905) 84 S. W. Rep. 1134.

**Montana.**—*Rossiter v. Loeber*, 18 Mont. 372; *Harrington v. Butte, etc., Min. Co.*, 27 Mont. 1.

**Nebraska.**—*National Bank v. Miller*, 51 Neb. 156; *Thompson v. West*, 59 Neb. 677; *Payne v. Liebee*, (Neb. 1902) 91 N. W. Rep. 851; *Bovier v. McCarthy*, (Neb. 1903) 94 N. W. Rep. 965; *Chapman v. Snyder*, (Neb. 1901) 95 N. W. Rep. 346.

**New Hampshire.**—*Hallock v. Young*, 72 N. H. 417.

**New York.**—*Brown v. James*, 2 N. Y. App. Div. 105; *Douai v. Lutjens*, 21 N. Y. App. Div. 254; *Blair v. Hagemeyer*, 26 N. Y. App. Div. 219; *McCammon v. Shantz*, 41 N. Y. App. Div. 460; *Lucker v. Iba*, 54 N. Y. App. Div. 566; *Elmira Second Nat. Bank v. Weston*, 62 N. Y. App. Div. 621; *Strickland v. Henry*, 66 N. Y. App. Div. 23; *Wright v. Bartholomew*, 66 N. Y. App. Div. 357; *Cahen v. Everitt*, 67 N. Y. App. Div. 86; *Sutherland v. Mead*, 80 N. Y. App. Div. 103; *Mitchell v. Baldwin*, 88 N. Y. App. Div. 265; *German-American Bank v. Cunningham*, 97 N. Y. App. Div. 244; *Orr v. South Amboy Terra Cotta Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 350; *Stifter v. Boggs*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 623; *Mandan First Nat. Bank v. Gilmor*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 614; *Mundy v. Prichard*, (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 22; *Moquin v. Bennett*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 157; *Hall v. Whiton*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 756; *Simpson v. Hefter*, (N. Y. City Ct. Tr. T.) 42 Misc. (N. Y.) 482; *Wisner v. Osteyee*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 704, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 123; *Benedict v. Kress*, 97 N. Y. App. Div. 65; *Consolidation Nat. Bank v. Kirkland*, 99 N. Y. App. Div. 121; *Smith v. Weston*, 159 N. Y. 194; *Citizens' Nat. Bank v. Weston*, 162 N. Y. 113; *Morgantown Second Nat. Bank v. Weston*, 172 N. Y. 250; *Perth Amboy Mut. Loan, etc., Assoc. v. Chapman*, 178 N. Y. 558, affirming 80 N. Y. App. Div. 556; *Orr v. South Amboy Terra Cotta Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 350.

**North Carolina.**—*Loftin v. Hill*, 131 N. Car. 105.

**North Dakota.**—*Vickery v. Burton*, 6 N. Dak. 245; *Knowlton v. Schultz*, 6 N. Dak. 417; *Peckham v. Van Bergen*, 10 N. Dak. 43; *Porter v. Andrus*, 10 N. Dak. 558; *Massachusetts L. & T. Co. v. Twichell*, 7 N. Dak. 440; *Mooney v. Williams*, 9 N. Dak. 329; *St. Thomas First Nat. Bank v. Flath*, 10 N. Dak. 281.

**Ohio.**—*Allen v. Johnson*, 11 Ohio Cir. Dec. 42.

**Oregon.**—*Owens v. Snell, etc., Co.*, 29 Oregon 483.

**Pennsylvania.**—*Dutton's Estate*, 205 Pa. St. 244; *Reeper v. Greevy*, 5 Pa. Super. Ct. 316; *Loeb v. Mellinger*, 17 Lanc. L. Rev. 139, 12 Pa. Super. Ct. 592.

**South Dakota.**—*Kirby v. Berguin*, 15 S. Dak. 444; *Landauer v. Sioux Falls Imp. Co.*, 10 S.

- 323.** In a Subsequent Negotiation. — See note 1.  
 The Reason of This Rule. — See note 2.  
 Not Sufficient to Prove Value Merely. — See notes 3, 4, 5.  
 Burden Shifted to Defendant to Show Notice of Specific Invalidity. — See note 6.
- 324.** Suspicion of Fraud. — See note 1.  
 Paper Diverted. — See note 3.  
 Effect of Proof of Gross Negligence. — See note 5.
- 325.** Effect of Proof of Want or Failure of Consideration. — See note 1.

Dak. 205; Jamison v. McFarland, 10 S. Dak. 574; McGill v. Young, 16 S. Dak. 360.

Tennessee. — Whiteside v. Chattanooga First Nat. Bank, (Tenn. Ch. 1898) 47 S. W. Rep. 1108.

Texas. — Mulberger v. Morgan, (Tex. Civ. App. 1896) 34 S. W. Rep. 148; Malsch v. Heller, (Tex. Civ. App. 1896) 37 S. W. Rep. 384; Hart v. West, 91 Tex. 184; Mulberger v. Morgan, (Tex. Civ. App. 1898) 47 S. W. Rep. 738; Ricker Nat. Bank v. Brown, (Tex. Civ. App. 1901) 60 S. W. Rep. 810; People's Nat. Bank v. Mulkey, (Tex. Civ. App. 1901) 61 S. W. Rep. 528.

Vermont. — Limerick Nat. Bank v. Adams, 70 Vt. 132; Capital Sav. Bank, etc., Co. v. Montpelier Sav. Bank, etc., Co., (Vt. 1905) 59 Atl. Rep. 827.

Virginia. — Piedmont Bank v. Hatcher, 94 Va. 229.

Wisconsin. — Burnham v. Merchants' Exch. Bank, 92 Wis. 277; Thompson v. Brennan, 104 Wis. 564.

Canada. — MacArthur v. MacDowall, 1 N. W. Ter. 345; Farmer v. Ellis, 2 Ont. L. Rep. 544; Flour City Bank v. Connery, 12 Manitoba 305.

Under the Negotiable Instruments Law, § 98, when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course. Lucker v. Iba, 54 N. Y. App. Div. 566.

Sufficiency of Evidence. — Warman v. Akron First Nat. Bank, 185 Ill. 60.

Sufficiency of Evidence to Show Duress. — Overstreet v. Dunlap, 56 Ill. App. 486.

Fraudulent Diversion. — Wisner v. Osteyee, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 704; Sutherland v. Mead, 80 N. Y. App. Div. 103; German-American Bank v. Cunningham, 97 N. Y. App. Div. 244; Berman v. Zuckerman, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 744; McCammon v. Shantz, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 476; Hide, etc., Nat. Bank v. Alexander, 184 Ill. 416; McCammon v. Shantz, 49 N. Y. App. Div. 460. See also Roane Iron Co. v. Bell-Armstead Mfg. Co., 24 Ind. App. 250; Shattuck v. Eldredge, 173 Mass. 165.

Partnership Note in Fraud of Firm. — Smith v. Weston, 159 N. Y. 194.

**323.** 1. Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246; Mann v. Merchants' L. & T. Co., 100 Ill. App. 228, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321; Atlas Nat. Bank v. Holm, (C. C. A.) 71 Fed. Rep. 489.

2. Mann v. Merchants' L. & T. Co., 100 Ill. App. 228, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321.

3. Mann v. Merchants' L. & T. Co., 100 Ill. App. 228, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321; McCammon v. Shantz, 49 N. Y. App. Div. 460; Cahen v. Everitt, 67 N. Y. App. Div. 86; Citizens' Bank v. Rung Furniture Co., 76 N. Y. App. Div. 471; Smith v. Weston, 159 N. Y. 194; Kirby v. Berguin, 15 S. Dak. 444.

4. Circumstances of Taking Must Be Shown. — Mann v. Merchants' L. & T. Co., 100 Ill. App. 228, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321; McCammon v. Shantz, 49 N. Y. App. Div. 460; Cahen v. Everitt, 67 N. Y. App. Div. 86.

5. Taking Before Maturity for Value Prima Facie Bona Fide. — Mann v. Merchants' L. & T. Co., 100 Ill. App. 228, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321; St. Thomas First Nat. Bank v. Flath, 10 N. Dak. 281.

6. Defendant Must Prove that Plaintiff Had Notice of Specific Invalidity. — Sinkler v. Siljan, 136 Cal. 356; Mann v. Merchants' L. & T. Co., 100 Ill. App. 228, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321; Fredonia Nat. Bank v. Tommei, 131 Mich. 674; Langford v. Varner, 65 Mo. App. 370; Prouty v. Musquiz, 94 Tex. 87.

**324.** 1. Burden Shifted by Suspicious Circumstances in the Origin. — Owens v. Snell, etc., Co., 29 Oregon 483; Piedmont Bank v. Hatcher, 94 Va. 229.

3. Schneider v. Lebanon Dairy, etc., Co., 73 Ill. App. 612.

5. Presumption of Title Not Overcome by Proof of Gross Negligence. — Lampson v. Illinois Trust, etc., Bank, 62 Ill. App. 371, affirmed 166 Ill. 162; Tradesmen's Nat. Bank v. Bacheneheimer, 5 Pa. Dist. 218.

**325.** 1. Proof of Want or Failure of Consideration Does Not Shift the Burden — Colorado. — McKinley v. Beggs, 17 Colo. App. 23.

Georgia. — Jenkins v. Jones, 108 Ga. 556.

Indiana. — People's State Bank v. Ruxer, 31 Ind. App. 245.

Iowa. — Freittenberg v. Rubel, 123 Iowa 154. Kentucky. — McCarty v. Louisville Banking Co., 100 Ky. 4.

Massachusetts. — Holden v. Phoenix Rattan Co., 168 Mass. 570.

Missouri. — Hahn v. Bradley, 92 Mo. App. 399.

Nebraska. — National Bank v. Miller, 51 Neb. 156; Knight v. Finney, 59 Neb. 274; Chapman v. Snyder, (Neb. 1901) 95 N. W. Rep. 346.

New York. — Mitchell v. Baldwin, 88 N. Y. App. Div. 265.

Pennsylvania. — Historical Pub. Co. v. Hart-ranft, 3 Pa. Super. Ct. 59; Boston Commercial Bank v. Heppes, 23 Pa. Co. Ct. 447, 9 Pa. Dist. 352. See also Snyder v. Hancock, 9 Pa. Dist. 159.

- 325. 5. Effect of Fraud, Duress, or Misappropriation on Holder's Rights —**  
**a. FRAUD IS A PERSONAL DEFENSE.** — See notes 3, 4.  
**326. Fraud upon the Payee.** — See note 2.  
**327. b. INSTRUMENTS PROCURED BY DECEIT AND MISREPRESENTATION — (1) General Rule —** When Held a Defense Against a Bona Fide Holder. — See note 1.

View that Fraudulent Procurement No Defense Against Bona Fide Holder. — See note 2.

(2) *Effect of Negligence in Signing.* — See note 3.

*Texas.* — *Malsch v. Heller*, (Tex. Civ. App. 1896) 37 S. W. Rep. 384; *Mulberger v. Morgan*, (Tex. Civ. App. 1898) 47 S. W. Rep. 738. See also *Graham v. Lawrence*, (Tex. Civ. App. 1898) 44 S. W. Rep. 558.

**Burden Not Shifted by Neglect of Plaintiff to Avail Himself of Presumption.** — *Durland v. Durland*, 153 N. Y. 67.

**325. 3. Between Immediate Parties Fraud Is a Defense.** — *Farkas v. Monk*, 119 Ga. 515; *Smith v. McDonald*, (Mich. 1905) 102 N. W. Rep. 738; *Swinney v. Patterson*, 25 Nev. 411; *Mueller v. Buch*, (N. J. 1904) 58 Atl. Rep. 1092, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 325; *Ford v. Oliphant*, (Tex. Civ. App. 1895) 32 S. W. Rep. 437; *Wilcox v. Tennant*, 13 Tex. Civ. App. 220; *Hall v. Grayson County Nat. Bank*, (Tex. Civ. App. 1904) 81 S. W. Rep. 762; *Macpherson v. McLean*, 34 N. Bruns. 361. See also *American Nat. Bank v. Cruger*, 91 Tex. 446.

**Fraud in Procurement of Execution of Notes Given in Renewal of Valid Note No Defense.** — *Farmers', etc., Bank v. Richards*, (Cal. 1898) 53 Pac. Rep. 439.

**4. Between Remote Parties Fraud Is Not a Defense — Alabama.** — *Bunzel v. Maas*, 116 Ala. 68.

*Arkansas.* — *Lanier v. Union Mortg., etc., Co.*, 64 Ark. 39.

*Delaware.* — *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511.

*Georgia.* — *Highsmith v. Martin*, 99 Ga. 92; *Taylor v. Cribb*, 100 Ga. 94.

*Illinois.* — *Gray v. Goode*, 72 Ill. App. 504; *Metcalf v. Draper*, 98 Ill. App. 399; *Mann v. Merchants' L. & T. Co.*, 100 Ill. App. 224.

*Indiana.* — *People's State Bank v. Ruxer*, 31 Ind. App. 245.

*Kansas.* — *Kennedy v. Gibson*, 68 Kan. 612.

*Kentucky.* — *Greer v. Bently*, (Ky. 1897) 43 S. W. Rep. 219; *Beattyville Bank v. Roberts*, 78 S. W. Rep. 901, 25 Ky. L. Rep. 1796.

*Massachusetts.* — *White v. Dodge*, 187 Mass. 449.

*Missouri.* — *Emmert v. Meyer*, 65 Mo. App. 609; *Adams County Bank v. Hainline*, 67 Mo. App. 483.

*New York.* — *Ft. Worth First Nat. Bank v. American Exch. Nat. Bank*, 170 N. Y. 88.

*North Dakota.* — *Mooney v. Williams*, 9 N. Dak. 329.

*Ohio.* — *Wisnogle v. Powers*, 4 Ohio Dec. (Reprint) 232, 1 Cleve. L. Rep. 141.

*Pennsylvania.* — *Lancaster County Nat. Bank v. Garber*, 1-8 Pa. St. 91; *Tradesmen's Nat. Bank v. Bachenheimer*, 5 Pa. Dist. 218.

*Texas.* — *Ford v. Oliphant*, (Tex. Civ. App. 1895) 32 S. W. Rep. 437.

**Fraud of a Syndicate** does not relieve a member from liability to a bona fide holder for the maker's share in the syndicate property. *Trades-*

*men's Nat. Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830.

**Holder with Notice.** — *Roberts v. Tomlinson*, 9 Kan. App. 85; *Ganz v. Weisenberger*, 66 Mo. App. 110; *Phillips v. Allen*, 90 N. Y. App. Div. 531; *Mayes v. McElroy*, (Tex. Civ. App. 1904) 81 S. W. Rep. 344.

**326. 2. Beath v. Chapoton, 115 Mich. 506, 69 Am. St. Rep. 589.**

**327. 1. Misrepresentations as a Defense — England.** — *Lewis v. Clay*, 67 L. J. Q. B. 224, 77 L. T. N. S. 653, 46 W. R. 319.

*Canada.* — *Alloway v. Hrabi*, 14 Manitoba 627, per *Perdue, J.*; *Banque Jacques-Cartier v. Lalonde*, 20 Quebec Super. Ct. 43.

*Georgia.* — See *Hansford v. Freeman*, 99 Ga. 376.

*Indiana.* — *Lindley v. Hofman*, 22 Ind. App. 239, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 346; *People's State Bank v. Ruxer*, 31 Ind. App. 245; *Home Nat. Bank v. Hill*, (Ind. 1905) 74 N. E. Rep. 1086, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 327.

*Michigan.* — *Beard v. Hill*, 131 Mich. 246.

*Minnesota.* — See *Decorah First Nat. Bank v. Holan*, 63 Minn. 525.

*Nebraska.* — *Shenandoah Nat. Bank v. Gravatte*, (Neb. 1903) 95 N. W. Rep. 694.

*New York.* — *Hutkoff v. Moje*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 632.

*Texas.* — *Wootters v. Haden*, (Tex. Civ. App. 1898) 45 S. W. Rep. 755.

*Wisconsin.* — *Keller v. Ruppold*, 115 Wis. 636, 95 Am. St. Rep. 974; *Prentiss v. Strand*, 116 Wis. 647.

**False Representations as to the Liability of the Indorser in the Eyes of the Law** being merely an expression of opinion upon the question of law are not a defense. *Court Valhalla, No. 16, etc., v. Olson*, 14 Colo. App. 243.

**Fraud a Question of Fact.** — *Walton v. Mason*, 109 Mich. 486.

**Sufficiency of Evidence.** — *Texas City Imp. Co. v. Pollard*, (Tex. Civ. App. 1896) 35 S. W. Rep. 860.

**2. Defendant Liable Whether Negligent or Not.** — See *Highsmith v. Martin*, 99 Ga. 92; *Tower v. Whip*, 53 W. Va. 158. See also *Lancaster County Nat. Bank v. Garber*, 178 Pa. St. 91; *Adams v. Ashman*, 203 Pa. St. 536.

**3. Holder May Recover Where Signer Negligent — Alabama.** — See also *Orr v. Sparkman*, 120 Ala. 9.

*Illinois.* — *Muhlke v. Hegerness*, 56 Ill. App. 322; *Yeomans v. Lane*, 101 Ill. App. 228.

*Indiana.* — *Home Nat. Bank v. Hill*, (Ind. 1905) 74 N. E. Rep. 1086, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 327. See *Lindley v. Hofman*, 22 Ind. App. 237. See also *Pape v. Hartwig*, 23 Ind. App. 333.

**328.** (3) *What Amounts to Negligence — Instances — What Is Negligence Depends on Circumstances.* — See note 1.

Failure to Read or Have Read. — See note 3.

**329.** Aged, Ignorant, and Illiterate Persons. — See notes 1, 2.

(4) *Statutes.* — See note 3.

**331.** c. INSTRUMENTS NEVER DELIVERED — A Contrary Rule. — See note 3.

**332.** Negligence of the Defendant. — See note 1.

d. INSTRUMENTS FRAUDULENTLY ALTERED. — See note 2.

Effect of Drawer's Negligence — Recovery Allowed. — See note 3.

*Kentucky.* — Clark v. Tanner, 100 Ky. 275.  
*New Hampshire.* — Woodward v. Bixby, 68 N. H. 219.

*North Dakota.* — Porter v. Hardy, 10 N. Dak. 551.

*Oregon.* — Brown v. Feldwert, (Oregon 1905) 80 Pac. Rep. 414.

*Wisconsin.* — Keller v. Schmidt, 104 Wis. 596.

**Negligence Not Superinduced by Fraud.** — Martin v. Smith, 116 Ala. 639.

**Missouri — Fraud in Procurement Not a Defense Against Holder in Due Course.** — Clark v. Porter, 90 Mo. App. 143; Brown v. Hoffelmeyer, 74 Mo. App. 385.

**328.** 1. Home Nat. Bank v. Hill, (Ind. 1905) 74 N. E. Rep. 1086; Green v. Wilkie, 98 Iowa 74, 60 Am. St. Rep. 184; Woodward v. Bixby, 68 N. H. 219; Hutkoff v. Moje, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 632.

**Negligence a Question of Fact for Court Where Issue Is Tried Without Jury** — Kingman v. Reinemer, 58 Ill. App. 173, affirmed 166 Ill. 208.

**Negligence a Question of Fact under Minn. Gen. Stat. 1894, § 2239.** — Decorah First Nat. Bank v. Holan, 63 Minn. 525.

**3. Failing to Read or Have Read — Alabama.** — Orr v. Sparkman, 120 Ala. 9.

*Georgia.* — Boynton v. McDaniel, 97 Ga. 400; Highsmith v. Martin, 99 Ga. 92; Walton Guano Co. v. Copelan, 112 Ga. 319.

*Illinois.* — Exchange Nat. Bank v. Plate, 69 Ill. App. 489; Yeomans v. Lane, 101 Ill. App. 228; Wilcox v. Tetherington, 103 Ill. App. 404.

*Indiana.* — See Lindley v. Hofman, 22 Ind. App. 237. See also People's State Bank v. Ruxer, 31 Ind. App. 245.

*Missouri.* — Catterlin v. Lusk, 98 Mo. App. 182.

*Oregon.* — Brown v. Feldwert, (Oregon 1905) 80 Pac. Rep. 414.

*Pennsylvania.* — Manhattan Mercantile Co. v. Jones, 9 Kulp (Pa.) 452; Howie v. Lewis, 14 Pa. Super. Ct. 232.

*Wisconsin.* — New Bank v. Kleiner, 112 Wis. 287.

**Evidence Sufficient to Sustain Finding that Maker Understood Note.** — Warnock v. Itawis, (Wash. 1905) 80 Pac. Rep. 297.

**329.** 1. **Infirm, Illiterate, and Ignorant Persons.** — Gore v. Malsby, 110 Ga. 893; Muhlke v. Hegerness, 56 Ill. App. 322; Ray v. Baker, (Ind. 1905) 74 N. E. Rep. 619; Home Nat. Bank v. Hill, (Ind. 1905) 74 N. E. Rep. 1086; Green v. Wilkie, 98 Iowa 74, 60 Am. St. Rep. 184; Beard v. Hill, 131 Mich. 246; Chase v. Milroy, 16 Mont. Co. Rep. (Pa.) 43.

**"Misplaced Confidence" Not Essential Where Fraud Is Proven.** — Shenandoah Nat. Bank v. Gravatte, (Neb. 1903) 95 N. W. Rep. 694.

**2. Failure to Call on Bystanders.** — Lindley v. Hofman, 22 Ind. App. 237; Keller v. Schmidt, 104 Wis. 596.

**3. Illinois Statute — Nature of the Fraud.** — Metcalf v. Draper, 98 Ill. App. 399; Gehlbach v. Carlinville Nat. Bank, 83 Ill. App. 129; Gray v. Goode, 72 Ill. App. 504; Mann v. Merchants' L. & T. Co., 100 Ill. App. 224; Yeomans v. Lane, 101 Ill. App. 228.

**Person Signing Negligently Not Protected.** — Stone v. Billings, 167 Ill. 170; Yeomans v. Lane, 101 Ill. App. 228; Wilcox v. Tetherington, 103 Ill. App. 404; Exchange Nat. Bank v. Plate, 69 Ill. App. 489.

**Payee Ignorant of the Fraud May Recover.** — McCrea v. Murphy, 90 Ill. App. 434.

**Georgia Statute.** — Jenkins v. Jones, 108 Ga. 556.

**Same — Nature of the Fraud.** — Walters v. Palmer, 110 Ga. 776; Martina v. Muhlke, 186 Ill. 327.

**Minnesota Statute.** — Determination of questions of fraud and negligence for the jury, under Minn. Gen. Stat. 1894, § 2239. O'Gara v. Hansing, 88 Minn. 401.

**331.** 3. **Delivery Essential to Validity.** — Salley v. Terrill, 95 Me. 553, 85 Am. St. Rep. 433.

**332.** 1. **Negligent Maker Liable.** — Heavy v. Commercial Nat. Bank, 27 Utah 222, 101 Am. St. Rep. 966. See also Young v. Brewster, 62 Mo. App. 628.

**2. By the Negotiable Instruments Law** the rule has been changed, and when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment according to the original tenor of the note. Mutual Loan Assoc. v. Lesser, 76 N. Y. App. Div. 614; Massachusetts Nat. Bank v. Snow, (Mass. 1905) 72 N. E. Rep. 959; Thorpe v. White, (Mass. 1905) 74 N. E. Rep. 592; Moskowitz v. Deutsch, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 603; Bryan v. Harr, 21 App. Cas. (D. C.) 190; Packard v. Windholz, (County Ct.) 40 Misc. (N. Y.) 347, affirmed 88 N. Y. App. Div. 365, 180 N. Y. 549.

**Rights of Innocent Holder, Not a Party to Alteration, Not Affected, under Md. Neg. Inst. Act, § 143.** — Schwartz v. Wilmer, 90 Md. 136.

**Under the Canadian Bills of Exchange Act,** where one signs the name of an alleged joint maker without his authority before the note comes into the hands of a holder for value, the holder may recover thereon, the alteration not being apparent and he being a holder in due course. Cunningham v. Peterson, 29 Ont. 346.

**3. View that a Recovery May Be Had Because of Negligence — Alabama.** — Holmes v. Ft. Gaines Bank, 120 Ala. 493.

**333.** Part of the Instrument Easily Detached. — See note 2.

Drawing Paper So as to Facilitate Alteration Held No Defense. — See note 3.

**334.** *e.* FORGED PAPER — Signatures Forged. — See note 1.*f.* DURESS — Between Immediate Parties. — See note 2.

Between Remote Parties. — See notes 3, 4.

**335.** *g.* MISAPPROPRIATION AND BREACH OF TRUST — (1) *Instruments Delivered Conditionally and Circulated Fraudulently.* — See note 1.*Colorado.* — *Statton v. Stone*, 15 Colo. App. 237.*Illinois.* — *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246; *Weaver v. Leseure*, 89 Ill. App. 628; *Leseure v. Weaver*, 99 Ill. App. 375; *Dewey v. Merritt*, 106 Ill. App. 156.*Iowa.* — *Derr v. Keaough*, 96 Iowa 397.*Kentucky.* — *Bank of Commerce v. Haldeman*, 109 Ky. 222; *Hackett v. Louisville First Nat. Bank*, 114 Ky. 193.*Nebraska.* — *Humphrey Hardware Co. v. Herrick*, (Neb. 1904) 101 N. W. Rep. 1016.*North Dakota.* — *Porter v. Hardy*, 10 N. Dak. 551.**Implied Authority of Holder to Insert Name Inadvertently Omitted.** — Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577.**Alteration by Filling Blank Invalidates Note** in the hands of a *bona fide* holder, where the alteration is apparent. *Alexander v. Buckwalter*, 8 Del. Co. Rep. (Pa.) 74, 17 Lanc. L. Rev. 366.**Insertion of Place of Payment When There Is No Blank Space a Material Alteration.** — *Wisnogle v. Powers*, 4 Ohio Dec. (Reprint) 232, 1 Cleve. L. Rep. 141. See also *Young v. Baker*, 29 Ind. App. 130; *Pope v. Branch County Sav. Bank*, 23 Ind. App. 210.**Blank Spaces Not Utilized.** — *Weidman v. Symes*, 120 Mich. 657, 77 Am. St. Rep. 603; *First State Sav. Bank v. Webster*, 121 Mich. 149.**Rule Confined to Negotiable Instruments.** — *Smith v. Holzhauer*, 67 N. J. L. 206, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 332, 333.**English Doctrine.** — See *Imperial Bank v. Hamilton Bank*, 31 Can. Sup. Ct. 360, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 332.**333. 2. Compare Porter v. Hardy**, 10 N. Dak. 551.**Recovery Not Allowed in Absence of Negligence on the Maker's Part.** — *Rochford v. McGee*, 16 S. Dak. 606, 102 Am. St. Rep. 719.**Margin Torn Off.** — *Compare Seebold v. Tatlie*, 76 Minn. 131.*3. Herington Bank v. Wangerin*, 65 Kan. 423.**334. 1. Illinois.** — *Beattie v. National Bank*, 69 Ill. App. 632, affirmed 174 Ill. 571, 66 Am. St. Rep. 318; *Commercial Nat. Bank v. Wagge-man*, 87 Ill. App. 171, affirmed 187 Ill. 227; *Havorka v. Hemmer*, 108 Ill. App. 443.*Kansas.* — *Stevens Point First Nat. Bank v. Martin*, 56 Kan. 247.*Missouri.* — *Chamberlain Banking House v. Noble*, 85 Mo. App. 428.*Nebraska.* — *Chicago, etc., R. Co. v. Burns*, 61 Neb. 793.*New York.* — *Doty v. Dellinger*, 94 N. Y. App. Div. 610. Compare *Lennon v. Grauer*, 2 N. Y. App. Div. 513, affirmed 159 N. Y. 433.*Ohio.* — *Merrick v. Merchants Nat. Bank*, 11 Ohio Dec. 293.*Tennessee.* — *Furnish v. Burge*, (Tenn. Ch. 1899) 54 S. W. Rep. 90.*Vermont.* — *Terrill v. Tillison*, 75 Vt. 193.*Virginia.* — *Pettyjohn v. National Exch. Bank*, 101 Va. 111. See also *Commercial Bank v. Cabell*, 96 Va. 552.**Burden of Proof.** — *Brown v. Tourtelotte*, 24 Colo. 204.**Admissions Estopping Plea of Forgery.** — *Lewis v. Hodapp*, 14 Ind. App. 111, 56 Am. St. Rep. 295.**Forgery of Subsequent Indorsement Not Defense to Action Against Prior Indorser.** — Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577.**Ratification of Forged Signatures.** — *Barry v. Kirkland*, (Ariz. 1898) 52 Pac. Rep. 771; *Central Nat. Bank v. Copp*, 184 Mass. 328; *Dominion Bank v. Ewing*, 7 Ont. L. Rep. 90. See also *Corner Stone Bank v. Rhodes*, (Indian Ter. 1904) 82 S. W. Rep. 739.**2. Duress Is a Defense Between Immediate Parties.** — *Brueggestradt v. Ludwig*, 184 Ill. 24; *Lee v. Ryder*, 1 Kan. App. 293; *Peckham v. Van Bergen*, 10 N. Dak. 43; *Behl v. Schuett*, 104 Wis. 76; *Nebraska Mut. Bond Assoc. v. Klee*, (Neb. 1903) 97 N. W. Rep. 476. See also *Kennedy v. Roberts*, 105 Iowa 521; *Delta County Bank v. McGranahan*, (Wash. 1905) 79 Pac. Rep. 796. Compare *Largent v. Beard*, (Tex. Civ. App. 1899) 53 S. W. Rep. 90; *Delta County Bank v. McGranahan*, (Wash. 1905) 79 Pac. Rep. 796.**Duress a Question of Fact.** — *Overstreet v. Dunlap*, 56 Ill. App. 486.**What Constitutes Duress.** — *James v. Dalbey*, 107 Iowa 463.**3. Between Remote Parties Duress Is Not a Defense.** — *Pate v. Allison*, 114 Ga. 651; *Wilson v. Neu*, (Neb. 1901) 95 N. W. Rep. 502; *Mack v. Prang*, 104 Wis. 6, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 334; *Keller v. Schmidt*, 104 Wis. 596.**4. Shirk v. Neible, 156 Ind. 66, 83 Am. St. Rep. 150. See also *Ganz v. Weisenberger*, 66 Mo. App. 110.****335. 1. Arkansas.** — *Craighead v. Farmers' Bldg., etc., Assoc.*, 69 Ark. 332.*Connecticut.* — *McCormick v. Warren*, 74 Conn. 234.*Indiana.* — *Galvin v. Syfers*, 22 Ind. App. 43. *Iowa.* — *Dubuque First Nat. Bank v. Getz*, 96 Iowa 139.*Kansas.* — *Topeka Bank v. Nelson*, 58 Kan. 815, 49 Pac. Rep. 155.*Maine.* — *Salley v. Terrill*, 95 Me. 553, 85 Am. St. Rep. 433.*Missouri.* — *Walters v. Tiefkemeyer*, 72 Mo. App. 371.*Montana.* — *American Exch. Nat. Bank v. Ulm*, 21 Mont. 440.*New York.* — *Utica City Nat. Bank v. Tallman*, 63 N. Y. App. Div. 480, affirmed 172

**335.** Instrument Deposited as an Escrow. — See note 2.

**336.** Fraudulent Diversion by Agent. — See note 1.  
Conditional Indorser or Surety. — See note 2.

**337.** (2) *Instruments Delivered in Blank and Completed Fraudulently* —  
Authority to Fill Blanks — In General. — See note 1.

Bona Fide Holder. — See notes 2, 3.

**338.** See note 1.

Limitation of the Rule. — See note 2.

Filling Interest Blank. — See notes 3, 4.

Holder with Notice. — See note 5.

**339.** England. — See note 1.

6. Holder of Renewal Bill or Note — In General. — See note 5.

N. Y. 642; Metropolitan Bank *v.* Engel, 66 N. Y. App. Div. 273; Chase Nat. Bank *v.* Faurot, 149 N. Y. 532.

North Dakota. — Porter *v.* Andrus, 10 N. Dak. 558.

Texas. — Mulberger *v.* Morgan, (Tex. Civ. App. 1896) 34 S. W. Rep. 148.

Virginia. — Greever *v.* Graham Bank, 99 Va. 547.

Wisconsin. — Mendenhall *v.* Ulrich, (Minn. 1905) 101 N. W. Rep. 1057.

One Who Is Not a Bona Fide Holder Cannot Recover. — Burke *v.* White, 61 Mo. App. 521; Commercial Bank *v.* Smith, 34 Nova Scotia 426.

Recovery by Maker Against Fraudulent Transferer. — The wrongful transfer of a negotiable note to a *bona fide* purchaser, thereby cutting off the maker's valid defense, gives rise to a cause of action for the damages resulting therefrom. Detwiler *v.* Bainbridge Grocery Co., 119 Ga. 981.

**335.** 2. Burden of Proof on Holder. — Jamison *v.* McFarland, 10 S. Dak. 574.

**336.** 1. Schneider *v.* Lebanon Dairy, etc., Co., 73 Ill. App. 612; Salley *v.* Terrill, 95 Me. 553, 85 Am. St. Rep. 433; Mendenhall *v.* Ulrich, (Minn. 1905) 101 N. W. Rep. 1057. See also Chase Nat. Bank *v.* Faurot, 149 N. Y. 532.

2. Notes Delivered in Violation of Authority. — Craighead *v.* Farmers' Bldg., etc., Assoc., 69 Ark. 332.

Surety Not Liable Where Holder Has Notice. — Deering *v.* Veal, 78 S. W. Rep. 886, 25 Ky. L. Rep. 1809.

Failure to Obtain Other Signatures. — Craighead *v.* Farmers' Bldg., etc., Assoc., 69 Ark. 332; Deering *v.* Veal, 78 S. W. Rep. 886, 25 Ky. L. Rep. 1809.

**337.** 1. Prim *v.* Hammel, 134 Ala. 652, 92 Am. St. Rep. 52; Ofenstein *v.* Bryan, 20 App. Cas. (D. C.) 1; Merritt *v.* Boyden, 191 Ill. 136, 85 Am. St. Rep. 246, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 337; Leseure *v.* Weaver, 99 Ill. App. 375; Young *v.* Baker, 29 Ind. App. 130; Boston Steel, etc., Co. *v.* Steuer, 183 Mass. 140, 97 Am. St. Rep. 426 (under Negotiable Instruments Law); Lewiston Sav. Bank *v.* Lawson, 87 Mo. App. 42; Mechanics' Bank *v.* Chardavoyne, 69 N. J. L. 256, 101 Am. St. Rep. 701; Porter *v.* Hardy, 10 N. Dak. 551.

2. Exceeding Authority No Defense Against a Bona Fide Holder. — Prim *v.* Hammel, 134 Ala. 652, 92 Am. St. Rep. 52; Leseure *v.* Weaver, 99 Ill. App. 375; Boston Steel, etc., Co. *v.* Steuer, 183 Mass. 140, 97 Am. St. Rep. 426; Mechan-

ics' Bank *v.* Chardavoyne, 69 N. J. L. 256, 101 Am. St. Rep. 701; Porter *v.* Hardy, 10 N. Dak. 551; Howie *v.* Lewis, 14 Pa. Super. Ct. 232; Gillespie *v.* Rogers, 184 Pa. St. 488; Burton *v.* Goffin, 5 British Columbia 454.

Insertion of Provision for Attorney's Fees in Blank Space Does Not Affect Bona Fide Holder. — Leseure *v.* Weaver, 99 Ill. App. 375.

Surety Signing Blank Note Liable Though Principal Exceeds His Authority. — Roberson *v.* Blevins, 57 Kan. 50.

Under the English Bills of Exchange Act of 1882, § 20, subs. 2, one signing a blank note and delivering it to an agent with authority to fill it out for a certain sum payable to such agent, is not liable where the agent fills the note for an amount in excess of that authorized, making it payable to another payee, as the delivery of such note by the agent to the payee does not constitute a negotiation of the note within the meaning of the statute. Herdman *v.* Wheeler, (1902) 1 K. B. 361.

3. Amount in Excess of Agreement. — Prim *v.* Hammel, 134 Ala. 652, 92 Am. St. Rep. 52; Merritt *v.* Boyden, 191 Ill. 136, 85 Am. St. Rep. 246, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 337; Howie *v.* Lewis, 14 Pa. Super. Ct. 232; Gillespie *v.* Rogers, 184 Pa. St. 488.

Marginal Figures Altered. — Merritt *v.* Boyden, 191 Ill. 136, 85 Am. St. Rep. 246.

**338.** 1. British Columbia Land, etc., Agency *v.* Ellis, 6 British Columbia 82.

2. Ofenstein *v.* Bryan, 20 App. Cas. (D. C.) 1.

3. Commercial Bank *v.* Maguire, 89 Minn. 394.

4. Leseure *v.* Weaver, 99 Ill. App. 375; Burton *v.* Goffin, 5 British Columbia 454; British Columbia Land, etc., Agency *v.* Ellis, 6 British Columbia 82; Humphrey Hardware Co. *v.* Herick, (Neb. 1904) 101 N. W. Rep. 1016.

5. Commercial Bank *v.* Maguire, 89 Minn. 394.

**339.** 1. Watkin *v.* Lamb, 85 L. T. N. S. 483.

5. Renewal Bill or Note — Generally. — Dalton First Nat. Bank *v.* Black, 108 Ga. 538; Oakes *v.* Merrifield, 93 Me. 297; Cristy *v.* Campau, 107 Mich. 172; Stevens *v.* MacLachlan, 120 Mich. 285; Nebraska Nat. Bank *v.* Pennock, 55 Neb. 188; Adams *v.* Ashman, 203 Pa. St. 536; Seay *v.* Fennell, 15 Tex. Civ. App. 261. See also Oldacre *v.* Stuart, 122 Ala. 405; Albuquerque First Nat. Bank *v.* Lesser, 9 N. Mex. 604.

"Renewal" Defined. — The term "renewal," as applied to promissory notes, means the re-establishment of the particular contract for

- 340.** Partial Illegality of Original Instrument. — See note 1.  
Renewal for Valid Part of Consideration. — See note 2.  
Purgation of Illegality — Usurious Contracts. — See note 3.

- 341.** Change of Securities Between Original Parties. — See note 1.  
Usurious Paper in Renewal of Paper Not Usurious. — See note 2.

- 342.** Renewal with Forged Paper. — See note 1.

**7. Holder's Right of Action and Proof Thereof — a. RIGHTS OF ACTION — (1) Who May Bring Action — In General. — See notes 2, 3.**

another period of time. *Lowry Nat. Bank v. Fickett*, 122 Ga. 489.

**Original Invalidity Affects Renewal.** — *Alabama Nat. Bank v. Halsey*, 109 Ala. 196; *Kuhl v. M. Gally Universal Press Co.*, 123 Ala. 452, 82 Am. St. Rep. 135; *Turle v. Sargent*, 63 Minn. 211, 56 Am. St. Rep. 475; *Decorah First Nat. Bank v. Holan*, 63 Minn. 525; *Puckett v. Fore*, 77 Miss. 391; *Brown v. James*, 2 N. Y. App. Div. 105; *St. Pierre v. L'Ecuyer*, 23 Quebec Super. Ct. 495.

**A Holder for Value** takes the note subject to the defenses. *Oakes v. Merrifield*, 93 Me. 297.

**A Renewal Note Given by One Who Has Been Released** on the original instrument is without consideration. *Farmers, etc., Bank v. Hawn*, 79 N. Y. App. Div. 640.

**Waiver by Renewal After Knowledge of Fraud.** — *Dunn v. Columbia Nat. Bank*, 204 Pa. St. 53.

**Failure to Surrender Original Note Does Not Affect Validity.** — *Murphy v. Carey*, 89 Hun (N. Y.) 106.

**340. 1. Partial Illegality.** — *Kuhl v. M. Gally Universal Press Co.*, 123 Ala. 452, 82 Am. St. Rep. 135; *Oakes v. Merrifield*, 93 Me. 297; *Rapid City First Nat. Bank v. McCarthy*, (S. Dak. 1904) 100 N. W. Rep. 14.

**2. Failure of Consideration for Renewal.** — While the defense of "failure of consideration" is not available to defeat a recovery by the plaintiff in an action upon a promissory note which was in renewal of one previously given for the purchase of personal property, when it plainly appears that this defense is based solely upon alleged defects in the property of which the maker of the note sued on had full knowledge before executing the same, a plea in effect alleging that the renewal note was given to the plaintiff in consideration of a promise by the latter to repair the defects, that this promise had not been performed, and that, in consequence of the breach thereof, the defendant had been damaged in an amount stated, was meritorious. *Atlanta City St. R. Co. v. American Car Co.*, 103 Ga. 254.

**3. How Usury May Be Purged.** — *McFarland v. State Bank*, 7 Kan. App. 722. See also *Lanier v. Union Mortg., etc., Co.*, 64 Ark. 39; *Palmer v. Carpenter*, 53 Neb. 394.

**341. 1. Mere Change of Securities.** — *Flannery v. Three Forks Deposit Bank*, (Ky. 1899) 52 S. W. Rep. 847.

**2. Quint v. Hays City First Nat. Bank**, 9 Kan. App. 474; *Wilson v. Donaldson*, (Ky. 1897) 38 S. W. Rep. 897.

**342. 1. Forged Paper in Renewal.** — *Traders Deposit Bank v. Day*, 105 Ky. 219.

**2. California.** — *Dyer v. Sebrell*, 135 Cal. 597; *Ft. Collins First Nat. Bank v. Hughes*, (Cal. 1896) 46 Pac. Rep. 272. See also *Scribner v. Hanke*, 116 Cal. 613.

*Connecticut.* — *New Haven Mfg. Co. v. New Haven Pulp, etc., Co.*, 76 Conn. 126.

*Georgia.* — *Daniel v. Royce*, 96 Ga. 566; *Mayer v. Thomas*, 97 Ga. 772; *Tyson v. Bray*, 117 Ga. 689; *Ray v. Anderson*, 119 Ga. 926.

*Illinois.* — *Illinois Conference, etc., v. Plagge*, 177 Ill. 431, 69 Am. St. Rep. 252; *Dickinson v. Bull*, 72 Ill. App. 75.

*Kansas.* — *Perry v. Wheeler*, 63 Kan. 870; *Greene v. McAuley*, (Kan. 1905) 79 Pac. Rep. 133; *Manley v. Park*, 68 Kan. 400, (Kan. 1904) 76 Pac. Rep. 1130; *Linney v. Thompson*, 3 Kan. App. 718.

*Minnesota.* — *Kells v. Northwestern Live-Stock Ins. Co.*, 64 Minn. 390, 58 Am. St. Rep. 541; *Ames, etc., Co. v. Smith*, 65 Minn. 304; *Cooper v. Hayward*, 67 Minn. 92.

*Missouri.* — *Barber v. Stroub*, (Mo. App. 1905) 85 S. W. Rep. 915.

*Nebraska.* — *Menzie v. Smith*, 63 Neb. 666.

*New York.* — *Callahan v. Crow*, 91 Hun (N. Y.) 346, affirmed 157 N. Y. 695; *Carpenter v. Cummings*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 587; *Snyder v. Gruniger*, (Supm. Ct. App. T.) 77 N. Y. Supp. 234.

*Oregon.* — *Overholt v. Dietz*, 43 Oregon 194; *Sturgis v. Baker*, 43 Oregon 236.

*Rhode Island.* — *Hutchings v. Reinhalter*, 23 R. I. 518.

*Texas.* — *Fant v. Wickes*, 10 Tex. Civ. App. 394; *Lewis v. Womack*, (Tex. Civ. App. 1896) 33 S. W. Rep. 894; *Jones v. Butler*, (Tex. Civ. App. 1897) 42 S. W. Rep. 367; *Schauer v. Beitel*, (Tex. Civ. App. 1898) 49 S. W. Rep. 145.

*Washington.* — *Riddell v. Prichard*, 12 Wash. 601; *Lodge v. Lewis*, 32 Wash. 191.

*West Virginia.* — *Spencer Bank v. Simmons*, 43 W. Va. 79.

**Action by Holder of Legal Title Requisite under Ala. Code 1896, § 28.** — *Piedmont Bank v. Smith*, 119 Ala. 57.

**Action Maintainable by Assignee for Benefit of Creditors.** — *Forster v. New Albany Second Nat. Bank*, 61 Ill. App. 272.

**Action May Be Brought by Either of Joint Holders.** — *Collyer v. Cook*, 28 Ind. App. 272.

**Holder May Sue with Consent** and for benefit of real owner. *New England Trust Co. v. New York Belting, etc., Co.*, 166 Mass. 42.

**Rights of Holder under Tex. Rev. Stat., art. 313.** — *Schauer v. Beitel*, 92 Tex. 601.

**Action by Agent.** — An agent who purchases a note with his principal's money, and has it indorsed to himself, may maintain an action thereon in his own name. *Routh v. Kostachek*, (Okla. 1905) 81 Pac. Rep. 429.

**Pledgor and Pledgee — Action by Pledgee.** — *McDaniel v. Chinski*, 23 Tex. Civ. App. 504; *Mersick v. Alderman*, 77 Conn. 634; *Greene v. McAuley*, (Kan. 1905) 79 Pac. Rep. 133.



**342.** Note or Bill Payable to Bearer or Indorsed in Blank. — See note 4.

Note or Bill Specially Payable. — See note 5.

**343.** (2) *Against Whom Action May Be Brought* — At Common Law. — See note 1.

By Statute. — See note 2.

(3) *When Right of Action Accrues* — Bill or Note Payable on Demand. — See note 3.

**Joint Holders Not Partners Must All Sue Together.** — *King v. King*, 73 N. Y. App. Div. 547, dismissed 172 N. Y. 604.

**342.** 3. *Dyer v. Sebrell*, 135 Cal. 597; *Mayer v. Thomas*, 97 Ga. 772; *Greene v. McAuley*, (Kan. 1905) 79 Pac. Rep. 133; *Carpenter v. Cummings*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 587; *Sturgis v. Baker*, 43 Oregon 236; *Hutchings v. Reinhalter*, 23 R. I. 518; *Lewis v. Womack*, (Tex. Civ. App. 1896) 33 S. W. Rep. 894; *Jones v. Butler*, (Tex. Civ. App. 1897) 42 S. W. Rep. 367; *Ray v. Anderson*, 119 Ga. 926.

4. *Vanarsdale v. Hax*, (C. C. A.) 107 Fed. Rep. 878; *Berney v. Steiner*, 108 Ala. 111, 54 Am. St. Rep. 144.

**Transferee for Purpose of Collection.** — The holder of a note payable to the order of the maker, and indorsed in blank, may maintain an action on the note in his own name, though the title was transferred to him by delivery for the purpose of enabling him to collect the note for the benefit of another transferee. *Meyer v. Foster*, (Cal. 1905) 81 Pac. Rep. 402.

5. *Pattillo v. Alexander*, 96 Ga. 60. See also *Haug v. Riley*, 101 Ga. 372.

**343.** 1. **Separate Actions Necessary.** — *Kimmel v. Weil*, 95 Ill. App. 15; *State v. Hughes*, 19 Ind. App. 266; *Maddox v. Duncan*, 143 Mo. 613, 65 Am. St. Rep. 678; *Wolf v. Hostetter*, 182 Pa. St. 292; *Willis v. Willis*, 42 W. Va. 522; *Mason v. Kilcourse*, (N. J. 1904) 59 Atl. Rep. 21. See also *Harvard Pub. Co. v. Benjamin*, 84 Md. 333, 57 Am. St. Rep. 402.

2. **Statutes Providing for Joint Action** — *California*. — *Loustalot v. Calkins*, 120 Cal. 688.

*Colorado*. — See also *Cooper v. German Nat. Bank*, 9 Colo. 169; *Byers v. Tritch*, 12 Colo. App. 377.

*District of Columbia*. — *Young v. Warner*, 6 App. Cas. (D. C.) 433.

*Georgia*. — *Saussy v. Weeks*, (Ga. 1905) 49 S. E. Rep. 809.

*Illinois*. — *Mexican Asphalt Paving Co. v. Lowe*, 73 Ill. App. 250; *Kimmel v. Weil*, 95 Ill. App. 15; *Harrison v. National Bank*, 108 Ill. App. 493, judgment affirmed 207 Ill. 630.

*Nebraska*. — *Palmer v. McFarlane*, (Neb. 1905) 102 N. W. Rep. 256.

*New Hampshire*. — See also *Benton v. Hopkins*, 68 N. H. 606.

*New Jersey*. — *Mason v. Kilcourse*, (N. J. 1904) 59 Atl. Rep. 21.

*North Carolina*. — *Washington First Nat. Bank v. Eureka Lumber Co.*, 123 N. Car. 24.

*Oklahoma*. — *Outcalt v. Collier*, 8 Okla. 473.

*Rhode Island*. — *Providence County Sav. Bank v. Vadnais*, 25 R. I. 295.

*Washington*. — *Gilmore v. Skookum Box Factory*, 20 Wash. 703.

**Action on Joint and Several Note under Illinois Statute.** — *Glines v. Ellars*, 73 Ill. App. 553.

**Under the Indiana Statute**, the assignor of a note, not payable in bank, cannot be sued on the note in the same action with the maker, as can the indorser of a note payable in bank. In such case the assignor is liable to suit on the note only after the use of due diligence against the maker, or upon a showing of lawful excuse for failure to sue the maker. *Huston v. Fatka*, 30 Ind. App. 693.

**Holder Not Obligated to Sue Maker Before Suing Indorser, under New York Code Civ. Pro., § 454.** — *Singer v. Abrams*, (Supm. Ct. App. T.) 94 N. Y. Supp. 7.

**Under Ohio Rev. Stat., § 5149, Separate Action Will Lie Against an Irregular Indorser** where the principal debtor has left the state. *Colver v. Wheeler*, 5 Ohio Cir. Dec. 278, 11 Ohio Cir. Ct. 604.

**West Virginia Code, ch. 99, § 11**, providing that all parties liable may be sued jointly, is not intended to enlarge the liability of parties to negotiable paper, but relates only to the remedy when the liability exists. *Willis v. Willis*, 42 W. Va. 522.

3. **Immediate Right of Action on a Demand Bill or Note** — *Connecticut*. — *Cooke v. Pomeroy*, 65 Conn. 466.

*Georgia*. — See also *Hotel Lanier Co. v. Johnson*, 103 Ga. 604.

*Iowa*. — *Leonard v. Olson*, 99 Iowa 162, 61 Am. St. Rep. 230.

*Kentucky*. — *Cooke v. Clark*, (Ky. 1899) 51 S. W. Rep. 316.

*Michigan*. — *Peninsular Sav. Bank v. Hosie*, 112 Mich. 357; *Citizens' Sav. Bank v. Vaughan*, 115 Mich. 156.

*Nebraska*. — *Palmer v. McFarlane*, (Neb. 1905) 102 N. W. Rep. 256.

*New York*. — *Central Bank v. Kimball*, 73 N. Y. App. Div. 100; *Field v. Sibley*, 74 N. Y. App. Div. 81, affirmed 174 N. Y. 514.

*North Carolina*. — *Causey v. Snow*, 122 N. Car. 326.

*Ohio*. — *Rigley v. Watts*, 8 Ohio Cir. Dec. 229, 15 Ohio Cir. Ct. 645.

*Pennsylvania*. — See also *McKelvey v. Berry*, 21 Pa. Super. Ct. 276.

*Texas*. — *Brookshire v. Allen*, (Tex. Civ. App. 1895) 32 S. W. Rep. 164.

*Vermont*. — *New England F. Ins. Co. v. Haynes*, 71 Vt. 307, 76 Am. St. Rep. 771.

*Virginia*. — *Bacon v. Bacon*, 94 Va. 686.

*Canada*. — *Bachand v. Lalumière*, 21 Quebec Super. Ct. 449, by Archibald, J.

**Payable on Demand After Date.** — *Peninsular Sav. Bank v. Hosie*, 112 Mich. 357; *Rigley v. Watts*, 8 Ohio Cir. Dec. 229, 15 Ohio Cir. Ct. 645.

**Note Payable "On or After Date" Is Due and Actionable at Any Time After Date.** — *Brookshire v. Allen*, (Tex. Civ. App. 1895) 32 S. W. Rep. 164.

**343.** Bill or Note Payable After Demand. — See note 4.

**344.** On the Day Due or the Next Day. — See notes 2, 3.

*b.* PROOF OF CAUSE OF ACTION — (1) *Production of the Instrument.*

— See note 4.

**345.** (2) *Execution and Indorsement* — Signature of Maker and Acceptor. — See note 1.

Indorsements. — See notes 2, 3.

**The Fact that a Demand Note Is Secured by Collateral** does not render it necessary that demand should be made before suit brought to collect the note. *Field v. Sibley*, 74 N. Y. App. Div. 81, affirmed 174 N. Y. 514.

**South Dakota Comp. Laws, § 4465**, providing that any negotiable instrument which does not specify the terms of payment is payable immediately, is by section 4571 made subordinate to the intention of the parties. *Tobin v. McKinney*, 15 S. Dak. 257, 91 Am. St. Rep. 694, affirming 14 S. Dak. 52, 91 Am. St. Rep. 688.

**343. 4.** *Cooke v. Pomeroy*, 65 Conn. 466; *Larrabee v. Southard*, 95 Me. 385 (Me. Rev. Stat., c. 32, § 10; *Peninsular Sav. Bank v. Hosie*, 112 Mich. 357; *New England F. Ins. Co. v. Haynes*, 71 Vt. 307, 76 Am. St. Rep. 771.

**An Action May Be Brought Immediately After Acceptance** where it appears that the drawee is transferring his property with an intent to defraud creditors. *Lustig v. McCulloch*, 10 Colo. App. 41.

**Accrual of Cause of Action on Guaranty.** — *Phelps v. Sargent*, 69 Minn. 118.

**Alternative Provision.** — A note payable at a certain date or when the maker gets possession of all of the land for which the note is given does not mature until the happening of the latter event. *Ray County Sav. Bank v. Porterfield*, 70 Mo. App. 573.

**An Indorser Whose Indorsement Has Been Procured by Fraud** of the maker may pay the note before maturity and bring suit thereon immediately. *Davison v. Farr*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 124.

**344. 2.** **An Extension of Time Is a Bar** to an action on the note before the expiration of the extension. *Fisher v. Stevens*, 143 Mo. 181.

**3. No Action on the Day When Due.** — *Farmers' Nat. Bank v. Salina Paper Mfg. Co.*, 58 Kan. 207; *Sutcliffe v. Humphreys*, 58 N. J. L. 42; *Evaas v. Geo. D. Cross Lumber Co.*, 11 Ohio Cir. Dec. 543, 21 Ohio Cir. Ct. 80.

**4.** *Galloway v. Bartholomew*, 44 Oregon 75. See also *Solomon v. Brodie*, 10 Colo. 353; *Jameson v. Officer*, 15 Tex. Civ. App. 212; *Davis v. Poland*, 92 Va. 225.

**Note Not Produced Presumed Negotiable.** — *In re Williams*, 120 Fed. Rep. 542.

**345. 1.** **Execution by the Maker or Acceptor Must Be Proved** — *Arkansas*. — *Klein v. German Nat. Bank*, 69 Ark. 140, 86 Am. St. Rep. 183.

*Colorado*. — *Brown v. Tourtelotte*, 24 Colo. 204. See also *Solomon v. Brodie*, 10 Colo. App. 353.

*Illinois*. — *Kripner v. Lincoln*, 66 Ill. App. 532; *Shepherd v. Royce*, 71 Ill. App. 321; *Hinsey v. Studebaker Bros. Mfg. Co.*, 73 Ill. App. 278.

*Indiana*. — *Crumrine v. Crumrine*, 14 Ind. App. 641; *Wines v. State Bank*, 22 Ind. App. 114; *Cincinnati Barbed Wire Fence Co. v.*

*Chenoweth*, 22 Ind. App. 685; *Fudge v. Marquell*, (Ind. 1904) 72 N. E. Rep. 565; *Fudge v. Marquell*, (Ind. 1905) 73 N. E. Rep. 895; *Home Nat. Bank v. Hill*, (Ind. 1905) 74 N. E. Rep. 1086.

*Iowa*. — *Renner v. Thornburg*, 111 Iowa 515; *Carthage Nat. Bank v. Butterbaugh*, 116 Iowa 657.

*Kentucky*. — *Collins v. Partin*, (Ky. 1897) 42 S. W. Rep. 1111.

*Maryland*. — See also *Horner v. Plumley*, 97 Md. 271.

*Massachusetts*. — See *Sears v. Moore*, 171 Mass. 514.

*Oklahoma*. — *Richardson v. Fellner*, 9 Okla. 513.

*Oregon*. — *Sears v. Daly*, 43 Oregon 346. *Pennsylvania*. — *Dexter v. Powell*, 14 Pa. Super. Ct. 162.

*Texas*. — *Talbot v. Dillard*, 22 Tex. Civ. App. 360. See also *Harvey v. Harvey*, (Tex. Civ. App. 1897) 40 S. W. Rep. 185; *Stowe v. Kempner*, 23 Tex. Civ. App. 276.

*Compare Crosby v. Wright*, 70 Minn. 251.

**Proof of Execution Dispensed with.** — *Ryerson Tourcotte*, 121 Mich. 78; *Marshall Field Co. v. Oren Ruffcorn Co.*, 117 Iowa 157; *Banks v. McCosker*, 82 Md. 518, 51 Am. St. Rep. 478; *Hoxie v. Farmers', etc., Nat. Bank*, 20 Tex. Civ. App. 462; *Abbott v. Bowers*, 98 Md. 525. See also *Flint First Nat. Bank v. Union Cent. L. Ins. Co.*, 107 Mich. 543.

**Admission of Execution Presumed in Absence of Denial.** — *Stewart v. Gleason*, 23 Pa. Super. Ct. 325.

**Sufficiency of Evidence to Show Execution.** — *Crawford v. Crane*, 61 Ill. App. 459; *Pettiford v. Mayo*, 117 N. Car. 27.

**Admissibility of Evidence that Note Was Not Executed.** — *Taylor v. Gale*, 14 Wash. 57.

**Sufficiency of Evidence to Show Nonexecution.** — *Moore v. Palmer*, 14 Wash. 134.

**Delivery Presumed.** — See *Odell v. Clyde*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 735, affirmed 38 N. Y. App. Div. 333.

**Burden of Proving Guaranty on Holder.** — *Hinsey v. Studebaker Bros. Mfg. Co.*, 73 Ill. App. 278.

**2. Indorsements Constituting Title Must Be Proved** — *Alabama*. — *Slaughter v. Montgomery First Nat. Bank*, 109 Ala. 157.

*Colorado*. — *Gumaer v. Sowers*, 31 Colo. 166, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345.

*Kansas*. — *James v. Blackman*, 68 Kan. 723. *Missouri*. — *Robinson v. Powers*, 63 Mo. App. 290; *Hugumin v. Hinds*, 97 Mo. App. 346;

*Dunlap v. Kelly*, 105 Mo. App. 1.

*Nebraska*. — *Western Mattress Co. v. Potter*, (Neb. 1901) 95 N. W. Rep. 841.

*New York*. — *Manawaring v. Keenan*, (Supm. Ct. App. T.) 86 N. Y. Supp. 262.

**345.** (3) *Identity of Parties.* — See note 5.

**8. Amount of Recovery and Damages** — *a. AMOUNT OF RECOVERY*

— (1) *In Case of Want or Failure of Consideration.* — See note 7.

**346.** (2) *By Transferee for Less than Face Value* — (a) *Against Remote Parties.* — See note 2.

*Modification of the Rule.* — See note 3.

**347.** *By the Pledgee.* — See note 3.

(b) *Against an Immediate Party.* — See note 4.

**348.** *b. DAMAGES* — (1) *Interest.* — See note 1.

(5) *Costs.* — See note 5.

**VI. DILIGENCE REQUIRED OF HOLDER** — 1. *Presentment for Acceptance*

— *a. NECESSITY OF PRESENTMENT* — *What Instruments Must Be Presented* — *Bills Payable After Sight.* — See note 6.

*Bills Other than Those Payable After Sight* — *Need Not Be Presented for Acceptance.*

— See note 8.

**350.** *c. TIME OF PRESENTMENT* — *Must Be Within Reasonable Time.* — See notes 4, 6.

*What Constitutes Reasonable Time.* — See note 7.

**352.** *Mixed Question of Law and Fact.* — See note 1.

*f. PLACE OF PRESENTMENT* — *Must Be at Drawee's Domicil.* — See

note 2.

*May Be at Dwelling House or Place of Business.* — See notes 3, 4.

**2. Presentment for Payment** — *a. NECESSITY OF PRESENTMENT* —

(1) *As Against Drawer or Indorser.* — See note 5.

*North Dakota.* — *Vickery v. Burton*, 6 N. Dak. 245; *Massachusetts L. & T. Co. v. Twichell*, 7 N. Dak. 440.

*South Dakota.* — *Baker v. Warner*, 16 S. Dak. 292.

*Virginia.* — *Clason v. Parrish*, 93 Va. 24.

**345.** 3. *Texas.* — See *Green v. Scottish-American Mortg. Co.*, 18 Tex. Civ. App. 286.

**5. Evidence as to the Identity of the Parties.** — *Tapley v. Herman*, 95 Mo. App. 537; *Vickery v. Burton*, 6 N. Dak. 245.

**7. Amount Apparently Due Presumed to Be Value of Note.** — *Wylly v. Grigsby*, 11 S. Dak. 491.

**346.** 2. *Full Face Value Recoverable.* — *Landsburg v. Sansone*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 576; *Callahan v. Crow*, 157 N. Y. 695; *McNamara v. Jose*, 28 Wash. 461. See also *Barker v. Barth*, 192 Ill. 460.

**Purchaser with Notice May Recover Amount Paid.** — *Greer v. Bently*, (Ky. 1897) 43 S. W. Rep. 219.

**Nonnegotiable Notes — Recovery from Remote Assignor Limited to Amount Paid.** — *Goff v. Miller*, 41 W. Va. 683, 56 Am. St. Rep. 889.

**3. Distinction in the Case of a Fraudulent or Illegal Instrument.** — *Campbell v. Brown*, 100 Tenn. 245; *People's Nat. Bank v. Mulkey*, (Tex. Civ. App. 1901) 61 S. W. Rep. 528. See also *Hyman v. American Electric Forge Co.*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 381.

**Iowa Statute.** — *Wray v. Warner*, 111 Iowa 64 (under Iowa Code, § 3070).

**347.** 3. *Johnston v. Gulleddge*, 115 Ga. 981; *Forstall v. Fussell*, 50 La. Ann. 256; *Wright v. Hardie*, 88 Tex. 653; *Jackson v. Chemical Nat. Bank*, (Tex. Civ. App. 1898) 46 S. W. Rep. 295. See also *Yellowstone Nat. Bank v. Gagnon*, 19 Mont. 402, 61 Am. St. Rep. 520; *Payne v. Zell*, 98 Va. 294.

**4. Note Payable in Specific Securities.** — Where

the note provides for the payment of a certain sum of money in specific securities the maker is not liable for the amount stated in money, but only for the value of the securities. *Johnson v. Dooley*, 65 Ark. 71.

**348.** 1. *Adams v. Adams*, 55 N. J. Eq. 42.

**5. Recovery of Costs Barred by Failure to Present,** where the maker was ready at the time and place appointed to pay the note and there was no one to receive the money. *Budweiser Brewing Co. v. Capparelli*, (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 502.

**6. Bills Payable After Sight Must Be Presented for Acceptance.** — *Industrial Bank v. Bowes*, 165 Ill. 70, 56 Am. St. Rep. 228; *Citizens' Nat. Bank v. Greensburg Third Nat. Bank*, 19 Ind. App. 69.

**8. Compare** *Smith v. Unangst*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 564.

**350.** 4. **First Presentment Presumed to Be for Acceptance.** — *Burrus v. Life Ins. Co.*, 124 N. Car. 9.

**6. Presentment Must Be Made Within Reasonable Time.** — *Industrial Bank v. Bowes*, 165 Ill. 70, 56 Am. St. Rep. 228; *Gilby Bank v. Farnsworth*, 7 N. Dak. 6.

**7. Reasonable Time under N. Dak. Rev. Code, § 4941.** — *Gilby Bank v. Farnsworth*, 7 N. Dak. 6.

**352.** 1. **"Reasonable Time" Dependent upon Particular Facts of Case.** — See *Citizens' Nat. Bank v. Greensburg Third Nat. Bank*, 19 Ind. App. 69.

**2. Whether Presentment Made at Proper Place a Question of Fact.** — *Burrus v. Life Ins. Co.*, 121 N. Car. 62.

**3.** *Westcott v. Patton*, 10 Colo. App. 544.

**4.** *Trottier v. Rivard*, 23 Quebec Super. Ct. 526.

**5. Presentment for Payment Necessary to Charge Drawer or Indorser** — *Alabama.* — *Carrington v.*

**354. (2) As Against Acceptor or Maker — In General. — See notes 1, 2.**

Odom, 124 Ala. 529; *Moody v. Keller*, 127 Ala. 630.

*Delaware.* — *Stoeckle v. Gray*, 1 Penn. (Del.) 117.

*Georgia.* — *Germania Bank v. Trapnell*, 118 Ga. 578.

*Illinois.* — *Bowes v. Industrial Bank*, 58 Ill. App. 498; *Hinsey v. Studebaker Bros. Mfg. Co.*, 73 Ill. App. 278; *Arnold v. Mangan*, 89 Ill. App. 327; *Kimmel v. Weil*, 95 Ill. App. 15; *Gormley v. Hartray*, 105 Ill. App. 625; *Weil v. Sturgis*, (Ky. 1901) 63 S. W. Rep. 602 (construing Illinois statute).

*Indiana.* — *La Follette Coal, etc., Co. v. Whiting Foundry Equipment Co.*, 25 Ind. App. 647.

*Iowa.* — *Trease v. Haggin*, 107 Iowa 458.

*Kansas.* — *Green v. Keller*, 8 Kan. App. 110.

*Kentucky.* — *Brown v. Crofton*, 76 S. W. Rep. 372, 25 Ky. L. Rep. 753.

*Louisiana.* — *Redden v. Lambert*, 112 La. 740.

*Maine.* — *National Shoe, etc., Bank v. Gooding*, 87 Me. 337; *Yates v. Goodwin*, 96 Me. 90.

*Missouri.* — *Myers v. Commercial Bank*, 72 Mo. App. 4; *Tucker v. Gentry*, 93 Mo. App. 655; *Westbay v. Stone*, (Mo. App. 1905) 87 S. W. Rep. 34.

*New York.* — *Moore v. Alexander*, 63 N. Y. App. Div. 100; *Kelly v. Theiss*, 65 N. Y. App. Div. 146; *Smith v. Unangst*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 564; *O'Neill v. Meighan*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 516; *Moore v. Alexander*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 613, *affirmed* 63 N. Y. App. Div. 100; *German-American Bank v. Atwater*, 165 N. Y. 36; *Harral v. Sternberger*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 274; *Filler v. Gallantcheck*, (Supm. Ct. App. T.) 66 N. Y. Supp. 509; *Hayward v. Empire State Sugar Co.*, 105 N. Y. App. Div. 21. See also *Reitman v. Neulander*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 770.

*North Dakota.* — *Ashe v. Beasley*, 6 N. Dak. 191; *Nelson v. Grondahl*, (N. Dak. 1904) 100 N. W. Rep. 1093.

*Oregon.* — *Carroll v. Nodine*, 41 Oregon 412, 93 Am. St. Rep. 743.

*Pennsylvania.* — *Messmore v. Morrison*, 172 Pa. St. 300; *Deacon v. Smaltz*, 10 Pa. Super. Ct. 151.

*Tennessee.* — *Hutchison v. Crutcher*, 98 Tenn. 421; *Douglas v. Bank of Commerce*, 97 Tenn. 133.

*Virginia.* — *Fidelity L. & T. Co. v. Engleby*, 99 Va. 168.

*West Virginia.* — *National Exch. Bank v. McElfish Clay Mfg. Co.*, 48 W. Va. 406.

*Wisconsin.* — *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636.

*Canada.* — *Vanier v. Kent*, 11 Quebec K. B. 373.

**Liability of Irregular Indorser.** — In some jurisdictions presentment and demand are necessary to bind an irregular indorser. *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67 Am. St. Rep. 95; *Carter v. Odom*, 121 Ala. 162; *Carlington v. Odom*, 124 Ala. 529.

In other jurisdictions, it is held that presentment and demand are necessary to bind an

irregular indorser. *Colver v. Wheeler*, 5 Ohio Cir. Dec. 278, 11 Ohio Cir. Ct. 604.

Thus where the indorser is considered as an original promisor, demand is not necessary to bind him. *National Exch. Bank v. Cumberland Lumber Co.*, 100 Tenn. 479.

**Bill or Note Indorsed After Maturity.** — *Sachs v. Fuller Bros. Toll, etc., Co.*, 69 Ark. 270; *Kimmel v. Weil*, 95 Ill. App. 15 (under Laws 1895); *Jacobs v. Gibson*, 77 Mo. App. 244; *Moore v. Alexander*, 63 N. Y. App. Div. 100; *German-American Bank v. Atwater*, 165 N. Y. 36; *Hudson v. Walcott*, 4 Ohio Dec. (Reprint) 459, 2 Cleve. L. Rep. 194.

**Under Alabama Code of 1896, § 892 et seq.**, suit must be brought against the maker within the time fixed by the statute in order to charge the indorser, unless the indorser induces delay in bringing the suit. *Marshall v. Bishop*, 140 Ala. 206.

**Under N. Car. Code, 1883, § 50**, making indorsers liable as sureties, demand is not necessary to fix the liability of an indorser of a promissory note. *Washington First Nat. Bank v. Eureka Lumber Co.*, 123 N. Car. 24.

**One Presentment Sufficient.** — *Ryerson v. Tourcotte*, 121 Mich. 78.

**Presentment of Demand Note Essential.** — *Porter v. Thom*, 30 N. Y. App. Div. 363.

**Texas Statute.** — *Vitkovitch v. Kleinecke*, (Tex. Civ. App. 1903) 75 S. W. Rep. 544.

**Same — Express Waiver of Diligence in Bringing Suit.** — *Williams v. Rosenbaum*, (Tex. Civ. App. 1904) 79 S. W. Rep. 594.

**Presentment Essential Where Note Matures by Reason of Maker's Insolvency.** — *Banque Nationale v. Martel*, 17 Quebec Super. Ct. 97.

**Presentment Not Necessary to Bind Indorser of Nonnegotiable Paper.** — *Herrick v. Edwards*, 106 Mo. App. 633.

**354. 1. Presentment Unnecessary to Charge Maker or Acceptor — United States.** — *Harrisburg Trust Co. v. Shufeldt*, 78 Fed. Rep. 292.

*Alabama.* — *Steiner v. Jeffries*, 118 Ala. 573.

*Colorado.* — *Westcott v. Patton*, 10 Colo. App. 544; *Erdman v. Hardesty*, 14 Colo. App. 395.

*Illinois.* — *Oxman v. Garwood*, 80 Ill. App. 658; *Gormley v. Hartray*, 105 Ill. App. 625.

*Iowa.* — *Jurgensen v. Carlsen*, 97 Iowa 627.

*Louisiana.* — *Redden v. Lambert*, 112 La. 740.

*Maine.* — *Heslan v. Bergeron*, 94 Me. 395.

*Mississippi.* — *Gillespie v. Planters' Oil Mill, etc., Co.*, 76 Miss. 406.

*New York.* — *Budweiser Brewing Co. v. Caparelli*, (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 502; *Wells v. Simpson*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 665 *affirmed* (Supm. Ct. App. Div.) 63 N. Y. Supp. 1118; *McGowan v. Hover*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 138.

*South Carolina.* — *McNair v. Moore*, 55 S. Car. 435, 74 Am. St. Rep. 760.

**Presentment Not Necessary to Bind Joint Maker.** — *Elliott v. Moreland*, 69 N. J. L. 216.

**2. Instruments Payable on Demand — Presentment Not Necessary as to Acceptor or Maker.** — *Harrisburg Trust Co. v. Shufeldt*, 78 Fed. Rep. 292; *Gormley v. Hartray*, 105 Ill. App. 625; *Central Bank v. Kimball*, 73 N. Y. App. Div.

**355.** (3) *As Against Guarantor* — Authorities Conflicting. — See note 1.

**356.** *b. BY WHOM PRESENTMENT SHOULD BE MADE* — (1) *In the Case of Notes and Inland Bills* — General Rule — By Holder or Agent. — See note 4.

**357.** By Personal Representative. — See note 3.

**358.** *c. TO WHOM PRESENTMENT SHOULD BE MADE.* — See note 2.

Where Maker or Drawee Is Dead. — See note 3.

**359.** Joint Makers or Drawees. — See note 2.

*d. MODE OF PRESENTMENT* — (1) *Possession of Instrument by Party Presenting Necessary.* — See note 6.

**360.** (2) *Demand According to Tenor of Paper Required.* — See note 3.

**361.** (5) *Where Instrument Is Payable at Holder's Residence or Place of Business.* — See note 4.

**362.** See note 2.

*e. TIME OF PRESENTMENT* — (1) *Day of Presentment* — (a) *As Against Drawee or Maker.* — See note 5.

[Presentment Must Be at Maturity. — See note 5a.]

(b) *As Against Drawer or Indorser* — aa. *WHERE INSTRUMENT IS PAYABLE ON DAY CERTAIN.* — See notes 6, 7.

100; *Field v. Sibley*, 174 N. Y. 514, *affirming* 74 N. Y. App. Div. 81; *Hardin v. Sweeney*, 14 Wash. 129.

By the Statutes of Maine (Rev. Stat., c. 32, § 10) it is provided that in an action on a promissory note payable at a place certain, either on demand, or on demand at or after a time specified therein, the plaintiff shall not recover unless he proves a demand made at the place of payment prior to the commencement of the suit. *Heslan v. Bergeron*, 94 Me. 395.

Where the Note Is Partly Payable in Certain Material as Ordered by the Payee demand is essential. *Keeffe v. Bannin*, 57 N. Y. App. Div. 361.

**355.** 1. *Guarantor's Liability Held Absolute by Some Authorities.* — *Portsmouth Sav. Bank v. Wilson*, 5 App. Cas. (D. C.) 8; *Ewen v. Wilbor*, 99 Ill. App. 132, *affirmed* 208 Ill. 492; *Porter v. Andrus*, 10 N. Dak. 558; *Colver v. Wheeler*, 5 Ohio Cir. Dec. 278, 11 Ohio Cir. Ct. 604; *Delsman v. Friedlander*, 40 Oregon 33; *Herrick v. Edwards*, 106 Mo. App. 633. See also *Redden v. Lambert*, 112 La. 740.

**356.** 4. *By Whom Presentment of Notes and Inland Bills Should Be Made* — General Rule. — *Ewen v. Wilbor*, 99 Ill. App. 132, *affirmed* 208 Ill. 492.

*Presentment to Bank Through Messenger.* — *Martin v. Smith*, 108 Mich. 278.

*Possession of Note Indorsed in Blank Evidence of Right to Present.* — *Ewen v. Wilbor*, 99 Ill. App. 132, *affirmed* 208 Ill. 492.

*Presentment by Unauthorized Person Insufficient.* — *Hofrichter v. Eneyeart*, (Neb. 1904) 99 N. W. Rep. 658.

**357.** 3. *Presentment by Personal Representative of Deceased Holder.* — *Yates v. Goodwin*, 96 Me. 90.

**358.** 2. *To Whom Presentment Should Be Made* — General Rule. — *Congress Brewing Co. v. Habenicht*, 83 N. Y. App. Div. 141; *Williams v. Planters', etc.*, Nat. Bank, 91 Tex. 651.

3. *Presentment to One Executor Sufficient.* — *Carrington v. Odom*, 124 Ala. 529.

**359.** 2. *Presentment to Joint Makers or Drawees.* — *Closz v. Miracle*, 103 Iowa 198.

6. *Waiver of Production.* — *Porter v. Thom*, 40 N. Y. App. Div. 34, *affirmed* 167 N. Y. 584.

*Demand by Mail Insufficient.* — *Closz v. Miracle*, 103 Iowa 198.

*Leaving Copy with Administrator's Solicitor.* — Where the maker has died, the leaving of a copy of the note by the holder with the administrator's solicitor, before maturity, pursuant to the administrator's advertisement, and a statutory declaration that the note is unpaid, do not constitute a sufficient presentment within the requirements of the Canada Bills of Exchange Act. *Fraser v. McLeod*, 2 N. W. Ter. 154.

**360.** 3. *When Formal Demand Not Essential.* — *McDougall v. Hazelton Tripod-Boiler Co.* (C. C. A.) 88 Fed. Rep. 217.

*Demand on Demand Note Should Be for Present Payment.* — See *National Hudson River Bank v. Kinderhook, etc.*, R. Co., 17 N. Y. App. Div. 232, *affirmed* 162 N. Y. 623.

**361.** 4. *Instrument Payable at Particular Place* — *When Demand Unnecessary.* — *Martin v. Smith*, 108 Mich. 278; *Evans v. Geo. D. Cross Lumber Co.*, 11 Ohio Cir. Dec. 543, 21 Ohio Cir. Ct. 80.

The Rule Seems Otherwise in the Case of Demand Notes, and a formal demand is necessary. *National Hudson River Bank v. Kinderhook, etc.*, R. Co., 17 N. Y. App. Div. 232, *affirmed* 162 N. Y. 623.

**362.** 2. *Moore v. Alexander*, 63 N. Y. App. Div. 100.

5. *Day of Presentment as Against Acceptor or Maker.* — *Merchants Bank v. Henderson*, 28 Ont. 360.

5a. *Presentment Must Be at Maturity.* — *Brown v. Crofton*, 76 S. W. Rep. 372, 25 Ky. L. Rep. 753; *Merchant's Bank v. Henderson*, 28 Ont. 360.

6. *Presentment Before Day Fixed for Payment Insufficient.* — *Carrington v. Odom*, 124 Ala. 529; *Congress Brewing Co. v. Habenicht*, 83 N. Y. App. Div. 141; *Creteau v. Foote, etc.*, Glass Co., 40 N. Y. App. Div. 215; *Wood v. Rosendale*, 10 Ohio Cir. Dec. 56, 18 Ohio Cir. Ct. 247; *National Exch. Bank v. McElfish Clay Mfg. Co.*, 48 W. Va. 406.

In the Case of a Series of Notes, in which it is provided that all shall mature upon default in

**363.** *bb. WHERE INSTRUMENT IS NOT PAYABLE ON DAY CERTAIN — Must Be Within Reasonable Time.* — See note 1.

Notes Payable on Demand — To Charge an Indorser. — See note 2.

**364.** Bills Payable on Demand. — See notes 1, 2.

**365.** See notes 1, 2.

Sight Drafts. — See note 3.

Paper Indorsed after Maturity. — See note 6.

**366.** (2) *Allowance of Days of Grace* — (a) *Definition and Character of Grace.* — See notes 8, 9.

the payment of any, the holder has a reasonable time after the default in the payment in which to make presentment. *Creteau v. Foote*, etc., Glass Co., 40 N. Y. App. Div. 215.

**362.** 7. *Presentment After Maturity — As to Drawer or Indorser Insufficient.* — *Carrington v. Odum*, 124 Ala. 529; *Hinsey v. Studebaker Bros. Mfg. Co.*, 73 Ill. App. 278; *Kelly v. Theiss*, 65 N. Y. App. Div. 146; *Creteau v. Foote*, etc., Glass Co., 40 N. Y. App. Div. 215; *National Exch. Bank v. McElfish Clay Mfg. Co.*, 48 W. Va. 406. See also *Randall v. Rhode Island Lumber Co.*, 20 R. I. 625.

**363.** 1. *Presentment Within Reasonable Time.* — *Sachs v. Fuller Bros. Toll, etc., Co.*, 69 Ark. 270; *Arnold v. Mangan*, 89 Ill. App. 327; *Foley v. Emerald, etc., Brewing Co.*, 61 N. J. L. 428; *Niles v. Bradley*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 172; *Aspinall v. Viney*, 206 Pa. St. 383; *Home Sav. Bank v. Hosie*, 119 Mich. 116; *Aebi v. Evansville Bank*, (Wis. 1905) 102 N. W. Rep. 329; *Banque du Peuple v. Denicourt*, 10 Quebec Super. Ct. 428.

*Reasonable Time a Question of Fact under Negotiable Instruments Law.* — *German-American Bank v. Mills*, 99 N. Y. App. Div. 312.

*Whether Reasonable Time a Question of Law or Fact.* — *Oley v. Miller*, 74 Conn. 304.

*"Reasonable Time" a Mixed Question of Law and Fact.* — *Guckian v. Newbold*, 23 R. I. 553, 594.

*Burden of Proving Unreasonable Delay on Defendant.* — *German-American Bank v. Mills*, 99 N. Y. App. Div. 312.

2. *Instances of Reasonable Presentment of Notes Payable on Demand.* — *Iowa.* — *Leonard v. Olson*, 99 Iowa 162, 61 Am. St. Rep. 230.

*Maine.* — *Yates v. Goodwin*, 96 Me. 90.

*Massachusetts.* — *Merritt v. Jackson*, 181 Mass. 69.

*Michigan.* — *Home Sav. Bank v. Hosie*, 119 Mich. 116.

*New Jersey.* — *Foley v. Emerald, etc., Brewing Co.*, 61 N. J. L. 428.

*New York.* — *Wylie v. Cotter*, 170 Mass. 356, 64 Am. St. Rep. 305, construing New York statute; *O'Neill v. Meighan*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 516; *German-American Bank v. Mills*, 99 N. Y. App. Div. 312.

*Pennsylvania.* — *Harrisburg Nat. Bank v. Moffitt*, 10 Pa. Dist. 22.

*Virginia.* — *Bacon v. Bacon*, 94 Va. 686.

*Canada.* — *Banque du Peuple v. Denicourt*, 10 Quebec Super. Ct. 428.

*Usage of Trade as Affecting Time for Presentment.* — *Merritt v. Jackson*, 181 Mass. 69.

*Doctrine in Connecticut.* — A written promise to pay interest semiannually in advance, contained in a negotiable note payable "on demand," makes it clear that the parties to the

note understood and intended that it should run for some time, and for at least six months. Accordingly, the payee of such a note is under no obligation to demand payment four months from its date and thereafter use due diligence to collect of the maker, in order to hold the guarantor of the note liable thereon. *Beardsley v. Hawes*, 71 Conn. 39.

Under Connecticut Gen. Stat., § 1859, negotiable demand notes remaining unpaid four months from date are considered overdue and dishonored. *Oley v. Miller*, 74 Conn. 304.

*Doctrine in New York — Indorser Not Discharged by Holder's Delay.* — *National Hudson River Bank v. Kinderhook, etc., R. Co.*, 17 N. Y. App. Div. 232, affirmed 162 N. Y. 623.

*Minnesota Statute.* — Under Minn. Stat., 1894, § 2231, presentment of a demand note is required to be made before the expiration of sixty days. *Ueland v. Hibbard*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 749.

*Burden of Proof on Plaintiff.* — *Merritt v. Jackson*, 181 Mass. 69.

*Note Indorsed After Maturity.* — What constitutes a reasonable time for demanding payment of notes indorsed after maturity, and giving notice if not paid, so as to hold the indorser, is not measured by an arbitrary period of time, but depends upon, and must be ascertained from, the facts of each case. *German-American Bank v. Atwater*, 165 N. Y. 36.

**364.** 1. *Bills Payable on Demand.* — *Aebi v. Evansville Bank*, (Wis. 1905) 102 N. W. Rep. 329 (under Negotiable Instruments Law).

2. *"Reasonable Time" Determined by Circumstances.* — *Arnold v. Mangan*, 89 Ill. App. 327.

*"Reasonable Time" Determined by Circumstances.* — *Aebi v. Evansville Bank*, (Wis. 1905) 102 N. W. Rep. 329 (under Negotiable Instruments Law).

**365.** 1. *Aebi v. Evansville Bank*, (Wis. 1905) 102 N. W. Rep. 329 (under Negotiable Instruments Law).

2. *Aebi v. Evansville Bank*, (Wis. 1905) 102 N. W. Rep. 329 (under Negotiable Instruments Law).

3. *Presentment of Sight Drafts.* — See also *Smith v. Unangst*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 564.

*Under Idaho Statute ten days, in addition to a reasonable time, are allowed for the presentment of bills payable at sight.* *Chambers v. Custer County*, 8 Idaho 724.

6. *Bills Indorsed Overdue Must Be Presented Within Reasonable Time.* — *Kimmel v. Weil*, 95 Ill. App. 15.

**366.** 8. *Origin of the Expression "Days of Grace."* — *Blacker v. Ryan*, 65 Mo. App. 230.

9. *At Present Grace Allowed as Matter of Right.* — *Portsmouth Sav. Bank v. Wilson*, 5 App.

- 367.** (b) On What Instruments Grace Is Allowed. — See notes 2, 3.  
**368.** Bills and Notes Payable on Demand. — See note 1.  
 Bills or Notes Expressly Payable Without Grace. — See note 2.  
 (c) Term of Grace Allowed. — See note 3.  
 (3) *Reckoning of Time* — (a) *Reckoning of Days*. — See note 4.  
 Last Day of Grace Falling on Sunday or Legal Holiday. — See note 6.  
**369.** See note 1.  
 Paper Falling Due on Sunday Without Grace. — See note 2.  
 (b) *Reckoning of Months*. — See notes 3, 4.  
**370.** (c) From What Time Maturity Is Reckoned. — See note 1.  
 (4) *Hour of Presentment*. — See note 3.  
 When Presentment Is Made at a Bank. — See note 5.

Cas. (D. C.) 8; *Steinau v. Moody*, 100 Ga. 136; *Blacker v. Ryan*, 65 Mo. App. 230; *Wood v. Rosendale*, 10 Ohio Cir. Dec. 66, 18 Ohio Cir. Ct. 247; *Evans v. Geo. D. Cross Lumber Co.*, 11 Ohio Cir. Dec. 543, 21 Ohio Cir. Ct. 80.

**Grace Allowed under South Dakota Rev. Civ. Code, § 2236.** — *Davis v. Brady*, (S. Dak. 1903) 97 N. W. Rep. 719.

**Grace Allowed by Iowa Code, 1873, § 2092.** — *Trease v. Haggin*, 107 Iowa 458.

**Grace Abolished by Negotiable Instruments Law.** — See *Crawford's Annot. Neg. Inst. L.* (2d ed.), § 145.

**Grace Abolished by Mass. Stat. 1896, c. 496, p. 494.** — *Lowell Trust Co. v. Pratt*, 183 Mass. 379.

**Effect of Abolishment by Statute.** — A statute abolishing days of grace does not have a retroactive effect so as to apply to contracts entered into before its passage, or after its passage and before the day on which it goes into effect. *Evans v. Geo. D. Cross Lumber Co.*, 11 Ohio Cir. Dec. 543; *Wood v. Rosendale*, 10 Ohio Cir. Dec. 66, 18 Ohio Cir. Ct. 247.

**What Law Governs — As to Allowance of Grace.** — *Weller v. Goslin*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 36; *Pawcatuck Nat. Bank v. Barber*, 22 R. I. 77, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 366.

**367. 2. Waiver of Protest Not a Waiver of Grace.** — *Steinau v. Moody*, 100 Ga. 136.

**3. Grace Allowed on Negotiable Bills and Notes Generally.** — *Steinau v. Moody*, 100 Ga. 136; *Blacker v. Ryan*, 65 Mo. App. 230; *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18; *Dupuis v. Hudon*, 12 Quebec Super. Ct. 227.

**Sight Bills and Notes.** — Grace not allowed under *Georgia* statute. *Steinau v. Moody*, 100 Ga. 136.

**Nonnegotiable Instruments — Grace Not Allowed.** — *Tranter v. Hibbard*, 108 Ky. 265; *Steinau v. Moody*, 100 Ga. 136; *Davis v. Brady*, (S. Dak. 1903) 97 N. W. Rep. 719.

**368. 1. Bills and Notes Payable on Demand Not Entitled to Grace.** — *Steinau v. Moody*, 100 Ga. 136; *Cincinnati Fifth Nat. Bank v. Woolsey*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 761, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 368.

**2. The Term "Fixed" Signifies Without Grace.** — *Doyle v. Birmingham First Nat. Bank*, 131 Ala. 294, 90 Am. St. Rep. 41; *Steinau v. Moody*, 100 Ga. 136; *Cincinnati Fifth Nat. Bank v. Woolsey*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 757.

**3. Local Customs as to Days of Grace must be**

alleged and proved. *Tranter v. Hibbard*, 108 Ky. 265.

**4. Doyle v. Birmingham First Nat. Bank**, 131 Ala. 294, 90 Am. St. Rep. 41.

**6. Reckoning of Days — Where Last Day of Grace Is Sunday.** — *Capital Nat. Bank v. American Exch. Nat. Bank*, 51 Neb. 707.

**In Nebraska.** — The common-law rule respecting the time of presentment of instruments with grace, which expire on Sunday, is not abrogated by the Nebraska Act of 1873, § 1, designating certain days to be observed as holidays in respect to bills, notes, and checks. *Capital Nat. Bank v. American Exch. Nat. Bank*, 51 Neb. 707, *overruling* *Hastings First Nat. Bank v. McAllister*, 33 Neb. 646, *overruled* 51 Neb. 707.

**369. 1. Last Day of Grace a Legal Holiday.** — *Capital Nat. Bank v. American Exch. Nat. Bank*, 51 Neb. 707.

**2. Paper Due on Sunday or Holiday Without Grace.** — *Balkwill v. Bridgeport Wood Finishing Co.*, 62 Ill. App. 663; *Capital Nat. Bank v. American Exch. Nat. Bank*, 51 Neb. 707. See also *Morris v. Bailey*, 10 S. Dak. 507.

**In Kentucky,** where an instrument not entitled to grace falls due on Sunday, it matures on the secular day next preceding. *Tranter v. Hibbard*, 108 Ky. 265.

**3. Doyle v. Birmingham First Nat. Bank**, 131 Ala. 297, 90 Am. St. Rep. 41, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369.

**4. Doyle v. Birmingham First Nat. Bank**, 131 Ala. 297, 90 Am. St. Rep. 41, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369.

**370. 1. Maturity Reckoned from Date.** — *Meyer v. Foster*, (Cal. 1905) 81 Pac. Rep. 402.

**3. Hour of Presentment — In General.** — *Evans v. Geo. D. Cross Lumber Co.*, 11 Ohio Cir. Dec. 543, 21 Ohio Cir. Ct. 80.

**5. Hour of Presentment at Bank.** — *Metropolitan Bank v. Engel*, 66 N. Y. App. Div. 273; *Evans v. Geo. D. Cross Lumber Co.*, 11 Ohio Cir. Dec. 543, 21 Ohio Cir. Ct. 80.

While presentment may be made at any hour before the usual hour of closing the bank, and the note protested for nonpayment, the maker has until the close of the business day in which to make his payment to the bank; and where a deposit is made for that purpose after the demand of payment, but before the close of the bank, the protest becomes of no avail. *German-American Bank v. Milliman*, (County Ct.) 31 Misc. (N. Y.) 87.

**The Fact that the Notary Protesting the Note Presented It After Banking Hours Is Immaterial**

**371.** *f. PLACE OF PRESENTMENT — (1) Where Instrument Is Payable at Specified Place — (a) As Between Holder and Drawer or Indorser. — See note 2.*

**372.** See note 1.

Designation of Locality Without Specification of Particular Place Therein. — See note 2.

**373.** (b) As Between Holder and Maker of Note — Doctrine in England. — See note 3. Doctrine in United States — Want of Demand as Bar to Damages Against Maker. —

See note 4.

**374.** Notes Payable on Demand. — See note 4.

**375.** (c) As Between Holder and Acceptor of Bill — Rule under Statute. — See note 4.

**376.** (3) *Where Instrument Is Payable Generally — General Rule. — See note 2.*

Place of Business. — See note 6.

**377.** Requisites as to Place of Business. — See note 2.

Presentment at Place of Date of Note. — See note 5.

**378.** Presentment at the Place of Address of Bill. — See note 3.

**379.** *b. WHAT INSTRUMENTS MUST BE PROTESTED — Foreign Bills of Exchange. — See note 1.*

Inland Bills. — See note 5.

where the note has already been presented for payment during banking hours. *Metropolitan Bank v. Engel*, 66 N. Y. App. Div. 273.

**371.** 2. *Indorser of Note.* — *Carrington v. Odom*, 124 Ala. 529; *Ewen v. Wilbor*, 99 Ill. App. 132, *affirmed* 208 Ill. 492; *Brown v. Crofton*, 76 S. W. Rep. 372, 25 Ky. L. Rep. 753; *National Hudson River Bank v. Kinderhook*, etc., R. Co., 17 N. Y. App. Div. 232, *affirmed* 162 N. Y. 623; *Evans v. Geo. D. Cross Lumber Co.*, 11 Ohio Cir. Dec. 543, 21 Ohio Cir. Ct. 80; *Hutchison v. Crutcher*, 98 Tenn. 421; *Rose v. McCracken*, 20 Tex. Civ. App. 637; *Nelson v. Grondahl*, (N. Dak. 1904) 100 N. W. Rep. 1093; *Vanier v. Kent*, 11 Quebec K. B. 373.

*Drawer of Bill.* — *Douglas v. Bank of Commerce*, 97 Tenn. 133.

**372.** 1. *Presentment at Specified Place Sufficient.* — *Carrington v. Odom*, 124 Ala. 529; *Ewen v. Wilbor*, 99 Ill. App. 132, *affirmed* 208 Ill. 492; *Nelson v. Grondahl*, (N. Dak. 1904) 100 N. W. Rep. 1093. See also *Bartholomew v. Everett First Nat. Bank*, 18 Wash. 683.

*Error in Description of Place — What Constitutes Sufficient Presentment.* — *Pawcatuck Nat. Bank v. Barber*, 22 R. I. 73.

2. *Locality of Payment Designated Generally.* — *Wood v. Rosendale*, 10 Ohio Cir. Dec. 66, 18 Ohio Cir. Ct. 247; *Williams v. Planters'*, etc., Nat. Bank, 91 Tex. 651, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 372.

*Possession by Notary as Holder's Agent.* — *Williams v. Planters'*, etc., Nat. Bank, 91 Tex. 651, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 372.

**373.** 3. *England — Presentment at Place Designated Necessary as to Maker.* — *Merchants' Bank v. Henderson*, 28 Ont. 360.

*Under the Canadian Bills of Exchange Act of 1890*, presentment at a particular place at maturity is not necessary in order to charge the maker of a promissory note. *Merchants' Bank v. Henderson*, 28 Ont. 360.

4. *Presentment at Place Designated Unnecessary.* — *Westcott v. Patton*, 10 Colo. App. 544; *Dillingham v. Parks*, 30 Ind. App. 61; *Mon-*

*treale Bank v. Ingerson*, 105 Iowa 349; *Chapman v. Wagner*, (Neb. 1901) 96 N. W. Rep. 412; *McNair v. Moore*, 55 S. Car. 438, 74 Am. St. Rep. 760, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 373; *Hardin v. Sweeney*, 14 Wash. 129; *Ray v. Anderson*, 119 Ga. 926.

**374.** 4. *Doctrine Applied to Demand Notes.* — *Rigley v. Watts*, 8 Ohio Cir. Dec. 229, 15 Ohio Cir. Ct. 645.

**375.** 4. *Indian Territory Bank v. Buchanan County First Nat. Bank*, 109 Mo. App. 665.

**376.** 2. *Instruments Payable Generally.* — *Strawberry Point Bank v. Lee*, 117 Mich. 122; *Sturges v. Williams*, 4 Ohio Dec. (Reprint) 33, Cleve. L. Rec. 39, *affirmed* 9 Ohio St. 443, 75 Am. Dec. 473; *Evans v. Geo. D. Cross Lumber Co.*, 11 Ohio Cir. Dec. 543, 21 Ohio Cir. Ct. 80.

*Right of Maker to Designate Place of Payment.* — *Rose v. McCracken*, 20 Tex. Civ. App. 637.

*Place Fixed by Agreement.* — *Rose v. McCracken*, 20 Tex. Civ. App. 637.

6. *Presentment at Place of Business.* — *Evans v. Geo. D. Cross Lumber Co.*, 11 Ohio Cir. Dec. 543, 21 Ohio Cir. Ct. 80.

*Payment at Place of Business Where No Place Named in Note.* — *McCruden v. Jonas*, 173 Pa. St. 507, 51 Am. St. Rep. 774.

**377.** 2. *Presentment at an Abandoned Place of Business Is Not Sufficient.* — *Reinke v. Wright*, 93 Wis. 368.

5. *Inquiry at Place of Date.* — *Overland Gold Min. Co. v. McMaster*, 19 Utah 177.

*Place of Date Prima Facie Place of Payment.* — *Rose v. McCracken*, 20 Tex. Civ. App. 637.

**378.** 3. *Place of Address of Bill.* — *Weller v. Goslin*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 37, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 378.

**379.** 1. *Protest of Foreign Bill Indispensable.* — *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67 Am. St. Rep. 95; *Pattillo v. Alexander*, 96 Ga. 60; *Hays v. Citizens' Sav. Bank*, 101 Ky. 201; *Richland Bank v. Nicholson*, 120 Ga. 622; *Amsinck v. Rogers*, 103 N. Y. App. Div. 428.

5. *Protest of Inland Bills Unnecessary.* — *Murphy v. Citizens' Sav. Bank*, 110 Ky. 225; *King*



**380.** Promissory Notes. — See note 1.

**381.** *c.* FORMALITIES OF MAKING PROTEST — (2) *The Certificate of Protest* — (a) *The Contents* — *aa.* DESCRIPTION OF INSTRUMENT PROTESTED — *Literal Variations Immaterial.* — See note 3.

*bb.* FACT AND MODE OF PRESENTMENT. — See note 5.

*cc.* PERSON TO WHOM PRESENTMENT IS MADE. — See note 8.

**382.** *dd.* PERSON BY WHOM PRESENTMENT IS MADE. — See note 1.

*ee.* TIME OF PRESENTMENT. — See note 2.

*ff.* PLACE OF PRESENTMENT. — See note 3.

**383.** *gg.* DEMAND OF PAYMENT. — See note 1.

*hh.* REFUSAL OF ACCEPTANCE OR PAYMENT. — See note 2.

**384.** (3) *When Protest Should Be Made* — *Noting.* — See note 3.

*Of What the Noting Consists.* — See note 4.

**386.** *d.* PROTEST AS EVIDENCE — (2) *Of Facts Therein* — (a) *Generally.* — See note 1.

**387.** *As to What Instruments Evidence Admissible at Common Law.* — See notes 1, 2, 3.

*v. Griggs*, 82 Minn. 387; *Richland Bank v. Nicholson*, 120 Ga. 622.

*Under Statute.* — *Ewen v. Wilbor*, 208 Ill. 492.

**380.** 1. *Protest of Promissory Notes Unnecessary.* — *Carrington v. Odom*, 124 Ala. 529; *Pattillo v. Alexander*, 96 Ga. 60; *State Bank of Chicago v. Carr*, 130 N. Car. 479; *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636; *Nelson v. Killingley First Nat. Bank*, (C. C. A.) 69 Fed. Rep. 798.

*Under Statute.* — *The Texas Rev. Stat. 1895, Art. 315*, providing that the liability of the drawer or indorser of any bill of exchange or promissory note, assignable or negotiable by the law merchant, may be fixed by protest and notice thereof, is not limited to instruments originating in transactions between merchant and merchant, their factors or agents. *Williams v. Planters', etc., Nat. Bank*, (Tex. Civ. App. 1898) 44 S. W. Rep. 617.

*Protest Necessary to Charge Maker.* — See *Beissner v. Weekes*, 21 Tex. Civ. App. 14.

**381.** 3. *Misdescription as to Date.* — *Northup v. Cheney*, 27 N. Y. App. Div. 418.

5. *Statement of Fact of Presentment Necessary.* — *Mason v. Kilcourse*, (N. J. 1904) 59 Atl. Rep. 21.

*Statement of Due Diligence Where There Is Failure to Present.* — *Williams v. Planters', etc., Nat. Bank*, 91 Tex. 651.

8. *Statement as to Person to Whom Presentment Is Made.* — *Union Nat. Bank v. Williams Milling Co.*, 117 Mich. 535.

*Where Bill Is Payable at a Bank.* — *Ashe v. Beasley*, 6 N. Dak. 191.

**382.** 1. *Union Nat. Bank v. Williams Milling Co.*, 117 Mich. 535.

2. *Statement as to Time of Presentment Necessary.* — *Union Nat. Bank v. Williams Milling Co.*, 117 Mich. 535.

3. *Statement as to Place of Presentment.* — *Union Nat. Bank v. Williams Milling Co.*, 117 Mich. 535.

**383.** 1. *Recital of Presentment Without Mention of Demand.* — *Union Nat. Bank v. Williams Milling Co.*, 117 Mich. 535.

2. *Refusal of Acceptance of Payment.* — *Union Nat. Bank v. Williams Milling Co.*, 117 Mich. 535.

**384.** 3. *Noting on Day of Presentment.* —

*Mattingly v. Bank of Commerce*, (Ky. 1899) 53 S. W. Rep. 1043; *Moreland v. Citizens' Nat. Bank*, 114 Ky. 577, 102 Am. St. Rep. 293; *Union Nat. Bank v. Williams Milling Co.*, 117 Mich. 535.

*Destruction of Memorandum After Protest Executed Does Not Affect Validity.* — *Moreland v. Citizens' Nat. Bank*, 114 Ky. 577, 102 Am. St. Rep. 293.

4. *Of What Noting Consists.* — *Moreland v. Citizens' Nat. Bank*, 114 Ky. 577, 102 Am. St. Rep. 293.

*Writing the Word "Protested" on Face of Bill and writing out notices at the same time is sufficient.* *Mattingly v. Bank of Commerce*, (Ky. 1899) 53 S. W. Rep. 1043.

**386.** 1. *Protest as Evidence of Facts Therein* — *Arkansas.* — *Fletcher v. Arkansas Nat. Bank*, 62 Ark. 265, 54 Am. St. Rep. 294.

*Georgia.* — *Hobbs v. Chemical Nat. Bank*, 97 Ga. 524.

*Kentucky.* — *Mattingly v. Bank of Commerce*, (Ky. 1899) 53 S. W. Rep. 1043.

*Michigan.* — *Martin v. Smith*, 108 Mich. 278.

*Missouri.* — *State v. Edmunds*, 66 Mo. App. 47; *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404.

*New York.* — *Northup v. Cheney*, 27 N. Y. App. Div. 418; *Persons v. Kruger*, 45 N. Y. App. Div. 187; *Solomon v. Cohen*, (Supm. Ct. App. T.) 94 N. Y. Supp. 502.

*Pennsylvania.* — *Historical Pub. Co. v. Hartmanft*, 3 Pa. Super. Ct. 59; *Farmers' Nat. Bank v. Marshall*, 9 Pa. Super. Ct. 621; *Union Safe Deposit Bank v. Strauch*, 20 Pa. Super. Ct. 196.

*Tennessee.* — *Douglas v. Bank of Commerce*, 97 Tenn. 133; *City Sav. Bank v. Kensington Land Co.*, (Tenn. Ch. 1896) 37 S. W. Rep. 1037; *Chattanooga First Nat. Bank v. Reid*, (Tenn. Ch. 1900) 58 S. W. Rep. 1124.

*Wisconsin.* — *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18.

*Evidence Open to Rebuttal.* — *Historical Pub. Co. v. Hartmanft*, 3 Pa. Super. Ct. 59.

**387.** 1. *Protest of Foreign Bill Evidence at Common Law.* — *Ashe v. Beasley*, 6 N. Dak. 191; *Brandon First Nat. Bank v. Briggs*, 70 Vt. 599.

2. *Protest of Foreign Note as Evidence.* — See also *Ashe v. Beasley*, 6 N. Dak. 191.

- 387.** As to What Instruments Evidence Admissible under Statute. — See note 5.  
 (b) Presentment and Demand — Foreign Bills. — See note 6.
- 388.** Inland Bills and Promissory Notes. — See notes 1, 2.  
 (a) Dishonor. — See note 3.  
 Inland Bills and Promissory Notes. — See note 5.
- 389.** (d) Notice of Dishonor — *aa.* GENERALLY — Rule at Common Law. — See note 2.  
 Rule under Statute. — See note 3.
- 390.** *bb.* THE FACT OF NOTICE. — See note 8.  
*cc.* MANNER OF GIVING NOTICE. — See note 9.
- 391.** *cc.* PLACE OF GIVING NOTICE — Recital of Mailing Notice to Place of Residence or Business. — See note 6.
- 393.** (e) Collateral Facts. — See note 3.
- 394.** See note 2.  
 (4) *Protest as Secondary Evidence.* — See note 6.

**387. 3. Protest of Inland Notes Not Evidence.** — Schofield v. Palmer, 134 Fed. Rep. 753.

**5. Protest of Inland Bills and Notes Evidence under Statute.** — Nelson v. Killingley First Nat. Bank, (C. C. A.) 69 Fed. Rep. 798; Legg v. Vinal, 165 Mass. 555; Union Nat. Bank v. Williams Milling Co., 117 Mich. 535; Persons v. Kruger, 45 N. Y. App. Div. 187; Biber v. Schmidt, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 777 (under Negotiable Instruments Law); German-American Bank v. Mills, 99 N. Y. App. Div. 312; Ashe v. Beasley, 6 N. Dak. 191; Union Safe Deposit Bank v. Strauch, 20 Pa. Super. Ct. 196; Richmond Second Nat. Bank v. Smith, 118 Wis. 18; Nelson v. Grondahl, (N. Dak. 1904) 100 N. W. Rep. 1093.

Under New Jersey Statute. — Mason v. Kilcourse, (N. J. 1904) 59 Atl. Rep. 21.

The Virginia Statute, making the notary's certificate *prima facie* evidence of what is stated therein, seems to have been repealed by the Act of Dec. 24, 1903. Schofield v. Palmer, 134 Fed. Rep. 753.

**6. Protest as Evidence of Presentment of Foreign Bills.** — Brandon First Nat. Bank v. Briggs, 70 Vt. 599.

**Bill Payable in Another State.** — Nelson v. Killingley First Nat. Bank, (C. C. A.) 69 Fed. Rep. 798; Persons v. Kruger, 45 N. Y. App. Div. 187.

**388. 1. Protest of Inland Bills Evidence of Presentment under Statute.** — Ewen v. Wilbor, 208 Ill. 492; Ashe v. Beasley, 6 N. Dak. 191.

**2. Protest of Promissory Note Evidence of Presentment under Statute.** — State v. Edmunds, 66 Mo. App. 47; Rolla State Bank v. Pezoldt, 95 Mo. App. 404; Ashe v. Beasley, 6 N. Dak. 191.

**As to Person to Whom Presentment Is Made.** — When a note is payable at a bank, a statement in the certificate of protest that it was presented at the place of payment, and payment demanded, is sufficient evidence of a legal demand, without a further statement to whom it was presented for payment. Ashe v. Beasley, 6 N. Dak. 191.

**3. Bills Payable in Another State.** — Persons v. Kruger, 45 N. Y. App. Div. 187.

**5. Protest of Promissory Note as Evidence of Dishonor under Statute.** — State v. Edmunds, 66 Mo. App. 47; Rolla State Bank v. Pezoldt, 95 Mo. App. 404. See also Historical Pub. Co. v. Hartmanft, 3 Pa. Super. Ct. 59.

**Protest as Evidence under N. Y. Code Civ. Proc.,**

**§ 923.** — Cuming v. Roderick, 28 N. Y. App. Div. 253.

**389. 2. Protest of Promissory Note No Evidence of Notice of Dishonor at Common Law.** — Schofield v. Palmer, 134 Fed. Rep. 753, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389; Brandon First Nat. Bank v. Briggs, 70 Vt. 599.

**3. Protest of Foreign Bill as Evidence under Statute.** — State v. Edmunds, 66 Mo. App. 47; Rolla State Bank v. Pezoldt, 95 Mo. App. 404; Persons v. Kruger, 45 N. Y. App. Div. 187; Union Safe Deposit Bank v. Strauch, 20 Pa. Super. Ct. 196; Brandon First Nat. Bank v. Briggs, 70 Vt. 599.

**Protest of Inland Bills as Evidence.** — Ashe v. Beasley, 6 N. Dak. 191.

**Protest of Promissory Notes as Evidence** — Michigan. — Martin v. Smith, 108 Mich. 278.

New York. — McLean v. Ryan, 36 N. Y. App. Div. 281, affirmed 165 N. Y. 620; German-American Bank v. Mills, 99 N. Y. App. Div. 312.

North Dakota. — Ashe v. Beasley, 6 N. Dak. 191.

Pennsylvania. — Historical Pub. Co. v. Hartmanft, 3 Pa. Super. Ct. 59; Farmers' Nat. Bank v. Marshall, 9 Pa. Super. Ct. 621.

Tennessee. — City Sav. Bank v. Kensington Land Co., (Tenn. Ch. 1896) 37 S. W. Rep. 1037.

**Vermont Statutes, § 2310,** making protests evidence does not apply to protests made without the state. Brandon First Nat. Bank v. Briggs, 70 Vt. 599.

**390. 8. The Fact of Notice Must Be Stated.** — Biber v. Schmidt, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 777 (under Negotiable Instruments Law); Mason v. Kilcourse, (N. J. 1904) 59 Atl. Rep. 21.

**9. Nonreceipt of Notice in Rebuttal under N. Y. Code Civ. Proc., § 923.** — Persons v. Kruger, 45 N. Y. App. Div. 187.

**391. 6. Notice Should State that Letter Was Properly Stamped.** — Farmers' Nat. Bank v. Marshall, 9 Pa. Super. Ct. 621.

**393. 3. Protest Not Evidence of Collateral Facts.** — Nelson v. Kastle, 105 Mo. App. 187.

**394. 2. Reason for Refusal of Acceptance or Payment.** — Nelson v. Kastle, 105 Mo. App. 187.

**6. Protest as Secondary Evidence.** — Sexton v. Perrigo, 126 Mich. 544, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394.

**Notary's Certificate Inadmissible under Mich. Comp. Laws (1897), § 2635,** where defendant

**395.** (5) *Protest Used to Assist Notary's Memory.* — See note 4.

**396.** (6) *Admissibility of Extrinsic Evidence in Aid of Protest* — As Regards Inland Bills and Promissory Notes. — See notes 2, 3.

**397.** *e.* NOTARIAL FEES — Protest of Inland Bill or Promissory Note. — See note 2.

**4. Notice of Dishonor** — *b.* NECESSITY OF NOTICE — (1) *To Fix Liability of Drawer or Indorser* — (a) *Generally.* — See notes 6, 7.

makes affidavit denying having received notice. *Sexton v. Perrigo*, 126 Mich. 542.

**395.** **4. Protest Itself Admitted.** — *City Sav. Bank v. Kensington Land Co.*, (Tenn. Ch. 1896) 37 S. W. Rep. 1037.

**396.** **2. Farmers' Nat. Bank v. Marshall**, 9 Pa. Super. Ct. 621; *Nelson v. Grondahl*, (N. Dak. 1904) 100 N. W. Rep. 1093.

**A Representative of the Payee** may defend a suit against the maker by the indorsee, and show that the payee was induced to transfer the note through the fraud and undue influence of the indorsee. *Coon v. Dennis*, 111 Mich. 450.

**3. Extrinsic Evidence Admissible in Aid of Protest of Notes or Inland Bills.** — *Nelson v. Grondahl*, (N. Dak. 1904) 100 N. W. Rep. 1093; *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18.

**Omission as to Notice May Be Supplied by Notary's Evidence.** — *Williams v. Planters'*, etc., Nat. Bank, (Tex. Civ. App. 1898) 44 S. W. Rep. 617.

**Omission as to Presentment.** — *Nelson v. Grondahl*, (N. Dak. 1904) 100 N. W. Rep. 1093; *Williams v. Planters'*, etc., Nat. Bank, (Tex. Civ. App. 1898) 44 S. W. Rep. 617.

**Where the Notary Protesting the Note Is Cashier or the Holder** his credibility is of the determination of the jury. *Kingsland Land Co. v. Newman*, 1 N. Y. App. Div. 1.

**397. 2. Under Mass. Pub. Stat., c. 77, § 22**, fees may be recovered for protest of promissory note. *Legg v. Vinal*, 165 Mass. 555.

**6. Notice of Nonacceptance to Charge Drawer or Indorser.** — *Sibley v. American Exch. Nat. Bank*, 97 Ga. 126; *Germania Bank v. Trapnell*, 118 Ga. 578; *Industrial Bank v. Bowes*, 165 Ill. 70, 56 Am. St. Rep. 228; *Bowes v. Industrial Bank*, 58 Ill. App. 498; *Murphey v. Citizens Sav. Bank*, 110 Ky. 225; *Torpey v. Tebo*, 184 Mass. 307; *Burk v. Shreve*, 2 N. J. L. J. 92.

**7. Notice of Dishonor by Nonpayment Necessary** — *United States*. — *Nelson v. Killingley First Nat. Bank*, (C. C. A.) 69 Fed. Rep. 798; *In re Edson*, 119 Fed. Rep. 487.

*Alabama*. — *Carrington v. Odom*, 124 Ala. 529; *Moody v. Keller*, 127 Ala. 630.

*Delaware*. — *Stoeckle v. Gray*, 1 Penn. (Del.) 117; *Standard Sewing Mach. Co. v. Smith*, 1 Marv. (Del.) 330.

*District of Columbia*. — *Walker v. Washington Title Ins. Co.*, 19 App. Cas. (D. C.) 575.

*Georgia*. — *Richland Bank v. Nicholson*, 120 Ga. 622, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 397.

*Illinois*. — *Hinsey v. Studebaker Bros. Mfg. Co.*, 73 Ill. App. 278; *Kimmel v. Weil*, 95 Ill. App. 15.

*Indiana*. — *La Follette Coal, etc., Co. v. Whiting Foundry Equipment Co.*, 25 Ind. App. 647.

*Iowa*. — *Trease v. Haggin*, 107 Iowa 458.

*Kansas*. — *Malott v. Jewett*, 1 Kan. App. 14; *C. C. Thompson, etc., Co. v. Appleby*, 5 Kan. App. 680; *Green v. Keller*, 8 Kan. App. 110.

*Kentucky*. — *Hays v. Citizen's Sav. Bank*, 101 Ky. 201; *Brown v. Crofton*, 76 S. W. Rep. 372, 25 Ky. L. Rep. 753.

*Louisiana*. — *Redden v. Lambert*, 112 La. 740.

*Maine*. — *Yates v. Goodwin*, 96 Me. 90.

*Maryland*. — *Schwartz v. Wilmer*, 90 Md. 136.

*Massachusetts*. — *Lowell Trust Co. v. Pratt*, 183 Mass. 379.

*Michigan*. — *Barger v. Farnham*, 130 Mich. 487.

*Missouri*. — *Johnson v. Parker*, 86 Mo. App. 660; *Tucker v. Gentry*, 93 Mo. App. 655; *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404; *Westbay v. Stone*, (Mo. App. 1905) 87 S. W. Rep. 34.

*New Jersey*. — *Mason v. Kilcourse*, (N. J. 1904) 59 Atl. Rep. 21.

*New York*. — *Kelly v. Theiss*, 65 N. Y. App. Div. 146; *Smith v. Unangst*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 564; *Philip, etc., Ebling Brewing Co. v. Reinheimer*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 594; *Moore v. Alexander*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 613, affirmed 63 N. Y. App. Div. 100; *German-American Bank v. Atwater*, 165 N. Y. 36; *Harral v. Sternberger*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 274; *Traders' Nat. Bank v. Jones*, 104 N. Y. App. Div. 433; *Solomon v. Cohen*, (Supm. Ct. App. T.) 94 N. Y. Supp. 502.

*North Dakota*. — *Ashe v. Beasley*, 6 N. Dak. 191; *Nelson v. Grondahl*, (N. Dak. 1904) 100 N. W. Rep. 1093.

*Ohio*. — *Henry v. Spengler*, 5 Ohio Cir. Dec. 362, 12 Ohio Cir. Ct. 153.

*Oregon*. — *Carroll v. Nodine*, 41 Oregon 412, 93 Am. St. Rep. 743.

*Pennsylvania*. — *Peale v. Addicks*, 174 Pa. St. 543; *Deacon v. Smaltz*, 10 Pa. Super. Ct. 151.

*Rhode Island*. — *McLean v. Bryer*, 24 R. I. 599.

*Tennessee*. — *Carnegie Steel Co. v. Chattanooga Constr. Co.*, (Tenn. Ch. 1896) 38 S. W. Rep. 102.

*Texas*. — *Beauchamp v. Chester*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1055.

*Utah*. — *Burnham v. McCornick*, 18 Utah 42.

*Virginia*. — *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768; *Fidelity L. & T. Co. v. Engleby*, 99 Va. 168.

*West Virginia*. — *National Exch. Bank v. McElfish Clay Mfg. Co.*, 48 W. Va. 406.

*Wisconsin*. — *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636.

*Canada*. — *Vanier v. Kent*, 11 Quebec K. B. 373; *Trottier v. Rivard*, 23 Quebec Super. Ct. 526.

**Under Alabama Code of 1896, § 892 et seq.,**

**399.** Notice to Successive Indorsers. — See notes 2, 4.

**400.** See note 1.

**401.** (b) Indorser of Note Before Delivery — Indorser Considered as Maker. — See note 3.  
Indorser Considered as Ordinary Indorser. — See note 4.

suit must be brought against the maker within the time fixed by the statute in order to charge the indorser, unless the indorser induces delay in bringing the suit. *Marshall v. Bishop*, 140 Ala. 206.

**Georgia.** — *Pattillo v. Alexander*, 96 Ga. 60; *Sibley v. American Exch. Nat. Bank*, 97 Ga. 126; *Germania Bank v. Trapnell*, 118 Ga. 578; *Richland Bank v. Nicholson*, 120 Ga. 622; *Aldine Mfg. Co. v. Warner*, 96 Ga. 370.

Notice to surety not required. *Hunnicut v. Perot*, 100 Ga. 312.

While the mere failure of the holder of a domestic bill of exchange to give the drawer notice that the bill has been dishonored will not discharge him, if statements are made by the holder to the drawer to the effect that the bill has been paid, which statements lull the drawer into security, and as a consequence thereof injury results to him by reason of the depreciation in value of property pledged to secure the payment of the bill, the drawer will be discharged to the extent of the injury thus sustained. *Richland Bank v. Nicholson*, 120 Ga. 622.

**By Kentucky Stat., § 489**, every person who signs his name upon the back of a promissory note is liable as an assignor unless a different purpose is expressed in the writing, and to hold him liable the maker must ordinarily be prosecuted to insolvency at the first term of the court after the maturity of the note; but if the assignor, either by words or acts, induces the assignee to refrain from prompt institution of the suit against the maker, he is estopped from relying upon such failure as a defense when sued on the assignment. *American Nat. Bank v. Smallhouse*, 113 Ky. 147.

**By Mass. Stat. 1898, c. 533, § 115**, notice to the indorser is not required where he is the person to whom the instrument is presented for payment. *In re Swift*, 106 Fed. Rep. 65.

**Under N. Car. Code, 1883, § 50**, making indorsers liable as sureties, notice is not necessary. *Washington First Nat. Bank v. Eureka Lumber Co.*, 123 N. Car. 24.

**Under Statute in Texas.** — *Blakey v. Allen*, 22 Tex. Civ. App. 39; *Smith v. Ojerholm*, 18 Tex. Civ. App. 111; *Smith v. T. M. Richardson Lumber Co.*, 92 Tex. 448; *Vitkovitch v. Kleinecke*, (Tex. Civ. App. 1903) 75 S. W. Rep. 544. This statute does not apply where it is sought to hold the original promisor liable. *Beissner v. Weekes*, 21 Tex. Civ. App. 14.

**Same — Express Waiver of Diligence in Bringing Suit.** — *Williams v. Rosenbaum*, (Tex. Civ. App. 1904) 79 S. W. Rep. 594.

**Notice Essential Though Note Matures by Reason of Maker's Insolvency.** — *Banque Nationale v. Martel*, 17 Quebec Super. Ct. 97.

**Joint Indorsers — Notice to Each Essential to Bind Him.** — *Bowie v. Hume*, 13 App. Cas. (D. C.) 286.

**Notice of Dishonor of Demand Note Essential.** — *Porter v. Thom*, 30 N. Y. App. Div. 363.

**An Indorser to Whom a Note Has Been Sent for**

**Collection Is Not Excused by His Neglect** to give himself notice. *Auten v. Manistee Nat. Bank*, 67 Ark. 243.

**Inability to Make Presentment for Payment Does Not Excuse Failure to Give Notice of Protest.** — *Reed v. Spear*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 1007.

**Burden of Proving Notice.** — *Robinson v. Aird*, 43 Fla. 30; *Historical Pub. Co. v. Hartranft*, 3 Pa. Super. Ct. 59.

**399. 2. Notice Given by Holder to All the Successive Indorsers.** — *Standard Sewing Mach. Co. v. Smith*, 1 Marv. (Del.) 330. See also *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581.

**4. Notice to Indorser to Be Charged Sufficient.** — *Standard Sewing Mach. Co. v. Smith*, 1 Marv. (Del.) 330; *Lyddane v. Owensboro Banking Co.*, (Ky. 1899) 51 S. W. Rep. 453; *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404; *Oakley v. Carr*, 66 Neb. 751.

**Under Ky. Stat., § 3725**, notice to all of the indorsers is not essential. *Lyddane v. Owensboro Banking Co.*, (Ky. 1899) 51 S. W. Rep. 453.

**400. 1. Notice to Prior Indorser May Be Given by Immediate Indorsee.** — *Standard Sewing Mach. Co. v. Smith*, 1 Marv. (Del.) 330; *University Press v. Williams*, 48 N. Y. App. Div. 188.

**Preparation of New Notice Not Essential.** — The notice served by the last indorser need not be actually prepared by him, but he may adopt and utilize for that purpose a notice sent him by the protesting officer, addressed to the next prior indorser. *Oakley v. Carr*, 66 Neb. 751.

**401. 3. Indorser Considered as Maker.** — *New York L. Ins. Co. v. McKellar*, 68 N. H. 326; *McPetrich v. Woodrow*, 67 N. H. 174; *Colver v. Wheeler*, 5 Ohio Cir. Dec. 278, 11 Ohio Cir. Ct. 604; *National Exch. Bank v. Cumberland Lumber Co.*, 100 Tenn. 479; *Kennon v. Bailey*, 15 Tex. Civ. App. 28.

**Indorsers Before Delivery Who Are Recognized as Indorsers** are entitled to notice, even though they were, *prima facie*, joint makers. *Carolina Sav. Bank v. Florence Tobacco Co.*, 45 S. Car. 373.

**In West Virginia** unless the payee agrees to treat such an indorser as an indorser notice of nonpayment is not necessary to hold him as a joint maker or guarantor. *Miller v. Clendenin*, 42 W. Va. 416.

**4. Indorser Considered as Ordinary Indorser.** — *Carter v. Odum*, 121 Ala. 162; *Carrington v. Odum*, 124 Ala. 529; *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67 Am. St. Rep. 95; *Howard v. Van Gieson*, 46 N. Y. App. Div. 77. See also *Redden v. Lambert*, 112 La. 740.

**Massachusetts Statute.** — *Brooks v. Stackpole*, 168 Mass. 537; *Legg v. Vinal*, 165 Mass. 555; *New York L. Ins. Co. v. McKellar*, 68 N. H. 326.

This statute does not refer to a collateral contract made subject to the issuing of a note, and upon an independent consideration, even though it is indorsed upon the note. *Equitable Marine Ins. Co. v. Adams*, 173 Mass. 436.

- 402.** (c) Indorser after Maturity. — See notes 3, 4.
- 403.** (e) What Instruments Require Notice — Nonnegotiable Instruments. — See note 8.
- 404.** (2) To Fix Liability of Maker or Acceptor. — See notes 1, 2.
- 405.** (3) To Fix Liability of Guarantor — Doctrine in the United States — Guaranty of Collectibility of Paper. — See note 3.
- Guaranty Considered as Absolute Contract. — See note 5.
- 406.** Guaranty Considered as Conditional Contract. — See note 1.
- 407.** Damage by the Holder's Neglect Necessary. — See note 1.
- 408.** c. BY WHOM NOTICE MAY BE GIVEN — (1) In General — May Come from Any Party to Paper. — See notes 5, 7.
- 409.** Notice by Acceptor or Maker. — See note 3.
- (3) Agents. — See note 7.
- Notaries Public. — See note 11.
- 410.** See note 1.
- Agents for Collection. — See notes 2, 3.

**402. 3. Indorsement After Maturity.** — De Hass v. Dibert, (C. C. A.) 70 Fed. Rep. 227; Kimmel v. Weil, 95 Ill. App. 15; Jacobs v. Gibson, 77 Mo. App. 244.

**4. Indorser After Maturity — Notice Required.** — Sachs v. Fuller Bros. Toll, etc., Co., 69 Ark. 270; Kimmel v. Weil, 95 Ill. App. 15; Jacobs v. Gibson, 77 Mo. App. 244; German-American Bank v. Atwater, 165 N. Y. 36; Moore v. Alexander, 63 N. Y. App. Div. 100; Hudson v. Walcott, 4 Ohio Dec. (Reprint) 459, 2 Cleve. L. Rep. 194; Landon v. Bryant, 69 Vt. 203.

**Texas Statute — Duty of Holder as to Bringing Suit.** — See Hollimon v. Karger, 30 Tex. Civ. App. 558.

**403. 8. Nonnegotiable Paper — Notice Held Unnecessary.** — Smith v. Tyler First State Bank, (Minn. 1905) 104 N. W. Rep. 369, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403; Burke v. Ward, (Tex. Civ. App. 1895) 32 S. W. Rep. 1047; Herrick v. Edwards, 106 Mo. App. 633.

**Under Alabama Civ. Code, § 892 et seq.,** to charge the indorser or assignor of non-negotiable paper, suit must first be brought against the maker within the time specified by the statute. Brown v. Fowler, 133 Ala. 310.

**404. 1. To Fix Liability of Maker.** — Tuck v. National Bank, 108 Ga. 446, 75 Am. St. Rep. 69; Oxman v. Garwood, 80 Ill. App. 658; Redden v. Lambert, 112 La. 740; Barger v. Farnham, 130 Mich. 487; McGowan v. Hover, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 138; Bush v. Gilmore, 45 N. Y. App. Div. 89; Furth v. Baxter, 24 Wash. 608.

**Surety for Maker.** — Sibley v. American Exch. Nat. Bank, 97 Ga. 126.

**2. To Fix Liability of Acceptor.** — Gillespie v. Planters' Oil Mill, etc., Co., 76 Miss. 406.

**405. 3. Guarantor of Collectibility Released by Want of Notice.** — Patillo v. Alexander, 96 Ga. 60.

**5. Guaranty of Payment Considered Absolute — District of Columbia.** — Portsmouth Sav. Bank v. Wilson, 5 App. Cas. (D. C.) 8.

**Georgia.** — Sibley v. American Exch. Nat. Bank, 97 Ga. 126.

**Illinois.** — Ewen v. Wilbor, 99 Ill. App. 132, affirmed 208 Ill. 492.

**Louisiana.** — See Redden v. Lambert, 112 La. 740.

**Missouri.** — Herrick v. Edwards, 106 Mo. App. 633.

**North Dakota.** — Dunham v. Peterson, 5 N. Dak. 414, 57 Am. St. Rep. 556; Porter v. Andrus, 10 N. Dak. 558.

**Ohio.** — See Colver v. Wheeler, 5 Ohio Cir. Dec. 278, 11 Ohio Cir. Ct. 604.

**Oregon.** — Delsman v. Friedlander, 40 Oregon 33.

**Vermont.** — Stevens v. Gibson, 69 Vt. 142.

**406. 1. Guaranty of Payment Considered Conditional.** — Iowa Valley State Bank v. Sigstad, 96 Iowa 491; Farrer v. People's Trust Co., 63 Kan. 881, 64 Pac. Rep. 1031; Pawtucket First Nat. Bank v. Adamson, 25 R. I. 73.

**407. 1. Guarantor Must Suffer Damage by Want of Notice.** — Grier v. Irwin, (Iowa 1901) 86 N. W. Rep. 273; Pawtucket First Nat. Bank v. Adamson, 25 R. I. 73.

**Insolvency of Principal at Maturity of Paper.** — Grier v. Irwin, (Iowa 1901) 86 N. W. Rep. 273.

**408. 5. By Whom Notice to Be Given.** — State v. Edmunds, 66 Mo. App. 47; Oakley v. Carr, 66 Neb. 751; University Press v. Williams, 48 N. Y. App. Div. 188; Ashe v. Beasley, 6 N. Dak. 191.

**7. Enclosing Notice Addressed to Indorser in Notice Addressed to Another Indorser Insufficient.** — Aldine Mfg. Co. v. Warner, 96 Ga. 370.

**409. 3. Maker Acting as Agent of Holder May Give Notice to Indorser.** — Traders' Nat. Bank v. Jones, 104 N. Y. App. Div. 433.

**7. Notice Given by Agent of Holder — In General.** — State v. Edmunds, 66 Mo. App. 47.

**Notice by Unauthorized Person Insufficient.** — Hofrichter v. Enyeart, (Neb. 1904) 99 N. W. Rep. 658.

**11. Notaries as Agents to Give Notice.** — Nelson v. Killingley First Nat. Bank, (C. C. A.) 69 Fed. Rep. 798; State v. Edmunds, 66 Mo. App. 47.

**410. 1. Schofield v. Palmer,** 134 Fed. Rep. 753; Standard Sewing Mach. Co. v. Smith, 1 Marv. (Del.) 330.

**Statute — Missouri.** — Compare State v. Edmunds, 66 Mo. App. 47.

**Notary Not Generally Liable for Neglect in Giving Notice.** — State v. Edmunds, 66 Mo. App. 47.

**2. Agent for Collection.** — Ashe v. Beasley, 6 N. Dak. 191.

**410.** *d. To WHOM NOTICE MAY BE GIVEN — (2) Where Party to Be Notified Is Dead.* — See note 9.

**411.** *Notice to Drawer's or Indorser's Place of Residence.* — See note 2.

**412.** *(3) Where Party to Be Notified Is a Bankrupt — Notice Subsequent to Appointment.* — See note 4.

**413.** *(4) Agents.* — See note 1.

*General Agent.* — See note 2.

*Agents Acting under Implied Authority.* — See note 3.

**414.** *(5) Partners.* — See note 1.

*(6) Joint Drawers or Indorsers.* — See note 4.

*e. FORMAL REQUISITES OF NOTICE — (1) In General — No Particular Form of Language Necessary.* — See note 6.

*Notice May Be Verbal or in Writing.* — See note 7.

**417.** *(4) Contents — (b) Description of Paper.* — See note 1.

**420.** *(c) Statement of Fact of Dishonor — Generally.* — See notes 2, 3.  
*Some Specific Statements.* — See note 4.

**410. 3.** *Ashe v. Beasley*, 6 N. Dak. 191.

**9.** *Under Canada Statute.* — *Merchants' Bank v. Brown*, 86 N. Y. App. Div. 599 (construing Canada contract.).

**411. 2.** *No Personal Representative Qualified — Notice to Last Residence.* — *Deining v. Miller*, 7 N. Y. App. Div. 409; *J. H. Mohlman Co. v. McKane*, 60 N. Y. App. Div. 546, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188.

A notarial notice of protest of nonpayment of a note, addressed to an indorser as if living, when the indorser is dead, if actually received by his administrator, is good to charge such indorser's estate. *Ravenswood Bank v. Wetzel*, (W. Va. 1905) 50 S. E. Rep. 886.

**412. 4.** *Notice to Bankrupt After Appointment of Assignee.* — *Moreland v. Citizens' Nat. Bank*, 114 Ky. 577, 102 Am. St. Rep. 293.

**413. 1.** *Notice to Agent.* — *Kelly v. Theiss*, 77 N. Y. App. Div. 81; *J. H. Mohlman Co. v. McKane*, 60 N. Y. App. Div. 546, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188; *Reed v. Spear*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 1007; *Counsell v. Livingston*, 4 Ont. L. Rep. 340, affirming 2 Ont. L. Rep. 582.

*Service on Wife of Indorser at His Place of Business Sufficient.* — *Reed v. Spear*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 1007.

*Evidence of Authority Necessary.* — *Robinson v. Aird*, 43 Fla. 30.

**2.** *King v. Griggs*, 82 Minn. 387; *Kruger v. Persons*, 52 N. Y. App. Div. 635, affirming 45 N. Y. App. Div. 184.

**3.** *Notice to Agent Acting under Implied Authority.* — *King v. Griggs*, 82 Minn. 389, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 413.

**414. 1.** *Notice to One Partner Notice to All.* — *Hays v. Citizens' Sav. Bank*, 101 Ky. 201.

**4.** *Notice to Each of Two or More Joint Parties.* — *Phipps v. Harding*, (C. C. A.) 70 Fed. Rep. 468; *Northrup v. Chambers*, 90 Mo. App. 61.

*Note Signed in Blank Before Delivery — Notice to All of Signers Not Required to Sustain Action by Payee.* — *Legg v. Vinal*, 165 Mass. 555.

**6.** *No Particular Form of Language Necessary.* — *Standard Sewing Mach. Co. v. Smith*, 1 Marv. (Del.) 330; *Counsell v. Livingston*, 2 Ont. L. Rep. 582, affirmed 4 Ont. L. Rep. 340.

*Insufficient Notice.* — The request by a bank, of one who indorsed notes to it after maturity,

for the return of the proceeds of the notes, which, pursuant to the original agreement, had been deposited in the bank to the indorser's credit, the deposit to remain as security for the payment of the notes until it could be ascertained that certain assets assigned to the bank by the makers would be sufficient, but which, without any modification of the agreement, had been withdrawn from time to time by the indorser, cannot be treated as notice of the dishonor of the notes by the makers. *German-American Bank v. Atwater*, 165 N. Y. 36.

**7.** *Verbal Notice Sufficient.* — *Standard Sewing Mach. Co. v. Smith*, 1 Marv. (Del.) 330; *C. C. Thompson, etc., Co. v. Appleby*, 5 Kan. App. 680; *Lowell Trust Co. v. Pratt*, 183 Mass. 379; *Kelly v. Theiss*, 77 N. Y. App. Div. 82, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 414; *Reed v. Spear*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 1007; *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18.

*Notice by Telephone — Sufficiency.* — *C. C. Thompson, etc., Co. v. Appleby*, 5 Kan. App. 680.

**417. 1.** *Description of Paper — General Rule.* — *Rudd v. Deposit Bank*, 105 Ky. 448, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 417; *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18 (under Negotiable Instruments Law).

*Verbal Notice to Aid Written Notice Allowed.* — *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18 (under Negotiable Instruments Law).

**420. 2.** *Standard Sewing Mach. Co. v. Smith*, 1 Marv. (Del.) 330.

**3.** *Dishonor Appearing by Reasonable Intendment Sufficient.* — *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18 (under Negotiable Instruments Law).

*Sufficiency of Statement.* — A notice which shows that the note was presented and payment thereof was refused, and that it was protested, is sufficient. *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18.

*Notice Setting Forth Dishonor, Protest, Demand, and Refusal*, and that the holder looks to the person notified, is sufficient. *Legg v. Vinal*, 165 Mass. 555.

**4.** *Demand Without Intimation of Dishonor.* — *Solomon v. Cohen*, (Supm. Ct. App. T.) 94 N. Y. Supp. 692.

**422.** See note 1.

**423.** (f) Name of Sender of Notice. — See note 6.

**424.** f. MODE OF GIVING NOTICE—(1) *Service by Mail*—(a) *Where Parties Reside in Different Towns or Villages.* — See note 3.

**425.** (b) Notice by Mail to Person Residing Beyond Town Limits. — See note 2.

**426.** In Some Jurisdictions, However, This Doctrine Has Been Denied. — See note 1.

(c) *Where Parties Reside in Same Town or Village — General Rule.* — See note 2.

**427.** Effect of Receipt of Notice in Due Time. — See note 1.

Where Residence or Place of Business Cannot Be Found. — See note 5.

**428.** Notice to Prior Parties Inclosed in Notice to Indorser. — See note 2.

(d) *What Amounts to a Sufficient Service by Mail.* — See note 3.

**429.** (2) *Service by Delivery* — (a) *In General.* — See note 4.

(b) *What Will Be a Sufficient Delivery.* — See note 5.

**430.** (3) *Verbal Notice.* — See note 2.

**422.** 1. Notice that Paper Was "Protested." — See *Rudd v. Deposit Bank*, 105 Ky. 443.

**423.** 6. Signature of Sender. — Compare *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18 (under Negotiable Instruments Law).

**424.** 3. Service by Mail Where Parties Reside in Different Town or Village. — *Carter v. Odom*, 121 Ala. 162; *Carrington v. Odom*, 124 Ala. 529; *Burk v. Shreve*, 2 N. J. L. J. 92; *J. H. Mohlman Co. v. McKane*, 60 N. Y. App. Div. 546, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188.

Under Negotiable Instruments Law. — "Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address then the notice must be sent as follows: (1) either to the post office nearest to his place of residence or to the post office where he is accustomed to receive his mail; or (2) if he live in one place, and have his place of business in another, notice may be sent to either place; or (3) if he is sojourning in another place, notice may be sent to the place where he is sojourning." *Philip, etc., Ebling Brewing Co. v. Reinheimer*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 594; *J. H. Mohlman Co. v. McKane*, 60 N. Y. App. Div. 546; *Reed v. Spear*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 1007; *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18.

**425.** 2. Where Party Resides Outside Town, but Receives Mail there. — *Carter v. Odom*, 121 Ala. 162; *M. V. Monarch Co. v. Farmers', etc., Bank*, 105 Ky. 430, 88 Am. St. Rep. 310.

**426.** 1. Under Tenn. Acts 1895, p. 402, service is allowed by mail in all cases. *Chattanooga First Nat. Bank v. Reid*, (Tenn. Ch. 1900) 58 S. W. Rep. 1124.

2. Mode of Sending Notice Where Parties Reside in the Same Town or Village. — *Carter v. Odom*, 121 Ala. 162; *C. C. Thompson, etc., Co. v. Appleby*, 5 Kan. App. 680; *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404; *Lenhart v. Ramey*, 2 Ohio Cir. Dec. 77. Compare *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18 (under Negotiable Instruments Law).

*Alabama Statute.* — *Carter v. Odom*, 121 Ala. 162.

*Massachusetts Statute — Notice by Mail Allowed.* — *Lowell Trust Co. v. Pratt*, 183 Mass. 379.

*Absence of Indorser from Residence — Service by Mail Sufficient.* — *Lenhart v. Ramey*, 2 Ohio Cir. Dec. 77.

**427.** 1. Effect of Receipt of Notice in Due

Time. — *Carter v. Odom*, 121 Ala. 162; *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404; *Chapman v. Ogden*, 37 N. Y. App. Div. 355, affirmed 165 N. Y. 642.

5. Where Residence or Place of Business Cannot Be Found. — *Lenhart v. Ramey*, 2 Ohio Cir. Dec. 77; *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581.

Notice Mailed to Place Where Note Dated Sufficient under N. Y. Neg. Inst. L., §§ 176, 179. — *J. H. Mohlman Co. v. McKane*, 60 N. Y. App. Div. 546.

**428.** 2. Notice to One Indorser Inclosed in Notice to Another by Whom It Is Redeposited. — *Oakley v. Carr*, 66 Neb. 751; *Metropolitan Bank v. Engel*, 66 N. Y. App. Div. 273. See also *Henry v. Spengler*, 5 Ohio Cir. Dec. 362, 12 Ohio Cir. Ct. 153.

3. What Amounts to Sufficient Service by Mail. — *Lowell Trust Co. v. Pratt*, 183 Mass. 379; *German-American Bank v. Mills*, 99 N. Y. App. Div. 312; *State Bank v. Soloman*, (Supm. Ct. App. T.) 84 N. Y. Supp. 976; *Cook v. Forker*, 193 Pa. St. 461, 74 Am. St. Rep. 699; *Phoenix Brewing Co. v. Weiss*, 23 Pa. Super. Ct. 519; *Farmers' Nat. Bank v. Marshall*, 9 Pa. Super. Ct. 621; *Siegel v. Hirsch*, 26 Pa. Super. Ct. 398; *Dime Deposit, etc., Bank v. Arnold*, 6 Lack. Leg. N. (Pa.) 210, 7 Northam. Co. Rep. (Pa.) 281, 14 York Leg. Rec. (Pa.) 101. See also *Siegel v. Hirsch*, 26 Pa. Super. Ct. 398.

The Word "Mailed," as applied to notice of protest, implies that the requisite postage was prepaid on the letter. *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404.

Sufficiency of Evidence to Show Mailing of Notice. — *Persons v. Kruger*, 45 N. Y. App. Div. 187; *Farmers' Nat. Bank v. Marshall*, 9 Pa. Super. Ct. 621.

Presumption Rebuttable. — *Phoenix Brewing Co. v. Weiss*, 23 Pa. Super. Ct. 510.

**429.** 4. Service by Delivery Where Parties Reside in Different Town. — *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18 (under Negotiable Instruments Law).

5. Service of Notice on Corporation Must Be on Officer or Agent. — *American Exch. Nat. Bank v. American Hotel Victoria Co.*, 103 N. Y. App. Div. 372.

**430.** 2. Verbal Notice. — See *C. C. Thompson, etc., Co. v. Appleby*, 5 Kan. App. 680; *Lowell Trust Co. v. Pratt*, 183 Mass. 379. See also *Kelly v. Theiss*, 77 N. Y. App. Div. 81.

**430.** *g.* TIME OF GIVING NOTICE — (2) *Notice on Day of Dishonor.* — See note 4.

**431.** (3) *Within What Time After Dishonor Notice May Be Given* — (a) *General Rule.* — See note 1.

(b) *Parties Residing in Same Place.* — See note 2.

**432.** (e) *Parties Residing in Different Places* — *aa.* WHERE NOTICE IS TRANSMITTED BY MAIL. — See note 1.

**433.** Where there Are Several Successive Mails on the Same Day. — See note 1.

**434.** *bb.* TRANSMISSION BY MEANS OTHER THAN MAIL. — See note 1.

(d) *Notice to Successive Indorsers* — Each Party Entitled to His Day Where Successive Notices Are Given. — See note 3.

**436.** (f) *Exclusion of Holidays from Computation.* — See note 8.

(g) *Excuses for Delay* — *Inability to Find Party to Be Notified.* — See note 12.

**438.** *h.* PLACE OF GIVING NOTICE — (2) *Where Service Is by Mail* — (a) *General Rule.* — See notes 3, 4.

**439.** Where Party Is Accustomed to Receive Mail from More Remote Office. — See notes 1, 2.

(b) *Notice to Party Having Two Places of Residence.* — See note 5.

**430.** 4. Under the Tennessee Statute (Acts 1895, p. 402) notices of protest shall be placed in the post office on the same day, immediately after the protestation. *Chattanooga First Nat. Bank v. Reid*, (Tenn. Ch. 1900) 58 S. W. Rep. 1124.

**431.** 1. *Notice Within Reasonable Time After Dishonor.* — *Fielding v. Corry*, (1898) 1 Q. B. 268, 77 L. T. N. S. 453, 67 L. J. Q. B. 7, 46 W. R. 97; *Carrington v. Odom*, 124 Ala. 529; *Pattillo v. Alexander*, 96 Ga. 60; *Standard Sewing Mach. Co. v. Smith*, 1 Marv. (Del.) 330; *Oakley v. Carr*, 66 Neb. 751; *German-American Bank v. Atwater*, 165 N. Y. 36; *Merchants' Bank v. Brown*, 86 N. Y. App. Div. 599; *Deininger v. Miller*, 7 N. Y. App. Div. 409; *Fidelity L. & T. Co. v. Engleby*, 99 Va. 168.

When "Reasonable Time" a Question of Law and When a Question of Fact. — *Pattillo v. Alexander*, 96 Ga. 60; *Merchants' Bank v. Brown*, 86 N. Y. App. Div. 599.

2. *Notice on Day Following Dishonor Required.* — *Standard Sewing Mach. Co. v. Smith*, 1 Marv. (Del.) 330; *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404; *Oakley v. Carr*, 66 Neb. 751; *Kelly v. Theiss*, 65 N. Y. App. Div. 146; *Deininger v. Miller*, 7 N. Y. App. Div. 409; *M. V. Monarch Co. v. Farmers', etc., Bank*, 105 Ky. 430, 88 Am. St. Rep. 310.

*Under California Statute.* — *Meyer v. Foster*, (Cal. 1905) 81 Pac. Rep. 402.

*Under Negotiable Instruments Law.* — *Solomon v. Cohen*, (Supm. Ct. App. T.) 94 N. Y. Supp. 502.

*Notice by Telegram.* — Where a notice was, though by mistake, addressed to the wrong place, and, on the day after it was sent, notice was telegraphed to the proper address, the notice was held sufficient. *Fielding v. Corry*, (1898) 1 Q. B. 268, 77 L. T. N. S. 453, 67 L. J. Q. B. 7, 46 W. R. 97.

**432.** 1. *Posting in Time for Mail of Day After Dishonor.* — *Fielding v. Corry*, (1898) 1 Q. B. 268, 77 L. T. N. S. 453, 67 L. J. Q. B. 7, 46 W. R. 97; *The Elmville*, (1904) P. 319, 91 L. T. N. S. 151, 73 L. J. P. 104; *Crosby v. Patton*, 76 Minn. 40; *Brewster v. Shrader*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 480.

*Burden of Proof.* — *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404.

**433.** 1. *First Mail of Day After Dishonor Required.* — *Oakley v. Carr*, 66 Neb. 751.

**434.** 1. *Notice by Telegram Sufficient.* — *Fielding v. Corry*, (1898) 1 Q. B. 268, 67 L. J. Q. B. 7, 77 L. T. N. S. 453, 46 W. R. 97.

3. *Notice Between Successive Parties — Each Entitled to His Day.* — *Standard Sewing Mach. Co. v. Smith*, 1 Marv. (Del.) 330; *Oakley v. Carr*, 66 Neb. 751; *State v. Edmunds*, 66 Mo. App. 47; *University Press v. Williams*, 48 N. Y. App. Div. 188; *Ashe v. Beasley*, 6 N. Dak. 191; *Wolf v. Jacobs*, 3 Lack. Leg. N. (Pa.) 160.

**436.** 8. *Indorser Receiving Notice on Saturday need not serve notice on preceding indorser until following Sunday.* *Oakley v. Carr*, 66 Neb. 751.

12. *Inability to Find to Be Notified as Excuse for Delay.* — *Burk v. Shreve*, 2 N. J. L. J. 92; *University Press v. Williams*, 48 N. Y. App. Div. 190, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 436.

**438.** 3. *Notice by Mail.* — *Burk v. Shreve*, 2 N. J. L. J. 92; *Philip, etc., Ebling Brewing Co. v. Reinheimer*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 594; *J. H. Mohlman Co. v. McKane*, 66 N. Y. App. Div. 546, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188; *Fonseca v. Hartman*, (Supm. Ct. App. T.) 84 N. Y. Supp. 131.

4. *Notice to Post Town at or near Place of Business.* — *Philip, etc., Ebling Brewing Co. v. Reinheimer*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 594; *Fonseca v. Hartman*, (Supm. Ct. App. T.) 84 N. Y. Supp. 131.

**439.** 1. *Where Party Accustomed to Receive Mail at More Remote Office.* — *J. H. Mohlman Co. v. McKane*, 66 N. Y. App. Div. 546, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188; *Fonseca v. Hartman*, (Supm. Ct. App. T.) 84 N. Y. Supp. 131; *Siegel v. Hirsch*, 26 Pa. Super. Ct. 308 (under Negotiable Instruments Law).

2. *Notice to Nearer Office Sufficient.* — *Siegel v. Hirsch*, 26 Pa. Super. Ct. 398 (under Negotiable Instruments Law).

5. *Lowell Trust Co. v. Pratt*, 183 Mass. 379,



- 439.** Actual Temporary Abode Differing from Place of Domicil. — See note 6.
- 440.** See note 1.  
Place Visited for Temporary and Special Purpose. — See note 3.  
(d) Notice Sent to Wrong Place After Due Inquiry. — See note 5.
- 441.** See note 1.
- 442.** (f) Where Party Directs Notice to Be Sent to Certain Place. — See note 4.  
Place Specified in Conjunction with Indorsement. — See note 5.
- 443.** (3) *Place Immaterial Where Notice Is Received.* — See note 5.
- 444.** 5. Excuses for Want of Presentment, Protest, and Notice — *a.* DRAWING WITHOUT HAVING EFFECTS IN HANDS OF DRAWEE. — See note 1.
- 445.** Where Drawer Has Reasonable Expectation that Bill Will Be Honored. — See note 1.
- 447.** *b.* TRANSFER OF INVALID PAPER. — See note 1.  
*c.* RECEIVING FUNDS OR ASSETS OF ACCEPTOR OR MAKER — Where by Agreement the Drawer or Indorser Assumes Primary Liability. — See note 2.  
Receiving Security Without Agreement to Assume Primary Liability. — See notes 3, 4.
- 448.** Adequacy of Security Immaterial. — See note 1.  
Security Consisting of Acceptor's or Maker's Entire Property. — See note 2.
- 449.** *d.* PARTIES OCCUPYING DOUBLE RELATION — (1) *Identity of Drawer and Drawee.* — See note 1.

**439.** 6. Notice Sent to Temporary Residence. — Philip, etc., Ebling Brewing Co. v. Reinheimer, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 594; Fonseca v. Hartman, (Supm. Ct. App. T.) 84 N. Y. Supp. 131.

**440.** 1. Notice Sent to Permanent Domicil Sufficient. — Lowell Trust Co. v. Pratt, 183 Mass. 379.

3. Place Visited for Temporary or Special Purpose. — Chattanooga First Nat. Bank v. Reid, (Tenn. Ch. 1900) 58 S. W. Rep. 1124.

5. Reasonable Diligence Necessary in Inquiring for Residence. — Trease v. Haggin, 107 Iowa 458; Burk v. Shreve, 2 N. J. L. J. 92; University Press v. Williams, 48 N. Y. App. Div. 188; Fonseca v. Hartman, (Supm. Ct. App. T.) 84 N. Y. Supp. 131.

**441.** 1. Notice Sent to Wrong Place After Due Inquiry. — Burk v. Shreve, 2 N. J. L. J. 92; University Press v. Williams, 48 N. Y. App. Div. 188.

Notice Negligently Misdirected Not Sufficient. — Howard v. Van Gieson, 46 N. Y. App. Div. 77.

Information Received from City Directory. — Cuming v. Roderick, 28 N. Y. App. Div. 253; Cuming v. Roderick, 42 N. Y. App. Div. 620, affirmed 167 N. Y. 571.

**442.** 4. Where Party Directs Notice to Be Sent to Certain Place. — Siegel v. Hirsch, 26 Pa. Super. Ct. 398; J. H. Mohlman Co. v. McKane, 60 N. Y. App. Div. 546, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188; Fonseca v. Hartman, (Supm. Ct. App. T.) 84 N. Y. Supp. 131.

Under the Negotiable Instruments Law, § 179, if the party to receive the notice has added an address to his signature, the notice must be sent to the address so given or to the post office nearest his place of residence or to the post office where he is accustomed to receive his letters. J. H. Mohlman Co. v. McKane, 60 N. Y. App. Div. 546.

5. Place Specified in Conjunction with Indorse-

ment. — See also Siegel v. Hirsch, 26 Pa. Super. Ct. 398 (under Negotiable Instruments Law).

**443.** 5. Place Immaterial Where Notice Is Actually Received. — Oakley v. Carr, 66 Neb. 751; Siegel v. Hirsch, 26 Pa. Super. Ct. 398, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 443.

**444.** 1. Want of Presentment Excused by Want of Effects in Hands of Drawee. — Lawrence v. Hammond, 4 App. Cas. (D. C.) 467.

Rule as to Indorser of Bill. — Citizens' Nat. Bank v. Greensburg Third Nat. Bank, 19 Ind. App. 69.

Want of Effects as Excusing Want of Protest. — Lawrence v. Hammond, 4 App. Cas. (D. C.) 467.

**445.** 1. Want of Funds where there Is Reasonable Expectation that Bill Will Be Honored — Right of Indorsee to Presume that Draft Will Be Honored. — Citizens' Nat. Bank v. Greensburg Third Nat. Bank, 19 Ind. App. 69.

**447.** 1. Transfer of Void Paper as Excusing Diligence. — Wells v. Simpson Nat. Bank, 19 Tex. Civ. App. 636.

Where Paper Is Forged. — Wells v. Simpson Nat. Bank, 19 Tex. Civ. App. 636.

2. Indorser Must Have Knowledge of and Accept Transfer. — Moore v. Alexander, 63 N. Y. App. Div. 100.

3. M. Rumley Co. v. Dollarhide, 86 Ill. App. 476.

4. Mere Taking of Security Does Not Excuse Demand and Notice. — Moody v. Keller, 127 Ala. 630; Moore v. Alexander, 63 N. Y. App. Div. 100; Moore v. Alexander, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 613, affirmed 63 N. Y. App. Div. 100.

**448.** 1. Adequate Funds in Indorser's Hands Excuses Demand and Notice. — Kimmel v. Weil, 95 Ill. App. 15.

2. General Assignment of Maker's Property — Notice to Indorser Not Necessary. — Moore v. Alexander, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 613, affirmed 63 N. Y. App. Div. 100.

**449.** 1. Notice to Directors Individually In-

**449.** (2) *Where Drawer or Indorser and Drawee or Maker Are Partners* — Notice Dispensed with. — See note 4.

**450.** (3) *Appointment of Drawer or Indorser as Acceptor's or Maker's Personal Representative.* — See note 4.

*e.* REMOVAL OR ABSCONDING OF MAKER OR ACCEPTOR — Absconding of Maker or Acceptor. — See note 6.

Removal of Maker or Acceptor into Another Jurisdiction. — See note 8.

**451.** Removal to New Residence Within Same Jurisdiction. — See note 4.

*f.* INABILITY OF HOLDER TO MAKE PRESENTMENT OR GIVE NOTICE — (1) *Where Place for Presentment or Notice Cannot Be Found.* — See note 9.

**452.** See note 1.

What Will Amount to Due Diligence. — See note 2.

When a Question of Law and When a Question of Fact. — See notes 3, 4.

**453.** (2) *Where Place for Presentment or Notice Is Closed.* — See note 2.

(3) *Where Specified Place of Payment Has Ceased to Exist.* — See note 3.

(4) *Where Paper Is Transferred Too Near Maturity.* — See note 4.

*dorsing Corporation's Note Necessary.* — Phipps v. Harding, (C. C. A.) 70 Fed. Rep. 468.

**449.** 4. *Officer of Two Corporations.* — Where one person is secretary of the holder company and also secretary of the drawer and indorser of the bill, in order that knowledge of dishonor acquired by him as secretary of the holder shall be binding upon the drawer and indorser, it must have been the officer's duty to communicate the fact to the drawer and indorser. *In re Fenwick*, (1902) 1 Ch. 507.

**450.** 4. *Fraser v. McLeod*, 2 N. W. Ter. 154.

Where the indorser is the executor of the holder and also treasurer of the corporation maker of the note, demand made by him as executor upon himself as treasurer is sufficient notice to him as indorser. *Yates v. Goodwin*, 96 Me. 90.

**6.** *Absconding by Maker or Acceptor as Excusing Want of Presentment.* — *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581.

*Under Ill. Act of 1874, sec. 7.* — *Oxman v. Garwood*, 80 Ill. App. 658.

**8.** *Removal of Maker of Demand Note before reasonable time for presentment has elapsed excuses demand.* *Leonard v. Olson*, 99 Iowa 162, 61 Am. St. Rep. 230.

**451.** 4. *Removal to New Residence Within Same Jurisdiction.* — *Wood v. Rosendale*, 10 Ohio Cir. Dec. 66, 18 Ohio Cir. Ct. 247; *Reinke v. Wright*, 93 Wis. 368.

**9.** *Where Residence or Place of Business Cannot Be Found.* — *Trease v. Haggin*, 107 Iowa 458; *King v. Griggs*, 82 Minn. 387; *University Press v. Williams*, 48 N. Y. App. Div. 188; *Port Jefferson Bank v. Darling*, 91 Hun (N. Y.) 236; *Wood v. Rosendale*, 10 Ohio Cir. Dec. 66, 18 Ohio Cir. Ct. 247; *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581; *Reinke v. Wright*, 93 Wis. 368.

*Degree of Diligence Required.* — *King v. Griggs*, 82 Minn. 387.

*Failure of Notary to Make Inquiry of Holder.* — See also *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581.

**452.** 1. *The Elmville*, (1904) P. 319, 91 L. T. N. S. 151, 73 L. J. P. 104; *Trease*

*v. Haggin*, 107 Iowa 458; *Philip, etc., Ebling Brewing Co. v. Reinheimer*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 594; *Fonseca v. Hartman*, (Supm. Ct. App. T.) 84 N. Y. Supp. 131; *Reinke v. Wright*, 93 Wis. 368.

*Necessity of Inquiry of Parties to Paper.* — *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581.

*Under the Negotiable Instruments Law*, where no place of payment is specified in the note, and the person primarily liable thereon is dead, and no personal representative has been appointed, the holder of the note is excused from presenting it for payment. *Reed v. Spear*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 1007.

**2.** *Cuming v. Roderick*, 28 N. Y. App. Div. 253; *University Press v. Williams*, 48 N. Y. App. Div. 188; *Brewster v. Shrader*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 480; *Philip, etc., Ebling Brewing Co. v. Reinheimer*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 594; *Lenhart v. Ramey*, 2 Ohio Cir. Dec. 77; *Wood v. Rosendale*, 10 Ohio Cir. Dec. 66, 18 Ohio Cir. Ct. 247; *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581.

*Sufficiency of Evidence to Show Due Diligence.* — *Reed v. Spear*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 1007.

**3.** *Lenhart v. Ramey*, 2 Ohio Cir. Dec. 77.

**4.** *University Press v. Williams*, 48 N. Y. App. Div. 188; *Philip, etc., Ebling Brewing Co. v. Reinheimer*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 594; *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581.

**453.** 2. *Place of Residence or Business of Party to Be Notified Closed.* — *Hazlett v. Bragdon*, 7 Pa. Super. Ct. 581.

**3.** *Demand of Bank Examiner in Control of Insolvent Bank Sufficient.* — *Auten v. Manistee Nat. Bank*, 67 Ark. 243.

*Presentment at Receiver's Office.* — Where the bank at which the paper was made payable is in the hands of a receiver who has his office elsewhere, presentment should be made at the receiver's office, to charge the indorser. *Hutchinson v. Crutcher*, 98 Tenn. 421.

**4.** *Donohoe Kelly Banking Co. v. Puget Sound Sav. Bank*, 13 Wash. 407, 52 Am. St. Rep. 57.

**453.** *g. WAIVER — (1) In General.* — See note 6.

**454.** *(3) By Whom Waiver May Be Given.* — See note 5.

**455.** *Waiver by Partners.* — See note 2.

*(4) Parties Affected by Waiver in Written Instrument — Waiver in Body of the Instrument.* — See note 5.

**456.** *Waiver Appearing in the Form of an Indorsement.* — See note 2.

*Where the Peculiar Indorsement Is Regarded as Part of the Original Instrument.* — See note 4.

*(5) Time of Making Waiver — Waiver Before Maturity of Paper.* — See notes 5, 6.

**457.** See note 1.

*Waiver After Maturity.* — See note 2.

*(6) Consideration of Waiver — Waiver Before or at Maturity.* — See note 5.

*Waiver After Maturity.* — See note 7.

*(7) Mode of Making Waiver — (a) In General.* — See notes 8, 9, 10.

**458.** See note 2.

*Verbal Waiver Subsequent to Execution or Indorsement.* — See note 3.

**453. 6. Waiver — United States.** — *In re Swift*, 106 Fed. Rep. 65.

*District of Columbia.* — *Portsmouth Sav. Bank v. Wilson*, 5 App. Cas. (D. C.) 8; *Bowie v. Hume*, 13 App. Cas. (D. C.) 286.

*Illinois.* — *Deering v. Wiley*, 56 Ill. App. 309; *Oxman v. Garwood*, 80 Ill. App. 658.

*Indiana.* — *State v. Hughes*, 19 Ind. App. 268, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 453.

*Iowa.* — *Iowa Valley State Bank v. Sigstad*, 96 Iowa 491.

*Kansas.* — *Green v. Keller*, 8 Kan. App. 110.

*Kentucky.* — *Murphy v. Citizens' Sav. Bank*, 110 Ky. 930.

*Maryland.* — *Schwartz v. Wilmer*, 90 Md. 136.

*New York.* — *Friendship First Nat. Bank v. Weston*, 25 N. Y. App. Div. 414; *Bird v. Kay*, 40 N. Y. App. Div. 533; *Roch v. London*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 384, reversed (Supm. Ct. App. T.) 25 Misc. (N. Y.) 533.

*Texas.* — *Beauchamp v. Chester*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1055.

*Washington.* — *Donnerberg v. Oppenheimer*, 15 Wash. 290.

*Waiver by Joint Indorsers.* — *Bowie v. Hume*, 13 App. Cas. (D. C.) 286.

*Consideration Not Essential.* — *Delsman v. Friedlander*, 40 Oregon 33.

*Waiver by Guarantor Immaterial.* — *Delsman v. Friedlander*, 40 Oregon 33.

**454. 5. Waiver by Curator of Insolvent Not Sufficient.** — *Denenberg v. Mendelsohn*, 22 Quebec Super. Ct. 474, affirmed 22 Quebec Super. Ct. 128; *Molsons Bank v. Steel*, 23 Quebec Super. Ct. 316, 5 Quebec Pr. 184; *In re Boutin*, 12 Quebec Super. Ct. 186.

**455. 2. Waiver by One Partner Sufficient to Bind Partnership.** — *Schwartz v. Wilmer*, 90 Md. 136. See also *Friendship First Nat. Bank v. Weston*, 25 N. Y. App. Div. 414; *Hays v. Citizens' Sav. Bank*, 101 Ky. 201.

**5. Waiver in Body of Instrument.** — *Eudora Min.*, etc., Co. v. Barclay, 122 Ala. 506; *State v. Hughes*, 19 Ind. App. 266; *Jacobs v. Gibson*, 77 Mo. App. 244; *German-American Sav. Bank*

*v. Hanna*, (Iowa 1904) 100 N. W. Rep. 57; *Williams v. Rosenbaum*, (Tex. Civ. App. 1904) 79 S. W. Rep. 594.

**456. 2. Portsmouth Sav. Bank v. Wilson**, 5 App. Cas. (D. C.) 8. See also *Elliott v. Moreland*, 69 N. J. L. 216.

**4. Waiver by Indorsement Regarded as Part of Instrument.** — *Farmers' Exch. Bank v. Altura Gold Mill*, etc., Co., 129 Cal. 270, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 456; *Portsmouth Sav. Bank v. Wilson*, 5 App. Cas. (D. C.) 8; *Johnson v. Parker*, 86 Mo. App. 660.

**Even Though the Waiver Is Blank** subsequent indorsers are bound by it. *Loveday v. Anderson*, 18 Wash. 322.

**5. Waiver at Time of Execution or Indorsement.** — *Deering v. Wiley*, 56 Ill. App. 309; *Schwartz v. Wilmer*, 90 Md. 136; *Keller v. Home L. Ins. Co.*, 95 Mo. App. 627; *Souther v. McKenna*, 20 R. I. 645.

**6. Waiver After Execution and Before Maturity.** — *Schwartz v. Wilmer*, 90 Md. 136.

**Sufficiency of Evidence to Show Waiver Before Maturity.** — *Bankers Iowa State Bank v. Mason Hand Lathe Co.*, 121 Iowa 570.

**457. 1. Waiver at Maturity.** — *Schwartz v. Wilmer*, 90 Md. 136.

**2. Waiver After Maturity.** — *Schwartz v. Wilmer*, 90 Md. 136; *Parr v. City Trust*, etc., Co., 95 Md. 291.

**5. Schwartz v. Wilmer**, 90 Md. 144, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 457.

**7. Schwartz v. Wilmer**, 90 Md. 144, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 457.

**8. Murphy v. Citizens' Sav. Bank**, 110 Ky. 930.

**9. Murphy v. Citizens' Sav. Bank**, 110 Ky. 930.

**10. Waiver Implied from Understanding Between the Parties.** — *Fraser v. McLeod*, 2 N. W. Ter. 154.

**What Amounts to a Waiver — Question for Court or Jury.** — *Valley Nat. Bank v. Urich*, 191 Pa. St. 556.

**458. 2. Waiver in Separate Writing.** — *Robertson v. Parrish*, (Tex. Civ. App. 1897) 39 S. W. Rep. 646.

**3. Verbal Waiver Subsequent to Execution.** —

- 458.** Parol Waiver Prior to or Contemporaneous with Indorsement. — See notes 4, 5.
- 459.** (b) Direct and Express Waiver. — See note 3.  
Waiver of Protest Construed. — See note 4.
- 460.** See note 1.  
Waiver of Notice Construed. — See note 4.  
(c) Implied Waiver Before and at Maturity — *aa.* GENERALLY. — See note 6.
- 461.** *bb.* PROMISE TO PAY BILL OR NOTE. — See notes 2, 3.
- 462.** See note 2.  
*cc.* AGREEMENT TO EXTEND TIME OF PAYMENT. — See note 3.  
Agreement to Renew Paper. — See note 5.  
Agreement to Extend Time for Bringing Suit. — See note 6.
- 463.** *dd.* REQUEST FOR FORBEARANCE. — See note 1.  
(d) Effect of Promise to Pay Made After Maturity. — See note 3.

Quaintance *v.* Goodrow, 16 Mont. 376; Roch *v.* London, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 384, *reversed* (Supm. Ct. App. T.) 25 Misc. (N. Y.) 533.

**458.** 4. Waiver by Parol Not Allowed in Some Jurisdictions.—Bird *v.* Kay, 40 N. Y. App. Div. 538, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 458.

5. Quaintance *v.* Goodrow, 16 Mont. 376.

Waiver by Indorser in Blank.—Sloan *v.* Gibbes, 56 S. Car. 480, 76 Am. St. Rep. 559.

**459.** 3. Direct and Express Waiver.—Portsmouth Sav. Bank *v.* Wilson, 5 App. Cas. (D. C.) 8; Deering *v.* Wiley, 56 Ill. App. 309.

4. Waiver of Protest Construed Generally.—Parr *v.* City Trust, etc., Co., 95 Md. 291; Seymour *v.* Francisco, 4 Ohio Dec. (Reprint) 12, Cleve. L. Rec. 9.

Waiver of Notice of Protest a Waiver of Presentment, Demand, and Notice.—Parr *v.* City Trust, etc., Co., 95 Md. 291.

Waiver of Notice of Protest Waives Notice of Nonpayment.—Furth *v.* Baxter, 24 Wash. 608.

Waiver of Protest and Notice Waives Demand.—Timberlake *v.* Thayer, 76 Miss. 76.

Waiver of Presentment Construed as Waiver of Notice.—See *In re* Swift, 106 Fed. Rep. 65.

Waiver of Notice of Presentment, Dishonor, and Protest does not waive presentment and demand of payment. Hayward *v.* Empire State Sugar Co., 105 N. Y. App. Div. 21.

Waiver of Protest Construed as Equivalent to Waiver of Demand and Notice.—Valley Nat. Bank *v.* Ulrich, 191 Pa. St. 556.

Waiver of Demand Waives Presentment.—Burton *v.* Goffin, 5 British Columbia 454.

Effect of Indorsement "Protest Waived" a Question of Law.—Schwartz *v.* Wilmer, 90 Md. 136.

**460.** 1. Waiver of Protest of Negotiable Notes.—Seymour *v.* Francisco, 4 Ohio Dec. (Reprint) 12, Cleve. L. Rec. 9.

4. Waiver of Notice No Excuse for Want of Presentment.—Union Nat. Bank *v.* Grant, 48 La. Ann. 18; Blatchford *v.* Harris, 115 Ill. App. 164, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 460.

6. Waiver Implied from Acts and Language Before Maturity.—*In re* Swift, 106 Fed. Rep. 65; Quaintance *v.* Goodrow, 16 Mont. 376; Roch *v.* London, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 384, *reversed* (Supm. Ct. App. T.) 25 Misc. (N. Y.) 533; Laumeier *v.* Hallock, 103 Mo. App. 116. See also Hays *v.* Citizens' Sav. Bank, 101 Ky. 201.

Language Not Amounting to Waiver.—The fact that the indorser, upon being informed by the payee of the balance due upon the note, stated that he would see the maker, and that, if the latter did not make his account good, he would "go and shut him up," does not amount to a waiver of demand and notice. Congress Brewing Co. *v.* Habenicht, 83 N. Y. App. Div. 141.

Giving a Duplicate Draft to replace a lost one does not constitute a waiver, where the plaintiff was guilty of negligence. Gilby Bank *v.* Farnsworth, 7 N. Dak. 6.

Waiver Implied from Statement of Indorser that he and the maker are insolvent. *In re* Swift, 106 Fed. Rep. 65.

Waiver Not Presumed.—Bird *v.* Kay, 40 N. Y. App. Div. 533.

**461.** 2. Promise to Pay Made Before Maturity as Waiver.—Quaintance *v.* Goodrow, 16 Mont. 376; Souther *v.* McKenna, 20 R. I. 645.

3. Protest Is Waived by the indorser stating to the holder, before and after maturity, that he was to look to him, the indorser, and no one else, for payment. Quaintance *v.* Goodrow, 16 Mont. 376.

**462.** 2. See also Bird *v.* Kay, 40 N. Y. App. Div. 533.

3. An Extension Secured by an Indorser Acting as Agent for Another who has assumed liability for the note, the fact of the agency being known to the holder, does not constitute a waiver by the indorser of demand and notice. Laumeier *v.* Hallock, 103 Mo. App. 116.

5. Mere Offer to Renew Paper as Waiver.—Friendship First Nat. Bank *v.* Weston, 25 N. Y. App. Div. 414. Compare Tallahassee First Nat. Bank *v.* McCord, (Tex. Civ. App. 1897) 39 S. W. Rep. 1003.

6. Waiver is not shown by proof that the payee understood that the holder to whom he transferred the note after maturity was buying it to give the maker more time. Landon *v.* Bryant, 69 Vt. 203.

**463.** 1. Request for Forbearance as Waiver.—Oley *v.* Miller, 74 Conn. 304; Quaintance *v.* Goodrow, 16 Mont. 376; Bush *v.* Gilmore, 45 N. Y. App. Div. 89.

Whether Request Amounts to Waiver a Question for Jury.—Jones *v.* Roberts, 191 Pa. St. 152.

3. Promise to Pay Made After Maturing as Waiver.—Alabama.—Alabama Nat. Bank *v.* Rivers, 116 Ala. 1, 67 Am. St. Rep. 95.

Georgia.—Hunnicut v. Perot, 100 Ga. 312.

**465.** Drawer or Indorser Must Know of Laches. — See note 1.

**466.** Ignorance of Legal Effect of Laches Immaterial. — See note 1.

Unequivocal Promise Necessary. — See note 2.

**467.** Unaccepted Conditional Promise Insufficient. — See note 1.

*h.* SOME CIRCUMSTANCES INOPERATIVE AS EXCUSES — (1) *Want of Prejudice to Drawer or Indorser.* — See note 2.

**468.** See note 1.

*Kentucky.* — *Murphy v. Citizens' Sav. Bank*, 110 Ky. 930.

*Maryland.* — *Schwartz v. Wilmer*, 90 Md. 142, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 463.

*Massachusetts.* — *Glidden v. Chamberlin*, 167 Mass. 486, 57 Am. St. Rep. 479.

*Michigan.* — *State Bank v. McCabe*, (Mich. 1904) 98 N. W. Rep. 20, 10 Detroit Leg. N. 846.

*Minnesota.* — *Amor v. Stoeckele*, 76 Minn. 181, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 463-464.

*Missouri.* — *Laumeier v. Hallock*, 103 Mo. App. 116.

*New York.* — *Linthicum v. Caswell*, 19 N. Y. App. Div. 541, affirmed 160 N. Y. 702; *Porter v. Thom*, 30 N. Y. App. Div. 363; *Werr v. Kohles*, 64 N. Y. App. Div. 117; *Harral v. Sternberger*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 274; *Murphy v. Levy*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 147. See also *Smith v. Unangst*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 564.

*North Dakota.* — *Gilby Bank v. Farnsworth*, 7 N. Dak. 6.

*Tennessee.* — *Carnegie Steel Co. v. Chattanooga Constr. Co.*, (Tenn. Ch. 1896) 38 S. W. Rep. 102.

*Wisconsin.* — *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18; *Aebi v. Evansville Bank*, (Wis. 1905) 102 N. W. Rep. 329.

*Canada.* — *Commercial Bank v. Smith*, 34 Nova Scotia 426; *McLaurin v. Seguin*, 12 Quebec Super. Ct. 63.

**Request for Renewal, After Maturity, Not a Waiver.** — *Carnegie Steel Co. v. Chattanooga Constr. Co.*, (Tenn. Ch. 1896) 38 S. W. Rep. 102.

**Waiver by Part Payment.** — *Amor v. Stoeckele*, 76 Minn. 180; *Brown v. Mechanics', etc., Bank*, 16 N. Y. App. Div. 207.

**Waiver by Payment of Interest.** — Payments of interest made by the indorser on the account of the maker after the maturity of the note are not sufficient to show waiver of failure to give notice of presentment and dishonor in the absence of evidence that the indorser knew of the dishonor. *Porter v. Thom*, 40 N. Y. App. Div. 34, affirmed 167 N. Y. 584.

Under some circumstances a part payment on the note, after maturity, does not amount to a waiver. See *Carnegie Steel Co. v. Chattanooga Constr. Co.*, (Tenn. Ch. 1896) 38 S. W. Rep. 102.

**Same — Knowledge Essential.** — *Werr v. Kohles*, 64 N. Y. App. Div. 117.

**The Payment of Interest on a Demand Note When Demand is made by the holder for payment is not alone sufficient to show a waiver.** *Porter v. Thom*, 30 N. Y. App. Div. 363.

**Promise to Pay as Evidence of Due Diligence.** — *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67

Am. St. Rep. 95; *Smith v. Unangst*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 564; *Harral v. Sternberger*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 274.

**Burden on Holder to Show Waiver.** — *Porter v. Thom*, 30 N. Y. App. Div. 363.

**465. 1. Drawer or Indorser Must Know of Laches** — *Iowa.* — *Closz v. Miracle*, 103 Iowa 198.

*Kentucky.* — *Murphy v. Citizens' Sav. Bank*, 110 Ky. 930.

*Maryland.* — *Schwartz v. Wilmer*, 90 Md. 136.

*Michigan.* — *State Bank v. McCabe*, (Mich. 1904) 98 N. W. Rep. 20, 10 Detroit Leg. N. 846.

*New York.* — *Porter v. Thom*, 30 N. Y. App. Div. 363; *Werr v. Kohles*, 64 N. Y. App. Div. 117; *Murphy v. Levy*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 147; *Porter v. Thom*, 40 N. Y. App. Div. 34, affirmed 167 N. Y. 584.

*Ohio.* — *Graffin v. Gibson*, 3 Ohio Dec. (Reprint) 236, 5 Wkly. L. Gaz. 41.

*Tennessee.* — *Carnegie Steel Co. v. Chattanooga Constr. Co.*, (Tenn. Ch. 1896) 38 S. W. Rep. 102.

*Wisconsin.* — *Aebi v. Evansville Bank*, (Wis. 1905) 102 N. W. Rep. 329.

**Burden of Proof.** — Promise to pay is *prima facie* evidence of knowledge. *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67 Am. St. Rep. 95; *State Bank v. McCabe*, (Mich. 1904) 98 N. W. Rep. 20, 10 Detroit Leg. N. 846.

**Burden of Proving Laches on Holder.** — *Amor v. Stoeckele*, 76 Minn. 180.

**Knowledge Inferred from Surrounding Circumstances.** — *Murphy v. Citizens Sav. Bank*, 110 Ky. 225; *Linthicum v. Caswell*, 19 N. Y. App. Div. 541, affirmed 160 N. Y. 702.

**466. 1. Ignorance of Legal Effect of Laches Immaterial.** — *Glidden v. Chamberlin*, 167 Mass. 486, 57 Am. St. Rep. 479. But see *Carnegie Steel Co. v. Chattanooga Constr. Co.*, (Tenn. Ch. 1896) 38 S. W. Rep. 102.

**2. Unequivocal Promise Necessary.** — *Glidden v. Chamberlin*, 167 Mass. 486, 57 Am. St. Rep. 479; *State Bank v. McCabe*, (Mich. 1904) 98 N. W. Rep. 20, 10 Detroit Leg. N. 846; *Carnegie Steel Co. v. Chattanooga Constr. Co.*, (Tenn. Ch. 1896) 38 S. W. Rep. 102.

**467. 1. Unaccepted Conditional Promise Inoperative as Waiver.** — See also *Tallahassee First Nat. Bank v. McCord*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1003.

**2. Presumption of Injury from Delay.** — Upon the failure of the holder to present a demand note for payment within a reasonable time, it will be presumed in a suit against the indorser that injury was caused him thereby until the contrary is made to appear. *O'Neill v. Meighan*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 516.

**468. 1. Bowen v. Needles Nat. Bank**, 87 Fed. Rep. 430, affirmed 94 Fed. Rep. 925, 36 C. C. A. 553.

- 468.** (3) *Bankruptcy or Insolvency of Acceptor or Maker.* — See note 4.  
 (4) *Death of Maker or Acceptor* — General Rule. — See note 5.

Where No Representative Is Appointed, and Residence of Deceased Is Unoccupied. —

See note 6.

**470. VII. LIABILITIES OF PARTIES** — 1. Drawee and Acceptor of a Bill —

*a. OBLIGATION OF THE DRAWEE TO ACCEPT* — After Notice of Bankruptcy of Drawer. — See note 3.

Withdrawal of Offer to Accept. — See note 4.

*b. LIABILITY OF THE DRAWER FOR NONACCEPTANCE.* — See note 5.

The Measure of Damage. — See note 6.

*c. EFFECT OF ACCEPTANCE* — (1) *Acceptor Becomes Primary Debtor.* — See note 7.

**471.** (2) *Admissions by Acceptance* — (a) *In General.* — See note 1.

(c) *Genuineness of Signatures* — Signature of Drawer. — See notes 5, 6.

**472.** *Recovery of Money Paid on Bill with Forged Indorsement.* — See note 2.

**473.** (g) *Funds of Drawer in Acceptor's Hands.* — See notes 7, 8.

**474.** (3) *Liability of Acceptor.* — See note 1.

Varying Acceptance by Parol Evidence. — See note 3.

2. *Maker of a Note* — *a. ENGAGEMENT OF THE MAKER.* — See note 5.

**468. 4. Prevailing Rule — Insolvency No Excuse.** — *Kimmel v. Weil*, 95 Ill. App. 15; *Citizens' Nat. Bank v. Greensburg Third Nat. Bank*, 19 Ind. App. 69; *Leonard v. Olson*, 99 Iowa 162, 61 Am. St. Rep. 230; *Moore v. Alexander*, 63 N. Y. App. Div. 100; *O'Neill v. Meighan*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 516; *Hudson v. Walcott*, 4 Ohio Dec. (Reprint) 459, 2 Cleve. L. Rep. 194; *Banque Nationale v. Martel*, 17 Quebec Super. Ct. 97.

Under Illinois Rev. Stat., c. 98, § 7, an indorsee could recover against his indorser by showing by a preponderance of the evidence that the institution of a suit against the maker would have been unavailing at the date of the maturity of the note and at all times thereafter until the suit against the indorser was begun, and by showing that the exercise of reasonable diligence would not have enabled the plaintiff to collect the judgment and execution against the maker. *Barlow v. Cooper*, 109 Ill. App. 375.

**5. Death of Maker or Acceptor No Excuse for Want of Presentment.** — *Ireys v. Wallace*, 76 Miss. 277.

6. See also *Ireys v. Wallace*, 76 Miss. 277.

**470. 3. Sherwin v. Brigham**, 4 Ohio Dec. (Reprint) 482, 2 Cleve. L. Rep. 228.

4. See also *Morrison v. Farmers', etc., Bank*, 9 Okla. 697.

**5. Liability for Nonacceptance.** — *Putnam Nat. Bank v. Snow*, 172 Mass. 569.

**6. Amount of Draft and Protest Fees Is Measure of Damage.** — *Gambrill v. Brown Hotel Co.*, 11 Colo. App. 529.

**7. Acceptor Becomes Principal Debtor** — *United States*. — *Levy, etc., Mule Co. v. Kauffman*, (C. C. A.) 114 Fed. Rep. 170.

*Alabama.* — *Steiner v. Jeffries*, 118 Ala. 573; *Ragsdale v. Gresham*, (Ala. 1904) 37 So. Rep. 367; *Morris v. Eufaula Nat. Bank*, 122 Ala. 592, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 470.

*Georgia.* — *Ray v. Morgan*, 112 Ga. 923.

*Illinois.* — *Industrial Bank v. Bowes*, 165 Ill. 70, 56 Am. St. Rep. 228.

*Iowa.* — *Jack v. Hosmer*, 97 Iowa 17; *Tolerton, etc., Co. v. Anglo-California Bank*, 112 Iowa 706; *Indian Territory Bank v. Buchanan County First Nat. Bank*, 109 Mo. App. 665.

*New York.* — *American Boiler Co. v. Foutham*, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351, reversed 34 N. Y. App. Div. 294.

*Pennsylvania.* — *Ravenswood Bank v. Reneker*, 18 Pa. Super. Ct. 192.

*Texas.* — *Grumbach v. Hirsch*, 17 Tex. Civ. App. 618.

**471. 1. Admissions by Acceptance.** — *Ragsdale v. Gresham*, (Ala. 1904) 37 So. Rep. 367.

**5. Acceptance Admits Signature of Drawer.** — *Ragsdale v. Gresham*, (Ala. 1904) 37 So. Rep. 367.

**6. Compare** *Guaranty Trust Co. v. Grottrian*, (C. C. A.) 114 Fed. Rep. 433.

**472. 2. Negotiation of Bill by Drawer with Forged Indorsement.** — *La Fayette v. Merchants Bank*, (Ark. 1905) 84 S. W. Rep. 700.

**473. 7. Acceptance Admits Funds of Drawer in Acceptor's Hands.** — *Ray v. Morgan*, 112 Ga. 923; *Grumbach v. Hirsch*, 17 Tex. Civ. App. 618; *Stevens v. Hill*, 74 Vt. 164; *Ragsdale v. Gresham*, (Ala. 1904) 37 So. Rep. 367; *Indian Territory Bank v. Buchanan County First Nat. Bank*, 109 Mo. App. 665. See also *Taggart v. Anacortes First Nat. Bank*, 12 Wash. 538.

**8. Grumbach v. Hirsch**, 17 Tex. Civ. App. 618.

**474. 1. Liability by Absolute Acceptance.** — *Buffalo Cycle Co. v. Todd*, 133 Cal. 292; *Tolerton, etc., Co. v. Anglo-California Bank*, 112 Iowa 706; *McMurray v. Sisters of Charity*, 68 N. J. L. 312; *Wadhams v. Inman*, 38 Oregon 143; *Ragsdale v. Gresham*, (Ala. 1904) 37 So. Rep. 367.

**Liability to Indorsee Not Affected by Iowa Code, § 2546.** — *Jack v. Hosmer*, 97 Iowa 17.

**3. Parol Evidence to Vary Acceptance.** — *Morrison v. Farmers', etc., Bank*, 9 Okla. 697.

**5. Bell v. Ottawa Trust, etc., Co.**, 28 Ont. 519; *Vanier v. Kent*, 11 Quebec K. B. 373.

**Maker's Engagement Absolute and Primary.** — *Harvard Pub. Co. v. Benjamin*, 84 Md. 333, 57 Am. St. Rep. 402.

**474.** Joint and Several Makers. — See note 6.

*b.* ADMISSIONS BY EXECUTION — (1) *Existence of Payee.* — See note 8.

**475.** (2) *Capacity of Payee to Indorse.* — See note 1.

**4.** Transferrer by Delivery — *a.* INCURS NO LIABILITY ON THE INSTRUMENT. — See note 8.

**476.** *b.* WARRANTIES AS VENDOR — Illustrations of the Principle. — See notes 1, 2.

**477.** See notes 1, 2, 4, 5.

Express Warranty of Solvency of Parties. — See note 6.

**478.** 5. Drawer and Indorsers — *a.* THE CONTRACT OF INDORSEMENT CONSIDERED — (1) *Indorsement an Independent Contract.* — See note 1.

Contract of Sureties and Indorsers Distinguished. — See notes 2, 3.

**479.** (3) *Indorsement "Without Recourse."* — See note 1.

(4) *Indorsement in the Form of Assignment.* — See note 3.

(5) *Indorsement in the Form of Guaranty.* — See notes 4, 5.

**474.** 6. Death of Joint Maker — Holder's Right of Action. — The payee of a joint and several note may look to either of the joint makers for payment, and, where one of the joint makers dies, is not compelled to pursue his remedy against the estate of the deceased debtor; nor is his action barred against another joint maker because the time has expired wherein he might have presented his claim against the estate for allowance. *Newhall v. Field*, (N. Mex. 1905) 79 Pac. Rep. 711.

**8.** Maker Admits Existence of Payee — Corporation. — *McMann v. Walker*, 31 Colo. 261, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 474.

**475.** 1. *McMann v. Walker*, 31 Colo. 261, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 475.

**8.** Liability of Transferrer by Delivery. — *Carroll v. Nodine*, 41 Oregon 415, 93 Am. St. Rep. 743, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 475.

**476.** 1. Warranties of Vendors of Bills and Notes — Genuineness of Instrument According to Its Purport. — *Gabay v. Doane*, 66 N. Y. App. Div. 507 (under Negotiable Instruments Law, § 115); *Carroll v. Nodine*, 41 Oregon 412, 93 Am. St. Rep. 743; *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 56 Am. St. Rep. 828.

Special Provision Against Implied Warranty Valid. — *Strauss v. Hensey*, 7 App. Cas. (D. C.) 289.

2. Warranty that Instrument Is a Valid and Subsisting Obligation. — *Gabay v. Doane*, 66 N. Y. App. Div. 507 (under Negotiable Instruments Law, § 115); *Carroll v. Nodine*, 41 Oregon 412; *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 56 Am. St. Rep. 828.

**477.** 1. Warranty of Genuineness of Signatures. — *Strauss v. Hensey*, 7 App. Cas. (D. C.) 289; *Packard v. Windholz*, (County Ct.) 40 Misc. (N. Y.) 347, affirmed 88 N. Y. App. Div. 365, 180 N. Y. 549; *Mt. Vernon First Nat. Bank v. Lincoln First Nat. Bank*, 68 Ohio St. 43; *Wilhelm v. Loop*, 8 Ohio Dec. 444, 6 Ohio N. P. 270; *Lowry v. Stapp*, (Tenn. Ch. 1899) 53 S. W. Rep. 194; *Monticello Bank v. Bostwick*, 71 Fed. Rep. 641, reversed 77 Fed. Rep. 123, 40 U. S. App. 721.

2. Warranty Against Material Alteration. — *Strauss v. Hensey*, 7 App. Cas. (D. C.) 289.

4. *Strauss v. Hensey*, 7 App. Cas. (D. C.) 289.

5. *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 56 Am. St. Rep. 828. See also *Lowry v. Stapp*, (Tenn. Ch. 1899) 53 S. W. Rep. 194. *Guaranty of Solvency Implied.* — *Pattillo v. Alexander*, 96 Ga. 60.

6. Express Warranty of Solvency of Parties. — *Knauss v. Major*, 111 Mich. 239; *Carroll v. Nodine*, 41 Oregon 412, 93 Am. St. Rep. 743.

**478.** 1. *Indorsement a New and Independent Contract.* — *Phipps v. Harding*, (C. C. A.) 70 Fed. Rep. 468; *Johnson v. Parker*, 86 Mo. App. 660; *Maddox v. Duncan*, 143 Mo. 613, 65 Am. St. Rep. 678; *Moore v. Alexander*, 63 N. Y. App. Div. 100; *Van Winkle Gin, etc., Co. v. Citizens' Bank*, 89 Tex. 147. See also *Sibley v. American Exch. Nat. Bank*, 97 Ga. 126; *Harrah v. Doherty*, 111 Mich. 175.

2. *Indorser Not Released by Invalidity of Instrument.* — *Jordon v. Long*, 109 Ala. 414; *Maddox v. Duncan*, 143 Mo. 613, 65 Am. St. Rep. 678.

3. *Maddox v. Duncan*, 143 Mo. 613, 65 Am. St. Rep. 678.

Under N. Car. Code, 1883, § 50, an ordinary indorser of a promissory note is liable as surety. *Washington First Nat. Bank v. Eureka Lumber Co.*, 123 N. Car. 24.

**479.** 1. *Indorser "Without Recourse"* — Liable as Transferrer Only. — *Carroll v. Nodine*, 41 Oregon 412, 93 Am. St. Rep. 743.

3. *Indorsement in the Form of Assignment and "Without Recourse"* renders a note nonnegotiable. *Warren v. Gruwell*, 5 Kan. App. 523; *Gilbert v. Nelson*, 5 Kan. App. 528.

An Assignment of His Interest by one of two joint payees does not render him liable as an indorser. *Bond v. Holloway*, 18 Ind. App. 251.

4. *Indorsement in Form of Guaranty.* — *Hutches v. J. I. Case Threshing Mach. Co.*, (Tex. Civ. App. 1896) 35 S. W. Rep. 60. See also *Maddox v. Duncan*, 143 Mo. 613, 65 Am. St. Rep. 678; *National Exch. Bank v. McElfish Clay Mfg. Co.*, 48 W. Va. 406.

5. *Indorser Liable as Guarantor* — *Illinois.* — *Ewen v. Wilbor*, 99 Ill. App. 132, affirmed 208 Ill. 492.

*Iowa.* — See *German-American Sav. Bank v. Hanna*, (Iowa 1904) 100 N. W. Rep. 57.

*Kansas.* — See *Kellogg v. Douglas County*

**479.** (6) *Indorsement of Nonnegotiable Instruments* — Whether a Guaranty of Payment Is Included. — See note 6.

**480.** See notes 1, 2.

Assignor Liable as Irregular Indorser. — See note 3.

**481.** Statutes. — See note 1.

*b. INDORSEMENT CONSIDERED AS A TRANSFER OF TITLE* — (2) *Warranties in Respect to the Validity of the Instrument.* — See note 2.

Capacity of Parties. — See note 3.

Bank, 58 Kan. 43, 62 Am. St. Rep. 596. Compare Halbert v. Ellwood, 1 Kan. App. 95, wherein it is said that the guaranty of payment adds nothing to his liability beyond what the law implies from an indorsement in blank with waiver of protest.

Massachusetts. — Edgerly v. Lawson, 176 Mass. 551.

Minnesota. — Phelps v. Sargent, 69 Minn. 118.

Oregon. — Delsman v. Friedlander, 40 Oregon 33.

Washington. — National Bank of Commerce v. Galland, 14 Wash. 502. See also Donnerberg v. Oppenheimer, 15 Wash. 290.

Compare Baldwin Fertilizer Co. v. Carmichael, 116 Ga. 762; Pawtucket First Nat. Bank v. Adamson, 25 R. I. 73.

In Pattillo v. Alexander, 96 Ga. 60, it was said: "The mere guaranty of a paper does not involve the idea of negotiation, nor negotiation necessarily the idea of guaranty, unless the contract of assignment be of such a character as to operate as a guaranty of the solvency of the maker; and the mere fact that the contract of the indorser may contain a stipulation for a guaranty which extends his obligation beyond that of a mere indorser does not affect his legal relation to the paper. \* \* \* A guaranty indorsed on a note by the payee thereof may operate as well as an indorsement as a guaranty, and may make the party signing liable as an indorser. \* \* \* As between the original parties, in considering the effect of contracts of guaranty, the court will look to all the surrounding circumstances, and will not be necessarily controlled by the use of the word 'guarantee,' according to its technical acceptance."

**The Guaranty Must Be According to the Terms of the Note** in order to amount to an indorsement which will pass title. Frost v. Fisher, 13 Colo. App. 322.

**Rule in Indiana.** — An indorsement in the form of a guaranty is a direct and absolute undertaking to pay the note, and the indorser's liability thereon is absolute and unconditional. Metzger v. Hubbard, 153 Ind. 189.

**479. 6. Assignor of Nonnegotiable Note Liable as Transferrer Only.** — De Hass v. Dibert, (C. C. A.) 70 Fed. Rep. 227; Jossey v. Rushin, 109 Ga. 319, 77 Am. St. Rep. 377; Smith v. Myers, 207 Ill. 131; Smith v. Myers, 107 Ill. App. 410, affirmed 207 Ill. 126. See also Barry v. Wachosky, 57 Neb. 534.

**Liability of Assignor of Nonnegotiable Note under Ala. Code, §§ 1778-1780.** — Caulfield v. Finnegan, 114 Ala. 39.

**480. 1.** See also Phelps v. Sargent, 69 Minn. 118; Barry v. Wachosky, 57 Neb. 534.

**2. Express Promise of Guaranty.** — Jossey v.

Rushin, 109 Ga. 320, 77 Am. St. Rep. 377, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d 480; Jenness v. Barron, 95 Me. 531).

**3.** Herrick v. Edwards, 106 Mo. App. 633. See also Matchett v. Anderson Foundry, etc., Works, 29 Ind. App. 207, 94 Am. St. Rep. 272.

**481. 1. Liability of Assignor — Statutes.** — Caulfield v. Finnegan, 114 Ala. 39; Cannon v. Serrel, 15 Colo. App. 99.

**2. Warranty that Instrument Is a Valid and Subsisting Obligation — United States.** — McDonnell v. Burns, (C. C. A.) 83 Fed. Rep. 866.

Alabama. — Jordan v. Long, 109 Ala. 414.

Arkansas. — Spencer v. Halpern, 62 Ark. 595.

California. — Bunker v. Osborn, 132 Cal. 480; Meyer v. Foster, (Cal. 1905) 81 Pac. Rep. 402. District of Columbia. — Willard v. Crook, 21 App. Cas. (D. C.) 237 (under Negotiable Instruments Law).

Illinois. — See Beattie v. National Bank, 69 Ill. App. 632, affirmed 174 Ill. 571, 66 Am. St. Rep. 318.

Kentucky. — Gray Tie, etc., Co. v. Farmers' Bank, 109 Ky. 694; M. V. Monarch Co. v. Farmers', etc., Bank, 105 Ky. 430, 88 Am. St. Rep. 310. See also Wilcoxon v. Morse, (Ky. 1898) 44 S. W. Rep. 142.

Massachusetts. — Leonard v. Draper, (Mass. 1905) 73 N. E. Rep. 644.

Minnesota. — Crosby v. Wright, 70 Minn. 251.

New York. — Lennon v. Grauer, 159 N. Y. 433; Packard v. Windholz, 88 N. Y. App. Div. 365, affirmed 180 N. Y. 549, affirming (County Ct.) 40 Misc. (N. Y.) 347 (under Negotiable Instruments Law); Donohoe v. Meeker, 35 N. Y. App. Div. 43.

Ohio. — Ewan v. Brooks-Waterfield Co., 55 Ohio St. 596, 60 Am. St. Rep. 719.

Oregon. — Carroll v. Nodine, 41 Oregon 412, 93 Am. St. Rep. 743.

Texas. — Jackson v. Dupree, (Tex. Civ. App. 1900) 57 S. W. Rep. 606.

Canada. — Choquette v. Leclair, 19 Quebec Super. Ct. 521.

**3. Warranty of Capacity of Parties — Alabama.** — Jordan v. Long, 109 Ala. 414.

Arkansas. — Spencer v. Halpern, 62 Ark. 595.

California. — Bunker v. Osborn, 132 Cal. 480.

Colorado. — Cannon v. Serrel, 15 Colo. App. 99.

District of Columbia. — Willard v. Crook, 21 App. Cas. (D. C.) 237 (under Negotiable Instruments Law).

Illinois. — See Mexican Asphalt Paving Co. v. Love, 73 Ill. App. 250.

Indiana. — M. V. Monarch Co. v. Farmers, etc., Bank, 105 Ky. 430, 88 Am. St. Rep. 310.

Kentucky. — Gray Tie, etc., Co. v. Farmers' Bank, 109 Ky. 694.



**481.** Genuineness of Signatures. — See note 4.

**482.** See note 1.

c. INDORSEMENT CONSIDERED AS A CONTRACT OF INDEMNITY —

Indorsement Equivalent to a New Drawing. — See note 3.

**483.** d. THE ENGAGEMENT OF DRAWER AND INDORSERS. — See notes 1, 2.

*Massachusetts.* — Glidden v. Chamberlin, 167 Mass. 486, 57 Am. St. Rep. 479; Leonard v. Draper, (Mass. 1905) 73 N. E. Rep. 644.

*Minnesota.* — Crosby v. Wright, 70 Minn. 251.

*New York.* — Donohoe v. Meeker, 35 N. Y. App. Div. 43.

**481. 4. Warranty of Genuineness of Signatures — United States.** — See Warren-Scharf Asphalt Paving Co. v. Commercial Nat. Bank, (C. C. A.) 97 Fed. Rep. 184, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447.

*Alabama.* — Jordan v. Long, 109 Ala. 414.

*Arkansas.* — Spencer v. Halpern, 62 Ark. 595.

*California.* — Bunker v. Osborn, 132 Cal. 480.

*District of Columbia.* — Bowie v. Hume, 13 App. Cas. (D. C.) 286; Willard v. Crook, 21 App. Cas. (D. C.) 237.

*Illinois.* — Beattie v. National Bank, 69 Ill. App. 632, affirmed 174 Ill. 571, 66 Am. St. Rep. 318.

*Kentucky.* — Gray Tie, etc., Co. v. Farmers' Bank, 109 Ky. 694.

*Massachusetts.* — Glidden v. Chamberlain, 167 Mass. 486, 57 Am. St. Rep. 479.

*Missouri.* — Rossi v. National Bank of Commerce, 71 Mo. App. 150.

*Nebraska.* — Hastings First Nat. Bank v. Farmers, etc., Bank, 56 Neb. 149.

*New York.* — Lennon v. Grauer, 159 N. Y. 433; Packard v. Windholz, 88 N. Y. App. Div. 365, 180 N. Y. 549, affirming (County Ct.) 40 Misc. (N. Y.) 347 (under Negotiable Instruments Law).

*Ohio.* — Mt. Vernon First Nat. Bank v. Lincoln First Nat. Bank, 68 Ohio St. 43.

*Texas.* — Wells v. Simpson Nat. Bank, 19 Tex. Civ. App. 636.

*Canada.* — Choquette v. Leclaire, 19 Quebec Super. Ct. 521.

**482. 1. Indorsement by Holder of Same Name as Payee.** — Gray Tie, etc., Co. v. Farmers' Bank, 109 Ky. 694.

**3. Indorsement Equivalent to a New Drawing.** — De Hass v. Dibert, (C. C. A.) 70 Fed. Rep. 227.

**483. 1. Engagement of Drawer and Indorser — Arkansas.** — Spencer v. Halpern, 62 Ark. 595.

*Colorado.* — Frost v. Fisher, 13 Colo. App. 322.

*Connecticut.* — Brown v. Wilcox, 73 Conn. 100.

*District of Columbia.* — Portsmouth Sav. Bank v. Wilson, 5 App. Cas. (D. C.) 8.

*Florida.* — Yager v. McCormack, 41 Fla. 204.

*Georgia.* — Pattillo v. Alexander, 96 Ga. 60.

*Illinois.* — Smith v. Myers, 207 Ill. 131; Oxman v. Garwood, 80 Ill. App. 658; Kimmel v. Weil, 95 Ill. App. 15.

*Indiana.* — M. V. Monarch Co. v. Farmers, etc., Bank, 105 Ky. 430, 88 Am. St. Rep. 310.

*Iowa.* — Iowa Valley State Bank v. Sigstad, 96 Iowa 491.

*Kentucky.* — Gray Tie, etc., Co. v. Farmers' Bank, 109 Ky. 694.

*Maine.* — Roads v. Webb, 91 Me. 406, 64 Am. St. Rep. 246.

*Maryland.* — Harvard Pub. Co. v. Benjamin, 84 Md. 333, 57 Am. St. Rep. 402.

*New Jersey.* — Mason v. Kilcourse, (N. J. 1904) 59 Atl. Rep. 21.

*New York.* — Moore v. Alexander, 63 N. Y. App. Div. 100; Kelly v. Theiss, 65 N. Y. App. Div. 146; Lincoln Nat. Bank v. Butler, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 566; Davison v. Farr, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 124; Philip, etc., Ebling Brewing Co. v. Reinheimer, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 594; Donohoe v. Meeker, 35 N. Y. App. Div. 43.

*North Dakota.* — Nelson v. Grondahl, (N. Dak. 1904) 100 N. W. Rep. 1093.

*Ohio.* — Lenhart v. Ramey, 2 Ohio Cir. Dec. 77; Sturges v. Williams, 4 Ohio Dec. (Reprint) 33, Cleve. L. Rec. 39, affirmed 9 Ohio St. 443, 75 Am. Dec. 473.

*Pennsylvania.* — Peale v. Addicks, 174 Pa. St. 543. See also Van Brunt v. Potter, 2 Pa. Super. Ct. 591.

*South Carolina.* — Sloan v. Gibbes, 56 S. Car. 480, 76 Am. St. Rep. 559.

*Tennessee.* — City Sav. Bank v. Kensington Land Co., (Tenn. Ch. 1896) 37 S. W. Rep. 1037.

*Texas.* — Van Winkle Gin, etc., Co. v. Citizens' Bank, 89 Tex. 147.

*Virginia.* — Tidball v. Shenandoah Nat. Bank, 98 Va. 768.

*West Virginia.* — Willis v. Willis, 42 W. Va. 522.

*Wisconsin.* — Halbach v. Trester, 102 Wis. 530.

*Canada.* — Trotter v. Rivard, 23 Quebec Super. Ct. 526; Vanier v. Kent, 11 Quebec K. B. 373.

**The Burden of Proof Is on the Drawer**, upon the nonpayment of the bill, to show that, in fact, he was not to be liable as drawer. Yager v. McCormack, 41 Fla. 204.

**Engagement of Indorser of Nonnegotiable Paper Imports Conditional Contract.** — Caulfield v. Finnegan, 114 Ala. 39.

**2. Liability of Indorsers Fixed by Notice of Dishonor — District of Columbia.** — Portsmouth Sav. Bank v. Wilson, 5 App. Cas. (D. C.) 8.

*Georgia.* — Pattillo v. Alexander, 96 Ga. 60.

*Maryland.* — Harvard Pub. Co. v. Benjamin, 84 Md. 333, 57 Am. St. Rep. 402.

*Michigan.* — Flint First Nat. Bank v. Union Cent. L. Ins. Co., 107 Mich. 543.

*Missouri.* — Maddox v. Duncan, 143 Mo. 613, 65 Am. St. Rep. 678.

*New Jersey.* — Foley v. Emerald, etc., Brewing Co., 61 N. J. L. 428.

*New York.* — Moore v. Alexander, 63 N. Y. App. Div. 100.

*North Dakota.* — Nelson v. Grondahl, (N. Dak. 1904) 100 N. W. Rep. 1093.

**483.** By Statute. — See note 3.

*c.* ORDER OF LIABILITY. — See notes 4, 5.

**484.** *f.* ADMISSIBILITY OF CONTEMPORANEOUS AGREEMENTS — (1) *Inadmissibility to Affect Right of Bona Fide Holder Without Notice.* — See note 1.

(2) *Admissibility Between the Parties to the Agreement* — (a) *Written Agreements.* — See note 2.

(b) *Parol Agreements* — *aa.* GENERAL PRINCIPLE. — See note 3.

*bb.* AGREEMENTS BETWEEN DRAWER AND PAYEE. — See note 4.

**485.** *cc.* AGREEMENTS BETWEEN INDORSER AND INDORSEE — (*aa*) *Test of Applicability of Principle* — *Indorsement Considered as a Written Contract.* — See note 1.

*Indorsement Considered as Evidence of Contract.* — See note 2.

**486.** (*bb*) *What May Not Be Shown.* — See notes 1, 2, 3, 4, 5, 6.

*Pennsylvania.* — Peale *v.* Addicks, 174 Pa. St. 543.

*Tennessee.* — Hutchison *v.* Crutcher, 98 Tenn. 421.

*Texas.* — Van Winkle Gin, etc., Co. *v.* Citizens' Bank, 89 Tex. 147.

*Canada.* — Trottier *v.* Rivard, 23 Quebec Super. Ct. 526; Vanier *v.* Kent, 11 Quebec K. B. 373.

*Waiver of Protest Renders Indorser's Liability Absolute.* — Franklin *v.* Browning, 117 Fed. Rep. 226, 54 C. C. A. 258.

*Where Note Is Not Protested.* — The liability of the indorser being conditioned upon non-payment of the note and notice to him of dishonor, he has no right of action against the maker, although the note is due, as long as it has not been protested and notice of protest has not been given him. Trottier *v.* Rivard, 23 Quebec Super. Ct. 526.

**483. 3. Indorsers of Promissory Notes — Liability under Statutes.** — Ellsworth *v.* Varney, 83 Ill. App. 94; Spears *v.* Thompson, 30 Ind. App. 267; Huston *v.* Fatka, 30 Ind. App. 693. See also Varley *v.* Title Guarantee, etc., Co., 60 Ill. App. 565; Godfrey *v.* Wingert, 110 Ill. App. 563.

**4. Order of Liability — Indorsers Prima Facie Successively Liable** — *Massachusetts.* — Bank of America *v.* Wilson, 186 Mass. 214.

*New York.* — Egbert *v.* Hanson, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596; Oneida County Bank *v.* Lewis, (Supm. Ct. App. Div.) 55 N. Y. Supp. 1144.

*Pennsylvania.* — See Wolf *v.* Hostetter, 182 Pa. St. 292.

*Rhode Island.* — Crompton *v.* Spencer, 20 R. I. 330; Chapman *v.* Niantic Nat. Bank, (R. I. 1904) 57 Atl. Rep. 934.

*South Carolina.* — See Sloan *v.* Gibbes, 56 S. Car. 480, 76 Am. St. Rep. 559.

*Tennessee.* — Stacy *v.* Rose, (Tenn. Ch. 1900) 58 S. W. Rep. 1087.

*West Virginia.* — Willis *v.* Willis, 42 W. Va. 522. See also Hughes *v.* Frum, 41 W. Va. 445.

*Canada.* — McRae *v.* Lionais, 16 Quebec Super. Ct. 262 (*affirmed* in review); Poisson *v.* Bourgeois, 17 Quebec Super. Ct. 94.

**5. Express Agreements as to Order of Liability.** — Egbert *v.* Hanson, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596; Oneida County Bank *v.* Lewis, (Supm. Ct. App. Div.) 55 N. Y. Supp. 1144; Crompton *v.* Spencer, 20 R. I. 330; Sloan *v.* Gibbes, 56 S. Car. 480, 76 Am. St. Rep. 559; Willis *v.* Willis, 42 W. Va. 522; McRae *v.*

Lionais, 16 Quebec Super. Ct. 262; Poisson *v.* Bourgeois, 17 Quebec Super. Ct. 94. See also Wolf *v.* Hostetter, 182 Pa. St. 292.

**484. 1.** Scott *v.* Taul, 115 Ala. 529; Corbett *v.* Fetzer, 47 Neb. 269; Foley *v.* Emerald, etc., Brewing Co., 61 N. J. L. 428.

**2. Qualification of Indorsement by Contemporaneous Writing.** — New Blue Springs Milling Co. *v.* De Witt, 65 Kan. 665.

**3.** Ewan *v.* Brooks-Waterfield Co., 55 Ohio St. 596, 60 Am. St. Rep. 719.

**4. Parol Agreements Between Drawer and Payee.** — Metropolitan Nat. Bank *v.* Jansen, (C. C. A.) 108 Fed. Rep. 572.

**485. 1. Indorsement Considered as a Written Contract** — *United States.* — See also Franklin *v.* Browning, 117 Fed. Rep. 226, 54 C. C. A. 258.

*California.* — Citizens' Bank *v.* Jones, 121 Cal. 30.

*Illinois.* — Bowes *v.* Industrial Bank, 58 Ill. App. 498; Kimmel *v.* Weil, 95 Ill. App. 15. See also Cozzens *v.* Chicago Hydraulic-Press Brick Co., 166 Ill. 213.

*Iowa.* — Hathaway *v.* Rogers, 112 Iowa 638.

*New Jersey.* — Foley *v.* Emerald, etc., Brew-

ing Co., 61 N. J. L. 428.

*New York.* — Bird *v.* Kay, 40 N. Y. App. Div. 533.

*North Dakota.* — Drinkall *v.* Movius State Bank, 11 N. Dak. 17, 95 Am. St. Rep. 693, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 485-487.

*Oregon.* — Carroll *v.* Nodine, 41 Oregon 412, 93 Am. St. Rep. 743; Smith *v.* Bayer, (Oregon 1905) 79 Pac. Rep. 497.

*Virginia.* — Citizens' Nat. Bank *v.* Walton, 96 Va. 435.

*Wisconsin.* — Halbach *v.* Trester, 102 Wis. 530.

**2. Indorsement Considered as Evidence of Contract.** — Corbett *v.* Fetzer, 47 Neb. 269; U. S. National Bank *v.* Geer, 53 Neb. 67, *overruled* 55 Neb. 462.

**Parol Evidence to Vary Full Indorsement Not Admissible.** — Iowa Valley State Bank *v.* Sigstad, 96 Iowa 491.

**486. 1. Indorser Cannot Show that He Intended to Assume No Liability.** — Alabama Nat. Bank *v.* Rivers, 116 Ala. 1, 67 Am. St. Rep. 95; Harrington *v.* Baker, 173 Mass. 488; Bowler *v.* Braun, 63 Minn. 32, 56 Am. St. Rep. 449; Pensacola First Nat. Bank *v.* Anderson, 55 N. Y. App. Div. 570; Emerson *v.* Erwin, 10 British Columbia 191; See also Kripner *v.*

**487.** (cc) *What May Be Shown.* — See notes 1, 5, 6.

**488.** See notes 1, 2.

**6. Irregular Indorsers** — *a. LIABILITY DETERMINED BY RELATION TO THE INSTRUMENT.* — See note 3.

*b. THE RELATION ASSUMED BY AN IRREGULAR INDORSER* — (1) *In General* — *Circumstances Determining Character.* — See note 4.

*Time of Indorsement.* — See notes 5, 6.

**489.** See note 1.

(2) *Negotiable Instruments* — (a) *Indorsement Before Delivery* — *aa. RELATION DETERMINED BY PURPOSE OF INDORSEMENT.* — See note 2.

*bb. PRESUMPTIVE PURPOSE* — (aa) *To Assume Liability to Payee* — *Irregular Indorser Liable as Original Promisor.* — See note 3.

Lincoln, 66 Ill. App. 532; Halbach v. Trester, 102 Wis. 530.

**Parol Evidence Admissible to Show that Signature Was Not Intended as Indorsement, but as Memorandum.** — Hathaway v. Rogers, 112 Iowa 638.

**Parol Evidence Inadmissible to Show that Maker Acted as Agent.** — Keokuk Falls Imp. Co. v. Kingsland, etc., Mfg. Co., 5 Okla. 32.

**Parol Evidence of Agreement Releasing Indorser from Liability Inadmissible.** — Gumz v. Giegling, 108 Mich. 295.

**486. 2. Parol Evidence Inadmissible to Charge Indorser as Maker.** — Harvard Pub. Co. v. Benjamin, 84 Md. 333, 57 Am. St. Rep. 402. See also Tinker v. Catlin, 205 Ill. 108.

3. See also Kingman v. Cornell-Tebbetts Mach., etc., Co., 150 Mo. 282; Torbit v. Heath, 11 Colo. App. 492. Compare Hoffman v. Habighorst, 38 Oregon 261.

**4. Parol Evidence Inadmissible to Charge Indorser as Guarantor.** — Schmitz v. Hawkeye Gold Min. Co., 8 S. Dak. 544. Compare Brown v. Wilcox, 73 Conn. 100.

**5. Parol Evidence Inadmissible to Show Indorsement Was Without Recourse.** — Randle v. Davis Coal, etc., Co., 15 App. Cas. (D. C.) 357; Smith v. Brabham, 48 S. Car. 337.

**Parol Agreement Relieving Indorser Without Recourse from Implied Warranty Admissible.** — Carroll v. Nodine, 41 Oregon 412, 93 Am. St. Rep. 743.

**6. Parol Evidence Inadmissible to Change Time of Payment.** — See Citizens' Bank v. Jones, 121 Cal. 30.

**Parol Evidence to Show that Waiver of Demand Was Unintentional Is Inadmissible.** — Farmers' Exch. Bank v. Altura Gold Mill, etc., Co., 129 Cal. 263.

**487. 1. Farmers' Sav. Bank v. Hansmann,** 114 Iowa 49; Higgins v. Ridgway, 153 N. Y. 130; Drinkall v. Movius State Bank, 11 N. Dak. 17, 95 Am. St. Rep. 693, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 485-487; Sloan v. Gibbs, 56 S. Car. 489, 76 Am. St. Rep. 559, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487. See also Roads v. Webb, 91 Me. 406, 64 Am. St. Rep. 246.

**5. Parol Evidence to Show that Note Was Procured by Fraud Admissible.** — Banks v. McCosker, 82 Md. 518, 51 Am. St. Rep. 478.

**6. Indorsement "for Collection" Cannot Be Shown to Be Unrestricted.** — Smith v. Bayer, (Oregon 1905) 79 Pac. Rep. 497.

**488. 1. Farmers' Sav. Bank v. Hansmann,** 114 Iowa 49; Higgins v. Ridgway, 153 N. Y.

130; Faulkner v. Thomas, 48 W. Va. 148. See also Carlton v. White, 99 Ga. 384.

2. Egbert v. Hanson, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596; Sloan v. Gibbs, 56 S. Car. 480, 76 Am. St. Rep. 559.

**Sufficiency of Evidence to Show Agreement.** — Sloan v. Gibbs, 56 S. Car. 480, 76 Am. St. Rep. 559.

**3. Irregular Indorsement Creates No Definite Contract.** — Keyser v. Warfield, (Md. 1904) 59 Atl. Rep. 189, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488.

**4. Parkersburg First Nat. Bank v. Handley,** 48 W. Va. 690.

**5. Time of Indorsement — Presumption.** — Duncanson v. Kirby, 90 Ill. App. 15.

**It Is Immaterial Whether the Signature Is Actually Indorsed** upon the note before or after it comes to the possession of the payee, if it is part of the agreement that the note shall be so indorsed to be acceptable. Downey v. O'Keefe, 26 R. I. 571.

**N. Y. Neg. Inst. L., § 114, Applies Only to Indorsers Before Delivery.** — Kohn v. Consolidated Butter, etc., Co., (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 725.

**6. Ohio.** — Ewan v. Brooks-Waterfield Co., 55 Ohio St. 596, 60 Am. St. Rep. 719.

**489. 1. Parol Evidence Admissible to Show Time of Indorsement.** — Meyer v. Foster, (Cal. 1905) 81 Pac. Rep. 402, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489; Court Valhalla, No. 16, etc., v. Olson, 14 Colo. App. 243; Wright v. Denham, 4 Ohio Dec. (Reprint) 428, 2 Cleve. L. Rep. 146; Young v. Schon, 53 W. Va. 127, 97 Am. St. Rep. 970, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488; Redden v. Lambert, 112 La. 740.

2. Carter v. Long, 125 Ala. 280; Atkinson v. Bennet, 103 Ga. 508; Citizens' Commercial, etc., Bank v. Platt, (Mich. 1903) 97 N. W. Rep. 694, 10 Detroit Leg. N. 743; Roanoke Grocery, etc., Co. v. Watkins, 41 W. Va. 789.

**Relation a Question of Fact.** — Cadwallader v. Hirshfeld, 62 N. J. L. 747, 72 Am. St. Rep. 671.

**3. Irregular Indorser Prima Facie Liable as Original Promisor** — *United States.* — Phipps v. Harding, (C. C. A.) 70 Fed. Rep. 468.

*Arkansas.* — Scanland v. Porter, 64 Ark. 470.

*Colorado.* — National Bank of Commerce v. Graham, 10 Colo. App. 373; Byers v. Tritch, 12 Colo. App. 377.

*District of Columbia.* — Portsmouth Sav. Bank v. Wilson, 5 App. Cas. (D. C.) 8; Randle v. Davis Coal, etc., Co., 15 App. Cas. (D. C.) 357.

**490. Irregular Indorser Liable as Indorser.** — See notes 1, 2, 3, 4.

*Florida.* — *Camp v. Ocala First Nat. Bank*, 44 Fla. 497.

*Louisiana.* — *Metropolitan Bank v. Muller*, 50 La. Ann. 1278, 69 Am. St. Rep. 475.

*Maine.* — *Merchants' Trust, etc., Co. v. Jones*, 95 Me. 335, 85 Am. St. Rep. 412.

*Maryland.* — *Thompson v. Young*, 90 Md. 72; *Keyser v. Warheld*, (Md. 1904) 59 Atl. Rep. 189.

*Michigan.* — *Peninsular Sav. Bank v. Hosie*, 112 Mich. 357; *Dow Law Bank v. Godfrey*, 126 Mich. 521, 86 Am. St. Rep. 559; *Alderton v. Williams*, 130 Mich. 626; *McGraw v. Union Trust Co.*, (Mich. 1904) 99 N. W. Rep. 758, 11 Detroit Leg. N. 91.

*Missouri.* — *Kansas City First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494; *Rossi v. Schawacker*, 66 Mo. App. 67; *Pohle v. Dickmann*, 67 Mo. App. 381; *Malone v. Fidelity, etc., Co.*, 71 Mo. App. 1; *Adams v. Huggins*, 73 Mo. App. 140; *Hardester v. Tate*, 85 Mo. App. 624; *Siemens, etc., Electric Co. v. Ten Broek*, 97 Mo. App. 173; *Kingman v. Cornell-Tebbetts Mach., etc., Co.*, 150 Mo. 282; *Oexner v. Loehr*, 106 Mo. App. 412; *Herrick v. Edwards*, 109 Mo. App. 633; *Andrews v. Congar*, 131 U. S. (Appendix) clxxxiii, 26 U. S. (L. ed.) 90 (construing Missouri contract).

*Nebraska.* — *Drexel v. Pusey*, 57 Neb. 30; *Harnett v. Holdrege*, (Neb. 1903) 97 N. W. Rep. 443.

*New Hampshire.* — *New York L. Ins. Co. v. McKellar*, 68 N. H. 326; *McFetrich v. Woodrow*, 67 N. H. 174; *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 100 Am. St. Rep. 573 (construing New Hampshire contract).

*Ohio.* — *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596, 60 Am. St. Rep. 719; *Sturges v. Williams*, 4 Ohio Dec. (Reprint) 33, Cleve. L. Rec. 39, affirmed 9 Ohio St. 443, 75 Am. Dec. 473; *Colver v. Wheeler*, 5 Ohio Cir. Dec. 278, 11 Ohio Cir. Ct. 604. *Compare* *Bartlett v. Jones*, 4 Ohio Dec. (Reprint) 292, 1 Cleve. L. Rep. 219.

*Rhode Island.* — *McLean v. Bryer*, 24 R. I. 599; *Atwood v. Lester*, 20 R. I. 660; *Downey v. O'Keefe*, 26 R. I. 571. (It is otherwise in this state, however, in the case of instruments made subsequent to the adoption of the Negotiable Instruments Law.)

*South Carolina.* — *Johnston v. McDonald*, 41 S. Car. 81; *Sylvester Bleckley Co. v. Alewine*, 48 S. Car. 308; *McLaughlin v. Braddy*, 63 S. Car. 433, 90 Am. St. Rep. 681.

*Tennessee.* — *National Exch. Bank v. Cumberland Lumber Co.*, 100 Tenn. 479; *Logan v. Ogden*, 101 Tenn. 392; *Wright v. Knoxville Livery, etc., Co.*, (Tenn. Ch. 1900) 59 S. W. Rep. 677.

*Texas.* — *Kennon v. Bailey*, 15 Tex. Civ. App. 28; *Rice v. Farmers', etc., Nat. Bank*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1023; *Beissner v. Weekes*, 21 Tex. Civ. App. 14; *Hollimon v. Karger*, 30 Tex. Civ. App. 558.

*Washington.* — *Donohoe Kelly Banking Co. v. Puget Sound Sav. Bank*, 13 Wash. 407, 52 Am. St. Rep. 57.

**Liability Not Affected by Waiver of Protest.** — *Camp v. Ocala First Nat. Bank*, 44 Fla. 497.

**Liability Joint and Several.** — *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470.

**Under the Negotiable Instruments Law**, the liability of an irregular indorser is that of an indorser, and he is liable as such to the payee and to all subsequent parties, if the instrument is payable to a third person. *Corn v. Levy*, 97 N. Y. App. Div. 48; *Metropolitan Bank v. Engel*, 66 N. Y. App. Div. 273.

Under the Negotiable Instruments Act (Laws 1897, c. 612, § 114) it is presumed that an irregular indorser indorsed the instrument with the intention of becoming liable to the payee, the obligation becoming complete after delivery. *Kohn v. Consolidated Butter, etc., Co.*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 725.

**Irregular Indorsement Waiving Protest and Guaranteeing Payment** does not affect indorser's liability as maker. *Atwood v. Lester*, 20 R. I. 660.

**Irregular Indorsers Liable as Joint Sureties as Between Themselves.** — *Logan v. Ogden*, 101 Tenn. 392.

**The Word "Indorser" After a Signature** renders the signer liable as either maker or guarantor, his contract being the equivalent of making a new note. *Herrick v. Edwards*, 106 Mo. App. 633.

**490. 1. Irregular Indorser Prima Facie Liable as Indorser — Alabama.** — *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67 Am. St. Rep. 95; *Carter v. Long*, 125 Ala. 280; *Carter v. Odom*, 121 Ala. 162; *Carrington v. Odom*, 124 Ala. 529.

**2. England.** — See also *Carrique v. Beaty*, 24 Ont. App. 302, reversing 28 Ont. 175.

**The English Bills of Exchange Act** does not render liable as an indorser one who writes his name upon a bill payable to the drawer before the bill has been indorsed by the drawer. *Jenkins v. Coomber*, (1898) 2 Q. B. 168.

**3. Canada.** — *Robinson v. Mann*, 31 Can. Sup. Ct. 484; *Fraser v. McLeod*, 2 N. W. Ter. 154. *Compare* *Robinson v. Mann*, 2 Ont. L. Rep. 63.

It seems that one indorsing a note before it has been indorsed by the payee assumes no liability thereon, as the note is not complete. *Canadian Bank of Commerce v. Perram*, 31 Ont. 116.

**4. California.** — *O'Connor v. Clarke*, (Cal. 1896) 44 Pac. Rep. 482; *Loustalot v. Calkins*, 120 Cal. 688.

**Connecticut.** — *Oley v. Miller*, 74 Conn. 304; *Smith v. Myers*, 107 Ill. App. 410, judgment affirmed 207 Ill. 126 (construing Connecticut contract).

**Massachusetts.** — *Brooks v. Stackpole*, 168 Mass. 537; *National Bank of Republic v. Delano*, 185 Mass. 424; *Cherry v. Sprague*, (Mass. 1904) 72 N. E. Rep. 456; *Lewis v. Monahan*, 173 Mass. 122; *New York L. Ins. Co. v. McKellar*, 68 N. H. 326 (construing a Massachusetts contract). See also *Rowe v. Bowman*, 183 Mass. 488.

**Under the Negotiable Instruments Law** an irregular indorser of a note payable to the order of a third person is liable as an indorser to the payee and all subsequent parties. *Leonard v. Draper*, (Mass. 1905) 73 N. E. Rep. 644;

**491.** Irregular Indorser Liable as a Guarantor. — See note 1.

**492.** (*bb*) To Assume No Liability to Payee. — See notes 1, 2.

*cc.* ADMISSIBILITY OF EXTRANEOUS EVIDENCE TO SHOW TRUE PURPOSE — When Liability to Payee Presumed. — See notes 3, 4.

Thorpe *v.* White, (Mass. 1905) 74 N. E. Rep. 592.

**491. 1. Irregular Indorser Prima Facie Liable as a Guarantor.** — Tinker *v.* Catlin, 205 Ill. 108; Mexican Asphalt Paving Co. *v.* Love, 73 Ill. App. 250; Duncanson *v.* Kirby, 90 Ill. App. 15; Pfirshing *v.* Heitner, 91 Ill. App. 407; Griffiths *v.* Herzog, 100 Ill. App. 380; Tinker *v.* Catlin, 102 Ill. App. 264, *affirmed* 205 Ill. 108; Andrews *v.* Congar, 131 U. S. (Appendix) clxxxiii, 26 U. S. (L. ed.) 90 (construing *Illinois* decisions); Price *v.* Lonn, 31 Ind. App. 379 (construing *Illinois* statute).

Under Ky. Stat., § 481, every person who signs his name upon the back of a promissory note is liable as an assignor unless a different purpose is expressed in writing. American Nat. Bank *v.* Smallhouse, 113 Ky. 147.

**Irregular Indorsement of Note Payable to Maker's Order.** — Yates *v.* Goodwin, 96 Me. 90; Benedict *v.* Berger, 64 Ill. App. 173; Hately *v.* Pike, 162 Ill. 241, 53 Am. St. Rep. 304; Tinker *v.* Catlin, 205 Ill. 108; Harnett *v.* Holdrege, (Neb. 1903) 97 N. W. Rep. 443; Harnett *v.* Holdrege, (Neb. 1905) 103 N. W. Rep. 277.

**Virginia and West Virginia.** — Roanoke Grocery, etc., Co. *v.* Watkins, 41 W. Va. 789; Miller *v.* Clendenin, 42 W. Va. 416; Young *v.* Schon, 53 W. Va. 127, 97 Am. St. Rep. 970.

**492. 1. Irregular Indorser Prima Facie Liable as Second Indorser** — Iowa. — Lyon *v.* Sioux City First Nat. Bank, (C. C. A.) 85 Fed. Rep. 120 (construing Iowa statute).

*New York.* — Nagel *v.* Lutz, 41 N. Y. App. Div. 193; Howard *v.* Van Gieson, 46 N. Y. App. Div. 77; Port Jefferson Bank *v.* Darling, 91 Hun (N. Y.) 236; Kohn *v.* Consolidated Butter, etc., Co., (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 725; Davis *v.* Bly, 164 N. Y. 527, 79 Am. St. Rep. 670, *affirming* 32 N. Y. App. Div. 124; Davis *v.* Bly, 32 N. Y. App. Div. 124, *affirmed* 164 N. Y. 527; Oneida County Bank *v.* Lewis, (Supm. Ct. App. Div.) 55 N. Y. Supp. 1144; Wylie *v.* Cotter, 170 Mass. 356, 64 Am. St. Rep. 305 (construing New York statute). See also Smith *v.* Weston, 159 N. Y. 194; McMoran *v.* Lange, 25 N. Y. App. Div. 11; Oneida County Bank *v.* Lewis, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 34. The rule is now otherwise in this state under the Negotiable Instruments Law. Corn *v.* Levy, 97 N. Y. App. Div. 48.

*Pennsylvania.* — Moran *v.* Bates, 16 Lanc. L. Rev. 148.

*Georgia.* — Saussy *v.* Weeks, (Ga. 1905) 49 S. E. Rep. 809. See also Sibley *v.* American Exch. Nat. Bank, 97 Ga. 126; Pirkle *v.* Chamberlee, 109 Ga. 32.

Where a promissory note is executed by one person, and another, who is not the payee, and whose indorsement is neither essential nor proper to the transmission of title to the note, signs his name upon the back of it, he becomes liable thereon either as joint principal or as surety, but does not, by thus signing his name, enter into such a contract of indorsement as will cut him off from setting up

against the payee the defense that the note was founded upon an illegal consideration, and therefore void. Benson *v.* Dublin Warehouse Co., 99 Ga. 303.

A promissory note executed by two persons, one signing at the bottom of the note, and the other upon the back thereof, the latter not being the payee, and which is written "I promise to pay," is a joint and several note; and the person whose name appears upon the back of the note is, according to the facts connected with his undertaking, liable thereon either in the capacity of a co-principal or in that of a surety. Booth *v.* Huff, 116 Ga. 8, 94 Am. St. Rep. 98.

*New Jersey.* — Cadwallader *v.* Hirshfeld, 62 N. J. L. 747, 72 Am. St. Rep. 671; Elliott *v.* Moreland, 69 N. J. L. 216; Lowry *v.* Tivy, 70 N. J. L. 457. (It is otherwise, however, as to contracts entered into since the adoption of the Negotiable Instruments Law.)

**Burden of Proving Nature of Contract on Plaintiff.** — Lowry *v.* Tivy, 70 N. J. L. 457.

**2. N. Y. Neg. Inst. L., § 114 — Burden of Proving Liability of Payee as First Indorser on Other Indorsers.** — Kohn *v.* Consolidated Butter, etc., Co., (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 725.

**3. Rule as to Admissibility of Evidence.** — Court Valhalla, No. 16, etc., *v.* Olson, 14 Colo. App. 243; Atkinson *v.* Bennet, 103 Ga. 508; Elliott *v.* Moreland, 69 N. J. L. 216; Kohn *v.* Consolidated Butter, etc., Co., (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 726, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 492; Ewan *v.* Brooks-Waterfield Co., 55 Ohio St. 596, 60 Am. St. Rep. 719; Roanoke Grocery, etc., Co. *v.* Watkins, 41 W. Va. 789; Young *v.* Schon, 53 W. Va. 127, 97 Am. St. Rep. 970.

**4. Admissibility of Evidence to Show True Relation** — Alabama. — Carter *v.* Long, 125 Ala. 280. Arkansas. — See Scanland *v.* Porter, 64 Ark. 470.

*District of Columbia.* — Portsmouth Sav. Bank *v.* Wilson, 5 App. Cas. (D. C.) 8.

*Georgia.* — Atkinson *v.* Bennet, 103 Ga. 508; Saussy *v.* Weeks, (Ga. 1905) 49 S. E. Rep. 809.

*Illinois.* — Pfirshing *v.* Heitner, 91 Ill. App. 407; Griffiths *v.* Herzog, 100 Ill. App. 380; Tinker *v.* Catlin, 102 Ill. App. 264, *affirmed* 205 Ill. 108.

*Indiana.* — Price *v.* Lonn, 31 Ind. App. 379.

*Maryland.* — Keyser *v.* Warfield, (Md. 1904) 59 Atl. Rep. 189.

*Michigan.* — Barger *v.* Farnham, 130 Mich. 487.

*Mississippi.* — Richardson *v.* Foster, 73 Miss. 12, 55 Am. St. Rep. 483.

*Missouri.* — Kansas City First Nat. Bank *v.* Guardian Trust Co., 187 Mo. 494; Harvester *v.* Tate, 85 Mo. App. 624; Peoples Bank *v.* Hansbrough, 89 Mo. App. 252; Malone *v.* Fidelity, etc., Co., 71 Mo. App. 1; Siemens, etc., Electric Co. *v.* Ten Broek, 97 Mo. App. 173; Kingman *v.* Cornell-Tebbetts Mach., etc., Co., 150 Mo. 282; Oexner *v.* Loehr, 106 Mo. App. 412; Hertrick *v.* Edwards, 106 Mo. App. 633.

**493.** When No Liability to Payee Is Presumed. — See notes 3, 4, 5.

**494.** See note 1.

(b) Indorsement After Delivery. — See note 2.

(3) *Nonnegotiable Instruments*. — See notes 3, 4.

**495. VIII. DISCHARGE AND PAYMENT** — 1. Nature and Methods of Discharge. — See notes 2, 4.

2. Payment — b. TIME OF PAYMENT — Payment in Due Course. — See note 7.

Payment Before Maturity. — See notes 8, 9.

*Nebraska*. — Drexel v. Pusey, 57 Neb. 30.

*New Jersey*. — Cadwallader v. Hirshfeld, 62 N. J. L. 747, 72 Am. St. Rep. 671; Elliott v. Moreland, 69 N. J. L. 216.

*North Carolina*. — Salisbury First Nat. Bank v. Swink, 129 N. Car. 255.

*Ohio*. — Wright v. Denham, 4 Ohio Dec. (Reprint) 428, 2 Cleve. L. Rep. 146; Ewan v. Brooks-Waterfield Co., 55 Ohio St. 596, 60 Am. St. Rep. 719.

*South Carolina*. — Carolina Sav. Bank v. Florence Tobacco Co., 45 S. Car. 373.

*Tennessee*. — Wright v. Knoxville Livery, etc., Co., (Tenn. Ch. 1900) 59 S. W. Rep. 677.

*Texas*. — Hollimon v. Karger, 30 Tex. Civ. App. 558.

*Washington*. — Donohoe Kelly Banking Co. v. Puget Sound Sav. Bank, 13 Wash. 407, 52 Am. St. Rep. 57.

*West Virginia*. — Roanoke Grocery, etc., Co. v. Watkins, 41 W. Va. 789; Young v. Schon, 53 W. Va. 127, 97 Am. St. Rep. 970; Parkersburg First Nat. Bank v. Handley, 48 W. Va. 690.

**Parol Evidence Not Admissible Where Holder Is Bona Fide Purchaser.** — Kingman v. Cornell-Tebbetts Mach., etc., Co., 150 Mo. 282.

**Sufficiency of Evidence to Show True Relation.** — Drexel v. Pusey, 57 Neb. 30.

**Evidence Insufficient to Show Different Relation.** — Kansas City First Nat. Bank v. Guardian Trust Co., 187 Mo. 494.

**493. 3. Indorsement for Purpose of Giving Maker Credit with Payee.** — Port Jefferson Bank v. Darling, 91 Hun (N. Y.) 236; Cumming v. Roderick, 16 N. Y. App. Div. 339; Nagel v. Lutz, 41 N. Y. App. Div. 193; Howard v. Van Gieson, 46 N. Y. App. Div. 77; Moynihan v. McKeon, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 343; Davis v. Bly, 164 N. Y. 527, 79 Am. St. Rep. 670, 32 N. Y. App. Div. 124. See also McMoran v. Lange, 25 N. Y. App. Div. 11.

**4. Admissibility of Evidence to Show Liability to Payee — As First Indorser.** — Port Jefferson Bank v. Darling, 91 Hun (N. Y.) 236; Cumming v. Roderick, 16 N. Y. App. Div. 339; Nagel v. Lutz, 41 N. Y. App. Div. 193; Lincoln Nat. Bank v. Butler, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 566; Davis v. Bly, 164 N. Y. 527, 79 Am. St. Rep. 670, 32 N. Y. App. Div. 124.

*Pennsylvania*. — See Cooke v. Addicks, 6 Pa. Super. Ct. 115.

**5. Evidence Inadmissible to Rebut Liability as Indorser.** — See also Port Jefferson Bank v. Darling, 91 Hun (N. Y.) 236.

**494. 1. In New Jersey.** — See Cooke v. Addicks, 6 Pa. Super. Ct. 115 (construing a New Jersey contract).

**2. Irregular Indorsement After Delivery.** — Ridley v. Hightower, 112 Ga. 476; Adams v. Huggins, 73 Mo. App. 140; Adams v. Huggins,

78 Mo. App. 219; Corbyn v. Brokmeyer, 84 Mo. App. 649; Elliott v. Moreland, 69 N. J. L. 216; Roanoke Grocery, etc., Milling Co. v. Watkins, 41 W. Va. 789. See also Smucker v. Wright, 2 Ohio Cir. Dec. 360; Hollimon v. Karger, 30 Tex. Civ. App. 558.

**In Kansas** it seems that an irregular indorser is considered an ordinary indorser. In such cases, however, if it be alleged that the plaintiff acquired the note by purchase before maturity from the payee, and that such person whose signature appears after that of the payee on the back of the note is in fact a joint maker thereof, parol evidence is admissible to prove the nature and extent of the contract entered into by such apparent indorser. Commercial Nat. Bank v. Atkinson, 62 Kan. 775.

**Indorsement After Delivery in Pursuance of a Prior Agreement.** — Downey v. O'Keefe, 26 R. I. 571.

**3. Irregular Indorsers — Nonnegotiable Instruments.** — Young v. Schon, 53 W. Va. 127, 97 Am. St. Rep. 970; Saussy v. Weeks, (Ga. 1905) 49 S. E. Rep. 809.

4. Rossi v. Schawacker, 66 Mo. App. 67.

**495. 2. Connecticut Trust, etc., Co. v. Trumbo,** (Neb. 1902) 90 N. W. Rep. 216.

**Bill Not Revoked by Death of Drawer.** — Trunkfield v. Proctor, 2 Ont. L. Rep. 326.

**4. Demand Note Discharged by Transfer to Maker under Negotiable Instruments Law.** — Schwartzman v. Post, 94 N. Y. App. Div. 474, 475.

**Under the English Bills of Exchange Act** which enacts that when the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged, the expression "in his own right" is not used in contradistinction to a right in a representative capacity, but indicates a right not subject to that of another person, and good against all the world. Nash v. De Freville, (1900) 2 Q. B. 72, 69 L. J. Q. B. 484, 82 L. T. N. S. 642, 48 W. R. 434.

7. Fogg v. School Dist., 75 Mo. App. 159.

**Payment by Surety Presumed to Have Been at Maturity.** — Heaton v. Ainley, 108 Iowa 112.

**Lost Paper.** — Page Woven Wire Fence Co. v. Pool, 133 Mich. 323.

**Paper Not Payable, as a Matter of Right, Before Maturity.** — Smith v. Merchants', etc., Bank, 8 Ohio Cir. Dec. 176, 14 Ohio Cir. Ct. 199.

8. Fogg v. School Dist., 75 Mo. App. 159.

**Holder May Decline Payment Tendered Before Maturity.** — Vanier v. Kent, 11 Quebec K. B. 373.

9. Prim v. Hammel, 134 Ala. 652, 92 Am. St. Rep. 52; Cowing v. Cloud, 16 Colo. App. 326; Haug v. Riley, 101 Ga. 372; Martina v. Muhike, 186 Ill. 327; Fogg v. School Dist., 75

**496. Instrument Should Be Taken Up.** — See note 1.**c. TO WHOM PAYMENT MUST BE MADE.** — See note 2.

Mo. App. 159; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123; *Walsh v. Peterson*, 59 Neb. 645.

Under Ky. Stat., § 483, and Civ. Code, § 19, payment made to the payee by the maker, before maturity and before the transfer of the note, is a defense to an action by a *bona fide* purchaser before maturity, other than a banker, to whom the payee has sold the note. *Gaines v. Deposit Bank*, (Ky. 1897) 39 S. W. Rep. 438.

**496. 1. Importance of Taking Up Instrument.** — *Cowing v. Cloud*, 16 Colo. App. 326; *Martina v. Muhlike*, 186 Ill. 327; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123; *Walsh v. Peterson*, 59 Neb. 645; *Allen v. Johnson*, 11 Ohio Cir. Dec. 42. See also *Finlay v. Marshall*, (Miss. 1891) 20 So. Rep. 864; *Harding v. Jenkins*, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 398.

**2. Payment Must Be Made to Holder or Agent** — *England.* — *Nash v. De Freville*, 69 L. J. Q. B. 484, (1900) 2 Q. B. 72, 82 L. T. N. S. 642, 48 W. R. 434.

*Alabama.* — *Prim v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52.

*Arkansas.* — *State Nat. Bank v. Hyatt*, (Ark. 1905) 86 S. W. Rep. 1002.

*Colorado.* — *Campbell v. Equitable Securities Co.*, 17 Colo. App. 417.

*Georgia.* — *University Bank v. Tuck*, 101 Ga. 104; *Tuck v. National Bank*, 108 Ga. 446, 75 Am. St. Rep. 69; *Loughridge v. Wilson*, 102 Ga. 524. See also *Johnson v. Cobb*, 100 Ga. 139.

*Illinois.* — *Fortune v. Stockton*, 182 Ill. 454, *affirming* 82 Ill. App. 272; *Clarke v. Hunter*, 83 Ill. App. 100, *affirmed* 184 Ill. 158, 75 Am. St. Rep. 160; *McNamara v. Clark*, 85 Ill. App. 439; *Hass v. Lobstein*, 108 Ill. App. 217.

*Indiana.* — *Porter v. Roseman*, (Ind. 1905) 74 N. E. Rep. 1105.

*Indian Territory.* — *Barton v. Ferguson*, 1 Indian Ter. 263.

*Kansas.* — *Fox v. Harrison Nat. Bank*, 6 Kan. App. 682; *Hall v. Smith*, 3 Kan. App. 685; *Walter v. Logan*, 63 Kan. 193; *Doe v. Callow*, 64 Kan. 886, 67 Pac. Rep. 824; *Fowle v. Outcalt*, 64 Kan. 352.

*Kentucky.* — *Cassidy v. Martin Bank*, (Ky. 1901) 62 S. W. Rep. 528.

*Maine.* — *Hunt v. Bessey*, 96 Me. 429.

*Maryland.* — *Barroll v. Forman*, 88 Md. 188.

*Michigan.* — *Texarkana Nat. Bank v. Stillwell*, 121 Mich. 154. See also *Barnett v. Saloman*, 118 Mich. 460.

*Minnesota.* — *Dwight v. Lenz*, 75 Minn. 78.

*Missouri.* — *White v. Kehlor*, 85 Mo. App. 557; *Jenks v. Glenn*, 86 Mo. App. 329; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123; *Maguire v. Donovan*, 108 Mo. App. 511.

*Nebraska.* — *Boyer v. Richardson*, 52 Neb. 156; *Walsh v. Peterson*, 59 Neb. 645; *Garnett v. Meyers*, 65 Neb. 280; *Northern Counties Invest. Trust v. Edgar*, 65 Neb. 301; *Campbell v. O'Connor*, 55 Neb. 638; *Stuart v. Stonebraker*, 63 Neb. 554; *Bradbury v. Kinney*, 63 Neb. 754; *Coddington Sav. Bank v. Anderson*, 64 Neb. 205; *Lay v. Honey*, (Neb. 1902) 89 N.

W. Rep. 998; *Union Stock Yards Nat. Bank v. Haskell*, (Neb. 1902) 90 N. W. Rep. 233; *Boyd v. Pape*, (Neb. 1902) 90 N. W. Rep. 646; *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620; *Thompson v. Buehler*, (Neb. 1901) 95 N. W. Rep. 854; *Chapman v. Wagner*, (Neb. 1901) 96 N. W. Rep. 412.

*New York.* — *Buffalo Third Nat. Bank v. Bowman-Spring*, 50 N. Y. App. Div. 66.

*North Dakota.* — *Winona Second Nat. Bank v. Spottswood*, 10 N. Dak. 114; *Drinkall v. Movius State Bank*, 11 N. Dak. 10, 95 Am. St. Rep. 693; *Hollinshead v. Stuart*, 8 N. Dak. 35.

*Ohio.* — *Smith v. Merchants', etc., Bank*, 8 Ohio Cir. Dec. 176, 14 Ohio Cir. Ct. 199.

*Texas.* — *Renfro v. Waco*, (Tex. Civ. App. 1896) 33 S. W. Rep. 766; *Eastham v. Patty*, 29 Tex. Civ. App. 473; *Cunningham v. McDonald*, (Tex. 1904) 83 S. W. Rep. 372.

*Wisconsin.* — *Bartel v. Brown*, 104 Wis. 493; *Jackson County Bank v. Parsons*, 112 Wis. 265; *Loizeaux v. Fremder*, (Wis. 1904) 101 N. W. Rep. 423.

**The Maker Is Chargeable with Notice of a Transfer** of the paper, and his liability to the holder is not changed by payment made to the original payee. *Stolzman v. Wyman*, 8 N. Dak. 108; *Hollinshead v. Stuart*, 8 N. Dak. 35.

**The Fact that a Negotiable Note Is Made Payable at a Particular Office** does not make the party in charge of the office the agent of the holder to receive payment unless the note is actually in possession of the party. *Dwight v. Lenz*, 75 Minn. 78; *McNamara v. Clark*, 85 Ill. App. 439; *White v. Kehlor*, 85 Mo. App. 557; *Stolzman v. Wyman*, 8 N. Dak. 108; *Corey v. Hunter*, 10 N. Dak. 5; *Hollinshead v. Stuart*, 8 N. Dak. 35; *Bartel v. Brown*, 104 Wis. 493.

**Authority to Collect Interest** does not carry with it an implied agency to collect the principal. *Walsh v. Peterson*, 59 Neb. 645.

**Burden of Proving Authority of Agent on Defendant.** — *University Bank v. Tuck*, 101 Ga. 104; *Fox v. Harrison Nat. Bank*, 6 Kan. App. 682; *Stuart v. Asher*, 15 Colo. App. 403; *Higley v. Dennis*, (Tex. Civ. App. 1905) 88 S. W. Rep. 400.

**Presumption of Agency from Possession of Paper.** — *Dwight v. Lenz*, 75 Minn. 78.

**Payment of Collateral Note to Unauthorized Person** does not release the maker of the note to secure which the collateral was given, even though the collateral was deposited with the person by authority of the payee. *St. Paul, etc., Grain Co. v. Rudd*, 102 Iowa 748.

**Payment to Agent Sufficient Though Maker Did Not Know of His Authority.** — *Bonner v. Lisenby*, 86 Mo. App. 666.

**Though the Payment Is Made to an Unauthorized Person** it is sufficient if it eventually reaches one authorized to receive it. *Stuart v. Stonebraker*, 63 Neb. 554; *Winona Second Nat. Bank v. Spottswood*, 10 N. Dak. 114.

**Payment to the Pledgor of Negotiable Paper.** — *University Bank v. Tuck*, 101 Ga. 104.

**Payment to Pledgor After Notice of Pledgee's Rights.** — *Prim v. Glass*, (Tex. Civ. App. 1898) 48 S. W. Rep. 57.

**Payment May Be Made to the Pledgor where the**

**497.** Paper Payable to Bearer or Indorsed in Blank. — See note 3.

*d. BY WHOM PAYMENT MUST BE MADE — (2) Payment by Party Ultimately Liable.* — See notes 4, 5.

Where there Are Several Joint Acceptors or Makers. — See note 6.

**498.** (3) *Payment by a Drawer or Indorser.* — See notes 2, 3.

**499.** *f. RIGHT TO REISSUE PAPER AFTER PAYMENT — When Payment Has Been Made at Maturity.* — See note 6.

**500.** See note 2.

Before Maturity. — See note 3.

**501.** See note 1.

*g. RECOVERY OF MONEY PAID UNDER MISTAKE.* — See note 6.

**502.** See notes 1, 2.

note has been returned by the pledgee. *Zimmer v. Chew*, 34 N. Y. App. Div. 504.

**Payment to Pledgee.** — *Fox v. Harrison Nat. Bank*, 6 Kan. App. 682.

**Nonnegotiable Paper.** — *Fox v. Cipra*, 5 Kan. App. 312; *Chapman v. Steiner*, 5 Kan. App. 326; *Warren v. Gruwell*, 5 Kan. App. 523; *Gilbert v. Nelson*, 5 Kan. App. 528; *Snyder v. Moon*, 5 Kan. App. 447; *Bliss v. Young*, 7 Kan. App. 728; *Wright v. Shimek*, 8 Kan. App. 350; *Garnett v. Myers*, (Neb. 1903) 94 N. W. Rep. 803; *Swan v. Craig*, (Neb. 1905) 102 N. W. Rep. 471; *Hollinshead v. Stuart*, 8 N. Dak. 35; *Lee v. Sallada*, 7 Pa. Super. Ct. 98; *Sykes v. Citizens' Nat. Bank*, 69 Kan. 134.

**Nonnegotiable Paper — Burden of Proving Notice of Transfer on Plaintiff.** — *Snyder v. Moon*, 5 Kan. App. 447.

**Payment to Third Person by Direction of Holder Sufficient.** — *Matter of Baker*, 72 N. Y. App. Div. 211, *affirmed* 172 N. Y. 617.

**Sufficiency of Evidence to Show Authority.** — *Jones v. Dulick*, 8 Kan. App. 855, 55 Pac. Rep. 522.

**Duty of Maker to Demand Production of Note.** — *Fowle v. Outcalt*, 64 Kan. 352.

**When Payment to Surviving Joint Owner Is Sufficient.** — *Perry v. Perry*, 98 Ky. 242.

**Payment According to Owner's Direction.** — One may retain title to a negotiable note, and order its contents to be paid to another. *Downing v. Wheeler*, 93 Me. 570.

**An Indorsement for Collection** does not prevent the indorser from demanding and receiving payment himself. *Page Woven Wire Fence Co. v. Pool*, 133 Mich. 323.

**497. 3. Payment to Bearer.** — *Drinkall v. Movius State Bank*, 11 N. Dak. 10, 95 Am. St. Rep. 693.

**Payment on Forged Indorsement.** — *Beattie v. National Bank*, 69 Ill. App. 632, *affirmed* 174 Ill. 571, 66 Am. St. Rep. 318.

**4. Stevenson v. Short**, 52 La. Ann. 967; *Williams v. Gerber*, 75 Mo. App. 18; *Cussen v. Brandt*, 97 Va. 1, 75 Am. St. Rep. 762.

**Payment of Joint Obligation.** — Where a joint obligation is bought by a firm, a member of which is one of the obligors, the note is extinguished. *Logan County Nat. Bank v. Barclay*, 104 Ky. 97.

**5. The Giving of a Judgment or Other Security by the Maker** or a prior indorser does not, however, discharge a subsequent indorser. *Lock Haven First Nat. Bank v. Peltz*, 176 Pa. St. 513, 53 Am. St. Rep. 686.

**6.** See also *Williams v. Gerber*, 75 Mo. App. 18.

**498. 2. March v. Barnet**, (Cal. 1897) 51 Pac. Rep. 20; *State v. Hughes*, 19 Ind. App. 266; *Oneida County Bank v. Lewis*, (Supm. Ct. App. Div.) 55 N. Y. Supp. 1144; *Twelfth Ward Bank v. Brooks*, 63 N. Y. App. Div. 220 (under Negotiable Instruments Law); *Van Winkle Gin, etc., Co. v. Citizens' Bank*, 89 Tex. 147; *Pegg v. Howlett*, 28 Ont. 473. See also *McGowan v. Hover*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 138.

**Failure to Protest Does Not Prevent Recovery by Indorser Paying Note.** — *McGowan v. Hover*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 138.

**3. Payment Where Payment Has Not Been Protested.** — Where no proof of a protest or the waiver of protest is made, the indorser of a promissory note who pays cannot recover, and he must be held to have paid without any obligation to do so; and the payment must be attributed to his own generosity. *Savaria v. Paquette*, 20 Quebec Super. Ct. 314.

**499. 6. Root v. Fast**, 58 Neb. 498; *Vanier v. Kent*, 11 Quebec K. B. 373.

**Effect of Payment by Third Person.** — *McDonnell v. Burns*, (C. C. A.) 83 Fed. Rep. 866.

**500. 2. Reissue After Payment by Indorser at Maturity.** — See also *Kelly v. Staed*, 136 Mo. 430, 58 Am. St. Rep. 648.

**3. Holton v. Hubbard**, 49 La. Ann. 715; *Fogg v. School Dist.*, 75 Mo. App. 159; *Vanier v. Kent*, 11 Quebec K. B. 373, *affirming* 20 Quebec Super. Ct. 545.

**501. 1. Acceptor or Maker Paying Before Maturity May Reissue.** — *Sater v. Hunt*, 66 Mo. App. 527.

**6. Fitts v. Gilmore**, (Tenn. Ch. 1899) 54 S. W. Rep. 681.

**502. 1. Grotian v. Guaranty Trust Co.**, 105 Fed. Rep. 566, *affirmed* 114 Fed. Rep. 433, 52 C. C. A. 235; *La Fayette v. Merchants' Bank*, (Ark. 1905) 84 S. W. Rep. 700.

**Forged Indorsement — Recovery by Drawee.** — *Citizens' Nat. Bank v. City Nat. Bank*, 111 Iowa 216, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 502; *La Fayette v. Merchants Bank*, (Ark. 1905) 84 S. W. Rep. 700.

**Forgery of Drawer's Name.** — *Indian Territory Bank v. Buchanan County First Nat. Bank*, 109 Mo. App. 665. See also *LaFayette v. Merchants Bank*, (Ark. 1905) 84 S. W. Rep. 700; *Woods v. Colony Bank*, 114 Ga. 683.

**Same — Drawee Supposed to Know Drawer's Signature.** — See also *La Fayette v. Merchants' Bank*, (Ark. 1905) 84 S. W. Rep. 700.

**2. Compare Boyer v. Richardson**, 52 Neb. 156.



**502.** Laches After Discovery of Mistake. — See note 3.

**503.** 3. Novation, Satisfaction, and Release. — See note 4.

4. Cancellation or Destruction. — See notes 6, 7.

**504.** The Liability of Any Party to the Instrument. — See note 2.

Cancellation by Mistake. — See note 3.

6. Discharge by Operation of Law — Merger — The Discharge in Bankruptcy or Insolvency. — See note 11.

**505.** 7. Discharge of Indorsers as Sureties — How Far Indorsers Deemed Sureties. — See note 3.

Discharge of Indorser by Time Given to Antecedent Party. — See notes 6, 7, 8.

**502.** 3. Recovery Allowed in Absence of Prejudice to Other Party by Delay. — *La Fayette v. Merchants Bank*, (Ark. 1905) 84 S.W. Rep. 700.

**503.** 4. Macon Sash, etc., *Co. v. Gunn*, 110 Ga. 401.

Actual Release for Consideration Essential. — *Hale v. Grogan*, 99 Ky. 170.

Under the English Bills of Exchange Act a parol renunciation and delivery of the note to a devisee of the maker is not sufficient. *Edwards v. Walters*, (1896) 2 Ch. 157, 65 L. J. Ch. 557, 74 L. T. N. S. 396, 44 W. R. 547.

Renunciation Accompanied by Surrender under Negotiable Instruments Law. — *Leask v. Dew*, 102 N. Y. App. Div. 529.

6. Consideration Is Essential to support an agreement to cancel notes held by the payee. *Templeton v. Butler*, 117 Wis. 455.

7. Riddle v. Russell, 108 Iowa 591; *Wettermark v. Burton*, 30 Tex. Civ. App. 511, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 503.

Agreement to Cancel Acceptance — Sufficiency of Evidence. — *Dubouque First Nat. Bank v. Booth*, 102 Iowa 333.

Surrender of Note by Holder to Maker. — See *Cunningham v. Hurd*, 109 Iowa 34.

Marking the Word "Paid" on the Note is ineffectual to constitute a discharge and cancellation of the note where it is retained by the payee. *Wittman v. Pickens*, (Colo. 1905) 81 Pac. Rep. 299.

**504.** 2. Cancellation of Acceptor's Name. — See *Cooper Grocery Co. v. Moore*, 19 Tex. Civ. App. 283.

3. *Milo Bank v. Vertz*, 96 Iowa 725. See also *Cooper Grocery Co. v. Moore*, 19 Tex. Civ. App. 283; *Ashburn v. Evans*, (Tex. Civ. App. 1903) 72 S. W. Rep. 242.

Burden of Proving Mistake. — *Riddle v. Russell*, 108 Iowa 591.

Stamping Note "Paid" Does Not Discharge Maker when done through mistake. *Grogan v. Smith*, (Tex. Civ. App. 1895) 33 S. W. Rep. 276.

11. Indorser Not Discharged by failure of holder to prove claim against bankrupt maker in manner prescribed by *Massachusetts Bankruptcy Act* 1898, § 57. *National Bank v. Sawyer*, 177 Mass. 490, 83 Am. St. Rep. 292.

**505.** 3. An indorser is released by the vote of the holder, at a meeting of creditors, to discharge the maker, even though the indorser had waived demand, notice, and protest. *Union Nat. Bank v. Grant*, 48 La. Ann. 18.

6. Time Given to Prior Party Discharges Indorsers — *Alabama*. — *Elyton Co. v. Hood*, 121 Ala. 373.

*California*. — *Daneri v. Gazzola*, 139 Cal. 416.

*Colorado*. — *Fisher v. Denver Nat. Bank*, 22

Colo. 373; *Drescher v. Fulham*, 11 Colo. App. 62.

*District of Columbia*. — *Reed v. Tierney*, 12 App. Cas. (D. C.) 165; *Walker v. Washington Title Ins. Co.*, 19 App. Cas. (D. C.) 575.

*Georgia*. — *Tanner v. Gude*, 100 Ga. 157.

*Illinois*. — *Gaar v. Hulse*, 90 Ill. App. 548.

*Indiana*. — *Brannon v. Irons*, 19 Ind. App. 305; *Schieber v. Traudt*, 19 Ind. App. 349.

*Kansas*. — *Wellington Nat. Bank v. Thomson*, 9 Kan. App. 667; *Horton Bank v. Brooks*, 10 Kan. App. 576, 62 Pac. Rep. 675.

*Kentucky*. — *Schuff v. Germania Safety-Vault, etc., Co.*, (Ky. 1897) 43 S. W. Rep. 229.

*Minnesota*. — *St. Paul Trust Co. v. St. Paul Chamber of Commerce*, 64 Minn. 439.

*Missouri*. — *Johnson v. Franklin Bank*, 173 Mo. 171; *Marquardt Sav. Bank v. Freund*, 80 Mo. App. 657; *Smith v. Warren*, 88 Mo. App. 285; *Laumeier v. Hallock*, 103 Mo. App. 116; *Westbay v. Stone*, (Mo. App. 1905) 87 S. W. Rep. 34.

*New York*. — *Cincinnati Fifth Nat. Bank v. Woolsey*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 757.

*Pennsylvania*. — *Bishop's Estate*, 195 Pa. St. 85.

*South Dakota*. — *Niblack v. Champeny*, 10 S. Dak. 165.

*Tennessee*. — *Sully v. Childress*, 106 Tenn. 109, 82 Am. St. Rep. 875; *Stone's River Nat. Bank v. Walter*, 104 Tenn. 11.

*Texas*. — *Robson v. Brown*, (Tex. Civ. App. 1900) 57 S. W. Rep. 83; *Guerquin v. Boone*, (Tex. Civ. App. 1903) 77 S. W. Rep. 630.

*Virginia*. — *State Sav. Bank v. Baker*, 93 Va. 510.

*Wisconsin*. — *Black River Falls First Nat. Bank v. Jones*, 92 Wis. 36.

*Wyoming*. — *Lawrence v. Thom*, 9 Wyo. 414.

*Canada*. — *Le Jeune v. Sparrow*, 1 N. W. Ter. 384.

Sufficiency of Agreement to Discharge Sureties a Question of Fact. — *Roberson v. Blevins*, 57 Kan. 50.

The Fact that One of Two Notes Secured by the Same Collateral Is Extended does not release one who is surety on both notes, but he is only released from the extended note. *Owings v. McKenzie*, 133 Mo. 323.

Indemnified Surety Not Discharged. — *Hardest v. Tate*, 85 Mo. App. 624.

Extension of Time with Consent of Sureties Not a Release. — *Milan First Nat. Bank v. Wells*, 98 Mo. App. 573.

Indorser Not Discharged by Stipulation Extending Time to Answer. — *German-American Bank v. Niagara Cycle Fittings Co.*, 13 N. Y. App. Div. 450.

**506.** See notes 1, 2, 3, 4, 5.

**An Agreement Between the Maker and Holder that the Surety Shall Not Be Released** is not binding where the surety is not a party to the agreement and does not consent thereto. *Robson v. Brown*, (Tex. Civ. App. 1900) 57 S. W. Rep. 686.

**Sufficiency of Evidence.**—Evidence that notes deposited as collateral security for the payment of other notes were from time to time renewed, interest collected thereon in advance, and the time of payment extended, will not, of itself, support a finding that the holder of the original notes thereby extended their time of payment and release a subsequent indorser from liability. *Benton v. German-American Nat. Bank*, 45 Neb. 850.

**505. 7. National Citizens' Bank v. Toplitz**, 81 N. Y. App. Div. 593, affirmed 178 N. Y. 464 (under Negotiable Instruments Law, § 55); *Wright v. Independence Nat. Bank*, 96 Va. 728, 70 Am. St. Rep. 889.

**8. Agreement Must Be Binding**—*District of Columbia*.—*Reed v. Tierney*, 12 App. Cas. (D. C.) 165; *Clark v. Read*, 12 App. Cas. (D. C.) 343; *Walker v. Washington Title Ins. Co.*, 19 App. Cas. (D. C.) 575.

*Georgia*.—See *Tanner v. Gude*, 100 Ga. 157. *Illinois*.—*Heenan v. Howard*, 81 Ill. App. 629; *Wyatt v. Dufrene*, 106 Ill. App. 214.

*Indiana*.—*Bugh v. Crum*, 26 Ind. App. 465, 84 Am. St. Rep. 307; *Brannon v. Irons*, 19 Ind. App. 305.

*Kansas*.—*Roberson v. Blevins*, 57 Kan. 50; *Eaton v. Whitmore*, 3 Kan. App. 760; *Horton Bank v. Brooks*, 10 Kan. App. 576, 62 Pac. Rep. 675.

*Massachusetts*.—*Way v. Dunham*, 166 Mass. 263.

*Missouri*.—*Fisher v. Stevens*, 143 Mo. 181; *La Belle Sav. Bank v. Taylor*, 69 Mo. App. 99; *Smith v. Warren*, 88 Mo. App. 285.

*Ohio*.—*Cone v. Rees*, 5 Ohio Cir. Dec. 192, 11 Ohio Cir. Ct. 632.

*Pennsylvania*.—*Bishop's Estate*, 195 Pa. St. 85; *Farmers' Nat. Bank v. Marshall*, 9 Pa. Super. Ct. 621; *In re Bishop*, 7 Del. Co. Rep. (Pa.) 553.

*Tennessee*.—*Sully v. Childress*, 106 Tenn. 109, 82 Am. St. Rep. 875.

*Texas*.—*Jameson v. Officer*, 15 Tex. Civ. App. 212; *Tallahassee First Nat. Bank v. McCord*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1003; *Angel v. Miller*, 16 Tex. Civ. App. 679; *Behrns v. Rogers*, (Tex. Civ. App. 1897) 40 S. W. Rep. 419; *Robson v. Brown*, (Tex. Civ. App. 1900) 57 S. W. Rep. 83; *Guerguin v. Boone*, (Tex. Civ. App. 1903) 77 S. W. Rep. 630.

*Virginia*.—*State Sav. Bank v. Baker*, 93 Va. 510; *Bacon v. Bacon*, 94 Va. 686.

*West Virginia*.—*Parsons v. Harrold*, 46 W. Va. 122.

**An Agreement by an Agent, Not Having Express Authority**, to extend the time of payment is not binding on the principal, and does not release the indorser. *Behrns v. Rogers*, (Tex. Civ. App. 1897) 40 S. W. Rep. 419.

**Unauthorized Renewal by Cashier Does Not Release Indorser.**—*Gray v. Farmers' Nat. Bank*, 81 Md. 631.

**Delay Granted or Promised upon a Usurious Consideration** not being based upon a valid enforceable contract will not release the sureties. *McKamy v. McNabb*, 97 Tenn. 236.

**506. 1. Definite in Extent**—*District of Columbia*.—*Reed v. Tierney*, 12 App. Cas. (D. C.) 165; *Walker v. Washington Title Ins. Co.*, 19 App. Cas. (D. C.) 575.

*Georgia*.—*Tanner v. Gude*, 100 Ga. 157.

*Illinois*.—*Heenan v. Howard*, 81 Ill. App. 629.

*Indiana*.—*Bugh v. Crum*, 26 Ind. App. 465, 84 Am. St. Rep. 307; *Brannon v. Irons*, 19 Ind. App. 305; *Schieber v. Traudt*, 19 Ind. App. 349.

*Kansas*.—*Roberson v. Blevins*, 57 Kan. 50; *Eaton v. Whitmore*, 3 Kan. App. 760.

*Maryland*.—*Gray v. Farmers' Nat. Bank*, 81 Md. 631.

*Missouri*.—*Fisher v. Stevens*, 143 Mo. 181; *La Belle Sav. Bank v. Taylor*, 69 Mo. App. 99; *Smith v. Warren*, 88 Mo. App. 285.

*Ohio*.—*Cone v. Rees*, 5 Ohio Cir. Dec. 192, 11 Ohio Cir. Ct. 632.

*Pennsylvania*.—*Bishop's Estate*, 195 Pa. St. 85; *Farmers' Nat. Bank v. Marshall*, 9 Pa. Super. Ct. 621; *In re Bishop*, 7 Del. Co. Rep. (Pa.) 553.

*Tennessee*.—*Sully v. Childress*, 106 Tenn. 109, 82 Am. St. Rep. 875; *Stone's River Nat. Bank v. Walter*, 104 Tenn. 11.

*Texas*.—*Robson v. Brown*, (Tex. Civ. App. 1900) 57 S. W. Rep. 83; *Guerguin v. Boone*, (Tex. Civ. App. 1903) 77 S. W. Rep. 630.

*Virginia*.—*State Sav. Bank v. Baker*, 93 Va. 510; *Bacon v. Bacon*, 94 Va. 686.

**Implied Contract for Extension** by receiving interest in advance on past due note—effect as to guarantors. *St. Paul Trust Co. v. St. Paul Chamber of Commerce*, 64 Minn. 439.

**Indorsers Not Released by Renewals Discounted under Continuing Guaranty.**—*Cincinnati Fifth Nat. Bank v. Woolsey*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 757.

**An Extension Until the Fall of the Year** is sufficiently definite as extending at least to the first day of September. *Robson v. Brown*, (Tex. Civ. App. 1900) 57 S. W. Rep. 686.

**2. Consideration Necessar**—*District of Columbia*.—*Reed v. Tierney*, 12 App. Cas. (D. C.) 165; *Walker v. Washington Title Ins. Co.*, 19 App. Cas. (D. C.) 575.

*Illinois*.—*Heenan v. Howard*, 81 Ill. App. 629; *Wyatt v. Dufrene*, 106 Ill. App. 214.

*Indiana*.—*Bugh v. Crum*, 26 Ind. App. 465, 84 Am. St. Rep. 307; *Brannon v. Irons*, 19 Ind. App. 305; *Schieber v. Traudt*, 19 Ind. App. 349.

*Kansas*.—*Eaton v. Whitmore*, 3 Kan. App. 760; *Horton Bank v. Brooks*, 10 Kan. App. 576, 62 Pac. Rep. 675.

*Missouri*.—*Fisher v. Stevens*, 143 Mo. 181; *La Belle Sav. Bank v. Taylor*, 69 Mo. App. 99; *Smith v. Warren*, 88 Mo. App. 285.

*New York*.—*Cincinnati Fifth Nat. Bank v. Woolsey*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 757.

*Ohio*.—*Cone v. Rees*, 5 Ohio Cir. Dec. 192, 11 Ohio Cir. Ct. 632.

*Pennsylvania*.—*Bishop's Estate*, 195 Pa. St.

**506. Release of Prior Parties.** — See note 6.

By Release of Securities. — See note 7.

85; *Farmers' Nat. Bank v. Marshall*, 9 Pa. Super. Ct. 621; *In re Bishop*, 7 Del. Co. Rep. (Pa.) 553.

*Tennessee*. — *Sully v. Childress*, 106 Tenn. 109, 82 Am. St. Rep. 875. See also *McKamy v. McNabb*, 97 Tenn. 236.

*Texas*. — *Tallahassee First Nat. Bank v. McCord*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1003; *Angel v. Miller*, 16 Tex. Civ. App. 679; *Robson v. Brown*, (Tex. Civ. App. 1900) 57 S. W. Rep. 83; *Guerguin v. Boone*, (Tex. Civ. App. 1903) 77 S. W. Rep. 630.

*Virginia*. — *Bacon v. Bacon*, 94 Va. 686.

**Sufficiency of Considerations.** — *Drescher v. Fulham*, 11 Colo. App. 62; *Brannon v. Irons*, 19 Ind. App. 305; *Horton Bank v. Brooks*, 64 Kan. 285.

**Payment of Interest in Advance Sufficient Consideration.** — *Schieber v. Traudt*, 19 Ind. App. 349.

**Promise to Pay Interest for Period of Extension Sufficient Consideration.** — *Eaton v. Whitmore*, 3 Kan. App. 760.

**Payment of Interest, Usurious or Legal, Sufficient Consideration.** — *Parsons v. Harrold*, 46 W. Va. 122. See also *Niblack v. Champeny*, 10 S. Dak. 165.

**Giving of a Real Estate Mortgage a Sufficient Consideration.** — *Roberson v. Blevins*, 57 Kan. 50.

**The Giving of a Demand Note** in order to render the original note a live asset, the original note not being surrendered and the time of payment not being thereby extended, does not constitute sufficient consideration to release the surety. *Twelfth Ward Bank v. Samuels*, 71 N. Y. App. Div. 168, *affirmed* 176 N. Y. 593.

**Sufficiency of Evidence to Show Consideration.** — *Niblack v. Champeny*, 10 S. Dak. 165.

**Surety Not Released Where Renewal Note Is Forgery.** — *Jameson v. Officer*, 15 Tex. Civ. App. 212.

**506. 3. Mere Delay No Discharge** — *United States*. — *Greenway v. William D. Orthwein Grain Co.*, (C. C. A.) 85 Fed. Rep. 536.

*District of Columbia*. — *Clark v. Read*, 12 App. Cas. (D. C.) 343.

*Illinois*. — *Heenan v. Howard*, 81 Ill. App. 629.

*Indiana*. — *Bugh v. Crum*, 26 Ind. App. 465, 84 Am. St. Rep. 307.

*Louisiana*. — *Forstall v. Fussell*, 50 La. Ann. 256.

*Massachusetts*. — *Agawam Nat. Bank v. Downing*, 169 Mass. 297.

*Missouri*. — *La Belle Sav. Bank v. Taylor*, 69 Mo. App. 99.

*New York*. — *Cincinnati Fifth Nat. Bank v. Woolsey*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 757.

*Pennsylvania*. — *Farmers' Nat. Bank v. Marshall*, 9 Pa. Super. Ct. 621.

*Tennessee*. — *Sully v. Childress*, 106 Tenn. 109, 82 Am. St. Rep. 875.

*Texas*. — *Behrns v. Rogers*, (Tex. Civ. App. 1897) 40 S. W. Rep. 419; *Rice v. Farmers', etc., Nat. Bank*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1023; *Guerguin v. Boone*, (Tex. Civ. App. 1903) 77 S. W. Rep. 630.

*Virginia*. — *Bacon v. Bacon*, 94 Va. 686; *Tate v. New York State Bank*, 96 Va. 765.

*West Virginia*. — *Parsons v. Harrold*, 46 W. Va. 122.

**4. Taking New Security as Substitute.** — *In re Bishop*, 7 Del. Co. Rep. (Pa.) 553; *Rudolph v. Hewitt*, 11 S. Dak. 646; *Black River Falls First Nat. Bank v. Jones*, 92 Wis. 36. See also *Peterson v. Stege*, 67 Ill. App. 147.

**Maker Not Discharged by Acceptance of New Security from Indorser.** — *Agawam Nat. Bank v. Downing*, 169 Mass. 297.

**New Security as Collateral Merely.** — *Fisher v. Denver Nat. Bank*, 22 Colo. 373; *Roberson v. Blevins*, 57 Kan. 50; *Merchants' Trust, etc., Co. v. Jones*, 95 Me. 335, 85 Am. St. Rep. 412; *Agawam Nat. Bank v. Downing*, 169 Mass. 297; *Cincinnati Fifth Nat. Bank v. Woolsey*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 757; *Farmers' Nat. Bank v. Marshall*, 9 Pa. Super. Ct. 621; *Bacon v. Bacon*, 94 Va. 686.

**Taking of Additional Security under Agreement for an Extension of Time** releases a surety not a party thereto. *Merchants' Bank v. Bussell*, 16 Wash. 546.

**A Note Payable on Demand After Date** being immediately payable, the acceptance thereof by the holder does not constitute such an extension of time as to release an indorser on the note to cover which it was given. *Peninsular Sav. Bank v. Hosie*, 112 Mich. 357.

**Exchange of Security for One of Equal Value Does Not Release.** — *Keeler v. Hollweg*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 415, *affirmed* 36 N. Y. App. Div. 490.

**Release by Change of Security a Question of Fact.** — *Nassau Bank v. Campbell*, 147 N. Y. 694.

**Refusal of the Holder to Accept Additional Security** and extend time does not discharge the indorser. *City Sav. Bank v. Kensington Land Co.*, (Tenn. Ch. 1896) 37 S. W. Rep. 1037.

**5. Reservation of Rights Against Indorsers.** — *Big Rapids Nat. Bank v. Peters*, 120 Mich. 518; *Brink v. Stratton*, 64 N. Y. App. Div. 336, *reversed* 176 N. Y. 150, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 506; *Winfree v. Lexington First Nat. Bank*, 97 Va. 83. See also *Faneuil Hall Nat. Bank v. Meloon*, 183 Mass. 66.

**6. Release of or Composition with Prior Parties.** — *Brown v. Croy*, 74 Mo. App. 462; *Spies v. National City Bank*, 174 N. Y. 222, 68 N. Y. App. Div. 70; *Plankinton v. Gorman*, 93 Wis. 560. See also *Schuff v. Germania Safety-Vault, etc., Co.*, (Ky. 1897) 43 S. W. Rep. 229.

**Parol Release Does Not Release Other Parties.** — *Valley Sav. Bank v. Mercer*, 97 Md. 458.

**7. Discharge by Release of Securities.** — *Gotzian v. Heine*, 87 Minn. 429; *George v. Somerville*, 153 Mo. 7; *Keeler v. Hollweg*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 415, *affirmed* 36 N. Y. App. Div. 490; *Clapp v. Cooper*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 466, *reversing* (N. Y. City Ct. Gen. T.) 62 N. Y. Supp. 1133; *Fayetteville Bank v. Nimocks*, 124 N. Car. 352; *Price County Bank v. McKenzie*, 91 Wis. 658; *Plankinton v. Gorman*, 93 Wis. 560.

**The Mere Exchange of Security does not re-**

**506. 8. Discharge of Joint Parties.** — See note 8.

**One Joint Party a Surety.** — See note 9.

lease the indorser where the two securities are of equal value and the indorser is not injured thereby. *State Bank v. Smith*, 155 N. Y. 185.

**506. 8. Joint Parties.**—*Morse v. Blanchard*, 117 Mich. 37; *Banque Provinciale v. Arnoldi*, 2 Ont. L. Rep. 624; *Bogart v. Robertson*, 8 Ont. L. Rep. 261; *Leet v. Blumenthal*, 13 Quebec Super. Ct. 250.

**Taking a New Note of One of the Joint Makers** does not release the others unless there is a positive agreement to that effect. *Bexar Bldg., etc., Assoc. v. Lockwood*, (Tex. Civ. App. 1899) 54 S. W. Rep. 253.

**9. Release of Joint Party with Knowledge of**

**Suretyship.** — *Drescher v. Fulham*, 11 Colo. App. 62; *Lazelle v. Miller*, 40 Oregon 549; *Mays v. Sanders*, (Tex. Civ. App. 1896) 36 S. W. Rep. 108.

The rule that where the guaranty is joint the release of one obligor releases the other, and that the release of the principal discharges the surety only, applies where the discharge is brought about by some affirmative act on the part of the creditor. It does not apply where the estate of a surety who has died is discharged through a failure to present the note against the estate within the specified time. *Donnerberg v. Oppenheimer*, 15 Wash. 290.

## BILLS OF LADING.

BY THEODOR MEGAARDEN.

**510. II. ISSUING BILLS OF LADING — 1. Duty of Carrier to Issue.** — See note 6.

**511.** See note 1.

**512. 3. By Whom Issued — By the Master of a Vessel — Implied Authority.** — See note 2.

**513. III. FORM, CONTENTS, AND EXECUTION — 2. Contents.** — See note 8.

**514. 3. Execution and Delivery — b. DELIVERY.** — See note 7.

**515. IV. ASSENT OF CONSIGNOR — 2. Necessity and Effect of Assent.** — See note 3.

**3. How Given — a. BY SIGNING THE INSTRUMENT.** — See note 4.

**516. b. BY RECEIVING AND RETAINING THE INSTRUMENT — (1) In General.** — See note 2.

*(2) View that Assent Is Conclusively Presumed from Acceptance —*

*(a) General Rule.* — See note 3.

**510. 6.** See *Cushing v. McLeod*, 2 N. Bruns. Eq. Rep. 63; *Forsyth v. Sutherland*, 31 Nova Scotia 391.

**511. 1. Statutory Provisions Requiring Carrier to Issue.** — *Sherman, etc., R. Co. v. Conly*, (Tex. Civ. App. 1896) 37 S. W. Rep. 253; *Conley v. Sherman, etc., R. Co.*, 90 Tex. 295.

**Issuing Bill of Lading Without Having Received Goods.** — In addition to requiring carriers to issue bills of lading, some of the statutes impose a penalty upon carriers that issue bills of lading without having received the goods for carriage. See *Thompson v. Alabama Midland R. Co.*, 122 Ala. 378, wherein it was held that the defendant, an intermediate carrier, did not incur the statutory penalty by issuing, for the accommodation of the shipper and consignee, a bill of lading for goods which it expected soon to receive from the initial carrier.

**512. 2.** See *O'Connell v. One Thousand and Two Bales Sisal Hemp*, 75 Fed. Rep. 410.

**513. 8. Reference to Charter-Party.** — The words "freight and all conditions as per charter-party" will incorporate into a bill of lading all conditions in the charter applicable to and consistent with the character of the bill of lading.

*O'Connell v. One Thousand and Two Bales Sisal Hemp*, 75 Fed. Rep. 408; *The Sandfield*, 79 Fed. Rep. 371, *affirmed* (C. C. A.) 92 Fed. Rep. 663.

**514. 7.** See *Cleveland, etc., R. Co. v. Potts*, 33 Ind. App. 564.

In *Dunbar v. Charleston, etc., R. Co.*, 62 S. Car. 414, it was held that where a shipper received a receipt reciting that the shipment was subject to the terms of the regular bill of lading for which the receipt was exchangeable, the law imputed to him notice of, and he was bound by, the terms of the regular bill.

**515. 3. Assent, Express or Implied. Necessary to Bind Shipper.** — *Cleveland, etc., R. Co., v. Potts*, 33 Ind. App. 564.

**4. Assent Conclusively Presumed from Signature.** — *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218.

**516. 2. Dobson v. Central R. Co.**, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 586, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 516; *Cleveland, etc., R. Co. v. La Tourette*, 1 Ohio Cir. Dec. 486; *Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31.

**3. Assent Presumed from Acceptance of Bill of Lading.** — *Dean v. Furness*, 9 Quebec Q. B. 81;

**517.** (b) *Circumstances Rebutting Presumption of Assent.* — See notes 2, 4.

**518.** (c) *Receiving Bill After Shipment of Goods under Oral Contract.* — See note 1.

**519.** *Express Assent.* — See note 2.

(3) *View that Possession of Bill by Shipper Is Prima Facie Evidence of Assent.* — See note 3.

(4) *View that Assent Is a Question of Fact.* — See note 4.

**521.** *V. FORCE AND EFFECT — 1. Functions of Bills of Lading — Receipt and Contract.* — See note 3.

**522.** *2. As Evidence — b. OF WHAT FACTS EVIDENCE — (1) General Rule.* — See note 4.

(2) *Of the Shipment, Description, Quantity, and Condition of the Goods.* — See notes 5, 6, 7.

**523.** *'Contents Unknown,' Etc.* — *Bills Containing, Not Evidence of Contents of Packages.* — See note 1.

**525.** *"Contents and Weight Unknown"* — *Bills Containing, Not Evidence of Quantity.* — See note 2.

(3) *Of the Ownership of the Goods.* — See notes 3, 4.

(4) *Of the Terms of the Contract.* — See note 6.

**526.** *c. ADMISSIBILITY OF PAROL EVIDENCE TO VARY OR CONTRADICT — (2) Receipt Clauses — (a) General Rule.* — See note 7.

**527.** *Clause Acknowledging the Receipt of Goods.* — See note 1.

*Cox v. Central Vermont R. Co.*, 170 Mass. 138, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 516; *Cincinnati, etc., R. Co. v. Berdan*, 12 Ohio Cir. Dec. 481, 22 Ohio Cir. Ct. 326; *Stevens v. Lake Shore, etc., R. Co.*, 11 Ohio Cir. Dec. 168, 20 Ohio Cir. Ct. 41.

**517. 2.** *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568 (bill of lading handed to shipper's clerk at the time of, or soon after, the delivery of the goods to the carrier).

**4. Accepting Bill under Circumstances Inducing the Shipper to Mistake Its Nature.** — *Stoner v. Chicago G. W. R. Co.*, 109 Iowa 551.

**518. 1. Assent Not Presumed from Acceptance of Bill.** — *The Arctic Bird*, 109 Fed. Rep. 167, applying the rule where previous contract was in writing; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, (C. C. A.) 120 Fed. Rep. 873, reversing 112 Fed. Rep. 829; *Stoner v. Chicago G. W. R. Co.*, 109 Iowa 551.

**519. 2. Ratification of Terms of Bill — Assuming Control of Goods Shipped.** — *North British, etc., Ins. Co. v. Central Vermont R. Co.*, 9 N. Y. App. Div. 4, affirmed without opinion in 158 N. Y. 726.

**3. Acceptance Prima Facie Evidence of Assent.** — *Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31.

**4.** *Elgin, etc., R. Co. v. Bates Mach. Co.*, 98 Ill. App. 311, affirmed in 200 Ill. 636.

**521. 3. Character of Instrument — Receipt and Contract.** — *Crampton v. McBain*, 71 Vt. 246, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 521.

**522. 4. Goods Shipped under Previous Contract.** — Bills of lading issued for goods shipped under a previous contract covering future shipments are only evidence of the dates and amounts of shipments made under the pre-existing contract. *St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619, affirmed in 175 Ill. 557.

**5. Of the Shipment of Goods.** — *The Titania*, (C. C. A.) 131 Fed. Rep. 229, affirming 124 Fed.

Rep. 975; *Chicago, etc., R. Co. v. Johnston*, 58 Neb. 236.

**6. Of the Weight and Quantity of the Goods.** — *Smith v. Bedouin Steam Nav. Co.*, (1896) A. C. 70. See also *Waydell v. Adams*, (Supm. Ct. Tr. T.) 46 N. Y. Supp. 240.

The bill in the hands of the consignee is conclusive evidence against the party signing it. *Art. 2422 C. C. Hart v. Pearson*, 12 Quebec Super. Ct. 540.

**7. Of the Condition of the Goods.** — *Gardner v. New Orleans, etc., R. Co.*, 78 Miss. 645, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 622.

**523. 1. "Contents Unknown."** — *Mears v. New York, etc., R. Co.*, 75 Conn. 171, the instrument (a shipping receipt) reading "in apparent good order except as noted (contents and condition of packages unknown)."

**525. 2. "Contents and Weight Unknown."** — *Waydell v. Adams*, (Supm. Ct. Tr. T.) 46 N. Y. Supp. 240.

**3.** *Ryan v. Great Northern R. Co.*, 90 Minn. 12; *National Newark Banking Co. v. Delaware, etc., R. Co.*, 70 N. J. L. 774; *Pullman First Nat. Bank v. Northern Pac. R. Co.*, 28 Wash. 439, construing the Washington statutes.

**4. Prima Facie Evidence of Title in Consignee.** — *Merchants' Exch. Bank v. McGraw*, (C. C. A.) 76 Fed. Rep. 930; *Grayson County Nat. Bank v. Nashville, etc., R. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1094.

**6.** *Texas, etc., R. Co. v. Reiss*, 183 U. S. 621, affirming 99 Fed. Rep. 1006, 39 C. C. A. 680.

**526. 7. Planters' Fertilizer Mfg. Co. v. Elder, (C. C. A.) 101 Fed. Rep. 1001; *Cunard Steamship Co. v. Kelley* (C. C. A.) 115 Fed. Rep. 678; *Lake Shore, etc., R. Co. v. National Live Stock Bank*, 178 Ill. 506.**

**527. 1.** *Lake Shore, etc., R. Co. v. National Live Stock Bank*, 178 Ill. 506.

**Identity of Goods.** — It may be shown by parol evidence that the goods actually received were different from those described in the bill of

**527.** Clause Stating the Weight and Quantity of the Goods. — See note 3.

**528.** See note 1.

**533.** (b) *Modifying Effect of Doctrine of Estoppel* — *cc.* ESTOPPEL OF SHIPOWNER OR CARRIER — (bb) *Bills Issued Without Receiving Goods* — In the United States. — See notes 4, 5.

**534.** See note 1.

**535.** Where Goods Are Afterwards Received. — See notes 1, 2.

(cc) *Bills for Quantity Larger than Shipped*. — See note 5.

**536.** (4) *Contractual Stipulations* — (a) *General Rule*. — See note 6.

**537.** See note 1.

**540.** (b) *Application of Rule* — *dd.* EXPRESS STIPULATIONS IN BILL — *Stipulation as to Place of Delivery*. — See note 4.

**543.** (e) *Limitations of and Exceptions to the Rule* — *aa.* EVIDENCE OF FRAUD OR MISTAKE. — See note 2.

**545.** *cc.* EVIDENCE OF USAGE OR CUSTOM — In Connection with Express Terms. — See note 1.

## VI. NEGOTIABILITY — 1. In General. — See notes 3, 4, 5.

**546.** 2. As Symbols of Property — *a.* GENERAL RULE. — See note 1.

lading. *Cunard Steamship Co. v. Kelley*, (C. C. A.) 115 Fed. Rep. 678.

**527.** 3. *Carrier May Contradict by Parol*. — *The Willie D. Sandhval* 92 Fed. Rep. 286; *Planters' Fertilizer Mfg. Co. v. Elder* (C. C. A.) 101 Fed. Rep. 1001. See also *Southern R. Co. v. Allison*, 115 Ga. 635.

**528.** 1. *Shipper or Consignee May Contradict by Parol*. — *Higley v. Burlington, etc., R. Co.*, 99 Iowa 503, 61 Am. St. Rep. 250.

**533.** 4. *English Doctrine Followed in United States Courts*. — *The Isola Di Procida*, 124 Fed. Rep. 942, holding also that the rule was not changed by the Harter Act.

*Rule Applied to False Statement of Date of Shipment*. — The rule that the owner of the vessel is not estopped from denying a false statement in a bill of lading issued by the master that certain goods were received, has been applied to a false statement as to the date of shipment. *The Isola Di Procida*, 124 Fed. Rep. 942.

**5.** *English Doctrine Followed by State Courts*. — See *Smith v. Missouri Pac. R. Co.*, 74 Mo. App. 48.

**534.** 1. *Doctrine that Carrier Is Estopped*. — *St. Louis, etc., R. Co. v. Adams*, 4 Kan. App. 305.

**535.** 1. But not when the goods subsequently received were taken from the carrier by replevin. *Smith v. Missouri Pac. R. Co.*, 74 Mo. App. 48.

2. The carrier is not bound if, by deceit or mistake, he is induced to receive goods which are different from those described in the bill of lading. *Cunard Steamship Co. v. Kelley*, (C. C. A.) 115 Fed. Rep. 678.

**5.** *View that Carrier Is Not Estopped*. — *American Sugar Refining Co. v. Maddock*, (C. C. A.) 93 Fed. Rep. 980.

**536.** 6. *The View Criticised*. — *Evansville, etc., R. Co. v. Kevekorde*, (Ind. App. 1904) 69 N. E. Rep. 1022.

**537.** 1. *Georgia*. — *Western, etc., R. Co. v. Ohio Valley Banking, etc., Co.*, 107 Ga. 512, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 536; *McElveen v. Southern R. Co.*, 109 Ga. 249. *Indiana*. — *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218.

*Louisiana*. — *Sonia Cotton Oil Co. v. Steamer Red River*, 106 La. 42.

*Ohio*. — *Stevens v. Lake Shore, etc., R. Co.*, 11 Ohio Cir. Dec. 168, 20 Ohio Cir. Ct. 41; *Cleveland, etc., R. Co. v. La Tourette*, 1 Ohio Cir. Dec. 486.

*Pennsylvania*. — *Keller v. Baltimore, etc., R. Co.*, 196 Pa. St. 57, affirming 10 Pa. Super. Ct. 249.

*Texas*. — *Bessling v. Houston, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 639.

**540.** 4. *Place of Delivery — Parol Evidence Inadmissible to Show*. — *McElveen v. Southern R. Co.*, 109 Ga. 249, holding that evidence of a parol representation that the freight should be delivered to a connecting railroad, and not a steamer, is inadmissible to vary the terms of the bill of lading.

**543.** 2. *Bill Prepared by Shipper*. — If a bill of lading is prepared by the shipper himself he is precluded from showing fraud or mistake. *Bessling v. Houston, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 639.

**545.** 1. *Express Term — Usage Cannot Control*. — *Tallassee Falls Mfg. Co. v. Western R. Co.*, 128 Ala. 167; *Parsons v. Hart*, 30 Can. Sup. Ct. 473.

3. *Negotiable — Bills of Lading Said to Be*. — *Sather Banking Co. v. Hartwig*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 90.

4. *Quasi-negotiable — Bills of Lading Said to Be*. — *The Carlos F. Roses*, 177 U. S. 655.

5. *Crampton v. McBain*, 71 Vt. 246, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 545.

**546.** 1. *Transfer of Bill of Lading Passes Title to Property*. — *The Prussia*, 100 Fed. Rep. 489, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 546; *The Carlos F. Roses*, 177 U. S. 655; *American Nat. Bank v. Henderson*, 123 Ala. 615, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 546; *People v. Midkiff*, 71 Ill. App. 141, dismissed 174 Ill. 323; *American Zinc, etc., Co. v. Markle Lead Works*, 102 Mo. App. 158; *Robert C. White Live Stock Commission Co. v. Chicago, etc., R. Co.*, 87 Mo. App. 330; *Storey v. Hershey*, 19 Pa. Super. Ct. 485.

*Statutory Provisions*. — *The Protection*, (C. C. A.) 102 Fed. Rep. 516.

*Intention to Pass Title Necessary*. — Title to the property does not pass by the indorsement and delivery of a bill of lading unless that is the intention of the parties, and the real trans-

**547.** *c.* MODE OF TRANSFER — By Delivery. — See note 2.

**548.** Under Statutory Provisions. — See note 1.

*d.* TRANSFER AS COLLATERAL SECURITY. — See notes 3, 4, 5.

*e.* DURATION OF NEGOTIABILITY. — See note 8.

**549.** *f.* LIMITATIONS OF NEGOTIABILITY — Negotiable Instruments Proper Distinguished. — See note 5.

*g.* RIGHTS OF BONA FIDE PURCHASERS — (1) *General Rule.* — See note 7.

action may be shown by parol. *Walker v. Athena First Nat. Bank*, 43 Oregon 106.

**547.** *2. Delivery.* — *Lewis v. Springville Banking Co.*, 166 Ill. 311; *American Zinc, etc., Co. v. Markle Lead Works*, 102 Mo. App. 158; *Walker v. Athena First Nat. Bank*, 43 Oregon 106, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 547.

**Return to Consignor.** — A transfer by the consignee to the consignor may be made by the return of the bill of lading to him. *American Roofing Co. v. Memphis, etc., Packet Co.*, 8 Ohio Dec. 490, 5 Ohio N. P. 146.

**548.** *1. Illustrative Provisions.* — See *Pullman First Nat. Bank v. Northern Pac. R. Co.*, 28 Wash. 439, construing a *Washington* statute.

Even though a statute may be construed as providing that a written indorsement is necessary to transfer the legal title, a transfer of the bill of lading without indorsement, like the delivery of an unindorsed note, would be sufficient to pass the equitable title. *Turner v. Israel*, 64 Ark. 244.

**3.** *United States.* — *Merchants' Exch. Bank v. McGraw*, (C. C. A.) 76 Fed. Rep. 930.

*Alabama.* — *American Nat. Bank v. Henderson*, 123 Ala. 612, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 548.

*Iowa.* — *Shaffer v. Rhyniers*, 116 Iowa 472, holding that the fact that the pledgee obtains a guaranty from the consignee that the draft will be paid is immaterial; *Ayres v. Dorsey Produce Co.*, 101 Iowa 141.

*New Jersey.* — *National Newark Banking Co. v. Delaware, etc., R. Co.*, 70 N. J. L. 774.

*New York.* — *Matter of McElheny*, 91 N. Y. App. Div. 131, affirmed 178 N. Y. 610.

*Texas.* — *Cuero First Nat. Bank v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1033.

*Vermont.* — *Crampton v. McBain*, 71 Vt. 246, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 548.

*Washington.* — *Seattle Nat. Bank v. Powles*, 33 Wash. 21. See also *Pullman First Nat. Bank v. Northern Pac. R. Co.*, 28 Wash. 439.

**Consignor's Indorsing Draft to Third Person.** —

When the vendor of goods ships them, taking from the carrier a bill of lading to deliver to his own order, and thereupon draws a draft payable to his own order upon the vendee, attaching the bill of lading and indorsing to a third party such draft for value, the title to the goods vests in the indorsee at least to the extent of the amount advanced. *Willard Mfg. Co. v. Tierney*, 133 N. Car. 630; *Lewis v. Springville Banking Co.*, 166 Ill. 311; *Kansas City First Nat. Bank v. Mt. Pleasant Milling Co.*, 103 Iowa 518; *Landa v. Lattin*, 19 Tex. Civ. App. 249. And it has been held that when a bill of lading and draft is negotiated in this manner,

the proceeds in the hands of the collecting bank may be subjected by the consignee to a claim for damages for shortage in the goods. *Searles v. Smith Grain Co.*, 80 Miss. 693, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 549. See also *Landa v. Lattin*, 19 Tex. Civ. App. 249. But compare *Blaisdell v. White*, (Tex. Civ. App. 1903) 76 S. W. Rep. 70. When the transfer by the consignor is merely for collection, no title or control of the property passes to the transferee. *Walker v. Athena First Nat. Bank*, 43 Oregon 102.

**4.** *Coker v. Memphis First Nat. Bank*, 112 Ga. 71, wherein it is held that the title of the transferee is not lost simply because the bill is indorsed over to the consignor for the sole purpose of having him dispose of the goods for the transferee's benefit.

**Title of Pledgee.** — A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. The *Carlos F. Roses*, 177 U. S. 655.

**5.** See *Cuero First Nat. Bank v. San Antonio, etc., R. Co.*, 97 Tex. 201.

**Payment by Third Person.** — When a draft with bill of lading attached is sent to a bank for collection, a third person who pays the charges under an agreement that he shall hold the property until he shall be repaid acquires at least an equitable title to the goods under a statute making bills of lading negotiable by written indorsement and delivery. *Turner v. Israel*, 64 Ark. 244.

**8. Transfer After Arrival of Goods.** — *Anchor Mill Co. v. Burlington, etc., R. Co.*, 102 Iowa 262.

**Transfer After Delivery of Goods.** — The innocent transferee of a bill of lading after the goods have been delivered does not obtain title, even though the bill contains a provision that it shall be surrendered upon delivery of the goods. *National Commercial Bank v. Lackawanna Transp. Co.*, 59 N. Y. App. Div. 270, affirmed 172 N. Y. 596, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 548, 549.

**Carrier Deprived of Possession by Legal Process.**

— When the parties to a transfer of a bill of lading know that the property has, prior to the transfer, been taken from the possession of the carrier by legal process, the indorsement and delivery of the bill of lading cannot operate as a transfer of the possession of the property. *Storey v. Hershey*, 19 Pa. Super. Ct. 485.

**549.** *5. Grounds for Distinction Stated.* — *Grayson County Nat. Bank v. Nashville, etc., R. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1094.

**7. Transferee Acquires Title of Transferor.** — *Searles v. Smith Grain Co.*, 80 Miss. 693,

**550.** (2) *Purchasers of Lost or Stolen Bill.*—See note 1.

(3) *Purchasers of Bills Delivered by Carrier to Person Without Title*  
— *Rights of Bona Fide Consignee.*—See note 5.

**551.** (6) *Exceptions to and Limitations of Rule*—(b) *Transfer by Apparent Owner*—*aa. IN GENERAL.*—See note 2.

*bb. BY CONSIGNEE INVESTED WITH APPARENT OWNERSHIP.*—See note 4.

**553.** 3. *As Evidence of the Contract for Carriage*—*At the Common Law.*—See note 5.

quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 549; *Hart v. Boston, etc., R. Co.*, 72 N. H. 410; *Landa v. Lattin*, 19 Tex. Civ. App. 249, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 549.

**550.** 1. *Raleigh, etc., R. Co. v. Lowe*, 101 Ga. 320.

5. *Hart v. Boston, etc., R. Co.*, 72 N. H. 410.

**551.** 2. *Raleigh, etc., R. Co. v. Lowe*, 101 Ga. 330, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 551.

4. *Bona Fide Transferee Acquires Title of Vendor.*—*Munroe v. Philadelphia Warehouse Co.*, 75 Fed. Rep. 545; *Commercial Bank v. J. K. Armsby Co.*, 120 Ga. 74, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 589; *Western Union Cold Storage Co. v. Bankers Nat. Bank*, 176 Ill. 260, affirming 73 Ill. App. 410.

**553.** 5. *Cox v. Central Vermont R. Co.*, 170 Mass. 136, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 554.

## BILLS OF SALE.

BY FRANKLYN G. BAMMAN.

**555.** I. *DEFINITION.*—See note 2.

**557.** II. *THE INSTRUMENT AND ITS INTERPRETATION*—1. *In General*—*Description of Property.*—See note 1.

2. *Must Be Delivered*—*a. IN GENERAL.*—See note 3.

**558.** *b. EFFECT OF DELIVERY.*—See note 1.

*Gives Vendee Right to Possession of Property.*—See note 2.

**559.** 3. *Delivery of Possession of the Property*—*a. EFFECT OF FAILURE TO DELIVER*—*At Common Law.*—See note 1.

**560.** *b. WHAT CONSTITUTES DELIVERY.*—See note 2.

**562.** 4. *When Treated as a Mortgage*—*a. GENERALLY.*—See note 1.

**555.** 2. See *Putnam v. McDonald*, 72 Vt. 5.  
*When a Trust.*—It may be shown by parol that the transfer of personal property by a conveyance absolute in form was in trust for the assignor. *Martin v. Martin*, 43 Oregon 119, citing *Chace v. Chapin*, 130 Mass. 128.

*Bill of Sale as Means of Preferring Creditors.*—*Fraser v. Macpherson*, 34 N. Bruns. 417; *Owens v. Gascho*, 154 Ind. 225.

*A Mere Receipted Statement of Account* containing no words importing a transfer of title is not a bill of sale. *Putnam v. McDonald*, 72 Vt. 5.

**557.** 1. *Description of Property.*—*Fraser v. Macpherson*, 34 N. Bruns. 417; *Brown v. Loos*, 66 Mo. App. 211.

*Parol Evidence Admissible to Explain What Is Intended by Description.*—But see *Keller v. Rhodes*, 64 Ill. App. 36.

3. *The Vendor May Waive a condition that title is not to pass till delivery of the bill of sale, and by delivering the property to the vendee entitle himself to maintain an action for the purchase price, although the bill of sale has never been delivered.* *Yori v. Cohn*, 26 Nev. 206.

**558.** 1. *Delivery of Instrument Passes Title to Property.*—*Bellerby v. Thomas*, 105 Ga. 477; *Casentini v. Galveston Fruit Co.*, (Tex. Civ. App. 1898) 45 S. W. Rep. 756.

*After-acquired Property Mingled with Property Transferred.*—See *Fraser v. Macpherson*, 34 N. Bruns. 417.

2. *Vendee Has Right to Possession of Property.*—See *Crug v. Gorham*, 74 Conn. 541.

**559.** 1. *Modification of Common-law Rule.*—See *Heisch v. Bell*, (N. Mex. 1902) 70 Pac. Rep. 572.

**560.** 2. *What Constitutes Delivery of Possession.*—It was held that where a debtor left a bill of sale in a designated place, and, after the debtor absconded, the creditor for whose benefit the bill was executed found it there together with a letter stating that the bill was in a desk which with the keys were "hereby delivered" to him, there was a sufficient delivery as against a subsequent attachment by another creditor. *Chezum v. Parker*, 19 Wash. 645.

**562.** 1. *When Bill of Sale Treated as Mortgage.*—See *infra*, the title CHATTEL MORTGAGES, 951. 1.



**564.** Separate Written Defeasance. — See note 4.

**565.** *c.* ADMISSIBILITY OF PAROL EVIDENCE — (1) *In General.* — See note 2.

**567.** (2) *Degree of Proof Required.* — See note 1.

**568.** 5. Warranty Cannot Be Shown by Parol Evidence. — See note 3.

**569.** When Instrument a Receipt. — See note 2.

III. REGISTRATION — 1. *In General.* — See note 3.

**571.** 2. Delivery of Property Equivalent to Registration. — See note 1.

3. Unauthorized Registration a Nullity. — See note 2.

4. Sale of Live Stock — Texas Statute — Stock Not Running on Range. —

— See note 4.

**573.** IV. INSTRUMENT AS EVIDENCE — Consideration Expressed — *Prima Facie* Evidence. — See note 1.

**576.** BISHOP. — See note 1.

In *Wetmore v. Moloney*, 127 Mich. 372, a bill of sale was held to be a mortgage, although it contained the statement: "It is understood that this instrument conveys an absolute title."

It must have been intended at the time of the execution of the bill of sale that it should operate as a security, in order for the court to treat it as a mortgage. *Long v. State*, 44 Fla. 134.

**564.** 4. Separate Written Defeasance. — *Dickinson v. Oliver*, 96 N. Y. App. Div. 65.

**565.** 2. Parol Evidence Admissible — *Georgia.* — *Denton v. Shields*, 120 Ga. 1076.

*Indian Territory.* — *Rogers v. Nidiffer*, (Indian Ter. 1904) 82 S. W. Rep. 673.

*Kansas.* — *McCluskey v. Cubbison*, 8 Kan. App. 857, 57 Pac. Rep. 496.

*New York.* — *Donnelly v. McArdle*, 86 N. Y. App. Div. 33.

*Ohio.* — *Mullenkops v. Baumgardner*, 11 Ohio Cir. Dec. 655, 21 Ohio Cir. Ct. 591.

*Oklahoma.* — *Miller v. Campbell Commission Co.*, 13 Okla. 75.

*Oregon.* — *Culver v. Randle*, (Oregon 1904) 78 Pac. Rep. 394.

*Texas.* — *Watson v. Boswell*, 25 Tex. Civ. App. 379.

To Show Conveyance in Trust. — It may be shown by parol that a trust and not an absolute transfer was intended. *Martin v. Martin*, 43 Oregon 119.

**567.** 1. Insufficient Evidence. — Evidence that the vendee would have been willing to let the vendor redeem the property is not sufficient to transform an absolute bill of sale into a mortgage, where there was no agreement to that effect. *Fisher v. Stout*, 74 N. Y. App. Div. 97.

**568.** 3. What Constitutes a Warranty in a Bill of Sale. — It is a question of fact where a doubt exists whether certain recitals in a bill of sale are intended as description or warranties, and it may be determined by oral evidence or proof of the custom of the trade. *Sharp v. Sturgeon*, 66 Mo. App. 191.

**569.** 2. *Putnam v. McDonald*, 72 Vt. 4, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 569.

3. Registration of Instrument. — The recordation of a conditional bill of sale was held to be notice to a third person that title was still in the vendor, and the instrument was admissible

to show that as between the vendee and a third person no title passed by a sale of a colt subsequently foaled by the mare which was the subject of the bill of sale. *Anderson v. Leverette*, 116 Ga. 732.

Valid Between Parties Though Not Recorded. — *Heisch v. Bell*, (N. Mex. 1902) 70 Pac. Rep. 572.

Recording Not Essential in Texas. — Failure to record a bill of sale does not, in the absence of fraud, entitle a creditor of the seller to levy an attachment on the goods, although delivery has not been made to the purchaser. *Casentini v. Galveston Fruit Co.*, (Tex. Civ. App. 1898) 45 S. W. Rep. 756.

Transfers of Choses in Action are not deemed to be within the meaning of the *Georgia* statute providing that a "bill of sale of personality" shall be void unless filed. *Thomas v. Schumacher*, 17 N. Y. App. Div. 441, affirmed 163 N. Y. 554.

As to the Requirement and Effect of Registration in General, see the title RECORDING ACTS.

**571.** 1. Delivery of Property Equivalent to Registration. — *Owens v. Gascho*, 154 Ind. 225. see also *Heisch v. Bell*, (N. Mex. 1902) 70 Pac. Rep. 572.

2. Unauthorized Registration a Nullity. — See *Baldinger v. Levine*, 83 N. Y. App. Div. 130. See also the title RECORDING ACTS.

But it was held that where registration was unnecessary, yet the fact that it was filed should be considered in determining whether a bill absolute on its face was in fact given as security. *Black v. Simon*, 116 Mich. 382.

4. Stock Not Running on Range. — See *Brill v. Christy*, (Ariz. 1901) 63 Pac. Rep. 757.

**573.** 1. Consideration Expressed *Prima Facie* Evidence. — See *Rogers v. Thompson*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 801.

Oral Evidence to Impeach Consideration. — Where the omission to insert additional consideration is not due to fraud, accident, or mistake it cannot be supplied by oral evidence. *McFarland v. McGill*, 16 Tex. Civ. App. 298.

**576.** 1. The Transfer Tax Law of *New York* provides for the exemption of property bequeathed to a bishop, etc. In construing this section the court said: "The statute uses only the word 'bishop,' but I have no question that it covers a bequest made to an archbishop or the cardinal archbishop, in his official capacity,

**576. BITCH.** — See note 2.[**BLACKGUARD.** — See note 7a.]**577. BLACKLISTING EMPLOYEES.** — See note 2.**BLACKMAIL.** — See note 4.

as they are all, unquestionably, bishops, as well as the religious and temporal heads of their church." *Matter of Kelly*, (Surrogate Ct.) 29 Misc. (N. Y.) 169.

**576. 2. Libel and Slander.** — *State v. Harwell*, 129 N. Car. 550; *Craver v. Norton*, 114 Iowa 46; *Robertson v. Edelsstein*, 104 Wis. 440; *Jacobs v. Cater*, 87 Minn. 448; *Craig v. Pyles*, 101 Ky. 593; *Stoner v. Erisman*, 206 Pa. St. 600.

**7a. Libel and Slander.** — In *Paladino v. Gustin*, 17 Ont. Pr. 560, the court said: "The word *blackguard* ordinarily means a vulgar, base fellow; a ruffian, a scoundrel. It does not appear to me necessary here to refer to the early history or the use of the word. Most people have an understanding as to what is meant by it, and, so far as the use of the word has concern, the question is, what would a bystander think was meant by it in the circumstances in which it was used? Strictly, the word may be considered as not being applicable to a female at all; yet, as it appears to me, the man who calls a woman a *blackguard* should

be answerable in respect of the meaning that the ordinary bystander would, in all the circumstances, attach to it."

**577. 2. Blacklisting — Statutes.** — The *Minnesota* statute prohibiting *blacklisting* has been held constitutional. *State v. Justus*, 85 Minn. 279. In this case the court said: "Conceding that the word *blacklist*, as used in the title, has no well-defined meaning in the law, either by statute or judicial expression, the general understanding of the term is that it has reference to the practice of one employer presenting to another the names of employees for the purpose of furnishing information concerning their standing as employees, and, so understood, it may have reference to the subject of influencing or coercing employees or employers."

**4. Libel and Slander.** — The word *blackmailing* is libelous *per se*, requiring no innuendo, and it does not lie upon the plaintiff to prove the falsity of the charge. *Macdonald v. Mail Printing Co.*, 2 Ont. L. Rep. 278.

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## BLASPHEMY AND PROFANITY.

**582. II. As CRIMES — 2. Statutes Regarding.** — See note 2.[**BLIND SIDING.** — See note 3a.]**583. BLOCK.** — See note 1.**584. BLOCKADE.** — See note 1.

**582. 2. Statutes in United States.** — *State v. Wiley*, 76 Miss. 282.

**The Name of the Deity Need Not Be Used in order to constitute profanity under the Mississippi statute.** Any words importing an imprecation of divine vengeance, or implying divine condemnation, so used as to constitute a public nuisance, are sufficient. *State v. Wiley*, 76 Miss. 282.

In *Georgia* a similar rule obtains under the statute making it an offense to use profane language in the presence of a female. *Foster v. State*, 99 Ga. 56.

**Georgia Statute — Profane Language in Presence of Female.** — The Penal Code Ga., § 396, making it penal to use obscene, vulgar, or profane language in the presence of a female must be held, under the rule of strict construction applicable to penal statutes, to contemplate spoken words only. Where, therefore, an indictment alleged that the accused used obscene and vulgar language in the presence of a female by delivering to her a written communication set out in the indictment, a demurrer thereto on the ground that the indictment charged no offense against the laws of this state should have been sustained. *Williams v. State*, 117 Ga. 13.

There being no evidence that the profane language alleged to have been used by the defendant in the presence of females was with-

out provocation, or that the defendant knew of the proximity of the women, his conviction was contrary to law. *Hardin v. State*, 114 Ga. 58.

On the trial of one charged with the offense of using profane language, without provocation, in the presence of a female, the accused may defend by showing that he was provoked to use the language by one other than such female, the sufficiency of the provocation being a question for the jury, under all the circumstances of the case. *Ray v. State*, 113 Ga. 1065.

**3a. A Blind Siding** is one without a telegraph operator. *Galveston, etc., R. Co. v. Brown*, 95 Tex. 2.

**583. 1. Block — Synonymous with Square.** — *Harrison v. People*, 195 Ill. 466.

**Platted Ground.** — In *McGrew v. Kansas City*, 64 Kan. 61, the court said: "According to the common understanding, a *block* is a portion of platted ground in a city, surrounded by streets, and the term is not ordinarily applied to a tract of unplatted land."

**Not a Subdivision of a Section.** — A contract for a quitclaim deed to property described as "lot 56, bl. 12, sec. 7, 39, 14," is too uncertain for specific performance. There is no such governmental subdivision of a section as a block. *Glos v. Wilson*, 108 Ill. 44.

**584. 1. See** *The Olinde v. Rodrigues*, 91 Fed. Rep. 274; *The Adula*, 89 Fed. Rep. 356.

## BLOOD STAINS.

**587. I. BLOOD STAINS AS EVIDENCE OF CRIME.** — See note 1.

**II. ADMISSIBILITY OF EVIDENCE IN RESPECT TO BLOOD STAINS —**

**1. Testimony of Ordinary Witnesses.** — See note 2.

**588. 2. Testimony of Experts** — As to Whether Spots Were of Human or Animal Blood. — See note 1.

**3. Articles with Stains Thereon Resembling Blood.** — See note 4.

**BLOW.** — See note 6.

**592. BOARD** — Inn Distinguished from Boarding House, and Boarder from Guest. — See notes 1, 2, 3, 4.

**593. A Board.** — See note 2.

**587. 1. Blood Stains as Evidence of Crime in General.** — *Com. v. Williams*, 171 Mass. 461; *State v. Brown*, 168 Mo. 449.

But where the state offers circumstantial evidence under an indictment for murder tending to show that deceased met his death by choking at the hands of the defendants, evidence in behalf of the defense that certain stains or spots on the floor were not blood stains is irrelevant and is properly excluded. *Vaughn v. State*, 130 Ala. 18.

**2. Testimony of Ordinary Witnesses as to Existence of Blood Stains.** — *Gantling v. State*, 40 Fla. 237; *People v. Burgess*, 153 N. Y. 561; *State v. Henry*, 51 W. Va. 283. Compare *Taylor v. State*, 41 Tex. Crim. 148.

In *State v. Rice*, 7 Idaho 762, it was held that the assistance of chemistry and the testimony of expert witnesses are not necessary to show the existence of blood, owing to the familiarity of all persons competent to testify as witnesses with its appearance, and it is only in cases where it is necessary to distinguish between the blood of a human being and that of the inferior animals that such expert evidence is necessary.

**Weight of Evidence.** — *State v. Henry*, 51 W. Va. 283.

**588. 1. Expert Testimony as to Whether Stains Were of Human or Animal Blood.** — *State v. Rice*, 7 Idaho 762; *State v. Martin*, 47 S. Car. 67.

Thus, where a physician testified on a trial under an indictment for murder that he had had considerable experience in examining blood spots, and had examined the defendant's leg-

gings which were worn by him on the day of the homicide, it is competent for such witness to testify that the stains found on the leggings looked like blood stains. *White v. State*, 133 Ala. 122.

**4. Clothing with Spots Thereon Resembling Blood.** — *State v. Henry*, 51 W. Va. 283.

A Board from the floor of a house with stains thereon supposed to be blood stains is admissible in evidence, and the fact that it was taken from the floor nine or ten months after the homicide will not affect the competency of the evidence. *State v. Martin*, 47 S. Car. 67.

**6. Blowing Up — Insurance Policy.** — Where a policy of insurance provided that the company should not be liable for any loss caused by "blowing up of buildings," and plate glass was broken by the explosion of gas generated from gasoline in use in the building, it was held that the damage was not the result of "blowing up of a building" within the meaning of the policy. *Vorse v. Jersey Plate Glass Ins. Co.*, 119 Iowa 555.

**592. 1. Meacham v. Galloway**, 102 Tenn. 424, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 592.

**2. Liability.** — See *Meacham v. Galloway*, 102 Tenn. 424.

**3. Matter of Brewster**, (County Ct.) 39 Misc. (N. Y.) 689; *Metzger v. Schnabel*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 698.

**4. See Metzger v. Schnabel**, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 698.

**593. 2. Double Meanings — Board of Education.** — *Hancock v. Board of Education*, 140 Cal. 554.

# BOARDS OF HEALTH.

By W. H. CROW.

## 597. II. ORGANIZATION — 1. In General. — See note 1.

Liberal Construction in Favor of Boards. — See note 2.

## 598. 3. State and Local Boards. — See note 1.

To Municipal and Local Boards. — See note 2.

## 599. III. EXTENT AND LIMITATIONS OF POWERS — 1. Enactment of Laws and Ordinances. — See note 3.

### 600. See note 2.

Must Be Confined to Sanitary and Police Regulations. — See note 4.

**597. 1. Police Power.** — An act of a board of health in pursuance of a state statute in requiring vaccination of citizens, under penalty of a fine of five dollars, was held to be valid, and the city could recover for noncompliance; the statute being a lawful exercise of the police power. *Com. v. Pear*, 183 Mass. 242.

**2. Presumption of Legality of Existence.** — Where an act provided that three out of five members of the board of health should, if practicable, be registered physicians, it was held that the provision should not be taken to prohibit the organization of such boards with more than three physicians as members. *State v. Kohnke*, 106 La. 420. See also *People v. Williamson*, 135 Cal. 415.

**Acts Presumed Valid** — *Indiana*. — *Blue v. Beach*, 155 Ind. 130, 80 Am. St. Rep. 195, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 597; *Monroe v. Bluffton*, 31 Ind. App. 269.

*Iowa*. — *State v. Kirby*, 120 Iowa 26.

*Massachusetts*. — *McKenna v. Eaton*, 182 Mass. 346, 94 Am. St. Rep. 661.

*Minnesota*. — *State v. Zimmerman*, 86 Minn. 353, 91 Am. St. Rep. 351.

*New Hampshire*. — *Whidden v. Cheever*, 69 N. H. 142, 76 Am. St. Rep. 154.

*New Jersey*. — *La Porta v. Board of Health*, (N. J. 1904) 58 Atl. Rep. 115.

*Utah*. — *State v. Board of Education*, 21 Utah 415, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 597.

**598. 1. State Boards — Various Statutory Provisions** — *Indiana*. — *Blue v. Beach*, 155 Ind. 130, 80 Am. St. Rep. 195.

*Ohio*. — *State v. Massillon*, 24 Ohio Cir. Ct. 249.

*Tennessee*. — *State v. King*, (Tenn. Ch. 1901) 62 S. W. Rep. 314.

*Vermont*. — *Nay v. Underhill*, 71 Vt. 66.

*Wisconsin*. — *State v. Burdge*, 95 Wis. 390, 60 Am. St. Rep. 123.

**2. Municipal and Local Boards.** — See *Braiman v. New London*, 74 Conn. 695; *Henderson County Board of Health v. Ward*, 107 Ky. 477; *Matter of Board of Health*, 43 N. Y. App. Div. 236; *People v. Scott*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 131, affirmed 57 N. Y. App. Div. 630; *Matter of Rensselaer*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 512; *Deysher v. Reading*, 18 Pa. Co. Ct. 611.

**599. 3. Powers to Make Regulations and Ordinances** — *United States*. — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29; *Wong Wai v. Williamson*, 103 Fed. Rep. 1.

*Delaware*. — *Hartman v. Wilmington*, 1 Marv. (Del.) 215.

*Indiana*. — *Blue v. Beach*, 155 Ind. 130, 80 Am. St. Rep. 195, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 599.

*Iowa*. — *Warner v. Stebbins*, 111 Iowa 86; *State v. Kirby*, 120 Iowa 26.

*Kentucky*. — *Hengehold v. Covington*, 108 Ky. 752.

*Minnesota*. — *State v. Zimmerman*, 86 Minn. 353, 91 Am. St. Rep. 351.

*New Jersey*. — *Morford v. Board of Health*, 61 N. J. L. 386; *La Porta v. Board of Health*, (N. J. 1904) 58 Atl. Rep. 115.

*New York*. — *Cartwright v. Cohoes*, 39 N. Y. App. Div. 69, affirmed 165 N. Y. 631; *People v. Vandecarr*, 175 N. Y. 440.

*Pennsylvania*. — *Com. v. Yost*, 197 Pa. St. 171.

*South Dakota*. — *Glover v. Board of Education*, 14 S. Dak. 143, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 599.

*Tennessee*. — *Allen v. Dekalb County*, (Tenn. Ch. 1900) 61 S. W. Rep. 291.

*Utah*. — *State v. Board of Education*, 21 Utah 415, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 599.

*Washington*. — *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893.

*Wisconsin*. — *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983.

**Right to Turn Off Water Supply.** — A board of health, empowered by statute to regulate the plumbing in buildings, has no right to turn off the water supply of a citizen who fails to comply with its ordinances, there being a statutory penalty on prosecution of the board for such noncompliance. *Johnston v. Belmar*, 58 N. J. Eq. 354.

**600. 2. State v. New Orleans**, 52 La. Ann. 1263.

**4. Must Not Exceed Jurisdiction.** — A board of health cannot, under pretext of abating a nuisance, enter into the domain of public improvements and construction. *Haag v. Mt. Vernon*, 41 N. Y. App. Div. 366.

**600.** Must Not Be Inconsistent with Constitution and Laws of State. — See notes 5, 6.

**601.** Publication of Regulation. — See note 1.

**2. Abatement of Nuisances** — *a.* IN GENERAL. — See note 2.

**Summary Action** — Notice. — See note 3.

**Specifying Manner of Abatement.** — See note 4.

**600.** 5. *Wong Wai v. Williamson*, 103 Fed. Rep. 1.

**Constitutionality of Inspection Fee.** — A fee placed by the city on laundries for compensation of inspectors was held to be a proper health law and constitutional, not taking property without due process of law. *New Orleans v. Kee*, 107 La. 762.

**6. Must Be Reasonable** — *United States*. — *Jew Ho v. Williamson*, 103 Fed. Rep. 10; *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29.

*District of Columbia*. — *U. S. v. Ross*, 5 App. Cas. (D. C.) 241.

*Iowa*. — *State v. Kirby*, 120 Iowa 26.

*Minnesota*. — *State v. Zimmerman*, 86 Minn. 353, 91 Am. St. Rep. 351.

*Mississippi*. — *Wilson v. Alabama G. S. R. Co.*, 77 Miss. 714, 78 Am. St. Rep. 543.

*New Jersey*. — *Morford v. Board of Health*, 61 N. J. L. 386.

*New York*. — *Cartwright v. Cohoes*, 39 N. Y. App. Div. 69, affirmed 165 N. Y. 631. See also *People v. Vandecarr*, 175 N. Y. 440.

In *People v. Van Fradenburgh*, 81 N. Y. App. Div. 259, it was held that an order of a village board of health prohibiting the taking of fresh table and kitchen refuse from a sanitarium for consumptives into a village as food for hogs and fowl was invalid in the absence of evidence that such refuse was any more dangerous to the community than similar refuse from a hotel or other public house.

Where by statute the health officers are required to examine premises and supervise the proper cleansing and fumigation of privy vaults, an ordinance charging persons engaged in such work for the supervision is legal; but a charge for issuing the permit, intended to cover expense of renovating privies, which should properly fall upon property owners, cannot be lawfully placed on persons licensed to do the work. *Toledo v. Buechele*, 11 Ohio Cir. Dec. 479, 21 Ohio Cir. Ct. 429.

**Vaccination.** — A regulation adopted by the state board of health requiring compulsory vaccination as a qualification for admission to the public schools was held to be unreasonable in the absence of a smallpox epidemic. *State v. Burdge*, 95 Wis. 390, 60 Am. St. Rep. 123.

So in *Canada* a regulation requiring employers to see that their workmen do not enter any place of business without a vaccination certificate is unreasonable. *Montreal v. Garon*, 23 Quebec Super. Ct. 363.

But see *State v. Board of Education*, 21 Utah 415, holding a regulation excluding unvaccinated children from the public schools during a time of epidemic to be reasonable, and the exercise of the right delegated by the state to adopt such regulations was supported by the police power inherent in the state. See also *Com. v. Smith*, 9 Pa. Dist. 625; *Blue v. Beach*, 155 Ind. 130, 80 Am. St. Rep. 195.

**Reasonableness a Question for Jury.** — In an ac-

tion against the city for the burning of plaintiff's house as infected, during an epidemic of smallpox, the court held that the jury should pass on the question of the reasonable necessity for the destruction. *Dallas v. Allen*, (Tex. Civ. App. 1897) 40 S. W. Rep. 324.

**601.** 1. See *People v. Vandecarr*, 175 N. Y. 440.

**2. Abatement of Nuisances.** — *Gaines v. Waters*, 64 Ark. 609; *State v. Jersey City*, 55 N. J. Eq. 116; *State v. Henzler*, (N. J. 1898) 41 Atl. Rep. 228; *Com. v. Yost*, 197 Pa. St. 171, reversing 11 Pa. Super. Ct. 323.

**Mode of Exercising Powers.** — The act of ordering abatement of a nuisance must be a formal action of the state board of health, and not the order of its secretary; so the disobedience of such an order is not indictable. *In re Yost*, 14 York Leg. Rec. (Pa.) 25.

Where the statute provides that all three members of the executive committee of a board of health must be present in order to make a valid order, an order made by only two members is invalid. *Wilson v. Alabama G. S. R. Co.*, 77 Miss. 714, 78 Am. St. Rep. 543.

**Suit Must Be Brought in Name of Village.** — *Board of Health v. Magill*, 17 N. Y. App. Div. 249.

**Preliminary Injunction.** — Under a statute providing in effect that the board of health may file a bill in chancery to enjoin the maintenance of any structures, adjoining a stream, likely to pollute it by drainage, and that on the establishment of the fact of the wrongful maintenance of such a structure the court shall abate it, the court has no jurisdiction to grant a preliminary injunction. *Board of Health v. Summit*, (N. J. 1903) 56 Atl. Rep. 125.

**3. Hartman v. Wilmington**, 1 Marv. (Del.) 215; *Brown v. Narragansett Dist.*, 21 R. I. 503.

**4. Mann v. Willey**, 51 N. Y. App. Div. 169, affirmed 168 N. Y. 664.

**Board Directing Removal in Specific Names.** — Under a statute authorizing the health commissioner to abate nuisances, "in such manner as he may deem expedient," the act of the commissioner in replacing a privy by a water-closet was held to be unwarranted. The court said: "No sanitary board or officer can be permitted, under the guise of a power to abate nuisances detrimental to health, not only to remove or abate the nuisance \* \* \* but also to proceed in a summary manner and cause new erections to be made, and new appliances, contrivances and conveniences to be used and adopted at a large expense to the owner and far beyond what the exigencies of the particular case may require." *Eckhardt v. Buffalo*, 19 N. Y. App. Div. 1, affirmed 156 N. Y. 658.

A board of health cannot abate a polluted stream, conceded to be a public nuisance, by constructing a drain costing \$10,000, and draining an entire swamp, several hundred feet beyond the property of the plaintiff. *Haag v. Mt. Vernon*, 41 N. Y. App. Div. 366.

**602. Exceeding Powers — Injunction.** — See notes 2, 3, 4.**b. POWER TO CONCLUSIVELY DECLARE A NUISANCE — General Rule.**

— See notes 5, 7.

**603. Quasi-judicial Power — Presumption.** — See note 3.

Under a Pennsylvania Statute. — See note 4.

**604. In Massachusetts.** — See note 2.**c. NOTICE.** — See note 3.

Where Notice Required by Statute. — See note 4.

**605. 3. Employment of Professional Aid.** — See note 1.

A board of health proceeding under a statute to abate as a nuisance the conditions of filth and disease existing in a tenement house cannot order the destruction of the premises if they can be rendered innoxious and sanitary by other means, or by ceasing their use for human habitation. *Health Dept. v. Dassori*, 21 N. Y. App. Div. 348.

**602. 2. Ultra Vires Acts — Injunction.** — *Philadelphia v. Lyster*, 3 Pa. Super. Ct. 475.

**3. Gaines v. Waters**, 64 Ark. 609. See also *Golden v. Health Dept.*, 21 N. Y. App. Div. 420.

**4. Stone v. Heath**, 179 Mass. 385; *Egan v. Health Dept.*, 9 N. Y. App. Div. 431.

The erection of a garbage crematory pursuant to a contract with a city board of health will not be enjoined on the ground that the operation of the crematory will constitute a nuisance, where the contract expressly provides for a plant the operation of which shall not prove a nuisance. The question whether or not a nuisance will result can only be determined after the plant has been put into operation. *Deyscher v. Reading*, 18 Pa. Co. Ct. 611.

**5. Cartwright v. Cohoes**, 39 N. Y. App. Div. 69, *affirmed* 165 N. Y. 631. See also *Harrington v. Board of Aldermen*, 20 R. I. 233, *distinguished* 21 R. I. 503; *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983.

**7. Power of Board to Conclusively Declare a Nuisance.** — *Gaines v. Waters*, 64 Ark. 609; *Stone v. Heath*, 179 Mass. 385; *Golden v. Health Dept.*, 21 N. Y. App. Div. 420; *Smith v. Irish*, 37 N. Y. App. Div. 220.

An ordinance of the board of health of a city regulating the manner of building stables operates merely to protect those who conform to its provisions, and to impose on those who do not so conform the burden of showing that the particular structure is not a nuisance. Such an ordinance does not declare all erections not in accordance with its provisions to be nuisances. *Morford v. Board of Health*, 61 N. J. L. 386.

**603. 3. In Rhode Island** the order of a town council, proceeding under a statute empowering it to declare and abate a nuisance, is not appealable; such proceeding is intended to be summary, and the statute contemplates prompt and vigorous action. *Brown v. Narragansett Dist.*, 21 R. I. 503.

In *New York* the statute prescribes that the effect of an order of the board shall be of *prima facie* legality, imposing "upon persons who question the orders of the board of health in such cases the duty of establishing that the facts upon which they were based do not exist, or that the orders themselves are beyond the authority given to the board by the law."

*Golden v. Health Dept.*, 21 N. Y. App. Div. 420.

**4. Pennsylvania Statute.** — See *Adams v. Ford*, 3 Pa. Super. Ct. 239.

**604. 2. Stone v. Heath**, 179 Mass. 385, holding that under a statute conferring on local boards of health power to abate a nuisance, an order of abatement cannot be restrained by injunction.

**3. Necessity of Notice.** — *Gaines v. Waters*, 64 Ark. 609; *Hartman v. Wilmington*, 1 Marv. (Del.) 215; *Chase v. Middleton*, 123 Mich. 647; *Eckhardt v. Buffalo*, 19 N. Y. App. Div. 1, *affirmed* 156 N. Y. 658.

**4. Where the Statute Requires Notice.** — *Fayette v. Greenleaf*, (County Ct.) 44 Misc. (N. Y.) 352.

**605. 1. Power to Employ Professional Aid — Liability for Compensation.** — *Bell County v. Blair*, (Ky. 1899) 50 S. W. Rep. 1104; *Zimmerman v. Cheboygan County*, 133 Mich. 494; *Board of Health v. Renville County*, 89 Minn. 402; *Rockaway Tp. v. Morris County*, 68 N. J. L. 16; *Matter of Plattsburgh*, 157 N. Y. 78; *Allen v. Dekalb County*, (Tenn. Ch. 1900) 61 S. W. Rep. 291. See also *Monroe v. Bluffton*, 31 Ind. App. 269.

A county court in *Kentucky* has the power, in the case of resignation of all the members of the county board of health, to appoint a committee to take charge of smallpox patients until vacancies in the board shall be filled. And such committee has the power to secure professional aid at a compensation, not arbitrary, but governed by value of the services. *Henderson County Board of Health v. Ward*, 107 Ky. 477.

**Where Board Exceeds Its Authority.** — See *Jay County v. Fertich*, 18 Ind. App. 1.

A board of health, having power by statute to employ a health officer, has no power to appoint a sanitary inspector, and a person so appointed cannot recover from the city the compensation fixed by the board for his services. *In re Kent*, (Supm. Ct. Spec. T.) 60 N. Y. Supp. 627.

**As Town Charges.** — A health officer, acting under a statute substituting a physician in each town to perform the duties and to have the powers formerly exercised by the board of health, has the power to employ assistants in maintaining quarantine, and the town will be liable for such services. *Keefe v. Union*, 76 Conn. 160.

A physician appointed by a county board of health to take charge of a quarantine in a city, such appointment being approved by the city council, can recover from the city the value of his services. *Blair v. Middlesboro*, (Ky. 1902) 67 S. W. Rep. 16.

**605. A Health Officer of the Board.** — See note 2.

Where Individual Concerned Is Able to Pay for Services Rendered. — See note 3.

**606. 4. Establishment of Quarantine and Erection of Hospitals.** — See note 3.

Hospitals. — See note 5.

Rights as to Private Residences. — See note 6.

**Action by Town Against County.**— *Bardstown v. Nelson County*, (Ky. 1904) 78 S. W. Rep. 169; *Durand v. Shiawassee County*, 132 Mich. 448; *Louriston v. Swift County*, 89 Minn. 91; *Comstock v. Le Sueur County*, 92 Minn. 88; *Iosco v. Waseca County*, (Minn. 1904) 100 N. W. Rep. 734. *Compare* *Schmidt v. Muscatine County*, 120 Iowa 267.

**Member of Board as Physician.**— A physician who is a health officer of a city, and who receives a regular salary as such, cannot recover for medical services during a quarantine, such services being included in his regular duties, for which his salary is paid. *Reynolds v. Mt. Vernon*, 164 N. Y. 592, *affirming* 26 N. Y. App. Div. 581.

A health officer, called into consultation by another physician to determine whether a disease is contagious, performs his regular duty imposed by the statute, and he is not entitled to the extra compensation granted by another section of the act for attending infectious cases. *Browne v. Livingston County*, 126 Mich. 276.

In *Minnesota* a town board of health, formed under the provisions of the general statutes, one of whose members is a practicing physician, may employ such physician to act for the board in all matters requiring such services. *Board of Health v. Renville County*, 89 Minn. 402. See also *Cedar Creek Tp. v. Wexford County*, (Mich. 1903) 97 N. W. Rep. 409.

**Power to Employ Persons to Make Examination of Premises.**— Under a statute authorizing a board of health to suppress nuisances under the health laws and to engage persons to carry out its orders, such board has the power to employ persons to examine and report on the condition of premises, and the municipality will be liable for their compensation. *Kent v. North Tarrytown*, 50 N. Y. App. Div. 502.

**Statute Requiring Auditing.**— Under a statute providing that bills contracted at the instance of the board of health shall be audited by the board, no recovery can be allowed without showing such auditing. *Cooke v. Custer County*, 13 Okla. 11.

**Reasonable Compensation in Absence of Agreed Terms.**— In the absence of any agreed compensation, made between the board and a physician, or regulations touching upon charges, the physician will be entitled to recover the reasonable value of his services. *Clement v. Lewiston*, 97 Me. 95. See also *Allen v. Dekalb County*, (Tenn. Ch. 1900) 61 S. W. Rep. 291.

**Liability Depends upon Existence of Valid Contract.**— A physician employed by a person to attend his family, quarantined for scarlet fever, cannot recover compensation from the town in the absence of any contract for his services by the board of health. *Pettengill v. Amherst*, 72 N. H. 103. See also *Congdon v. Nashua*, 72 N. H. 468.

**Contract Must Be by Formal Action of Board.**— *Martin v. Montgomery County*, 27 Ind. App. 98,

But see *Pierce v. Gladwin County*, (Mich. 1904) 99 N. W. Rep. 1132, where it was held that the hiring of the physician need not be by formal act of the board of health convened in regular meeting. An authorization by all the members of the board to go ahead and attend to the cases is sufficient.

**Compensation of Health Officer.**— A health officer appointed by the board to perform certain duties at a stated compensation cannot recover extra compensation for things done within the scope of those duties. *Sloan v. Peoria*, 106 Ill. App. 151. See also *Reynolds v. Mt. Vernon*, 26 N. Y. App. Div. 581, *affirmed* 164 N. Y. 592.

**605. 2. Power of Health Officer of the Board.**— *Mankato v. Blue Earth County*, 87 Minn. 425; *Turner v. Toledo*, 8 Ohio Cir. Dec. 196, 15 Ohio Cir. Ct. 627.

A health officer empowered by ordinance to secure medical services cannot appoint himself to render such services at the expense of the city. *Sloan v. Peoria*, 106 Ill. App. 151.

**3. Where Patient Able to Pay for the Services.**— *McKillop v. Cheboygan County*, 116 Mich. 614. But see *St. Johns v. Clinton County*, 111 Mich. 609. See also *Laurel County Ct. v. Pennington*, 80 S. W. Rep. 820, 26 Ky. L. Rep. 124, holding that a physician cannot recover compensation from the county for services rendered to a person quarantined with infectious disease, if the statute makes the liability of the county dependent on the inability of the person treated to pay, without proving such inability.

**606. 3. Quarantine Regulations.**— *Tweedy v. Fremont County*, 99 Iowa 721; *Warner v. Stebbins*, 111 Iowa 86; *Hengehold v. Covington*, 108 Ky. 752; *Highland v. Schulte*, 123 Mich. 360; *Browne v. Livingston County*, 126 Mich. 276; *Turner v. Toledo*, 8 Ohio Cir. Dec. 196, 15 Ohio Cir. Ct. 627.

A health commissioner has no power to establish a quarantine station for smallpox patients so near a school as to be dangerous, and therefore constituting a public nuisance. *Thompson v. Kimbrough*, 23 Tex. Civ. App. 350.

**Boards of Health to Control Pest House.**— The authority of a county board of health to take charge of and care for those suffering from infectious disease necessarily implies the custody and charge of the county pest house. *Henderson County Board of Health v. Ward*, 107 Ky. 477.

**5. Hospitals.**— *Turner v. Toledo*, 8 Ohio Cir. Dec. 196, 15 Ohio Cir. Ct. 627.

**6. Private Residences.**— Where a health officer took possession of the plaintiff's unoccupied dwelling and used it as a pest house, this was held a proper act; and not necessary to be done by express authority of the board of health. *Brown v. Pierce County*, 28 Wash. 345.

**As Sustaining General Quarantine Laws.**— The state board of health of *Louisiana*, exercising very general powers by virtue of the statute, can prohibit the entrance into the state

**607. IV. LIABILITY OF BOARD.** — See note 1.

Errors of Judgment. — See note 3.

Wrongful Acts — Negligence. — See note 4.

**608. V. LIABILITY OF MUNICIPALITY.** — See notes 1, 4.**609. BOAT.** — See note 1.**611. BODILY HEIRS.** — See note 2.[**BODILY INJURIES.** — See note 2*a*.]**612. BODY.** — See note 1.**615. BONA FIDE.** — See note 3.

of immigrants from a foreign country, even though they or the place from which they came be not affected by disease. *Compagnie Francaise, etc., v. State Board of Health*, 51 La. Ann. 645, 72 Am. St. Rep. 458, *affirmed* 186 U. S. 380.

**607. 1. Liability in Tort.** — *Compagnie Francaise, etc., v. State Board of Health*, 51 La. Ann. 645, 72 Am. St. Rep. 458, *affirmed* 186 U. S. 380.

**Statutory Immunity.** — In *New York*, by section 599 of the Consolidation Act (Laws 1882, c. 410), it is provided that "no member, officer, or agent of said board of health and no person (but only the board itself) shall be sued or held to liability for any act done or omitted by either person aforesaid (in good faith and with ordinary discretion) on behalf of or under said board, or pursuant to its regulations, ordinances, or the health laws." See *Sbarboro v. Health Dept.*, 26 N. Y. App. Div. 177.

**3. Errors of Judgment.** — *Whidden v. Cheever*, 69 N. H. 142, 76 Am. St. Rep. 154.

**4.** *Whidden v. Cheever*, 69 N. H. 142, 76 Am. St. Rep. 154.

So a health officer, destroying wrongfully the plaintiff's cattle which the jury found not to be diseased, and therefore, not a nuisance, will be liable in damages, when such destruction was the result of summary action without notice. *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983.

**608. 1. Municipality Not Liable.** — *Murray v. Grass Lake*, 125 Mich. 6, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 607; *Gilboy v. Detroit*, 115 Mich. 121; *Verdon v. Bowman*, (Neb. 1903) 97 N. W. Rep. 229; *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983. But see *Clayton v. Henderson*, 103 Ky. 228, in which the court held that the establishment by a board of health of a pest house within one mile of the city limits, contrary to a statute of the state, made the city liable for damages to any person suffering from contagion contracted from the nuisance.

**A Municipality Is Liable on Contracts** made by its board of health. *Deysher v. Reading*, 18 Pa. Co. Ct. 611.

**4.** *Chase v. Middleton*, 123 Mich. 647.

**609. 1. A Steam Dredge and Amalgamator** used for mining purposes though called a *boat* is not such within the meaning of an attachment statute. *Dietrich v. Martin*, 24 Mont. 147.

**611. 2. Bodily Heirs.** — The phrase *bodily heir* is a well-established technical term, and is

defined in *And. Law Dict.* 508 as "an heir begotten of the body; a lineal descendant." The words "children," "issue," and "heirs," are not synonymous terms. *Clarkson v. Hatton*, 143 Mo. 47.

**Synonymous with Heirs of the Body.** — *Turner v. Hause*, 199 Ill. 464; *Kyner v. Boll*, 182 Ill. 171; *Stratton v. McKinnie*, (Tenn. Ch. 1900) 62 S. W. Rep. 636; *Miller v. Ensminger*, 182 Mo. 195; *Marsh v. Griffin*, 136 N. Car. 333.

**2*a*. Bodily Injuries — Personal Injuries.** — In *Terre Haute Electric R. Co. v. Lauer*, 21 Ind. App. 475, the court said: "The standard dictionaries define the word *bodily* to mean, pertaining to or concerning the body; of or belonging to the body or to the physical constitution; not mental, but corporeal; and the word 'personal' as pertaining to the person or bodily form. The expression 'great personal injury' has been said to be equivalent to the expression 'great *bodily* harm.' 2 *Abbott's Dict.* 273. A personal injury is an injury to the person of an individual, as an assault is distinguished from an injury to one's property. 2 *Rap. & Law. Law Dict.* 955. If we admit, as claimed by appellant, that the terms 'personal injuries' and *bodily injuries* are not 'necessarily equivalent,' yet the jury could only have understood from instruction fifteen given that the appellee was entitled to recover only for mental suffering growing out of the *bodily injuries* he received."

**Impairment of Vision** may properly be proved under an allegation that "the plaintiff sustained serious and painful internal and other *bodily injuries*," as *bodily injuries* do not necessarily mean injuries to the trunk or main part of the human form as distinguished from the limbs or head. *Quirk v. Siegel-Cooper Co.*, 43 N. Y. App. Div. 467.

**612. 1. Body of the County — Jury and Jury Trial.** — *State v. Bollin*, 10 Wyo. 439; *People v. Dunn*, 31 N. Y. App. Div. 139.

**Body of Estate — Trusts.** — See *Meldon v. Devlin*, 31 N. Y. App. Div. 146.

**615. 3. Bona Fide Purchaser.** — See *O'Connor v. Gertgens*, 85 Minn. 481; *Wilkins v. McCorkle*, (Tenn. 1904) 80 S. W. Rep. 834.

**Bona Fide Possessor.** — *Lindt v. Uihlein*, 116 Iowa 48.

**Bona Fides of the Taking — Larceny.** — In *People v. Slayton*, 123 Mich. 397, the court said: "By *bona fides* I mean the good faith of the taking, — whether with a felonious intent or a criminal intent."



# BONDS.

By J. E. BRADY.

**620.** I. DEFINITION AND SCOPE OF TITLE — In the Technical Sense. — See notes 1, 3.

**621.** II. EXECUTION AND DELIVERY — 1. Seal and Signature — Signature. — See note 5.

**622.** See note 1.

Execution by Agent. — See note 2.

2. Delivery — Acceptance. — See note 3.

To Constitute a Delivery. — See note 4.

**623.** The Delivery Need Not Be to the Obligee. — See note 1.

**624.** Date of Delivery — Presumption. — See note 3.

**620.** 1. Definition — Technical Sense. — *Warder, etc., Co. v. Stewart*, 2 Marv. (Del.) 275; *Duncan v. Charleston*, 60 S. Car. 555, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620.

3. *Duncan v. Charleston*, 60 S. Car. 555, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620.

A Bond Is Evidence of a Debt and represents money at interest. *Sweetsir v. Chandler*, 98 Me. 145.

**621.** 5. *Union Guaranty, etc., Co. v. Robinson*, 79 Fed. Rep. 420, 49 U. S. App. 148; *Donnell Mfg. Co. v. Repass*, 75 Mo. App. 420.

The Fact that the Names of Persons Appear in the Body of a Bond not signed by those persons does not invalidate the bond so as to prevent a recovery against those who did sign. *Young v. Union Sav. Bank, etc., Co.*, 23 Wash. 360.

The Term "Signature" includes within its meaning the mark of a person unable to write. *Terry v. Johnson*, 109 Ky. 589.

A Mark or Sign is a sufficient signature, but the burden of proving it is on the obligee. *Com. v. Campbell* (Ky. 1898) 45 S. W. Rep. 89.

Signing Conditionally that the signature of another person be secured before delivery is not a defense in event of the other signature not being obtained, where it does not appear that the obligee had notice of the condition. *Hart v. Mead Invest. Co.*, 53 Neb. 153.

Bond Not Executed. — A party cannot be held liable on a bond which he never executed. *Borman v. Jung Brewing Co.*, 23 Ind. App. 399; *Camden v. Ward*, 67 N. J. L. 558, holding that where the signature of the obligors was placed on the bond without their knowledge they are not liable thereon even though the obligees accepted the bond in good faith; *Terrill v. Tillison*, 75 Vt. 193, holding that where the obligors never signed the bond, but their signatures were placed on the bond by a third party, the bond was void.

Effect of Failure to Sign. — The absence of the obligor's signature on a liquor bond has been held not to invalidate the bond. *North v. Barringer*, 147 Ind. 224. So an attachment bond is not void because the obligor failed to

sign it, but the obligor cannot be held liable on such an instrument. *Storz v. Finklestein*, 50 Neb. 177.

**622.** 1. *Manhattan L. Ins. Co. v. Alexander*, 158 N. Y. 732, affirmed 89 Hun (N. Y.) 449.

2. *Mutual L. Ins. Co. v. Yates County Nat. Bank*, 35 N. Y. App. Div. 218.

The Agent Is Prima Facie Liable even though his signature is followed by words descriptive of his agency. The burden is upon him to show by sufficient evidence that he is not actually the obligor. *Gardner v. Cooper*, 9 Kan. App. 587.

A Depository's Bond signed by "Harvey P. Smith, cashier of the Manufacturers' Bank," though a statute provided for a different mode of execution, was held to be good as a common-law bond. *St. Louis County v. Manufacturers' Bank*, 69 Minn. 421.

3. Delivery Essential. — See *Yeareance v. Blake*, (N. J. 1899) 44 Atl. Rep. 858.

4. Illustrations. — A delivery of bonds to a third person with instructions that they be delivered to the obligee on the death of the obligor is sufficient. *Frank v. Frank*, 100 Va. 627.

A Formal Delivery. — *St. Louis Brewing Assoc. v. Hayes*, (C. C. A.) 97 Fed. Rep. 859, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 622.

Delivery by a Surety to a principal, in the absence of an express condition, cannot thereafter be shown to have been conditional. *Gyger v. Courtney*, 59 Neb. 555.

Where a Bond Was Given Pursuant to a Requirement of Court and there was no statute regulating its service, it was held to be sufficiently delivered if the instructions of the court were obeyed. *Whereatt v. Ellis*, 103 Wis. 348, 74 Am. St. Rep. 865.

**623.** 1. Delivery Need Not Be to Obligee Personally. — *Wylie v. Commercial, etc., Bank*, 63 S. Car. 406.

**624.** 3. The Date of Delivery of a bond may be shown where no date appears on the bond; and the fact that the bond is undated does not vitiate it. *Harper v. Golden*, (Tex. Civ. App. 1897) 39 S. W. Rep. 623.

**624.** Acceptance Essential. — See note 5.

Repudiation. — See note 7.

III. THE OBLIGOR — 1. Generally. — See note 10.

**626.** 2. Capacity to Contract — *b.* COVERTURE — Statutes. — See note 2.

**627.** *d.* INSANITY. — See note 1.

**631.** 3. Freedom of Will — *b.* FRAUD — Common-law Rule. — See note 2.

**632.** See note 1.

**634.** Modification — Statutes. — See note 1.

Fraud of Third Party. — See note 2.

**635.** 4. Special Limitations — *c.* PARTNERSHIP AUTHORITY — Implied Power of Partner. — See note 7.

**637.** Authority Need Not Be under Seal. — See note 1.

**638.** *e.* JOINT OBLIGORS — (1) *Whether Joint or Joint and Several.* — See notes 4, 5.

**640.** Sureties in Joint Bonds. — See note 1.

(2) *Whether Several or Joint.* — See note 3.

**641.** IV. THE OBLIGEE — 1. General Characteristics — A Distinct Obligee Essential. — See note 4.

**624.** 5. Sufficient Acceptance. — Where a bond for the faithful performance of duties by a bank cashier was received and kept by one of the directors of the bank it was held that there was a sufficient delivery and acceptance. *Fiala v. Ainsworth*, 63 Neb. 1, 93 Am. St. Rep. 420.

A Bail Bond accepted by a county attorney is not valid where the proper person to accept was the county judge. *Ex p. Price*, 37 Tex. Crim. 275.

**Compelling Acceptance.** — Where a statute provided for the acceptance of a bond with but one surety it was held that the statute was permissive in meaning and that an obligor could not compel the acceptance of his bond by a public officer. *Schmitt v. Clinton*, 111 Mich. 99.

**7.** *Valley Bank v. Wolf*, 101 Iowa 51, holding that the acceptance of a bond and its retention for fourteen years amounted to a waiver of any formal defects wherein the bond did not conform to the requirements of a statute.

**10. Name of Obligor in Body of Bond.** — *Thompson v. Mecosta*, 127 Mich. 522, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 624, and holding that a bond signed by the president and clerk of a village wherein the obligor named was the "board of trustees of the village" was the bond of the village. *Standard Underground Cable Co. v. Stone*, 35 N. Y. App. Div. 64, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 624.

**626.** 2. *Warder, etc., Co. v. Stewart*, 2 Marv. (Del.) 275.

**627.** 1. *Where the Obligor Was an "Imbecile in Body and Mind"* and there was additional evidence of fraud, his bond was held to be invalid. *Tatum v. Tatum*, 101 Va. 77.

**631.** 2. *Fraud.* — See *Hart v. Mead Invest. Co.*, 53 Neb. 153.

**632.** 1. *Fraud Affecting the Execution of a Bond.* — *Fowler Cycle Works v. Fraser*, 110 Ill. App. 126.

In an Action on an Administrator's Bond the sureties testified that when they signed the bond they understood from the probate judge that it was merely a certificate. A slight examination of the paper would have shown what

it was intended for. It was held that they could not defend on the ground stated, and that they were estopped to deny their execution of the bond. *Engstad v. Syverson*, 72 Minn. 188.

**634.** 1. *Statutory Modifications.* — *Tyson v. Williamson*, 96 Va. 636; *South Roanoke Land Co. v. Roberts*, 99 Va. 487.

**2. Fraud of One Other than Obligee Not Ground of Avoidance.** — *Feigenspan v. Wilson*, 68 N. J. L. 83.

**Exception Where Obligee Is Privy or Has Notice.** — *Tyson v. Williamson*, 96 Va. 636.

**635.** 7. *Unauthorized Bond of One Partner.* — *Seeberger v. Wyman*, 108 Iowa 527. See further the title PARTNERSHIP, 151. 2, 158. 1.

**637.** 1. *Parol Authority to Execute Is Sufficient.* — See *Seeberger v. Wyman*, 108 Iowa 527.

**638.** 4. *Where a Husband and Wife Are Joint Obligors* on a bond the husband may be sued alone, the bond being void as to the wife. *Seigman v. Streeter*, 64 N. J. L. 169.

**Indemnifying Bond.** — A bond was given by a bonding company to an employer conditioned to make good any loss suffered through the defalcation of a general agent, and the agent agreed to indemnify the company for any payment it was compelled to make to his employer. It was held that the obligation was not joint, and an action against the company alone could be maintained. *American Bonding, etc., Co. v. Milwaukee Harvester Co.*, 91 Md. 733.

**5. Joint and Several Obligation.** — Where the obligors of a bond, by its terms, bound themselves, their "heirs, etc., each and every one of them," the obligation thereon was held to be joint and several. *Lehigh County v. Gossler*, 24 Pa. Super. Ct. 406.

**640.** 1. *Sureties in Joint Bonds.* — Where sureties sign the bond of a school district treasurer the obligation is joint and several. *Com. v. Joyce*, 3 Pa. Super. Ct. 616, 40 W. N. C. (Pa.) 191.

**3. A Bond Given by Stockholders to the directors of a corporation, making their liability proportionate to their holdings of stock, is a several and not a joint obligation. *Spencer v. McLean*, 20 Ind. App. 626, 67 Am. St. Rep. 271.**

**641.** 4. *Obligee Must Be Named in Bond.* —

**646. 2. Particularity of Designation — *b. QUALIFICATIONS* — (4) *Statutory Designation* — Oblige Different from That Designated by Law — Directory Provisions. — See note 1.**

**647. No Statutory Designation — Whoever Shall Be Damnified. — See note 3.**

**648. 3. Change of Oblige — *a. BY ASSIGNMENT* — In Equity, However, and under the Reformed Procedure. — See note 2.**

**650. *c. BY TERMINATION OF OFFICE — Succession.* — See note 2.**

**651. 4. Beneficial Obligees — *a. IN GENERAL.* — See note 2.**

**652. *b. IN PUBLIC BONDS — Indeterminate Beneficiaries.* — See note 1.**

**653. *c. IN PRIVATE BONDS — Determinate Beneficiaries.* — See note 3.**

**655. 5. Joint Obligees — But for Jurisdictional Purposes. — See note 1.**

**657. V. THE CONDITION — 2. Invalid Conditions — *a. UNLAWFUL CONDITIONS* — (2) *To Do Unlawful Acts* — (b) *In Violation of the Common Law — Various Instances.* — See note 4.**

State *v. Watson*, 2 Cleve. L. Rep. 314, 4 Ohio Dec. (Reprint) 526.

**Action in Name of Oblige.**—A suit on a bond must be brought in the name of the parties to whom it was given. *Sister Mary Nonn v. Conlan*, 68 N. J. L. 88.

**646. 1. Nominal Obligees Trustee for Person Actually Damnified.**—*Anderson v. Blair*, 118 Ga. 211; *Farr v. Rouillard*, 172 Mass. 303.

**The Bond of a Depositary** which named the "board of county commissioners" as obligee, instead of the county as directed by statute, was held not to be void for that reason. *St. Louis County v. American L. T. Co.*, 67 Minn. 112.

**Substantial Compliance** with the statutory requirement is sufficient, as where the bond run to the county treasurer for the county instead of to the county. *Buhrer v. Baldwin*, (Mich. 1904) 11 Detroit Leg. N. 298, 100 N. W. Rep. 468.

**647. 3. Where the Statute under Which a Bond Was Given Did Not Designate an obligee** it was held that it was error to name one person as obligee and that an action might be brought by any of the parties interested. *Moede v. Haines*, 66 Minn. 419.

**648. 2. The Assignee of a Bastardy Bond** may maintain an action of debt thereon. *St. Paul Title, etc., Co. v. Sabin*, 112 Wis. 105. See further the title **ASSIGNMENTS**, 1041. 7 *et seq.*

**650. 2. Successor in Office the Obligees by Succession.**—*Board of Education v. National Surety Co.*, 183 Mo. 166.

**651. 2. Contractor's Bond.**—Where one contracting to construct public improvements gave a bond to protect the city, it was held that a creditor beneficially interested could bring an action therein in the name of the city, without the city's consent. *Stephenson v. Monmouth Min., etc., Co.*, 84 Fed. Rep. 114, 54 U. S. App. 499.

A contractor's bond given for the construction of a schoolhouse inures to the benefit of a person furnishing work or material under the contract, and such beneficial obligee may maintain an action thereon. *Young v. Young*, 21 Ind. App. 509. See also *American Surety Co. v. Lauber*, 22 Ind. App. 326.

**Liquor Dealer's Bond.**—Under the *Texas* statute requiring from liquor dealers a bond for the keeping of an open, quiet, and orderly

house, a person who has suffered through the violation of the condition may bring an action upon the bond. *Cunningham v. Porchet*, 23 Tex. Civ. App. 80.

**The Obligor of a Bond Given in Proceedings to Contest an Election** may be sued by any person to whom the inspection of ballots was referred, though not named in the bond as an obligee. *Moede v. Haines*, 66 Minn. 419.

**The Beneficiaries of a Bond Given by an Insurance Company** to the state, conditioned to indemnify the policyholders, may, under statute, maintain suit for a breach. *Union Guaranty, etc., Co. v. Robinson*, 79 Fed. Rep. 420, 49 U. S. App. 148.

**652. 1. Beneficial Obligees in Public Bonds.**—*Norwalk v. Ireland*, 68 Conn. 1.

**653. 3. Private Bonds Benefiting Third Parties.**—See *Macatee v. Hamilton*, 15 Tex. Civ. App. 108.

On a contractor's bond, given to a city, faithfully to perform a contract to construct a sewer, in which there is a condition to "furnish all labor, materials," etc., an action may not be maintained by third parties for material used in the construction. *Sterling v. Wolf*, 163 Ill. 467.

In a contractor's bond there was a condition that the obligors would pay all damages sustained through their negligence, and all claims for labor, material, etc. It was held that subcontractors might maintain an action on the bond. *Getchell, etc., Lumber, etc., Co. v. Peterson*, 124 Iowa 599.

The name of the beneficial obligee need not be given. It is enough if he is sufficiently described or designated. *American Surety Co. v. Thorn-Halliwell Cement Co.*, 9 Kan. App. 8.

**655. 1. A Bond Given in Proceedings to Contest an Election** was held to be several as to the ballot inspectors who had made personal expenditures during the performance of their duties, so that suits thereon should be separately brought. *Moede v. Haines*, 66 Minn. 419.

**657. 4. Conditions Held Legal and Binding.**—To refund to a city all amounts of salary received from the city as an officer of the same in case of a judicial determination that the obligor's election to office was invalid. *Finley v. Tucson*, (Ariz. 1900) 60 Pac. Rep. 872.

Faithfully to perform the duties of cashier of a branch bank. *Morehead Banking Co. v. Tate*, 122 N. Car. 313.

**661.** (3) *In Consideration of Unlawful Acts by Obligee* — (c) *Indemnity Against Unlawful Acts* — Indemnifying Innocent Parties. — See note 1.

**662.** (e) *Unauthorized Corporate Acts*. — See note 6.

**663.** b. *DEFECTIVE CONDITIONS*. — See notes 1, 2.

**664.** c. *CONDITIONS WITHOUT CONSIDERATION* — (1) *Effect of Seal* — At Law. — See notes 2, 3, 4, 5.

**666.** (2) *Effect of No Consideration* — (a) *Generally* — Equivalent to a Voluntary Gift — Intention. — See note 1.

**667.** (b) *Statutory Considerations* — aa. *UNCONSTITUTIONAL STATUTE*. — See notes 2, 3.

**668.** bb. *NONCOMPLIANCE WITH STATUTORY FORMALITIES* — *General Rule*. — See notes 1, 2.

**661.** 1. *A Bond Given to a Garnishee in Attachment*, who was the defendant's trustee, with a condition to save the garnishee free from any loss, where the consideration was the payment to the obligors of the money claimed by them, was held not to be void as against public policy. *Klock v. Pack*, 112 Mich. 670.

**662.** 6. *Unauthorized Corporate Acts*. — Where a bond was given to secure the performance of a contract to furnish water to a municipality and the contract was *ultra vires* and therefore void, the bond was held to be without consideration. *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637.

**663.** 1. *Conditions Held Void Because Defective* — *Impossibility*. — A bond requiring the principal to appear in court at a time when court could not be legally held is void. *Moseley v. State*, 37 Tex. Crim. 18.

2. *Distinction Between Defective and Unlawful Conditions*. — *Ward v. Hood*, 124 Ala. 572, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 663.

**664.** 2. *Where Seals Have Been Abolished by Statute*. — *Keith County v. Ogalalla Power, etc., Co.*, 64 Neb. 35.

*An Unsealed Instrument in the Form of a Bond*, if supported by a consideration and delivered, is effectual as a contract. *Brandon First Nat. Bank v. Briggs*, 69 Vt. 12, 60 Am. St. Rep. 922.

*One Seal Where there Are Several Obligors* is sufficient. *Warder, etc., Co. v. Stewart*, 2 Marv. (Del.) 275.

3. *Seal Raises Prima Facie Presumption of Consideration*. — *Mutual L. Ins. Co. v. Yates County Nat. Bank*, 35 N. Y. App. Div. 218.

4. *In Pennsylvania* a seal implies a consideration, and an action on a bond properly sealed cannot be defended on the ground of want of consideration. *Cosgrove v. Cummings*, 195 Pa. St. 497.

5. *Want of Consideration No Defense at Common Law*. — *Chicago Sash, etc., Mfg. Co. v. Haven*, 195 Ill. 474, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 664; *Cosgrove v. Cummings*, 195 Pa. St. 497. See also *Graham v. Middleby*, 185 Mass. 349.

The seal imports a consideration, and to defend on the ground of want of consideration notice of such defense must be given. *Hollenbeck v. Breakey*, 127 Mich. 555, 8 Detroit Leg. N. 450.

**666.** 1. *Instances of No Consideration*. — Entering into the contractual relation by the obligee where the obligee is not legally bound by such contract is not a valid consideration.

*Keith County v. Ogalalla Power, etc., Co.*, 64 Neb. 35.

A bond given to secure an advance of money where the advance was already secured by a bottomry bond is without consideration. *Davis v. Soelberg*, 24 Wash. 308.

*Instances of Sufficient Consideration*. — Where an obligee had refused to enter into a contract with the obligor unless the latter furnished a bond, and a bond was thereupon made, it was held that there was a valid consideration. *Sweeney v. Aetna Indemnity Co.*, 34 Wash. 126.

*Indemnification of a surety for any loss he may suffer by reason of signing a bond as surety is a valid consideration*. Seeberger v. Wyman, 108 Iowa 527.

A bond given to obtain goods from the possession of a receiver is based on a good consideration although it is subsequently judicially determined that the appointment of the receiver is invalid. *Larsen v. Winder*, 20 Wash. 419.

The issuance of a liquor license to the principal is a valid consideration for the execution of the bond by the sureties. *North v. Barringer*, 147 Ind. 224.

A depository's bond was held to be based on sufficient consideration where sixteen thousand dollars was deposited with the obligor of the bond after its execution. *Wylie v. Commercial, etc., Bank*, 63 S. Car. 406.

**667.** 2. *Unconstitutional Statute Requiring Bond Is No Consideration*. — *San Francisco Lumber Co. v. Bibb*, 139 Cal. 192; *Shaughnessy v. American Surety Co.*, 138 Cal. 543.

3. *Stevenson v. Morgan*, (Neb. 1903) 93 N. W. Rep. 180; *U. S. Fidelity, etc., Co. v. Ettenheimer*, (Neb. 1904) 99 N. W. Rep. 652.

**668.** 1. *Joint Instead of Joint and Several*. — Where a bond which by statute is required to be joint and several is joint in form the bond is not void, but is valid in so far as it complies with the statute. *Clark v. Douglas*, 58 Neb. 573, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 668.

2. *Bond Exceeding Statutory Requirements*. — See *Stephenson v. Monmouth Min., etc., Co.*, 84 Fed. Rep. 114, 54 U. S. App. 499.

*Less Stringent Conditions* than those required by statute, in *North Carolina*, are enforced as though the condition were written in accordance with the statute. *State v. Sutton*, 120 N. Car. 298.

*Excessive Penalty*. — *Meador v. Adams*, (Tex. Civ. App. 1903) 76 S. W. Rep. 238.

**669.** See note 2.

**670.** See notes 1, 2.

**671.** Valid if Voluntary and Another Consideration Exists. — See notes 1, 3.

**672.** Not a Statutory but a Common-law Bond. — See notes 2, 3.

**673.** (c) Bonds in Judicial Proceedings. — See note 1.

**674.** Judicial Proceedings Must Be Valid. — See note 1.

Mere Irregularities. — See note 3.

**676.** 3. Partially Invalid Conditions. — See note 3.

4. Breach of Condition — a. FAILURE OF PERFORMANCE. — See note 4.

**669.** 2. Provisions Requiring Official Approval of Bonds. — *Ramsay v. People*, 197 Ill. 572, 90 Am. St. Rep. 177; *McIntire v. Linehan*, 178 Mass. 263; *Clark v. Douglas*, 58 Neb. 573, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 669; *Holt County v. Scott*, 53 Neb. 192, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 669; *State v. Paxton*, 65 Neb. 110; *Howard v. Burns*, 14 S. Dak. 391, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 667-670, and approving the whole text paragraph; *Harper v. Golden*, (Tex. Civ. App. 1897) 39 S. W. Rep. 623.

**670.** 1. Immaterial Nonconformity Does Not Invalidate. — A bond is not invalid for the reason that it was not taken by a constable previous to the levy of a writ of execution as required by statute. *Terry v. Johnson*, 109 Ky. 589.

Where a statute required a condition in a saloon-keeper's bond that he would not use any screen which might obstruct the view "through" the doors of the saloon, the use of the word "to" instead of through was held not to invalidate the bond. *State v. Wharton*, 26 Tex. Civ. App. 262.

2. A Statutory Provision Requiring an Attested Copy of a Treasurer's Bond sent to the commissioners to be accompanied by a certificate of the custodian of the bond is directory. *Johnson v. Gerald*, 169 Mass. 500.

**671.** 1. Valid if Voluntary and Supported by Consideration. — *Spriggs v. State*, 161 Ind. 226, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 671, and applying the rule to a bond given on petition for the establishment of a drain.

Bond Must Be Voluntary. — See *Anderson v. Blair*, 118 Ga. 211; *Farr v. Rouillard*, 172 Mass. 303.

3. Official Bonds. — *Farr v. Rouillard*, 172 Mass. 303; *State v. Paxton*, 65 Neb. 110, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 671; *Hines v. Norris*, (Tex. Civ. App. 1904) 81 S. W. Rep. 791.

**672.** 2. Bond Not Conforming to Statute Admits Only of Common-law Remedies. — *Stephenson v. Monmouth Min., etc., Co.*, 84 Fed. Rep. 114, 54 U. S. App. 499; *Farr v. Rouillard*, 172 Mass. 303; *Hines v. Norris*, (Tex. Civ. App. 1904) 81 S. W. Rep. 791.

3. Intention to Comply with Statute. — In *Farr v. Rouillard*, 172 Mass. 303, wherein a constable's bond did not conform to the statutory requirement as to the obligee, it was said: "Treating the bond as a common-law bond, it is contended by the defendant that only nominal damages can be recovered; but it is plain that the obligor intended to comply with the statute, and therefore by implication it was taken in trust for the benefit of the same persons who

could take advantage of a bond in the statutory form. The damages, therefore, will be measured by the interest of the *cestui que trust*, not by that of the obligee."

**673.** 1. Nonconforming Bonds in Judicial Proceedings — *Bond of Committee of a Lunatic*. — *Dudley v. Rice*, 119 Wis. 97.

*Trustee's Bond*. — *McIntire v. Linehan*, 178 Mass. 263.

A Bond Given upon the Granting of a Stay Order cannot be said to be without consideration. *Whereatt v. Ellis*, 103 Wis. 348, 74 Am. St. Rep. 865.

The Grant of a New Trial is a sufficient consideration for the giving of a bond. *American Exch. Bank v. Brenzinger*, 10 Ohio Dec. 208.

A Bail Bond taken by a sheriff without authority is not enforceable as a common-law bond. *State v. Fraser*, 165 Mo. 242.

**674.** 1. Proceedings Coram Non JUDGE Render Judicial Bonds Invalid. — *Robinson v. Bonjour*, 16 Colo. App. 459, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 674; *Jones v. Wright*, 24 Ohio Cir. Ct. 649.

Where the Proceedings Are Erroneous but Not Void, the bond is binding. *Findley v. Findley*, 42 W. Va. 372.

3. Mere Irregularities Not Fatal. — *State v. Ruthing*, 49 La. Ann. 909.

**676.** 3. Partially Invalid Conditions. — *U. S. v. Jones*, 77 Fed. Rep. 717; *Seeberger v. Wyman*, 108 Iowa 534, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 676.

4. Instances of Conditions Broken by Failure to Perform. — To "Support and Kindly Treat" the mother of the obligor's bastard child. Broken by inoculating the obligee with a "loathsome disease." *Porter v. Caylor*, 146 Ind. 448.

To Support a Parent During Life. — Broken by ceasing to support, although a brother of the obligor offered to take care of the parent at his own home. *Empire v. Empire*, 35 N. Y. App. Div. 51.

To Appear in Court and Not to Depart Without Leave. — Broken by departure without leave of court. *State v. Ruthing*, 49 La. Ann. 909.

Faithfully to Perform the Duties of Cashier. — Broken by discounting a note in violation of the instructions of the directors. *Cassell v. Mercer Nat. Bank*, 59 S. W. Rep. 504, 22 Ky. L. Rep. 1009. See also *Harrisburg Sav., etc., Assoc. v. U. S. Fidelity, etc., Co.*, 197 Pa. St. 177.

To Perform a Contract for the Paving of a Street. — Broken by leaving the work incomplete. *Camden v. Ward*, 67 N. J. L. 558.

Not to Sell Liquor in Violation of the Law. — Broken by an illegal sale made by the obligor's clerk, in the absence of the obligor and against

**677.** Mixed Questions of Law and Fact. — See note 1.

**679.** *b.* SUBSTANTIAL PERFORMANCE — (2) *Public Official Bonds* —

(a) *In General.* — See note 2.

**680.** (b) *Accounting for Funds* — *Unavoidable Loss of Funds.* — See note 5.  
*Intention.* — See note 7.

**681.** See note 1.

(c) *Performing Public Duties.* — See note 2.

**684.** (5) *Separate Duties.* — See note 2.

**685.** (6) *Condition to Perform a Separate Contract.* — See note 1.

**686.** *c.* NONPERFORMANCE EXCUSED — (1) *Generally.* — See note 1.

**687.** (3) *By Act of the Obligee* — (a) *Generally.* — See note 1.

**688.** (c) *Waiver by Public Agents.* — See note 3.

**691.** *d.* CONDITION PRECEDENT TO PERFORMANCE. — See note 5.

his instructions. *Cullinan v. Burkard*, 93 N. Y. App. Div. 31.

*To Keep an Open, Quiet, and Orderly House.* — Broken by the nightly occurrence of music and dancing, serving lewd women and prostitutes with liquor, and allowing loud and boisterous language. *Cunningham v. Porchet*, 23 Tex. Civ. App. 80.

*To Perform a Contract of Construction.* — Broken by failure to complete within the designated time. *Folz v. Tradesmen's Trust, etc., Co.*, 201 Pa. St. 583.

*To Perform a Contract to Sell Property and Deposit Proceeds.* — Broken by a failure to deposit the proceeds, although it did not appear that the property had been sold. *Carpenter v. Fulmer*, 118 Wis. 454.

**677.** 1. *A Condition to Pay Money.* — Where a bond was given to a bank to secure all notes, etc., for which the obligor "is liable," it was held that the condition covered only the notes, etc., for which the obligor was liable to the bank at the time when the bond was given. *Matter of Neff*, 185 Pa. St. 98.

**679.** 2. *General Rule of Construction.* — *U. S. v. Smythe*, 120 Fed. Rep. 30, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 679, and supporting the whole text paragraph.

*The Erroneous Performance of a Judicial Act by a Sheriff* is not a breach of his official bond. *Scott v. Ryan*, 115 Ala. 587.

**680.** 5. *Officials Held Insurers of Public Funds.* — *U. S. v. Smythe*, 120 Fed. Rep. 30, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 680.

7. *Intention to Become Insurer Manifested.* — *U. S. v. Smythe*, 120 Fed. Rep. 30, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 680.

*Funds Stolen.* — *Boshyshell v. U. S.*, 77 Fed. Rep. 944, 39 U. S. App. 474.

*Funds Lost Before the Execution of a County Treasurer's Bond* cannot be recovered from the sureties. *Coe v. Nash*, 91 Tex. 113.

**681.** 1. *Condition to Faithfully Perform Duties.* — *U. S. v. Smythe*, 120 Fed. Rep. 30, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681.

2. *St. Marys v. Rowe*, 15 Ohio Dec. 686, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681, and holding that the sureties on the bond of a public officer are entitled to stand on the strict letter of the contract and cannot be held for malfeasance except in respect to the acts of their principal as such officer and in discharge of the duties pertaining to his office.

*Incidental and Necessary Duties Covered.* — *Smythe v. U. S.*, (C. C. A.) 107 Fed. Rep. 376, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681.

*Instances of Public Duties* — *Constable.* — *Norwalk v. Ireland*, 68 Conn. 1.

**684.** 2. *Separate Duties Not Included.* — *St. Marys v. Rowe*, 15 Ohio Dec. 686, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 684.

**685.** 1. *Condition to Perform Separate Contract.* — See also *Shelby v. Bohn*, 25 Ind. App. 473.

**686.** 1. *Remedy of the Obligee When Performance Is Excused.* — *Ward v. Hood*, 124 Ala. 572, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 686; *Webster v. Major*, 33 Ind. App. 213, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 686.

**687.** 1. *Act of Obligee — General Rule.* — *Webster v. Major*, 33 Ind. App. 213, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 687.

**688.** 3. *Bond of Bank Cashier.* — Where a cashier broke the condition of his bond by wrongfully discounting a note, an attempt by the bank to collect the note was held not to amount to a waiver of its rights on the bond. *Cassell v. Mercer Nat. Bank*, 59 S. W. Rep. 504, 22 Ky. L. Rep. 1009.

**691.** 5. *Conditions Precedent.* — *Tyrer v. Chew*, 7 App. Cas. (D. C.) 175; *Learn v. Bag-nall*, 1 Ont. L. Rep. 472.

It is not necessary to make demand on a county treasurer for money wrongfully diverted by him before bringing an action on his bond. *Coe v. Nash*, (Tex. Civ. App. 1897) 40 S. W. Rep. 235, reversed 91 Tex. 113.

*Occurrence of Conditions Precedent — Substantial Performance — Foreclosure of Mortgage.* — Under the *New Jersey* statute providing that the holder of a bond secured by a mortgage shall foreclose the mortgage before proceeding upon the bond, it was held that where the mortgage had been wiped out foreclosure was not a condition precedent to a recovery on the bond. *Seigman v. Streeter*, 64 N. J. L. 169.

*Arrival of Day of Payment.* — Where in the case of a bond to pay a sum of money to the grandson of the obligee, or in the event of his death before the day of payment, then to a third person, the grandson died before the time named, it was held that the sum did not thereupon become payable. It did not fall due until the time set by the instrument itself. *Matter of Garlock*, 8 N. Y. App. Div. 341.

**693.** *e.* DISCHARGE OR RELEASE. — See note 1.

**694.** *f.* BREACH OF CONDITION TO INDEMNIFY — (1) *Generally.* — See note 4.

**695.** (2) *No Specific Contingency.* — See note 2.

**699.** VI. THE OBLIGATION — 4. Liability — *a.* IN COMMON-LAW BONDS. — See notes 1, 2.

**700.** *b.* IN STATUTORY BONDS. — See note 1.

**701.** *c.* EXTENT OF LIABILITY. — See notes 1, 2.

**693.** 1. A Release by the Obligee is no defense to a suit on the bond by a beneficial obligee. *Etscheid v. Baker*, 112 Wis. 129.

**694.** 4. Nature and Extent of Indemnity — *Intention Controls.* — U. S. *v.* Smythe, 120 Fed. Rep. 30, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 694, and holding that a condition to keep safely all moneys of the mint was not merely an obligation to pay the moneys, but safely to keep and deliver them as received.

**695.** 2. Events Causing Breach of Condition to Indemnify. — The obligor of a bond to keep safely the moneys of the United States was held to be liable where money was destroyed by fire through the carelessness of his subordinates. U. S. *v.* Smythe, 120 Fed. Rep. 30, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 695.

**699.** 1. Obligation Payable at Common Law as Penalty. — *Ripley v. Eady*, 106 Ga. 422; *Disosway v. Edwards*, 134 N. Car. 257, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 699; *Dunavant v. Caldwell, etc.*, R. Co., 122 N. Car. 999; *Grand Lodge, etc., v. Cleghorn*, 20 Tex. Civ. App. 134.

*In Bonds of Indemnity.* — A bond given by a grantor of land upon which there was a mortgage, conditioned to satisfy the mortgage and other incumbrances, is a bond of indemnity and not one for liquidated damages. *McDaniels v. Gowey*, 30 Wash. 412.

2. *Intention of Parties as to Liquidated Damages.* — *New Britain v. New Britain Telephone Co.*, 74 Conn. 326.

*Where Part of the Sum Named in the Bond Was Paid*, under an agreement between the parties to discontinue the performance of the condition, an action was held to be properly brought on the bond for the balance as liquidated damages. *Bazemore v. Bynum*, 127 N. Car. 11.

*In a Bond Given for the Performance of a Separate Contract* in the penal sum of one hundred dollars, the liability will be enforced as liquidated damages. *Shelby v. Bohn*, 25 Ind. App. 473.

*In a Proceeding to Determine the Validity of an Election* the holder of the office gave a bond the obligation of which was to refund to the city all salary which he had received in event he was found to be illegally in office. It was held that the measure of liability was the entire amount he had received, and not the amount by which the city had actually been damaged. *Finley v. Tucson*, (Ariz. 1900) 60 Pac. Rep. 872.

**700.** 1. Equity Cannot Relieve Against Statutory Penalty. — See *State v. Larson*, 83 Minn. 131, per Brown, J., dissenting, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 700. In this case, however, the majority of the court held that a liquor dealer's bond was one of

indemnity, the amount thereof being in the nature of a penalty and not liquidated damages.

*In New York* an action may be brought on a liquor-tax bond to enforce either the penalty for the breach of any condition of the bond or for any penalty or penalties incurred or imposed for the violation of the liquor-tax law. *Lyman v. Perlmutter*, 166 N. Y. 414, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 700.

A liquor dealer's bond conditioned to pay to all persons all damages sustained by reason of obtaining the license was held to make the obligor liable for damages to one whose husband was killed as a result of becoming intoxicated from liquor sold to him by the obligor. *Dowiat v. People*, 92 Ill. App. 433. See generally the title CIVIL DAMAGE ACTS.

**701.** 1. Amount of Penalty Limit of Liability. — *Moss v. Rowlett*, 112 Ky. 124, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 701; *People's Sav. Bank v. Campau*, 124 Mich. 106; *Board of Education v. National Surety Co.*, 183 Mo. 166, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 701; *Sachs v. American Surety Co.*, 177 N. Y. 551 (where the condition is for the performance of an act, and not for the payment of money); *John Polhemus Printing Co. v. Hallenbeck*, 46 N. Y. App. Div. 563; *Sachs v. American Surety Co.*, 72 N. Y. App. Div. 60, affirmed 177 N. Y. 551; *New Home Sewing Mach. Co. v. Seago*, 128 N. Car. 158; *Grand Lodge, etc., v. Cleghorn*, 20 Tex. Civ. App. 134. See also *Hughes v. Pritchard*, 129 N. Car. 42.

*On a Bond to Secure a Note* recovery may be had for attorney's fees mentioned in the note and for interest on the principal. *Morristown Stove Works v. Jones*, (Tenn. Ch. 1899) 53 S. W. Rep. 217.

*Costs.* — Where the recovery is less than the penalty full costs may be allowed though the total is thereby brought above the amount of the penalty. *Dwyer v. U. S.*, 93 Fed. Rep. 616, 35 C. C. A. 488.

2. *Interest Allowed Beyond Penalty.* — *Knipe v. Blair*, (1900) 1 Ir. R. 372; U. S. *v.* Walker, 128 Fed. Rep. 1012; *Holmes v. Standard Oil Co.*, 183 Ill. 70; *Getchell, etc., Lumber, etc., Co. v. Peterson*, 124 Iowa 599; *McMullen v. Winfield Bldg., etc., Assoc.*, 64 Kan. 305, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 701; *Pennell v. Card*, 96 Me. 392; *Board of Education v. National Surety Co.*, 183 Mo. 166, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 701; *Mutual Ben. Ins. Co. v. Brown*, 80 Mo. App. 459, 2 Mo. App. Rep. 592; *Camden v. Ward*, 67 N. J. L. 558; *New Home Sewing Mach. Co. v. Seago*, 128 N. Car. 158, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 701; *Whereatt v. Ellis*, 103 Wis. 348, 74 Am. St. Rep. 865. See also *In re Dixon*, (1900) 2 Ch.

- 701. BONDSMAN.** — See note 4a.  
**BONUS.** — See note 8.  
**703. BOOK.** — See note 3.  
**705. [BOOKMAKING.]** — See note 1a.)  
**706. BOOM.** — See note 2.

561, 83 L. T. N. S. 129. See *Grand Lodge, etc., v. Cleghorn*, 20 Tex. Civ. App. 134.

**701. 4a.** *Haberstich v. Elliott*, 189 Ill. 74, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 701.

**8. Bonus Distinguished from Tax.** — *Com. v. Bailey*, 20 Pa. Super. Ct. 218.

**703. 3. Copyright — Bound Volume.** — In *Holmes v. Hurst*, 174 U. S. 89, the court said: "It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes, and the word *book* as used in the statute is not to be understood in its technical sense of a bound volume, but any species of publication which the author selects to embody his literary product."

**Customs Duties.** — The unbound sheets of a scientific publication are a *book* within the Tariff Act prescribing a free list including "scientific *books* and periodicals devoted to

original scientific research." *In re Hempstead*, 95 Fed. Rep. 967; *Macmillan Co. v. U. S.*, 116 Fed. Rep. 1019.

**Book Account.** — See *Stieglitz v. O. J. Lewis Mercantile Co.*, 76 Mo. App. 275.

**705. 1a. Bookmaking** imports some method of registering bets. *People v. Bennett*, 113 Fed. Rep. 516.

**The Phrases "Bookmaking" and "Pool-selling"** in a contract, granting to certain persons the exclusive *bookmaking* and pool-selling privileges on a racecourse, "are but other names for betting and gambling on horse races, as in *bookmaking* the betting is with the *book-makers*, and in 'pool-selling' the betting is among the purchasers of the pool." *Ullman v. St. Louis Fair Assoc.*, 167 Mo. 273.

And see the title GAMING; HORSE RACING.

**706. 2. Boomage.** — See *Moss Point Lumber Co. v. Thompson*, 83 Miss. 499.

## BOOM COMPANIES.

By J. E. BRADY.

### 708. III. AUTHORITY OF LEGISLATURE WITH RESPECT TO BOOM COMPANIES

#### — 1. In General. — See notes 2, 3, 4.

Overflowing Lands of Riparian Owners — Use of Banks — Police Powers. — See notes 5, 6.

#### 709. 2. To Grant Exclusive Privileges. — See notes 1, 2.

#### IV. RIGHTS AND POWERS — 1. In General. — See note 4.

#### 710. See note 2.

**708. 2. May Condemn Land.** — *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586.

**3. Right to Improve Streams and Charge Toll.** — *West Branch Logging Co. v. Strong*, 196 Pa. St. 51; *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 707 [708].

A corporation organized to improve a stream does not gain incidentally the right to drive logs and impose tolls, where the statute requires the organization to be for the purpose of improving the stream and driving logs. *Northwestern Imp., etc., Co. v. O'Brien*, 75 Minn. 335.

**4. Legislature May Declare Highways.** — *Matter of Wilder*, 90 N. Y. App. Div. 262; *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 707 [708]. See also *Brewster v. J. & J. Rogers Co.*, 169 N. Y. 73; *Watkins v. Dorris*, 24 Wash. 636.

**5. Overflow of Lands Along Bank of Stream.** — See *Mullen v. Penobscot Log-Driving Co.*, 90 Me. 555.

**6. Use of Banks Without Compensation.** — See *Mullen v. Penobscot Log-Driving Co.*, 90 Me. 555.

**Private Stream.** — The legislature may not declare a nonnavigable stream to be a highway for the purpose of floating logs without making provision for compensation to the owners of land taken in improving the stream. *De Camp v. Thomson*, 16 N. Y. App. Div. 528, affirmed 159 N. Y. 436.

**709. 1. Exclusive Grants.** — *Mullen v. Penobscot Log-Driving Co.*, 90 Me. 555.

**2. Boom Entire by Obstructing Navigation May Be Authorized.** — Compare *Pascagoula Boom Co. v. Dixon*, 77 Miss. 587, 78 Am. St. Rep. 537.

**4. Easement of Private Persons.** — *Hutton v. Webb*, 126 N. Car. 897; *Watkins v. Dorris*, 24 Wash. 636; *Watkinson v. McCoy*, 23 Wash. 372. See also *Nester v. Diamond Match Co.*, 105 Fed. Rep. 567, 44 C. C. A. 606; *West Branch Logging Co. v. Strong*, 196 Pa. St. 51.

**710. 2. Right of Boom Companies Limited.** — *Watkinson v. McCoy*, 23 Wash. 372.

**Unauthorized Booms** "which prevent the speedy



**710.** 2. Interference with Navigation. — See note 4.

**711.** See notes 1, 2, 3.

**712.** 3. Interference with Rights of Riparian Proprietors — By Flooding Lands. — See note 1.

By Constructing Improper Works. — See note 2.

**713.** Flooding Caused by Authorized and Properly Constructed Boom. — See note 1.

4. Improving, Diverting, or Retarding Streams for Purposes of Floatage — Cannot Interfere with Other Uses Without Legislative Sanction. — See note 4.

**715.** 5. Compensation and Lien — *a.* GENERALLY — Regulation of Charges. — See note 1.

**716.** *b.* FOR DRIVING LOGS OF NONCONSENTING OWNERS — Authority to Drive Logs of Third Persons. — See notes 2, 3.

passage of rafts and logs down the stream" are public nuisances and may be removed as such. *Pascagoula Boom Co. v. Dixon*, 77 Miss. 587, 78 Am. St. Rep. 537.

**710.** 4. Streams May Be Used for Floating Logs, Just as They May Be Used for Vessels. — *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 710-712.

**711.** 1. May Not Needlessly Obstruct Stream. — *Nester v. Diamond Match Co.*, 105 Fed. Rep. 567, 44 C. C. A. 606; *Alabama Lumber Co. v. Keel*, 125 Ala. 603, 82 Am. St. Rep. 265, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 711 et seq.; *Pascagoula Boom Co. v. Dixon*, 77 Miss. 587, 78 Am. St. Rep. 537; *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 710-712.

2. Injury to Navigable Capacity of Stream. — But one may not maintain an action for an obstruction who has acquiesced in its maintenance and who does not show a special injury to himself. *Nester v. Diamond Match Co.*, 105 Fed. Rep. 567, 44 C. C. A. 606.

3. Use of Stream for Booming Not Paramount to Other Uses. — *Ward v. Grenville*, 32 Can. Sup. Ct. 524, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 711. See also *Pascagoula Boom Co. v. Dixon*, 77 Miss. 587, 78 Am. St. Rep. 537.

**712.** 1. *Sibley v. Penobscot Lumbering Assoc.*, 93 Me. 399; *Doucette v. Little Falls Imp., etc., Co.*, 71 Minn. 206; *Akin v. St. Croix Lumber Co.*, 88 Minn. 119; *Hueston v. Mississippi, etc., Boom Co.*, 76 Minn. 251; *Brewster v. J. & J. Rogers Co.*, 169 N. Y. 73; *Watkinson v. McCoy*, 23 Wash. 372; *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 710-712.

Flooding from Jams. — *Hunter v. Grande Ronde Lumber Co.*, 39 Oregon 448.

But where the flooding of the lands of a riparian owner is due to the negligence of a logging company the latter is liable. *Watkins v. Dorris*, 24 Wash. 636.

2. Works Improperly Constructed. — *Sibley v. Penobscot Lumbering Assoc.*, 93 Me. 399; *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819.

Burden of Proof. — *Gniadck v. Northwestern Imp., etc., Co.*, 73 Minn. 87.

Where the Defendants Were Not Authorized to Carry on the Business of Booming they were held liable for damages resulting to riparian owners

irrespective of the question of negligence. *Watkinson v. McCoy*, 23 Wash. 372.

Negligence Not Presumed. — Where the plaintiff showed that his lands had been flooded annually for a number of years by reason of the raising of a dam, he was held not to be entitled to a recovery in the absence of sufficient evidence to establish the defendant's negligence. *Ramgren v. McDermott*, 73 Minn. 368.

**713.** 1. Sudden Freshet — Where Boom Properly Constructed. — *Coyne v. Mississippi, etc., Boom Co.*, 72 Minn. 533, 71 Am. St. Rep. 508.

4. Cannot Interfere with Water Power. — *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 710-712 [713].

**715.** 1. Entire and Severable Contracts. — Where the compensation for booming a number of logs is payable in instalments it is not necessary for the contractor to perform fully before being entitled to receive pay, but a *pro tanto* recovery may be had for part performance. *Kerslake v. McInnis*, 113 Wis. 659.

Counterclaim. — The defendant in an action for compensation for driving logs may not interpose as a counterclaim a lien on his logs by one who drove them, the plaintiff having been negligent in performing his contract. Such facts might be shown in defense. *Gibson v. Trow*, 105 Wis. 288.

Failure of Stream. — In an action of assumption it was shown that the plaintiff was unable to complete the contract to drive the defendant's logs because of a falling of the water. It was held that such failure of the water excused the full performance. *Clarksville Land Co. v. Harriman*, 68 N. H. 374.

**716.** 2. Statutory Authority to Run Logs of Nonconsenting Owners. — See *Doyle v. Pelton*, 134 Mich. 398, 10 Detroit Leg. N. 475; *Boyle v. Musser*, 77 Minn. 153; *E. W. Backus Lumber Co. v. Scanlon-Gipson Lumber Co.*, 78 Minn. 438; *O'Brien v. Glasow*, 72 Minn. 135; *Gray's Harbor Boom Co. v. McAmant*, 21 Wash. 465; *East Hoquiam Boom, etc., Co. v. Neeson*, 20 Wash. 142; *Washougal River Imp., etc., Co. v. Skamania Logging Co.*, 23 Wash. 89.

Such a Statute Is Constitutional, and does not in its operation deprive one of property without due process of law. *Crane Lumber Co. v. Bellows*, 117 Mich. 482.

3. Right to Compensation from Third Persons. — *Doyle v. Pelton*, 134 Mich. 398, 10 Detroit Leg. N. 475; *Crane Lumber Co. v. Bellows*, 117 Mich. 482; *E. W. Backus Lumber Co. v. Scan-*

**716.** Lien in Such Cases. — See note 4.

**717.** When Right to Compensation Attaches. — See note 3.

Where the Owner Is Actually Driving His Own Logs. — See note 4.

**V. DUTIES AND LIABILITIES — 1. Degree of Care Generally — Not Liable**

**as Common Carriers or Insurers.** — See notes 5, 6.

Ballees for Hire. — See note 7.

**718.** 2. In Respect to Receiving and Driving Logs Tendered. — See note 1.

[**BORDER.** — See note 4a.]

Ion-Gipson Lumber Co., 78 Minn. 438; Boyle v. Musser, 77 Minn. 153; O'Brien v. Glasow, 72 Minn. 135; East Hoquiam Boom, etc., Co. v. Neeson, 20 Wash. 142; Gray's Harbor Boom Co. v. McAmman, 21 Wash. 465. See also Washougal River Imp., etc., Co. v. Skamania Logging Co., 23 Wash. 89.

**716. 4. Lien.** — See Doyle v. Pelton, 134 Mich. 398, 10 Detroit Leg. N. 475; E. W. Bachus Lumber Co. v. Scanlon-Gipson Lumber Co., 78 Minn. 438. See also Washougal River Imp., etc., Co. v. Skamania Logging Co., 23 Wash. 89; East Hoquiam Boom, etc., Co. v. Neeson, 20 Wash. 142.

A lien, however, does not attach to logs merely because they were taken past the booms of the company claiming the lien by the owner. Gray's Harbor Boom Co. v. McAmman, 21 Wash. 465.

**Assumpsit for Services.** — O'Brien v. Glasow, 72 Minn. 135.

**717. 3. When Right to Compensation Attaches.** — Weymouth v. Beatham, 93 Me. 525; Doyle v. Pelton, 134 Mich. 398, 10 Detroit Leg. N. 475.

**Driving the Logs to a Point Where They Can Be Conveniently Separated** is all that the law requires to give to the party doing the driving a right to compensation. Boyle v. Musser, 77 Minn. 153.

**4. No Lien Where Owner Driving His Logs.** — See Mullen Penobscot Log-Driving Co., 90 Me. 555; Washougal River Imp., etc., Co. v. Skamania Logging Co., 23 Wash. 89.

**5. Not Common Carriers.** — Crane v. Fry, (C. C. A.) 126 Fed. Rep. 281, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 717.

**6. Not Insurers.** — Crane v. Fry, (C. C. A.) 126 Fed. Rep. 278, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 717.

**Bridge Damaged by Floating Logs.** — Where one negligently allows logs to be sent down a stream, thereby damaging a bridge, and the injury to the bridge could have been averted, he is liable. Cue v. Breeland, 78 Miss. 864.

**7. Contract a Bailment for Hire.** — Crane v. Fry, (C. C. A.) 126 Fed. Rep. 278, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 717; Parks v. Libby, 92 Me. 133; Holway v. Machias Boom, 90 Me. 125; Palmer v. Penobscot Lumbering Assoc., 90 Me. 193.

**Loss by Overloading Boom.** — Where a loss was caused by the defendant overloading the boom of the plaintiff the latter was held not to be liable therefor and was allowed to recover compensation for services according to the contract. Hebard v. Shaw, 123 Mich. 514.

**Liability for Negligence.** — Where one under a contract for logging assumes control of the work he is liable for negligence. Sullivan v. Ross, 124 Mich. 287.

**718. 1. Duty as to Receiving and Driving.** — Mullen v. Penobscot Log-Driving Co., 90 Me. 555.

**4a.** The word *border* means "to approach," "to come near to," "to verge." It conveys the idea of immediate proximity. Handy v. Maddox, 85 Md. 553

# BOROUGHES.

BY J. E. BRADY.

**721. I. DEFINITION AND HISTORY** — In United States. — See note 1.

**722. II. CREATION** — Special Act. — See note 5.

**723. Incorporation by Courts** — Pennsylvania. — See notes 2, 3.

Statute of Incorporation Construed Strictly — Record Must Show Performance of Conditions. — See note 5.

**724. Notice of Proceedings to Incorporate** — What Must State. — See note 3.

Defect in Published Notice of Application — How Cured. — See note 5.

Facts Warranting Incorporation. — See note 6.

**III. BOUNDARIES** — 1. In General — Two or More Distinct Villages. — See note 8.

**721. 1. Applied to Incorporated Municipalities Only.** — See *State v. Minneapolis*, etc., R. Co., 76 Minn. 473, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 721.

**An Incorporated Borough Is Included Within the Word "Town"** as used in the *New Jersey* statute, providing for the incorporation of cities. *Stout v. Glen Ridge*, 59 N. J. L. 201.

**A Borough Is a Public Municipal Corporation**, and has within its sphere all the powers necessary for its corporate existence. *Ridley Park v. Citizens Electric Light, etc., Co.*, 7 Del. Co. Rep. (Pa.) 395, 9 Pa. Super. Ct. 615.

**722. 5. Constitutionality of Acts.** — Though the statute under which a borough was created has been declared unconstitutional in a proceeding against another borough existing under the same statute, that fact has no bearing as to the *de facto* existence of the borough in an action against its officers to restrain them from tearing down a building. *Coast Co. v. Spring Lake*, 56 N. J. Eq. 615.

**723. 2. Delegation of Powers.** — In proceedings for incorporation the Court of Quarter Sessions may not delegate its power of hearing and passing upon the evidence to a master appointed by the court. *In re Wayne*, 7 Del. Co. Rep. (Pa.) 533, 12 Pa. Super. Ct. 363.

**Annexation to City.** — The Court of Quarter Sessions may determine whether three-fifths of the taxable inhabitants have signed a petition to annex the borough to a city. *West New Castle Annexation*, 19 Pa. Co. Ct. 33.

**3. Application for Incorporation.** — *In re Old Forge Borough*, 5 Lack. Leg. N. (Pa.) 185, 7 Del. Co. Rep. (Pa.) 462.

**Contents of Petition.** — The petition must contain a detailed description of the boundaries of the proposed borough. *Riverton Borough*, 20 Pa. Co. Ct. 63, 6 Pa. Dist. 685.

**Minors Holding Property as Heirs** are not counted in ascertaining whether a majority of the freeholders have signed the petition for incorporation. *Alliance Borough Case*, 7 Northam. Co. Rep. (Pa.) 235.

**Jurisdiction** once having been obtained by the court it cannot be ousted by a remonstrance of the petitioner. *In re Old Forge Borough*, 5 Lack. Leg. N. (Pa.) 185, 7 Del. Co. Rep. (Pa.) 462.

**Incorporation Will Not Be Refused** because the proposed borough includes a large tract of unoccupied land. *In re Rouseville*, 21 Pa. Co. Ct. 262, affirmed 12 Pa. Super. Ct. 126.

**Vacating Decree.** — A decree incorporating a borough may be vacated by the Court of Quarter Sessions during the same term at which it was made. *In re Herndon*, 19 Pa. Super. Ct. 127.

But an appeal from a decree incorporating a borough may not be taken two years after it was entered, where in the meantime obligations have been entered into and a school district has been organized by the borough. *Morton Borough*, 8 Del. Co. Rep. (Pa.) 118, 15 Pa. Super. Ct. 466.

**5. Record Must Show Performance of Condition.** — *In re Pyne*, 6 Lack. Leg. N. (Pa.) 124.

**724. 3. Notice of Proceedings.** — See *In re Linton*, 5 Pa. Super. Ct. 36, 40 W. N. C. (Pa.) 525.

**5. Defect in Published Notice of Petition.** — Although the objecting parties had notice themselves they may still object that others did not have notice. *Pyne Borough*, 6 Lack. Leg. N. (Pa.) 124.

**6. Facts Warranting Incorporation.** — *Smithfield Borough*, 23 Pa. Co. Ct. 583, 30 Pittsb. Leg. J. N. S. (Pa.) 433; *In re Alliance*, 7 Northam. Co. Rep. (Pa.) 396; *West Homestead Borough Case*, 31 Pittsb. Leg. J. N. S. (Pa.) 172.

The court should be satisfied of the necessity of incorporation before it is justified in making a decree incorporating a borough. *Pyne Borough*, 6 Lack. Leg. N. (Pa.) 124.

In *Wall Borough Case*, 30 Pittsb. Leg. J. N. S. (Pa.) 308, it was held that a petition would be refused where it appeared that the town was small and the land to be included uneven and rough, the greater part being included for purposes of taxation.

**The Increase of Township Taxes** which will follow the incorporation of a borough is not a sufficient ground for an exception to the incorporation. *Cross Roads Borough*, 13 York Leg. Rec. (Pa.) 85.

**8. Separate Groups of Houses** between which is land not used for dwelling purposes may be incorporated into a borough. *In re Swogerville*, 12 Pa. Super. Ct. 118.

**725.** **Extent of Territory — How Determined — Judicial Discretion.** — See note 1.

**2. Annexation of Territory.** — See note 3.

**Description of Boundaries — Courses and Distances.** — See note 4.

**What Petition for Annexation Must State.** — See note 5.

**3. Division into Wards.** — See note 6.

**726.** **Manner of Procedure in Dividing Boroughs into Wards.** — See note 1.

**IV. POWERS, DUTIES, AND LIABILITIES — 1. In General.** — See note 4.

**727.** **Incorporation of Borough into City.** — See note 1.

**Adjustment of Liabilities of a Borough Accruing Prior to Its Erection.** — See note 2.

**2. Governing Bodies.** — See note 6.

**728.** **Vacation of Seat — Removal of Councilman.** — See note 2.

**Duty of Burgesses to Sign Ordinances.** — See note 7.

**725. 1. Extent of Territory Within Judicial Discretion.** — *In re Old Forge Borough*, 5 Lack. Leg. N. (Pa.) 185, 7 Del. Co. Rep. (Pa.) 462; *In re Alliance*, 19 Pa. Super. Ct. 179; *In re Rouseville*, 12 Pa. Super. Ct. 126.

**Lands Included.** — Land will not be included within a borough for the reason alone that the land is owned by a railroad and the borough may at a future time desire to bridge over the property. *Riverton Borough*, 18 Pa. Co. Ct. 539, 6 Pa. Dist. 29.

**An Objection to the Inclusion of Farm Lands** within the limits of a borough must be raised by the owners of the land. *Cross Roads Borough*, 13 York Leg. Rec. (Pa.) 85.

**3. Annexation Proceedings Will Not Be Set Aside After Approval** by the court if the statutory requirements have been complied with. *Edwardsville Borough*, 8 Kulp (Pa.) 339.

**4. Description of Boundaries — Courses and Distances.** — *In re Moosic*, 12 Pa. Super. Ct. 353.

**5. Allegation as to Character of Petitioners.** — A petition is not invalid though it refers to the petitioners as "taxables" instead of taxable inhabitants. *West New Castle Annexation*, 19 Pa. Co. Ct. 33.

**6. The Court of Quarter Sessions** is vested with jurisdiction to constitute a borough, annexed to a city, a new ward. *Morrellville Borough Annexation*, 20 Pa. Co. Ct. 257.

**Petition — Signatures — Review.** — The petition should be signed by at least twenty freeholders; but the same number of signers is not necessary in the case of a petition for a review, since the court might of its own motion order a review without any petition. *Freeland Borough*, 22 Pa. Co. Ct. 403.

**726. 1. Not Necessary to State Specific Number of Wards.** — *In re South Ward Div.*, 7 Del. Co. Rep. (Pa.) 428, 9 Kulp (Pa.) 387, 13 York Leg. Rec. (Pa.) 15.

**Invalid Report.** — A report should be set aside where it appears that the commissioners held no meeting within the borough and did not visit the land to be incorporated. *Sharpsburg Borough Cas*, 30 Pittsb. Leg. J. N. S. (Pa.) 167, 13 York Leg. Rec. 156.

**4. Application of Borough Funds.** — In *England* the borough fund of a municipal corporation, where there is no surplus, cannot be applied lawfully, either under the provisions of the *Municipal Corporations Act of 1882*, or of the *Borough Funds Act of 1872*, to indemnify the

chief constable of the borough for costs incurred by him in appearing by counsel as a party to an appeal to Quarter Sessions, by the holder of a license for the selling of intoxicating liquors, from the refusal of the licensing justices to grant a renewal of the license. Query, whether if there be a surplus, it can be applied legally to the payment of such costs? *Tynemouth v. Atty.-Gen.*, (1899) A. C. 293, *affirming* (1898) 1 Q. B. 604.

**727. 1. A Local Statute Is Not Repealed** by the incorporation of a part of a township into a borough. *Com. v. Ayers*, 17 Pa. Super. Ct. 352.

**2. In New Jersey**, where a borough is incorporated out of a township, its liability for debts of the township contracted previous to incorporation is provided for by Laws N. J., 1896, p. 270. *Lodi Tp. v. Hackensack Imp. Commission*, 60 N. J. Eq. 229.

**6. In New Jersey** the general government of boroughs is provided for by statute (P. L. 1897, p. 285). *Smith v. Hightstown*, (N. J. 1904) 57 Atl. Rep. 901.

**Quorum of Council.** — Members of a borough council, present at a meeting, though not voting, are to be counted for the purpose of making a quorum. *Com. v. Schubmehl*, 3 Lack. Leg. N. (Pa.) 186.

**Under the English Bankruptcy Act of 1883**, a bankrupt is disqualified, not only for being elected to, but also for holding or exercising, the office of borough councilor. An information in the nature of a quo warranto lies to oust a bankrupt from holding or exercising such office. *Rex v. Beer*, (1903) 2 K. B. 693.

**Notice of Adjourned Meeting.** — Councilmen are not entitled to notice of an adjourned meeting of a borough council. *Com. v. Fleming*, 23 Pa. Super. Ct. 404.

**728. 2. Disqualification of Councilman.** — It was held that a councilman who, being disqualified to hold office for nonpayment of a tax, resigned after paying the tax, might be appointed to fill the vacancy. *Com. v. Giles*, 2 Lack. Leg. N. (Pa.) 223.

**A Vacancy in the Council** is filled by the council, not by the Court of Quarter Sessions. *In re Strasburg*, 16 Lanc. L. Rev. (Pa.) 191, 8 Pa. Dist. 544.

**7. Acts Passed Over Veto of Burgesses.** — Where the veto of the burgess is not properly recorded an ordinance passed over the veto is valid. *Galloway v. Gilmour*, 3 Pa. Dist. 333.

- 729.** Borough Auditors. — See note 3.  
**3.** Streets and Sidewalks. — See note 7.  
**730.** Notice. — See note 1.  
**4.** Licenses and Taxes. — See note 3.

**734.** [BOTANICAL GARDEN. — See note 1a.]

**BOTH.** — See note 3.

**735.** BOTTLE. — See note 1.

**729. 3. Compensation.** — In *England* an elective auditor of a borough, holding under the Municipal Corporations Act of 1882, is not entitled to any remuneration for his services in auditing the accounts of the borough. *Thomas v. Devonport*, (1900) 1 Q. B. 16.

**7. Liability for Condition of Streets.** — *Canfield v. East Stroudsburg*, 19 Pa. Super. Ct. 649; *Brown v. Towanda*, 24 Pa. Super. Ct. 378.

**Alleys.** — The degree of care required in the case of streets is not called for in the case of alleys. *Musick v. Latrobe*, 184 Pa. St. 375, 42 W. N. C. (Pa.) 209.

**730. 1. Borough Entitled to Actual or Implied Notice.** — *Boyle v. Mahanoy City*, 19 Pa. Co. Ct. 195, affirmed 187 Pa. St. 1. See also *Dutton v. Lansdowne*, 7 Del. Co. Rep. (Pa.) 400, 10 Pa. Super. Ct. 204, 44 W. N. C. (Pa.) 290.

**Latent Defect.** — A borough is not liable for an injury from a latent defect in a sidewalk. *McClosky v. Dubois*, 4 Pa. Super. Ct. 181, 40 W. N. C. (Pa.) 214; *Fitzpatrick v. Darby*, 184 Pa. St. 645.

**3. Power to Exact License Fees.** — A borough in *Pennsylvania* has power to exact license fees

from an electric light and power company for poles erected in its streets. *Ridley Park v. Citizen's Electric Light, etc., Co.*, 9 Pa. Super. Ct. 620; *Lansdowne v. Citizens Electric Light, etc., Co.*, 7 Del. Co. Rep. (Pa.) 399, 9 Pa. Super. Ct. 620.

**734. 1a. "A Botanical Garden** means, primarily, a collection of plants, shrubs, etc., that would assist in the acquisition and advancement of botanical knowledge, — not large quantities of flowering plants for merely ornamental purposes of the private grounds of a gentleman's residence, but specimens, whether flowering, or ornamental, or otherwise, that would aid a botanist in imparting botanical knowledge." Per Rogers, J., in *Pierce v. Brown University*, 21 R. I. 392.

**3. The Word Both Means Either**, as used in a joint deed for the maintenance and support of the grantors so long as they *both* shall live. *Greenbrier Bank v. Effingham*, 51 W. Va. 267.

**735. 1. Customs Duties.** — Old *bottles* capable of being used as *bottles* are not junk, but are properly assessed as *bottles* under the Tariff Act. *Carberry v. U. S.*, 116 Fed. Rep. 773.

## BOTTOMRY AND RESPONDENTIA.

By A. W. VARIAN.

**737. I. DEFINITION — A Bottomry Contract.** — See note 2.

**Respondentia Bond.** — See note 3.

**II. FORM, REQUISITES, AND GENERAL NATURE OF THE CONTRACT —**

**1. General Principles** — Construction — Presumption — Extrinsic Evidence. — See note 9.

**738.** What Law Determines. — See note 2.

**As Collateral Security.** — See note 5.

**739.** Personal Liability of Owner. — See note 2.

**2. Maritime Risk.** — See note 3.

**740. 3. Maritime Interest.** — See note 1.

**737. 2. Davies v. Soelberg**, 24 Wash. 308.

**A Document in Substance a Bottomry Bond** is not invalid because it is called something else. *The Haabet*, (1899) P. 295, 81 L. T. N. S. 463.

**3. Respondentia Bond.** — See *The Mauna Loa*, 76 Fed. Rep. 829.

**9. Liberally Construed.** — *O'Brien v. Miller*, 168 U. S. 287.

**738. 2. What Law Governs.** — *Hanschell v. Swan*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 304.

**5. Lender May Take Additional Security.** — *The Haabet*, (1899) P. 295.

A draft given to secure the same debt for which a bottomry bond has been given does not

mature until the safe arrival of the vessel. *Davies v. Soelberg*, 24 Wash. 308.

**739. 2. No Personal Liability of Owner.** — *Davies v. Soelberg*, 24 Wash. 308.

**If the Agreement Binds the Owner Personally.** — See *Hanschell v. Swan*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 304.

**Personal Liability in Event of Safe Arrival.** — *The Haabet*, (1899) P. 295.

**3. Marine Risk Essential.** — *The Haabet*, (1899) P. 295, 81 L. T. N. S. 463.

**740. 1. Maritime Interest Not Essential.** — *The Haabet*, (1899) P. 295; *Davies v. Soelberg*, 24 Wash. 308.

Including a premium of ten per cent. of the

**741.** IV. BOTTOMRY BY THE MASTER — 2. Under What Circumstances Justified. — See notes 6, 7.

**742.** 3. For What Purposes Justified. — See note 7.

**744.** 4. Bottomry of the Cargo. — See note 1.

He May Hypothecate the Cargo. — See note 4.

**745.** VI. THE LENDER ON BOTTOMRY — 1. Who May Loan — Consignee. — See note 3.

**747.** 3. Burden of Proof — Presumption — Shifting of Burden of Proof. — See note 1.

VII. REPAYMENT OF ADVANCES — 1. When Due and Payable. — See note 6.

**748.** VIII. WHAT PROPERTY BOUND. — See note 6.

Ship and Cargo Property of Different Persons. — See note 9.

**749.** Freight. — See note 3.

BOUGHT. — See note 12.

amount lent in the bond and providing for the payment of interest at eight per cent. on the whole amount will not invalidate the bond. *The Northern Light*, 106 Fed. Rep. 748.

**741.** 6. When Funds of Owner Available. — *The Mauna Loa*, 76 Fed. Rep. 829.

**7.** Funds on Owner's Credit. — *The Mauna Loa*, 76 Fed. Rep. 829.

**742.** 7. Bottomry Justified Only by Necessity. — *Hanschell v. Swan*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 304; *Davies v. Soelberg*, 24 Wash. 308.

**744.** 1. See *The Mauna Loa*, 76 Fed. Rep. 829.

**4.** Master Should Communicate with Owner of Cargo. — See *O'Brien v. Miller*, 168 U. S. 287.

**745.** 3. Insurer. — The fact that the lenders themselves insured the risk does not invalidate the bond. *The Haabet*, (1899) P. 295.

**747.** 1. Shifting of Burden of Proof. — See *The Northern Light*, 106 Fed. Rep. 748.

**6.** A Stipulation in a Bottomry Bond that should the ship put into a port of refuge to repair the loan would become due does not invalidate the bond if the parties contemplated a maritime risk. *The Haabet*, (1899) P. 295, 81 L. T. N. S. 463.

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**748.** 6. Damages Recovered by Owner on Account of Loss. — See *O'Brien v. Miller*, 168 U. S. 287.

**9.** Hypothecation of Cargo — Ship and Cargo Property of Different Owners. — *The Chioggia*, (1898) P. 1, 77 L. T. N. S. 472.

**749.** 3. *The Chioggia*, (1898) P. 1, 77 L. T. N. S. 472.

**12.** Bought and Paid for — Indian Lands. — In construing the Act of Congress of July 28, 1891, providing that lands occupied by Indians who have *bought* and paid for the same may be leased under the authority of the secretary of the interior, the court said: "Reflections upon the history and policy of the government in its dealings with the Indians go far to support the position that Congress did not intend to limit the words '*bought* and paid for' to lands which had been actually paid for in cash, or to lands which had been patented, and the title thereto actually parted with, by the United States. It was doubtless the intention of Congress that the statute and those words should apply to all lands which had been purchased by the Indians, either by the payment of money, or exchange or surrender of the possession of other property." *Strawberry Valley Cattle Co. v. Chipman*, 13 Utah 454.

## BOUGHT AND SOLD NOTES.

**751. I. DEFINITION AND FORM** — Bought and Sold Notes. — See note 1.

**752. III. NOTES AS EVIDENCE TO SATISFY THE STATUTE OF FRAUDS** — Where Notes Agree and There Is No Signed Entry in Broker's Book. — See note 3.

**753. Notes Differing or Imperfect Where There Is No Signed Entry.** — See note 2.  
A Mere Immaterial Difference. — See note 6.

**754.** See note 1.

**BOULEVARD.** — See note 3.

**BOUND.** — See note 4.

**751. 1. Definition.** — Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, *quoting* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 751, the court saying, however, that "some authorities hold that the sold note is delivered to the buyer and the bought note to the seller;" Murray v. Doud, 167 Ill. 368, 59 Am. St. Rep. 297; Reid v. Alaska Packing Co., 43 Oregon 429, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 751.

**752. 3. Notes May Satisfy Statute of Frauds.** — Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561; Murray v. Doud, 167 Ill. 368, 59 Am. St. Rep. 297, holding further that interest was recoverable as damages for breach of the contract; Reid v. Alaska Packing Co., 43 Oregon 429.

**753. 2. Material Variance Between Notes.** — Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753.

**Party's Own Signature to Bought Note.** — See Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561.

**6. Mere Immaterial Variance.** — Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753.

**754. 1. Material Variance.** — Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754.

**3. A Boulevard Is a Street or Highway** within the meaning of an act making municipalities liable for defects in streets, etc. Burridge v. Detroit, 117 Mich. 557. See also West Chicago v. Farber, 171 Ill. 146.

**Speedway a Boulevard.** — "The word *boulevard*, as now commonly used in this commonwealth, has not a very definite meaning. It sometimes means little more than a wide street or highway. In the Century Dictionary it is said: 'The name is now sometimes extended to any street or walk encircling a town, and also to a street which is of especial width, is given a park-like appearance by reserving spaces at the sides or centre for shade trees, flowers, seats, and the like, and is not used for heavy teaming.' It seems to us that the 'speedway' may properly be said to be a *boulevard*, within the meaning of that word in the conditions of the deeds." Per Field, C. J., in Howe v. Lowell, 171 Mass. 575.

**4. Bound in the Sense of Concluded.** — See Finch v. Finch, 131 N. Car. 271.

# BOUNDARIES.

BY BRISCOE BALDWIN CLARK.

## 759. II. DESCRIPTION — 1. Methods of Description — The Statute of Frauds. —

See note 3.

**760. 2. Elements of Description — a. IN GENERAL — The Relative Value of the Various Elements. —** See notes 4, 5.

**761. When the Calls Are False, Mistaken, or Repugnant. —** See note 1.

**All the Elements Need Not Be Employed. —** See note 2.

**b. MONUMENTS — (1) General Principles — Defined. —** See note 3.

**Conflicting Monuments. —** See note 4.

**762. Monument Corresponding with Courses and Distances. —** See note 1.

**Beginning Corner. —** See note 4.

**759. 3.** *Sheafer v. Mitchell*, 109 Tenn. 181, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 759.

**760. 4. Reason for Preference as Between Several Elements of Description — United States. —** *Ulman v. Clark*, 100 Fed. Rep. 180; *Belding v. Hebard*, 103 Fed. Rep. 532, 43 C. C. A. 296; *Watkins v. King*, 118 Fed. Rep. 524, 55 C. C. A. 290.

*California. —* *Miller v. Grunsky*, (Cal. 1901) 66 Pac. Rep. 858; *Dutra v. Pereira*, 135 Cal. 320.

*Georgia. —* *Hammond v. George*, 116 Ga. 792, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 760.

*Maryland. —* *Long v. Ragan*, 94 Md. 462.

*Pennsylvania. —* *Lehigh Valley Coal Co. v. Beaver Lumber Co.*, 203 Pa. St. 544; *Green v. Schrack*, 16 Pa. Super. Ct. 26; *Richardson v. McKeesport*, 18 Pa. Super. Ct. 199.

*South Carolina. —* *Connor v. Johnson*, 53 S. Car. 90.

**5. Rule Not Inflexible. —** *Connor v. Johnson*, 53 S. Car. 90, 59 S. Car. 115; *Huff v. Crawford*, 89 Tex. 214.

**761. 1.** *Ulman v. Clark*, 100 Fed. Rep. 180; *Belding v. Hebard*, 103 Fed. Rep. 532, 43 C. C. A. 296; *Hammond v. George*, 116 Ga. 792, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 761; *Sellman v. Sellman*, (Tex. Civ. App. 1903) 73 S. W. Rep. 48.

**2. All the Elements of Description Not Necessary — Designation by Particular Name. —** *Robinson v. Atkins*, 105 La. 790; *Carter v. Clark*, 92 Me. 225 (description held sufficiently certain); *Sheafer v. Mitchell*, 109 Tenn. 181, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 759.

**Where a Dwelling House Situated in a Comparatively Large Tract** of land is leased merely by description of street number, it has been held that the nearest fence or hedge may ordinarily be presumed to be the boundary, unless the contrary is made to appear. *Okie v. Person*, 23 App. Cas. (D. C.) 170.

**3. Corner of Adjoining Landowner** may constitute a monument. *Abbey v. McPherson*, 1 Kan. App. 177.

**Boundary Line of Another Tract** Is a monument. *Miller v. Grunsky*, (Cal. 1901) 66 Pac. Rep. 858.

**A Witness or Bearing Tree** is not an established corner, but merely a designated object, from which in connection with the field notes, the location of the corner may be ascertained. *Stadin v. Helin*, 76 Minn. 496.

**4. Conflicting Monuments — Preference — General Rule. —** *Ulman v. Clark*, 100 Fed. Rep. 180; *Kentucky Land, etc., Co. v. Crabtree*, 113 Ky. 922 (course should be taken which will satisfy most of the calls for natural monuments); *Cincinnati Southern R. Co. v. Shakers Soc.*, 78 S. W. Rep. 130, 25 Ky. L. Rep. 1339; *Bell County Land, etc., Co. v. Hendrickson*, 68 S. W. Rep. 842, 24 Ky. L. Rep. 371; *Hitchcock v. Southern Iron, etc., Co.*, (Tenn. Ch. 1896) 38 S. W. Rep. 588; *Utley v. Smith*, (Tex. Civ. App. 1895) 32 S. W. Rep. 906; *Cox v. Finks*, (Tex. Civ. App. 1897) 41 S. W. Rep. 95; *Morgan v. Mowles*, (Tex. Civ. App. 1901) 61 S. W. Rep. 155; *Masterson v. Ribble*, (Tex. Civ. App. 1904) 78 S. W. Rep. 358; *Lyon v. Waggoner*, (Tex. Civ. App. 1904) 83 S. W. Rep. 46 (calls which produce the fewest conflicts should be adopted).

**762. 1. When One Monument Coincides with Courses and Distances and the Other Not. —** *Hostetter v. Los Angeles Terminal R. Co.*, 108 Cal. 38; *Warden v. Harris*, (Tex. Civ. App. 1898) 47 S. W. Rep. 834.

**4. Survey Must Be Commenced at Beginning Corner. —** *Whitehouse Cannel Coal Co. v. Wells*, 74 S. W. Rep. 736, 25 Ky. L. Rep. 60; *Allaire v. Ketcham*, 55 N. J. Eq. 168; *Davis v. Coleman*, 16 Tex. Civ. App. 310; *Halsell v. McCutchen*, (Tex. Civ. App. 1901) 64 S. W. Rep. 72. *Compare* *Shrake v. Laffin*, (Neb. 1902) 92 N. W. Rep. 184.

In *Cox v. Finks*, (Tex. Civ. App. 1897) 41 S. W. Rep. 95, it was held that the beginning corner given in the field notes was of no more value than another corner found upon the ground. *Compare* *Wilkins v. Clawson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 732.

**Where the Beginning Corner Cannot Be Established** the survey should start at the first known corner. *Muse v. Caddell*, 126 N. Car. 265.

**If a Preceding Monument Cannot Be Located**, a subsequent monument may be used and the preceding monument located by courses and



**763.** Intention of the Parties. — See note 2.

Metes and Bounds. — See note 4.

**764.** See note 1.

(2) *Natural Monuments* — (a) *Defined*. — See notes 3, 6, 7.

(b) *Control Other Calls* — *Presumption*. — See note 9.

**765.** See note 1.

distances reversed. *Brudin v. Inglis*, 121 Mich. 410.

**763. 2. The Beginning Corner Is of No Greater Dignity than Any Other Known Corner.** — *Belding v. Hebard*, 103 Fed. Rep. 532, 43 C. C. A. 296; *Tucker v. Satterthwaite*, 123 N. Car. 511, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 763.

**4. Conveyance by Metes and Bounds.** — *Huntress v. Portwood*, 116 Ga. 351, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 763; *Adkins v. Quest*, 79 Mo. App. 36; *Mires v. Summerville*, 85 Mo. App. 183; *Hill v. Broadbent*, 25 Ont. App. 159.

**764. 1. Where Quantity Exceeds or Falls Below That Specified in Deed.** — *Kulas v. McHugh*, 114 Iowa 188; *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364.

**3. Streams.** — *Pitman v. Nunnally*, (Ky. 1895) 32 S. W. Rep. 606; *Park v. Wilkinson*, 21 Utah 279; *Lampman v. Van Alstyne*, 94 Wis. 417.

**"Mouth of Stream."** — *Rowe v. Cape Fear Lumber Co.*, 133 N. Car. 433.

**6. Highways and Streets.** — *McCutcheon v. Rawleigh*, 76 S. W. Rep. 50, 25 Ky. L. Rep. 549.

**7. Walls — Fences — Trees — Hedges — Springs — Rocks.** — *Ulman v. Clark*, 100 Fed. Rep. 180.

**Hedge.** — At best, a spreading hedge, not trimmed every year, is a poor monument of a boundary line. *Bright v. New Orleans R. Co.*, (La. 1905) 38 So. Rep. 494.

**9. All Lands Supposed to Be Actually Surveyed.** — *Morgan v. Mowles*, (Tex. Civ. App. 1901) 61 S. W. Rep. 155; *Burge v. Poindexter*, (Tex. Civ. App. 1900) 56 S. W. Rep. 81.

**765. 1. Natural Monuments When Found Fix the Limits** — *United States*. — *Koons v. Bryson*, 69 Fed. Rep. 297, 25 U. S. App. 368; *Garrard v. Silver Peak Mines*, 82 Fed. Rep. 578; *Ulman v. Clark*, 100 Fed. Rep. 180; *Belding v. Hebard*, 103 Fed. Rep. 532, 43 C. C. A. 296; *Watkins v. King*, 118 Fed. Rep. 524, 55 C. C. A. 290; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, (C. C. A.) 129 Fed. Rep. 668.

*Alabama*. — *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149.

*Arizona*. — *Bird v. Noon*, (Ariz. 1904) 76 Pac. Rep. 592; *Meyer-Clarke-Rowe Mines Co. v. Steinfeld*, (Ariz. 1905) 80 Pac. Rep. 400.

*California*. — *Freeman v. Bellegarde*, 108 Cal. 179, 49 Am. St. Rep. 76; *Bullard v. Kempff*, 119 Cal. 9.

*Connecticut*. — *Beach v. Whittlesey*, 73 Conn. 530.

*Delaware*. — *Quillen v. Betts*, 1 Penn. (Del.) 53.

*Georgia*. — *Hammond v. George*, 116 Ga. 792, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 764.

*Iowa*. — *Dows Real Estate, etc., Co. v. Emerson*, (Iowa 1904) 99 N. W. Rep. 724.

*Kansas*. — *Abbey v. McPherson*, 1 Kan. App. 177.

*Kentucky*. — *Pitman v. Nunnally*, (Ky. 1895)

32 S. W. Rep. 606; *Simpkins v. Wells*, (Ky. 1897) 42 S. W. Rep. 358 (call to beginning monument actual distance one hundred and forty-one poles; call for distance twenty poles); *Hunter v. Witt*, (Ky. 1899) 50 S. W. Rep. 985 (call for meander of stream); *Asher Lumber Co. v. Duff*, 59 S. W. Rep. 489, 22 Ky. L. Rep. 956; *Wisconsin Chair Co. v. Columbia Finance, etc., Co.*, 60 S. W. Rep. 717, 22 Ky. L. Rep. 1374; *Allen v. Pulliam*, 66 S. W. Rep. 722, 23 Ky. L. Rep. 2129; *Kentucky Land, etc., Co. v. Crabtree*, 113 Ky. 922; *McCutcheon v. Rawleigh*, 76 S. W. Rep. 50, 25 Ky. L. Rep. 549; *Crech v. Johnson*, (Ky. 1903) 76 S. W. Rep. 185; *Tarvin v. Walkers Creek Coal, etc., Co.*, (Ky. 1904) 80 S. W. Rep. 504.

*Louisiana*. — *Booth v. Buras*, 104 La. 614 (bayous); *Leonard v. Forbing*, 109 La. 220 (control courses and distances); *Hall v. Caplis*, 109 La. 483.

*Maine*. — *Whitcomb v. Dutton*, 89 Me. 212.

*Massachusetts*. — *McKenzie v. Gleason*, 184 Mass. 452, 100 Am. St. Rep. 566.

*Michigan*. — *Woodbury v. Venia*, 114 Mich. 251; *Brown v. Milliman*, 119 Mich. 606; *Brudin v. Inglis*, 121 Mich. 410 (controls quantity).

*Minnesota*. — *Kleven v. Gunderson*, (Minn. 1905) 104 N. W. Rep. 4.

*Missouri*. — *Whitehead v. Atchison*, 136 Mo. 485; *Burnham v. Hitt*, 143 Mo. 414; *Johnson v. Bowlware*, 149 Mo. 451; *Patton v. Fox*, 179 Mo. 525.

*New Hampshire*. — *Bartlett v. La Rochelle*, 68 N. H. 211; *Heywood v. Wild River Lumber Co.*, 70 N. H. 24.

*New Mexico*. — *Canavan v. Dugan*, 10 N. Mex. 316.

*New York*. — *Wilcox v. Bread*, 157 N. Y. 713; *Singer v. New York*, 47 N. Y. App. Div. 42, affirmed 165 N. Y. 658; *Lewis v. Upton*, 52 N. Y. App. Div. 617.

*North Carolina*. — *Bowen v. Gaylord*, 122 N. Car. 816; *Tucker v. Satterthwaite*, 123 N. Car. 511; *Echerd v. Johnson*, 126 N. Car. 409; *Wiseman v. Green*, 127 N. Car. 288 (changing west call to east); *Rowe v. Cape Fear Lumber Co.*, 133 N. Car. 433; *Elliott v. Jefferson*, 133 N. Car. 207.

*Ohio*. — *Ziska v. Schutt*, 10 Ohio Cir. Dec. 289, 19 Ohio Cir. Ct. 625 (controls distances).

*Oregon*. — *Johnson v. Tomlinson*, 41 Oregon 198; *Albert v. Salem*, 39 Oregon 466.

*Pennsylvania*. — *Miller v. Cramer*, 190 Pa. St. 315 (controls quantity); *Pringle v. Rogers*, 193 Pa. St. 94; *Miller v. Cure*, 205 Pa. St. 168; *Rook v. Greenwalt*, 17 Pa. Co. Ct. 642; *Richardson v. McKeesport*, 18 Pa. Super. Ct. 199; *Rook v. Greenwald*, 22 Pa. Super. Ct. 641; *Dunlap v. Reardon*, 24 Pa. Super. Ct. 35.

*Tennessee*. — *Duffield v. Spence*, (Tenn. Ch. 1897) 51 S. W. Rep. 492; *Turnage v. Kenton*, 102 Tenn. 328 (state grant); *Morris v. Milner*, 104 Tenn. 485.

*Texas*. — *Mock v. Hatcher*, (Tex. Civ. App.

**769. Monuments Need Not Have Been Seen by the Parties.** — See note 1.

Necessity for Actual Fixed Monuments. — See note 2.

**771. (3) Artificial Monuments** — (a) Defined. — See note 1.

(b) Marked Lines. — See note 2.

1897) 43 S. W. Rep. 30; *Bell v. Preston*, 19 Tex. Civ. App. 375; *Warden v. Harris*, (Tex. Civ. App. 1898) 47 S. W. Rep. 834; *Allen v. Worsham*, (Tex. Civ. App. 1899) 49 S. W. Rep. 525; *Koch v. Poerner*, (Tex. Civ. App. 1900) 55 S. W. Rep. 386 (controls calls for adjoining survey); *Burge v. Poindexter*, (Tex. Civ. App. 1900) 56 S. W. Rep. 81; *Wiley v. Lindley*, (Tex. Civ. App. 1900) 56 S. W. Rep. 1001; *Lincoln v. Waddell*, (Tex. Civ. App. 1900) 59 S. W. Rep. 613; *Stacy v. Greenwade*, 26 Tex. Civ. App. 277; *Griffin v. Barbee*, 29 Tex. Civ. App. 325.

*Utah*. — *Park v. Wilkinson*, 21 Utah 279.

*Vermont*. — *Fullam v. Foster*, 68 Vt. 590; *Sowles v. Butler*, 71 Vt. 271.

*Virginia*. — *Clarkston v. Virginia Coal, etc., Co.*, 93 Va. 258 ("top of ridge" held to control courses and distances).

*West Virginia*. — *Mays v. Hinchman*, (W. Va. 1905) 50 S. E. Rep. 823.

*Wisconsin*. — *Lampman v. Van Alstyne*, 94 Wis. 417.

**Unstable Monuments.** — Courses and distances will control a natural monument, where the position of the latter is shown to be unstable. *Smith v. Hitchison*, 104 Tenn. 394.

If a natural monument, such as a spring, shifts its location, the boundary line, of course, remains at the original location of the spring. *Ballinger v. Stinnett*, (Tenn. Ch. 1900) 59 S. W. Rep. 1044.

**769. 1. Monuments Need Not Have Been Seen by the Parties.** — See *Bell v. Preston*, 19 Tex. Civ. App. 375 (office survey intending to follow previous actual surveys, but containing erroneous calls for monuments).

**2. Must Be Actual Fixed Monuments — Places Determined.** — *Hammond v. George*, 116 Ga. 792, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 769; *De Long v. Baldwin*, 111 Mich. 466; *Bartlett v. La Rochelle*, 68 N. H. 211; *Washington Rock Co. v. Young*, (Utah 1905) 80 Pac. Rep. 382, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 769.

**771. 1. Natural Monuments Defined.** — A party-wall called for as a boundary is a monument within the rule that monuments control calls for distances. *Medara v. Du Bois*, 187 Pa. St. 437.

**2. Marked Lines — Next in Importance to Natural Monuments.** — *England*. — *Barnard v. De Charleroy*, 81 L. T. N. S. 497.

*United States*. — *Martin v. Hughes*, 98 Fed. Rep. 556, 39 C. C. A. 160; *Platt v. Vermillion*, (C. C. A.) 99 Fed. Rep. 356 (governs call in field notes for adjoining survey); *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, (C. C. A.) 129 Fed. Rep. 668.

*California*. — *Wheeler v. Benjamin*, 136 Cal. 51 (controls map); *Kaiser v. Dalto*, 140 Cal. 167.

*Georgia*. — *Leverett v. Bullard*, 121 Ga. 534.

*Illinois*. — *Joliet v. Werner*, 166 Ill. 34; *Decatur v. Niedermeyer*, 168 Ill. 68 (controls plat of survey); *Hewes v. Crete*, 68 Ill. App. 305.

*Iowa*. — *Thrush v. Graybill*, 110 Iowa 585 (actual survey controls recorded plat).

*Kentucky*. — *Willoughby v. Willoughby*, (Ky. 1898) 48 S. W. Rep. 427 (marked line controlling call for straight line); *Kant v. Rice*, (Ky. 1900) 55 S. W. Rep. 203; *Ross v. Veech*, 58 S. W. Rep. 475, 22 Ky. L. Rep. 578 (controls fence); *Wisconsin Chair Co. v. Columbia Finance, etc., Co.*, 60 S. W. Rep. 717, 22 Ky. L. Rep. 1374; *Johnson v. Harris*, 68 S. W. Rep. 844, 24 Ky. L. Rep. 449; *Whitehouse Cannel Coal Co. v. Wells*, 74 S. W. Rep. 736, 25 Ky. L. Rep. 60; *McCormick v. Applegate*, 76 S. W. Rep. 511, 25 Ky. L. Rep. 914; *Crech v. Johnson*, 116 Ky. 441.

*Louisiana*. — *Hall v. Caplis*, 109 La. 483.

*Maine*. — *Stetson v. Adams*, 91 Me. 178 (line of actual survey controls plan made from notes of survey); *Coleman v. Lord*, 96 Me. 192; *Adams v. Clapp*, 99 Me. 169.

*Michigan*. — *Brudin v. Inglis*, 121 Mich. 410.

*Minnesota*. — *Kleven v. Gunderson*, (Minn. 1905) 104 N. W. Rep. 4.

*Missouri*. — *McKinney v. Doane*, 155 Mo. 287 (marked line controls plat).

*New Jersey*. — *Stanwood v. Beck*, (N. J. 1902) 52 Atl. Rep. 353 (controls map).

*New York*. — *James v. Lewis*, 27 N. Y. App. Div. 623; *People v. Hall*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 117; *Herse v. Questa*, 100 N. Y. App. Div. 59.

*North Carolina*. — *Tucker v. Satterthwaite*, 123 N. Car. 511, 126 N. Car. 958; *Elliott v. Jefferson*, 133 N. Car. 207.

*North Dakota*. — *Radford v. Johnson*, 8 N. Dak. 182.

*Oregon*. — *Albert v. Salem*, 39 Oregon 466; *Trinwith v. Smith*, 42 Oregon 239; *Killgore v. Carmichael*, 42 Oregon 618.

*Pennsylvania*. — *Lehigh Valley Coal Co. v. Beaver Lumber Co.*, 203 Pa. St. 544; *Kron v. Daugherty*, 9 Pa. Super. Ct. 163; *Washington Female Seminary v. Washington*, 18 Pa. Super. Ct. 555; *Long v. Shields*, 20 Pa. Super. Ct. 559; *Rook v. Greenewald*, 22 Pa. Super. Ct. 641.

*South Carolina*. — *Connor v. Johnson*, 59 S. Car. 115 (artificial monuments control adjacent boundaries).

*Texas*. — *Busk v. Manghum*, 14 Tex. Civ. App. 621; *Branch v. Simons*, (Tex. Civ. App. 1898) 48 S. W. Rep. 40; *Hunt v. O'Brien*, (Tex. Civ. App. 1899) 50 S. W. Rep. 487; *Burnett v. Gault*, (Tex. Civ. App. 1899) 54 S. W. Rep. 268 (controls call for adjoining survey); *Besson v. Richards*, 24 Tex. Civ. App. 64; *Blackwell v. Coleman County*, 94 Tex. 216; *Griffin v. Barbee*, 29 Tex. Civ. App. 325; *Sloan v. King*, 29 Tex. Civ. App. 599; *Parrish v. Williams*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1097.

*Vermont*. — *Graves v. Mattison*, 67 Vt. 630; *Trammell v. Ashworth*, 99 Va. 646, 3 Va. Sup. Ct. Rep. 446.

*Washington*. — *Olson v. Seattle*, 30 Wash. 687 (controls city plat).

**773.** Government Surveys. — See note 2.

**774.** Patent Covers Land Actually Surveyed. — See note 2.

**775.** May Not Be Corrected by Surveys by Individuals or under State Statutes. — See note 1.

**776.** The Fact that the Lines of a Survey Were Not Actually Run. — See note 2.

(c) Meander Lines. — See note 4.

*Wisconsin.* — *Verson v. Nicolai*, (Wis. 1905) 103 N. W. Rep. 1111.

See, however, *Cleveland v. Bigelow*, 98 Fed. Rep. 242, 39 C. C. A. 47 (plat held to control actual surveyed line); *Jackson v. Welsh Land Assoc.*, 51 W. Va. 482 (map held to control).

**773. 2. Surveys by Federal Government** — *California.* — *Harrington v. Boehmer*, 134 Cal. 196.

*Iowa.* — *Rowell v. Weinemann*, 119 Iowa 256, 97 Am. St. Rep. 310; *Klinkefus v. Vanmeter*, 122 Iowa 412.

*Missouri.* — *Granby Min., etc., Co. v. Davis*, 156 Mo. 422.

*Nebraska.* — *Knoll v. Randolph*, (Neb. 1902) 92 N. W. Rep. 195; *Baty v. Elrod*, 66 Neb. 735; *Clark v. Thornburg*, 66 Neb. 717.

*New Mexico.* — *Canavan v. Dugan*, 10 N. Mex. 316 (control field notes and plat).

*North Dakota.* — *Radford v. Johnson*, 8 N. Dak. 182.

*Oregon.* — *Trinwith v. Smith*, 42 Oregon 239; *Schmidtke v. Keller*, 44 Oregon 23.

*South Dakota.* — *Dowdle v. Cornue*, 9 S. Dak. 126; *Randall v. Burk Tp.*, 9 S. Dak. 534; *White v. Amrhien*, 14 S. Dak. 270; *McGray v. Monarch Elevator Co.*, 16 S. Dak. 109; *Unzelmann v. Shelton*, (S. Dak. 1905) 103 N. W. Rep. 646; *Tyler v. Haggard*, (S. Dak. 1905) 102 N. W. Rep. 682 (controls field notes of survey).

*Texas.* — *Galloway v. State Nat. Bank*, (Tex. Civ. App. 1900) 56 S. W. Rep. 236.

*Utah.* — *Washington Rock Co. v. Young*, (Utah 1905) 80 Pac. Rep. 382.

*Washington.* — *Thayer v. Spokane County*, 36 Wash. 63 (controls field notes).

*Wisconsin.* — *Schlei v. Struck*, 109 Wis. 598.

**774. 2. Patent Covers Land Actually Surveyed.** — *Burke v. McCowen*, 115 Cal. 481; *Higdon v. Rice*, 119 N. Car. 623. See also *Barnhart v. Ehrhart*, 33 Oregon 274.

**775. 1. Corrections by Private Surveys or Surveys under State Authority.** — *Martin v. Hughes*, (C. C. A.) 90 Fed. Rep. 632; *Porter v. Gaines*, 151 Mo. 560.

**776. 2. Lines Not Actually Run and Marked** — *Following Former Survey.* — Where, in the survey, the surveyor did not actually run the line called for, but followed a former survey, the line called for must still be followed as if it had been actually run. *Lester v. Hays*, 14 Tex. Civ. App. 643.

**4. Meander Line Not a Boundary — Purpose and Effect** — *United States.* — *Coburn v. San Mateo County*, 75 Fed. Rep. 529; *Kirwan v. Murphy*, 83 Fed. Rep. 275, 49 U. S. App. 658; *In re Valley*, 116 Fed. Rep. 983 (announcing Iowa rule).

*California.* — *Hendricks v. Feather River Canal Co.*, 138 Cal. 423; *Kirby v. Potter*, 138 Cal. 686.

*Idaho.* — *Johnson v. Hurst*, (Idaho 1904) 77 Pac. Rep. 784.

*Illinois.* — *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380.

*Indiana.* — *Tolleston Club v. Clough*, 146 Ind. 93; *Sizor v. Logansport*, 151 Ind. 626; *Leonard v. Wood*, 33 Ind. App. 83.

*Iowa.* — *Welch v. Browning*, 115 Iowa 690.

*Kansas.* — *Steinbuechel v. Lane*, 59 Kan. 7 (held not to carry island in river separated by well-defined channel from land); *Black v. Diver*, 68 Kan. 204.

*Kentucky.* — *Vaughn v. Foster*, (Ky. 1898) 47 S. W. Rep. 333; *Hunter v. Witt*, (Ky. 1899) 50 S. W. Rep. 985; *Stonestreet v. Jacobs*, 82 S. W. Rep. 363, 26 Ky. L. Rep. 628.

*Louisiana.* — *Hall v. Bossier Levee Dist.*, 111 La. 913.

*Michigan.* — *Goff v. Cogle*, 118 Mich. 307.

*Minnesota.* — *Olson v. Thorndike*, 76 Minn. 399; *Security Land, etc., Co. v. Burns*, 87 Minn. 97, 94 Am. St. Rep. 684; *Hanson v. Rice*, 88 Minn. 273; *Kleven v. Gunderson*, (Minn. 1905) 104 N. W. Rep. 4.

*Nebraska.* — *McBride v. Whitaker*, 65 Neb. 137, affirmed 197 U. S. 510; *Shrake v. Laffin*, (Neb. 1902) 92 N. W. Rep. 184.

*North Dakota.* — *Heald v. Yumisko*, 7 N. Dak. 422.

*Ohio.* — *Chesbrough v. Head*, 23 Ohio Cir. Ct. 427.

*Oklahoma.* — *Provins v. Lovi*, 6 Okla. 94.

*Oregon.* — *Johnson v. Tomlinson*, 41 Oregon 198.

*Texas.* — *Bland v. Smith*, (Tex. Civ. App. 1897) 43 S. W. Rep. 49; *Griffin v. Barbee*, 29 Tex. Civ. App. 325.

*Utah.* — *Hinckley v. Peay*, 22 Utah 21.

*Washington.* — *Washougal, etc., Transp. Co. v. Dalles, etc., Nav. Co.*, 27 Wash. 490; *Johnson v. Brown*, 33 Wash. 588.

*Wisconsin.* — *Walls v. Cunningham*, (Wis. 1904) 101 N. W. Rep. 696.

See also *Wilcox v. Snyder*, 22 Pa. Super. Ct. 451.

Where the boundary line on the lake side of the land is substantially coincident with the shore of the lake at low-water mark the intent to convey to such low-water mark will be presumed, though no mention is made in the deed of the lake as a boundary. *Slauson v. Goodrich Transp. Co.*, 94 Wis. 642.

**Effect of Call for Quantity.** — The mere fact that the quantity called for in the deed corresponds with the quantity within the meandered line, does not show that the meandered line was intended as the boundary. *Schlosser v. Cruickshank*, 96 Iowa 414.

**Where There Is No Adjacent Body of Water Proper to Be Meandered,** the rule stated in the text will not apply. In such a case the meandered line will be a boundary line, and one who purchases from the government accordingly thereto cannot claim title beyond it. *Schlosser v. Hemphill*, 118 Iowa 452. See also *Carr v. Moore*, 119 Iowa 152, 97 Am. St. Rep. 292.

- 777.** (d) Monuments Subsequently Erected — Where No Notice Is Given. — See note 3.  
 (e) When Monuments Conflict with Plan. — See note 4.  
**778.** (f) Stakes — General Rule as to When Stakes Control. — See notes 2, 3.  
 Actual Survey Subsequently Made. — See note 4.  
 When "Stakes" Are Mentioned in a Deed. — See note 6.  
**779.** (g) Lost Corners and Monuments. — See note 1.  
**780.** c. ADJOINING SURVEYS. — See note 2.

**Omission of Extensive Tract.** — The rule does not apply where an extensive tract is omitted between the meandered line and the body of water. *Barnhart v. Ehrhart*, 33 Oregon 274.

Boundaries of fractional lots will not be indefinitely extended, where they appear by the government plat to abut on a body of water, which in fact never existed at substantially the place indicated on the plat. In such exceptional cases, the supposed meander line will, if consistent with the other calls and distances, mark the limit of the survey, and be held to be the boundary line of the land it delimits. *Security Land, etc., Co. v. Burns*, 87 Minn. 97, 94 Am. St. Rep. 684.

**Establishment of Side Lines.** — In establishing the side lines of adjoining property owners whose front line is a meandered line around a lake, the side lines are fixed by extending their side lines on a deflected course from their intersection with the meander line toward a point in the centre of the lake. *Hanson v. Rice*, 88 Minn. 273.

Where in a deed conveying a triangular piece of land, the front line of the triangle was a road near the shore, and the deed expressly called for the land "in front of" such line to high-water mark, in extending the side lines they are not to be extended on the oblique line of the triangle but on lines perpendicular to the front line. *McIntyre v. McKinnon*, 31 Nova Scotia 54.

**777. 3. Monument Subsequently Erected — Want of Notice.** — *Woodbury v. Venia*, 114 Mich. 251; *Tucker v. Satterthwaite*, 126 N. Car. 958; *Matthews v. Thatcher*, (Tex. Civ. App. 1903) 76 S. W. Rep. 61.

**4. Where Monuments and Plan Conflicting.** — See *Mineral R., etc., Co. v. Auten*, 188 Pa. St. 568, 43 W. N. C. (Pa.) 158.

**778. 2. Coleman v. Lord**, 96 Me. 192; *McKinney v. Doane*, 155 Mo. 287 (plat referred to controls stakes not mentioned).

**3. Stakes, When Found, Control Distance.** — *Kuglin v. Bock*, 181 Ill. 165; *Brudin v. Inglis*, 121 Mich. 410.

**4. McKinney v. Doane**, 155 Mo. 287 (where stakes are pointed out as boundary of a lot, they will control plat as against grantor).

**6. Brown v. House**, 118 N. Car. 870; *Matthews v. Thatcher*, (Tex. Civ. App. 1903) 76 S. W. Rep. 61.

**779. 1. Lost Corners and Monuments.** — *Stoughton v. Rice*, (Ky. 1895) 32 S. W. Rep. 1083.

**Establishment of Interior Section Corners.** — *Trinwith v. Smith*, 42 Oregon 239.

**Where There Are Two Known Monuments.** — *Lewis v. Prien*, 98 Wis. 87 (establishing intermediate lost monument from distance between known monuments on either side).

**780. 2. Adjoining Surveys — General Rule —**

*United States.* — *Glen Mfg. Co. v. Weston Lumber Co.*, 80 Fed. Rep. 242.

*Arizona.* — *Bird v. Noon*, (Ariz. 1904) 76 Pac. Rep. 592.

*California.* — *Miller v. Grunsky*, (Cal. 1901) 66 Pac. Rep. 858.

*Connecticut.* — *Post Hill Imp. Co. v. Brandegee*, 74 Conn. 338.

*Kansas.* — *Abbey v. McPherson*, 1 Kan. App. 177.

*Kentucky.* — *Allen v. Pulliam*, 66 S. W. Rep. 722, 23 Ky. L. Rep. 2129.

*Louisiana.* — *Kellogg v. McFatter*, 111 La. 1037.

*Maine.* — *Perry v. Keith*, 93 Me. 433.

*Missouri.* — *Schuster v. Myers*, 148 Mo. 422.

*New Jersey.* — *Stanwood v. Beck*, (N. J. 1902) 52 Atl. Rep. 353.

*North Carolina.* — *Brown v. House*, 118 N. Car. 870; *Bowen v. Gaylord*, 122 N. Car. 816; *Tucker v. Satterthwaite*, 123 N. Car. 511.

*Pennsylvania.* — *Fisher v. Kaufman*, 170 Pa. St. 444; *Airey v. Kunkle*, 7 Pa. Super. Ct. 112; *Lehigh Valley Coal Co. v. Beaver Lumber Co.*, 203 Pa. St. 544; *Marcy v. Brock*, 207 Pa. St. 95 (grant by state controls call for distance); *Long v. Shields*, 20 Pa. Super. Ct. 559.

*South Carolina.* — *Connor v. Johnson*, 53 S. Car. 90 (control courses and distances). Compare *Connor v. Johnson*, 59 S. Car. 115.

*Tennessee.* — *Phillips v. Crabtree*, (Tenn. Ch. 1899) 52 S. W. Rep. 787; *Christian v. Cope*, (Tenn. Ch. 1899) 56 S. W. Rep. 1030; *Montgomery v. Lipscomb*, 105 Tenn. 144 (prolongation of line of adjoiner to comply with call for distance).

*Texas.* — *Langermann v. Nichols*, (Tex. Civ. App. 1893) 32 S. W. Rep. 124; *Reed v. Phillips*, (Tex. Civ. App. 1896) 33 S. W. Rep. 986; *Best v. Splawn*, (Tex. Civ. App. 1896) 33 S. W. Rep. 1005; *Holland v. Thompson*, 12 Tex. Civ. App. 471; *Warden v. Harris*, (Tex. Civ. App. 1898) 47 S. W. Rep. 834 (extension of line of adjoining tract called for); *Burge v. Poin Dexter*, (Tex. Civ. App. 1900) 56 S. W. Rep. 81; *Galloway v. State Nat. Bank*, (Tex. Civ. App. 1900) 56 S. W. Rep. 236; *Wiley v. Lindley*, (Tex. Civ. App. 1900) 56 S. W. Rep. 1001 (will control natural monument called for by mistake); *Bullard v. Watkins*, (Tex. Civ. App. 1900) 58 S. W. Rep. 205; *Taylor v. Lewis*, (Tex. Civ. App. 1904) 81 S. W. Rep. 534; *Lyon v. Waggoner*, (Tex. Civ. App. 1904) 83 S. W. Rep. 46.

*West Virginia.* — *Miller v. Holt*, 47 W. Va. 7 (controls course and distances).

**A Reference to the Adjoining Land of the Grantor** as a boundary cannot be treated as describing a monument intended to control the courses and distances stated in the deed. *Kashman v. Parsons*, 70 Conn. 295.

**781.** See note 1.

True Line Intended. — See note 2.

**782.** Boundary of Junior Grant. — See note 2.

**783.** Where Neither Corners Nor Lines of Survey Found — Surrounding Surveys. — See note 3.

**784.** *d.* COURSES AND DISTANCES — (1) *Defined.* — See notes 1, 2.

(2) *When They Control* — (a) *General Rule.* — See notes 3, 4, 5, 6.

**785.** See notes 1, 3.

**786.** (b) *Incidental Calls for Monuments.* — See notes 4, 5.

**787.** (c) *Calls for Adjoining Surveys.* — See note 5.

(3) *Used to Locate Monuments and Lost Corners.* — See notes 6, 7.

**788.** (4) *Courses Control Distances.* — See notes 1, 2.

**781. 1. Immaterial Whether Line Marked or Unmarked.** — *Randolph v. Sentilles*, 110 La. 419; *Airey v. Kunkle*, 18 Pa. Co. Ct. 620, 6 Pa. Dist. 1, *affirmed* 190 Pa. St. 196, 7 Pa. Super. Ct. 112; *Waggoner v. Daniels*, 18 Tex. Civ. App. 235. Compare *Burge v. Poindexter*, (Tex. Civ. App. 1900) 56 S. W. Rep. 81.

**2. True Line Intended, Not a Supposed Line.** — *Hall v. Davis*, 122 Ga. 252. See, however, *Morgan v. Mowles*, (Tex. Civ. App. 1901) 61 S. W. Rep. 155.

Where a description calls for the boundary line of a municipality, a change by prescription in the boundary line of the municipality does not change the line of the individual. *Heywood v. Wild River Lumber Co.*, 70 N. H. 24.

**782. 2. Boundaries of Junior Grant.** — *Taylor v. Lewis*, (Tex. Civ. App. 1904) 81 S. W. Rep. 534.

**783. 3. Fisher v. Kaufman**, 170 Pa. St. 444.

**784. 1. Distances to Be Measured on Horizontal Line.** — *Stack v. Pepper*, 119 N. Car. 434.

**2. How Ascertained in Questions of Boundary.** — *Ayers v. Huddleston*, 30 Ind. App. 242; *Brown v. Milliman*, 119 Mich. 606.

**3. Where No Monuments Called For — Connecticut.** — *Kashman v. Parsons*, 70 Conn. 295 (distances control fences not called for in deed).

*Illinois.* — *Ely v. Brown*, 183 Ill. 575.

*Indiana.* — *Ayers v. Huddleston*, 30 Ind. App. 242.

*Missouri.* — *Adkins v. Quest*, 79 Mo. App. 36, 2 Mo. App. Rep. 348 (distance called for as "more or less").

*New York.* — *Clark v. Durland*, 35 N. Y. App. Div. 312.

*North Carolina.* — *Elliott v. Jefferson*, 133 N. Car. 207.

*Oregon.* — *Trotter v. Stayton*, 41 Oregon 117.

*Pennsylvania.* — *Lehigh Valley Coal Co. v. Beaver Lumber Co.*, 203 Pa. St. 544; *Green v. Schrack*, 16 Pa. Super. Ct. 26.

*Texas.* — *Matthews v. Thatcher*, (Tex. Civ. App. 1903) 76 S. W. Rep. 61; *Sloan v. King*, (Tex. Civ. App. 1903) 77 S. W. Rep. 48; *Missouri, etc., R. Co. v. Anderson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 781.

As against a subsequent grantee courses and distances in a prior deed will control private and hidden monuments not referred to in the deed. *Whitehead v. Atchison*, 136 Mo. 485.

**4. Where Monuments Are Called for by Mistake.** — *King v. Watkins*, 98 Fed. Rep. 913 (office survey); *White v. Smith*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1028; *Sloan v. King*, (Tex. Civ. App. 1903) 77 S. W. Rep. 48.

**5. Error in Call for Monument.** — Where the courses and distances in the deed are intended to form a fixed line so as to inclose a fixed quantity of land, they will control natural boundaries. *Tuxedo Park Assoc. v. Sterling Iron, etc., Co.*, 60 N. Y. App. Div. 349.

Where the courses and distances coincide with the quantity, they will control monuments. *Wilcox v. Bread*, 92 Hun (N. Y.) 9, *affirmed* 157 N. Y. 713.

**Street Called for Which Did Not Exist.** — *Hammond v. George*, 116 Ga. 792, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 784.

**6. No Marked Objects Found.** — *Taylor v. Pomby*, 116 Ala. 621, 67 Am. St. Rep. 149; *Deaver v. Jones*, 119 N. Car. 598; *Mays v. Hinchman*, (W. Va. 1905) 50 S. E. Rep. 823.

**785. 1. Places Where Monuments Once Stood Not Identified.** — *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, (C. C. A.) 129 Fed. Rep. 668; *Bell County Land, etc., Co. v. Hendrickson*, 68 S. W. Rep. 842, 24 Ky. L. Rep. 371; *Echerd v. Johnson*, 126 N. Car. 409; *Smith v. Hutchison*, 104 Tenn. 394.

**3. General Rule as to Controlling Effect of Courses and Distances.** — *Quillen v. Betts*, Penn. (Del.) 53 (courses and distances control quantity); *Kleven v. Gunderson*, (Minn. 1905) 104 N. W. Rep. 4; *McIrwin v. Charlebois*, (Wash. 1905) 80 Pac. Rep. 285 (controls call for quantity).

**786. 4. Where Surrounding Circumstances Show Courses and Distances to Be More Reliable than Incidental Calls for Monuments.** — *Sloan v. King*, (Tex. Civ. App. 1903) 77 S. W. Rep. 48.

**5. Intention of Parties.** — *Trinwith v. Smith*, 42 Oregon 239; *Busk v. Manghum*, 14 Tex. Civ. App. 621.

**787. 5. Washington Rock Co. v. Young**, (Utah 1905) 86 Pac. Rep. 382, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 787.

**6. Courses and Distances Employed to Locate Monuments and Lost Corners.** — *Taylor v. McConigle*, 120 Cal. 123 (to establish thread of shifting stream); *Richardson v. McCullough*, (Tex. Civ. App. 1901) 60 S. W. Rep. 974.

**7. Meyer-Clarke-Rowe Mines Co. v. Steinfield**, (Ariz. 1905) 80 Pac. Rep. 400; *Marshall v. Corbett*, (N. Car. 1905) 50 S. E. Rep. 210; *Brown v. House*, 118 N. Car. 870; *Simmons v. Jamieson*, 32 Wash. 619 (line to be run by course, etc., from nearest known corner). Compare *Graves v. Mattison*, 67 Vt. 630.

**788. 1. Courses Control Distances.** — *Meyer-Clarke-Rowe Mines Co. v. Steinfield*, (Ariz.

**789.** (5) *Courses May Be Reversed.* — See note 1.

*e.* QUANTITY — (1) *General Rule.* — See notes 2, 3.

**790.** (2) *Quantity Aids in Defining Boundary.* — See note 1.

(3) *When Quantity Controls.* — See note 2.

**791.** See notes 1, 2, 4.

**792.** (5) *Definite Quantity.* — See note 4.

**793.** (7) *"More or Less."* — See note 1.

### III. RULES FOR CONSTRUING DESCRIPTIONS — 1. General Principles. —

See note 2.

1905) 80 Pac. Rep. 400; *Iverson v. Swan*, 169 Mass. 582.

**788.** 2. Where Land Fully Identified — Distances Control Courses. — *Airey v. Kunkle*, 7 Pa. Super. Ct. 112.

**789.** 1. When Courses May Be Reversed — *United States.* — *Platt v. Vermillion*, 99 Fed. Rep. 356, 39 C. C. A. 555; *Belding v. Hebard*, 103 Fed. Rep. 532, 43 C. C. A. 296.

*Kentucky.* — *Whitehouse Cannel Coal Co. v. Wells*, 74 S. W. Rep. 736, 25 Ky. L. Rep. 60 (calls should be followed as a rule in the order set out in the deed); *Creech v. Johnson*, (Ky. 1903) 76 S. W. Rep. 185, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489; *Creech v. Johnson*, 116 Ky. 441, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789.

*North Carolina.* — *Duncan v. Hall*, 117 N. Car. 443; *Tucker v. Satterthwaite*, 123 N. Car. 511; *Marshall v. Corbett*, (N. Car. 1905) 50 S. E. Rep. 210.

*Tennessee.* — *Phillips v. Crabtree*, (Tenn. Ch. 1899) 52 S. W. Rep. 787.

*Texas.* — *Pierce v. Schram*, (Tex. Civ. App. 1899) 53 S. W. Rep. 716; *Burge v. Poinexter*, (Tex. Civ. App. 1900) 56 S. W. Rep. 81.

2. Quantity the Least Reliable Element of Description. — *Dutra v. Pereira*, 135 Cal. 320; *Dashiel v. Harshman*, 113 Iowa 283; *People v. Hall*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 117; *Miller v. Cramer*, 190 Pa. St. 315.

3. When Quantity Taken as Merely Descriptive. — *Quillen v. Betts*, 1 Penn. (Del.) 53; *Leonard v. Forbing*, 109 La. 220; *Wilcox v. Bread*, 92 Hun (N. Y.) 9, affirmed 157 N. Y. 713; *Branch v. Simons*, (Tex. Civ. App. 1898) 48 S. W. Rep. 40; *Sowles v. Butler*, 71 Vt. 271; *McIrwin v. Charlebois*, (Wash. 1905) 80 Pac. Rep. 285 (courses and distances control call for quantity).

The fact that the depth of platted lots as given excludes the distance to the centre of the street will not prevent the land to the centre of the street from passing. *Paine v. Consumers' Forwarding, etc., Co.*, 71 Fed. Rep. 626, 37 U. S. App. 539.

**790.** 1. Quantity Aids in Defining Boundary. — *Hostetter v. Los Angeles Terminal R. Co.*, 108 Cal. 38; *Creech v. Johnson*, (Ky. 1903) 76 S. W. Rep. 185, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 790; *Cincinnati Southern R. Co. v. Shakers' Soc.*, 78 S. W. Rep. 130, 25 Ky. L. Rep. 1339; *McCoy v. Cassidy*, (Ky. 1905) 86 S. W. Rep. 1130; *Cole v. Mueller*, 187 Mo. 638, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801; *Watson v. New York*, 175 N. Y. 475, affirming 67 N. Y. App. Div. 573; *Kennedy v. Mineola, etc., Traction Co.*, 77 N. Y. App. Div. 484, affirmed 178 N. Y. 508, (Supm. Ct.

App. T.) 12 N. Y. Annot. Cas. 189; *Deppen v. Bogar*, 7 Pa. Super. Ct. 434.

2. Quantity Controlling When of Essence of Contract. — *Fullam v. Foster*, 68 Vt. 590 (in which quantity controlled courses and distances between two monuments).

**791.** 1. Quantity May Control Where Other Parts of Description Uncertain. — *Graves v. Mattison*, 67 Vt. 630.

2. Where the Intention to Convey Certain Quantity Is Clear. — *Crocker v. Cotting*, 166 Mass. 183.

4. Where Deed Contains No Calls for Monuments or for Courses and Distances. — *Ayers v. Hudleston*, 30 Ind. App. 242.

**792.** 4. *Dashiel v. Harshman*, 113 Iowa 283.

Where a Deed Conveys the East Half of a Government Subdivision of land, the term is used with reference to a line which is equidistant from the boundary lines of the parcel so subdivided, and the dividing line should run to a point equidistant between the outer boundaries of the parcel, though thereby one of the subdivisions contains more dry land than the other, due to the fact that in the latter there is a meandering body of water. *Edinger v. Woodke*, 127 Mich. 41, following *Jones v. Pashby*, 62 Mich. 614.

**793.** 1. "Estimated" Quantity — "More or Less." — *Mires v. Sommerville*, 85 Mo. App. 183; *Watson v. New York*, 67 N. Y. App. Div. 573, 175 N. Y. 475, affirming (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 701. And see the title MORE OR LESS, vol. 20, p. 873.

2. Leading Rule — Effect Should Be Given to the Intention of Parties — *Connecticut.* — *Post Hill Imp. Co. v. Brandegee*, 74 Conn. 338.

*Iowa.* — *Dows Real Estate, etc., Co. v. Emerson*, (Iowa 1904) 99 N. W. Rep. 724.

*Kentucky.* — *Harkleroads v. Trosper*, (Ky. 1896) 35 S. W. Rep. 116.

*Louisiana.* — *Robinson v. Atkins*, 105 La. 790, *Massachusetts.* — *Crocker v. Cotting*, 166 Mass. 183.

*Michigan.* — *Peck v. Webb*, 129 Mich. 342, 8 Detroit Leg. N. 975.

*New Hampshire.* — *Kendall v. Green*, 67 N. H. 557; *Heywood v. Wild River Lumber Co.*, 70 N. H. 24.

*New Jersey.* — *Naughton v. Elliott*, (N. J. Eq. 1905) 59 Atl. Rep. 869.

*New York.* — *Graham v. Stern*, 51 N. Y. App. Div. 406, affirmed 168 N. Y. 517; *Weiant v. Rockland Lake Trap Rock Co.*, 61 N. Y. App. Div. 383, affirmed 174 N. Y. 509; *Smith v. Stacey*, 68 N. Y. App. Div. 521.

*North Carolina.* — *Elliott v. Jefferson*, 133 N. Car. 207.

*Pennsylvania.* — *Deppen v. Bogar*, 7 Pa.

**794.** See notes 1, 3.

**795.** 2. *Extrinsic Evidence*. — See note 2.

**796.** 3. *Contemporanea Expositio Est Optima, Etc.* — See note 1.

**797.** See note 1.

4. *Falsa Demonstratio Non Nocet* — *a.* IN GENERAL. — See note 2.

**798.** *Reasonable Construction*. — See note 1.

**799.** *Intention of Parties that All the Elements Be Necessary to Identification*. — See note 2.

**800.** *c.* PARTICULAR DESCRIPTION CONTROLS GENERAL. — See note 1.

But if the Particular Description Is Uncertain. — See note 2.

*d.* MOST MATERIAL ELEMENT PREVAILS. — See note 3.

*e.* REPUGNANT CLAUSES. — See note 4.

Super. Ct. 434; *Abrahams v. Alsberg*, 173 Pa. St. 383; *Fuller v. Weaver*, 175 Pa. St. 182.

*Tennessee*. — *Morris v. Milner*, 104 Tenn. 485.

*Texas*. — *Huff v. Crawford*, 89 Tex. 214; *Holland v. Thompson*, 12 Tex. Civ. App. 471; *Sellman v. Sellman*, (Tex. Civ. App. 1903) 73 S. W. Rep. 48.

*Vermont*. — *Graves v. Mattison*, 67 Vt. 630.

A mistake in course and distance will not be permitted to defeat the intent of the parties, if such intent otherwise appears from the deed. *Tucker v. Satterthwaite*, 123 N. Car. 511.

Where the lines and corners were not established on the ground as in the case of an office survey, the ambiguity or uncertainty from inconsistent calls must be removed by ascertaining and giving effect to the intention of the parties. *Coleman County v. Stewart*, (Tex. Civ. App. 1901) 65 S. W. Rep. 383, *affirmed* 95 Tex. 445.

**Federal Grants.** — The question as to boundaries is one of local laws, and unrestricted grants of the government ought to be construed according to the law of the state in which the land lies. *Whitaker v. McBride*, 197 U. S. 510, *following* *Hardin v. Jordan*, 140 U. S. 371.

**794.** 1. *Id Certum Est Quod Certum Reddi Potest*. — *Knowlton v. Dolan*, 151 Ind. 79, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794.

3. *Substitution and Supplying of Words*. — *Bryant v. Kendall*, 79 S. W. Rep. 186, 25 Ky. L. Rep. 1859.

**795.** 2. *Extrinsic Evidence*. — *Sloan v. King*, 29 Tex. Civ. App. 599.

**Parol Evidence to Vary Description**. — *Fuller v. Weaver*, 175 Pa. St. 182. And see generally the title PAROL EVIDENCE.

**796.** 1. *Contemporanea Expositio Est Optima et Fortissima in Lege*. — *Beach v. Whittlesey*, 73 Conn. 530; *Post Hill Imp. Co. v. Brandegee*, 74 Conn. 338; *Bartlett v. La Rochelle*, 68 N. H. 211; *Tucker v. Satterthwaite*, 123 N. Car. 511.

**797.** 1. *Whan v. Steingotter*, 54 N. Y. App. Div. 83, 8 N. Y. Annot. Cas. 162; *Deaver v. Jones*, 119 N. Car. 598; *Hale v. Morgan*, (Tenn. Ch. 1900) 63 S. W. Rep. 506; *Donaldson v. Rall*, 14 Tex. Civ. App. 336; *Busk v. Manghum*, 14 Tex. Civ. App. 621.

One buying land described as bounded by a private way between the land conveyed and that retained by the grantor is bound by the location fixed by fences previously erected by the grantor, and cannot claim to the way as sur-

veyed before the fences were erected. *Stockwell v. Fitzgerald*, 70 Vt. 468.

2. *Falsa Demonstratio Non Nocet* — **General Rule**. — In the application of the doctrine *falsa demonstratio non nocet*, it is immaterial in what part of the description the *falsa demonstratio* appears; it is not necessary that it should follow a true part and qualify what has gone before. *Cowen v. Truefitt*, (1899) 2 Ch. 309.

**798.** 1. *Kentucky*. — *West v. Chamberlain*, 109 Ky. 194; *Finley v. Curd*, 62 S. W. Rep. 501, 22 Ky. L. Rep. 1912; *Uhl v. Reynolds*, 64 S. W. Rep. 498, 23 Ky. L. Rep. 759; *Johnson v. Harris*, 68 S. W. Rep. 844, 24 Ky. L. Rep. 449 (closing call supplied); *Bryant v. Kendall*, 79 S. W. Rep. 186, 25 Ky. L. Rep. 1859.

*Louisiana*. — *Robinson v. Atkins*, 105 La. 790. *Nebraska*. — *Egan v. Light*, (Neb. 1903) 93 N. W. Rep. 859.

*North Carolina*. — *Clark v. Moore*, 126 N. Car. 1.

*Tennessee*. — *Phillips v. Crabtree*, (Tenn. Ch. 1899) 52 S. W. Rep. 787; *State v. Cooper*, (Tenn. Ch. 1899) 53 S. W. Rep. 391; *Tellico Mfg. Co. v. Williams*, (Tenn. Ch. 1900) 59 S. W. Rep. 1075.

**799.** 2. *Repugnant Elements of the Description Rejected*. — *People v. Hall*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 117.

**800.** 1. *Particular Description Controls General Description* — **General Rule**. — *Rosenberger v. Wabash R. Co.*, 96 Mo. App. 504, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 799 [800]; *Heman v. Gilliam*, 171 Mo. 263, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 799 [800]; *Stanwood v. Beck*, (N. J. 1902) 52 Atl. Rep. 353; *People v. Saxton*, 15 N. Y. App. Div. 263, *affirmed* 154 N. Y. 748; *Mitchell v. Einstein*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 358; *Hitchcock v. Southern Iron, etc., Co.*, (Tenn. Ch. 1896) 38 S. W. Rep. 588; *Bogges v. Allen*, (Tex. Civ. App. 1900) 56 S. W. Rep. 195, *affirmed* 94 Tex. 83.

2. *Where Particular Description Uncertain or Obscure*. — *Currier v. Jones*, 121 Iowa 160, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 800.

3. *The Most Material and Certain Calls Control*. — *Stanwood v. Beck*, (N. J. 1902) 52 Atl. Rep. 353; *Rowe v. Cape Fear Lumber Co.*, 133 N. Car. 433.

4. *When There Are Two Repugnant Clauses*. — *Johnson v. Bowlware*, 149 Mo. 451; *Murphy v. Murphy*, 132 N. Car. 360, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 800.

**801.** 5. **Conflicting Descriptions — Description Uncertain — Construed Most Favorably to Grantee.** — See note 3.

Rule Otherwise in Public Grants. — See note 4.

**802.** 6. **Description Hopelessly Uncertain.** — See note 3.

**803.** 7. **When Deed Refers to Another Deed or to Map.** — See note 1.

**804.** Where a Deed Refers to Lines as Laid Down in a Map or Plat. — See note 1.

**805.** 8. **"Between," "from," "to," or "by" Objects.** — See note 1.

9. **Straight Line.** — See note 2.

**806.** See note 2.

**807.** 10. **Line Deflected.** — See notes 1, 2.

11. **House as Boundary.** — See note 3.

**808.** 13. **Overlapping Surveys.** — See notes 1, 2.

**801.** 3. **Description Uncertain — Construed Against Grantor.** — *Freeman v. Bellegarde*, 108 Cal. 179, 49 Am. St. Rep. 76; *Knowlton v. Dolan*, 151 Ind. 79, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801-802; *Creech v. Johnson*, 116 Ky. 1, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801; *Cole v. Mueller*, 187 Mo. 638; *Clark v. Durland*, 35 N. Y. App. Div. 312; *Van Winkle v. Van Winkle*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 593.

4. **In Case of Public Grants — Rule Otherwise.** — *Whitney v. U. S.*, 167 U. S. 529; *Oakland v. Oakland Water Front Co.*, 118 Cal. 160; *Creech v. Johnson*, (Ky. 1903) 76 S. W. Rep. 185; citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801.

**802.** 3. **Where Description Hopelessly Uncertain — Instrument Void.** — *Alleman v. Hammond*, 209 Ill. 70, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 802.

**803.** 1. **Where Deed Refers to Another Deed or to Map — General Rule.** — *Post Hill Imp. Co. v. Brandegee*, 74 Conn. 338; *Allmendinger v. McHie*, 189 Ill. 308, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 803.

**804.** 1. **Deed Referring to Lines as Laid Down in Map or Plat — United States.** — *Paine v. Consumers' Forwarding, etc., Co.*, (C. C. A.) 71 Fed. Rep. 626; *De Lancey v. Wellbrock*, 113 Fed. Rep. 103.

*California.* — *Taylor v. McConigle*, 120 Cal. 123; *Olsen v. Rogers*, 120 Cal. 225; *Buckley v. Mohr*, 125 Cal. xix, 58 Pac. Rep. 261.

*Indiana.* — *Tolleston Club v. Clough*, 146 Ind. 93.

*Kentucky.* — *Miller v. Pryse*, (Ky. 1899) 49 S. W. Rep. 776.

*Maine.* — *Coleman v. Lord*, 96 Me. 192.

*Michigan.* — *Guentherodt v. Ross*, 121 Mich. 47.

*New York.* — *Hastings v. McDonough*, 13 N. Y. App. Div. 625 (map should be considered with reference to actual survey on the ground as shown by monuments).

*Pennsylvania.* — *Deppen v. Bogar*, 7 Pa. Super. Ct. 434; *Nissley v. Moeslein*, 23 Pa. Super. Ct. 119.

*Washington.* — *Schwede v. Hemrich*, 29 Wash. 124.

*Wisconsin.* — *Neumeister v. Goddard*, (Wis. 1905) 103 N. W. Rep. 241.

A reference to a map is of itself a reference to the survey upon which the map was based, and in case of a conflict between the map and the survey, it seems that the latter will control. *Burke v. McCowen*, 115 Cal. 481. See,

however, *Haley v. Martin*, (Miss. 1905) 38 So. Rep. 99.

If the description in a grant does not refer to the field notes of the survey, the description in the grant will control, though the description in the grant, as a general rule, conforms to the field notes. *Taylor v. Brown*, (Tex. Civ. App. 1897) 39 S. W. Rep. 312.

**805.** 1. **Construction of Terms "Between" — "From" — "To" — "By."** — *Dunton v. Parker*, 97 Me. 461. See also BETWEEN; BY; FROM; TO. "Near." — *Creech v. Johnson*, (Ky. 1903) 76 S. W. Rep. 185. And see NEAR.

2. **Boundary Described as Running from One Point to Another — Straight Line Intended.** — *Belding v. Hebard*, 103 Fed. Rep. 532, 43 C. C. A. 296; *Hostetter v. Los Angeles Terminal R. Co.*, 108 Cal. 38; *Abbey v. McPherson*, 1 Kan. App. 177; *Willoughby v. Willoughby*, (Ky. 1898) 48 S. W. Rep. 427 (call for straight line between monuments will be controlled by actual marked diverging line); *Rowe v. Cape Fear Lumber Co.*, 133 N. Car. 433; *Cannon v. Hedrick*, (Tenn. Ch. 1900) 57 S. W. Rep. 205; *Sloan v. King*, 29 Tex. Civ. App. 599; *Fullam v. Foster*, 68 Vt. 590 (where straight line was drawn between two monuments as against courses and distances).

**806.** 2. **Where Course and Distance Not Specified.** — *Christian v. Cope*, (Tenn. Ch. 1899) 56 S. W. Rep. 1030 (from monument to nearest point on line of adjoining survey).

**807.** 1. **Deflection of Line — Intention.** — *Leonard v. Smith*, 111 La. 1008; *Dillingham v. Smith*, 30 Tex. Civ. App. 525; *Jackson v. Welsh Land Assoc.*, 51 W. Va. 482, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 807.

2. **Continuous Line.** — *Seitz v. People's Sav. Bank*, (Mich. 1905) 103 N. W. Rep. 545, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 807; *Jackson v. Welsh Land Assoc.*, 51 W. Va. 482, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 807.

3. **House as Boundary.** — In *New Hampshire* it is held that where a description calls for a certain number of feet from a house, the distance is to be measured from the base of the house and not from the eaves. *Kendall v. Green*, 67 N. H. 557. See also *Carney v. Hennessey*, 77 Conn. 577.

**808.** 1. **Rule in Case of Overlapping Surveys.** — *Ullman v. Clark*, 100 Fed. Rep. 180; *Adams v. Wilson*, 137 Ala. 632; *Vincent v. Blanton*, (Ky. 1905) 85 S. W. Rep. 703; *Hogg v. Lusk*, (Ky. 1905) 86 S. W. Rep. 1128; *Albert v. Salem*, 39 Oregon 466, citing 4 AM. AND ENG. ENCYC. OF



**808. 14. Calls Must Close.** — See note 3.

**809. 15. Block Surveys.** — See notes 1, 2.

**16. Functions of Court and Jury.** — See note 3.

**810. IV. HIGHWAYS, PRIVATE WAYS, AND PARKS — 1. Highways — b. GENERAL RULE — Presumption as to Extent of Ownership.** — See note 1.

LAW (2d ed.) 808; Lehigh Valley Coal Co. v. Beaver Lumber Co., 203 Pa. St. 544; Bennett v. Latham, 18 Tex. Civ. App. 403; Allen v. Worsham, (Tex. Civ. App. 1899) 49 S. W. Rep. 525; Hornberger v. Giddings, 31 Tex. Civ. App. 283.

The older plat of an addition to a city will control a younger plat of a subdivision of such addition. Busse v. Central Covington, (Ky. 1897) 38 S. W. Rep. 865.

**808. 2. Where Two Deeds from Same Grantor Conflict.** — Quillen v. Betts, 1 Penn. (Del.) 53; Sandy River Cannel Coal Co. v. White House Cannel Coal Co., 72 S. W. Rep. 298, 24 Ky. L. Rep. 1653.

**Where Two Tracts of Land Are Simultaneously Conveyed** by the grantor to different persons, if there is an overlapping in the descriptions the grant of the grantee whose survey was prior controls. Adams v. Wilson, 137 Ala. 632.

**3. Calls Must Be Made to Close.** — Johnson v. Harris, 68 S. W. Rep. 844, 24 Ky. L. Rep. 449; Johnson v. Bowlware, 149 Mo. 451 (call for west read east to close); Deppen v. Bogar, 7 Pa. Super. Ct. 434 (extension of call for distance to close); Hitchcock v. Southern Iron, etc., Co., (Tenn. Ch. 1896) 38 S. W. Rep. 588 (insertion of a call in order to close calls); Warden v. Harris, (Tex. Civ. App. 1898) 47 S. W. Rep. 834 (call for north read south in order to reach place of beginning); Park v. Wilkinson, 21 Utah 279.

**809. 1. Block Surveys.** — Morrison v. Seaman, 183 Pa. St. 74; Humphrey v. Cooper, 183 Pa. St. 432, 41 W. N. C. (Pa.) 304; Lehigh Valley Coal Co. v. Beaver Lumber Co., 203 Pa. St. 544; Knupp v. Barnard, 206 Pa. St. 280.

**2. Knupp v. Barnard,** 206 Pa. St. 280.

**3. Questions of Law and Fact — United States.** — Watkins v. King, 118 Fed. Rep. 524, 55 C. A. 290.

**Alabama.** — Taylor v. Fomby, 116 Ala. 621, 67 Am. St. Rep. 149.

**California.** — Ponet v. Wills, (Cal. 1897) 48 Pac. Rep. 483; Reynier v. Elton, 133 Cal. 304.

**Connecticut.** — Merwin v. Morris, 71 Conn. 555.

**Georgia.** — Boardman v. Scott, 102 Ga. 404; Hammond v. George, 116 Ga. 792.

**Illinois.** — Decatur v. Niedermeyer, 168 Ill. 68.

**Indiana.** — Ayers v. Huddleston, 30 Ind. App. 242.

**Iowa.** — Hyatt v. Clever, 104 Iowa 338.

**Kentucky.** — Ashcraft v. Cox, (Ky. 1899) 50 S. W. Rep. 986; Barker Cedar Co. v. Roberts, 65 S. W. Rep. 123, 23 Ky. L. Rep. 1345; Johnson v. Harris, 68 S. W. Rep. 844, 24 Ky. L. Rep. 449; Patterson v. T. J. Moss Tie Co., 71 S. W. Rep. 930, 24 Ky. L. Rep. 1571; Garred v. Blackburn, 82 S. W. Rep. 234, 26 Ky. L. Rep. 486.

**Louisiana.** — State v. Burton, 106 La. 732.

**Massachusetts.** — Graves v. Broughton, 185 Mass. 174.

**Michigan.** — Woodbury v. Venia, 114 Mich. 251; Pugh v. Schindler, 133 Mich. 314, 10 Detroit Leg. N. 169.

**Minnesota.** — Stadin v. Helin, 76 Minn. 496; Ferch v. Konne, 78 Minn. 515; Winger v. Vaee, 82 Minn. 145.

**Missouri.** — McKinney v. Doane, 155 Mo. 287.

**Nebraska.** — Baty v. Elrod, 66 Neb. 735.

**New Jersey.** — Allen v. Ponitz, (N. J. 1899) 43 Atl. Rep. 981.

**New York.** — Egerer v. New York Cent., etc., R. Co., 39 N. Y. App. Div. 652; Weiant v. Rockland Lake Trap Rock Co., 174 N. Y. 509, affirming 61 N. Y. App. Div. 383.

**North Carolina.** — Davidson v. Shuler, 119 N. Car. 582; Deaver v. Jones, 119 N. Car. 598; Tucker v. Satterthwaite, 123 N. Car. 311; Rowe v. Cape Fear Lumber Co., 128 N. Car. 301, 133 N. Car. 433; Echerd v. Johnson, 126 N. Car. 409; Williams v. Shoemaker, 127 N. Car. 182; Harper v. Anderson, 130 N. Car. 538.

**North Dakota.** — Radford v. Johnson, 8 N. Dak. 182.

**Oregon.** — Albert v. Salem, 39 Oregon 466.

**Pennsylvania.** — Deppen v. Bogar, 7 Pa. Super. Ct. 434; Kron v. Daugherty, 9 Pa. Super. Ct. 163; Lehigh Valley Coal Co. v. Beaver Lumber Co., 203 Pa. St. 544; Miller v. Cure, 205 Pa. St. 168; Marcy v. Brock, 207 Pa. St. 95.

**South Carolina.** — Connor v. Johnson, 53 S. Car. 90.

**South Dakota.** — Dowdle v. Cornue, 9 S. Dak. 514; White v. Amrhien, 14 S. Dak. 270.

**Tennessee.** — Kittrell v. Biles, (Tenn. Ch. 1898) 52 S. W. Rep. 783; Christian v. Cope, (Tenn. Ch. 1899) 56 S. W. Rep. 1030.

**Texas.** — Taylor v. Brown, (Tex. Civ. App. 1897) 39 S. W. Rep. 312; Petrucio v. Gross, (Tex. Civ. App. 1898) 47 S. W. Rep. 43; Bell v. Preston, 19 Tex. Civ. App. 375; Vogt v. Geyer, (Tex. Civ. App. 1898) 48 S. W. Rep. 1100; Wiley v. Lindley, (Tex. Civ. App. 1900) 56 S. W. Rep. 1001; Stacy v. Greenwade, 26 Tex. Civ. App. 277; White v. Smith, (Tex. Civ. App. 1902) 67 S. W. Rep. 1028; Broil v. Wishert, (Tex. Civ. App. 1904) 79 S. W. Rep. 1089.

**Vermont.** — Turner Falls Lumber Co. v. Burns, 71 Vt. 354; Baker v. Sherman, 71 Vt. 439.

**Virginia.** — Greif v. Norfolk, etc., R. Co., (Va. 1898) 30 S. E. Rep. 438; Reusens v. Lawson, 96 Va. 285.

The correctness of rival surveys made to establish disputed boundary lines is a question for the determination of the jury. Reilly v. Howe, 101 Wis. 108.

**"Thence to Mountain — Thence Along Mountain,"** does not require that the line go to the top of the mountain. Duffield v. Spence, (Tenn. Ch. 1897) 51 S. W. Rep. 492.

**Conveyance of "Bed" of Stream — What Constitutes the Bed.** — Dayton v. Cooper Hydraulic Co., 10 Ohio Dec. 192, 7 Ohio N. P. 495. See also BED OF A RIVER.

**810. 1. Presumption as to Extent of Owner-**

**811.** Presumption Rebuttable. — See note 2.

**812.** Decisions Conflicting. — See note 1.

The More Reasonable Rule. — See note 2.

**813.** c. HIGHWAY VESTED IN PUBLIC. — See note 1.

d. BOUNDED "BY," "ON," OR "ALONG" A HIGHWAY. — See note 3.

ship. — Chicago, etc., R. Co. v. Kelley, 105 Iowa 106.

**811.** 2. Presumption Rebuttable. — Graham v. Stern, 51 N. Y. App. Div. 406, *affirmed* 168 N. Y. 517.

**812.** 1. Boundary at Centre of Highway. — Huff v. Hastings Express Co., 195 Ill. 257 (intention controls).

2. The More Reasonable Rule. — Carpenter v. Buckman, (Ky. 1897) 41 S. W. Rep. 579; McKenzie v. Gleason, 184 Mass. 452, 100 Am. St. Rep. 566; Pell v. Pell, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 472, *affirmed* 65 N. Y. App. Div. 388, 169 N. Y. 607; Van Winkle v. Van Winkle, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 593, and *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 809 [812].

Conveyance of Lot by Number. — Where a recorded plat of the city shows the lots abutting on a street, a conveyance of a lot by number, with reference to the plat, conveys to the centre of the street. Thompson v. Maloney, 199 Ill. 276, 93 Am. St. Rep. 133.

**813.** 1. When Fee Vested in Public. — Calhoun v. Faraldo, (La. 1905) 38 So. Rep. 551.

3. When Land Described as "Bounded by," or "Bounded on," or "Running Along" Highway — England. — Chamber Colliery Co. v. Rochdale Canal Co., (1895) A. C. 564, 11 Reports 264; In re White, (1898) 1 Ch. 659, 67 L. J. Ch. 430, 78 L. T. N. S. 550, 46 W. R. 479 (the rule applies to streets as boundaries as well as to rural highways).

United States. — Paine v. Consumers' Forwarding, etc., Co., 71 Fed. Rep. 626, 37 U. S. App. 539.

Illinois. — Thompson v. Maloney, 199 Ill. 276, 93 Am. St. Rep. 133; Corning v. Woolner, 206 Ill. 190; Owen v. Brookport, 208 Ill. 35.

Indiana. — Western Union Tel. Co. v. Krueger, (Ind. App. 1903) 74 N. E. Rep. 25.

Maine. — Winslow v. Reed, 89 Me. 67.

Massachusetts. — Lemay v. Furtado, 182 Mass. 280; McKenzie v. Gleason, 184 Mass. 452, 100 Am. St. Rep. 566.

Michigan. — Goff v. Cogle, 118 Mich. 307.

Minnesota. — Hall v. Connecticut Mut. L. Ins. Co., 76 Minn. 401.

New York. — Matlage v. New York El. R. Co., 157 N. Y. 708, *affirming* (C. Pl. Gen. T.) 14 Misc. (N. Y.) 291; Cheney v. Syracuse, etc., R. Co., 158 N. Y. 739, *affirming* 8 N. Y. App. Div. 620; Mangam v. Sing Sing, 164 N. Y. 560, *affirming* 26 N. Y. App. Div. 464; Matter of Opening Cathedral Parkway, 20 N. Y. App. Div. 404, *affirmed* 155 N. Y. 638; Pell v. Pell, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 472, *affirmed* 65 N. Y. App. Div. 388, 169 N. Y. 607 (the fact that the beginning point is stated as being on the side of the road does not change the rule when the subsequent call is for boundary "by" the road); Van Winkle v. Van Winkle, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 593; Mitchell v. Einstein, (Supm. Ct. Spec. T.)

42 Misc. (N. Y.) 358. See, however, Watson v. New York, 175 N. Y. 475, *affirming* 67 N. Y. App. Div. 576, *affirming* (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 701 (intention controls); Mitchell v. Einstein, 105 N. Y. App. Div. 413. Rhode Island. — Healey v. Kelly, 24 R. I. 581.

South Dakota. — Sweatman v. Bathrick, (S. Dak. 1903) 95 N. W. Rep. 422.

Tennessee. — Hamilton County v. Rape, 101 Tenn. 222; Reeves v. Allen, 101 Tenn. 412, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 813, 814.

Wisconsin. — Brown v. Baraboo, 98 Wis. 273; Smith v. Beloit, (Wis. 1904) 100 N. W. Rep. 877.

See also ALONG; BY; UPON.

Where, by a special description, a strip exists between the land conveyed and a street, the grantee, of course, cannot claim to the centre of the street. Huff v. Hastings Express Co., 195 Ill. 257.

Contract to Sell. — The rule applies to a contract to sell. Pittsburgh, etc., R. Co. v. Fischer Foundry, etc., Co., 208 Pa. St. 73.

Northerly "to" a highway carries to the centre of the highway. Baker v. Barry, 22 R. I. 471.

State Grant. — The rule that title to land described in a deed as bounded by a highway extends to the middle of the highway applies to grants by the state as well as to grants by private individuals. Hines v. Kingston Coal Co., 186 Pa. St. 43; Cheney v. Syracuse, etc., R. Co., 158 N. Y. 739, *affirming* 8 N. Y. App. Div. 620.

But if the dedication of the highway has been vacated before the conveyance it is otherwise. Paine v. Consumers' Forwarding, etc., Co., (C. C. A.) 71 Fed. Rep. 626.

Includes Colonial Grant. — Paige v. Schenectady R. Co., 77 N. Y. App. Div. 571, *reversing* (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 384, 84 N. Y. App. Div. 91 (colonial English grant in confirmation of Dutch grant).

Grant by Municipality carries to centre of street in the absence of circumstances showing a contrary intention. Paige v. Schenectady R. Co., 178 N. Y. 102, *modifying* 84 N. Y. App. Div. 91. See also In re White, (1898) 1 Ch. 659 (grant by municipality held to carry to centre of street).

In Graham v. Stern, 168 N. Y. 517, *affirming* 51 N. Y. App. Div. 406, it was held that a conveyance by a municipality of land bordering on a street, the fee of which was in the municipality, does not convey to the centre of the street, but merely to the margin.

Compare Mappin v. Liberty, (1903) 1 Ch. 118, 72 L. J. Ch. 63, 87 L. T. N. S. 523 (grant by municipality whose duties with regard to the street are inconsistent with a disposal of the fee).

Unopened Street. — And in New York it has been held that a conveyance by a municipality

**814.** *e.* "BY THE SIDE," "BY THE MARGIN," OR "BY THE LINE" OF A HIGHWAY. — See note 2.

**816.** *f.* HIGHWAY AS OPENED, NOT AS PLATTED. — See note 1.

2. Private Ways — *a.* IN GENERAL. — See note 3.

**817.** *c.* MESNE CONVEYANCES. — See note 3.

**818.** VI. PARTY WALLS. — See note 3.

**819.** VII. WATERS AS BOUNDARIES — 1. Seashore, Estuaries, Tidal Rivers — *a.* IN GENERAL — High-water Mark. — See note 1.

Low-water Mark — The Shore. — See notes 3, 4.

of land bounding on an unopened street would not carry to the centre of the proposed street. *Graham v. Stern*, 51 N. Y. App. Div. 406, affirmed 168 N. Y. 517.

**814.** 2. Land Described as "By the Side," or "By the Margin," or "By the Line" of Highway — *Iowa*. — *Dows Real Estate, etc., Co. v. Emerson*, (Iowa 1904) 99 N. W. Rep. 724.

*Massachusetts*. — *McKenzie v. Gleason*, 184 Mass. 452, 100 Am. St. Rep. 566.

*New York*. — *Deering v. Riley*, 38 N. Y. App. Div. 164, affirmed 167 N. Y. 184 (by the "side" of); *Kennedy v. Mineola, etc., Traction Co.*, 77 N. Y. App. Div. 484, affirmed 178 N. Y. 508, (Supm. Ct. App. Div.) 12 N. Y. Ann. Cas. 189; *Jacquemin v. Finnegan*, (County Ct.) 39 Misc. (N. Y.) 628; *Mitchell v. Einstein*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 358; *Mott v. Eno*, 97 N. Y. App. Div. 580; *Mitchell v. Einstein*, 105 N. Y. App. Div. 413.

*Rhode Island*. — *Healey v. Kelly*, 24 R. I. 581. See, however, *Hamilton County v. Rape*, 101 Tenn. 222, where a deed of a lot described as situated on the "west side" of a street was held simply to mean that the lot lay on the western side of or in that direction from the street, and did not stop the grantee's boundary line at the margin of the street.

**A Deed Describing a Lot as Beginning at a "Post Planted"** on a street line, thence to another "post planted" on a street line, conveys no part of the street beyond where such other post was planted. *Neal v. Hopkins*, 87 Md. 19.

**816.** 1. Highway as Actually Opened, Intended. — *Southern Iron Works v. Central of Georgia R. Co.*, 131 Ala. 649, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815; *Singer v. New York*, 47 N. Y. App. Div. 42, affirming 165 N. Y. 658; *Burke v. Henderson*, 54 N. Y. App. Div. 157, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 803-5 [816]; *Smith v. Stacey*, 68 N. Y. App. Div. 521, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816; *Donahue v. Keysone Gas Co.*, 90 N. Y. App. Div. 386; *Norris v. Dalrymple*, 18 Pa. Super. Ct. 287; *Stockwell v. Fitzgerald*, 70 Vt. 468. See also *Quebec v. North Shore R. Co.*, 27 Can. Sup. Ct. 102.

3. Private Ways — General Rule. — *Lemay v. Furtado*, 182 Mass. 280; *McKenzie v. Gleason*, 184 Mass. 452, 100 Am. St. Rep. 566; *Pitney v. Husted*, 8 N. Y. App. Div. 105; *Baker v. Barry*, 22 R. I. 471; *Stockwell v. Fitzgerald*, 70 Vt. 468.

The fact that the way has not been fenced off is immaterial. *Paine v. Consumers' Forwarding, etc., Co.*, (C. C. A.) 71 Fed. Rep. 626.

The rule does not apply when the contrary intention of the parties is shown. *Crocker v. Cotting*, 166 Mass. 583.

In *Maine* it is held that though land bounded

on a highway extends to the centre of the way, still when land is bounded on a private way it extends only to the side line of the way. *Winslow v. Reed*, 89 Me. 67, affirming *Bangor House v. Brown*, 33 Me. 309; *Ames v. Hilton*, 70 Me. 36.

**Right of Way of Railway Company as Boundary — Deed Held to Carry to Centre of Right of Way.** — *Rice v. Clear Spring Coal Co.*, 186 Pa. St. 49.

**817.** 3. Rule as to Mesne Conveyances. — *Overland Machinery Co. v. Alpenfels*, 30 Colo. 175, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 817.

**818.** 3. Party Walls. — *Ehrenreich v. Froment*, 73 N. Y. App. Div. 213; *Medara v. Du Bois*, 187 Pa. St. 431. See also *Fleming v. Cohen*, 186 Mass. 323; *Dunlap v. Reardon*, 24 Pa. Super. Ct. 35.

**819.** 1. High-water Mark — Civil Law — *Change in High-water Mark from Natural Causes — Boundary also Changes.* — *De Lancey v. Wellbrock*, 113 Fed. Rep. 103.

*Method of Determining Boundary Line Described as the Junction of One Body of Water with Another.* — *Oakland v. Oakland Water Front Co.*, 118 Cal. 160.

**Head of Stream.** — The head of a stream is the highest point on that stream which furnishes a continuous stream of water, and not necessarily its longest prong. In determining the head of a stream which has several branches, courts have uniformly held that branch to be the main fork which furnishes the main volume of water. *Uhl v. Reynolds*, (Ky. 1901) 64 S. W. Rep. 498. See also *HEAD*.

**The Thread of a Stream** is the line midway between the banks at the ordinary stage of water, without regard to the channel or the lowest and deepest part of the stream. *State v. Burton*, 106 La. 732. See also *FILUM AQUÆ*; *THREAD*.

**High-water Mark on Nontidal River.** — *Welch v. Browning*, 115 Iowa 690. See also *HIGH-WATER MARK*.

High-water mark as applied to nontidal streams, though inaccurate, means the ordinary high-water mark. *Morrison v. Skowhegan First Nat. Bank*, 88 Me. 155.

3. **Low-water Mark.** — Low-water mark as applied to inland navigable lakes means the ordinary low-water mark. *McBurney v. Young*, 67 Vt. 574.

Low-water mark upon an inland lake is a point at which the water stands when free from disturbing causes. *Slauson v. Goodrich Transp. Co.*, 94 Wis. 642.

See also *LOW-WATER MARK*.

4. **The Shore.** — *Dunton v. Parker*, 97 Me. 461; *Maynard v. Puget Sound Nat. Bank*, 24 Wash. 455.

**819.** Right of the Crown. — See note 6.

Grant — Prescription. — See note 8.

**820.** See note 1.

*b.* LEADING RULE. — See notes 2, 3.

**821.** See note 1.

*c.* "BY," "UPON," "TO," OR "ALONG" THE SHORE. — See note 2.

**822.** *d.* SIDE LINES OF FLATS ON TIDE WATERS. — See note 1.

**2.** Navigable Rivers — *a.* DEFINED. — See note 4.

**823.** *b.* GENERAL RULE — Presumption. — See note 1.

Conflict of Authorities. — See note 2.

**825.** See note 1.

**826.** See note 1.

**828.** *d.* SIDE LINES OF FORESHORE OWNERS. — See note 1.

The Term "Shore," though inapplicable, is sometimes used with regard to nontidal streams. *Morrison v. Skowhegan First Nat. Bank*, 88 Me. 155.

See also SHORE.

"Strand." — The term "strand" is synonymous with "shore," and is that portion of the land lying between ordinary high and low water marks. *Stillman v. Burfeind*, 21 N. Y. App. Div. 13. See also STRAND.

**819.** **6.** When Granted to the Subject. — *Johnson v. State*, 114 Ga. 790, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819.

**8.** Grant — Prescription. — *Coburn v. San Mateo County*, 75 Fed. Rep. 520; *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143.

**820.** **1.** Uplands or Flats May Be Conveyed Separately. — *Dunton v. Parker*, 97 Me. 461.

**2.** Boundary of Lands Abutting on the Sea — Leading Rule. — *Coburn v. San Mateo County*, 75 Fed. Rep. 520 (Mexican grant bordering "to the west on the sea" carries only to high-water mark); *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143; *Johnson v. State*, 114 Ga. 790, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820; *Jarvis v. Lynch*, 91 Hun (N. Y.) 349, affirmed 157 N. Y. 445; *Sage v. New York*, 154 N. Y. 61; *Stillman v. Burfeind*, 21 N. Y. App. Div. 13; *Pacific Sheet Metal Works v. Roeder*, 26 Wash. 183, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820.

**3.** Statutes. — *Waverly Water Front, etc., Co. v. White*, 97 Va. 176 (statutory provision extending boundary to low-water mark).

Colonial Ordinance, 1641-47. — *Dunton v. Parker*, 97 Me. 461.

**821.** **1.** Centre Thread of Small Tidal Creeks. — Where the grantor owns to the centre of a tidal stream, a description "to mouth of creek" and "thence ascending" the stream, will carry to centre of stream. *Freeman v. Bellegarde*, 108 Cal. 179, 49 Am. St. Rep. 76.

**2.** "By," "Upon," "To," or "Along" the Shore — Decisions Conflicting. — *Freeman v. Bellegarde*, 108 Cal. 179, 49 Am. St. Rep. 76; *Freeman v. Leighton*, 90 Me. 541 ("to the shore" excludes flats); *Dunton v. Parker*, 97 Me. 461. See also ALONG; BY; TO; UPON.

To Low-water Mark on Sea Shore. — A description of land as running to a certain bay, "thence northerly following the meandering from said bay," carries to low-water mark.

*Maynard v. Puget Sound Nat. Bank*, 24 Wash. 455.

To High-water Mark on Shore. — *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143; *Stillman v. Burfeind*, 21 N. Y. App. Div. 13.

To High-water Mark on Tidal Rivers. — *District of Columbia v. Cropley*, 23 App. Cas. (D. C.) 232 (legislative grant held to carry only to high-water mark).

**822.** **1.** Side Lines of Flats on Tide Waters — General Rule. — *Lowndes v. Wicks*, 69 Conn. 15.

**4.** What Is Meant by a Navigable River as a Boundary. — *Webster v. Harris*, 111 Tenn. 668.

**823.** **1.** Presumption — Deed Conveys as Far as Grantor Owns. — *Smith v. Bartlett*, 180 N. Y. 366, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 823.

Non-ownership of Bed of River. — The rule that the conveyance of land adjoining a river passes *ad medium filum* without special mention does not apply where the bed is not owned by the grantor so that it would pass if expressly mentioned. *Ecroyd v. Coulthard*, (1897) 2 Ch. 554, (1898) 2 Ch. 358.

**2.** To Middle Thread of River. — *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269; *Smith v. Bartlett*, 180 N. Y. 360, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 823; *Chesbrough v. Head*, 23 Ohio Cir. Ct. 427.

In *Wisconsin* it is held that where a river separates Wisconsin from another state, the title of a riparian owner in Wisconsin goes to the state boundary line in the river, regardless of whether that is nearer to or farther from the shore than the *filum aqua* of the stream. *Franzini v. Layland*, 120 Wis. 72.

Leases. — The rule applies to leases. *Balance v. Peoria*, 180 Ill. 29, reversing 70 Ill. App. 546 (Illinois river).

**825.** **1.** To High-water Mark. — *Black v. Diver*, 68 Kan. 204; *Dashiel v. Harshman*, 113 Iowa 283; *Smucker v. Pennsylvania R. Co.*, 6 Pa. Super. Ct. 521, reversing 188 Pa. St. 40; *Washougal, etc., Transp. Co. v. Dalles, etc., Nav. Co.*, 27 Wash. 490.

**826.** **1.** To Low-water Mark. — *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812 (announcing law in *Tennessee*); *Edwards v. Woodruff*, 25 Pa. Super. Ct. 575.

**828.** **1.** Side Lines of Foreshore Owners. —

**828. 3. Nonnavigable Streams — a. GENERAL RULE.** — See notes 3, 4.

**830. b. BY "BANK" OR "SHORE" OF STREAM.** — See notes 2, 3.

**831. c. "BOUNDING ON," "RUNNING ALONG" A STREAM, AND THE LIKE.** — See note 1.

**832. f. SIDE LINES TO FILUM AQUÆ DETERMINED.** — See note 3.

**g. ARTIFICIAL WATERCOURSES.** — See note 4.

**833. 4. Lakes and Ponds — a. GENERAL RULE.** — See note 1.

**834. b. BOUNDARY LINES ON NONNAVIGABLE LAKES.** — See note 1.

Montgomery v. Shaver, 40 Oregon 244, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 828.

**828. 3. Nonnavigable Streams — Common-law Rule.** — Chamber Colliery Co. v. Rochdale Canal Co., (1895) A. C. 564.

**4. Nonnavigable Streams — United States Rule.** — Matter of Wilder, 90 N. Y. App. Div. 262, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 828; Ludwig v. Overly, 6 Ohio Cir. Dec. 690, 19 Ohio Cir. Ct. 709; Edwards v. Woodruff, 25 Pa. Super. Ct. 575; Webster v. Harris, 111 Tenn. 668; Walls v. Cunningham, (Wis. 1904) 101 N. W. Rep. 696.

A description of land extending to a stake on the bank of a stream, thence up the stream to a sycamore on the bank, has been held to carry to the thread of the stream. Reunion v. Alley, (Ky. 1897) 39 S. W. Rep. 849.

**Island.** — The fact that there is an island in the watercourse does not change the rule that a grant of land bordering on the watercourse carries to the centre of the stream. Whitaker v. McBride, 197 U. S. 510.

**Federal Grants.** — Grants of the federal government for land bounded on streams without any reservation or restriction of terms ought to be construed as to their effect according to the law of the state in which the land lies. Whitaker v. McBride, 197 U. S. 510, following Hardin v. Jordan, 140 U. S. 371.

**830. 2. Land Described as Bounded "on the Bank or Shore" of Stream.** — Morrison v. Skowhegan First Nat. Bank, 88 Me. 155; Matter of Rochester, 8 N. Y. App. Div. 609 (a call to the top of the bank of a stream, thence along the top of the bank; the course should follow the meanders of the bank).

A description of land as lying on the south "side of" a river carries to the centre of the river. Hanlon v. Hobson, 24 Colo. 284.

**3. Dayton v. Cooper Hydraulic Co.,** 10 Ohio Dec. 192, 7 Ohio N. P. 495 (to ordinary line of water without reference to extraordinary freshets or extraordinary low water). See, however, Morrison v. Skowhegan First Nat. Bank, 88 Me. 155, where the call was to high-water mark of a river and thence by the bank or shore of the river, and it was held to carry only to the ordinary high-water mark.

Where the description expressly calls for the low-water mark of the stream, such mark will, of course, be the boundary line. Webster v. Harris, 111 Tenn. 668.

**831. 1. Land Described as "Bounding on" or "Running Along" Stream — United States.** — Kirwan v. Murphy, 83 Fed. Rep. 275, 49 U. S. App. 658.

*California.* — Kirby v. Potter, 138 Cal. 686.

*Colorado.* — Hanlon v. Hobson, 24 Colo. 284.

*Indiana.* — Sizor v. Logansport, 151 Ind. 626.

*Kansas.* — Steinbuechel v. Lane, 59 Kan. 7

(held not to extend to any part of an island separated from the shore by a well-defined channel).

*Kentucky.* — Penrod v. Bruce, 61 S. W. Rep. 1, 22 Ky. L. Rep. 1697 (rule does not apply where grantor has previously conveyed the bed of the stream); Stonestreet v. Jacobs, 82 S. W. Rep. 363, 26 Ky. L. Rep. 628.

*Nebraska.* — McBride v. Whitaker, 65 Neb. 137.

*North Carolina.* — Rowe v. Cape Fear Lumber Co., 128 N. Car. 301.

*Tennessee.* — Webster v. Harris, 111 Tenn. 668.

*Wisconsin.* — Lampman v. Van Alstyne, 94 Wis. 417; Roberts v. Decker, 120 Wis. 102.

**The Fact that a Dam Extends Across the Stream** does not change the rule, but the grantee acquires title to the dam to the thread of the stream. Roberts v. Decker, 120 Wis. 102.

**Mention of a Monument** on the bank of a stream does not change the rule. Stonestreet v. Jacobs, (Ky. 1904) 82 S. W. Rep. 363.

**832. 3. Side Lines of Lands Fronting on Non-navigable River.** — South Shore Lumber Co. v. Thompson Lumber Co., (C. C. A.) 94 Fed. Rep. 738.

**4. Lands Bounded upon Artificial Watercourses.** — Warren v. Gloversville, 81 N. Y. App. Div. 291, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832.

In Chamber Colliery Co. v. Rochdale Canal Co., (1895) A. C. 564, it was held that the presumption did not apply in the case of the conveyance of land bounded by a canal.

**833. 1. Calls for Natural Lake or Pond — General Rule.** — Hardin v. Shedd, 190 U. S. 508, affirming 177 Ill. 123 (on the ground that the Illinois rule controls a federal grant of land situate in Illinois); Boardman v. Scott, 102 Ga. 404, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832; Fuller v. Shedd, 161 Ill. 462, 52 Am. St. Rep. 380; Hinckley v. Peay, 22 Utah 21; McBurney v. Young, 67 Vt. 574.

A description commencing at a point "twenty feet above low-water mark, thence along the said shore about twenty feet above low-water mark," carries only to a line about twenty feet above low-water mark. Lynch v. Troxell, 207 Pa. St. 162.

**834. 1. Nonnavigable Lakes and Ponds.** — Kirwan v. Murphy, 83 Fed. Rep. 275, 49 U. S. App. 658; Wilcox v. Bread, 92 Hun (N. Y.) 9, affirmed 157 N. Y. 713.

"Where a meandered lake is nonnavigable, and in cases where lakes have gradually and imperceptibly dried up, the owner of land bordering on the shore thereof takes to the centre or middle of the lake. In other words, the title of the shore owner extends to the centre of the lake, the boundary lines of his

**835.** *c.* MEANDER LINES ON NONNAVIGABLE LAKES. — See note 1.

**836.** *e.* BOUNDARY ON ARTIFICIAL LAKE OR POND. — See note 2.

**837.** *g.* SIDE LINES ON FORESHORE OF NAVIGABLE LAKES. — See note 6.

**838.** VIII. JURISDICTION OF QUESTIONS OF BOUNDARY — 1. Interstate Boundaries Determined. — See note 1.

2. At Law. — See note 3.

**839.** 3. In Equity. — See notes 2, 3.

**840.** Right of Discovery. — See note 1.

Fraud. — See note 2.

tract extending from the shore or meander line, on lines converging to a point in the centre of the lake bed; and such lake bed is an incident and an appurtenance to the adjoining lands, and becomes the property of the individual shore owner upon acquiring title to the adjoining land." *Shell v. Matteson*, 81 Minn. 38, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 828 [834].

**Swamp.** — A description running to a swamp and thence along the swamp carries only to the banks of the swamp, and not to the centre thread of a stream running through the swamp. *Rowe v. Cape Fear Lumber Co.*, 128 N. Car. 301.

Where the call is "with the run of the swamp" the line should be extended to the run and not limited to the edge of the swamp. *Rowe v. Cape Fear Lumber Co.*, 133 N. Car. 433.

And it has been held that where there is a call for a swamp, it is for the jury to say whether the margin or the run is intended. *Rowe v. Cape Fear Lumber Co.*, 133 N. Car. 433, *citing* *Brooks v. Britt*, 4 Dev. L. (15 N. Car.) 481, and *explaining* *Rowe v. Cape Fear Lumber Co.*, 128 N. Car. 301; *Rowe v. Cape Fear Lumber Co.*, (1905) 138 N. Car. 465, *following* *Rowe v. Cape Fear Lumber Co.*, 133 N. Car. 433.

**835. 1. Meander Lines on Nonnavigable Lakes.** — *Schlosser v. Cruickshank*, 96 Iowa 414. See, however, *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380; *Carr v. Moore*, 119 Iowa 152, 97 Am. St. Rep. 292.

The fact that the meandered line does not actually follow the bank of the lake does not alter the rule. *Schlosser v. Cruickshank*, 96 Iowa 414.

The fact that the quantity called for by the grant and the quantity within the meandered line correspond does not alter the rule. *Schlosser v. Cruickshank*, 96 Iowa 414.

**836. 2. Artificial Pond.** — Under a deed bounding the land therein conveyed by an artificial pond, which had been in existence for more than forty years, and which had thus become a permanent body of water, and was still being kept up and maintained as such, its waters, however, ebbing and flowing from time to time, so as to leave a margin of land between its high and low water marks, the line of the land so conveyed did not extend to the thread of the stream from whose waters the pond was formed, but only to the low-water mark of the pond at the date of the execution of the deed. *Boardman v. Scott*, 102 Ga. 404.

A conveyance bounded by an artificial pond does not carry to the centre of the pond, but

merely to the shore; but where the pond is merely an enlargement of a stream by the erection of a dam, the grant will carry to the centre of the pond. *Roberts v. Decker*, 120 Wis. 102.

**837. 6. Side Lines on Foreshore of Navigable Lakes.** — See *Hanson v. Rice*, 88 Minn. 273.

**838. 1. Where the Boundary Line Between Two States** is the centre thread of a river, in case of a sudden and violent change in the channel of the river the boundary between the states remains in the old channel. *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812.

The Middle of the Sabine River is the boundary line between the states of Louisiana and Texas. *State v. Burton*, 106 La. 732.

The Boundary Line Between Wisconsin and Minnesota is the centre line of the main channel of the Mississippi river. *Franzini v. Layland*, 120 Wis. 72.

**3. Limitations of Jurisdiction at Law.** — *New York, etc., Land Co. v. Votaw*, 91 Tex. 282.

**839. 2. Guice v. Barr, 130 Ala. 570, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 839; *Heideman v. Sequin*, 110 La. 449; *F. H. Wolf Brick Co. v. Lonyo*, 132 Mich. 162, 102 Am. St. Rep. 412, 9 Detroit Leg. N. 566.**

Where There Are Other Grounds for equitable jurisdiction a court of equity may in the suit establish boundary lines. *Le Comte v. Carson*, (W. Va. 1904) 49 S. E. Rep. 238.

**Appointment of Commissioners.** — *Guice v. Barr*, 130 Ala. 570.

**3. Necessity for Superinduced Equity.** — *Guice v. Barr*, 130 Ala. 570, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 839; *Blumenauer v. O'Connor*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 17; *McCreery Land, etc., Co. v. Myers*, 70 S. Car. 282; *Collins v. Sutton*, 94 Va. 127; *Robinson v. Moses*, (Va. 1899) 34 S. E. Rep. 48; *Eakin v. Taylor*, 55 W. Va. 652.

**840. 1. Discovery as to Boundaries.** — The mere fact that a land owner has in his possession a map and deed showing the disputed boundary line does not confer jurisdiction upon a court of equity for discovery of evidence. *Collins v. Sutton*, 94 Va. 127.

**2. Fraud.** — While the jurisdiction of a court of equity to establish a disputed boundary line does not arise upon any mere dispute as to the location of the boundary between adjoining parcels of land or even upon the mere dispute as to such location because of a confusion or obliteration of the line, it will be exercised when the obliteration or confusion has resulted from the act of the defendant in fraud of the complainant's rights. *Guice v. Barr*, 130 Ala. 570, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 840.

**842. IX. STATUTORY PROVISIONS FOR DETERMINING BOUNDARIES — United States.** — See note 2.

**846.** See note 1.

[Canada. — See note 2a.]

**847. X. ESTABLISHMENT OF BOUNDARIES BY EVIDENCE — 1. In General.** — See note 3.

2. Parol Evidence — a. GENERAL RULE. — See note 4.

**848. b. WHEN ADMISSIBLE — (1) To Remove Latent Ambiguities.** — See note 1.

**842. 2. Statutes for Determining Boundaries** — *Georgia*. — *Bowen v. Jackson*, 101 Ga. 817; *Crawford v. Wheeler*, 111 Ga. 870; *Ballard v. Haines*, 115 Ga. 847; *Riddle v. Sheppard*, 119 Ga. 930; *Walker v. Boyer*, 121 Ga. 300.

*Illinois*. — *Ely v. Brown*, 183 Ill. 575.

*Indiana*. — *Ricketts v. Dorrell*, 59 Ind. 427; *Tolleston Club v. Clough*, 146 Ind. 93; *Spacy v. Evans*, (Ind. 1897) 48 N. E. Rep. 355 (waiver of conclusiveness of official survey by agreement for new survey); *Wood v. Kuper*, 150 Ind. 622; *Williams v. Atkinson*, 152 Ind. 98; *Spacy v. Evans*, 152 Ind. 431; *Bennett v. Simon*, 152 Ind. 490; *Miller v. White*, 28 Ind. App. 371; *Ayers v. Huddleston*, 30 Ind. App. 242; *Helton v. Fastnow*, 33 Ind. App. 288.

*Iowa*. — *Maher v. Shenhall*, 96 Iowa 634; *Richards v. Schneider*, (Iowa 1898) 76 N. W. Rep. 711 (appeal); *Boyd v. Shoop*, 107 Iowa 10; *Dickinson County v. Fouse*, 112 Iowa 21 (who may maintain proceedings); *McAnich v. Hulse*, 113 Iowa 58; *Oster v. Devereaux*, 115 Iowa 724; *Newton v. Templeman*, 115 Iowa 643; *Brutsche v. Bowers*, 122 Iowa 226.

*Kansas*. — *Estrel v. Diehl*, 6 Kan. App. 245 (review of order and report of surveyor); *Lackey v. Wilson*, 63 Kan. 881; *Swaz v. Ramala*, 63 Kan. 633; *Close v. Huntington*, 66 Kan. 354; *Shanline v. Wiltzie*, (Kan. 1904) 78 Pac. Rep. 436.

*Kentucky*. — *Liter v. Shirley*, (Ky. 1896) 35 S. W. Rep. 550; *Krauth v. Hahn*, 65 S. W. Rep. 18, 23 Ky. L. Rep. 1261; *Chenault v. Spencer*, 68 S. W. Rep. 128, 24 Ky. L. Rep. 141.

*Louisiana*. — *Williams v. Bernstein*, 51 La. Ann. 115; *Booth v. Buras*, 104 La. 614.

*Massachusetts*. — *Gardner v. Essex County*, 183 Mass. 189.

*Michigan*. — *Van Der Groef v. Jones*, 108 Mich. 65 (provision for surveys by county surveyors).

*Minnesota*. — *Stadin v. Helin*, 76 Minn. 496; *Ferch v. Konne*, 78 Minn. 515; *Rock v. Donora Min. Co.*, 91 Minn. 259.

*Missouri*. — *Allen v. Hickam*, 156 Mo. 49 (qualification of commissioners); *Granby Min., etc., Co. v. Davis*, 156 Mo. 422.

*North Carolina*. — *Scott v. Kellum*, 117 N. Car. 664; *Williams v. Hughes*, 124 N. Car. 3; *Midgett v. Midgett*, 129 N. Car. 21; *Parker v. Taylor*, 133 N. Car. 103; *Smith v. Johnson*, (N. Car. 1904) 49 S. E. Rep. 62.

*North Dakota*. — *Radford v. Johnson*, 8 N. Dak. 182.

*Oklahoma*. — *Watkins v. Havighorst*, 13 Okla. 128.

*Oregon*. — *Sellwood v. Henneman*, 36 Oregon 573; *Egan v. Finney*, 42 Oregon 599.

*Rhode Island*. — *Taber v. Hall*, 23 R. I. 613, 24 R. I. 88.

*Tennessee*. — *Barnes v. Brown*, (Tenn. Ch. 1898) 48 S. W. Rep. 326 (necessity for notice for processioning survey).

*Texas*. — *Wardlow v. Harmon*, (Tex. Civ. App. 1898) 45 S. W. Rep. 828 (survey by surveyor appointed by court); *Broll v. Wishert*, (Tex. Civ. App. 1904) 79 N. W. Rep. 1089.

*Washington*. — *Wilkeson Coal, etc., Co. v. Driver*, 13 Wash. 610.

*Wisconsin*. — *Peters v. Reichenbach*, 114 Wis. 209.

Location by county surveyor of section lines is only *prima facie* correct. *Webster v. White*, 8 S. Dak. 479.

Proceedings under the *Maine* statute to establish the boundary lines between towns does not affect the rights of individuals. *Whitcomb v. Dutton*, 89 Me. 212.

**Compensation of Surveyor.** — *Swoope v. Moody*, 73 Miss. 82.

**Surveyor Appointed by Committee Must Be Disinterested.** — *Carney v. Wilkinson*, 67 Conn. 345.

**846. 1.** *Muncy v. Mattfield*, (Tex. Civ. App. 1897) 40 S. W. Rep. 345.

**2a. Canada.** — *Mercier v. Barrette*, 25 Can. Sup. Ct. 94.

**847. 3. The Best Evidence.** — *Cloud County v. Morgan*, 7 Kan. App. 213 (with regard to highway there is no presumption that actual surveyed line was centre of highway).

Evidence that a fence, the true line of which is in dispute, is in line with fences on adjoining lands, is inadmissible to show that it is on the true line. *Fuller v. Worth*, 91 Wis. 406.

**4. General Rule as to Parol Evidence — Not Admissible to Vary Description.** — *United States — Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, (C. C. A.) 129 Fed. Rep. 668.

*Illinois*. — *Ballance v. Peoria*, 180 Ill. 29.

*Iowa*. — *Palmer v. Osborne*, 115 Iowa 714 (custom with regard to platting additions to cities).

*Maryland*. — *Neal v. Hopkins*, 87 Md. 19.

*New Jersey*. — *Naughton v. Elliott*, (N. J. Eq. 1905) 59 Atl. Rep. 869.

*North Carolina*. — *Davidson v. Shuler*, 119 N. Car. 582.

*Texas*. — *Blackwell v. Coleman County*, 94 Tex. 216; *Coleman County v. Stewart*, (Tex. Civ. App. 1901) 65 S. W. Rep. 383, *affirmed* 95 Tex. 445; *Sloan v. King*, (Tex. Civ. App. 1903) 77 S. W. Rep. 48; *Missouri, etc., R. Co. v. Anderson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 781.

**848. 1. Parol Evidence Admissible to Remove Latent Ambiguities** — *Connecticut*. — *Beach v. Whittlesey*, 73 Conn. 530.

*District of Columbia*. — *Okie v. Person*, 23 App. Cas. (D. C.) 170.

**849.** (2) *To Prove Location on the Ground.* — See note 1.

**850.** (3) *To Establish Lost Corners.* — See notes 1, 2.

**3. Hearsay Evidence** — *a.* IN GENERAL. — See notes 3, 4.  
*Particular Facts.* — See note 6.

**851.** In the United States. — See note 1.

*b.* DECLARATIONS AND ADMISSIONS — *Declarations of Deceased Persons.*

— See note 3.

*Georgia.* — *Leverett v. Bullard*, 121 Ga. 534.  
*Illinois.* — *Wiggins Ferry Co. v. Louisville*, etc., R. Co., 178 Ill. 473.

*Kentucky.* — *Hall v. Conlee*, 62 S. W. Rep. 899, 23 Ky. L. Rep. 177.

*Massachusetts.* — *Graves v. Broughton*, 185 Mass. 174.

*New Hampshire.* — *Bartlett v. La Rochelle*, 68 N. H. 211.

*New York.* — *Watson v. New York*, 175 N. Y. 475, *affirming* 67 N. Y. App. Div. 573; *Bell v. Hayes*, 60 N. Y. App. Div. 382; *Smith v. Stacey*, 68 N. Y. App. Div. 521.

*North Carolina.* — *Davidson v. Shuler*, 119 N. Car. 582 (to show clerical error in stating compass points); *Tucker v. Satterthwaite*, 123 N. Car. 511; *Rowe v. Cape Fear Lumber Co.*, 138 N. Car. 465.

*Ohio.* — *Crane v. Buckles*, 5 Ohio Dec. 539 (reference to prior deeds).

*Texas.* — *Dillingham v. Smith*, 30 Tex. Civ. App. 525; *Sloan v. King*, (Tex. Civ. App. 1903) 77 S. W. Rep. 48.

*West Virginia.* — *Summerfield v. White*, 54 W. Va. 311.

It is not competent to create an ambiguity by changing the written description by parol evidence, so as to render parol evidence admissible to explain the ambiguity so raised. *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, (C. C. A.) 129 Fed. Rep. 668.

**849. 1. Parol Evidence Admissible to Prove Location on the Ground.** — *Harris v. Ansonia*, 73 Conn. 359; *Diggs v. Kurtz*, 132 Mo. 250; *Davidson v. Shuler*, 119 N. Car. 582.

**Measurements by Person Not a Surveyor.** — Any measurement of the ground, whether made by a surveyor or any one else, is competent, the accuracy of the measurement being a question for the jury. *Gunkel v. Seiberth*, (Ky. 1905) 85 S. W. Rep. 733.

**850. 1. Parol Evidence Admissible to Establish Lost Monuments.** — *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, (C. C. A.) 129 Fed. Rep. 688; *Vaughan v. Knowlton*, 112 Cal. 151; *Justen v. Schaaf*, 175 Ill. 45; *Busse v. Central Covington*, (Ky. 1897) 38 S. W. Rep. 865 (testimony of surveyor); *Woodbury v. Venia*, 114 Mich. 251 (actual survey); *Tuxedo Park Assoc. v. Sterling Iron, etc., Co.*, 60 N. Y. App. Div. 359; *Echerd v. Johnson*, 126 N. Car. 409; *Besson v. Richards*, 24 Tex. Civ. App. 64; *Hamilton v. Saunders*, (Tex. Civ. App. 1903) 73 S. W. Rep. 1069; *Matthews v. Thatcher*, (Tex. Civ. App. 1903) 76 S. W. Rep. 61; *Chew v. Zweib*, (Tex. Civ. App. 1905) 86 S. W. Rep. 925.

In order to testify to marks on trees, the witness need not be an expert. *Vogt v. Geyer*, (Tex. Civ. App. 1898) 48 S. W. Rep. 1100.

**Parol Evidence** is always admissible to locate the monuments and boundaries. *Carter v. Clark*, 92 Me. 225.

**Testimony of Chainman Employed in Survey**

is admissible. *Marshall v. Corbett*, (N. Car. 1905) 50 S. E. Rep. 210.

**A Map Drawn by the Surveyor** may be admissible to correct calls in the surveyor's certificate and corresponding calls in the patent. *Hogg v. Lusk*, (Ky. 1905) 86 S. W. Rep. 1128; *McCoy v. Cassidy*, (Ky. 1905) 86 S. W. Rep. 1130.

**2. Marked Lines or Corners Not Called for in Grant** — *California.* — *Taylor v. McConigle*, 120 Cal. 123 (actual survey); *Olsen v. Rogers*, 120 Cal. 225; *Harrington v. Boehmer*, 134 Cal. 196; *Wheeler v. Benjamin*, 136 Cal. 51.

*Michigan.* — *Olin v. Henderson*, 120 Mich. 149; *Anderson v. Wirth*, 131 Mich. 183, 9 Detroit Leg. N. 254.

*Missouri.* — *Granby Min., etc., Co. v. Davis*, 156 Mo. 422; *Johnson v. Boonville*, 85 Mo. App. 199 (testimony of surveyor).

*New York.* — *Pearsall v. Westcott*, 30 N. Y. App. Div. 99 (weight to be attached to survey).

*Pennsylvania.* — *Kron v. Daugherty*, 9 Pa. Super. Ct. 163; *Culver v. Hazlett*, 13 Pa. Super. Ct. 323 (marks of old survey on the ground).

*South Dakota.* — *White v. Amrhein*, 14 S. Dak. 270.

*Vermont.* — *Clark v. Gallagher*, 74 Vt. 331 (rebutting accuracy to locate boundaries).

*Virginia.* — *Greif v. Norfolk, etc., R. Co.*, (Va. 1898) 30 S. E. Rep. 438 (evidence of marks on trees claimed as monuments).

On the question as to the true location of a quarter-section line, testimony as to how the line claimed by one party agrees with fences in adjoining section is immaterial. *Schlei v. Struck*, 109 Wis. 598.

Where it is apparent that a square tract of land was divided into four equal parts, it is competent in evidence of the dividing line between two of the lots to show the line between the two other lots. *O'Banion v. Goodrich*, (Ky. 1901) 62 S. W. Rep. 1015.

**Burden of Proof as to Shifting of Water Boundary.** — *Leonard v. Forbing*, 109 La. 220.

**Records of Surveys by County Surveyor.** — *Schlei v. Struck*, 109 Wis. 598.

**3. General Rule as to Hearsay Evidence.** — *Wheeler v. State*, 109 Ala. 56; *Dowdle v. Cornue*, 9 S. Dak. 126.

**4. Where No Better Evidence Is Procurable.** — *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149; *Risiden v. Harrison*, (Tenn. Ch. 1897) 42 S. W. Rep. 884.

**6. King v. Watkins**, 98 Fed. Rep. 913; *Olin v. Henderson*, 120 Mich. 149; *Guentherodt v. Ross*, 121 Mich. 47; *Harper v. Anderson*, 130 N. Car. 538.

**851. 1. Rule in United States — Matters of Private Boundaries.** — See *Fraser v. Hunter*, 5 Cranch (C. C.) 470, 9 Fed. Cas. No. 5,063.

**Declarations of Deceased Chain Bearer Participating in Survey.** — *Koons v. Bryson*, (C. C. A.) 69 Fed. Rep. 297.

**3. Declarations of Deceased Persons — United**



**852.** *Declarations Against Interest.* — See notes 1, 2.

**853.** *The Limitations of the Rule.* — See note 1.

**854.** *c. GENERAL REPUTE* — In the United States. — See note 3.

**855.** *4. Field Notes, Plats, and Maps* — By the United States Statutes. — See note 4.

**856.** See note 1.

*Private Survey.* — See note 2.

*The Field Note of Surrounding Surveys.* — See note 3.

*States.* — *King v. Watkins*, 98 Fed. Rep. 913 (report of survey by deceased surveyor held inadmissible). Compare *Martin v. Hughes*, (C. C. A.) 90 Fed. Rep. 632 (testimony of deceased surveyor given in court).

*Connecticut.* — *Hamilton v. Smith*, 74 Conn. 374 (declaration of deceased made after commencement of action held inadmissible, though he had no knowledge of action, and though his declarations made before the action were admitted).

*North Carolina.* — *Westfelt v. Adams*, 131 N. Car. 379.

*Tennessee.* — *Montgomery v. Lipscomb*, 105 Tenn. 144.

*Texas.* — *Matthews v. Thatcher*, (Tex. Civ. App. 1903) 76 S. W. Rep. 61.

*Vermont.* — *Martyn v. Curtis*, 68 Vt. 397; *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354.

*Virginia.* — *Fry v. Stowers*, 92 Va. 13.

See also *Finley v. Curd*, 62 S. W. Rep. 501, 22 Ky. L. Rep. 1912. Compare *Southern Iron Works v. Central of Georgia R. Co.*, 131 Ala. 649.

**852. 1. Declarations Against Interest** — *Alabama.* — *Wheeler v. State*, 109 Ala. 56.

*Connecticut.* — *Hamilton v. Smith*, 74 Conn. 374 (act of grantor locating boundaries).

*Iowa.* — *Miller v. Mills County*, 111 Iowa 654 (acquiescence in line is evidence of true location).

*Maine.* — *Whitcomb v. Dutton*, 89 Me. 212.

*Pennsylvania.* — *Kron v. Daugherty*, 9 Pa. Super. Ct. 163.

*Tennessee.* — *Christian v. Cope*, (Tenn. Ch. 1899) 56 S. W. Rep. 1030.

*Texas.* — *Bell v. Preston*, 19 Tex. Civ. App. 375 (admission before acquiring title held inadmissible); *Vogt v. Geyer*, (Tex. Civ. App. 1898) 48 S. W. Rep. 1100 (declarations of agent).

**Value of Old Fence as Fixing Boundary.** — *Wollman v. Ruehle*, 104 Wis. 603.

**2. State v. Crocker**, 49 S. Car. 242 (self-serving declarations inadmissible); *Bailey v. Baker*, (Tex. Civ. App. 1897) 42 S. W. Rep. 124 (not admissible against person not in privacy); *Fry v. Stowers*, 92 Va. 13.

**853. 1. Limitations of Rule as to Declarations Made Ante Litem Motam.** — *Clark v. Gallagher*, 74 Vt. 331.

**A Copy of an Affidavit Filed by a Surveyor** in the public records is not admissible as a declaration of the surveyor who has since died. *Daniels v. Fitzhugh*, 13 Tex. Civ. App. 300.

**854. 3. Klinkner v. Schmidt**, 114 Iowa 695; *Kentucky Land, etc., Co. v. Crabtree*, 113 Ky. 922; *Echard v. Johnson*, 126 N. Car. 409; *Westfelt v. Adams*, 131 N. Car. 379; *Montgomery v. Lipscomb*, 105 Tenn. 144; *Matthews v. Thatcher*, (Tex. Civ. App. 1903) 76 S. W. Rep. 61.

**855. 4. United States Statute** — *United*

*States.* — *Martin v. Hughes*, 98 Fed. Rep. 556, 39 C. C. A. 160.

*Alabama.* — *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149.

*California.* — *Harrington v. Boehmer*, 134 Cal. 196.

*Kentucky.* — *Patrick v. Spradlin*, (Ky. 1897) 42 S. W. Rep. 919; *Bell County Land, etc., Co. v. Hendrickson*, 68 S. W. Rep. 842, 24 Ky. L. Rep. 371.

*Maine.* — *Adams v. Clapp*, 99 Me. 169.

*Michigan.* — *Brown v. Milliman*, 119 Mich. 606; *Olin v. Henderson*, 120 Mich. 149.

*Minnesota.* — *Ferch v. Konne*, 78 Minn. 515.

*Missouri.* — *Carter v. Hornback*, 139 Mo. 238; *Granby Min., etc., Co. v. Davis*, 156 Mo. 422.

*Nebraska.* — *Clark v. Thornburg*, 66 Neb. 717; *Knoll v. Randolph*, (Neb. 1902) 92 N. W. Rep. 195; *Baty v. Elrod*, 66 Neb. 735.

*Pennsylvania.* — *Mineral R., etc., Co. v. Auten*, 188 Pa. St. 568, 43 W. N. C. (Pa.) 158.

*South Dakota.* — *White v. Amrhien*, 14 S. Dak. 270.

*Tennessee.* — *Montgomery v. Lipscomb*, 105 Tenn. 144.

*Texas.* — *Pierce v. Schram*, (Tex. Civ. App. 1899) 53 S. W. Rep. 716; *Stewart v. Crosby*, (Tex. Civ. App. 1900) 56 S. W. Rep. 433; *Besson v. Richards*, 24 Tex. Civ. App. 64; *McLane v. Grice*, (Tex. Civ. App. 1900) 66 S. W. Rep. 709; *Hamilton v. Saunders*, (Tex. Civ. App. 1903) 73 S. W. Rep. 1069.

*Washington.* — *Simmons v. Jamieson*, 32 Wash. 619.

**The Actual Survey Line** of a government survey must be followed though the survey was made on a wrong magnetic variation. *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149.

**Inconsistent Field Notes.** — Where a government corner is lost or obliterated, so that resort must be had to the government field notes for the purpose of determining its location, but these field notes are inconsistent and cannot be reconciled, there is no universal rule that certain ones shall be preferred to the others, but, as in a case where living witnesses contradict each other, those should be accepted as correct which under all the circumstances are most entitled to credit and most likely to be in accordance with the actual facts. *Standin v. Helin*, 76 Minn. 496.

**856. 1. Wiggins Ferry Co. v. Louisville, etc., R. Co.**, 178 Ill. 473; *Hanson v. Rice*, 88 Minn. 273.

Since the plat is made from the field notes, in case of a discrepancy between the two the field notes control. *Harrington v. Boehmer*, 134 Cal. 196.

**2. Private Survey.** — *Van Der Groef v. Jones*, 108 Mich. 65; *Fuller v. Worth*, 91 Wis. 406.

**3. Field Notes of Surrounding Surveys** — *United*

**856.** *Maps in Common Use.* — See note 4.

**857.** *5. Ancient Deeds, Extents, Surveys, and Patents.* — See note 1.

**858.** *7. Possession.* — See note 4.

*8. Weight of Evidence.* — See note 5.

**859.** See note 1.

**XI. BOUNDARY AS AFFECTED BY AGREEMENT, ACQUIESCENCE, OR ESTOPPEL — 1. In General.** — See note 3.

**860.** *2. Agreement — Where the Boundary Is in Doubt.* — See note 1.

*States.* — *King v. Watkins*, 98 Fed. Rep. 913 (deed to adjoining land held inadmissible; no connection of the lands appearing on face of deed).

*Kentucky.* — *O'Banion v. Goodrich*, 62 S. W. Rep. 1015, 23 Ky. L. Rep. 313.

*Tennessee.* — *State v. Cooper*, (Tenn. Ch. 1899) 53 S. W. Rep. 391.

*Texas.* — *Barrow v. Lyons*, (Tex. Civ. App. 1905) 86 S. W. Rep. 773; *Daniels v. Fitzhugh*, 13 Tex. Civ. App. 300; *Petrucio v. Gross*, (Tex. Civ. App. 1898) 47 S. W. Rep. 43; *Matthews v. Thatcher*, (Tex. Civ. App. 1903) 76 S. W. Rep. 61. *Compare Coleman County v. Stewart*, (Tex. Civ. App. 1901) 65 S. W. Rep. 383, affirmed 95 Tex. 445.

*Utah.* — *Washington Rock Co. v. Young*, (Utah 1905) 80 Pac. Rep. 382.

*Vermont.* — *Martyn v. Curtis*, 68 Vt. 397.

*West Virginia.* — *Kain v. Young*, 41 W. Va. 618 (stream located from maps of surrounding survey).

Where a surveyor makes at the same time a survey of two adjoining tracts for the same person, the field notes for one survey may be used in locating the boundaries of the other. *Bell v. Preston*, 19 Tex. Civ. App. 375.

**856. 4. Maps.** — *Taylor v. McConigle*, 120 Cal. 123; *Justen v. Schaaf*, 175 Ill. 45; *Carpenter v. Fisher*, 12 N. Y. App. Div. 622; *Ostrom v. Layer*, (Tex. Civ. App. 1898) 48 S. W. Rep. 1095.

**857. 1. Ancient Documents.** — *Olsen v. Rogers*, 120 Cal. 225 (deed of common grantor); *Merwin v. Morris*, 71 Conn. 555; *Hamilton v. Smith*, 74 Conn. 374 (copy of ancient map which has been destroyed held inadmissible); *Pierce v. Schram*, (Tex. Civ. App. 1899) 53 S. W. Rep. 716.

**858. 4. Acts of Ownership.** — *Whitcomb v. Dutton*, 89 Me. 212; *M. E. Society v. Akers*, 167 Mass. 560; *Welton v. Poynter*, 96 Wis. 346.

**5. United States.** — *Ulman v. Clark*, 100 Fed. Rep. 180.

*Arkansas.* — *Sherman v. King*, 71 Ark. 248.

*California.* — *Vaughan v. Knowlton*, 112 Cal. 151; *Reynier v. Elton*, 133 Cal. 304.

*Illinois.* — *Itasca v. Schroeder*, 182 Ill. 192; *LaMont v. Dickinson*, 189 Ill. 628; *Macauley v. Cunningham*, 60 Ill. App. 28.

*Iowa.* — *Rowell v. Weinemann*, 119 Iowa 256, 97 Am. St. Rep. 310; *Rowell v. Clark*, 119 Iowa 299.

*Kentucky.* — *Handshoe v. Conley*, (Ky. 1905) 84 S. W. Rep. 1140.

*Michigan.* — *Anderson v. Wirth*, 134 Mich. 612, 10 Detroit Leg. N. 589.

*Nebraska.* — *Shrake v. Laffin*, (Neb. 1902) 92 N. W. Rep. 184; *Williams v. Shepherdson*, (Neb. 1903) 95 N. W. Rep. 827.

*New Jersey.* — *Saunders v. Sutton*, (N. J.

1903) 55 Atl. Rep. 652; *Dowling v. Linburg*, (N. J. 1904) 57 Atl. Rep. 1035.

*New York.* — *Roth v. Rochester*, 90 Hun (N. Y.) 606.

*Oregon.* — *Shaver v. Adams*, 37 Oregon 282; *Albert v. Salem*, 39 Oregon 466; *Killgore v. Carmichael*, 42 Oregon 618.

*Pennsylvania.* — *Richardson v. Morris*, 26 Pa. Super. Ct. 192; *Wilson v. Marvin*, 172 Pa. St. 30.

*South Dakota.* — *Cope v. Eckert*, 15 S. Dak. 177; *Unzelmann v. Shelton*, (S. Dak. 1905) 103 N. W. Rep. 646.

*Tennessee.* — *Spears v. Hall*, (Tenn. Ch. 1898) 48 S. W. Rep. 248; *Cannon v. Hedrick*, (Tenn. Ch. 1900) 57 S. W. Rep. 205; *Smith v. Hutchinson*, 104 Tenn. 394; *Mason v. Williams*, (Tenn. Ch. 1899) 58 S. W. Rep. 755; *Ballinger v. Stinnett*, (Tenn. Ch. 1900) 59 S. W. Rep. 1044; *Clay v. Sloan*, 104 Tenn. 401.

*Texas.* — *Taylor v. Brown*, (Tex. Civ. App. 1897) 39 S. W. Rep. 312; *Ostrom v. Layer*, (Tex. Civ. App. 1898) 48 S. W. Rep. 1095; *Childress County Land, etc., Co. v. Baker*, 23 Tex. Civ. App. 451; *Bullard v. Watkins*, (Tex. Civ. App. 1900) 58 S. W. Rep. 205; *Richardson v. McCullough*, (Tex. Civ. App. 1901) 60 S. W. Rep. 974; *Morgan v. Mowles*, (Tex. Civ. App. 1901) 61 S. W. Rep. 155; *McCulloch v. Patman*, (Tex. Civ. App. 1902) 69 S. W. Rep. 1012; *Barrow v. Lyons*, (Tex. Civ. App. 1905) 86 S. W. Rep. 773.

*Vermont.* — *Baker v. Sherman*, 71 Vt. 439.

*Washington.* — *Thayer v. Spokane County*, 36 Wash. 63.

*Wisconsin.* — *Gilman v. Brown*, 115 Wis. 1; *McGarry v. Runkel*, 118 Wis. 1; *Neumeister v. Goddard*, (Wis. 1905) 103 N. W. Rep. 241.

With regard to the location of a highway, the testimony of the viewers by whom the road was laid out is not, as a matter of law, entitled to greater weight than the testimony of other people having actual knowledge of the location of the highway. *Cloud County v. Morgan*, 7 Kan. App. 213.

**Value of Fence as Evidence.** — *Kennedy v. Niles*, (Iowa 1903) 96 N. W. Rep. 772.

**859. 1. Preponderance of Evidence.** — *Pugh v. Schindler*, 133 Mich. 314, 10 Detroit Leg. N. 169; *Rook v. Greenewald*, 22 Pa. Super. Ct. 641; *Masterson v. Ribble*, (Tex. Civ. App. 1904) 78 S. W. Rep. 358; *Greif v. Norfolk, etc., R. Co.*, (Va. 1898) 30 S. E. Rep. 438.

**3. Practical Location.** — *People v. Hall*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 117; *Parrish v. Williams*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1097.

**860. 1. Agreement — United States.** — *Glen Mfg. Co. v. Weston Lumber Co.*, 80 Fed. Rep. 242; *South Shore Lumber Co. v. Thompson Lumber Co.*, (C. C. A.) 94 Fed. Rep. 738.

*Alabama*.—*Wheeler v. State*, 109 Ala. 56.  
*Arkansas*.—*McCombs v. Wall*, 66 Ark. 336 (husband has no implied power to bind wife by agreement as to boundary line); *Sherman v. King*, 71 Ark. 248, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860.

*California*.—*Dierssen v. Nelson*, 138 Cal. 394.

*Georgia*.—*Chewning v. Bryson*, 108 Ga. 750; *Farr v. Woolfolk*, 118 Ga. 277, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860.

*Illinois*.—*St. Bede College v. Weber*, 168 Ill. 324; *Clayton v. Feig*, 179 Ill. 534; *LaMont v. Dickinson*, 189 Ill. 628, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860; *Henderson v. Dennis*, 177 Ill. 550, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860.

*Indiana*.—*Burr v. Smith*, 152 Ind. 469.

*Iowa*.—*Dashiel v. Harshman*, 113 Iowa 283; *Kulas v. McHugh*, 114 Iowa 188.

*Kansas*.—*Steinhilber v. Holmes*, 68 Kan. 607.

*Kentucky*.—*Gayheart v. Cornett*, (Ky. 1897) 42 S. W. Rep. 730 (interference of boundary line as shown by title papers unnecessary to validity of agreement); *Duff v. Cornett*, 62 S. W. Rep. 895, 23 Ky. L. Rep. 297; *Campbell v. Campbell*, 64 S. W. Rep. 458, 23 Ky. L. Rep. 869; *Higginson v. Schaneback*, 66 S. W. Rep. 1040, 23 Ky. L. Rep. 2230; *Alexander v. Parks*, 72 S. W. Rep. 1105, 24 Ky. L. Rep. 2113; *Campbell v. Combs*, 77 S. W. Rep. 923, 25 Ky. L. Rep. 1643.

*Louisiana*.—*Fortier v. Roane*, 104 La. 90 (husband has no implied power to bind wife by agreement as to disputed boundary line).

*Michigan*.—*Dauer v. Hildebrandt*, 110 Mich. 272; *Tritt v. Hoover*, 116 Mich. 4; *Pittsburgh, etc., Iron Co. v. Lake Superior Iron Co.*, 118 Mich. 109.

*Minnesota*.—*Benz v. St. Paul*, 89 Minn. 31.

*Missouri*.—*Diggs v. Kurtz*, 132 Mo. 250, 53 Am. St. Rep. 488; *Ernsting v. Gleason*, 137 Mo. 594; *Brummell v. Harris*, 148 Mo. 430, 162 Mo. 397, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860; *Schwartz v. Gebhardt*, 157 Mo. 99; *McKinney v. Doane*, 155 Mo. 287; *Lemmons v. McKinney*, 162 Mo. 525; *Hopper v. Hickam*, 169 Mo. 166.

*Montana*.—*Hoar v. Hennessy*, 29 Mont. 253.

*Nebraska*.—*Lynch v. Egan*, (Neb. 1903) 93 N. W. Rep. 775; *Egan v. Light*, (Neb. 1903) 93 N. W. Rep. 859.

*New Hampshire*.—*Hitchcock v. Libby*, 70 N. H. 399 (binds successors in interest).

*New York*.—*Bell v. Hayes*, 60 N. Y. App. Div. 382; *Blumenauer v. O'Connor*, 62 N. Y. App. Div. 618, affirming (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 17; *Smith v. Stacey*, 68 N. Y. App. Div. 521.

*Oregon*.—*Thiessen v. Worthington*, 41 Oregon 145, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860.

*Pennsylvania*.—*Farr v. Mullen*, 5 Lack. Leg. N. (Pa.) 318; *Reiter v. McJunkin*, 8 Pa. Super. Ct. 164, affirmed 194 Pa. St. 301; *Grogan v. Leike*, 22 Pa. Super. Ct. 59; *Dunlap v. Reardon*, 24 Pa. Super. Ct. 35.

*South Carolina*.—*Perry v. Jefferies*, 61 S. Car. 292.

*Tennessee*.—*Mynatt v. Smart*, (Tenn. Ch. 1898) 48 S. W. Rep. 270.

*Texas*.—*Wardlow v. Harmon*, (Tex. Civ. App. 1898) 45 S. W. Rep. 828; *Sloan v. King*, 29 Tex. Civ. App. 599; *Masterson v. Bokel*, 32 Tex. Civ. App. 509; *Brown v. Johnson*, (Tex. Civ. App. 1903) 73 S. W. Rep. 49.

*Utah*.—*Lilly Min. Co. v. Kellogg*, 24 Utah 195.

*Virginia*.—*Trammell v. Ashworth*, 99 Va. 646, 3 Va. Sup. Ct. Rep. 446.

*West Virginia*.—*Le Comte v. Carson*, (W. Va. 1904) 49 S. E. Rep. 238.

*Wisconsin*.—*Welton v. Foynter*, 96 Wis. 346; *Schlei v. Struck*, 109 Wis. 598.

The rule sustaining agreements as to division lines does not apply unless the lands of the parties to the agreement are contiguous. *Cavanaugh v. Wholey*, 143 Cal. 164.

Where the plaintiff claims the location of a boundary line by agreement, the agreement is not binding upon the defendant if there is no privity between the defendant and the person with whom plaintiff made his agreement. *Connor v. Johnson*, 59 S. Car. 115.

A surveyor employed by one party to locate his boundary line has no power to bind his employer by an agreement with an adjoining owner as to the boundary line. *Higginson v. Schaneback*, (Ky. 1902) 66 S. W. Rep. 1040.

A grantor after conveyance cannot bind his grantee by an agreement as to boundary line between adjoining owners. *Donaldson v. Rall*, 14 Tex. Civ. App. 336.

One cotenant cannot bind the other cotenant by an agreement as to a disputed boundary line. *Strickley v. Hill*, 22 Utah 257, 83 Am. St. Rep. 786.

**A Tenant** has no power to bind his landlord by agreement as to boundary line. *Cox v. Dougherty*, 62 Ark. 629, 36 S. W. Rep. 184.

**In New Hampshire** in order that parol agreement as to division line shall be binding, the line must be actually run. *Glen Mfg. Co. v. Weston Lumber Co.*, 80 Fed. Rep. 242.

**Consideration**.—The uncertainty as to the location of the boundary is a sufficient foundation or consideration for their agreement locating the boundary. *Thaxter v. Inglis*, 121 Cal. 593; *Gardner v. White*, 74 S. W. Rep. 206, 24 Ky. L. Rep. 2444; *Brummell v. Harris*, 148 Mo. 430.

**Where a Government Section Line Is a True Boundary Line**, still, if its true location is in doubt, the adjoining owners may, by parol agreement, establish a boundary line, though the line so established differs from the section line. *LaMont v. Dickinson*, 189 Ill. 628; *Cox v. Dougherty*, 62 Ark. 629, 36 S. W. Rep. 184.

**Agreement Is Binding at Law as Well as in Equity**.—*Brown v. Bowerman*, (Mich. 1903) 97 N. W. Rep. 352, 10 Detroit Leg. N. 659.

**Abandonment of Agreement Avoids it**.—*Geoghagan v. Turner*, 82 S. W. Rep. 244, 26 Ky. L. Rep. 537.

If the parties after agreeing on a disputed boundary line disregard such agreement by long course of conduct, the court will not enforce such agreement. *Brummell v. Harris*, 162 Mo. 397.

Where a disputed boundary line is agreed on between the parties, the fact that in erecting a line fence the line agreed upon is departed from merely to accommodate the fence to a creek does not show an abandonment of the

**861.** See note 1.

**862.** Line Fixed by Surveyors. — See note 1.

Where Boundary Is Known and Not in Doubt. — See note 2.

An Erroneous Line Agreed on by Mistake. — See note 3.

**863.** 3. Acquiescence — For Period Greater than Statutory Period of Limitation. — See note 2.

**864.** For Other Periods — Conflict of Authority. — See note 1.

agreement fixing the line. *Barnes v. Allison*, 166 Mo. 96.

Where an agreement fixing a disputed line is entered into, the mere negotiations between the parties with the view to fixing a different line is not an abandonment of the agreement. *Masterson v. Bokel*, 32 Tex. Civ. App. 509.

**Misrepresentation by One Party Avoids the Agreement.** — *Perry v. Hardy*, 71 N. H. 151.

**Proof of Agreement.** — *Clark v. Thornburg*, 66 Neo. 717; *Francois v. Taylor*, 71 N. H. 222.

**861. 1. Such Agreement Not Affected by Statute of Frauds.** — *Deidrich v. Simmons*, (Ark. 1905) 87 S. W. Rep. 649; *Steinhilber v. Holmes*, 68 Kan. 607; *Frazier v. Mineral Development Co.*, (Ky. 1905) 86 S. W. Rep. 983; *Hitchcock v. Libby*, 70 N. H. 399; *Le Comte v. Freshwater*, 56 W. Va. 336, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860; *Mays v. Hinchman*, (W. Va. 1905) 50 S. E. Rep. 823.

**Reason of Rule.** — *Sherman v. King*, 71 Ark. 248, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860, 861.

**862. 1. Line Run by Surveyor According to Agreement.** — *Tonopah, etc., Min. Co. v. Tonopah Min. Co.*, 125 Fed. Rep. 408, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 862; *McCombs v. Wall*, 66 Ark. 336; *Gullett v. Phillips*, 153 Ind. 227; *Schwartz v. Gebhardt*, 157 Mo. 99; *Barnes v. Allison*, 166 Mo. 96; *Hitchcock v. Libby*, 70 N. H. 399; *Masterson v. Bokel*, 20 Tex. Civ. App. 416.

**Evidence Held Insufficient to Show Agreement to Boundary Line Run by Surveyor.** — *Dauer v. Hildebrandt*, 110 Mich. 272.

**Effect of Failure of Surveyor to Run Line.** — *McCormick v. Applegate*, 76 S. W. Rep. 511, 25 Ky. L. Rep. 914.

**2. Parol Agreement as to Ascertained Boundary Ineffectual.** — *De Long v. Baldwin*, 111 Mich. 466; *Ohn v. Henderson*, 120 Mich. 149 (evidence held insufficient to show that boundary line was in dispute so as to sustain parol agreement thereto); *Barnes v. Allison*, 166 Mo. 96; *Hitchcock v. Libby*, 70 N. H. 399 (sufficiency of evidence to show doubt as to boundary line); *Strickley v. Hill*, 22 Utah 257, 83 Am. St. Rep. 786; *Le Comte v. Carson*, (W. Va. 1904) 49 S. E. Rep. 238, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860-861; *Mays v. Hinchman*, (W. Va. 1905) 50 S. E. Rep. 823.

In order to render an agreement fixing a boundary line binding on the parties, it is necessary that the location of the boundary line should be in dispute, and therefore, where the parties merely construct a division fence on what they think is the boundary line, it is not such an agreement as will be binding upon them. *Peters v. Reichenbach*, 114 Wis. 209.

**3. Erroneous Line Agreed on by Mistake.** — *Higginson v. Schaneback*, 66 S. W. Rep. 1040,

23 Ky. L. Rep. 2230; *Alexander v. Parks*, 72 S. W. Rep. 1105, 24 Ky. L. Rep. 2113; *Hedges v. Pollard*, 149 Mo. 216; *McKinney v. Doane*, 155 Mo. 287; *Detwiler v. Toledo*, 6 Ohio Cir. Dec. 297, 13 Ohio Cir. Ct. 572; *Turner Falls Lumber Co. v. Burns*, 71 Vt. 355; *Peters v. Reichenbach*, 114 Wis. 209.

**863. 2. Acquiescence for Statutory Period Binding** — *Arkansas*. — *Deidrich v. Simmons*, (Ark. 1905) 87 S. W. Rep. 649.

*California*. — *Dierssen v. Nelson*, 138 Cal. 394.

*Georgia*. — *Catoosa Springs Co. v. Webb*, (Ga. 1905) 50 S. E. Rep. 942.

*Indiana*. — *Palmer v. Dosch*, 148 Ind. 10; *Helton v. Fastnow*, 33 Ind. App. 288.

*Iowa*. — *Axmear v. Richards*, 112 Iowa 657; *Corey v. Ft. Dodge*, 118 Iowa 742; *Kennedy v. Niles*, (Iowa 1903) 96 N. W. Rep. 772.

*Kentucky*. — *Robards v. Rogers*, (Ky. 1898) 48 S. W. Rep. 154; *Tarvin v. Walkers Creek Coal, etc., Co.*, (Ky. 1904) 80 S. W. Rep. 504; *Frazier v. Mineral Development Co.*, (Ky. 1905) 86 S. W. Rep. 983.

*Michigan*. — *Michigan Soldiers' Home v. Jackman*, 128 Mich. 679; *F. H. Wolf Brick Co. v. Lonyo*, 132 Mich. 162, 102 Am. St. Rep. 412, 9 Detroit Leg. N. 566; *Lamb v. Lamb*, (Mich. 1905) 102 N. W. Rep. 645, 11 Detroit Leg. N. 805.

*Minnesota*. — *Benz v. St. Paul*, 89 Minn. 31.

*Missouri*. — *Lemmons v. McKinney*, 162 Mo. 525.

*New York*. — *Katz v. Kaiser*, 154 N. Y. 294, affirming 10 N. Y. App. Div. 137; *Pearsall v. Westcott*, 30 N. Y. App. Div. 99; *Wentworth v. Braun*, 78 N. Y. App. Div. 634, 175 N. Y. 515, affirming (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 702.

*Pennsylvania*. — *Peck v. Peck*, 5 Lack. Leg. N. (Pa.) 145.

*Texas*. — *Sullivan v. Michael*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1061.

*Utah*. — *Larsen v. Onesite*, 21 Utah 38.

*West Virginia*. — *Mays v. Hinchman*, (W. Va. 1905) 50 S. E. Rep. 823.

*Wisconsin*. — *Peters v. Reichenbach*, 114 Wis. 209; *Welton v. Poynter*, 96 Wis. 346.

See also *Henderson v. Dennis*, 177 Ill. 550, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863.

**864. 1. Acquiescence — Strength of Presumption Depends on Circumstances** — *Alabama*. — *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149.

*Connecticut*. — *Lowndes v. Wicks*, 69 Conn. 15.

*Georgia*. — *Chewning v. Bryson*, 108 Ga. 750; *Farr v. Woolfolk*, 118 Ga. 277.

*Illinois*. — *Lourance v. Goodwin*, 170 Ill. 390 (question of fact for jury); *Henderson v. Dennis*, 177 Ill. 547.

*Iowa*. — *Boyd v. Shoop*, 107 Iowa 10; *Miller*

**864.** Acquiescence in Boundaries Erroneously Marked. — See note 3.

**865.** 4. Estoppel. — See note 4.

**866.** Requisites of Estoppel — Knowledge. — See note 2.

Mutual Mistake. — See note 3.

**867.** Mistake Discovered in Survey. — See note 1.

The Purchase and Holding of Lands Bordered by a Disputed Boundary. — See note 3.

Agreement with One Adjoining Owner No Estoppel as to Another. — See note 5.

Mere Acquiescence. — See note 6.

*v. Mills County*, 111 Iowa 654, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 864 *et seq.*; *Lawrence v. Washburn*, 119 Iowa 109; *Buch v. Flanders*, 119 Iowa 164; *O'Callaghan v. Whisenand*, 119 Iowa 566; *Graham v. Gorman*, (Iowa 1903) 93 N. W. Rep. 595; *Klinkefus v. Vanmeter*, 122 Iowa 412; *Dows Real Estate, etc., Co. v. Emerson*, (Iowa 1904) 99 N. W. Rep. 724; *Rattray v. Talcott*, 124 Iowa 398; *Harn-don v. Stultz*, 124 Iowa 734.

*Kentucky*. — *Liter v. Shirley*, (Ky. 1896) 35 S. W. Rep. 550; *Hall v. Conlee*, 62 S. W. Rep. 899, 23 Ky. L. Rep. 177; *Castleman v. Common School Dist. No. 42*, 68 S. W. Rep. 17, 24 Ky. L. Rep. 88.

*Michigan*. — *Tritt v. Hoover*, 116 Mich. 4; *Husted v. Willoughby*, 117 Mich. 56 (acquiescence for fifteen years).

*Missouri*. — *Brummell v. Harris*, 148 Mo. 430; *McKinney v. Doane*, 155 Mo. 287; *Barnes v. Allison*, 166 Mo. 96.

*Nebraska*. — *Clark v. Thornburg*, 66 Neb. 717; *Nance County v. Russell*, (Neb. 1903) 97 N. W. Rep. 320.

*New York*. — *Bell v. Hayes*, 60 N. Y. App. Div. 382; *People v. Hall*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 117.

*Pennsylvania*. — *Omensetter v. Kemper*, 6 Pa. Super. Ct. 309, 41 W. N. C. (Pa.) 501; *Rook v. Greenwalt*, 17 Pa. Co. Ct. 642 (acquiescence for twelve years).

*Texas*. — *Stark v. Homuth*, (Tex. Civ. App. 1898) 45 S. W. Rep. 761; *Wardlow v. Harmon*, (Tex. Civ. App. 1898) 45 S. W. Rep. 828.

*Washington*. — *Denny v. Northern Pac. R. Co.*, 19 Wash. 298.

*Wisconsin*. — *Wollman v. Ruehle*, 100 Wis. 31.

Acquiescence between the adjoining property owners as to the boundary line may be sufficient to show an implied agreement thereto which will be binding on the parties. *Ernsting v. Gleason*, 137 Mo. 594.

**864.** 3. Acquiescence in Erroneous Line Not Conclusive. — *Boone v. Graham*, 215 Ill. 511; *Palmer v. Osborne*, 115 Iowa 714; *Stier v. Latreyte*, (Tex. Civ. App. 1899) 50 S. W. Rep. 589; *Peters v. Reichenbach*, 114 Wis. 209.

**865.** 4. Estoppel — *Arkansas*. — *Diedrich v. Simmons*, (Ark. 1905) 87 S. W. Rep. 649.

*Connecticut*. — *Lowndes v. Wicks*, 69 Conn. 15.

*Illinois*. — *Joliet v. Werner*, 166 Ill. 34 (estoppel against municipality as to street line). See also *Henderson v. Dennis*, 177 Ill. 551, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 865.

*Iowa*. — *Corey v. Ft. Dodge*, 118 Iowa 742; *Rowell v. Weinemann*, 119 Iowa 256, 97 Am. St. Rep. 310; *Ross v. Ferree*, 95 Iowa 604.

*Michigan*. — *Mowers v. Evers*, 117 Mich. 93 (disclaiming title on faith of which another purchases); *Pittsburgh, etc., Iron Co. v. Lake Superior Iron Co.*, 118 Mich. 109.

*Minnesota*. — *Benz v. St. Paul*, 89 Minn. 31; *Thompson v. Borg*, 90 Minn. 209 (inducing person to purchase adjoining land with reference to particular line).

*New York*. — *Blumenauer v. O'Connor*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 17.

*Oregon*. — *Walla Walla First Nat. Bank v. McDonald*, 42 Oregon 257; *Clark v. Hindman*, (Oregon 1905) 79 Pac. Rep. 56.

*Tennessee*. — *Mynatt v. Smart*, (Tenn. Ch. 1898) 48 S. W. Rep. 270 (purchase by two grantees from common grantor — the latter grantee purchasing on faith of line acquiesced in between grantor and grantee).

*Texas*. — *Holland v. Thompson*, 12 Tex. Civ. App. 471.

*West Virginia*. — *Summerfield v. White*, 54 W. Va. 311.

*Wisconsin*. — *Schlei v. Struck*, 109 Wis. 598.

**866.** 2. Knowledge Requisite to Estoppel. — *Wells v. Hall*, (Tenn. Ch. 1898) 49 S. W. Rep. 61 (survey to complete sale — failure of adjoining owner to object to accuracy of survey); *Reed v. Phillips*, (Tex. Civ. App. 1896) 33 S. W. Rep. 986.

3. Adjoining Owners Equally Chargeable with Notice. — *Boone v. Graham*, 215 Ill. 511; *Jordan v. Ferree*, 101 Iowa 440.

**867.** 1. Mistake in Survey. — *Granby Min., etc., Co. v. Davis*, 156 Mo. 422; *Wiley v. Lindley*, (Tex. Civ. App. 1900) 56 S. W. Rep. 1001.

3. Purchase of Land on Disputed Boundary. — *Hitchcock v. Libby*, 70 N. H. 399.

5. Langermann v. Nichols, (Tex. Civ. App. 1893) 32 S. W. Rep. 124.

6. United States. — *King v. Watkins*, 98 Fed. Rep. 913 (effect of private survey by a landowner as against himself and grantees); *Ulman v. Clark*, 100 Fed. Rep. 180; *Belding v. Hebard*, 103 Fed. Rep. 532, 43 C. C. A. 296.

*Illinois*. — *St. Bede College v. Weber*, 168 Ill. 324; *Clayton v. Feig*, 179 Ill. 534; *Boone v. Graham*, 215 Ill. 511.

*Kentucky*. — *Stoughton v. Rice*, (Ky. 1895) 32 S. W. Rep. 1083; *Higginson v. Schaneback*, 66 S. W. Rep. 1040, 23 Ky. L. Rep. 2230.

*Louisiana*. — *Williams v. Bernstein*, 51 La. Ann. 115.

*Massachusetts*. — *Iverson v. Swan*, 169 Mass. 582 (the mere fact that a landowner builds upon what he thinks the boundary line does not preclude him from claiming to the true line).

*Missouri*. — *Brummell v. Harris*, 148 Mo. 430 (acquiescence in improvements by adjoining owner); *Hedges v. Pollard*, 149 Mo. 216

**867. XII. BOUNDARIES FIXED BY APPORTIONMENT**—Where a Vacant Space Exists. — See note 8.

**868.** Where a Discrepancy Exists. — See notes 1, 2.  
In the Congressional Surveys. — See note 4.

**869. XIII. IDENTIFICATION OF BOUNDARY**—Miscellaneous Rules. — See note 1.  
[XIV. MISCELLANEOUS MATTERS. — See note 1a.]

**BOUNTIES.** — See note 3.

**871. [BOWLINE KNOT.** — See note 2a.]

**873. BRAKEMAN.** — See note 1.

(acquiescence in erection of fence); Patton v. Smith, 171 Mo. 231, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867.

*New Hampshire.* — Heywood v. Wild River Lumber Co., 70 N. H. 24.

*Rhode Island.* — Taber v. Hall, 23 R. I. 613.

*Texas.* — Vogt v. Geyer, (Tex. Civ. App. 1898) 48 S. W. Rep. 1100; Pierce v. Schram, (Tex. Civ. App. 1899) 53 S. W. Rep. 716 (erection of fence within boundary line); Wiley v. Lindley, (Tex. Civ. App. 1900) 56 S. W. Rep. 1001; Hornberger v. Giddings, 31 Tex. Civ. App. 283.

*Virginia.* — Fry v. Stowers, 92 Va. 13.

*Wisconsin.* — Peters v. Reichenbach, 114 Wis. 209.

Where the grantee had already purchased the land from his grantor, the fact that the adjoining owner admitted the line pointed out by the grantor to the grantee as a boundary line does not estop him to deny that it was the true line, as the grantee did not rely in his purchase upon any act or representation of the adjoining owner. Davidson v. Pickard, (Tex. Civ. App. 1896) 37 S. W. Rep. 374.

**Fencing Within Boundary Line.** — A man is under no legal or moral obligation to set his fences on the true boundary line. Therefore, the mere fact that one places his fence within the line of his land does not give his neighbor the right to the land fenced out. Reiter v. McJunkin, 8 Pa. Super. Ct. 164, affirmed 194 Pa. St. 301.

**867. 8. Apportionment.** — Bennett v. Simon, 152 Ind. 490, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 868; Schuster v. Myers, 148 Mo. 422; Porter v. Gaines, 151 Mo. 560; Halsell v. McCutchen, (Tex. Civ. App. 1901) 64 S. W. Rep. 72. See also Lewis v. Prien, 98 Wis. 87.

**868. 1. When Discrepancy Affects All the Lots in a Block.** — Clayton v. Feig, 179 Ill. 534; Brooks v. Stanley, 66 Neb. 826.

**2. Anderson v. Wirth,** 131 Mich. 183, 9 Detroit Leg. N. 254.

**4. Congressional Surveys.** — Underwood v. Smith, 109 Wis. 334 (U. S. Rev. Stat., § 2396).

**869. 1. Where the Point of Beginning and the Three Last Corners Are Monuments.** — Wheeler v. State, 114 Ala. 22 (proof of actual re-survey).

**1a. Liability of Surveyor for Negligence in Survey.** — Halsey v. Hobbs, (Ky. 1895) 32 S. W. Rep. 415.

**Statutes Prohibiting Removal of Monuments.** — Ropes v. Flint, 182 Mass. 473.

**Criminal Prosecution for Removal of Landmarks** — State v. Ferguson, 82 Mo. App. 583.

**3. In Downs v. U. S.,** 187 U. S. 501, the court said: "A *bounty* is defined by Webster as 'a premium offered or given to induce men to enlist into the public service; or to encourage any branch of industry, as husbandry or manufactures.' And by Bouvier, as 'an additional benefit conferred upon or a compensation paid to a class of persons.' In a conference of representatives of the principal European powers, specially convened at Brussels in 1898 for the purpose of considering the question of sugar *bounties*, the definition of *bounty* was examined by the conference sitting in committee, who made the following report: 'The conference, while reserving the question of mitigations and provisional disposition that may be authorized, if need be by reason of exceptional situations, is of opinion that *bounties* whose abolition is desirable are understood to be all the advantages conceded to manufacturers and refiners by the fiscal legislation of the states, and that, directly or indirectly, are borne by the public treasury. There should be classified as such, notably (a) The direct advantages granted in case of exportation. (b) The direct advantages granted to production. (c) The total or partial exemptions from taxation granted to a portion of the manufactured products. (d) The indirect advantages growing out of surplus or allowance in manufacturing effected beyond the legal estimates. (e) The profit that may be derived from an excessive drawback."

**871. 2a. A Bowline Knot** is one in which a loop "can be made of any size, and does not jam nor render." Cent. Dict., quoted in Trapp v. McClellan, 68 N. Y. App. Div. 362.

**873. 1. In Chesapeake, etc., R. Co. v. Anderson,** 93 Va. 650, the court said: "The word *brakeman* is defined by Webster as follows: 'The man whose business it is to manage the brake on railways.'"

## BRANDS AND MARKS.

### **874. I. DEFINITIONS AND PRELIMINARY OBSERVATIONS — Brands upon Animals.**

— See note 2.

### **875. II. BRANDS AND MARKS AS EVIDENCE — 1. Generally. — See note 5.**

#### **2. Recorded Brands—*a.* STATUTES REGULATING USE AS EVIDENCE.**

— See note 7.

### **876. Evidence of Identity of Animal. — See note 1.**

**Ear and Flesh Marks. — See note 2.**

**Whether Recorded Brands Are Prima Facie Evidence of Ownership. — See notes 4, 5.**

### **877. *b.* PROVISIONS AND REGULATIONS AS TO RECORDING BRANDS —**

**Proof of Record. — See note 1.**

**874. 2. Marks and Brands Distinguished. —** In *Churchill v. Georgia R., etc., Co.*, 108 Ga. 265, the court said: "When we speak of the 'marks and brands' used by an owner of stock to designate his property and distinguish it from property of like character belonging to others, every one understands the expression to include only those devices placed upon stock by artificial means. The word 'brand' indicates some figure or device burned upon the animal by a hot iron, and the word 'mark' indicates generally some change made in some part of the animal by a knife or other means, such as boring or slitting the ear. The 'brand' is more commonly used upon some animals as a means of identification, such as horses, mules, and the like; while others are generally identified by 'marks' made by knife-cuts in the ear, such as cattle, hogs, and the like."

**875. 5. Brand Not Conclusive Evidence of Ownership in Replevin Suit. —** *Debord v. Johnson*, 11 Colo. App. 402.

**Evidence of Custom. —** Where the issue was as to the ownership of the animal, evidence as to a custom that prevailed in regard to placing a certain brand on all calves when parties did not know to whom they belonged was not pertinent; as, if such a custom did prevail, action in pursuance of the custom could not deprive a person of his property. *Rumfield v. Neal*, (Tex. Civ. App. 1898) 46 S. W. Rep. 262.

**7. Statutes — Only Recorded Brands Evidence of Ownership. —** *Sapp v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 456; *Walton v. State*, 41 Tex. Crim. 454; *Chowning v. State*, 41 Tex. Crim. 81; *Unsell v. State*, 39 Tex. Crim. 330; *Turner v. State*, 39 Tex. Crim. 322; *Brooke v. People*, 23 Colo. 375; *Welch v. State*, 42 Tex. Crim. 338.

**8. Theft of Cattle — Proof of Ownership by Brand Recorded After Theft. —** *State v. Hanna*, 35 Oregon 195, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 876; *State v. Morse*, 35 Oregon 462; *Unsell v. State*, 39 Tex. Crim. 330; *Turner v. State*, 39 Tex. Crim. 322; *Chowning v. State*, 41 Tex. Crim. 81; *Welch v. State*, 42 Tex. Crim. 338.

**Brand Defectively Recorded not admissible to prove ownership. —** *Steed v. State*, 43 Tex. Crim. 567.

**876. 1. Proof of Identity by Unrecorded Brands. —** *Sapp v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 456; *Chowning v. State*, 41 Tex. Crim. 81; *Turner v. State*, 39 Tex. Crim. 322; *Brooke v. People*, 23 Colo. 375; *Welch v. State*, 42 Tex. Crim. 338.

**Identity Proved by Brand Defectively Recorded. —** *Steed v. State*, 43 Tex. Crim. 567.

**Brand on Animal Different from Recorded Brand. —** Where the brand on an alleged stolen animal is different from the recorded brand of the owner, it does not constitute evidence of ownership, but may be looked to as any other flesh mark which might serve to identify the animal. *Garrett v. State*, 42 Tex. Crim. 521.

**2. Proof of Ownership by Unrecorded Mark. —** In *Turner v. State*, 39 Tex. Crim. 322, it was held that a person or company could have but one recorded brand; and, if such person or company had more than one recorded brand, said brands could be regarded as no more than flesh marks on the animal so branded, which could be used, not as evidence of ownership in connection with the recorded brand, but simply as evidence to establish the identity of such ownership, and that this identity in connection with other proof might, of course, show ownership.

In *Swan v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 464, the court said: "The holding in *Turner's Case* is not authority for the proposition that, where a person or company has several recorded brands and marks, either or all of said brands cannot be offered in evidence, but merely relates to the effect of such recorded brand where the party has more than one." See also *Welch v. State*, 42 Tex. Crim. 338.

**4. —** *Dickson v. Territory*, (Ariz. 1899) 56 Pac. Rep. 971. See also *Debord v. Johnson*, 11 Colo. App. 402.

**5. —** In *Turner v. State*, 39 Tex. Crim. 322, it was held that a brand recorded prior to the theft does not constitute indisputable evidence of ownership, but is merely *prima facie* proof thereof subject to rebuttal.

**877. 1. Proof by Certified Copy — Authentication of Date of Registration. —** *Dickson v. Territory*, (Ariz. 1899) 56 Pac. Rep. 971.

**Record Is Evidence in Any County in State. —** *Walton v. State*, 41 Tex. Crim. 454.

**Conflict Between Brand in Certificate and on**

**877.** Part of the Animal to Be Branded Must Be Designated. — See note 3.

**878.** Only One Brand to Be Used by One Person. — See note 1.

**IV. OFFENSES CONNECTED WITH BRANDS AND MARKS — 1. Generally.**

— See note 6.

**879.** 2. Illegal Branding. — See note 1.

3. Alteration of Brands and Marks. — See note 4.

**BRANDY.** — See note 5.

**880. BRASS KNUCKLES.** — See note 2.

**Animal.** — In *Garrett v. State*, 42 Tex. Crim. 521, the court said: "The certificate of the brand being admissible in evidence, then other testimony to reconcile and explain the conflict between the brand in the purported certificate and that actually placed on the animal was admissible, that is, it was admissible to show how the particular brand on the alleged stolen animal came to be placed there instead of the recorded brand."

**877. 3. Steed v. State**, 43 Tex. Crim. 567. **Side of Animal Need Not Be Designated.** — *Reese v. State*, 43 Tex. Crim. 539.

**Shoulder or Side.** — A record of a brand designating the place of the brand on the animal in the alternative, as either on the "shoulder or side" (that is, different parts on the same side of the animal), is defective. *Reese v. State*, 43 Tex. Crim. 539.

**878. 1.** See *Unsell v. State*, 39 Tex. Crim. 330.

**6. The Texas Penal Code of 1895, Art. 932**, imposes a penalty upon any one who originally uses more than one brand in the branding of cattle. *Unsell v. State*, 39 Tex. Crim. 330.

**879. 1. Intent to Prevent Identification.** — In construing a *California* statute providing that one who in any way marks any animal therein named, belonging to another, with intent thereby to prevent identification thereof by the true owner, is guilty of a felony, the court said: "It can make no difference that the mark placed on the animal is not of a character usually adopted for the purpose of indicating ownership, or that it may not accomplish the purpose of preventing identification. These are matters that may properly weigh with the jury in determining as to the intent with which the marking was done. It is the placing of any mark on such an animal, with the intent thereby to prevent identification by the true owner, that constitutes the crime. That one who slits the

ears of a horse or colt thereby 'marks' the same, within the ordinary meaning of that word, is clear." *People v. Strombeck*, 145 Cal. 110.

**4. Elements of the Offense.** — In *Samples v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1041, the court said: "In order to constitute this offense, it must be shown (1) that the accused marked the animals of another, (2) without consent of the owner, and (3) with intent to defraud."

In *Shiver v. State*, 41 Fla. 630, the court said: "It is the fraudulent altering or changing of the mark or brand upon an animal of another, with intent to claim the same, that is denounced by the statute; and it is not a necessary ingredient of the offense that the altered mark or brand should be claimed by the defendant or any other person. The ownership of the altered mark or brand might constitute a circumstance proper to be considered in determining the question of defendant's intent in effecting the alteration, but the statute does not make it an essential ingredient of the offense, so as to require it to be noticed in framing the indictment."

**Evidence Held Sufficient to Convict.** — *Samples v. State*, (Tex. 1901) 64 S. W. Rep. 1041; *Diaz v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 632.

**The Punishment** for altering the mark on a hog, under the *Texas* statutes, is a felony, without regard to the value of the hog. *Barfield v. State*, (Tex. Crim. 1897) 43 S. W. Rep. 333, (Tex. Crim. 1898) 44 S. W. Rep. 1104. And the same rule applies in *Arkansas*. *Houston v. State*, 66 Ark. 607.

**5. The Court Will Take Notice.** — *State v. Lewis*, 86 Minn. 174.

**880. 2. Brass Knuckles.** — See *Morrison v. State*, 38 Tex. Crim. 392; *Louis v. State*, 36 Tex. Crim. 52.



# BREACH OF PROMISE OF MARRIAGE.

By X. P. HUDDY.

## 882. I. DEFINITION AND HISTORY — Definition. — See note 1.

History — Roman Law. — See note 2.

## 883. In England. — See note 1.

## II. THE CONTRACT — 1. Capacity of Parties — Infants. — See notes

5, 7, 9.

Married Persons. — See note 12.

## 884. Promise While Decree of Divorce Forbidding Second Marriage Operative. — See note 1.

## 2. Form and Proof of the Contract — a. IN GENERAL — MUTUALITY.

— See note 8.

Express Words Unnecessary. — See note 10.

## 882. 1. Right of Action Exists Independent of Legislation. — Parker v. Forehand, 99 Ga. 743.

The Action Is Not a Tort Action, although it partakes somewhat of the character of such an action. Broyhill v. Norton, 175 Mo. 190.

Procuring Breach. — In Leonard v. Whetstone, (Ind. App. 1903) 68 N. E. Rep. 197, it was held that it was not an actionable wrong for parents to induce their son to refuse to carry out a marriage contract.

Action Does Not Survive Death of Party. — French v. Merrill, 27 N. Y. App. Div. 612, appeal dismissed 157 N. Y. 704.

2. Action Affects Character. — In Hullett v. Baker, 101 Tenn. 689, it was held that an action for breach of promise abated on the death of the defendant, since it comes within the excepting clause of the statute (Shannon's Tenn. Code, § 4569), which provides that "no civil action commenced, whether founded on wrongs or contracts, except for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived."

883. 1. See Lewis v. Tapman, 90 Md. 294, wherein the early practice in England is discussed.

5. Wells v. Hardy, 21 Tex. Civ. App. 454.

7. Promise of Infant. — Wells v. Hardy, 21 Tex. Civ. App. 454, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 883.

9. See Wells v. Hardy, 21 Tex. Civ. App. 454.

12. Promise by Parties Already Married. — A promise of marriage made to a married party known to be such is void. Davis v. Pryor, (C. C. A.) 112 Fed. Rep. 274, reversing 3 Indian Ter. 396; Smith v. Hall, 69 Conn. 651.

When Married Party Is Liable on Promise. — "The law unquestionably is settled that a married person can enter into a contract of marriage, and thereby become responsible in damages to the other contracting party, provided the party with whom the married person contracts is ignorant of the fact that the person is married." Davis v. Pryor, 3 Indian Ter. 396, judgment reversed (C. C. A.) 112 Fed. Rep. 274.

884. 1. Statute Forbidding Second Marriage for Certain Time. — In Buelna v. Ryan, 139

Cal. 630, it was held, under a statute making a subsequent marriage illegal and void when contracted by a divorced person within one year subsequent to the divorce, that a divorced person could, before the expiration of the time, agree to marry after the time.

8. Must Be an Offer — Mere Intention Insufficient. — A charge which substantially stated that if the defendant told or held out to other persons that he was to marry the plaintiff, his promise was established, etc., was held to be erroneous. Tamke v. Vangsnes, 72 Minn. 236.

Burden of Proving Promise Is on Plaintiff. — McPhail v. Trovillo, 65 Ill. App. 660.

Breach of Former Promise No Bar to Proof of New Promise. — The fact that a previous promise had been made by the defendant and a breach thereof taken place does not constitute a bar to the introduction of evidence that a new and subsequent promise had been made. Pyle v. Piercy, 122 Cal. 383.

Evidence Warranting Finding of New and Independent Promise. — In an action for the breach of a contract to marry, it appeared that in February, 1901, the parties had agreed to marry in March, 1902. In June, 1901, they had a conversation, in which the plaintiff said to the defendant: "Do you intend to marry me as you promised, or are you making a fool of me?" To which the defendant replied: "I intend to marry you as I promised. In March we will go on the farm and live right. I will either buy or build." It was held that, under all the facts of the case, the jury was warranted in finding that the latter part of the defendant's statement constituted a present, new, and independent promise, and not a mere declaration of a continuing obligation previously incurred. Parrish v. Parrish, 67 Kan. 323.

10. Walters v. Stockberger, 20 Ind. App. 277; Rime v. Rater, 108 Iowa 61.

When Express Contract Is Question for Jury. — Where a party brought an action on an express contract to marry, which contract was not based on any particular letter, promise, or act, and the defendant claimed that an offer by him

**885. Acceptance.** — See note 1.

Where Promise Is by Deed. — See note 2.

Acceptance Must Be Made Known to Other Party. — See note 6.

**886. b. MAY BE INFERRED FROM CONDUCT.** — See note 1.**887.** See notes 3, 5.**888. Preparations in Absence of Other Party.** — See note 1.

was answered by a letter containing a conditional acceptance, and evidence was introduced to the effect that the letter was an unconditional acceptance, also that subsequent to the letter the parties agreed to be married at a certain time, the court held that the question whether there was an express contract to marry, even though the letter was a conditional acceptance, was properly submitted to the jury. *Olmstead v. Hoy*, 112 Iowa 349.

**885. 1. Mutuality Necessary.** — *Smyth v. Greacen*, 100 N. Y. App. Div. 275.

**Offer and Acceptance Constitute Contract.** — Where there are no legal disabilities existing, an offer of marriage by one person to another, and an acceptance of such offer, constitute a marriage contract. *Walters v. Stockberger*, 20 Ind. App. 277; *Broyhill v. Norton*, 175 Mo. 190.

**Sufficiency of Evidence to Establish Promise.** — Where the testimony was that the defendant asked the plaintiff to marry him; that she consented; that he asked her to go to his home and prepare it for the marriage; and that the day for the marriage was fixed, it was held that the evidence was sufficient to establish the promise. *Lauer v. Schmidt*, 25 Ind. App. 54.

**2. Promise by Deed.** — *Sponable v. Owens*, 92 Mo. App. 174.**6. Acceptance Must Be Known to Other Party.** — *Walters v. Stockberger*, 20 Ind. App. 277.**886. 1. Contract Inferred from Circumstances.** — *Walters v. Stockberger*, 20 Ind. App. 277; *Rime v. Rater*, 108 Iowa 61; *Edge v. Griffin*, (Tex. Civ. App. 1901) 63 S. W. Rep. 148.

**Evidence of Destroyed Letter.** — In *Shields v. Lewis*, (Ky. 1899) 49 S. W. Rep. 803, it was held that it did not constitute error to admit the plaintiff's testimony as to the contents of letters containing promises of marriage written to her by the defendant, but which were destroyed by the plaintiff in good faith.

**Representations Concerning Defendant's Wealth.** — In *Humphrey v. Brown*, 89 Fed. Rep. 640, it was held that representations which the defendant made to the plaintiff concerning his wealth, whether true or false, would be admissible for the purpose of explaining the situation and relation of the parties.

**Letters Concerning Business and Other Women.** — Letters concerning the defendant's business and relations with other women are admissible. *Geiger v. Payne*, 102 Iowa 581.

**When Construction of Correspondence Is for Jury.** — The construction of correspondence was held to have been properly left to the jury where oral testimony was given concerning some of the letters which were lost. *Barber v. Geer*, 31 Tex. Civ. App. 176.

Where the contract is evidenced in part by letters and in part by parol, its construction is for the jury. But no injury is done by permitting the plaintiff to place a construction on it where her answer is inconclusive and is given

merely as her supposition. *Lewis v. Tapman*, 90 Md. 294.

**Admissions After Suit Is Brought.** — Admissions of the defendant even after suit is brought may be considered. *Lohner v. Coldwell*, 15 Tex. Civ. App. 444.

**Admissions Made by the Plaintiff** to persons not invited to the wedding, and before the wedding day was fixed, were held to be inadmissible to establish the contract. *Liebrandt v. Sorg*, (Cal. 1901) 65 Pac. Rep. 318.

**Declarations Made After Breach.** — Declarations to a third party tending to show a promise are admissible, even if made after the breach. *Geiger v. Payne*, 102 Iowa 581.

**Relation of Parties Where One Was Married.** — Evidence showing the relation of the parties which existed before the divorce of the woman is admissible as bearing on the question whether a promise of marriage was made after the divorce and as showing the circumstances under which the plaintiff had rendered services as alleged. *Smith v. Hall*, 69 Conn. 651.

Evidence whether the plaintiff had ever met the defendant in a certain city while he was living with his first wife was held to be admissible. While at that time the defendant was incapable of entering into a matrimonial contract, yet it was proper to show the origin and continuation of their acquaintance, for the purpose of aiding the jury in determining the probability of an offer of marriage at a subsequent time, when he had legal capacity to make it. *Hahn v. Bettingen*, 84 Minn. 512.

**Evidence of Previous Engagement.** — In an action for the breach of a contract to marry, it is not error to admit in evidence, in corroboration of direct testimony of an express contract between the parties, a previous contract of marriage, included in their past intercourse with each other. This rule does not, however, forbid the court from excluding testimony only remotely affecting the latest relations of the parties, although involved in their previous intercourse, and does not compel the court to permit the complete rehabilitation of all the minute details of a long-past association, which could be of no material aid in elucidating the issues on trial. *Parrish v. Parrish*, 67 Kan. 323.

**Evidence of Defendant's Flight Is Inadmissible.** — *Wise v. Schloesser*, 111 Iowa 16.

**887. 3. Understanding of Friends and Relations.** — *Lewis v. Tapman*, 90 Md. 294, holding that it may be shown by the plaintiff that she stated to her family that she was engaged to the defendant.

**5. Preparations for Marriage.** — *Rime v. Rater*, 108 Iowa 61, supporting the text paragraph generally.

**888. 1.** *Hahn v. Bettingen*, 81 Minn. 91, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 887 [888]; *Liebrandt v. Sorg*, (Cal. 1901) 65 Pac. Rep. 318.

**888.** *c.* STATUTE OF FRAUDS — Promises in Consideration of Marriage. — See notes 5, 6.

When Not to Be Performed Within a Year. — See note 7.

When Contract May or May Not Be Performed in One Year. — See note 9.

**889.** 3. Consideration. — See notes 1, 3.

4. Conditional Promises — General Rule. — See note 4.

Marriage to Be in Accordance with Customs of Particular Religion. — See note 5.

**890.** In Restraint of Marriage. — See note 3.

And Marriage Brokers Bonds. — See note 5.

III. THE BREACH — Time of Performance — General Rule. — See note 6.

Even if a Day Is Fixed. — See note 8.

**891.** Request and Refusal — General Rule. — See note 1.

Where Request Not Necessary. — See notes 7, 9, 11, 12.

**888.** 5. Not "Agreements Made in Consideration of Marriage." — *Lewis v. Tapman*, 90 Md. 294.

6. *Lewis v. Tapman*, 90 Md. 294, wherein the subject is fully discussed.

7. When Not to Be Performed Within One Year. — *MacElree v. Wolfersberger*, 59 Kan. 105, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888. See also *Clark v. Reese*, 26 Tex. Civ. App. 619. *Contra*, *Lewis v. Tapman*, 90 Md. 294. (In Maryland the English statute of 29 Car. II. was in force, under which this case was decided).

9. Where the Contract May or May Not Be Performed Within One Year. — *Hellenthal v. Bleuhm*, 13 Ohio Dec. 513, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888; *Clark v. Reese*, 26 Tex. Civ. App. 619.

**889.** 1. Mutual Promises the Consideration. — *Walters v. Stockberger*, 20 Ind. App. 277, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 882-889.

Agreement to Marry as Consideration for Other Agreements. — An agreement to marry is a valuable consideration upon which other lawful agreements may be based. Such an agreement may be a valuable consideration which will support a promise that may be void, as for example the promise of a father to the mother to support a bastard. *Sponable v. Owens*, 92 Mo. App. 174.

3. Future Intercourse. — *Edmonds v. Hughes*, 115 Ky. 561; *Spellings v. Parks*, 104 Tenn. 351, holding, however, that where a contract was made the basis for obtaining the intercourse, and as a result of the promise intercourse was consummated, the contract was not illegal.

4. Promise on Condition. — *Lewis v. Tapman*, 90 Md. 294, holding that a conditional promise is valid.

A contract of marriage to be performed upon the death of a divorced spouse is not void for uncertainty. *Brown v. Odill*, 104 Tenn. 250, 78 Am. St. Rep. 914, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 889.

Where an engagement of marriage is entered into, the marriage to take place on the happening of a future event, the law implies that the promise shall be fulfilled within a reasonable time thereafter, which may depend, where no specific date is named, upon the character of such event. *Birum v. Johnson*, 87 Minn. 362.

5. *Waneck v. Kratky*, (Neb. 1903) 96 N. W. Rep. 651.

**890.** 3. In Restraint of Marriage. — Where the terms of the contract restrained the parties from marrying other parties, it was held that the contract did not constitute an unlawful restraint of marriage. *Brown v. Odill*, 104 Tenn. 250, 78 Am. St. Rep. 914.

5. Contract to Be Performed upon Death of Divorced Spouse. — A contract to be performed upon the death of the man's divorced wife is not void as against public policy as an inducement to the destruction of life. *Brown v. Odill*, 104 Tenn. 250, 78 Am. St. Rep. 914.

6. Where Promise Is General. — *Grubbs v. Pence*, (Ky. 1903) 73 S. W. Rep. 785; *Clark v. Reese*, 26 Tex. Civ. App. 619. See also *Clement v. Skinner*, 72 Vt. 159.

When Time Is Question for Jury. — Where the pleadings raise an issue of fact as to the time agreed upon, it is proper to submit the issue to the jury. *Hesse v. Seypp*, 88 Mo. App. 66.

Evidence of Plaintiff's Statements — Hearsay. — Where the fact of a long-standing engagement was admitted, and the inquiry was as to who was at fault for the breach of the contract, persons to whom the plaintiff said that she heard the defendant say to his mother that he proposed to study it over before he married the plaintiff, cannot testify as to the statements made to them by the plaintiff, as such evidence is hearsay. *Ranck v. Brackbill*, 209 Pa. St. 499.

8. *Walters v. Stockberger*, 20 Ind. App. 277; *Clark v. Corey*, 24 R. I. 137.

The Performance of the Contract May Be Postponed by one party, even without the consent of the other, for a good and sufficient reason. *Walters v. Stockberger*, 20 Ind. App. 277.

**891.** 1. When Request Necessary. — *Rime v. Rater*, 108 Iowa 61; *Grubbs v. Pence*, (Ky. 1903) 73 S. W. Rep. 785; *Broyhill v. Norton*, 175 Mo. 190; *Clark v. Corey*, 24 R. I. 137.

Request Once Refused. — After the defendant has once refused to marry the plaintiff on request, a further request is not necessary. *Buelna v. Ryan*, 139 Cal. 630. See also *Grubbs v. Pence*, (Ky. 1903) 73 S. W. Rep. 785; *Broyhill v. Norton*, 175 Mo. 190.

7. *Rime v. Rater*, 108 Iowa 61.

Lapse of Time and Conduct Amounting to Refusal. — Where a party has promised another to fulfil a marriage contract on return from a trip abroad, lapse of time and the conduct of such party after his return which show that he does not intend to fulfil his promise, may be re-

**892. IV. DEFENSES — 1. Character and Habits — Unchastity Unknown to Defendant.** — See note 4.

Unchastity Known to Defendant. — See note 6.

**893. Mutual Improprieties and Lewdness.** — See note 3.

**2. Disease.** — See note 7.

**894. Physical Condition of Woman.** — See note 1.

**895. 4. Release — Renewal.** — See note 3.

garded as the equivalent of a refusal to do so, and dispense with a request to consummate marriage by the other party. *Birum v. Johnson*, 87 Minn. 362.

**891. 9. Repudiation of Promise.** — *Brown v. Odill*, 104 Tenn. 250, 78 Am. St. Rep. 914.

**A Mere Request for Postponement** for an expressed and reasonable cause does not amount to a repudiation of the contract. *Walters v. Stockberger*, 20 Ind. App. 277.

**11. When Suit May Be Brought Immediately.** — *Zatlin v. Davenport*, 71 Ill. App. 292; *Lewis v. Tapman*, 90 Md. 294; *Trammell v. Vaughan*, 158 Mo. 214, 81 Am. St. Rep. 302. See also *Walters v. Stockberger*, 20 Ind. App. 277; *Waneck v. Kratky*, (Neb. 1903) 96 N. W. Rep. 651.

**12. Where Defendant Has Married Another.** — *Folz v. Wagner*, 24 Ind. App. 694; *Hellenthal v. Bleuhm*, 13 Ohio Dec. 514, supporting the text paragraph; *Clark v. Corey*, 24 R. I. 137; *Brown v. Odill*, 104 Tenn. 250, 78 Am. St. Rep. 914.

**892. 4. Unchastity of Woman.** — *Bowman v. Bowman*, 153 Ind. 498; *Edmonds v. Hughes*, 115 Ky. 561; *Markham v. Herrick*, 82 Mo. App. 327; *Welker v. Metcalf*, 209 Pa. St. 373; *Williams v. Fahn*, 119 Iowa 746, holding that specific acts of unchastity need not be shown; *La Porte v. Wallace*, 89 Ill. App. 517, holding that what constitutes a legal cause for refusing to carry out the contract is a question of law for the court.

**Evidence of Reputation Is Competent.** — The character of the plaintiff for chastity, when attacked, can always be sustained by evidence of reputation. *Smith v. Hall*, 69 Conn. 651.

**Evidence of Unchastity After Bringing Suit** should not be admitted. *Duvall v. Fuhrman*, 2 Ohio Cir. Dec. 174.

**6. Unchastity Known to Defendant.** — *Bowman v. Bowman*, 153 Ind. 498; *Walker v. Metcalf*, 209 Pa. St. 373.

**When Question of Knowledge Is Not for Jury.** — Where there is no evidence that the defendant, at the time of the alleged promise to marry, had any knowledge of the conduct of the plaintiff being other than that of a chaste and virtuous woman, it is error to submit to the jury the question whether or not the defendant knew that the plaintiff was of bad character for chastity at the time he entered into the alleged marriage contract. *Welker v. Metcalf*, 209 Pa. St. 373.

**893. 3. Fleetford v. Barnett, 11 Colo. App. 77; *Dunn v. Trout*, 87 Ill. App. 432.**

**7. Disease.** — *Vierling v. Binder*, 113 Iowa 337; *Gardner v. Arnett*, (Ky. 1899) 50 S. W. Rep. 840, holding that the mere fact that the defendant, after a disease reappeared, talked over the matter of getting married and expressed a willingness to marry, did not deprive him of the right to rely on the defense.

In *Smith v. Compton*, 67 N. J. L. 548, the court refused to sanction the doctrine established by *Allen v. Baker*, 86 N. Car. 91, 41 Am. Rep. 444, and *Shackleford v. Hamilton*, 93 Ky. 80, 40 Am. St. Rep. 166. It was held that the disease must make the performance of the marriage contract impossible in order to excuse performance.

If the party without fault contracts a disease between the date of the contract and the date set for the marriage, which renders it unsafe for him to marry, he may have a postponement until the result of the disease is known or he is cured; this, too, whether or not the woman knows of his condition, or consents to such an arrangement. *Trammell v. Vaughan*, 158 Mo. 214, 81 Am. St. Rep. 302.

In *Sanders v. Coleman*, 97 Va. 690, it was held that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable. See also *Waneck v. Kratky*, (Neb. 1903) 96 N. W. Rep. 651.

**894. 1. Vierling v. Binder, 113 Iowa 337. **Operation Incapacitating Woman.** — It is a good defense that the woman, subsequent to the promise, unnecessarily underwent an operation which made her incapable of procreation. *Edmonds v. Hughes*, 115 Ky. 561.**

**895. 3. Release.** — *Kellett v. Robie*, 99 Wis. 303.

**Circumstances Held Not a Release.** — In *Folz v. Wagner*, 24 Ind. App. 694, it was held that a letter containing expressions of regret and forgiveness, written by the plaintiff to the defendant in answer to a letter from the defendant announcing his intention not to marry the plaintiff, did not constitute a release.

**Evidence of Release.** — Where the contract was admitted by the defendant, and the disputed question before the jury was whether the contract was terminated by mutual consent, or whether it was broken by the defendant, and the jury decided that the contract was terminated by mutual consent, the court was of the opinion that testimony introduced for the purpose of showing the existence of a lack of harmony between the defendant (who was the pastor of a church of which the plaintiff was a member) and the plaintiff with relation to church work, offered on the theory that it tended to sustain the case made by the defendant that the engagement was terminated by mutual consent, was competent; but even if it was not, it was immaterial, and its admission was a harmless error. *Justice v. Davis*, (N. J. 1904) 59 Atl. Rep. 6.

**Burden of Proving Release Is on Defendant.** — *Liese v. Meyer*, 143 Md. 547.

**895.** Postponement. — See note 4.

Renewal. — See note 7.

**896.** V. DAMAGES — 1. General Principles. — See note 4.

Discretion of Jury. — See notes 5, 6.

**897.** Exemplary Damages. — See note 1.

Circumstances to Be Considered in Estimating Damages. — See notes 2, 3, 4, 5,

6, 8.

**895. 4. Evidence of Acquiescing in Postponement.** — Evidence that the plaintiff sold property at a sacrifice in order to be prepared to be married, to the knowledge of the defendant, without any claim on his part that the contract was not binding, is admissible to show whether the plaintiff acquiesced in the postponement of the marriage. *Clement v. Skinner*, 72 Vt. 159.

7. *Waneck v. Kratky*, (Neb. 1903) 96 N. W. Rep. 651.

**896. 4. Parker v. Forehand**, 99 Ga. 743.

**No Fixed Measure of Compensation Can Be Laid Down.** — *La Porte v. Wallace*, 89 Ill. App. 517; *Hahn v. Bettingen*, 81 Minn. 91.

**Services Rendered in Consideration of Promise.** — Where the value of services which were rendered to the defendant in consideration of his promise and pending the engagement was sought to be recovered, and a recovery for the breach of the promise of marriage was also sought, it was held that a recovery for the breach of promise was equivalent to performance which precluded a recovery for the services. *Smith v. Hall*, 69 Conn. 651.

**5. Discretion of Jury.** — *Parker v. Forehand*, 99 Ga. 743; *Poehlmann v. Kertz*, 105 Ill. App. 249, affirmed 204 Ill. 418; *Lauer v. Schmidt*, 25 Ind. App. 54; *Hooker v. Phillippe*, 26 Ind. App. 501; *Geiger v. Payne*, 102 Iowa 581; *Rime v. Rater*, 108 Iowa 61; *Herriman v. Layman*, 118 Iowa 590; *Hahn v. Bettingen*, 81 Minn. 91; *Hahn v. Bettingen*, 84 Minn. 512; *Duval v. Fuhrman*, 2 Ohio Cir. Dec. 174; *Brown v. Odill*, 104 Tenn. 250, 78 Am. St. Rep. 914.

**Illustrations.** — In *Mainz v. Lederer*, 21 R. I. 370, a verdict of twelve thousand five hundred dollars was held not to be excessive.

**6. Prejudice, Passion, or Corruption.** — *McCarty v. Heryford*, 125 Fed. Rep. 46; *La Porte v. Wallace*, 89 Ill. App. 517; *Gardner v. Arnett*, (Ky. 1899) 50 S. W. Rep. 840; *Broyhill v. Norton*, 175 Mo. 190; *Kolsch v. Jewell*, 21 N. Y. App. Div. 581; *Duval v. Fuhrman*, 2 Ohio Cir. Dec. 174; *Kellett v. Robie*, 99 Wis. 303.

**897. 1. Exemplary Damages.** — *Jacoby v. Stark*, 205 Ill. 34; *Duval v. Fuhrman*, 2 Ohio Cir. Dec. 174. But see *Trammell v. Vaughan*, 158 Mo. 214, 81 Am. St. Rep. 302, wherein it is stated that exemplary or punitive damages, as such, cannot be recovered for the breach of a contract of marriage.

**Matter in Aggravation Must Appear.** — The jury is restricted to compensatory damages, unless matter in aggravation appears. *La Porte v. Wallace*, 89 Ill. App. 517.

**2. Defendant's General Reputation for Wealth.** — *Humphrey v. Brown*, 89 Fed. Rep. 640; *Geiger v. Payne*, 102 Iowa 581; *Herriman v. Layman*, 118 Iowa 590; *Tamke v. Vangsnes*, 72 Minn. 236; *Hahn v. Bettingen*, 84 Minn. 512; *Birum v. Johnson*, 87 Minn. 362. See also

*Vierling v. Binder*, 113 Iowa 337. *Contra*, *Johansen v. Modahl*, (Neb. 1903) 94 N. W. Rep. 532.

**Evidence of Particulars of Defendant's Property.** — As denying the admissibility of such evidence, see *Smith v. Compton*, 67 N. J. L. 548, wherein it is held, however, that where the declaration alleges, as a ground of special damages, the loss of a valuable right of dower in the defendant's property, evidence of the defendant's ownership of specific property may be given by the plaintiff.

As sustaining the admissibility of such evidence, see *Vierling v. Binder*, 113 Iowa 337; *Rime v. Rater*, 108 Iowa 61.

Where the exchange of property was a part of the consideration of marriage, the two questions were held to be so interwoven as to render competent testimony as to the value of the property. *Shields v. Lewis*, (Ky. 1899) 49 S. W. Rep. 803.

**Defendant's Interest in His Father's Estate** is a proper matter of inquiry. *Rime v. Rater*, 108 Iowa 61.

**Necessity of Evidence.** — In *Pyle v. Piercy*, 122 Cal. 383, the court was of the opinion that in the absence of evidence thereof, the defendant's financial ability should not be considered by the jury.

3. *Smith v. Compton*, 67 N. J. L. 548.

Where it was alleged that the defendant was worth over ten thousand dollars, and his business relations were proved, it was competent for the defendant to show his actual financial condition. *Casey v. Gill*, 154 Mo. 181.

**4. Social Position of Defendant.** — *Tamke v. Vangsnes*, 72 Minn. 236; *Brown v. Odill*, 104 Tenn. 250, 78 Am. St. Rep. 914.

Where the evidence warrants it, the jury may take into consideration the plaintiff's pecuniary loss, her loss of opportunities during her engagement, the disappointment of her reasonable expectation of marital and social advantages resulting from the intended marriage, and the marring of her prospects in life. *Hahn v. Bettingen*, 81 Minn. 91.

**5. Length of Engagement.** — *Olmstead v. Hoy*, 112 Iowa 349.

**6. Evidence of Inducement to Change Church Relations.** — As showing the woman's affection and her wounded feelings, testimony that after the marriage contract the defendant induced the plaintiff to change her church relations, and transfer her membership to the church of which he was a member, is admissible for consideration in the computation of damages. *MacElree v. Wolfersberger*, 59 Kan. 105.

8. *Liebrandt v. Sorg*, 133 Cal. 571; *Parker v. Forehand*, 99 Ga. 743; *La Porte v. Wallace*, 89 Ill. App. 517; *Rime v. Rater*, 108 Iowa 61; *Stewart v. Anderson*, 111 Iowa 329; *MacElree v. Wolfersberger*, 59 Kan. 105; *Grubbs v. Pence*,

**898.** See notes 3, 4.

**2. Circumstances in Aggravation — Seduction.** — See note 6.

**899.** Cruel and Insulting Conduct of Defendant. — See note 2.

**Alleging Plaintiff's Unchaste Conduct.** — See note 3.

**Bad Faith.** — See note 4.

**Bad Motives — Fraud.** — See note 6.

**900.** **3. Circumstances in Mitigation — Question of Motive.** — See note 3.

**Unchastity.** — See notes 5, 6.

**Participation of Defendant.** — See note 9.

(Ky. 1903) 73 S. W. Rep. 785; *Hahn v. Bettingen*, 81 Minn. 91; *Liese v. Meyer*, 143 Mo. 547; *Trammell v. Vaughan*, 158 Mo. 214, 81 Am. St. Rep. 302; *Broyhill v. Norton*, 175 Mo. 190; *Brown v. Odill*, 104 Tenn. 250, 78 Am. St. Rep. 914.

Evidence that the plaintiff told others about her contemplated marriage, though not admissible to prove the contract, may be admitted to show humiliation after the contract has been *prima facie* shown. *Liebrandt v. Sorg*, 133 Cal. 571.

**898. 3. Expense of Preparations.** — Such expenses are an element of damage, if alleged and proven. Where there is no evidence tending to show the amount expended, it is error to submit the matter to the jury. *Olmstead v. Hoy*, 112 Iowa 349.

**4. Understanding Concerning Building Home.** — In *Jacoby v. Stark*, 205 Ill. 34, it was held that it was proper to submit to the jury the consideration of the money value or worldly advantage of a marriage which would have given the plaintiff a permanent home, where there was evidence of an understanding concerning the building of a home.

**Loss of Opportunity to Marry Jilted Lover.** — Where the plaintiff broke an existing engagement with another man, at the solicitation of the defendant, and promised to marry him, the loss of the opportunity to marry her jilted lover cannot be considered in assessing damages for a breach of the subsequent engagement. *Hahn v. Bettingen*, 81 Minn. 91; *Trammell v. Vaughan*, 158 Mo. 214, 81 Am. St. Rep. 302.

**6. Seduction.** — *Mainz v. Lederer*, 21 R. I. 370, explaining and limiting *Perkins v. Hersey*, 1 R. I. 493, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 898; *Poehlmann v. Kertz*, 204 Ill. 418, affirming 105 Ill. App. 249; *Geiger v. Payne*, 102 Iowa 581; *Liese v. Meyer*, 143 Mo. 547; *Spellings v. Parks*, 104 Tenn. 351; *Kaufman v. Fye*, 99 Tenn. 145.

**Seduction Outside of State or Territory.** — Seduction may be considered even if accomplished outside of the jurisdiction of the state or territory. *Davis v. Pryor*, 3 Indian Ter. 396, judgment reversed (C. C. A.) 112 Fed. Rep. 274.

**Must Be Pleaded to Be Available.** — *Herriman v. Layman*, 118 Iowa 590.

**899. 2. Trammell v. Vaughan, 158 Mo. 214, 81 Am. St. Rep. 302; *Clark v. Reese*, 26 Tex. Civ. App. 619; *Roberts v. Druillard*, 123 Mich. 286, holding that full damages for slander cannot be awarded.**

**3. Allegation of Plaintiff's Bad Character.** — *Fleetford v. Barnett*, 11 Colo. App. 77; *Liese v. Meyer*, 143 Mo. 547; *Broyhill v. Norton*,

175 Mo. 190; *Duvall v. Fuhrman*, 2 Ohio Cir. Dec. 174.

**4. Bad Faith.** — *Contra*, *Kaufman v. Fye*, 99 Tenn. 145.

*6. Jacoby v. Stark*, 205 Ill. 34, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 899; *Tamke v. Vangsnes*, 72 Minn. 236; *Duvall v. Fuhrman*, 2 Ohio Cir. Dec. 174; *Kaufman v. Fye*, 99 Tenn. 145. But see *Trammell v. Vaughan*, 158 Mo. 214, 81 Am. St. Rep. 302, wherein the court held that where the defendant enters into the transaction maliciously and not in good faith, this may aggravate the compensatory damages, but will not entitle the plaintiff to punitive damages.

**Evidence of Bad Faith.** — Where the court allowed the plaintiff to put in evidence the value of specific tracts of land owned by the defendant, and conveyed by him to his sisters shortly before the date set for the marriage, it was held that this evidence was admissible to show the bad faith on the part of the defendant, and that he intended to break the contract, and to contradict the truthfulness of his specification of defense that his failure to comply with his engagement was in consequence of his physical condition. *Smith v. Compton*, 67 N. J. L. 548.

**900. 3. The Plaintiff's Reputation for Truth and Veracity** is not competent in mitigation of special damages claimed to result from wounded feelings, injured reputation, etc. *Barber v. Geer*, 31 Tex. Civ. App. 176, distinguishing *Collins v. Clark*, 30 Tex. Civ. App. 341.

**Remote Previous Engagements of the Plaintiff**, not breached by fault of the plaintiff, are not admissible on the question of damages. *Edge v. Griffin*, (Tex. Civ. App. 1901) 63 S. W. Rep. 148.

*5. Markham v. Herrick*, 82 Mo. App. 327.

**Must Be Pleaded to Be Available.** — *Herriman v. Layman*, 118 Iowa 590.

**Evidence of the Plaintiff's Mother's Misconduct**, with which the plaintiff had no connection, is inadmissible as a bar to the action or to mitigate damages. *Lewis v. Tapman*, 90 Md. 294.

Evidence that the mother of the plaintiff was a prostitute and the mother of illegitimate children is inadmissible to mitigate the damages. The general reputation and standing of the family may be shown by the plaintiff to enhance, and by the defendant to diminish, damages, but the reputation of a particular member of the family other than the plaintiff cannot be inquired into. *Spellings v. Parks*, 104 Tenn. 351.

*6. Clark v. Reese*, 26 Tex. Civ. App. 619, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 900; *La Porte v. Wallace*, 89 Ill. App. 517.

*9. Fleetford v. Barnett*, 11 Colo. App. 77.

**900.** Incurable Disease. — See note 12.

Ill Health of Plaintiff. — See note 13.

**901.** Offer to Marry After Suit Brought. — See note 10.

**900.** 12. In order to mitigate the damages because of inability to perform the contract by reason of ill health, such should be pleaded. *Edge v. Griffin*, (Tex. Civ. App. 1901) 63 S. W. Rep. 148.

**13.** Must Be Pleaded to Be Available. — *Vierling v. Binder*, 113 Iowa 337.

Evidence of Insanity in the Plaintiff's Family

is not admissible where it appears that the defendant knew of the insanity at the time of the promise. *Lohner v. Coldwell*, 15 Tex. Civ. App. 444.

**901.** 10. *McCarty v. Heryford*, 125 Fed. Rep. 46, wherein the rule stated in the text is supported.

## BREACH OF THE PEACE.

**902.** I. DEFINITION. — See note 1.

Actual or Threatened Violence. — See note 2.

**903.** II. TERM NOT SPECIFIC, BUT GENERIC. — See note 1.

III. ACTS TENDING TO BREACH OF THE PEACE. — See notes 2, 3.

**904.** See note 2.

**902.** 1. Definition. — *Stancliff v. U. S.*, (Indian Ter. 1904) 82 S. W. Rep. 882, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 902; *Scougale v. Sweet*, 124 Mich. 311.

In *People v. Most*, 171 N. Y. 423, the court said: "A breach of the peace is an offense well known to the common law. It is a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community."

**2.** Actual or Threatened Violence. — *Com. v. Krubeck*, 23 Pa. Co. Ct. 35, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 902.

**903.** 1. *Scougale v. Sweet*, 124 Mich. 311, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 903. In this case it was held that games of baseball upon Sunday are prohibited by section 5912, Comp. Laws Mich. 1897, and are breaches of the peace under section 11334. And see the title SUNDAYS AND HOLIDAYS.

Discharging Firearms. — See *Stancliff v. U. S.*, (Indian Ter. 1904) 82 S. W. Rep. 882.

A conviction for disturbing the peace will lie where the evidence showed that the defendant with some drinking companions, traveling along a road at night, fired several shots into a house and hit one of the occupants. *Spiares v. State*, 40 Tex. Crim. 437.

**2.** *People v. Most*, 171 N. Y. 423.

**3.** A Publication in a Newspaper which instigates revolution and murder; which suggests the persons to be murdered, through the positions occupied and the duties performed by them; which advises all to discharge their duty to the human race by murdering those who enforce the law; which denounces those who spare the ministers of public justice, as guilty of a crime against humanity; and which names poison and dynamite as the agencies to be used to murder and destroy, necessarily endangers the public peace; and the publisher may be convicted under *New York Penal Code*, § 675, providing that "a person who wilfully and wrong-

fully commits any act \* \* \* which seriously disturbs or endangers the public peace, \* \* \* for which no other punishment is expressly prescribed by this Code, is guilty of a misdemeanor." *People v. Most*, 171 N. Y. 423.

**Street Meeting.** — Under the above-quoted section of the *New York Penal Code*, it was held that a conviction might be had of representatives of a socialistic party addressing a political meeting from boxes in the public street, and thereby collecting a disorderly crowd which the police could not disperse. *People v. Wallace* 85 N. Y. App. Div. 170.

**904.** 2. Statutes Directed Against Disturbances of the Peace. — *State v. Maggard*, 80 Mo. App. 286.

In *Alabama*. — In a prosecution for going sufficiently near the dwelling house of another person and using abusive and insulting language in the presence or hearing of the family of the occupant thereof, it is not necessary, to authorize a conviction, that the entire family should be present or within hearing when the language was used; but if it was used in the presence or hearing of two or more members of the family, there is a violation of the statute. *Bones v. State*, 117 Ala. 146.

Evidence that the defendant was in his own room quarreling with his wife, not talking very loudly nor cursing, but that the talking disturbed a sick man in the same house, will not warrant a conviction under an ordinance providing that "any person who disturbs the peace of others by violent, offensive, or boisterous conduct or carriage, or by loud or unusual noises, or by profane, obscene, or offensive language, calculated to provoke a breach of the peace, or being drunk or in a state of intoxication in a public place, or in a private place to the annoyance of others, shall be guilty of disorderly conduct." *Ellis v. Pratt City*, 113 Ala. 541.

In *Georgia*. — The use in the presence of a man, of an obscene word in an ordinary tone, without anger, and under circumstances

not calculated to offend the hearer or cause a breach of the peace, does not constitute a violation of a municipal ordinance prohibiting disorderly conduct "calculated to disturb the peace of the citizen." *Daniel v. Athens*, 110 Ga. 289.

The Georgia Penal Code, § 396, prohibits "indecent or disorderly conduct in the presence of females on passenger cars, street cars, or other places of like character." In construing this statute, the court said: "We think the true construction of the statute is that, if the disorderly or indecent conduct takes place on a street car on which females are riding, it is in their presence, although their backs may be turned to the offenders. That being drunk, cursing, and hugging and kissing, in an offensive manner, as was here shown to be the case, by a man and a woman on a street car, is disorderly conduct, we think too clear to require any discussion." *Sailors v. State*, 108 Ga. 35, 75 Am. St. Rep. 17.

*Question for Jury.*—In a prosecution for using opprobrious words tending to cause a breach of the peace, it is for the jury to say whether there was a provocation, and if so whether it was sufficient to justify the accused in using the language attributed to him. *Williams v. State*, 105 Ga. 608; *Echols v. State*, 110 Ga. 257.

*Indian Territory.*—It is not necessary in a prosecution for a breach of the peace that "any person should testify that he was disturbed by the conduct of the defendant, in order to sustain the charge. The jury are to consider all the facts and circumstances in the case, and then arrive at a conclusion as to whether the acts of the defendant disturbed the inhabitants of a community or not. The gravamen of the offense is the indulgence of improper conduct, and the attracting of the attention of any part of the people of a community." *Stancliff v. U. S.*, (Indian Ter. 1904) 82 S. W. Rep. 882.

*Time Not an Element.*—In *Stancliff v. U. S.*, (Indian Ter. 1904) 82 S. W. Rep. 882, the court said: "But by express provision of statute and the uniform opinions of the courts, time is not a necessary element of the crime."

*In Kansas.*—"One who applies vile epithets to another in a public street in the presence of bystanders, with the intention of annoying and disturbing such person, commits a breach of the peace." *State v. Appleton*, (Kan. 1904) 78 Pac. Rep. 445.

*The Office of a Hotel Is a Public Place* within an ordinance prohibiting wrangling, etc., in a public place. *Howard v. Stroud*, 63 Kan. 883, 65 Pac. Rep. 249.

*Missouri Statute.*—*The Conversation Must Be Loud* and offensive or indecent to constitute an offense under this statute. An instruction which fails to charge that the conversation was loud does not define the offense. *State v. Maggard*, 80 Mo. App. 286.

*What Constitutes Family.*—*State v. Maggard*, 80 Mo. App. 286.

*In New Jersey.*—Using loud language is no offense under section 3 of the Disorderly Act; the offense consists in the use of "loud and offensive or indecent language." *Mullen v. State*, 67 N. J. L. 451.

*New York — Disorderly Conduct.*—"Disorderly conduct in the abstract does not constitute any crime known to the law; it is only when it 'tends to a breach of the peace,' under the circumstances detailed in section 1458 of the Consolidation Act, that it constitutes a minor offense cognizable by the police magistrates of the city of New York; and when it in fact threatens to disturb the peace it is a misdemeanor, as well under section 675 of the Penal Code as at common law, and not within the jurisdiction of the police magistrates, but of the Court of Special Sessions (Laws of 1895, c. 601, § 14; Laws of 1901, c. 466, § 1409)." *People v. Davis*, 80 N. Y. App. Div. 448, affirmed 176 N. Y. 465.

*In Texas.*—A conviction for breach of the peace in using language calculated to bring on a difficulty is warranted where the evidence shows that the defendant called the plaintiff a "God damn liar." *Johnson v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1097.

The statute prohibiting the use of profane language near a private house, calculated to disturb the inhabitants thereof, does not require that the acts complained of be wilfully done. *Watson v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 340.

In a prosecution for cursing under circumstances calculated to provoke a breach of the peace, an instruction that it is sufficient that the cursing be in the presence or hearing of the injured party is proper when such party admitted he heard the cursing. *Christmas v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 175; *Watkins v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 507.

*Defenses.*—In a prosecution for cursing under circumstances calculated to provoke a breach of the peace, the fact that the prosecutor cursed the defendant first is no defense, but may go in mitigation of penalty. *Christmas v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 175; *Watkins v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 507.



# BRIBERY.

By X. P. HUDDY.

## 907. I. DEFINITION AND REQUISITES OF OFFENSE. — See note 1.

**907. 1. Definition.**—*People v. Van De Carr*, 87 N. Y. App. Div. 386, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 908 [907]; *State v. Davis*, 2 Penn. (Del.) 139; *State v. Miles*, 89 Me. 142; *State v. Meysenburg*, 171 Mo. 1; *Com. v. Brown*, 23 Pa. Super. Ct. 470. See also *State v. Smith*, 72 Vt. 366.

**Under State Statutes**—*California*.—A party who offers to accept a bribe is guilty under Penal Code Cal., § 57, even though there is no offer to bribe him. *People v. Hurley*, 126 Cal. 351.

**At an Early Day in England**, when the duties of judicial officers, especially of the petty sort, entered more closely into the everyday life of the people than in later years, the motive for bribery was largely confined to the corruption of such officers, and bribery was perhaps largely confined to such officials. So the crime came to be defined by some of the old writers as "where any man in judicial place takes any fee or pension, robe or livery, gift, reward, or brocade, of any person that hath to do before him in any way, for doing his office, or by color of his office, but of the King only, unless it be meat and drink, and that of small value." *State v. Sullivan*, 110 Mo. App. 75.

**Where the Offense Is Not Defined by Statute** reference will be had to the common law, not only for the definition of the crime, but also for the punishment, under a general provision of the *Delaware* statute. *State v. Davis*, 2 Penn. (Del.) 139.

**Bribery Is an Offense Against Public Justice.**—The essence of it is the prostitution of a public trust, the betrayal of public interest, and the debauchment of public conscience. *State v. Duncan*, 153 Ind. 318.

**Infamous Crime.**—In the *Illinois* constitutions of 1848 and 1870, bribery of all kinds was classed with perjury, as rendering the offender infamous. *Christie v. People*, 206 Ill. 337.

**It Is Immaterial Whether the Agreement Is Carried Out** by the parties. The offense is complete upon the acceptance of the promise of a gift in pursuance of a corrupt agreement to vote in favor of a measure pending before a municipal assembly. *State v. Lehman*, 182 Mo. 424. See also *State v. Gardner*, 88 Minn. 130.

**Must Be Legal Duty.**—There is no rule so uniformly adhered to by the courts, both state and federal, as the one "that there can be no bribery of any official to do a particular act, unless the law requires or imposes upon him the duty of acting." It is bottomed upon the sound and logical principle that he cannot be influenced to do something that he has no power or authority to do. *State v. Butler*, 178 Mo. 272.

**Ignorance of Duty.**—That the defendant did not, at the time he received the money, know

of the existence of the statutory duty would be no defense under an indictment for failure to do the thing required; but where the charge is receiving money for an agreement to omit to perform that duty, evidence by the defendant of his ignorance of the statute is material to sustain his claim that he never made an agreement not to perform the duty imposed by the statute. Where an instruction was asked for by the defendant, which covered this theory, and was refused, it was held that the ruling was not, under the facts, erroneous, because, while the defendant may not have known of the specific statute, he was conclusively presumed to know that gambling was a crime, and the record showed that he did know it, and, in general, that his official duty was to execute the laws against gambling. His transaction with gamblers was conclusive that he knew that gambling was unlawful, and that the gamblers would not give him money to prevent interference with their practices unless it was within his power, and a part of his duty, to do the things which the statute declared that he should do. *Newman v. People*, 23 Colo. 300.

**A Tender of a Bribe** is not necessary under a statute prohibiting the offering to give any gift with the intent to bribe a juror. A proposal and declaration of a willingness to give the bribe is prohibited. *State v. Miller*, 182 Mo. 370; *State v. Woodward*, 182 Mo. 391. See also *State v. Iden*, 5 Ohio Dec. 627.

**Defendant Need Not Expressly Agree to Act.**—It is sufficient if there was a promise of money which induced the defendant to make an appointment, although he did not actually agree to do so, and that in pursuance of the promise or offer he afterwards accepted the money which had been offered. *Com. v. Dietrich*, 7 Pa. Super. Ct. 515. See also *Com. v. Donovan*, 170 Mass. 228.

**Act of Two Parties Essential.**—To constitute bribery, the act of at least two persons is essential, that of him who gives and him who receives. The minds of the two must concur. It is immaterial, however, whether the giver makes the first advances or gives the money to get some personal advantage to himself. *Newman v. People*, 23 Colo. 300. See also *State v. Sargent*, 71 Minn. 28.

**In Missouri** the statute has effected such a change in the common-law offense of bribery as to divide the crime into two divisions, so that bribery consists in giving anything of value in corrupt payment for an official act, etc.; while the other division consists in the acceptance or receipt of any bribe. There are two distinct offenses plainly marked out, one for giving, the other for receiving, a bribe; but both are termed bribery. *State v. Meysenburg*, 171 Mo. 1, per Sherwood, J.

**907.** Intent. — See note 2.

**908.** See note 1.

The Act Induced. — See notes 2, 3, 5.

**Bribery of a Juror** or an offer to bribe a juror is a crime by itself under section 71 of the *New York Penal Code*. The acceptance of a bribe by a juror is a separate offense. *People v. Winant*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 361.

**Suspension of Trial to Investigate Charges of Bribery.** — Where an attempt to bribe one of the state's witnesses was made during a criminal trial and the fact was called to the court's attention, it was held that a temporary suspension of the trial for the purpose of investigating the matter did not constitute error. *People v. Salsbury*, 134 Mich. 537.

**A Magistrate Has Jurisdiction in New York** to inquire into a violation of section 72 of the *New York Penal Code*, which prohibits an officer from receiving a bribe, and he may thereafter, upon proper proof, hold a person to answer for the crime. *People v. Van De Carr*, 87 N. Y. App. Div. 386.

**907.** 2. See *Higgins v. State*, 157 Ind. 57; *People v. Gorsline*, 132 Mich. 549; *State v. Butler*, 178 Mo. 272; *State v. Smith*, 72 Vt. 366.

**908.** 1. *Epps v. Smith*, 121 N. Car. 157.

2. *State v. Ray*, 153 Ind. 334; *State v. Duncan*, 153 Ind. 318.

**Officers and Other Persons Designated by Statute.** — Where the party is in no manner an officer within the meaning of the statute, the offense is not committed. *Messer v. State*, 37 Tex. Crim. 635. See also *U. S. v. Dietrich*, 126 Fed. Rep. 676.

**An Accountant** employed by a board of revision of a city, constituted of the mayor, president of the council, and city solicitor, is an employee of an officer within the meaning of section 6900 of Rev. Stat. *Ohio*, 1892, and may be punished, by virtue of said section, for accepting a bribe given for the purpose of influencing him with respect to his duty as such accountant. *Barker v. State*, 69 Ohio St. 68.

**3. Act in Excess of Power.** — In *State v. Butler*, 178 Mo. 272, it was held that the offense of attempted bribery under the *Missouri* statute was not committed where the act induced was not something the officer could by law do.

**The Law Must Impose a Duty on the Officer** and authorize him to act in the particular matter in order for the offense of bribery to be committed. *U. S. v. Boyer*, 85 Fed. Rep. 426; *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433, reversing 86 Ill. App. 676; *Moore v. State*, 44 Tex. Crim. 159; *Ex p. Richards*, 44 Tex. Crim. 561.

**Under Rev. Stat. U. S., § 5451**, the prosecution must prove: (a) an offer to bribe; (b) that such corrupt offer was made to an officer of the United States, or a person at the time acting for or on behalf of the United States in an official function; (c) that the offer was made to influence the officer or person in the doing of some act or performance of some duty in his official capacity. Where the accused offered to bribe an interpreter of Chinese, appointed by the Secretary of the Treasury, to secure for him a translation favorable to the accused of certain Chinese letters and documents which

he expected would be offered in evidence at a hearing to take place before a United States commissioner of a criminal charge then pending, and which were supposed to contain material evidence, no charge of bribery under this section can be predicated, because it is not a matter within the scope of the interpreter's duties under the appointment of the Secretary of the Treasury, nor could he act as an interpreter at the hearing of the case without the authority and approval of the commissioner presiding, and such authority and approval had not been given at the time the offer of a bribe was made. An offer made to a person in contemplation of a mere probability that he may be called to perform official functions, and intended to influence his conduct in performance of such functions if he shall be so called, does not violate this section. *In re Yee Gee*, (1897) 83 Fed. Rep. 145.

**The Term "Official Function,"** as used in Rev. Stat. U. S., § 5451, may include a function belonging to an officer held by his superior, which function has been committed to the subordinate for the purpose of being executed. A secret service operative, employed by the Secretary of the Treasury to detect certain crimes, is a person acting in an official function, and any one bribing such a person is guilty of an offense under this section. *U. S. v. Ingham*, 97 Fed. Rep. 935.

**Official Action and Duty.** — The asking for a bribe by a member of the city council, with the understanding or agreement that he would corruptly use it to bribe or influence the votes or official action of his colleagues, constitutes a crime under Gen. Stat. Minn. 1894, § 6349. The influence of the member of a public body over the official action of his colleagues is itself a part of his own official action and duty. *State v. Durnam*, 73 Minn. 150.

**Unauthorized Action by City.** — Even though a city has no authority to take a certain course, the bribery of an officer before whom the matter might lawfully come is unlawful. *People v. McGarry*, (Mich. 1904) 99 N. W. Rep. 147; *People v. Salsbury*, 134 Mich. 537; *People v. Mol*, (Mich. 1904) 100 N. W. Rep. 913; *People v. Ellen*, (Mich. 1904) 100 N. W. Rep. 1008; *State v. Lehman*, 182 Mo. 424.

**5. Bribe to Procure Release from Illegal Arrest.** — *Compare Moore v. State*, 44 Tex. Crim. 159, distinguishing *Florez v. State*, 11 Tex. App. 102; *Moseley v. State*, 25 Tex. App. 515, and holding that in order to bribe the officer he must be in the discharge of a legal and official duty, and the custody of the prisoner must have been legal. See also *Ex p. Richards*, 44 Tex. Crim. 561.

**Evidence — Conspiracy.** — In *People v. Gorsline*, 132 Mich. 549, it was held that testimony tending to show a conspiracy which characterized and made clear the motive and purpose of the defendant in the payment of the money was admissible.

**Communications and Actions by Others.** — Evidence concerning communications and actions by and between other persons interested in

**908. Value of Thing Offered as Bribe. — See note 6.**

procuring a contract from a city council was held to be admissible on the trial of a city attorney for accepting a bribe to influence the city council in reference to the contract. It was proper to submit to the jury the question whether all of the parties and the defendant were co-conspirators. *People v. Salsbury*, 134 Mich. 537.

*Conversations.* — Where an indictment charged the defendant with asking one Richards for a bribe with the understanding and agreement that his vote and official action should be thereby influenced in favor of the acceptance of a bid which the firm of Haverson, Richards & Co. had submitted to the city council for the construction of a reservoir by the city, it was held that, upon the facts, a conversation on the same subject which the defendant had, on the day previous, with Haverson, was admissible for the purpose of illustrating and explaining the conversation on the next day between the defendant and Richards, when the crime charged is alleged to have been committed, the latter being but a continuation of the conversation with Haverson, and the two being part of the same transaction. *State v. Durnam*, 73 Minn. 150.

*Execution of Agreement.* — Where on the trial of a defendant indicted for accepting a bribe upon the agreement or understanding that he would not as a police officer arrest or prosecute the confidence men from whom he received the bribe, but would permit them to operate their business and would influence the police force so to do, evidence tending to show that the defendant carried into effect the agreement on his part was not erroneously admitted. His acts and declarations in the premises, and those of the persons from whom the bribe was received, of which he had knowledge, were also admissible; but it was error to receive evidence of the acts and declarations of such persons and of members of the police force with whom it was not shown that the defendant was connected. *State v. Gardner*, 88 Minn. 130.

*Negotiations Culminating in Bribery May Be Shown.* — *State v. Smith*, 72 Vt. 366.

*Evidence of Previous Offenses.* — Evidence that a member of a legislative body previously solicited a bribe with reference to another measure may be admissible to prove purpose, intent, notice, and to corroborate other testimony. *Higgins v. State*, 157 Ind. 57; *State v. Ames*, 90 Minn. 183. See also *State v. Schnettler*, 181 Mo. 173.

*Corpus Delicti.* — All testimony going to show that the bribe was received is admissible as proof of the *corpus delicti*. *People v. McGarry*, (Mich. 1904) 99 N. W. Rep. 147.

*Proceedings Before City Council.* — In *State v. Durnam*, 73 Minn. 150, it was held that the proceedings before the city council, of which the defendant was a member, were admissible for the purpose of showing that the matter upon which the bribe was alleged to have been asked for was pending before that body, and in what way or manner it was pending.

*Offer to Receive Bribe from Third Party.* — In *People v. Hurley*, 126 Cal. 351, it was held that where there was no connection between the

two offers, evidence that the defendant offered to receive a bribe from a person other than the one charged in the prosecution was inadmissible.

*Agency.* — A party was indicted for having, while acting as superintendent of the police department of the city of Minneapolis, received a bribe from one Mills, under an agreement to protect her in an unlawful occupation in the city. The evidence showed that Mills paid the money to one Cohen, who, the state claimed, was acting for the defendant in receiving the money. It was held, taking the evidence altogether, that it was sufficient to justify the jury in finding that Cohen was acting for and in behalf of the defendant, and that the payment to him was equivalent to a payment to the defendant personally. *State v. Ames*, 90 Minn. 183.

*Variance.* — Where a variance alleged was that the charge was that the defendant corruptly agreed to omit to seize and take before a judicial officer gambling devices, and the proof showed nothing but a vague understanding between the defendant and the gamblers from whom the money was received that he, the defendant, was not to close the gambling houses, it was held that the distinction which was endeavored to be made was too unsubstantial and refined for courts to recognize in the administration of the criminal law. *Newman v. People*, 23 Colo. 300.

*Failure of Proof.* — An indictment charged that on the 15th day of December, 1901, the defendant (the mayor of the city) did feloniously receive from (naming certain parties, and others unknown, who were conducting houses of ill repute) the sum of six hundred dollars, upon the agreement and with the understanding that such persons would be protected from criminal prosecution for the month of December, 1901. The undisputed evidence was that detectives and police officers accepted money from the women specified in the indictment, and others, in amounts ranging from fifteen to twenty-five dollars, in consideration of which each person making payment was promised police protection; that the detectives and police officers who received the money were the agents of the defendant, and not of those making payments; that there was no joint agreement or understanding between those paying the money; and that the six hundred dollars which was paid over to the defendant by his agent in one sum, after it was paid to him by the women individually, was not a general fund; contributed with the understanding that those participating should be protected. The court held that there was a failure of proof to sustain the offense charged. *State v. Ames*, 91 Minn. 365.

**908. 6. Political or Personal Advantage Is Sufficient.** — *People v. Van De Carr*, 87 N. Y. App. Div. 386.

*Void Notes.* — The fact that the notes which the defendant received were void because of the corrupt agreement under which they were given constitutes no defense. *People v. Willis*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 549. See also *Com v. Donovan*, 170 Mass. 228, holding that the fact that notes were given by the

**909.** *Accomplices — Corroboration.* — See note 2.

**II. NATURE OF THE OFFENSE** — *At Common Law.* — See notes 3, 4.

**910.** *By Statute.* — See note 1.

**III. THE VARIOUS CLASSES OF BRIBERY** — **1. Bribery of Judicial, Legislative, or Executive Officers.** — See notes 2, 3.

**911. 2. Bribery at Elections.** — See note 2.

defendant with the belief that they were worthless does not constitute a valid defense. But see *U. S. v. Driggs*, 125 Fed. Rep. 520, wherein it was held that an illegal nonnegotiable note did not constitute "property" or a "valuable consideration" within the meaning of a statute.

**Money Paid as Bribe Cannot Be Recovered.** — *Patterson v. Hamilton*, (Ky. 1897) 42 S. W. Rep. 88.

**909. 2.** See *People v. Bissert*, 71 N. Y. App. Div. 118, *affirmed* 172 N. Y. 643, *per McLaughlin, J.*

And see *State v. Meysenburg*, 171 Mo. 1, holding that the court should have charged that the accomplice's testimony should be received with caution.

**Slight Corroborative Evidence May Be Sufficient.** — *People v. Winant*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 361.

**One Who Gives or Offers a Bribe Is Not an Accomplice** of the one who asks for it. Asking for a bribe and offering or giving a bribe are separate and distinct offenses. *State v. Durnam*, 73 Minn. 150.

**3. Misdemeanor at Common Law.** — *State v. Sullivan*, 110 Mo. App. 75. See also *Com. v. Brown*, 23 Pa. Super. Ct. 470.

Bribery was an indictable offense at common law, and, although in the early days it was limited to judicial officers and those engaged in the administration of justice, it was later extended to all public officers. It was variously defined as taking or offering an "undue reward" or a "reward" to influence official action. *People v. Van De Carr*, 87 N. Y. App. Div. 386.

**4. Aggravated Bribery at Common Law.** — "While it was a felony at common law to bribe a judicial officer, it does not appear clear whether it was a felony or a misdemeanor to bribe other officers." *State v. Sullivan*, 110 Mo. App. 75.

**910. 1. Bribery as Felony Within Statute of Limitations.** — *Rev. Stat. Mo. 1899*, § 2419, provides: "No person shall be tried, prosecuted or punished for any felony, other than as specified in the next preceding section, unless an indictment for such offense be found within three years after the commission of the offense." The "preceding section" applies only to offenses punishable by death or imprisonment for life. The offense of bribery falls within section 2419, and the three-year bar applies. *State v. Snyder*, 182 Mo. 462.

**2. Justice of Peace.** — In *Morawietz v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 997, it was held that a justice of the peace was guilty of bribery where, in consideration of money, he refrained from instituting proceedings against a party known by him to be unlawfully carrying a pistol. It was also held that a deputy sheriff, who was with the justice of the peace when information was obtained of carrying the pistol, was guilty of taking a bribe where the

justice of the peace divided the money with him; and it was further held that the deputy sheriff, the party who carried the pistol, and his friend who was with him during the settlement and who paid part thereof were accomplices.

**Attorney — Michigan Statute.** — A statute punishing the receiving of bribes by executive or judicial officers includes a city attorney. *People v. Salsbury*, 134 Mich. 537.

**A Commonwealth's Attorney in Kentucky** may be prosecuted for bribery under section 1366, Ky. Stat., for taking a bribe to dismiss an indictment, or he may be prosecuted for the common-law offense of malfeasance in office; however, where every fact stated in the indictment is included in the statutory offense, the punishment is limited to the mode prescribed by statute. *Com. v. Rowe*, 112 Ky. 482.

**3. A Common-law bribery** was not confined to judicial officers, but it was an offense to bribe or attempt to bribe a legislative officer. *Com. v. Brown*, 23 Pa. Super. Ct. 470; *State v. Sullivan*, 110 Mo. App. 75, holding that it is an offense for a legislative officer to solicit a bribe. See also *People v. Hammond*, 132 Mich. 422, holding that a solicitation is an offense even where the other party refuses to act.

But see *State v. Bowles*, (Kan. 1905) 79 Pac. Rep. 731, where it is said concerning the decision in the preceding case, "The inference from this decision is that soliciting a bribe would not be punishable in *Michigan* except for the statute recognizing common-law offenses."

In *Ohio* the statute makes it a crime for a member of the legislature to solicit from any person any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment in any matter pending or that might legally come before him. The state in order to convict under this law is not obliged to prove that even a cent of money was paid. The fact that the defendant did not want the money for his own use, or intend to use it for his own purposes, is of no importance. It is not necessary to prove that the solicitation for the money was the only consideration that was to influence the defendant. To ask, to induce, other members to vote for the passage of a bill, and to collect facts and reasons and present them to other members for the purpose of inducing them to vote for or against the bill, would constitute official action or official duty. *State v. Geyer*, 5 Ohio Dec. 646, 3 Ohio N. P. 242.

**A Delegate-elect to a Political Convention**, even though the convention is not organized, is a member of the convention within the purview of *Penal Code California*, § 57, which prescribes punishment against a member of such a convention who receives or offers to receive a bribe. *People v. Hurley*, 126 Cal. 351.

**911. 2. At Common Law.** — *State v. Towns*,

**912.** See notes 1, 2.

**913.** See note 1.

Disqualification to Hold Office. — See note 3.

**914.** 3. Bribery of Witnesses. — See note 1.

153 Mo. 91, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 911, 912. See also *Doyle v. Kirby*, 184 Mass. 409; *Baum v. State*, 157 Ind. 282.

**912. 1. Bribery at Elections of Members of Parliament** was an offense at common law in *England*, and so, probably, was bribery at municipal elections. At common law, as well as under some of the English statutes, there seems to be no difference in liability between the giver and the taker of a bribe. *Doyle v. Kirby*, 184 Mass. 409.

**2. Distinction Between Lawful Expenditures and Bribe Money.** — There is a difference between a contribution made by a candidate for office for his part of the necessary expenses of a political campaign or paying individuals to help him conduct his own personal canvas, provided the electioneering is honest and the service duly rendered, and the giving of money or any other thing of value to electors in order to be elected. *Epps v. Smith*, 121 N. Car. 157.

**Congress May Punish Bribery at Federal Elections.** — See *James v. Bowman*, 190 U. S. 127.

**Constitutionality of Federal Statute.** — Section 5507 of the Revised Statutes of the United States, which prohibited individuals from bribing others from exercising the right of suffrage guaranteed by the Fifteenth Amendment, was held to be unconstitutional and not an appropriate exercise of the power conferred by that amendment. It was also held that the court would not restrict the scope of the statute, which included all elections, state and federal. *James v. Bowman*, 190 U. S. 127. See also *Karem v. U. S.*, (C. C. A.) 121 Fed. Rep. 250.

**Conviction Warranted.** — A prosecution was had for corruptly influencing a voter, in *Washington*, under Ball. Code, § 7421, which prohibits an attempt to influence any person, directly or indirectly, in giving or refusing to give his vote. The conviction of a defendant was held to be warranted where the evidence showed that the defendant, a judge of the election, gave a slip of paper to a voter at the latter's request, which indicated that the voter was "all right," upon the surrender of which to a party outside money was given to the voter; and it further appeared that the defendant was with the voter in the voting booth at the time the latter marked his ballot, at the voter's request for instructions in regard thereto, but the defendant did not ask the voter to vote any particular ticket, merely telling him that an "X" at the top of the national ticket voted the whole ticket, and showing him how to mark the ballot. *State v. Milby*, 26 Wash. 661.

**The Gist of the Offense under the Indiana statute** is in the giving or offering of an article of value "to influence" the vote of an elector. *State v. Downs*, 148 Ind. 324.

In *Massachusetts* the legislature has not left the common law in force as to any form of bribery at elections. No punishment is pro-

vided for the voter. *Doyle v. Kirby*, 184 Mass. 409.

**In North Carolina It Is the Doing of the Particular Act**, the giving of money to electors in order to be elected, that gives the cause of action, and the intent with which the act is done is not material except that the purpose must be to procure the election of the defendant. *Epps v. Smith*, 121 N. Car. 161.

**In Pennsylvania**, under the Act of June 8, 1881, P. L. 70, an indictment cannot be maintained which alleges that at a nominating or delegate election commonly known as a primary election, the defendant offered bribes to different electors to vote for him for the office of county chairman. The purpose of the act was to prevent bribery in the nomination of candidates to be voted for at a subsequent election, and does not apply to an election of officers of a party organization by direct vote of the qualified electors of the party. Under section 6 of the Act of June 8, 1881, an indictment may be maintained which charges that the defendant offered money to a member of the election board at a primary election to influence him to have the vote of the ward cast and counted in favor of a certain person for the office of county chairman. *Com. v. Gouger*, 21 Pa. Super. Ct. 217.

**913. 1. Reception of Bribe by Voter.** — *Contra*, *Doyle v. Kirby*, 184 Mass. 409. (In *Massachusetts* the common law is superseded.)

**Disfranchisement as Punishment.** — The *Illinois* statute which provides for the disfranchisement of one who solicits a bribe to procure votes at an election does not violate section 1 of article 7 of the constitution, as the crime was considered to be infamous at the adoption of the constitution of 1870. *Christie v. People*, 206 Ill. 337. See also *Baum v. People*, 157 Ind. 282.

**3. Disqualification for Office.** — See *State v. Towns*, 153 Mo. 91, holding that where a candidate for the nomination to the office of county clerk promises the appointment of a deputy at a salary of one thousand five hundred dollars a year, if made to secure votes, violates the Corrupt Practice Act of *Missouri* and will authorize an ouster from office.

In *Bradley v. Clark*, 133 Cal. 196, it is held that a promise of official patronage may be a cause for a forfeiture of office, but the promisee commits no offense.

**914. 1. Witness Need Not Have Been Subpoenaed.** — *Com. v. Bailey*, (Ky. 1904) 82 S. W. Rep. 299.

**Minnesota Statute.** — Where the accused bribed or offered to bribe a witness to absent himself from a trial to which he had been duly subpoenaed, it was held that the accused could not be convicted under section 6385, Minn. Gen. Stat. 1894, as that section applies only to cases where the witness was bribed, or attempted to be bribed, to give false testimony, or, under sections 6310 and 6386, for aiding and abetting the receiving of a bribe, and could only be con-

**914. IV. ATTEMPTS TO BRIBE.** — See note 2.

**915.** See note 1.

**916. BRICK.** — See note 1.

victed, under section 6383, of a misdemeanor of which a justice of the peace has jurisdiction. *State v. Sargent*, 71 Minn. 28.

**Knowledge that Person Is Witness.** — One of the essential elements of the offense of offering to bribe a witness is that the accused should know that the person to whom the bribe was offered was in fact a witness. The necessary knowledge may, however, be implied from circumstances. *Com. v. Bailey*, (Ky. 1904) 82 S. W. Rep. 299.

**Contempt of Court.** — In *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971, it was held that an attempt to bribe witnesses committed in the hallway of the court house or adjoining the building is a contempt committed in the presence of the court.

**914. 2. At Common Law.** — *People v. Hammond*, 132 Mich. 422; *State v. Sullivan*, 110 Mo. App. 75.

**Offense of Bribery Embraces Attempt to Bribe.** — *Com. v. Bailey*, (Ky. 1904) 82 S. W. Rep. 299.

**Solicitation as Attempt to Receive Bribe.** — The solicitation of a bribe does not constitute an attempt to accept or receive a bribe. *State v. Bowles*, (Kan. 1905) 79 Pac. Rep. 726.

**915. 1. Missouri.** — The statute makes it a felony to bribe a legislative officer; consequently if the defendant solicited that he be bribed, he solicited the commission of a felony, and committed a common-law misdemeanor. *State v. Sullivan*, 110 Mo. App. 75.

In this state every person who directly or indirectly offers to give any money to any public officer of the state or city thereof, with intent to influence his vote, opinion, judgment, or decision on any question which may by law be brought before him in his official capacity, is guilty of an attempt to bribe. The elements of the offense, as denounced by the statute, are: First. There must be a public officer of the state or city thereof. Second. The offer must

be made with intent to influence the vote, opinion, judgment, or decision of such public officer. Third. The vote, opinion, judgment, or decision must be in respect to some question which may by law be brought before the public officer in his official capacity. To constitute the offense, all the elements herein noted must be shown to exist. *State v. Butler*, 178 Mo. 272.

**Solicitation of Bribe.** — A legislator who invites a person to pay money for the purpose of engaging another to appear before a committee in support of or against a bill is guilty of soliciting a bribe. *State v. Abbot*, 5 Ohio Dec. 650.

**To Constitute the Crime of Asking for a Bribe** by a public officer "with the understanding or agreement that his vote," etc., "shall be influenced thereby" (Gen. Stat. Minn. 1894, § 6349), it is not necessary that the party solicited for the bribe shall consent to give it, or that there shall be any meeting of minds or mutual understanding or agreement between him and the party asking for a bribe. It is sufficient if the latter is ready and willing to enter into a corrupt agreement or understanding that his vote, etc., shall be influenced by the bribe. *State v. Durnam*, 73 Minn. 150.

In *Kansas* the solicitation of a bribe is not punishable as a crime. *State v. Bowles*, (Kan. 1905) 79 Pac. Rep. 726.

**916. 1. City Ordinance.** — In *Peters v. Chicago*, 192 Ill. 438, the court said: "We need not go to a lexicographer to ascertain the generally accepted meaning of the word *brick*. Among builders and mechanics a *brick* is understood to be eight inches in length, four inches in width, and two inches in thickness, and where an ordinance simply describes the material out of which an improvement shall be made, as of *brick*, paving *brick*, or sewer *brick*, every one will understand that it means *brick* of the ordinary dimensions and of the best quality for that particular structure."

# BRIDGES.

By R. N. CHAFFEE.

**919. 1. DEFINITION.** — See note 4.

**920. II. PUBLIC AND PRIVATE BRIDGES — 1. Public Bridges — a. PUBLIC BRIDGES A PART OF HIGHWAY.** — See notes 1, 2.

*b. WHAT CONSTITUTES A PUBLIC BRIDGE.* — See note 4.

**921. c. OWNERSHIP — Action for Injury to Bridges.** — See note 1.

**2. Private Bridges — b. LIABILITY OF PUBLIC TO REPAIR — Bridge Adopted by Public.** — See note 3.

*Bridge Erected and Continued for Private Benefit.* — See note 4.

**922. Where Construction Rendered Necessary by Private Act.** — See note 1.

**III. BRIDGES OVER NAVIGABLE WATERS — 1. Power of Congress to Construct and Regulate — Power Exists although Navigation Partially Obstructed.** — See note 4.

**923. 2. Power of States.** — See notes 3, 4.

**919. 4. U. S. v. Cincinnati, etc., R. Co.,** (C. C. A.) 134 Fed. Rep. 353, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 919; *Pittsburg, etc., R. Co. v. Dodd*, 115 Ky. 176; *Shaw v. Saline Tp.*, 113 Mich. 342.

**Approaches.** — *Francis v. Franklin Tp.*, 179 Pa. St. 195.

**Stringers** in a bridge are a part of the framework and not a part of the roadway. *Bush v. Delaware, etc., R. Co.*, 166 N. Y. 210.

**920. 1. Public Bridge Part of Highway.** — *Sachs v. Sioux City*, 109 Iowa 228, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920; *Cedar Rapids v. Cedar Rapids, etc., R. Co.*, 108 Iowa 406; *Leslie County v. Wooten*, 115 Ky. 850; *Southern Illinois, etc., Bridge Co. v. Stone*, 174 Mo. 1; *Hall v. Oyster Bay*, 61 N. Y. App. Div. 508; *Spencer v. Chosen Freeholders*, 66 N. J. L. 301; *Mahnken v. Chosen Freeholders*, 62 N. J. L. 404; *Oliver v. Thompson's Run Bridge Co.*, 197 Pa. St. 344.

**Bridge in City Street.** — *Sachs v. Sioux City*, 109 Iowa 228.

A bridge over a river connecting a city street is a street improvement, within the meaning of a city charter authorizing the issuance of bonds for street improvements. *Berlin Iron-Bridge Co. v. San Antonio*, (Tex. Civ. App. 1899) 50 S. W. Rep. 408.

**Approaches Part of Highway.** — Where a bridge is constructed for the purpose of joining the two parts of a highway which is crossed by a waterway, the approaches thereto are a part of that highway. *Willetts Mfg. Co. v. Chosen Freeholders*, 62 N. J. L. 95.

**2. Schroeder v. Multnomah County**, (Oregon 1904) 76 Pac. Rep. 772.

**The Allotment of a Town-line Road** does not include the bridge on that road. *Union Drainage Dist. v. Highway Com'rs.*, 87 Ill. App. 93, *reversed* 199 Ill. 80.

**4. General Public Use Necessary.** — *Crawford v. Griffin*, 113 Ga. 564, *quoting* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920; *Spencer v. Chosen Freeholders*, 66 N. J. L. 301.

"A bridge which constitutes a portion of a

public road is necessarily a public bridge." *Tattnall County v. Newton*, 112 Ga. 779.

**921. 1. Town or County Has Right of Action.** — *Ft. Covington v. U. S., etc., R. Co.*, 156 N. Y. 702, *affirmed* 8 N. Y. App. Div. 223; *Steam Canal Boat Tempest v. Lucas County*, 7 Ohio Cir. Dec. 137, 13 Ohio Cir. Ct. 263.

**3. Public Repair of Private Bridges.** — *Tattnall County v. Newton*, 112 Ga. 779, *quoting* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 921; *Chesapeake, etc., R. Co. v. Jennings*, 98 Va. 70.

**4. Bridge Erected or Continued for Private Benefit.** — *Chesapeake, etc., R. Co. v. Jennings*, 98 Va. 70.

**922. 1. Construction Required by Private Act.** — *Boise City v. Boise Rapid-Transit Co.*, 6 Idaho 779; *Clay v. Hart*, (County Ct.) 25 Misc. (N. Y.) 110; *Conewango v. Shaw*, (Supm. Ct. Spec. T.) 48 N. Y. Supp. 1; *Chesapeake, etc., R. Co. v. Jennings*, 98 Va. 70.

**4. Congress May Erect Bridges Over Navigable Waters.** — *Frost v. Washington County R. Co.*, 96 Me. 76.

**923. 3. State Authority to Authorize Bridges Over Navigable Waters.** — *Adams v. Ulmer*, 91 Me. 47; *Dietrich v. Schremms*, 117 Mich. 298, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 923; *Kansas City, etc., R. Co. v. Wiygul*, 82 Miss. 223, *quoting* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 923; *People v. Jessup*, 28 N. Y. App. Div. 524, *reversed* 160 N. Y. 249; *Carvalho v. Brooklyn, etc., Turnpike Co.*, (Supm. Ct. App. Div.) 76 N. Y. Supp. 859.

**Delegation of Power.** — The state may delegate to a board of supervisors the power to erect bridges over navigable streams. *Chico Bridge Co. v. Sacramento Transp. Co.*, 123 Cal. 178.

But no grant of the legislature of any right in or control over the bridging of navigable streams will be upheld which rests upon mere implication or construction or anything short of a clear and direct expression of the legislative will. *Dundalk, etc., R. Co. v. Smith*, 97 Md. 177.

**924.** 3. Should Not Needlessly Obstruct Navigation. — See note 1.

**925.** Public Bridge Erected Without License, or for Unlawful Purpose. — See note 3.

**926.** Bridge Constructed in Unlawful Manner. — See note 1.

4. Duty of Drawbridge Proprietors in Respect to Navigation. — See note 2.

**927.** See note 1.

**IV. CONSTRUCTION AND MAINTENANCE OF BRIDGES—1. Who Is to Erect and Maintain.** — See note 3.

Under the Statute Laws of Most of the States. — See note 6.

**929.** 2. Legislative Powers and Discretion — Delegating Powers — Granting Exclusive Rights. — See note 5.

**930.** Providing for Expense of Construction — Apportioning Expenses. — See notes 1, 2.

**Power to Construct Includes Power to Renew.** — In *U. S. v. Cincinnati, etc., R. Co.*, (C. C. A.) 134 Fed. Rep. 353, it was held that a railroad company maintaining a bridge over a navigable river, under authority from the state, had a right, in making repairs, to renew the superstructure of such bridge with other materials than those originally used, and that a bill by the United States to restrain such renewal could not be maintained.

**923.** 4. Plenary Authority Over Internal Navigable Waters. — *Adams v. Ulmer*, 91 Me. 47.

**924.** 1. Freedom of Navigation to Be Preserved as Far as Possible. — *Clement v. Metropolitan West Side El. R. Co.*, (C. C. A.) 123 Fed. Rep. 271.

**So Long as Navigation Is Not Prevented.** — See *Hedges v. West Shore R. Co.*, 150 N. Y. 150, 55 Am. St. Rep. 660.

**925.** 3. Bridge Unlawfully Erected a Nuisance. — *People v. Jessup*, 28 N. Y. App. Div. 524, reversed 160 N. Y. 249; *Carvalho v. Brooklyn, etc., Turnpike Co.*, (Supm. Ct. App. Div.) 76 N. Y. Supp. 859.

**926.** - 1. *Corning v. Saginaw*, 116 Mich. 78, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 926.

**2. Duty of One Maintaining Drawbridge.** — *Piscataqua Nav. Co. v. New York, etc., R. Co.*, 89 Fed. Rep. 362; *Boland v. Combination Bridge Co.*, 94 Fed. Rep. 888; *Hartley v. American Steel-Barge Co.*, 47 C. C. A. 229, 108 Fed. Rep. 97.

**Delay in Passing Draw.** — A county is not liable for detaining vessels in a river by reason of breakage of the machinery operating a draw in a county bridge, where there was no negligence by the county's agents or servants, or any unreasonable delay in making repairs. *Pettit v. Chosen Freeholders*, 91 Fed. Rep. 998, 63 U. S. App. 286.

**Cities — Liability for Drawbridges.** — A city cannot be charged with negligence in failing to have at each end of a drawbridge a lock of sufficient strength to resist the impact of a heavy steamer. *Chicago v. Wisconsin Steamship Co.*, 97 Fed. Rep. 107, 38 C. C. A. 70.

**927.** 1. Liability for Negligence of Bridge Officials. — *Boland v. Combination Bridge Co.*, 94 Fed. Rep. 888; *Hartley v. American Steel-Barge Co.*, 47 C. C. A. 229, 108 Fed. Rep. 97; *Chicago v. Mullen*, (C. C. A.) 116 Fed. Rep. 292.

**3. Turning Ferry into Bridge.** — In *Oloff v. Shreveport*, 52 La. Ann. 1203, it was held that a grant of the power to establish a toll ferry

includes by necessary implication power to establish a toll bridge as a substitute for the ferry.

**6. Authorities Required by Statute to Erect and Repair Bridges.** — *Johnson County v. Hemphill*, (Ind. App. 1895) 41 N. E. Rep. 965; *Leslie County v. Wooten*, 115 Ky. 850; *Bigelow v. Brooks*, 119 Mich. 208; *Piqua v. Geist*, 59 Ohio St. 163; *Newark v. Jones*, 9 Ohio Cir. Dec. 196, 16 Ohio Cir. Ct. 563; *Francis v. Franklin Tp.*, 179 Pa. St. 195. See also *State v. Ahnapee*, 99 Wis. 322.

**Unauthorized Bridges.** — Where the duty of erecting and maintaining bridges is imposed upon a county, the county is liable only for the class of bridges which the statute requires or authorizes it to build and maintain. *Ehle v. Minden*, 70 N. Y. App. Div. 275.

**County Aid.** — Provision is made by statute in *Illinois* for application to the county by the highway commissioners for aid in building a bridge, and where the statute has been complied with the county board has no discretion in regard to granting or refusing the requested aid. *People v. Moultrie County*, 71 Ill. App. 348. The requirement that such aid can be demanded where the bridge will cost more than twenty cents on the hundred dollars on the latest assessment roll is not fulfilled by the inclusion in one petition of a number of bridges so that the total exceeds such limit. *Board of Supervisors v. Highway Com'rs*, 69 Ill. App. 344.

**Cities in Indiana** are liable for failing to keep their bridges in a reasonably safe condition for travel. *Connersville v. Snider*, 31 Ind. App. 218.

**Bridges over Railroads.** — The *Pennsylvania* statute of 1855 does not require that all railroad crossings should be bridged. Such bridges, when required for the ordinary needs of travel, are put on the same status with other bridges with respect to liability for cost of construction, which is borne by one or more towns or one or more counties, as the case may be. *Dixon v. Butler Tp.*, 4 Pa. Super. Ct. 333, 40 W. N. C. (Pa.) 209.

**929.** 5. See *Dietrich v. Schremms*, 117 Mich. 298.

**Delegation by County Commissioners.** — The power to determine whether a bridge shall be built or repaired, and the sum to be paid, is conferred upon the county commissioners in *North Carolina*, and cannot be delegated. *McPhail v. Cumberland County*, 119 N. Car. 330.

**930.** 1. County Required to Maintain Bridge



**931.** 4. Bridges Between Counties and Municipalities. — See note 1.

5. Powers Incident to Power to Construct. — See note 2.

**932.** Right of Eminent Domain. — See note 1.

**933.** 8. Duties and Liabilities of Owners and Constructors — *a.* IN RESPECT TO CONSTRUCTION — (1) *Generally* — Construction Must Be in Proper Manner and so as Not to Injure Others. — See note 6.

**934.** See note 1.

**935.** The Degree of Strength of the Structure. — See note 1.

The Size, Height, and Width of the Bridge. — See note 2.

**936.** Height of Bridges over Railroads. — See note 1.

in Another County. — See Dodge County *v.* Saunders County, (Neb. 1904) 100 N. W. Rep. 934.

**930.** 2. Apportioning Expense Among Counties and Townships. — Cass County *v.* Sarpy County, 66 Neb. 473; Dodge County *v.* Saunders County, (Neb. 1903) 97 N. W. Rep. 617.

**931.** 1. Bridges Between Counties and Municipalities — California. — Croley *v.* California Pac. R. Co., 134 Cal. 557.

Connecticut. — State *v.* Fairfield County, 68 Conn. 16.

Georgia. — Forsyth County *v.* Gwinnett County, 108 Ga. 510.

Indiana. — Wrought Iron Bridge Co. *v.* Hendricks County, 19 Ind. App. 672; Jackson County *v.* Washington County, 146 Ind. 138.

Maryland. — Queen Anne's County *v.* Talbot County, 99 Md. 13.

Missouri. — State *v.* Thomas, 183 Mo. 220.

Nebraska. — Iske *v.* State, (Neb. 1904) 100 N. W. Rep. 315; Cass County *v.* Sarpy County, 66 Neb. 473; Saline County *v.* Gage County, 66 Neb. 839.

New York. — Candor *v.* Tioga, 11 N. Y. App. Div. 502; Edwards *v.* Ford, 22 N. Y. App. Div. 277; Lysander *v.* Syracuse, etc., R. Co., (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 330; Matter of Webster, 77 N. Y. App. Div. 560; East Fishkill *v.* Wappinger, 97 N. Y. App. Div. 7, reversing (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 428; Matter of Madrid, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 431.

North Carolina. — McPeeters *v.* Blankenship, 123 N. Car. 651.

Pennsylvania. — Sheridan *v.* Palmyra, 180 Pa. St. 439, 40 W. N. C. (Pa.) 245.

Vermont. — Glover *v.* Carpenter, 70 Vt. 278.

**Bridge Must Connect a Lawful Highway.** — The liability of towns or counties under the New York statutes to construct bridges over waters dividing them exists only where there is a lawful highway the parts of which would be connected by them, and of which the bridge would form a part. People *v.* Queens County, 151 N. Y. 190.

**Canada — Public Bridge.** — In Canada a rule passed by a county council is illegal where it places on two municipalities the cost of a bridge which the county has declared to be a public bridge. Corporation Du Comté, etc., *v.* Corporation Du Township, etc., 17 Quebec Super. Ct. 87.

**2. The Right to Make Repairs** is included in power to bridge a navigable stream. Kansas City, etc., R. Co. *v.* Wiygul, 82 Miss. 223.

**Canada — Extent of Authority.** — A rule of a county council for the construction of a wooden bridge at a small expense will not authorize

the construction of an iron bridge costing a greater amount. Corporation Du Comté, etc., *v.* Du Township, etc., 17 Quebec Super. Ct. 87.

**932.** 1. Authority to Condemn Lands for Public Bridge. — Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1.

**933.** 6. Care Required of Railroad Company in Constructing Bridges. — Jones *v.* Seaboard Air Line R. Co., 67 S. Car. 181.

But a railroad company in building a bridge is not bound to provide against floods of which the usual course of nature affords no premonition. Southern R. Co. *v.* Plott, 131 Ala. 312.

Where a bridge was constructed by a railroad in pursuance of an agreement between it and a borough council, which agreement prescribed the details of design and construction, and the bridge as constructed was accepted by the borough council, the railroad was held not to be liable to a person injured by reason of an alleged defect in its design. Smith *v.* Pennsylvania R. Co., 201 Pa. St. 131.

**934.** 1. Construction of Railroad Bridges and Drawbridges. — A structure which dams up a waterway and causes the water to spread dangerously from its natural course may amount to a nuisance, and the maintenance as well as the erection of a nuisance, with knowledge of its harmful character, may create a liability for resultant injuries. Southern R. Co. *v.* Plott, 131 Ala. 312.

**935.** 1. Degree of Strength Requisite. — Seyfer *v.* Otter County, 66 Neb. 566.

The maintenance by a highway commissioner, and keeping open for public travel, without notice or warning, of a bridge which is of strength insufficient to support in transportation across it a vehicle and load weighing less than four tons is *prima facie* negligence. Heib *v.* Big Flats, 66 N. Y. App. Div. 88.

**Extraordinary Uses of Bridges.** — The city is not liable for damages resulting from the hauling of extraordinary and unusual loads. Moore *v.* Hazelton Tp., 118 Mich. 425.

**Limit of Strength Required Established by Statute.** — Stone *v.* Tilden, (Wis. 1904) 99 N. W. Rep. 1026. See also Welch *v.* Geneva, 110 Wis. 388. But see Vandewater *v.* Wappinger, 69 N. Y. App. Div. 325; Lee *v.* Delaware, etc., R. Co., 62 N. Y. App. Div. 624.

**2. Statutes Fixing the Width of Bridges.** — See Gould *v.* Schermer, 101 Iowa 582; Gillette-Herzog Mfg. Co. *v.* Aitkin County, 69 Minn. 207.

**936.** 1. Height of Street Bridges over Railroads. — Hedrick *v.* Southern R. Co., 136 N. Car. 510, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 936. See also the title MASTER AND SERVANT, 67. 2 *et seq.*

**936.** *b. IN RESPECT TO MAINTENANCE AND REPAIR — (1) Generally — Public Bridges — Repairable by Counties at Common Law. — See note 5.*

**937.** *Statutes Regulating Maintenance and Repair. — See note 1.*

**938.** *Liability for Injuries for Lack of Repair. — See note 1.*

*Railroad Required to Maintain Bridge over Its Road. — See note 2.*

**939.** *Bridges Erected over Highways for Individuals or Corporations. — See note 1.*

**940.** *Obligation to Make Necessary Alterations. — See note 2.*

*Duty to Repair Includes Duty to Rebuild. — See note 3.*

**941.** *(2) Approaches. — See note 1.*

**942.** *See notes 1, 2.*

*(3) Railings. — See note 3.*

**936.** *5. Common-law Obligation of Counties. — See Atty.-Gen. v. West Riding of Yorkshire, 67 J. P. 173.*

*As to the Obligation to Repair Ratione Tenuræ, or by prescription, see Hertfordshire County Council v. New River Co., (1904) 2 Ch. 513.*

**937.** *1. Statutes as to Maintenance and Repair. — Martin v. Sherwood, 74 Conn. 475; Freeman v. Independence, 123 Iowa 1; Bembe v. Anne Arundel County, 94 Md. 330; Moore v. St. Paul, 82 Minn. 494; State v. Cincinnati, 4 Ohio Dec. 368; Mooney v. St. Mary, 8 Ohio Cir. Dec. 341, 15 Ohio Cir. Ct. 446; Smith v. Muncy Creek Tp., 206 Pa. St. 7; Battles v. Doll, 113 Wis. 357.*

**938.** *1. Nonliability of Counties at Common Law. — "It is well settled that no liability existed at common law for the nonrepair of a bridge by the county; the only remedy being by indictment." Spencer v. Chosen Freeholders, 66 N. J. L. 301. See further the titles COUNTIES, 950. 1 et seq.; TOWNS AND TOWNSHIPS, 330. 4.*

**2. Right to Close Bridge for Repairs. —** Where a bridge becomes out of repair and dangerous and it is the duty of the railroad company to maintain and repair, the company has the same right as the city to close the bridge although it constitutes a part of the public street. *Toledo Consol. St. R. Co. v. Mammet, 6 Ohio Cir. Dec. 244, 13 Ohio Cir. Ct. 591.*

**939.** *1. Purchaser of Bridge Takes Cum Onere. — Book v. Pennsylvania R. Co., 207 Pa. St. 138.*

*Turnpike Franchise Carries Duty of Erecting and Maintaining Bridges. — Allen v. Smith, (Tenn. Ch. 1898) 47 S. W. Rep. 206, wherein the turnpike company was held to be bound to repair a bridge forming part of the turnpike, which bridge had been built and kept in repair by the town until its charter expired.*

*But a Railway Company Which Diverts a Stream that ran under a highway, and puts up a new bridge where the stream crosses the highway as diverted, is not liable, in the absence of a special agreement, to keep such bridge in repair. Peterborough v. Grand Trunk R. Co., 32 Ont. 154. See also Rutland v. Chicago, etc., R. Co., 71 Ill. App. 442, wherein it was held that the railroad was not obliged to rebuild or repair the bridge.*

**940.** *2. Bridge Must Be Altered Where Public Necessity Requires it. — Jones v. Seaboard Air Line R. Co., 67 S. Car. 181, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 940.*

*New Use of Bridge Carries New Duties. — Acts which would fulfil every reasonable requirement of ordinary care in the inspection of bridges over which nothing heavier than an ordinary*

*loaded wagon ever passed might not constitute ordinary care when it was known that traction engines of many tons in weight frequently passed over them under the sanction of express law. Walker v. Ontario, 118 Wis. 564.*

*Use Not Originally Contemplated — Who Must Strengthen Bridge. —* Where a railroad agreed with a turnpike company to construct a bridge for the latter, and at that time it was not within the contemplation of either party that the bridge was to be used for anything but ordinary turnpike travel, it was held that the expense of rebuilding the bridge so as to make it strong enough to carry a trolley line must be borne by the turnpike company. *West Shore R. Co. v. Bergen Turnpike Co., 62 N. J. Eq. 109.*

**3. Rebuilding. —** *State v. Renville County, 83 Minn. 67, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 940.*

**941.** *1. Duty to Repair Includes Approaches. — Johnson County v. Hemphill, (Ind. App. 1895) 41 N. E. Rep. 965; People v. Bay County Bridge Commission, 115 Mich. 622, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 941; Grant v. Brainerd, 86 Minn. 126; Edwards v. Ford, 22 N. Y. App. Div. 279, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 941.*

*Repairing Fence on Raised Approach. —* Where a statute provided that a canal company should not be liable to repair any part of the grounds approaching any bridge over its canal beyond or further than the extremity of the wing walls of any such bridge, but that the company was not to be exonerated from the repair of all such bridges and of the wing walls, ramparts, and side banks thereof, it was held that the company was not liable to repair a broken fence on a raised approach to one of its bridges. *Atty.-Gen. v. Oxford Canal Nav., 88 L. T. N. S. 250, affirming 87 L. T. N. S. 93.*

**942.** *1. Hertfordshire County Council v. New River Co., (1904) 2 Ch. 513; Eginore v. Union County, 112 Iowa 538.*

**2. Cases to Which Statute of Bridges Applies. —** The rule laid down by the Statute of Bridges (22 Hen. VIII., c. 5) that the persons liable to repair a bridge are also liable to repair the highway at each end of the bridge for a distance of three hundred feet applies where the bridge is repairable by the county and where the liability arises by prescription or (*semble*) *ratione tenuræ*, but does not apply where the liability is directly imposed by a later statute. *Hertfordshire County Council v. New River Co., (1904) 2 Ch. 513.*

**3. Duty to Maintain Bridge Railing. —** *Faulk v. Iowa County, 103 Iowa 442; Topeka v. Hemp-*

**943. c. DEGREE OF CARE REQUIRED.** — See notes 2, 3.

Mere Neglect to Repair — Exemplary Damages — Belief that Bridge Is Safe. —

See note 4.

**944. Bridge Owner Not Insurer.** — See note 1.

d. PARTY LIABLE MUST BE FIXED WITH NOTICE OF DEFECT. —

See note 3.

**945. V. TOLL-BRIDGES — 1. Generally.** — See note 1. See generally the title **TURNPIKES AND TOLL ROADS.**

stead, 58 Kan. 328; *Bratfisch v. Mason Tp.*, 120 Mich. 323; *McInnes v. Egremont*, 5 Ont. L. Rep. 713.

The county commissioners are bound to have guard-rails erected along the approaches of county bridges, and will be liable by reason of their neglect to do so. *Snowden v. Bader*, 12 Ohio Cir. Dec. 335, 21 Ohio Cir. Ct. 787.

**Use of Railings — Leaning Thereon.** — In *Georgia* it has been held that while the owner of a bridge owes a duty to the public to keep it in a reasonably safe condition for pedestrians, it is not bound to anticipate that weary citizens will use the railing to recline upon. *Knowles v. Central of Georgia R. Co.*, 118 Ga. 795.

**The Absence of the Railing Must Be the Proximate Cause.** — *Walrod v. Webster County*, 110 Iowa 349; *White v. Riley Tp.*, 121 Mich. 413; *Lauder v. St. Clair Tp.*, 125 Mich. 479, 7 Detroit Leg. N. 665.

**943. 2. Ordinary Care Required.** — *Warren County v. Evans*, 118 Ga. 200; *Marshall v. McAllister*, 18 Tex. Civ. App. 159; *Robe v. Snohomish Co.*, 35 Wash. 475.

**Contributory Negligence in Use of Defective Bridge.** — *Hamerlynck v. Banfield*, 36 Oregon 436. But see *Anderson v. St. Cloud*, 79 Minn. 88; *Spencer v. Sardinia*, 42 N. Y. App. Div. 472.

**Safe Condition.** — A city owes to the public the duty of keeping a bridge in a safe condition, and is liable for special injuries resulting from neglect to perform this duty. *Buechner v. New Orleans*, 112 La. 599; *Ford v. Roulet Tp.*, 9 Pa. Super. Ct. 643.

**3. Duty to Ascertain and Repair Defects.** — *Murray v. Woodson County*, 58 Kan. 1; *Cook v. Dean*, 11 N. Y. App. Div. 123; *Boyce v. Shawangunk*, 40 N. Y. App. Div. 593; *Whitmire v. Muncy Creek Tp.*, 17 Pa. Super. Ct. 399.

Where a town exercised the requisite degree of care in inspecting a bridge, and failed to discover the defect in season to remedy it, it was held not to be liable. *Hawkes v. Chester*, 70 Vt. 271.

**4. Lack of Funds.** — See *Lee v. Berne*, 79 N. Y. App. Div. 214.

In order to make the defense of lack of funds complete, it must appear not only that there was a lack of funds, but an inability, in the exercise of reasonable diligence, to obtain them. *McMahon v. Salem*, 25 N. Y. App. Div. 1.

**944. 1. Not Insurer.** — *Warren County v. Evans*, 118 Ga. 200; *Pearl v. Benton Tp.*, 131 Mich. 275, 9 Detroit Leg. N. 317; *Comstock v. Georgetown Tp.*, (Mich. 1904) 100 N. W. Rep. 788, 11 Detroit Leg. N. 379; *Johnson County v. Carmen*, (Neb. 1904) 99 N. W. Rep. 502; *Creighton v. Chosen Freeholders*, 70 N. J. L. 350; *Marshall v. McAllister*, 18 Tex. Civ. App. 159.

**3. Notice of Defects Must Be Brought Home to**

**Proprietors.** — *Jones v. Walnut Tp.*, 59 Kan. 774, 52 Pac. Rep. 865; *Pearl v. Benton Tp.*, 131 Mich. 275, 9 Detroit Leg. N. 317; *Thomas v. Flint*, 123 Mich. 10; *Bratfisch v. Mason Tp.*, 120 Mich. 323; *Johnson County v. Carmen*, (Neb. 1904) 99 N. W. Rep. 502; *Creighton v. Chosen Freeholders*, 70 N. J. L. 350; *Robe v. Snohomish County*, 35 Wash. 475. See also *Shaw v. Potsdam*, 11 N. Y. App. Div. 508.

**Reasonable Expectation of Decay of Old Bridge.** — *Perry v. Clarke County*, 120 Iowa 96; *Smith v. Muncy Creek Tp.*, 206 Pa. St. 7; *Green v. Nebagamin*, 113 Wis. 508. See also *Robe v. Snohomish County*, 35 Wash. 475.

**What Evidence of Notice Admissible and Sufficient.** — A city is chargeable with notice where it appears that the bridge was in a populous part of the city, and that the defect consisted of a hole two to three feet long and six inches wide, which had existed for three or four months. *Connersville v. Snyder*, 31 Ind. App. 218.

The admissions and declarations of the officers of the town after the accident are competent for the purpose of showing that the town, through its officers, had notice of the condition of the bridge. *Vandewater v. Wappinger*, 69 N. Y. App. Div. 325.

Notice to a commissioner of highways is notice to the town in cases of injury resulting from defective bridges. *Allen v. Allen*, 33 N. Y. App. Div. 463.

**Constructive Notice.** — A city will be deemed to have constructive notice where by reasonable diligence it should have known of the defective condition of the bridge, but such notice cannot be presumed unless of such long standing and of such a character as actually to arrest the attention of passers-by or of persons inspecting the bridge. *Snyder v. Albion*, 113 Mich. 275. See also *Allen v. Allen*, 33 N. Y. App. Div. 463; *Spencer v. Sardinia*, 42 N. Y. App. Div. 472. But see *Murray v. Woodson County*, 58 Kan. 1, wherein the statute excluded the idea of constructive notice.

**Where Notice Not Necessary.** — Where a bridge is negligently constructed and the defect is an open one, it is not necessary to show that the defendant had notice of its unsafe condition. *McDonald v. Duluth*, 93 Minn. 206.

**Notice to Contractor Where Construction under Direction of Engineer.** — Where a contractor for the erection of a public bridge agrees to construct a temporary bridge, pending the erection of the permanent bridge, and to keep it in good repair, all work to be done under the direction of an engineer, he is liable for injuries caused by failure to keep the bridge in repair, though he had not been notified by the engineer that repairs were needed. *Cook v. Dean*, 11 N. Y. App. Div. 123.

**945. 1. Brand v. Multnomah County**, 38

**945.** Right to Maintain Is a Franchise. — See note 3.

**950.** 3. Right to Take Toll — *b.* AMOUNT OF TOLL — DISCRIMINATIONS AND EXEMPTIONS — Discrimination. — See note 4.

Exemptions — By Contract. — See note 6.

**951.** 4. Rights and Liabilities of Toll-bridge Proprietors — Liabilities. — See note 3.

**953.** BRING — BROUGHT. — See note 1.

Oregon 79; Chamberlin *v.* Peoples Bridge Co., 2 Dauphin Co. Rep. (Pa.) 332.

When Right to Take Toll Expires, Bridge Becomes Free Highway. — Brand *v.* Multnomah County, 38 Oregon 79.

Where the Owner of a Toll-bridge Abandons It, the bridge becomes a free public highway under the *California* statutes. Sears *v.* Tuolumne County, 132 Cal. 167.

**945.** 3. Without Legislative Grant, municipal corporations are without authority to exact tolls for crossing a bridge. Oliff *v.* Shreveport, 52 La. Ann. 1203.

**950.** 4. Contract Against Discrimination — Waiver by Failure to Object. — Where a bridge company contracted with a railroad for the use of the bridge, agreeing not to contract with any other railroad for the same privilege at a less rate without the consent of the first railroad, it was held that a reduction thereafter given to another railroad under circumstances which must have brought such reduction to the knowledge of the first railroad was no defense to an action for tolls, consent to the reduction being presumed from failure to object to the reduction. Pittsburgh, etc., R. Co. *v.* Keokuk,

etc., Bridge Co., (C. C. A.) 107 Fed. Rep. 781.

**6. Right to Free Passage — Waiver — Limitation.** — Where a turnpike company granted to the owner of land the right to free passage of a ferry in consideration of the use of his land for the turnpike, the privilege was held to extend to a bridge afterwards substituted for the ferry and to attach to subsequent grantees of the land so long as the turnpike was maintained over such land. It was further held that payment of toll under protest by such person was not a waiver of the right to free passage, but that after twelve years' continuous denial of the right it was barred by limitation. Dupont *v.* Charleston Bridge Co., 65 S. Car. 524.

**951.** 3. Conowingo Bridge Co. *v.* Hedrick, 95 Md. 669.

**953.** 1. Bringing Before Judge. — "The application of the state, \* \* \* for preliminary examination, formally made to the judge, was a *bringing* of the person accused of crime before the judge in the sense of the statute." State *v.* Brunot, 104 La. 237.

When Suit Is Brought — Statute of Limitations. — U. S. *v.* American Lumber Co., 80 Fed. Rep. 315.

# BROKERS.

By O. D. ESTEE.

**960.** II. DEFINITION. — See note 1.

**962.** III. THE SEVERAL CLASSES OF BROKERS — Real-estate Brokers. — See note I.

IV. AUTHORITY OF BROKERS — 2. Authority Defined by Usage. — See note II.

**964.** 3. Implied Authority — See note 4.

**965.** 4. Particular Authorities Considered — *a.* TO RECEIVE PAYMENT. — See note I.

**966.** *c.* TO ACT AS AGENT OF BOTH PARTIES. — See notes 1, 2.

**967.** 5. Delegation of Authority. — See note 2.

Effect of Usage. — See note 4.

6. Revocation of Authority. — See notes 5, 6.

**960.** 1. Broker Defined. — Ayres *v.* Thomas, 116 Cal. 140; Southack *v.* Lane, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 515; Adkins *v.* Richmond, 98 Va. 91, 81 Am. St. Rep. 705, *quoting* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 960.

**962.** 1. See Henken *v.* Schwicker, 67 N. Y. App. Div. 196, *per* Woodward, J., *dissenting*, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 962.

11. See Van Dusen-Harrington Co. *v.* Jungelblut, 75 Minn. 298, 74 Am. St. Rep. 463.

**964.** 4. Implied Authority to Do What Is Necessary to Effect Business. — Dodd Grocery Co. *v.* Postal Tel.-Cable Co., 112 Ga. 685, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 964.

Implied Authority — Illustrations — Broker Cannot Sell on Credit. — Staten *v.* Hammer, 121 Iowa 499.

*A Real-estate Broker Has No Implied Authority to Sign a Contract of Sale.* — McCullough *v.* Hitchcock, 71 Conn. 401, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 964; Kesner *v.* Miesch, 204 Ill. 320; Balkema *v.* Searle, 116 Iowa 374; Scull *v.* Brinton, 55 N. J. Eq. 489; Dickinson *v.* Updike, (N. J. 1901) 49 Atl. Rep. 712; Ballou *v.* Bergvendsen, 9 N. Dak. 285; Brandrup *v.* Britten, 11 N. Dak. 376; York *v.* Nash, 42 Oregon 321; Donnan *v.* Adams, 30 Tex. Civ. App. 615, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 964.

*Extending Time of Payment.* — A broker who has made a binding contract of sale has no authority to extend the time of payment. Adams *v.* Fraser, (C. C. A.) 82 Fed. Rep. 211.

**965.** 1. Broker Not Authorized to Receive Payment. — Adams *v.* Fraser, (C. C. A.) 82 Fed. Rep. 211; Halsell *v.* Renfrow, 14 Okla. 674. See also Henken *v.* Schwicker, 67 N. Y. App. Div. 196, *per* Woodward, J., *dissenting*, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 965.

*A Factor Who Is Intrusted with the Possession of Property* has authority to receive payment

if he delivers possession of the property to the purchaser at the time of sale. Adams *v.* Fraser, (C. C. A.) 82 Fed. Rep. 211.

**966.** 1. Broker Is Primarily Agent of First Employer. — Illingworth *v.* De Mott, 59 N. J. Eq. 8, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 966.

*May Act for Both Parties in Making Memorandum.* — Southern Cotton Oil Co. *v.* Shreveport Cotton Oil Co., 111 La. 387, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 966; Carpenter *v.* Virginia-Carolina Chemical Co., 98 Va. 177, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 966.

2. Broker Cannot Act for Both Parties Where Their Interests Conflict. — Deutsch *v.* Baxter, 9 Colo. App. 58; Weinhouse *v.* Cronin, 68 Conn. 250; Hafner *v.* Herron, 165 Ill. 242; Morey *v.* Laird, 108 Iowa 670; Leathers *v.* Canfield, 117 Mich. 277; Dartt *v.* Sonnesyn, 86 Minn. 55; Lamb *v.* Baxter, 130 N. Car. 67; Addison *v.* Wanamaker, 185 Pa. St. 536; Ferguson *v.* Gooch, 94 Va. 1.

*Where Both Parties Know of and Assent to Double Agency*, the rule is waived. McKenzie *v.* Lego, 98 Wis. 364.

**967.** 2. Broker Cannot Delegate His Authority. — Jones *v.* Brand, 106 Ky. 410.

4. A Real-estate Broker may employ agents to aid him in selling land. Leech *v.* Clemons, 14 Colo. App. 45; Boyd *v.* Watson, 101 Iowa 214; Henninger *v.* Burch, 90 Minn. 43.

5. Revocation of Authority. — Hale *v.* Kumler, (C. C. A.) 85 Fed. Rep. 161; Taylor *v.* Martin, 109 La. 137, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967; George B. Loving Co. *v.* Hesperian Cattle Co., 176 Mo. 330; Abbott *v.* Hunt, 129 N. Car. 403; Evans *v.* Gay, (Tex. Civ. App. 1903) 74 S. W. Rep. 575; Rowan *v.* Hull, 55 W. Va. 335.

*The Death of the Principal.* — *In re* Overweg, (1000) 1 Ch. 209, 69 L. J. Ch. 255.

*Sale of Property by Principal Terminates Broker's Authority.* — White *v.* Benton, 121 Iowa 354.

**967.** Where Several Brokers Are Employed. — See note 7.

**968.** V. LIABILITY OF BROKER TO PRINCIPAL — 2. Broker Must Exercise Reasonable Skill and Diligence. — See notes 3, 4.

**969.** 3. Duty to Account for Profits. — See note 2.

**970.** VI. RIGHTS OF BROKER AGAINST PRINCIPAL — 1. Right to Compensation — *b.* AMOUNT OF COMPENSATION. — See note 3.

*c.* CONSIDERATIONS AFFECTING BROKER'S RIGHT TO RECOVER — (1) Broker Must Act under Employment. — See note 4.

**971.** (2) Broker Must Obey Instructions. — See notes 1, 2.

(3) Broker Must Act in Good Faith. — See note 3.

When the Authority Is Coupled with an Interest it cannot be revoked by the principal. *Bird v. Phillips*, 115 Iowa 703.

**967.** 6. *Rowan v. Hull*, 55 W. Va. 335.

An Interest in the Proceeds. — *Abbott v. Hunt*, 129 N. Car. 403.

7. *Calloway v. Stobart*, 35 Can. Sup. Ct. 301, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967.

**968.** 3. A Broker Must Exercise Reasonable Skill and Diligence, but the law does not require of him the highest degree of skill and care. *Caruthers v. Ross*, (Tex. Civ. App. 1901) 63 S. W. Rep. 911.

Where the sale of real estate and the security to be accepted in payment therefor were entirely intrusted to a broker, the broker was held liable for not exercising reasonable care in respect to the security which he accepted in payment. *Harlow v. Bartlett*, 170 Mass. 584.

4. A Money-lender Who Receives Money to Invest. — See *Rubens v. Mead*, (Cal. 1898) 53 Pac. Rep. 432.

**969.** 2. Broker Selling for More than Stipulated Price. — *Stearns v. Hochbrunn*, 24 Wash. 206. See also *Merriam v. Johnson*, 86 Minn. 61; *Balinger v. Wilson*, (N. J. 1902) 53 Atl. Rep. 488.

Broker Selling to Himself for Less than Others Offer. — When a broker, employed to sell property, sells to himself at a price lower than is offered by others he can be required to account to his principals. *Cornwell v. Foord*, 96 Ill. App. 366. See also *Ersine v. Sachs*, (1901) 2 K. B. 504, 70 L. J. K. B. 978.

**970.** 3. Broker Entitled to Reasonable Compensation. — *Staufer v. Bell*, 99 Iowa 545; *Veatch v. Norman*, 95 Mo. App. 500.

4. Broker Must Act under Employment — *Colorado*. — *Duncan v. Borden*, 13 Colo. App. 481.

*Georgia*. — *Gresham v. Connally*, 114 Ga. 906.

*Illinois*. — *Hafner v. Herron*, 165 Ill. 242.

*Kansas*. — *Thomas v. Merrifield*, 7 Kan. App. 669.

*Kentucky*. — *Jones v. Brand*, 106 Ky. 410.

*Louisiana*. — *Taylor v. Martin*, 109 La. 137, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 970.

*Massachusetts*. — *Barton v. Powers*, 182 Mass. 467.

*Michigan*. — *Downing v. Buck*, 135 Mich. 636; *Brooks v. Leathers*, 112 Mich. 463; *Nolan v. Swift*, 111 Mich. 56.

*Missouri*. — *McDonnell v. Stevinson*, 104 Mo. App. 191.

*New Jersey*. — *Callaway v. Equitable Trust Co.*, 67 N. J. L. 44.

*New York*. — *Hart v. Maloney*, 80 N. Y. App. Div. 265; *Benedict v. Pell*, 70 N. Y. App. Div.

40; *McVickar v. Roche*, 74 N. Y. App. Div. 397; *Curry v. Terry*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 797; *Loeffler v. Friedman*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 750; *Walton v. Chesebrough*, 39 N. Y. App. Div. 665. See also *Brady v. American Mach., etc., Co.*, 86 N. Y. App. Div. 267.

*Oklahoma*. — *Johnson v. Whalen*, 13 Okla. 320.

*Texas*. — *Pipkin v. Horne*, (Tex. Civ. App. 1902) 68 S. W. Rep. 1000; *Burnett v. Edling*, 19 Tex. Civ. App. 711.

*Wisconsin*. — *Bell v. Siemens, etc., Electric Co.*, 101 Wis. 320.

**Ratification.** — To entitle a broker to commissions there must be either an actual employment or a ratification and acceptance of his services. But in case of ratification, the intention of the principal to ratify must be clear. *Fowler v. Hoshcke*, 53 N. Y. App. Div. 327.

A party may ratify the acts of a broker in such a way that it is equivalent to an original employment of the broker by him. *Duncan v. Kearney*, 72 Conn. 585; *McCormack v. McCaffrey*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 775.

**Mere Volunteer Not Entitled to Commissions.** — See *Weinhouse v. Cronin*, 68 Conn. 250; *Somers v. Wescoat*, 66 N. J. L. 551; *White v. Molloy*, 9 N. Y. App. Div. 101; *Samuels v. Luckenbach*, 205 Pa. St. 428.

**Must Be Contract Express or Implied.** — There must be a contract in writing, or at least an equivalent admission, on the part of the principal, of the existence of a contract. The mere statement of a price which the principal is willing to take and of a commission which he is willing to pay does not constitute such a contract. *Mainwaring v. Crane*, 22 Quebec Super. Ct. 67. See also *Calloway v. Stobart*, 14 Manitoba 650.

Where a broker is authorized to sell to one particular person only, he cannot recover commissions for having secured a different purchaser, unless the principal ratified his act. *Breen v. Rives*, 16 N. Y. App. Div. 632.

**What Amounts to Employment.** — See *Wilkes v. Maxwell*, 14 Manitoba 599.

**971.** 1. *Gatling v. Menke*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 787.

2. Where Broker Employed to Sell on Specified Terms Sells on Different Terms. — *Smith v. Allen*, 101 Iowa 608.

3. **Must Act in Good Faith.** — *Hall v. Gambrill*, (C. C. A.) 92 Fed. Rep. 32; *Hobart v. Sherburne*, 66 Minn. 171; *Pollatschek v. Goodwin*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 587; *Whaples v. Fahys*, 87 N. Y. App. Div. 518; *Vandevort v. Wheeling Steel, etc., Co.*, 194 Pa. St. 118.

**972.** (4) *Completeness of Transaction* — Broker to Sell Entitled to Commissions When Customer Procured, Though Sale Never Completed. — See note 5.

**973.** Qualification of the Rule — Special Contract. — See note 2.

**974.** (5) *Availability of Customer* — Customer Must Be Ready to Buy on Terms Stipulated. — See note 1.

Where an agent of a real-estate broker attempted to depress the price of property at a sale, it was held that the broker could not recover commissions. *De Armit v. Milnor*, 20 Pa. Super. Ct. 369.

**The Intentional Concealment of Important and Material Facts.** — See *Hafner v. Herron*, 165 Ill. 242; *Mullen v. Bower*, 22 Ind. App. 294; *Morey v. Laird*, 108 Iowa 670; *Jeffries v. Robbins*, 66 Kan. 427; *Humphrey v. Robinson*, 134 N. Car. 432; *Wilkinson v. McCullough*, 196 Pa. St. 205, 79 Am. St. Rep. 702.

Where a customer authorized a broker to buy certain property for a given price, but the broker knew that it could be bought for less, it was the duty of the broker so to inform his customer, and on his failing to do so he was held not to be entitled to commissions. *Carpenter v. Fisher*, 175 Mass. 9.

**Secret Bargain Between Purchaser and Vendor's Broker.** — Where the purchaser promised to the vendor's broker a sum of money for extending the time of sale, and after the time was extended the sale was consummated but the broker did not receive the sum promised to him, it was held that though the secret bargain was a breach of the broker's duty to his principal it was not such as to disentitle him to the stipulated commission for the service which he had fully performed. *Davidson v. Manitoba, etc., Land Corp.*, 14 Manitoba 232, reversed 34 Can. Sup. Ct. 255.

**972. 5. Broker Entitled to Compensation When Purchaser Procured.** — *United States.* — *Hale v. Kumler*, (C. C. A.) 85 Fed. Rep. 161.

*California.* — *Ayres v. Thomas*, 116 Cal. 140.

*Colorado.* — *Ross v. Smiley*, 18 Colo. App. 204.

*Georgia.* — *Fenn v. Ware*, 100 Ga. 563.

*Illinois.* — *Wolven v. Shoudy*, 66 Ill. App. 42; *Phillips v. Dowhower*, 103 Ill. App. 50; *Hersher v. Wells*, 103 Ill. App. 418; *Fox v. Starr*, 106 Ill. App. 273; *Jeffries v. Loving*, 106 Ill. App. 380; *Kilpatrick v. McLaughlin*, 108 Ill. App. 463; *Faber v. Vaughan*, 108 Ill. App. 553.

*Indiana.* — *Indiana Bermudez Asphalt Co. v. Robinson*, 29 Ind. App. 59.

*Iowa.* — *Collins v. Padden*, 120 Iowa 381.

*Massachusetts.* — *Monk v. Parker*, 180 Mass. 246.

*Missouri.* — *Huggins v. Hearne*, 74 Mo. App. 86; *Finley v. Dyer*, 79 Mo. App. 604.

*Nebraska.* — *Stewart v. Smith*, 50 Neb. 631; *Craig v. Wead*, 58 Neb. 782.

*New Jersey.* — *S. E. Crowley Co. v. Myers*, 69 N. J. L. 245.

*New York.* — *Seymour v. St. Luke's Hospital*, 28 N. Y. App. Div. 119; *Thompson v. Sea Isle City*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 834, reversed (Supm. Ct. App. T.) 28 Misc. (N. Y.) 494; *Cody v. Dempsey*, 86 N. Y. App. Div. 335.

*North Carolina.* — *Mallonee v. Young*, 119 N. Car. 549.

*Oklahoma.* — *Gorman v. Hargis*, 6 Okla. 360.

*Oregon.* — *Holbrook v. Investment Co.*, 30 Oregon 259.

*Pennsylvania.* — *Seabury v. Fidelity Ins. Trust, etc., Co.*, 205 Pa. St. 234.

*South Dakota.* — *Huntemer v. Lego*, 16 S. Dak. 465.

*Texas.* — *Smye v. Groesbeck*, (Tex. Civ. App. 1902) 73 S. W. Rep. 972; *Orynski v. Menger*, 15 Tex. Civ. App. 448; *McLane v. Goode*, (Tex. Civ. App. 1902) 68 S. W. Rep. 707; *Gibson v. Gray*, 17 Tex. Civ. App. 646.

*West Virginia.* — *Parker v. National Mut. Bldg., etc., Assoc.*, 55 W. Va. 134.

*Wisconsin.* — *McKenzie v. Lego*, 98 Wis. 364.

*Canada.* — *Osler v. Moore*, 8 British Columbia 115; *Brydges v. Clement*, 14 Manitoba 588.

The fact that a customer to whom the principal has conveyed land fails to pay all of the purchase price does not affect a real-estate broker's right to commissions in the absence of a special contract. *Travis v. Graham*, 23 N. Y. App. Div. 214.

**Title Taken in Name of Third Party.** — Where a broker secured a customer, but for reasons of his own the customer wished title to be taken in the name of a third person, the broker was held to be entitled to his commissions. *Konner v. Anderson*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 511.

**973. 2. Special Contract Defeating Broker's Recovery.** — *White v. Turnbull*, 78 L. T. N. S. 726; *Beale v. Bond*, 84 L. T. N. S. 313; *Chapman v. Winson*, 91 L. T. N. S. 17; *Hale v. Kumler*, (C. C. A.) 85 Fed. Rep. 161; *Goin v. Hess*, 102 Iowa 140; *Seymour v. St. Luke's Hospital*, 28 N. Y. App. Div. 119; *Holbrook v. Investment Co.*, 30 Oregon 259. See also *Lassen v. Bayliss*, (C. C. A.) 125 Fed. Rep. 744; *Inge v. McCreery*, 60 N. Y. App. Div. 557.

**Illustration.** — Where a broker is promised a commission if he succeeds in merging two corporations, he is not entitled to his commission unless the merger actually takes place through his efforts. *Brown v. Snyder*, 57 N. Y. App. Div. 413.

**974. 1. Customer Must Be Ready to Contract on Principal's Terms** — *Alabama.* — *Cook v. Forst*, 116 Ala. 395.

*Colorado.* — *Alta Invest. Co. v. Worden*, 25 Colo. 215.

*Illinois.* — *Schmidt v. Keeler*, 63 Ill. App. 487; *Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Lawrence v. Rhodes*, 188 Ill. 96; *Hanrahan v. Ulrich*, 107 Ill. App. 626.

*Indiana.* — *Rabb v. Johnson*, 28 Ind. App. 665.

*Iowa.* — *Park v. Hogle*, 124 Iowa 98.

*Kentucky.* — *Higgins v. Miller*, 109 Ky. 209.

*Maine.* — *Smith v. Lawrence*, 98 Me. 92.

*Massachusetts.* — *Roche v. Smith*, 176 Mass. 595, 79 Am. St. Rep. 345.

*Minnesota.* — *Fairchild v. Cunningham*, 84 Minn. 521.

*Missouri.* — *Yoder v. White*, 75 Mo. App. 155; *Butts v. Ruby*, 85 Mo. App. 405;

**975. Customer Must Be Responsible.** — See note 1.

The Burden of Proof. — See notes 2, 3.

(6) *Failure of Principal to Complete the Contract.* — See note 4.**976. (7) Failure of Customer to Complete the Contract.** — See note 2.*New Hampshire.* — *Parker v. Estabrook*, 68 N. H. 349.*New York.* — *Montgomery v. Knickerbacker*, 27 N. Y. App. Div. 117; *Folsom v. Hesse*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 713; *Byrne v. Korn*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 509; *Freedman v. Havemeyer*, 37 N. Y. App. Div. 518; *Diamond v. Hartley*, 38 N. Y. App. Div. 87; *Ward v. Zborowski*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 66; *Walsh v. Gay*, 49 N. Y. App. Div. 50; *Sheinhouse v. Klueppel*, 80 N. Y. App. Div. 445; *Hausman v. Herdtfelder*, 81 N. Y. App. Div. 46.*Texas.* — *Burnett v. Edling*, 19 Tex. Civ. App. 711.*Washington.* — *Jones v. Eilenfeldt*, 28 Wash. 687.*Wisconsin.* — *Bell v. Siemens, etc.*, Electric Co., 101 Wis. 320.See also *Burchfield v. Griffith*, 10 Pa. Super. Ct. 618; *Calloway v. Stobart*, 35 Can. Sup. Ct. 301.**975. 1. Customer Must Be Responsible.** — *Lawrence v. Rhodes*, 188 Ill. 96; *Schmidt v. Keeler*, 63 Ill. App. 487; *Hanrahan v. Ulrich*, 107 Ill. App. 626; *Smith v. Lawrence*, 98 Me. 92; *Burnham v. Upton*, 174 Mass. 408, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 972-975; *Stewart v. Smith*, 50 Neb. 631; *Moses v. Helmke*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 357; *Walsh v. Gay*, 49 N. Y. App. Div. 50.**Want of Title.** — *Hersher v. Wells*, 103 Ill. App. 418; *Moskowitz v. Hornberger*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 558, *affirming*, as to the point in question, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 645, cited in the original note.The rule stated in the original note does not apply to a case where the broker is ignorant of the defect in the customer's title and the principal enters into a binding contract with the customer. *Roche v. Smith*, 176 Mass. 595, 79 Am. St. Rep. 345.**2. Burden of Proving Customer's Irresponsibility Rests on Principal.** — *Stauffer v. Linenthal*, 29 Ind. App. 305.**3. Presumption that Customer Is Responsible.** — *Stauffer v. Linenthal*, 29 Ind. App. 305.**4. Broker May Recover Though Principal Fail to Complete Contract.** — *England.* — *Nosotti v. Auerbach*, 79 L. T. N. S. 413.*California.* — *Merriman v. Wickersham*, 141 Cal. 567.*Indiana.* — *Stauffer v. Linenthal*, 29 Ind. App. 305.*Iowa.* — *Marple v. Ives*, 111 Iowa 602; *Bird v. Phillips*, 115 Iowa 703; *McDermott v. Mahoney*, 119 Iowa 470; *Johnson v. Wright*, 124 Iowa 61.*Kansas.* — *Sandefur v. Hines*, 69 Kan. 168.*Massachusetts.* — *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 397; *Fitzpatrick v. Gilson*, 176 Mass. 477. See also *Wright v. Young*, 176 Mass. 100.*Missouri.* — *Gwinnup v. Sibert*, 106 Mo. App. 709; *Goodson v. Embleton*, 106 Mo. App. 77.*New York.* — *Moses v. Helmke*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 357; *Friend v. Jetter*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 101; *Van Orden v. Morris*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 497; *Moskowitz v. Hornberger*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 558; *Auten v. Jacobus*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 669, *affirmed* (Supm. Ct. App. T.) 21 Misc. (N. Y.) 632. See also *Byrne v. Korn*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 509; *Halprin v. Schachne*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 195; *Pulich v. Casey*, 43 N. Y. App. Div. 122; *Rohner v. Lenisch*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 315; *Lord v. Moran*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 750; *Goldberg v. Gelles*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 797; *Brady v. Foster*, 72 N. Y. App. Div. 416; *McQuillen v. Carpenter*, 72 N. Y. App. Div. 595; *Michaelis v. Roffmann*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 830; *Snydam v. Healy*, 93 N. Y. App. Div. 396.*Oregon.* — *York v. Nash*, 42 Oregon 321.*Pennsylvania.* — See *Showaker v. Kelly*, 21 Pa. Super. Ct. 390.*Virginia.* — *Crockett v. Grayson*, 98 Va. 354.*Washington.* — *Barnes v. German Sav., etc., Soc.*, 21 Wash. 448.See also *Brydges v. Clement*, 14 Manitoba 588. *Compare Calloway v. Stobart*, 14 Manitoba 650.Where a broker secures a customer whom the principal accepts, he is entitled to his commission even though the principal subsequently becomes dissatisfied with such customer. *Miller v. Barth*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 372.**976. 2. Where Broker May Recover Though Customer Refuse to Complete Contract** — *Connecticut.* — See *Clark v. Henry G. Thompson, etc., Co.*, 75 Conn. 161.*District of Columbia.* — *Block v. Ryan*, 4 App. Cas. (D. C.) 283.*Indiana.* — *Indiana Bermudez Asphalt Co. v. Robinson*, 29 Ind. App. 59.*Iowa.* — *Welch v. Young*, (Iowa 1899) 79 N. W. Rep. 59.*Kansas.* — *Remington v. Sellers*, 8 Kan. App. 806.*Kentucky.* — *Reid v. Thompson*, (Ky. 1899) 50 S. W. Rep. 248.*Massachusetts.* — *Washburn v. Bradley*, 169 Mass. 86.*Missouri.* — *Hynes v. Brettelle*, 70 Mo. App. 344; *Bruce v. Wolfe*, 10 Mo. App. 384. See also *Fullerton v. Carpenter*, 97 Mo. App. 197.*New York.* — *Cohen v. Farley*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 168; *Hausman v. Herdtfelder*, 81 N. Y. App. Div. 46; *Finck v. Bauer*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 218; *Cusack v. Aikman*, 93 N. Y. App. Div. 579.*Texas.* — *Brackenridge v. Claridge*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1005; *Smye v. Groesbeck*, (Tex. Civ. App. 1902) 73 S. W. Rep. 972; *Wilson v. Clark*, (Tex. Civ. App. 1904) 79 S. W. Rep. 649.



**977.** (8) *Broker Must Be the Procuring Cause.* — See note 1.

**978.** *Broker Procuring Cause — Contract Completed by Another.* — See note 1.

See also *Brydges v. Clement*, 14 Manitoba 588.

**Broker Cannot Recover When in Fault.** — If a real-estate broker knows of a defect in his principal's title at the time when he secures the customer, he cannot recover. *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 291.

**Failure of Customer to Perform Contract.** — Where the principal makes a binding contract with the customer, the subsequent failure of the customer to live up to the terms of the contract does not defeat the broker's claim for commissions in the absence of an express agreement to that effect. *Odell v. Dozier*, 104 Ga. 203; *Off v. J. B. Inderrieden Co.*, 74 Ill. App. 105; *Friestedt v. Dietrich*, 84 Ill. App. 604; *Flynn v. Jordal*, 124 Iowa 457; *Roche v. Smith*, 176 Mass. 595, 79 Am. St. Rep. 345; *Lunney v. Healey*, 56 Neb. 313; *Baumann v. Nevins*, 52 N. Y. App. Div. 290; *Brown v. Grassman*, 53 N. Y. App. Div. 640; *Norton v. Genesee Nat. Sav., etc., Assoc.*, 57 N. Y. App. Div. 520; *Brady v. Foster*, 72 N. Y. App. Div. 416; *Thain v. Philbrick*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 829; *Charles v. Cook*, 88 N. Y. App. Div. 81; *Hipple v. Laird*, 189 Pa. St. 472; *Mattes v. Engel*, 15 S. Dak. 330. See also *Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Rosenberg v. Smith*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 774; *Sullivan v. Frazier*, 40 N. Y. App. Div. 288.

In *New York* a different rule is adopted in the case of loan brokers. Thus, where a broker who is employed to procure a loan secures a party who enters into an agreement with the principal to make the loan, but subsequently refuses to perform his part of the agreement, the broker is not entitled to a commission. *Ashfield v. Case*, 93 N. Y. App. Div. 452.

Where a principal made a contract with a customer by the terms of which the customer was to buy real estate or pay liquidated damages for his refusal to take the property, and the customer chose to pay the damages, it was held that the broker was entitled to his commission. *Parker v. Estabrook*, 68 N. H. 349.

**977. 1. Broker Must Be Procuring Cause — California.** — *Ayres v. Thomas*, 116 Cal. 140.  
*Illinois.* — *Tinsley v. Scott*, 69 Ill. App. 352.  
*Kansas.* — *Sandefur v. Hines*, 69 Kan. 168.  
*Kentucky.* — *Greene v. Owings*, (Ky. 1897) 41 S. W. Rep. 264; *Stedman v. Richardson*, 100 Ky. 79; *Collier v. Johnson*, (Ky. 1902) 67 S. W. Rep. 830.

*Louisiana.* — *Taylor v. Martin*, 109 La. 137, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 977.

*Maryland.* — *Leupold v. Weeks*, 96 Md. 280, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 977.

*Massachusetts.* — *French v. McKay*, 181 Mass. 485.

*Michigan.* — *Douville v. Comstock*, 110 Mich. 693.

*Minnesota.* — *Jaeger v. Glover*, 89 Minn. 490.

*Missouri.* — *Henkle v. Dunn*, 9 Mo. App. 671; *Campbell v. Vanstone*, 73 Mo. App. 84; *Crowley v. Somerville*, 70 Mo. App. 376.

*Nebraska.* — *Buck v. Hogeboom*, (Neb. 1902) 90 N. W. Rep. 635.

*New Jersey.* — *Somers v. Wescoat*, 66 N. J. L. 551.

*New York.* — *Markus v. Kenneally*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 517; *Randrup v. Schroeder*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 52; *Woods v. Burton*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 326; *Hamilton v. Gillender*, 26 N. Y. App. Div. 156; *Meyer v. Straus*, 42 N. Y. App. Div. 613; *Burke v. Pfeffer*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 774; *Walton v. McMorrow*, 63 N. Y. App. Div. 147; *Tyng v. Constable*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 283; *Phinney v. Chesebro*, 87 N. Y. App. Div. 409; *Scherer v. Colwell*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 390; *Sampson v. Ottinger*, 93 N. Y. App. Div. 226.

*North Carolina.* — *Mallonee v. Young*, 119 N. Car. 549.

*Pennsylvania.* — *Kifer v. Yoder*, 198 Pa. St. 308.

*Texas.* — *Evans v. Gay*, (Tex. Civ. App. 1903) 74 S. W. Rep. 575.

*Canada.* — *Starr v. Royal Electric Co.*, 30 Can. Sup. Ct. 384. See also *Calloway v. Stobart*, 35 Can. Sup. Ct. 301.

Where a broker obtained from a prospective purchaser an offer to purchase the property in question, giving certain shares of stock in lieu of cash for a part of the purchase price, which offer was refused by the principal, it was held that the broker was not entitled to commissions on a sale to the same party, subsequently effected through another broker, by an agreement of such other broker to purchase the stock from the principal for cash. *Burchfield v. Griffith*, 10 Pa. Super. Ct. 618.

Where a broker made an unsuccessful attempt to sell stock to A, and A casually mentioned the matter to his friend B, who purchased the stock direct from the principal, it was held that the broker was not entitled to commissions, as he was not the procuring cause of the sale. *Jones v. Frost*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 208.

**978. 1. If Procuring Cause, Extent of Exertions Immaterial — Colorado.** — *Leech v. Clemens*, 14 Colo. App. 45; *Knowles v. Harvey*, 10 Colo. App. 9.

*Connecticut.* — *Hoadley v. Savings Bank*, 71 Conn. 599.

*Illinois.* — *Hafner v. Herron*, 165 Ill. 242; *Kaestner v. Oldham*, 102 Ill. App. 372; *Baker v. Murphy*, 105 Ill. App. 151; *Dean v. Archer*, 103 Ill. App. 455.

*Indiana.* — *Miller v. Stevens*, 23 Ind. App. 365.

*Iowa.* — *Stauffer v. Bell*, 99 Iowa 545.

*Kentucky.* — *Stedman v. Richardson*, 100 Ky. 79.

*Maryland.* — *Leupold v. Weeks*, 96 Md. 280, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978.

*Missouri.* — *McCormack v. Henderson*, 100 Mo. App. 647.

*New York.* — *Weinstein v. Golding*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 613; *Doran v. Bussard*, 18 N. Y. App. Div. 36; *Hobbs v. Edgar*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 618; *Walton v. Chesebrough*, 39 N. Y. App. Div. 665; *Snydam v. Vogel*, (Supm. Ct. App.

**978.** Unsuccessful Attempt. — See notes 2, 3.

**979.** (9) *Negotiation by Principal* — (a) Without Intervention of Broker. — See note 1.

(b) *Principal Completing Contract Initiated by Broker*. — See note 3.

**980.** See note 1.

*Ignorance of Broker's Services Immaterial*. — See note 2.

(10) *Revocation of Authority*. — See note 3.

**981.** *Revocation After Partial Performance*. — See note 1.

T.) 84 N. Y. Supp. 915; *Kiernan v. Bloom*, 91 N. Y. App. Div. 429.

*Ohio*. — *Roush v. Loeffler*, 6 Ohio Cir. Dec. 760.

*Texas*. — *Blair v. Slosson*, 27 Tex. Civ. App. 403.

*Canada*. — *Morson v. Burnside*, 31 Ont. 438; *Osler v. Moore*, 8 British Columbia 115.

See also *Hambleton v. Fort*, 58 Neb. 282.

**978. 2. Unsuccessful Attempt — No Commissions.** — *Moore v. Cresap*, 109 Iowa 749; *Fairchild v. Cunningham*, 84 Minn. 521; *Leonard v. Eldridge*, 184 Mass. 594; *Crowninshield v. Foster*, 169 Mass. 237; *Markus v. Kenneally*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 517; *Sampson v. Ottinger*, 93 N. Y. App. Div. 226. See also *Frenzer v. Lee*, (Neb. 1902) 90 N. W. Rep. 914; *Starr v. Royal Electric Co.*, 30 Can. Sup. Ct. 384.

**3. Where the Broker Has Been Allowed a Reasonable Time.** — If a broker fails to find a purchaser within a reasonable time, his principal has the right to revoke his authority without incurring any liability. *Collier v. Johnson*, (Ky. 1902) 67 S. W. Rep. 830. See also *infra*, this title, **981. 1, 2.**

**979. 1. Principal May Treat Directly Without Broker's Intervention.** — *Cook v. Forst*, 116 Ala. 395; *Mullen v. Bower*, 22 Ind. App. 294; *Collier v. Johnson*, (Ky. 1902) 67 S. W. Rep. 830; *York v. Nash*, 42 Oregon 321. See also *Curtis v. Wagner*, 98 Ill. App. 345.

**The Fact that the Broker's Agency Is Exclusive** does not prohibit the owner from selling. *Ingold v. Symonds*, (Iowa 1904) 99 N. W. Rep. 713.

**3. Sale Completed by Principal with Customer Found by Broker — Alabama.** — *Cook v. Forst*, 116 Ala. 395.

*Georgia*. — *Gresham v. Connally*, 114 Ga. 906, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 979.

*Illinois*. — *Pate v. Marsh*, 65 Ill. App. 482.

*Iowa*. — *Lewis v. Simpson*, 122 Iowa 663;

*Gibson v. Hunt*, (Iowa 1903) 94 N. W. Rep. 277.

*Massachusetts*. — *French v. McKay*, 181 Mass. 485.

*Michigan*. — *Humphrey v. Eddy Transp. Co.*, 115 Mich. 420.

*Missouri*. — *Lipscomb v. Cole*, 81 Mo. App. 53. See also *Pollard v. Banks*, 67 Mo. App. 187.

*Nebraska*. — *Traynor v. Morse*, 55 Neb. 595.

*New Jersey*. — *Somers v. Wescoat*, 66 N. J. L. 551.

*Tennessee*. — *Glascok v. Vanfleet*, 100 Tenn. 603.

*Washington*. — *Von Tobel v. Stetson*, etc., Mill Co., 32 Wash. 683.

*West Virginia*. — *Parker v. National Mut. Bldg.*, etc., Assoc., 55 W. Va. 134.

*Canada*. — *Osler v. Moore*, 8 British Columbia 115; *Aikins v. Allan*, 14 Manitoba 549; *Wilkes v. Maxwell*, 14 Manitoba 599.

**Recovery upon a Quantum Meruit.** — See *Steinfeld v. Storm*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 167.

**980. 1. Principal Completing Sale on Different Terms.** — *Williams v. Bishop*, 11 Colo. App. 378; *Knowles v. Harvey*, 10 Colo. App. 9; *Hoadley v. Savings Bank*, 71 Conn. 599; *Loehde v. Halsey*, 88 Ill. App. 452; *Snyder v. Fearer*, 87 Ill. App. 275; *Lapsley v. Holridge*, 71 Ill. App. 652; *Hafner v. Herron*, 165 Ill. 242; *Crone v. Mississippi Valley Trust Co.*, 85 Mo. App. 601; *Hobbs v. Edgar*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 618; *O Toole v. Tucker*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 554; *Bishop v. Averill*, 17 Wash. 209. See also *Henry v. Stewart*, 185 Ill. 448; *Mullen v. Bower*, 22 Ind. App. 294; *Barnes v. German Sav.*, etc., Soc., 21 Wash. 448.

A real estate broker, who was authorized to sell certain property, introduced a customer to his principal, who exchanged other real estate for the property in question. It was held that the broker was entitled to commissions on the reasonable worth of the property taken in exchange. *Grether v. McCormick*, 79 Mo. App. 325.

Where the principal sells for less than the price agreed upon, and there is no express agreement as to compensation, the broker is entitled to the reasonable worth of his services. *Veatch v. Norman*, 95 Mo. App. 500.

**2. Principal Ignorant of Broker's Services.** — *Rounds v. Alec*, 116 Iowa 345; *Craig v. Wead*, 58 Neb. 782.

**3. Broker Cannot Recover for Services After Revocation of Authority.** — *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 397; *Fairchild v. Cunningham*, 84 Minn. 521; *Gorman v. Hargis*, 6 Okla. 360.

Where property is placed in the hands of two brokers, a sale by one before the other has found a customer revokes the other's authority, and he cannot recover for subsequent services. *Johnson v. Wright*, 124 Iowa 61.

**Resale After Revocation to Customer Procured by Broker.** — Where a broker negotiated with a certain party but failed to effect a sale, and his authority was then revoked, after which his principal sold to the same party without his assistance, it was held that in the absence of bad faith on the part of the principal the broker was not entitled to commissions. *Rees v. Pellow*, (C. C. A.) 97 Fed. Rep. 167.

**981. 1. Suit for Breach of Contract upon Revocation After Partial Performance.** — Where the owner of real estate makes a written contract with a broker, giving him a year in which to sell certain lots, and in reliance upon this

**981.** *Revocation After Reasonable Time to Complete Transaction.* — See note 2.

(11) *Illegality of Transaction* — (a) *In General.* — See note 3.

**982.** (c) *Broker Acting Without License — Under Revenue Laws.* — See note 5.  
*Laws Making It Illegal to Act Without License.* — See note 6.

**983.** *d. EMPLOYMENT OF SEVERAL BROKERS.* — See note 1.

**984.** *Division of Commissions.* — See note 1.

*e. BROKER ACTING FOR BOTH PARTIES — DOUBLE COMMISSIONS — Broker Cannot in General Recover Double Commissions.* — See notes 3, 4, 5.

**985.** See note 1.

*Can Recover by Consent of Both Parties.* — See note 2.

agreement the broker makes diligent efforts to procure customers, a suit for damages for breach of contract may be maintained in case the broker's authority is revoked before the expiration of the year. *Stamets v. Deniston*, 193 Pa. St. 548. See also *supra*, this title, **978. 3.**

**981. 2.** *Bona Fide Revocation Defeats Broker's Claim.* — *Stedman v. Richardson*, 100 Ky. 79; *Buehler v. Weiffenbach*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 30.

**3.** *Contract in Restraint of Trade.* — A broker cannot recover commissions for having secured an agreement by the terms of which competing breweries were to maintain prices, as such a contract is illegal. *Street v. Houston Ice, etc., Co.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 516.

**982. 5.** *Recovery by Unlicensed Broker Allowed.* — *Hanesley v. Monroe*, 103 Ga. 279; *Ober v. Stephens*, 54 W. Va. 354.

**6.** *Laws and Ordinances Making Acting Without License Illegal.* — *Yedinsky v. Strouse*, 6 Pa. Super. Ct. 587; *Saule v. Ryan*, (Tenn. Ch. 1899) 53 S. W. Rep. 977.

A party who is not a licensed real estate broker cannot recover commissions in *Pennsylvania*, unless there is an express contract as to the amount to be paid. *Coles v. Meade*, 5 Pa. Super. Ct. 334. But one who is not a regular broker, but makes a sale under a contract for the payment of a certain commission for finding a purchaser, may recover such commission, though unlicensed. *Black v. Snook*, 204 Pa. St. 119.

**Effect of Tender of License Fee.** — In *Wicks v. Carlisle*, 12 Okla. 337, a real estate broker tendered his license fee to the proper officers, but they refused to accept it, and it was held that, under these circumstances, the broker could recover commissions on sales made.

**983. 1.** *Broker Effecting Contract Entitled to Commissions.* — *Carper v. Sweet*, 26 Colo. 547; *Barton v. Rogers*, 84 Ill. App. 49; *Higgins v. Miller*, 109 Ky. 209; *Whitcomb v. Bacon*, 170 Mass. 479, 64 Am. St. Rep. 317; *Cunliff v. Hausman*, 97 Mo. App. 467; *Johnson v. Lord*, 35 N. Y. App. Div. 325; *McNulty v. Rowe*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 523; *Haines v. Barney*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 748; *De Zavala v. Royaliner*, (Supm. Ct. App. T.) 84 N. Y. Supp. 969; *Glascock v. Vanfleet*, 100 Tenn. 603; *Duval v. Moody*, 24 Tex. Civ. App. 627. See also *Wright v. Brown*, 68 Mo. App. 577.

**Illustrations.** — A customer made inquiries concerning a lease from a real estate broker, and then broke off negotiations and negotiated the lease through another broker. It was held that the broker who negotiated the lease was en-

titled to the commission. *McCloskey v. Thompson*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 735.

Where property was placed in the hands of two real estate brokers it was held that the broker who first entered into a contract of sale with a financially responsible party was entitled to his commission, though the land was in fact conveyed to a customer of the other broker. *Stewart v. Woodward*, 7 Kan. App. 633.

**984. 1.** See *Alvord v. Cook*, 174 Mass. 120.

**3.** *Broker Acting Secretly for Both Parties Can Recover from Neither.* — *Deutsch v. Baxter*, 9 Colo. App. 58; *Alta Invest. Co. v. Worden*, 25 Colo. 215; *Casady v. Carraher*, 119 Iowa 500; *Rosenthal v. Drake*, 82 Mo. App. 358; *Southack v. Lane*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 141.

**4.** *Double Agency Unknown to One Party — Broker Cannot Recover from Both.* — *Van Vlis-singen v. Blum*, 92 Ill. App. 145; *Hampton v. Lackens*, 72 Ill. App. 442; *Alvord v. Cook*, 174 Mass. 120; *Lebowitz v. Colligan*, 18 N. Y. App. Div. 624; *Norman v. Reuther*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 161; *Brierly v. Connelly*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 268; *Gracie v. Stevens*, 56 N. Y. App. Div. 203; *Linderman v. McKenna*, 20 Pa. Super. Ct. 409; *Grant v. Gold Exploration, etc., Syndicate*, (1900) 1 Q. B. 233; *Andrews v. Ramsay*, (1903) 2 K. B. 635. See also *Robinson v. Clock*, 38 N. Y. App. Div. 67. *Compare Davidson v. Manitoba, etc., Land Corp.*, 14 Manitoba 232, *reversed* 34 Can. Sup. Ct. 255.

**Consent by One Party to Double Agency.** — Where a party at the time when he employs a broker knows that the broker is acting as agent for the adverse party, he is liable for commissions and cannot set up the defense of double agency. *Hanesley v. Monroe*, 103 Ga. 279. See also *Whiting v. Saunders*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 539, *affirmed* (Supm. Ct. App. T.) 23 Misc. (N. Y.) 332; *Geery v. Pollock*, 16 N. Y. App. Div. 321; *Abel v. Disbrow*, 15 N. Y. App. Div. 536.

**A Principal May Recover from His Broker** commissions secretly paid to him by the other party to the transaction. *Cohen v. Kuschke*, 83 L. T. N. S. 102.

**5. Rule Founded on Public Policy — Good Faith Immaterial.** — *Casady v. Carraher*, 119 Iowa 500; *Leathers v. Canfield*, 117 Mich. 277.

**985. 1.** *Usage in Contravention of Rule Immaterial.* — *Addison v. Wanamaker*, 185 Pa. St. 536. See also *Bartram v. Lloyd*, 88 L. T. N. S. 286.

**2.** *Broker May Recover Double Commissions Where Parties Consent.* — *Red Cypress Lumber Co. v. Perry*, 118 Ga. 876; *Lamb v. Baxter*, 130

**985.** Broker Acting as Middleman May Recover Double Commissions. — See notes 4, 5.  
2. Right to Reimbursement. — See note 6.

**987.** VII. LIABILITY TO THIRD PARTIES — 1. Liability of Principal — Principal Liable for Contracts of Broker. — See note 1.

**988.** 2. Liability of Broker — When Principal Is Disclosed. — See note 2.  
Where Fact of Agency Is Not Disclosed. — See note 3.

Agency Disclosed, but Principal's Name Withheld. — See note 4.

**989.** VIII. RIGHTS AGAINST THIRD PARTIES — 1. Rights of Principal — Where the Agency Is Undisclosed. — See note 5.

Fraudulent Sale by Broker. — See note 7.

**990.** [BROMO. — See note 2a.]

BROTHER. — See note 3.

[BROTHER-IN-LAW. — See note 3a.]

**991.** BUCKET-SHOP. — See note 3.

N. Car. 67; *Maxwell v. West*, 23 Pa. Co. Ct. 302.

**985.** 4. Middleman May Recover Double Commissions. — *Clark v. Allen*, 125 Cal. 276; *Casady v. Carraher*, 119 Iowa 500; *Hannan v. Prentis*, 124 Mich. 417; *Flattery v. Cunningham*, 125 Mich. 467; *Pollatschek v. Goodwin*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 587; *Southack v. Lane*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 515; *Southack v. Lane*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 141; *Gracie v. Stevens*, 56 N. Y. App. Div. 203. See also *Lamb v. Baxter*, 130 N. Car. 67; *McKenzie v. Lego*, 98 Wis. 364.

5. Leathers v. Canfield, 117 Mich. 277; *Norton v. Genesee Nat. Sav., etc., Assoc.*, 57 N. Y. App. Div. 520.

6. Broker Entitled to Reimbursement. — Where a principal revokes a broker's authority, the broker is entitled to be reimbursed for expenses. *Hale v. Kumlner*, (C. C. A.) 85 Fed. Rep. 161; *Dulaney v. Page Belting Co.*, (Tenn. Ch. 1900) 59 S. W. Rep. 1082.

Where a broker bought cotton for a customer on a margin, but on account of the sudden decline in the price of cotton was compelled to sell at a loss, it was held that he could recover from the customer the balance thus lost. *Robinson v. Crawford*, 31 N. Y. App. Div. 228.

Where brokers were employed to sell property at auction, and they accordingly advertised the property and made the necessary arrangements for the sale, but on the day before the auction the owner sold the property to another party, it was held that the brokers could recover from the owner their disbursements and the reasonable value of their services. *Donald v. Lawson*, (Supm. Ct. App. T.) 87 N. Y. Supp. 485.

**987.** 1. Principal Not Bound Where Broker Exceeds Authority. — *Planer v. Equitable L. Assur. Soc.*, (N. J. 1897) 37 Atl. Rep. 668. See generally the title AGENCY, **986.** 3 *et seq.*, **1136.** 5 *et seq.*

"Where a broker sells goods without disclosing the name of his principal, he acts beyond the scope of his authority, and the buyer cannot set off a debt due from the broker to him against the demand for the goods made by the principal." *Delafield v. Smith*, 101 Wis. 664, 70 Am. St. Rep. 938.

Unauthorized Sale on Credit. — A principal authorized a broker to sell certain real property

for cash during the following sixty days. The broker made a contract for sale, extending the time for payment thirty days after the expiration of the sixty days. It was held that the contract of sale was not binding on the principal. *Smith v. McCann*, 205 Pa. St. 57.

**988.** 2. Broker Not Liable on Contracts for Known Principal. — *Bailey v. Galbreath*, 100 Tenn. 599.

3. Broker Liable Where Agency Not Disclosed. — *Lichten v. Verner*, 8 Pa. Dist. 218.

4. Principal's Name Not Disclosed. — *Lincoln v. Levi Cotton Mills Co.*, (C. C. A.) 128 Fed. Rep. 865.

**989.** 5. Principal May Enforce Contract Made by Broker. — *Dodd Grocery Co. v. Postal Tel.-Cable Co.*, 112 Ga. 685.

7. Compare *Rimmer v. Webster*, (1902) 2 Ch. 163.

**990.** 2a. In *Paris Medicine Co. v. W. H. Hill Co.*, (C. C. A.) 102 Fed. Rep. 148, the court said: "The court below took judicial notice of a definition of *bromo* found in the Standard Dictionary, where it is stated that the word is 'derived from bromine,' and is 'a combining word used mostly in names of chemical compounds in which bromine is a principal element.' \* \* \* Whether the word *bromo* has or has not acquired a definite significance as a term of science, indicating a compound in which bromine is an element, is a matter upon which this court is not clear."

3. *State v. Guiton*, 51 La. Ann. 155.

Intestate Law. — *Matter of Lynch*, 132 Cal. 214.

Incest — Brother of the Half-Blood. — *State v. Guiton*, 51 La. Ann. 155.

Wills. — *McNeal v. Sherwood*, 24 R. I. 314.

3a. The term *brother-in-law* is thus defined: "The brother of one's husband or wife; also one's sister's husband." Cent. Dict.; *Webst. Dict.* *Farmers' L. & T. Co. v. Iowa Water Co.*, 80 Fed. Rep. 469.

In *State v. Foster*, 112 La. 533, the husbands of two sisters were held to be *brothers-in-law* within the meaning of the law providing for the recusation of judges.

**991.** 3. A *bucket-shop* is a place where wheat, corn, and pork, and other provisions, and grain are bought and sold on margin. *Lancaster v. McKinley*, 33 Ind. App. 448.

Bucket-shop Not a Game. — *Bpyce v. O'Dell*

**992. BUGGERY.** — See note 3.

**BUILD.** — See note 5.

**994. BUILDER.** — See note 1.

**BUILDING.** — See notes 2, 3, 4.

Commission Co., 109 Fed. Rep. 758; Lancaster v. McKinley, 33 Ind. App. 448. And see the title GAMING.

**992. 3.** See Com. v. J——, 21 Pa. Co. Ct. 625. 5. Little Rock, etc., R. Co. v. Spencer, 65 Ark. 183, dissenting opinion.

"**Built Up Portions of Cities.**" — In Com. v. Charity Hospital, 198 Pa. St. 270, the court said: "The phrase '**built up portions of cities**' must be understood in its ordinary and popular meaning, and with reference to the object of the act, viz., the protection of the public health. The object of the act must be presumed to be to remove supposed sources of contagion from immediate contact with a large population. With this meaning of the act and the situation of the proposed hospital in reference to its surroundings in view, we are of opinion that the site of the proposed hospital is in a **built up** portion of the city of Pittsburg within the meaning of the act."

**994. 1.** Little Rock, etc., R. Co. v. Spencer, 65 Ark. 183, dissenting opinion.

"**Contractor**" **Synonymous with "Builder."** Little Rock, etc., R. Co. v. Spencer, 65 Ark. 183, dissenting opinion.

**Builder's Lien.** — In June v. Doke, (Tex. Civ. App. 1904) 80 S. W. Rep. 406, the court said: "The lien is described in the contract as a '**builder's lien**,' and evidently has reference to the lien described in the constitution and statute, because there is no other **builder's** lien in Texas. In order, therefore, to arrive at the meaning of the parties when they used the term '**builder's lien**,' resort must be had to the definitions given to the constitution and statute. By a reference thereto, we find that the '**builder's lien**' extends not only to the house or building erected, but also to the lot or lots of land necessarily connected therewith."

**2.** Williams v. State, 105 Ga. 814; Favro v. State, 39 Tex. Crim. 452.

**3.** Cincinnati v. Cincinnati University, 13 Ohio Dec. 289, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 994; Clark v. Lee, 185 Mass. 223. See also Favro v. State, 39 Tex. Crim. 452.

**4. Block — Mechanic's Lien.** — Gordon v. Norton, 186 Pa. St. 168.

**Monument.** — Parsons v. Van Wyck, 56 N. Y. App. Div. 336; Spangler v. Leitheiser, 182 Pa. St. 277.

**Hen-house — Burglary.** — The phrase "other **building**" in a statute punishing burglary includes a hen-house. Gillock v. People, 171 Ill. 307; State v. Poole, 65 Kan. 713.

**Hotel — Burglary.** — A hotel is a **building** within a statute against burglary. Bruen v. People, 206 Ill. 417.

**Planing-mill — Burglary.** — A planing mill is a **building** within a statute against burglary. State v. Haney, 110 Iowa 26.

**Fences.** — A fence is not a **building** within the meaning of an agreement providing that a university "may erect a university **building** and such other **buildings** as may be incidentally connected therewith, and forever afterward maintain and control the same for the purposes hereinafter named." Cincinnati v. Cincinnati University, 13 Ohio Dec. 288.

Under a statute requiring all necessary **buildings** to be erected by contract let to the highest bidder, etc., the word **buildings** will include an iron fence around the courthouse grounds. Swasey v. Shasta County, 141 Cal. 392.

**Wall — Covenant in a Deed.** — Clark v. Lee, 185 Mass. 223, following Nowell v. Boston Academy, 130 Mass. 209, set out in the original note.

**Building Purposes.** — Under a tax providing for "**building purposes**," appropriation and tax levy ordinances, each substantially specifying the purposes for which the school tax is to be used, are sufficiently definite. Otis v. People, 196 Ill. 542.

"**Building**" in the Sense of House — Arson. — State v. Spiegel, 111 Iowa 701.

**Building Partially Destroyed — Insurance — Question for Jury.** — See Corbett v. Spring Garden Ins. Co., 40 N. Y. App. Div. 628, affirmed 167 N. Y. 596.

**Tent Not a Building — Exemption from Taxation.** — Children's Seashore House, etc., v. Atlantic City, 68 N. J. L. 385.

**A Greenhouse** is a **building** within section 3 of the Prescription Act (2 & 3 Wm. IV., c. 71), and therefore, if it has ancient lights, may be protected by injunction against interference with the access of light. Clifford v. Holt, (1899) 1 Ch. 698.

**Fixtures and Machinery.** — A covenant in a lease to pay for "**buildings** and erections" on the demised premises, covers and includes fixtures and machinery which would have been fixtures but for 58 Vict., c. 26, § 2, subsec. (c) (o). Re Brantford Electric, etc., Co., 28 Ont. 40.

**A Churchyard Wall**, so built as to form an arcade or covered way for the protection from the weather of frescoes proposed to be painted on the panels on that side of the wall which would be inside the churchyard, is not a **building** prohibited to be erected on a disused burial ground by the Disused Burial Grounds Act, 1884, and the Open Spaces Act, 1887. St. Botolph v. Parishioners, (1900) P. 69.

# BUILDING AND LOAN ASSOCIATIONS.

BY A. A. WADSWORTH.

**1001.** I. DEFINITION AND DESCRIPTION — 1. Definition. — See note 1.

**1002.** Other Terms. — See note 1.

2. Object — The Primary Object. — See note 2.

May Have Nonborrowing Members. — See note 4.

Seeing to Application of Funds Borrowed. — See note 5.

Whether Bona Fide Association a Question of Fact. — See note 7.

**1003.** 3. Origin and History. — See notes 4, 6.

4. General Scheme — Stock — Shares. — See note 8.

**1004.** Association Fund. — See note 3.

**1005.** Variations in Detail — Central Idea. — See note 2.

**1001.** 1. Definition. — *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1001. See also *Miles v. New South Bldg., etc., Assoc.*, 111 Fed. Rep. 946; *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319; *Albany Mut. Bldg. Assoc. v. Laramie*, 10 Wyo. 54.

**1002.** 1. No Distinction Exists Between a Building and Loan Association and a Savings and Loan Association, the two appellations being used to designate but one class of societies, viz., those doing a savings and loan or investment business on the building society plan. *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319.

2. Object. — *Armstrong v. U. S. Building, etc., Assoc.*, 15 App. Cas. (D. C.) 1; *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814; *Forsell v. Suddard*, 90 Ill. App. 407; *Simpson v. Kentucky Citizens Bldg., etc., Assoc.*, 101 Ky. 496; *Myers v. Alpena Loan, etc., Assoc.*, 117 Mich. 389; *Stoddard v. Saginaw Bldg., etc., Assoc.*, (Mich. 1904) 101 N. W. Rep. 50; *Coggeshall v. Sussman*, (County Ct.) 41 Misc. (N. Y.) 384; *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319; *Meyer v. Chattanooga Sav., etc., Assoc.*, (Tenn. Ch. 1897) 48 S. W. Rep. 105; *Lee v. Canadian Mut. Loan, etc., Co.*, 5 Ont. L. Rep. 471.

Loans Not Restricted to Home Building. — In *Home Bldg., etc., Assoc. v. Evans*, (Tenn. Ch. 1899) 53 S. W. Rep. 1104, it was held that there is no law requiring building and loan associations to limit their loans to their members alone for the purpose of home building. See also *Simpson v. Kentucky Citizens Bldg., etc., Assoc.*, 101 Ky. 496; *Archer v. Baltimore Bldg., etc., Assoc.*, 45 W. Va. 37.

4. May Have Nonborrowing Members. — *Tootle v. Singer*, 118 Iowa 533, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002; *Boleman v. Citizens' Loan, etc., Assoc.*, 114 Wis. 217.

5. *Thurstan v. Nottingham Permanent Ben. Bldg. Soc.*, (1902) 1 Ch. 1, 86 L. T. N. S. 35.

7. Nature of Association a Question for Jury. — *Hollis v. Covenant Bldg., etc., Assoc.*, 104 Ga. 318.

Presumption from Corporate Name. — The corporate name of the plaintiff below indicating

that it was a building and loan association "pure and simple," and there being nothing either in the allegations of its petition or in the evidence tending to show that it had ever engaged in transactions outside of the scope of the legitimate business of such a corporation, the trial court properly treated it as an organization of that kind. *Smith v. Southern Bldg., etc., Assoc.*, 111 Ga. 811, *citing* *Morgan v. Interstate Bldg., etc., Assoc.*, 108 Ga. 185.

**1003.** 4. *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1003.

6. Statutory Regulations. — During the period of 1850 to 1860 the states generally undertook statutory regulation of the business of building and loan associations. *Security Sav., etc., Assoc. v. Elbert*, 153 Ind. 198.

8. *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1003.

Contribution of Members Constitutes Sole Capital. — Such an organization has and can have no capital in the ordinary sense of the word, except the contributions made from time to time by its shareholders. *Winegardner v. Equitable Loan Co.*, 120 Iowa 485.

**1004.** 3. See *Winegardner v. Equitable Loan Co.*, 120 Iowa 485.

**1005.** 2. Mutuality the Essential Principle — *United States*. — *Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652; *Columbia Bldg., etc., Assoc. v. Junquist*, 111 Fed. Rep. 645; *Miles v. New South Bldg., etc., Assoc.*, 111 Fed. Rep. 946; *Manship v. New South Bldg., etc., Assoc.*, 110 Fed. Rep. 845; *Latimer v. Equitable Loan, etc., Co.*, 81 Fed. Rep. 776.

*Arkansas*. — *Hale v. Phillips*, 68 Ark. 382.

*Colorado*. — *Hawley v. North Side Bldg., etc., Assoc.*, 11 Colo. App. 93.

*Georgia*. — *Rooney v. Southern Bldg., etc., Assoc.*, 119 Ga. 941; *Reynolds v. Georgia State Bldg., etc., Assoc.*, 102 Ga. 126.

*Indiana*. — *Security Sav., etc., Assoc. v. Elbert*, 153 Ind. 198; *Huter v. Union Trust Co.*, 153 Ind. 204.

*Iowa*. — *Winegardner v. Equitable Loan Co.*, 120 Iowa 485.

*Kentucky*. — *Forwood v. Eubank*, 106 Ky. 291.

**1005.** Legality. — See note 3.

5. Varieties — *b.* TERMINATING. — See note 5.

**1006.** *c.* SERIAL. — See note 2.

Profits and Losses. — See note 4.

*d.* PERMANENT. — See note 7.

**1007.** *g.* UNINCORPORATED — Are Partnerships. — See note 3.

**1008.** II. THE BUILDING ASSOCIATION AS A CORPORATION — 1. In General. — See notes 1, 2.

Constitutionality. — See note 4.

Incorporation Must Be Bona Fide. — See note 5.

Foreign Associations. — See note 6.

*Maryland.* — Baltimore Bldg., etc., Assoc. *v.* Powhatan Imp. Co., 87 Md. 59.

*Missouri.* — Bertche *v.* Equitable Loan, etc., Assoc., 147 Mo. 343, 71 Am. St. Rep. 571.

*Nebraska.* — Anselme *v.* American Sav., etc., Assoc., 63 Neb. 525, affirmed 66 Neb. 520.

*New York.* — Hannon *v.* Cobb, 49 N. Y. App. Div. 480.

*North Dakota.* — Clarke *v.* Olson, 9 N. Dak. 364.

*Ohio.* — Richter *v.* Main St. Bldg., etc., Co., 6 Ohio Dec. 95.

*Tennessee.* — Meyer *v.* Chattanooga Sav., etc., Assoc., (Tenn. Ch. 1897) 48 S. W. Rep. 105; Province *v.* Interstate Bldg., etc., Assoc., 104 Tenn. 458.

*Texas.* — North Texas Bldg., etc., Assoc. *v.* Hay, 23 Tex. Civ. App. 98.

*Wisconsin.* — Leahy *v.* National Bldg., etc., Assoc., 100 Wis. 555, 69 Am. St. Rep. 945.

**1005.** 3. Legality. — *Manship v.* New South Bldg., etc., Assoc., 110 Fed. Rep. 845.

**5. Terminating Societies.** — Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1005.

**1006.** 2. Serial Association. — An association which issues its stock every three months in a new series, each series being distinguished by its number, is such an association as is commonly designated as a "serial association." Vierling *v.* Mechanics', etc., Sav., etc., Assoc., 179 Ill. 524.

**4. Profits and Losses.** — Young *v.* Improvement Loan, etc., Assoc., 48 W. Va. 512, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1006.

**7. Permanent.** — Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1006.

**1007.** 3. Are Partnerships. — Schell *v.* Equitable Loan, etc., Assoc., 150 Mo. 103.

**Held to Be Quasi Partnerships.** — Union Mut. Bldg., etc., Assoc. *v.* Aichele, 28 Ind. App. 69. See also Security Sav., etc., Assoc. *v.* Elbert, 153 Ind. 198.

**1008.** 1. Object of Incorporation. — Meyer *v.* Chattanooga Sav., etc., Assoc., (Tenn. Ch. 1897) 48 S. W. Rep. 105.

2. Tootle *v.* Singer, 118 Iowa 533.

**4. Constitutionality.** — Beyer *v.* National Bldg., etc., Assoc., 131 Ala. 369; Sheldon *v.* Birmingham Bldg., etc., Assoc., 121 Ala. 278, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1008. See also Iowa Sav., etc., Assoc. *v.* Heidt, 107 Iowa 297, 70 Am. St. Rep. 197; Zenith Bldg., etc., Assoc. *v.* Heimbach, 77 Minn. 97; Home Bldg., etc., Assoc. *v.* Nolan, 21 Mont. 205; South Omaha Loan, etc., Assoc. *v.* Wirrick, 63

Neb. 598; Spies *v.* Southern Ohio L. & T. Co., 24 Ohio Cir. Ct. 40, overruling Mykrantz *v.* Globe Bldg., etc., Assoc., 10 Ohio Cir. Dec. 250; Smoot *v.* People's Perpetual Loan, etc., Assoc., 95 Va. 686; Archer *v.* Baltimore Bldg., etc., Assoc., 45 W. Va. 37.

**In Kentucky** it has been held in cases of domestic building and loan associations that charters conferring the power to collect a higher rate of interest than six per cent. were unconstitutional. Locknane *v.* U. S. Savings, etc., Co., 103 Ky. 265. See also Safety Bldg., etc., Co. *v.* Ecklar, 106 Ky. 115.

**5. Bona Fides.** — The question whether a building association is organized for legitimate building and loan purposes is one of fact, to be determined from the evidence in the case. Tootle *v.* Singer, 118 Iowa 533.

In *Georgia* a company calling itself a building association, but not such in fact, cannot acquire the privilege of charging more than the lawful rate of interest in ordinary contracts between borrower and lender. Rooney *v.* Southern Bldg., etc., Assoc., 119 Ga. 941.

**6. Foreign Associations** — *Alabama.* — Interstate Bldg., etc., Assoc. *v.* Brown, 128 Ala. 462.

*Florida.* — Skinner *v.* Southern Home Bldg., etc., Assoc., (Fla. 1903) 35 So. Rep. 67.

*Illinois.* — Rhodes *v.* Missouri Sav., etc., Co., 173 Ill. 621; St. Louis Loan, etc., Co. *v.* Yantis, 173 Ill. 321.

*Indiana.* — National Home Bldg., etc., Assoc. *v.* Black, 153 Ind. 701; U. S. Saving, etc., Co. *v.* Marion First Methodist Protestant Church, 153 Ind. 702; Security Sav., etc., Assoc. *v.* Elbert, 153 Ind. 198; Equitable Loan, etc., Assoc. *v.* Peed, (Ind. 1898) 52 N. E. Rep. 201.

*Iowa.* — Tootle *v.* Singer, 118 Iowa 533.

*Mississippi.* — Shannon *v.* Georgia State Bldg., etc., Assoc., 78 Miss. 955, 84 Am. St. Rep. 657.

*Nebraska.* — Equitable Bldg., etc., Assoc. *v.* Bidwell, 60 Neb. 169.

*Utah.* — Hiskey *v.* Pacific States Sav., etc., Co., 27 Utah 409.

*West Virginia.* — Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 87 Am. St. Rep. 805; Prince *v.* Holston Nat. Bldg., etc., Assoc., 55 W. Va. 19; Archer *v.* Baltimore Bldg., etc., Assoc., 45 W. Va. 37.

*Canada.* — A loan company incorporated under the laws of the Province of Ontario may lend money on mortgage security in the Province of Quebec, even in the absence of permission from the secretary of that province, as provided in R. S. Q., art. 5470. Birkbeck

- 1009. 2. The Charter — Power of Legislature to Alter Charter.** — See note 3.  
**Construction by Act of Legislature.** — See note 4.  
**The Charter a Contract.** — See note 5.  
**Curative Acts.** — See note 6.

*Invest. Security, etc., Co. v. Brabant*, 8 Quebec Q. B. 311.

In *Alabama* under the Constitution, art. 14, § 4, and Code 1896, §§ 1316, 1318, 1319, enacted pursuant thereto, prohibiting foreign building and loan associations from transacting business directly or indirectly in the state, where the association has not designated a known place of business in the state and an authorized agent or agents residing thereat, such foreign association cannot, in the courts of the state, enforce a loan made through a traveling soliciting agent to a resident of the state without first complying with the Code provision. *Denson v. Chattanooga Nat. Bldg., etc., Assoc.*, (C. C. A.) 107 Fed. Rep. 777, affirmed 189 U. S. 408.

But it has been held that the failure of a foreign building and loan association to pay a license fee for doing business in the state as required by the Act of Feb. 7, 1893, does not vitiate the contract arising in such business. *Eslava v. New York Nat. Bldg., etc., Assoc.*, 121 Ala. 480.

In *Florida*, Acts of 1893, p. 80, c. 4158, authorizing foreign building associations to do business in the state, does not relieve them from the general rule requiring the validity of their contracts made in the state to be tested by the laws applicable to domestic corporations of like character. *Equitable Bldg., etc., Assoc. v. King*, (Fla. 1904) 37 So. Rep. 181.

In *Iowa* the courts, as an exercise of comity, will not enforce a contract resulting from the transaction of business by a foreign building and loan association within the state violating the public policy thereof. *Henni v. Fidelity Bldg., etc., Assoc.*, 61 Neb. 744, 87 Am. St. Rep. 519.

See also *Welling v. Eastern Bldg., etc., Assoc.*, 56 S. Car. 280.

**When Receiver Has Been Appointed.** — But where a foreign building and loan association doing business in the state has become insolvent and a receiver has been appointed therefor to wind up its affairs, its failure to comply with the laws relative to its right or admission to transact business within the state does not affect or defeat the right of such receiver to institute and maintain any suit necessary to the winding up of its affairs. *Clarke v. Darr*, 156 Ind. 692. Compare *U. S. Savings, etc., Co. v. Shain*, 8 N. Dak. 136, wherein it was held that a note and mortgage executed to a foreign building and loan association can be enforced in the courts of that state, notwithstanding the fact that the association had not complied with the statutes prescribing the terms upon which foreign corporations might do business in that jurisdiction.

In *Maine*, by statute (Laws 1897, c. 319, § 4), loan and building associations are placed under the charge, and to a certain extent under the control, of a public official, the bank examiner, and it is made his duty to see that the safeguards established by law are maintained and that the business of the association is law-

fully conducted. *Ulmer v. Falmouth Loan, etc., Assoc.*, 93 Me. 302.

In *Oregon* a certificate of the secretary of state is sufficient to establish, *prima facie*, the authority of a foreign association to do business in the state. *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319.

**Subjected to Supervision by Statute.** — *Huntington County Loan, etc., Assoc. v. Fulk*, 158 Ind. 113; *Home Bldg., etc., Assoc. v. Nolan*, 21 Mont. 205.

**1009. 3. Retroactive Legislation.** — In *Bosang v. Iron Belt Bldg., etc., Assoc.*, 96 Va. 119, it was held that the legislature has power in granting a new charter to validate and confirm previously made usurious contracts under the old charter granted by a corporation court. See also *Smoot v. People's Perpetual Loan, etc., Assoc.*, 95 Va. 686.

But see *Crabtree v. Old Dominion Bldg., etc., Assoc.*, 95 Va. 670, wherein it was held that an act of the legislature ratifying the charter of an association theretofore granted by a court is not retroactive in its effect on a usurious contract made prior to the passage of the act.

**Taint of Usury Removed by Curative Legislation.** — Building association loans tainted with usury may be legalized by curative acts of the general assembly. *Bacon v. Iowa Sav., etc., Assoc.*, 121 Iowa 449. See also *Edworthy v. Iowa Sav., etc., Assoc.*, 114 Iowa 220; *Iowa Sav., etc., Assoc. v. Selby*, 111 Iowa 402; *Iowa Sav., etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197; *Iowa Sav., etc., Assoc. v. Curtis*, 107 Iowa 504.

**Legislation Held Not Retroactive.** — *Washington Nat. Bldg., etc., Assoc. v. Fiske*, 20 App. Cas. (D. C.) 514; *Home Bldg., etc., Assoc. v. Nolan*, 21 Mont. 205; *Hale v. Stenger*, 22 Wash. 516.

*4. Miller v. Eastern Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 231. And see the title **STATUTES**.

**5. Charter a Contract.** — *Agnew v. Macomb Bldg., etc., Assoc.*, 197 Ill. 256; *Daley v. People's Bldg., etc., Assoc.*, 172 Mass. 533; *Louchheim v. Somerset Bldg., etc., Assoc.*, 25 Pa. Super. Ct. 325; *Williamson v. Eastern Bldg., etc., Assoc.*, 54 S. Car. 582, 71 Am. St. Rep. 822, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1009.

**Contract of Loan Interpreted by Charter, Statute, or By-law.** — Both the borrower and the association must conform to the charter, statute, and by-law which constitute a part of the contract, and where the contract is repugnant thereto it must yield and be interpreted according to the law of the charter, statute, or by-law. *Young v. Improvement Loan, etc., Assoc.*, 48 W. Va. 512; *Savage v. People's Bldg., etc., Assoc.*, 45 W. Va. 275. See also *Schell v. Equitable Loan, etc., Assoc.*, 150 Mo. 103; *Bertche v. Equitable Loan, etc., Assoc.*, 147 Mo. 343, 71 Am. St. Rep. 571; *People's Bldg., etc., Assoc. v. Tinsley*, 96 Va. 322.

**6. Curative Acts.** — *Deitch v. Staub*, (C. C.



**1010.** Requisites of Valid Articles. — See note 3.

**1011.** 4. When Proof of Corporate Character Necessary — *b. ESTOPPEL TO DENY CORPORATE CHARACTER.* — See note 2.

Member Mortgage. — See note 3.

Estoppel of One Who Has Dealt with Association. — See note 6.

**1012.** 5. Taxation. — See note 2.

Basis of Taxation. — See notes 6, 7.

III. OFFICERS AND AGENTS — 1. In General. — See note 9.

**1013.** Are Quasi Trustees. — See note 4.

Compensation. — See note 5.

**1014.** 2. Authority. — See notes 1, 2, 3, 4, 5.

A.) 115 Fed. Rep. 309; *Swope v. Jordan*, 107 Tenn. 166.

**1010.** 3. Cannot Affect Vested Rights. — *Kelly v. People's Bldg., etc., Assoc.*, 65 Ark. 574.

**1011.** 2. Estoppel. — *Manship v. New South Bldg., etc., Assoc.*, 110 Fed. Rep. 845.

3. Member Mortgage. — *Deitch v. Staub*, (C. C. A.) 115 Fed. Rep. 309; *Manship v. New South Bldg., etc., Assoc.*, 110 Fed. Rep. 845; *Collins v. Citizens' Bank, etc., Co.*, 121 Ga. 513; *Iowa Sav., etc., Assoc. v. Curtis*, 107 Iowa 504; *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319.

A Member Is Estopped to deny the right of an association which has succeeded to the assets and assumed the liabilities of a former association, to which new corporation his mortgage had been given by reason of the expiration of the charter of the old association, where the stockholders, including such member, have treated the new corporation as the successor of the former body. *Helping Hand Bldg., etc., Assoc. v. Samuelson*, 21 Pa. Super. Ct. 134.

One who has entered into a contract with an association assuming to act as a corporation is not permitted, when sued on such contract, to question the capacity of such body to contract or to sue. *Equitable Bldg., etc., Assoc. v. Bidwell*, 60 Neb. 169.

6. *Eagle Sav., etc., Co. v. Samuels*, 43 N. Y. App. Div. 386.

**1012.** 2. Taxation. — *Com. v. Licking Valley Bldg. Assoc.*, No. 3, (Ky. 1904) 82 S. W. Rep. 435; *Albany Mut. Bldg. Assoc. v. Laramie*, 10 Wyo. 54, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1012.

6. Tax on Capital Stock. — *Com. v. Licking Valley Bldg. Assoc.*, No. 3, (Ky. 1904) 82 S. W. Rep. 435.

In Indiana the stock in building and loan associations, whether paid up, running, or otherwise, is taxable at its true cash value. *State v. Workingmen's Bldg., etc., Fund, etc., Assoc.*, 152 Ind. 278. See also *State v. Real Estate Bldg., etc., Assoc.*, 151 Ind. 502; *Harn v. Woodard*, 151 Ind. 132.

7. Tax on Mortgages. — *Albany Mut. Bldg. Assoc. v. Laramie*, 10 Wyo. 54. See also *Georgia State Bldg., etc., Assoc. v. Savannah*, 109 Ga. 67; *Atlanta Nat. Bldg., etc., Assoc. v. Stewart*, 109 Ga. 80; *Territory v. Co-operative Bldg., etc., Assoc.*, 10 N. Mex. 337.

9. The Business of Lending Money may be vested in the board of directors, who are responsible to the body of members for their acts. *Bol-*

*man v. Citizens' Loan, etc., Assoc.*, 114 Wis. 217.

Deposing Directors. — Shareholders cannot depose a board of directors whose term of service has not expired. *Powers v. Blue Grass Bldg., etc., Assoc.*, 86 Fed. Rep. 705.

**1013.** 4. Officers Are Quasi Trustees. — *Young v. Stevenson*, 81 Ill. App. 40, affirmed 180 Ill. 608, 72 Am. St. Rep. 236.

Directors Held to Be Trustees for Creditors and Shareholders. — *Ferrell v. Evans*, 25 Mont. 444.

5. Compensation. — *Equitable Bldg., etc., Soc. v. Fritze*, 83 Ill. App. 18, affirmed 186 Ill. 183; *Myers v. Equitable Bldg., etc., Soc.*, 92 Ill. App. 27.

In Illinois no officer except the secretary of a building and loan association can be allowed pay from it for services, and a contract to pay therefore is *ultra vires* and against public policy, although such association has received the benefit of such services. *Eddy v. Barry*, 99 Ill. App. 266. See also *Equitable Bldg., etc., Soc. v. Fritze*, 83 Ill. App. 18, affirmed 186 Ill. 183.

Right to Compel Repayment of Salaries. — Nonassenting members of an association have certain rights of action against the executive officers thereof, where losses of the association are due to deficits arising from the illegal action of such officers or directors in the payment of salaries to themselves in violation of the articles of association, to compel the repayment of such salaries. *People v. Empire Loan, etc., Co.*, 15 N. Y. App. Div. 69.

**1014.** 1. Acts of Officers Binding. — *Towle v. American Bldg., etc., Co.*, 78 Fed. Rep. 688; *Prairie State Loan, etc., Assoc. v. Nubling*, 170 Ill. 240, 62 Am. St. Rep. 377, affirming 64 Ill. App. 329; *Fidelity Bldg., etc., Union v. Fidelity Bldg., etc., Union*, 27 Ind. App. 325; *Farmers', etc., Bank v. Loyd*, 89 Mo. App. 262; *Latimer v. Equitable Loan, etc., Assoc.*, 78 Mo. App. 463; *Tyler v. Anglo-American Sav., etc., Assoc.*, 30 N. Y. App. Div. 404; *McMullen v. Griggs*, 23 Ohio Cir. Ct. 417; *Kesting v. Donohue*, 5 Ohio Dec. 153; *Cunningham v. Mutual Bldg., etc., Assoc.*, 6 Pa. Dist. 99.

2. Estoppel. — *Prairie State Loan, etc., Assoc. v. Gorrie*, 167 Ill. 414, affirming 64 Ill. App. 325; *Shinkle v. Knoll*, 99 Ill. App. 274; *Iowa Business Men's Bldg., etc., Assoc. v. Berlau*, (Iowa 1904) 98 N. W. Rep. 766; *Williams v. Verity*, 98 Mo. App. 654; *People's Bldg., etc., Assoc. v. Platz*, 59 N. Y. App. Div. 275; *American Bldg., etc., Assoc. v. Daugherty*, 27 Tex. Civ. App. 430.

Liability of Association for False Representation of Agents. — *Hartman v. International Bldg.,*

**1015.** Acting Beyond Authority. — See note 1.

**3. Duties and Liabilities.** — See notes 4, 8.

**1016.** Enforcement of Liability. — See note 6.

**1017.** IV. RIGHTS AND POWERS — 1. In General — Powers Dependent on Charter. — See note 5.

**1018.** Power to Contract, Generally. — See note 2.

etc., Assoc., 28 Ind. App. 65; *Stoddard v. Saginaw Bldg., etc., Assoc.*, (Mich. 1904) 101 N. W. Rep. 50; *Com. v. Anchor Bldg., etc., Assoc.*, 20 Pa. Super. Ct. 101. See also *Guaranty Sav., etc., Assoc. v. Simko*, (Ind. App. 1904) 71 N. E. Rep. 906.

**False Representation Ground for Rescission of Contract.** — *Neuman v. New York Mut. Sav., etc., Assoc.*, 17 N. Y. App. Div. 72, reversed on other grounds, 164 N. Y. 248.

**Declarations of Officer Competent as Evidence Against Association.** — *Fowles v. Aetna Loan Co.*, 86 Mo. App. 103.

**When Association Not Estopped by Oral Statements of Officers.** — "Oral or printed statements made by the officers or agents of a building and loan association in direct contradiction of the by-laws, when the by-laws are made a part of the contract by reference thereto, or when such declarations or statements are in direct contradiction of the plain language of the contract itself, whether relied upon by the person to whom made or not, cannot be made the basis of an estoppel, unless such representations are fraudulently made." *Noah v. German-American Bldg., Assoc.*, 31 Ind. App. 504, *distinguishing* *Hartman v. International Bldg., etc., Assoc.*, 28 Ind. App. 65.

**1014. 3. Must Be Acting as Officer.** — *Towle v. American Bldg., etc., Co.*, 78 Fed. Rep. 688; *Columbia Bldg., etc., Assoc. v. Lyttle*, 16 Colo. App. 423; *National Bldg. Assoc. v. Quin*, 120 Ga. 358; *Huntington County Loan, etc., Assoc. v. Emerick*, 23 Ind. App. 175; *Hasselmeyer v. Avondale Loan, etc., Co.*, 10 Ohio Dec. 570; *McMullen v. Griggs*, 23 Ohio Cir. Ct. 417; *Merchantville Bldg., etc., Assoc. v. Zane*, (N. J. 1897) 38 Atl. Rep. 420; *Mutual Bldg., etc., Assoc. v. Johnson*, 7 Pa. Dist. 729; *Erthal v. Glueck*, 10 Pa. Super. Ct. 402; *Williamson v. Eastern Bldg., etc., Assoc.*, 54 S. Car. 582, 71 Am. St. Rep. 822; *Lane v. Southern Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 54 S. W. Rep. 329.

**4. Ratification.** — *Marion Trust Co. v. Crescent Loan, etc., Co.*, 27 Ind. App. 451, 87 Am. St. Rep. 257; *McMullen v. Griggs*, 23 Ohio Cir. Ct. 417.

**5. Notice to Officer.** — *Inter-State Bldg., etc., Assoc. v. Ayres*, 71 Ill. App. 329, *affirmed* 177 Ill. 9.

**1015. 1. Cannot Change Scope of Business.** — *Towle v. American Bldg., etc., Co.*, 78 Fed. Rep. 688; *Columbia Bldg., etc., Assoc. v. Lyttle*, 16 Colo. App. 423; *Christopher Columbus Bldg., etc., Assoc. v. Kriete*, 192 Ill. 128, *modifying* 87 Ill. App. 51; *Williamson v. Eastern Bldg., etc., Assoc.*, 54 S. Car. 582, 71 Am. St. Rep. 822.

**Misconduct of Officers in conducting the affairs of the association cannot change its character or release a member from a contract obligation.** *Smith v. Southern Bldg., etc., Assoc.*, 111 Ga. 811.

**Matter of Opinion as Affecting the Contract.** — An opinion expressed, even if not realized, does

not vitiate a contract with the association. *Beyer v. National Bldg., etc., Assoc.*, 131 Ala. 369. See also *Gale v. Southern Bldg., etc., Assoc.*, 117 Fed. Rep. 732; *Motes v. People's Bldg., etc., Assoc.*, 137 Ala. 369; *Johnson v. National Bldg., etc., Assoc.*, 125 Ala. 465, 82 Am. St. Rep. 257; *Hough v. Maupin*, (Ark. 1905) 84 S. W. Rep. 717; *Cantwell v. Welch*, 187 Ill. 275; *Wayne International Bldg., etc., Assoc. v. Gilmore*, (Ind. App. 1904) 72 N. E. Rep. 190; *No. 5 Fidelity Bldg., etc., Union v. Driver*, 31 Ind. App. 691; *Noah v. German-American Bldg. Assoc.*, 31 Ind. App. 504; *Union Mut. Bldg., etc., Assoc. v. Aichele*, 28 Ind. App. 69; *Meyers v. Alpena Loan, etc., Assoc.*, 117 Mich. 389; *Interstate Bldg., etc., Assoc. v. Hunter*, (Tex. Civ. App. 1899) 51 S. W. Rep. 530; *Campbell v. Eastern Bldg., etc., Assoc.*, 98 Va. 729.

**4. Mistakes of Judgment.** — *Com. v. Anchor Bldg., etc., Assoc.*, 10 Pa. Dist. 167, *affirmed* 20 Pa. Super. Ct. 101; *Eaton v. Eastern Bldg., etc., Assoc.*, 7 Pa. Dist. 440.

**6. Strict integrity, attendance at stated periods for the purpose of investing and loaning the money paid by the stockholders, reasonable skill, time, and diligence in the management of the financial affairs of the association, and care in, and according to, the duties imposed and the usages of the business, are the requisites to escape liability on the part of directors.** *Com. v. Anchor Bldg., etc., Assoc.*, 10 Pa. Dist. 167, *affirmed* 20 Pa. Super. Ct. 101.

**1016. 6. Embezzlement.** — An association is liable to its members for payments embezzled by its secretary. *Prairie State Loan, etc., Assoc. v. Nubling*, 170 Ill. 240, 62 Am. St. Rep. 377, *affirming* 64 Ill. App. 329.

**1017. 5. No Authority to Pledge Corporate Assets for Payment of Preferred Stock.** — An association organized under and subject to the provisions of Rev. Stat. Mo., art. 9, c. 42, has no authority to pledge corporate assets for the retirement or payment of a certain class of its stock, in preference to others. *Latimer v. Equitable Loan, etc., Co.*, 81 Fed. Rep. 776. See also *Sumrall v. Commercial Bldg. Trust*, 106 Ky. 260, 90 Am. St. Rep. 223.

**1018. 2. May Negotiate Notes and Mortgages of Association.** — *Bowby v. Kline*, 28 Ind. App. 659.

In Washington, under the provisions of Laws 1889-90, p. 56 (Ball. Code, § 4395 *et seq.*), notes and mortgages given by a stockholder to an association are nonnegotiable and nonassignable, but must be deposited with the state auditor, or with a duly chartered trust company approved by the auditor, as a trust fund for the benefit of all stockholders. *Trowbridge v. Hamilton*, 18 Wash. 686. But this rule does not apply to notes and mortgages taken by the association prior to the passage of the Act of 1880-90. *Hale v. Stenger*, 22 Wash. 516.

**May Not Do a Banking Business.** — *Columbus*

- 1018.** Power to Compromise. — See note 3.  
 Power to Make Assignment for Creditors. — See notes 4, 5.  
 Ultra Vires Acts. — See notes 6, 7.
- 1019.** See notes 1, 2, 4.  
 2. To Make By-laws. — See notes 5, 6, 7, 8.
- 1020.** Enactment and Construction. — See notes 2, 3, 4, 5.

Bldg., etc., *Assoc. v. Kriete*, 87 Ill. App. 51, reversed on another point 192 Ill. 128; *Stefan v. Brennan*, 92 Ill. App. 291.

**1018. 3. Compromises.** — *Kelso v. Oak Park Bldg., etc., Assoc.*, 99 Ill. App. 123.

**4. Assignment in Insolvency.** — *U. S. Building, etc., Assoc. v. Brunner*, (Ky. 1901) 64 S. W. Rep. 996; *Woerheide v. Johnston*, 81 Mo. App. 193.

**5.** Directors cannot make a valid assignment for the benefit of creditors without authority from the stockholders, when the association is solvent, either under the general assignment statute of *Kentucky*, or at common law. *Powers v. Blue Grass Bldg., etc., Assoc.*, 86 Fed. Rep. 705.

**6. Ultra Vires.** — *Fritze v. Equitable Bldg., etc., Soc.*, 186 Ill. 183; *Marion Trust Co. v. Crescent Loan, etc., Co.*, 27 Ind. App. 451, 87 Am. St. Rep. 257, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1018; *Miller v. Eastern Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 231.

**7. Contract Executed on Side of Corporation — United States.** — *U. S. Savings, etc., Co. v. Convent of St. Rose*, (C. C. A.) 133 Fed. Rep. 354; *Pacific States Sav., etc., Co. v. Green*, (C. C. A.) 123 Fed. Rep. 43; *Bowman v. Foster, etc., Hardware Co.*, 94 Fed. Rep. 592.

*California.* — *Bay City Bldg., etc., Assoc. v. Broad*, 136 Cal. 525.

*Georgia.* — *Reynolds v. Georgia State Bldg., etc., Assoc.*, 102 Ga. 126.

*Illinois.* — *Lurton v. Jacksonville Loan, etc., Assoc.*, 187 Ill. 141, affirming 87 Ill. App. 395.

*Indiana.* — *Noah v. German-American Bldg. Assoc.*, 31 Ind. App. 504; No. 2 Fidelity Bldg., etc., Union v. No. 4 Fidelity Bldg., etc., Union, 27 Ind. App. 325.

*Michigan.* — *Menominee Loan, etc., Assoc. v. Lovell*, 131 Mich. 449.

*Missouri.* — *Farmers, etc., Sav. Co. v. McCabe*, 73 Mo. App. 551.

*New York.* — *Coggeshall v. Sussman*, (County Ct.) 41 Misc. (N. Y.) 384.

**1019. 1. United States.** — *Eastern Bldg., etc., Assoc. v. Williamson*, 189 U. S. 122, affirming 62 S. Car. 390.

*Illinois.* — *Fritze v. Equitable Bldg., etc., Soc.*, 186 Ill. 183; *National Home Bldg., etc., Assoc. v. Home Sav. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245.

*Indiana.* — *International Bldg., etc., Assoc. v. Bratton*, 24 Ind. App. 654.

*Iowa.* — *Field v. Eastern Bldg., etc., Assoc.*, 117 Iowa 185.

*Michigan.* — *Peterson v. People's Bldg., etc., Assoc.*, 124 Mich. 573.

*Missouri.* — *Williams v. Verity*, 98 Mo. App. 654.

*Montana.* — *Floyd-Jones v. Anderson*, 30 Mont. 351.

*New York.* — *Vought v. Eastern Bldg., etc., Assoc.*, 172 N. Y. 508, 92 Am. St. Rep. 761;

*Dickinson v. Continental Trust Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 489; *Mutual Ben. Loan, etc., Co. v. Lynch*, 54 N. Y. App. Div. 559, reversing (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 499.

*North Dakota.* — *Clarke v. Olson*, 9 N. Dak. 364.

*South Carolina.* — *Williamson v. Eastern Bldg., etc., Assoc.*, 54 S. Car. 582, 71 Am. St. Rep. 822.

*Tennessee.* — *Miller v. Eastern Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 231.

**2. Executory Contract.** — *Eastern Bldg., etc., Assoc. v. Williamson*, 189 U. S. 122, affirming 62 S. Car. 390; *Vought v. Eastern Bldg., etc., Assoc.*, 172 N. Y. 508, 92 Am. St. Rep. 761; *Miller v. Eastern Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 231.

**4. Contrary to Public Policy.** — *National Home Bldg., etc., Assoc. v. Home Sav. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, reversing 79 Ill. App. 303.

**5. Power to Make By-laws.** — *Williams v. Dominion Permanent Loan Co.*, 1 Ont. L. Rep. 532; *Interstate Bldg., etc., Assoc. v. Wooten*, 113 Ga. 247; *Maynard v. Interstate Bldg., etc., Assoc.*, 112 Ga. 443; *Crittenden v. Southern Home Bldg., etc., Assoc.*, 111 Ga. 266; *Interstate Bldg., etc., Assoc. v. Hafter*, 76 Miss. 770; *Stilwell v. People's Bldg., etc., Assoc.*, 19 Utah 257; *Eastern Bldg., etc., Assoc. v. Snyder*, 98 Va. 710. See also the title BY-LAWS.

**6. Must Be Reasonable.** — *Ebaugh v. Eastern Bldg., etc., Assoc.*, 58 S. Car. 83; *Stilwell v. People's Bldg., etc., Assoc.*, 19 Utah 257. See also the title BY-LAWS.

A by-law which requires a withdrawing member to take scrip of the association payable at the time the stock of such withdrawing member would have matured, if he had continued his membership, is reasonable and valid. *Hundermark v. New South Bldg., etc., Assoc.*, (Miss. 1901) 29 So. Rep. 528.

**7. Must Be Legal.** — *Collins v. Cobe*, 202 Ill. 469, affirming 104 Ill. App. 142; *Stilwell v. People's Bldg., etc., Assoc.*, 19 Utah 257; *Trowbridge v. Hamilton*, 18 Wash. 686. See also the title BY-LAWS.

In *Illinois*, under Act of July, 1879 (Laws 1879), pp. 83, 84-87, no power is conferred upon building and loan associations to amend their by-laws, which are a part of their articles of incorporation, but the act expressly excludes such power; nor can the association nullify the statute by embodying in the by-laws themselves the right at some future time to make amendments thereto. *Fritze v. Equitable Bldg., etc., Soc.*, 186 Ill. 183.

**8. Must Be Consistent with Charter.** — *Interstate Bldg., etc., Assoc. v. Wooten*, 113 Ga. 247; *Stilwell v. People's Bldg., etc., Assoc.*, 19 Utah 257; *Eastern Bldg., etc., Assoc. v. Snyder*, 98 Va. 710. See also the title BY-LAWS.

**1020. 2. By-laws Binding by Estoppel.**

**1020.** Vested Rights Protected. — See note 6.

3. To Loan Money — To Members. — See note 7.

**1022.** 4. To Borrow Money — *a.* THE RIGHT TO BORROW — [(1*a*) Rule in Canada. — See note 4*a*.]

(2) Rule in the United States. — See note 5.

**1023.** Power to Borrow Implied. — See note 1.

Existence of Such Power Denied. — See note 2.

*b.* PURPOSES OF THE BORROWING. — See notes 6, 7.

**1024.** [In Canada. — See note 2*a*.]

*c.* SECURITY. — See note 3.

*Collins v. Cobe*, 202 Ill. 469, affirming 104 Ill. App. 142.

**1020.** 3. Baltimore Bldg., etc., Assoc. v. Powhatan Imp. Co., 87 Md. 59; *Miller v. Eastern Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 231. See also the title BY-LAWS.

4. Binding on Members — *United States*. — *Columbia Bldg., etc., Assoc. v. Junquist*, 111 Fed. Rep. 645.

*Alabama*. — *Johnson v. National Bldg., etc., Assoc.*, 125 Ala. 465, 82 Am. St. Rep. 257.

*California*. — *Provident Mut. Bldg.-Loan Assoc. v. Davis*, 143 Cal. 253.

*Colorado*. — *People's Bldg., etc., Assoc. v. Purdy*, (Colo. App. 1904) 78 Pac. Rep. 465.

*Georgia*. — *Morgan v. Interstate Bldg., etc., Assoc.*, 108 Ga. 185.

*Illinois*. — *Agnew v. Macomb Bldg., etc., Assoc.*, 1917 Ill. 256; *Sullivan v. Spaniol*, 78 Ill. App. 125; *Domestic Bldg. Assoc. v. Jourdain*, 110 Ill. App. 197.

*Iowa*. — *Building Sav., etc., Assoc. v. Froelich*, 110 Iowa 244.

*Missouri*. — *Bertche v. Equitable Loan, etc., Assoc.*, 147 Mo. 343, 71 Am. St. Rep. 571.

*Pennsylvania*. — *Louchheim v. Somerset Bldg., etc., Assoc.*, 25 Pa. Super. Ct. 325.

*Tennessee*. — *Miller v. Eastern Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 231.

*Utah*. — *Stilwell v. People's Bldg., etc., Assoc.*, 19 Utah 257.

*Virginia*. — *Eastern Bldg., etc., Assoc. v. Snyder*, 98 Va. 710; *Campbell v. Eastern Bldg., etc., Assoc.*, 98 Va. 729.

*Canada*. — *Lee v. Canadian Mut. Loan, etc., Co.*, 5 Ont. L. Rep. 471, affirmed 34 Can. Sup. Ct. 224; *Williams v. Dominion Permanent Loan Co.*, 1 Ont. L. Rep. 532.

See also the title BY-LAWS.

5. Notice to Members Unnecessary. — *Bell v. Southern Home Bldg., etc., Assoc.*, 140 Ala. 371; *People's Bldg., etc., Assoc. v. Purdy*, (Colo. App. 1904) 78 Pac. Rep. 465; *Columbia Bldg., etc., Assoc. v. Lyttle*, 16 Colo. App. 423; *Wayne International Bldg., etc., Assoc. v. Skelton*, 27 Ind. App. 624; *Bertche v. Equitable Loan, etc., Assoc.*, 147 Mo. 343, 71 Am. St. Rep. 571; *Setliff v. North Nashville Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 39 S. W. Rep. 546; *Stilwell v. People's Bldg., etc., Assoc.*, 19 Utah 257; *Eastern Bldg., etc., Assoc. v. Snyder*, 98 Va. 710.

Not Entitled to Notice of Repeal of By-law. — *Western Realty, etc., Co. v. Haase*, 75 Conn. 436.

6. Vested Rights Protected — *Arkansas*. — *Kelly v. People's Bldg., etc., Assoc.*, 65 Ark. 574.

*Georgia*. — *Interstate Bldg., etc., Assoc. v. Western*, 113 Ga. 347.

*Iowa*. — *Field v. Eastern Bldg., etc., Assoc.*, 117 Iowa 185.

*South Carolina*. — *Interstate Bldg., etc., Assoc. v. Ouzts*, 54 S. Car. 214.

*Utah*. — *Stilwell v. People's Bldg., etc., Assoc.*, 19 Utah 257.

*Virginia*. — *Eastern Bldg., etc., Assoc. v. Snyder*, 98 Va. 710.

*West Virginia*. — *Savage v. People's Bldg., etc., Assoc.*, 45 W. Va. 275.

*Canada*. — *Lee v. Canadian Mut. Loan, etc., Co.*, 5 Ont. L. Rep. 471, affirmed 34 Can. Sup. Ct. 224.

See also the title BY-LAWS.

7. Loan to Members. — *Hale v. Phillips*, 68 Ark. 382.

**1022.** 4*a*. Upper Canada Act (C. S. U. C., c. 53, § 38) expressly recognizes the right of a building and loan society to borrow money, if authorized by its rules to do so. *Re Farmers' Loan, etc., Co.*, 30 Ont. 337.

5. Power to Borrow Conferred by Statute. — *Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652 (stating the rule in *Tennessee*); *McNamara v. Oakland Bldg., etc., Assoc.*, 131 Cal. 336.

May Borrow for the Purpose of Relending to Members. — *Maury County Bldg., etc., Assoc. v. Cowley*, (Tenn. Ch. 1899) 52 S. W. Rep. 312.

**1023.** 1. Implied Power to Borrow. — *Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1023; *Manship v. New South Bldg., etc., Assoc.*, 110 Fed. Rep. 845; *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1023; *Marion Trust Co. v. Crescent Loan, etc., Co.*, 27 Ind. App. 451, 87 Am. St. Rep. 257; *Woerheide v. Johnston*, 81 Mo. App. 193, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1023.

2. Columbus Bldg., etc., Assoc. v. Kriete, 87 Ill. App. 51, reversed on another point 192 Ill. 128; *Forwood v. Eubank*, 106 Ky. 291.

6. Purpose of Borrowing. — *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814; *Powell's Appeal*, 93 Mo. App. 296.

7. Borrowing to Pay Off Maturing Shares. — *Powell's Appeal*, 93 Mo. App. 296.

**1024.** 2*a*. In Canada it has been held that a building and loan company, if authorized by its rules to do so, may borrow money for the purposes of the company, and may charge or pledge its assets for the amount borrowed. *Re Farmers' Loan, etc., Co.*, 30 Ont. 337.

3. Security. — *Re Farmers' Loan, etc., Co.*, 30 Ont. 337. As to the power to assign notes and mortgages generally, see *supra*, this title, 1018, 2.

- 1024.** *d.* UNAUTHORIZED BORROWING. — See note 7.  
**1025.** 5. To Hold Land. — See notes 4, 6.  
**1026.** Rights under Statutes. — See notes 2, 4.  
 6. Effect of Departure from Proper Functions. — See note 6.  
 V. MEMBERSHIP — 1. Acquisition. — See note 9.  
**1027.** Assignee of Mortgagor. — See note 3.  
 2. Qualifications. — See note 7.  
 Persons under Disability. — See note 8.  
**1028.** Construction of Enabling Statute. — See note 1.  
 Married Woman Mortgagor. — See note 4.  
 3. Proof of Membership — *b.* ESTOPPEL. — See note 8.  
**1029.** Mortgagor Estopped. — See note 1.  
 Association Estopped. — See note 2.

**1024.** 7. Estoppel. — *Woerheide v. Johnston*, 81 Mo. App. 193; *Eaton v. Eastern Bldg., etc., Assoc.*, 7 Pa. Dist. 440.

**1025.** 4. Holding Land. — *National Home Bldg., etc., Assoc. v. Home Sav. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, reversing 79 Ill. App. 303.

6. Redeeming Prior Mortgage. — *Manhattan, etc., Sav., etc., Assoc. v. Massarelli*, (N. J. 1899) 42 Atl. Rep. 284.

**1026.** 2. Statutes. — *McNamara v. Oakland Bldg., etc., Assoc.*, 131 Cal. 336.

4. Protection from Loss on Loans. — *National Home Bldg., etc., Assoc. v. Home Sav. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, reversing 79 Ill. App. 303; *Kelso v. Oak Park Bldg., etc., Assoc.*, 99 Ill. App. 123; *Musial v. Kosciuszko Bldg., etc., Assoc.*, 80 Ill. App. 464.

6. The fact that some of the by-laws of a building association purport to authorize it to engage in transactions outside of the scope of its legitimate business does not destroy the character of the association; it not appearing that there was any attempt to operate under such by-laws. *Smith v. Southern Bldg., etc., Assoc.*, 111 Ga. 811.

Nor does the fact that there are different classes of stock, with different rights and liabilities, necessarily destroy the company's character as a building association. *Rooney v. Southern Bldg., etc., Assoc.*, 119 Ga. 941.

Misconduct of Officers. — Mere misconduct of the officers in managing the affairs of the association could not change its character or release a member from a contract obligation. *Burns v. Equitable Bldg., etc., Assoc.*, 108 Ga. 181.

9. Membership, How Acquired. — *Reynolds v. Georgia State Bldg., etc., Assoc.*, 102 Ga. 126; *Royal Trust Co. v. Culver*, 87 Ill. App. 630; *Ottawa Mut. Loan, etc., Assoc. v. Merriman*, 67 Kan. 779; *Baker v. U. S. Savings, etc., Assoc.*, 23 R. I. 243; *Setliff v. North Nashville Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 39 S. W. Rep. 546; *Albany Mut. Bldg. Assoc. v. Laramie*, 10 Wyo. 54.

A Purchaser of Stock who secures its transfer to him on the books of the association steps into the shoes of the transferor and assumes all the responsibility of a stockholder, but if the transfer is made without his knowledge or consent, and without his having purchased the stock or assumed the position of a stockholder, the transfer imposes on him none of the liabilities of a stockholder. *Manor v. Aldrich*, (C. C. A.) 126 Fed. Rep. 934.

Cannot Assert Membership Based on Forged Certificate of Shares. — *Columbia Council No. 77 v. Belmar Bldg., etc., Assoc.*, (N. J. 1903) 54 Atl. Rep. 142.

**1027.** 2. In *North Texas Bldg., etc., Assoc. v. Hay*, 23 Tex. Civ. App. 98, it was held that a purchaser of property of a member, pledged to an association, may become a stockholder by substitution, though there be no transfer of stock to him on the books of the association, by assuming his vendor's obligation to the association as part of the purchase price.

7. Purpose. — *Reynolds v. Georgia State Bldg., etc., Assoc.*, 102 Ga. 126; *Setliff v. North Nashville Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 39 S. W. Rep. 546; *Boleman v. Citizens' Loan, etc., Assoc.*, 114 Wis. 217.

8. Enabling Statutes — *England*. — The Building Society Act of 1874, § 38, enables minors to become members of such society. *Thurstan v. Nottingham Permanent Ben. Bldg. Soc.*, (1902) 1 Ch. 1, 86 L. T. N. S. 35.

**1028.** 1. *Thurstan v. Nottingham Permanent Ben. Bldg. Soc.*, (1902) 1 Ch. 1, 86 L. T. N. S. 35.

4. Mortgages of Married Women. — It has been held that a mortgage executed by a husband and wife, reciting that the wife was a member and stockholder in an association and had received an advance of shares for which she was liable, was legal, valid, binding, and enforceable. *Maury County Bldg., etc., Assoc. v. Cowley*, (Tenn. Ch. 1899) 52 S. W. Rep. 312. See also *Hughes v. Farmers' Sav., etc., Assoc.*, (Tenn. Ch. 1897) 46 S. W. Rep. 362.

Under Rev. Stat. Fla. (1892), § 2208, the bond of a married woman and a mortgage given by her on her separate real estate to secure a loan from a building and loan association must be executed by the husband as well as by the wife in order to render the same valid for any purpose, and a bond so given executed by the wife alone is void. *Equitable Bldg., etc., Assoc. v. King*, (Fla. 1904) 37 So. Rep. 181.

8. Estoppel. — *Bowman v. Foster, etc., Hardware Co.*, 94 Fed. Rep. 592; *Stanley v. Verity*, 98 Mo. App. 632; *Western Loan, etc., Co. v. Garff*, 27 Utah 211.

**1029.** 1. Mortgagor Estopped. — *Setliff v. North Nashville Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 39 S. W. Rep. 546; *Boleman v. Citizens' Loan, etc., Assoc.*, 114 Wis. 217; *Provident Loan, etc., Assoc. v. Carter*, 107 Wis. 383.

2. When Association Not Estopped. — In *Columbia Council No. 77 v. Belmar Bldg., etc.,*

**1029.** 4. Termination — *a.* GENERALLY. — See note 3.

*b.* DEATH OF MEMBER. — See note 6.

**1030.** Death of Borrowing Member. — See note 1.

**VI. STOCK — 2. Kinds — Prepaid and Paid-up Stock.** — See note 5.

**1031.** See note 1.

Preferred Stock. — See note 2.

Assoc., (N. J. 1903) 54 Atl. Rep. 142, it was held that an association was not estopped to deny membership by virtue of certificates of stock issued by its secretary, who had received payment of dues thereon without authority and turned the same over to the treasurer, who was the only officer authorized to receive payments of the association and who was without knowledge of the forged shares.

**1029.** 3. Termination — Dissolution of Association. — *Juergens v. Cobe*, 99 Ill. App. 156; *Leahy v. National Bldg., etc., Assoc.*, 100 Wis. 555, 69 Am. St. Rep. 945.

**On Forfeiture of Stock.** — *Armstrong v. Douglas Park Bldg. Assoc.*, 176 Ill. 298. See also *Juergens v. Cobe*, 99 Ill. App. 156.

**When Members Become Borrowers** their interest in the association is absolutely at an end except as to the contract as borrowers; their holding of stock is merely nominal. *Armstrong v. U. S. Building, etc., Assoc.*, 15 App. Cas. (D. C.) 1.

In *South Carolina* it has been held that when a person subscribes for stock and becomes a member of a building and loan association, and thereafter secures a loan therefrom and pledges his stock to secure its payment, he thereby practically ceases to be a member, and the new relation of debtor and creditor is established between himself and the association. *Bird v. Kendall*, 62 S. Car. 178.

**Termination of Membership** may result from failure of a borrowing member to pay. *Safety Bldg., etc., Co. v. Eeklar*, 106 Ky. 115. See also *Dowell v. Safety Bldg., etc., Co.*, (Ky. 1900) 54 S. W. Rep. 845.

**6. Effect of Death of Member.** — *In re Counties Conservative Permanent Ben. Bldg. Soc.*, (1900) 2 Ch. 819; *Shahan v. Shahan*, 48 W. Va. 477, 86 Am. St. Rep. 68, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029.

**1030.** 1. Death of Borrowing Member. — *Shahan v. Shahan*, 48 W. Va. 477, 86 Am. St. Rep. 68, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1030.

**5. Prepaid and Paid-up Stock — United States.** — *Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652; *Latimer v. Equitable Loan, etc., Co.*, 81 Fed. Rep. 776.

*Alabama.* — *Johnson v. National Bldg., etc., Assoc.*, 125 Ala. 465, 82 Am. St. Rep. 257, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1030; *Bell v. Southern Home Bldg., etc., Assoc.*, 140 Ala. 371.

*Florida.* — *Skinner v. Southern Home Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 67.

*Georgia.* — *Rooney v. Southern Bldg., etc., Assoc.*, 119 Ga. 941; *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814.

*Iowa.* — *Tootle v. Singer*, 118 Iowa 533.

*Missouri.* — *Hohenshell v. Home Sav., etc., Assoc.*, 140 Mo. 566.

*South Carolina.* — *Ebaugh v. Eastern Bldg., etc., Assoc.*, 58 S. Car. 83.

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**Fully Paid-up Stock an Anomaly.** — In *Cashen v. Southern Mut. Bldg., etc., Assoc.*, 114 Ga. 983, it was held that fully paid-up stock in building associations is really an anomaly, and that, strictly speaking, there can be no such thing, for the moment stock as such is matured — that is, brought to its par value — the holder thereof is entitled to his money, and his connection with the association is at an end.

In *Georgia*, when authorized by its charter, an association may issue instalment stock and also stock wholly or partly prepaid, where no preference is given to the holder over other classes, as such a system does not contravene the laws of building and loan associations as to mutuality. *Kirklin v. Atlas Sav., etc., Assoc.*, 107 Ga. 313.

The issuance by a building association of fully paid stock on which dividends are guaranteed, the holder having no further interest in the profits, is a borrowing of money by the association and does not contravene the principles of an association on the building and loan plan. *Cottingham v. Equitable Bldg., etc., Assoc.*, 114 Ga. 940. See also *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814.

In *Illinois* a building and loan association, such as is provided for by the statute, is not authorized under the statute, either directly or by implication, to issue paid-up stock. *Rhodes v. Missouri Sav., etc., Co.*, 173 Ill. 621.

In *Iowa* it has been held that the plan of issuing preferred stock, which is quite compatible with an ordinary business undertaking, is essentially destructive of that "mutuality, reciprocity, and equality" which constitute the controlling idea of building and loan transactions. *Winegardner v. Equitable Loan Co.*, 120 Iowa 485.

In *Michigan* the law does not authorize the issuance of paid-up shares, thus allowing investments which will bring rates of interest much in excess of those allowed by the usury laws. *National Mut. Bldg., etc., Assoc. v. Burch*, 124 Mich. 57, 83 Am. St. Rep. 311.

*New York.* — In *Dickinson v. Continental Trust Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 489, it was held that a building and loan association doing business on the mutual plan was not authorized to issue stock to which was attached an unconditional guaranty to pay a fixed dividend of six per cent. annually to the holder.

**No Interest on Paid-up Stock After Association Becomes Insolvent.** — Holders of paid-up stock are not entitled to interest on their shares after the association becomes insolvent. *Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652.

**1031.** 1. *Tootle v. Singer*, 118 Iowa 533.

2. **May Issue Preferred Stock.** — *Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652; *People v. New York Bldg. Loan Banking Co.*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 363, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1031, affirmed 96 N. Y. App. Div. 625.

**1031. 3. Transfer.**— See note 5.

**Remedies for Refusal to Transfer.**— See note 7.

**1032. 4. Lien of Association.**— See note 3.

**5. Maturity of Stock — Methods of Determining.**— See note 5.

**1034. VII. RIGHTS, DUTIES, AND LIABILITIES OF MEMBERS — 1. The Rights**

— *a. GENERALLY.*— See note 2.

*b. TO BE PAID ON MATURITY.*— See notes 6, 7.

In *Hohenshell v. Home Sav., etc., Assoc.*, 140 Mo. 566, it was held that the power to issue stock payable in instalments would seem to imply the power to issue prepaid stock, and there was no apparent reason why an association should not do so. But in the absence of charter provisions or by-laws authorizing such issue, or a contract to that effect, such association cannot issue preferred stock; that is, stock entitled to be first paid, after the payment of the general indebtedness, over other stock of the association.

**Preferred as to Dividends and Principal.**— The power to issue prepaid shares, preferred as to dividends and principal, is a valid exercise of the association *inter se*, and not so inconsistent with the purposes and objects of such association as to be regarded as illegal and void. *Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652.

**Definition.**— Preferred stock is an issue of shares on which a stated dividend from the corporate profits is to be paid before any distribution is made to the holders of common stock. *Winegardner v. Equitable Loan Co.*, 120 Iowa 485.

**Estoppel to Deny Validity of Transfer.**— An association is estopped to deny the validity of a transfer of stock as not having been made in accordance with its by-laws when it has recognized the validity of such transfer for purposes advantageous to itself. *Prairie State Loan, etc., Assoc. v. Gorrie*, 167 Ill. 414, *affirming* 64 Ill. App. 325.

**1031. 5. Transfer.**— In *Washington* the statutes, Ball. Annot. Codes and Stat., § 4264, neither contemplate nor require that the holder of stock which has been pledged shall notify the association that the stock has been pledged to him. The statute recognizes the pledgor as the sole owner of such stock and the only one authorized to represent it at the stockholders' meetings, and does not provide for a conditional transfer, as it is only absolute transfers which must be entered. Hence notice of the pledge is not necessary to the association, which will be held responsible in damages to the pledgee for a cancellation of the stock without requiring a return of the certificates thereof. *Brown v. Union Sav., etc., Assoc.*, 28 Wash. 657.

7. A purchaser of shares of the company's stock, without notice by a by-law providing for a lien thereon, by tendering the prescribed fee and a proper transfer, may compel the company to make the transfer on its books. *In re McKain, etc., Invest., etc., Co.*, 7 Ont. L. Rep. 241.

**1032. 3. Lien.**— A provision in the by-laws of an investment and savings company that all shares of stock shall, whether it is mentioned in the certificate of stock or not, be subject to a lien of the company to secure indebtedness for dues, loans, interest, and otherwise, is binding on the original borrower of the stock so long as he is the holder thereof; but the per-

chaser of such stock, taking it without notice of the provision, is not bound thereby. *In re McKain, etc., Invest., etc., Co.*, 7 Ont. L. Rep. 241.

**Lien on Stock for Unpaid Fines.**— By-laws may provide that all stock shall be subject to a lien for the payment of unpaid fines. *Fidelity Sav. Assoc. v. Bank of Commerce*, (Wyo. 1904) 75 Pac. Rep. 448.

**5. Cannot Be Fixed Arbitrarily**— *Alabama.*— *Richter v. Southern Bldg., etc., Assoc.*, 137 Ala. 521.

*Arkansas.*— *Hough v. Maupin*, (Ark. 1905) 84 S. W. Rep. 717.

*Colorado.*— *People's Bldg., etc., Assoc. v. Purdy*, (Colo. App. 1904) 78 Pac. Rep. 465; *Columbia Bldg., etc., Assoc. v. Lyttle*, 16 Colo. App. 423.

*Illinois.*— *King v. International Bldg., etc., Union*, 170 Ill. 135; *Cantwell v. Welch*, 187 Ill. 275, *affirming* 88 Ill. App. 247.

*Iowa.*— *Winegardner v. Equitable Loan Co.*, 120 Iowa 485.

*Massachusetts.*— *Daley v. People's Bldg., etc., Assoc.*, 172 Mass. 533.

*Missouri.*— *Gary v. Verity*, 101 Mo. App. 586; *Williams v. Verity*, 98 Mo. App. 654; *Caston v. Stafford*, 92 Mo. App. 182; *Schell v. Equitable Loan, etc., Assoc.*, 150 Mo. 103; *Bertche v. Equitable Loan, etc., Assoc.*, 147 Mo. 343, 71 Am. St. Rep. 571.

*New Jersey.*— *Campbell v. Perth Amboy Mut. Loan, etc., Assoc.*, 67 N. J. L. 71.

*New York.*— *Heslin v. Eastern Bldg., etc., Assoc.*, 61 N. Y. App. Div. 458.

*Virginia.*— *Campbell v. Eastern Bldg., etc., Assoc.*, 98 Va. 729.

**Contract to Mature Stock Within Limited Period, Void.**— *Province v. Interstate Bldg., etc., Assoc.*, 104 Tenn. 458. See also *Columbia Bldg., etc., Assoc. v. Junquist*, 111 Fed. Rep. 645; *Royal Trust Co. v. Culver*, 87 Ill. App. 630; *Miller v. Eastern Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 231. But see *Guarantee Sav., etc., Co. v. Alexander*, 96 Fed. Rep. 870, upholding a building and loan contract where the maturity of the contract was guaranteed to be within ten years from its date, and was not dependent on the business or the termination of the company.

**1034. 2. Miscellaneous Rights — Voting for Officers.**— Where the constitution of a building association provides that "each shareholder shall be entitled to one vote only, irrespective of the number of shares he or she may hold," a shareholder is for voting purposes the holder of a share which is a unit, and where a share is owned jointly by two or more persons each of such persons is not entitled to a vote. *Matter of Provident Bldg., etc., Assoc.*, 62 N. J. L. 590.

**6. Right to Be Paid on Maturity.**— *Hammerquist v. Pioneer Sav., etc., Co.*, 15 S. Dak. 70.

**1034.** The Right Absolute. — See note 9.

**1035.** Insolvency of Association. — See note 1.

c. TO RECEIVE A LOAN. — See note 2.

**2. Duties and Liabilities — To Contribute to Losses and Expenses. — See note 8.**

**1034. 7. No Right to Redemption Before Maturity.** — *Agnew v. Macomb Bldg., etc., Assoc.*, 197 Ill. 256.

**9. Remedy in Equity.** — Recovery of the value of matured shares in an association organized under the "act to encourage the establishment of mutual loan, homestead, and building associations" (Gen. Stat. N. J., p. 331, Revision approved April 9, 1875), cannot be had at law. The remedy of a shareholder, if the directors will not recognize his demand for distribution of the fund in which he is interested, is the Court of Chancery. *Campbell v. Perth Amboy Mut. Loan, etc., Assoc.*, 67 N. J. L. 71.

**1035. 1. Insolvency of Association — United States.** — *Miles v. New South Bldg., etc., Assoc.*, 111 Fed. Rep. 946; *Coltrane v. Baltimore Bldg., etc., Assoc.*, 110 Fed. Rep. 272; *Manorita v. Fidelity Trust, etc., Co.*, 101 Fed. Rep. 8; *McIlwaine v. Iseley*, 96 Fed. Rep. 62; *Lauer v. Covenant Bldg., etc., Assoc.*, 96 Fed. Rep. 775. *Arkansas.* — *Hale v. Phillips*, 68 Ark. 382.

*Illinois.* — *Christopher Columbus Bldg., etc., Assoc. v. Kriete*, 192 Ill. 128; *Gibson v. Safety Homestead, etc., Assoc.*, 170 Ill. 44; *Mutual Union Loan, etc., Assoc. v. Stolz*, 93 Ill. App. 164.

*Indiana.* — *MacMurray v. Sidwell*, 155 Ind. 560, 80 Am. St. Rep. 255; *Bingham v. Marion Trust Co.*, 27 Ind. App. 247; *Boice v. Rabb*, 24 Ind. App. 368.

*Kentucky.* — *Vinton v. National Bldg., etc., Assoc.*, 112 Ky. 622; *U. S. Building, etc., Assoc. v. Rowland*, 109 Ky. 737; *Safety Bldg., etc., Assoc. v. Montjoy*, 107 Ky. 473; *Peoples' Sav., etc., Assoc. v. Denton*, 106 Ky. 186; *Reddick v. U. S. Building, etc., Assoc.*, 106 Ky. 94.

*Nebraska.* — *Anselme v. American Sav., etc., Assoc.*, 63 Neb. 525, affirmed 66 Neb. 520.

*New Jersey.* — *Weir v. Granite State Provident Assoc.*, 56 N. J. Eq. 234; *Bettie v. Republic Sav., etc., Assoc.*, (N. J. 1904) 58 Atl. Rep. 1053.

*New York.* — *Hall v. Stowell*, 75 N. Y. App. Div. 21; *Breed v. Ruoff*, 54 N. Y. App. Div. 142, appeal dismissed 166 N. Y. 612; *Hannon v. Cobb*, 49 N. Y. App. Div. 480; *Roberts v. Murray*, (County Ct.) 40 Misc. (N. Y.) 339, affirmed 89 N. Y. App. Div. 616.

*North Carolina.* — *Williams v. Maxwell*, 123 N. Car. 586.

*North Dakota.* — *Hale v. Cairns*, 8 N. Dak. 145, 73 Am. St. Rep. 746.

*Ohio.* — *Demland v. Pioneer Sav., etc., Co.*, 11 Ohio Cir. Dec. 249; *Main St. Bldg., etc., Co. v. Richter*, 9 Ohio Cir. Dec. 74.

*Tennessee.* — *Southern Bldg., etc., Assoc. v. Easley*, (Tenn. Ch. 1900) 59 S. W. Rep. 440.

*Utah.* — *Western Loan, etc., Co. v. Desky*, 24 Utah 347.

**Liability for Losses.** — Members of an insolvent association are liable to contribute to losses in the same proportion in which they would be entitled to share in any profits. *In re Building Assoc.*, 5 Ohio Dec. 556.

**Losses Do Not Include Usury.** — Such losses do not include usury which the association has failed to collect or has refunded. *Safety Bldg., etc., Assoc. v. Montjoy*, 107 Ky. 473.

**Cannot Be Made to Account for Losses Occasioned by the Payment of Usurious Interest to Withdrawing Members.** — *Safety Bldg., etc., Assoc. v. Montjoy*, 107 Ky. 473; *Peoples' Sav., etc., Assoc. v. Denton*, 106 Ky. 186; *National Bldg., etc., Assoc. v. Bybee*, (Ky. 1899) 53 S. W. Rep. 670.

**2. Right to Receive Loan.** — *Myers v. Alpena Loan, etc., Assoc.*, 117 Mich. 389; *Demland v. Pioneer Sav., etc., Co.*, 11 Ohio Cir. Dec. 249.

**8. Duty to Contribute to Losses — United States.** — *Miles v. New South Bldg., etc., Assoc.*, 111 Fed. Rep. 946; *Coltrane v. Baltimore Bldg., etc., Assoc.*, 110 Fed. Rep. 272; *Lauer v. Covenant Bldg., etc., Assoc.*, 96 Fed. Rep. 775; *McIlwaine v. Iseley*, 96 Fed. Rep. 62; *Lauer v. Covenant Bldg., etc., Assoc.*, 96 Fed. Rep. 775.

*Arkansas.* — *Hale v. Phillips*, 68 Ark. 382.

*Indiana.* — *MacMurray v. Sidwell*, 155 Ind. 560, 80 Am. St. Rep. 255; *Bingham v. Marion Trust Co.*, 27 Ind. App. 247; *Boice v. Rabb*, 24 Ind. App. 368.

*Kentucky.* — *Vinton v. National Bldg., etc., Assoc.*, 112 Ky. 622; *Reddick v. U. S. Building, etc., Assoc.*, 106 Ky. 94; *Safety Bldg., etc., Assoc. v. Montjoy*, 107 Ky. 473.

*Missouri.* — *Bertche v. Equitable Loan, etc., Assoc.*, 147 Mo. 343, 71 Am. St. Rep. 571.

*Nebraska.* — *Anselme v. American Sav., etc., Assoc.*, 63 Neb. 525, affirmed 66 Neb. 520.

*New Jersey.* — *Weir v. Granite State Provident Assoc.*, 56 N. J. Eq. 234; *Bettie v. Republic Sav., etc., Assoc.*, (N. J. 1904) 58 Atl. Rep. 1053.

*New York.* — *Roberts v. Murray*, (County Ct.) 40 Misc. (N. Y.) 339, affirmed 89 N. Y. App. Div. 616; *Hannon v. Cobb*, 49 N. Y. App. Div. 480.

*North Carolina.* — *Williams v. Maxwell*, 123 N. Car. 586.

*Ohio.* — *Demland v. Pioneer Sav., etc., Co.*, 11 Ohio Cir. Dec. 249; *Main St. Bldg., etc., Co. v. Richter*, 9 Ohio Cir. Dec. 74.

*Pennsylvania.* — *Neversink Bldg., etc., Assoc.*, No. 3 v. Heine, 8 Pa. Dec. 443.

*Tennessee.* — *Province v. Interstate Bldg., etc., Assoc.*, 104 Tenn. 458.

*Utah.* — *Western Loan, etc., Co. v. Desky*, 24 Utah 347; *Betz v. People's Bldg., etc., Assoc.*, 22 Utah 149.

*Wisconsin.* — *Leahy v. National Bldg., etc., Assoc.*, 100 Wis. 555, 69 Am. St. Rep. 945.

**In Maryland,** on the winding up of a building association, the borrowing shareholder is not required to contribute to the losses of a building association incorporated under the laws of that state. *Coltrane v. Baltimore Bldg., etc., Assoc.*, 110 Fed. Rep. 293.

**Kentucky.** — As a member the borrower is chargeable with his proportion of the expenses and losses of the association while he is a



- 1036.** Liability Limited to Losses Sustained During Membership. — See note 1.  
**1037.** VIII. DUES — 1. Definition — Object. — See note 6.  
**1038.** 2. When the Liability to Pay Exists. — See note 1.  
 When It Attaches. — See note 2.  
 Liability Absolute. — See note 3.  
 Effect of Loan. — See note 6.  
 Effect of Suit. — See note 7.  
**1039.** When It Ends. — See notes 1, 2.  
 3. Payment — Payable in Cash Only. — See note 5.  
 Time and Place of Payment — See notes 7, 8.  
 4. Collection — Fines and Liens. — See note 10.  
**1040.** IX. FINES — 1. Nature and Objects — Liquidated Damages. — See note 4.  
 If Unreasonable, Are Penalties. — See note 8.  
 Do Not Bear Interest. — See note 9.  
 Do Not Violate Usury Law. — See note 11.  
**1041.** 2. The Power to Impose — Implied. — See notes 1, 2.

member. *Pioneer Bldg., etc., Assoc. v. Jones*, (Ky. 1900) 56 S. W. Rep. 657.

In Canada it has been held that losses cannot be charged up against a borrowing member unless under proper by-laws duly passed and applicable equally to all members. *Lee v. Canadian Mut. Loan, etc., Co.*, 5 Ont. L. Rep. 471, affirmed 34 Can. Sup. Ct. 224.

**1036.** 1. *Leahy v. National Bldg., etc., Assoc.*, 100 Wis. 555, 69 Am. St. Rep. 945.

A Failure to Pay may be regarded as terminating a borrower's connection with the association as a stockholder, and he thereafter participates in no benefits and shares no burdens. *Safety Bldg., etc., Co. v. Ecklar*, 106 Ky. 115.

**1037.** 6. Object of Dues. — *Hale v. Phillips*, 68 Ark. 382.

**1038.** 1. Liability Continues Throughout Membership. — *Sullivan v. Spaniol*, 78 Ill. App. 125.

The payment of periodical instalments of dues on each share of stock continues until the share reaches its maturity value, or is withdrawn or retired. *King v. International Bldg., etc., Union*, 170 Ill. 135.

2. Dues Are Payable from the Time Series of Stock Commenced to Run. — *Setliff v. North Nashville Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 39 S. W. Rep. 546.

3. *Buker v. Leighton Lea Assoc.*, 164 N. Y. 557, reversing 18 N. Y. App. Div. 548.

6. *Young v. Improvement Loan, etc., Assoc.*, 48 W. Va. 512.

7. *Skinner v. Southern Home Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 67.

**1039.** 1. Abandonment of Enterprise. — *Number Four Fidelity Bldg., etc., Union v. Smith*, 155 Ind. 679.

Liquidation of Association. — On liquidation of an association the obligation of both borrowing and nonborrowing members to pay dues ceases. *Seventeenth Ward Bldg. Assoc. v. Fitzgerald*, 11 Ohio Dec. 133.

2. Insolvency of Association. — *Hale v. Phillips*, 68 Ark. 382.

5. Payment in Cash Only. — *Sachs v. Duckworth Bldg., etc., Assoc.*, 6 Ohio Dec. 254.

7. *Sachs v. Duckworth Bldg., etc., Assoc.*, 6 Ohio Dec. 254; *Louchheim v. Somerset Bldg., etc., Assoc.*, 25 Pa. Super. Ct. 325, distinguish-

ing 16 Pa. Super. Ct. 33; *Killian v. Building, etc., Assoc.*, 21 Pa. Co. Ct. 58.

Stock payments in a building and loan association, in order to bind the same, must be made in the manner, to the person, and at the time and place designated by the borrower. *Killian v. Building, etc., Assoc.*, 21 Pa. Co. Ct. 58.

8. Payment to Secretary at Place of Business. — *Louchheim v. Richmond Mut. Bldg., etc., Assoc.*, 16 Pa. Super. Ct. 33. See also *Louchheim v. Richmond Mut. Bldg., etc., Assoc.*, 16 Pa. Super. Ct. 37.

Payments Made Otherwise than in Accordance with By-laws are not payments to the association unless the money actually came into the hands of the association. *Sachs v. Duckworth Bldg., etc., Assoc.*, 6 Ohio Dec. 254.

In *Killian v. Building, etc., Assoc.*, 21 Pa. Co. Ct. 58, it was held that where it has been the practice of an association to permit its secretary to receive and receipt for members' dues, such practice might be regarded as a waiver of the precise requirement of its by-laws and the association be held bound by such payments to its secretary.

10. A Second Fine for nonpayment of the same dues cannot be imposed. *Setliff v. North Nashville Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 39 S. W. Rep. 546.

**1040.** 4. Are Liquidated Damages. — *Miles v. New South Bldg., etc., Assoc.*, 111 Fed. Rep. 946.

Enforced by Courts. — *Safety Bldg., etc., Assoc. v. Montjoy*, 107 Ky. 473; *Simpson v. Kentucky Citizens Bldg., etc., Assoc.*, 101 Ky. 496; *Graham v. House-Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 52 S. W. Rep. 1011.

Reasonable in Amount. — Fines, when reasonable in amount, should be sustained, rather than stricken out. *Harris Bldg., etc., Assoc. v. Simon*, 6 Pa. Dist. 204. See also *Setliff v. North Nashville Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 39 S. W. Rep. 546.

8. If Unreasonable, Are Penalties. — *Hughes v. Farmers' Sav., etc., Assoc.*, (Tenn. Ch. 1897) 46 S. W. Rep. 362.

9. No Interest on Fines. — *Kenner v. White-lock*, 152 Ind. 635.

11. Usury. — *Mutual Ben. Loan, etc., Co. v. Lynch*, 54 N. Y. App. Div. 559.

**1041.** 1. Power to Impose Fine. — *Mutual*

**1041.** Fines on Interest. — See notes 4, 6.

**1042.** 3. Requisites — Construction Against Them. — See note 1. Certain and Reasonable. — See note 4.

**1044.** 4. How Liability Is Enforced — When Secured by Mortgage. — See notes 2, 3, 4, 5.

Remitting Fines. — See note 6.

**X. FORFEITURES** — [In General. — See note 6a.]

Forfeitures Strictly Construed. — See notes 7, 8, 9, 10.

**1045.** Enforcement Discretionary with Association. — See notes 3, 4.

Settlement upon Forfeiture. — See notes 5, 6.

*Ben. Loan, etc., Co. v. Lynch*, 54 N. Y. App. Div. 559.

**1041.** 2. Implied. — *Harris Bldg., etc., Assoc. v. Simon*, 6 Pa. Dist. 204; *Graham v. House-Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 52 S. W. Rep. 1011; *Boleman v. Citizen's Loan, etc., Assoc.*, 114 Wis. 217.

4. Statute Providing for Fines on Members. — *Setliff v. North Nashville Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 39 S. W. Rep. 546.

6. Fines on Interest Held Valid. — *Kenner v. Whitelock*, 152 Ind. 635; *Setliff v. North Nashville Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 39 S. W. Rep. 546.

**1042.** 1. Strict Construction of Clause Creating Fine. — *Graham v. House-Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 52 S. W. Rep. 1011.

4. Must Be Certain and Reasonable. — *Vierling v. Mechanics', etc., Sav., etc., Assoc.*, 179 Ill. 524; *Iowa Sav., etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1042; *Safety Bldg., etc., Assoc. v. Montjoy*, 107 Ky. 473; *Land Title, etc., Co. v. Fulmer*, 24 Pa. Super. Ct. 256; *Graham v. House-Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 52 S. W. Rep. 1011.

Progressive Fines. — A by-law fixing the penalty of a fine at five cents on each share for the first default, and ten cents for each subsequent default, are not so exorbitant as to be void. *Iowa Sav., etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197.

Unreasonable and Oppressive Fines. — In *Vierling v. Mechanics', etc., Sav., etc., Assoc.*, 179 Ill. 524, it was held that the imposition of a fine of twenty-five cents on each share of stock of a borrowing member for defaulting in the payment of a monthly instalment of interest amounting to \$13.33 on twenty shares of stock was unreasonable and oppressive, and by-laws imposing the same were invalid and non-enforceable.

**1044.** 2. When Covered by Mortgage. — *Hutchinson v. Straub*, 9 Ohio Cir. Dec. 171; *Fidelity Sav. Assoc. v. Bank of Commerce*, (Wyo. 1904) 75 Pac. Rep. 448.

3. Not Covered unless Mortgage So Provides. — *State Mut. Bldg., etc., Assoc. v. Batterson*, (N. J. 1904) 59 Atl. Rep. 469; *Fidelity Sav. Assoc. v. Bank of Commerce*, (Wyo. 1904) 75 Pac. Rep. 448.

4. Reference in By-laws. — *State Mut. Bldg., etc., Assoc. v. Batterson*, (N. J. 1904) 59 Atl. Rep. 469.

5. Foreclosure — Fines to Time of Sale. — *Hutchinson v. Straub*, 9 Ohio Cir. Dec. 171. *Contra*, *Manhattan, etc., Sav., etc., Assoc. v. Massarelli*, (N. J. 1899) 42 Atl. Rep. 284.

6. Remitting Fines. — *Folsom Bldg., etc., Assoc. v. Gogel*, 24 Pa. Super. Ct. 539.

Waiver of Fines by Association. — *Arbuthnot v. Brookfield Loan, etc., Assoc.*, 98 Mo. App. 382.

6a. Forfeiture Authorized by By-law. — In the absence of statutory or charter inhibition, forfeiture of stock for nonpayment of dues may be authorized by by-law. *Barrows v. Southern Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 50 S. W. Rep. 665.

Effect of Forfeiture. — Where stock is forfeited its effect is to mature the debt and to sever the relation of the borrower as a member of the association. *Armstrong v. Douglas Park Bldg. Assoc.*, 176 Ill. 298. See also *Juergens v. Cobe*, 99 Ill. App. 156.

7. *Carpenter v. Welty*, 101 Ill. App. 58.

8. *Palmer v. De Witt County Bldg. Assoc.*, 79 Ill. App. 362.

By-laws Subordinate to Statute. — A by-law providing for arbitrary forfeiture and cancellation of stock can be sustained, if at all, only by force of a statute expressly authorizing such proceeding. *Mueller v. Madison Bldg., etc., Assoc.*, 11 S. Dak. 43.

9. Fines Must Be Reasonable to work a forfeiture. *Barrows v. Southern Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 50 S. W. Rep. 665.

10. Doctrine of Equitable Estoppel Applies in case of defaulting members failing to dissent and assert their rights within a reasonable time. *Barton v. Pioneer Sav., etc., Co.*, 69 Minn. 85, 65 Am. St. Rep. 549.

**1045.** 3. *Motes v. People's Bldg., etc., Assoc.*, 137 Ala. 369; *Devens v. Normal Park Loan Assoc.*, 94 Ill. App. 314; *Louchheim v. Somerset Bldg., etc., Assoc.*, 25 Pa. Super. Ct. 325; *Barrows v. Southern Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 50 S. W. Rep. 665.

Foreclosure for Nonpayment Must Be Ordered by Directors. — *Palmer v. De Witt County Bldg. Assoc.*, 79 Ill. App. 362.

4. Forfeiture May Be Waived by an association either expressly or by its course of business. *Barrows v. Southern Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 50 S. W. Rep. 665.

5. No Allowance for Amounts Paid in. — *Andruss v. People's Bldg., etc., Assoc.*, (C. C. A.) 94 Fed. Rep. 575; *Gwin v. National Bldg., etc., Assoc.*, 121 Ala. 572; *Beach v. Co-operative Sav., etc., Assoc.*, 10 S. Dak. 549, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1045.

6. Amounts Paid in Credited on Settlements. — *Vierling v. Mechanics', etc., Sav., etc., Assoc.*, 179 Ill. 524; *People's Bldg., etc., Assoc. v. Gilmore*, (Neb. 1901) 90 N. W. Rep. 108; *Pollock v. Carolina Interstate Bldg., etc., Assoc.*, 51

**1046.** Action for Wrongful Declaration of Forfeiture. — See note 1.

**XI. WITHDRAWALS** — 1. Origin of the Right — No Right at Common Law. — See note 3.

**A Voluntary Act.** — See note 4.

**Death of Member.** — See note 5.

**General Statute Controls Charter Regulation.** — See note 6.

**1047.** Changing By-law Allowing Withdrawal. — See notes 1, 2.

**2. Prerequisites** — *a.* IN GENERAL — Reasonable Regulations. — See note 3.

**1048.** See note 1.

**Provision that Only Certain Funds Shall Be Used.** — See notes 3, 4, 5.

*S. Car. 420, 64 Am. St. Rep. 683; Mueller v. Madison Bldg., etc., Assoc., 11 S. Dak. 43.*

**Credited by Actual Payments Made on Stock.** — The borrower is entitled to be credited with actual payments made by him on account of his stock and by way of interest on the loan. *Juergens v. Cobe, 99 Ill. App. 156.* See also *Vierling v. Mechanics', etc., Sav., etc., Assoc., 179 Ill. 524.*

**Credit for Withdrawal Value of Stock.** — *Lane v. Southern Bldg., etc., Assoc., (Tenn. Ch. 1899) 54 S. W. Rep. 329.* See also *Pioneer Sav., etc., Co. v. Nonnemacher, 127 Ala. 521; Devens v. Normal Park Loan Assoc., 94 Ill. App. 314.*

**Amounts Paid in Credited in Settlement Less All Fines and Charges.** — *Payson v. Iroquois Bldg., etc., Assoc., 93 Ill. App. 621.*

**1046. 1. Remedy for Wrongful Forfeiture.** — Where shares are wrongfully forfeited the shareholder's rights are to be sought in separate actions and constitute no defense in the foreclosure proceeding. *Canadian Mut. Loan, etc., Co. v. Burns, 34 Nova Scotia 303.*

**3. How Right Is Created.** — *Latimer v. Equitable Loan, etc., Co., 81 Fed. Rep. 776; Synnott v. Iron Belt Bldg., etc., Assoc., 89 Fed. Rep. 292; Provident Mut. Bldg.-Loan Assoc. v. Davis, 143 Cal. 253; Crittenden v. Southern Home Bldg., etc., Assoc., 111 Ga. 266, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1046; Domestic Bldg. Assoc. v. Jourdain, 110 Ill. App. 197; Huntington County Loan, etc., Assoc. v. Emerick, 23 Ind. App. 175; Crenshaw v. Hedrick, 19 Tex. Civ. App. 52.*

**4. A Voluntary Act.** — *Ottawa Mut. Loan, etc., Assoc. v. Merriman, 67 Kan. 779.*

**5. In re Counties Conservative Permanent Ben. Bldg. Soc., (1900) 2 Ch. 819.**

**6. Pioneer Sav., etc., Co. v. Nonnemacher, 127 Ala. 521, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1046.**

**Statutory Right of Withdrawal.** — The fundamental right of withdrawal, conferred by statute, is one evidencing a public policy, and cannot be waived by receiving certificates curtailing this right. *Latimer v. Equitable Loan, etc., Co., 81 Fed. Rep. 776.*

**Foreign Building and Loan Associations** are subject to the same restrictions, liabilities, and duties as domestic corporations. *St. Louis Loan, etc., Co. v. Yantis, 173 Ill. 321.*

**1047. 1. Right to Withdraw Cannot Be Divested by Repeal of By-law.** — *Kelly v. People's Bldg., etc., Assoc., 65 Ark. 574; Enterprise Bldg., etc., Soc. v. Bolin, 12 Colo. App. 304; Interstate Bldg., etc., Assoc. v. Wooten, 113 Ga. 247, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1047; Ottawa Mut. Loan, etc.,*

*Assoc. v. Merriman, 67 Kan. 779; Georgia State Bldg., etc., Assoc. v. Grant, 82 Miss. 424; Johnson v. Mutual Guarantee Bldg., etc., Assoc., 66 N. J. L. 683; Sinteff v. People's Bldg., etc., Assoc., 37 N. Y. App. Div. 340, affirmed 166 N. Y. 630; Savage v. People's Bldg., etc., Assoc., 45 W. Va. 275.*

**The Power of an Association to Make By-laws** does not extend so far as to authorize it by a subsequent by-law to change the essential character of an antecedent agreement with one of its members. *Eastern Bldg., etc., Assoc. v. Snyder, 98 Va. 710.* And see *supra*, this title **1020. 6.**

**2. By-laws Allowing Withdrawal Held Subject to Amendment or Repeal.** — *Sixth West Kent Mut. Bldg. Soc. v. Hills, (1899) 2 Ch. 60, 81 L. T. N. S. 86; Interstate Bldg., etc., Assoc. v. Wooten, 113 Ga. 247, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1047; Crittenden v. Southern Home Bldg., etc., Assoc., 111 Ga. 266; Interstate Bldg., etc., Assoc. v. Hafter, 76 Miss. 770; Bearden v. People's Bldg., etc., Assoc., (Tenn. Ch. 1898) 49 S. W. Rep. 64; Stilwell v. People's Bldg., etc., Assoc., 19 Utah 257.*

While the rules of a building society may be varied so as to affect the rights of a member even after he has given notice of withdrawal, a rule must not change the constitution of the society, and the power of making and altering rules must be confined to the internal rights of the members of the society. *Sixth West Kent Mut. Bldg. Soc. v. Hills, (1899) 2 Ch. 60, 81 L. T. N. S. 86.* See also *Strohenger v. Finsbury Permanent Invest. Bldg. Soc., (1897) 2 Ch. 469, 77 L. T. N. S. 235.*

**Estoppel.** — In *Gardner v. New York Mut. Sav., etc., Assoc., (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 115*, it was held that a member of a mutual savings and loan association who has knowledge of an amendment to its articles of association which may have reduced the withdrawal value of his shares below their actual value, cannot stand by in silence and without protest see other members paying dues for two years on the faith of the amendment, and afterwards, as against them, have any greater sum on withdrawal than the amendment entitled him to.

**3. Reasonable Regulations.** — *Eastern Bldg., etc., Assoc. v. Snyder, 98 Va. 710.*

**1048. 1. Approval of Directors.** — A member cannot withdraw before his loan is fully paid, without the consent of the directors. *McNamara v. Oakland Bldg., etc., Assoc., 131 Cal. 336.*

**3. Statutes.** — *In re Counties Conservative Permanent Ben. Bldg. Soc., (1900) 2 Ch. 819;*

**1049.** See notes 1, 2.

*b.* NOTICE. — See note 3.

Order of Payment. — See note 4.

**1050.** Waiver After Notice. — See note 2.

**3. When the Right Exists** — *a.* IN GENERAL. — See note 4.

Shares Must Be Free. — See note 5.

*Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652; *Enterprise Bldg., etc., Soc. v. Bolin*, 12 Colo. App. 304; *Musial v. Kosciuszko Bldg., etc., Assoc.*, 80 Ill. App. 464; *Powell's Appeal*, 93 Mo. App. 296; *Healy v. Eastern Bldg., etc., Assoc.*, 17 Pa. Super. Ct. 385.

A withdrawing member is not required to prove that at the time his notice of withdrawal matured his demand did not exceed one-half of the funds in the treasury of the association. *St. Louis Loan, etc., Co. v. Yantis*, 173 Ill. 321.

**Payments Made in Manner Provided by Statute.** — The withdrawing member is only entitled to his money on the terms and in the manner provided in the by-laws, and, if the amount per month which the association may pay on withdrawal is limited, it is necessary for the withdrawing member, in an action on his claim, to allege and prove that, at the time he commenced his action, there were funds in the treasury applicable to the payment of his claim. *Stilwell v. People's Bldg., etc., Assoc.*, 19 Utah 257.

**1048. 4. Effect of the Fact that There Are No Available Funds.** — See *Lepore v. Twin Cities Nat. Bldg., etc., Assoc.*, 5 Pa. Super. Ct. 276.

**Execution May Be Stayed Permanently** where it turns out that the association was insolvent at the time of the actual withdrawal. *Musial v. Kosciuszko Bldg., etc., Assoc.*, 80 Ill. App. 464.

**5. No Recovery unless Funds Shown.** — *Domestic Bldg. Assoc. v. Jourdain*, 110 Ill. App. 197; *Ronca v. New York Bldg. Loan Banking Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 879; *Healy v. Eastern Bldg., etc., Assoc.*, 17 Pa. Super. Ct. 385; *Eastern Bldg., etc., Assoc. v. Snyder*, 98 Va. 710; *Andrews v. Roanoke Bldg. Assoc., etc., Co.*, 98 Va. 445.

**1049. 1. Waiver of Provision as to Withdrawals.** — A vote of the board of management directing a claim to be paid must be deemed a consent thereto, and entitles a withdrawing member to payment regardless of the condition of the treasury of the association. *Davies v. Millinery Bldg., etc., Assoc.*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 735.

**Borrowing Money.** — Under the *Missouri* statute authorizing building associations to borrow money for temporary purposes, the money so borrowed cannot be applied to withdrawals. *Powell's Appeal*, 93 Mo. App. 296.

**2. Duty to Keep Funds on Hand.** — *Colin v. Wellford*, 102 Va. 581, 102 Am. St. Rep. 859; *Andrews v. Roanoke Bldg. Assoc., etc., Co.*, 98 Va. 445.

**3. Notice Necessary.** — *Pioneer Bldg., etc., Assoc. v. Everheart*, 18 Tex. Civ. App. 192.

**Verbal Notice Sufficient.** — *St. Louis Loan, etc., Co. v. Yantis*, 173 Ill. 321.

**May Require Notice of Filing of Certificate at Home Office.** — The association is entitled to require notice of withdrawal and the filing of the certificate of stock at its home office, as preliminaries to the payments of the withdrawal

value of the stock. *Heslin v. Eastern Bldg., etc., Assoc.*, 61 N. Y. App. Div. 458.

**Notice to the Secretary Has Been Held Insufficient**, since at most the secretary is the mere agent of the shareholder to convey the notice to the directors, and his failure to do so is the failure of the shareholder himself. *Huntington County Loan, etc., Assoc. v. Emerick*, 23 Ind. App. 175.

**Notice May Be Waived by Association.** — *Reitz v. Hayward*, 100 Mo. App. 216.

**4. Order of Payment.** — *Ward v. North Fairmount Bldg., etc., Co.*, 8 Ohio Dec. 489; *Eastern Bldg., etc., Assoc. v. Snyder*, 98 Va. 710.

**Rule Inapplicable in Absence of By-law.** — In *Davies v. Millinery Bldg., etc., Assoc.*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 735, it was held that the rule does not apply in the absence of a by-law requiring that members shall be paid only in the order in which their withdrawals take place.

**1050. 2. Waiver After Notice.** — *Mutual Union Loan, etc., Assoc. v. Stolz*, 93 Ill. App. 164.

**A Member Waives His Notice** of withdrawal by exercising thereafter the privileges of membership, such as paying dues and charges against him. *Hawley v. North Side Bldg., etc., Assoc.*, 11 Colo. App. 93.

By accepting a loan from the society, after notice of withdrawal, a member waives such notice. *In re Counties Conservative Permanent Ben. Bldg. Soc.*, (1900) 2 Ch. 819.

**4. Only While the Association Is Running.** — *Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652; *Coltrane v. Baltimore Bldg., etc., Assoc.*, 110 Fed. Rep. 272; *Latimer v. Equitable Loan, etc., Co.*, 81 Fed. Rep. 776; *Young v. Stevenson*, 81 Ill. App. 40, affirmed 180 Ill. 608, 72 Am. St. Rep. 236; *Rickert v. Suddard*, 80 Ill. App. 204; *Musial v. Kosciuszko Bldg., etc., Assoc.*, 80 Ill. App. 464; *Bingham v. Marion Trust Co.*, 27 Ind. App. 247; *Cook v. Emmet Perpetual, etc., Bldg. Assoc.*, 90 Md. 284.

**Cannot Withdraw When Association Is Known to Be Insolvent.** — *Eaton v. Eastern Bldg., etc., Assoc.*, 7 Pa. Dist. 440. See also *Reitz v. Hayward*, 100 Mo. App. 216.

**5. Shares Must Be Free.** — *Kinney v. Columbia Sav., etc., Assoc.*, 113 Fed. Rep. 359; *Haensel v. Pacific States Sav., etc., Co.*, 135 Cal. 41; *McNamara v. Oakland Bldg., etc., Assoc.*, 131 Cal. 336; *Huntington County Loan, etc., Assoc. v. Emerick*, 23 Ind. App. 175; *Vinton v. National Bldg., etc., Assoc.*, 112 Ky. 622; *Yager v. National Bldg., etc., Assoc.*, (Ky. 1904) 79 S. W. Rep. 197; *Denison v. Alpena Loan, etc., Assoc.*, 117 Mich. 98; *Reitz v. Hayward*, 100 Mo. App. 216; *Edinger v. Missouri Guarantee, etc., Assoc.*, 83 Mo. App. 615; *Johnson v. Sharon Bldg. Assoc.*, 16 Pa. Super. Ct. 311.

**Mere Failure to Pay Instalments** does not prohibit withdrawal. *Denison v. Alpena Loan, etc., Assoc.*, 117 Mich. 98.

**1050.** [Must Surrender Certificates. — See note 5a.]

**1051.** *b. EFFECT OF INSOLVENCY OR DISSOLUTION OF THE ASSOCIATION.* — See notes 1, 2.

**1052.** 4. Amount Due on Withdrawal. — See note 1.

**Cannot Redeem Shares until Fines Are Paid.** — A borrower may not obtain withdrawal value of shares until all fines are paid. *Safety Co-operative Bldg., etc., Assoc. v. Robinson*, 170 N. Y. 568, *affirming* 47 N. Y. App. Div. 534.

**1050** 5a. A member must surrender his certificate before he is entitled to payment. *Ballou v. Manhattan Real Estate, etc., Co.*, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 698.

**1051.** 1. *Insolvency or Dissolution* — *United States.* — *Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1051; *Coltrane v. Blake*, (C. C. A.) 113 Fed. Rep. 785; *Alexander v. Southern Home Bldg., etc., Assoc.*, 110 Fed. Rep. 267; *Coltrane v. Baltimore Bldg., etc., Assoc.*, 110 Fed. Rep. 272.

*Alabama.* — *Walker v. Terry*, 138 Ala. 428. *Illinois.* — *Gibson v. Safety Homestead, etc., Assoc.*, 170 Ill. 44; *Dooling v. Smith*, 89 Ill. App. 26; *Musial v. Kosciuszko Bldg., etc., Assoc.*, 80 Ill. App. 464; *Rickert v. Suddard*, 80 Ill. App. 204, *reversed* on other grounds 184 Ill. 149.

*Indiana.* — *Bingham v. Marion Trust Co.*, 27 Ind. App. 247; *Columbia Finance, etc., Co. v. Tharp*, 24 Ind. App. 82.

*Kentucky.* — *Wills v. Paducah Bldg., etc., Assoc.*, 113 Ky. 196; *Vinton v. National Bldg., etc., Assoc.*, 112 Ky. 622; *Forwood v. Eubank*, 106 Ky. 291; *Reddick v. U. S. Building, etc., Assoc.*, 106 Ky. 94; *Manheimer v. Henderson Bldg., etc., Assoc.*, (Ky. 1903) 72 S. W. Rep. 313.

*Missouri.* — *Hohenshell v. Home Sav., etc., Assoc.*, 140 Mo. 566; *Reitz v. Hayward*, 100 Mo. App. 216.

*New York.* — *Cobb v. Johnson*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 109.

*Virginia.* — *Colin v. Wellford*, 102 Va. 581, 102 Am. St. Rep. 859.

But see *Silvers v. Merchants, etc., Sav. Fund, etc., Assoc.*, (N. J. 1903) 56 Atl. Rep. 294, wherein it was held that where a stockholder served notice of withdrawal on the association during its solvency, and persistently and continuously maintained his place as entitled to preference, and so proved his claim before the receiver after the association had become insolvent, such stockholder became a creditor, and was entitled to be paid in full in preference of the distribution of the surplus *pro rata* among the shareholders.

**Certificate for the Direct Payment of Money.** — In *State v. Phoenix Loan Assoc.*, 86 Mo. App. 301, it was held that a certificate issued to a stockholder created the relation of debtor and creditor, and entitled the holder to priority of payment out of the assets of the defunct association ahead of its shareholders.

**When Holders of Matured Stock Are Not Entitled to Priority.** — Holders of matured stock are not entitled to priority as creditors, unless warrants of the association have come into their hands, or they hold checks upon a bank where the association funds are deposited. *Christopher*

*Columbus Bldg., etc., Assoc. v. Kriete*, 192 Ill. 128. See also *Gibson v. Safety Homestead, etc., Assoc.*, 170 Ill. 44; *Mutual Union Loan, etc., Assoc. v. Stolz*, 93 Ill. App. 164.

**Withdrawing Shareholder a Creditor and Entitled to Priority.** — Where a withdrawing shareholder permits his stock to be canceled by the association as a solvent concern, and leaves the money due him on withdrawal with the association and takes acknowledgment of indebtedness therefrom, he takes priority over stockholders whose stock has not matured, if the association is subsequently declared insolvent. *Jones v. Brennan*, 100 Ill. App. 153. See also *Gallagher v. Brennan*, 99 Ill. App. 81; *Solomons v. American Bldg., etc., Assoc.*, 116 Fed. Rep. 676, *affirmed* (C. C. A.) 120 Fed. Rep. 1018; *Com. v. Anchor Bldg., etc., Assoc.*, 10 Pa. Dist. 167, *affirmed* 20 Pa. Super. Ct. 101.

**The Holder of a Certificate of Fully Paid Stock** is a creditor of the association which issued it, and is entitled to be dealt with as such in the equitable distribution of the assets of the association. *Cashen v. Southern Mut. Bldg., etc., Assoc.*, 114 Ga. 983. See also *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814.

**2. English Rule.** — In 12 Counties Conservative Permanent Ben. Bldg. Soc., (1900) 2 Ch. 819, wherein it was held that the executor of a member who died before the winding up of the association was entitled to priority over withdrawing members.

**Widows and Children of deceased members** are entitled to be paid in priority to other shareholders, such widows and children ranking *inter se* according to the dates of the death of their respective husbands and fathers, through whom they claim. *Re West London, etc., Bldg. Soc.*, 78 L. T. N. S. 393.

**1052.** 1. *Amount Due on Withdrawal.* — *Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652; *Synnot v. Iron Belt Bldg., etc., Assoc.*, 89 Fed. Rep. 292; *Enterprise Bldg., etc., Soc. v. Bolin*, 12 Colo. App. 304; *Hawley v. North Side Bldg., etc., Assoc.*, 11 Colo. App. 93; *Baltimore Bldg., etc., Assoc. v. Powhatan Imp. Co.*, 87 Md. 59; *Johnson v. Mutual Guarantee Bldg., etc., Assoc.*, 66 N. J. L. 683; *House v. Eastern Bldg. Assoc.*, 52 N. Y. App. Div. 163; *Sinteff v. People's Bldg., etc., Assoc.*, 37 N. Y. App. Div. 340, *affirmed* 166 N. Y. 630; *Beach v. Co-operative Sav. etc., Assoc.*, 10 S. Dak. 549.

**Entitled to Dividends Earned and Declared.** — A withdrawing stockholder is entitled to be credited with dividends earned and declared while the association was active and before it failed. *Reitz v. Hayward*, 100 Mo. App. 216.

**Rule as to Defaulting Borrowers.** — A defaulting borrowing stockholder of a building association, whose stock is pledged to the association as collateral, is not entitled to withdraw and receive the same share of the estimated profits as a withdrawing stockholder who has fulfilled all of the requirements of his undertakings with the building association. *Folsom Bldg., etc., Assoc. v. Gogel*, 24 Pa. Super. Ct. 539.

**1052.** Net Value. — See note 2.

**1053.** 5. The Withdrawing Member — *a.* STATUS — Perfected Withdrawal. — See notes 1, 2.

Between Notice and Payment. — See notes 3, 4, 5.

A Quasi Creditor. — See notes 8, 9.

**A By-law of a Foreign Building Association Requiring Withdrawing Creditors to Accept Scrip** payable at the time the stock would have matured is valid in the absence of a statute prohibiting such law in the state where such association was organized. *Hundermark v. New South Bldg., etc., Assoc., (Miss. 1901) 29 So. Rep. 528.*

Provisions in the constitution of a building and loan association limiting payment of the withdrawal value of shares to a fund arising from a percentage of funds collected, and exacting a withdrawal fee of one dollar per share, are not inconsistent with the provisions of Gen. Stat. N. J., p. 331, authorizing its organization. *Intiso v. Metropolitan Sav., etc., Assoc., 68 N. J. L. 588.*

**Must Bear His Proportion of Loss.** — *Vincent v. Harrison Bldg., etc., Co., 7 Ohio Dec. 353.* See also *Eaton v. Eastern Bldg., etc., Assoc., 7 Pa. Dist. 440.*

**Fines Chargeable Against Stock on Withdrawal.** — Fines against the stock, if reasonable, are allowable to the association in determining the withdrawal value of the stock. *Fidelity Sav. Assoc. v. Bank of Commerce, (Wyo. 1904) 75 Pac. Rep. 448.*

**Where Assets Equal Amount Paid in on Stock.** — Under Gen. Laws *Rhode Island*, c. 131, § 27, where the assets of an association equal the amounts paid in on its stock, it must pay a withdrawing stockholder of any class the full amount paid in (less stipulated charges), and only when the assets are reduced by losses below the amount paid in can the association charge such loss against stock listed for withdrawal. *Baker v. U. S. Savings, etc., Assoc., 23 R. I. 243.*

**1052. 2. Net Value.** — *Reitz v. Hayward, 100 Mo. App. 216.*

**1053. 1. Perfected Withdrawal.** — *Rickert v. Suddard, 184 Ill. 149, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1052 [1053].*

**2. Ends Membership.** — *Floyd-Jones v. Anderson, 30 Mont. 351, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1052 [1053].*

**3. Regarded as Member.** — *Coltrane v. Baltimore Bldg., etc., Assoc., 110 Fed. Rep. 272; Synnott v. Iron Belt Bldg., etc., Assoc., 89 Fed. Rep. 292; Hawley v. North Side Bldg., etc., Assoc., 11 Colo. App. 93.*

**Regarded as Stockholder and Not Creditor.** — *Mutual Union Loan, etc., Assoc. v. Stolz, 93 Ill. App. 164.*

**Continues to Be a Stockholder until Actually Paid Out.** — *Rehn v. North Fairmount Bldg., etc., Co., 7 Ohio Dec. 398.*

**May Institute Action for Equitable Relief After Notice.** — Notice of withdrawal does not sever the member's relation so completely as to preclude him from bringing suit to have a receiver appointed, or for other equitable relief against the association. *Continental Nat. Bldg., etc., Assoc. v. Miller, 44 Fla. 750.*

**No Relief from Liability for Losses by Inade-**

**quate Assessment.** — If a condition of insolvency exists at the time of withdrawal, the withdrawing member is not relieved from all further liability by reason of a grossly inadequate assessment, but he may be declared a member and be required to pay his just and proper share of the loss existing at the time of withdrawal. *Galvin v. Albers, 9 Ohio Dec. 279.*

**4. As a Creditor.** — *Solomons v. American Bldg., etc., Assoc., 116 Fed. Rep. 676, affirmed (C. C. A.) 120 Fed. Rep. 1018; Alexander v. Southern Home Bldg., etc., Assoc., 110 Fed. Rep. 267; Synnott v. Iron Belt Bldg., etc., Assoc., 89 Fed. Rep. 292; National Guarantee L. & T., etc., Co. v. Yeatman, 121 Ala. 594; Enterprise Bldg., etc., Soc. v. Bolin, 12 Colo. App. 304; Lepore v. Twin Cities Nat. Bldg., etc., Assoc., 5 Pa. Super. Ct. 276; Tiltinghast v. U. S. Savings, etc., Assoc., 23 R. I. 258; Moore v. Southern Mut. Bldg., etc., Assoc., 50 S. Car. 89.*

**As a Creditor and Not a Shareholder.** — *Jones v. Brennan, 100 Ill. App. 153.* See also *Rickert v. Suddard, 184 Ill. 149; Barley v. Gittings, 15 App. Cas. (D. C.) 427.*

**At the Expiration of the Term of Notice** the withdrawal of a member is complete; and, as between such member and the other shareholders, he ceases to be a member and becomes a creditor of the association. *Enterprise Bldg., etc., Soc. v. Bolin, 12 Colo. App. 304.*

In *Coggeshall v. McGrath, (Supm. Ct. Tr. T.) 89 N. Y. Supp. 334*, it was held that a borrowing member of an insolvent association, by giving notice of withdrawal, did not, *ipso facto*, become a creditor of the association for the value of his shares or the excess thereof over his indebtedness to the association on his note, so as to exempt his shares from their proportionate share of the general debts of the company. See also to same effect *Cobb v. Johnson, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 109; Vinton v. National Bldg., etc., Assoc., 112 Ky. 622.*

**5. Not Liable for Dues.** — *Coltrane v. Blake, (C. C. A.) 113 Fed. Rep. 785; Rehn v. North Fairmount Bldg., etc., Co., 7 Ohio Dec. 398; Crenshaw v. Hedrick, 19 Tex. Civ. App. 52.*

**8. Quasi Creditor.** — *Rehn v. North Fairmount Bldg., etc., Co., 7 Ohio Dec. 398.*

**Suit May Be Brought After Appointment of Receiver.** — *Southern Bldg., etc., Assoc. v. Price, 88 Md. 155.* But see *Canadian-American Loan, etc., Assoc. v. Quimby, 79 Ill. App. 105.*

**9. Not a General Creditor.** — *Coltrane v. Baltimore Bldg., etc., Assoc., 110 Fed. Rep. 272; Walker v. Terry, 138 Ala. 428; Cook v. Emmet Perpetual, etc., Bldg. Assoc., 90 Md. 284; Rehn v. North Fairmount Bldg., etc., Co., 7 Ohio Dec. 398.*

**Status of Withdrawing Creditor.** — On the withdrawal of a member he assumes the rôle of a creditor having a claim subject to his antecedent agreement of membership. *Stiwell v. People's Bldg., etc., Assoc., 19 Utah 257.*

**1054.** See notes 1, 2.

**Statute of Limitations.** — See note 3.

**b. ENFORCEMENT OF RIGHTS.** — See notes 4, 5.

**Relief in Equity.** — See note 7.

**XII. THE BUILDING ASSOCIATION LOAN — 1. Method of Making —**

**Auctioning Funds.** — See note 8.

**1055. 2. Nature of the Transaction — Transaction Regarded as an Advance Out of Partnership Funds.** — See note 4.

**Other Authorities Holding Transaction Not Usurious.** — See notes 6, 7.

**When Stockholder Becomes a General Creditor.** — A stockholder becomes a general creditor, and entitled to preference, where he has surrendered his stock at maturity and settled with the association, and has deposited the balance with the association under an agreement to pay him interest thereon for the use thereof; the contract, while being *ultra vires*, is not *malum in se* or *malum prohibitum*, but is such a one as equity will enforce. *Brennan v. Gallagher*, 199 Ill. 207, reversing 99 Ill. App. 81 and distinguishing *National Home Bldg., etc., Assoc. v. Home Sav. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, and *Columbus, etc., Assoc. v. Kriete*, 192 Ill. 128.

**1054. 1. Restrictions on His Rights.** — A withdrawing member cannot sue for the value of his stock unless he shows that he complied with the by-laws of the association relating to withdrawal. Hence, where a by-law provides that a withdrawing member shall take scrip payable at the time his stock would have matured if he had remained a member, and the withdrawing member refuses to accept such scrip, he still remains a member of the association and cannot maintain an action against it as a creditor. *Hundermark v. New South Bldg., etc., Assoc.*, (Miss. 1901) 29 So. Rep. 528.

In *Bettle v. Republic Sav., etc., Assoc.*, 63 N. J. Eq. 578, it was held that ordinary shareholders are not creditors of the association, at least until withdrawal claims have been filed, and entitled to such amounts as they have paid in without deducting their proportion of expenses.

**2. Premiums Fixed by Contract Authority.** — In *Manship v. New South Bldg., etc., Assoc.*, 110 Fed. Rep. 845, it was held that, when there is no legislative prohibition, premiums may be fixed by contract, just as interest may be fixed thereby, and that in view of the extent of building and loan association in the United States fixed premiums are better calculated to pay all members on an equal footing than premiums by open bidding.

**3. Statute of Limitations.** — *Andrews v. Roanoke Bldg. Assoc., etc., Co.*, 98 Va. 445.

**4. Prairie State Loan, etc., Assoc. v. Gorrie**, 167 Ill. 414, affirming 64 Ill. App. 325.

**May Sue Although Stock Has Not Been Transferred.** — Where the stockholder purchases stock from another, and has been treated by the association as a member and recognized by it as the holder and owner thereof, he may bring an action to recover the amount due on withdrawal, though such stock has not been transferred to him on the books of the association. *Denison v. Alpena Loan, etc., Assoc.*, 117 Mich. 98.

**Action for Withdrawal Value of Shares.** — A

solvent building association, in the absence of bad faith on its part, is not in default and cannot be sued by a withdrawing member until there are funds in the treasury of the association out of which he is entitled to be paid. *Eastern Bldg., etc., Assoc. v. Synder*, 98 Va. 710. See also *Andrews v. Roanoke Bldg. Assoc., etc., Co.*, 98 Va. 445.

**5. Common Counts.** — *National Guarantee L. & T. Co. v. Yeatman*, 121 Ala. 594.

**7. Relief in Equity by Withdrawal Member.** — A withdrawal member is not required to exhaust legal remedies before proceeding in equity. *Continental Nat. Bldg., etc., Assoc. v. Miller*, 44 Fla. 757.

A withdrawing stockholder may sue in equity for appointment of a receiver and for other equitable relief. *Universal Sav., etc., Co. v. Stoneburner*, (C. C. A.) 113 Fed. Rep. 251; *Continental Nat. Bldg., etc., Assoc. v. Miller*, 44 Fla. 757.

**Where the Value of Shares Is in Dispute**, a stockholder, after notice, may sue in equity to determine their withdrawal value. *Eaton v. Eastern Bldg., etc., Assoc.*, 7 Pa. Dist. 440.

**8. Bids Are Not Required to Be Made in Person**, as by-laws may authorize a written bid filed with the secretary. *Boleman v. Citizens' Loan, etc., Assoc.*, 114 Wis. 217. See also *Hughes v. Farmers' Sav., etc., Assoc.*, (Tenn. Ch. 1897) 46 S. W. Rep. 362; *Ruppel v. Missouri Guarantee, etc., Assoc.*, 158 Mo. 613.

**Assignment of Bid.** — Where the charter of a building association provides that if a stockholder who has made the highest bid for a loan fails to offer satisfactory security for the money he "shall be charged with one month's interest and the money resold at the next stated meeting," such bid cannot be transferred to another person. Unless the person obtaining the loan makes his bid in open meeting, as prescribed by the charter, the transaction is usurious. *Meyer v. Chattanooga Sav., etc., Assoc.*, (Tenn. Ch. 1897) 48 S. W. Rep. 105.

**1055. 4. American Decisions on Partnership Fund Theory.** — *Royal Trust Co. v. Culver*, 87 Ill. App. 630; *Sullivan v. Spaniol*, 78 Ill. App. 125; *International Bldg., etc., Assoc. v. Wall*, 153 Ind. 554.

**6. Not Usurious** — *United States*. — *Manship v. New South Bldg., etc., Assoc.*, 110 Fed. Rep. 845.

*Alabama.* — *Motes v. People's Bldg., etc., Assoc.*, 137 Ala. 369; *Beyer v. National Bldg., etc., Assoc.*, 131 Ala. 369; *Interstate Bldg., etc., Assoc. v. Brown*, 128 Ala. 462; *National Bldg., etc., Assoc. v. Ballard*, 126 Ala. 155; *Johnson v. National Bldg., etc., Assoc.*, 125 Ala. 465, 82 Am. St. Rep. 257.

*Georgia.* — *Collins v. Citizens' Bank, etc., Co.*,

**1056.** See note 1.

**Transaction & Sale of Borrower's Shares.** — See note 2.

**Transaction & Loan and Within Usury Laws.** — See note 4.

**1057.** See notes 1, 2.

**Usury** — Statute Authority. — See notes 4, 5.

**3. Effect on Membership.** — See notes 6, 7, 8.

**4. Relation of Stock Payments and Loans** — *a.* IN GENERAL — **Stock Payments Not Payments on Loan.** — See note 9.

121 Ga. 513; *Hollis v. Covenant Bldg., etc., Assoc.*, 104 Ga. 318; *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814; *Reynolds v. Georgia State Bldg., etc., Assoc.*, 102 Ga. 126.

*Michigan.* — *Phelps v. American Sav., etc., Assoc.*, 121 Mich. 343. See also *Russell v. Pierce*, 121 Mich. 208.

And see generally the title **USURY**.

**1055. 7. Uncertainty of the Scheme.** — *Farmer's Sav., etc., Assoc. v. Ferguson*, 69 Ark. 352; *International Bldg., etc., Assoc. v. Wall*, 153 Ind. 554.

**1056. 1. Amount Not to Be Returned.** — *Security Sav., etc., Assoc. v. Elbert*, 153 Ind. 198, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1054-1056; *Albany Mut. Bldg. Assoc. v. Laramie*, 10 Wyo. 54.

**2. As a Sale of Shares.** — *Bertche v. Equitable Loan, etc., Assoc.*, 147 Mo. 343, 71 Am. St. Rep. 571.

**4. As a Loan Proper — Usury** — *Idaho.* — *Stevens v. Home Sav., etc., Assoc.*, 5 Idaho 741, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056; *Fidelity Sav. Assoc. v. Shea*, 6 Idaho 405.

*Illinois.* — *Borrowers', etc., Bldg. Assoc. v. Eklund*, 190 Ill. 257, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056.

*Kentucky.* — *Simpson v. Kentucky Citizens Bldg., etc., Assoc.*, 101 Ky. 496; *James v. James*, (Ky. 1900) 55 S. W. Rep. 193; *National Bldg., etc., Assoc. v. Gallagher*, (Ky. 1899) 54 S. W. Rep. 209.

*Oregon.* — *Johnson v. Washington Nat. Bldg., etc., Assoc.*, 44 Oregon 603.

*South Carolina.* — *Pollock v. Carolina Interstate Bldg., etc., Assoc.*, 51 S. Car. 420, 64 Am. St. Rep. 683.

*Texas.* — *American Bldg., etc., Assoc. v. Daugherty*, 27 Tex. Civ. App. 430.

And see generally the title **USURY**.

**Held to Be a Loan in Disguise.** — *Watts v. National Bldg., etc., Assoc.*, 102 Ky. 29; *Kleimeir v. Covington Perpetual Bldg., etc., Assoc.*, (Ky. 1902) 70 S. W. Rep. 41.

**1057. 1. Incorporated Associations.** — *Simpson v. Kentucky Citizens Bldg., etc., Assoc.*, 101 Ky. 496.

**2. Watts v. National Bldg., etc., Assoc.**, 102 Ky. 29.

**4. Special Statutes Exempting from Usury Laws.** — *Myers v. Alpena Loan, etc., Assoc.*, 117 Mich. 389.

**A Loan Made in Conformity with the Statutes** is not void as against public policy. *Interstate Sav., etc., Assoc. v. Knapp*, 20 Wash. 225.

**5. Compliance with Statute.** — *Collins v. Cobe*, 202 Ill. 469, affirming 104 Ill. App. 142; *Myers v. Alpena Loan, etc., Assoc.*, 117 Mich. 389; *Meyer v. Chattanooga Sav., etc., Assoc.*, (Tenn. Ch. 1897) 48 S. W. Rep. 105.

**6. Effect on Membership** — *United States.* — *Miles v. New South Bldg., etc., Assoc.*, 111 Fed. Rep. 946.

*Arkansas.* — *Hale v. Phillips*, 68 Ark. 382.

*California.* — *McNamara v. Oakland Bldg., etc., Assoc.*, 131 Cal. 336.

*District of Columbia.* — *Washington Nat. Bldg., etc., Assoc. v. Fiske*, 20 App. Cas. (D. C.) 514. See also *Armstrong v. U. S. Building, etc., Assoc.*, 15 App. Cas. (D. C.) 1; *Eastern Bldg., etc., Assoc. v. Olmsted*, 16 App. Cas. (D. C.) 387.

*Georgia.* — *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814; *Boyd v. Robinson*, 104 Ga. 793.

*Iowa.* — *Wilcoxon v. Smith*, 107 Iowa 555, 70 Am. St. Rep. 220.

*New York.* — *Breed v. Ruoff*, 54 N. Y. App. Div. 142, appeal dismissed 166 N. Y. 612; *Roberts v. Murray*, (County Ct.) 40 Misc. (N. Y.) 339, affirmed 89 N. Y. App. Div. 616.

*Ohio.* — *Main St. Bldg., etc., Co. v. Richter*, 9 Ohio Cir. Dec. 74.

*West Virginia.* — *Day v. National Mut. Bldg., etc., Assoc.*, 53 W. Va. 550; *Young v. Improvement Loan, etc., Assoc.*, 48 W. Va. 512.

*Wisconsin.* — *Leahy v. National Bldg., etc., Assoc.*, 100 Wis. 555, 69 Am. St. Rep. 945.

*Wyoming.* — *Fidelity Sav. Assoc. v. Bank of Commerce*, (Wyo. 1904) 75 Pac. Rep. 448.

**7. Held to Terminate Membership.** — It has been held that a borrowing member virtually ceases to be a stockholder, in the ordinary sense of that term, as soon as he has transferred his stock to the association, though that transfer is designated as a pledge. *Armstrong v. U. S. Building, etc., Assoc.*, 15 App. Cas. (D. C.) 1. See also *Eastern Bldg., etc., Assoc. v. Olmsted*, 16 App. Cas. (D. C.) 387; *Bird v. Kendall*, 62 S. Car. 178.

**8. Right to Vote.** — *Main St. Bldg., etc., Co. v. Richter*, 9 Ohio Cir. Dec. 74.

**9. Borrowing Members Double Relation** — *United States.* — *Riggs v. Capital Brick Co.*, 128 Fed. Rep. 491.

*Alabama.* — *Pioneer Sav., etc., Co. v. Non-nemacher*, 127 Ala. 521; *Johnson v. National Bldg., etc., Assoc.*, 125 Ala. 465, 82 Am. St. Rep. 257.

*Arkansas.* — *Hale v. Phillips*, 68 Ark. 382.

*California.* — *McNamara v. Oakland Bldg., etc., Assoc.*, 131 Cal. 336.

*Georgia.* — *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814.

*Indiana.* — *International Bldg., etc., Assoc. v. Wall*, 153 Ind. 554; *Security Sav., etc., Assoc. v. Elbert*, 153 Ind. 198.

*Iowa.* — *Spinney v. Miller*, 114 Iowa 210, 89 Am. St. Rep. 351.

*Kentucky.* — *Simpson v. Kentucky Citizens Bldg., etc., Assoc.*, 101 Ky. 496.



**1058.** See notes 1, 2.

**1059. b. THE RIGHT TO APPLY STOCK PAYMENTS ON LOANS — Stock Payments Cannot Be Credited on Loans. —** See notes 2, 3, 4.

*Michigan.* — *Estey v. Capitol Invest., etc.*, Assoc., 131 Mich. 502.

*North Dakota.* — *Clarke v. Olson*, 9 N. Dak. 364.

*South Carolina.* — *Meares v. Finlayson*, 55 S. Car. 105.

*Texas.* — *State Nat. L. & T. Co. v. Fuller*, 26 Tex. Civ. App. 318.

*Washington.* — *Interstate Sav., etc., Assoc. v. Knapp*, 20 Wash. 225.

*Wyoming.* — *Fidelity Sav. Assoc. v. Bank of Commerce*, (Wyo. 1904) 75 Pac. Rep. 448, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057.

*Canada.* — *Lee v. Canadian Mut. Loan, etc., Co.*, 5 Ont. L. Rep. 471, affirmed 34 Can. Sup. Ct. 224.

**1058. 1. Stock Payments Not Payments on Loan —** *United States.* — *Pacific States Sav., etc., Co. v. Green*, (C. C. A.) 123 Fed. Rep. 43; *Manorita v. Fidelity Trust, etc., Co.*, 101 Fed. Rep. 8; *Wilson v. Martinez*, (C. C. A.) 108 Fed. Rep. 705.

*Alabama.* — *Sheldon v. Birmingham Bldg., etc., Assoc.*, 121 Ala. 278.

*California.* — *McNamara v. Oakland Bldg., etc., Assoc.*, 131 Cal. 336.

*Iowa.* — *Briggs v. Iowa Sav., etc., Assoc.*, 114 Iowa 232.

*Michigan.* — *Russell v. Pierce*, 121 Mich. 211.

*Missouri.* — *Caston v. Stafford*, 92 Mo. App. 182; *Sappington v. Aetna Loan Co.*, 76 Mo. App. 242; *Price v. Empire Loan Assoc.*, 75 Mo. App. 551.

*Nebraska.* — *People's Bldg., etc., Assoc. v. Gilmore*, (Neb. 1901) 90 N. W. Rep. 108.

*New York.* — *Breed v. Ruoff*, 54 N. Y. App. Div. 142, appeal dismissed 166 N. Y. 612.

*North Dakota.* — *U. S. Savings, etc., Co. v. Shain*, 8 N. Dak. 136.

*Pennsylvania.* — *Freemansburg Bldg., etc., Assoc. v. Watts*, 199 Pa. St. 221; *Land Title, etc., Co. v. Fulmer*, 24 Pa. Super. Ct. 260; *Johnson v. Sharon Bldg. Assoc.*, 16 Pa. Super. Ct. 311; *Erthal v. Glueck*, 10 Pa. Super. Ct. 402.

*Texas.* — *Geisberg v. Mutual Bldg., etc., Assoc.*, (Tex. Civ. App. 1900) 60 S. W. Rep. 478.

*Wyoming.* — *Fidelity Sav. Assoc. v. Bank of Commerce*, (Wyo. 1904) 75 Pac. Rep. 448, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058.

**Applied as Credits on Shares.** — Payments of premiums on stock are not payments on the loan, but are to be applied solely to the credit of the shares. *Pacific States Sav., etc., Co. v. Green*, (C. C. A.) 123 Fed. Rep. 43. See also *Kinney v. Columbia Sav., etc., Assoc.*, 113 Fed. Rep. 359; *Columbia Bldg., etc., Assoc. v. Junquist*, 111 Fed. Rep. 645; *Manship v. New South Bldg., etc., Assoc.*, 110 Fed. Rep. 845; *MacMurray v. Gosney*, 106 Fed. Rep. 11; *Andruss v. People's Bldg., etc., Assoc.*, (C. C. A.) 94 Fed. Rep. 575; *Sullivan v. Stucky*, 86 Fed. Rep. 491.

**Usurious Contracts.** — Where usury exists, all

payments should be credited on the loan on an accounting. *Fowles v. Aetna Loan Co.*, 86 Mo. App. 103. See also *National Bldg., etc., Assoc. v. Glover*, (Ky. 1900) 58 S. W. Rep. 418; *Safety Bldg., etc., Co. v. Ecklar*, 106 Ky. 145; *People's Sav., etc., Assoc. v. Denton*, 106 Ky. 186; *O'Kelly v. Safety Bldg., etc., Co.*, (Ky. 1900) 54 S. W. Rep. 834; *Thudium v. Brookfield Loan, etc., Assoc.*, 98 Mo. App. 377; *Pacific States Sav., etc., Assoc. v. Hill*, 40 Oregon 280; *American Bldg., etc., Assoc. v. Daugherty*, 27 Tex. Civ. App. 430; *People's Bldg., etc., Assoc. v. Marston*, 30 Tex. Civ. App. 100; *Rogers v. People's Bldg., etc., Assoc.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 383; *National Loan, etc., Co. v. Stone*, (Tex. Civ. App. 1898) 46 S. W. Rep. 67; *State Nat. L. & T. Co. v. Fuller*, 26 Tex. Civ. App. 318; *Interstate Bldg., etc., Assoc. v. Goforth*, (Tex. Civ. App. 1900) 57 S. W. Rep. 700.

**2.** See the cases cited in the next preceding note.

In *Canada* it has been held that each payment a borrower makes is *pro tanto* a discharge of his liability. *Lee v. Canadian Mut. Loan, etc., Co.*, 5 Ont. L. Rep. 471, affirmed 34 Can. Sup. Ct. 224.

**1059. 2. Contract Authorizing Application by Parties.** — *Manorita v. Fidelity Trust, etc., Co.*, 101 Fed. Rep. 8; *Sheldon v. Birmingham Bldg., etc., Assoc.*, 121 Ala. 278; *McNamara v. Oakland Bldg., etc., Assoc.*, 131 Cal. 336; *People's Bldg., etc., Assoc. v. Gilmore*, (Neb. 1901) 90 N. W. Rep. 108; *York Trust, etc., Co. v. Gallatin*, 186 Pa. St. 150; *Land Title, etc., Co. v. Fulmer*, 24 Pa. Super. Ct. 260; *Com. v. Anchor Bldg., etc., Assoc.*, 10 Pa. Dist. 167, affirmed 20 Pa. Super. Ct. 101; *Pioneer Bldg., etc., Assoc. v. Everheart*, 18 Tex. Civ. App. 192.

**The Courts Will Enforce Such an Agreement.** — *People's Bldg., etc., Assoc. v. Keller*, 20 Tex. Civ. App. 616.

In *Texas* it has been held that an agreement that payments on stock should be payments on the loan when it is finally adjusted is not usurious. *Cotton States Bldg. Co. v. Rawlins*, (Tex. Civ. App. 1901) 62 S. W. Rep. 805. See also *Geisberg v. Mutual Bldg., etc., Assoc.*, (Tex. Civ. App. 1900) 60 S. W. Rep. 478.

**3. Judgment for Full Amount on Foreclosure.** — *McNamara v. Oakland Bldg., etc., Assoc.*, 131 Cal. 336; *Hale v. Cairns*, 8 N. Dak. 145, 73 Am. St. Rep. 746.

**Must Renounce Claim to Profits.** — In *U. S. Savings, etc., Co. v. Shain*, 8 N. Dak. 136, it was held that a stockholder in a building and loan association who insists on having his stock instalment payments applied at once in reduction of the amount advanced to him, must, in fairness, renounce all claims to share in the profits of the association.

**4. On Redemption.** — *Farmers' Sav., etc., Assoc. v. Kent*, 131 Ala. 246; *Interstate Bldg., etc., Assoc. v. Brown*, 128 Ala. 462; *Pioneer Sav., etc., Co. v. Nonnemacher*, 127 Ala. 521; *National Bldg., etc., Assoc. v. Ballard*, 126 Ala. 155; *Johnson v. National Bldg., etc., Assoc.*,

**1059. Other View.** — See note 5.

Amount Paid in Credited. — See note 7.

Who May Apply. — See note 8.

**1060. Vender of Mortgagor.** — See note 1.

Interest and Profits Not Allowed. — See notes 4, 5.

**1061. 5. Incidents of the Loan — b. INTEREST — When Interest Begins and Ends.** — See note 4.

Special Statutes — Foreign and Domestic Corporations. — See note 5.

125 Ala. 465, 82 Am. St. Rep. 257; Hayes v. Southern Home Bldg., etc., Assoc., 124 Ala. 663, 82 Am. St. Rep. 216; Sheldon v. Birmingham Bldg., etc., Assoc., 121 Ala. 278; Bell v. Southern Home Bldg., etc., Assoc., 140 Ala. 371; Briggs v. Iowa Sav., etc., Assoc., 114 Iowa 232; U. S. Savings, etc., Co. v. Shain, 8 N. Dak. 136; Hale v. Cairns, 8 N. Dak. 145, 73 Am. St. Rep. 746; Fidelity Sav. Assoc. v. Bank of Commerce, (Wyo. 1904) 75 Pac. Rep. 448.

On Foreclosure the mortgagor is not entitled to have sums paid as dues credited on the mortgage debt. Hoagland v. Saul, (N. J. 1902) 53 Atl. Rep. 704.

**1059. 5. Credit Given for Stock Payments — Idaho.** — Stevens v. Home Sav., etc., Assoc., 5 Idaho 741.

*Illinois.* — Vierling v. Mechanics', etc., Sav., etc., Assoc., 179 Ill. 524.

*Indiana.* — International Bldg., etc., Assoc. v. Wall, 153 Ind. 554.

*Kentucky.* — Kentucky Citizens' Bldg., etc., Assoc. v. Daugherty, (Ky. 1905) 84 S. W. Rep. 1178; Safety Bldg., etc., Co. v. Ecklar, 106 Ky. 115; Simpson v. Kentucky Citizens Bldg., etc., Assoc., 101 Ky. 496; Yager v. National Bldg., etc., Assoc., (Ky. 1904) 79 S. W. Rep. 197; Johnson v. Bush, (Ky. 1901) 65 S. W. Rep. 158.

*Missouri.* — Sappington v. Aetna Loan Co., 91 Mo. App. 551; Price v. Empire Loan Assoc., 75 Mo. App. 551.

*Nebraska.* — People's Bldg., etc., Assoc. v. Gilmore, (Neb. 1901) 90 N. W. Rep. 108.

*Oregon.* — Johnson v. Washington Nat. Bldg., etc., Assoc., 44 Oregon 603; Pacific States Sav., etc., Assoc. v. Hill, 40 Oregon 280; Western Sav. Co. v. Houston, 38 Oregon 377.

*Pennsylvania.* — York Trust, etc., Co. v. Gallatin, 186 Pa. St. 150; Johnson v. Sharon Bldg. Assoc., 16 Pa. Super. Ct. 311; Erthal v. Glueck, 10 Pa. Super. Ct. 402.

*South Carolina.* — Interstate Bldg., etc., Assoc. v. Holland, 65 S. Car. 448; Pollock v. Carolina Interstate Bldg., etc., Assoc., 51 S. Car. 420, 64 Am. St. Rep. 683.

*Texas.* — People's Bldg., etc., Assoc. v. Keller, 20 Tex. Civ. App. 616.

*Utah.* — People's Bldg., etc., Assoc. v. Fowble, 17 Utah 122, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1059; Hiskey v. Pacific States Sav., etc., Co., 27 Utah 409; Western Loan, etc., Co. v. Desky, 24 Utah 347; Snyder v. Fidelity Sav. Assoc., 23 Utah 291; Howells v. Pacific States Sav., etc., Co., 21 Utah 45, 81 Am. St. Rep. 659; People's Bldg., etc., Assoc. v. Kroeger, 22 Utah 134; Hale v. Thomas, 20 Utah 426; Sawtelle v. North American Sav., etc., Co., 14 Utah 443.

*Washington.* — U. S. Savings, etc., Co. v. Parr, 26 Wash. 115; U. S. Savings, etc., Co. v. Owens, 23 Wash. 790.

**7. Amount Paid in Credited — Illinois.** — Vierling v. Mechanics, etc., Sav., etc., Assoc., 179 Ill. 524.

*Indiana.* — International Bldg., etc., Assoc. v. Wall, 153 Ind. 554.

*Kentucky.* — Kentucky Citizens' Bldg., etc., Assoc. v. Daugherty, (Ky. 1905) 84 S. W. Rep. 1178; Yager v. National Bldg., etc., Assoc., (Ky. 1904) 79 S. W. Rep. 197; Johnson v. Bush, (Ky. 1901) 65 S. W. Rep. 158; Safety Bldg., etc., Co. v. Ecklar, 106 Ky. 115; Simpson v. Kentucky Citizens Bldg., etc., Assoc., 101 Ky. 496.

*Missouri.* — Sappington v. Aetna Loan Co., 91 Mo. App. 551; Price v. Empire Loan Assoc., 75 Mo. App. 551.

*Nebraska.* — People's Bldg., etc., Assoc. v. Gilmore, (Neb. 1901) 90 N. W. Rep. 108.

*Oregon.* — Johnson v. Washington Nat. Bldg., etc., Assoc., 44 Oregon 603; Pacific States Sav., etc., Assoc. v. Hill, 40 Oregon 280; Western Sav. Co. v. Houston, 38 Oregon 377.

*South Carolina.* — Interstate Bldg., etc., Assoc. v. Holland, 65 S. Car. 448; Pollock v. Carolina Interstate Bldg., etc., Assoc., 51 S. Car. 420, 64 Am. St. Rep. 683.

*Utah.* — Hiskey v. Pacific States Sav., etc., Co., 27 Utah 409; Snyder v. Fidelity Sav. Assoc., 23 Utah 291; Howells v. Pacific States Sav., etc., Co., 21 Utah 45, 81 Am. St. Rep. 659; Hale v. Thomas, 20 Utah 426; Sawtelle v. North American Sav., etc., Co., 14 Utah 443.

*Washington.* — U. S. Savings, etc., Co. v. Parr, 26 Wash. 115; U. S. Savings, etc., Co. v. Owens, 23 Wash. 790.

**8.** McMillan v. Craft, 135 Ala. 148; Johnson v. Sharon Bldg. Assoc., 16 Pa. Super. Ct. 311; Lewin v. Royersford Bldg., etc., Assoc., 9 Pa. Dist. 507.

**1060. 1. Mortgagor's Vender.** — Erthal v. Glueck, 10 Pa. Super. Ct. 402.

**4. No Interest Allowed.** — But see Sappington v. Aetna Loan Co., 91 Mo. App. 551, wherein it was held that in an accounting interest is allowable on dues from the several dates of payment of the same.

**5. No Profits Allowed.** — Interstate Bldg., etc., Assoc. v. Holland, 65 S. Car. 448.

**1061. 4. Tender of Settlement Stops Interest.** — Reitz v. Hayward, 100 Mo. App. 216.

**5.** Rhodes v. Missouri Sav., etc., Co., 173 Ill. 621; People's Bldg., etc., Assoc. v. Kidder, 9 Kan. App. 385; National Mut. Bldg., etc., Assoc. v. Burch, 124 Mich. 57, 83 Am. St. Rep. 311; Hoskins v. Rochester Sav., etc., Assoc., 133 Mich. 505; National Mut. Bldg., etc., Assoc. v. Pinkston, 79 Miss. 468; Sokoloski v. New South Bldg., etc., Assoc., 77 Miss. 155; Clarke v. Woodruff, (Neb. 1904) 100 N. W. Rep. 314.

In Alabama the fact that an association derives its powers from another state does not

**1061.** *c. SECURITY IN GENERAL—Power to Take Security Implied.*—See note 8.

**1062.** *Personal Security.*—See note 3.

**1063.** *e. MORTGAGES—(1) In General—Second Mortgage.*—See note 2. *Estoppel.*—See note 7.

*Enforcing Mortgage.*—See note 8.

**1064.** *(3) Terms of the Mortgage—Certain Sum Secured.*—See note 4. *Different Amount Due on Default.*—See note 5.

**1065.** *Powers of Sale—Attorney's Fees.*—See note 4.

*Instruments Construed as Mortgages.*—See note 5.

**1066.** *Reference to Rules or By-laws.*—See notes 1, 2, 4.

operate as an objection to its doing business in accordance with the statute regulating the rate of interest, where such foreign association has complied with the conditions prescribed by the laws of Alabama. *Interstate Bldg., etc., Assoc. v. Brown*, 128 Ala. 462. See also *Eslava v. New York Nat. Bldg., etc., Assoc.*, 121 Ala. 480.

In Illinois, in order for foreign building and loan associations to enforce in the courts of that state a contract which would be usurious, unless within the exemption given by its statutes to domestic building and loan associations, it must appear that the statute under which it was organized is similar to the statute of Illinois, and an association which, under the guise of a building and loan association, derives its loaning fund in whole or in part from paid-up stock, is not entitled to the protection of the statute exempting building and loan associations from the usury law. *Phoenix Loan Assoc. v. Stringham*, 81 Ill. App. 48. See also *Rhodes v. Missouri Sav., etc., Co.*, 173 Ill. 621.

In Nebraska the contracts of foreign building and loan associations made in that state are not exempt from the penalties denounced against usurious transaction by the statutes. *Anselme v. American Sav., etc., Assoc.*, 66 Neb. 520, *affirming* 63 Neb. 525. See also *People's Bldg., etc., Assoc. v. Shaffer*, 63 Neb. 573; *Building, etc., Assoc. v. Bilan*, 59 Neb. 458; *Interstate Sav., etc., Assoc. v. Strine*, 58 Neb. 133, *affirmed* 59 Neb. 27; *National Mut. Bldg., etc., Assoc. v. Keeney*, 57 Neb. 94; *People's Bldg., etc., Assoc. v. Parish*, (Neb. 1901) 96 N. W. Rep. 243.

**1061.** *8. Power to Take Security Implied.*—*Cogglesall v. Sussman*, (County Ct.) 41 Misc. (N. Y.) 384.

**1062.** *3. Personal Security.*—*Home Sav., etc., Co. v. Fidelity, etc., Co.*, 115 Iowa 394.

The requirement of the Missouri statute to take real security is directory only. *Farmers, etc., Sav. Co. v. McCabe*, 73 Mo. App. 551.

**1063.** *2. Second Mortgage.*—*Manhattan, etc., Sav., etc., Assoc. v. Massarelli*, (N. J. 1899) 42 Atl. Rep. 284.

*7. Estoppel.*—*Reynolds v. Georgia State Bldg., etc., Assoc.*, 102 Ga. 126; *Boleman v. Citizens' Loan, etc., Assoc.*, 114 Wis. 217.

*Estoppel to Deny the Existence of a By-law Providing for Loans.*—A borrower, by receiving a loan and executing his note and mortgage to secure it, both of which recite that the premium was bid to secure the loan under the by-laws of the association, is estopped from disputing the existence of a by-law providing for a fixed

rate of premium. *Collins v. Cobe*, 202 Ill. 469, *affirming* 104 Ill. App. 142.

*8. Enforcing Mortgage.*—*Palmer v. De Witt County Bldg. Assoc.*, 79 Ill. App. 362.

**1064.** *4. To Secure Definite Sum.*—*International Bldg., etc., Assoc. v. Bratton*, 24 Ind. App. 654; *Home Sav., etc., Assoc. v. Mason*, 127 Mich. 676; *Lee v. Canadian Mut. Loan, etc., Co.*, 5 Ont. L. Rep. 471, *affirmed* 34 Can. Sup. Ct. 224.

*Intention Must Be Expressed in Instrument.*—Where it is apparent from the terms of a mortgage that it was intended for a security for the payment of a designated sum, the same being the principal, interest, and premium of a loan by the association, the covenant that the mortgagor will perform all engagements according to the by-laws and articles of the association refers simply to the loans. Any intention to make the mortgage a security for the payment of stock should be expressly set out in the instrument by appropriate language. *Beso v. Eastern Bldg., etc., Assoc.*, 201 Pa. St. 355. See also to same effect *Eastern Bldg., etc., Assoc. v. Olmsted*, 16 App. Cas. (D. C.) 387.

*Construction Favorable to Subscriber.*—*Eastern Bldg., etc., Assoc. v. Olmsted*, 16 App. Cas. (D. C.) 387.

*5. Accelerated Payments.*—*Yankton Bldg., etc., Assoc. v. Dowling*, 10 S. Dak. 540.

Where the mortgage itself authorizes a sale on failure strictly to observe and conform to the provisions of the by-laws and regulations, and such by-laws and regulations provide for a fine for nonpayment of interest and dues, and that the borrower shall execute a mortgage to secure them, a sale of the property may be made on default in the payment of the fines. *Setliff v. North Nashville Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 39 S. W. Rep. 546.

**1065.** *4. Columbian Bldg., etc., Assoc. v. Rice*, 68 S. Car. 236; *Crenshaw v. Hedrick*, 19 Tex. Civ. App. 52.

*5. Instruments Construed as Mortgages.*—*Kear v. Eastern Bldg., etc., Assoc.*, (Neb. 1902) 90 N. W. Rep. 643.

**1066.** *1. By-laws Will Not Prevail Against an Express Agreement* where such agreement, set forth in the mortgage, and the by-laws are inconsistent and in irreconcilable conflict. *Welling v. Eastern Bldg., etc., Assoc.*, 56 S. Car. 280.

*2. Palmer v. De Witt County Bldg. Assoc.*, 79 Ill. App. 362; *Wayne International Bldg., etc., Assoc. v. Skelton*, 27 Ind. App. 624; *Racer v. International Bldg., etc., Assoc.*, (Ind. App. 1902) 63 N. E. Rep. 772; *Washington Nat. Bldg., etc., Assoc. v. Andrews*, 95 Md. 696;

**1067.** *f. MARSHALING SECURITIES — Mortgage and Assigned Stock.* — See notes 1, 2.

**XIII. THE PREMIUM — 1. In General — Defined.** — See note 8.

**1068.** *Its Nature — Not Usurious.* — See notes 1, 2, 3, 4, 5, 6.

Freemansburg Bldg., etc., Assoc. *v.* Watts, 199 Pa. St. 221; *Miller v. Eastern Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 231; *Lee v. Canadian Mut. Loan, etc., Co.*, 5 Ont. L. Rep. 471, *affirmed* 34 Can. Sup. Ct. 224.

**By-laws Construed as Making the Association the Agent of a Borrowing Member** to keep mortgaged property insured, and as fixing responsibility on the association for a failure to do so in event of loss. *Geswine v. Star Bldg., etc., Co.*, 23 Ohio Cir. Ct. 477.

**1066. 4. Canada.** — Where the mortgage contains a covenant that monthly payments will be made by the mortgagor according to the by-laws of the association until the shares shall have matured, the association has power by a by-law passed subsequent to the date of the execution of the mortgage to change the mode of payment from fixed monthly instalments, as stipulated in the mortgage, to a provision by which the mortgage should be released on the maturity of the shares. *Williams v. Dominion Permanent Loan Co.*, 1 Ont. L. Rep. 532.

**1067. 1. Mortgage and Assigned Stock.** — *Plank v. Indiana Mut. Bldg., etc., Assoc.*, 28 Ind. App. 259; *Johnson v. Sharon Bldg. Assoc.*, 16 Pa. Super. Ct. 311; *Lewin v. Royersford Bldg., etc., Assoc.*, 9 Pa. Dist. 507.

**Stock Proceeds Applied First.** — In *Hoagland v. Saul*, (N. J. 1902) 53 Atl. Rep. 704, it was held that the assigned stock should be sold and the proceeds applied on the mortgage debt before enforcing the mortgage lien on the premises.

**2. Where Land Has Been Conveyed.** — *Caston v. Stafford*, 92 Mo. App. 182; *Lewin v. Royersford Bldg., etc., Assoc.*, 9 Pa. Dist. 507.

**Application of Payments.** — A building association, to whom one of its stockholders is indebted for stock subscription and also on a note secured by a mortgage, cannot be forced by a junior mortgagee to impute partial payments made by the debtor upon the mortgage debt, when, under the contract between the parties, they were to be imputed to the stock indebtedness. *Union Nat. Bank v. Hyams*, 50 La. Ann. 1110. See to same effect *Provident Loan, etc., Assoc. v. Carter*, 107 Wis. 383.

**Effect of Release of Stock Held as Collateral Security.** — If the association holds both a mortgage and an assignment of a member's stock as collateral security for a loan, and the borrower subsequently executes a second mortgage on the same premises to a third party, the association, as senior creditor, cannot, after notice of the junior incumbrance, release his peculiar security without running the risk of having its value charged against him, if the common security is insufficient. *Merchantville Bldg., etc., Assoc. v. Zane*, (N. J. 1897) 38 Atl. Rep. 420.

**8. Premium Defined.** — *Cantwell v. Welch*, 187 Ill. 275; *White v. Williams*, 90 Md. 719; *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319; *Western Sav. Co. v. Houston*, 38 Oregon 377; *Fidelity Sav. Assoc. v. Bank of Commerce*, (Wyo. 1904) 75 Pac. Rep. 448, *cit-*

*ing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1067.

**1068. 1. Alabama.** — *Motes v. People's Bldg., etc., Assoc.*, 137 Ala. 369; *Sheldon v. Birmingham Bldg., etc., Assoc.*, 121 Ala. 278.

*Georgia.* — *Collins v. Citizens' Bank, etc., Co.*, 121 Ga. 513.

*Idaho.* — *Stevens v. Home Sav., etc., Assoc.*, 5 Idaho 741.

*Missouri.* — *McDonnell v. De Soto Sav., etc., Assoc.*, 175 Mo. 250, 97 Am. St. Rep. 592; *Laidley v. Cram*, 96 Mo. App. 580.

*Oregon.* — *Hubert v. Washington Nat. Bldg., etc., Assoc.*, 42 Oregon 71.

*Utah.* — *Howells v. Pacific States Sav., etc., Co.*, 21 Utah 45, 81 Am. St. Rep. 659.

*Canada.* — *Lee v. Canadian Mut. Loan, etc., Co.*, 3 Ont. L. Rep. 191, *reversed* on other grounds, 5 Ont. L. Rep. 471.

**Premium on Stock and Interest on Loans Are Separable Obligations.** — *Bell v. Southern Home Bldg., etc., Assoc.*, 140 Ala. 371.

**2. Nonusurious — United States.** — *Bedford v. Eastern Bldg., etc., Assoc.*, 181 U. S. 227; *Pacific States Sav., etc., Co. v. Green*, (C. C. A.) 123 Fed. Rep. 43; *Alexander v. Southern Home Bldg., etc., Assoc.*, 120 Fed. Rep. 963 (under *Georgia* law); *Gale v. Southern Bldg., etc., Assoc.*, 117 Fed. Rep. 732 (under *Alabama* law); *Deitch v. Staub*, (C. C. A.) 115 Fed. Rep. 309 (under *Tennessee* law); *Hieronymus v. New York Nat. Bldg., etc., Assoc.*, 101 Fed. Rep. 12, *affirmed* (C. C. A.) 107 Fed. Rep. 1005 (under *New York* laws); *Miles v. New South Bldg., etc., Assoc.*, 111 Fed. Rep. 946 (under *Louisiana* laws); *Southern Bldg., etc., Assoc. v. Rector*, (C. C. A.) 98 Fed. Rep. 171 (under *Alabama* laws); *Guarantee Sav., etc., Co. v. Alexander*, 96 Fed. Rep. 870 (under *District of Columbia* laws); *Andruss v. People's Bldg., etc., Assoc.*, (C. C. A.) 94 Fed. Rep. 575 (under *New York* laws).

*Alabama.* — *Motes v. People's Bldg., etc., Assoc.*, 137 Ala. 369, *following* *Interstate Bldg., etc., Assoc. v. Brown*, 128 Ala. 462; *Beyer v. National Bldg., etc., Assoc.*, 131 Ala. 369; *Sheldon v. Birmingham Bldg., etc., Assoc.*, 121 Ala. 278; *Farmers Sav., etc., Assoc. v. Kent*, 131 Ala. 246; *Interstate Bldg., etc., Assoc. v. Brown*, 128 Ala. 462; *Pioneer Sav., etc., Co. v. Nonnemacher*, 127 Ala. 521.

*Arkansas.* — *Farmers Sav., etc., Assoc. v. Ferguson*, 69 Ark. 352.

*Georgia.* — *Collins v. Citizens' Bank, etc., Co.*, 121 Ga. 513; *Kirklin v. Atlas Sav., etc., Assoc.*, 107 Ga. 313; *Morgan v. Interstate Bldg., etc., Assoc.*, 108 Ga. 185.

*Illinois.* — *Collins v. Cobe*, 202 Ill. 469; *Hedley v. Geissler*, 90 Ill. App. 565.

*Indiana.* — *U. S. Savings, etc., Co. v. Rider*, 155 Ind. 704; *Equitable Loan, etc., Assoc. v. Peed*, (Ind. 1898) 52 N. E. Rep. 201.

*Iowa.* — *Briggs v. Iowa Sav., etc., Assoc.*, 114 Iowa 232; *Wilcoxon v. Smith*, 107 Iowa 555, 70 Am. St. Rep. 220.

**1068. Sometimes Held to Be Interest.** — See notes 7, 8.

*Michigan.* — *Myers v. Alpena Loan, etc., Assoc.*, 117 Mich. 389.

*Minnesota.* — *Zenith Bldg., etc., Assoc. v. Heimbach*, 77 Minn. 97.

*Missouri.* — *McDonnell v. De Soto Sav., etc., Assoc.*, 175 Mo. 250, 97 Am. St. Rep. 592; *Stanley v. Verity*, 98 Mo. App. 632; *Laidley v. Cram*, 96 Mo. App. 580; *Cover v. Mercantile Mut. Bldg., etc., Assoc.*, 93 Mo. App. 302; *Moses v. National Loan, etc., Co.*, 92 Mo. App. 484.

*New York.* — *Hall v. Stowell*, 75 N. Y. App. Div. 21; *Mutual Ben. Loan, etc., Co. v. Lynch*, 54 N. Y. App. Div. 559, *reversing* (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 499; *Roberts v. Murray*, (County Ct.) 40 Misc. (N. Y.) 339, *affirmed* 89 N. Y. App. Div. 616; *Coggeshall v. Sussman*, (County Ct.) 41 Misc. (N. Y.) 384.

*North Dakota.* — *U. S. Savings, etc., Co. v. Shain*, 8 N. Dak. 136.

*Ohio.* — *Spies v. Southern Ohio L. & T. Co.*, 24 Ohio Cir. Ct. 40, *overruling* *Mykrantz v. Globe Bldg., etc., Assoc.*, 10 Ohio Cir. Dec. 250; *Peoples Sav., etc., Assoc. v. Roberts*, 5 Ohio Dec. 489.

*Utah.* — *Howells v. Pacific States Sav., etc., Co.*, 21 Utah 45, 81 Am. St. Rep. 659.

*Wisconsin.* — *Boleman v. Citizens' Loan, etc., Assoc.*, 114 Wis. 217.

*Wyoming.* — *Fidelity Sav. Assoc. v. Bank of Commerce*, (Wyo. 1904) 75 Pac. Rep. 448.

*Canada.* — *Guertin v. Sansterre*, 27 Can. Sup. Ct. 522; *Lee v. Canadian Mut. Loan, etc., Co.*, 3 Ont. L. Rep. 191, *reversed* on other grounds 5 Ont. L. Rep. 471.

In *Bowman v. Cleveland Bldg., etc., Assoc.*, (Tenn. Ch. 1900) 59 S. W. Rep. 669, it was held that a premium bid of forty per cent., with an assessment of three dollars per month on six hundred dollars' worth of stock, and six per cent. interest on a six hundred dollars loan payable monthly, being in strict compliance with the charter and by-laws of the association, while a hard contract for the borrower, was binding on the parties.

In *Setliff v. North Nashville, Bldg., etc., Assoc.*, (Tenn. Ch. 1897) 39 S. W. Rep. 546, it was held that the payment of a premium of twenty-five per cent., bid at a competitive sale for a loan on shares, did not make the contract usurious.

Under Code Ala. (1886), § 1556, subs. 9 and 10, building and loan associations have the right, if their by-laws so provide, to lend on a fixed premium, which, together with the interest charge *eo nomine*, exceeds the interest rate allowed to be charged by other lenders. *Gale v. Southern Bldg., etc., Assoc.*, 117 Fed. Rep. 732. See also *Sheldon v. Birmingham Bldg., etc., Assoc.*, 121 Ala. 278; *Johnson v. Southern Bldg., etc., Assoc.*, 121 Ala. 524; *National Bldg., etc., Assoc. v. Ballard*, 126 Ala. 155.

**1068. 3.** *Security Sav., etc., Assoc. v. Elbert*, 153 Ind. 198; *International Bldg., etc., Assoc. v. Wall*, 153 Ind. 554; *Iowa Sav., etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197; *Home Bldg., etc., Assoc. v. Nolan*, 21 Mont. 205; *South Omaha Loan, etc., Assoc. v. Wirrick*, 63 Neb. 598; *Smoot v. People's Perpetual*

*Loan, etc., Assoc.*, 95 Va. 686; *Archer v. Baltimore Bldg., etc., Assoc.*, 45 W. Va. 37.

And see generally the cases cited in the next preceding note.

**4. Held Not Part of Principal Advanced.** — *Pacific States Sav., etc., Co. v. Green*, (C. C. A.) 123 Fed. Rep. 43.

*Contra.* — *Safety Bldg., etc., Co. v. Ecklar*, 106 Ky. 115. See also *Locknane v. U. S. Savings, etc., Co.*, 103 Ky. 265.

**5. Held Not Part of Loan.** — *Alexander v. Southern Home Bldg., etc., Assoc.*, 120 Fed. Rep. 963; *Pacific States Sav., etc., Co. v. Green*, (C. C. A.) 123 Fed. Rep. 43; *Briggs v. Iowa Sav., etc., Assoc.*, 114 Iowa 232.

**6. Premiums May Be Deducted as a Gross Sum**, or the association may allow it to be paid in proportionate amounts or instalments. *Cantwell v. Welch*, 187 Ill. 275.

**Payments of Premium by Weekly Instalments.** — A premium bid for a preference in receiving a loan may be paid in weekly instalments. *Graham v. House-Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 52 S. W. Rep. 1011. See also *Counselman v. Holston Nat. Bldg., etc., Assoc.*, 97 Va. 261.

In *Hughes v. Farmers' Sav. etc., Assoc.*, (Tenn. Ch. 1897) 46 S. W. Rep. 362, it was held that a contract providing for the payment of the premium in semi-annual instalments rather than in weekly and monthly instalments was not a violation of the Acts of 1889, c. 267.

**Premium May Be Taken in Advance** out of the amount lent. *South Omaha Loan, etc., Assoc. v. Wirrick*, 63 Neb. 598; *Counselman v. Holston Nat. Bldg., etc., Assoc.*, 97 Va. 261. See also *Hughes v. Farmers' Sav., etc., Assoc.*, (Tenn. Ch. 1897) 46 S. W. Rep. 362.

**Statutes Authorizing Deduction in One Amount.** — Statutes in force where the loan is made authorize the premium to be deducted from the loan in one amount. *Kelly v. Queen City Loan, etc., Assoc.*, 85 Ill. App. 680.

**7. Moses v. National Loan, etc., Co.**, 92 Mo. App. 484; *Hubert v. Washington Nat. Bldg., etc., Assoc.*, 42 Oregon 71. See also *Fry v. Missouri Guarantee, etc., Assoc.*, 88 Mo. App. 289; *Fowles v. Aetna Loan Co.*, 86 Mo. App. 105; *Edinger v. Missouri Guarantee, etc., Assoc.*, 83 Mo. App. 615; *Sappington v. Aetna Loan Co.*, 76 Mo. App. 242; *Wightman v. Suddard*, 93 Ill. App. 142; *Forsell v. Suddard*, 90 Ill. App. 407; and the cases cited in the next following note.

Calling the excess above the highest legal rate a premium does not change the usurious nature of the transaction. *Mykrantz v. Globe Bldg., etc., Assoc.*, 10 Ohio Cir. Dec. 250.

**8. Usury** — *United States*. — *Interstate Sav., etc., Assoc. v. Badgley*, 115 Fed. Rep. 390.

*District of Columbia.* — *Washington Nat. Bldg., etc., Assoc. v. Fiske*, 20 App. Cas. (D. C.) 514; *Middle States Loan, etc., Co. v. Baker*, 19 App. Cas. (D. C.) 1.

*Idaho.* — *Fidelity Sav. Assoc. v. Shea*, 6 Idaho 405; *Stevens v. Home Sav., etc., Assoc.*, 5 Idaho 741.

*Kansas.* — *Royal Loan Assoc. v. Forter*, 68 Kan. 468; *People's Bldg., etc., Assoc. v. Kidder*, 9 Kan. App. 385.

**1069.** See note 1.**A Lump Sum.** — See note 2.

*Kentucky.* — *Simpson v. Kentucky Citizens Bldg., etc., Assoc.*, 101 Ky. 496; *Kleimeir v. Covington Perpetual Bldg., e.c., Assoc.*, (Ky. 1902) 70 S. W. Rep. 41; *James v. James*, (Ky. 1900) 55 S. W. Rep. 193; *Pryse v. People's Bldg., etc., Assoc.*, (Ky. 1897) 41 S. W. Rep. 574.

*Maryland.* — *Washington Nat. Bldg., etc., Assoc. v. Andrews*, 95 Md. 696; *White v. Williams*, 90 Md. 719.

*Mississippi.* — *Southern Home Bldg., etc., Assoc. v. Tony*, 78 Miss. 916; *Sokoloski v. New South Bldg., etc., Assoc.*, 77 Miss. 155; *Shannon v. Georgia State Bldg., etc., Assoc.*, 78 Miss. 955, 84 Am. St. Rep. 657, affirmed 80 Miss. 642; *Crofton v. New South Bldg., etc., Assoc.*, 77 Miss. 166.

*Nebraska.* — *Anselme v. American Sav., etc., Assoc.*, 66 Neb. 520, affirming 63 Neb. 525.

*North Carolina.* — *Cheek v. Iron Belt Bldg., etc., Assoc.*, 126 N. Car. 242; *Hollowell v. Southern Bldg., etc., Assoc.*, 120 N. Car. 286.

*Oregon.* — *Irwin v. Washington Nat. Bldg., etc., Assoc.*, 42 Oregon 105; *Pacific States Sav., etc., Assoc. v. Hill*, 40 Oregon 280; *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319; *Western Sav. Co. v. Houston*, 38 Oregon 377.

*Pennsylvania.* — *Land Title, etc., Co. v. Fulmer*, 24 Pa. Super. Ct. 256.

*Texas.* — *People's Bldg., etc., Assoc. v. Keller*, 20 Tex. Civ. App. 616; *American Mut. Bldg., etc., Assoc. v. Cornibe*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1026; *Walter v. Mutual Home Sav. Assoc.*, 29 Tex. Civ. App. 379; *State Nat. L. & T. Co. v. Fuller*, 26 Tex. Civ. App. 318; *Interstate Bldg., etc., Assoc. v. Goforth*, (Tex. Civ. App. 1900) 57 S. W. Rep. 700; *People's Bldg., etc., Assoc. v. Marston*, 30 Tex. Civ. App. 100; *American Bldg., etc., Assoc. v. Daugherty*, 27 Tex. Civ. App. 430; *National Loan, etc., Co. v. Stone*, (Tex. Civ. App. 1898) 46 S. W. Rep. 67.

*West Virginia.* — *Prince v. Holston Nat. Bldg., etc., Assoc.*, 55 W. Va. 19; *McConnell v. Cox*, 50 W. Va. 469; *Gray v. Baltimore Bldg., etc., Assoc.*, 48 W. Va. 164; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149.

**Money Held Back.** — In *Hyland v. Phoenix Loan Assoc.*, 118 Iowa 401, it was held that, where a loan was nominally for one thousand five hundred dollars, with the usual concomitants of premiums and fines, and the security was given on the basis of a loan for that sum, and dated June 14, 1892, from which date interest and premiums were paid, but no money was received by the borrower until September 23 thereafter, when a draft of seven hundred and fifty dollars was delivered to the borrower, and the account was finally balanced on the following December 23 by delivering to the borrower another draft for five hundred and seventy-nine dollars, and charging him the sum of one hundred and seventy-one dollars for the monthly instalments which had accrued at that date, the transaction was not within the protection of the statute, and was treated as usurious.

**Florida Rule as to Foreign Building and Loan Associations.** — A foreign building and loan

association is not permitted to charge interest at the rate of six per cent. and a fixed premium of six per cent. on loans to its members in the state; the contract being made subject to the laws of Florida. *Skinner v. Southern Home Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 67.

**In Nebraska** a contract which provides for six per cent. interest, payable monthly, on a loan of one thousand five hundred dollars, and also provides for a premium of one thousand five hundred dollars to be paid by the borrower by taking stock in that amount in a foreign corporation which has not complied with the statute laws regulating building and loan associations, and making monthly payments on such stock of nine dollars until the same is matured, is usurious. *Anselme v. American Sav., etc., Assoc.*, 66 Neb. 520.

**1069.** 1. See *Washington Nat. Bldg., etc., Assoc. v. Fiske*, 20 App. Cas. (D. C.) 514; *Middle States Loan, etc., Co. v. Baker*, 19 App. Cas. (D. C.) 1; *National Mut. Bldg., etc., Assoc. v. Burch*, 124 Mich. 57, 83 Am. St. Rep. 311.

In *West Virginia* a building and loan association contract, requiring the payment of a fixed monthly premium on the loan for an indefinite time, is usurious. *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149.

In *Laidley v. Cram*, 96 Mo. App. 580, it was held that, unless such premiums, by an annual apportionment through all the years of the loan, when added to the five per cent. named in the bond, make the total interest charged in excess of what may be lawfully agreed on in writing, the loan is not usurious.

Where the charter of an association provides that the money shall be loaned to members upon competitive bidding, and premiums bid shall be paid in cash before the loan is made, a loan made under by-laws permitting the premium to be paid in monthly instalments at a greater rate than legal interest is usurious. *Carpenter v. Lewis*, 60 S. Car. 23.

**2. A Lump Sum.** — A building and loan association may fix a minimum premium, payable in advance or in periodical instalments, but such premium must be a lump sum, certain and definite, and not a percentage payable indefinitely at fixed periods. *Prince v. Holston Nat. Bldg., etc., Assoc.*, 55 W. Va. 19. See also to same effect *Gray v. Baltimore Bldg., etc., Assoc.*, 48 W. Va. 164; *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 87 Am. St. Rep. 805; *McConnell v. Cox*, 50 W. Va. 469; *Racer v. International Bldg., etc., Assoc.*, 159 Ind. 697; *International Bldg., etc., Assoc. v. Radebaugh*, 159 Ind. 549; *Coppes v. Union Nat. Sav., etc., Assoc.*, 133 Ind. App. 367; *White v. Williams*, 90 Md. 719; *Washington Nat. Bldg., etc., Assoc. v. Andrews*, 95 Md. 696. But see *Counselman v. Holston Nat. Bldg., etc., Assoc.*, 97 Va. 261, wherein it was held that, if the premium is only payable until the maturity of the loan, and that period is fixed by the bond and deed of trust securing it, the payment of the premium cannot be exacted beyond such period, and, therefore, the date of the maturity of the loan being fixed and definite, it renders the amount of

- 1069.** Legalized by Statute. — See notes 5, 6.  
 Recovery on Repayment of Loan. — See note 7.  
**1070.** 2. Minimum Premiums. — See notes 1, 2.

premium definite and certain also, although paid in instalments.

**1069. 5. Statutes Authorizing Premiums.** — *Boleman v. Citizens' Loan, etc., Assoc.*, 114 Wis. 217. See also *Manship v. New South Bldg., etc., Assoc.*, 110 Fed. Rep. 845; *Edworthy v. Iowa Sav., etc., Assoc.*, 114 Iowa 220.

**6. Auctions Authorized.** — *Gale v. Southern Bldg., etc., Assoc.*, 117 Fed. Rep. 732; *Counselman v. Holston Nat. Bldg., etc., Assoc.*, 97 Va. 261. See also *supra*, this title, **1054. 8.**

**7. Premium Not to Be Credited on Foreclosure.** — A premium originally deducted from the loan, being a voluntary payment by the applicant as an entrance fee and exacted by the association under its constitution and by-laws, the borrower is not entitled to any credit therefor on account of either principal or interest on foreclosure of his mortgage to the association. *State Mut. Bldg., etc., Assoc. v. O'Callaghan*, (N. J. 1904) 57 Atl. Rep. 496.

**1070. 1. Minimum Premium Held Unlawful** — *United States.* — *Deitch v. Staub*, (C. C. A.) 115 Fed. Rep. 309; *Coltrane v. Baltimore Bldg., etc., Assoc.*, 110 Fed. Rep. 293; *Douglass v. Kavanaugh*, (C. C. A.) 90 Fed. Rep. 373.

*Florida.* — *Skinner v. Southern Home Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 67.

*Illinois.* — *Jurgens v. Jamieson*, 97 Ill. App. 557, affirmed 195 Ill. 86; *Assets Realization Co. v. Wightman*, 105 Ill. App. 618; *Trainor v. German-American Sav., etc., Assoc.*, 102 Ill. App. 604.

*Iowa.* — *Wilcoxon v. Smith*, 107 Iowa 555, 70 Am. St. Rep. 220; *Iowa Sav., etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197.

*Kansas.* — *Mutual Home, etc., Assoc. v. Worz*, 67 Kan. 506.

*Michigan.* — *Stoddard v. Saginaw Bldg., etc., Assoc.*, (Mich. 1904) 101 N. W. Rep. 50; *Estey v. Capitol Invest., etc., Assoc.*, 131 Mich. 502. See also *Myers v. Alpena Loan, etc., Assoc.*, 117 Mich. 389.

*Missouri.* — *Clark v. Missouri Guarantee, etc., Assoc.*, 85 Mo. App. 388; *McDonnell v. De Soto Sav., etc., Assoc.*, 175 Mo. 250, 97 Am. St. Rep. 592.

*Nebraska.* — *South Omaha Loan, etc., Assoc. v. Wirrick*, 63 Neb. 598.

*Oregon.* — *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319.

*Pennsylvania.* — *Land Title, etc., Co. v. Fulmer*, 24 Pa. Super. Ct. 256.

*South Carolina.* — *Carpenter v. Lewis*, 60 S. Car. 23.

*South Dakota.* — *Clarke v. Connors*, (S. Dak. 1904) 101 N. W. Rep. 883.

*Tennessee.* — *Star, etc., Assoc. v. Woods*, 100 Tenn. 121; *Meyer v. Chattanooga Sav., etc., Assoc.*, (Tenn. Ch. 1897) 48 S. W. Rep. 105; *Graham v. House-Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 52 S. W. Rep. 1011.

**Bid Defined.** — "A bid is an offer at an auction sale to pay a certain price for the property on sale. An offer may be made as well in writing as orally, and where there are a number of bids in writing for the same property that is

offered at auction, unless they all bid the same amount on like terms, it cannot be said there were no competing bids at the sale." *Edinger v. Missouri Guarantee, etc., Assoc.*, 83 Mo. App. 615. See also *Hughes v. Farmers' Sav., etc., Assoc.*, (Tenn. Ch. 1897) 46 S. W. Rep. 362.

*In Illinois.* — Making a successful bid for a loan constitutes the bidder a member of the association, and such member is estopped from setting up the irregularities of the meeting where the bid was made. *Lurton v. Jacksonville Loan, etc., Assoc.*, 187 Ill. 141, affirming 87 Ill. App. 395.

*In Indiana.* under Acts 1897, p. 287, § 9, it is competent and lawful for a borrower from the association to agree in writing upon a given rate of premium in addition to the interest to be paid upon each loan, without bidding, the premium thereof to be by instalments instead of in gross. The act further legalizes all such contracts previously made. *International Bldg., etc., Assoc. v. Wall*, 153 Ind. 554; *U. S. Savings, etc., Co. v. Rider*, 155 Ind. 704. See also *International Bldg., etc., Assoc. v. Radebaugh*, 159 Ind. 549.

*In Iowa.* under Code (1897), § 1898, the necessity for competitive bidding was removed, and by Acts of 27th Gen. Assem., c. 48, said section 1898 is made retroactive. *Tootle v. Singer*, 118 Iowa 533. See also *Iowa Sav., etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197.

**When By-law Fixing Minimum Premium Not Prejudicial.** — The rule that the bidding must be free is not violated by a by-law fixing a minimum premium of twenty-five per cent., where the loan is awarded after competitive bidding, at an advance of thirty and thirty-one per cent. *Dailey v. Saginaw Bldg., etc., Assoc.*, 133 Mich. 403.

*In Missouri.* under Rev. Stat. 1899, § 2812, building and loan associations were required to offer loans to members only on competitive bidding and in open meeting. *Moore v. Cameron Bldg., etc., Assoc.*, 74 Mo. App. 468. See also *Price v. Empire Loan Assoc.*, 75 Mo. App. 551; *Sappington v. Aetna Loan Co.*, 76 Mo. App. 242; *Barnes v. Missouri Guarantee, etc., Assoc.*, 83 Mo. App. 466; *Clark v. Missouri Guarantee, etc., Assoc.*, 85 Mo. App. 388; *Fry v. Missouri Guarantee, etc., Assoc.*, 88 Mo. App. 289; *Cornwall v. Ganser*, 85 Mo. App. 678; *Ruppel v. Missouri Guarantee, etc., Assoc.*, 158 Mo. 613; *State v. Phoenix Loan Assoc.*, 85 Mo. App. 477; *Thudium v. Brookfield Loan, etc., Assoc.*, 98 Mo. App. 377; *Arbuthnot v. Brookfield Loan, etc., Assoc.*, 98 Mo. App. 382; *Moses v. National Loan, etc., Co.*, 92 Mo. App. 484; *Kittredge v. Chillicothe Loan, etc., Assoc.*, 103 Mo. App. 361. But see *Cover v. Mercantile Bldg., etc., Assoc.*, 93 Mo. App. 302, wherein it was held that under Rev. Stat. 1899, § 1362, amending the former statute, instead of requiring competitive bids in open meeting, a fixed premium may now be required to be paid by a by-law of the association, and where such premium has been so fixed and a member bor-

**1070. 3. Interest on Premiums — Not Allowed.** — See note 4.

Interest Allowed on Premiums. — See note 6.

**1071. XIV. USURY — 1. In General — Substance and Not Form the Criterion.** — See note 4.

Combining Dues and Interest. — See note 5.

rows at a less premium, no complaint can be heard from the borrower on the ground of usury, though the association exacts a premium, which, added to the interest charged, would exceed the legal rate. *Compare* *McDonnell v. De Soto Sav., etc., Assoc.*, 175 Mo. 250, 97 Am. St. Rep. 592, wherein it was held that such a by-law was subject to the defense of usury for the reason that the bidder was compelled to pay more than ten per cent., while there could have been no bidders under that rate because of the arbitrary minimum rate fixed by the by-law.

**In West Virginia** the statute allows the fixing of a minimum premium, which may be deducted from the loan in advance, or paid in periodical instalments, thus rendering the unjust, unequal, and deceptive practice of competitive bidding practically obsolete. *Archer v. Baltimore Bldg., etc., Assoc.*, 45 W. Va. 37. See also *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 87 Am. St. Rep. 805.

**Borrower Need Not Be Present.** — The borrower need not himself be present at the meeting, but may submit his bid in writing. *State v. Phoenix Loan Assoc.*, 85 Mo. App. 477. See also *Barnes v. Missouri Guarantee, etc., Assoc.*, 83 Mo. App. 466; *Hilton v. Rosenheim*, (Tenn. Ch. 1899) 52 S. W. Rep. 658; *Collins v. Citizens' Bank, etc., Co.*, 121 Ga. 513.

**Bid May Be Made by a Secretary on Authority in Writing** from the stockholders, and it is not necessary that the stockholders should meet every time money is put up at auction, as open meetings of the board of directors answer the demands of the statute. *Boleman v. Citizens' Loan, etc., Assoc.*, 114 Wis. 217. See also *Farmer's Sav., etc., Assoc. v. Kent*, 131 Ala. 246.

**Effect of Voluntary Bid in Excess of Minimum Premium Required by By-law.** — While a by-law which fixes a minimum premium below which bids will not be considered may render a transaction usurious as to one who was forced, by reason of the by-law, to bid a larger premium than he otherwise would have been required to pay, yet, where one voluntarily bids a premium greatly in excess of that required by the by-law, he cannot be heard to complain of the obnoxious by-law. *U. S. Savings, etc., Co. v. Shain*, 8 N. Dak. 136. See also *Kittredge v. Chillicothe Loan, etc., Assoc.*, 103 Mo. App. 361.

**Presumption that By-law as to Bidding Was Complied with.** — The presumption is that a by-law relative to competitive bidding was complied with until the contrary is shown. *Farmer's Sav., etc., Assoc. v. Ferguson*, 69 Ark. 352. See also *International Bldg., etc., Assoc. v. Wall*, 153 Ind. 554; *Hawkeye State Sav., etc., Assoc. v. Johnston*, 106 Iowa 218; *U. S. Savings, etc., Co. v. Shain*, 8 N. Dak. 136.

**By Bidding by Officers or Agents.** — In *Nebraska* loans by a building and loan association must be open to competitive bidding, and by-bidding by its officers or agents for the purpose

of increasing the premium to be paid will not be tolerated. *South Omaha Loan, etc., Assoc. v. Wirrick*, 63 Neb. 598.

**The Assent of the Borrower to Pay the Price Required** does not make him a bidder within the meaning of the statute. *Mykrantz v. Globe Bldg., etc., Assoc.*, 10 Ohio Cir. Dec. 250.

**Where Balance of Fund Is Loaned at Same Amount as Highest Bid.** — In *Stewart v. Hamilton Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 47 S. W. Rep. 1106, it was held that, where the highest bidder takes as much of the money offered by the association as he desired, and such amounts as other bidders desired were knocked off to them at the same price, the rule against fixed premiums was not violated.

**Member Has No Right to Sell and Transfer a Bid.** — *Meyer v. Chattanooga Sav., etc., Assoc.* (Tenn. Ch. 1897) 48 S. W. Rep. 105.

**When Borrower Cannot Complain of Violation of By-law.** — Where a borrower has consented to pay a premium bid fixed contrary to a by-law requiring bids to be made in open meeting, he cannot complain of the violation of the by-law. *McNamara v. Oakland Bldg., etc., Assoc.*, 131 Cal. 336.

**1070. 2. Beyer v. National Bldg., etc., Assoc.**, 131 Ala. 369; *Crittenden v. Southern Home Bldg., etc., Assoc.*, 111 Ga. 266, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1070; *Racer v. International Bldg., etc., Assoc.*, (Ind. App. 1902) 63 N. E. Rep. 772; *Zenith Bldg., etc., Assoc. v. Heimbach*, 77 Minn. 97; *Peoples Sav., etc., Assoc. v. Roberts*, 5 Ohio Dec. 489.

**In the Absence of a Statute**, the exaction of a premium and its amount are matters that can be determined by the association itself. *Eagle Sav., etc., Co. v. Samuels*, 43 N. Y. App. Div. 386.

**In South Dakota** it is competent for the board of directors of an association to provide by a by-law that they (the board of directors) should have a power to fix a minimum rate of interest and premium at which money shall be loaned, since Laws 1893, c. 40, do not operate as a repeal of Laws 1885, c. 34, § 4. *Co-operative Sav., etc., Assoc. v. Fawick*, 11 S. Dak. 589.

**4. Interest on Premiums Held Usury.** — *Pacific States Sav., etc., Assoc. v. Hill*, 40 Oregon 280; *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319; *Western Sav. Co. v. Houston*, 38 Oregon 377; *Interstate Bldg., etc., Assoc. v. Crawford*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1071.

**6. Interest on Premiums Held Legal.** — *Hall v. Stowell*, 75 N. Y. App. Div. 21.

**1071. 4. Usury — Form of Contract Immaterial.** — *Trainor v. German-American Sav., etc., Assoc.*, 102 Ill. App. 604; *Wilcoxon v. Smith*, 107 Iowa 555, 70 Am. St. Rep. 220, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071; *Zenith Bldg., etc., Assoc. v. Heimbach*, 77 Minn. 97; *Meares v. Finlayson*, 63 S. Car. 537.

**5. Dues and Interest Combined.** — *State v. Phoenix Loan Assoc.*, 85 Mo. App. 477.



**1071.** Question of Fact. — See note 7.

Burden of Proof. — See note 8.

How Usury Determined. — See note 11.

**1072.** Monthly Interest — Incidental Charges — Fines. — See notes 1, 2.

Law of Place. — See note 5.

**1071. 7. Usury a Question for Jury.** — *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814; *Hollis v. Covenant Bldg., etc., Assoc.*, 104 Ga. 318; *Walter v. Mutual Home Sav. Assoc.*, 29 Tex. Civ. App. 379; *State Nat. L. & T. Co. v. Fuller*, 26 Tex. Civ. App. 318; *Mathews v. Interstate Bldg., etc., Assoc.*, (Tex. Civ. App. 1899) 50 S. W. Rep. 604; *Peightal v. Cotton States Bldg. Co.*, 25 Tex. Civ. App. 390.

**8. Rooney v. Southern Bldg., etc., Assoc.**, 119 Ga. 941; *International Bldg., etc., Assoc. v. Wall*, 153 Ind. 554; *Building, Sav., etc., Assoc. v. Froelich*, 110 Iowa 244; *Hawkeye State Sav., etc., Assoc. v. Johnston*, 106 Iowa 218; *Sappington v. Ætna Loan Co.*, 76 Mo. App. 242.

**11. In Canada** it has been held that, where the by-laws of the company provide that the rate of interest should be six per cent., and the mortgage executed to the company provided that the rate of interest payable when the stock payments, dues, and interest were not promptly paid, should be fifteen per cent., the borrower having made default in such payments, the company was entitled to the amount due, with interest at the latter rate. *Canadian Mut. Loan, etc., Co. v. Burns*, 34 Nova Scotia 303.

**1072. 1. In West Virginia** it has been held that the requirement of a loan that the premium should be paid in monthly instalments until the stock matured rendered the amount of the premium so uncertain as to stain the contract with usury. *Prince v. Holston Nat. Bldg., etc., Assoc.*, 55 W. Va. 19.

**2. Incidental Charges.** — *Iowa Sav., etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197.

**5. Law of Place — United States.** — *National Mut. Bldg., etc., Assoc. v. Farnham*, 194 U. S. 630, *affirming* 81 Miss. 364; *Bedford v. Eastern Bldg., etc., Assoc.*, 181 U. S. 227; *Interstate Sav., etc., Assoc. v. Badgley*, 115 Fed. Rep. 390; *Kinney v. Columbia Sav., etc., Assoc.*, 113 Fed. Rep. 359; *Kirlicks v. Interstate Bldg., etc., Assoc.*, (C. C. A.) 113 Fed. Rep. 290; *Coltrane v. Blake*, (C. C. A.) 113 Fed. Rep. 785; *Southern Bldg., etc., Assoc. v. Johnson*, (C. C. A.) 111 Fed. Rep. 657; *Mac Murray v. Gosney*, 106 Fed. Rep. 11; *Sullivan v. Sheehan*, 89 Fed. Rep. 247.

*Alabama.* — *Farmer's Sav., etc., Assoc. v. Kent*, 131 Ala. 246.

*Arkansas.* — *Hough v. Maupin*, (Ark. 1905) 84 S. W. Rep. 717; *Clarke v. Taylor*, 69 Ark. 612; *Farmer's Sav., etc., Assoc. v. Ferguson*, 69 Ark. 352; *Farmers', etc., Sav. Co. v. Bazole*, 67 Ark. 252.

*Florida.* — *Skinner v. Southern Home Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 67.

*Georgia.* — *Hollis v. Covenant Bldg., etc., Assoc.*, 104 Ga. 318.

*Illinois.* — *Rhodes v. Missouri Sav., etc., Co.*, 173 Ill. 621.

*Iowa.* — *Spinney v. Chapman*, 121 Iowa 38, 100 Am. St. Rep. 305, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1072.

*Kansas.* — *Royal Loan Assoc. v. Forter*, 68 Kan. 468; *Mutual Home, etc., Assoc. v. Worz*, 67 Kan. 506; *People's Bldg., etc., Assoc. v. Kidder*, 9 Kan. App. 385.

*Kentucky.* — *Locknane v. U. S. Savings, etc., Co.*, 103 Ky. 265; *Pryse v. People's Bldg., etc., Assoc.*, (Ky. 1897) 41 S. W. Rep. 574.

*Michigan.* — *Home Sav., etc., Assoc. v. Mason*, 127 Mich. 676; *National Mut. Bldg., etc., Asso. v. Burch*, 124 Mich. 57, 83 Am. St. Rep. 311; *Hoskins v. Rochester Sav., etc., Assoc.*, 133 Mich. 505; *Phelps v. American Sav., etc., Assoc.*, 121 Mich. 343. See also *Russell v. Pierce*, 121 Mich. 208.

*Mississippi.* — *Shannon v. Georgia State Bldg., etc., Assoc.*, 78 Miss. 955, 84 Am. St. Rep. 657, *citing* 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1072; *National Mut. Bldg., etc., Assoc. v. Brahan*, 80 Miss. 407; *National Mut. Bldg., etc., Assoc. v. Hulet*, (Miss. 1902) 33 So. Rep. 3; *Georgia State Bldg., etc., Assoc. v. Brown*, (Miss. 1902) 31 So. Rep. 911.

*Nebraska.* — *Peoples Bldg., etc., Assoc. v. Shaffer*, 63 Neb. 573; *Henni v. Fidelity Bldg., etc., Assoc.*, 61 Neb. 744, 87 Am. St. Rep. 519; *People's Bldg., etc., Assoc. v. Parish*, (Neb. 1901) 96 N. W. Rep. 243; *Building, etc., Assoc. v. Bilan*, 59 Neb. 458; *Interstate Sav., etc., Assoc. v. Strine*, 58 Neb. 133, *affirmed* 59 Neb. 27; *National Mut. Bldg., etc., Assoc. v. Keeney*, 57 Neb. 94.

*New Jersey.* — *Manhattan, etc., Sav., etc., Assoc. v. Massarelli*, (N. J. 1899) 42 Atl. Rep. 284.

*New Mexico.* — *Monier v. Clarke*, (N. Mex. 1904) 75 Pac. Rep. 35.

*Oregon.* — *Hicinbotham v. Interstate Sav., etc., Assoc.*, 40 Oregon 511; *Pacific States Sav., etc., Assoc. v. Hill*, 40 Oregon 280; *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319.

*Pennsylvania.* — *Land Title, etc., Co. v. Fulmer*, 24 Pa. Super. Ct. 256; *Healy v. Eastern Bldg., etc., Assoc.*, 17 Pa. Super. Ct. 385.

*South Carolina.* — *Carpenter v. Lewis*, 60 S. Car. 23; *Meares v. Finlayson*, 55 S. Car. 105; *Pollock v. Carolina Interstate Bldg., etc., Assoc.*, 51 S. Car. 420, 64 Am. St. Rep. 683.

*Tennessee.* — *Neal v. New Orleans Loan, etc., Assoc.*, 100 Tenn. 607; *Harmon v. Hart*, (Tenn. Ch. 1899) 53 S. W. Rep. 310.

*Texas.* — *Crenshaw v. Hedrick*, 19 Tex. Civ. App. 52; *National Loan, etc., Co. v. Stone*, (Tex. Civ. App. 1898) 46 S. W. Rep. 67.

*Utah.* — *Snyder v. Fidelity Sav. Assoc.*, 23 Utah 291; *People's Bldg., etc., Assoc. v. Fowble*, 17 Utah 122, *affirmed* 18 Utah 206.

*Virginia.* — *People's Bldg., etc., Assoc. v. Tinsley*, 96 Va. 322; *Cowan v. National Mut. Bldg., etc., Assoc.*, (Va. 1899) 33 S. E. Rep. 553.

*West Virginia.* — *Prince v. Holston Nat. Bldg., etc., Assoc.*, 55 W. Va. 19; *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 87 Am. St. Rep. 805; *Gray v. Baltimore Bldg., etc., Assoc.*, 48 W. Va. 164.

**1072. 2. Effect of Usury on the Contract.** — See note 6.**Usurious Payments Applied on Principal.** — See notes 8, 9.**Who May Set Up Usury.** — See notes 11, 12, 13.

*Wyoming.* — *Fidelity Sav. Assoc. v. Bank of Commerce*, (Wyo. 1904) 75 Pac. Rep. 448.

**Where the Home Office Is Designated as Place of Performance**, the contract is governed by the laws in the state of the home office.

*United States.* — *Bedford v. Eastern Bldg., etc., Assoc.*, 181 U. S. 227, affirming 88 Fed. Rep. 7. See also *Lewis v. Clark*, (C. C. A.) 129 Fed. Rep. 570; *Pacific States Sav., etc., Co. v. Green*, (C. C. A.) 123 Fed. Rep. 43; *Alexander v. Southern Home Bldg., etc., Assoc.*, 120 Fed. Rep. 963; *Interstate Bldg., etc., Assoc. v. Edgefield Hotel Co.*, 120 Fed. Rep. 422; *Gale v. Southern Bldg., etc., Assoc.*, 117 Fed. Rep. 732; *U. S. Savings, etc., Co. v. Harris*, 113 Fed. Rep. 27; *Miles v. New South Bldg., etc., Assoc.*, 111 Fed. Rep. 946; *McIlwaine v. Ellington*, (C. C. A.) 111 Fed. Rep. 578; *Manship v. New South Bldg., etc., Assoc.*, 110 Fed. Rep. 845; *Hieronymus v. New York Nat. Bldg., etc., Assoc.*, 101 Fed. Rep. 12, affirmed (C. C. A.) 107 Fed. Rep. 1005; *McIlwaine v. Iseley*, 96 Fed. Rep. 62; *Lauer v. Covenant Bldg., etc., Assoc.*, 96 Fed. Rep. 775; *Southern Bldg., etc., Assoc. v. Rector*, (C. C. A.) 98 Fed. Rep. 171; *Guarantee Sav., etc., Co. v. Alexander*, 96 Fed. Rep. 870; *Andruss v. People's Bldg., etc., Assoc.*, (C. C. A.) 94 Fed. Rep. 575.

*Alabama.* — *Allen v. Riddle*, (Ala. 1904) 37 So. Rep. 680.

*Arkansas.* — *Clarke v. Taylor*, 69 Ark. 612.

*Pennsylvania.* — *Beso v. Eastern Bldg., etc., Assoc.*, 16 Pa. Super. Ct. 222. See also *People's Bldg., etc., Assoc. v. Berlin*, 201 Pa. St. 1, 88 Am. St. Rep. 764.

*South Carolina.* — *Columbian Bldg., etc., Assoc. v. Rice*, 68 S. Car. 236; *Tobin v. McNab*, 53 S. Car. 75.

See also *U. S. Saving, etc., Co. v. Miller*, (Tenn. Ch. 1897) 47 S. W. Rep. 17.

**In Idaho** the validity of the contract of a foreign building and loan association must be determined by the laws of that state as respects usury. *Fidelity Sav. Assoc. v. Shea*, 6 Idaho 405.

**In Iowa** a condition in the contract of a foreign association requiring all actions against the association to be brought in the state of its domicile is opposed both to the general principles of the general policy and the settled policy of that state. *Field v. Eastern Bldg., etc., Assoc.*, 117 Iowa 185.

**Intention of Parties.** — In *Ohio* parties to a building and loan contract, living in different states, are at liberty to elect to be governed by the laws of either state; but where they make no choice in express terms, it becomes the duty of the court to determine from the evidence and circumstances attending the transaction which code of laws was intended by the parties to cover and govern their rights in the contract. *Demland v. Pioneer Sav., etc., Co.*, 11 Ohio Cir. Dec. 249.

**Contract as to Which Law Shall Govern.** — Unless the contract is made with the intent and purpose of evading the usury laws, the parties may contract for the payment of interest accord-

ing to the law of either the place of making the contract or of the place of its performance, without offending the laws of that state. *Barratt v. Central Bldg., etc., Assoc.*, 130 Ala. 299. See also *Pioneer Sav., etc., Co. v. Nonnemacher*, 127 Ala. 521.

Where a foreign building and loan association advances money to a member residing in another state, they may agree that the transaction shall be governed by the laws of either state, and if the transaction should be valid in one state and invalid in another, the law will presume, in the absence of stipulations, that the parties contracted with reference to the laws of that state where their contract will be upheld. *U. S. Savings, etc., Co. v. Shain*, 8 N. Dak. 136. See also *Hale v. Cairns*, 8 N. Dak. 145, 73 Am. St. Rep. 746.

**1072. 6. Locknane v. U. S. Savings, etc., Co.**, 103 Ky. 265; *Hubert v. Washington Nat. Bldg., etc., Assoc.*, 42 Oregon 71; *Land Title, etc., Co. v. Fulmer*, 24 Pa. Super. Ct. 256; *Epping v. Washington Nat. Bldg., etc., Assoc.*, 44 Oregon 116; *Hughes v. Farmers' Sav., etc., Assoc.*, (Tenn. Ch. 1897) 46 S. W. Rep. 362. See also *Hubert v. Washington Nat. Bldg., etc., Assoc.*, 42 Oregon 71; *Irwin v. Washington Nat. Bldg., etc., Assoc.*, 42 Oregon 105; *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319.

**8. Usurious Interest Applied to Principal** — *United States.* — *Southern Bldg., etc., Assoc. v. Johnson*, (C. C. A.) 111 Fed. Rep. 657; *Coltrane v. Baltimore Bldg., etc., Assoc.*, 110 Fed. Rep. 293.

*District of Columbia.* — *Washington Nat. Bldg., etc., Assoc. v. Fiske*, 20 App. Cas. (D. C.) 514; *Middle States Loan, etc., Co. v. Baker*, 19 App. Cas. (D. C.) 1.

*Iowa.* — *Wilcoxon v. Smith*, 107 Iowa 555, 70 Am. St. Rep. 220.

*Kentucky.* — *National Bldg., etc., Assoc. v. Glover*, (Ky. 1900) 58 S. W. Rep. 418; *James v. James*, (Ky. 1900) 55 S. W. Rep. 193; *O'Kelly v. Safety Bldg., etc., Co.*, (Ky. 1900) 54 S. W. Rep. 834; *Pryse v. People's Bldg., etc., Assoc.*, (Ky. 1897) 41 S. W. Rep. 574.

*Michigan.* — *Estey v. Capitol Invest., etc., Assoc.*, 131 Mich. 502.

*Missouri.* — *McDonnell v. De Soto Sav., etc., Assoc.*, 175 Mo. 250, 97 Am. St. Rep. 592; *Gary v. Verity*, 101 Mo. App. 586.

*Texas.* — *American Bldg., etc., Assoc. v. Daugherty*, 27 Tex. Civ. App. 430; *National Loan, etc., Co. v. Stone*, (Tex. Civ. App. 1898) 46 S. W. Rep. 67.

**9. Cotton States Bldg. Co. v. Rawlins**, (Tex. Civ. App. 1901) 62 S. W. Rep. 805.

**11. Johnson v. Southern Bldg., etc., Assoc.**, 121 Ala. 524; *Hubert v. Washington Nat. Bldg., etc., Assoc.*, 42 Oregon 71; *Irwin v. Washington Nat. Bldg., etc., Assoc.*, 42 Oregon 105; *Bird v. Kendall*, 62 S. Car. 178; *Tobin v. McNab*, 53 S. Car. 75; *Snyder v. Middle States Loan, etc., Co.*, 52 W. Va. 655; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149.

**Waiver.** — The right to interpose the plea of usury, being personal to the borrower, may be

**1072.** After Default. — See note 14.

**1073.** Compromise. — See note 2.

**3. Recovery of Usurious Interest.** — See notes 3, 4.

Doctrine that Parties Are in *Pari Delicto*. — See note 7.

**4. Exemptions from Usury Law — Their Validity.** — See notes 8, 9.

**1074.** See notes 1, 2.

waived by him. *Beach v. Guaranty Sav., etc., Assoc.*, 44 Oregon 530.

**1072. 12. Assignee of Equity of Redemption Cannot Take Advantage of It.** — *Building, etc., Assoc. v. Bilan*, 59 Nen. 458; *Snyder v. Middle States Loan, etc., Co.*, 52 W. Va. 655; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149.

**13.** *Deitch v. Staub*, (C. C. A.) 115 Fed. Rep. 309; *Bacon v. Iowa Sav., etc., Assoc.*, 121 Iowa 449; *Spinney v. Miller*, 114 Iowa 210, 89 Am. St. Rep. 351; *Irwin v. Washington Nat. Bldg., etc., Assoc.*, 42 Oregon 105; *Meares v. Pinlayson*, 55 S. Car. 105; *North Texas Bldg., etc., Assoc. v. Hay*, 23 Tex. Civ. App. 98. But see *National Loan, etc., Co. v. Stone*, (Tex. Civ. App. 1898) 46 S. W. Rep. 67, wherein it was held that, where the vendee of the property subject to the mortgage lien agrees merely to pay all legal amounts due on the mortgage, such vendee may avail himself of the defense of usury. See also to same effect *Washington Nat. Bldg., etc., Assoc. v. Andrews*, 95 Md. 696.

In *Middle States Loan, etc., Co. v. Baker*, 19 App. Cas. (D. C.) 1, it was held that where it is shown that the grantee of the original mortgagor was admitted by the association in the place and stead of such mortgagor, with all his rights, privileges, and liabilities, he was entitled to deal with the contract as if it were originally his own, and may take advantage of the claim of usury. See also *Wightman v. Suddard*, 93 Ill. App. 142.

**14.** *Snyder v. Middle States Loan, etc., Co.*, 52 W. Va. 655.

**1073. 2. Settlement.** — *Trainor v. German-American Sav., etc., Assoc.*, 102 Ill. App. 604; *Building, etc., Assoc. v. Leonard*, 74 Miss. 810; *State v. Phoenix Loan Assoc.*, 85 Mo. App. 477; *Cover v. Mercantile Mut. Bldg., etc., Assoc.*, 93 Mo. App. 302; *Cox v. Magnetic Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 50 S. W. Rep. 662; *Milnor v. People's Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 48 S. W. Rep. 732. See also *Barrow v. Southern Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 48 S. W. Rep. 736; *Star, etc., Assoc. v. Woods*, 100 Tenn. 121.

In *Kentucky* it has been held that, where a borrowing member agrees to pay a building and loan association a certain amount as his contribution to make up his just proportion of the losses and running expenses of the concern, the fact that such agreed amount retained by the association was tainted with usury does not render the agreement invalid as a compromise of usury. *Cynthiana Bldg., etc., Assoc. v. Florence*, 107 Ky. 636.

**A Borrower Is Estopped** by soliciting others to attend a sale after default and by standing by and making no objection. *McDonnell v. De Soto Sav., etc., Assoc.*, 175 Mo. 250, 97 Am. St. Rep. 592.

**A Final Order of Distribution** in a suit to wind up an insolvent association precludes a recovery for usury. *Rettner v. Ohio Falls Bldg.,*

*etc., Assoc.*, (Ky. 1903) 74 S. W. Rep. 1104. But see *Cynthiana Bldg., etc., Assoc. v. Ecklar*, 112 Ky. 164, wherein it was held that any settlement of a usurious transaction had between the parties, where the relation of debtor and creditor existed, on other than a full consideration of the usury involved, is void as to the difference between the actual value of the consideration and the amount of usury.

**3. Voluntary Payments Not Generally Recoverable.** — *Beach v. Guaranty Sav., etc., Assoc.*, 44 Oregon 530. And see the titles PAYMENT; USURY.

**4. Recovery of Usurious Interest.** — *Locknane v. U. S. Savings, etc., Co.*, 103 Ky. 265; *James v. James*, (Ky. 1900) 55 S. W. Rep. 193; *Hughes v. Farmer's Sav., etc., Assoc.*, (Tenn. Ch. 1897) 46 S. W. Rep. 362; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149.

**Recovery of Double the Amount of Usurious Interest Paid.** — In *Hollowell v. Southern Bldg., etc., Assoc.*, 120 N. Car. 286, it was held that, notwithstanding a borrower who has paid usurious interest is *in pari delicto*, he may recover double the amount he has so paid. See also *Cheek v. Iron Belt Bldg., etc., Assoc.*, 126 N. Car. 242; *American Bldg., etc., Assoc. v. Daugherty*, 27 Tex. Civ. App. 430; *Mathews v. Interstate Bldg., etc., Assoc.*, (Tex. Civ. App. 1899) 50 S. W. Rep. 604.

**7.** *Cover v. Mercantile Mut. Bldg., etc., Assoc.*, 93 Mo. App. 302; *Beach v. Guaranty Sav., etc., Assoc.*, 44 Oregon 530.

**8.** *Iowa Sav., etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197; *Zenith Bldg., etc., Assoc. v. Heimbach*, 77 Minn. 97; *Stanley v. Verity*, 98 Mo. App. 632.

**9. Grounds for Exempting Building Associations.** — On the theory that such institutions are profit-sharing, and that the amounts directly paid for the use of money go indirectly to the benefit of the stockholders through the increase in the value of their shares, and where loans are confined to shareholders, good reasons exist for exempting such associations from the operation of the usury laws. *Iowa Sav., etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197.

**Dealing with Associations as a Separate Class.** — *Zenith Bldg., etc., Assoc. v. Heimbach*, 77 Minn. 97.

**1074. 1. Constitutionality of Exempting Statutes — Alabama.** — *Sheldon v. Birmingham Bldg., etc., Assoc.*, 121 Ala. 278, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1074; *Beyer v. National Bldg., etc., Assoc.*, 131 Ala. 369.

*Georgia.* — *Cook v. Equitable Bldg., etc., Assoc.*, 104 Ga. 814.

*Indiana.* — *Security Sav., etc., Assoc. v. Elbert*, 153 Ind. 198.

*Iowa.* — *Iowa Sav., etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197.

*Minnesota.* — *Zenith Bldg., etc., Assoc. v. Heimbach*, 77 Minn. 97, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1073 [1074].

**1074.** Exemptions Strictly Construed. — See notes 3, 4.

**XV. SATISFACTION OF THE LOAN** — 1. At Maturity of Stock. — See note 7.

**1075.** 2. Payment Before Maturity — *a.* IN GENERAL. — See note 1.

Association Cannot Compel. — See note 2.

*b.* AMOUNT DUE ON VOLUNTARY PAYMENT OR FORECLOSURE. — See note 7.

Provisions of Mortgage Followed. — See note 8.

**1076.** First View: The Loan Treated as the Debt — Stock Payments Credited. — See notes 1, 2.

*Montana.* — Home Bldg., etc., Assoc. v. Nolan, 21 Mont. 205.

*Nebraska.* — South Omaha Loan, etc., Assoc. v. Wirrick, 63 Neb. 598.

*Ohio.* — Spies v. Southern Ohio L. & T. Co., 24 Ohio Cir. Ct. 40.

*Virginia.* — Smoot v. People's Perpetual Loan, etc., Assoc., 95 Va. 686.

*West Virginia.* — Archer v. Baltimore Bldg., etc., Assoc., 45 W. Va. 37, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1073 [1074].

**1074.** 2. Special Exemption of Building Associations Held Unconstitutional. — Safety Bldg., etc., Co. v. Ecklar, 106 Ky. 115; Locknane v. U. S. Savings, etc., Co., 103 Ky. 265; James v. James, (Ky. 1900) 55 S. W. Rep. 193.

3. Exemptions Strictly Construed. — Assets Realization Co. v. Wightman, 105 Ill. App. 618; Myers v. Alpena Loan, etc., Assoc., 117 Mich. 389.

4. Provisions of Statute to Be Observed Closely. — Economy Bldg., etc., Assoc. v. Paris Ice Mfg. Co., 113 Ky. 246.

7. Loan Satisfied at Maturity of Stock. — Pioneer Sav., etc., Co. v. Kasper, 7 Kan. App. 813, 52 Pac. Rep. 623; Reitz v. Hayward, 100 Mo. App. 216; Home Bldg. Assoc. Co. v. Tenney, 8 Ohio Dec. 391.

Cannot Be Called In until Series Matures. — A loan cannot be called in, if the interest and dues are paid, until the series to which the borrower's stock belongs matures. Albany Mut. Bldg. Assoc. v. Laramie, 10 Wyo. 54.

**1075.** 1. Agnew v. Macomb Bldg., etc., Assoc., 197 Ill. 256; Bertche v. Equitable Loan, etc., Assoc., 147 Mo. 343, 71 Am. St. Rep. 571; Reitz v. Hayward, 100 Mo. App. 216; Fowles v. Aetna Loan Co., 86 Mo. App. 103; Clark v. Missouri Guarantee, etc., Assoc., 85 Mo. App. 388; People's Bldg., etc., Assoc. v. Gilmore, (Neb. 1901) 90 N. W. Rep. 108; Maury County Bldg., etc., Assoc. v. Cowley, (Tenn. Ch. 1899) 52 S. W. Rep. 312; Hiskey v. Pacific States Sav., etc., Co., 27 Utah 409; Albany Mut. Bldg. Assoc. v. Laramie, 10 Wyo. 54.

2. Redemption Cannot Be Compelled. — Riggin v. Southern Bldg., etc., Assoc., 66 Ark. 646, 49 S. W. Rep. 1079.

7. By-laws — Different Amounts Due on Foreclosure and Voluntary Redemption. — Agnew v. Macomb Bldg., etc., Assoc., 197 Ill. 256.

8. Provisions of Mortgage Followed. — Hale v. Barker, 129 Cal. 419; Equitable Bldg., etc., Assoc. v. Bidwell, 60 Neb. 169.

**1076.** 1. First View: The Loan Treated as the Debt — *California.* — Hale v. Barker, 129 Cal. 419.

*Indiana.* — International Bldg., etc., Assoc. v. Wall, 153 Ind. 554.

*Kentucky.* — Kentucky Citizens Bldg., etc., Assoc. v. Daugherty, (Ky. 1905) 84 S. W. Rep. 1178; Yager v. National Bldg., etc., Assoc., (Ky. 1904) 79 S. W. Rep. 197; Kleimeir v. Covington Perpetual Bldg., etc., Assoc., (Ky. 1902) 70 S. W. Rep. 41.

*Nebraska.* — McDowell v. Pioneer Sav., etc., Co., (Neb. 1901) 90 N. W. Rep. 111.

*Oregon.* — Johnson v. Washington Nat. Bldg., etc., Assoc., 44 Oregon 603; Pacific States Sav., etc., Assoc. v. Hill, 40 Oregon 280; Washington Nat. Bldg., etc., Assoc. v. Stanley, 38 Oregon 319; Western Sav. Co. v. Houston, 38 Oregon 377.

*South Carolina.* — Pollock v. Carolina Interstate Bldg., etc., Assoc., 51 S. Car. 420, 64 Am. St. Rep. 683.

*Utah.* — Hiskey v. Pacific States Sav., etc., Co., 27 Utah 409; Western Loan, etc., Co. v. Desky, 24 Utah 347; Snyder v. Fidelity Sav. Assoc., 23 Utah 291; People's Bldg., etc., Assoc. v. Kroeger, 22 Utah 134; Howells v. Pacific States Sav., etc., Co., 21 Utah 45, 81 Am. St. Rep. 659; Hale v. Thomas, 20 Utah 426; Sawtelle v. North American Sav., etc., Co., 14 Utah 443.

*Washington.* — U. S. Savings, etc., Co. v. Parr, 26 Wash. 115; U. S. Savings, etc., Co. v. Owens, 23 Wash. 790; Hopkins v. Hale, 23 Wash. 790; Hale v. Stenger, 22 Wash. 516, 699.

Contract Treated as a Loan of Which the Stock Contract Is a Part. — People's Bldg., etc., Assoc. v. Gilmore, (Neb. 1901) 90 N. W. Rep. 108.

2. Stock Payments Credited. — McNamara v. Oakland Bldg., etc., Assoc., 131 Cal. 336; Stevens v. Home Sav., etc., Assoc., 5 Idaho 741; Safety Bldg., etc., Co. v. Ecklar, 106 Ky. 115; National Bldg., etc., Assoc. v. Frisbie, (Ky. 1903) 76 S. W. Rep. 7; Olliges v. Kentucky Citizens' Bldg., etc., Assoc., (Ky. 1903) 72 S. W. Rep. 747; Johnson v. Bush, (Ky. 1901) 65 S. W. Rep. 158; Dowell v. Safety Bldg., etc., Co., (Ky. 1900) 54 S. W. Rep. 845; Price v. Empire Loan Assoc., 75 Mo. App. 551; Mathews v. Interstate Bldg., etc., Assoc., (Tex. Civ. App. 1899) 50 S. W. Rep. 604; People's Bldg., etc., Assoc. v. Fowble, 17 Utah 122, 18 Utah 206. And see the cases cited in the next preceding note.

Treated as a Straight Loan. — In Prince v. Holston Nat. Bldg., etc., Assoc., 55 W. Va. 19, it was held that, where a borrower subscribed for twenty shares of association stock for the sole purpose of borrowing the par value thereof, two thousand dollars, and not to hold any part of his stock as investment stock, the association refusing to loan the borrower on more than fifteen of said shares, or fifteen hundred dollars, it was not error to apply all pay-

**1076.** Second View: Future Dues — The Debt. — See notes 3, 4.

**1078.** Estoppel. — See note 2.

**3. Collection by Suit — a. ON THE NOTE — Effect on Membership. —**

See note 9.

**1079.** b. FORECLOSURE. — See notes 1, 2.

**XVI. DISSOLUTION AND WINDING UP — 1. In General — Other Causes of Dissolution. —** See note 4.

ments of dues made by the borrower on the twenty shares of stock, on account of the debt of fifteen hundred dollars and its legal interest.

In *Nebraska* a defaulting borrower from a foreign building and loan association may elect to have the present value of his stock credited on the debt at the time of foreclosure. *People's Bldg., etc., Assoc. v. Gilmore*, (Neb. 1901) 90 N. W. Rep. 108. See also *McDowell v. Pioneer Sav., etc., Co.*, (Neb. 1901) 90 N. W. Rep. 111; *Mercantile Co-operative Bank v. Schaaf*, (Neb. 1902) 89 N. W. Rep. 990.

**Stock Payments Should Be Credited**, but not membership fees. *Crenshaw v. Hedrick*, 19 Tex. Civ. App. 52.

**1076. 3. Second View: Only Obligation to Pay Dues.** — *Farmers Sav., etc., Assoc. v. Kent*, 131 Ala. 246; *Interstate Bldg., etc., Assoc. v. Brown*, 128 Ala. 462; *Pioneer Sav., etc., Co. v. Nonnemacher*, 127 Ala. 521; *National Bldg., etc., Assoc. v. Ballard*, 126 Ala. 155; *Johnson v. National Bldg., etc., Assoc.*, 125 Ala. 465, 82 Am. St. Rep. 257; *Hayes v. Southern Home Bldg., etc., Assoc.*, 124 Ala. 663, 82 Am. St. Rep. 216; *Sheldon v. Birmingham Bldg., etc., Assoc.*, 121 Ala. 278; *Bell v. Southern Home Bldg., etc., Assoc.*, 140 Ala. 371; *Briggs v. Iowa Sav., etc., Assoc.*, 114 Iowa 232; *U. S. Savings, etc., Co. v. Shain*, 8 N. Dak. 136; *Freemansburg Bldg., etc., Assoc. v. Watts*, 199 Pa. St. 221.

**4.** *Briggs v. Iowa Sav., etc., Assoc.*, 114 Iowa 232; *U. S. Savings, etc., Co. v. Shain*, 8 N. Dak. 136; *Freemansburg Bldg., etc., Assoc. v. Watts*, 199 Pa. St. 221; *Geisberg v. Mutual Bldg., etc., Assoc.*, (Tex. Civ. App. 1900) 60 S. W. Rep. 478.

In *Clark v. Missouri Guarantee, etc., Assoc.*, 85 Mo. App. 388, it was held that on repayment of his loan the borrower should be charged with the full amount of the loan originally made by him, together with all instalments of dues, interest, premiums, and fines, and other sums due and remaining unpaid, and should be credited, if he desired to surrender his shares, with the withdrawal value of the shares pledged and transferred by him as security for the loan, and the balance found remaining due over and above such credits should be received by the association in full satisfaction and discharge of the loan. See also *Price v. Empire Loan Assoc.*, 75 Mo. App. 551; *Agnew v. Macomb Bldg., etc., Assoc.*, 197 Ill. 256.

**1078. 2.** *Stoddard v. Saginaw Bldg., etc., Assoc.*, (Mich. 1904) 101 N. W. Rep. 50.

**9. Effect of Suit on Membership.** — *Skinner v. Southern Home Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 67; *Racer v. International Bldg., etc., Assoc.*, (Ind. App. 1902) 63 N. E. Rep. 772.

**Contra.** — *Manhattan, etc., Sav., etc., Assoc. v. Massarelli*, (N. J. 1899) 42 Atl. Rep. 284.

In *Illinois* it has been held that after the

termination of the stockholder's membership by reason of forfeiture of his stock for nonpayment, fines cannot be charged against him. *Armstrong v. Douglas Park Bldg. Assoc.*, 176 Ill. 298, reversing 60 Ill. App. 318. See also *Juergens v. Cobe*, 99 Ill. App. 156.

In *Kentucky*, after the borrower has ceased to make payments of the premiums, such failure being regarded as the termination of the borrower's connection with the association as a stockholder, fines accruing after such failure of premiums cannot be collected. *Kleimeir v. Covington Perpetual Bldg., etc., Assoc.*, (Ky. 1902) 70 S. W. Rep. 41. See also *Safety Bldg., etc., Co. v. Ecklar*, 106 Ky. 115; *Dowell v. Safety Bldg., etc., Co.*, (Ky. 1900) 54 S. W. Rep. 845.

**1079. 1.** *Racer v. International Bldg., etc., Assoc.*, (Ind. App. 1902) 63 N. E. Rep. 772, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079; *Iowa Deposit, etc., Co. v. Matthews*, (Iowa 1905) 102 N. W. Rep. 817; *Hawkeye State Sav., etc., Assoc. v. Johnston*, 106 Iowa 218; *Bacon v. Iowa Sav., etc., Assoc.*, 121 Iowa 449.

On foreclosure the association is entitled to recover the amount due on the note, amount of unpaid interest, instalments and fines, and dues and fines shown to have been assessed, and the mortgagor should then be credited with the withdrawal value of the stock as of that date. *Home Bldg., etc., Assoc. v. Evans*, (Tenn. Ch. 1899) 53 S. W. Rep. 1104; *Bowman v. Cleveland Bldg., etc., Assoc.*, (Tenn. Ch. 1900) 59 S. W. Rep. 669.

**2.** *Racer v. International Bldg., etc., Assoc.*, (Ind. App. 1902) 63 N. E. Rep. 772, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079.

**Borrower Not Entitled to Credit for Improvements.** — Where the association required, as a condition for the loan, that certain improvements should be placed on the mortgaged property by the borrower, he is not entitled to be credited with the amount of such expenditures on foreclosure. *Motes v. People's Bldg., etc., Assoc.*, 137 Ala. 369.

**Insurance Premiums Not Applied in Liquidation of the Debt.** — *Alexander v. Southern Home Bldg., etc., Assoc.*, 120 Fed. Rep. 963.

**4. Voluntary Dissolution.** — Under Gen. Stat. Ky., c. 56, § 8, a newspaper publication of four weeks is a condition precedent to the voluntary dissolution of a building and loan association organized under that statute. *Economy Bldg., etc., Assoc. v. Paris Ice Mfg. Co.*, 113 Ky. 246.

**An Association May Go into Voluntary Liquidation** so as to defeat a borrower's right to a settlement with it as a going concern. *Yager v. National Bldg., etc., Assoc.*, (Ky. 1904) 79 S. W. Rep. 197. See also *Eminence Bldg., etc., Assoc. v. Bohannon*, (Ky. 1900) 55 S. W. Rep. 1074.

**1080.** See notes 1, 2.

**2. Effect on Assets and Liabilities — a. IN GENERAL — Order of Priority of Claims.** — See notes 4, 5.

**1081.** See note 1.

**b. SETTLEMENTS WITH MEMBERS.** — See notes 2, 3.

**First View.** — See note 4.

**1080. 1. One Association May Assume Business of the Other.** — *Palmer v. Bosley*, (Tenn. Ch. 1900) 62 S. W. Rep. 195.

**2. Courts Are Averse to Declaring Forfeitures,** and the dominant idea in every case where forfeiture can be declared is that the state should resume the franchise granted because of its abuse. *State v. Southern Bldg., etc., Assoc.*, 132 Ala. 50.

**4. Costs.** — *Walker v. Terry*, 138 Ala. 428; *Williams v. Maxwell*, 123 N. Car. 586.

**5. Claims of Creditors.** — *Walker v. Terry*, 138 Ala. 428; *Economy Bldg., etc., Assoc. v. Paris Ice Mfg. Co.*, 113 Ky. 246; *Cook v. Emmet Perpetual, etc., Bldg. Assoc.*, 90 Md. 284; *Williams v. Maxwell*, 123 N. Car. 586.

**Stockholders Are Creditors After Debts Are Paid.** — *Barry v. Friel*, 114 Fed. Rep. 989.

**1081. 1. Creditors Who Are Also Members.** — *Cook v. Emmet Perpetual, etc., Bldg. Assoc.*, 90 Md. 284.

**Canada — Debenture Holders Entitled to Priority over Depositors.** — *Re Farmers' Loan, etc., Co.*, 30 Ont. 337.

**2. Settlements with Members — United States.** — *Lewis v. Clark*, (C. C. A.) 129 Fed. Rep. 570; *Miles v. New South Bldg., etc., Assoc.*, 111 Fed. Rep. 946; *Sullivan v. Stucky*, 86 Fed. Rep. 491.

**Connecticut.** — *Western Realty, etc., Co. v. Haase*, 75 Conn. 436.

**Illinois.** — *Hedley v. Geissler*, 90 Ill. App. 565; *Sullivan v. Spaniol*, 78 Ill. App. 125.

**Indiana.** — *Columbia Finance, etc., Co. v. Sharp*, 24 Ind. App. 82.

**Iowa.** — *Hale v. Kline*, 113 Iowa 523.

**Kentucky.** — *Eminence Bldg., etc., Assoc. v. Bohannon*, (Ky. 1900) 55 S. W. Rep. 1074, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Vinton v. National Bldg., etc., Assoc.*, 112 Ky. 622; *Catlett v. U. S. Building, etc., Assoc.*, (Ky. 1902) 68 S. W. Rep. 123.

**Maryland.** — *Cook v. Emmet Perpetual, etc., Bldg. Assoc.*, 90 Md. 284.

**New Jersey.** — *Hoagland v. Saul*, (N. J. 1902) 53 Atl. Rep. 704; *Harris v. Nevins*, (N. J. 1904) 58 Atl. Rep. 1051; *Bettle v. Republic Sav., etc., Assoc.*, (N. J. 1904) 58 Atl. Rep. 1053.

**New York.** — *Riggs v. Carter*, 173 N. Y. 632, affirming 77 N. Y. App. Div. 580; *Bertin v. Falk*, 101 N. Y. App. Div. 562.

**North Dakota.** — *Hale v. Cairns*, 8 N. Dak. 145, 73 Am. St. Rep. 746.

**Pennsylvania.** — *Neversink Bldg., etc., Assoc. No. 3 v. Heine*, 8 Pa. Dist. 443.

**South Dakota.** — *Hale v. Gullick*, 13 S. Dak. 637.

**Tennessee.** — *Johnston v. Grosvenor*, 105 Tenn. 353, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081.

**West Virginia.** — *Young v. Improvement Loan, etc., Assoc.*, 48 W. Va. 512, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081.

**Wisconsin.** — *Leahy v. National Bldg., etc., Assoc.*, 100 Wis. 555, 69 Am. St. Rep. 945.

**Canada.** — *Guertin v. Sansterre*, 27 Can. Sup. Ct. 522.

**Upon the Appointment of a Receiver of an insolvent building and loan association, the business ceases and nothing remains but liquidation.** *Monier v. Clarke*, (N. Mex. 1904) 75 Pac. Rep. 35. See also *Hale v. Phillips*, 68 Ark. 382. But see *Armstrong v. U. S. Building, etc., Assoc.*, 15 App. Cas. (D. C.) 1.

**When Obligation to Pay Fines, Dues, etc., Ceases.** — The obligation to pay fines, dues, or further payment of premium ceases on the liquidation of the association. *Seventeenth Ward Bldg. Assoc. v. Fitzgerald*, 11 Ohio Dec. 133.

**Statute of Limitations.** — The statute of limitations begins to run against the right of action of a receiver to recover the debt on the insolvency of the association. *Clarke v. Kaufman*, 66 Kan. 61.

**The Effect of the Winding-up Process** is the equivalent of a compulsory withdrawal of all members, and distribution is made, not according to the contract relations of the parties, but according to the established rules of equity. *No. 2 Fidelity Bldg., etc., Union v. No. 4 Fidelity Bldg., etc., Union*, 27 Ind. App. 325.

**What Constitutes Insolvency in a Building Association.** — A building association is insolvent when its available assets are below the level of the stock already paid in, and it cannot pay to the stockholders the amount of their contributions dollar for dollar. *Continental Nat. Bldg., etc., Assoc. v. Miller*, 44 Fla. 757. See also *Bingham v. Marion Trust Co.*, 27 Ind. App. 247; *Bettle v. Republic Sav., etc., Assoc.*, 63 N. J. Eq. 578; *People v. Empire Loan, etc., Co.*, 15 N. Y. App. Div. 69.

**Where an Association Sells Its Assets and Retires from Business,** it renders the performance of the contract impossible, and the fact that a borrowing shareholder is in default does not defeat his right to a rescission of his contract. *North Texas Sav., etc., Assoc. v. Jackson*, (Tex. Civ. App. 1901) 63 S. W. Rep. 344.

**3. Young v. Improvement Loan, etc., Assoc.**, 48 W. Va. 512, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081.

The equitable principle of accounting on the dissolution of an association must be the same whether the association be solvent or insolvent. *People's Bldg., etc., Assoc. v. McPhilamy*, 81 Miss. 61, 95 Am. St. Rep. 454.

**Payment of Final Estimate Discharges Borrowing Stockholder.** — *Star Loan Assoc. v. Moore*, 4 Penn. (Del.) 308.

**4. First View — Borrower Credited with All Payments — United States.** — *Interstate Bldg., etc., Assoc. v. Edgefield Hotel Co.*, 120 Fed. Rep. 422, affirmed (C. C. A.) 134 Fed. Rep. 74; *McIlwaine v. Ellington*, (C. C. A.) 111 Fed. Rep. 578; *Coltrane v. Baltimore Bldg., etc., Assoc.*, 110 Fed. Rep. 293; *McIlwaine v. Ise-*

**1081. Second View.** — See note 5.

ley, 96 Fed. Rep. 62; *Lauer v. Covenant Bldg., etc., Assoc.*, 96 Fed. Rep. 775; *Bowman v. Foster, etc., Hardware Co.*, 94 Fed. Rep. 592.

*California.* — *Hale v. Barker*, 129 Cal. 419.

*Idaho.* — *Fidelity Sav. Assoc. v. Shea*, 6 Idaho 405; *Stevens v. Home Sav., etc., Assoc.*, 5 Idaho 741.

*New Jersey.* — *Weir v. Granite State Provident Assoc.*, 56 N. J. Eq. 234, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Moran v. Gray*, (N. J. 1897) 38 Atl. Rep. 668; *Mercantile Co-operative Bank v. Goodspeed*, (N. J. 1905) 59 Atl. Rep. 802.

*North Carolina.* — *Williams v. Maxwell*, 123 N. Car. 586.

*South Carolina.* — *Carpenter v. Lewis*, 65 S. Car. 400; *Meares v. Finlayson*, 63 S. Car. 537.

*Texas.* — *Park v. Kribs*, 24 Tex. Civ. App. 650, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *North Texas Sav., etc., Assoc. v. Jackson*, (Tex. Civ. App. 1901) 63 S. W. Rep. 344; *North Texas Bldg., etc., Assoc. v. Hay*, 23 Tex. Civ. App. 98.

*Utah.* — *People's Bldg., etc., Assoc. v. Fowble*, 17 Utah 122, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Hale v. Thomas*, 20 Utah 426; *Snyder v. Fidelity Sav. Assoc.*, 23 Utah 291.

*Virginia.* — *People's Bldg., etc., Assoc. v. Tinsley*, 96 Va. 322.

*Washington.* — *Hopkins v. Hale*, 23 Wash. 790; *Hale v. Stenger*, 22 Wash. 516, 699.

**May Be Credited for Fines Paid.** — *Thompson v. North Carolina Bldg., etc., Assoc.*, 120 N. Car. 420.

**Borrower to Be Credited on Loan for Dues Paid on Premium Stock.** — *Southern Bldg., etc., Assoc. v. Johnson*, (C. C. A.) 111 Fed. Rep. 657.

**Credited with All Payments but Charged Pro Rata for Losses.** — *Manorita v. Fidelity Trust, etc., Co.*, 101 Fed. Rep. 8.

**Interest Computed to Date of Decision.** — *Home Sav. Assoc. v. Noblesville Monthly Meeting of Friends Church*, 31 Ind. App. 115. See also *Bowman v. Cleveland Bldg., etc., Assoc.*, (Tenn. Ch. 1900) 59 S. W. Rep. 669.

**Where Assets Are Insufficient to Treat Mortgagors and Stockholders Alike.** — In *Whitehead v. Commercial Bldg., etc., Assoc.*, 64 N. J. Eq. 24, it was held that, while not departing from the general rule declared in *Weir v. Granite State Provident Assoc.*, 56 N. J. Eq. 234, nevertheless, if the assets of an insolvent association are insufficient to an extent that the receiver cannot deal with each mortgagor and stockholder upon the basis of a settlement allowing credits for the whole amount of premium and dues paid, the same will not be allowed.

**1081. 5. Second View — Interest and Premiums only Credited** — *United States*. — *Douglas v. Kavanaugh*, (C. C. A.) 90 Fed. Rep. 373; *Coltrane v. Blake*, (C. C. A.) 113 Fed. Rep. 785; *Sleeper v. Winkel*, 122 Fed. Rep. 736; *Riggs v. Capital Brick Co.*, 128 Fed. Rep. 491.

*Arkansas.* — *Taylor v. Clarke*, (Ark. 1905) 85 S. W. Rep. 231; *Hale v. Phillips*, 68 Ark. 382; *Hough v. Maupin*, (Ark. 1905) 84 S. W. Rep. 717.

*Indiana.* — *Marion Trust Co. v. Edwards Lodge*, 153 Ind. 96, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Columbia Finance, etc., Co. v. Tharp*, 24 Ind. App. 82, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Number Four Fidelity Bldg., etc., Union v. Smith*, 155 Ind. 679; *Huter v. Union Trust Co.*, 153 Ind. 204; *James v. Sidwell*, 153 Ind. 697; *Home Sav. Assoc. v. Noblesville Monthly Meeting of Friends Church*, 31 Ind. App. 115; *Boice v. Rabb*, 24 Ind. App. 368.

*Iowa.* — *Spinney v. Miller*, 114 Iowa 210, 89 Am. St. Rep. 351, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Hale v. Kline*, 113 Iowa 523, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1080 [1081]; *Briggs v. Iowa Sav., etc., Assoc.*, 114 Iowa 232, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088 [1082]; *Spinney v. Chapman*, 121 Iowa 38, 100 Am. St. Rep. 305; *Wilcoxon v. Smith*, 107 Iowa 555, 70 Am. St. Rep. 220.

*Kentucky.* — *Kentucky Citizens Bldg., etc., Assoc. v. Daugherty*, (Ky. 1905) 84 S. W. Rep. 1178; *Wills v. Paducah Bldg., etc., Assoc.*, 113 Ky. 196; *Vinton v. National Bldg., etc., Assoc.*, 112 Ky. 622; *U. S. Building, etc., Assoc. v. Reed*, 110 Ky. 874; *Globe Bldg., etc., Co. v. Wood*, 110 Ky. 4, 96 Am. St. Rep. 417; *U. S. Building, etc., Assoc. v. Rowland*, 109 Ky. 737; *Safety Bldg., etc., Assoc. v. Montjoy*, 107 Ky. 473; *Reddick v. U. S. Building, etc., Assoc.*, 106 Ky. 94; *Yager v. National Bldg., etc., Assoc.*, (Ky. 1904) 79 S. W. Rep. 197; *U. S. Building, etc., Assoc. v. Green*, (Ky. 1901) 64 S. W. Rep. 962; *U. S. Building, etc., Assoc. v. Brunner*, (Ky. 1901) 64 S. W. Rep. 996; *Columbia Finance, etc., Co. v. Swartz*, (Ky. 1901) 64 S. W. Rep. 743; *Globe Bldg., etc., Co. v. Spillman*, 112 Ky. 155; *Catlett v. U. S. Building, etc., Assoc.*, (Ky. 1902) 68 S. W. Rep. 123; *U. S. Building, etc., Assoc. v. Fitzpatrick*, (Ky. 1902) 68 S. W. Rep. 400; *Globe Bldg., etc., Co. v. Stephens*, (Ky. 1901) 60 S. W. Rep. 723; *Andrews v. Kentucky Citizens' Bldg., etc., Assoc.*, (Ky. 1902) 70 S. W. Rep. 409.

*Michigan.* — *Phelps v. American Sav., etc., Assoc.*, 121 Mich. 343. See also *Russell v. Pierce*, 121 Mich. 208; *Home Sav., etc., Assoc. v. Mason*, 127 Mich. 676.

*Mississippi.* — *People's Bldg., etc., Assoc. v. McPhilamy*, 81 Miss. 61, 95 Am. St. Rep. 454, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081.

*Missouri.* — *Caston v. Stafford*, 92 Mo. App. 182; *Price v. Empire Loan Assoc.*, 75 Mo. App. 551.

*Nebraska.* — *Anselme v. American Sav., etc., Assoc.*, 63 Neb. 525, affirmed 66 Neb. 520.

*New Mexico.* — *Monier v. Clarke*, (N. Mex. 1904) 75 Pac. Rep. 35.

*New York.* — *Hannon v. Cobb*, 49 N. Y. App. Div. 480; *Rochester Sav. Bank v. Whitmore*, 25 N. Y. App. Div. 491; *Hall v. Stowell*, 75 N. Y. App. Div. 21; *Breed v. Ruoff*, 54 N. Y. App. Div. 142, dismissed 166 N. Y. 612; *Roberts v. Murray*, (County Ct.) 40 Misc. (N. Y.) 339, affirmed 89 N. Y. App. Div. 616; *Roberts v. Cronk*, 94 N. Y. App. Div. 171; *Riggs v. Carter*, 77 N. Y. App. Div. 580, affirmed 173 N. Y. 632.

**1082. Third View.** — See note 1.

Borrower Must Pay. — See note 2.

Settlement by Agreement. — See note 3.

*North Dakota.* — *Hale v. Cairns*, 8 N. Dak. 145, 73 Am. St. Rep. 746.

*South Dakota.* — *Hale v. Gullick*, 13 S. Dak. 637, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081.

*Tennessee.* — Southern Bldg., etc., Assoc. v. Easley, (Tenn. Ch. 1900) 59 S. W. Rep. 440. See *Bowman v. Cleveland Bldg., etc., Assoc.*, (Tenn. Ch. 1900) 59 S. W. Rep. 669.

*West Virginia.* — *Young v. Improvement Loan, etc., Assoc.*, 48 W. Va. 512.

*Wisconsin.* — *Leahy v. National Bldg., etc., Assoc.*, 100 Wis. 555, 69 Am. St. Rep. 945.

The borrower should be charged with interest (six per cent. in *Kentucky*) on the amount actually received by him, and credited under the rule of partial payments with interest and premiums paid. The balance thus reached is the amount due. *Carman v. Carrico*, (Ky. 1904) 80 S. W. Rep. 216.

**Credited with Interest and Premiums Paid but Not with Dues.** — *Williamson v. Glove Bldg., etc., Co.*, (Tenn. Ch. 1901) 64 S. W. Rep. 298; *Johnston v. Grosvenor*, 105 Tenn. 353; *Carpenter v. Richardson*, 101 Tenn. 176.

Borrowing members are not entitled to have dues paid on stock deducted from their indebtedness, but such dues stand as a credit until final adjustment. *Steele v. New Park City Bldg., etc., Assoc.*, (Ky. 1903) 74 S. W. Rep. 177.

**No Credit for Interest on Premiums.** — *Barry v. Friel*, 114 Fed. Rep. 989.

**Credit for Dues Paid in Ignorance of Insolvency.** — The borrower is entitled to credit on his debt for dues paid in ignorance of the true financial condition of the association after it becomes insolvent. *Johnston v. Grosvenor*, 105 Tenn. 353.

**Value of Stock.** — Upon the insolvency of an association a borrower is not entitled to be credited with the value of his stock, as the amount due him on that account can only be ascertained by the liquidation and winding up of the association, at which time the assets will be disturbed *pro rata*. *Gary v. Verity*, 101 Mo. App. 586. See also *Ottensoser v. Scott*, (Fla. 1904) 37 So. Rep. 161.

In *New York* it has been held that a borrower is immediately entitled to have his note, secured by his stock as collateral, credited with the value of his stock, upon the insolvency of the association, if such value can be approximated. *Robinson v. Spencer*, 72 N. Y. App. Div. 493. Compare *People v. New York Bldg. Loan Banking Co.*, 101 N. Y. App. Div. 484.

**1082. 1. Third View — Unearned Premium Credited.** — *Gunby v. Armstrong*, (C. C. A.) 133 Fed. Rep. 417, citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082 and notes; *Gwinn v. Iron Belt Bldg., etc., Assoc.*, 132 Fed. Rep. 710; *MacMurray v. Gosney*, 106 Fed. Rep. 11; *Sullivan v. Stucky*, 86 Fed. Rep. 401; *Hedley v. Geissler*, 90 Ill. App. 565; *Dooling v. Smith*, 89 Ill. App. 26; *Barry v. Downs*, 87 Ill. App. 486; *Dooling v. Coats*, 86 Ill. App. 411; *Dooling v. Davis*, 84 Ill. App. 393; *Sullivan v.*

*Spaniol*, 78 Ill. App. 125; *Choisser v. Young*, 69 Ill. App. 252; *Ferrell v. Evans*, 25 Mont. 444.

**Borrower Should Not Be Charged with Earned Premium.** — *Ottensoser v. Scott*, (Fla. 1904) 37 So. Rep. 161.

**2. Borrower Must Pay at Once — United States.** — *Lewis v. Clark*, (C. C. A.) 129 Fed. Rep. 570; *Miles v. New South Bldg., etc., Assoc.*, 111 Fed. Rep. 946.

*Arkansas.* — *Hale v. Phillips*, 68 Ark. 382.

*California.* — *Hale v. Barker*, 129 Cal. 419.

*Connecticut.* — *Western Realty, etc., Co. v. Haase*, 75 Conn. 436.

*Illinois.* — *Sullivan v. Spaniol*, 78 Ill. App. 126.

*Indiana.* — *Number Four Fidelity Bldg., etc., Union v. Smith*, 155 Ind. 679; *Marion Trust Co. v. Edwards Lodge*, 153 Ind. 96.

*Iowa.* — *Spinney v. Chapman*, 121 Iowa 38, 100 Am. St. Rep. 305.

*Kentucky.* — *Eminence Bldg., etc., Assoc. v. Bohannon*, (Ky. 1900) 55 S. W. Rep. 1074, quoting 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082; *U. S. Building, etc., Assoc. v. Rowland*, 109 Ky. 737.

*Michigan.* — *Home Sav., etc., Assoc. v. Mason*, 127 Mich. 676.

*Mississippi.* — *People's Bldg., etc., Assoc. v. McPhilamy*, 81 Miss. 61, 95 Am. St. Rep. 454.

*Missouri.* — *Woerheide v. Johnston*, 81 Mo. App. 193.

*New Jersey.* — *Bettle v. Republic Sav., etc., Assoc.*, (N. J. 1904) 58 Atl. Rep. 1053; *Weir v. Granite State Provident Assoc.*, 56 N. J. Eq. 234.

*New York.* — *Breed v. Ruoff*, 54 N. Y. App. Div. 142, dismissed 166 N. Y. 612; *Hannon v. Cobb*, 49 N. Y. App. Div. 480.

*North Dakota.* — *Clarke v. Olson*, 9 N. Dak. 364.

*West Virginia.* — *Young v. Improvement Loan, etc., Assoc.*, 48 W. Va. 512, quoting 2 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082.

*Wisconsin.* — *Leahy v. National Bldg., etc., Assoc.*, 100 Wis. 555, 69 Am. St. Rep. 945.

**Insolvency Operates as a Modification Rather than Extinguishment of Contract.** — *Clarke v. Olson*, 9 N. Dak. 364.

In *Breed v. Ruoff*, 54 N. Y. App. Div. 142, it was held that where there is a dividend presently due to the borrowing stockholder there is no good reason why he should be compelled to pay the full amount of the loan in the first instance. See also *Robinson v. Spencer*, 72 N. Y. App. Div. 493. Compare *People v. New York Bldg. Loan Banking Co.*, 101 N. Y. App. Div. 484, wherein it was held that the rights and liabilities of borrowing stockholders should not be determined until the net assets are ascertained.

The fact that an association has gone out of business as a building and loan association furnishes no defense to the borrower against the payment of the loan made to him. *Motes v. People's Bldg., etc., Assoc.*, 137 Ala. 369.

**3. Settlement by Agreement.** — *Bowman v. Foster, etc., Hardware Co.*, 94 Fed. Rep. 592; *Main St. Bldg., etc., Co. v. Richter*, 9 Ohio Cir. Dec. 74.



1. BUILDING CONTRACTS.— See note 1.

1. 1. In *Utah Lumber Co. v. James*, 25 Utah 434, the court said: "A contract," says Mr. Lloyd, in his work on the Law of Building and Buildings (section 1), 'is an agreement between two or more persons, for a valuable considera-

tion, to do or not to do some particular thing; and when the undertaking refers to constructing, erecting, or repairing an edifice or other work or structure, it may be called a *building contract*."

## BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS.

By J. E. BRADY.

3. II. CREATION AND NATURE—1. Method of Creation—At Law.— See note 2.

4. 2. Whether Restrictive Covenants Run with Land—Burden of Covenant.— See notes 1, 2.

The Benefit of a Covenant.— See note 3.

5. 3. Restrictive Agreements Create Rights in Nature of Easements.— See note 8.

6. III. EXTENT AND CHARACTER OF RESTRICTION—1. Buildings—*a*. AGAINST ERECTION OF ANY STRUCTURE.— See note 6.

7. *b*. STYLE, COST, MATERIAL, AND HEIGHT OF STRUCTURE.— See note 1.

3. 2. *Wittenberg v. Mollyneaux*, 60 Neb. 583, which was an action for damages for breach of the covenant.

4. 1. The Burden of a Covenant will not pass with the land in the absence of a privity of estate or tenure between the covenanting parties. *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36.

A Covenant Not to Sell Intoxicating Liquor on the Granted Premises is a covenant which will run with the land. *Spencer v. Stevens*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 112.

A Covenant Relating to the Use and Enjoyment of Land not only at the time of the making of the lease, but for the future also, is a covenant that runs with the land. *Wright v. Heidorn*, 6 Ohio Dec. 151.

2. A Covenant Restricting the Use of a Leasehold, which appears in the lease, will run with the land. *Wright v. Heidorn*, 6 Ohio Dec. 151, 4 Ohio N. P. 124.

3. *Rogers v. Hosegood*, (1900) 2 Ch. 388, 69 L. J. Ch. 652, 83 L. T. N. S. 186, 48 W. R. 659.

Benefit of Covenant.— "If the covenant were one intended to benefit the land, it was considered to be incident to and run with the land, and therefore whoever might become the owner of the land would also become entitled to the benefit of the covenant." *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36.

5. 8. A Covenant Against Building Beyond a Certain Height was regarded as creating an easement of light and aid in favor of the covenantee's land, in *Meigs v. Milligan*, 177 Pa. St. 66. See also *Chase v. Walker*, 167 Mass. 293; *Brown v. O'Brien*, 168 Mass. 484.

6. 6. A Covenant Against the Erection of Any

House or "part of or projection from" does not prevent the building of a wall. *Clark v. Lee*, 185 Mass. 223.

A Structure Set Up on Posts, one portion of which is used as a photograph gallery, is a building within the meaning of a covenant not to erect any building. *Evans v. Mary A. Riddle Co.*, (N. J. 1899) 43 Atl. Rep. 894.

Not More than One House to Be Erected.— Where the purchaser of a lot of land, subject to a restriction that "not more than one house should be erected thereon," commenced to erect a double tenement house on the plot, one tenement being on the ground floor and the other on the floor above, and there being no internal communication between the tenements, each having its own front door in a common entrance archway, it was held that the building constituted two distinct houses structurally separated in all respects, and that there was a breach of the restriction. *Ilford Park v. Jacobs*, (1903) 2 Ch. 522, 89 L. T. N. S. 295. And such a restriction is violated by the erection of a block of residential flats having a common public entrance-hall, corridors, lifts, and staircases. *Rogers v. Hosegood*, (1900) 2 Ch. 388, 83 L. T. N. S. 186.

7. 1. For Restriction as to Cost of Building see *Holford v. Acton Urban Dist. Council*, (1898) 2 Ch. 240, 78 L. T. N. S. 829.

Prohibiting Windows.— A covenant not to place any "lights" overlooking plaintiff's land in buildings "adjoining" same was enforced where the buildings containing the lights were not contiguous to the plaintiff's property, but were set back several yards from the dividing line. *Ind v. Hamblin*, 81 L. T. N. S. 779, 48 W. R. 238.

**7. c. POSITION ON LOT OR DISTANCE FROM STREET. — See note 2.**

Projecting Porches, Windows, Etc. — See note 3.

**8. d. PURPOSE FOR WHICH TO BE USED. — See note 1.**

**Covenant for Dwelling Houses of a Certain Cost.** — *Roberts v. Burke*, 15 Montg. Co. Rep. (Pa.) 109.

**Restrictions as to Height of Building.** — Where a covenantor agreed not to build a wall then standing on his premises any higher, he could not build an entirely new and higher wall just inside the line of the original wall. *Chase v. Walker*, 167 Mass. 293.

A covenant not to erect any building or obstruction within a certain distance of the street "except a bath house and privy and walls or fences not exceeding eight feet in height," was enforced and was held to have been violated by the construction of a bath house over eight feet high as an addition to the dwelling of the defendant. *Meigs v. Milligan*, 177 Pa. St. 66.

**A Covenant Against the Erection of More than One Building** on the "lot hereby conveyed," where the deed conveys two lots, does not prevent the erection of a building on each lot. *Walker v. Renner*, 60 N. J. Eq. 493.

Such a covenant is not broken by the construction of a building containing separate flats on every floor. *Kimber v. Admans*, (1900) 1 Ch. 412, 69 L. J. Ch. 296, 82 L. T. N. S. 136, 48 W. R. 322.

Such a covenant is infringed by placing a row of flats upon the land representing the burden of the covenant. *Rogers v. Hosegood*, (1900) 2 Ch. 388, 69 L. J. Ch. 652, 83 L. T. N. S. 186, 48 W. R. 659.

**A Covenant to Erect Private Dwellings Only** is broken by the putting up of a flat house. *Skillman v. Smatheurst*, 57 N. J. Eq. 1. Or a hotel. *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164, affirmed 63 N. J. Eq. 804. Or by constructing a railroad. *Long Eaton Recreation Grounds Co. v. Midland R. Co.*, 71 L. J. K. B. 74, 85 L. T. N. S. 278, 50 W. R. 120.

On the other hand, tenement and apartment houses have been held not to violate an agreement to build "dwellings" only. *Roth v. Jung*, 79 N. Y. App. Div. 1; *Holt v. Fleischman*, 75 N. Y. App. Div. 593. But see *Levy v. Schreyer*, 27 N. Y. App. Div. 282, reversing 19 Misc. (N. Y.) 227, wherein a building containing three housekeeping apartments was held not to be a private dwelling.

**A Covenant Against a Tenement House** is not violated by the erection of an apartment house. *Kitchings v. Brown*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 439; *White v. Collins P'dg.*, etc., Co., 82 N. Y. App. Div. 1.

**A Covenant to Build a House of Certain Specifications** cannot be construed as a covenant not to erect buildings which do not conform to the specifications. *Hurley v. Brown*, 44 N. Y. App. Div. 480.

**A Covenant to Permit No Construction on the Ocean Side of Certain Property** other than a pier is not illegal, and the covenant being part of a general plan of improvement, the case falls within the "exceptional class of cases discussed by Chief Justice Beasley in *Brewer v. Marshall*, 19 N. J. Eq. 537." *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139.

**Covenant Against Use Distinguished from Covenant Against Construction.** — *Longworth v. Deane*, 15 N. Y. App. Div. 461.

**7. 2. Distance from Street.** — *Hooper v. Bromet*, 89 L. T. N. S. 37; *Skillman v. Smatheurst*, 57 N. J. Eq. 1; *Evans v. Mary A. Riddle Co.*, (N. J. 1899) 43 Atl. Rep. 894; *Hemsley v. Marlborough Hotel Co.*, 65 N. J. Eq. 167; *Roth v. Jung*, 79 N. Y. App. Div. 1; *Holt v. Fleischman*, 75 N. Y. App. Div. 593; *Levy v. Schreyer*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 227; *Evans v. New Auditorium Pier Co.*, (N. J. 1904) 58 Atl. Rep. 191; *Meigs v. Milligan*, 177 Pa. St. 66.

**Construction of Word "Adjoining."** — A house twenty feet distant from a boundary fence is not "adjoining," within the meaning of a restriction against the insertion of lights in "any buildings adjoining" the premises adjacent to such boundary fence. *Ind v. Hamblin*, 84 L. T. N. S. 168, reversing 48 W. R. 238, 81 L. T. N. S. 779.

**A Wall Projecting from a Building** does not come within the term "building," as used in a covenant, providing that no building or any parts thereof or projection therefrom shall be built within a stipulated number of feet from a certain line. *Clarke v. Lee*, 185 Mass. 223.

**A Covenant in An Agreement Which Does Not in Terms Express the Direction in Which a House Must Face**, but merely provides that only dwelling houses of a certain height shall be erected on the lots of the parties to the agreement, does not, by implication, restrict the erection of a dwelling house which does not face the street between the lots of such parties. *Gubbins v. Peterson*, 21 N. Y. App. Div. 241, affirmed 163 N. Y. 583.

**3. Projecting Structures.** — *Skinner v. Allison*, 54 N. Y. App. Div. 47, 8 N. Y. Annot. Cas. 155; *Levy v. Schreyer*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 227.

Where, in a restrictive covenant against building, an exception was made in the case of a bay window, it was held that the fact that an addition built by the covenantor differed from the ordinary bay window in that it rested on the ground did not take the structure without the exception. *Keith v. Goldsmith*, 194 Ill. 488.

**A Projection Will Not Be Restrained** where it appears that other grantees have ignored the conditions of the covenant. *Hemsley v. Marlborough Hotel Co.*, 65 N. J. Eq. 167.

**8. 1. Allowing Temporary Explorations for Oil** is not a violation of a covenant that the land whereon such explorations are being made shall be devoted exclusively as a part of the campus of a university, and that no buildings shall be erected except those devoted to university purposes, where the educational institution upon the premises is to be continued and where the general purpose of the original grant will not be defeated, but may be materially advanced in the pecuniary results to be derived from the explorations. *Los Angeles University v. Swarth*, 107 Fed. Rep. 798, 46 C. C. A. 647.

**A Covenant to Use Premises as a Saloon Only,**

- 8. 2. Nuisances.** — See note 2.  
**9. 3. Prohibited Trades or Occupations.** — See note 1.  
**10. IV. ENFORCEMENT IN EQUITY — 1. General Rule.** — See note 3.

in a lease, is not broken by ceasing to use for any purpose. *McCormick v. Stephany*, 57 N. J. Eq. 257.

**A Covenant Permitting the Erection of a Pier,** but restricting the sale of commodities thereon, is broken by giving entertainments on the pier for entrance to which a fee is imposed. *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139.

**A Covenant Relating Solely to the First Building Erected on Certain Land** within twenty years, and providing that such building shall be a private dwelling of brick or stone, not less than three stories in height, planned and adapted for the residence of private families, etc., and that a tenement, flat, or apartment house is not such a building, does not prevent any one from using the building in any way he pleases, or from removing the building thus erected and erecting upon the premises a building that can be used for any purpose. *Kurtz v. Potter*, 44 N. Y. App. Div. 262, *affirmed* 167 N. Y. 586.

**A Covenant to Erect a Substantial Two-story Dwelling**, to cost not less than a certain price, cannot be construed as a covenant that nothing but a dwelling house should be maintained on the land, and accordingly the erection of a three-story building costing more than the stipulated price, and containing stores on the first floor, and flats or apartments above, will not be restrained. *Hurley v. Brown*, 44 N. Y. App. Div. 480.

**The Construction of a Building with Stores Therein** is not a breach of a covenant that "no part of said premises shall be so used or occupied as injuriously to affect the use, occupation, or value of the adjoining or adjacent premises for residence purposes." *Hurley v. Brown*, 54 N. Y. App. Div. 619.

**A Covenant to Use a House as a Private Residence Only** is broken by taking lodgers from a nearby school. *Hobson v. Tulloch*, (1898) 1 Ch. 424, 67 L. J. Ch. 205, 78 L. T. N. S. 224, 46 W. R. 331.

**The Erection of a Block of Residential Flats** violates a restriction against the erection of any house except such as is "adapted for and used as and for a private residence only." *Rogers v. Hosegood*, (1900) 2 Ch. 388, 83 L. T. N. S. 186.

**The Erection of a Railway Embankment** is a breach of a covenant not to erect any building other than a private dwelling house. *Long Eaton Recreation Grounds Co. v. Midland R. Co.*, (1902) 2 K. B. 574, *affirming* 85 L. T. N. S. 278.

**A Covenant to Use for Hotel or Club Purposes Only** was held to be valid. *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36.

**A Covenant Not to Maintain an Alley** running through the premises for "ingress or egress to rear buildings" is not broken by permitting a driveway along the rear of the premises for the delivery of supplies to a hotel standing thereon. *Leonard v. Hotel Majestic Co.*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 279.

**In the Absence of an Express Restriction, One**

**Should Not Be Implied.** — *Holford v. Acton Urban Dist. Council*, (1898) 2 Ch. 240, 78 L. T. N. S. 829.

**S. 2. The Establishment of a School for Boys** was held to violate a covenant not to carry on a business whereby there might be caused any offensive deposit or "disagreeable noise, or nuisance." *Wauton v. Coppard*, (1899) 1 Ch. 92, 68 L. J. Ch. 8, 79 L. T. N. S. 467, 47 W. R. 72.

**The Running of Railroad Trains** is a breach of a covenant not to carry on a noisy trade. *Long Eaton Recreation Grounds Co. v. Midland R. Co.*, 85 L. T. N. S. 278, *affirmed* (1902) 2 K. B. 574.

**9. 1. Restrictions Against Particular Trades** — A covenant not to use premises for a blacksmith shop will be enforced. *Wright v. Heidorn*, 6 Ohio Dec. 151, 4 Ohio N. P. 124.

A restrictive agreement against the sale of liquor is not void as against public policy. *Sullivan v. Kohlenberg*, 31 Ind. App. 215; *Uihlein v. Matthews*, 57 N. Y. App. Div. 476, *reversed* 172 N. Y. 154.

A covenant not to use property for hotel purposes is not void as against public policy. *Wittenberg v. Mollyneaux*, 60 Neb. 583.

A covenant not to manufacture certain articles is valid. *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. Rep. 619, 54 U. S. App. 416.

**A Covenant Not to Use Premises for a Saloon** is valid and not in restraint of trade. *Star Brewery Co. v. Primas*, 163 Ill. 652.

**A Covenant Against the Erection of "Any Beer House or shop or any hotel of less annual value than fifty pounds"** does not apply to an ordinary shop, but merely prohibits the erection of a beer house or beer shop, or of a hotel the rental of which is so low that its principal use is likely to be for the sale of beer rather than for the reception of guests. *Formby v. Barker*, (1903) 2 Ch. 539, 89 L. T. N. S. 249.

**Restriction Against "Building" Forbids "Use."** — A restriction that no house or shop for the sale of malt or spirituous liquors shall be "built" on the land is violated by the use for such purpose of a house which the purchaser was allowed to build without interference. *Webb v. Fagotti*, 79 L. T. N. S. 683.

**10. 3. Enforcement in Equity.** — *Ewertsen v. Gerstenberg*, 186 Ill. 349, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 10. See also the following cases:

*United States.* — *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. Rep. 619, 54 U. S. App. 416.

*Illinois.* — *Star Brewery Co. v. Primas*, 163 Ill. 652.

*Indiana.* — *Sullivan v. Kohlenberg*, 31 Ind. App. 215.

*New Jersey.* — *Roberts v. Scull*, 58 N. J. Eq. 396; *Bridgewater v. Ocean City R. Co.*, 62 N. J. Eq. 276.

*New York.* — *Spencer v. Stevens*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 112; *Uihlein v. Matthews*, 57 N. Y. App. Div. 476, *reversed* 172 N. Y. 154.

11. **Restriction Presumed to Enter into Consideration.** — See note 1.
2. **Burden of Proof.** — See note 2.
12. **3. Purpose of Restriction Controlling** — *a. GENERALLY.* — See note 1.
13. **6. HOW PURPOSE DETERMINED.** — See note 1.
4. **Restrictions Pursuant to General Plan.** — See note 7.
14. See note 1.
5. **Restrictions in Absence of General Plan.** — See notes 2, 3.
15. **7. Whether Negative Agreements Only Enforced.** — See note 3.
8. **Discretion of Court — Equitable Defenses** — *a. GENERALLY.* — See notes 4, 5.

*Pennsylvania.* — *Roberts v. Burke*, 15 Montg. Co. Rep. (Pa.) 109.

*Vermont.* — *Trudeau v. Field*, 69 Vt. 446.

**The Recording of a Deed** containing a restrictive covenant as to the property retained by the grantor is constructive notice to a subsequent purchaser. *Holt v. Fleischman*, 75 N. Y. App. Div. 593.

11. 1. *Roberts v. Scull*, 58 N. J. Eq. 396.

2. *Roberts v. Scull*, 58 N. J. Eq. 396; *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164.

**Restrictions Construed Against Covenantee.** — Covenants are to be construed most strongly against the covenantee, and the burden of proof is on the plaintiff clearly and satisfactorily to establish the breach. *Levy v. Schreyer*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 227.

12. 1. **Restriction Must Be for Benefit of Party Enforcing It.** — *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164; *Roberts v. Scull*, 58 N. J. Eq. 396; *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36.

**Restriction Imposed for Personal Benefit of Grantor.** — Where the right acquired is personal merely it is enforceable only as between the parties. *Louisville, etc., R. Co. v. Webster*, 106 Tenn. 586; *Hutchison v. Thomas*, 190 Pa. St. 242; *Krekeler v. Aulbach*, 51 N. Y. App. Div. 591, *affirmed* 169 N. Y. 372; *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36.

13. 1. **How Purpose Determined.** — *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36; *Hemsley v. Marlborough Hotel Co.*, 65 N. J. Eq. 167; *Krekeler v. Aulbach*, 51 N. Y. App. Div. 591, *affirmed* 169 N. Y. 372; *Spencer v. Stevens*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 112; *Louisville, etc., R. Co. v. Webster*, 106 Tenn. 586.

**A Trivial Breach of a Trivial Restriction** does not prevent a purchaser from maintaining a suit as to a breach of a substantial restriction by an adjoining owner. *Hooper v. Bromet*, 89 L. T. N. S. 37.

7. **General Plan.** — *Nalder, etc., Brewery Co. v. Harman*, 83 L. T. N. S. 257; *Hooper v. Bromet*, 89 L. T. N. S. 37; *Rowell v. Satchell*, (1903) 2 Ch. 212, 89 L. T. N. S. 267; *Hills v. Metzneroth*, 173 Mass. 423. See also *Bridge-water v. Ocean City R. Co.*, 62 N. J. Eq. 276.

14. 1. *Nalder, etc., Brewery Co. v. Harman*, 83 L. T. N. S. 257, *affirming* 64 J. P. 358; *Bridge-water v. Ocean City R. Co.*, 62 N. J. Eq. 276, *affirmed* 63 N. J. Eq. 798.

**Where There Is a General Plan** the covenant can be enforced only by the owner of property included within the plan. *Hemsley v. Marlborough Hotel Co.*, 65 N. J. Eq. 167.

**Presumption that Building Scheme Was In-**

**tended.** — The court will not infer that a building scheme was intended where the contract leaves undefined the property to be bound by the conditions which are to apply, and does not bind the vendor to observe the conditions in the meantime as to property remaining unsold, especially where the vendor has the right to modify the conditions as to the unsold part. *Osborne v. Bradley*, (1903) 2 Ch. 446, 89 L. T. N. S. 11.

**Stipulation Not Formulated at Date of Original Sale.** — Where an estate is sold in parcels at successive sales and subject to restrictive stipulations contained in a building scheme, a purchaser at a prior sale cannot enforce against a purchaser at a subsequent sale stipulations in respect of property subsequently sold which were not formulated or promulgated at the date of the contract under which he claims. *Rowell v. Satchell*, (1903) 2 Ch. 212, 89 L. T. N. S. 267.

**Effect of Conveyance Departing from Scheme of Which Purchaser Has Notice.** — A purchaser with notice of a building scheme is bound by restrictions of which he has notice, and accidental departures in the form of the conveyance, purporting to relieve him from observance of the restrictions, are ineffective, and, conversely, are no bar to his title to sue. *Rowell v. Satchell*, (1903) 2 Ch. 212, 89 L. T. N. S. 267.

2. **Restrictions on Land Sold in Behalf of Land Retained.** — *Rogers v. Hosegood*, 69 L. J. Ch. 59, 81 L. T. N. S. 515; *Osborne v. Bradley*, (1903) 2 Ch. 446, 89 L. T. N. S. 11. See also *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164.

3. **Restrictions on Land Retained in Behalf of Land Sold.** — *Holt v. Fleischman*, 75 N. Y. App. Div. 593.

**Where No Restriction Was Placed on the Land Retained in Behalf of That Sold**, and where, also, the transactions are not part of a general plan, the owner of the lot first sold cannot enforce against one who afterwards purchased an adjoining lot a restriction placed on such adjoining lot in favor of the common grantor. *Roberts v. Scull*, 58 N. J. Eq. 396; *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164.

15. 3. **Positive Act Enforced.** — *Holt v. Fleischman*, 75 N. Y. App. Div. 593.

4. **"Where There Are Negative Covenants** the court has, speaking generally, no discretion to consider the balance of convenience or matters of that nature, but is bound to give effect to the contract between the parties, unless the plaintiff seeking to enforce the covenant has, by his own misconduct, delay, laches, or the like, disintitiled himself to sue; that is to say,

- 16. b. EFFECT OF LACHES, ACQUIESCENCE, OR CHANGE OF CIRCUMSTANCES** — The Conduct of the Plaintiff, Such as Acquiescence and Laches. — See note 1.  
 After Right Has Vested in Vendee, Vendor's Action Cannot Divest It. — See note 2.
- 17. Effect of Change of Circumstances.** — See note 2.  
*d. PLAINTIFF NEED NOT SHOW DAMAGE.* — See note 7.
- 18. BULK.** — See note 2.  
**BULL.** — See note 3.
- 20. BURDEN.** — See note 1.

has raised against himself a personal equity." *Osborne v. Bradley*, (1903) 2 Ch. 446, 89 L. T. N. S. 11.

**15. 5. Circumstances and Conduct of Parties Considered.** — *Ewertsen v. Gerstenberg*, 186 Ill. 349.

**16. 1. Laches, Acquiescence, Etc.** — See also *Osborne v. Bradley*, (1903) 2 Ch. 446, 89 L. T. N. S. 11.

The fact that a covenantor entered a saloon and drank liquor there does not amount to an acquiescence in a breach of the covenant not to maintain such saloon. *Star Brewery Co. v. Primas*, 163 Ill. 652.

A long-continued disregard of a restrictive covenant on the part of a covenantee will constitute a waiver or release of the covenant. *Hepworth v. Pickles*, (1900) 1 Ch. 108, 69 L. J. Ch. 55, 81 L. T. N. S. 818, 48 W. R. 184.

**2. Subsequent Deed by Vendor.** — Where a vendor had conveyed property to the plaintiff by a deed containing a restrictive covenant, the covenant was not annulled by a subsequent quitclaim deed of a larger piece of property, including the land conveyed by the first deed, and given for the purpose of quieting the plaintiff's title. *Uihlein v. Matthews*, 57 N. Y. App. Div. 476, reversed 172 N. Y. 154.

**17. 2. Change of Circumstances.** — *Ewertsen v. Gerstenberg*, 186 Ill. 349; *Roth v. Jung*, 79 N. Y. App. Div. 1; *Deeves v. Constable*, 87 N. Y. App. Div. 352; *Leonard v. Hotel Majestic Co.*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 229.

Change of circumstance is not a defense unless it appears that the change has been occasioned through some act of the covenantee or those claiming through him. *Star Brewery Co. v. Primas*, 163 Ill. 652.

**Change in Neighborhood Not Defeating Right.** — "The right of a person to enforce a restrictive covenant by injunction could not be defeated by mere change in the character of the neighborhood, unless there was an equity against him arising from his acts or conduct in sanctioning or knowingly permitting such

change as to render it unjust for him to seek relief by injunction." *Osborne v. Bradley*, (1903) 2 Ch. 446, 89 L. T. N. S. 11.

**7. Damage Need Not Be Proved.** — *Star Brewery Co. v. Primas*, 163 Ill. 652; *Walker v. McNulty*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 701.

**Nominal Damages.** — Judgment had been rendered for the defendant on the ground that the plaintiff had suffered no damage by the breach of covenant. The judgment was reversed, the court holding that the violation of the covenant entitled the plaintiff to nominal damages at least. *Skinner v. Allison*, 54 N. Y. App. Div. 47, 8 N. Y. Annot. Cas. 155.

**18. 2. Wills.** — By the words "the bulk of my estate" it is clear the testator referred to his estate both real and personal. *Cole v. Proctor*, (Tenn. Ch. 1899) 54 S. W. Rep. 674.

**3. Bulls Not Included in Mortgage of Steers.** — "Bulls and cows are not covered by a mortgage which undertakes to include only one and two year old steers." *Wyman v. Herard*, 9 Okla. 87.

**20. 1. Burthen — Taxation.** — "In each instance it was recited in the deed given to the purchaser that the conveyance of the city was made and the rights of the purchaser thereunder were conferred 'subject only to such assessments and burthens as shall be in common with other lot holders in the said city.' The term 'assessment' is often used as a synonym of 'taxes.' Indeed, one of the definitions of this term given by Webster is 'a tax.' But even if this word, as used in the deed, does not necessarily refer to taxation, the word *burthen*, which is also therein employed, is certainly sufficiently comprehensive to include municipal taxes. Taken all together, the language adopted is clearly broad enough to embrace every *burden* then existing or which might thereafter be lawfully imposed upon other landowners in the city." *Wells v. Savannah*, 181 U. S. 541, affirming 107 Ga. 1.

# BURDEN OF PROOF.

By W. B. ROBINSON.

## 22. II. MEANING OF THE TERM — Term Used in Two Senses — The Two Uses Stated.

— See note 1.

Illustration. — See note 2.

## 23. When a Case Is Closed and Submitted. — See note 1.

## III. FUNDAMENTAL RULE — ONUS ON AFFIRMATIVE. — See note 4.

## 24. Rule Founded in Convenience. — See note 1.

## IV. DETERMINING WHO HOLDS THE AFFIRMATIVE — 1. General Tests.

— See note 3.

## 25. 2. The Pleadings — a. RECORD SHOWING THE ISSUE. — See note 3.

### 22. 1. Two Senses of Phrase "Burden of Proof."

— Egbers v. Egbers, 177 Ill. 82, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 21 [22].

2. See Field v. French, 80 Ill. App. 78, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 22.

23. 1. Quirk v. Metropolitan L. Ins. Co., 12 Pa. Super. Ct. 257, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 21 [23], and adopting the language of the text.

4. Burden of Proof on Affirmative. — Supreme Lodge, etc., v. Beck, 36 C. C. A. 467, 94 Fed. Rep. 751; Land Mortg. Invest. Agency Co. v. Preston, 119 Ala. 290; Mott v. Baxter, 29 Colo. 418, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 23; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 99 Ill. App. 114, 199 Ill. 151, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 23; Hudson v. Miller, 97 Ill. App. 74; Nash v. Cooney, 108 Ill. App. 211; Chicago Transit Co. v. Campbell, 110 Ill. App. 366; Mississinewa Min. Co. v. Andrews, 22 Ind. App. 528, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 23; Piper v. Matkins, 8 Kan. App. 215, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 21-26; Kuenzel v. Stevens, 155 Mo. 280; Turner v. Wells, 64 N. J. L. 269; Hurd v. Wing, 56 N. Y. App. Div. 595; Cook v. Guirkin, 119 N. Car. 13.

24. 1. A Rule of Convenience. — See Keller v. Strauss, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 36, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24.

3. Wetherell v. Hollister, 73 Conn. 622, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24; Funk v. Procter, 110 Ky. 290; Chaplin, etc., Turnpike Road Co. v. Nelson County, 77 S. W. Rep. 377, 25 Ky. L. Rep. 1154; Walling v. Eggers, 78 S. W. Rep. 428, 25 Ky. L. Rep. 1563; Ashland, etc., R. Co. v. Hoffman, 82 S. W. Rep. 566, 26 Ky. L. Rep. 778; Gile v. Sawtelle, 94 Me. 46; Clifton v. Weston, 54 W. Va. 250. See also Dieterle v. Bekin, 143 Cal. 683.

25. 3. Under the General Issue or a General Denial. — McGhee v. Cashin, 130 Ala. 568; Mott v. Baxter, 29 Colo. 418; Nash v. Cooney, 108 Ill. App. 211; Piper v. Matkins, 8 Kan. App. 215, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 21-26; Kenton Ins. Co. v. Osborne, (Ky. 1899) 51 S. W. Rep. 306; Louisville, etc., R. Co. v. McClain, 66 S. W. Rep.

391, 23 Ky. L. Rep. 1878; Chamberlain Banking House v. Woolsey, 60 Neb. 516; Connolly v. Clark, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 415.

Allegation of Facts in Avoidance. — Gambling Debt, in an action for money advanced. Hall v. Barrett, 93 Ill. App. 642.

Fraudulent Proof of Loss, in an action on an insurance policy. Schallman v. Royal Ins. Co., 94 Ill. App. 364.

A Gift, in an action for money lent. Zeok v. Hertz, 11 Pa. Super. Ct. 512.

Release, in an action by the mortgagee for conversion. Knoche v. Whiteman, 86 Mo. App. 568.

Suicide, in defense to an action on an insurance policy. Supreme Lodge, etc., v. Beck, 36 C. C. A. 467, 94 Fed. Rep. 751; Fidelity, etc., Co. v. Weise, 80 Ill. App. 499, reversed 182 Ill. 496.

Adverse Possession, in an action of ejectment. Walling v. Eggers, 78 S. W. Rep. 428, 25 Ky. L. Rep. 1563.

A Plea of Right to Apply Funds on other debts, in an action by the plaintiff to cancel a promissory note alleging the sale of securities placed to meet the note. Cook v. Guirkin, 119 N. Car. 13.

Agency, in defense to an action to cancel a mortgage on the ground that the loan was never received. Land Mortg. Invest. Agency Co. v. Preston, 119 Ala. 290.

Trust Account, in an action for goods sold and delivered. Mitchell v. Whitlock, 121 N. Car. 166.

Allegation Fraudulently Made, in an action for a penalty under a statute. Davis v. Texas, etc., R. Co., 12 Tex. Civ. App. 427.

New Contract, in an action in a written contract for goods delivered. Gernert Bros. Lumber Co. v. Rapier, (Ky. 1896) 37 S. W. Rep. 261.

Default on Prior Bond, in an action against sureties on a county treasurer's bond. Skipwith v. Hurt, (Tex. Civ. App. 1900) 58 S. W. Rep. 192.

Agreement to Accept Shares of Stock, where the plaintiff sued for payment of a transfer and the defendant alleged an agreement to take pay in stock. Wright v. Stewart, 19 Wash. 179.

- 27.** *c. GENERAL DENIAL AND AFFIRMATIVE ANSWER.* — See note 1.  
*d. FAILURE TO FORM AN ISSUE.* — See note 2.  
**28.** **3. Proving a Negative — Form of Allegations of No Consequence.** — See note 2.  
*Meaning of "Affirmative of the Issue."* — See note 3.  
**29.** **Negative Matter in Affirmative Actions.** — See note 1.

*Contract of Guaranty*, on a contract for the use of a field, where the defendant set up that the plaintiff guaranteed the field to yield a designated amount. *Gile v. Sawtelle*, 94 Me. 46.

*Debt Not Bona Fide*, in an action of replevin for certain chattels. *Coates v. Miller*, 99 Ill. App. 227.

*Recoupment or Counterclaim.* — *Warranty of Quality and Breach*, in an action for the price of goods sold and delivered. *Avery v. Burrall*, 118 Mich. 676, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 26; *Keystone Mfg. Co. v. Forsyth*, 123 Mich. 628, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 26.

*Sawing Not Carefully Done*, in an action on a contract to manufacture shingles. *Truax v. Heartt*, 135 Mich. 150, 10 Detroit Leg. N. 709.

*Breach of a Special Agreement*, in an action by the plaintiff on a *quantum meruit* for services rendered the defendant. *Blum v. Versteeg Grant Shoe Co.*, 77 Mo. App. 567.

*Agreement of an Agent to Pay Certain Lapsed Policies*, in an action by the agent to recover a deposit. *Sun L. Ins. Co. v. Bevan*, (Ky. 1897) 43 S. W. Rep. 427.

*Counterclaim for Breach of Contract.* — Where the defendant pleads a counterclaim, the burden is on him the same as if he had brought an action against the plaintiff for the breach of contract set up in the counterclaim. *Liberty Wall Paper Co. v. Stover Wall Paper Mfg. Co.*, 178 N. Y. 219.

*Set-off.* — *Account Against Plaintiff*, in an action for goods sold and delivered. *O'Neal v. Curry*, 134 Ala. 216.

*Replication to Plea.* — *Release of Liens Prior to Loss*, in an action on an insurance policy, the defendant having pleaded the giving of a mortgage in violation of the terms of the policy. *Home F. Ins. Co. v. Johansen*, 59 Neb. 349.

*Former Judgment Set Aside on Appeal*, in an action for personal injuries, where the defendant pleaded a prior judgment. *Meeh v. Missouri Pac. R. Co.*, 61 Kan. 630.

*Statute Invalid*, in an action for failure to deliver certain cattle, the defendant having pleaded that quarantine statutes prevented delivery. *St. Louis Southwestern R. Co. v. Smith*, 20 Tex. Civ. App. 451.

*Waiver*, in an action on an insurance policy, where the defendant pleaded a forfeiture. *Alabama State Mut. Assur. Co. v. Long Clothing, etc., Co.*, 123 Ala. 667.

*Cross-complaint.* — The allegations of a cross-complaint put upon the defendant the burden of proof the same as if he had instituted an original action to obtain the relief prayed for in the cross-complaint. *Herriman Irrigation Co. v. Butterfield Min., etc., Co.*, 19 Utah 453.

**27. 1. Allowing General Denial and Affirmative Answers** at the same time does not relieve the plaintiff of the burden of proof. *McGhee v. Cashin*, 130 Ala. 568, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 27. See also *Chaplin, etc., Turnpike Road Co. v. Nelson County*, 77

S. W. Rep. 377, 25 Ky. L. Rep. 1154; *Balmford v. Grand Lodge, etc.*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 1.

**2. Proceeding to Trial Without Issue.** — See *March-Davis Cycle Mfg. Co. v. Strobbridge Lithographing Co.*, 79 Ill. App. 687, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 27.

**28. 2. Where Proof of Claim Involves a Negative.** — *Turner v. Wells*, 4 N. J. L. 269, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28; *Clifton v. Weston*, 54 W. Va. 250, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28.

**3. Substance and Not Form Material.** — See *Clifton v. Weston*, 54 W. Va. 260.

*The General Rule Judicially Stated.* — See *Turner v. Wells*, 64 N. J. L. 269.

**29. 1.** See *Clifton v. Weston*, 54 W. Va. 260.

*Actions Necessitating Proof of Negative Matter — Illustrations.* — Want of probable cause; in an action for malicious prosecution. *Ambs v. Atchison, etc.*, R. Co., 114 Fed. Rep. 317; *Spitzer v. Friedlander*, 14 App. Cas. (D. C.) 556; *St. Louis, etc., R. Co. v. Wallin*, 71 Ark. 422; *Herbener v. Crossan*, 4 Penn. (Del.) 43; *Skala v. Rus*, 60 Ill. App. 479; *Tumalty v. Parker*, 100 Ill. App. 382; *Richards v. Jewett*, 118 Iowa 629; *Monroe v. H. Weston Lumber Co.*, 50 La. Ann. 142; *Matlick v. Crump*, 62 Mo. App. 21, 1 Mo. App. Rep. 712; *Merchant v. Pielke*, 10 N. Dak. 48; *Pownall v. Lancaster, etc., Turnpike Co.*, 16 Lanc. L. Rev. 411; *Boush v. Fidelity, etc., Co.*, 100 Va. 735; *Porter v. Mack*, 50 W. Va. 581; *Cullen v. Hanisch*, 114 Wis. 24; *Malcolm v. Perth Mut. F. Ins. Co.*, 29 Ont. 717, affirming 29 Ont. 406.

Failure to drill an oil well; in an action on a lease which provided that the lessor should be entitled to rent if no oil well was put down by the lessee. *Mississinewa Min. Co. v. Andrews*, 22 Ind. App. 528, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28-31.

The non-existence of liens; in an action on a building contract, where it was stipulated that final payment was to be made upon the contractor's providing releases of all liens growing out of the contract. *Turner v. Wells*, 64 N. J. L. 269.

That no money was due to the defendant; in an action to recover money paid under mistake, upon false representations. *Pacaud v. Reg.*, 29 Can. Sup. Ct. 637.

Officers not legally elected; in an action by the corporation to recover money collected by the defendants as officers. *Carmel Natural Gas, etc., Co. v. Small*, 150 Ind. 431.

That a check was not given for value received; in an action to recover the amount of a check given to the defendant. *Larraway v. Harvey*, 14 Quebec Super. Ct. 97.

Absence of notice; in an action claiming under an attachment levied before a prior deed was recorded. *L., etc., Blum Land Co. v. Hartin*, (Tex. Civ. App. 1895) 33 S. W. Rep. 153.

Land in dispute not a part of the street;

**30.** See note 1.

Negative Matter in Affirmative Defenses. — See note 2.

**V. SHIFTING THE BURDEN OF PROOF — 1. Generally — True Burden Does**

Not Shift. — See note 4.

**31.** Effect of Establishing Prima Facie Case. — See note 1.**33.** 3. In Criminal Cases. — See note 2.**34.** Reason — Admissions Not Effective. — See note 1.**37.** Distinction — Going Forward. — See note 2.**39.** VI. GOING FORWARD WITH EVIDENCE — 1. Generally. — See note 2.

in an action to enjoin an easement by the public therein. *Clifton v. Weston*, 54 W. Va. 250.

Absence of consent need not be proved where the allegation of the negative was held not to be necessary to entitle the plaintiff to recover. In an action to recover certain money deposited by the plaintiff for the defendant under an agreement that the deposit was not to be drawn without the plaintiff's consent, and the plaintiff alleged that the same had been withdrawn without his consent, the court declared, notwithstanding the negative allegation, that the burden of showing consent was on the defendant. *Dirks v. California Safe Deposit, etc., Co.*, 136 Cal. 84.

**30.** 1. See *Clifton v. Weston*, 54 W. Va. 260.

**2. When Defendant Has Burden of Proving Negative — Illustrations.** — No authority to indorse; in an action on a check. *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 99 Ill. App. 114, 199 Ill. 151, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 29-31.

Where the defendant in an action on an insurance policy alleges that statements in the application were untrue. *Mutual Reserve Fund Assoc. v. Powell*, 79 Ill. App. 482.

Damage could not have been caused otherwise; defense of sea peril in an action for goods found to have been damaged at the end of the voyage. *The Dunbritton*, 38 U. S. App. 369, 73 Fed. Rep. 352.

Court without jurisdiction; in an action on a promissory note. *Pyron v. Ruohs*, 120 Ga. 1060.

In an action on four promissory notes, the making of the notes was admitted, and it was alleged by way of a defense that there was a tender of payment on condition of surrendering certain collateral deposited as security for the payment of the notes, and for no other purpose. It was held that the allegation "and for no other purpose" put upon the defendant the burden of proving a negative. *Stokes v. Stokes*, 155 N. Y. 581, affirmed (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 716.

**4. True Burden Does Not Shift.** — *Michael v. Marshall*, 201 Ill. 76, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30; *Piper v. Matkins*, 8 Kan. App. 215; *Rupp v. Sarpay County*, (Neb. 1904) 98 N. W. Rep. 1042; *Wiley v. Bondy*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 658.

**31. 1. Prima Facie Case Does Not Shift Burden — To Similar Effect.** — *Supreme Lodge, etc., v. Beck*, 36 C. C. A. 467, 94 Fed. Rep. 751; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 99 Ill. App. 114, 199 Ill. 151, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 29-31; *Field v. French*, 80 Ill. App. 78; *Chaplin, etc., Turnpike Road Co. v. Nelson County*, 77 S. W.

Rep. 377, 25 Ky. L. Rep. 1154; *Laubheimer v. Naill*, 88 Md. 174; *Liberty Ins. Co. v. Central Vermont R. Co.*, 19 N. Y. App. Div. 509; *Wiley v. Bondy*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 658.

**33. 2. Burden Never Shifts in Criminal Cases.** — *Davis v. State*, 54 Neb. 177; *Snider v. State*, 56 Neb. 309; *Knights v. State*, 58 Neb. 225; *Brown v. State*, 62 N. J. L. 666. See also *State v. Clark*, 34 Wash. 485, 101 Am. St. Rep. 1006.

**Self-defense.** — See *State v. Ballou*, 20 K. I. 607. See also *People v. Eposki*, 57 N. Y. App. Div. 91.

**Alibi.** — See *People v. Roberts*, 122 Cal. 377, disapproving an instruction to the effect that "when satisfactorily proven" an alibi is a good defense in law; *State v. McClellan*, 23 Mont. 532, 75 Am. St. Rep. 558; *Peyton v. State*, 54 Neb. 188; *State v. Thornton*, 10 S. Dak. 349.

**34. 1. Other Authorities — Florida.** — *Brown v. State*, 40 Fla. 459.

*Iowa.* — *State v. Thiele*, 119 Iowa 659.

*Kansas.* — *State v. Grinstead*, 10 Kan. App. 78.

*Oklahoma.* — *Maas v. Territory*, 10 Okla. 714.

*Pennsylvania.* — *Com. v. Wireback*, 190 Pa. St. 138, 70 Am. St. Rep. 625; *Com. v. Heidler*, 191 Pa. St. 375; *Com. v. Kilpatrick*, 204 Pa. St. 218; *Com. v. Gentry*, 5 Pa. Dist. 703.

*South Carolina.* — *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661.

*Washington.* — *State v. Clark*, 34 Wash. 485, 101 Am. St. Rep. 1006.

*West Virginia.* — *State v. Manns*, 48 W. Va. 480.

*Wyoming.* — *Gustavenson v. State*, 10 Wyo. 300.

**37. 2. Similar Views Have Been Expressed. — Self-defense;** in a prosecution for an assault with intent to murder, *Hendricks v. State*, 122 Ala. 42; or in a prosecution for murder, *Lewis v. State*, 120 Ala. 339; *Foster v. Territory*, (Ariz. 1899) 56 Pac. Rep. 738; *Carr v. State*, 11 Ohio Cir. Dec. 353, 21 Ohio Cir. Ct. 43; or in a prosecution for assault with a deadly weapon, *State v. Hatfield*, 48 W. Va. 561.

*Drunkenness of Accused;* in a prosecution for murder. *State v. Corrivau*, 93 Minn. 38.

*Delirium Tremens;* in a prosecution for larceny. *State v. Kavanaugh*, 4 Penn. (Del.) 131.

*Imbecility;* in a prosecution for homicide. *State v. Palmer*, 161 Mo. 152.

**Alibi;** in a prosecution for larceny, *Wilburn v. Territory*, 10 N. Mex. 402; or in a prosecution for assault with intent to murder, *Saeng v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 316; or in a trial for murder. *Cochran v. State*, 113 Ga. 726.

**39. 2. Necessity of Going Forward.** — See *Gile v. Lawtelle*, 94 Me. 46.



**39. 3. After a Prima Facie Case** — *a. GENERAL EFFECT OF PRIMA FACIE CASE* — Burden Shifted. — See note 5.

*b. WHAT CONSTITUTES A PRIMA FACIE CASE* — (1) *In General*. — See note 6.

**40. (2) Effect of Presumptions**. — See notes 2, 3.

To Shift Burden of Proof. — See note 6.

**41.** See note 1.

(3) *Effect of Peculiar Knowledge*. — See note 2.

**42. Negative Claims**. — See note 1.

(4) *Effect of Admissions*. — See note 2.

**43. c. REPELLING PRIMA FACIE CASE** — May Avail Himself of Evidence Introduced by Adversary. — See note 1.

[BUREAU. — See note 1a.]

"Weight of Evidence." — See Supreme Lodge, etc., *v. Beck*, 36 C. C. A. 467, 94 Fed. Rep. 751, affirmed 181 U. S. 49.

**39. 5.** See *Herriman Irrigation Co. v. Butterfield Min., etc., Co.*, 19 Utah 453.

**6. Prima Facie Case**. — The *Warren Adams*, (C. C. A.) 74 Fed. Rep. 413; Supreme Lodge, etc., *v. Beck*, 36 C. C. A. 467, 94 Fed. Rep. 751; *Matter of Williams*, 128 Cal. 552, 79 Am. St. Rep. 67; *Hunter v. Sanders*, 113 Ga. 140; *New York, etc., R. Co. v. Blumenthal*, 160 Ill. 40, affirming 57 Ill. App. 538; Supreme Tent, etc., *v. Stensland*, 105 Ill. App. 267, affirmed 206 Ill. 124; *Myers v. Hinds*, 110 Mich. 300, 64 Am. St. Rep. 345; *Rivers v. Obear, etc., Glass Co.*, 81 Mo. App. 374; *Cook v. Guirkin*, 119 N. Car. 13; *McIntyre v. Ajax Min. Co.*, 20 Utah 323. See also *Parry v. Squair*, 79 Ill. App. 324.

**40. 2. Presumptions Assisting to Make Prima Facie Case**. — Of sanity; the burden being to establish a will, *Egbers v. Egbers*, 177 Ill. 82; the burden being to establish guilt, *State v. Cole*, 2 Penn. (Del.) 344; *Brown v. State*, 40 Fla. 459; *Snider v. State*, 56 Neb. 309; *State v. Clark*, 34 Wash. 485, 101 Am. St. Rep. 1006.

Death by accident; the defense being suicide, *Stephenson v. Banker's L. Assoc.*, 108 Iowa 637; *Fidelity, etc., Co. v. Weise*, 80 Ill. App. 499, reversed 182 Ill. 496; Supreme Council, etc., *v. Brashears*, 89 Md. 624, 73 Am. St. Rep. 244.

Of malice from the fact of the killing; the burden being to establish a charge of murder, *State v. Brinte*, 4 Penn. (Del.) 551.

That a person intends the natural consequences of his act. *Wells v. Territory*, 14 Okla. 436.

That a letter reached its destination; the burden being to show notice, *Iroquois Furnace Co. v. Wilkins Mfg. Co.*, 181 Ill. 582; *Railway Officials, etc., Assoc. v. Beddow*, 112 Ky. 184; *Bloom v. Wanner*, 77 S. W. Rep. 930, 25 Ky. L. Rep. 1646; *McDermott v. Jackson*, 97 Wis. 64.

**3. Presumption Assisting to Repel Prima Facie Case**. — That a surrender and cancellation of a note is a payment of the debt. *Chamberlain Banking House v. Woolsey*, 60 Neb. 516.

**6. Burden of Establishing Not Changed by Presumption**. — *Wiley v. Bondy*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 658.

**41. 1. Presumption Shifts Duty of Going Forward**. — *Chamberlain Banking House v. Woolsey*, 60 Neb. 516. See also *Fidelity, etc., Co. v. Weise*, 80 Ill. App. 499, reversed 182 Ill. 496; *Kelly v. Forty-second St., etc., R. Co.*, 37 N. Y. App. Div. 500.

**2. Peculiar Knowledge of Adversary Discharges Duty of Going Forward Pro Tanto**. — *Spaulding v. Cœur D'Alene R., etc., Co.*, 5 Idaho 533, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 41; *Northwestern Mut. L. Ins. Co. v. Calloway*, (Ky. 1896) 38 S. W. Rep. 430; *Funk v. Procter*, 110 Ky. 290; *Nunez v. Bayhi*, 52 La. Ann. 1719; *Mitchell v. Carolina Cent. R. Co.*, 124 N. Car. 242, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 41; *Hinkle v. Southern R. Co.*, 126 N. Car. 938, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 41; *Cook v. Guirkin*, 119 N. Car. 13; *State v. McCaffrey*, 69 Vt. 85. See also *Turner v. Wells*, 64 N. J. L. 269. But see *McIntyre v. Ajax Min. Co.*, 20 Utah 323.

**42. 1. Negative Claims Provable Only by Opposite Party**. — *Bastrop State Bank v. Levy*, 106 La. 586; *State v. Miller*, 182 Mo. 370. See also *Cook v. Guirkin*, 119 N. Car. 13; *McIntyre v. Ajax Min. Co.*, 20 Utah 323.

**Sale Without License**. — *Liggett v. People*, 26 Colo. 364; *State v. Goff*, 10 Kan. App. 286; *Com. v. Read Phosphate Co.*, 113 Ky. 37, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 42; *Orme v. Com.*, (Ky. 1900) 55 S. W. Rep. 195; *Scott v. Dewey*, 23 Pa. Super. Ct. 396; *Com. v. Regan*, 182 Mass. 22. See also *Chandler v. Smith*, 70 Ill. App. 658. And see the title INTOXICATING LIQUORS, **330. 5. et seq.**

**2. Admissions**. — *Knoche v. Whiteman*, 86 Mo. App. 568; *Cook v. Guirkin*, 119 N. Car. 13; *Jacoby v. North British, etc., Ins. Co.*, 10 Pa. Super. Ct. 366. See also *Rupp v. Sarpy County*, (Neb. 1904) 98 N. W. Rep. 1042.

**43. 1. Annual Cases**. — *State v. Manns*, 48 W. Va. 480.

**Civil Cases**. — See Supreme Lodge, etc., *v. Beck*, 36 C. C. A. 467, 94 Fed. Rep. 751, affirmed 181 U. S. 49.

**1a. Gift Causa Mortis**. — A bureau is an article of household furniture used for domestic purposes and not generally for securing valuable papers as a life insurance policy. therefore a gift *causa mortis* of a bureau will not carry a policy contained therein. *Newman v. Bost*, 122 N. Car. 531.

# BURGLARY.

BY M. G. BEAMAN.

**44. I. DEFINITION AND NATURE OF THE OFFENSE** — Definition — At Common Law. — See note 1.

**45. II. ELEMENTS OF THE OFFENSE** — 1. Breaking — *a*. ACTUAL BREAKING. — See note 3.

**46.** See note 1.

**48. *b*. CONSTRUCTIVE BREAKING.** — See note 1.

**49. *c*. BREAKING OUT** — At Common Law. — See note 1.

**50. 2. Entry.** — See note 3.

**44. 1. Other Expositions.**—*State v. Fisher*, 1 Penn. (Del.) 303; *Claiborne v. State*, (Tenn. 1904) 83 S. W. Rep. 352; *State v. Petit*, 32 Wash. 129.

**45. 3. Entrance Through Open Door or Window.**—*State v. Bates*, 182 Mo. 70; *Duke v. State*, 42 Tex. Crim. 3. See also *Fields v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 309.

**Removal of Props from Door.**—*State v. Powell*, 61 Kan. 81.

**Statutory Offense — Breaking Not Essential.** — *People v. Brittain*, 142 Cal. 8, 100 Am. St. Rep. 95.

**Must Be Opening Made by Force.** — It is not burglary to tear wooden slats off a window and to remove putty and tacks from a pane of glass, if the glass is not removed. *Minter v. State*, 71 Ark. 178, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 45. See also *Gaddie v. Com.*, (Ky. 1904) 78 S. W. Rep. 162.

**46. 1. Injury to Building Not Essential to Constitute Breaking.**—*State v. Fisher*, 1 Penn. (Del.) 303; *State v. Moon*, 62 Kan. 801, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 45, 46; *State v. Peebles*, 178 Mo. 475; *People v. Gartland*, 30 N. Y. App. Div. 534; *Wagner v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 372; *Hedrick v. State*, 40 Tex. Crim. 532.

**Lifting Latch.**—*State v. Snow*, 3 Penn. (Del.) 259; *State v. Woods*, 137 Mo. 6; *Matthews v. State*, (Tex. Crim. 1896) 38 S. W. Rep. 172; *Martin v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 270.

**Fact that Other Door Is Open Immaterial.** — *Ferguson v. State*, 52 Neb. 432, 66 Am. St. Rep. 512.

**Fact that Store Open for Business Immaterial.** — *Gonzales v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 1018.

**Raising Window.** — *State v. Howard*, 64 S. Car. 344, 92 Am. St. Rep. 804; *Parker v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 790.

**Entering Through Screen Door.** — *State v. Moon*, 62 Kan. 801, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 46.

**Tearing Down Network.** — *State v. Herbert*, 63 Kan. 516.

**Boring Hole in Floor.** — *State v. Crawford*, 8 N. Dak. 539, 73 Am. St. Rep. 772.

**Quality of Fastenings.** — *State v. Powell*, 61 Kan. 81.

**Enlarging Opening.** — It is a sufficient breaking

to raise a partly open window, so as to admit of an entrance. *Claiborne v. State*, (Tenn. 1904) 83 S. W. Rep. 352.

**Domestic Servant.** — The *Texas* statute does not apply where the servant enters a part of the building into which he has no right to go, and which is operated separately. *Jackson v. State*, 43 Tex. Crim. 260.

**Use of Force Not an Element of Crime.** — *State v. Simas*, 25 Nev. 432.

**Entry Without Breaking.** — The rule stated in the original note is applied in *California* and *Washington*. *People v. Brittain*, 142 Cal. 8, 100 Am. St. Rep. 95, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 48; *State v. Petit*, 32 Wash. 129.

In *New York* it is a misdemeanor to enter any building, under circumstances not amounting to a burglary, with intent to commit a felony, even if the entry be peaceable. *People v. Corcoran*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 332.

**Pushing Open a Closed Door** has been held to be a sufficient breaking. *May v. State*, 40 Fla. 426; *Barber v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 515; *Parker v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 790; *Duke v. State*, 42 Tex. Crim. 3; *Bartley v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 190.

**Same Amount of Force at Night or Day.** — *Daggett v. State*, 39 Tex. Crim. 5.

**Opening Railroad Car Without Breaking Seal.** — *Gilbert v. State*, 116 Ga. 819.

**48. 1. Constructive Breaking Sufficient.** — *State v. Fisher*, 1 Penn. (Del.) 303.

**Entry Through Open Door with Intent to Conceal One's Self — Not Fraud.** — *St. Louis v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 889; *Smith v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 668.

**Obtaining Key by Trick.** — *Com. v. Ballard*, (Ky. 1897) 38 S. W. Rep. 678.

**Threats and Pointing Pistol.** — *State v. Foster*, 129 N. Car. 704.

**49. 1. At Common Law.** — *State v. Howard*, 64 S. Car. 344, 92 Am. St. Rep. 804; *Edwards v. State*, 36 Tex. Crim. 387.

**50. 3. Entry Essential.** — *Lester v. State*, 106 Ga. 371.

**Putting Hand Through Broken Pane of Glass.** — *State v. Boysen*, 30 Wash. 338.

**Either Breaking or Entry Enough — Statute.** —

**51.** Consent. — See note 1.

**52.** 3. What Premises Are Subjects of Burglary — *a.* AT COMMON LAW. — See note 1.

**54.** *b.* BY STATUTE. — See notes 2, 3.

*c.* CERTAIN STATUTORY TERMS CONSTRUED — **Other Building.** — See note 4.

**55.** Further Instances. — See note 1. See also, for judicial construction of the several statutes as applied to particular buildings and structures, the various words and phrases in their alphabetical places throughout this work.

In *Arkansas* it is not necessary to prove both a breaking and an entry. Either is sufficient. *Minter v. State*, 71 Ark. 178.

**What Is "Unusual Place of Entry," Is for Jury.** — *Green v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 99.

**51. 1. If Entry Is by Owner's Consent, It Is Not Burglary.** — *Duke v. State*, 42 Tex. Crim. 3. **Entry by Collusion of Detective.** — *Roberts v. Territory*, 8 Okla. 326.

**Mere Knowledge on Part of Owner Insufficient.** — *State v. Abley*, 109 Iowa 61, 77 Am. St. Rep. 520.

**Entry by Consent of Occupant Not Burglarious.** — *Trevenio v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 594. See also *Monceveis v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 94.

**Collusion of Servant Cannot Be Imputed to Master.** — *State v. Abley*, 109 Iowa 61, 77 Am. St. Rep. 520.

**Entry Not According to Consent.** — Permission to enter for the purpose of sleep is no defense to a charge of burglary by entering in a manner other than that authorized, for the purpose of stealing. *State v. Howard*, 64 S. Car. 344, 92 Am. St. Rep. 804.

Consent by the wife of the owner to enter the premises with a key for a certain purpose is no defense where the premises were entered by breaking in the door for another purpose. *Hehn v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1118.

**Consent Will Not Be Inferred**, where the owner of the premises is a witness and fails to testify directly as to consent. *Wisdom v. State*, 42 Tex. Crim. 579; *Ridge v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 774.

**52. 1.** *State v. Burns*, 109 Iowa 436; *Cronin v. State*, (Tenn. 1904) 82 S. W. Rep. 477.

**What Mansion Includes.** — *People v. Griffith*, 133 Mich. 607.

**Occupancy.** — *State v. Fisher*, 1 Penn. (Del.) 303.

**Absence of Occupant Animo Revertendi.** — *Schwabacher v. People*, 165 Ill. 618.

**Meaning of "Within the Curtilage."** — A building, to be within the curtilage, need not be inclosed with the dwelling. It is sufficient that it be near enough to the dwelling house to be conveniently accessible, and that it be actually used for domestic purposes. *State v. Bugg*, 66 Kan. 668.

**54. 2. Statutes.** — *Smith v. State*, 140 Ala. 146; *State v. Davis*, 138 Mo. 107; *Cronin v. State*, (Tenn. 1904) 82 S. W. Rep. 477.

**Railroad Cars.** — By statute in *Missouri* a railroad car may be the subject of burglary. *State v. Davis*, 138 Mo. 107.

A flat car loaded with wheat and covered over with tarpaulin, fastened down on all sides,

is not a "railroad car," within the *Washington* statute. *State v. Petit*, 32 Wash. 129.

**Building Must Be Actually Used.** — Under Gen. Stat. Kan. (1901), § 2059, the building must contain goods, wares, etc., in order to be the subject of burglary. That it is usually used for keeping such goods is not enough. *State v. Poole*, 65 Kan. 713.

**3. Degrees of Crime.** — It is a greater offense under the *Kansas* statutes burglariously to break and enter a dwelling house than it is to break and enter any other building. *State v. Moon*, 62 Kan. 801.

In *North Carolina*, under Acts 1889, c. 434, if a sleeping apartment is not in a dwelling house it must be actually entered by breaking in order to support a conviction of burglary in the first degree. *State v. Foster*, 129 N. Car. 704.

In *Texas* there is a difference between burglary of a house and burglary of a private residence. See *Williams v. State*, 42 Tex. Crim. 602; *Adams v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 1058; *Holland v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 763; *Jones v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 530.

**4. Chicken House.** — Under Act Mo. May 31, 1899, a chicken house is a building in which burglary can be committed; and there is no distinction whether the chickens are kept for sale or for private use. *State v. Helms*, 179 Mo. 280.

So a chicken house is within the term "other building," as used in Gen. Stat. Kan. (1901), § 2059. *State v. Poole*, 65 Kan. 713.

**Hotel.** — A hotel is an "other building" within the *Illinois* statute. *Bruen v. People*, 206 Ill. 417.

**A Planing Mill Is a "Building"** within Code Iowa, § 4791. *State v. Haney*, 110 Iowa 26.

**A Camp House** is an "other house" within the *Tennessee* statute. *Cronin v. State*, (Tenn. 1904) 82 S. W. Rep. 477.

**55. 1. Tent.** — Where a wagon sheet was stretched over poles stuck in the ground and fastened to stakes, one end of the tent boarded up, and some boxes and an old door placed at the other end, it was held that the structure was a "house." *Favro v. State*, 39 Tex. Crim. 452, 73 Am. St. Rep. 950.

**Cornerib.** — A cornerib used only for storing feed, etc., is a house under the *Texas* statutes. *Barber v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 515.

**Header Box.** — A portable box, fourteen feet long and six feet wide, with cover, used for carrying grain, is not a "house." *Williamson v. State*, 39 Tex. Crim. 60.

**Private Residence — Room in Hotel.** — A room in a hotel is a private residence under the

**56.** See notes 1, 3, 4.

**57.** See note 3.

**4. Time — a. AT COMMON LAW.** — See note 5.

**58. b. BY STATUTE.** — See note 2.

**59.** See note 1.

**5. Intent.** — See note 2.

**61.** See note 1.

**III. EVIDENCE — Possession of Stolen Property.** — See note 3.

*Texas* statute. *Holland v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 763.

**Temporary Absence of Family Immaterial.** — *Hardy v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 526.

**56. 1. Term Outhouse Construed.** — Under 2 Ball. Annot. Codes and Stat. Wash. (1897), § 7104, an outhouse must be both adjoining to the dwelling house and occupied therewith. *State v. Randall*, 36 Wash. 438.

**3. Storeroom.** — Compare *State v. Johnson*, 64 Ohio St. 270.

**A Drug Store** has been held to be a storehouse. *McNutt v. State*, (Neb. 1903) 94 N. W. Rep. 143.

**A Room in a Storehouse** is a storehouse within Stat. Ky. (1894), § 1164. *Johnson v. Com.*, (Ky. 1900) 57 S. W. Rep. 255.

**A Mill-house** is neither an office, shop, storehouse, warehouse, nor banking house, within the *Virginia* statute. *Cool v. Com.*, 94 Va. 799.

**A Small Room in the Cellar of a Dwelling**, in which a few bottles of wine are kept for family use, is not a storehouse within Stat. Ky. (1894), § 1164. *Mason v. Com.*, 101 Ky. 397.

**4. An Opera House**, in which are kept the stage properties between performances, is a "warehouse" within Stat. Ky. (1894), § 1164. *Hunter v. Com.*, (Ky. 1899) 48 S. W. Rep. 1077.

**A Building Which Is Part Warehouse and Part Lodging House** is a "warehouse" within the *Washington* statute. *State v. Dolson*, 22 Wash. 259.

**57. 3. Dwelling House.** — A log house, with but one window, and that one boarded up, used by wood-choppers occasionally, and occupied temporarily at the time of the burglary, is a "dwelling house" within Mo. Rev. Stat. 1889, § 3521. *State v. Weber*, 156 Mo. 257.

The basement of a dwelling house, having no internal connection therewith, is nevertheless part of the dwelling house. *Hahn v. State*, 60 Neb. 487.

If the barn be within the same inclosure as the dwelling house, one who breaks and enters there in the night-time is guilty of burglary of the dwelling, even though breaking and entering a barn by night constitutes a distinct statutory offense. *People v. Griffith*, 133 Mich. 607.

**Yard.** — For a discussion of the word "yard," see *State v. Bugg*, 66 Kan. 668.

**3. Common-law Rule — Night-time.** — *State v. Gray*, 23 Nev. 301.

**58. 2. Statutory Modification.** — *Schwabacher v. People*, 165 Ill. 618.

In *Nebraska* burglary must take place at night-time. Breaking and entering by day is a separate statutory offense. *In re McVey*, 50 Neb. 481.

**Statutory Definitions of Night-time — Period Between Sunset and Sunrise.** — *Taylor v. Territory*,

(Ariz. 1901) 64 Pac. Rep. 423; *People v. Perry*, 144 Cal. 748; *State v. Gray*, 23 Nev. 301; *State v. Miller*, 24 Utah 312.

*Thirty Minutes After Sunset to Thirty Minutes Before Sunrise.* — *Jackson v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 990.

**59. 1. Degrees of Offense.** — See *People v. Smith*, 136 Cal. 207; *Schwabacher v. People*, 165 Ill. 618; *Bruen v. People*, 206 Ill. 417; *State v. Moon*, 62 Kan. 801; *Bergeron v. State*, 53 Neb. 752.

**2. Felonious Intent Essential Ingredient of Offense.** — *State v. Fisher*, 1 Penn. (Del.) 303; *State v. Snow*, 3 Penn. (Del.) 259; *Bergeron v. State*, 53 Neb. 752; *State v. Tough*, 12 N. Dak. 425.

**Intent Must Be to Commit Public Offense.** — *State v. Williams*, 120 Iowa 36.

**Intent to Take Property for Temporary Use Only Not Burglary.** — *State v. Bullitt*, 64 N. J. L. 379.

**Breaking into a Jail to Effect the Escape of Prisoners** is not burglary under the *Texas* statute. *Kipper v. State*, 42 Tex. Crim. 613.

**There Must Be Some Evidence to show intent.** *King v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 410.

**61. 1. Commission of Felony Not Essential.** — *Ragland v. State*, 71 Ark. 65; *State v. Fisher*, 1 Penn. (Del.) 303; *State v. Worthen*, 111 Iowa 267; *Walker v. State*, 44 Fla. 466; *Williams v. State*, (Fla. 1904) 37 So. Rep. 521; *Brown v. State*, (Miss 1904) 37 So. Rep. 497. See also *King v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 410.

**Proof Must Be of Intent Charged in Indictment.** — Evidence showing the defendant guilty of burglary with intent to commit rape will not authorize a conviction under an indictment for burglary with intent to commit theft. *Ford v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 761.

**3. Possession of Stolen Property.** — *People v. Boxer*, 137 Cal. 562; *State v. Brady*, (Iowa 1902) 91 N. W. Rep. 801; *State v. Brundige*, 118 Iowa 92; *State v. Powell*, 61 Kan. 81, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 61; *People v. Hogan*, 123 Mich. 233; *State v. Gray*, 23 Nev. 301; *Johnson v. Territory*, 5 Okla. 695; *State v. Fitzgerald*, 72 Vt. 142.

It must be shown that the goods found in the defendant's possession have actually been taken from the house alleged to have been broken and entered. *King v. State*, 99 Ga. 686, 59 Am. St. Rep. 251.

**Burglary and Larceny Committed by Same Person and at Same Time.** — *State v. Tucker*, 36 Oregon 201; *State v. Ryan*, 113 Iowa 536; *State v. Williams*, 120 Iowa 36; *State v. Swift*, 120 Iowa 8; *State v. Raphael*, 123 Iowa 452, 101 Am. St. Rep. 334; *State v. Hullen*, 133 N. Car. 656.

## 62. See note 1.

The *Iowa* cases were reviewed, and the subject considered at great length, in *State v. Brady*, (Iowa 1902) 91 N. W. Rep. 801, the court laying down the following rules: That the fact of possession of goods recently stolen in connection with burglary does not in itself create a presumption or amount to *prima facie* proof that the possessor is guilty of the burglary. Second. That where, independent of the mere possession by the accused of the recently stolen goods, the evidence tends to show that a burglary was committed by some one, and that the theft of the goods was accomplished at the same time and by means of such burglary, the proof of possession of the fruits of the crime will be sufficient to sustain a conviction of the felonious breaking and entering. See also *State v. Brundige*, 118 Iowa 92.

**Unexplained Recent Possession Should Be Considered by Jury.**—*Considine v. U. S.*, (C. C. A.) 112 Fed. Rep. 342; *Taylor v. Territory*, (Ariz. 1901) 64 Pac. Rep. 423; *People v. Brady*, 133 Cal. xx, 65 Pac. Rep. 823; *Gravitt v. State*, 114 Ga. 841, 88 Am. St. Rep. 63; *Jordan v. State*, 119 Ga. 443; *Hunter v. Com.*, (Ky. 1899) 48 S. W. Rep. 1077; *Leisenberg v. State*, 60 Neb. 628; *State v. Peach*, 70 Vt. 283. See also *Gilbert v. State*, 116 Ga. 819.

**Unexplained Possession of Recently Stolen Property Sufficient for Conviction.**—*People v. Lang*, 142 Cal. 482; *Williams v. People*, 196 Ill. 173; *State v. Yandle*, 166 Mo. 589; *State v. Armstrong*, 170 Mo. 406; *State v. Dale*, 141 Mo. 284, 64 Am. St. Rep. 513; *Richardson v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 996; *Boersh v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 1060; *Cook v. State*, (Miss. 1900) 28 So. Rep. 833; *Favro v. State*, 39 Tex. Crim. 452, 73 Am. St. Rep. 950; *Glover v. State*, (Tex. Crim. 1898) 46 S. W. Rep. 824; *Willis v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 829; *Odell v. State*, (Tex. Crim. 1903) 71 S. W. Rep. 971; *Davis v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 919; *Archibald v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 189; *Bartley v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 190.

**Possession of Part and Giving Information as to Rest Sufficient to Convict.**—*Binyon v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 339.

**Possession Must Be Unexplained to Warrant Inference of Guilt.**—*State v. Gillespie*, 62 Kan. 469, 84 Am. St. Rep. 411.

**62. 1. Indicatory Evidence on Collateral Points.**—*McCormick v. State*, (Ala. 1904) 37 So. Rep. 377; *People v. Boxer*, 137 Cal. 562; *State v. Powell*, 61 Kan. 81; *State v. Woods*, 137 Mo. 6; *State v. Tucker*, 36 Oregon 291; *Lamater v. State*, 38 Tex. Crim. 249; *Henderson v. Com.*, 98 Va. 794; *Branch v. Com.*, 100 Va. 837.

**Onus of Explanation Cast on Accused.**—*State v. Wilson*, 137 Mo. 592; *State v. Blue*, 136 Mo. 41; *Carano v. State*, 24 Ohio Cir. Ct. 93.

**Possession Must Be Recent.**—*Roberson v. State*, 40 Fla. 509; *Jones v. State*, 105 Ga. 649; *State v. Belcher*, 136 Mo. 135 (holding that the lapse of four months was too long). See also *Knight v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 88.

**Possession Must Be Personal and Exclusive.**—*Roberson v. State*, 40 Fla. 509; *State v. Bel-*

*cher*, 136 Mo. 135; *Torres v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 828. *Contra*, *People v. Barker*, 144 Cal. 705.

Finding the defendant in close juxtaposition to the goods has been held to be enough. *Perry v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 513.

**Possession Must Be Actual.**—*Simmons v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 762.

**Failure to Trace Stolen Goods to Accused.**—If it appears reasonably certain that the defendant placed the goods where they were found, it is not necessary to prove further the possession. *McDaniel v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 324.

**Evidence of Possession of Stolen Goods Admissible.**—Goods found in possession of one jointly indicted with the defendants are properly received in evidence, if identified as taken at the same time as the goods sold by the defendants, and if all were seen together before and after the burglary. *State v. Wrand*, 108 Iowa 73.

But the goods must be identified. *Brantley v. State*, 115 Ga. 229.

**Evidence Explanatory of Possession of Property Admissible.**—*King v. State*, 99 Ga. 686, 59 Am. St. Rep. 251.

**Explanation of Possession.**—If the jurors have a reasonable doubt of the defendant's guilt, caused by his explanation of possession, they should acquit him. *Hale v. State*, 122 Ala. 85; *People v. Lang*, 142 Cal. 482; *Alvia v. State*, 42 Tex. Crim. 424; *Lovelace v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 756; *McCoy v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 46.

A charge that if the jurors believed that the defendant borrowed the property found in his possession, they should not consider such possession as an inculpatory circumstance, is sufficiently favorable to the defendant. *Riding v. State*, 40 Tex. Crim. 452.

The defendant need not necessarily show an honest and fair possession. *State v. Brady*, 121 Iowa 561.

**Evidence of Possession of Burglar's Tools.**—Burglar's tools found on a farm after a burglary are admissible in evidence where it appears that the defendant was the only person living on the farm. *People v. Gregory*, 130 Mich. 522.

It is immaterial as bearing on the admissibility that the tools are not of a kind exclusively used for criminal purposes. *State v. Wayne*, 62 Kan. 636.

It is also immaterial that the possession of burglar's tools is in itself a separate crime. *Williams v. People*, 196 Ill. 173.

On an indictment for burglariously entering a hotel, proof that keys of other hotels were found in the possession of the defendant, one of them fitting the door of a room entered by him, is admissible. *Bruen v. People*, 206 Ill. 417.

**Breaking and Entry Must Be Proved.**—*Lester v. State*, 106 Ga. 371; *Strickland v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 689.

**Possession of One Defendant.**—Evidence is admissible against one defendant to identify property taken from a burglarized house and found in the possession of another defendant. *Terry v. State*, 39 Tex. Crim. 628. See also *People v. Wilson*, 133 Mich. 517.

**65. Proof of Time.** — See note 1.

**Hour of the Night.** — See note 2.

**66. Evidence of Intent.** — See notes 1, 2.

**67. Evidence of Another Offense.** — See notes 1, 2. See generally the title **PROOF OF OTHER CRIMES.**

**Proof of Breaking and Entering.** — See note 4.

**68. Evidence of Conspiracy.** — See note 1.

**Sufficiency of Evidence.** — See notes 2, 3.

**Goods Found in Possession of Another.** — Where the goods are found in the possession of one who could not have obtained them save from the defendant, this may be shown by the state. *Riding v. State*, 40 Tex. Crim. 452. See also *Mass v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 46.

**Possession of Chloroform.** — Where a burglary was committed by the aid of chloroform, evidence that chloroform was found shortly after at the defendant's house is admissible. *Miller v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 704.

**65. 1. Proof of Time.** — *Leisenberg v. State*, 60 Neb. 628; *State v. Gray*, 23 Nev. 301; *State v. Miller*, 24 Utah 312.

**Sufficiency of Proof.** — Where it was shown that the property taken was in the building at nightfall, and was not there shortly after daylight the next morning, and people lived near at hand, it was held that the taking in the night-time was sufficiently proved. *People v. Tracy*, 121 Mich. 318.

**Judicial Notice of Time of Rising of Sun.** — The court will take judicial notice of the time of the rising and setting of the sun. *Taylor v. Territory*, (Ariz. 1901) 64 Pac. Rep. 423; *State v. Gray*, 23 Nev. 301; *State v. Miller*, 24 Utah 312. See also the title **JUDICIAL NOTICE**, 904. 6.

**2. Hour of Night Need Not Be Proved.** — *Leisenberg v. State*, 60 Neb. 628.

**66. 1. Actual Commission of Felony.** — *State v. Taylor*, 136 Mo. 66; *State v. Peebles*, 178 Mo. 475; *State v. Crawford*, 8 N. Dak. 539, 73 Am. St. Rep. 772; *Moseley v. State*, 43 Tex. Crim. 559; *Ferris v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 140.

*2. Walker v. State*, 44 Fla. 466. See also *Pilot v. State*, 38 Tex. Crim. 515.

**Intent — Question of Fact for Jury.** — *Ragland v. State*, 71 Ark. 65; *State v. Worthen*, 111 Iowa 267.

**Presumption of Intent from Breaking and Entering — Usually Theft.** — *State v. Worthen*, 111 Iowa 267.

**Intent Must Be Proved.** — If the indictment alleges an intent to steal a specific article, such intent must be proved before a conviction may be had. *Rush v. State*, 114 Ga. 113.

On an indictment for burglary with intent to murder, it is error to admit statements of the prosecutrix that she was afraid the defendant would kill her, there being no evidence of any threats or acts on the part of the defendant. *Trevenio v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 594.

**Evidence Held Insufficient to Prove Intent.** — *In Price v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 185, evidence that the defendant tore a board off of the house of the prosecutrix, but went away when commanded, was held not to

be enough to support an indictment for an attempt to commit burglary with intent to rape. See also *Taylor v. State*, (Miss. 1904) 37 So. Rep. 498; *Mason v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 689.

**67. 1. Evidence Tending to Prove Another Offense.** — *State v. Ellsworth*, 130 N. Car. 690; *Denton v. State*, 42 Tex. Crim. 427; *McAnally v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 404; *McCoy v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 47.

**2. Connection Between Two Offenses.** — *State v. Donovan*, 125 Iowa 239; *State v. Bates*, 182 Mo. 70; *Adams v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 1058; *Glenn v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 757.

**Burning Building to Conceal Burglary.** — It is competent for the state to show that subsequent to the alleged burglary the defendant set fire to the building burglarized in order to conceal the traces of guilt. *Roberson v. State*, 40 Fla. 509.

**Attempt to Escape from Jail May Be Shown.** — *State v. Wrand*, 108 Iowa 73.

**4. Proof that Building Was Closed.** — *Adkinson v. State*, (Fla. 1904) 37 So. Rep. 522.

**Evidence Held Sufficient to Prove Breaking and Entry.** — Proof that the door of an apartment was closed at noon, that the defendant was discovered inside between one and two o'clock, and that the door was always kept closed, was held to be sufficient to show that the defendant opened the door. *People v. Gartland*, 30 N. Y. App. Div. 534.

**Proof of Breaking Essential.** — Mere proof that property is stolen from a house, into which apparently no entry could have been made save by unlocking a door, is not enough to show a breaking. *Lester v. State*, 106 Ga. 371.

**68. 1. Evidence of Conspiracy.** — *State v. Donovan*, 125 Iowa 239.

**2. Evidence Sufficient to Sustain Conviction — California.** — *People v. Lang*, 142 Cal. 482; *People v. Sears*, 119 Cal. 267; *People v. Brady*, 133 Cal. xx, 65 Pac. Rep. 823; *People v. Joy*, 135 Cal. xix, 66 Pac. Rep. 964.

*Georgia.* — *Holland v. State*, 112 Ga. 540; *Davis v. State*, 105 Ga. 808.

*Iowa.* — *State v. Marshall*, 105 Iowa 38; *State v. Raphael*, 123 Iowa 452, 101 Am. St. Rep. 334; *State v. McPherson*, (Iowa 1904) 101 N. W. Rep. 738.

*Kentucky.* — *Jones v. Com.*, (Ky. 1904) 79 S. W. Rep. 1183; *Short v. Com.*, (Ky. 1903) 76 S. W. Rep. 11.

*Michigan.* — *People v. Hogan*, 123 Mich. 233; *People v. McDonald*, 133 Mich. 366.

*Mississippi.* — *Cook v. State*, (Miss. 1900) 28 So. Rep. 833.

*Nebraska.* — *Kennedy v. State*, (Neb. 1904) 99 N. W. Rep. 645.

**69. IV. ATTEMPTS.**—See notes 2, 3.**V. POSSESSION OF BURGLARS' TOOLS.**—See note 4.**70. BURN.**—See note 3.**72. BUSINESS.**—See notes 1, 2.

*New Jersey.*—*State v. Wines*, 65 N. J. L. 31.

*New York.*—*People v. Lyons*, 29 N. Y. App. Div. 174.

*Texas.*—*Harraway v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 262; *Martin v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 270; *Rocha v. State*, 38 Tex. Crim. 69; *Cogshall v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1011; *Dickson v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1043; *Hollingshead v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 114; *Blackwell v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 960; *Miller v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 800; *Brown v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 936; *Perry v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 513.

*Washington.*—*State v. Norris*, 27 Wash. 453.

*Wisconsin.*—*Grimshaw v. State*, 98 Wis. 612; *Hunt v. State*, 103 Wis. 559.

**What Constitutes "Taking Away."**—Under the *Kentucky* statute forbidding entering and "taking away" property, a conviction is proper if the defendant is discovered in a house with a basket packed with articles taken from a trunk. Asportation from the house is not essential. *Loving v. Com.*, 107 Ky. 575.

**68. 3. Evidence Not Sufficient to Convict.**—*State v. Riggs*, 74 Minn. 460; *James v. State*, 77 Miss. 370, 78 Am. St. Rep. 527; *Richardson v. State*, (Miss. 1903) 33 So. Rep. 441; *State v. King*, 174 Mo. 647; *State v. Dashman*, 153 Mo. 454; *People v. Cronk*, 40 N. Y. App. Div. 206; *Porter v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 380; *Grant v. State*, 42 Tex. Crim. 275; *Brooks v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 924; *Stevens v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 549; *Garcia v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 95; *Brooks v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 419; *Bundick v. State*, 97 Va. 783.

**69. 2. State v. Garbe, 34 Wash. 395.**

**3. For Acts Held to Constitute an Attempt to commit burglary**, see *State v. Carr*, 146 Mo. 1.

**Statutory Definition.**—Pen. Code Tex., art. 850, defines an attempt to commit burglary as "an endeavor to accomplish the crime of burglary carried beyond mere preparation, but falling short of the ultimate design in any particular of it." *Fonville v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 573.

**Acts Amounting to Burglary Will Warrant Conviction for Attempt.**—*State v. Mahoney*, 122 Iowa 168.

**Breaking Transom, with Intent Feloniously to Enter, Is Attempt.**—*Com. v. Flaherty*, 25 Pa. Super. Ct. 490.

**Going to Building with Suitable Tools Is Sufficient Overt Act.**—*People v. Sullivan*, 173 N. Y. 122, 93 Am. St. Rep. 582.

**Sufficiency of Evidence.**—Possession of a broken knife fitting exactly a piece of knife blade found in the door jamb of the house

attempted to be entered, coupled with suspicious conduct and false statements, is sufficient to justify a conviction of attempt to commit burglary. *White v. People*, 179 Ill. 356.

**Acts Not Amounting to an Attempt.**—Where the defendant agreed to burglarize a house, met an accomplice pursuant to such agreement, armed, and bought chloroform at a drug store, but was then arrested, it was held that there was no attempt to commit burglary. *People v. Youngs*, 122 Mich. 292. See also *Moore v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 747.

**4. Proof of General Intent Sufficient.**—*People v. Jones*, 124 Mich. 177; *State v. Hahn*, 11 Ohio Dec. 311, 8 Ohio N. P. 101.

**Evidence of Intent.**—Where a policeman saw the defendant, who had just completed a term for burglary, examining the houses on a street, and where the defendant, on seeing the policeman, jumped on a truck and attempted to conceal a "jimmy," it was held that this was sufficient evidence of his intent to use the jimmy in the commission of a crime. *People v. Thompson*, 33 N. Y. App. Div. 177.

**Evidence of Previous Behavior.**—On an indictment for having a burglar's tool with intent to use it in committing burglary, evidence is inadmissible to prove that some months previous the defendant was seen loitering around a dwelling house at night under suspicious circumstances. *Leonard v. State*, 60 N. J. L. 8.

**Intent to Use Tools Outside of State Sufficient.**—*People v. Reilly*, 49 N. Y. App. Div. 218, affirmed 164 N. Y. 600.

**State May Show Purpose for Which Tools Are Adapted.**—*People v. Jones*, 124 Mich. 177.

**70. 3. Burn, Burning—Arson.**—In an indictment for arson the terms "set fire to" and *burn* are synonymous, and either term means that the house or some part thereof must be consumed by fire. The charring of wood by fire is the *burning* of it within the meaning of the statutes defining arson. *Benbow v. State*, 128 Ala. 1.

**72. 1. White v. Rio Grande Western R. Co.**, 25 Utah 346.

**2. The word business** in a will stating that the testator in his lifetime had given his son the *business* of an express company must be regarded as meaning the establishment of the enterprise, its good-will, its connection with transportation lines so established, which were valuable adjuncts and almost a necessity for the culmination of final success to the son. *Solley v. Westcott*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 195.

**In the Sense of Employment, Occupation.**—*Brush Electric Light, etc., Co. v. Wells*, 110 Ga. 198; *Foster v. Monroe*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 449.

**Calling and Business.**—See *Waggner v. Haskell*, 89 Tex. 435.

**79. BUT.** — See note 1.

**81. [BUTTER.** — See note 2a.]

**BUY.** — See note 3.

**Sunday.** — Taking a Note in settlement of an account for merchandise is *business*. *Howe v. Ballard*, 113 Wis. 375.

**County and Township Business** — **Special Legislation.** — *Jackson County v. State*, 147 Ind. 476.

**Change of Venue.** — In construing a state constitution providing that "all civil and criminal *business* arising in any county must be tried in such county unless a change of venue be taken in such cases as may be provided by law," the court said: "The word *business* was used as a general term to include causes of action and all other *business* which might arise in any county, and the manifest intention was that all suits, civil and criminal, should be brought, and the cases tried, in the county in which the causes of action arose, unless a change of venue should be taken in such cases as might be provided by law." *Konold v. Rio Grande Western R. Co.*, 16 Utah 151; *Bach v. Brown*, 17 Utah 435.

**Business Hours.** — *Cox v. Island Min. Co.*, 65 N. Y. App. Div. 508, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77, 78.

**Business Agents.** — The word "agents," as used in an act providing a tax "upon all agents of packing houses doing *business* in this state," means managing or superintending agents, and includes every agent who is the *alter ego* of the principal by whom he is employed. *Stewart v. Kehrner*, 115 Ga. 184.

**"The Word Business Is Not Synonymous with the Word Action,** and is not an element either of a cause or right of action." *White v. Rio Grande Western R. Co.*, 25 Utah 349. Compare *Bach v. Brown*, 17 Utah 435; *Konold v. Rio Grande Western R. Co.*, 16 Utah 151.

**"Business and Property."** — Amounts unpaid on stock at the time of the liquidation of a corporation do not constitute a part of its "*business* and property" which may be transferred to a new company under section 161 of the English Companies Act of 1862. *Bank of China, etc., v. Morse*, 168 N. Y. 458.

**Business and Trade.** — The meaning of the word *business*, while very broad and comprehensive in its general sense, must be limited when used in connection with the word "trade." *Bohnsack v. McDonald*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 496.

**Single Act — Wood Business.** — In construing a contract not to engage in the wood *business*, the court said: "The word *business* is not used in the contract to denote an isolated act or two of disposing of wood for the special convenience and interest of the defendant, but an aggregation of acts that may fairly constitute the carrying on of the 'wood *business*' as defined in the contract." *Parkhurst v. Brock*, 72 Vt. 355.

**Foreign Corporation.** — Delaware, etc., *Canal Co. v. Mahlenbrock*, 63 N. J. L. 281, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 71; *Ammons v. Brunswick-Balke-Collender Co.*, (Indian Ter. 1904) 82 S. W. Rep. 937.

**Doing Business Within a State— Foreign Cor-**

**porations.** — *Cesar v. Capell*, 83 Fed. Rep. 421; *Stewart v. Kehrner*, 115 Ga. 184; *National Mut. Bldg., etc., Assoc. v. Braham*, 80 Miss. 407; *Florida Cent., etc., R. Co. v. Columbia*, 54 S. Car. 266; *George R. Barse Live Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59.

**Established Business.** — Under a *Massachusetts* statute giving compensation to the owner of an established *business* injured by the taking of property for a metropolitan reservoir it was held that a physician's practice is such a *business*. *Earle v. Com.*, 180 Mass. 579.

But under the same statute a widow whose children and other relatives boarded with her was held not to be an individual owning an established *business*. *Gavin v. Com.*, 182 Mass. 190.

**79. 1. In the Sense of "On the Contrary."** — *Potter v. Lainhart*, 44 Fla. 647.

**"But" in the Sense of "Except" — Constitutional Provision.** — *Rock Springs First Nat. Bank v. Foster*, 9 Wyo. 157; *Western Union Tel. Co. v. Harris*, (Tenn. Ch. 1899) 52 S. W. Rep. 748; *Dowdell v. McBride*, 92 Tex. 239.

**"But" May Mean "Yet," "Still," "Moreover"** in construing a statute. *Adams v. Yazoo, etc.*, R. Co., 75 Miss. 284.

**"Or" Substituted for "But"** in construing a will. *Cox's Estate*, 180 Pa. St. 144.

**§1. 2a. Adulteration — Oleomargarine Statute.** — In *People v. Rotter*, 131 Mich. 252, the court said: "*Butter* is a well-known commodity. From time immemorial it has had but one origin, viz., from the churning of milk or cream. Whatever may be said of the possibility of making a product from other compounds than milk or cream that shall closely resemble or be chemically identical with *butter*, the world has but one understanding of what is meant by the word *butter*, and we must assume that such is the sense in which our legislature used the term." And see the title ADULTERATION.

**3. Strawberry Valley Cattle Co. v. Chipman**, 13 Utah 454, quoting Webster's definition set out in the original text.

**"Buying and Selling or Pledging** are acts of a different nature. An authority to do the one by no means implies the authority to do the other." *Per Bramley, C. J.*, in *Trent v. Sherlock*, 26 Mont. 88.

**Buyer's Risk.** — Where it was stipulated in a contract of sale that fruit was to be shipped "F. O. B. California, *buyer's* risk, California weights," it was held that the term "*buyer's* risk" did not impose on the purchasers the assumption of the risk of any damage from improper packing or shipping in a defective car, if the seller was himself the owner and shipper. *Rose v. Weinberger*, 108 Ga. 533; *Rose v. Weinberger*, 112 Ga. 631.

**Buying and Providing** are not synonymous terms, under an *English* statute authorizing the providing of burial grounds. *Ward v. Portsmouth*, (1898) 2 Ch. 200.



**82. BY.** — See note 1.

**82. 1. "By" Not Exclusive — In the Sense of "On" or "At."** — *Walters v. Stockberger*, 20 Ind. App. 277; *Blalock v. Clark*, 133 N. Car. 306; *Wachsmuth v. Routledge*, 36 Oregon 307.

"When used to designate a terminal point of time the word *by* means 'not later than;' hence, a condition affixed to a subscription to the capital stock of a corporation that a certain amount should be subscribed for '*by* July 1st,' was fulfilled by the total subscriptions reaching such amount on the night of July 1st." *Elizabeth City Cotton Mills v. Dunstan*, 121 N. Car. 12.

**Boundaries — Middle of Highway.** — *Graham v. Stern*, 51 N. Y. App. Div. 408.

**"By" Is Equivalent to "Through the Means, Act, or Instrumentality of,"** as used in a statute providing that no conveyance *by* an insolvent corporation or officer thereof shall be valid, etc. *O'Brien v. East River Bridge Co.*, 36 N. Y. App. Div. 17, affirmed 161 N. Y. 539.

**The Words "By or in Behalf of"** a person aggrieved, in N. Y. Code Civ. Pro., § 2127, providing for an application for certiorari, are sufficiently broad to permit verification by a duly authorized attorney. *Matter of Belmont*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 133.

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## BY-LAWS.

By J. E. BRADY.

**87. II. DEFINITION AND DISTINCTIONS.** — See note 1.

**Constitution — Charter.** — See note 4.

**Rules and Regulations.** — See note 5.

**88. A Resolution.** — See note 3.

**Binding Force of By-law.** — See note 4.

**III. POWER AND MODE OF ENACTMENT — 1. Power to Enact — a. GENERAL RULE — THE POWER INHERENT.** — See note 5.**89. b. IN WHOM THE POWER RESIDES PRIMARILY.** — See note 3.**c. CHARTER AND STATUTE PROVISIONS — DELEGATION.** — See notes 4, 5.

**87. 1. Definitions.** — "A by-law is a permanent and continuing rule for the government of the corporation and its officers." *North Milwaukee Town Site Co. No. 2 v. Bishop*, 103 Wis. 492.

"The Proper Office of By-laws is to regulate the transaction of the incidental business of a corporation. They should not affect rights of property or create obligations unknown to the law." *Ireland v. Globe Milling Co.*, 21 R. I. 9, 79 Am. St. Rep. 769.

**4. Constitution — Charter.** — *Supreme Lodge, etc., v. Kutscher*, 179 Ill. 346; *Dornes v. Supreme Lodge, etc.*, 75 Miss. 480.

**5. Rules and Regulations.** — *Liverpool v. Liverpool, etc., R. Co.*, 35 Nova Scotia 265, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88 [87].

**88. 3. Dornes v. Supreme Lodge, etc., 75 Miss. 480, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88.**

**4. Force and Effect.** — *Walker v. Johnson*, 17 App. Cas. (D. C.) 144, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88.

**5. Power to Enact By-laws Inherent.** — *Walker v. Johnson*, 17 App. Cas. (D. C.) 144; *People v. Chicago Live Stock Exch.*, 170 Ill. 556, 62 Am. St. Rep. 404; *Blasingame v. Royal Circle*, 111 Ill. App. 202; *Farmers' Mut. Hail Ins. Assoc. v. Slattery*, 115 Iowa 410; *Hundermark v. New South Bldg., etc., Assoc.*, (Miss. 1901) 29 So. Rep. 528; *Alters v. Journeymen Bricklayers' Protective Assoc.*, 19 Pa. Super. Ct. 272;

*Herring v. Ruskin Co-operative Assoc.*, (Tenn. Ch. 1899) 52 S. W. Rep. 327, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88; *Bearden v. Peoples' Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 49 S. W. Rep. 64; *North Milwaukee Town Site Co. No. 2 v. Bishop*, 103 Wis. 492.

**89. 3. General Rule — Power Resides in Corporation at Large.** — *North Milwaukee Town Site Co. No. 2 v. Bishop*, 103 Wis. 492; *Alters v. Journeymen Bricklayers' Protective Assoc.*, 19 Pa. Super. Ct. 272.

**Notice.** — A by-law making an important change in the directors of the corporation and passed at a regular annual meeting is not valid unless notice of the purpose of the by-law is previously given to the stockholders. *Bagley v. Reno Oil Co.*, 201 Pa. St. 78.

**4. Supreme Lodge, etc., v. Kutscher, 179 Ill. 346; *Supreme Lodge, etc., v. Trebbe*, 74 Ill. App. 545, reversed 179 Ill. 348; *Farmers' Mut. Hail Ins. Assoc. v. Slattery*, 115 Iowa 410.**

**Interference by Shareholders.** — The trustees of a company incorporated under the British Columbia Companies Act of 1890 have the exclusive right to make by-laws for the company, and the shareholders cannot interfere with the exercise of such right. *Dunsmuir v. Colonist Printing, etc., Co.*, 9 British Columbia 290.

**5. Alters v. Journeymen Bricklayers' Protective Assoc., 19 Pa. Super. Ct. 272.**

**The Power to Make By-laws Cannot Be Delegated** by the body in which it rests to a subordinate

**90. By-law Adopted at Stockholders' Meeting.** — See note 2.*d.* AMENDMENT AND REPEAL. — See note 3.

Limitations. — See note 4.

**91. See note 1.****2. Mode of Enactment** — Charter Provisions. — See note 2.

Need Not Always Be in Writing — Usage — Acquiescence. — See notes 3, 4, 5.

**IV. REQUISITES AND VALIDITY** — 1. In General — Question for Court. — See note 8.**2. Must Not Be Contrary to Law or Public Policy.** — See note 9.**92. In Restraint of Trade.** — See note 3.**93. Transfer of Corporate Stock** — Unreasonable Restraints. — See note 1.board. Supreme Lodge, etc., *v.* Trebbe, 74 Ill. App. 545, *reversed* 179 Ill. 348.**90. 2. Where a Statute Provided for the Adoption of By-laws After Organization,** a set of by-laws signed by the stockholders before the corporation was organized was held to be invalid. *Vercoutere v. Golden State Land Co.*, 116 Cal. 410.**3. Amendment and Repeal of By-laws.** — *Western Realty, etc., Co. v. Haase*, 75 Conn. 436; *Crittenden v. Southern Home Bldg., etc., Assoc.*, 111 Ga. 266; *Farmers' Mut. Hail Ins. Assoc. v. Slattery*, 115 Iowa 410; *Mutual F. Ins. Co. v. Farquhar*, 86 Md. 668, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 90; *Messer v. Grand Lodge, etc.*, 180 Mass. 321; *Dornes v. Supreme Lodge, etc.*, 75 Miss. 480; *Mitterwallner v. Supreme Lodge, etc.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 786; *Berg v. Badenser Unterstuetzungs Verein*, 90 N. Y. App. Div. 474; *Beach v. Supreme Tent, etc.*, 74 N. Y. App. Div. 527, *affirmed* 177 N. Y. 100; *Alters v. Journeymen Bricklayers' Protective Assoc.*, 19 Pa. Super. Ct. 272; *Marshall v. Pilots' Assoc.*, 18 Pa. Super. Ct. 644; *Bearden v. Peoples' Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 49 S. W. Rep. 64; *Eversberg v. Supreme Tent, etc.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 246.**4. Alteration Affecting Vested Rights.** — A by-law may be amended though a vested right is thereby affected, where the right is one existing between a member and the association as such, and not one springing from a relation purely contractual. *Marshall v. Pilots' Assoc.*, 18 Pa. Super. Ct. 644.**91. 1. Void By-law.** — In *Alters v. Journeymen Bricklayers' Protective Assoc.*, 19 Pa. Super. Ct. 272, it was held that a by-law conferring on the directors exclusively the power of altering and amending by-laws was invalid.**2. Mode of Enactment.** — A by-law is not rendered invalid because in its adoption certain rules of procedure are not complied with where the adoption is otherwise lawful. *Supreme Lodge, etc., v. Kutscher*, 179 Ill. 346, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88 [91].**3. By-laws Need Not Be in Writing.** — See *Dornes v. Supreme Lodge, etc.*, 75 Miss. 480.**4. Bowler v. American Box Strap Co.**, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 336, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 91; *Buck v. Troy Aqueduct Co.*, 76 Vt. 75; *Blair v. Metropolitan Sav. Bank*, 27 Wash. 103.**5. Usage and Acquiescence.** — *Kelly v. People's Bldg., etc., Assoc.*, 65 Ark. 574; *Walker**v. Johnson*, 17 App. Cas. (D. C.) 144; *Collins v. Cobe*, 202 Ill. 469, *affirming* 104 Ill. App. 142; *Smith v. Sherman*, 113 Iowa 601; *Mutual F. Ins. Co. v. Farquhar*, 86 Md. 668; *Berg v. Badenser Unterstuetzungs Verein*, 90 N. Y. App. Div. 474; *Evans v. Southern Tier Masonic Relief Assoc.*, 76 N. Y. App. Div. 151; *Stafford v. Produce Exch. Banking Co.*, 8 Ohio Cir. Dec. 483, 16 Ohio Cir. Ct. 50; *Marsh v. Mathias*, 19 Utah 350; *Graebner v. Post*, 119 Wis. 392, 100 Am. St. Rep. 890.**8. Validity Question of Law.** — *Bearden v. People's Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 49 S. W. Rep. 64.**9. By-laws Must Not Contravene Law or Public Policy** — *California.* — *Vercoutere v. Golden State Land Co.*, 116 Cal. 410; *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162.*District of Columbia.* — *Walker v. Johnson*, 17 App. Cas. (D. C.) 144, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 91.*Illinois.* — *Wierman v. International Bldg., etc., Union*, 67 Ill. App. 550; *Board of Trade v. Riordan*, 94 Ill. App. 298; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *People v. Chicago Live Stock Exch.*, 170 Ill. 556, 62 Am. St. Rep. 404.*Louisiana.* — *State v. Citizens Bank*, 51 La. Ann. 426.*Maryland.* — *Darrin v. Hoff*, 99 Md. 491.*Missouri.* — *Missouri Bottlers' Assoc. v. Fennerty*, 81 Mo. App. 525.*New York.* — *Hart v. Adams' Cylinder, etc., Assoc.*, 69 N. Y. App. Div. 580, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 91; *Stein v. Marks*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 140.*Pennsylvania.* — See *Alters v. Journeymen Bricklayers' Protective Assoc.*, 19 Pa. Super. Ct. 272.*Rhode Island.* — *Ireland v. Globe Milling Co.*, 21 R. I. 9, 79 Am. St. Rep. 769.*Tennessee.* — *Herring v. Ruskin Co-operative Assoc.*, (Tenn. Ch. 1899) 52 S. W. Rep. 327, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 91.*Washington.* — *Trowbridge v. Hamilton*, 18 Wash. 686.*West Virginia.* — *Hartigan v. Board of Regents*, 49 W. Va. 45.**92. 3. By-laws in Restraint of Trade.** — *People v. Chicago Live Stock Exch.*, 170 Ill. 556, 62 Am. St. Rep. 404; *Bailey v. Master Plumbers*, 103 Tenn. 99.**93. 1. By-laws Regulating Transfer of Corporate Stock.** — *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Herring v. Rus-*

- 93.** Reasonable Restraint upon Transfer. — See note 3.  
**94.** Bona Fide Purchasers. — See note 1.  
**95.** 3. Must Be Consistent with Charter. — See note 9.  
**96.** 4. Must Not Impair Vested Rights — General Rule. — See note 6.  
**97.** Qualification — Contracts with Reference to Future By-laws. — See note 1.

kin Co-operative Assoc., (Tenn. Ch. 1899) 52 S. W. Rep. 327.

**Requiring Offer to Corporation.** — A by-law limiting the stockholder's right to transfer his stock without first offering it to the corporation for a certain length of time has been held in *Rhode Island* to be invalid. *Ireland v. Globe Milling Co.*, 21 R. I. 9, 79 Am. St. Rep. 769. See also *infra*, this title, **94. 8.**

**93. 3. Prohibiting Transfer While Holder Indebted to Corporation.** — *Culloden Bank v. Forsyth Bank*, 120 Ga. 575, 102 Am. St. Rep. 115. See also *London, etc., Bank v. Aronstein*, 117 Fed. Rep. 601, 54 C. C. A. 663, and see the title STOCK AND STOCKHOLDERS, **869. 1 et seq.**

**94. 1. Validity as to Bona Fide Purchasers.** — *Ireland v. Globe Milling Co.*, 21 R. I. 9, 79 Am. St. Rep. 769.

**95. 9. By-laws Repugnant to Charter Void — Alabama.** — *Steiner v. Steiner Land, etc., Co.*, 120 Ala. 128, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 95.

*District of Columbia.* — *Walker v. Johnson*, 17 App. Cas. (D. C.) 144, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 95.

*Illinois.* — *King v. International Bldg., etc., Union*, 170 Ill. 135; *People v. Chicago Live Stock Exch.*, 170 Ill. 556, 62 Am. St. Rep. 404; *Wierman v. International Bldg., etc., Union*, 67 Ill. App. 550; *Nelson v. Gibson*, 92 Ill. App. 595.

*Louisiana.* — *State v. Citizens Bank*, 51 La. Ann. 426.

*Maryland.* — *Mutual F. Ins. Co. v. Farquhar*, 86 Md. 668, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 90 [95].

*Minnesota.* — *Thibert v. Supreme Lodge, etc.*, 78 Minn. 448.

*Missouri.* — *Purdy v. Bankers' L. Assoc.*, 101 Mo. App. 91.

*New York.* — *Hart v. Adams' Cylinder, etc., Assoc.*, 69 N. Y. App. Div. 580, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 95; *Stein v. Marks*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 140; *Bottjer v. Supreme Council, etc.*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 406, affirmed 78 N. Y. App. Div. 546.

*Pennsylvania.* — See *Alters v. Journeymen Bricklayers' Protective Assoc.*, 19 Pa. Super. Ct. 272.

*Tennessee.* — *Herring v. Ruskin Co-operative Assoc.*, (Tenn. Ch. 1899) 52 S. W. Rep. 327, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 91 [95].

*West Virginia.* — *Hartigan v. Board of Regents*, 49 W. Va. 45, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 95.

**96. 6. By-laws May Not Impair Vested Rights — United States.** — *Supreme Council, etc., v. Champe*, (C. C. A.) 127 Fed. Rep. 541; *Lloyd v. Supreme Lodge, etc.*, 98 Fed. Rep. 66, 38 C. C. A. 654.

*California.* — *Richter v. Supreme Lodge, etc.*, 137 Cal. 8.

*District of Columbia.* — *Walker v. Johnson*,

17 App. Cas. (D. C.) 144, citing 5 AM. AND ENG. ENCYC. OF LAW. (2d ed.) 96.

*Georgia.* — *Supreme Council, etc., v. Jordan*, 117 Ga. 811, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 96; *Sovereign Camp, etc., v. Thornton*, 115 Ga. 798.

*Illinois.* — *People v. Chicago Live Stock Exch.*, 170 Ill. 556, 62 Am. St. Rep. 404; *Nelson v. Gibson*, 92 Ill. App. 595; *National Council, etc., v. Dillon*, 108 Ill. App. 183, reversed 212 Ill. 320; *Modern Woodmen of America v. Wieland*, 109 Ill. App. 340.

*Michigan.* — *Pokrefky v. Detroit Firemen's Fund Assoc.*, 121 Mich. 456.

*Minnesota.* — *Tebow v. Supreme Council, etc.*, 89 Minn. 3. See also *Thibert v. Supreme Lodge, etc.*, 78 Minn. 448.

*New Jersey.* — *O'Neill v. Supreme Council, etc.*, 70 N. J. L. 410.

*New York.* — *McNeil v. Southern Tier Masonic Relief Assoc.*, 40 N. Y. App. Div. 587, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 96; *Brown v. Supreme Ct., etc.*, 176 N. Y. 132; *Beach v. Supreme Tent, etc.*, 177 N. Y. 100; *Weber v. Supreme Tent, etc.*, 172 N. Y. 490, 92 Am. St. Rep. 753; *Sinteff v. Peoples Bldg., etc., Assoc.*, 37 N. Y. App. Div. 340; *Deuble v. Grand Lodge, etc.*, 66 N. Y. App. Div. 323; *Williams v. Supreme Council, etc.*, 80 N. Y. App. Div. 402; *Smith v. Supreme Council, etc.*, 94 N. Y. App. Div. 357; *Grossmeyer v. District No. 1, (Supm. Ct. Tr. T.)* 34 Misc. (N. Y.) 577; *Langan v. American Legion of Honor, (Supm. Ct. Tr. T.)* 34 Misc. (N. Y.) 629; *Bottjer v. Supreme Council, etc.*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 406, affirmed 78 N. Y. App. Div. 546; *Fargo v. Supreme Tent, etc.*, 96 N. Y. App. Div. 491.

*North Carolina.* — *Strauss v. Mutual Reserve Fund L. Assoc.*, 128 N. Car. 465, 83 Am. St. Rep. 699; *Makely v. Supreme Legion of Honor*, 133 N. Car. 367.

*Utah.* — See *Stilwell v. People's Bldg., etc., Assoc.*, 19 Utah 257.

*West Virginia.* — *Savage v. People's Bldg., etc., Assoc.*, 45 W. Va. 275, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 96.

*Canada.* — *Gardner v. Canadian Manufacturer Pub. Co.*, 31 Ont. 488.

**97. 1. Consent to Future Change of By-laws — Georgia.** — See *Sovereign Camp, etc., v. Thornton*, 115 Ga. 798.

*Massachusetts.* — *Hudson v. Roxbury Sav. Inst.*, 176 Mass. 522.

*Mississippi.* — *Dornes v. Supreme Lodge, etc.*, 75 Miss. 480; *Interstate Bldg., etc., Assoc. v. Hafter*, 76 Miss. 770.

*Missouri.* — *Richmond v. Supreme Lodge, etc.*, 100 Mo. App. 8.

*Nebraska.* — *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808.

*New Hampshire.* — *Supreme Council, etc., v. Adams*, 68 N. H. 236.

*New York.* — *Evans v. Southern Tier Masonic Relief Assoc.*, 76 N. Y. App. Div. 151;

- 97. Illustrations.** — See note 2.  
**5. Must Be Reasonable.** — See note 4.  
**98. Illustrations of Reasonable By-laws.** — See notes 7, 8, 10.  
**99. Illustrations of Unreasonable By-laws.** — See note 6.  
**Question for Court.** — See note 8.  
**100. 6. Must Be Certain and Operate Equally.** — See note 2.  
**V. FORCE AND EFFECT — 1. As to Members.** — See notes 3, 4.

*Evans v. Southern Tier Masonic Relief Assoc.*, 94 N. Y. App. Div. 541.

*Pennsylvania.* — *Chambers v. Supreme Tent of Knights, etc.*, 200 Pa. St. 244, 86 Am. St. Rep. 716.

*Texas.* — *Eversberg v. Supreme Tent, etc.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 246.

*Canada.* — *Doidge v. Royal Templars*, 4 Ont. L. Rep. 423.

**97. 2. Benefit Societies — Payment of Benefits — Reducing Amount of Benefit Payable at Death of Member.** — *Supreme Council, etc., v. Champe*, (C. C. A.) 127 Fed. Rep. 541; *Pokrefky v. Detroit Firemen's Fund Assoc.*, 121 Mich. 456; *Williams v. Supreme Council, etc.*, 80 N. Y. App. Div. 402. See also *Roxbury Lodge No. 184 v. Hocking*, 60 N. J. L. 439. And see the title **BENEVOLENT OR BENEFICIAL ASSOCIATIONS, 1065. 1 et seq.**

**4. Must Be Reasonable** — *District of Columbia.* — *Walker v. Johnson*, 17 App. Cas. (D. C.) 144, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97.

*Illinois.* — *People v. Chicago Live Stock Exch.*, 170 Ill. 556, 62 Am. St. Rep. 404; *Board of Trade v. Riordan*, 94 Ill. App. 298; *Modern Woodmen of America v. Wieland*, 109 Ill. App. 340.

*Minnesota.* — *Tebbo v. Supreme Council, etc.*, 89 Minn. 3; *Thibert v. Supreme Lodge, etc.*, 78 Minn. 448.

*Missouri.* — *State v. St. Louis Medical Soc.*, 91 Mo. App. 76.

*Nebraska.* — *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808.

*New Jersey.* — *O'Neill v. Supreme Council, etc.*, 70 N. J. L. 410.

*New York.* — *Weber v. Supreme Tent, etc.*, 172 N. Y. 490, 92 Am. St. Rep. 753; *Brown v. Supreme Ct., etc.*, 176 N. Y. 132; *Grossmeyer v. District No. 1*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 577; *Ranney v. Bowery Sav. Bank*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 301; *Stein v. Marks*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 140; *McNeil v. Southern Tier Masonic Relief Assoc.*, 40 N. Y. App. Div. 587; *Beach v. Supreme Tent, etc.*, 74 N. Y. App. Div. 527, affirmed 177 N. Y. 100; *Kennedy v. Local Union No. 726*, 75 N. Y. App. Div. 243; *Fargo v. Supreme Tent, etc.*, 96 N. Y. App. Div. 491.

*Pennsylvania.* — See *Alters v. Journeymen Bricklayers' Protective Assoc.*, 19 Pa. Super. Ct. 272.

*Tennessee.* — *Bearden v. People's Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 49 S. W. Rep. 64.

**98. 7. In re Gaylord**, 111 Fed. Rep. 717; *Board of Trade v. Nelson*, 162 Ill. 431, 53 Am. St. Rep. 312; *Central Stock, etc., Exch. v. Board of Trade*, 196 Ill. 396.

**8. Expulsion.** — *Fay v. Supreme Tent, etc.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 427.

**10. Other Instances** of by-laws held to be rea-

sonable and valid are the following: A by-law of a benevolent organization which prohibited the members thereof from joining any society not sanctioned by the Roman Catholic Church. *Mazurkiewicz v. St. Adelbertus Aid Soc.*, 127 Mich. 145, 8 Detroit Leg. N. 253. A by-law which provides that no party shall be represented by counsel in a matter under the investigation of the board of directors. *Greene v. Board of Trade*, 63 Ill. App. 446, affirmed 174 Ill. 585. A rule of a corporation that its members shall secure shippers by issuing a bond. *Warren v. Louisville Leaf Tobacco Exch.*, (Ky. 1900) 55 S. W. Rep. 912. A by-law of an association providing that no member thereof shall furnish material to any person indebted at the time to another member. *Brewster v. Miller's Sons Co.*, 101 Ky. 368. A by-law of a beneficial organization providing that a member in arrears of dues for thirteen weeks or more shall not be entitled to receive benefits until thirteen weeks after settling all arrears. *Littleton v. Wells, etc., Council, etc.*, 98 Md. 453. A by-law prohibiting smoking during the business hours of a merchant's exchange. *Albers v. Merchant's Exch.*, 138 Mo. 140. A by-law requiring members of a beneficial society to give notice to the secretary within twenty-four hours after being taken sick in order to be entitled to sick benefits. *Falcone v. Societa, etc.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 106. A by-law which provides that a member reinstated after suspension shall be deprived of benefits for six months. *Hart v. Adams' Cylinder, etc., Assoc.*, 69 N. Y. App. Div. 580. A by-law of a beneficial society denying benefits to the beneficiaries of suicides. *Chambers v. Supreme Tent of Knights, etc.*, 200 Pa. St. 244, 86 Am. St. Rep. 716. A by-law which deprives a member of a beneficial society of the benefits of the organization when in arrears of dues. *Alters v. Journeymen Bricklayers' Protective Assoc.*, 43 W. N. C. (Pa.) 336.

**99. 6. Kennedy v. Local Union No. 726**, 75 N. Y. App. Div. 243.

**8. Reasonableness Question for Court.** — *Bearden v. People's Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 49 S. W. Rep. 64.

**100. 2. Must Be Certain and General.** — *Baltimore Bldg., etc., Assoc. v. Powhatan Imp. Co.*, 87 Md. 59; *Dornes v. Supreme Lodge, etc.*, 75 Miss. 480; *Bearden v. People's Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 49 S. W. Rep. 64.

**3. Binding Effect upon Members** — *United States* — *Columbia Bldg., etc., Assoc. v. Junquist*, 111 Fed. Rep. 645; *Mazurkiewicz v. St. Adelbertus Aid Soc.*, 127 Mich. 145.

*Connecticut.* — *Masonic Mut. Ben. Assoc. v. Severson*, 71 Conn. 719.

*Delaware.* — *Emmons v. Hope Lodge No. 21*, 1 Marv. (Del.) 187.

**101.** Inconvenience of By-laws. — See note 2.

**102.** 2. As to Strangers — One Not a Member. — See note 4.

**VI. CONSTRUCTION AND INTERPRETATION — 1. General Principles —**

**Effect of Practical Construction by Usage of Corporation.** — See note 7.

**Penal Provisions — Forfeitures.** — See note 8.

**103.** See note 1.

**By-law Conferring Powers upon Directors.** — See note 3.

**Rules of Benevolent Societies — Liberal Construction.** — See note 4.

**2. By-law Void in Part and Valid in Part.** — See note 7.

**104.** **VII. ENFORCEMENT.** — See note 1.

**Benevolent Associations.** — See note 3.

**BY-ROAD.** — See note 6.

**106.** **CALCULATED.** — See note 3.

**107.** **CALL.** — See notes 2, 3, 4.

*Illinois.* — Mechanics, etc., Sav., etc., Assoc. v. Vierling, 66 Ill. App. 621, 179 Ill. 524; Greene v. Board of Trade, 63 Ill. App. 446, affirmed 174 Ill. 585.

*Iowa.* — Farmers Mut. Hail Ins. Assoc. v. Slattery, 115 Iowa 410.

*Maine.* — Ladd v. Augusta Sav. Bank, 96 Me. 510.

*Mississippi.* — Hundermark v. New South Bldg., etc., Assoc., (Miss. 1901) 29 So. Rep. 528.

*Missouri.* — Albers v. Merchants' Exch., 138 Mo. 140; Purdy v. Bankers' L. Assoc., 101 Mo. App. 91.

*Nebraska.* — Jackson v. South Omaha Live Stock Exch., 49 Neb. 687; Farmers' Mut. Ins. Co. v. Kinney, 64 Neb. 808.

*New York.* — Burden v. Burden, 159 N. Y. 287; Jennings v. Chelsea Div. Ben. Fund Soc., etc., (Supm. Ct. App. T.) 28 Misc. (N. Y.) 556; Ferguson v. Harlem Sav. Bank, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 10; Stein v. Marks, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 140.

*Ohio.* — Cheney v. Ketcham, 7 Ohio Dec. 183, 5 Ohio N. P. 139.

*Pennsylvania.* — Stark v. Byers, 24 Pa. Co. Ct. 517; Marshall v. Pilots' Assoc., 18 Pa. Super. Ct. 644.

*Tennessee.* — Bearden v. People's Bldg., etc., Assoc., (Tenn. Ch. 1898) 49 S. W. Rep. 64.

*Utah.* — Stilwell v. People's Bldg., etc., Assoc., 19 Utah 257.

*West Virginia.* — Kalbitzer v. Goodhue, 52 W. Va. 435.

*Wisconsin.* — Wood v. Chamber of Commerce, 119 Wis. 367; Langnecker v. Grand Lodge, etc., 111 Wis. 279, 87 Am. St. Rep. 860.

**100.** **4. Members Chargeable with Notice.** — Columbia Bldg., etc., Assoc. v. Junquist, 111 Fed. Rep. 645; Emmons v. Hope Lodge No. 21, 1 Marv. (Del.) 187; Purdy v. Bankers' L. Assoc., 101 Mo. App. 91; Farmers' Mut. Ins. Co. v. Kinney, 64 Neb. 808; Supreme Council, etc., v. Adams, 68 N. H. 236; Jennings v. Chelsea Div. Ben. Fund Soc., etc., (Supm. Ct. App. T.) 28 Misc. (N. Y.) 556; Stilwell v. People's Bldg., etc., Assoc., 19 Utah 257.

**101.** **2.** Walker v. Johnson, 17 App. Cas. (D. C.) 144.

**102.** **4.** Downes v. Bennett, 63 Kan. 653.

**7. Construction of By-law.** — In a controversy as to the meaning of a by-law, the intent and

design of its framer, if ascertainable, should prevail. Baltimore Bldg., etc., Assoc. v. Powhatan Imp. Co., 87 Md. 59.

**8. Penal Provisions — Forfeitures.** — *In re Gaylord*, 111 Fed. Rep. 717; Thibert v. Supreme Lodge, etc., 78 Minn. 448.

**103.** **1.** *In re Gaylord*, 111 Fed. Rep. 717.

**3.** See Alters v. Journeymen Bricklayers' Protective Assoc., 19 Pa. Super. Ct. 272, holding invalid a by-law conferring upon directors the power of alteration and amendment.

**4.** Leahy v. Mooney, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 829.

**7.** Lariviere v. La Corporation, etc., 21 Quebec Super. Ct. 46, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103, and supporting the whole text paragraph.

**104.** **1. Enforcement of By-laws.** — Littleton v. Wells, etc., Council, etc., 98 Md. 453; Hart v. Adams Cylinder, etc., Assoc., 69 N. Y. App. Div. 580; Jennings v. Chelsea Div. Ben. Fund Soc., etc., (Supm. Ct. App. T.) 28 Misc. (N. Y.) 556.

**3.** See Richter v. Supreme Lodge, etc., 137 Cal. 8.

**Proper Imposition of Penalty Must Appear.** — A forfeiture will not be enforced on the ground of nonpayment of a fine where it does not appear affirmatively that the fine was properly imposed. Leahy v. Mooney, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 829.

**6.** See Clement v. Bettle, 65 N. J. L. 675.

**106.** **3. Instruction.** — The word *calculated*, in an instruction as to a deadly weapon *calculated* to produce death, is synonymous with the words "fitted," "adapted," or "suited." Smallwood v. Com., (Ky. 1897) 40 S. W. Rep. 248.

**Calculated to Deceive — Trade Mark.** — See Aerators, etc., v. Tollitt, (1902) 2 Ch. 319.

**107.** **2.** See White v. Treat, 100 Fed. Rep. 290.

**3.** Germania Iron Min. Co. v. King, 94 Wis. 439; American Alkali Co. v. Campbell, 113 Fed. Rep. 398.

**4. On Call.** — Territory v. Hopkins, 9 Okla. 153, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 107. See also Bacon v. Bacon, 94 Va. 686.

**Call for Trial.** — See Fossett v. State, 43 Tex. Crim. 117.

**Call an Election — Synonymous with Order.** —

**110. CAN.**— See note 1.

In *Rizer v. People*, 18 Colo. App. 40, the court said: "The judgment below awards a peremptory writ commanding the respondents to *call* a special election. Exception is taken to the phraseology. The word used in the statute is 'order.' The meaning of the language of the judgment cannot be very well misunderstood. It uses *call* as synonymous with 'order.'"

Nevertheless it is not strictly accurate, and, although we think the judgment good as it stands, to obviate possible technical objection it should be amended so as to conform to the statutory phraseology."

**110. 1. As Denoting Possibility.**— See *New Jersey Electric R. Co. v. Miller*, 59 N. J. L. 423.

## CANALS.

BY J. E. BRADY.

**115. III. AUTHORIZATION AND CONSTRUCTION — Compensation — Compliance with Requirements.**— See note 2.

**116.** See note 1.

**117. IV. POWER TO EXACT TOLLS — Express Authority.**— See note 3.

**119.** Rates of Toll.— See note 1.

**120. V. DUTIES AND LIABILITIES OF OWNERS — 1. In General.**— See note 3.

**121.** See note 1.

**122. 2. As to Bridges — Public Roads.**— See note 2.

**123. Ways Laid Out After Canal Constructed.**— See note 2.  
Personal Injuries.— See note 3.

**124. 3. As to Navigation.**— See note 1.

**126. When Special Damage Must Be Shown.**— See note 1.

**4. As to Surplus Water.**— See note 3.

**115. 2. Compensation — Statutory Prerequisites.**— *Miller v. Wisenberger*, 61 Ohio St. 561; *Smith v. State*, 59 Ohio St. 278.

**116. 1. Davis v. Port Arthur Channel, etc., Co., (C. C. A.)** 87 Fed. Rep. 512.

**117. 3. New York Cement Co. v. Consolidated Rosendale Cement Co.,** 178 N. Y. 167.

**119. 1. A Successor to the Original Canal Owner** cannot exact any greater rates than were allowed in the original charter. *New York Cement Co. v. Consolidated Rosendale Cement Co.*, 178 N. Y. 167.

**120. 3. General Rule as to Duty in Construction and Operation — Liability for Damages.**— *Mullen v. Lake Drummond Canal, etc., Co.*, 130 N. Car. 496; *Bullock v. Lake Drummond Canal, etc., Co.*, 132 N. Car. 179; *Pinnix v. Lake Drummond Canal, etc., Co.*, 132 N. Car. 124.

Where a License Has Been Granted to a canal company to flood a part of the grantor's land for the purpose of maintaining a canal the grantor cannot hold the company liable for incidental damages which accrue to his remaining land. *Nunnamaker v. Columbia Water Power Co.*, 47 S. Car. 485, 58 Am. St. Rep. 905.

**121. 1. In Case of State Ownership.**— *Zorn v. State*, 45 N. Y. App. Div. 163.

Where the employees of the state are negligent in failing to attend to a waste weir the owner of a boat damaged thereby may recover against the state. *Shannahan v. State*, 57 N. Y. App. Div. 239.

One whose premises are injured by a leak in the canal bank may recover against the state. *Crowley v. State*, 90 N. Y. App. Div. 613.

**122. 2. Duty of Canal Company as to Bridges.**— *Ft. Wayne Water Power Co. v. Allen County*, 24 Ind. App. 514; *Allen County v. Ft. Wayne Water Power Co.*, 17 Ind. App. 36; *Book v. Pennsylvania R. Co.*, 207 Pa. St. 138.

**Public Bridge — Right of Canal Company.**— Where a bridge is constructed over a canal by the public authorities the canal company may compel the authorities to build the bridge at a certain height over the canal in accordance with a previous regulation of the canal company. *Morris Canal, etc., Co. v. Chosen Freeholders*, 61 N. J. L. 129.

**123. 2. Ft. Wayne Water Power Co. v. Allen County, 24 Ind. App. 514.**

**3. Liability for Personal Injuries.**— *Book v. Pennsylvania R. Co.*, 207 Pa. St. 138.

**124. 1. Liability as to Navigation.**— See *McKay v. Reg.*, 6 Can. Exch. 1.

**126. 1. Where Special Damage Must Be Shown.**— *Saylor v. Pennsylvania Canal Co.*, 183 Pa. St. 167, 63 Am. St. Rep. 749, 41 W. N. C. (Pa.) 245.

**3. Unlawful Disposition of Waste Water.**— Where it was provided by statute that the "waste water" of a canal should be discharged into another canal, it was held that "waste water" meant all water not legitimately needed for the purposes of navigation, and that the company owning the first canal had no right to sell water to manufacturers or otherwise so to dispose of it as to prevent it from passing into the other canal. *Rochdale Canal Co. v. Manchester Ship Canal Co.*, 85 L. T. N. S. 585.

**127. 5. When Abandoned.** — See notes 3, 4.

**128. CANCEL — CANCELLATION.** — See note 2.

**130. CANDIDATE.** — See note 1.

**131. CANVASS.** — See note 6.

**132. CAPABLE.** — See note 1.

**133. CAPACITY.** — See note 1.

**CAPE.** — See note 2.

**127. 3. Abandonment.** — Where a company has abandoned its canal, which had been destroyed by floods, a private individual is not entitled to an action for damages nor to compel the restoration of the canal. *Saylor v. Pennsylvania Canal Co.*, 183 Pa. St. 167, 63 Am. St. Rep. 749, 41 W. N. C. (Pa.) 245.

**Abutting Owners** cannot enjoin the abandonment of a canal. *Vought v. Columbus, etc.*, R. Co., 58 Ohio St. 123.

**4. State Canals.** — *Vought v. Columbus, etc.*, R. Co., 58 Ohio St. 123.

**Where Public Street Taken.** — Where the state abandoned a canal, for which a public street had been taken, it was held that the original easement thereupon revested in the public. *Huntington v. Townsend*, 29 Ind. App. 269.

**128. 2. Matter of Alger, (Surrogate Ct.)** 38 Misc. (N. Y.) 143.

**What Constitutes Canceling — Necessity of Cross Lines** — Canceled. — See *Matter of Alger, (Surrogate Ct.)* 38 Misc. (N. Y.) 143; *Matter of Akers*, 74 N. Y. App. Div. 461.

**Whether Writing the Word "Canceled" upon an Instrument Itself Amounts to a Cancellation**, see *Matter of Akers*, 74 N. Y. App. Div. 461.

**130. 1. The English Municipal Corporation Act 1882, § 77**, provides that "*candidate* means a person elected, or having been nominated, or having declared himself a *candidate* for election." *Harford v. Linskey*, (1899) 1 Q. B. 852.

**131. 6. A Canvasser Is Not a Traveling Salesman** within an act prohibiting the levying of a license tax. In this case the court said: "*Canvass* is defined in the Standard Dictionary of the English language to mean: 'To go about (a region or district) to solicit votes, orders, subscriptions, or the like; traverse (a district or region) for inquiry, or in the effort to obtain something; \* \* \* as, to *canvass* a territory for a subscription-book,' etc." *Price Co. v. Atlanta*, 105 Ga. 358.

A commercial drummer, or *canvasser*, who goes out on the road soliciting orders for his house, whether it be located in or out of the state, and who takes with him samples of the goods or wares his house deals in, is not a "traveling vender" within the meaning of section 13 of Act No. 150 of 1890. *Pegues v. Ray*, 50 La. Ann. 574.

**Includes Tally Sheet.** — A *canvass* under the provisions of the *New York Election Law* includes not only the counting of the votes by the inspectors, but the record of the count by the poll clerks upon the tally sheet. This tally sheet, therefore, is made a substantial part of the *canvass*. *Matter of Stewart*, 24 N. Y. App. Div. 209.

**132. 1. Capable of Taking Effect.** — Where under a special power of appointment a testator appoints to the uses or trusts of an antecedent

instrument, or such of them as are "*capable* of taking effect," the phrase "*capable* of taking effect" may be construed as meaning what the law allows to take effect, and need not be confined to a reference to the uses or trusts which, by reason of the deaths of parties and other intervening circumstances, are still in fact existing, or *capable* of coming into existence; and if therefore some of the uses or trusts fail by reason of the *cestuis que trust* not being objects of the power, or by reason of the rule against perpetuities being infringed, those uses or trusts may be treated as excluded from the appointment. *In re Finch*, (1903) 2 Ch. 486.

**133. 1. Capacity to Sue Distinguished from Cause of Action.** — "There is a difference between *capacity* to sue, which is the right to come into court, and a cause of action, which is the right to relief in court. *Inccapacity* to sue exists when there is some legal disability, such as infancy or lunacy, or a want of title in the plaintiff to the character in which he sues. The plaintiff was duly appointed receiver, and has a legal *capacity* to sue as such, and hence could bring the defendants into court by the service of a summons upon them, even if he had no cause of action against them. On the other hand, an infant has no *capacity* to sue, and hence could not lawfully cause the defendants to be brought into court, even if he had a good cause of action against them. *Inccapacity* to sue is not the same as insufficiency of facts to sue upon." *Ward v. Petrie*, 157 N. Y. 311. See also *Hanna v. People's Nat. Bank*, 76 N. Y. App. Div. 224.

**2. Shoulder Wrap.** — An indictment for larceny describing the property stolen as "one *cape*, of the value, etc.," is sufficient. The court said: "In the general popular and usual acceptance the word *cape* means either a garment or part of a garment used for covering the shoulders of the wearer, or a neck or narrow strip or point of land extending some distance into a body of water. The rule is, 'the indictment must state with reasonable certainty what was stolen.' (2 Bishop on Crim. Pro., § 969.) A natural formation of the earth — as a *cape* of land — cannot be the subject of larceny, hence it would be wholly unreasonable to say it was uncertain in which sense, in ordinary acceptance, the word *cape* was used. The word *cape* is sometimes employed as descriptive of a kind of wine made at the *Cape* of Good Hope, but in such instance it is not used as a noun. It is, therefore, clear it was not in that sense that it was used in the indictment. It is urged that the word *cape* means the coping of a wall, and also ears of corn broken off in threshing; but we find from standard dictionaries and cyclo-

**134. CAPITAL — CAPITAL STOCK.** — See notes 4, 5.

**136. Capital and Capital Stock.** — See note 1.

**137. See note 1.**

**138. See note 1.**

**139. Capital Stock Distinguished from Shares of Stock.** — See note 2.

**143. CAPTION.** — See note 1.

**CAPTURE.** — See note 3.

**144. CAR.** — See note 2.

[**CARBON.** — See note 2a.]

**147. CARE.** — See note 2.

pædias no such meanings are given the word except in certain restricted localities in the northern part of England. We are to accept the word in its plain, ordinary, and popular meaning in our country and among our people. We think the description of the property is set forth in the indictment with reasonable certainty." *Waller v. People*, 175 Ill. 222.

**134. 4. State v. Board of Assessors**, 48 La. Ann. 35.

**5. People v. Feitner**, 56 N. Y. App. Div. 284, affirmed 167 N. Y. 1, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 134.

**A Seat in the New York Stock Exchange** owned by a nonresident is not *capital* invested in business within the New York Tax Law taxing *capital* of nonresidents invested in business in New York. *People v. Feitner*, 56 N. Y. App. Div. 280, affirmed 167 N. Y. 1.

**136. 1. Chicago Union Traction Co. v. State Board of Equalization**, 112 Fed. Rep. 611. See *Cooke v. Marshall*, 191 Pa. St. 315; *State v. Lewis*, 118 Wis. 432.

**Declaring Dividends.** — *American Steel, etc., Co. v. Eddy*, 130 Mich. 267, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 134-142.

**137. 1. Batterson's Appeal**, 72 Conn. 374; *State v. Lewis*, 118 Wis. 432.

**138. 1. State v. Lewis**, 118 Wis. 432.

**Capital Stock in the Sense of Capital.** — *People v. Pond*, 37 N. Y. App. Div. 330.

**Franchise.** — *State Board of Equalization v. People*, 191 Ill. 528; *Henderson Bridge Co. v. Negley*, (Ky. 1901) 63 S. W. Rep. 989; *State v. Duluth Gas, etc., Co.*, 76 Minn. 96; *Georgia R., etc., Co. v. Wright*, 132 Fed. Rep. 912.

**Withdrawing Capital Stock.** — *American Steel, etc., Co. v. Eddy*, 130 Mich. 267, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 134, 142.

**139. 2. Capital Stock Distinguished from Shares of Stock.** — *Brown v. French*, 80 Fed. Rep. 168; *People v. Roberts*, 154 N. Y. 101; *People v. Knight*, 75 N. Y. App. Div. 164.

**Capital Stock — Taxation.** — *People v. Knight*, 75 N. Y. App. Div. 164; *People v. Dederick*, 161 N. Y. 195.

**143. 1. Title and Caption Synonymous.** — *Memphis St. R. Co. v. State*, 110 Tenn. 598.

**Indictment.** — *State v. Mowry*, 21 R. I. 376.

**3. Capture Not Synonymous with Prize.** — *Capture* and "prize" are not convertible terms, and for the subject of *capture* to be made prize for the benefit of the captors the taking must meet the conditions imposed by the statutes. *Manila Prize Cases*, 188 U. S. 259.

**144. 2. Hand Car.** — *Benson v. Chicago, etc., R. Co.*, 75 Minn. 163; *Texas, etc., R. Co. v. Webb*, 31 Tex. Civ. App. 498; *Peretz v. San*

*Antonio, etc., R. Co.*, 28 Tex. Civ. App. 255; *Houston, etc., R. Co. v. Jennings*, (Tex. Civ. App. 1904) 81 S. W. Rep. 822; *Seery v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 950.

**Car Load — Contract.** — See *North Carolina Corp. Commission v. Seaboard Air Line System*, 127 N. Car. 283.

**A Locomotive Engine** is a *car* within the meaning of the United States statute requiring *cars* engaged in interstate commerce to be equipped with automatic couplers. *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1. But see *Bryce v. Burlington, etc., R. Co.*, 119 Iowa 274.

**Tender a Car.** — In *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80, the court said: "The tender of a locomotive engine engaged in interstate commerce is a *car* within the scope of the Act of Congress, which uses the general terms 'locomotive,' *car*, or 'train.' A tender is defined to be a *car* by Webster. The tender is not a locomotive engine, or component part thereof, but is the small *car* carrying water and fuel for the engine, and to which the first passenger or freight *car* of the train is usually coupled."

"**Car Service**" is explained as meaning a demurrage charge made by the railway companies of one dollar per day on each *car* detained over forty-eight hours in unloading. *Everingham v. Halsey*, 108 Iowa 713.

"**The Car Puller** is what its name implies, a device used to pull *cars* by means of a rope attachment hitched to *cars* and operated by means of a drum or spool, around which the rope winds and unwinds, the power being applied by machinery attached to the engine." *Decatur Cereal Mill Co. v. Gogerty*, 80 Ill. App. 635.

**2a. In Thomson-Houston Electric Co. v. Lorain Steel Co., (C. C. A.)** 117 Fed. Rep. 251, the court said: "*Carbon* is a broad word. It may be used to include a diamond or soot, but, according to all the canons of patent construction, it must be taken here as meaning the *carbon* known at the time to electricians under that name, — the ordinary *carbon* of the art, such as was employed for the pencils of arc lamps, for battery plates, for rheostats or artificial resistances, and other similar electrical purposes. It was made up of some variety of coke either from petroleum or bituminous coal, the structure of the material being agglomerate; that is, it is practically numerous particles cemented together, leaving pores between the particles, but not large openings."

**147. 2. Promise to Support and Take Care of a Person.** — See *Kelly v. Jefferis*, 3 Penn. (Del.) 286.



**148. CARELESS — CARELESSNESS.** — See note 2.[**CARETAKER.** — See note 2a.]**151. CARRIAGE.** — See note 2.

**148. 2. Libel and Slander — Careless Manner.** — See *Ratzel v. New York News Pub. Co.*, 67 N. Y. App. Div. 598.

**Carelessly Does Not Import Criminal Intent.** — *Garver v. Territory*, 5 Okla. 342.

**Careless in the Sense of Negligent.** — *Great-house v. Croan*, (Indian Ter. 1903)) 76 S. W. Rep. 273; *Norfolk Beet-Sugar Co. v. Preuner*, 55 Neb. 656.

**Careless in the Sense of Reckless.** — *Choctaw, etc., R. Co. v. Hill*, 110 Tenn. 396.

**2a.** In *Hill v. Coates*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 535, the court said: "A *caretaker* is defined as one employed 'in a building or on an estate, during the absence of the owner, to look after goods or property of any kind' (Cent. Dict. 823), or as 'one employed to watch over or keep in order property, as a house, in the absence of the family' (Stand. Dict.)."

**151. 2. Bicycle — Law of the Road.** — *Taylor v. Union Traction Co.*, 184 Pa. St. 465.

**Toll Act.** — *Simpson v. Teignmouth, etc., Bridge Co.*, (1903) 1 K. B. 405, holding a bicycle not a *carriage*. And see *Murfin v. Detroit, etc., Plank-Road Co.*, 113 Mich. 675, *Compare Cannan v. Abingdon*, (1900) 2 Q. B. 66.

**Highway Defects.** — A bicycle is not a *carriage* within a statute providing that highways shall be kept in repair so as to be reasonably safe for *carriages*. *Richardson v. Danvers*, 176 Mass. 413; *Fox v. Clarke*, 25 R. I. 515.

**A Motor Bicycle** is a *carriage* within an act requiring a license for a *carriage* drawn or propelled upon a road by mechanical power. *O'Donoghue v. Moon*, 90 L. T. N. S. 843.

# CARRIERS OF GOODS.

BY JOHN SIMPSON.

- 159. II. DUTY TO RECEIVE AND CARRY — 1. Extent and Character of Duty**  
**— a. GENERALLY — Nature of Goods — Payment of Charges. — See note 1.**  
**Must Be Good Cause for Refusal — Discrimination. — See note 2.**  
**160. How the Duty Arises — Special Contract Unnecessary. — See note 1.**  
**Transportation Within Reasonable Time. — See notes 3, 4.**  
**Refusal or Failure to Carry — Proximate Cause. — See note 7.**  
**161. b. GOODS OFFERED BY CONNECTING LINES. — See note 1.**  
**c. HAULING CARS OF OTHER COMPANIES — Cars and Engines for Other Lines. — See note 4.**  
**162. A Railroad Company Is Entitled to Proper Compensation. — See note 4.**  
**2. Duty Enforceable by Mandamus. — See note 5.**  
**Usual Remedy. — See note 8.**  
**163. 3. What Will Excuse Failure or Refusal to Carry — a. GENERALLY — Where Goods Not of Character Carrier Transports. — See note 1.**

**159. 1. Duty to Receive and Carry — General Rule —** *United States*. — *Harp v. Choctaw*, etc., R. Co., (C. C. A.) 125 Fed. Rep. 445; *Bluthenthal v. Southern R. Co.*, 84 Fed. Rep. 920.

*Connecticut*. — *Lang v. Brady*, 73 Conn. 707.

*Kentucky*. — *Bedford-Bowling Green Stone Co. v. Oman*, 115 Ky. 369.

*Michigan*. — *Atty.-Gen. v. American Express Co.*, 118 Mich. 682, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 158, 159.

*Missouri*. — *Steffen v. Mississippi River*, etc., R. Co., 156 Mo. 322; *Robert C. White Live Stock Commission Co. v. Chicago*, etc., R. Co., 87 Mo. App. 330.

*Nebraska*. — *State v. Chicago*, etc., R. Co., (Neb. 1904) 101 N. W. Rep. 23.

*New Jersey*. — *Lanning v. Sussex R. Co.*, 1 N. J. L. J. 21.

*North Carolina*. — *Parker v. Atlantic Coast Line R. Co.*, 133 N. Car. 335.

*Pennsylvania*. — *Loraine v. Pittsburg*, etc., R. Co., 205 Pa. St. 132.

*South Carolina*. — *Mathis v. Southern R. Co.*, 65 S. Car. 271.

*Texas*. — *Missouri*, etc., R. Co. *v. Webb*, 20 Tex. Civ. App. 431.

**Where Goods Are Destined to a Point Beyond the Carrier's Line** the carrier cannot for that reason refuse to carry. *Seasongood v. Tennessee*, etc., Transp. Co., (Ky. 1899) 54 S. W. Rep. 193.

**2. No Discrimination.** — *Cumberland Telephone, etc., Co. v. Morgan's Louisiana*, etc., R. Co., 51 La. Ann. 29, 72 Am. St. Rep. 442.

**160. 1. Special Contract to Carry Need Not Be Shown.** — *Nelson v. Great Northern R. Co.*, 28 Mont. 297; *Mathias v. Southern R. Co.*, 65 S. Car. 271.

**3. Must Forward Promptly.** — *U. S. Express Co. v. Hammer*, 21 Ind. App. 186; *Denman v. Chicago*, etc., R. Co., 52 Neb. 140.

**4. Mathis v. Southern R. Co.**, 65 S. Car. 271.

**7. What Is Proximate Cause.** — *Seasongood v.*

*Tennessee*, etc., Transp. Co., (Ky. 1899) 54 S. W. Rep. 193.

**161. 1. Must Accept and Carry Freight Offered by Other Companies.** — *Chicago*, etc., R. Co. *v. Dorsey Fuel Co.*, 112 Ill. App. 382; *Schumacher v. Chicago*, etc., R. Co., 207 Ill. 199; *Thomas v. Frankfort*, etc., R. Co., 116 Ky. 879, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 160; *Texas*, etc., R. Co. *v. Texas Short Line R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 567; *Gulf*, etc., R. Co. *v. Texas*, etc., R. Co., 93 Tex. 482; *Texas*, etc., R. Co. *v. Bigham*, (Tex. Civ. App. 1898) 47 S. W. Rep. 814; *Inman v. St. Louis Southwestern R. Co.*, 14 Tex. Civ. App. 39.

**4. Duty to Haul Engines and Cars for Another Line.** — *Texas*, etc., R. Co. *v. Texas Short Line R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 567.

**162. 4. No Extra Charge.** — See *Texas*, etc., R. Co. *v. Texas Short Line R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 567.

**5. Mandamus to Compel Railroad Company to Receive and Carry Freight.** — *Tift v. Southern R. Co.*, 123 Fed. Rep. 789; *Bedford-Bowling Green Stone Co. v. Oman*, 115 Ky. 369. See also *State v. Chicago*, etc., R. Co., (Neb. 1904) 99 N. W. Rep. 309.

**8. Equitable Relief When Remedy at Law Is Inefficient.** — *Cumberland Telephone, etc., Co. v. Morgan's Louisiana*, etc., R. Co., 51 La. Ann. 29, 72 Am. St. Rep. 442; *Cumberland Telephone, etc., Co. v. Texas*, etc., R. Co., 52 La. Ann. 1850; *State v. Chicago*, etc., Co., (Neb. 1904) 101 N. W. Rep. 23; *Loraine v. Pittsburg*, etc., R. Co., 205 Pa. St. 132.

**163. 1. When Goods Not of Kind Carrier Accustomed to Transport.** — *Pennsylvania Co. v. Kenwood Bridge Co.*, 170 Ill. 645. See also *Wilson v. Atlantic Coast Line R. Co.*, 129 Fed. Rep. 774.

**Goods of Express Company — No Duty to Carry.** — *Louisville*, etc., R. Co. *v. Keefer*, 146 Ind. 21, 58 Am. St. Rep. 348.

- 163.** Particular Manner of Carriage for Certain Goods. — See note 2.  
Reasonable Regulations as to Time, Nature of Goods, and Mode of Carriage. — See note 3.
- 164.** Prescribing Place for Delivery. — See note 2.  
Goods Defectively Packed. — See note 3.
- 165.** Line under Military Authority. — See note 8.  
Waiver of Right to Object. — See note 9.
- 166.** *b.* PREPAYMENT OF CHARGES — Rule Stated. — See note 1.  
Usage. — See note 2.  
Acceptance for Carriage Sufficient Consideration. — See note 3.  
4. Mode of Transportation to Be Employed. — See note 4.
- 167.** See note 1.
- III. DUTY TO HAVE AND TO FURNISH FACILITIES FOR TRANSPORTATION** — 1. In Absence of Special Contract — At Common Law. — See note 2.  
Sufficient Facilities for Reasonably Prompt Carriage. — See note 3.
- 168.** Sudden and Unusual Press of Business. — See note 1.
- 169.** Carrier's Duty Where Facilities Lacking — Connecting Lines. — See note 3.  
Acceptance of Goods — Waiver — Consent of Shipper. — See note 5.
- 170.** 2. Special Contract to Furnish Cars. — See note 2.

**163.** 2. Certain Methods of Carriage for Certain Goods. — *Harp v. Choctaw*, etc., R. Co., (C. C. A.) 125 Fed. Rep. 445.

**3.** Time for Transportation — Character of Article — Kinds of Conveyances. — *Robinson v. Baltimore*, etc., R. Co., (C. C. A.) 129 Fed. Rep. 753; *Harp v. Choctaw*, etc., R. Co., (C. C. A.) 125 Fed. Rep. 445.

**164.** 2. Must Be Tendered at Proper Place. — *Robinson v. Baltimore*, etc., R. Co., (C. C. A.) 129 Fed. Rep. 753.

**3.** Goods Defectively Packed. — *Elgin*, etc., R. Co. *v.* *Bates Mach. Co.*, 98 Ill. App. 311, *affirmed* 200 Ill. 636, 93 Am. St. Rep. 218.

Goods Held to Be Properly Packed. — See *Bluthenthal v. Southern R. Co.*, 84 Fed. Rep. 920.

**165.** 8. Contraband of War. — Refusal of the customs authorities to clear the vessel because the goods are contraband of war is a sufficient excuse. *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 112 Fed. Rep. 829, *reversed* 120 Fed. Rep. 873, 57 C. C. A. 533.

**9.** Waiver of Right to Object. — *Illinois Cent. R. Co. v. Byrne*, 205 Ill. 9.

**166.** 1. Failure of Shipper to Prepay Freight Charges. — *McEachran v. Grand Trunk R. Co.*, 115 Mich. 318; *Berry v. Southern R. Co.*, 122 N. Car. 1002. See also *Montpelier*, etc., R. Co. *v.* *Macchi*, 74 Vt. 403.

Demand Fixes Beginning of Carrier's Liability. — Where a demand is made, the carrier's liability for negligent delay begins on prepayment of the freight. *Louisville*, etc., *Packet Co. v. Bottorff*, (Ky. 1904) 77 S. W. Rep. 920. See also *infra*, this title, **183. 1.**

**2.** Rule Controlled by Usage. — *Southern Indian Express Co. v. U. S. Express Co.*, 92 Fed. Rep. 1022, 35 C. C. A. 172, *affirming* 88 Fed. Rep. 659.

**3.** Shipper Need Not Allege Payment of Charges. — *Louisville*, etc., R. Co. *v.* *Allgood*, 113 Ala. 163; *Porter v. Raleigh*, etc., R. Co., 132 N. Car. 71.

Tender of Freight Charges Sufficient. — *Sonia Cotton Oil Co. v. Steamer Red River*, 106 La. 42.

**4.** Mode of Transportation — Absence of Express Contract. — *Post v. Southern R. Co.*, 103 Tenn. 184; *Gulf*, etc., R. Co. *v.* *Irvine*, (Tex. Civ. App. 1903) 73 S. W. Rep. 540; *Bessling v. Houston*, etc., R. Co., (Tex. Civ. App. 1904) 80 S. W. Rep. 639.

**167.** 1. Usual Route — Presumption. — *Louisville*, etc., R. Co. *v.* *Gidley*, 119 Ala. 523; *Houston*, etc., R. Co. *v.* *Houx*, 15 Tex. Civ. App. 502; *S. D. Seavey Co. v. Union Transit Co.*, 106 Wis. 394.

Option as to Mode of Transportation Must Be Exercised Reasonably. — *Stewart v. Comer*, 100 Ga. 754, 62 Am. St. Rep. 353.

**2.** Rule at Common Law. — *Texas*, etc., R. Co. *v.* *Smith*, (Tex. Civ. App. 1904) 79 S. W. Rep. 614.

**3.** Railroad and Steamship Carriers — Duty as to Facilities. — *Cumberland Telephone*, etc., Co. *v.* *Morgan's Louisiana*, etc., R. Co., 51 La. Ann. 29, 72 Am. St. Rep. 442; *Hallum v. Mobile*, etc., R. Co., (Miss. 1899) 24 So. Rep. 909; *Gann v. Chicago G. W. R. Co.*, 72 Mo. App. 34; *Strough v. New York Cent.*, etc., R. Co., 92 N. Y. App. Div. 584, *affirmed* 181 N. Y. 533; *Nichols v. Oregon Short Line R. Co.*, 24 Utah 83, 91 Am. St. Rep. 778.

Refrigerator Cars. — *Mathis v. Southern R. Co.*, 65 S. Car. 271.

**168.** 1. Effect of Unusual Press of Business. — *Strough v. New York Cent.*, etc., R. Co., 92 N. Y. App. Div. 584, *affirmed* 181 N. Y. 533.

**169.** 3. Carrier Must Inform Shipper of Inability to Carry. — *Shea v. Chicago*, etc., R. Co., 66 Minn. 102; *Nichols v. Oregon Short Line R. Co.*, 24 Utah 83, 91 Am. St. Rep. 778.

**5.** Carrier Receiving Goods with Knowledge of Obstruction. — See *Alabama*, etc., R. Co. *v.* *Hayne*, 76 Miss. 538, supporting the paragraph of the original note, beginning "A different view."

**170.** 2. *Weida v. Chicago*, etc., R. Co., 72 Minn. 102; *Currell v. Hannibal*, etc., R. Co., 97 Mo. App. 93; *Outland v. Seaboard Air Line R. Co.*, 134 N. Car. 350; *Baltimore*, etc., R. Co. *v.* *Fisher*, 5 Ohio Dec. 659; *International*, etc., R. Co. *v.* *Aten*, (Tex. Civ. App. 1904) 81 S. W.

**170.** Obligations Determined by the Contract. — See note 4.

**171.** If the Agreement Is to Furnish Cars Unconditionally. — See notes 1, 2.  
Consideration. — See note 3.

How Fact of Existence of Special Contract Determined. — See note 4.

**172.** 3. Duty Declared by Statute — Case Must Be Brought Within Statute. — See notes 2, 3.

**173.** Written Application for Cars Required — Oral Application Insufficient. — See note 1.

**175.** 4. Cars Furnished Must Be Suitable and Safe. — See note 1.

Cars Furnished the Property of Another Line. — See note 2.

Acceptance by Shipper of Unfit Cars, with Knowledge. — See note 3.

**176.** 5. Tender of Goods by Shipper. — See note 2.

**177.** 7. Proximate or Remote Cause. — See note 1.

Rep. 346; Gulf, etc., R. Co. v. Hodge, (Tex. Civ. App. 1897) 39 S. W. Rep. 986.

**170.** 4. What Is a Reasonable Time under the contract is a question of law for the court. Outland v. Seaboard Air Line R. Co., 134 N. Car. 350.

Breach of a Written Contract does not render the carrier liable for the statutory penalty. Texas, etc., R. Co. v. Barrow, (Tex. Civ. App. 1903) 77 S. W. Rep. 643.

**171.** 1. Act of God. — Outland v. Seaboard Air Line R. Co., 134 N. Car. 350.

2. Mathis v. Southern R. Co., 65 S. Car. 271; International, etc., R. Co. v. True, 23 Tex. Civ. App. 523.

When Carrier Does Not Own Cars. — It is immaterial whether or not the carrier owned any cars at the time of the contract. Baxley v. Tallassee, etc., R. Co., 128 Ala. 183.

3. Sufficient Consideration. — An agreement to pay freight is a sufficient consideration. Outland v. Seaboard Air Line R. Co., 134 N. Car. 350.

An obligation on the shipper to load the cars, and have weekly inspections and shipments, is a sufficient valuable consideration. Baxley v. Tallassee, etc., R. Co., 128 Ala. 183.

4. The Burden of Proof of the contract is on the shipper. Texas, etc., R. Co. v. Ray, (Tex. Civ. App. 1905) 84 S. W. Rep. 691.

**172.** 2. Duty Declared by Statute. — Texas, etc., R. Co. v. Barrow, (Tex. Civ. App. 1903) 77 S. W. Rep. 643; Houston, etc., R. Co. v. Buchanan, (Tex. Civ. App. 1905) 84 S. W. Rep. 1073.

"Reasonable Time," in the absence of agreement, is a question of fact for the jury. Davis v. Texas, etc., R. Co., 91 Tex. 505.

The North Carolina Statute, Code N. Car., §§ 1964, 1967, does not limit the carrier's common-law liability for negligence. Parker v. Atlantic Coast Line R. Co., 133 N. Car. 335.

Statute Proper Exercise of Police Power. — Houston, etc., R. Co. v. Mayes, (Tex. Civ. App. 1904) 83 S. W. Rep. 53.

3. Where Duty Prescribed by Statute. — International, etc., R. Co. v. True, 23 Tex. Civ. App. 523.

Statute to Be Strictly Construed. — Rev. Stat. Tex. (1895), art. 4497-4502, imposing a penalty for failure to furnish cars, is to be strictly construed. Houston, etc., R. Co. v. Campbell, 91 Tex. 551, reversing (Tex. Civ. App. 1897) 40 S. W. Rep. 431.

**173.** 1. Texas Statute Fixing Penalty for Not

Furnishing Cars. — Texas, etc., R. Co. v. Barrow, (Tex. Civ. App. 1903) 77 S. W. Rep. 643.

Sufficient Written Application. — Houston, etc., R. Co. v. Mayes, (Tex. Civ. App. 1904) 83 S. W. Rep. 53.

After the Carrier Has Refused the application it is not necessary, in order to maintain an action for damages, to offer the freight. Houston, etc., R. Co. v. Campbell, 91 Tex. 551.

**175.** 1. Cars Must Be Suitable for Purpose Required. — Cincinnati, etc., R. Co. v. Fairbanks, (C. C. A.) 90 Fed. Rep. 467; Cooper v. Raleigh, etc., R. Co., 105 Ga. 83; Burke v. U. S. Express Co., 87 Ill. App. 505; Johnson v. Toledo, etc., R. Co., 133 Mich. 596, 10 Detroit Leg. N. 324; Shea v. Chicago, etc., R. Co., 66 Minn. 102; International, etc., R. Co. v. Aten, (Tex. Civ. App. 1904) 81 S. W. Rep. 346.

Not Necessary to Prove Negligence. — In case of a failure to provide proper cars, the plaintiff is not required to allege or prove negligence. International, etc., R. Co. v. Pool, 24 Tex. Civ. App. 575.

2. Fact that Cars of Another Company Are Used No Defense. — Cincinnati, etc., R. Co. v. Fairbanks, (C. C. A.) 90 Fed. Rep. 467; Shea v. Chicago, etc., R. Co., 66 Minn. 102; New York, etc., R. Co. v. Cromwell, 98 Va. 227, 81 Am. St. Rep. 722.

3. Fact that Shipper Accepts Cars Is No Defense Unless Carrier Is Expressly Released. — Cincinnati, etc., R. Co. v. Fairbanks, (C. C. A.) 90 Fed. Rep. 467; Johnson v. Toledo, etc., R. Co., 133 Mich. 596, 10 Detroit Leg. N. 324.

Where Consignor Selects Car, Carrier Not Liable for Apparent Defects. — Edward Frohlich Glass Co. v. Pennsylvania Co., (Mich. 1904) 101 N. W. Rep. 223.

Where Shipper Selects Cars — Carriers Liable for Hidden Defects. — If the shipper agrees to select the car and to release the carrier from damages arising from its defective condition the carrier is not relieved from liability for damages arising from defects not known to the shipper. Lake Erie, etc., R. Co. v. Holland, 162 Ind. 406.

**176.** 2. Tender Must Be Alleged. — St. Louis, etc., R. Co. v. Lee, 69 Ark. 584.

**177.** 1. Loss Must Be Direct Consequence — Proximate Cause. — Compare Texas, etc., R. Co. v. Smith, (Tex. Civ. App. 1904) 79 S. W. Rep. 614.

Damage Proximate Cause — Defective Car. — See International, etc., R. Co. v. Aten, (Tex. Civ. App. 1904) 81 S. W. Rep. 346.

**177. IV. DISCRIMINATION AS TO FACILITIES — Common-law Duty. —** See note 2.

**178. Preferences as to Time of Shipment — Independently of the Statutes. —** See note 5.

**Mere Difference of Treatment Not Necessarily Unlawful Discrimination. —** See note 7.

**179. Rule Does Not Require Same Rates and Facilities for All. —** See note 1.

**180. The Common-law Rule as to Freight Charges. —** See note 1:

**Determination as to Prepayment of Charges. —** See note 2.

**Order in Which Goods Should Be Forwarded. —** See note 4.

**In Exceptional Instances. —** See note 5.

**V. WHEN LIABILITY COMMENCES — 1. With Delivery to Carrier. —** See note 8.

**181. 2. What Constitutes Delivery — Delivery and Acceptance — a. GENERALLY. —** See note 4.

**182. Exclusive Possession and Control. —** See note 1.

**183. When Acceptance Implied. —** See note 2.

**Time and Place of Tender. —** See note 3.

**Depositing Goods Near Depot. —** See note 4.

**177. 2. At Common Law. —** *Tift v. Southern R. Co.*, 123 Fed. Rep. 789; *Myar v. St. Louis Southwestern R. Co.*, 71 Ark. 552; *Newport News, etc., R. Co. v. McDonald Brick Co.*, 109 Ky. 408; *Bedford-Bowling Green Stone Co. v. Oman*, 105 Ky. 369; *Cumberland Telephone, etc., Co. v. Texas, etc., R. Co.*, 52 La. Ann. 1850; *State v. Chicago, etc., R. Co.*, (Neb. 1904) 101 N. W. Rep. 23; *State v. Chicago, etc., R. Co.*, (Neb. 1904) 99 N. W. Rep. 309; *Strough v. New York Cent., etc., R. Co.*, 92 N. Y. App. Div. 584, *affirmed* 181 N. Y. 533; *Nichols v. Oregon Short Line R. Co.*, 24 Utah 83, 91 Am. St. Rep. 778.

**Payment of Rebate Cannot Be Enforced. —** An action cannot be maintained to enforce repayment of a portion of freight charges under a contract to do so. *Baltimore, etc., R. Co. v. Diamond Coal Co.*, 61 Ohio St. 242.

**178. 5. Independently of Statute. —** *Houston, etc., R. Co. v. Lone Star Salt Co.*, 19 Tex. Civ. App. 676.

**7. What Amounts to Discrimination. —** *Harp v. Choctaw, etc., R. Co.*, (C. C. A.) 125 Fed. Rep. 445; *Choctaw, etc., R. Co. v. State*, (Ark. 1904) 84 S. W. Rep. 502; *State v. Chicago, etc., R. Co.*, (Neb. 1904) 99 N. W. Rep. 309.

**Discrimination as to Demurrage Charges. —** See *New Orleans, etc., R. Co. v. George*, 82 Miss. 710.

**179. 1. Meaning of Rule Against Discrimination — Undue Preferences. —** *Snell v. Clinton Electric Light, etc., Co.*, 196 Ill. 626, 89 Am. St. Rep. 341, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 179; *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218. See also *Laurel Cotton Mills v. Gulf, etc., R. Co.*, 84 Miss. 339.

**180. 1. When Smaller Rates Are Warranted. —** *Chicago, etc., R. Co. v. Colby*, (Neb. 1903) 96 N. W. Rep. 145.

**2. Discrimination as to Requiring Prepayment of Freight. —** *Southern Indian Express Co. v. U. S. Express Co.*, (C. C. A.) 92 Fed. Rep. 1022, *affirming* 88 Fed. Rep. 659.

**4. State v. Chicago, etc., R. Co., (Neb. 1904)**

101 N. W. Rep. 23, supporting the whole text paragraph.

**5. State v. Chicago, etc., R. Co., (Neb. 1904) 99 N. W. Rep. 309.**

**8. Delivery for Immediate Transportation. —** *Meloche v. Chicago, etc., R. Co.*, 116 Mich. 69, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 180; *Gulf, etc., R. Co. v. Compton*, (Tex. Civ. App. 1896) 38 S. W. Rep. 220; *Roy v. Griffin*, 26 Wash. 109. And see *Missouri, etc., R. Co. v. Beard*, (Tex. Civ. App. 1904) 78 S. W. Rep. 253, where the court held that the intention of immediate transportation was not necessary if the evidence showed that the railroad company received the goods as a common carrier.

**181. 4. Tate v. Yazoo, etc., R. Co., 78 Miss. 842, 84 Am. St. Rep. 649; *Spofford v. Pennsylvania R. Co.*, 11 Pa. Super. Ct. 97.**

**What Constitutes a Delivery depends upon the accompanying circumstances. Anchor Mill Co. v. Burlington, etc., R. Co., 102 Iowa 262.**

**182. 1. Change of Custody and Control. —** *Tate v. Yazoo, etc., R. Co.*, 78 Miss. 842, 84 Am. St. Rep. 649; *Roy v. Griffin*, 26 Wash. 109, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 181.

**Where Cotton Is Still in the Possession of a Compress Company. —** See *Atlanta Nat. Bank v. Southern R. Co.*, 106 Fed. Rep. 623; *Edwards v. Texas Midland R. Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 800.

**Permitting Cattle to Be Put in the Station Yard may constitute a delivery where such is the intention of the parties. See Missouri, etc., R. Co. v. Byrne, 3 Indian Ter. 740, *reversed* 100 Fed. Rep. 359, 40 C. C. A. 402.**

**Question for Jury. —** *Cunard Steamship Co. v. Kelley*, (C. C. A.) 115 Fed. Rep. 678; *Stapleton v. Grand Trunk R. Co.*, 133 Mich. 187; *Normile v. Northern Pac. R. Co.*, 36 Wash. 21.

**183. 2. When Acceptance by Carrier Implied. —** *Meloche v. Chicago, etc., R. Co.*, 116 Mich. 69.

**3. Time and Place of Tender. —** *Spofford v. Pennsylvania R. Co.*, 11 Pa. Super. Ct. 97.

**4. Depositing Goods Near Company's Roadbed,**

- 184.** Custom of Carrier to Receive Goods at Place Other than Depot. — See note 1.  
Actual Notice of the Deposit of Goods. — See note 2.
- 185.** *b.* DELIVERY TO CARRIER'S AGENT — Rule Stated. — See note 2.
- 186.** Apparent Authority. — See note 1.  
The Presumption. — See note 2.
- 187.** *c.* WHETHER BILL OF LADING ESSENTIAL — In the Absence of a Statutory Rule. — See notes 1, 2.  
Texas Statute. — See note 3.
- 188.** Bill of Lading as Evidence of Delivery. — See notes 1, 2.
- 189.** See note 1.  
Statutes Prohibiting Issuance of Bills of Lading Before Actual Delivery of Goods. — See note 2.
- d.* LOADING GOODS ON CARS — Carrier's Duty Primarily. — See note 4.
- 190.** 3. Proof of Delivery — So Also Receipts Given by the Carrier. — See note 6.
- 191.** VI. WHEN LIABILITY ENDS — 1. With Delivery by Carrier — General Rules. — See note 1.

etc., No Delivery. — *Tate v. Yazoo, etc., R. Co.*, 78 Miss. 842, 84 Am. St. Rep. 649.

**184.** 1. Effect of Custom or Usage. — *Missouri, etc., R. Co. v. Beard*, (Tex. Civ. App. 1904) 78 S. W. Rep. 253.

**2.** Notice of Special Delivery. — *Tate v. Yazoo, etc., R. Co.*, 78 Miss. 842, 84 Am. St. Rep. 649.

**185.** 2. Duly Authorized Agent. — *Hamil v. New York, etc., Despatch Express Co.*, 177 Mass. 474; *Meloche v. Chicago, etc., R. Co.*, 116 Mich. 69; *Lewis v. Van Horn*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 765; *Seasongood v. Tennessee, etc., Transp. Co.*, (Ky. 1899) 54 S. W. Rep. 193.

**186.** 1. Authority of Station Agents Presumed. — *Seasongood v. Tennessee, etc., Transp. Co.*, (Ky. 1899) 54 S. W. Rep. 193.

**2.** Agent's Authority to Receive Confined to Goods Tendered at His Station. — *Cunard Steamship Co. v. Kelley*, (C. C. A.) 115 Fed. Rep. 678; *Abrams v. Platt*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 637.

**187.** 1. Delivery May Be Complete Without Bill of Lading. — *Alabama Midland R. Co. v. Darby*, 119 Ala. 531; *Meloche v. Chicago, etc., R. Co.*, 116 Mich. 69; *Berry v. Southern R. Co.*, 122 N. Car. 1002; *New York, etc., Steamship Co. v. Weiss*, (Tex. Civ. App. 1898) 47 S. W. Rep. 674.

**2.** Liability Commences at Time of Acceptance. — *Cleveland, etc., R. Co. v. Wilson*, 99 Ill. App. 367; *Gulf, etc., R. Co. v. Compton*, (Tex. Civ. App. 1896) 38 S. W. Rep. 220; *Roy v. Griffin*, 26 Wash. 109, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187.

**3.** Under Texas Statute. — *Missouri, etc., R. Co. v. Beard*, (Tex. Civ. App. 1904) 78 S. W. Rep. 253.

**188.** 1. No Delivery Though Bill of Lading Issued. — *Planters Fertilizer Mfg. Co. v. Elder*, (C. C. A.) 101 Fed. Rep. 1001; *Kelley v. Cunard Steamship Co.*, 120 Fed. Rep. 536; *Cunard Steamship Co. v. Kelley*, (C. C. A.) 115 Fed. Rep. 678, (C. C. A.) 126 Fed. Rep. 610; *Mad-dock v. American Sugar Refining Co.*, 91 Fed. Rep. 166.

The Kansas Statute making the bill of lading conclusive proof of the amount of goods received by the carrier is unconstitutional. *Missouri, etc., R. Co. v. Simonson*, 64 Kan. 802, 91 Am. St. Rep. 248.

**2.** Although Bill of Lading May Have Passed to Innocent Purchaser. — *Cunard Steamship Co. v. Kelley*, (C. C. A.) 115 Fed. Rep. 678; *Smith v. Missouri Pac. R. Co.*, 74 Mo. App. 48. *Contra* under the *Mississippi* statute, Code Miss. (1892), § 4229. *Illinois Cent. R. Co. v. Lancashire Ins. Co.*, 79 Miss. 114. And see *Missouri, etc., R. Co. v. Union Ins. Co.*, (Tex. Civ. App. 1896) 39 S. W. Rep. 975, holding that delivery may be established by custom on the issue of a bill of lading without actual delivery.

**189.** 1. Bill of Lading Is Prima Facie Evidence. — *The Titania*, (C. C. A.) 131 Fed. Rep. 229, affirming 124 Fed. Rep. 975; *Smith v. Missouri Pac. R. Co.*, 74 Mo. App. 48; *Fasy v. International Nav. Co.*, 177 N. Y. 591, affirming 77 N. Y. App. Div. 469; *The Willie D. Sandhoval*, 92 Fed. Rep. 286; *Lake Shore, etc., R. Co. v. National Live-Stock Bank*, 178 Ill. 506.

**2.** Statute Prohibiting Issuance of Bill of Lading Before Actual Delivery of Goods. — *Jemison v. Birmingham, etc., R. Co.*, 125 Ala. 378.

**4.** Carrier's Duty to Load Primarily. — *Crawford v. Southern R. Co.*, 56 S. Car. 136, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 189.

Carrier's Liability Not Affected by Shipper's Loading Goods. — *Pennsylvania Co. v. Kenwood Bridge Co.*, 170 Ill. 645.

**190.** 6. Carrier's Receipts, etc., Admissible. — *The Willie D. Sandhoval*, 92 Fed. Rep. 286.

A Shipping Receipt May Be Contradicted by proof that the carrier never received the goods. *Lake Shore, etc., R. Co. v. National Live-Stock Bank*, 178 Ill. 506.

Bill of Lading and Waybill as Evidence. — A bill of lading and waybill issued by the carrier's authorized agent are admissible to prove delivery to the carrier. *Chicago, etc., R. Co. v. Johnston*, 58 Neb. 236.

**191.** 1. When Liability Ceases. — *Liverpool, etc., Ins. Co. v. McNeill*, (C. C. A.) 89 Fed. Rep. 131; *Illinois Cent. R. Co. v. Carter*, 165 Ill. 570.

Retaining the Goods in the Cars will not change the liability from that of common carrier to warehouseman. *Hipp v. Southern R. Co.*, 50 S. Car. 129.

**191.** Reasonable Efforts to Effect Delivery. — See note 5.

**192.** When There May Be Delivery Without Unloading. — See note 2.

**193.** 2. Goods Being Unloaded — Where Owner or Consignee Begins to Unload. — See note 3.

**194.** 3. To Whom Delivery May Be Made — *a.* TO CONSIGNEE OR HIS AGENT — In the Absence of Special Circumstances. — See note 1.

A Delivery to the Consignee's Agent. — See note 2.

**195.** Proof of Agent's Authority. — See note 1.

Shipper Directing Delivery to Third Party — Or to Consignee upon Certain Conditions. — See note 2.

**196.** *b.* TO TRUE OWNER OF GOODS — Burden of Proving Ownership. — See note 3.

Rights of Real Owner. — See note 4.

**197.** See note 1.

*c.* DELIVERY TO FRAUDULENT PURCHASER — Goods Shipped on Fraudulent Order to Fictitious Consignee. — See note 4.

**199.** *e.* CHANGE OF CONSIGNEE — SHIPPER'S RIGHT TO — General Rule as to Effect of Delivery to Carrier. — See note 1.

**200.** *f.* TO HOLDER OF BILL OF LADING — (1) *Holder Entitled to Delivery.* — See note 2.

**191.** 5. Delivery Impossible — Carrier's Duty. — *Pennsylvania Co. v. Canadian Pac. R. Co.*, 107 Ill. App. 386; *Grand Trunk R. Co. v. Frankel*, 33 Can. Sup. Ct. 115.

**192.** 2. Delivery Accomplished Before Goods Unloaded. — See *Schumacher v. Chicago, etc.*, R. Co., 207 Ill. 199, *affirming* 108 Ill. App. 520; *Chicago, etc., R. Co. v. Dorsey Fuel Co.*, 112 Ill. App. 382; *Anchor Mill Co. v. Burlington, etc.*, R. Co., 102 Iowa 262; *Paddock v. Toledo, etc.*, R. Co., 11 Ohio Cir. Dec. 789, 21 Ohio Cir. Ct. 626; *Baltimore, etc., R. Co. v. Fisher*, 5 Ohio Dec. 659.

**193.** 3. Carriers' Duty to Unload. — *Paddock v. Toledo, etc., R. Co.*, 11 Ohio Cir. Dec. 789, 21 Ohio Cir. Ct. 626.

**194.** 1. To the Consignee. — *Nebraska Meal Mills v. St. Louis Southwestern R. Co.*, 64 Ark. 169, 62 Am. St. Rep. 183; *Schlichting v. Chicago, etc., R. Co.*, 121 Iowa 502; *Sonia Cotton Oil Co. v. Steamer Red River*, 106 La. 42, 87 Am. St. Rep. 294; *National Newark Banking Co. v. Delaware, etc., R. Co.*, 70 N. J. L. 774; *Mairs v. Baltimore, etc., R. Co.*, 73 N. Y. App. Div. 265, *affirmed* 175 N. Y. 409; *Weisman v. Philadelphia, etc., R. Co.*, 22 R. I. 128.

**2.** Delivery to Consignee's Authorized Agent. — *Thompson v. Alabama Midland R. Co.*, 122 Ala. 378; *Southern Express Co. v. Williams*, 99 Ga. 482; *Brunswick, etc., R. Co. v. Rothchild*, 119 Ga. 604; *Schlesinger v. West Shore R. Co.*, 88 Ill. App. 273; *Conley v. Canadian Pac. R. Co.*, 32 Ont. 258, *affirmed* 1 Ont. L. Rep. 345.

Delivery to a Third Party without presentation of the bill of lading, when so ordered by the consignee, is a good delivery. *Anchor Mill Co. v. Burlington, etc., R. Co.*, 102 Iowa 262.

Delivery to third party by instruction of the consignee's agent is a good delivery. *National Newark Banking Co. v. Delaware, etc., R. Co.*, 70 N. J. L. 774.

Delivery to Customs Authorities. — The custom of the place of delivery to deliver dutiable goods to the customs authority makes such a delivery good. *The Asiatic Prince*, (C. C. A.) 108 Fed. Rep. 287, *affirming* 97 Fed. Rep. 343.

**195.** 1. Carrier Must Prove Agent's Authority to Receive. — *Schlesinger v. New York, etc., R. Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 372.

Receipt Constituting Expressman Consignee's Agent. — Acceptance of a receipt providing that delivery by the carrier to an express company for delivery to the consignee shall constitute the express company agent of the consignee is binding on the latter, and the carrier's liability ends with delivery to the express company. *Mills v. Weir*, 82 N. Y. App. Div. 396.

**2.** Production of Bill of Lading. — *Chicago Packing, etc., Co. v. Savannah, etc., R. Co.*, 103 Ga. 140.

**196.** 3. May Always Deliver to True Owner of Goods. — *Thomas v. Northern Pac. Express Co.*, 73 Minn. 185; *Union Pac. R. Co. v. Metcalf*, 50 Neb. 452; *National Newark Banking Co. v. Delaware, etc., R. Co.*, 70 N. J. L. 774; *Mairs v. Baltimore, etc., R. Co.*, 73 N. Y. App. Div. 265, *affirmed* 175 N. Y. 409.

**4.** Real Owner Always Entitled to Demand His Goods. — *Atchison, etc., R. Co. v. Jordon Stock-Food Co.*, 67 Kan. 86, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 196.

**197.** 1. Case an Exception to the General Rule. — *Atchison, etc., R. Co. v. Jordon Stock-Food Co.*, 67 Kan. 86, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 196; *Merz v. Chicago, etc., R. Co.*, 86 Minn. 33.

**4.** When Carrier Is Liable. — See *Atchison, etc., R. Co. v. Jordon Stock-Food Co.*, 67 Kan. 86.

**199.** 1. *Schlesinger v. West Shore R. Co.*, 88 Ill. App. 273.

**200.** 2. Must Deliver to Holder of Bill of Lading or His Assignee. — *The Prussia*, 100 Fed. Rep. 484; *Schlichting v. Chicago, etc., R. Co.*, 121 Iowa 502; *Missouri Pac. R. Co. v. Weil*, 8 Kan. App. 839; *Ryan v. Great Northern R. Co.*, 90 Minn. 12; *International, etc., R. Co. v. Diamond Roller Mills*, (Tex. Civ. App. 1904) 82 S. W. Rep. 660; *Pullman First Nat. Bank v. Northern Pac. Ry. Co.*, 28 Wash. 439. *Contra*, where the goods are billed "straight" to the consignee, *Nebraska Meal Mills v. St. Louis Southwestern R. Co.*, 64 Ark. 169, 62 Am. St. Rep. 183.

- 200.** Holder of Bill of Lading Properly Indorsed. — See note 3.
- 201.** Wrongful Possession of Bill of Lading. — See notes 1, 2.  
In What Sense Bill of Lading Negotiable. — See note 3.
- 202.** (2) *Carrier's Right to Demand Production of Bill of Lading* — Regulation Requiring Production Reasonable. — See note 3.  
Liability to Bona Fide Holder. — See note 4.  
The New York Statute. — See note 5.
- 203.** (3) *Liability to Innocent Purchaser of Bill of Lading*. — See note 1.
- 205.** (7) *Priority of Holder of Bill of Lading over Creditors*. — See note 1.
- (8) *Effect of Direction in Bill to "Notify"* — No Authority to Deliver Without Production of Bill of Lading. — See note 3.
- 206.** (9) *Bill of Lading Attached to Draft*. — See note 1.

On Surrender of the Bill of Lading by the consignee, the carrier must deliver to the consignee's order. National Newark Banking Co. v. Delaware, etc., R. Co., 70 N. J. L. 774.

**200.** 3. Bank Receiving Bill of Lading as Security for Advances. — Grayson County Nat. Bank v. Nashville, etc., R. Co., (Tex. Civ. App. 1904) 79 S. W. Rep. 1094; Pullman First Nat. Bank v. Northern Pac. R. Co., 28 Wash. 439.

**201.** 1. Carrier Liable Unless Negligence of Owner Intervenes. — Raleigh, etc., R. Co. v. Lowe, 101 Ga. 320.

2. Reason of Rule. — See Raleigh, etc., R. Co. v. Lowe, 101 Ga. 320.

3. Transferee Takes Only Rights Which Transferor Had. — Mairs v. Baltimore, etc., R. Co., 73 N. Y. App. Div. 265, affirmed 175 N. Y. 409.

**202.** 3. Carrier May Require Production of Bill of Lading. — Schlichting v. Chicago, etc., R. Co., 121 Iowa 502; Ryan v. Great Northern R. Co., 90 Minn. 12.

Carrier Cannot Require Surrender of Bill of Lading. — Cuero First Nat. Bank v. San Antonio, etc., Pass. R. Co., 97 Tex. 201.

4. Grayson County Nat. Bank v. Nashville, etc., R. Co., (Tex. Civ. App. 1904) 79 S. W. Rep. 1094.

5. Repeal of Statute. — In Mairs v. Baltimore, etc., R. Co., 73 N. Y. App. Div. 265, affirmed 175 N. Y. 409, it was held that the right to a civil action under the statute was taken away by its repeal in sections 629 and 633 of the Penal Code, and, there being no provision for a civil action in the re-enactment, no right of civil action resulted from a delivery to the consignee without surrender of the bill of lading.

**203.** 1. Failure to Require Surrender of Bill of Lading on Delivery of Goods. — Chicago, etc., R. Co. v. Fifth Nat. Bank, 26 Ind. App. 600; National Commercial Bank v. Lackawanna Transp. Co., 172 N. Y. 596, affirming 59 N. Y. App. Div. 270; Pullman First Nat. Bank v. Northern Pac. R. Co., 28 Wash. 439. See also Schlichting v. Chicago, etc., R. Co., 121 Iowa 502.

On Consignee's Request for Change of Destination. — The carrier may refuse to change the destination of the goods at the request of the consignee without production of the bill of lading. Ryan v. Great Northern R. Co., 90 Minn. 12.

Carrier Not Liable When Delivery Took Place Prior to Transfer. — Mairs v. Baltimore, etc., R. Co., 73 N. Y. App. Div. 265, affirmed 175 N. Y.

409; National Commercial Bank v. Lackawanna Transp. Co., 59 N. Y. App. Div. 270, affirmed 172 N. Y. 596.

**205.** 1. Merchants' Exch. Bank v. McGraw, (C. C. A.) 76 Fed. Rep. 930; Lewis v. Springville Banking Co., 166 Ill. 311; Ayres v. Dorsey Produce Co., 101 Iowa 141, 63 Am. St. Rep. 376; Kansas City First Nat. Bank v. Mt. Pleasant Milling Co., 103 Iowa 518; Shaffer v. Rhynders, 116 Iowa 472; Temple Nat. Bank v. Louisville Cotton Oil Co., 82 S. W. Rep. 253, 26 Ky. L. Rep. 518; Willard Mfg. Co. v. Tierney, 133 N. Car. 630.

3. No Authority for Dispensing with Production of Bill of Lading. — Southern R. Co. v. Atlanta Nat. Bank, (C. C. A.) 112 Fed. Rep. 861; Florida Cent., etc., R. Co. v. Berry, 116 Ga. 19; Western, etc., R. Co. v. Ohio Valley Banking, etc., Co., 107 Ga. 512; Wright, etc., Wire Cloth Co. v. Warren, 177 Mass. 283; Schwarzschild, etc., Co. v. Savannah, etc., R. Co., 76 Mo. App. 623; Grayson County Nat. Bank v. Nashville, etc., R. Co., (Tex. Civ. App. 1904) 79 S. W. Rep. 1094. See also Horner v. Missouri Pac. R. Co., 70 Mo. App. 285. But see Nebraska Meal Mills v. St. Louis, Southwestern R. Co., 64 Ark. 169, 62 Am. St. Rep. 183, distinguishing Furman v. Union Pac. R. Co., 106 N. Y. 579, and Colgate v. Pennsylvania R. Co., 102 N. Y. 120, stated in the original note; Witt v. East Tennessee, etc., R. Co., 99 Tenn. 442.

**206.** 1. Draft Must First Be Paid. — The Prussia, 100 Fed. Rep. 484; Nebraska Meal Mills v. St. Louis Southwestern R. Co., 64 Ark. 169, 62 Am. St. Rep. 183; Coker v. Memphis First Nat. Bank, 112 Ga. 71; Western, etc., R. Co. v. Ohio Valley Banking, etc., Co., 107 Ga. 512; Marshall, etc., Grain Co. v. Kansas City, etc., R. Co., 176 Mo. 480, 98 Am. St. Rep. 508; Grayson County Nat. Bank v. Nashville, etc., R. Co., (Tex. Civ. App. 1904) 79 S. W. Rep. 1094; St. Louis Southwestern R. Co. v. Hall, etc., Woodworking Mach. Co., 23 Tex. Civ. App. 211. See also St. Louis, etc., R. Co. v. Miller, (Tex. Civ. App. 1904) 79 S. W. Rep. 43; Fowler Commission Co. v. Chicago, etc., R. Co., 98 Mo. App. 210.

Action for Injury to Goods. — Until the draft is paid the consignee, not being the owner, cannot maintain an action for injury to the goods. Cudahy Packing Co. v. Dorsey, 26 Tex. Civ. App. 484.

If the Draft Is Paid, the production of the bill of lading is not required. Witt v. East Tennessee, etc., R. Co., 99 Tenn. 442.



**207.** If the Seller Has Negotiated the Draft to Third Parties. — See note 1.

(11) *Duplicate Bills of Lading* — Where There Is No Such Provision. — See note 4.

**208.** (12) *Necessity of Indorsement of Bill of Lading* — (a) In General — Must Be Indorsed. — See note 2.

**209.** Where Right of Disposition of Goods Retained by Consignor. — See note 1.

(b) Effect of Custom. — See note 3.

Delivery to Holder of Invoice. — See note 4.

g. MISDELIVERY — (1) In General. — See note 6.

**210.** Fraud upon Carrier. — See note 2.

**211.** Custom. — See note 1.

Liability Rests upon Contract. — See note 2.

Identification of Claimant. — See note 3.

**212.** When Liable for Negligence Only. — See note 2.

(2) *Where There Are Two Persons of Same Name*. — See note 3.

4. Place of Delivery — a. GENERALLY — In the Absence of a Statute or Special Contract. — See note 5.

Authority from the Seller to deliver to the consignee without requiring production of the bill of lading will relieve the carrier in a question with the seller. *Schwarzschild, etc., Co. v. Savannah, etc., R. Co.*, 76 Mo. App. 623.

**207. 1. Draft Negotiated to Third Party.** — *Western, etc., R. Co. v. Ohio Valley Banking, etc., Co.*, 107 Ga. 512.

**4. Where There Is No Such Provision.** — *St. Louis, etc., R. Co. v. Adams*, 4 Kan. App. 305.

**208. 2. When Bill of Lading Must Be Indorsed.** — *Compare American Zinc, etc., Co. v. Markle Lead Works*, 102 Mo. App. 158.

**209. 1. Where Consignor Retains Right of Disposition over Goods.** — *Hamilton v. Chicago, etc., R. Co.*, 103 Iowa 325; *Sonn v. Smith*, 57 N. Y. App. Div. 372.

**3. Delivery on Unindorsed Bill of Lading.** — *Western, etc., R. Co. v. Ohio Valley Banking, etc., Co.*, 107 Ga. 512, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209. See also *American Zinc, etc., Co. v. Markle Lead Works*, 102 Mo. App. 158.

**4. Delivery to Holder of Invoice.** — *Schlichting v. Chicago, etc., R. Co.*, 121 Iowa 502. See also *Bernstein v. New York, etc., R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 971.

**6. Carrier Liable Absolutely** — *United States*. — *Southern R. Co. v. Atlanta Nat. Bank*, (C. C. A.) 112 Fed. Rep. 861.

*California*. — *Germain Fruit Co. v. California Southern R. Co.*, 133 Cal. 426.

*Georgia*. — *Bruhl v. Coleman*, 113 Ga. 1102.

*Iowa*. — *Schlichting v. Chicago, etc., R. Co.*, 121 Iowa 502.

*Kentucky*. — *Louisville, etc., R. Co. v. Ft. Wayne Electric Co.*, 108 Ky. 113.

*Massachusetts*. — *Wright, etc., Wire Cloth Co. v. Warren*, 177 Mass. 283.

*Missouri*. — *Marshall, etc., Grain Co. v. Kansas City, etc., R. Co.*, 176 Mo. 480, 98 Am. St. Rep. 508.

*New York*. — *Marrus v. New Haven Steamboat Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 421, reversing (N. Y. City Ct. Gen. T.) 60 N. Y. Supp. 994; *Security Trust Co. v. Wells, etc., Express*, 81 N. Y. App. Div. 426, affirmed 178 N. Y. 620; *Richer v. Fargo*, 77 N. Y. App. Div. 550; *Schlesinger v. New York, etc., R.*

*Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 372.

*Ohio*. — *Oskamp v. Southern Express Co.*, 61 Ohio St. 341.

Subsequent Acceptance by the consignee of the goods constitutes waiver of the carrier's liability for the misdelivery. *Hayman v. Canadian Pac. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 74.

**210. 2. Fraud Practiced on Carrier.** — *Bruhl v. Coleman*, 113 Ga. 1102; *Louisville, etc., R. Co. v. Ft. Wayne Electric Co.*, 108 Ky. 113; *Security Trust Co. v. Wells, etc., Express*, 81 N. Y. App. Div. 426, affirmed 178 N. Y. 620; *Sinsheimer v. New York Cent., etc., R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 45; *Oskamp v. Southern Express Co.*, 61 Ohio St. 341. At least where there is negligence of the carrier. *Pacific Express Co. v. Critzer*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1017.

**211. 1. Delivery According to Custom No Defense.** — *See Sinsheimer v. New York Cent., etc., R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 45.

**2. The Question of Negligence or Want of Care.** — *Cleveland, etc., R. Co. v. Wright*, 25 Ind. App. 525; *Schlichting v. Chicago, etc., R. Co.*, 121 Iowa 502; *Wright, etc., Wire Cloth Co. v. Warren*, 177 Mass. 283. But see *Pacific Express Co. v. Hertzberg*, 17 Tex. Civ. App. 100; *Pacific Express Co. v. Critzer*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1017.

**3. Identification of Consignee.** — *Sinsheimer v. New York Cent., etc., R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 45. See also *Security Trust Co. v. Wells, etc., Express*, 81 N. Y. App. Div. 426, affirmed 178 N. Y. 620.

**212. 2. Where Relation of Carrier and Consignee Does Not Exist.** — *Missouri Pac. R. Co. v. Weil*, 8 Kan. App. 839.

**3. Where There Are Two Persons of Same Name.** — *Lake Shore, etc., R. Co. v. Luce*, 5 Ohio Cir. Dec. 145, 11 Ohio Cir. Ct. 543; *Southern Express Co. v. Oskamp*, 7 Ohio Cir. Dec. 417, 14 Ohio Cir. Ct. 176; *Seibert v. Philadelphia, etc., R. Co.*, 15 Pa. Super. Ct. 435.

**5. At Station to Which Goods Are Marked.** — *Chicago, etc., R. Co. v. Kendall*, 72 Ill. App. 105; *D. Klass Commission Co. v. Wabash R.*

- 214.** Delivery Must Be at Reasonably Safe and Convenient Place. — See note 1.  
 Waiver by Consignee. — See note 2.  
*b.* RIGHT OF OWNER OR CONSIGNEE TO CHANGE PLACE OF DELIVERY — Change by Owner during Transit. — See note 3.
- 215.** Presumption of Ownership — Consignee Directing Change. — See note 3.  
 Notice that Consignee Is Not Owner. — See note 4.
- 216.** *c.* GRAIN — STATUTES REQUIRING DELIVERY AT PARTICULAR ELEVATOR — The Common-law Rule. — See note 4.  
*d.* WHERE POINT OF DESTINATION IS NOT ON CARRIER'S LINE. — See note 7.
- Evidence Conflicting — Question for Jury. — See note 8.
- 217.** 5. Time of Delivery — Reasonable Time. — See note 1.  
 Time of Day. — See note 4.
- 218.** Inclemency of Weather. — See note 1.
6. When Personal Delivery Requisite — Special Contract — Usage. — See note 3.
- Express Companies. — See note 4.
- 219.** But Since the Introduction of Railroads. — See note 1.
7. In Case of Carriers by Water — Delivery at Wharf. — See note 3.
- 220.** Notice of Arrival of Goods — Storing. — See note 1.

Co., 80 Mo. App. 164; Ft. Worth Transfer Co. v. Isaacs, (Tex. Civ. App. 1897) 40 S. W. Rep. 39.

Delivery at Place Not a Station — Special Contract. — Hewlett v. Burrell, (C. C. A.) 105 Fed. Rep. 80; Hill v. St. Louis Southwestern R. Co., 67 Ark. 402; Cleveland, etc., R. Co. v. Potts, 33 Ind. App. 564.

**214.** 1. Delivery Must Be at Reasonably Safe and Convenient Place. — D. Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164; Gary v. Wells, etc., Express, (Tex. Civ. App. 1897) 40 S. W. Rep. 845; Normile v. Northern Pac. R. Co., 36 Wash. 21.

2. Waiver of Wrongful Delivery — Acceptance. — See Normile v. Northern Pac. R. Co., 36 Wash. 21.

3. Owner May Direct Change in Place of Delivery. — Soper v. Tyler, 77 Conn. 104; Western, etc., R. Co. v. Ohio Valley Banking, etc., Co., 107 Ga. 512, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 214.

A Purchasing Agent cannot change the destination of cattle consigned to his principal, while in transit. Lake Shore, etc., R. Co. v. National Live Stock Bank, 178 Ill. 506.

Cannot Add to Burdens of Carrier. — The right of diversion cannot add to the burdens of the carrier, or require it to do more than comply with a proper and legal demand therefor. Ryan v. Great Northern R. Co., 90 Minn. 12, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 214.

**215.** 3. Instructions from Consignee. — Western, etc., R. Co. v. Ohio Valley Banking, etc., Co., 107 Ga. 512, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 215; Southern Express Co. v. Williams, 99 Ga. 482.

4. Notice that Consignee Is Not Owner. — Western, etc., R. Co. v. Ohio Valley Banking, etc., Co., 107 Ga. 512, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 214, 215.

Carrier May Require Evidence of Ownership. — The carrier may require from the consignee production of the bill of lading or other evidence of ownership to entitle him to the right

of diversion. Ryan v. Great Northern R. Co., 90 Minn. 12.

**216.** 4. Galesburg, etc., R. Co. v. West, 108 Ill. App. 504.

7. Carrier's Duty Where Point of Destination Not on Its Line. — Louisville, etc., R. Co. v. Bernheim, 113 Ala. 489.

8. Question for Jury. — See Louisville, etc., R. Co. v. Bernheim, 113 Ala. 489.

**217.** 1. Houston, etc., R. Co. v. Trammell, 28 Tex. Civ. App. 312, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 217.

4. Must Be at Reasonable Hour of Day. — Houston, etc., R. Co. v. Trammell, 28 Tex. Civ. App. 312, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 217.

**218.** 1. On Stormy Day. — See Houston, etc., R. Co. v. Trammell, 28 Tex. Civ. App. 312.

3. Where There Is a Special Contract or Custom. — Burr v. Adams Express Co., (N. J. 1904) 58 Atl. Rep. 609.

4. Actual Personal Delivery Required of Carriers Holding Themselves Out as Willing to Make Such Delivery. — Gary v. Wells, etc., Express, (Tex. Civ. App. 1897) 40 S. W. Rep. 845.

Actual Delivery in Customary Manner Sufficient. — Aldrich Car-Seal Mfg. Co. v. American Express Co., 117 Mich. 32.

**219.** 1. Carriers by Railway Not Bound to Make Delivery to Consignee Personally. — Ft. Worth Transfer Co. v. Isaacs, (Tex. Civ. App. 1897) 40 S. W. Rep. 39.

3. Not Bound to Deliver at Consignee's Residence or Place of Business. — See Sonia Cotton Oil Co. v. Steamer Red River, 106 La. 42, 87 Am. St. Rep. 294.

**220.** 1. Mere Landing on Wharf Not a Delivery — Notice Essential. — The Titania, 124 Fed. Rep. 975, affirmed (C. C. A.) 131 Fed. Rep. 229; Reiss v. Texas, etc., R. Co., 98 Fed. Rep. 533, 39 C. C. A. 149, affirmed 99 Fed. Rep. 1006, 39 C. C. A. 680.

Notice May Be Waived. — Illinois Cent. R. Co. v. Carter, 165 Ill. 570.

Delivery May Be Fixed by Special Contract. —

**220.** Goods Must Be Within Reach of Owner. — See note 2.

**221.** 8. Where Consignee Refuses to Receive — Mere Delay in Delivery. — See note 1.

Consignee's Duty — Measure of Damages. — See note 2.

Total Loss — Removal Unsafe — Unreasonable Conditions. — See note 3.

**222.** See note 1.

Carrier's Duty When Consignee Will Not Receive Goods — Lien. — See note 3.

Notice to Consignor — Storing — Enforcement of Lien. — See note 4.

**224.** 9. Goods Sent C. O. D. — Right of Inspection. — See note 7.

**225.** Responsibility for Return of Price. — See note 1.

**226.** Reasonable Time to Consignee to Call and Pay for Goods. — See note 1.

**228.** 11. Statutory Penalties for Refusing to Deliver — The Statute Is a Penal One. — See note 3.

**230.** 12. Demand by Consignee — General Rule. — See note 1.

Where Demand Not Necessary. — See note 2.

*Smith v. Britain Steamship Co.*, 123 Fed. Rep. 176.

**220.** 2. Consignee Must Be Able to Reach Property. — *Sonia Cotton Oil Co. v. Steamer Red River*, 106 La. 42, 87 Am. St. Rep. 294.

Delivery at Usual Wharf Sufficient. — *McCaughn v. Milliot*, 78 Miss. 976.

**221.** 1. Consignee Cannot Refuse Merely Because of Delay. — *Gulf, etc., R. Co. v. Everett*, (Tex. Civ. App. 1904) 83 S. W. Rep. 257; *Gulf, etc., R. Co. v. Pitts*, (Tex. Civ. App. 1904) 83 S. W. Rep. 727; *St. Louis Southwestern R. Co. v. Tyler Coffin Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 826; *Beedy v. Pacey*, 22 Wash. 94; *Ryland v. Chesapeake, etc., R. Co.*, 55 W. Va. 181.

**2.** Consignee's Duty. — *Frederick v. Louisville, etc., R. Co.*, 133 Ala. 486; *Silverman v. St. Louis, etc., R. Co.*, 51 La. Ann. 1785; *Brand v. Weir*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 213; *Southern Pac. R. Co. v. Booth*, (Tex. Civ. App. 1897) 39 S. W. Rep. 585; *St. Louis Southwestern R. Co. v. Cates*, 15 Tex. Civ. App. 135.

The Consignee Must Prove Material Deterioration on account of the carrier's negligence. *Herrf, etc., Chemical Co. v. Lackawanna Line*, 100 Mo. App. 164.

A Consignee Is Not Bound to Receive at the Point of Transshipment goods which a connecting carrier refused to receive on account of damage while in the possession of the initial carrier. *Gulf, etc., R. Co. v. A. B. Frank Co.*, (Tex. Civ. App. 1898) 48 S. W. Rep. 210.

**3.** Where Damage to Goods Amounts to a Total Loss the consignee may refuse to receive them. *Brand v. Weir*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 213, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 221.

Where a machine is so damaged in transit that the cost of repairs would amount to a considerable proportion of its value, and expert witnesses refuse to say that it would work more satisfactorily after being repaired, the consignee may refuse to receive it and hold the carrier liable for its value. *Dick v. East Coast R. Co.*, Sc. Ct. of Sess., 4 F. 178.

**222.** 1. Where Carrier Imposes Unreasonable Conditions. — *Florida Cent., etc., R. Co. v. Berry*, 116 Ga. 10.

**3.** May Store Subject to Lien for Charges. — *Gulf City Constr. Co. v. Louisville, etc., R. Co.*, 121 Ala. 621; *Florida Cent., etc., R. Co.*

*v. Berry*, 116 Ga. 19; *Illinois Cent. R. Co. v. Carter*, 165 Ill. 570; *Sonia Cotton Oil Co. v. Steamer Red River*, 106 La. 42, 87 Am. St. Rep. 294; *Manhattan Rubber Shoe Co. v. Chicago, etc., R. Co.*, 9 N. Y. App. Div. 172.

**4.** Duty to Store Safely. — See *Florida Cent., etc., R. Co. v. Berry*, 116 Ga. 19; *Hirsch v. Platt*, (Supm. Ct. App. T.) 89 N. Y. Supp. 362.

Delay in Sending Notice. — The carrier will be liable in damages for delay in sending notice to the consignor. *Fishman v. Platt*, (Supm. Ct. App. T.) 90 N. Y. Supp. 354.

When the Consignee Has Given Notice to the Consignor notice by the carrier need not be given. *Manhattan Rubber Shoe Co. v. Chicago, etc., R. Co.*, 9 N. Y. App. Div. 172.

Where the Carrier Cannot Find the Consignor he is under no liability for failure to give notice. *Walsh v. Adams Express Co.*, 15 Pa. Super. Ct. 292.

Where the Shipper Is Owner and Consignee no notice is necessary. *Beedy v. Pacey*, 22 Wash. 94.

**224.** 7. Consignee's Right to Inspect Goods. — *Hardy v. American Express Co.*, 182 Mass. 328; *Brand v. Weir*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 213.

**225.** 1. Remittance Does Not Relieve from Liability of Damage. — The remittance of the price does not relieve the carrier from liability for damage, if notice thereof is given within a reasonable time. *Hardy v. American Express Co.*, 182 Mass. 328.

**226.** 1. Must Allow Consignee Reasonable Time in Which to Pay. — *Houston, etc., R. Co. v. Trammell*, 28 Tex. Civ. App. 312, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225.

**228.** 3. Michigan Statute — Parties. — The shipper, and not a connecting carrier to whom freight is consigned, is the proper party to sue for the penalty. *Crosby v. Pere Marquette R. Co.*, 131 Mich. 288, 9 Detroit Leg. N. 310.

**230.** 1. Demand Necessary. — *Jarrett v. Great Northern R. Co.*, 74 Minn. 477, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 230; *St. Louis Southwestern R. Co. v. Tyler Coffin Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 826; *St. Louis, etc., R. Co. v. Akers*, (Tex. Civ. App. 1903) 73 S. W. Rep. 848; *Ryland v. Chesapeake, etc., R. Co.*, 55 W. Va. 181.

**2.** When Demand Unnecessary. — *Chicago, etc., R. Co. v. Fifth Nat. Bank*, 26 Ind. App. 690.

- 230.** 13. Waiver of Right of Action for Wrongful Delivery. — See note 3.  
An Acceptance of the Goods. — See note 4.
- 231.** 14. Carrier's Right to Demand Receipt upon Delivery — Right of Inspection. — See note 5.
- 232.** VII. CONVERSION BY CARRIER. — See note 1.  
Rights and Duty of Consignee After Conversion. — See note 2.  
Failure to Deliver to Proper Party — Unreasonable Conditions. — See notes 3, 4.  
Carrying to Wrong Point. — See note 6.  
But a Mere Delay in the Delivery of Goods. — See note 7.
- 233.** Receiving from One with Apparent Right of Disposition. — See note 1.  
Goods Retained by Virtue of Carrier's Lien. — See note 2.  
Slight Interference — Injury Capable of Repair. — See note 3.  
Wrongful Disposition — Wilful Intent. — See note 5.

**230.** 3. Southern R. Co. v. Kinchen, 103 Ga. 186.

**4.** Acceptance of Goods a Waiver. — The St. Georg, (C. C. A.) 104 Fed. Rep. 898.

**231.** 5. Instruction to Notify. — An instruction in a bill of lading "to notify" entitles the party to be notified to the right of inspection. Sloan v. Carolina Cent. R. Co., 126 N. Car. 487.

**232.** 1. Cleveland, etc., R. Co. v. Potts, 33 Ind. App. 564; Missouri, etc., R. Co. v. Rines, (Tex. Civ. App. 1905) 84 S. W. Rep. 1092.

**Right to Action.** — A seller cannot maintain an action for conversion against the carrier when the title to the goods has passed to the purchaser: McLaughlin v. Martin, 12 Colo. App. 268.

**2.** Marshall, etc., Grain Co. v. Kansas City, etc., R. Co., 176 Mo. 480, 98 Am. St. Rep. 508.

**3.** Failure to Deliver to Proper Party. — Downing v. Outerbridge, (C. C. A.) 79 Fed. Rep. 931; Raleigh, etc., R. Co. v. Lowe, 101 Ga. 320. See also United States Express Co. v. Hammer, 21 Ind. App. 186; Chicago, etc., R. Co. v. Fifth Nat. Bank, 126 Ind. App. 600; Cleveland, etc., R. Co. v. Wright, 25 Ind. App. 525; Hamilton v. Chicago, etc., R. Co., 103 Iowa 325; Schlichting v. Chicago, etc., R. Co., 121 Iowa 502; Wright, etc., Wire Cloth Co. v. Warren, 177 Mass. 283; Collins v. Illinois Cent. R. Co., 94 Mo. App. 130; Frazier v. Atchison, etc., R. Co., 104 Mo. App. 355; Sonn v. Smith, 57 N. Y. App. Div. 372; St. Louis Southwestern R. Co. v. Hall, etc., Woodworking Mach. Co., 23 Tex. Civ. App. 211.

**4.** Refusal to Deliver Except upon Unreasonable Conditions. — Manda v. Wells, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 308; Cuero First Nat. Bank v. San Antonio, etc., Pass. R. Co., 97 Tex. 201.

**6.** Transporting to Wrong Point. — Security Trust Co. v. Wells, etc., Express, 81 N. Y. App. Div. 426, affirmed 178 N. Y. 620; Oskamp v. Southern Express Co., 61 Ohio St. 341; Missouri, etc., R. Co. v. Seley, 31 Tex. Civ. App. 158; Liefert v. Galveston, etc., R. Co., (Tex. Civ. App. 1900) 57 S. W. Rep. 899.

**7.** Mere Delay Not Necessarily Conversion. — Merz v. Chicago, etc., R. Co., 86 Minn. 33; Gulf, etc., R. Co. v. Darby, 28 Tex. Civ. App. 229; St. Louis Southwestern R. Co. v. Tyler Coffin Co., (Tex. Civ. App. 1904) 81 S. W. Rep. 826; Ryland v. Chesapeake, etc., R. Co., 55 W. Va. 181. See also Wabash R. Co. v. House, 101 Ill. App. 397.

A conversion is not worked by delay in delivery by a station agent who had reasonable doubt whether a charge for detention of the goods was lawful, Hett v. Boston, etc., R. Co., 69 N. H. 139; nor by a deviation resulting in failure of the consignee to receive prompt notice of arrival, Southern Pac. R. Co. v. Booth, (Tex. Civ. App. 1897) 39 S. W. Rep. 585.

**233.** 1. Receiving Goods from One Not the Owner. — Robert C. White Live Stock Commission Co. v. Chicago, etc., R. Co., 87 Mo. App. 330.

**2.** Shewalter v. Missouri Pac. R. Co., 84 Mo. App. 589.

**3.** Interference Not Amounting to Conversion. — Where the consignee refuses to receive goods on account of damage, it is not conversion for the carrier to have the boxes containing the goods broken open to discover the damage. Silverman v. St. Louis, etc., R. Co., 51 La. Ann. 1785.

Where grain is carried past the shelling point and sold unshelled, the remedy is not by action of conversion, but for the difference in the market value shelled and unshelled, less the expense of shelling. Redmon v. Chicago, etc., R. Co., 90 Mo. App. 68.

**But Taking Goods Out of Bond Without Authority,** whereby they are made of less value at the point of destination, makes the carrier liable in actual damages. Smith v. New Orleans, etc., R. Co., 106 La. 11, 87 Am. St. Rep. 285.

**5.** Wrongful Disposition or Wilful Withholding Necessary. — Buston v. Pennsylvania R. Co., 116 Fed. Rep. 235, affirmed (C. C. A.) 119 Fed. Rep. 808; Shewalter v. Missouri Pac. R. Co., 84 Mo. App. 589; Hett v. Boston, etc., R. Co., 69 N. H. 139; Manda v. Wells, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 308; Rubin v. Wells Fargo Express Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 1108; Fishman v. Platt, (Supm. Ct. App. T.) 90 N. Y. Supp. 354; St. Louis Southwestern R. Co. v. Tyler Coffin Co., (Tex. Civ. App. 1904) 81 S. W. Rep. 826. See also Wabash R. Co. v. House, 101 Ill. App. 397.

**Honest Mistake No Excuse.** — An honest mistake of the carrier's servants in appropriating the consignee's coal will not affect the latter's right of redress for the conversion. Frazier v. Atchison, etc., R. Co., 104 Mo. App. 355.

**Failure to Return the Goods to the Consignor** after refusal to receive by the consignee on account of delay is not a conversion. Louisville, etc., R. Co. v. Heilprin, 95 Ill. App. 492.

**233.** Prepayment of Charges. — See note 7.

**234.** VIII. LIABILITY FOR LOSS OR DAMAGE — 2. Act of God — Accidents Avoidable by Ordinary Care. — See note 3.

Unprecedented Floods. — See note 4.

**235.** When Casualty Could Have Been Avoided by Exercise of Ordinary Prudence. — See note 1.

Proximate Cause — Incidental Losses. — See notes 4, 5.

**237.** 4. Seizure by Court Process — *a.* ATTACHMENT — When Process Valid. — See note 3.

**238.** When Process Void. — See note 1.

**239.** When Goods Attachable. — See note 2.

Duty of Carrier. — See note 4.

**240.** *b.* GARNISHMENT — A Defense when Proceedings Valid. — See note 5.

**241.** Goods in Transit or Beyond Jurisdiction. — See note 1.

5. Seizure under Police Regulations. — See note 4.

**242.** But in Order to Protect the Carrier. — See note 1.

6. Inherent Nature of Goods. — See note 2.

**243.** 7. Carrier's Duty in Such Cases — Ordinary Care and Prudence. — See note 1.

**244.** If the Goods Are Seized under Legal Process. — See note 1.

In the Event the Goods Are in Danger from a Mob. — See note 2.

**233.** 7. See *Frazier v. Atchison, etc.*, R. Co., 104 Mo. App. 355.

**234.** 3. *Missouri, etc.*, R. Co. *v. Truskett*, (C. C. A.) 104 Fed. Rep. 728; *Pierce v. Southern Pac. R. Co.*, 120 Cal. 156; *Reed v. Wilmington Steamboat Co.*, 1 Marv. (Del.) 193; *Farley v. Lavary*, 107 Ky. 523.

4. *Wald v. Pittsburg, etc.*, R. Co., 162 Ill. 545, 53 Am. St. Rep. 332.

A Heavy Fall of Dew will not relieve the carrier. *Missouri, etc.*, R. Co. *v. Truskett*, 2 Indian Ter. 633.

**235.** 1. *Pierce v. Southern Pac. R. Co.*, 120 Cal. 156; *Nelson v. Great Northern R. Co.*, 28 Mont. 297.

4. Such Case Must Have Been Proximate Cause of Loss. — *Wald v. Pittsburg, etc.*, R. Co., 162 Ill. 545, 53 Am. St. Rep. 332; *Jones v. Minneapolis, etc.*, R. Co., 91 Minn. 229.

5. Question for Jury. — *Burnham v. Alabama, etc.*, R. Co., 81 Miss. 46.

**237.** 3. Where Process Valid. — *Indiana, etc.*, R. Co. *v. Doremeyer*, 20 Ind. App. 605, 67 Am. St. Rep. 264; *Cleveland, etc.*, R. Co. *v. Wright*, 25 Ind. App. 525; *Merz v. Chicago, etc.*, R. Co., 86 Minn. 33; *Hett v. Boston, etc.*, R. Co., 69 N. H. 139; *Santa Fe Pac. R. Co. v. Bossut*, 10 N. Mex. 322.

Carrier's Wrongful Act. — The seizure must not be a consequence of the carrier's wrongful act. *Western, etc.*, R. Co. *v. Ohio Valley Banking, etc.*, Co., 107 Ga. 512.

**238.** 1. Invalid Process. — *Hamilton v. Chicago, etc.*, R. Co., 103 Iowa 325; *Merz v. Chicago, etc.*, R. Co., 86 Minn. 33.

**239.** 2. When Property in Hands of Carrier Attachable. — *Storey v. Hershey*, 19 Pa. Super. Ct. 485.

4. Notice of Seizure Must Be Given to Owner Promptly. — *Pennsylvania Co. v. Canadian Pac. R. Co.*, 107 Ill. App. 386; *Indiana, etc.*, R. Co. *v. Doremeyer*, 20 Ind. App. 605, 67 Am. St. Rep. 264; *Merz v. Chicago, etc.*, R. Co., 86 Minn. 33; *Hett v. Boston, etc.*, R. Co., 69 N.

H. 139; *Frank v. Central R. Co.*, 9 Pa. Super. Ct. 129.

**240.** 5. Garnishment a Defense to Action by Shipper for Refusal to Deliver. — *Santa Fe Pac. R. Co. v. Bossut*, 10 N. Mex. 322.

**241.** 1. Cannot Be Garnished as to Goods in Transit. — *Baldwin v. Great Northern R. Co.*, 81 Minn. 247, 83 Am. St. Rep. 370.

4. Goods Seized under Police Regulations. — *Southern R. Co. v. Heymann*, 118 Ga. 616; *Graham v. Northern Pac. Express Co.*, 89 Minn. 193.

Detention for Customs Duties. — See *Pennsylvania Co. v. Canadian Pac. R. Co.*, 107 Ill. App. 386.

**242.** 1. When Such Seizure Is a Defense. — *Western, etc.*, R. Co. *v. Ohio Valley Banking, etc.*, Co., 107 Ga. 512.

2. Carrier Not Liable for Loss from Inherent Nature of Goods. — *Klair v. Wilmington Steamboat Co.*, 4 Penn. (Del.) 51; *Cash v. Wabash R. Co.*, 81 Mo. App. 109; *Missouri, etc.*, R. Co. *v. Mazzie*, (Tex. Civ. App. 1902) 68 S. W. Rep. 56; *Norfolk, etc.*, R. Co. *v. Reeves*, 97 Va. 284.

Further Statement of Rule. — The carrier is not liable for an injury to goods caused by inherent latent defect in the goods themselves, the existence of which was unknown both to the sender and to the carrier; and this is true though in the course of the transit the carrier's servants may have done some act contributing to the injury. *Lister v. Lancashire, etc.*, R. Co., (1903) 1 K. B. 878.

**243.** 1. To Use Ordinary Care. — *Cincinnati, etc.*, R. Co. *v. Webb*, 103 Ky. 705; *Burnham v. Alabama, etc.*, R. Co., 81 Miss. 46; *Nelson v. Great Northern R. Co.*, 28 Mont. 297; *Faucher v. Wilson*, 68 N. H. 338.

**244.** 1. *Nelson v. Great Northern R. Co.*, 28 Mont. 297.

2. Mob — Duty of Carrier to Resist. — *Alexander v. Pennsylvania R. Co.*, 7 Pa. Super. Ct. 183, 42 W. N. C. (Pa.) 187.

**244. IX. LIABILITY FOR DELAY — 1. In General — The Duty Implied by Law**

— Reasonable Time. — See note 3.

**245.** See note 1.

**246.** What Is Such Reasonable Time. — See note 1.

The Circumstances to Be Considered. — See note 2.

**247.** See note 1.

Question for Jury. — See note 2.

**248.** Unusual Time Required Not Conclusive of Culpable Delay. — See note 1.

Delivery in Usual Time According to Custom — Prima Facie Reasonable. — See note 2.

**249.** 2. Effect of Special Contract. — See note 2.

**250.** Parol Evidence. — See note 2.

3. Effect of Special Instructions by Shipper. — See note 3.

**251.** 4. Statute Requiring Prompt Forwarding of Freight. — See note 1.

**252.** 5. Perishable Freights — Rule Stricter than in Case of Ordinary Freight. — See note 2.

**253.** 6. Proximate Cause. — See note 4.

**244. 3. The General Rule — United States.** — The Prussia, 100 Fed. Rep. 484, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 244; The Hiram, 101 Fed. Rep. 138; Central Trust Co. v. Savannah, etc., R. Co., 69 Fed. Rep. 683.

Georgia. — Florida Cent., etc., R. Co. v. Berry, 116 Ga. 19.

Kentucky. — Felton v. McCreary-McClellan Live-Stock Co., 59 S. W. Rep. 744, 22 Ky. L. Rep. 1058; Louisville, etc., Packet Co. v. Bottorff, (Ky. 1904) 77 S. W. Rep. 920.

Nebraska. — Denman v. Chicago, etc., R. Co., 52 Neb. 140.

Pennsylvania. — Alexander v. Pennsylvania R. Co., 7 Pa. Super. Ct. 183, 42 W. N. C. (Pa.) 181.

Texas. — San Antonio, etc., R. Co. v. Josey, (Tex. Civ. App. 1903) 71 S. W. Rep. 606; Missouri, etc., R. Co. v. Jenkins, (Tex. Civ. App. 1904) 80 S. W. Rep. 428; Gulf, etc., R. Co. v. Pitts, (Tex. Civ. App. 1904) 83 S. W. Rep. 727.

West Virginia. — Lewis v. Chesapeake, etc., R. Co., 47 W. Va. 656, 81 Am. St. Rep. 816.

**Beyond Own Line.** — The carrier is liable for the consequences of its unreasonable delay occurring beyond its own line. San Antonio, etc., R. Co. v. Thompson, (Tex. Civ. App. 1902) 66 S. W. Rep. 792.

**245. 1. Carrier Bound to Carry Only Within Reasonable Time.** — Thompson v. Alabama Midland R. Co., 122 Ala. 378; Choctaw, etc., R. Co. v. Walker, 71 Ark. 571; St. Louis, etc., R. Co. v. Coolidge, (Ark. 1904) 83 S. W. Rep. 333; Adams Express Co. v. Bratton, 106 Ill. App. 563; Brooks v. Delaware, etc., R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 961; Gulf, etc., R. Co. v. Baugh, (Tex. Civ. App. 1897) 42 S. W. Rep. 245; St. Louis Southwestern R. Co. v. Cates, 15 Tex. Civ. App. 135; Norfolk, etc., R. Co. v. Reeves, 97 Va. 284.

**246. 1. As Affected by Special Contract.** — See Missouri, etc., R. Co. v. Webb, 20 Tex. Civ. App. 431.

**2. Circumstances to Be Considered in Determining Question of Reasonable Time.** — St. Louis, etc., R. Co. v. Coolidge, (Ark. 1904) 83 S. W. Rep. 333; Belcher v. Missouri, etc., R. Co., 92 Tex. 593.

**247. 1. Character of Freight Must Be Con-**  
sidered. — Lewis v. Chesapeake, etc., R. Co., 47 W. Va. 656, 81 Am. St. Rep. 816.

**2. Question for Jury.** — Adams Express Co. v. Bratton, 106 Ill. App. 563; Sloop v. Wabash R. Co., (Mo. App. 1904) 84 S. W. Rep. 111; Louisville, etc., Packet Co. v. Bottorff, 77 S. W. Rep. 920, 25 Ky. L. Rep. 1324; Burnham v. Alabama, etc., R. Co., 81 Miss. 46. See also Belcher v. Missouri, etc., R. Co., 92 Tex. 593, reversing (Tex. Civ. App. 1898) 47 S. W. Rep. 384, 1020; Bosley v. Baltimore, etc., R. Co., 54 W. Va. 563, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 247.

**248. 1. Unusual Time Required Not Conclusive of Culpable Delay.** — The Nutmeg State, 103 Fed. Rep. 797; Denman v. Chicago, etc., R. Co., 52 Neb. 140.

**2. Fact that Transportation Is in Usual Time Prima Facie Evidence.** — Choctaw, etc., R. Co. v. Walker, 71 Ark. 571; Johnston v. Chicago, etc., R. Co., (Neb. 1903) 97 N. W. Rep. 479.

**249. 2. Contract to Deliver Within Fixed Time — Carrier Liable Absolutely.** — The Protection, (C. C. A.) 102 Fed. Rep. 516; Cleveland, etc., R. Co. v. Heath, 22 Ind. App. 47; Shelby v. Missouri Pac. R. Co., 77 Mo. App. 205.

**250. 2. Parol Evidence to Show Agreement to Ship on a Certain Train Inadmissible.** — See Yazoo, etc., R. Co. v. Wilson, 83 Miss. 224.

**3. Subsequent Instructions.** — Notice given subsequent to the time when the contract was made, though in time to prevent delay, will not modify the contract or render the carrier liable in damages. Bradley v. Chicago, etc., R. Co., 94 Wis. 44.

**251. 1. The North Carolina Statute does not limit the carrier's common-law liability for negligence.** Parker v. Atlantic Coast Line R. Co., 133 N. Car. 335.

**252. 2. Where Freight Is Perishable.** — Wilson v. Canadian Development Co., 9 British Columbia 82, reversed 33 Can. Sup. Ct. 432, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252.

**253. 4. Delay Must Have Been Proximate Cause of Injury.** — The Nutmeg State, 103 Fed. Rep. 797; Popham v. Barnard, 77 Mo. App. 619; Texas, etc., R. Co. v. Bigham, (Tex. Civ. App. 1902) 67 S. W. Rep. 522; International,

**254.** 8. Excuses for Delay — *a.* GENERALLY — In Absence of Special Contract. — See note 3.

**255.** Prima Facie Case — Burden of Proof. — See note 2.

Unusual Flood — Carrier's Duty. — See note 3.

If the Obstruction Is Known to the Carrier. — See note 5.

**256.** *b.* ACCUMULATION OF CARS AND FREIGHT — Reasonable Care. — See note 3.

Unusual and Unexpected Pressure. — See note 5.

**257.** *d.* STRIKES BY EMPLOYEES — Where Operation of Trains Impracticable. — See note 2.

**258.** 9. Limitation of Liability for Delay. — See note 3.

10. Carrier's Duty During Delay. — See note 5.

**259.** 11. Delay Concurring with Inevitable Accident — View that Carrier Is Liable. — See note 1.

View that Carrier Is Not Liable. — See note 2.

**260.** See note 1.

Justification. — See note 3.

**261.** X. CARRIER'S LIABILITY AS WAREHOUSEMAN — 1. When It Exists — *a.* BEFORE TRANSPORTATION COMMENCED — Goods to Be Forwarded in Usual Course of Business. — See note 1.

Goods Retained at Shipper's Instance. — See note 2.

etc., *R. Co. v. Bergman*, (Tex. Civ. App. 1901) 64 S. W. Rep. 999; *Gulf, etc., R. Co. v. Darby*, 28 Tex. Civ. App. 229; *Belcher v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1898) 47 S. W. Rep. 384, 1020, *reversed* on other grounds 92 Tex. 593; *Texas Cent. R. Co. v. Dorsey*, 30 Tex. Civ. App. 377; *Hunt v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1903) 74 S. W. Rep. 69; *Missouri, etc., R. Co. v. Jenkins*, (Tex. Civ. App. 1904) 80 S. W. Rep. 428; *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778. See also *Texas, etc., R. Co. v. Smith*, (Tex. Civ. App. 1904) 79 S. W. Rep. 614.

**254.** 3. Carrier Liable Only for Negligent Delay in Absence of Special Contract. — *Gulf, etc., R. Co. v. Compton*, (Tex. Civ. App. 1896) 38 S. W. Rep. 220.

**255.** 2. *Parker v. Atlantic Coast Line R. Co.*, 133 N. Car. 335, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 254; *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 254, both cases supporting the whole text paragraph.

**3.** Unprecedented Floods. — *Burnham v. Alabama, etc., R. Co.*, 81 Miss. 46.

When Exercise of Reasonable Care Might Have Saved Delay. — *Nelson v. Great Northern R. Co.*, 28 Mont. 297, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 255; *Missouri, etc., R. Co. v. Davidson*, 25 Tex. Civ. App. 134.

Heavy Fog. — See *The Nutmeg State*, 103 Fed. Rep. 797.

**5.** Obstruction No Defense Where Carrier Knew of It When Goods Were Received. — *Nelson v. Great Northern R. Co.*, 28 Mont. 297, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 255; *Houston, etc., R. Co. v. Houx*, 15 Tex. Civ. App. 502.

**256.** 3. *D. Klass Commission Co. v. Wash R. Co.*, 80 Mo. App. 164, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 256.

**5.** Where Carrier, Knowing of Obstruction, Promises Delivery. — Where the carrier's agent,

knowing of an obstruction, promises delivery, and so prevents the consignee from coming to take delivery, the carrier is liable. *Southern R. Co. v. Deakins*, 107 Tenn. 522.

**257.** 2. Rebuttal Evidence of Strike. — The plaintiff may introduce evidence as to a strike in rebuttal. *Parker v. Atlantic Coast Line R. Co.*, 133 N. Car. 335.

**258.** 3. Delay Resulting from Negligence. — *Nelson v. Great Northern R. Co.*, 28 Mont. 297, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 255.

**5.** Must Use Reasonable Care. — See *Texas Cent. R. Co. v. Dorsey*, 30 Tex. Civ. App. 377, declaring the duty of the carrier to ice perishable goods in case of delay notwithstanding instructions by the consignor not to ice.

**259.** 1. View that Carrier Is Liable. — *Savannah, etc., R. Co. v. Commercial Guano Co.*, 103 Ga. 590; *Parrill v. Cleveland, etc., R. Co.*, 23 Ind. App. 638; *Plotz v. Miller*, (Ky. 1899) 51 S. W. Rep. 176; *Grier v. St. Louis Merchants Bridge Terminal R. Co.*, 108 Mo. App. 565.

**2.** View that Carrier Is Not Liable. — *Yazoo, etc., R. Co. v. Millsaps*, 76 Miss. 855, 71 Am. St. Rep. 543; *International, etc., R. Co. v. Bergman*, (Tex. Civ. App. 1901) 64 S. W. Rep. 999, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 259; *Gulf, etc., R. Co. v. Darby*, 28 Tex. Civ. App. 229; *Hunt v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1903) 74 S. W. Rep. 69; *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778.

**260.** 1. *Cleveland, etc., R. Co. v. Heath*, 22 Ind. App. 47.

**3.** Where Carrier Might Have Foreseen Danger of Delay. — *Farmer's L. & T. Co. v. Northern Pac. R. Co.*, 120 Fed. Rep. 873, 57 C. C. A. 533; *Jones v. Minneapolis, etc., R. Co.*, 91 Minn. 229. See also *Yazoo, etc., R. Co. v. Millsaps*, 76 Miss. 855, 71 Am. St. Rep. 543.

**261.** 1. *Missouri Pac. R. Co. v. Riggs*, 10 Kan. App. 578, 62 Pac. Rep. 712, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 261.

**2.** Shipment Delayed at Instance of Owner. —

**261.** Where Something Remains to Be Done by Shipper. — See note 3.

**263.** *c.* AFTER TRANSPORTATION ENDED — (1) *Massachusetts Doctrine*.

— See note 5.

**265.** (2) *New Hampshire Rule*. — See notes 1, 2.

**267.** (3) *English Decisions*. — See note 1.

**269.** (4) *Origin of Differences* — Proper Criterion. — See note 4.

**270.** (6) *What Is a Reasonable Time* — (a) Generally — Reasonable Time Defined.

— See note 3.

Question for Jury. — See note 4.

**271.** Instances. — See note 1.

**272.** Reasonable Time Begins Only After Notice or Knowledge. — See note 1.

**273.** Offer to Deliver and Refusal to Receive. — See note 2.

Missouri Pac. R. Co. v. Riggs, 10 Kan. App. 578, 62 Pac. Rep. 712, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 261; Fisher v. Lake Shore, etc., R. Co., 9 Ohio Cir. Dec. 413, 17 Ohio Cir. Ct. 491.

**261.** 3. Where Something Remains to Be Done by Shipper. — Dixon v. Central of Georgia R. Co., 110 Ga. 173, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 261; Missouri Pac. R. Co. v. Riggs, 10 Kan. App. 578, 62 Pac. Rep. 712, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 261.

The Test Whether the Carrier Is Acting as a Warehouseman. — Snelling v. Yetter, 25 N. Y. App. Div. 590.

**263.** 5. Georgia. — Georgia, etc., R. Co. v. Pound, 111 Ga. 6.

Illinois. — Schumacher v. Chicago, etc., R. Co., 207 Ill. 199, affirming 108 Ill. App. 520; Chicago, etc., R. Co. v. Dorsey Fuel Co., 112 Ill. App. 382.

Missouri. — Herf, etc., Chemical Co. v. Lackawanna Line, 70 Mo. App. 274.

South Carolina. — In South Carolina there must be a storage. Hipp v. Southern R. Co., 50 S. Car. 129.

Tennessee. — In Tennessee the carrier's liability as warehouseman does not begin until the goods are deposited in the depot or warehouse; and notice must be given to the consignee. Pennsylvania R. Co. v. Naive, (Tenn. 1904) 79 S. W. Rep. 124.

**265.** 1. Common Carrier by Water. — The M. C. Currie, 132 Fed. Rep. 125.

2. Alabama. — Tallassee Falls Mfg. Co. v. Western R. Co., 128 Ala. 167.

Kansas. — Missouri Pac. R. Co. v. Newberger, 67 Kan. 846.

Michigan. — Stapleton v. Grand Trunk R. Co., 133 Mich. 187, 10 Detroit Leg. N. 133.

Mississippi. — New Orleans, etc., R. Co. v. George, 82 Miss. 710; Alabama, etc., R. Co. v. Pounder, 82 Miss. 568; Gulf, etc., R. Co. v. Horton, 84 Miss. 490.

New Jersey. — The *New Hampshire* doctrine obtains in New Jersey. Burr v. Adams Express Co., 71 N. J. L. 265, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 263-267, and explaining Morris, etc., R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215, cited in 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 264.

Texas. — See Houston, etc., R. Co. v. Trammell, 28 Tex. Civ. App. 312, holding that the liability was not reduced from that of carrier to that of warehouseman where certain cattle were tendered at an unreasonable hour and in

bad weather. Compare St. Louis, etc., R. Co. v. Akers, (Tex. Civ. App. 1903) 73 S. W. Rep. 848.

Washington. — Normile v. Northern Pac. R. Co., 36 Wash. 21.

West Virginia. — In West Virginia the rule is that a railroad company is liable as an insurer during a reasonable time after the arrival of the goods for the consignee to obtain knowledge of their arrival and to remove them; but the carrier is under no duty to notify the consignee of their arrival. Berry v. West Virginia, etc., R. Co., 44 W. Va. 538, 67 Am. St. Rep. 781, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 263 [265].

**267.** 1. English Doctrine. — Poindron v. American Express Co., 12 Quebec K. B. 311, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 267.

**269.** 4. Hardman v. Montana Union R. Co., (C. C. A.) 83 Fed. Rep. 88; Texas, etc., R. Co. v. Clayton, (C. C. A.) 84 Fed. Rep. 305.

**270.** 3. What Is Reasonable Time. — Gulf City Constr. Co. v. Louisville, etc., R. Co., 121 Ala. 621; Missouri Pac. R. Co. v. Newberger, 67 Kan. 846; Burr v. Adams Express Co., (N. J. 1904) 58 Atl. Rep. 609.

4. Question for Jury. — Tallassee Falls Mfg. Co. v. Western R. Co., 128 Ala. 167; Missouri Pac. R. Co. v. Newberger, 63 Kan. 884, 65 Pac. Rep. 655; Burr v. Adams Express Co., (N. J. 1904) 58 Atl. Rep. 609; Laporte v. Wells, etc., Express, 23 N. Y. App. Div. 267; Berry v. West Virginia, etc., R. Co., 44 W. Va. 538, 67 Am. St. Rep. 781, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 270; Bosley v. Baltimore, etc., R. Co., 54 W. Va. 563, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 270.

Where the Facts Are Undisputed, it is a question of law. Denver, etc., R. Co. v. Peterson, 30 Colo. 77, 97 Am. St. Rep. 76; Normile v. Northern Pac. R. Co., 36 Wash. 21.

**271.** 1. Instances of Reasonable Time. — Six days has been held to be a reasonable time. Tallassee Falls Mfg. Co. v. Western R. Co., 128 Ala. 167.

What Is Not Reasonable Time. — See Stapleton v. Grand Trunk R. Co., 133 Mich. 187; Normile v. Northern Pac. R. Co., 36 Wash. 21.

**272.** 1. When Reasonable Time Begins. — See Tallassee Falls Mfg. Co. v. Western R. Co., 128 Ala. 167; Grieve v. New York Cent., etc., R. Co., 25 N. Y. App. Div. 518.

**273.** 2. Offer by Carrier to Deliver Goods. — Levy v. Weir, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 361.



**273.** Consignee's Distance from Receiving Depot. — See note 3.

**274.** Generally Reasonable Time Does Not Begin to Run until Goods Unloaded. — See note 1.

Where It Is Consignee's Duty to Unload. — See note 2.

**275.** (b) Effect of Carrier's Refusal to Deliver. — See note 2.

Consignee Wrongly Informed that Goods Have Not Arrived. — See note 5.

**277.** (c) Notice to Consignee — *aa*. NECESSITY OF NOTICE — Notice Held Not Essential. — See note 2.

Reasons for This View. — See note 3.

**278.** View that Notice Is Essential. — See notes 1, 2.

Statutes Requiring Notice. — See note 3.

**279.** Ignorance of Name and Address — Effect of Usage. — See note 2.

Special Contract Requiring Notice. — See note 4.

Carriers by Water. — See note 5.

**280.** *bb*. SUFFICIENCY OF NOTICE. — See note 2.

The Burden of Proof. — See note 3.

**273.** 3. Fact that Consignee Resides at a Distance Not to Be Considered. — *Denver, etc., R. Co. v. Peterson*, 30 Colo. 77, 97 Am. St. Rep. 76; *Schumacher v. Chicago, etc., R. Co.*, 207 Ill. 199; *Stapleton v. Grand Trunk R. Co.*, 133 Mich. 187, 10 Detroit Leg. N. 133. See also *Chicago, etc., R. Co. v. Dorsey Fuel Co.*, 112 Ill. App. 382.

**274.** 1. Goods Must Have Been Unloaded. — *D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 274.

**2.** Goods Unloaded Directly from Cars. — *Baltimore, etc., R. Co. v. Fisher*, 5 Ohio Dec. 659.

**275.** 2. *Thyll v. New York, etc., R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 175, modified 92 N. Y. App. Div. 513.

**5.** Where Consignee Calls for Goods and Is Wrongly Informed that They Have Not Arrived. — *Thyll v. New York, etc., R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 175, modified 92 N. Y. App. Div. 513; *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 67 Am. St. Rep. 781, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 275.

**277.** 2. *Alabama*. — As to the rule by statute see *Louisville, etc., R. Co. v. Johnson*, 135 Ala. 232. Compare *Alabama Midland R. Co. v. Darby*, 119 Ala. 531.

*Illinois*. — *Schumacher v. Chicago, etc., R. Co.*, 207 Ill. 199; *Chicago, etc., R. Co. v. Kendall*, 72 Ill. App. 105; *Illinois Cent. R. Co. v. Carter*, 165 Ill. 570.

*Missouri*. — *Herf, etc., Chemical Co. v. Lackawanna Line*, 70 Mo. App. 274.

See also *supra*, this title, **263**, 4 *et seq.*

**3.** Consignee Should Be Advised by Shipper — Special Notice Often Impracticable. — *Poindron v. American Express Co.*, 12 Quebec K. B. 311, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 277.

**278.** 1. Notice Essential. — *Welch v. Concord R. Co.*, 68 N. H. 206.

**2.** *Raleigh, etc., R. Co. v. Lowe*, 101 Ga. 320; *Stapleton v. Grand Trunk R. Co.*, 133 Mich. 187; *Alabama, etc., R. Co. v. Pounder*, 82 Miss. 568; *Gulf, etc., R. Co. v. Horton*, 84 Miss. 490; *Burr v. Adams Express Co.*, (N. J. 1904) 58 Atl. Rep. 609; *Diamant v. Long Island R. Co.*, (Supm. Ch. App. T.) 30 Misc. (N. Y.) 444; *Allam v. Pennsylvania R. Co.*, 183 Pa.

St. 174; *Southern Pac. R. Co. v. Booth*, (Tex. Civ. App. 1897) 39 S. W. Rep. 585; *Normile v. Northern Pac. R. Co.*, 36 Wash. 21. See also *Missouri Pac. R. Co. v. Newberger*, 63 Kan. 884, 65 Pac. Rep. 655.

**3.** Notice Required by Statute — *Tennessee*. — *Pennsylvania R. Co. v. Naive*, (Tenn. 1904) 79 S. W. Rep. 124.

*Alabama*. — The incorporation of the town need not be shown. *Louisville, etc., R. Co. v. Johnson*, 135 Ala. 232.

**279.** 2. Usage Dispensing with Notice. — *Diamant v. Long Island R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 444; *Pennsylvania R. Co. v. Naive*, (Tenn. 1904) 79 S. W. Rep. 124. *Contra, Gulf, etc., R. Co. v. Horton*, 84 Miss. 490.

Usage and Contract Dispensing with Notice. — *Allam v. Pennsylvania R. Co.*, 183 Pa. St. 174.

A Usage to Give Notice will bind the carrier. *Alabama, etc., R. Co. v. Pounder*, 82 Miss. 568; *Herf, etc., Chemical Co. v. Lackawanna Line*, 100 Mo. App. 164; even though the law does not require notice, *Herf, etc., Chemical Co. v. Lackawanna Line*, 70 Mo. App. 274. See also *Georgia, etc., R. Co. v. Pound*, 111 Ga. 6; *G. S. Roth Clothing Co. v. Maine Steamship Co.*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 237.

**4.** Carrier Bound by Contract to Give Notice. — *Herf, etc., Chemical Co. v. Lackawanna Line*, 100 Mo. App. 164; *Missouri, etc., R. Co. v. Jenkins*, (Tex. Civ. App. 1904) 80 S. W. Rep. 428.

A Special Contract Dispensing with Notice will govern. *Diamant v. Long Island R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 444.

**5.** Carriers by Water Always Bound to Give Notice to Consignee. — *The Titania*, 124 Fed. Rep. 975, affirmed (C. C. A.) 131 Fed. Rep. 229.

Waiver by Usage. — *Illinois Cent. R. Co. v. Carter*, 165 Ill. 570.

**280.** 2. Actual Notice Sufficient. — *Normile v. Northern Pac. R. Co.*, 36 Wash. 21.

Postal-card Notice Sufficient. — *Friedman v. Metropolitan Steamship Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 383.

Time of Notice and Actual Receipt Questions for Jury. — *Herf, etc., Chemical Co. v. Lackawanna Line*, 100 Mo. App. 164.

**3.** Compare *Herf, etc., Chemical Co. v. Lackawanna*

**281.** (a) Notice to Consignor — Notice to Consignor Required. — See note 3.

d. CONNECTING CARRIERS. — See note 4.

2. Burden of Proof on Carrier. — See note 5.

**283.** 3. Rule as Affected by Special Contract or Usage — Evidence of a Usage of Business. — See note 1.

Goods to Be Kept until Called For. — See note 4.

**284.** 4. Duty of Carrier as Warehouseman — a. DUTY TO STORE SAFELY. — See note 1.

Storage in Particular Warehouse. — See note 3.

b. LIABILITY FOR NEGLIGENCE — (1) *Generally* — Warehouseman Liable for Want of Ordinary Care. — See note 5.

**286.** Inevitable Accident and Irresistible Force. — See notes 1, 2, 4.

wanna Line, 78 Mo. App. 305, 2 Mo. App. Rep. 317.

**281. 3. Notice to Consignor Required.** — Levy *v.* Weir, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 361; Missouri, etc., R. Co. *v.* Jenkins, (Tex. Civ. App. 1904) 80 S. W. Rep. 428.

**4. Connecting Carriers.** — See Texas, etc., R. Co. *v.* Clayton, 173 U. S. 348, *affirming* 84 Fed. Rep. 305, 51 U. S. App. 676; Bosworth *v.* Chicago, etc., R. Co., (C. C. A.) 87 Fed. Rep. 72; Reiss *v.* Texas, etc., R. Co., (C. C. A.) 98 Fed. Rep. 533; Felton *v.* Central of Georgia R. Co., 114 Ga. 609; Pennsylvania Co. *v.* Dickson, 31 Ind. App. 451; Thomas *v.* Frankfort, etc., R. Co., 116 Ky. 879; Washburn Crosby Co. *v.* Boston, etc., R. Co., 180 Mass. 252; James S. Davis Clothing Co. *v.* Merchants' Dispatch Transp. Co., 106 Mo. App. 487; Osterhoudt *v.* Southern Pac. R. Co., 47 N. Y. App. Div. 146; Farnsworth *v.* New York Cent., etc., R. Co., 88 N. Y. App. Div. 320; Taffe *v.* Oregon R. Co., 41 Oregon 64; Sutton *v.* Chicago, etc., R. Co., 14 S. Dak. 111; Post *v.* Southern R. Co., 103 Tenn. 184; Missouri, etc., R. Co. *v.* Leibold (Tex. Civ. App. 1900) 55 S. W. Rep. 368; Lewis *v.* Chesapeake, etc., R. Co., 47 W. Va. 656, 81 Am. St. Rep. 816.

**Where No Means of Public Transportation from Terminus.** — See Texas, etc., R. Co. *v.* Reiss, 183 U. S. 621; Texas, etc., R. Co. *v.* Callender, 183 U. S. 632.

**While Goods "Await Further Conveyance."** — The bill of lading may limit an initial carrier's liability while the goods "await further conveyance" to that of warehouseman. Courteen *v.* Kanawha Dispatch, 110 Wis. 610.

**5. Burden on Company to Prove It Is Liable as Warehouseman Only.** — Washburn Crosby Co. *v.* Boston, etc., R. Co., 180 Mass. 252.

**283. 1. Usage Not Allowed to Vary a Special Contract.** — Tallassee Falls Mfg. Co. *v.* Western R. Co., 128 Ala. 167.

**4. Goods to Be Held until Called For.** — Levy *v.* Weir, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 361.

**Direction to Hold Goods.** — Liability as a carrier ceases when the consignor, on the consignee's refusal to receive the goods, directs the company to hold them until called for. Byrne *v.* Fargo, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 543.

**284. 1. Duty to Store and Keep Safely.** — Hipp *v.* Southern R. Co., 50 S. Car. 129; Ft. Worth, etc., R. Co. *v.* Garrison, (Tex. Civ. App. 1904) 79 S. W. Rep. 611; Lake Erie, etc., R. Co. *v.* Sales, 26 Can. Sup. Ct. 663.

**Where There Is No Suitable Warehouse** goods may be kept stored in the cars. Schumacher *v.* Chicago, etc., R. Co., 108 Ill. App. 520, *affirmed* 207 Ill. 199.

**3. Storage in Particular Warehouse.** — Laporte *v.* Wells, etc., Express, 23 N. Y. App. Div. 267.

**5. Ordinary Care.** — Marande *v.* Texas, etc., R. Co., (C. C. A.) 102 Fed. Rep. 246; Judd *v.* New York, etc., Steamship Co., (C. C. A.) 117 Fed. Rep. 206, *affirmed* 128 Fed. Rep. 7, 62 C. C. A. 515; Buston *v.* Pennsylvania R. Co., (C. C. A.) 119 Fed. Rep. 808; Diamond Joe Line *v.* Carter, 76 Ill. App. 470; Missouri Pac. R. Co. *v.* Riggs, 10 Kan. App. 578; Cox *v.* Central Vermont R. Co., 170 Mass. 129; Byrne *v.* Fargo, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 543; Grieve *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 518; Laporte *v.* Wells, etc., Express, 23 N. Y. App. Div. 267; Ft. Worth Transfer Co. *v.* Isaacs, (Tex. Civ. App. 1897) 40 S. W. Rep. 39; Grand Trunk R. Co. *v.* Frankel, 33 Can. Sup. Ct. 115. See also The Titania, 124 Fed. Rep. 975, *affirmed* (C. C. A.) 131 Fed. Rep. 229.

**286. 1. Accidental Fire.** — Judd *v.* New York, etc., Steamship Co., (C. C. A.) 117 Fed. Rep. 206, *affirmed* 128 Fed. Rep. 7, 62 C. C. A. 515; Marande *v.* Texas, etc., R. Co., (C. C. A.) 102 Fed. Rep. 246; Brunswick Grocery Co. *v.* Brunswick, etc., R. Co., 106 Ga. 270, 71 Am. St. Rep. 249; Welch *v.* Concord R. Co., 68 N. H. 206; Grieve *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 518; King *v.* New Brunswick, etc., Steamboat Co., (Supm. Ct. App. T.) 36 Misc. (N. Y.) 555; Walker *v.* Eikleberry, 7 Okla. 599; Texas Cent. R. Co. *v.* Flanary, (Tex. Civ. App. 1898) 45 S. W. Rep. 214; Texas Cent. R. Co. *v.* Flanary, (Tex. Civ. App. 1899) 50 S. W. Rep. 726.

**Want of Care Shown.** — See Chicago, etc., R. Co. *v.* Bosworth, 179 U. S. 442; Hunting Elevator Co. *v.* Bosworth, 179 U. S. 415.

**2. Goods Stolen.** — Indiana, etc., R. Co. *v.* Doremeyer, 20 Ind. App. 605, 67 Am. St. Rep. 264; Byrne *v.* Fargo, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 543.

**Wrongful Refusal to Receive for Shipment.** — The carrier will be liable for the theft of goods temporarily stored in its warehouse where it has wrongfully refused to receive them for shipment. Seasongood *v.* Tennessee, etc., Transp. Co., (Ky. 1899) 54 S. W. Rep. 193.

**4. Unprecedented Storm.** — Gulf, etc., R. Co. *v.* North Texas Grain Co., (Tex. Civ. App. 1903) 74 S. W. Rep. 567.

**286.** No Charge Made for Storage. — See note 5.

**287.** Not Gratuitous until After Reasonable Time for Delivery. — See note 1.

The Carrier Has a Right to Charge for Storage. — See note 2.

Burden on Consignee to Show Negligence. — See note 4.

**288.** (2) *Statute Making Railroad Company Liable for Losses by Fire.* — See note 1.

**XI. LIMITATION OF LIABILITY — 1. The General Doctrine.** — See note 2.

**289.** 2. How Effected — *a.* BY PUBLIC NOTICE. — Regulation of Declaration of Value. — See note 1.

**290.** Express Assent of Shipper Necessary — General Rule. — See note 3.

**291.** Contrary View — Express Assent Unnecessary. — See note 1.

**292.** *b.* BY SPECIAL CONTRACT — (1) *General Rule.* — See note 2.

**293.** (2) *What Constitutes Such a Contract* — (a) *Acceptance of Receipt or Bill of Lading* — United States. — See note 4.

**286.** 5. Where Storage Is Gratuitous. — Texas Cent. R. Co. *v.* Flahary, (Tex. Civ. App. 1899) 50 S. W. Rep. 726; Texas Cent. R. Co. *v.* Flahary, (Tex. Civ. App. 1898) 45 S. W. Rep. 214; Grand Trunk R. Co. *v.* Frankel, 33 Can. Sup. Ct. 115.

**287.** 1. See Missouri Pac. R. Co. *v.* Weil, 8 Kan. App. 839.

2. *Carrier's Right to Charge Storage.* — Schumacher *v.* Chicago, etc., R. Co., 207 Ill. 199.

When the Goods Are Wrongfully Detained by the carrier no claim for storage will lie. Southern Pac. Co. *v.* Redding, 17 Tex. Civ. App. 440.

4. *Burden of Proof.* — Frederick *v.* Louisville, etc., R. Co., 133 Ala. 486; Kansas City, etc., R. Co. *v.* Sharp, 64 Ark. 115; Chicago, etc., R. Co. *v.* Kendall, 72 Ill. App. 105; Grieve *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 518.

Where the Goods Are Not Accounted For, negligence will be presumed. Aaronson *v.* Pennsylvania R. Co., (Supm. Ct. App. T.) 23 Misc. (N. Y.) 666.

**288.** 1. Walker *v.* Eikleberry, 7 Okla. 599. And see Fire Assoc. *v.* Loeb, 25 Tex. Civ. App. 24.

2. *Limitation of Liability — General Rule — United States.* — Cunard Steamship Co. *v.* Kelley, (C. C. A.) 115 Fed. Rep. 678; Charnock *v.* Texas, etc., R. Co., 194 U. S. 432; Cau *v.* Texas, etc., R. Co., 194 U. S. 427; The Henry B. Hyde, 82 Fed. Rep. 681.

Alabama. — Louisville, etc., R. Co. *v.* Landers, 135 Ala. 504.

Connecticut. — Mears *v.* New York, etc., R. Co., 75 Conn. 171, 96 Am. St. Rep. 193.

Georgia. — Cooper *v.* Raleigh, etc., R. Co., 110 Ga. 659, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 288; Central of Georgia R. Co. *v.* Murphey, 116 Ga. 863.

Indiana. — Evansville, etc., R. Co. *v.* Kevekordes, (Ind. App. 1904) 69 N. E. Rep. 1022.

Iowa. — Burgher *v.* Chicago, etc., R. Co., 105 Iowa 335.

Kentucky. — Louisville, etc., R. Co. *v.* Chestnut, 115 Ky. 43.

Maine. — Morse *v.* Canadian Pac. R. Co., 97 Me. 77.

Massachusetts. — Cox *v.* Central Vermont R. Co., 170 Mass. 129.

Minnesota. — O'Malley *v.* Great Northern R. Co., 86 Minn. 380, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 288.

Missouri. — Wyrick *v.* Missouri, etc., R. Co., 74 Mo. App. 406; Nenno *v.* Chicago, etc., R. Co., 105 Mo. App. 540.

Montana. — Nelson *v.* Great Northern R. Co., 28 Mont. 297.

New Hampshire. — Welch *v.* Concord R. Co., 68 N. H. 206.

New York. — American Hay Co. *v.* Bath, etc., R. Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 341.

Ohio. — Stevens *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 168, 20 Ohio Cir. Ct. 41.

Pennsylvania. — Menner *v.* Delaware, etc., Canal Co., 7 Pa. Super. Ct. 135; Davenport *v.* Pennsylvania R. Co., 10 Pa. Super. Ct. 47.

South Carolina. — Dunbar *v.* Charleston, etc., R. Co., 62 S. Car. 414.

Tennessee. — Nashville, etc., R. Co. *v.* Stone, (Tenn. 1904) 79 S. W. Rep. 1031.

Wisconsin. — Courteen *v.* Kanawha Dispatch, 110 Wis. 610; Ullman *v.* Chicago, etc., R. Co., 112 Wis. 150, 88 Am. St. Rep. 949; Fremont, etc., R. Co. *v.* New York, etc., R. Co., 66 Neb. 159.

Canada. — McMorrin *v.* Canadian Pac. R. Co., 1 Ont. L. Rep. 561.

**289.** 1. In Georgia and South Carolina, under statutes, the carrier's liability can be limited only by an express contract. Central of Georgia R. Co. *v.* Kavanaugh, (C. C. A.) 92 Fed. Rep. 56; Mathis *v.* Southern R. Co., 65 S. Car. 271.

**290.** 3. *Rule that Express Assent Necessary.* — The Majestic, 166 U. S. 375; McElveen *v.* Southern R. Co., 109 Ga. 249, 77 Am. St. Rep. 371.

**291.** 1. *Rule that Express Assent Unnecessary.* — Klair *v.* Wilmington Steamboat Co., 4 Penn. (Del.) 51; Graves *v.* Adams Express Co., 176 Mass. 280.

**292.** 2. *Carrier May Limit Liability.* — Newberger Cotton Co. *v.* Illinois Cent. R. Co., 75 Miss. 303; American Grocery Co. *v.* Staten Island Rapid Transit R. Co., (Supm. Ct. App. T.) 23 Misc. (N. Y.) 356; Schaller *v.* Chicago, etc., R. Co., 97 Wis. 31.

Montana Statute. — See Nelson *v.* Great Northern R. Co., 28 Mont. 297.

**293.** 4. *Shipper's Acceptance of Receipt or Bill of Lading Held Binding on Him — United States.* — Charnock *v.* Texas, etc., R. Co., 194 U. S. 432, affirming (C. C. A.) 113 Fed. Rep. 92; Cau *v.* Texas, etc., R. Co., 194 U. S. 427, affirming (C. C. A.) 113 Fed. Rep. 91; Calderon

**294. Shipper's Knowledge or Assent.**— See note 1.

Presumption. — See note 2.

**295. Fraud.** — See note 1.

In Illinois and Ohio. — See note 2.

Georgia Statute. — See note 3.

**296. (b) Special Contract Must Be Express — Custom.** — See note 1.(3) *Where More than One Shipping Contract Exists.* — See note 4.**297. (4) Conflict of Oral and Written Agreements — Presumption.** — See note 1.*v. Atlas Steamship Co.*, (C. C. A.) 69 Fed. Rep. 574; *The Henry B. Hyde*, 82 Fed. Rep. 681.*Alabama.* — *Mouton v. Louisville, etc.*, R. Co., 128 Ala. 537.*Connecticut.* — *Mears v. New York, etc.*, R. Co., 75 Conn. 171, 96 Am. St. Rep. 193.*Indiana.* — *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279.*Massachusetts.* — *Cox v. Central Vermont R. Co.*, 170 Mass. 129, citing 2 [5] AM. AND ENG. ENCYC. OF LAW (2d ed.) 292-294; *Graves v. Adams Express Co.*, 176 Mass. 280.*New York.* — *Mills v. Weir*, 82 N. Y. App. Div. 396.*Ohio.* — *Cincinnati, etc.*, R. Co. *v. Berdan*, 12 Ohio Cir. Dec. 481, 22 Ohio Cir. Ct. 326.*Wisconsin.* — *Ullman v. Chicago, etc.*, R. Co., 112 Wis. 150, 88 Am. St. Rep. 949.**Acceptance of a Receipt** referring to the regular bill of lading will bind the shipper by the limitations in the latter. *Dunbar v. Charleston, etc.*, R. Co., 62 S. Car. 414.**Authority of Agent Presumed.** — The authority of an agent who ships goods to agree to a limitation of the carrier's liability by acceptance of the bill of lading will be presumed. *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279.**Acceptance and Assent.** — The bill of lading must have been accepted and assented to. *Cleveland, etc.*, R. Co. *v. Potts*, 33 Ind. App. 564.**294. 1. Shipper's Assent to or Knowledge of Stipulation in Receipt Not Necessary to Be Shown** — *Alabama.* — *Mouton v. Louisville, etc.*, R. Co., 128 Ala. 537.*Indiana.* — See *Cleveland, etc.*, R. Co. *v. Potts*, 33 Ind. App. 564.*Massachusetts.* — *Cox v. Central Vermont R. Co.*, 170 Mass. 129, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 292-294.*New York.* — *Wilson v. Platt*, (Supm. Ct. App. T.) 84 N. Y. Supp. 143; *Mills v. Weir*, 82 N. Y. App. Div. 396; *Bernstein v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 635; *Dobson v. Central R. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 582. But compare *Springer v. Westcott*, 166 N. Y. 117; *Walker v. Platt*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 799; *Rosenthal v. Weir*, 170 N. Y. 148; *Strong v. Long Island R. Co.*, 91 N. Y. App. Div. 442.*Wisconsin.* — *Schaller v. Chicago, etc.*, R. Co., 97 Wis. 31.See also *Cau v. Texas, etc.*, R. Co., (C. C. A.) 113 Fed. Rep. 91, affirmed 194 U. S. 427, holding that a shipper who himself filled out bills of lading at his office, before their signature by the carrier, and who had previously shipped under similar bills of lading, was chargeable with knowledge of their contents;*Charnock v. Texas, etc.*, R. Co., (C. C. A.) 113 Fed. Rep. 92, affirmed 194 U. S. 432, following the case last cited. But see *New York, etc.*, R. Co. *v. Sayles*, (C. C. A.) 87 Fed. Rep. 444; *Doyle v. Baltimore, etc.*, R. Co., 126 Fed. Rep. 841; *O'Malley v. Great Northern R. Co.*, 86 Minn. 380; *Newberger Cotton Co. v. Illinois Cent. R. Co.*, 75 Miss. 303.**Rule in Texas.** — *St. Louis Southwestern R. Co. v. McIntyre*, (Tex. Civ. App. 1904) 82 S. W. Rep. 346.In *Nebraska* express assent of the shipper is necessary. *Pennsylvania R. Co. v. Kennard Glass, etc.*, Co., 59 Neb. 435.**2. Shipper Presumed to Have Read and Assented to Receipt.** — *Evansville, etc.*, R. Co. *v. Kevekordes*, (Ind. App. 1904) 69 N. E. Rep. 1022. See also *Cox v. Central Vermont R. Co.*, 170 Mass. 129. Compare *The Majestic*, 166 U. S. 375; *Jennings v. Smith*, 99 Fed. Rep. 189.**Question for Jury.** — *Sayles v. New York, etc.*, R. Co., 81 Fed. Rep. 326, affirmed (C. C. A.) 87 Fed. Rep. 444; *Doyle v. Baltimore, etc.*, R. Co., 126 Fed. Rep. 841.**295. 1. In Case of Fraud.** — *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518.**2. Rule in Illinois.** — *Illinois Cent. R. Co. v. Carter*, 165 Ill. 570; *Elgin, etc.*, R. Co. *v. Bates Mach. Co.*, 98 Ill. App. 311, affirmed 200 Ill. 636, 93 Am. St. Rep. 218; *Adams Express Co. v. Bratton*, 106 Ill. App. 563; *Atchison, etc.*, R. Co. *v. Bilinsky*, 107 Ill. App. 504.*In Ohio.* — See *Mack v. Great Western Dispatch*, 2 Ohio Cir. Dec. 22. But see *Cincinnati, etc.*, R. Co. *v. Berdan*, 12 Ohio Cir. Dec. 481, 22 Ohio Cir. Ct. 326.**3. In Georgia.** — *Central of Georgia R. Co. v. Kavanaugh*, (C. C. A.) 92 Fed. Rep. 56; *Kavanaugh v. Southern R. Co.*, 120 Ga. 62; *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665.**296. 1.** *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665; *Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 101 Mo. App. 442.**4. The Bill of Lading Will Govern** where a subsequent charter-party was not brought to the shipper's knowledge until the contract was concluded. *The Titania*, (C. C. A.) 131 Fed. Rep. 229, affirming 124 Fed. Rep. 975.**297. 1. Oral Evidence Inadmissible to Contradict or Vary Written Contract of Shipment** — *Alabama.* — *Tallassee Falls Mfg. Co. v. Western R. Co.*, 117 Ala. 520, 67 Am. St. Rep. 179.*Georgia.* — *McElveen v. Southern R. Co.*, 109 Ga. 249, 77 Am. St. Rep. 371.*Indiana.* — *Stewart v. Cleveland, etc.*, R. Co., 21 Ind. App. 218; *Cleveland, etc.*, R. Co. *v. Heath*, 22 Ind. App. 47; *Evansville, etc.*, R. Co. *v. Kevekordes*, (Ind. App. 1904) 69 N. E. Rep. 1022.

**297.** Where Written Contract Contains Only Part of the Agreement. — See note 2.

**298.** Where Oral Agreement Substituted for the Written One. — See note 1.

(5) *Contract Must Have Been Fairly Made* — (a) *Such Contracts Not Favored.* — See note 2.

(b) *Necessity of Consideration* — *Reduced Rates.* — See notes 3, 4.

*Iowa.* — *Burgher v. Chicago, etc., R. Co.*, 105 Iowa 335.

*Louisiana.* — *Sonia Cotton Oil Co. v. Steamer Red River*, 106 La. 42, 87 Am. St. Rep. 294.

*Mississippi.* — *Yazoo, etc., R. Co. v. Wilson*, 83 Miss. 224.

*North Carolina.* — *Morganton Mfg. Co. v. Ohio River, etc., R. Co.*, 121 N. Car. 514, 61 Am. St. Rep. 679.

*Ohio.* — *Stevens v. Lake Shore, etc., R. Co.*, 11 Ohio Cir. Dec. 168, 20 Ohio Cir. Ct. 41.

*Texas.* — *St. Louis Southwestern R. Co. v. Cates*, 15 Tex. Civ. App. 135; *San Antonio, etc., Pass. R. Co. v. Woodley*, 20 Tex. Civ. App. 216; *Bessling v. Houston, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 639; *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291. See also *Lake Shore, etc., R. Co. v. National Live Stock Bank*, 178 Ill. 506. But see *Pompij v. Manhattan Delivery Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 230.

**The Shipper Must Have Assented** to the subsequent written contract. *Stoner v. Chicago G. W. R. Co.*, 109 Iowa 551.

**Question for Jury.** — Whether the contract is verbal or expressed by the writing is a question for the jury. *Stoner v. Chicago G. W. R. Co.*, 109 Iowa 551; *Caldwell v. Felton*, (Ky. 1899) 51 S. W. Rep. 575.

**A Written Agreement Made Subsequent to a Breach of an Oral Agreement** will not control. *Gann v. Chicago, G. W. R. Co.*, 72 Mo. App. 34.

**297. 2. When Written Contract Does Not Embrace Entire Agreement.** — *St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619; *Lowenstein v. Lombard*, 164 N. Y. 324; *Pittsburg, etc., R. Co. v. Blakemore*, 1 Ohio Cir. Dec. 26.

**A Completed Contract** for the carriage of goods cannot be varied by stipulations in a bill of lading delivered after the goods are loaded unless it is shown that the shipper assented thereto. *The Arctic Bird*, 109 Fed. Rep. 167.

**Prior Written Instructions** by the shippers do not constitute a contract which will control a subsequent accepted bill of lading inconsistent therewith. *Bessling v. Houston, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 639.

**298. 1. Where Written Contract Has Been Abandoned.** — *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218.

**Where Prior Oral Agreement Rules.** — See *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506.

**2. Such Contracts Not Favored.** — *Chicago, etc., R. Co. v. Bozarth*, 91 Ill. App. 69; *Evansville, etc., R. Co. v. Kevekordes*, (Ind. App. 1904) 69 N. E. Rep. 1022; *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279; *Atchison, etc., R. Co. v. Mason*, 4 Kan. App. 391; *Illinois Cent. R. Co. v. Lancashire Ins. Co.*, 79 Miss. 114; *Kellerman v. Kansas City, etc., R. Co.*, 68 Mo. App. 255, *affirmed* 136 Mo. 177; *Wyrick v. Missouri, etc., R. Co.*, 74 Mo. App. 406; *Gwyn Harper Mfg. Co. v. Caro-*

*lina Cent. R. Co.*, 128 N. Car. 280, 83 Am. St. Rep. 675; *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518.

**The Question Is for the Court**, where the facts are not in dispute. *Cox v. Central Vermont R. Co.*, 170 Mass. 129.

**A Contract Procured by Duress** is not binding. *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235.

It does not constitute duress that the shipper was obliged to sign the contract in order to obtain the reduced rate of charges. *Jennings v. Smith (C. C. A.)* 106 Fed. Rep. 139.

**Extrinsic Evidence** is admissible to determine whether the contract was fairly made and freely entered into. *O'Malley v. Great Northern R. Co.*, 86 Minn. 380.

**3. Consideration Necessary** — *Arkansas.* — *St. Louis, etc., R. Co. v. Coolidge*, (Ark. 1904) 83 S. W. Rep. 333.

*Connecticut.* — *Mears v. New York, etc., R. Co.*, 75 Conn. 171, 96 Am. St. Rep. 193.

*Indiana.* — *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218; *Evansville, etc., R. Co. v. Kevekordes*, (Ind. App. 1904) 69 N. E. Rep. 1022; *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406.

*Missouri.* — *Wyrick v. Missouri, etc., R. Co.*, 74 Mo. App. 406; *Sloop v. Wabash R. Co.*, (Mo. App. 1904) 84 S. W. Rep. 111; *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311; *Rice v. Wabash R. Co.*, 106 Mo. App. 371. See also *Gowling v. American Express Co.*, 102 Mo. App. 366.

*Nebraska.* — *Pennsylvania R. Co. v. Kennard Glass, etc., Co.*, 59 Neb. 435.

*North Carolina.* — *Gardner v. Southern R. Co.*, 127 N. Car. 293.

*Texas.* — *St. Louis Southwestern R. Co. v. McIntyre*, (Tex. Civ. App. 1904) 82 S. W. Rep. 346; *San Antonio, etc., Pass. R. Co. v. Wright*, 20 Tex. Civ. App. 136; *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235; *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506.

*West Virginia.* — *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 67 Am. St. Rep. 781, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 298; *Lewis v. Chesapeake, etc., R. Co.*, 47 W. Va. 656, 81 Am. St. Rep. 816, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 298.

**4. Consideration — Freedom of Choice as to Rates.** — *Mears v. New York, etc., R. Co.*, 75 Conn. 171, 96 Am. St. Rep. 193; *Atchison, etc., R. Co. v. Mason*, 4 Kan. App. 391; *Nashville, etc., R. Co. v. Stone*, (Tenn. 1904) 79 S. W. Rep. 1031. *Contra*, *Cau v. Texas, etc., R. Co.*, 194 U. S. 427; *Charnock v. Texas, etc., R. Co.*, 194 U. S. 432.

**If But One Rate Is Offered to the Shipper** the contract is invalid. *Illinois Cent. R. Co. v. Lancashire Ins. Co.*, 79 Miss. 114.

**Reduced Rates Sufficient Consideration.** — *Mou-ton v. Louisville, etc., R. Co.*, 128 Ala. 537.

**Actual Reduction Sufficient.** — *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406.

**299.** See notes 1, 2.

**300.** Presumption. — See note 1.

When Consideration Unnecessary. — See note 3.

**301.** (c) Contract Signed Hurriedly by Shipper. — See note 1.

(d) Contract Must Have Been Made at Time of Shipment. — See note 2.

Where Contract Complete — Subsequent Bill of Lading. — See note 4.

**302.** Where First Agreement Merely Tentative. — See note 1.

(e) Contract Must Be Legible. — See note 2.

(6) *By What Law Validity of Special Contract Governed.* — See

note 3.

**Reduced Rate Does Not Relieve Against Negligence.** — Cobban v. Canadian Pac. R. Co., 23 Ont. App. 115; Drainville v. Canadian Pac. R. Co., 22 Quebec Super. Ct. 480.

**299. 1. Must Be Reduced in Fact.** — Baltimore, etc., R. Co. v. Crawford, 65 Ill. App. 113; Stewart v. Cleveland, etc., R. Co., 21 Ind. App. 218; Kellerman v. Kansas City, etc., R. Co., 68 Mo. App. 255, affirmed 136 Mo. 177; Hendrix v. Wabash R. Co., 107 Mo. App. 127; Schalles v. Chicago, etc., R. Co., 97 Wis. 31.

The option of shipping the goods under the common-law liability need not have been offered to the shipper. Cau v. Texas, etc., R. Co., 194 U. S. 427; Charnock v. Texas, etc., R. Co., 194 U. S. 432.

**Parol Evidence Admissible.** — Phoenix Powder Mfg. Co. v. Wabash R. Co., 101 Mo. App. 442; Lake Erie, etc., R. Co. v. Holland, 162 Ind. 406. But see Wilson v. Atlantic Coast Line R. Co., 129 Fed. Rep. 774, holding that the shipper is bound by the statement in the contract.

**Rates Approved by Interstate Commerce Commission.** — The fact that the rates given were approved by the interstate commerce commission cannot be proved by parol. Mouton v. Louisville, etc., R. Co., 128 Ala. 537.

**2. Genuine Option Must Have Been Offered to Shipper.** — Parker v. Atlantic Coast Line R. Co., 133 N. Car. 335; Illinois Cent. R. Co. v. Craig, 102 Tenn. 298.

**300. 1. Consideration Presumed.** — Jennings v. Smith, (C. C. A.) 106 Fed. Rep. 139; St. Louis, etc., R. Co. v. Hurst, 67 Ark. 407; Adams Express Co. v. Carnahan, 29 Ind. App. 606, 94 Am. St. Rep. 279; Evansville, etc., R. Co. v. Kevekordes, (Ind. App. 1904) 69 N. E. Rep. 1022; Schaller v. Chicago, etc., R. Co., 97 Wis. 31. But see Lake Erie, etc., R. Co. v. Holland, 162 Ind. 406.

**A Contrary View** is held in *Missouri*. Phoenix Powder Mfg. Co. v. Wabash R. Co., 101 Mo. App. 442.

**Burden of Proof on Carrier.** — Gardner v. Southern R. Co., 127 N. Car. 293.

**3. Stipulations Requiring No Consideration.** — Compare Jones v. St. Louis, etc., R. Co., 89 Mo. App. 653.

**301. 1. Contract Not Avoided by Signing Hurriedly.** — Stewart v. Cleveland, etc., R. Co., 21 Ind. App. 218, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301; Evansville, etc., R. Co. v. Kevekordes, (Ind. App. 1904) 69 N. E. Rep. 1022; Hengstler v. Flint, etc., R. Co., 125 Mich. 530; Nashville, etc., R. Co. v. Stone, 112 Tenn. 367, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300-301. See also Ft. Worth, etc., R. Co. v. Wright, 24 Tex. Civ. App. 291. But

see San Antonio, etc., Pass. R. Co. v. Wright, 20 Tex. Civ. App. 136.

**2. General Rule — Special Contract Must Be Made at Time of Shipment.** — Wabash R. Co. v. Lanum, 71 Ill. App. 84; Missouri, etc., R. Co. v. Withers, 16 Tex. Civ. App. 506. See also Cleveland, etc., R. Co. v. Potts, 33 Ind. App. 564; Ryer v. Pennsylvania R. Co., (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 289, affirmed (Supm. Ct. App. T.) 26 Misc. (N. Y.) 715.

**4. Original Contract Not Affected by Subsequent Bill of Lading.** — Farmer's L. & T. Co. v. Northern Pac. R. Co., 120 Fed. Rep. 873, 57 C. C. A. 533; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. App. 619; Cleveland, etc., R. Co. v. Wilson, 99 Ill. App. 367; Cleveland, etc., R. Co. v. Potts, 33 Ind. App. 564; Rudell v. Ogdensburg Transit Co., 117 Mich. 568; American Roofing Co. v. Memphis, etc., Packet Co., 8 Ohio Dec. 490, 5 Ohio N. P. 146; Southern Pac. R. Co. v. Anderson, 26 Tex. Civ. App. 518; San Antonio, etc., Pass. R. Co. v. Wright, 20 Tex. Civ. App. 136; Missouri, etc., R. Co. v. Withers, 16 Tex. Civ. App. 506.

**302. 1. Where First Contract Was Not the Complete Agreement.** — Cleveland, etc., R. Co. v. Druien, (Ky. 1904) 80 S. W. Rep. 778, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 302.

**2. Nenno v. Chicago, etc., R. Co., 105 Mo. App. 540.**

**3. Governed by Law of Place Where Made — United States.** — The Henry B. Hyde, 82 Fed. Rep. 681; Central of Georgia R. Co. v. Kavanaugh, (C. C. A.) 92 Fed. Rep. 56.

*Georgia.* — Kavanaugh v. Southern R. Co., 120 Ga. 62.

*Kentucky.* — Hutchison v. Louisville, etc., R. Co., 108 Ky. 615; Cleveland, etc., R. Co. v. Druien, (Ky. 1904) 80 S. W. Rep. 778; Adams Express Co. v. Walker, (Ky. 1904) 83 S. W. Rep. 106, holding, however, that the loss must have occurred in the state where the limitation is valid if it is sought to be enforced in a state where such a limitation is void.

*Massachusetts.* — Brockway v. American Express Co., 171 Mass. 158.

*Minnesota.* — Powers Mercantile Co. v. Wells, 93 Minn. 143.

*Missouri.* — Herf, etc., Chemical Co. v. Lackawanna Line, 70 Mo. App. 274; Herf, etc., Chemical Co. v. Lackawanna Line, 100 Mo. App. 164.

*Nebraska.* — Pennsylvania R. Co. v. Kennard Glass, etc., Co., 59 Neb. 435.

*New York.* — Grand v. Livingston, 158 N. Y. 688.

*Texas.* — Pittman v. Pacific Express Co., 24 Tex. Civ. App. 595, citing 5 AM. AND ENG.

**304.** See note 1.

Rule of Federal Courts. — See notes 2, 3.

**305.** (7) *By Whom Contract May Be Made* — (a) **Consignor Bound by Contract of His Agent.** — See note 4.**306.** (b) **Consignor May Bind Consignee — Presumption.** — See note 2.**308.** 3. **Extent of Limitation** — *a.* **LOSSES THE RESULT OF NEGLIGENCE** — (1) *General Doctrine* — **Weight of Authority.** — See note 1.

ENCYC. OF LAW (2d ed.) 302; Pacific Express Co. v. Pitman, 30 Tex. Civ. App. 626.

*Contra*, Jacobson v. Adams Express Co., 1 Ohio Cir. Dec. 212, holding that the law of the place of delivery governs.**Presumption.** — Pierce v. Southern Pac. R. Co., 120 Cal. 157; Southern Pac. R. Co. v. Anderson, 26 Tex. Civ. App. 518; Pennsylvania R. Co. v. Naive, (Tenn. 1904) 79 S. W. Rep. 124; Southern Pac. R. Co. v. D'Arcais, 27 Tex. Civ. App. 57.**A Contract Against the Policy of the State** will not be enforced in *Texas*, though valid in the state where it was made: St. Louis Southwestern R. Co. v. McIntyre, (Tex. Civ. App. 1904) 82 S. W. Rep. 346.**304.** 1. Brockway v. American Express Co., 171 Mass. 158; Pittman v. Pacific Express Co., 24 Tex. Civ. App. 595, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 302.**2. Federal Courts Follow Independent Rule.** — Jennings v. Smith, 99 Fed. Rep. 189.

But if there is a state statute, it will control. Central of Georgia R. Co. v. Kavanaugh, 92 Fed. Rep. 56, 63 U. S. App. 501.

**3. Contracts Relieving Against Liability for Negligence.** — A bill of lading limiting the carrier's liability for negligence and providing that the contract shall be governed by the English law is not enforceable in the federal courts, as being against public policy. Botany Worsted Mills v. Knott, (C. C. A.) 82 Fed. Rep. 471; Compania de Navigacion la Flecha v. Brauer, 168 U. S. 104; The Oranmore, 92 Fed. Rep. 396; The Manitou, 116 Fed. Rep. 60, *affirmed* (C. C. A.) 127 Fed. Rep. 554. See also The Kensington, 88 Fed. Rep. 331. But see Wilson v. Atlantic Coast Line R. Co., 129 Fed. Rep. 774.**305.** 4. **Consignor's Agent.** — Adams Express Co. v. Carnahan, 29 Ind. App. 606, 94 Am. St. Rep. 279; Russell v. Erie R. Co., 70 N. J. L. 812, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 305; St. Louis Southwestern R. Co. v. McIntyre, (Tex. Civ. App. 1904) 82 S. W. Rep. 346.**When Contract Accepted Varies from Previous Contract Made by Consignor.** — When the carrier and the consignor make a special contract, and the carrier delivers to the consignor's shipping agent a bill of lading which contains a limitation of liability not contained in the previous contract, and the alteration is made without the knowledge or consent of the consignor, and the shipping agent neither has authority to agree nor does agree to the alteration, the limitation is not binding on the consignor. Wilson v. Canadian Development Co., 33 Can. Sup. Ct. 432, *reversing* 9 British Columbia 82. See also North-West Transp. Co. v. McKenzie, 25 Can. Sup. Ct. 38.**306.** 2. **Presumption.** — Mouton v. Louisville,

etc., R. Co., 128 Ala. 537; Edward Frohlich Glass Co. v. Pennsylvania Co., (Mich. 1904) 101 N. W. Rep. 223.

**308.** 1. **Weight of Authority — Carrier May Not Limit Liability for Negligence** — *United States.* — *Cau v. Texas*, etc., R. Co., 194 U. S. 427; *Charnock v. Texas*, etc., R. Co., 194 U. S. 432; *Compania de Navigacion la Flecha v. Brauer*, 168 U. S. 104; *Central Trust Co. v. East Tennessee*, etc., R. Co., 70 Fed. Rep. 764; *Botany Worsted Mills v. Knott*, (C. C. A.) 82 Fed. Rep. 471; *The Georg Dumois*, 88 Fed. Rep. 537; *Liverpool*, etc., Ins. Co. v. McNeill, (C. C. A.) 89 Fed. Rep. 131; *The Prussia*, (C. C. A.) 93 Fed. Rep. 837, *affirming* 88 Fed. Rep. 531; *The Mississippi*, 113 Fed. Rep. 985, *affirmed* 120 Fed. Rep. 1020, 56 C. C. A. 525; *The Tjomo*, 115 Fed. Rep. 919; *The Manitou*, 116 Fed. Rep. 60, *affirmed* (C. C. A.) 127 Fed. Rep. 554; *The Nellie Floyd*, 116 Fed. Rep. 80, *affirmed* (C. C. A.) 122 Fed. Rep. 617; *The Orcadian*, 116 Fed. Rep. 930; *The Seaboard*, 119 Fed. Rep. 375; *Wilson v. Atlantic Coast Line R. Co.*, 129 Fed. Rep. 774.*Alabama.* — *Louisville*, etc., R. Co. v. Cowherd, 120 Ala. 51; *Louisville*, etc., R. Co. v. Gidley, 119 Ala. 523.*California.* — *Pierce v. Southern Pac. R. Co.*, 120 Cal. 156.*Georgia.* — *Central of Georgia R. Co. v. Murphy*, 113 Ga. 514.*Illinois.* — *Louisville*, etc., R. Co. v. Cunningham, 88 Ill. App. 289.*Indiana.* — *Cleveland*, etc., R. Co. v. Potts, 33 Ind. App. 564; *Lake Erie*, etc., R. Co. v. Holland, 162 Ind. 406; *Anderson v. Lake Shore*, etc., R. Co., 26 Ind. App. 196; *Parrill v. Cleveland*, etc., R. Co., 23 Ind. App. 638; *Insurance Co. of North America v. Lake Erie*, etc., R. Co., 152 Ind. 333; *Cleveland*, etc., R. Co. v. Heath, 22 Ind. App. 47.*Iowa.* — See, under the statutes, *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659; *Lucas v. Burlington*, etc., R. Co., 112 Iowa 594.*Kansas.* — *Atchison*, etc., R. Co. v. Morris, 65 Kan. 532; *St. Louis*, etc., R. Co. v. Tribbey, 6 Kan. App. 467.*Kentucky.* — *Ireland v. Mobile*, etc., R. Co., 105 Ky. 402, 406.*Maine.* — *Morse v. Canadian Pac. R. Co.*, 97 Me. 77.*Mississippi.* — *Illinois Cent. R. Co. v. Bogard*, 78 Miss. 11.*Missouri.* — *Botts v. Wabash R. Co.*, 106 Mo. App. 397; *Minter v. Chicago*, etc., R. Co., 82 Mo. App. 130; *Marshall*, etc., Grain Co. v. Kansas City, etc., R. Co., 176 Mo. 480, 98 Am. St. Rep. 508; *Anderson v. Atchison*, etc., R. Co., 93 Mo. App. 677; *D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164.*Montana.* — *Nelson v. Great Northern R. Co.*, 28 Mont. 297.

**313.** (2) *Rule in New York* — Present Doctrine: May Contract Against Negligence. — See note 6.

**314.** Such Contracts, However, Are Not Favored. — See note 1.  
Construction Favorable to Shipper. — See note 2.

**316.** (3) *Rule in England and Canada* — Early Rule — Public Notice. — See note 1.

Special Contract. — See note 4.

*Nebraska.* — *Pennsylvania R. Co. v. Kennard Glass, etc., Co.*, 59 Neb. 435; *Union Pac. R. Co. v. Vincent*, 58 Neb. 171 (interstate shipment); *Union Pac. R. Co. v. Metcalf*, 50 Neb. 452.

*New Jersey.* — *Paul v. Pennsylvania R. Co.*, 70 N. J. L. 442.

*North Carolina.* — *Parker v. Atlantic Coast Line R. Co.*, 133 N. Car. 335; *Gardner v. Southern R. Co.*, 127 N. Car. 293.

*Ohio.* — *Cincinnati, etc., R. Co. v. Berdan*, 12 Ohio Cir. Dec. 481, 22 Ohio Cir. Ct. 326; *Pennsylvania R. Co. v. Yoder*, 25 Ohio Cir. Ct. 32; *Wells v. Bell*, 65 Ohio St. 408; *Ambach v. B., etc., R. Co.*, 4 Ohio Dec. 467; *Pittsburgh, etc., Co. v. Sheppard*, 56 Ohio St. 68, 60 Am. St. Rep. 732.

*Oregon.* — *Normile v. Oregon Nav. Co.*, 41 Oregon 177, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 308.

*Pennsylvania.* — *Paul v. Pennsylvania R. Co.*, 70 N. J. L. 442; *Roos v. Philadelphia, etc., R. Co.*, 199 Pa. St. 378.

*South Carolina.* — *Crawford v. Southern R. Co.*, 56 S. Car. 136.

*Tennessee.* — *Nashville, etc., R. Co. v. Stone*, (Tenn. 1904) 79 S. W. Rep. 1031; *Bird v. Southern R. Co.*, 99 Tenn. 719, 63 Am. St. Rep. 856.

*Texas.* — See *Gulf, etc., R. Co. v. Harris*, (Tex. Civ. App. 1903) 72 S. W. Rep. 71; *Texas, etc., R. Co. v. Richmond*, (Tex. Civ. App. 1901) 61 S. W. Rep. 410, reversed 94 Tex. 571; *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518. The statute applies to all agreements limiting the carrier's common-law liability, without reference to their reasonableness. *Pacific Express Co. v. Hertzberg*, 17 Tex. Civ. App. 100; *International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130; *Southern Pac. R. Co. v. Phillipson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 958.

*West Virginia.* — *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 307, 308, and approving all the text on those pages; *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 67 Am. St. Rep. 781, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 288 [308].

**May Contract Against Liability for Negligence as Private Carrier.** — *Pittsburgh, etc., R. Co. v. Mahoney*, 148 Ind. 196, 62 Am. St. Rep. 593.

**May Except Negligence Other than as Common Carrier.** — A railroad company may by contract exempt itself from liability for its negligence while acting in another capacity than that of common carrier. *Mann v. Pere Marquette R. Co.*, 135 Mich. 210, 10 Detroit Leg. N. 764.

**Negligence of Connecting Carrier.** — A carrier may stipulate against liability for the negligence of a connecting carrier. *State Nat. Bank v.*

*Chicago, G. W. R. Co.*, 72 Mo. App. 82. But not if it accepts charges for carriage over such carrier's line. *Eckles v. Missouri Pac. R. Co.*, 72 Mo. App. 296.

**313. 6. May Contract Against Result of Negligence.** — *Toy v. Long Island R. Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 792; *Campe v. Weir*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 243; *Bernstein v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 635; *Wilson v. Platt*, (Supm. Ct. App. T.) 84 N. Y. Supp. 143.

**314. 1. Such Contracts Not Favored — Intention Must Be Clear.** — *Morris v. Wier*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 586; *Grand v. Livingston*, 158 N. Y. 688, affirming 4 N. Y. App. Div. 589; *Hutkoff v. Pennsylvania R. Co.*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 770; *Bermel v. New York, etc., R. Co.*, 172 N. Y. 639, affirming 62 N. Y. App. Div. 389; *Fasy v. International Nav. Co.*, 77 N. Y. App. Div. 469, affirmed 177 N. Y. 591. See also *Marquis v. Wood*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 590.

**2. Construed Unfavorably to Carrier.** — *Bermel v. New York, etc., R. Co.*, 172 N. Y. 639, affirming 62 N. Y. App. Div. 389; *Thyll v. New York, etc., R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 175, modified 92 N. Y. App. Div. 513; *Security Trust Co. v. Wells, etc., Express*, 178 N. Y. 620, affirming 81 N. Y. App. Div. 426; *Fasy v. International Nav. Co.*, 177 N. Y. 591, affirming 77 N. Y. App. Div. 469.

**Goods Stopped In Transitu.** — Such a stipulation does not govern the liability of the carrier for failure to return goods stopped *in transitu*. *Rosenthal v. Weir*, 54 N. Y. App. Div. 275, affirmed 170 N. Y. 148.

**316. 1. Notice that the Carrier Will Not Be Responsible for Loss of Market** is valid, and relieves the carrier from liability in the absence of negligence. *Duckham v. Great Western R. Co.*, 80 L. T. N. S. 774.

**4. Special Contract — Wilful Wrongdoing.** — *Knox v. Great Northern R. Co.*, (1896) 2 Ir. R. 632.

**An Exemption in General Terms** will not relieve the carrier from liability for negligence. *Price v. Union Lighterage Co.*, (1903) 1 K. B. 750.

**Unreasonable Delay, Though Entirely Unexplained**, may not amount to wilful misconduct. The burden is on the consignor to prove that the carrier intentionally delayed the goods. *Graham v. Belfast, etc., R. Co.*, (1901) 2 Ir. R. 13.

**Deviation and Delay Are Covered** by a stipulation for nonliability except for wilful misconduct, where they were due to mistake on the part of the carrier, and the carrier, after discovering the mistake, did his best to minimize the damage. *Foster v. Great Western R. Co.*, (1904) 2 K. B. 306. *Compare Mallet v. Great Eastern R. Co.*, (1899) 1 Q. B. 309.



**316.** Under the Railway and Canal Traffic Act. — See note 6.

**317.** Test. — See note 1.

**318.** The Rule in Canada. — See note 1.

**319.** Severance of Conditions. — See note 3.

(4) *Rule in Illinois and Wisconsin.* — See note 4.

*b.* LOSSES NOT THE RESULT OF NEGLIGENCE — Losses by Fire. —

See note 5.

**316. 6. Scope of Act.** — The Railway and Canal Traffic Act "extends only to negligence, or default in the nature of negligence, or within the scope of the servant's employment." If there is no negligence on the part of the carrier or its servants, that act should not be considered in determining whether a notice by the carrier that it will not be responsible for any loss of market is reasonable, but the question should be decided according to the principles of the common law. *Duckham v. Great Western R. Co.*, 80 L. T. N. S. 774.

**317. 1. Perishable Goods — Loss of Market.** — *Mallet v. Great Eastern R. Co.*, (1899) 1 Q. B. 309, 68 L. J. Q. B. 256, 80 L. T. N. S. 53.

**318. 1. Total Exemption from Liability for Negligence.** — Under the provisions of the Dominion Railway Act, 51 Vict., c. 29, § 246, where the damage to goods is caused by the negligence of a railway company, the company is precluded from setting up a condition indorsed on the bill of lading totally exempting it from the liability for damages so caused. *St. Mary's Creamery Co. v. Grand Trunk R. Co.*, 8 Ont. L. Rep. 1, affirming 5 Ont. L. Rep. 742, following *Grand Trunk R. Co. v. Vogel*, 11 Can. Sup. Ct. 612, and distinguishing *Robertson v. Grand Trunk R. Co.*, 24 Can. Sup. Ct. 611.

**Wilful Torts of Carrier.** — Conditions in a shipping receipt relieving the carrier from liability for loss or damage arising out of the safe-keeping and carriage of the goods, even though caused by the negligence, carelessness, or want of skill of the carrier's officers, servants, or workmen, without the actual fault or privity of the carrier, and restricting claims to the cash value of the goods at the port of shipment, do not apply to a case where the goods shipped were wrongfully sold or converted by the carrier. *Wilson v. Canadian Development Co.*, 33 Can. Sup. Ct. 432, reversing 9 British Columbia 82.

**Goods Destroyed in United States While in Transit to Canada.** — The Dominion Railway Act, 51 Vict., c. 29, is not applicable to a railway situated in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada. Hence, where goods which were shipped from Scotland to be delivered at a port in the United States to such a railway company, and to be forwarded by that company to a point in Canada, were destroyed by fire at a point in the United States on the line of that company, by reason of negligence from which the company was protected from liability by the terms of the contract of carriage, it was held that the company was not liable for the loss, as the provisions of section 246 of the above mentioned statute, disabling a railway company from relieving itself from liability for its own negligence or that of its servants, were not

applicable. *Macdonald v. Grand Trunk R. Co.*, 31 Ont. 663.

**Liability for Negligence Notwithstanding Reduced Rate.** — A carrier cannot relieve itself from liability by stipulating that by reason of the reduced charge made for the carriage of goods it will not be liable for injury thereto, even if caused by the fault or negligence of its employees. *Cobban v. Canadian Pac. R. Co.*, 23 Ont. App. 115; *Drainville v. Canadian Pac. R. Co.*, 22 Quebec Super. Ct. 480. But when such a stipulation has been made, the owner of the goods damaged must prove that the injury was caused by such fault or negligence. *Drainville v. Canadian Pac. R. Co.*, 22 Quebec Super. Ct. 480.

**Limitation of Liability as Warehouseman.** — A stipulation in the bill of lading that the owners shall incur all risk of loss of the goods in the hands of the carrier at the end of the transit as a warehouseman is reasonable and binding, as the warehousing of the goods is for the convenience of consignors. *Lake Erie, etc., R. Co. v. Sales*, 26 Can. Sup. Ct. 663.

**319. 3. Evansville, etc., R. Co. v. Kevekordes, (Ind. App. 1904) 69 N. E. Rep. 1022.**

**4. Illinois.** — *Chicago, etc., R. Co. v. Grimes*, 71 Ill. App. 397; *Elgin, etc., R. Co. v. Bates Mach. Co.*, 98 Ill. App. 311, affirmed 200 Ill. 636, 93 Am. St. Rep. 218; *U. S. Express Co. v. Council*, 84 Ill. App. 491; *Chicago, etc., R. Co. v. Miller*, 79 Ill. App. 473. See also, reviewing the Illinois law, *Powers Mercantile Co. v. Wells*, 93 Minn. 143; *Brockway v. American Express Co.*, 168 Mass. 257, construing a contract made in Illinois. Compare *Cleveland, etc., R. Co. v. Newlin*, 74 Ill. App. 638, holding that the carrier cannot contract against his own actual negligence.

**Wisconsin.** — *Lamb v. Chicago, etc., R. Co.*, 101 Wis. 138; *Loeser v. Chicago, etc., R. Co.*, 94 Wis. 571. Compare *Densmore Commission Co. v. Duluth, etc., R. Co.*, 101 Wis. 563.

**5. Losses from Fire or Strikes of Employees — United States.** — *Liverpool, etc., Ins. Co. v. McNeill, (C. C. A.) 89 Fed. Rep. 131*; *Marande v. Texas, etc., R. Co., (C. C. A.) 102 Fed. Rep. 246*; *The Nutmeg State, 103 Fed. Rep. 797*; *Cau v. Texas, etc., R. Co., (C. C. A.) 113 Fed. Rep. 91, affirmed 194 U. S. 427*; *Washburn-Crosby Co. v. Johnston*, 125 Fed. Rep. 273, 60 C. C. A. 187; *Charnock v. Texas, etc., R. Co., (C. C. A.) 113 Fed. Rep. 92, affirmed 194 U. S. 432*.

**Alabama.** — *Louisville, etc., R. Co. v. Gidley*, 119 Ala. 523; *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537.

**Indiana.** — *Insurance Co. of North America v. Lake Erie, etc., R. Co.*, 152 Ind. 333; *Parrill v. Cleveland, etc., R. Co.*, 23 Ind. App. 638.

**Kentucky.** — *Cleveland, etc., R. Co. v. Druiena, (Ky. 1904) 80 S. W. Rep. 778*.

**320. Burden of Proof.** — See note 2.

*c. LIMITING TIME IN WHICH SUIT MUST BE BROUGHT.* — See note 5.

*Valid When Reasonable.* — See note 6.

**321. *d. REQUIRING CLAIM TO BE PRESENTED WITHIN FIXED TIME*** — (1) *General Rule — Such Stipulation Valid When Reasonable.* — See note 7.

**323. Waiver — Fraud and Misrepresentation by Carrier.** — See notes 1, 2.

**324. Question of Reasonableness.** — See notes 1, 2.

*Massachusetts.* — Cox *v.* Central Vermont R. Co., 170 Mass. 129.

*Mississippi.* — Yazoo, etc., R. Co. *v.* Millsaps, 76 Miss. 855, 71 Am. St. Rep. 543.

*Ohio.* — Cincinnati, etc., R. Co. *v.* Berdan, 12 Ohio Cir. Dec. 481, 22 Ohio Cir. Ct. 326.

*Texas.* — Texas, etc., R. Co. *v.* Richmond, 94 Tex. 571, reversing (Tex. Civ. App. 1901) 61 S. W. Rep. 410.

*Wisconsin.* — Schaller *v.* Chicago, etc., R. Co., 97 Wis. 31; Courteen *v.* Kanawha Dispatch, 110 Wis. 610.

*Canada.* — McMorrin *v.* Canadian Pac. R. Co., 1 Ont. L. Rep. 561.

**May Stipulate Against Liability for Losses by Theft Not Due to Negligence.** — Cunard Steamship Co. *v.* Kelley, (C. C. A.) 115 Fed. Rep. 678.

**Agreement Not to Enforce.** — For a valuable consideration the carrier may agree not to enforce a stipulation made against liability for loss by fire. Texas, etc., R. Co. *v.* Cau, (C. C. A.) 120 Fed. Rep. 15,645.

**Exception from Limitation.** — Where a carrier limits its liability from fire, excepting from such limitation damage to cotton by fire, its liability in respect to the cotton is governed by the common law. Texas, etc., R. Co. *v.* Calendar, (C. C. A.) 98 Fed. Rep. 538.

**Customary Exemption.** — A bill of lading providing that goods shall be subject to all customary conditions does not exempt a connecting carrier from liability from loss by fire unless its custom to stipulate for such an exemption is proved. Robinson *v.* New York, etc., Steamship Co., 75 N. Y. App. Div. 431, affirmed 177 N. Y. 565.

**320. 2.** Parrill *v.* Cleveland, etc., R. Co., 23 Ind. App. 638.

**5.** Ginn *v.* Ogdensburg Transit Co., (C. C. A.) 85 Fed. Rep. 985.

**6. Stipulation Valid When Reasonable.** — North British, etc., Ins. Co. *v.* Central Vermont R. Co., 9 N. Y. App. Div. 4, affirmed 158 N. Y. 726. *Contra*, Adams Express Co. *v.* Walker, (Ky. 1904) 83 S. W. Rep. 106; Richardson *v.* Chicago, etc., R. Co., 149 Mo. 311 (under statute).

**When Stipulation Not Applicable.** — Texas, etc., R. Co. *v.* Reeves, 90 Tex. 499.

**321. 7. General Rule — Stipulation Valid — United States.** — The St. Hubert, 102 Fed. Rep. 362, citing 5 AM. AND ENG. ENCYC. OF LAW 2d ed.) 321, affirmed (C. C. A.) 107 Fed. Rep. 727; Metropolitan Trust Co. *v.* Toledo, etc., R. Co., 107 Fed. Rep. 628, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321; The Westminster, (C. C. A.) 127 Fed. Rep. 680, affirming 116 Fed. Rep. 123, 102 Fed. Rep. 366; The Arctic Bird, 109 Fed. Rep. 167; The Naranja, 104 Fed. Rep. 160.

*Arkansas.* — Kansas, etc., R. Co. *v.* Ayers,

63 Ark. 331; St. Louis, etc., R. Co. *v.* Hurst, 67 Ark. 407.

*Illinois.* — Cleveland, etc., R. Co. *v.* Newlin, 74 Ill. App. 638; Chicago, etc., R. Co. *v.* Bozarth, 91 Ill. App. 69.

*Indiana.* — Chicago, etc., R. Co. *v.* Fifth Nat. Bank, 26 Ind. App. 600; Anderson *v.* Lake Shore, etc., R. Co., 26 Ind. App. 196.

*Kansas.* — Missouri Pac. R. Co. *v.* Park, 66 Kan. 248; Atchison, etc., R. Co. *v.* Morris, 65 Kan. 532.

*Massachusetts.* — Cox *v.* Central Vermont R. Co., 170 Mass. 129.

*Minnesota.* — Hinton *v.* Eastern R. Co., 72 Minn. 339.

*Missouri.* — Ward *v.* Missouri Pac. R. Co., 158 Mo. 226.

*New York.* — American Grocery Co. *v.* Staten Island Rapid Transit R. Co., (Supm. Ct. App. T.) 23 Misc. (N. Y.) 356; Osterhoudt *v.* Southern Pac. R. Co., 47 N. Y. App. Div. 146; Frankfurt *v.* Weir, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 683.

*Canada.* — Northern Pac. Express Co. *v.* Martin, 26 Can. Sup. Ct. 135.

**Application of Rule.** — A condition on the back of a bill of lading that no claim shall be allowed unless notice in writing and the particulars of the claim are given to the nearest station freight agent within thirty-six hours after the arrival of the goods is reasonable and valid. Gelinas *v.* Canadian Pac. R. Co., 11 Quebec Super. Ct. 253.

**Goods Sent C. O. D.** — See Hardy *v.* American Express Co., 182 Mass. 328.

**Restricted to Initial Carrier.** — Grayson County Nat. Bank *v.* Nashville, etc., R. Co., (Tex. Civ. App. 1904) 79 S. W. Rep. 1094.

**323. 1. Waiver of Notice of Claim.** — Chicago, etc., R. Co. *v.* Grimes, 71 Ill. App. 397; Cleveland, etc., R. Co. *v.* Heath, 22 Ind. App. 47; Soper *v.* Pontiac, etc., R. Co., 113 Mich. 443; Illinois Cent. R. Co. *v.* Bogard, 78 Miss. 111; Frankfurt *v.* Weir, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 683; Falkenberg *v.* Erie R. Co., (Supm. Ct. App. T.) 28 Misc. (N. Y.) 165; U. S. Watch Case Co. *v.* Southern Express Co., 120 N. Car. 351.

**Effect of Prior Waiver.** — The failure of the carrier to insist upon the condition on prior occasions is not a waiver where it is not shown that the plaintiffs knew and relied upon the fact of such failure. The Westminster, (C. C. A.) 127 Fed. Rep. 680.

**2. Marrus *v.* New Haven Steamboat Co.,** (Supm. Ct. App. T.) 30 Misc. (N. Y.) 421.

**324. 1. Limit Unreasonable.** — Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., (C. C. A.) 94 Fed. Rep. 180; Richardson *v.* Chicago, etc., R. Co., 149 Mo. 311; Popham *v.* Barnard, 77 Mo. App. 619; Dixie Cigar Co. *v.* Southern

- 324.** Claims Based upon Fall in Market Price. — See note 4.  
 (2) *When Stipulation Not Applicable.* — See note 5.
- 325.** See note 1.  
 (3) *Where Statute Prohibits Limitation of Liability.* — See note 3.
- 326.** (4) *Carrier Must Prove Limit to Be Reasonable.* — See note 1.  
 Reasonable Opportunity for Compliance. — See note 2.
- 327.** (5) *Shipper Must Prove Compliance.* — See notes 2, 3.  
*f. STIPULATION AS TO WHEN LIABILITY AS WAREHOUSEMAN*

SHALL BEGIN. — See note 5.

- 328.** *g. FIXING AMOUNT FOR WHICH CARRIER SHALL BE LIABLE* —  
 (1) *Generally* — General Rule — Not Regarded as Limitation of Liability for Negligence. —  
 See notes 2, 3.

Express Co., 120 N. Car. 348, 58 Am. St. Rep. 795; Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co., 128 N. Car. 280, 83 Am. St. Rep. 675; U. S. Watch Case Co. v. Southern Express Co., 120 N. Car. 351.

**Plaintiff Must Nevertheless Give Reasonable Notice.** — The fact that the limit is unreasonable does not relieve the plaintiff from the duty of giving notice within a reasonable time. The St. Hubert, 102 Fed. Rep. 362, *affirmed* (C. C. A.) 107 Fed. Rep. 727, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321; Osterhoudt v. Southern Pac. R. Co., 47 N. Y. App. Div. 146.

**324. 2. Question for Jury.** — Atchison, etc., R. Co. v. Morris, 65 Kan. 532; Cox v. Central Vermont R. Co., 170 Mass. 129; Missouri, etc., R. Co. v. Leibold, (Tex. Civ. App. 1900) 55 S. W. Rep. 368.

**4. Does Not Apply Where Claim is for Fall in Market Price During Delay.** — Kramer v. Chicago, etc., R. Co., 101 Iowa 178.

**5. When Stipulation Inapplicable.** — Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co., 128 N. Car. 280, 83 Am. St. Rep. 675. *Contra*, The St. Hubert, (C. C. A.) 107 Fed. Rep. 727; The Westminster, 102 Fed. Rep. 366.

**Delay in Delivery.** — Such a stipulation applies to injury to the goods only, and not to damage to the owner because of a fall in the market price during delay in delivery at the point of destination. D. Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164.

**325. 1. Where There Is Complete Failure to Deliver.** — Cleveland, etc., R. Co. v. Potts, 33 Ind. App. 564; Chicago, etc., R. Co. v. Fifth Nat. Bank, 26 Ind. App. 600; Ward v. Missouri Pac. R. Co., 158 Mo. 226; Security Trust Co. v. Wells, etc., Express, 178 N. Y. 620, *affirming* 81 N. Y. App. Div. 426; Grayson County Nat. Bank v. Nashville, etc., R. Co., (Tex. Civ. App. 1904) 79 S. W. Rep. 1094, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 324.

**Impossibility of Performance** will render the condition inapplicable. Carpenter v. Eastern R. Co., 67 Minn. 188.

**3. Stipulation Valid Though Statute Prohibits Limitation of Liability.** — See Missouri Pac. R. Co. v. Park, 66 Kan. 248.

**In Kentucky.** — Brown v. Illinois Cent. R. Co., 100 Ky. 525.

**326. 1. Burden of Proof.** — The Westminster, 116 Fed. Rep. 123, *affirmed* (C. C. A.) 127 Fed. Rep. 680; Cox v. Central Vermont R. Co., 170 Mass. 129, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 326; Hinkle v. Southern R. Co.,

126 N. Car. 939, 78 Am. St. Rep. 685, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 326.

**2. Shipper or Consignee Must Have Had Reasonable Opportunity for Complying with Stipulation.** — The St. Hubert, (C. C. A.) 107 Fed. Rep. 727; Louisville, etc., R. Co. v. Landers, 135 Ala. 504; Richardson v. Chicago, etc., R. Co., 149 Mo. 311.

Where the bill of lading was blank as to the name and location of the carrier's freight claim agent and as to the location of his office it was held that the shipper was not bound by a stipulation for notice of claim within five days. Norfolk, etc., R. Co. v. Reeves, 97 Va. 284.

**327. 2. Shipper Must Show Compliance with Regulations.** — The Westminster, (C. C. A.) 127 Fed. Rep. 680, *affirming* 116 Fed. Rep. 123; Parrill v. Cleveland, etc., R. Co., 23 Ind. App. 638; Kalina v. Union Pac. R. Co., 69 Kan. 172; Osterhoudt v. Southern Pac. R. Co., 47 N. Y. App. Div. 146; Frankfurt v. Weir, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 683.

**3. Substantial Compliance Sufficient.** — Nelson v. Great Northern R. Co., 28 Mont. 297.

**5. Stipulation as to Liability as Warehouseman.** — Kansas City, etc., R. Co. v. Sharp, 64 Ark. 115.

**328. 2. Stipulation Fixing Amount Not a Limitation of Liability.** — Michalitschke v. Wells, 118 Cal. 683.

**3. United States.** — Sayles v. New York, etc., R. Co., 81 Fed. Rep. 326; The Kensington, 88 Fed. Rep. 331; Calderon v. Atlas Steamship Co., (C. C. A.) 69 Fed. Rep. 574; Jennings v. Smith, (C. C. A.) 106 Fed. Rep. 139, *affirming* 99 Fed. Rep. 189.

Such a limitation must be agreed to by the shipper or distinctly brought to his notice. Doyle v. Baltimore, etc., R. Co., 126 Fed. Rep. 841.

**California.** — Michalitschke v. Wells, 118 Cal. 683.

An agreement in consideration of reduced freight, fixing the liability for damage, though caused by negligence, at a certain sum, was held to be valid in Pierce v. Southern Pac. R. Co., 120 Cal. 156.

**Delaware.** — The carrier may limit its liability by the rate of freight paid. Klair v. Wilmington Steamboat Co., 4 Penn. (Del.) 51.

**Indiana.** — Adams Express Co. v. Carnahan, 29 Ind. App. 607, 94 Am. St. Rep. 279, *rehearing denied* 29 Ind. App. 612.

**Kentucky.** — Adams Express Co. v. Walker, (Ky. 1904) 83 S. W. Rep. 106.

**333.** The Criterion. — See note 2.

**334.** Estoppel. — See note 2.

Stipulation as to Measure of Damages — Market Value at Place of Shipment — The Courts of Texas. — See note 4.

**335.** And in Minnesota. — See note 1.

But the Weight of Authority. — See note 2.

**Massachusetts.** — *Graves v. Adams Express Co.*, 176 Mass. 280.

**Minnesota.** — *O'Malley v. Great Northern R. Co.*, 86 Minn. 380.

*Stipulation Invalid Unless Amount Represents Fair Value of Goods.* — *Powers Mercantile Co. v. Wells*, 93 Minn. 143.

**Missouri.** — *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311.

**Montana.** — *Nelson v. Great Northern R. Co.*, 28 Mont. 297.

**Nebraska.** — *Chicago, etc., R. Co. v. Gardiner*, 51 Neb. 70.

**New Jersey.** — See *Paul v. Pennsylvania R. Co.*, 70 N. J. L. 442, wherein the court expressly refused to decide as to the validity of a contract fixing the value of goods and limiting the right of recovery to such valuation.

**New York.** — *Wilson v. Platt*, (Supm. Ct. App. T.) 84 N. Y. Supp. 143; *Hirsch v. New York Dispatch, etc., Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 198; *Frankfurt v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 683; *Bernstein v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 635; *Toy v. Long Island R. Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 792. See also *Marquis v. Wood*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 590.

A receipt given to a person who could not read or write, limiting liability to fifty dollars, without drawing his attention to the limitation, will not control a prior oral contract containing no such limitation. *Pompilj v. Manhattan Delivery Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 230.

A stipulation in a bill of lading, limiting damages to a certain sum, does not relieve the carrier from the consequences of his own negligence. *Blum v. Monahan*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 179. Such a stipulation does not relieve the carrier from liability to the full value of the goods for want of ordinary care as a bailee. *Bermel v. New York, etc., R. Co.*, 62 N. Y. App. Div. 389, *affirmed* 172 N. Y. 639, *distinguishing* *Zimmer v. New York Cent., etc., R. Co.*, 137 N. Y. 460.

Such a stipulation does not limit the shipper's right to recover for failure to stop goods *in transitu* on the shipper's order. *Rosenthal v. Weir*, 54 N. Y. App. Div. 275, *affirmed* 170 N. Y. 148.

**North Carolina.** — *Gardner v. Southern R. Co.*, 127 N. Car. 293.

**Ohio.** — *Wells v. Bell*, 65 Ohio St. 408; *Pennsylvania R. Co. v. Yoder*, 25 Ohio Cir. Ct. 32; *Jacobson v. Adams Express Co.*, 1 Ohio Cir. Dec. 212.

Such a contract is valid, even in case of negligence. *Cleveland, etc., R. Co. v. Simon*, 8 Ohio Cir. Dec. 540, 15 Ohio Cir. Ct. 123.

**Tennessee.** — *Nashville, etc., R. Co. v. Stone*, (Tenn. 1904) 79 S. W. Rep. 1031.

**Texas.** — *St. Louis Southwestern R. Co. v. McIntyre*, (Tex. Civ. App. 1904) 82 S. W. Rep. 346.

The carrier is liable for negligence in the absence of a statute permitting the limitation. *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518.

**Washington.** — The carrier and the shipper may stipulate in advance the value of the goods, and limit the carrier's liability thereto. *Hill v. Northern Pac. R. Co.*, 33 Wash. 697.

**Wisconsin.** — *Ullman v. Chicago, etc., R. Co.*, 112 Wis. 150, 88 Am. St. Rep. 949.

**333. 2. Criterion of Validity of Stipulations.** — The rule laid down in the text is supported by the following cases:

**Georgia.** — *Central of Georgia R. Co. v. Murphey*, 113 Ga. 514.

**Indiana.** — *Evansville, etc., R. Co. v. Kevekordes*, (Ind. App. 1904) 69 N. E. Rep. 1022; *Adams Express Co. v. Carnahan*, 29 Ind. App. 607, 94 Am. St. Rep. 279, *rehearing denied* 29 Ind. App. 612.

**Minnesota.** — *O'Malley v. Great Northern R. Co.*, 86 Minn. 380.

**Missouri.** — *Harrison v. Murray Iron Works Co.*, 96 Mo. App. 348, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 333; *Ward v. Missouri Pac. R. Co.*, 158 Mo. 226.

**New York.** — *Blum v. Monahan*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 179; *Springer v. V'estcott*, 166 N. Y. 117.

**North Carolina.** — *Gardner v. Southern R. Co.*, 127 N. Car. 293.

**Tennessee.** — *Nashville, etc., R. Co. v. Stone*, (Tenn. 1904) 79 S. W. Rep. 1031.

**Wisconsin.** — *Loeser v. Chicago, etc., R. Co.*, 94 Wis. 571; *Ullman v. Chicago, etc., R. Co.*, 112 Wis. 150, 88 Am. St. Rep. 949.

See also *Jennings v. Smith*, (C. C. A.) 106 Fed. Rep. 139.

In **Massachusetts** the only qualification is that the stipulation be brought home to the shipper's knowledge so that his assent may be assumed. *Graves v. Adams Express Co.*, 176 Mass. 280.

**334. 2. Nelson v. Great Northern R. Co.**, 28 Mont. 297.

A Consideration is necessary, however. *St. Louis, etc., R. Co. v. Coolidge*, (Ark. 1904) 83 S. W. Rep. 333.

**4. Invalid in Texas.** — *Southern Pac. R. Co. v. D'Arcas*, 27 Tex. Civ. App. 57; *International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130.

In **Mississippi** the same rule as in Texas appears to be applied. *Illinois Cent. R. Co. v. Bogard*, 78 Miss. 11.

**Canada — When Goods Are Converted by Carrier.** — A condition in a shipping receipt restricting claims to the cash value of the goods at the port of shipment does not apply to a case where the goods were wrongfully sold or converted by the carrier. *Wilson v. Canadian Development Co.*, 33 Can. Sup. Ct. 432, *reversing* 9 British Columbia 82.

**335. 1. Davis v. New York, etc., R. Co.**, 70 Minn. 37.

**2. Stipulation Valid by Weight of Authority.** —

**335.** (2) *Effect in Case of Injury Merely.* — See note 3.

**336.** 4. *Construction of Special Contracts.* — See note 1.

**338.** *Must Be Clear and Explicit.* — See note 2.

*Rule of Ejusdem Generis.* — See note 3.

**339.** *Reasonable Interpretation.* — See note 1.

6. *Statutes Prohibiting Limitation of Liability — In England.* — See note 3.

*In the United States.* — See note 4.

The Oneida, (C. C. A.) 128 Fed. Rep. 687; Nelson v. Great Northern R. Co., 28 Mont. 297; Gardner v. Southern R. Co., 127 N. Car. 293; Ullman v. Chicago, etc., R. Co., 112 Wis. 150, 88 Am. St. Rep. 949.

The stipulation must be broad enough to cover negligence where the loss has occurred thereby. Lowenstein v. Lombard, 164 N. Y. 324.

**335.** 3. *Where Property Is Damaged Merely.* — Goodman v. Missouri, etc., R. Co., 71 Mo. App. 460; Nelson v. Great Northern R. Co., 28 Mont. 297, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 335.

**336.** 1. *Construed Most Strongly Against the Carrier.* — Price v. Union Lighterage Co., (1904) 1 K. B. 412, affirming (1903) 1 K. B. 750; Fairbank v. Cincinnati, etc., R. Co., (C. C. A.) 81 Fed. Rep. 289; Compania de Navegacion la Flecha v. Brauer, 168 U. S. 104; Pacific Coast Steamship Co. v. Bancroft-Whitney Co., (C. C. A.) 94 Fed. Rep. 180; Adams Express Co. v. Carnahan, 29 Ind. App. 607, 94 Am. St. Rep. 279, rehearing denied 29 Ind. App. 612; Russell v. Erie R. Co., 70 N. J. L. 808, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 335-336; Robinson v. New York, etc., Steamship Co., 63 N. Y. App. Div. 211; Security Trust Co. v. Wells, etc., Express, 81 N. Y. App. Div. 426, affirmed 178 N. Y. 620; Parker v. Atlantic Coast Line R. Co., 133 N. Car. 335.

*Loss of Cotton While at Compress.* — See Amory Mfg. Co. v. Gulf, etc., R. Co., 89 Tex. 419.

*Rule Does Not Refer to Time When Liability Ceases.* — The rule of strict construction does not refer to the question of the time when the liability ceases by delivery. Paddock v. Toledo, etc., R. Co., 11 Ohio Cir. Dec. 789 21 Ohio Cir. Ct. 626.

**338.** 2. *Must Be Clear and Explicit.* — Adams Express Co. v. Carnahan, 29 Ind. App. 607, 94 Am. St. Rep. 279, rehearing denied 29 Ind. App. 612.

*Clause Capable of Two Constructions.* — When a clause in a contract of carriage is capable of two constructions, one of which will make it applicable where there is no negligence on the part of the carrier or his servants, and the other of which will make it applicable where there is such negligence, it requires special words to make the clause cover nonliability in the case of negligence. Thus, a contract exempting the carrier from liability "for any loss or damage to goods which can be covered by insurance" does not relieve him from liability for loss or damage caused by the negligence of his servants. Price v. Union Lighterage Co., (1904) 1 K. B. 412, affirming (1903) 1 K. B. 750.

3. *Rule of Ejusdem Generis Applied.* — The G. R. Booth, (C. C. A.) 91 Fed. Rep. 164; Fairbank

v. Cincinnati, etc., R. Co., (C. C. A.) 81 Fed. Rep. 289.

**339.** 1. *Contract to Be So Construed as Not to Invalidate it.* — Washburn Crosby Co. v. Johnston, (C. C. A.) 125 Fed. Rep. 273. See also The St. Hubert, (C. C. A.) 107 Fed. Rep. 727.

3. *The Canadian Railway Act of 1888,* 51 Vict., c. 29, § 246, precludes a railway company from setting up a stipulation for total exemption from liability where the damage is caused by its negligence. Hence, where the consignors, by their shipping bill, agreed to insure the goods to be shipped, the railway company to be subrogated to the consignors' rights in case of loss, and a condition of the bill of lading given by the railway company required the consignors to effect insurance on the goods shipped, and the goods were damaged by the railway's negligence, it was held that the contract was one for total exemption from liability, and that the railroad could not escape liability by setting up the consignors' breach of the condition as to insurance. St. Mary's Creamery Co. v. Grand Trunk R. Co., 8 Ont. L. Rep. 1, affirming 5 Ont. L. Rep. 742, following Grand Trunk R. Co. v. Vogel, 11 Can. Sup. Ct. 612, and distinguishing Robertson v. Grand Trunk R. Co., 24 Can. Sup. Ct. 611.

4. *The Kansas Statute,* providing that contracts limiting the carrier's liability should not be valid unless permitted by a board, became inoperative by implication on the abolition of the board. Missouri Pac. R. Co. v. Park, 66 Kan. 248. See in regard to this statute St. Louis, etc., R. Co. v. Sherlock, 59 Kan. 23; St. Louis, etc., R. Co. v. Tribbey, 6 Kan. App. 467.

*Kentucky Constitution.* — See Brown v. Illinois Cent. R. Co., 100 Ky. 525; Adams Express Co. v. Walker, (Ky. 1904) 83 S. W. Rep. 106.

The Kentucky Constitution, § 196, does not apply to a carrier incorporated in Kentucky which makes a contract in another state to ship goods that will not pass through the state of Kentucky. Tecumseh Mills v. Louisville, etc., R. Co., 108 Ky. 572. Nor does it apply on a contract made in another state to carry to a point within Kentucky where the loss occurred within the other state. Cleveland, etc., R. Co. v. Druien, (Ky. 1904) 80 S. W. Rep. 778. So it does not prevent the carrier from stipulating where the goods shall be delivered. The City of Clarksville, 94 Fed. Rep. 201.

*Missouri.* — See Western Sash, etc., Co. v. Chicago, etc., R. Co., 177 Mo. 641.

Rev. Stat. Mo. (1899), § 5222, prevents a railroad company issuing bills of lading for through shipments from limiting its liability for negligence to its own line. Marshall, etc., Grain Co. v. Kansas City, etc., R. Co., 176 Mo. 480, 98 Am. St. Rep. 508.

**340.** Interstate Shipments. — See notes 1, 2.

**341.** 7. Statutes Limiting Liability — *a.* IN THE UNITED STATES — Loss or Injury After Goods Unloaded. — See note 3.

A Statute of California. — See note 4.

**345.** 8. Effect of Concealment or Misrepresentation of Value by Shipper — *a.* OPERATES AS A LIMITATION OF LIABILITY. — See note 1.

Reason for Rule — Question of Consideration. — See note 3.

**347.** Where Purpose of Concealment Is to Obtain Reduced Rate. — See note 2.

**348.** *b.* DUTY OF CARRIER TO INQUIRE AS TO VALUE OF GOODS — Where Carrier Has Notice of Real Value. — See note 1.

Where Carrier Has Reason to Know Value of Articles. — See note 2.

**349.** *c.* DUTY OF SHIPPER TO STATE VALUE. — See note 2.

**350.** But When He Has Voluntarily Made a Declaration. — See note 1.

**XII. CARRIER'S RELATION TO GOODS — 2. Right to Dispute Shipper's Title — Present Rule — Right of True Owner. — See note 6.**

**351.** 3. May Maintain Action to Recover Goods. — See note 2.

**XIII. AUTHORITY OF CARRIER'S AGENTS — General Agent. — See note 3.**

Nebraska Constitution. — See Pennsylvania R. Co. *v.* Kennard Glass, etc., Co., 59 Neb. 435; Union Pac. R. Co. *v.* Metcalf, 50 Neb. 452; Chicago, etc., R. Co. *v.* Gardiner, 51 Neb. 70.

An agreement that the owner shall accompany live stock and be responsible for its care is not a limitation forbidden by the constitution. Chicago, etc., R. Co. *v.* Schultdt, 66 Neb. 43. Nor does the prohibition apply to a contract limiting the carrier's liability to losses occurring on its own line. Miller Grain, etc., Co. *v.* Union Pac. R. Co., 138 Mo. 658 (construing the Nebraska constitution).

South Carolina. — See Mathis *v.* Southern R. Co., 65 S. Car. 271.

Texas. — See Pacific Express Co. *v.* Hertzberg, 17 Tex. Civ. App. 100; International, etc., R. Co. *v.* Parish, 18 Tex. Civ. App. 130.

**340.** 1. Interstate Shipments — Texas. — Rev. Stat. Tex. (1895), art. 278, does not apply to interstate shipments. Galveston, etc., R. Co. *v.* Fales, (Tex. Civ. App. 1903) 77 S. W. Rep. 234; Texas, etc., R. Co. *v.* Richmond, 94 Tex. 571, reversing (Tex. Civ. App. 1901) 61 S. W. Rep. 410; Pittman *v.* Pacific Express Co., 24 Tex. Civ. App. 595; Texas, etc., R. Co. *v.* Berchfield, 19 Tex. Civ. App. 228; Southern Pac. Co. *v.* Redding, 17 Tex. Civ. App. 440; Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58; Southern Pac. R. Co. *v.* Phillipson, (Tex. Civ. App. 1897) 39 S. W. Rep. 958.

The Missouri, Nebraska, and South Carolina Statutes have been held, however, to embrace interstate shipments. Western Sash, etc., Co. *v.* Chicago, etc., R. Co., 177 Mo. 641; Union Pac. R. Co. *v.* Vincent, 58 Neb. 171; Crawford *v.* Southern R. Co., 56 S. Car. 136. See also *supra*, this title, **339.** 4.

**2.** What Contracts Are for Interstate Shipments. — Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58.

**341.** 3. Application of Statute — Goods Injured After Unloading. — The City of Clarksville, 94 Fed. Rep. 201.

Generally, as to the Statutory Limitation of Liability of shipowners, see the titles CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, **231.** 4 *et seq.*; SHIPS AND SHIPPING, **1048.** 1 *et seq.*

**4.** California Statute. — See Michalitschke *v.* Wells, 118 Cal. 683.

**345.** 1. Right of Carrier to Be Informed as to Nature and Value. — Kellerman *v.* Kansas City, etc., R. Co., 68 Mo. App. 255, affirmed 136 Mo. 177; Bernstein *v.* Weir, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 635; Hirsch *v.* New York Dispatch, etc., Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 198; Wilson *v.* Platt, (Supm. Ct. App. T.) 84 N. Y. Supp. 143; Rowan *v.* Wells, 80 N. Y. App. Div. 31; Pacific Express Co. *v.* Pitman, 30 Tex. Civ. App. 626. But see Louisville, etc., R. Co. *v.* Levi, 8 Ohio Cir. Dec. 373.

**3.** Shipper's Recovery Limited to Apparent Value of Goods. — Rowan *v.* Wells, 80 N. Y. App. Div. 31.

**347.** 2. Value Concealed for Purpose of Securing Lower Rate. — Chicago, etc., R. Co. *v.* Miller, 79 Ill. App. 473; Kellerman *v.* Kansas City, etc., R. Co., 68 Mo. App. 255, affirmed 136 Mo. 177; Pacific Express Co. *v.* Pitman, 30 Tex. Civ. App. 626.

When Rule Does Not Apply. — The rule does not apply to a contract void under a statute prohibiting a limitation of the amount of the carrier's liability. Lucas *v.* Burlington, etc., R. Co., 112 Iowa 594.

**348.** 1. Must Be Calculated to Deceive — Notice to Carrier. — Southern Pac. R. Co. *v.* D'Arcais, 27 Tex. Civ. App. 57.

**2.** Where Carrier Has Reason to Know Value of Consignment. — Trimble *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 403, affirmed 162 N. Y. 84, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 348 *et seq.*

**349.** 2. Not Bound to State Value of Goods Unless Asked. — Trimble *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 403, affirmed 162 N. Y. 84, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 348 *et seq.*

**350.** 1. When Voluntary Declaration Made. — Rowan *v.* Wells, 80 N. Y. App. Div. 31; Johnson *v.* Gulf, etc., R. Co., 82 Miss. 452.

**6.** See Le Revers *v.* Canadian Pac. R. Co., 12 Quebec Super. Ct. 128.

**351.** 2. Carrier May Sue for Injury to Goods. — Chicago, etc., R. Co. *v.* Kansas City Suburban Belt R. Co., 78 Mo. App. 245, 2 Mo. App. Rep. 204.

**3.** Authority of General Agent. — Stoner *v.* Chicago G. W. R. Co., 109 Iowa 551, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 351; Rudell

**351.** Presumption. — See note 4.

**352.** Special Instructions to the Agent. — See note 1.

Transportation to Points Beyond Carrier's Line. — See notes 2, 3.

**353.** Agent Limited to Fairly Apparent Authority. — See notes 1, 2.

Agent Acting Contrary to Duty and Known Course of Business. — See note 3.

Special Authority. — See note 5.

Acting for Both Parties. — See note 6.

**XIV. BURDEN OF PROOF — 1. In General — a. PROOF BY RESPECTIVE PARTIES — Plaintiff Must Show Receipt by Carrier and Nondelivery. — See note 7.**

**354.** See notes 1, 2.

*v. Ogdensburg Transit Co.*, 117 Mich. 568, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 351; *Atchison, etc., R. Co. v. Bryan*, (Tex. Civ. App. 1896) 37 S. W. Rep. 234; *Nichols v. Oregon Short Line R. Co.*, 24 Utah 83, 91 Am. St. Rep. 778, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 351; *Waldron v. Canadian Pac. R. Co.*, 22 Wash. 253, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 351.

**351. 4. Presumption of Agent's Authority.** — *Seasongood v. Tennessee, etc., Transp. Co.*, (Ky. 1899) 54 S. W. Rep. 193; *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 351; *Gann v. Chicago G. W. R. Co.*, 72 Mo. App. 34; *Gulf, etc., R. Co. v. Short*, (Tex. Civ. App. 1899) 51 S. W. Rep. 261; *Pacific Express Co. v. Needham*, (Tex. Civ. App. 1904) 83 S. W. Rep. 22; *Nichols v. Oregon Short Line R. Co.*, 24 Utah 83, 91 Am. St. Rep. 778, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 351.

**Can Only Contract to Furnish Cars at His Own Station.** — See *Texas, etc., R. Co. v. Ray*, (Tex. Civ. App. 1905) 84 S. W. Rep. 691.

**Authority to Furnish Cars.** — See *Houston, etc., R. Co. v. Bath*, 17 Tex. Civ. App. 697.

**352. 1. Limitations upon Agent's Authority Not Known to Shipper.** — *Stoner v. Chicago G. W. R. Co.*, 109 Iowa 551; *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 570; *Gann v. Chicago G. W. R. Co.*, 72 Mo. App. 34; *Lowenstein v. Lombard*, 164 N. Y. 324; *Gulf, etc., R. Co. v. Irvine*, (Tex. Civ. App. 1903) 73 S. W. Rep. 540; *International, etc., R. Co. v. True*, 23 Tex. Civ. App. 523.

**The Shipper Is under No Obligation to Make Inquiry** regarding the agent's instructions and powers. *San Antonio, etc., R. Co. v. Williams*, (Tex. Civ. App. 1900) 57 S. W. Rep. 883.

**Traveling Freight Agent.** — See *Baker v. Chicago G. W. R. Co.*, 91 Minn. 118.

**2. Powers of General Freight Agent.** — *Farmer's L. & T. Co. v. Northern Pac. R. Co.*, 120 Fed. Rep. 873, 57 C. C. A. 533; *Wolfe v. Lehigh Valley R. Co.*, 9 Kulp (Pa.) 401, 13 York Leg. Rec. (Pa.) 27; *Outland v. Seaboard Air Line R. Co.*, 134 N. Car. 350.

**Soliciting Freight Agent.** — See *Graves v. Miami Steamship Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 645.

**Agent Soliciting Traffic for Foreign Railroad Company.** — See *Fremont, etc., R. Co. v. New York, etc., R. Co.*, 66 Neb. 159.

**3. Powers of Ordinary Station Agent.** — *McLagan v. Chicago, etc., R. Co.*, 116 Iowa 183; *Hoffman v. Cumberland Valley R. Co.*, 85 Md. 391; *Faulkner v. Chicago, etc., R. Co.*, 99 Mo. App. 421; *Sutton v. Chicago, etc., R. Co.*, 14 S.

Dak. 111. But see *San Antonio, etc., R. Co. v. Williams*, (Tex. Civ. App. 1900) 57 S. W. Rep. 883.

**Company Estopped to Deny Agent's Authority.** — See *Nashville, etc., R. Co. v. Smith*, 132 Ala. 434.

**Ratification of Agent's Authority.** — See *Porter v. Raligh, etc., R. Co.*, 132 N. Car. 71.

**Actual Authority Proved.** — *Bigelow v. Chicago, etc., R. Co.*, 104 Wis. 109.

**353. 1. Agent Limited to Fairly Apparent Authority.** — *Myar v. St. Louis Southwestern R. Co.*, 71 Ark. 552; *McLagan v. Chicago, etc., R. Co.*, 116 Iowa 183; *Burgher v. Chicago, etc., R. Co.*, 105 Iowa 335; *Leinkauf v. Lombard*, 12 N. Y. App. Div. 302; *Wells, etc., Express Co. v. Williams*, (Tex. Civ. App. 1902) 71 S. W. Rep. 314; *Gulf, etc., R. Co. v. Dinwiddie*, 21 Tex. Civ. App. 344. See also *Jennings v. Smith*, 99 Fed. Rep. 189.

**Admissions by Agent.** — *Southern R. Co. v. Kinchen*, 103 Ga. 186.

**2.** *The Patria*, 118 Fed. Rep. 109; *Central of Georgia R. Co. v. Felton*, 110 Ga. 597; *Lake Shore, etc., R. Co. v. National Live Stock Bank*, 178 Ill. 506; *Bessling v. Houston, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 639.

**3. Cannot Receipt for Goods Never Received.** — *Cunard Steamship Co. v. Kelley*, (C. C. A.) 115 Fed. Rep. 678; *Burgher v. Chicago, etc., R. Co.*, 105 Iowa 335.

**5.** *Central of Georgia R. Co. v. Felton*, 110 Ga. 597; *Burgher v. Chicago, etc., R. Co.*, 105 Iowa 335; *Toledo, etc., R. Co. v. Bowler, etc., Co.*, 63 Ohio St. 274.

**The Custom of the Agent** to make similar contracts with other parties may be shown. *Central of Georgia R. Co. v. Felton*, 110 Ga. 597; *Lowenstein v. Lombard*, 164 N. Y. 324.

**6. Double Agency.** — *Illinois Cent. R. Co. v. Carter*, 165 Ill. 570.

**7. Shipper Must Prove Delivery to Carrier.** — *Cunard Steamship Co. v. Kelley*, (C. C. A.) 115 Fed. Rep. 678; *Ocean Steamship Co. v. Wilder*, 107 Ga. 220; *Southern R. Co. v. Allison*, 115 Ga. 635; *Bonfiglio v. Lake Shore, etc., R. Co.*, 125 Mich. 476, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 353; *Springer v. Westcott*, 19 N. Y. App. Div. 366; *Abrams v. Platt*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 637; *Illinois Cent. R. Co. v. Southern Seating, etc., Co.*, 104 Tenn. 568, 78 Am. St. Rep. 933.

**Delivery to an Expressman** in good condition raises a presumption of delivery to the railroad company in like condition. *Willett v. Southern R. Co.*, 66 S. Car. 477.

**354. 1. No Presumption that Goods Were in Good Order When Delivered to Carrier.** — *Mears*

**355.** Carrier's Burden in Meeting *Prima Facie* Case. — See note 1.

**357.** See note 1.

**Plaintiff Must Prove Negligence.** — See note 3.

**Proof that Defendant Is Common Carrier.** — See note 4.

*v. New York, etc., R. Co.*, 75 Conn. 171, 96 Am. St. Rep. 193; *Bath v. Houston, etc., R. Co.*, (Tex. Civ. App. 1904) 78 S. W. Rep. 993; *Texas, etc., R. Co. v. Capper*, (Tex. Civ. App. 1905) 84 S. W. Rep. 694.

**Goods Received for as "in Apparent Good Order."** — *Thyll v. New York, etc., R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 175, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 354; *Jean v. Flagg*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 421. Compare *Argo Steamship Co. v. Seago*, (C. C. A.) 101 Fed. Rep. 999, holding that a recital in a bill of lading that goods are in apparent good order and condition casts the burden of proof on the carrier!

**Where Damage Before and After Delivery Cannot Be Separated.** — Where the jury is unable to separate damage done before delivery to the carrier from damage that might have occurred thereafter there can be no recovery. *Missouri, etc., R. Co. v. Wood*, 26 Tex. Civ. App. 500.

**354. 2. Must Prove Nondelivery by Carrier.** — *Bonfiglio v. Lake Shore, etc., R. Co.*, 125 Mich. 476, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 353; *Hirsch v. Hudson River Line*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 823; *Southern Pac. R. Co. v. Phillipson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 958.

**Condition of Goods When Delivered to Consignee.** — *Mears v. New York, etc., R. Co.*, 75 Conn. 171, 96 Am. St. Rep. 193.

**The Plaintiff Must Prove Misdelivery** when alleged. *Missouri Pac. R. Co. v. Houston*, 10 Kan. App. 356.

**Burden Is on Plaintiff to Prove Damage.** — *Silverman v. St. Louis, etc., R. Co.*, 51 La. Ann. 1785.

**355. 1. Unexplained Loss Creates Presumption of Carrier's Liability** — *United States*. — *Hudson River Lighterage Co. v. Wheeler Condenser, etc., Co.*, 93 Fed. Rep. 374; *The Frey*, (C. C. A.) 106 Fed. Rep. 319; *The C. W. Elphicke*, 117 Fed. Rep. 279, affirmed 122 Fed. Rep. 439, 58 C. C. A. 421; *The Wildcroft*, 126 Fed. Rep. 229; *The Westminster*, (C. C. A.) 127 Fed. Rep. 680, affirming 116 Fed. Rep. 123. *Alabama*. — *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537; *Louisville, etc., R. Co. v. Cowherd*, 120 Ala. 51; *Nashville, etc., R. Co. v. Parker*, 123 Ala. 683.

*Arkansas*. — *St. Louis Southwestern R. Co. v. Birdwell*, 72 Ark. 502; *St. Louis, etc., R. Co. v. Coolidge*, (Ark. 1904) 83 S. W. Rep. 333.

*Connecticut*. — *Mears v. New York, etc., R. Co.*, 75 Conn. 171, 96 Am. St. Rep. 193.

*Kentucky*. — *Adams Express Co. v. Walker*, (Ky. 1904) 83 S. W. Rep. 106. See also *Louisville, etc., Packet Co. v. Smith*, (Ky. 1901) 60 S. W. Rep. 524.

*Michigan*. — *Bonfiglio v. Lake Shore, etc., R. Co.*, 125 Mich. 476, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 355.

*Mississippi*. — *Burnham v. Alabama, etc., R. Co.*, 81 Miss. 46.

*Missouri*. — *Grier v. St. Louis Merchants' Bridge Terminal R. Co.*, 108 Mo. App. 565.

*New York*. — *Aaronson v. Pennsylvania R. Co.*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 666; *Trimble v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 403, affirmed 162 N. Y. 84; *Hutkoff v. Pennsylvania R. Co.*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 770, affirmed (Supm. Ct. App. T.) 30 Misc. (N. Y.) 802; *Blum v. Monahan*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 179; *Fasy v. International Nav. Co.*, 77 N. Y. App. Div. 469, affirmed 177 N. Y. 591; *Strong v. Long Island R. Co.*, 91 N. Y. App. Div. 442; *Hoffberg v. Bumford*, (Supm. Ct. App. T.) 88 N. Y. Supp. 940.

*North Carolina*. — *Parker v. Atlantic Coast Line R. Co.*, 133 N. Car. 335.

*Ohio*. — *Pennsylvania R. Co. v. Yoder*, 25 Ohio Cir. Ct. 32.

*Pennsylvania*. — *Davenport v. Pennsylvania R. Co.*, 10 Pa. Super. Ct. 47; *United Fruit Co. v. Bisese*, 25 Pa. Super. Ct. 170.

*Tennessee*. — *Pennsylvania R. Co. v. Naive*, (Tenn. 1904) 79 S. W. Rep. 124; *Nashville, etc., R. Co. v. Stone*, (Tenn. 1904) 79 S. W. Rep. 1031.

*Texas*. — *Southern Pac. R. Co. v. Phillipson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 958; *Gulf, etc., R. Co. v. Browne*, 27 Tex. Civ. App. 437; *Southern Pac. R. Co. v. D'Arcrais*, 27 Tex. Civ. App. 57; *San Antonio, etc., R. Co. v. Josey*, (Tex. Civ. App. 1903) 71 S. W. Rep. 606; *Askew v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 846; *Ft. Worth, etc., R. Co. v. Shanley*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1014; *St. Louis Southwestern R. Co. v. McIntyre*, (Tex. Civ. App. 1904) 82 S. W. Rep. 346; *Bibb v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1904) 84 S. W. Rep. 663.

*Virginia*. — *Norfolk, etc., R. Co. v. Reeves*; 97 Va. 284.

*Wisconsin*. — *Lamb v. Chicago, etc., R. Co.*, 101 Wis. 138.

**Res Ipsa Loquitur.** — See *Powers Mercantile Co. v. Wells*, 93 Minn. 143; *Gardner v. New Orleans, etc., R. Co.*, 78 Miss. 640.

**Action for Delay in Delivery.** — *Atchison, etc., R. Co. v. Bryan*, (Tex. Civ. App. 1896) 37 S. W. Rep. 234.

**357. 1.** See *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, reversing (Tex. Civ. App. 1901) 61 S. W. Rep. 410; *Densmore Commission Co. v. Duluth, etc., R. Co.*, 101 Wis. 563.

**3. Mere Fact of Loss or Injury Creates No Presumption of Negligence.** — *The Queen*, 78 Fed. Rep. 155; *The Musselcrag*, 125 Fed. Rep. 786; *Jones v. Minneapolis, etc., R. Co.*, 91 Minn. 229; *Farr v. Adams Express Co.*, 100 Mo. App. 574; *Anderson v. Atchison, etc., R. Co.*, 93 Mo. App. 677; *Needy v. Western Maryland R. Co.*, 22 Pa. Super. Ct. 494, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 357. But see *Southern Pac. R. Co. v. Phillipson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 958, wherein it was held that the existence of negligence is presumed against the party having the means of disproving it, but failing to do so.

**4. Must Prove Defendant to Be a Common**



**357.** *b.* PRESUMPTION AS TO STATE OF GOODS WHEN RECEIVED. — See note 5.

**358.** *c.* WHERE ACT OF GOD IS THE DEFENSE. — See note 2.

*d.* DEFENSE OF CONTRIBUTORY NEGLIGENCE. — See note 3.

**2.** Where Special Contract Is Set Up — Special Contract Must Be Pleaded and Proved. — See note 6.

**359.** Carrier Must Bring Case Within the Exception of the Contract. — See note 1. Goods Unaccounted for — Presumption Against Carrier. — See note 2.

Where Shipper Agrees to Accompany and Care for Shipment. — See note 3.

**360.** Showing Case Within Exception Sufficient, Without Proving Absence of Negligence. — See note 1.

**Carrier.** — See *The Westminster*, (C. C. A.) 127 Fed. Rep. 680, *affirming* 116 Fed. Rep. 123.

**357.** *5.* *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659; *Morris v. Wier*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 586.

**358.** *2.* Act of God as Defense. — *The Majestic*, 166 U. S. 375; *Menner v. Delaware, etc.*, Canal Co., 7 Pa. Super. Ct. 135.

**3.** Where Contributory Negligence of Shipper Is Relied On. — *Menner v. Delaware, etc.*, Canal Co., 7 Pa. Super. Ct. 135; *Belcher v. Missouri, etc.*, R. Co., 92 Tex. 593.

**6.** Contract Must Be Specially Pleaded. — *Louisville, etc.*, R. Co. v. *Cunningham*, 88 Ill. App. 289, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 358; *Nelson v. Great Northern R. Co.*, 28 Mont. 297.

**359.** *1.* Burden of Proof on Carrier to Show Special Contract and that Loss Was Within Exemption Clause — *England*. — *Curran v. Midland Great Western Co.*, (1896) 2 Ir. R. 183; *Mahony v. Waterford, etc.*, R. Co., (1900) 2 Ir. R. 273. *Compare* *Graham v. Belfast, etc.*, R. Co., (1901) 2 Ir. R. 13, wherein it was held that the consignor, in order to hold the carrier liable for unreasonable delay under a contract exempting it from liability except for wilful misconduct, must prove that the carrier intentionally delayed the goods.

*United States.* — *The Isaac Reed*, 82 Fed. Rep. 566; *Insurance Co. of North America v. Easton, etc.*, Transp. Co., 97 Fed. Rep. 653; *Doherr v. Houston*, (C. C. A.) 128 Fed. Rep. 594, *affirming* 123 Fed. Rep. 334; *The Patria*, 125 Fed. Rep. 425; *The Friesland*, 104 Fed. Rep. 99; *Argo Steamship Co. v. Seago*, (C. C. A.) 101 Fed. Rep. 999.

*Alabama.* — *Louisville, etc.*, R. Co. v. *Cowherd*, 120 Ala. 51; *Mouton v. Louisville, etc.*, R. Co., 128 Ala. 537; *Nashville, etc.*, R. Co. v. *Parker*, 123 Ala. 683.

*Connecticut.* — *Mears v. New York, etc.*, R. Co., 75 Conn. 171, 96 Am. St. Rep. 193.

*Kansas.* — *Kalina v. Union Pac. R. Co.*, 69 Kan. 172.

*Michigan.* — *Bonfiglio v. Lake Shore, etc.*, R. Co., 125 Mich. 476, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 359.

*Minnesota.* — *Hinton v. Eastern R. Co.*, 72 Minn. 339.

*Montana.* — *Nelson v. Great Northern R. Co.*, 28 Mont. 297.

*Nebraska.* — *Pennsylvania R. Co. v. Kennard Glass, etc.*, Co., 59 Neb. 435.

*New York.* — *Robinson v. New York, etc.*, Steamship Co., 63 N. Y. App. Div. 211.

*South Carolina.* — *Crawford v. Southern R. Co.*, 56 S. Car. 136.

*Texas.* — *Galveston, etc.*, R. Co. v. *Efron*, (Tex. Civ. App. 1897) 38 S. W. Rep. 639.

*2.* *Aaronson v. Pennsylvania R. Co.*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 666.

**3.** Where Shipper Undertakes the Care of Goods. — *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659; *Faust v. Chicago, etc.*, R. Co., 104 Iowa 241, 65 Am. St. Rep. 454; *Louisville, etc.*, R. Co. v. *Wathen*, (Ky. 1899) 49 S. W. Rep. 185. *Contra*, *Nelson v. Great Northern R. Co.*, 28 Mont. 297.

**Carrier Still Liable for Negligence.** — *Comer v. Columbia, etc.*, R. Co., 52 S. Car. 36.

**360.** *1.* When Loss Shown to Be Within Exemption Clause, Burden on Plaintiff to Prove Negligence — *United States.* — *The Victory*, 168 U. S. 410; *Charnock v. Texas, etc.*, R. Co., 194 U. S. 432; *Cau v. Texas, etc.*, R. Co., 194 U. S. 427; *The Lennox*, 90 Fed. Rep. 308; *The Henry B. Hyde*, (C. C. A.) 90 Fed. Rep. 114; *Washburn-Crosby Co. v. Johnston*, 125 Fed. Rep. 273, 60 C. C. A. 187; *The Southwark*, (C. C. A.) 108 Fed. Rep. 880, *affirming* 104 Fed. Rep. 103, *reversed* on the ground of the illegality of the special contract 191 U. S. 1; *The Tjomo*, 115 Fed. Rep. 919; *The Westminster*, 116 Fed. Rep. 123, *affirmed* (C. C. A.) 127 Fed. Rep. 680.

*Indiana.* — *Insurance Co. of North America v. Lake Erie, etc.*, R. Co., 152 Ind. 333, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 360.

*Kansas.* — *Kalina v. Union Pac. R. Co.*, 69 Kan. 172.

*Maine.* — *Morse v. Canadian Pac. R. Co.*, 97 Me. 77.

*Missouri.* — *Anderson v. Atchison, etc.*, R. Co., 93 Mo. App. 677.

*New York.* — *Newman v. Pennsylvania R. Co.*, 33 N. Y. App. Div. 171, 27 Civ. Pro. (N. Y.) 377; *Campe v. Weir*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 243; *Sejalon v. Woolverton*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 752; *Rowan v. Wells*, 80 N. Y. App. Div. 31; *Dobson v. Central R. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 582; *Thyll v. New York, etc.*, R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 175, *modified* 92 N. Y. App. Div. 513; *Van Akin v. Erie R. Co.*, 92 N. Y. App. Div. 23.

*Pennsylvania.* — *Frank v. Central R. Co.*, 9 Pa. Super. Ct. 129; *Davenport v. Pennsylvania R. Co.*, 10 Pa. Super. Ct. 47; *Keller v. Baltimore, etc.*, R. Co., 10 Pa. Super. Ct. 240.

*Tennessee.* — *Nashville, etc.*, R. Co. v. *Stone*, (Tenn. 1904) 79 S. W. Rep. 1031.

**361.** Contrary Rule that Carrier Must Show Absence of Negligence. — See note 2.

**362.** Reasons for and Against Casting Burden on Carrier. — See note 1.

Action Based on Alleged Negligence. — See note 4.

**363.** Loss by Fire under Contract Limiting Liability to Negligence. — See note 1.

**3. When Carrier Is a Warehouseman Merely — Upon a Prima Facie Case of Negligence.** — See note 3.

**XV. NEGLIGENCE OF CARRIER — 1. General Rule as to Liability — Question of Negligence for Jury.** — See note 5.

**364.** Care Required of Carrier as to Goods in Its Hands. — See note 1.

*Wisconsin.* — Schaller *v.* Chicago, etc., R. Co., 97 Wis. 31.

**361. 2. Contrary View — Carrier Bound to Show Absence of Negligence — Alabama.** — Louisville, etc., R. Co. *v.* Gidley, 119 Ala. 523; Mouton *v.* Louisville, etc., R. Co., 128 Ala. 537. *Connecticut.* — Mears *v.* New York, etc., R. Co., 75 Conn. 171, 96 Am. St. Rep. 193.

*Kentucky.* — Merchants' Dispatch Transp. Co. *v.* Hoskins, (Ky. 1897) 41 S. W. Rep. 31. *Mississippi.* — Newberger Cotton Co. *v.* Illinois Cent. R. Co., 75 Miss. 303.

*Texas.* — Askew *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 846.

**362. 1.** Morse *v.* Canadian Pac. R. Co., 97 Me. 77.

**4. Question for Jury.** — Marande *v.* Texas, etc., R. Co., 184 U. S. 173, reversing (C. C. A.) 102 Fed. Rep. 246; Siebrecht *v.* Pennsylvania R. Co., (Supm. Ct. App. T.) 21 Misc. (N. Y.) 615; Texas, etc., R. Co. *v.* Richmond, 94 Tex. 571; Galveston, etc., R. Co. *v.* Efron, (Tex. Civ. App. 1897) 38 S. W. Rep. 639.

**363. 1. Proof of Loss by Fire Creates No Presumption of Negligence — United States.** — See Marande *v.* Texas, etc., R. Co., 102 Fed. Rep. 246, reversed for error in directing a verdict 184 U. S. 173; Charnock *v.* Texas, etc., R. Co., (C. C. A.) 113 Fed. Rep. 92, affirmed 194 U. S. 432; Cau *v.* Texas, etc., R. Co., (C. C. A.) 113 Fed. Rep. 91, affirmed 194 U. S. 427; The Strathdon, (C. C. A.) 101 Fed. Rep. 600, affirming 94 Fed. Rep. 206.

*Iowa.* — Faust *v.* Chicago, etc., R. Co., 104 Iowa 241, 65 Am. St. Rep. 454.

*Massachusetts.* — Cox *v.* Central Vermont R. Co., 170 Mass. 129.

*Mississippi.* — Newberger Cotton Co. *v.* Illinois Cent. R. Co., 75 Miss. 303. See also Yazoo, etc., R. Co. *v.* Millsaps, 76 Miss. 855, 71 Am. St. Rep. 543.

*New York.* — Rowan *v.* Wells, 80 N. Y. App. Div. 31.

In *Texas* a contrary doctrine prevails, and the burden is on the carrier to show that the loss was not due to its negligence. *Texas*, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58; St. Louis Southwestern R. Co. *v.* McIntyre, (Tex. Civ. App. 1904) 82 S. W. Rep. 346; Houston, etc., R. Co. *v.* McFadden, (Tex. Civ. App. 1897) 40 S. W. Rep. 216; Galveston, etc., R. Co. *v.* Efron, (Tex. Civ. App. 1897) 38 S. W. Rep. 639; Texas, etc., R. Co. *v.* Richmond, 94 Tex. 571.

**3.** Hardman *v.* Montana Union R. Co., (C. C. A.) 83 Fed. Rep. 88.

**Where Bill of Lading Casts Burden on Plaintiff.** — Where the bill of lading provides that the burden of proof of negligence shall be upon

the plaintiff, it is met by showing that the loss occurred from sparks from a locomotive, and the burden is shifted to the carrier to show a sufficient spark arrester. *Fire Assoc. v. Loeb*, 25 Tex. Civ. App. 24.

**5. Negligence a Question for the Jury — United States.** — Marande *v.* Texas, etc., R. Co., 184 U. S. 173, reversing (C. C. A.) 102 Fed. Rep. 246; Judd *v.* New York, etc., Steamship Co., 117 Fed. Rep. 206, 54 C. C. A. 238, on rehearing 118 Fed. Rep. 826, 55 C. C. A. 438, affirming 128 Fed. Rep. 7, 62 C. C. A. 515.

*Alabama.* — Mouton *v.* Louisville, etc., R. Co., 128 Ala. 537.

*Arkansas.* — Choctaw, etc., R. Co. *v.* Walker, 71 Ark. 571.

*Connecticut.* — Mears *v.* New York, etc., R. Co., 75 Conn. 171, 96 Am. St. Rep. 193.

*Georgia.* — Cooper *v.* Raleigh, etc., R. Co., 105 Ga. 83.

*Illinois.* — Louisville, etc., R. Co. *v.* Cunningham, 88 Ill. App. 289.

*Kansas.* — Atchison, etc., R. Co. *v.* Morris, 65 Kan. 532; Missouri Pac. R. Co. *v.* Weil, 8 Kan. App. 839.

*Kentucky.* — Louisville, etc., R. Co. *v.* Hull, 113 Ky. 561.

*Minnesota.* — O'Malley *v.* Great Northern R. Co., 86 Minn. 380.

*Mississippi.* — Gardner *v.* New Orleans, etc., R. Co., 78 Miss. 640.

*New York.* — Hutkoff *v.* Pennsylvania R. Co., (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 770; Rosenthal *v.* Weir, 54 N. Y. App. Div. 275, affirmed 170 N. Y. 148; G. S. Roth Clothing Co. *v.* Maine Steamship Co., (Supm. Ct. App. T.) 42 Misc. (N. Y.) 550; Strough *v.* New York Cent., etc., R. Co., 92 N. Y. App. Div. 584, affirmed 181 N. Y. 533.

*Pennsylvania.* — Menner *v.* Delaware, etc., Canal Co., 7 Pa. Super. Ct. 135.

*Texas.* — Pacific Express Co. *v.* Hertzberg, 17 Tex. Civ. App. 100; Ft. Worth Transfer Co. *v.* Isaacs, (Tex. Civ. App. 1897) 40 S. W. Rep. 39.

*Washington.* — Union Feed Co. *v.* Pacific Clipper Line, 31 Wash. 28.

*West Virginia.* — Lewis *v.* Chesapeake, etc., R. Co., 47 W. Va. 656, 81 Am. St. Rep. 816.

**Loss by Fire — Explosives Left Unguarded.** — See Phenix Powder Mfg. Co. *v.* Wabash R. Co., 101 Mo. App. 442.

**Where Findings of Fact Conflict,** the cause will be remanded for a new trial. *Missouri*, etc., R. Co. *v.* Levy, (Tex. Civ. App. 1899) 50 S. W. Rep. 1026.

**364. 1.** Pacific Express Co. *v.* Lothrop, 20 Tex. Civ. App. 339.

**365.** The Custom and Practice of Well-managed Railroads. — See note 6.

**366.** 2. Fact of Proximate Cause Must Be Shown. — See note 2.

**367.** 3. Stowage of Goods. — See note 1.

Carrier's Responsibility for Explosions Depends on Negligence. — See note 2.

**368.** XVI. CONTRIBUTORY NEGLIGENCE OF SHIPPER — 1. Generally. — See note 1.

Contributory Negligence Generally for Jury. — See note 2.

Where the Consignor Accompanies the Goods. — See note 4.

**369.** 2. Goods Improperly Loaded — Negligence of Shipper Imputed to Consignee. — See note 1.

3. Defective Packing or Marking — Goods Improperly Packed or in Bad Condition. — See note 3.

**370.** Goods Illegibly or Wrongly Addressed. — See note 1.

Where Carrier Knows Address to Be Wrong. — See note 4.

**371.** 4. Where Shipper Conceals Character of Goods — Concealment of Character Inducing Different Method of Shipment. — See note 2.

**365.** 6. Showing Custom of Well-managed Roads. — *Contra*, Texas, etc., R. Co. v. Payne, 15 Tex. Civ. App. 58.

An Instruction that the defendant's duty is to be measured by the custom of other railroads in like circumstances has been held to be improper. *Hinton v. Eastern R. Co.*, 72 Minn. 339.

The Defendant's Own Custom may be shown. — *Hendrick v. Boston*, etc., R. Co., 170 Mass. 44.

**366.** 2. Negligence Must Have Been Proximate Cause of Injury. — *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, (C. C. A.) 94 Fed. Rep. 180; *Missouri*, etc., R. Co. v. Byrne, 3 Indian Ter. 740, reversed 100 Fed. Rep. 359, 40 C. C. A. 402; *Insurance Co. of North America v. Lake Erie*, etc., R. Co., 152 Ind. 333; *Plotz v. Miller*, (Ky. 1899) 51 S. W. Rep. 176; *Yazoo*, etc., R. Co. v. Millsaps, 76 Miss. 855, 71 Am. St. Rep. 543; *Missouri*, etc., R. Co. v. Chittim, 24 Tex. Civ. App. 599; *Gulf*, etc., R. Co. v. Harris, (Tex. Civ. App. 1903) 72 S. W. Rep. 71.

Question of Proximate Cause for Jury. — See *Marande v. Texas*, etc., R. Co., 184 U. S. 173, reversing (C. C. A.) 102 Fed. Rep. 246.

**367.** 1. Duty to Stow Properly. — *Crowell v. Union Oil Co.*, (C. C. A.) 107 Fed. Rep. 302; *The Victoria*, 114 Fed. Rep. 962; *The Mississippi*, 113 Fed. Rep. 985, affirmed 120 Fed. Rep. 1020, 56 C. C. A. 525; *The Orcadian*, 116 Fed. Rep. 930; *The Hudson*, 122 Fed. Rep. 96; *Lazarus v. Barber*, 124 Fed. Rep. 1007; *Doherr v. Houston*, (C. C. A.) 128 Fed. Rep. 594, affirming 123 Fed. Rep. 334; *The Kensington*, 88 Fed. Rep. 331; *The Earnwood*, 83 Fed. Rep. 315 (neglect to provide dunnage for sugar cargo).

2. Liability of Carrier for Explosion of Dangerous Substance. — *Compare* *The G. R. Booth*, (C. C. A.) 91 Fed. Rep. 164, wherein a carrier was held to be liable for injuries to a cargo caused by an explosion.

**368.** 1. Where Shipper's Negligence Intervenes. — *Raleigh*, etc., R. Co. v. *Lowe*, 101 Ga. 320; *Stoner v. Chicago G. W. R. Co.*, 109 Iowa 351 (shipper's delay in having goods ready); *Schlichting v. Chicago*, etc., R. Co., 121 Iowa 502 (delay in delivery caused by shipper's conduct); *St. Louis Southwestern R. Co. v. Cates*, 15 Tex. Civ. App. 135.

For Injuries Occurring Independently of His Con-

tributory Negligence the shipper may recover. — *Belcher v. Missouri*, etc., R. Co., 92 Tex. 593; *Missouri*, etc., R. Co. v. *Chittim*, 24 Tex. Civ. App. 599, holding that the contributory negligence of the shipper will not bar recovery of damages proximately caused by the negligence of the carrier.

Carrying Out Consignor's Instructions. — Where the carrier carried out the consignor's instructions to leave a vent in the car open the carrier is not liable for the resulting damage. *Gillett v. Missouri*, etc., R. Co., (Tex. Civ. App. 1902) 68 S. W. Rep. 61.

2. Questions for Jury. — *Elgin*, etc., R. Co. v. *Bates Mach. Co.*, 200 Ill. 636, 93 Am. St. Rep. 218; *O'Malley v. Great Northern R. Co.*, 86 Minn. 380; *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34; *Morris v. Wier*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 586; *Missouri*, etc., R. Co. v. *Mazzie*, (Tex. Civ. App. 1902) 68 S. W. Rep. 56; *Missouri*, etc., R. Co. v. *Beard*, (Tex. Civ. App. 1904) 78 S. W. Rep. 253; *Southern R. Co. v. Wilcox*, 99 Va. 394, 3 Va. Sup. Ct. Rep. 321.

4. Owner Caring for Goods — Carrier Not Liable. — *Central of Georgia R. Co. v. Rogers*, 111 Ga. 865; *Hengstler v. Flint*, etc., R. Co., 125 Mich. 530; *Chicago*, etc., R. Co. v. *Schuldt*, 66 Neb. 43; *Paul v. Pennsylvania R. Co.*, 70 N. J. L. 442.

**369.** 1. Goods Improperly Loaded by Shipper — Carrier Not Liable. — *Norfolk*, etc., R. Co. v. *Reeves*, 97 Va. 284.

3. Defective Packing. — *The M. C. Currie*, 132 Fed. Rep. 125; *Morris v. Wier*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 586; *Farmers Nursery Co. v. Cowan*, 21 Pa. Super. Ct. 192; *Texas*, etc., R. Co. v. *Kelly*, (Tex. Civ. App. 1903) 74 S. W. Rep. 343.

Where Defective Marking Does Not Mislead Carrier. — Defective marking is no defense to an action for conversion where the carrier knew that the goods belonged to the plaintiff. *Downing v. Outerbridge*, (C. C. A.) 79 Fed. Rep. 931.

**370.** 1. Improper Marking. — *Feldstein v. Old Dominion Steamship Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 60.

4. Defective Marking Caused by Carrier. — *Chicago*, etc., R. Co. v. *Neimann*, 84 Ill. App. 272.

**371.** 2. Southern Express Co. v. Wood, 98

**373. XVII. LIABILITY OF SHIPPER OR CONSIGNEE TO CARRIER — 2. Dangerous Explosives — Liability of Shipper for Sending — Agreement Between Shipper and Carrier to Conceal Nature of Goods. — See note 1.**

Different Consignors Shipping Explosives at Same Time — Each Liable. — See note 2.

**XVIII. MEASURE OF DAMAGES — 1. General Doctrine — a. MARKET VALUE. — See note 3.**

**374.** Meaning of "Market Value." — See note 1.

When Market Value at Place of Shipment the Standard. — See notes 2, 3.

**375.** No Market at Place of Destination. — See note 1.

**b. WHAT TESTIMONY ADMISSIBLE TO SHOW MARKET VALUE — Testimony of Shipper. — See note 2.**

Market Quotations — Experts. — See notes 3, 4.

Ga. 268; *Pennsylvania Co. v. Kenwood Bridge Co.*, 170 Ill. 645.

**373. 1. Carrier Agreeing to Ship under Different Name. —** *Lachner v. Adams Express Co.*, 72 Mo. App. 13.

**2.** *St. Louis, etc., R. Co. v. Coolidge*, (Ark. 1904) 83 S. W. Rep. 333.

**3. Market Value at Time and Place of Delivery by Carrier —** *United States*. — The Protection, (C. C. A.) 102 Fed. Rep. 516, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 373; *The Arctic Bird*, 109 Fed. Rep. 167.

*District of Columbia*. — *Baltimore, etc., R. Co. v. Dougherty*, 7 App. Cas. (D. C.) 378.

*Indiana*. — *Tebbs v. Cleveland, etc., R. Co.*, 20 Ind. App. 192.

*Indian Territory*. — *Missouri, etc., R. Co. v. Truskett*, 2 Indian Ter. 633.

*Kansas*. — *Missouri Pac. R. Co. v. Weil*, 8 Kan. App. 839.

*Kentucky*. — *Marsden Co. v. Bullitt*, 72 S. W. Rep. 32, 24 Ky. L. Rep. 1697.

*Louisiana*. — *Armistead v. Shreveport, etc., R. Co.*, 108 La. 171.

*Mississippi*. — *Illinois Cent. R. Co. v. Bogard*, 78 Miss. 11.

*Missouri*. — See *Horner v. Missouri Pac. R. Co.*, 70 Mo. App. 285 (as to deduction of freight charges).

*Nebraska*. — *Pennsylvania R. Co. v. Kennard Glass, etc., Co.*, 59 Neb. 435.

*New York*. — *G. S. Roth Clothing Co. v. Maine Steamship Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 550.

*South Carolina*. — *Hipp v. Southern R. Co.*, 50 S. Car. 129.

*Tennessee*. — *Cole v. Rankin*, (Tenn. Ch. 1896) 42 S. W. Rep. 72.

*Texas*. — *Gulf, etc., R. Co. v. Short*, (Tex. Civ. App. 1899) 51 S. W. Rep. 261; *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58; *Galveston, etc., R. Co. v. Efron*, (Tex. Civ. App. 1897) 38 S. W. Rep. 639; *Missouri, etc., R. Co. v. Chittim*, 24 Tex. Civ. App. 599; *Southern Pac. R. Co. v. D'Arcais*, 27 Tex. Civ. App. 57; *Grayson County Nat. Bank v. Nashville, etc., R. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1094.

*Canada*. — *Rosenbloom v. Grand Trunk R. Co.*, 16 Quebec Super. Ct. 360.

**In Case of Conversion** the measure of damages is the market value at the time and place of the conversion. *Downing v. Outerbridge*, (C. C. A.) 70 Fed. Rep. 927.

**Where the Destination Is Changed** by agreement,

the value at the changed destination controls. *San Antonio, etc., R. Co. v. Thompson*, (Tex. Civ. App. 1902) 66 S. W. Rep. 792.

**374. 1. "Highest Market Value,"** which would be retail price, including profits, is not meant. *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58.

**Sale by Auction** is a proper method of ascertaining the market value. *The Queen*, 78 Fed. Rep. 155.

**Place of Delivery.** — In the absence of evidence of market value at the place of destination, that of the place of delivery may be taken. *The Arctic Bird*, 109 Fed. Rep. 167.

**2. Where by Contract Value at Place of Shipment Controls.** — *Pierce v. Southern Pac. R. Co.*, 120 Cal. 157; *Davis v. New York, etc., R. Co.*, 70 Minn. 37; *Horner v. Missouri Pac. R. Co.*, 70 Mo. App. 285; *Southern Pac. R. Co. v. Phillipson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 958.

**3. Circumstances Rendering Value at Place of Shipment the Standard.** — See *The Protection*, (C. C. A.) 102 Fed. Rep. 516; *Pierce v. Southern Pac. R. Co.*, 120 Cal. 156.

**375. 1. Evidence of Amount Paid Admissible.** — Evidence of the amount paid for the goods in other cities, and that they were reasonably worth such an amount at the place of destination, is admissible. *New York, etc., Steamship Co. v. Weiss*, (Tex. Civ. App. 1898) 47 S. W. Rep. 674.

**Proof of the Cost of an Animal** is admissible, though not conclusive, evidence, where it has no market value at the place of delivery. *Pacific Express Co. v. Lathrop*, 20 Tex. Civ. App. 339.

**2. Shipper, though Plaintiff, May Testify as to Values.** — *Southern R. Co. v. Deakins*, 107 Tenn. 522; *International, etc., R. Co. v. Aten*, (Tex. Civ. App. 1904) 81 S. W. Rep. 346; *Ft. Worth, etc., R. Co. v. Harlan*, (Tex. Civ. App. 1901) 62 S. W. Rep. 971.

**Auction or Retail Price Insufficient.** — Evidence of what the goods would fetch at auction or at retail price has been held to be inadmissible. *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58.

**Contract Price Insufficient.** — *Galveston, etc., R. Co. v. Efron*, (Tex. Civ. App. 1897) 38 S. W. Rep. 639.

**An Unaccepted Offer** for a colt lost is not admissible. *Texas, etc., R. Co. v. Randle*, 18 Tex. Civ. App. 348.

**3. Market Quotations.** — *Gulf, etc., R. Co. v.*

- 376.** Hearsay Statements as to Value. — See note 1.  
 Extent of Loss for Jury — Opinions Inadmissible. — See notes 2, 3.
- 377.** But Some Proof of Value Necessary. — See note 2.  
 Amount of Damages for Jury. — See note 3.
- 378.** Written Statements of Third Parties — Accounts of Sales. — See note 3.
- 379.** *c.* INTEREST. — See note 1.
- 381.** *d.* ATTORNEY'S FEES. — See note 3.  
*e.* DEDUCTION OF FREIGHT CHARGES. — See note 5.
- 382.** 2. Where Goods Are Merely Damaged. — See note 4.

Harris, (Tex. Civ. App. 1903) 72 S. W. Rep. 71.

But Evidence of Value at Other Places has been held not to be admissible. *Terry v. Gulf*, etc., R. Co., 14 Tex. Civ. App. 451; *Hendrick v. Boston*, etc., R. Co., 170 Mass. 44.

**375.** 4. Expert — Prices at Which Grain Sold. — See *Louisville*, etc., R. Co. *v.* *Landers*, 135 Ala. 504; *San Antonio*, etc., R. Co. *v.* *Josey*, (Tex. Civ. App. 1903) 71 S. W. Rep. 606.

Expert — Price at Which Cattle Sold. — See *St. Louis*, etc., R. Co. *v.* *White*, (Tex. Civ. App. 1903) 76 S. W. Rep. 947, reversed on other grounds 97 Tex. 473.

Stockmen, long familiar with the grading of cattle and the market quotations, are competent to testify as experts, as to the value of a shipment of cattle, the quality of which they know. *Missouri*, etc., R. Co. *v.* *Truskett*, (C. C. A.) 104 Fed. Rep. 728.

Qualification as Expert. — A witness's statement that he speaks of his own knowledge will not qualify him to testify as to value. *Gulf*, etc., R. Co. *v.* *Staton*, (Tex. Civ. App. 1899) 49 S. W. Rep. 277.

**376.** 1. Hearsay Evidence Inadmissible. — *Wells*, etc., Express Co. *v.* *Williams*, (Tex. Civ. App. 1902) 71 S. W. Rep. 314; *Norfolk*, etc., R. Co. *v.* *Reeves*, 97 Va. 284.

Testimony by the consignator that vegetables were accepted by his foreman as being in first-class condition is not hearsay. *Ft. Worth*, etc., R. Co. *v.* *Harlan*, (Tex. Civ. App. 1901) 62 S. W. Rep. 971.

Evidence Based on Newspaper Quotations Inadmissible. — A witness cannot base his evidence on newspaper quotations and merchants' statements. *Norfolk*, etc., R. Co. *v.* *Reeves*, 97 Va. 284.

2. Witness Must State Quantity and Character of Property in Stating Value. — *Missouri*, etc., R. Co. *v.* *Davidson*, 25 Tex. Civ. App. 134. But see *Lachner v. Adams Express Co.*, 72 Mo. App. 13.

3. Opinion as to Market Value. — A witness's opinion as to market value is admissible. *Gulf*, etc., R. Co. *v.* *Leatherwood*, 29 Tex. Civ. App. 507.

**377.** 2. But There Must Be Some Proof of Value. — *Alabama*, etc., R. Co. *v.* *Coleman*, 78 Miss. 182; *G. S. Roth Clothing Co. v. Maine Steamship Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 550; *Grayson County Nat. Bank v. Nashville*, etc., R. Co., (Tex. Civ. App. 1904) 79 S. W. Rep. 1094; *Gulf*, etc., R. Co. *v.* *Staton*, (Tex. Civ. App. 1899) 49 S. W. Rep. 277.

2. Evidence of Value. — See *Marquis v. Wood*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 590; *Cuero First Nat. Bank v. San Antonio*, etc.,

*Pass. R. Co.*, 97 Tex. 201, reversing in part (Tex. Civ. App. 1903) 72 S. W. Rep. 1033.

Evidence of what the goods had recently been insured for is admissible. *Girardeau v. Southern Express Co.*, 48 S. Car. 421.

Cost Price Awarded When No Other Proof of Value Introduced. — *Mitchell v. Weir*, 19 N. Y. App. Div. 185.

3. Question for the Jury. — *Litt v. Wabash R. Co.*, 50 N. Y. App. Div. 550; *Hipp v. Southern R. Co.*, 50 S. Car. 129; *Southern R. Co. v. Deakins*, 107 Tenn. 522.

**378.** 3. Written Statements — Account of Sales, Etc. — *Illinois Cent. R. Co. v. Seitz*, 105 Ill. App. 89; *Alabama*, etc., R. Co. *v.* *Coleman*, 78 Miss. 182; *Gulf*, etc., R. Co. *v.* *Baugh*, (Tex. Civ. App. 1897) 42 S. W. Rep. 245. See also *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, (C. C. A.) 94 Fed. Rep. 180.

**379.** 1. Recovery of Interest — *United States*. — *Missouri*, etc., R. Co. *v.* *Truskett*, (C. C. A.) 104 Fed. Rep. 728; *The Arctic Bird*, 109 Fed. Rep. 167.

*District of Columbia*. — *Baltimore*, etc., R. Co. *v.* *Dougherty*, 7 App. Cas. (D. C.) 378.

*Indian Territory*. — *Missouri*, etc., R. Co. *v.* *Truskett*, 2 Indian Ter. 633.

*Missouri*. — *Goodman v. Missouri*, etc., R. Co., 71 Mo. App. 460; *Lachner v. Adams Express Co.*, 72 Mo. App. 13; *Hall v. Wabash R. Co.*, 80 Mo. App. 463.

*Texas*. — *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518; *Gulf*, etc., R. Co. *v.* *Lee*, (Tex. Civ. App. 1901) 65 S. W. Rep. 54.

*Virginia*. — *Herring v. Chesapeake*, etc., R. Co., 101 Va. 778.

In Case of Conversion interest will be allowed from the date of the conversion. *Horner v. Missouri Pac. R. Co.*, 70 Mo. App. 285.

A Peremptory Instruction to Allow Interest on damage for delay has been held in *Tennessee* to be erroneous. *Illinois Cent. R. Co. v. Southern Seating*, etc., Co., 104 Tenn. 568, 78 Am. St. Rep. 933.

A Statutory Interest Penalty is to be treated as part of the principal in determining jurisdiction. *Gulf*, etc., R. Co. *v.* *Gregory*, (Tex. Civ. App. 1900) 59 S. W. Rep. 310.

**381.** 3. Attorney's Fees — Recoverable under Kansas Statute. — *Missouri*, etc., R. Co. *v.* *Simonson*, 64 Kan. 802, 91 Am. St. Rep. 248.

5. Stipulation that Shipping Value Shall Govern. — *The Oneida*, (C. C. A.) 128 Fed. Rep. 687.

**382.** 4. In Case of Injury Merely. — *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, (C. C. A.) 94 Fed. Rep. 180; *The Oneida*, (C. C. A.) 128 Fed. Rep. 687; *Missouri*, etc., R. Co. *v.* *Truskett*, 2 Indian Ter. 633; *Redmon v. Chicago*, etc., R. Co., 90 Mo. App. 68; *King v. Sherwood*, 22 N. Y. App. Div. 548; *Gulf*, etc.,

**383.** Expenses in Repairing Damage. — See note 1.

**384.** Care Must Be Exercised to Lighten Loss. — See note 1.

Permanent and Temporary Injuries. — See note 3.

**3.** In Case of Delay. — See note 5.

**386.** Any Additional Necessary Expense Incurred by the Shipper. — See note 2.

R. Co. v. Everett, (Tex. Civ. App. 1904) 83 S. W. Rep. 257; Garlington v. Ft. Worth, etc., R. Co., (Tex. Civ. App. 1904) 78 S. W. Rep. 368; Chicago, etc., R. Co. v. Halsell, (Tex. Civ. App. 1904) 80 S. W. Rep. 140; Missouri, etc., R. Co. v. Chittim, 24 Tex. Civ. App. 599; International, etc., R. Co. v. Parish, 18 Tex. Civ. App. 130.

**Injury to Stock in Transit — General Rule.** — Gulf, etc., R. Co. v. Staton, (Tex. Civ. App. 1899) 49 S. W. Rep. 277.

**Injury Does Not Create Liability for Total Value of Goods.** — Silverman v. St. Louis, etc., R. Co., 51 La. Ann. 1785; Yazoo, etc., R. Co. v. Millsaps, 76 Miss. 855, 71 Am. St. Rep. 543.

**Practical Total Loss.** — Brand v. Weir, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 212.

**Time of Delivery.** — When damaged fruit arrived at its destination in the night, its market value the next day is to be taken. St. Louis, etc., R. Co. v. Henry, (Tex. Civ. App. 1904) 81 S. W. Rep. 334.

**Where Goods Are Sent C. O. D.** a tender of the goods damaged must be made to the carrier where it is sued for the price paid. Hardy v. American Express Co., 182 Mass. 328.

**Evidence of What Horses Subsequently Sold For** at a place other than the place of destination is not admissible. San Antonio, etc., Pass. R. Co. v. Wright, 20 Tex. Civ. App. 136.

**383. 1. Estimate of Trouble and Annoyance.** — Testimony by the plaintiff estimating the trouble and annoyance to which he was put through injury to his horses is inadmissible. Louisville, etc., R. Co. v. Wathen, (Ky. 1899) 49 S. W. Rep. 185.

**384. 1. Consignee Must Render Damage as Slight as Possible.** — Louisville, etc., Packet Co. v. Bottorff, (Ky. 1904) 77 S. W. Rep. 920; Armitstead v. Shreveport, etc., R. Co., 108 La. Ann. 171; Silverman v. St. Louis, etc., R. Co., 51 La. Ann. 1785; Shelby v. Missouri Pac. R. Co., 77 Mo. App. 205; Brown v. Weir, 95 N. Y. App. Div. 78. See also Pacific Express Co. v. Redman, (Tex. Civ. App. 1901) 60 S. W. Rep. 677.

**Refusal of Owner to Receive Uninjured Portion of Goods.** — Where goods are partially destroyed, and the owner illegally refuses to receive the portion not destroyed, which is permitted to remain in the railway company's hands, as a result of which it is injured, the company will not be liable for such injury unless caused by its fault or negligence. Rosenbloom v. Grand Trunk R. Co., 16 Quebec Super. Ct. 360.

**3.** San Antonio, etc., Pass. R. Co. v. Woodley, 20 Tex. Civ. App. 216.

**5. United States.** — The Styria, (C. C. A.) 101 Fed. Rep. 728; Central Trust Co. v. Savannah, etc., R. Co., 69 Fed. Rep. 683; Missouri, etc., R. Co. v. Truskett, (C. C. A.) 104 Fed. Rep. 728.

**Arkansas.** — Little Rock, etc., R. Co. v. Miller Coal Co., 66 Ark. 645, 51 S. W. Rep. 1054.

**Illinois.** — Louisville, etc., R. Co. v. Heilprin, 95 Ill. App. 402.

**Missouri.** — Gann v. Chicago G. W. R. Co., 72 Mo. App. 34; D. Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164; Hendrix v. Wabash R. Co., 107 Mo. App. 127.

**New York.** — Brown v. Weir, 95 N. Y. App. Div. 78; G. S. Roth Clothing Co. v. Maine Steamship Co., (Supm. Ct. App. T.) 44 Misc. (N. Y.) 237.

**North Carolina.** — Leë v. St. Louis, etc., R. Co., 136 N. Car. 533, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 384.

**Tennessee.** — Illinois Cent. R. Co. v. Southern Seating, etc., Co., 104 Tenn. 568, 78 Am. St. Rep. 933.

**Texas.** — Atchison, etc., R. Co. v. Bryan, (Tex. Civ. App. 1896) 37 S. W. Rep. 234; Missouri, etc., R. Co. v. Webb, 20 Tex. Civ. App. 431; International, etc., R. Co. v. Hatchell, 22 Tex. Civ. App. 498; Texas, etc., R. Co. v. Bigham, (Tex. Civ. App. 1902) 67 S. W. Rep. 522; Texas, etc., R. Co. v. Slaughter, (Tex. Civ. App. 1905) 84 S. W. Rep. 1085.

See also Autrey v. Georgia Northern R. Co., 113 Ga. 618.

**Evidence of Values.** — Evidence of the market value of cattle is admissible. Missouri, etc., R. Co. v. Wells, 24 Tex. Civ. App. 304.

Where a wagon was delayed in its transportation for use in a certain place on a certain day the measure of damages was held to be the loss of profits for that day and its fair rental value for the other days lost by the delay. Gulf, etc., R. Co. v. Compton, (Tex. Civ. App. 1896) 38 S. W. Rep. 220.

**Mere Delay Not Conversion.** — Gulf, etc., R. Co. v. Darby, 28 Tex. Civ. App. 229. See also *supra*, this title, 232. 7.

**Where Delay Causes a Total Loss.** — The Protection, (C. C. A.) 102 Fed. Rep. 516; Baumann v. New York, etc., R. Co., (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 223; Mitchell v. Weir, 19 N. Y. App. Div. 185; Gulf, etc., R. Co. v. Darby, 28 Tex. Civ. App. 229.

**Where the Delay Results from Failure to Give Notice of Arrival** the measure of damages is the difference between the actual value at the time of arrival and that at the time when notice was received by the consignee. Southern Pac. R. Co. v. Booth, (Tex. Civ. App. 1897) 39 S. W. Rep. 585.

**Where the Consignee Cannot Be Found** and the consignor refuses to receive back the goods when tendered, they being of the same value then as when the carrier received them, the consignor cannot recover the goods and also damages. Brookstone v. Westcott Express Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 634.

**The Carrier Is Not Liable for Loss of Profits** to the consignee caused by the delay, but is liable for any expenses which the delay compelled the consignee to incur. "Den of Ogil" Co. v. Caledonian R. Co., Sc. Ct. of Sess. 5 F. 99.

**386. 2. Other Expenses Recoverable.** —

**387.** Rule as to Remoteness of Damages. — See notes 1, 2.

Shrinkage of Live Stock. — See note 3.

**388.** 4. For Refusal or Failure to Carry — Rule for Measure of Damages Stated. — See note 1.

Duty, upon Refusal, to Seek Other Means of Shipment. — See note 2.

Expenses of Caring for Goods While Shipment Delayed. — See note 3.

Failure to Furnish Means of Transportation. — See note 4.

**389.** Failure to Transport over Entire Distance. — See note 1.

5. For Refusal to Deliver. — See note 2.

Where Consignee or Owner Owes Freight Charges. — See note 3.

**391.** 7. Where Goods Have No Market Value — Actual Value to Owner. — See note 1.

Delay in Transportation of Household Goods. — See note 2.

Loss of Portrait. — See note 3.

**392.** 8. Mental Anguish. — See note 1.

9. Remote and Speculative Damages — *a.* RULE IN *HADLEY v. BAXENDALE*. — See note 2.

The Protection, (C. C. A.) 102 Fed. Rep. 516, in which case the consignee was allowed, because of delay rendering the article shipped worthless to him, to recover its cost at the place of shipment, together with his expenses including freight and wharfage paid. Illinois Cent. R. Co. v. Byrne, 205 Ill. 9; Missouri, etc., R. Co. v. Truskett, 2 Indian Ter. 633; Swift River Co. v. Fitchburg R. Co., 169 Mass. 326, 61 Am. St. Rep. 288; Hall v. Wabash R. Co., 80 Mo. App. 463; Hendrix v. Wabash R. Co., 107 Mo. App. 127; Lanning v. Sussex R. Co., 1 N. J. L. J. 21; Rocky Mt. Mills v. Wilmington, etc., R. Co., 119 N. Car. 693, 56 Am. St. Rep. 682; Texas, etc., R. Co. v. Smith, (Tex. Civ. App. 1904) 79 S. W. Rep. 614; San Antonio, etc., R. Co. v. Josey, (Tex. Civ. App. 1903) 71 S. W. Rep. 606; Houston, etc., R. Co. v. Bath, 17 Tex. Civ. App. 697.

**387.** 1. Damage Must Be Direct Consequence of Delay. — Louisville, etc., Packet Co. v. Bottorff, (Ky. 1904) 77 S. W. Rep. 920.

**2.** Nominal Damages. — Swift River Co. v. Fitchburg R. Co., 169 Mass. 326, 61 Am. St. Rep. 288.

**3.** Shipment of Live Stock — Shrinkage. — See Gann v. Chicago G. W. R. Co., 72 Mo. App. 34; Hendrix v. Wabash R. Co., 107 Mo. App. 127; Nelson v. Great Northern R. Co., 28 Mont. 297; Texas, etc., R. Co. v. Boggs, (Tex. Civ. App. 1897) 40 S. W. Rep. 20.

**388.** 1. Measure of Damages in Case of Refusal to Ship. — Inman v. St. Louis Southwestern R. Co., 14 Tex. Civ. App. 39; Houston, etc., R. Co. v. Bath, 17 Tex. Civ. App. 697; Bigelow v. Chicago, etc., R. Co., 104 Wis. 109.

Where Shipper Has Sold the Goods for Less than the Market Value, the actual price will control. Missouri, etc., R. Co. v. Witherspoon, 18 Tex. Civ. App. 615.

**2.** Shipper Must Make Damage as Slight as Practicable. — Lanning v. Sussex R. Co., 1 N. J. L. J. 21; Bigelow v. Chicago, etc., R. Co., 104 Wis. 109.

**3.** Inman v. St. Louis Southwestern R. Co., 14 Tex. Civ. App. 39.

**4.** Failure to Provide Proper Cars as Contracted For. — See Galveston, etc., R. Co. v. Thompson,

(Tex. Civ. App. 1898) 44 S. W. Rep. 8; Houston, etc., R. Co. v. Campbell, 91 Tex. 551.

**389.** 1. See Buston v. Pennsylvania R. Co., 116 Fed. Rep. 235, affirmed (C. C. A.) 119 Fed. Rep. 808.

**2.** Liable as for Conversion. — Missouri, etc., R. Co. v. Rines, (Tex. Civ. App. 1905) 84 S. W. Rep. 1092.

Wrongful Refusal to Deliver — Delivery Afterwards. — See Gulf, etc., R. Co. v. Leatherwood, 29 Tex. Civ. App. 507. See also Thyll v. New York, etc., R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 175, judgment modified 92 N. Y. App. Div. 513.

Exemplary Damages — Malicious Disregard of Consignee's Rights. — Gray v. Wells, etc., Express Co., (Tex. Civ. App. 1897) 40 S. W. Rep. 845.

**3.** Freight Charges Due — Injuries Must Exceed Charges. — Texas, etc., R. Co. v. Klepper, 29 Tex. Civ. App. 590.

For Failure to Stop in Transitu, the measure of damages is what the shipper lost thereby. Rosenthal v. Weir, 54 N. Y. App. Div. 275, affirmed 170 N. Y. 148.

**391.** 1. Value to Owner Constitutes Basis for Estimating Damages. — Wells, etc., Express Co. v. Williams, (Tex. Civ. App. 1902) 71 S. W. Rep. 314; Missouri, etc., R. Co. v. Davidson, 25 Tex. Civ. App. 134; Houston, etc., R. Co. v. Ney, (Tex. Civ. App. 1900) 58 S. W. Rep. 43; Galveston, etc., R. Co. v. Thompson, (Tex. Civ. App. 1898) 44 S. W. Rep. 8.

The Price at Which the Complainant Has Previously Sold goods may be taken where there is no other evidence of value. Cole v. Rankin, (Tenn. Ch. 1896) 42 S. W. Rep. 72.

Proof May Be by Facts and Opinions of Witnesses. — Lachner v. Adams Express Co., 72 Mo. App. 13.

**2.** Missouri, etc., R. Co. v. Davidson, 25 Tex. Civ. App. 134.

**3.** Family Portraits. — See Houston, etc., R. Co. v. Ney, (Tex. Civ. App. 1900) 58 S. W. Rep. 43.

**392.** 1. Delay in Transporting Corpse — Mental Anguish May Be Considered. — Louisville, etc., R. Co. v. Hull, 113 Ky. 561.

**2.** Rule in *Hadley v. Baxendale* Followed. —

**393.** The Maxim Causa Proxima, Non Remota, Spectatur. — See note 1.

**394.** Notice of Special Purpose for Jury — Actual Notice Unnecessary. — See note 2.

*b.* IN CONTRACT OF SALE — LOSS OF PROFITS — Loss of Goods Shipped under Contract of Sale — Contract Price Forms Measure of Damages. — See note 4.

**395.** Delay in Delivery Resulting in Refusal to Accept. — See note 1.

Carrier Ignorant of Contract of Sale. — See notes 2, 3.

**396.** When Loss of Profits Recoverable. — See note 1.

*c.* DELAY IN DELIVERY OF GOODS INTENDED FOR SPECIFIC PURPOSE — Damages Depend on Extent of Notice to Carrier. — See note 3

**398.** Expected Profits from Future Business. — See note 1.

Transportation of Machinery for Special Use. — See note 2.

**399.** *d.* FUTURE ADVANTAGES DEPENDENT UPON CONTINGENCIES — Damages Must Be Capable of Definite Ascertainment. — See note 1.

**XIX. CARRIER'S LIEN FOR CHARGES** — 1. What Charges It Embraces — *a.* GENERALLY. — See note 2.

Freight, Salvage, Demurrage, and Customs Duties. — See notes 3, 5, 6.

Central Trust Co. v. Georgia Pac. R. Co., 81 Fed. Rep. 277; Smith v. New Orleans, etc., R. Co., 106 La. 11, 87 Am. St. Rep. 285; Lanning v. Sussex R. Co., 1 N. J. L. J. 21; De Leon v. McKernan, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 182; Texas, etc., R. Co. v. Randle, 18 Tex. Civ. App. 348.

Damages Based on the Market Value are not speculative or remote. *Tebbs v. Cleveland, etc., R. Co.*, 20 Ind. App. 192.

**393.** 1. *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326, 61 Am. St. Rep. 288.

**394.** 2. *Actual Notice to Carrier Not Essential.* — *Illinois Cent. R. Co. v. Byrne*, 205 Ill. 9.

**4.** *Contract Price the Measure of Recovery When Goods Are Lost.* — *Central Trust Co. v. Savannah, etc., R. Co.*, 69 Fed. Rep. 683; *Baxley v. Tallassee, etc., R. Co.*, 128 Ala. 183; *Gulf, etc., R. Co. v. Hodge*, (Tex. Civ. App. 1897) 39 S. W. Rep. 986; *International, etc., R. Co. v. Hatchell*, 22 Tex. Civ. App. 498; *Bigelow v. Chicago, etc., R. Co.*, 104 Wis. 109.

**395.** 1. *Delay — Refusal of Consignee to Receive.* — *Farmer's L. & T. Co. v. Northern Pac. R. Co.*, (C. C. A.) 120 Fed. Rep. 873; *Southern Pac. R. Co. v. Booth*, (Tex. Civ. App. 1897) 39 S. W. Rep. 585.

2. See *Grayson County Nat. Bank v. Nashville, etc., R. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1094; *International, etc., R. Co. v. Hatchell*, 22 Tex. Civ. App. 498.

*When Shipper Declines to Ship on Account of High Freight Rates.* — See *Steffen v. Mississippi River, etc., R. Co.*, 156 Mo. 322.

**3.** *Carrier Must Have Had Notice of Contract of Sale.* — *Gulf, etc., R. Co. v. Pickens*, (Tex. Civ. App. 1900) 58 S. W. Rep. 156.

**396.** 1. *Loss of Profits.* — *Port Blakeley Mill Co. v. Sharkey*, (C. C. A.) 102 Fed. Rep. 259, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 396. *Contra* where the loss resulted from failure to furnish cars. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551.

**3.** *Measure of Damages Dependent on Notice to the Carrier.* — *Port Blakeley Mill Co. v. Sharkey*, (C. C. A.) 102 Fed. Rep. 259; *Brown v. Weir*, 95 N. Y. App. Div. 78; *Illinois Cent. R. Co. v. Southern Seating, etc., Co.*, 104 Tenn. 568, 78 Am. St. Rep. 933.

*Where Shipper Informed of Special Circumstances.*

— See *Gulf, etc., R. Co. v. Compton*, (Tex. Civ. App. 1896) 38 S. W. Rep. 220.

*Notice Subsequent to the Date of Shipment* is insufficient. *Pacific Express Co. v. Redman*, (Tex. Civ. App. 1901) 60 S. W. Rep. 677.

*Delay in Delivering Machinery.* — The general value of the use of the machinery is the criterion, where any enhanced value through being at a certain place at a certain time is not known to the carrier. *Texas, etc., R. Co. v. Hassell*, 23 Tex. Civ. App. 681.

**398.** 1. *Speculative Profits of a Contemplated Enterprise.* — *Armistead v. Shreveport, etc., R. Co.*, 108 La. 171.

2. *Where Carrier Is Fully Informed and Damages Are Definite.* — *Louisville, etc., Packet Co. v. Bottorff*, 77 S. W. Rep. 920, 25 Ky. L. Rep. 1324.

**399.** 1. *Damages Must Not Be Uncertain and Speculative.* — *Hendrix v. Wabash R. Co.*, 107 Mo. App. 127.

2. *Carrier Entitled to a Lien.* — *Dixon v. Central of Georgia R. Co.*, 110 Ga. 173; *Schumacher v. Chicago, etc., R. Co.*, 207 Ill. 199; *Cleveland, etc., R. Co. v. Holden*, 73 Ill. App. 582; *Caye v. Pool*, 108 Ky. 124, 94 Am. St. Rep. 348; *Chicago, etc., R. Co. v. Colby*, (Neb. 1903) 96 N. W. Rep. 145; *Central R. Co. v. MacCartney*, 68 N. J. L. 165; *Santa Fe Pac. R. Co. v. Bossut*, 10 N. Mex. 322; *Warehouse, etc., Supply Co. v. Galvin*, 96 Wis. 523, 65 Am. St. Rep. 57.

3. *Thomas v. Frankfort, etc., R. Co.*, 116 Ky. 879.

5. *Demurrage.* — *Hudson River Lighterage Co. v. Wheeler Condenser, etc., Co.*, 93 Fed. Rep. 374; *Cleveland, etc., R. Co. v. Holden*, 73 Ill. App. 582; *Cleveland, etc., R. Co. v. Lamm*, 73 Ill. App. 592; *Baltimore, etc., R. Co. v. Fisher*, 5 Ohio Dec. 659. But see *Chicago, etc., R. Co. v. Dorsey Fuel Co.*, 112 Ill. App. 382; *Schumacher v. Chicago, etc., R. Co.*, 207 Ill. 199, affirming 108 Ill. App. 520; *New Orleans, etc., R. Co. v. George*, 82 Miss. 710; *Darlington v. Missouri Pac. R. Co.*, 99 Mo. App. 1; *McGee v. Chicago, etc., R. Co.*, 71 Mo. App. 310.

*Car Service After Notice.* — A railroad company may charge demurrage for car service after notice. *Gulf City Constr. Co. v. Louisville, etc., R. Co.*, 121 Ala. 621.



**400.** *b.* FOR GENERAL BALANCE DUE. — See notes 5, 6.

**402.** 2. What Carriers Are Entitled to Lien — A Transfer Company. — See note 4.

Private Carriers. — See note 7.

**403.** 3. What Property Lien Covers — *a.* GENERALLY — Property in Carrier's Possession as Such. — See note 1.

*b.* GOODS DELIVERED TO CARRIER BY WRONGFUL HOLDER — No Lien Where Goods Received from Wrongful Holder. — See note 3.

**404.** Where Owner's Fault Clothes Holder with Apparent Authority. — See note 1.

**405.** 6. Failure or Refusal of Consignee to Receive. — See note 6.

7. Lien of Last of Connecting Carriers. — See note 8.

**406.** Goods Received by Last Carrier Through Error of Antecedent Carrier. — See note 1.

**407.** See note 1.

Second Carrier Receiving with Notice that Through Freight Prepaid. — See note 2.

**408.** Whether First Carrier Agent of Subsequent Carrier. — See note 2.

Damage Caused by First Carrier Cannot Be Set Off Against Last. — See note 3.

**409.** Unauthorized Guaranty of First Carrier as to Through Rates. — See note 1.

By Express Contract expressed in the bill of lading a lien for demurrage may exist. *Swan v. Louisville, etc., R. Co., 106 Tenn. 229.*

The Consignee May Waive His Right of Objection to demurrage charges. *Bernhardt v. Carolina, etc., R. Co., 135 N. Car. 258.*

**399.** 6. Customs Duties. — *Wabash R. Co. v. Pearce, 192 U. S. 179; Mitchelson v. Minneapolis, etc., R. Co., 67 Minn. 406; Waldron v. Canadian Pac. R. Co., 22 Wash. 253.*

No Lien for Special Services in Rehearing Before Custom-house Authorities. — *Topliff v. Lake Shore, etc., R. Co., 2 Ohio Dec. 352.*

**400.** 5. Carrier's Lien Does Not Extend to General Balance. — *Robinson v. Dover, etc., R. Co., 99 Ga. 480.*

6. Stipulation Creating General Lien Strictly Construed. — *Atlas Steamship Co. v. Columbian Land Co., (C. C. A.) 102 Fed. Rep. 358.*

**402.** 4. Contra. — *Caye v. Pool, 108 Ky. 124, 94 Am. St. Rep. 348,* holding that a person whose business it was to transport freight from depots to consignees, and whose practice it was to advance freight charges for the consignees and collect such advances together with his own charges, had a lien on the goods for the whole amount due to him.

Cartman's Lien under City Ordinance. — *Browning v. Belford, 83 N. Y. App. Div. 144, 13 N. Y. Annot. Cas. 154.*

7. Private Carrier Entitled to Lien. — *Thompson v. New York Storage Co., 97 Mo. App. 135, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 402.*

Public Cartman — New York. — Under the ordinances of the city of New York, the cartman must not retain the property, but must take it to the police department or to a convenient storage warehouse. *Taylor v. Smith, 87 N. Y. App. Div. 78.*

**403.** 1. See *Taylor v. Smith, 87 N. Y. App. Div. 78.*

3. Goods Delivered to Carrier by Wrongful Holder — No Lien. — *Liefert v. Galveston, etc., R. Co., (Tex. Civ. App. 1900) 57 S. W. Rep. 899, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403.*

**404.** 1. Holder Clothed with Apparent Author-

ity. — *Hoffman v. Lake Shore, etc., R. Co., 125 Mich. 201.*

Authority of Vendee of Goods Sold Conditionally Is Presumed. — *Lake St. El. R. Co. v. Long Island R. Co., (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 669.*

**405.** 6. Does Not Affect Carrier's Lien. — *Schumacher v. Chicago, etc., R. Co., 207 Ill. 199, affirming 108 Ill. App. 520; Chicago, etc., R. Co. v. Dorsey Fuel Co., 112 Ill. App. 382.*

8. Where There Are Connecting Carriers. — *Southern Indiana Express Co. v. U. S. Express Co., (C. C. A.) 92 Fed. Rep. 1022, affirming 88 Fed. Rep. 659; Thomas v. Frankfort, etc., R. Co., 116 Ky. 879; Pearce v. Wabash R. Co., 89 Mo. App. 437; Evans v. Chicago, etc., R. Co., 76 Mo. App. 472; Galveston, etc., R. Co. v. Orthwein-Fitzhugh Cotton Co., 27 Tex. Civ. App. 623.*

Different Shipment. — The last carrier has no lien for back charges advanced to the initial carrier on a different shipment lost while in the initial carrier's possession. *Robinson v. Dover, etc., R. Co., 99 Ga. 480.*

**406.** 1. Lien Not Affected by Error of Antecedent Carrier. — *Glover v. Cape Girardeau, etc., R. Co., 95 Mo. App. 369, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 406.*

**407.** 1. Improper Agreement with Initial Line — No Lien. — *Glover v. Cape Girardeau, etc., R. Co., 95 Mo. App. 369, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 407.*

2. Where Through Freight Is Prepaid. — *Converse Bridge Co. v. Collins, 119 Ala. 534. See also Shewalter v. Missouri Pac. R. Co., 84 Mo. App. 589.*

**408.** 2. Carrier Acts as Shipper's Agent in Forwarding. — See *Shewalter v. Missouri Pac. R. Co., 84 Mo. App. 589.*

3. Consignee Cannot Set Off Damages to Goods Caused by Previous Carrier. — *Thomas v. Frankfort, etc., R. Co., 116 Ky. 879. See also Gulf, etc., R. Co. v. Browne, 27 Tex. Civ. App. 437.*

**409.** 1. Initial Line Guaranteeing Fixed Rate — Last Carrier Claiming More. — But see *Chicago, etc., R. Co. v. Henderson, (Tex. Civ. App. 1903) 73 S. W. Rep. 36,* wherein it was held that the shipper could not recover the

**410.** Carrier Guaranteeing Through Rate Bound. — See note 2.

**8. Priority over Other Liens** — Priority as Compared with Other Liens. — See note 6.

**411.** 9. Loss of Lien — *a.* BY WAIVER OR FORFEITURE — Delivery to Owner or Consignee. — See note 2.

**412.** See note 1.

Partial Delivery. — See note 2.

**413.** Deposit in Warehouse. — See note 2.

**414.** Carriers by Water — Doctrine of Courts of Admiralty. — See note 1.

A Tender of the Full Amount of the Charges Justly Due. — See note 4.

Effect of Deviation from Route — Claiming to Retain on Other Grounds. — See note 5.

**415.** Where the Property Has Been Injured in Course of Transportation. — See note 1.

**417.** 10. Enforcement of Lien — *a.* HOW ENFORCED — Statutes Providing for Sale. — See note 1.

No Right of Sale at Common Law. — See note 2.

**418.** See note 1.

Perishable Goods — Sale After Refusal to Receive. — See note 4.

**419.** *c.* CONSIGNEE MAY SET OFF DAMAGES. — See note 1.

*d.* REMEDY OF CONSIGNEE — When Freight Tendered and Delivery Refused,

Trover Lies. — See note 2.

**420.** 11. Liability of Carrier While Retaining Goods — If the Shipment Consists of Live Stock. — See note 1.

excess rate charged from the initial carrier, who had received no part of it.

**410.** 2. Carrier Bound by Guaranty of Through Rate. — *Sherman, etc., R. Co. v. Beebe*, 15 Tex. Civ. App. 685; *Virginia Coal, etc., Co. v. Louisville, etc., R. Co.*, 98 Va. 776.

6. Inferior to Mortgage of Which Carrier Has Knowledge. — *Owen v. Burlington, etc., R. Co.*, 11 S. Dak. 153, 74 Am. St. Rep. 786.

**411.** 2. Lien Lost by Delivery. — *Central R. Co. v. MacCartney*, 68 N. J. L. 165.

What Amounts to Delivery. — See *New York Cent., etc., R. Co. v. Davis*, 158 N. Y. 674.

Delivery to an Assignee for the Benefit of the Owner's Creditors does not affect the carrier's lien. *Caye v. Pool*, 108 Ky. 124, 94 Am. St. Rep. 348.

**412.** 1. *Central R. Co. v. MacCartney*, 68 N. J. L. 165.

2. Delivery of Part Only. — *The Asiatic Prince*, 103 Fed. Rep. 676; *New Orleans, etc., R. Co. v. George*, 82 Miss. 710; *New York Cent., etc., R. Co. v. Davis*, 158 N. Y. 674.

**413.** 2. Lien Not Waived by Warehousing Goods. — *Schumacher v. Chicago, etc., R. Co.*, 108 Ill. App. 520, affirmed 207 Ill. 199.

**414.** 1. A Conditional Delivery of cargo in a warehouse does not destroy the lien. *Davidson Steamship Co. v. 119,254 Bushels Flaxseed*, 117 Fed. Rep. 283.

4. Tender by Consignee Destroys Lien. — *Chicago, etc., R. Co. v. Colby*, (Neb. 1903) 96 N. W. Rep. 145; *Warehouse, etc., Supply Co. v. Galvin*, 96 Wis. 523, 65 Am. St. Rep. 57.

In Case of Damage by Delay, a tender of the freight charges is not necessary to enable the consignee to maintain replevin. *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266. See also *Central R. Co. v. MacCartney*, 68 N. J. L. 165.

5. Forfeited by Variance from Designated Route. — *Hendrix v. Wabash R. Co.*, 107 Mo. App.

127. See also *Pearce v. Wabash R. Co.*, 89 Mo. App. 437.

**415.** 1. Where Goods Are Injured. — *Hudson River Lighterage Co. v. Wheeler Condenser, etc., Co.*, 93 Fed. Rep. 374.

And Where Damage Is Result of Breach of Contract. — *The Barcore*, (1896) P. 294.

**417.** 1. Statutory Methods. — See *New Orleans, etc., R. Co. v. George*, 82 Miss. 710; *Haebler v. New York Cent., etc., R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 509; *Missouri, etc., R. Co. v. Rines*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1092.

A Sale Without Notice as required by statute renders the carrier liable for conversion. *Gulf, etc., R. Co. v. North Texas Grain Co.*, (Tex. Civ. App. 1903) 74 S. W. Rep. 567.

2. Carrier No Right at Common Law to Enforce Lien by Sale. — *Girardeau v. Southern Express Co.*, 48 S. Car. 421.

**418.** 1. *Missouri, etc., R. Co. v. Rines*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1092.

4. Statutory Right of Sale of Perishable Goods — *New York*. — *Leech v. New York, etc., R. Co.*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 654.

Oats Are Not Perishable Freight so as to authorize a sale under the *Texas* statute. *Gulf, etc., R. Co. v. North Texas Grain Co.*, (Tex. Civ. App. 1903) 74 S. W. Rep. 567.

**419.** 1. Lien Subject to Set-off for Damages. — *Bloomington v. Wilson, etc., Line*, 105 Fed. Rep. 384; *Browning v. Belford*, 83 N. Y. App. Div. 144; *Clegg v. Southern R. Co.*, 135 N. Car. 148.

Additional Expense of Discharging the Cargo, due to the carrier's negligence, may be set off. *Aldrich v. 246  $\frac{5}{8}$  Tons Egg Coal*, 117 Fed. Rep. 757.

2. Consignee's Remedy on Tender of Freight and Refusal of Delivery. — *Hart v. Boston, etc., R. Co.*, 72 N. H. 410.

**420.** 1. Where Live Stock Are Held. — *Gulf*,

**420.** 12. Lien Not Assignable. — See note 4.

**421.** XX. CARRIER AND INSURANCE COMPANY — RELATIVE RIGHTS AND LIABILITIES — Special Contract Between Carrier and Owner for Benefit of Insurance. — See note 1.

**422.** Carrier's Recovery in Such Cases. — See note 2.

Carrier Cannot Require Owner to Insure. — See note 3.

**423.** XXI. LIABILITY FOR DEVIATION. — See note 1.

**424.** Loss During Deviation Creates Prima Facie Liability. — See note 1.

No Liability Where Loss Would Have Resulted if No Deviation. — See note 3.

The Consent of the Owner. — See note 4.

**425.** Unauthorized Transshipment or Reshipment. — See note 3.

Deviation Forfeits Lien and Contracts Limiting Liability. — See note 4.

**426.** See note 1.

etc., R. Co. v. Leatherwood, 29 Tex. Civ. App. 507.

**420.** 4. Lien Not Assignable. — Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 97 Am. St. Rep. 609, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420.

**421.** 1. Carrier May Stipulate for Benefit of Insurance. — Pennsylvania R. Co. v. Burr, (C. C. A.) 130 Fed. Rep. 847; North British, etc., Ins. Co. v. Central Vermont R. Co., 9 N. Y. App. Div. 4, affirmed 158 N. Y. 726; Roos v. Philadelphia, etc., R. Co., 199 Pa. St. 378, affirming 13 Pa. Super. Ct. 563, 7 Pa. Dist. 405; Missouri, etc., R. Co. v. Leibold, (Tex. Civ. App. 1900) 55 S. W. Rep. 368.

**422.** 2. Carrier Can Retain Only an Indemnity to Itself. — Pennsylvania R. Co. v. Burr, (C. C. A.) 130 Fed. Rep. 847.

**3.** Cannot Compel Shipper to Insure Goods in Its Favor. — See Pennsylvania R. Co. v. Burr, (C. C. A.) 130 Fed. Rep. 847.

**423.** 1. Carrier's Liability for Loss Due to Deviation. — Mallet v. Great Eastern R. Co., (1899) 1 Q. B. 309; The Ely, 110 Fed. Rep. 563, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 422-424; Pond-Decker Lumber Co. v. Spencer, (C. C. A.) 86 Fed. Rep. 846; Pierce v. Southern Pac. R. Co., 120 Cal. 156; Wald v. Pittsburg, etc., R. Co., 162 Ill. 545, 53 Am. St. Rep. 332; Southern Pac. R. Co. v. Booth, (Tex. Civ. App. 1897) 39 S. W. Rep. 585; Gulf, etc., R. Co. v. Irvine, (Tex. Civ. App. 1903) 73 S. W. Rep. 540. Compare Foster v. Great Western R. Co., (1904) 2 K. B. 306.

No Deviation by Delivery at Wharf Near Port

of Export. — Marande v. Texas, etc., R. Co., 184 U. S. 173, reversing (C. C. A.) 102 Fed. Rep. 246.

**424.** 1. Proof of Deviation and Loss Shows Prima Facie Liability. — The Ely, 110 Fed. Rep. 563, affirmed (C. C. A.) 122 Fed. Rep. 447, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 422-424.

**3.** Proof that Loss Was Not Due to Deviation. — The Ely, 110 Fed. Rep. 563, affirmed (C. C. A.) 122 Fed. Rep. 447, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 422-424; Louisville-Cincinnati Packet Co. v. Rogers, 20 Ind. App. 594; Gulf, etc., R. Co. v. Irvine, (Tex. Civ. App. 1903) 73 S. W. Rep. 540. See also Sutcliff v. Seligman, 110 Fed. Rep. 560, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 422-424 (attempting to apply the principle to damage to a vessel under a charter-party), reversed (C. C. A.) 121 Fed. Rep. 803.

**4.** Consent of Owner an Excuse. — Swift v. Furness, 87 Fed. Rep. 345.

**425.** 3. Transshipment — Reshipment. — See Pond-Decker Lumber Co. v. Spencer, (C. C. A.) 86 Fed. Rep. 846.

**4.** Lien Forfeited by Deviation. — See Pearce v. Wabash R. Co., 89 Mo. App. 437.

**426.** 1. By Deviation Carrier Loses Benefit of Contract Limiting Liability. — Cleveland, etc., R. Co. v. Potts, 33 Ind. App. 564; Louisville-Cincinnati Packet Co. v. Rogers, 20 Ind. App. 594; Hendrix v. Wabash R. Co., 107 Mo. App. 127. See also Marande v. Texas, etc., R. Co., (C. C. A.) 102 Fed. Rep. 246. Compare Foster v. Great Western R. Co., (1904) 2 K. B. 306.

# CARRIERS OF LIVE STOCK.

BY H. N. ELDRIDGE.

**428.** II. ARE COMMON CARRIERS. — See note 3.

**430.** III. DUTY TO RECEIVE AND CARRY — Not Necessary to Prove Express Contract. — See note 2.

IV. DUTY TO FURNISH FACILITIES FOR TRANSPORTATION — 1. Must Furnish Cars. — See note 3.

2. Other Facilities — Stock Pens and Yards. — See notes 4, 5.

**431.** See note 1.

Facilities for Unloading. — See note 3.

**432.** 3. Cars Must Be Suitable and Safe — a. THE GENERAL DOCTRINE — Kind, Character, and Value of Stock. — See note 1.

**428.** 3. *Arkansas.* — Kansas City, etc., R. Co. v. Pace, 69 Ark. 256.

*Delaware.* — Klair v. Wilmington Steamboat Co., 4 Penn. (Del.) 51.

*Georgia.* — Cooper v. Raleigh, etc., R. Co., 110 Ga. 660, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 428.

*Illinois.* — Adams Express Co. v. Bratton, 106 Ill. App. 563; Baltimore, etc., R. Co. v. Fox, 113 Ill. App. 180.

*Indiana.* — Chicago, etc., R. Co. v. Woodward, (Ind. 1904) 72 N. E. Rep. 558.

*Kansas.* — Kalina v. Union Pac. R. Co., 69 Kan. 172.

*Kentucky.* — Louisville, etc., R. Co. v. Harned, (Ky. 1901) 66 S. W. Rep. 25; Cincinnati, etc., R. Co. v. Sanders, (Ky. 1904) 80 S. W. Rep. 488.

*Missouri.* — Lockland v. Chicago, etc., R. Co., 101 Mo. App. 420; Keyes-Marshall Bros. Livery Co. v. St. Louis, etc., R. Co., 105 Mo. App. 556.

*Nebraska.* — Chicago, etc., R. Co. v. Williams, 61 Neb. 608; Johnston v. Chicago, etc., R. Co., (Neb. 1903) 97 N. W. Rep. 479.

*New Jersey.* — See Lewis v. Pennsylvania R. Co., 70 N. J. L. 135, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 428.

*North Carolina.* — Hinkle v. Southern R. Co., 126 N. Car. 932, 78 Am. St. Rep. 685.

*Oregon.* — Normile v. Oregon Nav. Co., 41 Oregon 177.

*Texas.* — International, etc., R. Co. v. Young, (Tex. Civ. App. 1903) 72 S. W. Rep. 68.

**430.** 2. Express Contract of Carriage Need Not Be Proved. — Pennsylvania Co. v. Walker, 29 Ind. App. 285; Evansville, etc., R. Co. v. Kevekordes, (Ind. App. 1904) 69 N. E. Rep. 1022.

**3. Must Furnish Cars upon Demand.** — St. Louis, etc., R. Co. v. Law, 68 Ark. 218; Chinn v. Chicago, etc., R. Co., 100 Mo. App. 576; Helm v. Missouri Pac. R. Co., 98 Mo. App. 419; Galveston, etc., R. Co. v. Thompson, (Tex. Civ. App. 1898) 44 S. W. Rep. 8; Texas, etc., R. Co. v. Jones, 23 Tex. Civ. App. 551; Texas, etc., R. Co. v. Powell, (Tex. Civ. App. 1904) 79 S. W. Rep. 86; Texas, etc., R. Co. v. Nelson, (Tex. Civ. App. 1905) 86 S. W. Rep. 616.

**Must Furnish Cars Within Reasonable Time**

**After Notice.** — Illinois Cent. R. Co. v. Bundy, 97 Ill. App. 202; International, etc., R. Co. v. True, 23 Tex. Civ. App. 523.

**Statute Imposing Penalty for Failure to Furnish Cars within a reasonable time exists in Texas.** Davis v. Texas, etc., R. Co., 91 Tex. 505; Texas, etc., R. Co. v. Smith, (Tex. Civ. App. 1904) 79 S. W. Rep. 614; Houston, etc., R. Co. v. Buchanan, (Tex. Civ. App. 1905) 84 S. W. Rep. 1073.

**4. Duty to Furnish Stock Pens, Yards, etc., for Shipment and Discharge of Stock.** — Kansas City, etc., R. Co. v. Barnett, 69 Ark. 150; Missouri, etc., R. Co. v. Byrne, 3 Indian Ter. 740, reversed 100 Fed. Rep. 359; Tracy v. Chicago, etc., R. Co., 80 Mo. App. 389; Flint v. Boston, etc., R. Co., (N. H. 1905) 59 Atl. Rep. 938; Galveston, etc., R. Co. v. Jackson, (Tex. Civ. App. 1896) 37 S. W. Rep. 255; Texas, etc., R. Co. v. Fambrough, (Tex. Civ. App. 1900) 55 S. W. Rep. 188; Houston, etc., R. Co. v. Trammell, 28 Tex. Civ. App. 312; Lackland v. Chicago, etc., R. Co., 101 Mo. App. 420; Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank, (Tex. Civ. App. 1904) 81 S. W. Rep. 1050. See Gulf, etc., R. Co. v. Porter, 25 Tex. Civ. App. 491.

**5. Carrier Liable for Furnishing Insufficient Facilities.** — Texas Cent. R. Co. v. Pittman, (Tex. Civ. App. 1904) 79 S. W. Rep. 847.

**431.** 1. Carrier Only Liable for Ordinary Care in Maintenance of Stock Yard. — Missouri, etc., R. Co. v. Byrne, (C. C. A.) 100 Fed. Rep. 359.

**3. Must Provide Facilities for Unloading and Keeping Stock After Transportation Ended.** — Normile v. Oregon Nav. Co., 41 Oregon 177; Houston, etc., R. Co. v. Trammell, 28 Tex. Civ. App. 312; Casey v. St. Louis Southwestern R. Co., (Tex. Civ. App. 1904) 83 S. W. Rep. 20. See also Atchison, etc., R. Co. v. Veale, (Tex. Civ. App. 1905) 87 S. W. Rep. 202.

**432.** 1. Cars Must Be Suitable and Safe — *Georgia.* — Cooper v. Raleigh, etc., R. Co., 105 Ga. 83; Gilleland v. Louisville, etc., R. Co., 119 Ga. 789.

*Illinois.* — Burke v. U. S. Express Co., 87 Ill. App. 505.

*Indiana.* — Evansville, etc., R. Co. v. Kevekordes, (Ind. App. 1904) 69 N. E. Rep. 1022.

**433.** Bedding for Cars. — See note 3.

**434.** *b.* CHARACTER OF CARS PRESCRIBED BY STATUTE. — See note 2.

*c.* EFFECT OF SHIPPER'S KNOWLEDGE OF DEFECTS IN CARS — Cars of Shipper's Own Selection. — See note 3.

**435.** Qualification — Shipper Agreeing to Accept Cars Offered. — See note 2.

Shipper Must Be Fully Informed. — See note 3.

*d.* EFFECT OF RECITAL IN BILL OF LADING — Burden of Proof. — See note 4.

**436.** V. DUTY DURING TRANSPORTATION — 1. Duty to Feed and Water Stock. — See notes 2, 3.

**437.** 2. Duty in Other Respects — Excessive Heat — Overcrowding — To Prevent Injury from Excessive Heat. — See note 1.

To Prevent Stock from Injuring One Another. — See note 2.

Summary — General Duty of Supervision. — See note 3.

*Louisiana.* — Schoenfeld *v.* Louisville, etc., Co., 49 La. Ann. 907.

*Mississippi.* — Illinois Cent. R. Co. *v.* Teams, 75 Miss. 147.

*Nebraska.* — Chicago, etc., R. Co. *v.* Williams, 61 Neb. 608; Union Pac. R. Co. *v.* Langan, 52 Neb. 105.

*Pennsylvania.* — See also Eckert *v.* Pennsylvania R. Co., (Pa. 1905) 60 Atl. Rep. 781.

*Texas.* — Weed *v.* International, etc., R. Co., 21 Tex. Civ. App. 689; International, etc., R. Co. *v.* True, 23 Tex. Civ. App. 523; International, etc., R. Co. *v.* Pool, 24 Tex. Civ. App. 575; Gulf, etc., R. Co. *v.* Irvine, (Tex. Civ. App. 1903) 73 S. W. Rep. 540.

*Virginia.* — Moore *v.* Baltimore, etc., R. Co., 103 Va. 189.

*Wisconsin.* — Leonard *v.* Whitcomb, 95 Wis. 646.

**Pens in Cars Must Be Suitable and Safe.** — Gulf, etc., R. Co. *v.* Dunman, (Tex. Civ. App. 1904) 81 S. W. Rep. 789.

**Car Doors Must Be Absolutely Safe.** — Central of Georgia R. Co. *v.* James, 117 Ga. 832.

**A Car in Which Fresh Lime** has recently been carried is not a suitable car in which to ship a horse. Galliers *v.* Chicago, etc., R. Co., 116 Iowa 319.

**Cars Must Not Be Infected with Disease.** — Illinois Cent. R. Co. *v.* Harris, 184 Ill. 57, affirming 84 Ill. App. 462.

**Stipulation as to Defects in Car.** — The shipper may stipulate that he will relieve the carrier of damages caused by defects in the car in which the live stock is carried. Ragsdale *v.* Southern R. Co., 119 Ga. 627.

**433. 3. Duty to Supply Bedding.** — Texas Cent. R. Co. *v.* O'Laughlin, (Tex. Civ. App. 1903) 72 S. W. Rep. 610. See Houston, etc., R. Co. *v.* Wilson, (Tex. Civ. App. 1899) 50 S. W. Rep. 156; Texas Cent. R. Co. *v.* O'Loughlin, (Tex. Civ. App. 1905) 84 S. W. Rep. 1104.

**434. 2. Cars with Trap Door** must be furnished. Paddock *v.* Missouri Pac. R. Co., 155 Mo. 524.

**3. When Shipper Selects Cars.** — Williams *v.* Central of Georgia R. Co., 117 Ga. 830; Central of Georgia R. Co. *v.* James, 117 Ga. 832; Gilleland *v.* Louisville, etc., R. Co., 119 Ga. 789. See also Nevius *v.* Chicago, etc., R. Co., (Wis. 1905) 102 N. W. Rep. 489.

**435. 2.** See San Antonio, etc., R. Co. *v.* Dolan, (Tex. Civ. App. 1905) 85 S. W. Rep. 302.

**3. Shipper must Have Been Fully Informed of Defects.** — Central of Georgia R. Co. *v.* James, 117 Ga. 832; Leonard *v.* Whitcomb, 95 Wis. 646.

**4. Lake Erie, etc., R. Co. *v.* Holland,** 162 Ind. 406.

**436. 2. Feeding and Watering Stock — Alabama.** — Southern Express Co. *v.* Ashford, 126 Ala. 591.

*Georgia.* — Southern R. Co. *v.* Horner, 115 Ga. 381.

*Illinois.* — Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 22, 66 Am. St. Rep. 253, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 436; Cleveland, etc., R. Co. *v.* Patterson, 69 Ill. App. 438.

*Kentucky.* — Cincinnati, etc., R. Co. *v.* Gregg, (Ky. 1904) 80 S. W. Rep. 512.

*Massachusetts.* — Hendrick *v.* Boston, etc., R. Co., 170 Mass. 44; Brockway *v.* American Express Co., 168 Mass. 257.

*Missouri.* — Rice *v.* Wabash R. Co., 106 Mo. App. 371.

*Texas.* — Missouri, etc., R. Co. *v.* Leibold, (Tex. Civ. App. 1900) 55 S. W. Rep. 368; Gulf, etc., R. Co. *v.* Porter, 25 Tex. Civ. App. 491; Texas, etc., R. Co. *v.* Peters, 31 Tex. Civ. App. 6; Texas, etc., R. Co. *v.* Byers, (Tex. Civ. App. 1903) 73 S. W. Rep. 427, (Tex. Civ. App. 1905) 84 S. W. Rep. 1087; St. Louis Southwestern R. Co. *v.* Musick, (Tex. Civ. App. 1904) 80 S. W. Rep. 673; St. Louis Southwestern R. Co. *v.* Hunt, (Tex. Civ. App. 1904) 81 S. W. Rep. 322. See also Houston, etc., R. Co. *v.* Kothmann, (Tex. Civ. App. 1905) 84 S. W. Rep. 1089.

See Millam *v.* Southern R. Co., 58 S. Car. 247.

**Water Furnished Must Be Wholesome.** — To give cattle alkaline water is *prima facie* negligence. Chicago, etc., R. Co. *v.* Mitchell, (Tex. Civ. App. 1905) 85 S. W. Rep. 286.

**3. Nature and Extent of the Duty.** — Nashville, etc., R. Co. *v.* Parker, 123 Ala. 683; Missouri, etc., R. Co. *v.* Clark, (Tex. Civ. App. 1904) 79 S. W. Rep. 827.

**437. 1. Must Throw Water Over Hogs Liable to Become Overheated.** — Wallace *v.* Lake Shore, etc., R. Co., 133 Mich. 633, 10 Detroit Leg. N. 331; Peterson *v.* Chicago, etc., R. Co., (S. Dak. 1905) 102 N. W. Rep. 595. See McCrary *v.* Missouri, etc., R. Co., 99 Mo. App. 518.

**2. Must Prevent Crowding.** — Louisville, etc., R. Co. *v.* Landers, 135 Ala. 504.

**3. General Duty of Supervision — Illinois.** —

**437.** Where Duty Assumed by Shipper — Opportunity and Facilities to Be Afforded. — See note 4.

**438.** Fire from Engine Communicated to Cattle — Management of Trains. — See notes 2, 3.

3. Duty Declared by Statute. — See note 4.

**439.** 4. Duty Assumed by Shipper — General Rule. — See note 1.

**440.** Carrier's Obligation. — See note 1.

Cleveland, etc., *R. Co. v. Patton*, 203 Ill. 376; *Burke v. U. S. Express Co.*, 87 Ill. App. 505.

*Kentucky.* — Louisville, etc., *R. Co. v. Harned*, (Ky. 1901) 66 S. W. Rep. 25; Louisville, etc., *R. Co. v. Wathen*, (Ky. 1902) 66 S. W. Rep. 714.

*Nebraska.* — Chicago, etc., *R. Co. v. Williams*, 61 Neb. 608.

*New York.* — *Newman v. Pennsylvania R. Co.*, 33 N. Y. App. Div. 171.

*Texas.* — Missouri, etc., *R. Co. v. Chittim*, 24 Tex. Civ. App. 599; San Antonio, etc., *R. Co. v. Barnett*, 27 Tex. Civ. App. 498; Texas, etc., *R. Co. v. Tribble*, 29 Tex. Civ. App. 104; International, etc., *R. Co. v. Young*, (Tex. Civ. App. 1903) 72 S. W. Rep. 68; St. Louis Southwestern *R. Co. v. Lovelady*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1040; Pacific Express *Co. v. Lothrop*, 20 Tex. Civ. App. 339.

**Hog Smothered by Close Confinement.** — *Lachner v. Adams Express Co.*, 72 Mo. App. 13.

**Rough Handling as Conclusive Evidence of Negligence.** — It cannot be said as a matter of law that a failure to transport cattle without rough handling constitutes negligence. Missouri, etc., *R. Co. v. Garrett*, (Tex. Civ. App. 1905) 87 S. W. Rep. 172. See also Ft. Worth, etc., *R. Co. v. James*, (Tex. Civ. App. 1905) 87 S. W. Rep. 730.

**437. 4. Illinois.** — Illinois Cent. *R. Co. v. Beebe*, 174 Ill. 13, 66 Am. St. Rep. 253, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437.

*Iowa.* — *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659.

*Kentucky.* — Memphis, etc., *Packet Co. v. Buckner*, 108 Ky. 701, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437; Illinois Cent. *R. Co. v. Eblin*, 114 Ky. 817; Louisville, etc., *R. Co. v. Bennett*, (Ky. 1903) 76 S. W. Rep. 408.

*Michigan.* — *McKenzie v. Michigan Cent. R. Co.*, (Mich. 1904) 100 N. W. Rep. 260.

*Missouri.* — 101 Live Stock *Co. v. Kansas City*, etc., *R. Co.*, 100 Mo. App. 674.

*Montana.* — *Nelson v. Great Northern R. Co.*, 28 Mont. 297.

*Nebraska.* — Chicago, etc., *R. Co. v. Schuldt*, 66 Neb. 43.

*New Jersey.* — *Paul v. Pennsylvania R. Co.*, 70 N. J. L. 442.

*South Carolina.* — *Comer v. Columbia*, etc., *R. Co.*, 52 S. Car. 36.

*Texas.* — Missouri, etc., *R. Co. v. Chittim*, (Tex. Civ. App. 1897) 40 S. W. Rep. 23; Texas, etc., *R. Co. v. Arnold*, 16 Tex. Civ. App. 74; Texas, etc., *R. Co. v. Peters*, 31 Tex. Civ. App. 6; Texas, etc., *R. Co. v. Byers*, (Tex. Civ. App. 1903) 73 S. W. Rep. 427; Gulf, etc., *R. Co. v. Dunn*, (Tex. Civ. App. 1904) 78 S. W. Rep. 1980.

**438. 2. Fire from Engine Communicated to**

**Cattle Car.** — *Parrill v. Cleveland*, etc., *R. Co.*, 23 Ind. App. 638.

**3. Improper Handling of Trains.** — Lake Erie, etc., *R. Co. v. Holland*, 162 Ind. 406; Louisville, etc., *R. Co. v. Cooper*, (Ky. 1900) 56 S. W. Rep. 144.

**Negligent Switching Causing Horses to Be Thrown Down.** — *Matney v. Chicago*, etc., *R. Co.*, 75 Mo. App. 233.

**4. Texas Statute.** — Texas, etc., *R. Co. v. Davis*, (Tex. Civ. App. 1897) 40 S. W. Rep. 167.

**439. 1. Where Shipper Assumes Duty of Carrying for Stock.** — *Georgia.* — Central of Georgia *R. Co. v. Rogers*, 111 Ga. 865; Seaboard, etc., *R. Co. v. Cauthen*, 115 Ga. 422.

*Illinois.* — Cleveland, etc., *R. Co. v. Patterson*, 69 Ill. App. 438.

*Indiana.* — Lake Erie, etc., *R. Co. v. Holland*, 162 Ind. 406.

*Iowa.* — *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659; *Burgher v. Chicago*, etc., *R. Co.*, 105 Iowa 335.

*Kentucky.* — Louisville, etc., *R. Co. v. Harned*, (Ky. 1901) 66 S. W. Rep. 25; Illinois Cent. *R. Co. v. Eblin*, 114 Ky. 817.

*Maine.* — *Morse v. Canadian Pac. R. Co.*, 97 Me. 77.

*Michigan.* — *Hengstler v. Flint*, etc., *R. Co.*, 125 Mich. 530.

*Missouri.* — *Spalding v. Chicago*, etc., *R. Co.*, 101 Mo. App. 225.

*Nebraska.* — Chicago, etc., *R. Co. v. Williams*, 61 Neb. 608; Chicago, etc., *R. Co. v. Schuldt*, 66 Neb. 43.

*New Jersey.* — *Lewis v. Pennsylvania R. Co.*, 70 N. J. L. 132.

*Pennsylvania.* — *Needy v. Western Maryland R. Co.*, 22 Pa. Super. Ct. 489.

*South Carolina.* — *Comer v. Columbia*, etc., *R. Co.*, 52 S. Car. 36.

*Texas.* — Missouri, etc., *R. Co. v. Belcher*, (Tex. Civ. App. 1897) 41 S. W. Rep. 706; Texas, etc., *R. Co. v. King*, (Tex. Civ. App. 1898) 45 S. W. Rep. 33; Texas, etc., *R. Co. v. Peters*, 31 Tex. Civ. App. 6; Texas, etc., *R. Co. v. Byers*, (Tex. Civ. App. 1903) 73 S. W. Rep. 427; Gulf, etc., *R. Co. v. Dunman*, (Tex. Civ. App. 1903) 76 S. W. Rep. 588; Gulf, etc., *R. Co. v. Dunn*, (Tex. Civ. App. 1904) 78 S. W. Rep. 1080; St. Louis Southwestern *R. Co. v. Hunt*, (Tex. Civ. App. 1904) 81 S. W. Rep. 322.

*Virginia.* — Norfolk, etc., *R. Co. v. Reeves*, 97 Va. 284.

**440. 1. Carrier Must Furnish Proper Facilities for Feeding, Etc.** — *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 440; Welch *v. Northern Pac. R. Co.*, (N. Dak. 1904) 103 N. W. Rep. 396, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 440; *Burns v. Chicago*, etc., *R. Co.*, 104 Wis. 646.

**442.** Express Contract — Unreasonable Conditions — Want of Consideration. — See note 1.

**5.** Statutory Penalty for Keeping Cattle Confined — Under the United States Statute. — See note 3.

**443.** In the Case of Connecting Lines. — See note 1.

Exception — "Storm or Other Accidental Causes" — Food and Rest in Car. — See note 3.

**VI. LIABILITY FOR LOSS OR INJURY — 1. The General Rule — Insurers — Exception — Vice of Animals. — See note 4.**

**446.** 2. When Liability Begins and Ends. — See note 4.

**447.** 3. Liability in Particular Cases — *a.* INJURY OCCURRING ON CONNECTING LINE — Defective Car Furnished by Initial Line. — See note 1.

*b.* INJURY FROM IMPROPER LOADING — Duty of Carrier. — See note 3.

**442.** 1. Texas, etc., R. Co. v. Peters, 31 Tex. Civ. App. 6.

3. U. S. v. Harris, (C. C. A.) 85 Fed. Rep. 533; U. S. v. St. Louis, etc., R. Co., 107 Fed. Rep. 870; Southern R. Co. v. Horner, 115 Ga. 381; Illinois Cent. R. Co. v. Eblin, 114 Ky. 817; Brockway v. American Express Co., 168 Mass. 257; Lewis v. Pennsylvania R. Co., 70 N. J. L. 132; International, etc., R. Co. v. Startz, (Tex. Civ. App. 1904) 82 S. W. Rep. 1071; Burns v. Chicago, etc., R. Co., 104 Wis. 646.

**Carrier Not Relieved from Liability under Statute** though shipper agrees to unload and feed. Southern Pac. R. Co. v. Arnett, (C. C. A.) 126 Fed. Rep. 75; Comer v. Columbia, etc., R. Co., 52 S. Car. 36. See Robert C. White Live Stock Commission Co. v. Chicago, etc., R. Co., 87 Mo. App. 330.

**A Massachusetts Statute** prohibits the confinement of animals in cars for more than twenty-eight consecutive hours, and it cannot be superseded by any order of the cattle commissioners. Hendrick v. Boston, etc., R. Co., 170 Mass. 44.

**No Demand to Stop Need Be Made by Shipper** in order to fix liability of carrier for damages. Southern Pac. R. Co. v. Arnett, (C. C. A.) 126 Fed. Rep. 75.

**443.** 1. Where There Are Connecting Lines. — Comer v. Columbia, etc., R. Co., 52 S. Car. 36.

**3. Exception Exists Where Car Contains Food, Water, and Space to Rest.** — See Regan v. Adams Express Co., 49 La. Ann. 1579; St. Louis Southwestern R. Co. v. Dolan, (Tex. Civ. App. 1903) 77 S. W. Rep. 415.

**4. Injury Resulting from "Proper Vice" of Animal — Arkansas.** — St. Louis, etc., R. Co. v. Jacobs, 70 Ark. 401.

*Georgia.* — Cooper v. Raleigh, etc., R. Co., 110 Ga. 659, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 443.

*Illinois.* — Burke v. U. S. Express Co., 87 Ill. App. 505.

*Indiana.* — Chicago, etc., R. Co. v. Woodward, (Ind. 1904) 72 N. E. Rep. 558.

*Kentucky.* — Louisville, etc., R. Co. v. Harned, (Ky. 1901) 66 S. W. Rep. 25.

*Mississippi.* — Illinois Cent. R. Co. v. Teams, 75 Miss. 147.

*Missouri.* — Cash v. Wabash R. Co., 81 Mo. App. 109.

*New Jersey.* — Lewis v. Pennsylvania R. Co., 70 N. J. L. 132.

*New York.* — Waldron v. Fargo, 170 N. Y. 130, reversing 52 N. Y. App. Div. 18.

*Texas.* — Texas, etc., R. Co. v. Turner, (Tex. Civ. App. 1896) 37 S. W. Rep. 643; St. Louis, etc., R. Co. v. Dickens, (Tex. Civ. App. 1900) 56 S. W. Rep. 124; Gulf, etc., R. Co. v. Porter, 25 Tex. Civ. App. 491; Ft. Worth, etc., R. Co. v. Lock, 30 Tex. Civ. App. 426; International, etc., R. Co. v. Young, (Tex. Civ. App. 1903) 72 S. W. Rep. 68; Gulf, etc., R. Co. v. Butler, 31 Tex. Civ. App. 576; Houston, etc., R. Co. v. Gray, (Tex. Civ. App. 1905) 85 S. W. Rep. 838. *Virginia.* — Norfolk, etc., R. Co. v. Reeves, 97 Va. 284.

**446.** 4. When Liability Begins. — Kansas City, etc., R. Co. v. Barnett, 69 Ark. 150.

In Chicago, etc., R. Co. v. Powers, (Neb. 1905) 103 N. W. Rep. 678, the court said: "We think the rule well established that when a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches. But we think it equally well settled that such liability does not attach until the goods are unconditionally surrendered by the shipper and accepted by the carrier. And where a railroad company constructs yards by the side of its tracks to facilitate the loading and unloading of stock, it is not responsible as a common carrier for stock placed in such yards for the convenience of the owner, who intends to ship on a subsequent day, and reserves the privilege of taking the stock from the pens for the purpose of feeding and caring for them before the shipment is made. In such a case the liability of the company is no greater than that of an ordinary depositary or bailee."

**447.** 1. Car Improperly Bedded. — Texas Cent. R. Co. v. O'Loughlin, (Tex. Civ. App. 1905) 84 S. W. Rep. 1104.

**3. As to Duty of Carrier to Load Properly.** — Texas, etc., R. Co. v. White, (Tex. Civ. App. 1904) 80 S. W. Rep. 641.

**Jack Injured While Being Loaded on Boat.** — Jones v. Memphis, etc., Packet Co., (Miss. 1897) 21 So. Rep. 303.

**Statute Against Overloading.** — In South Carolina a statute exists prohibiting a railroad company carrying live stock from overloading the cars. Crawford v. Southern R. Co., 56 S. Car. 136.

**447.** Special Contract by Which Shipper Is to Load Stock. — See note 4.

**449.** *d.* ANIMALS ESCAPING. — See note 2.

*e.* INJURIES OCCURRING WHILE STOCK ARE BEING UNLOADED. —

See note 5.

**450.** VII. LIABILITY FOR DELAY — General Rule as to Carriers. — See note 2.  
Rule Stricter than in Case of Ordinary Merchandise. — See note 3.

**451.** When Carrier Without Fault. — See note 1.

**452.** When There Is a Special Contract. — See note 1.

Unavoidable Delays. — See note 2.

Stipulations — Negligence. — See note 4.

**447.** 4. Where Shipper Contracts to Load. — Chicago, etc., R. Co. *v.* Carroll, (Tex. Civ. App. 1904) 81 S. W. Rep. 1020. See also Texas, etc., R. Co. *v.* Edins, (Tex. Civ. App. 1904) 83 S. W. Rep. 253; San Antonio, etc., R. Co. *v.* Dolan, (Tex. Civ. App. 1905) 85 S. W. Rep. 302.

**Cars Overloaded by Shipper.** — See Houston, etc., R. Co. *v.* Wilson, (Tex. Civ. App. 1899) 50 S. W. Rep. 156.

**449.** 2. Carrier Not Liable — Improper Loading. — Kaplan *v.* Midland R. Terminal Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 945.

**5. Insufficient Facilities for Unloading Stock.** — Toledo, etc., R. Co. *v.* Beery, 31 Ind. App. 556. See Central Stock Yards Co. *v.* Louisville, etc., R. Co., (C. C. A.) 118 Fed. Rep. 113, *affirmed* 192 U. S. 568; Mexican Nat. R. Co. *v.* Savage, (Tex. Civ. App. 1897) 41 S. W. Rep. 663. See also San Antonio, etc., R. Co. *v.* Dolan, (Tex. Civ. App. 1905) 85 S. W. Rep. 302.

**450.** 2. Arkansas. — Kansas, etc., R. Co. *v.* Ayers, 63 Ark. 331; St. Louis, etc., R. Co. *v.* Deshong, 63 Ark. 443; Kansas City, etc., R. Co. *v.* Barnett, 69 Ark. 150.

**Illinois.** — Baltimore, etc., R. Co. *v.* Ross, 105 Ill. App. 54; Adams Express Co. *v.* Bratton, 106 Ill. App. 563.

**Kentucky.** — Felton *v.* McCreary-McClellan Live-Stock Co., (Ky. 1900) 59 S. W. Rep. 744; Southern R. Co. *v.* Railey, (Ky. 1904) 80 S. W. Rep. 786; Cincinnati, etc., R. Co. *v.* Gregg, (Ky. 1904) 80 S. W. Rep. 512.

**Michigan.** — Wallace *v.* Lake Shore, etc., R. Co., 133 Mich. 633.

**Missouri.** — Hamilton *v.* Wabash R. Co., 80 Mo. App. 597; Sloop *v.* Wabash R. Co., 93 Mo. App. 605; Anderson *v.* Atchison, etc., R. Co., 93 Mo. App. 677; Spalding *v.* Chicago, etc., R. Co., 101 Mo. App. 225; McCrary *v.* Chicago, etc., R. Co., 109 Mo. App. 567; Sloop *v.* Wabash R. Co., (Mo. App. 1904) 84 S. W. Rep. 111.

**Nebraska.** — Johnston *v.* Chicago, etc., R. Co., (Neb. 1903) 97 N. W. Rep. 479.

**Tennessee.** — Nashville, etc., R. Co. *v.* Stone, (Tenn. 1904) 79 S. W. Rep. 1031.

**Texas.** — Texas, etc., R. Co. *v.* Truesdell, 21 Tex. Civ. App. 125; Galveston, etc., R. Co. *v.* Rutledge, (Tex. Civ. App. 1896) 37 S. W. Rep. 176; Texas, etc., R. Co. *v.* Boggs, (Tex. Civ. App. 1897) 40 S. W. Rep. 20; Gulf, etc., R. Co. *v.* Baugh, (Tex. Civ. App. 1897) 42 S. W. Rep. 215; San Antonio, etc., R. Co., *v.* Graves, (Tex. Civ. App. 1899) 49 S. W. Rep. 1103; Missouri, etc., R. Co. *v.* Wells, 24 Tex. Civ. App. 304; Gulf, etc., R. Co. *v.* Porter, 25 Tex. Civ. App. 491; Texas, etc., R. Co. *v.* Hall, 31 Tex. Civ. App. 464; Texas, etc., R. Co. *v.* Smissen, 31

Tex. Civ. App. 549; Texas, etc., R. Co. *v.* Dawson, (Tex. Civ. App. 1904) 78 S. W. Rep. 235; St. Louis Southwestern R. Co. *v.* Musick, (Tex. Civ. App. 1904) 80 S. W. Rep. 673; Gulf, etc., R. Co. *v.* Batte, (Tex. Civ. App. 1904) 81 S. W. Rep. 813; Ft. Worth, etc., R. Co. *v.* Alexander, (Tex. Civ. App. 1904) 81 S. W. Rep. 1015; Chicago, etc., R. Co. *v.* Halsell, (Tex. Civ. App. 1904) 81 S. W. Rep. 1241; Texas, etc., R. Co. *v.* Slaughter, (Tex. Civ. App. 1905) 84 S. W. Rep. 1085; Texas, etc., R. Co. *v.* Stewart, (Tex. Civ. App. 1905) 86 S. W. Rep. 631; St. Louis, etc., R. Co. *v.* Gunter, (Tex. Civ. App. 1905) 86 S. W. Rep. 938; Texas, etc., R. Co. *v.* Ellerd, (Tex. Civ. App. 1905) 87 S. W. Rep. 362; Texas, etc., R. Co. *v.* Sherrod, (Tex. Civ. App. 1905) 87 S. W. Rep. 363. See also Missouri, etc., R. Co. *v.* Storey, (Tex. Civ. App. 1903) 75 S. W. Rep. 847.

**Virginia.** — Moore *v.* Baltimore, etc., R. Co., 133 Va. 189.

**3. General Rule Applied to Carriers of Live Stock.** — Glasscock *v.* Chicago, etc., R. Co., 86 Mo. App. 114.

**451.** 1. United States. — Missouri, etc., R. Co. *v.* Truskett, (C. C. A.) 104 Fed. Rep. 728, *affirmed* 186 U. S. 480.

**Illinois.** — Adams Express Co. *v.* Bratton, 106 Ill. App. 563.

**Indiana.** — Cleveland, etc., R. Co. *v.* Heath, 22 Ind. App. 47.

**Indian Territory.** — Missouri, etc., R. Co. *v.* Truskett, 2 Indian Ter. 633.

**Michigan.** — McKenzie *v.* Michigan Cent. R. Co., (Mich. 1904) 100 N. W. Rep. 260.

**Missouri.** — McCrary *v.* Missouri, etc., R. Co., 99 Mo. App. 518.

**Montana.** — Nelson *v.* Great Northern R. Co., 28 Mont. 297.

**Texas.** — Texas, etc., R. Co. *v.* Berchfield, 10 Tex. Civ. App. 228; San Antonio, etc., R. Co. *v.* Woodley, 20 Tex. Civ. App. 216; Southern Kansas R. Co. *v.* Crump, 32 Tex. Civ. App. 222; St. Louis Southwestern R. Co. *v.* Hunt, (Tex. Civ. App. 1904) 81 S. W. Rep. 322.

**West Virginia.** — Bosley *v.* Baltimore, etc., R. Co., 54 W. Va. 563.

**452.** 1. Special Contract Fixing Time. — Louisville, etc., R. Co. *v.* Duncan, 137 Ala. 416.

**2. Unavoidable Delay.** — Jones *v.* Minneapolis, etc., R. Co., 91 Minn. 229; Herring *v.* Chesapeake, etc., R. Co., 101 Va. 778.

**4.** A stipulation that the live stock covered by a contract for shipment is not to be transferred within a specified time, nor delivered at its destination at any particular hour or in season for any particular market, does not relieve the carrier from liability for any negli-



**453.** Delivery to Connecting Carrier — Delay. — See note 1.

**VIII. LIMITATION OF LIABILITY — 2. Stipulation Requiring Shipper to Accompany Stock** — Shipper Caring for Stock. — See note 5.

Shipper Loading and Unloading. — See note 6.

**454.** 3. Stipulation Against Liability for Injuries Resulting from Viciousness, Etc. — See note 1.

4. Stipulation Requiring Claim to Be Made Before Removal of Stock. — See note 2.

**455.** Reasonable Construction — Impossible to Discover Nature and Extent of Injury for Some Time. — See note 1.

**458.** 5. Limitation of Liability to a Specified Amount. — See note 2.

gent delay in transportation. *Smith v. Chicago, etc., R. Co.*, (Mo. App. 1905) 87 S. W. Rep. 9.

**453.** 1. Delay in Delivering to Connecting Line. — 101 Live Stock Co. v. Kansas City, etc., R. Co., 100 Mo. App. 674.

**5. Stipulation that Shipper Shall Accompany and Care for Stock** — *Georgia*. — Central of Georgia R. Co. v. Rogers, 111 Ga. 865; *Susong v. Florida Cent., etc., R. Co.*, 115 Ga. 361; *Seaboard, etc., R. Co. v. Cauthen*, 115 Ga. 422; *Ragsdale v. Southern R. Co.*, 119 Ga. 627.

*Indiana*. — Lake Erie, etc., R. Co. v. Holland, 162 Ind. 406.

*Iowa*. — *Faust v. Chicago, etc., R. Co.*, 104 Iowa 241, 65 Am. St. Rep. 454; *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659.

*Kentucky*. — *Illinois Cent. R. Co. v. Eblin*, 114 Ky. 817.

*Michigan*. — *Hengstler v. Flint, etc., R. Co.*, 125 Mich. 530. See *Wallace v. Lake Shore, etc., R. Co.*, 133 Mich. 633.

*Missouri*. — *Schureman v. Chicago, etc., R. Co.*, 88 Mo. App. 183; *Spalding v. Chicago, etc., R. Co.*, 101 Mo. App. 225.

*Montana*. — *Nelson v. Great Northern R. Co.*, 28 Mont. 297.

*Texas*. — *Texas, etc., R. Co. v. Arnold*, 16 Tex. Civ. App. 74. See also *Houston, etc., R. Co. v. Gray*, (Tex. Civ. App. 1905) 85 S. W. Rep. 838.

**Stipulation Not Within Constitutional Prohibition against Limiting.** — *Chicago, etc., R. Co. v. Schuldt*, 66 Neb. 43.

**6. Stipulation that Shipper Shall Load, Unload, Etc.** — *Baltimore, etc., R. Co. v. Fox*, 113 Ill. App. 180; *Morse v. Canadian Pac. R. Co.*, 97 Me. 77; *Chicago, etc., R. Co. v. Mitchell*, (Tex. Civ. App. 1905) 85 S. W. Rep. 286.

**454.** 1. Stipulation Against Liability for Injuries Resulting from Viciousness. — *Metropolitan Trust Co. v. Toledo, etc., R. Co.*, 107 Fed. Rep. 628; *Williams v. Central of Georgia R. Co.*, 117 Ga. 830; *Central of Georgia R. Co. v. James*, 117 Ga. 832; *Ragsdale v. Southern R. Co.*, 119 Ga. 627; *Baxter v. Louisville, etc., R. Co.*, 165 Ill. 78; *Cincinnati, etc., R. Co. v. Gregg*, (Ky. 1904) 80 S. W. Rep. 512; *Keyes-Marshall Bros. Livery Co. v. St. Louis, etc., R. Co.*, 105 Mo. App. 556; *St. Louis Southwestern R. Co. v. Lovelady*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1040; *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563; *Loeser v. Chicago, etc., R. Co.*, 94 Wis. 571.

**2. General Rule — Stipulation Valid** — *Arkansas*. — *Kansas, etc., R. Co. v. Ayers*, 63 Ark. 331; *St. Louis, etc., R. Co. v. Law*, 68 Ark. 218.

*Georgia*. — *Southern R. Co. v. Adams*, 115 Ga. 705.

*Illinois*. — *Baltimore, etc., R. Co. v. Fox*, 113 Ill. App. 180. See *Baltimore, etc., R. Co. v. Ross*, 105 Ill. App. 54.

*Indiana*. — *Anderson v. Lake Shore, etc., R. Co.*, 26 Ind. App. 196.

*Kansas*. — *Kalina v. Union Pac. R. Co.*, 69 Kan. 172; *Missouri, etc., R. Co. v. Kirkham*, 63 Kan. 255; *See Wichita, etc., R. Co. v. Koch*, 8 Kan. App. 642.

*Kentucky*. — *Illinois Cent. R. Co. v. Radford*, (Ky. 1901) 64 S. W. Rep. 511.

*Michigan*. — *Wallace v. Lake Shore, etc., R. Co.*, 133 Mich. 633.

*Missouri*. — *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311; 101 Live Stock Co. v. Kansas City, etc., R. Co., 100 Mo. App. 674; *Smith v. Chicago, etc., R. Co.*, (Mo. App. 1905) 87 S. W. Rep. 9.

*Ohio*. — See *Baltimore, etc., R. Co. v. Hubbard*, 72 Ohio St. 302.

*Texas*. — *Texas, etc., R. Co. v. Edins*, (Tex. Civ. App. 1904) 83 S. W. Rep. 253; *Chicago, etc., R. Co. v. Mitchell*, (Tex. Civ. App. 1905) 85 S. W. Rep. 286.

**A Stipulation for Notice Within Ten Days of Removal Held Valid.** — *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659.

**Stipulation Though Valid May Be Waived by Carrier.** — *Eckert v. Pennsylvania R. Co.*, (Pa. 1905) 60 Atl. Rep. 781.

*Texas*. — In *Missouri, etc., R. Co. v. Allen*, (Tex. Civ. App. 1905) 87 S. W. Rep. 168, it was held that a special provision in a contract of shipment, to the effect that as a condition precedent to the shipper's right to recover he should give notice in writing of his claim for damages, before the horses were removed from the car in which they were transported, violates Rev. Stat. Tex. 1895, art. 320, which prohibits a carrier from stipulating for any limitation of his common-law liability.

**455.** 1. When Stipulation Not Valid. — *Louisville, etc., R. Co. v. Landers*, 135 Ala. 504.

**458.** 2. Rule Applicable to Carriers of Live Stock — *United States*. — *Jennings v. Smith*, (C. C. A.) 106 Fed. Rep. 139; *Metropolitan Trust Co. v. Toledo, etc., R. Co.*, 107 Fed. Rep. 628.

*Alabama*. — *Southern R. Co. v. Jones*, 132 Ala. 437.

*Georgia*. — *Southern R. Co. v. Adams*, 115 Ga. 705.

*Indiana*. — *U. S. Express Co. v. Joyce*, (Ind. 1904) 72 N. E. Rep. 865, (Ind. App. 1904) 69 N. E. Rep. 1015; *Evansville, etc., R. Co. v. Mc-*

**458.** 6. Where Loss Is Due to Carrier's Negligence. -- See note 3.

**459.** Failure to Exercise Ordinary Care -- Gross Negligence. -- See note 2.

**461.** IX. DELIVERY TO CARRIER -- WHAT CONSTITUTES -- Change of Possession. -- See note 2.

**462.** X. DELIVERY BY CARRIER -- 2. Sufficiency of Delivery -- When Shipper Engages to Unload. -- See note 5.

Must Unload Promptly. -- See note 8.

**463.** Prompt Delivery After Unloaded. -- See note 1.

As to What Constitutes a Sufficient Delivery. -- See note 2.

**XI. TRANSPORTATION OF PARTICULAR CLASSES OF STOCK -- 1. Of Dogs** -- Statutes. -- See note 5.

**465.** 2. Of Diseased Cattle -- Statutes Prohibiting -- *b.* EFFECT OF STATUTES -- When the Statute Is Valid. -- See note 4.

Kinney, (Ind. App. 1905) 73 N. E. Rep. 148; Evansville, etc., R. Co. v. Kevekordes, (Ind. App. 1905) 73 N. E. Rep. 1135, (Ind. App. 1904) 69 N. E. Rep. 1022.

Minnesota. -- O'Malley v. Great Northern R. Co., 86 Minn. 380.

Missouri. -- Keyes-Marshall Bros. Livery Co. v. St. Louis, etc., R. Co., (Mo. App. 1905) 87 S. W. Rep. 553; Wyrick v. Missouri, etc., R. Co., 74 Mo. App. 406; Bowring v. Wabash R. Co., 77 Mo. App. 250.

Ohio. -- Baltimore, etc., R. Co. v. Hubbard, 72 Ohio St. 302.

Oregon. -- Normile v. Oregon, Nav. Co., 41 Oregon 177.

Wisconsin. -- Loeser v. Chicago, etc., R. Co., 94 Wis. 571.

**458.** 3. Cannot Limit Liability for Negligence -- Alabama. -- Southern R. Co. v. Jones, 132 Ala. 437.

Connecticut. -- Candee v. New York, etc., R. Co., 73 Conn. 667.

Illinois. -- Chicago, etc., R. Co. v. Calumet Stock Farm, 194 Ill. 9, 88 Am. St. Rep. 68; Chicago, etc., R. Co. v. Grimes, 71 Ill. App. 397; U. S. Express Co. v. Council, 84 Ill. App. 491; Baltimore, etc., R. Co. v. Fox, 113 Ill. App. 180.

Indiana. -- Cleveland, etc., R. Co. v. Heath, 22 Ind. App. 47; Parrill v. Cleveland, etc., R. Co., 23 Ind. App. 638; Anderson v. Lake Shore, etc., R. Co., 26 Ind. App. 196.

Kentucky. -- Cincinnati, etc., R. Co. v. Graves, (Ky. 1899) 52 S. W. Rep. 961; Louisville, etc., R. Co. v. Frazee, (Ky. 1903) 71 S. W. Rep. 437; Cincinnati, etc., R. Co. v. Gregg, (Ky. 1904) 80 S. W. Rep. 512.

Maine. -- Morse v. Canadian Pac. R. Co., 97 Me. 77.

Mississippi. -- Illinois Cent. R. Co. v. Bogard, 78 Miss. 11.

Missouri. -- Vaughn v. Wabash R. Co., 78 Mo. App. 639; Minter v. Chicago, etc., R. Co., 82 Mo. App. 130; Anderson v. Atchison, 93 Mo. App. 677.

New Jersey. -- Paul v. Pennsylvania R. Co., 70 N. J. L. 442.

Ohio. -- Baltimore, etc., R. Co. v. Hubbard, 25 Ohio Cir. Ct. 477.

Oregon. -- Normile v. Oregon Nav. Co., 41 Oregon 177.

Pennsylvania. -- Hughes v. Pennsylvania R. Co., 202 Pa. St. 222, 97 Am. St. Rep. 713; Needy v. Western Maryland R. Co., 22 Pa. Super. Ct. 489; Trace v. Pennsylvania R. Co.,

26 Pa. Super. Ct. 466; Eckert v. Pennsylvania R. Co., (Pa. 1905) 60 Atl. Rep. 781.

South Carolina. -- Crawford v. Southern R. Co., 56 S. Car. 136.

Texas. -- Gulf, etc., R. Co. v. Dunman, (Tex. Civ. App. 1904) 81 S. W. Rep. 789; San Antonio, etc., R. Co. v. Dolan, (Tex. Civ. App. 1905) 85 S. W. Rep. 302.

West Virginia. -- Bpsley v. Baltimore, etc., R. Co., 54 W. Va. 563.

Wisconsin. -- Leonard v. Whitcomb, 95 Wis. 646; Loeser v. Chicago, etc., R. Co., 94 Wis. 571; Nevius v. Chicago, etc., R. Co., (Wis. 1905) 102 N. W. Rep. 489.

**459.** 2. Limitation to Losses Caused by Gross Negligence. -- Nelson v. Great Northern R. Co., 28 Mont. 297, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 459; Chicago, etc., R. Co. v. Calumet Stock Farm, 194 Ill. 9, 88 Am. St. Rep. 68, affirming 96 Ill. App. 337; Baltimore, etc., R. Co. v. Fox, 113 Ill. App. 180; St. Louis, etc., R. Co. v. Tribbey, 6 Kan. App. 467; Normile v. Oregon Nav. Co., 41 Oregon 177; Bosley v. Baltimore, etc., R. Co., 54 W. Va. 563.

**461.** 2: What Constitutes Delivery. -- St. Louis Southwestern R. Co. v. Musick, (Tex. Civ. App. 1904) 80 S. W. Rep. 673.

Delivery of Live Stock in Pens of Carrier. -- Lackland v. Chicago, etc., R. Co., 101 Mo. App. 420.

Loading of Live Stock on Cars. -- McCrary v. Missouri, etc., R. Co., 99 Mo. App. 518.

**462.** 5. Where Contract Requires Shipper to Unload. -- Brown v. Pontiac, etc., R. Co., 133 Mich. 371. See also Cooper v. Raleigh, etc., R. Co., 110 Ga. 659.

**8.** Must Unload Promptly. -- Galveston, etc., R. Co. v. Botts, (Tex. Civ. App. 1902) 70 S. W. Rep. 113.

**463.** 1. Delay in Delivery. -- Hinkle v. Southern R. Co., 126 N. Car. 932, 78 Am. St. Rep. 685; Missouri, etc., R. Co. v. Dilworth, (Tex. Civ. App. 1901) 65 S. W. Rep. 502, affirmed 95 Tex. 327.

Delivery Must Be Within Reasonable Time. -- Houston, etc., R. Co. v. Trammell, 28 Tex. Civ. App. 312.

**2.** Delivery Must Be Within Reasonable Hours. -- Houston, etc., R. Co. v. Trammell, 28 Tex. Civ. App. 312.

**5.** Shipper May Recover for Injury to Dog. -- Southern Express Co. v. Ashford, 126 Ala. 591; American Express Co. v. Bradford, 82 Miss. 130; Harrison v. Weir, 71 N. Y. App. Div. 248.

**465.** 4. Carriers May Refuse to Receive Pro-

**468.** *c.* JUDICIAL NOTICE OF DANGER OF INFECTION — Present Rule. — See note 1.

**XII. CONTRIBUTORY NEGLIGENCE OF SHIPPER.** — See note 2.

**469.** **XIII. CAUSE OF LOSS OR INJURY — HOW DETERMINED — When Presumption Against Carrier.** — See note 1.

Evidence Conflicting — Question for Jury. — See note 3.

**XIV. BURDEN OF PROOF — General Rule — On the Carrier.** — See note 4.

**471.** When Liability Restricted by Contract. — See note 3.

**472.** **XV. MEASURE OF DAMAGES — 1. General Rule.** — See note 3.

**Inhibited Cattle.** — See *Purcell v. Texas*, etc., R. Co., (Tex. Civ. App. 1897) 43 S. W. Rep. 836.

**468.** 1. See also *Dorr Cattle Co. v. Chicago*, etc., R. Co., (Iowa 1905) 103 N. W. Rep. 1003.

**2. General Rule as to Contributory Negligence.** — *Candee v. New York*, etc., R. Co., 73 Conn. 667; *Missouri*, etc., R. Co. *v. Byrne*, 3 Indian Ter. 740; *Burgher v. Chicago*, etc., R. Co., 105 Iowa 335; *O'Malley v. Great Northern R. Co.*, 86 Minn. 380; *Minter v. Chicago*, etc., R. Co., 82 Mo. App. 130; *Pacific Express Co. v. Emerson*, 101 Mo. App. 62; *Galveston*, etc., R. Co. *v. Jackson*, (Tex. Civ. App. 1896) 37 S. W. Rep. 255; *Missouri*, etc., R. Co. *v. Chittim*, (Tex. Civ. App. 1897) 40 S. W. Rep. 23; *Missouri*, etc., R. Co. *v. Belcher*, (Tex. Civ. App. 1897) 41 S. W. Rep. 706; *International*, etc., R. Co. *v. Pool*, 24 Tex. Civ. App. 575; *Missouri*, etc., R. Co. *v. Chittim*, 24 Tex. Civ. App. 599; *Chicago*, etc., R. Co. *v. Mitchell*, (Tex. Civ. App. 1905) 85 S. W. Rep. 286; *Burns v. Chicago*, etc., R. Co., 104 Wis. 646.

**Failure of Shipper to Fasten Gate of Pen Is Contributory Negligence.** — *St. Louis*, etc., R. Co. *v. Law*, 68 Ark. 218.

**469.** 1. **Carrier Presumptively Liable.** — *Cooper v. Raleigh*, etc., R. Co., 110 Ga. 659; *Louisville*, etc., R. Co. *v. Cody*, 119 Ga. 371; *Burke v. U. S. Express Co.*, 87 Ill. App. 505; *Smith v. Great Northern R. Co.*, 92 Minn. 11; *Keyes-Marshall Bros. Livery Co. v. St. Louis*, etc., R. Co., 105 Mo. App. 556.

**3. Cause of Loss a Question for Jury.** — *Botts v. Wabash R. Co.*, 106 Mo. App. 397.

**4. Burden of Proof Where Loss Is Shown Is on Carrier.** — *Baltimore*, etc., R. Co. *v. Fox*, 113 Ill. App. 180; *Cooper v. Raleigh*, etc., R. Co., 110 Ga. 659; *Smith v. Great Northern R. Co.*, 92 Minn. 11; *Nelson v. Great Northern R. Co.*, 28 Mont. 297. See *Chicago*, etc., R. Co. *v. Woodward*, (Ind. 1904) 72 N. E. Rep. 558, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 469; *Cash v. Wabash R. Co.*, 81 Mo. App. 109.

**471.** 3. **When Fact of Loss Not Sufficient Proof.** — See *Mitchell v. Carolina Cent. R. Co.*, 124 N. Car. 236.

**472.** 3. **General Rule as to Measure for Damages for Injury to Live Stock — United States.** — *Missouri*, etc., R. Co. *v. Truskett*, (C. C. A.) 104 Fed. Rep. 728, affirmed 186 U. S. 480.

*Arkansas.* — *St. Louis*, etc., R. Co. *v. De-shong*, 63 Ark. 443; *Kansas City*, etc., R. Co. *v. Barnett*, 69 Ark. 150.

*Delaware.* — *Klair v. Wilmington Steamboat Co.*, (Del.) 51.

*Illinois.* — *Cleveland*, etc., R. Co. *v. Patton*, 104 Ill. App. 550, affirmed 203 Ill. 376.

*Kentucky.* — *Illinois Cent. R. Co. v. Radford*, (Ky. 1901) 64 S. W. Rep. 511.

*Missouri.* — *Matney v. Chicago*, etc., R. Co., 75 Mo. App. 233; *Glasscock v. Chicago*, etc., R. Co., 86 Mo. App. 114; *Perry v. Chicago*, etc., R. Co., 89 Mo. App. 49; *Sloop v. Wabash R. Co.*, 93 Mo. App. 605.

*Texas.* — *Pacific Express Co. v. Lothrop*, 20 Tex. Civ. App. 339; *Texas*, etc., R. Co. *v. Truesdell*, 21 Tex. Civ. App. 125; *Texas*, etc., R. Co. *v. Reeves*, 15 Tex. Civ. App. 157; *Texas*, etc., R. Co. *v. Boggs*, (Tex. Civ. App. 1897) 40 S. W. Rep. 20; *Texas*, etc., R. Co. *v. Arnold*, 16 Tex. Civ. App. 74; *St. Louis*, etc., R. Co. *v. Vaughan*, (Tex. Civ. App. 1897) 41 S. W. Rep. 415; *Galveston*, etc., R. Co. *v. Thompson*, (Tex. Civ. App. 1898) 44 S. W. Rep. 8; *San Antonio*, etc., R. Co. *v. Wright*, 20 Tex. Civ. App. 136; *Gulf*, etc., R. Co. *v. Staton*, (Tex. Civ. App. 1899) 49 S. W. Rep. 277; *Texas*, etc., R. Co. *v. Scharbauer*, (Tex. Civ. App. 1899) 52 S. W. Rep. 590; *Texas*, etc., R. Co. *v. Fambrough*, (Tex. Civ. App. 1900) 55 S. W. Rep. 188; *Missouri*, etc., R. Co. *v. Chittim*, 24 Tex. Civ. App. 599; *Gulf*, etc., R. Co. *v. Butler*, 31 Tex. Civ. App. 576; *St. Louis Southwestern R. Co. v. Barnes*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1041; *Gulf*, etc., R. Co. *v. Butler*, 26 Tex. Civ. App. 494; *Southern Kansas R. Co. v. Crump*, 32 Tex. Civ. App. 222; *Missouri*, etc., R. Co. *v. Storey*, (Tex. Civ. App. 1903) 75 S. W. Rep. 847; *Moseley v. Houston*, etc., R. Co., (Tex. Civ. App. 1903) 75 S. W. Rep. 912; *Texas*, etc., R. Co. *v. Currie*, (Tex. Civ. App. 1903) 76 S. W. Rep. 810; *St. Louis Southwestern R. Co. v. Smith*, (Tex. Civ. App. 1903) 77 S. W. Rep. 28; *International*, etc., R. Co. *v. Earnest*, (Tex. Civ. App. 1903) 77 S. W. Rep. 29; *Texas*, etc., R. Co. *v. Murtishaw*, (Tex. Civ. App. 1904) 78 S. W. Rep. 953; *Gulf*, etc., R. Co. *v. Ware*, (Tex. Civ. App. 1904) 78 S. W. Rep. 961. See also *Gulf*, etc., R. Co. *v. Houghton*, (Tex. Civ. App. 1902) 68 S. W. Rep. 718; *Galveston*, etc., R. Co. *v. Botts*, (Tex. Civ. App. 1902) 70 S. W. Rep. 113; *International*, etc., R. Co. *v. Young*, (Tex. Civ. App. 1903) 72 S. W. Rep. 68; *Helm v. Missouri Pac. R. Co.*, 98 Mo. App. 419; *International*, etc., R. Co. *v. Startz*, (Tex. Civ. App. 1904) 82 S. W. Rep. 1071; *Texas*, etc., R. Co. *v. Stephens*, (Tex. Civ. App. 1905) 86 S. W. Rep. 933; *Texas*, etc., R. Co. *v. Snyder*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1041.

**Expense of Furnishing Extra Feed for Cattle.** the transportation of which is negligently delayed, must be borne by carrier and not by shipper. *Missouri*, etc., R. Co. *v. Truskett*, 2 Indian Ter. 633.

# CARRIERS OF PASSENGERS.

BY THEODOR MEGAARDEN.

**480. I. DEFINITION AND GENERAL NATURE — A Carrier of Passengers.** — See note 1.

**Distinguished from Carrier of Goods.** — See notes 3, 4.

**480. 1. Definition.** — *Simmons v. Oregon R., etc.*, Co., 41 Oregon 167, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480.

**3. Liability Dependent upon Negligence** — *England*. — *East Indian R. Co. v. Mukerjee*, (1901) A. C. 396, 70 L. J. P. C. 63.

*Canada*. — *Canadian Pac. R. Co. v. Smith*, 31 Can. Sup. Ct. 367; *Colpitts v. Reg.*, 6 Can. Exch. 264; *Cormier v. Dominion Atlantic R. Co.*, 36 N. Bruns. 10.

*United States*. — *Standard Marine Ins. Co. v. Nome Beach Lighterage, etc., Co.*, (C. C. A.) 133 Fed. Rep. 636, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480; *Lauterer v. Manhattan R. Co.*, (C. C. A.) 128 Fed. Rep. 540.

*California*. — *Yeager v. Southern California R. Co.*, (Cal. 1897) 51 Pac. Rep. 190.

*Colorado*. — *Denver, etc., R. Co. v. Pilgrim*, 9 Colo. App. 86.

*District of Columbia*. — *Kight v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494.

*Georgia*. — *Florida Cent., etc., R. Co. v. Rudolph*, 113 Ga. 143.

*Illinois*. — *Garneau v. Illinois Cent. R. Co.*, 109 Ill. App. 169; *Chicago City R. Co. v. Burrell*, 70 Ill. App. 60.

*Kentucky*. — *Cincinnati, etc., R. Co. v. Halcomb*, 78 S. W. Rep. 205, 25 Ky. L. Rep. 1444; *Louisville, etc., R. Co. v. Steenberger*, 69 S. W. Rep. 1094, 24 Ky. L. Rep. 761; *Illinois Cent. R. Co. v. Hanberry*, 66 S. W. Rep. 417, 23 Ky. L. Rep. 1867.

*Louisiana*. — *Jones v. Canal, etc., R. Co.*, 109 La. 213; *Gretzner v. New Orleans, etc., R. Co.*, 105 La. 266; *Weber v. New Orleans, etc., R. Co.*, 104 La. 367; *Cronan v. Crescent City R. Co.*, 49 La. Ann. 65.

*Maryland*. — *State v. United R., etc., Co.*, 98 Md. 397.

*Massachusetts*. — *Mullin v. Boston El. R. Co.*, 185 Mass. 522; *O'Neil v. Lynn, etc., R. Co.*, 180 Mass. 576; *Williams v. Citizens Electric St. R. Co.*, 184 Mass. 437; *Wadsworth v. Boston El. R. Co.*, 182 Mass. 572; *Stoddard v. New York, etc., R. Co.*, 181 Mass. 422; *Goddard v. Boston, etc., R. Co.*, 179 Mass. 52; *Harriman v. Reading, etc., St. R. Co.*, 173 Mass. 28; *Leary v. Fitchburg R. Co.*, 173 Mass. 373.

*Michigan*. — *Frohrie v. Lake Shore, etc., R. Co.*, 131 Mich. 459, 9 Detroit Leg. N. 415; *Whipple v. Michigan Cent. R. Co.*, 130 Mich. 460, 9 Detroit Leg. N. 110; *Vandercook v. Detroit, etc., R. Co.*, 125 Mich. 459; *Moore v. Saginaw, etc., R. Co.*, 115 Mich. 103.

*Minnesota*. — *Winchell v. St. Paul City R. Co.*, 86 Minn. 445.

*Missouri*. — *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597, citing 5 AM. AND ENG. ENCYC. OF

LAW (2d ed.) 480; *Holland v. St. Louis, etc., R. Co.*, 105 Mo. App. 117; *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573; *Lynch v. St. Louis Transit Co.*, 102 Mo. App. 630; *Maxey v. Metropolitan St. R. Co.*, 95 Mo. App. 303; *Parks v. St. Louis, etc., R. Co.*, 178 Mo. 108, 101 Am. St. Rep. 425; *Feary v. Metropolitan St. R. Co.*, 162 Mo. 75.

*New Jersey*. — *Zeliff v. North Jersey St. R. Co.*, 69 N. J. L. 541; *Foley v. Brunswick Traction Co.*, 66 N. J. L. 637; *Hansen v. North Jersey St. R. Co.*, (N. J. 1899) 43 Atl. Rep. 663.

*New York*. — *Whiting v. New York Cent., etc., R. Co.*, 97 N. Y. App. Div. 11; *Moskowitz v. Brooklyn Heights R. Co.*, 89 N. Y. App. Div. 425; *Cheyne v. Van Brunt St., etc., R. Co.*, 97 N. Y. App. Div. 55 (holding that the defendant street railway was not liable for injuries received by a passenger in consequence of being struck in the eye by a transfer punch which fell from the pocket of the conductor as he rushed through the car); *Stutsky v. Brooklyn Heights R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 358; *Wagner v. Brooklyn Heights R. Co.*, 95 N. Y. App. Div. 219; *Shadletsky v. New York City R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1014; *Roedecker v. Metropolitan St. R. Co.*, 87 N. Y. App. Div. 227; *Fahner v. Brooklyn Heights R. Co.*, 86 N. Y. App. Div. 488; *Hubener v. Heide*, 73 N. Y. App. Div. 200; *Cahn v. Manhattan R. Co.*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 824; *Kantrowitz v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 65; *McDonnell v. New York Cent., etc., R. Co.*, 35 N. Y. App. Div. 147, *appeal dismissed* 159 N. Y. 524; *Armstrong v. Metropolitan St. R. Co.*, 23 N. Y. App. Div. 137; *Schulz v. Second Ave. R. Co.*, 12 N. Y. App. Div. 445.

*North Carolina*. — *Fritz v. Southern R. Co.*, 132 N. Car. 829; *Skinner v. Wilmington, etc., R. Co.*, 128 N. Car. 435.

*Ohio*. — *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45; *Mt. Adams, etc., Inclined Plane R. Co. v. Isaacs*, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 177.

*Pennsylvania*. — *Scanlon v. Philadelphia Rapid Transit Co.*, 208 Pa. St. 195; *Jennings v. Union Traction Co.*, 206 Pa. St. 31; *Howell v. Union Traction Co.*, 202 Pa. St. 338; *Fisher v. Paxson*, 182 Pa. St. 457; *Ault v. Cowan*, 20 Pa. Super. Ct. 616; *Shade v. Union Traction Co.*, 7 Pa. Dist. 34.

*Rhode Island*. — *Murray v. Pawtuxet Valley St. R. Co.*, 25 R. I. 209.

*South Carolina*. — *Shealey v. South Carolina, etc., R. Co.*, 67 S. Car. 61; *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1; *Jarrell v. Charleston, etc., R. Co.*, 58 S. Car. 491.

**481. A Common Carrier of Passengers.** — See note 1.

Particular Classes of Common Carriers. — See notes 6, 7, 10, 11.

**482. Elevator.** — See note 1.**II. POWER TO MAKE RULES AND REGULATIONS.** — See note 5.

Rules Must Be Reasonable. — See note 6.

*Tennessee.* — *Payne v. Nashville, etc., R. Co.*, 106 Tenn. 167.*Texas.* — *St. Louis Southwestern R. Co. v. Byers*, (Tex. Civ. App. 1902) 70 S. W. Rep. 558; *Texas Midland R. Co. v. Johnson*, (Tex. Civ. App. 1901) 65 S. W. Rep. 388; *High v. International, etc., R. Co.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 526; *Texas, etc., R. Co. v. Atchison*, (Tex. Civ. App. 1899) 54 S. W. Rep. 1075; *Houston, etc., R. Co. v. Stewart*, 21 Tex. Civ. App. 33; *Dumas v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1897) 43 S. W. Rep. 908; *Texas Midland R. Co. v. Frey*, 25 Tex. Civ. App. 386; *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203.**Inevitable Accident.** — It has been held that a railroad carrier of passengers is not liable to a passenger for injuries received through the derailment of a train, which was caused by a snowslide at a point where a slide had never been known to occur, and which could not reasonably have been anticipated by the carrier. *Denver, etc., R. Co. v. Andrews*, 11 Colo. App. 204.**Liability under Nebraska Statutes.** — By statute in Nebraska a carrier is liable for injuries sustained by a passenger, unless they result from the passenger's criminal negligence or from a violation of a known regulation of the carrier. *Chicago, etc., R. Co. v. Wolfe*, 61 Neb. 502; *Chicago, etc., R. Co. v. Hambel*, (Neb. 1902) 89 N. W. Rep. 643; *Chicago, etc., R. Co. v. Zernecke*, 59 Neb. 689; *Chicago, etc., R. Co. v. Sattler*, 64 Neb. 636, 97 Am. St. Rep. 666.The Nebraska statute fixing the liability of railroad companies has been held inapplicable to drovers riding on freight trains in charge of stock. *Omaha, etc., R. Co. v. Crow*, 54 Neb. 747, 69 Am. St. Rep. 741. And it has been held to be inapplicable to street railway companies. *Lincoln St. R. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736.**480. 4. Distinction Between Carriers of Passengers and of Goods.** — *Simmons v. Seaboard Air-Line R. Co.*, 120 Ga. 225.**481. 1. Common Carrier.** — *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665.**6. Belt Line.** — *Fleming v. St. Louis, etc., R. Co.*, 89 Mo. App. 129.**7. Street Railway Companies** are common carriers of passengers for hire. *Dean v. Chicago General R. Co.*, 64 Ill. App. 165.**10. Omnibus Line.** — See *Atlantic City v. Dehn*, 69 N. J. L. 233.**11. Hackmen.** — *Stiner v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 285.**482. 1. Elevator** — *Illinois.* — *Beidler v. Branshaw*, 200 Ill. 425; *Chicago Exch. Bldg. Co. v. Nelson*, 197 Ill. 334; *Springer v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464, *affirming* 88 Ill. App. 529; *Hartford Deposit Co. v. Sol-litt*, 172 Ill. 222, 64 Am. St. Rep. 35; *Winheim v. Field*, 107 Ill. App. 145; *Springer v. Schultz*, 105 Ill. App. 544, *judgment affirmed* 205 Ill.144; *Western Union Tel. Co. v. Woods*, 88 Ill. App. 375; *Field v. French*, 80 Ill. App. 78.*Kentucky.* — *H. B. Phillips Co. v. Pruitt*, (Ky. 1904) 82 S. W. Rep. 628.*Michigan.* — *Burgess v. Stowe*, 134 Mich. 204, 10 Detroit Leg. N. 434.*Missouri.* — *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597; *Luckel v. Century Bldg. Co.*, 177 Mo. 608; *Becker v. Lincoln Real Estate, etc., Co.*, 174 Mo. 246; *Lee v. Knapp*, 155 Mo. 610. But see *Hubener v. Heide*, 62 N. Y. App. Div. 368.**5. Southern R. Co. v. Watson**, 110 Ga. 681; *Louisville, etc., R. Co. v. Miles*, 100 Ky. 84; *O'Gorman v. New York, etc., R. Co.*, 96 N. Y. App. Div. 594; *Wilt v. Wabash R. Co.*, 11 Ohio Cir. Dec. 589, 21 Ohio Cir. Ct. 579; *Robb v. Pittsburg, etc., R. Co.*, 14 Pa. Super. Ct. 282; *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460; *Nashville St. R. Co. v. Griffin*, 104 Tenn. 81.**Rules for Regulation of Business** — *Rules for the Conduct of Employees Riding on the Carriers' Vehicles When Not on Duty.* — See *Rowe v. Brooklyn Heights R. Co.*, 71 N. Y. App. Div. 474, 80 N. Y. App. Div. 477.*Rules Regulating the Carrying of Passengers on Freight Trains.* — *Ellis v. Houston East, etc., R. Co.*, 30 Tex. Civ. App. 172.**Rules as to Mode of Performance of Duty as Carrier** — *Rule Requiring White and Colored Passengers to Ride in Separate Cars.* — *Louisville, etc., R. Co. v. Catron*, 102 Ky. 323.*Rule Against Carrying Passengers Unprovided with Tickets on Freight Trains.* — *McCook v. Northup*, 65 Ark. 225.*Carriers May Make Reasonable Rules Governing the Admission of Passengers on Their Trains.* — *Lauterer v. Manhattan R. Co.*, (C. C. A.) 128 Fed. Rep. 540.**Requiring Purchase of Ticket Before Boarding Train.** — *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242.**Rule Requiring Exhibition of Ticket Before Entering Train.** — *Illinois Cent. R. Co. v. Louthan*, 80 Ill. App. 579.**Rule Against Soliciting for Hotels.** — There is no doubt that a railway company has the right to prohibit soliciting for hotels on its cars and station platforms. *St. Louis, etc., R. Co. v. Osborn*, 67 Ark. 399. See also the title STATIONS (RAILROAD).**Rule Providing that Particular Trains Shall Stop Only at Certain Stations.** — In the absence of statutory provision to the contrary, a railroad company may make rules providing that particular trains shall stop only at certain stations, when it furnishes reasonable means of reaching all stations on its road by some of its trains. *Evansville, etc., R. Co. v. Wilson*, 20 Ind. App. 5.**6. Jackson Electric R., etc., Co. v. Lowry**, 79 Miss. 431; *Jenkins v. Brooklyn Heights R. Co.*, 29 N. Y. App. Div. 8; *Louisville, etc., R. Co. v. Turner*, 100 Tenn. 218, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 482.

**483.** Reasonableness a Mixed Question of Law and Fact. — See note 2.

**484.** Notice of Rules. — See note 1.

**485.** Passenger's Duty to Obey. — See note 1.

**486.** III. WHAT PERSONS SHOULD BE CONSIDERED PASSENGERS — 1. In General — *a.* DEFINITION. — See note 1.

*b.* DISTINGUISHED FROM OTHER PERSONS. — See note 2.

**487.** See notes 1, 2.

**488.** *c.* PRESUMPTION THAT ONE IS A PASSENGER. — See note 1.

2. When the Relation Begins — *a.* IN GENERAL. — See note 2.

**483.** 2. Reasonableness Held Question of Law — *Arkansas.* — *McCook v. Northup*, 65 Ark. 225.

*Georgia.* — *Central of Georgia R. Co. v. Motes*, 177 Ga. 923, 97 Am. St. Rep. 223; *Southern R. Co. v. Watson*, 110 Ga. 681.

*Iowa.* — *Gregory v. Chicago, etc., R. Co.*, 100 Iowa 345.

*New Jersey.* — *Daniel v. North Jersey St. R. Co.*, 64 N. J. L. 603.

*New York.* — *O'Gorman v. New York, etc., R. Co.*, 96 N. Y. App. Div. 594; *Rowe v. Brooklyn Heights R. Co.*, 71 N. Y. App. Div. 474; *Dowd v. Albany R. Co.*, 47 N. Y. App. Div. 202; *Montgomery v. Buffalo R. Co.*, 24 N. Y. App. Div. 454, *affirmed* 165 N. Y. 139. See also *Ray v. United Traction Co.*, 96 N. Y. App. Div. 48.

*North Carolina.* — See *Phillips v. Southern R. Co.*, 124 N. Car. 123.

*Ohio.* — *Cincinnati, etc., Electric St. R. Co. v. Lohe*, 68 Ohio St. 101.

*South Carolina.* — *Weber v. Southern R. Co.*, 65 S. Car. 356.

*Tennessee.* — *Nashville St. R. Co. v. Griffin*, 104 Tenn. 81; *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639; *Louisville, etc., R. Co. v. Turner*, 100 Tenn. 218.

**484.** 1. What Constitutes Notice. — Posting in the waiting rooms, ticket office, and on the cars a notice of a rule limiting the time in which certain tickets may be used has been held insufficient to charge purchasers with knowledge of such rule. *Louisville, etc., R. Co. v. Turner*, 100 Tenn. 224.

**485.** 1. Enforcement of Regulations. — *Nashville St. R. Co. v. Griffin*, 104 Tenn. 81.

**486.** 1. Travelers' Ins. Co. *v. Austin*, 116 Ga. 266, 94 Am. St. Rep. 125, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486; *Stalcup v. Louisville, etc., R. Co.*, 16 Ind. App. 584; *McNeill v. Durham, etc., R. Co.*, 135 N. Car. 682; *Simmons v. Oregon R., etc., Co.*, 41 Oregon 151; *Rowdin v. Pennsylvania R. Co.*, 208 Pa. St. 623.

2. Relation Dependent on Contract. — *Southern R. Co. v. Bunnell*, 138 Ala. 254, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486.

**487.** 1. Distinguished from Licensees. — *Nightingale v. Union Colliery Co.*, 9 British Columbia 467, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487, *affirmed* 35 Can. Sup. Ct. 65.

2. Distinguished from Trespassers. — *Handley v. Missouri Pac. R. Co.*, 61 Kan. 237.

**488.** 1. Presumption, When Arises. — *Iseman v. South Carolina, etc., R. Co.*, 52 S. Car. 573, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488; *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460.

Presumption, When Does Not Arise. — Where

there is evidence that a person was riding on a train as a trespasser, the presumption that he was a passenger can have no application. *Southerland v. Texas, etc., R. Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 193.

And no such presumption arises when the entry is upon a baggage or mail car, or upon any other portion of the train not assigned to passengers. *McGraw v. Southern R. Co.*, 135 N. Car. 264.

The presumption is that one riding on a hand car is not legally a passenger, and it rests upon him, under all the circumstances of the case, to rebut the presumption. *Willis v. Atlantic, etc., R. Co.*, 120 N. Car. 508.

A person riding on a freight train, on which passengers are not permitted to be carried, is presumed not to be a passenger. *Dysart v. Missouri, etc., R. Co.*, (C. C. A.) 122 Fed. Rep. 228; *Purple v. Union Pac. R. Co.*, (C. C. A.) 114 Fed. Rep. 123.

Railroad companies have the right to run trains which do not carry passengers, or to run trains for a particular person, or for a particular class of persons, and if one boards such a train with notice of its character he is not presumptively a passenger. Whether he should be treated as a passenger or not depends upon the circumstances of each particular case. *Fitzgibbon v. Chicago, etc., R. Co.*, 108 Iowa 614.

In the absence of an established custom, or some sort of notice that amounts to an invitation, when a person gets aboard a train composed of cars obviously designed for and loaded with stone and other goods, in the absence of the conductor and other employees of the company, he will be presumed to be a trespasser, and the burden rests upon him to prove that he rightfully took passage. *Menaugh v. Bedford Belt. R. Co.*, 157 Ind. 20.

Existence of Relation a Question of Fact for the Jury. — *Alabama G. S. R. Co. v. Coggins*, (C. C. A.) 88 Fed. Rep. 455; *Chicago Terminal Transfer R. Co. v. Gruss*, 200 Ill. 195; *Gradert v. Chicago, etc., R. Co.*, 109 Iowa 547; *Fremont, etc., R. Co. v. Root*, 49 Neb. 900; *Holcombe v. Southern R. Co.*, 66 S. Car. 6.

2. General Rule — *United States.* — *Farley v. Cincinnati, etc., R. Co.*, (C. C. A.) 108 Fed. Rep. 17, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488.

*Illinois.* — *Chicago, etc., R. Co. v. Jennings*, 190 Ill. 484, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488-490; *Illinois Cent. R. Co. v. O'Keefe*, 168 Ill. 115, 61 Am. St. Rep. 68, *reversing* 63 Ill. App. 102; *Kane v. Cicero, etc., Electric R. Co.*, 100 Ill. App. 181; *Chicago, etc., R. Co. v. Weeks*, 99 Ill. App. 518, *judgment affirmed* 198 Ill. 551; *Pennington v. Illinois Cent. R. Co.*, 69 Ill. App. 628.

**489.** Implied from Circumstances. — See note 1.

**490.** See note 1.

**491.** *b.* PURCHASE OF TICKET. — See note 1.

*c.* ENTRY INTO CARRIER'S VEHICLE. — See notes 2, 5, 6.

**492.** See note 1.

*Indiana.* — Citizens St. R. Co. *v.* Jolly, 161 Ind. 87, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488.

*Missouri.* — Albin *v.* Chicago, etc., R. Co., 103 Mo. App. 308; Choate *v.* Missouri Pac. R. Co., 67 Mo. App. 105.

*New York.* — Wells *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 367, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488.

*Oregon.* — Radley *v.* Columbia Southern R. Co., 44 Oregon 337, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488.

*South Carolina.* — Creech *v.* Charleston, etc., R. Co., 66 S. Car. 537, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488.

*Texas.* — St. Louis Southwestern R. Co. *v.* Franklin, (Tex. Civ. App. 1898) 44 S. W. Rep. 701.

*Washington.* — Foster *v.* Seattle Electric Co., 35 Wash. 177.

But compare Atlantic City *v.* Brown, (N. J. 1904) 58 Atl. Rep. 110.

**489.** 1. Birmingham R., etc., Co. *v.* Mason, 137 Ala. 342; Chicago, etc., R. Co. *v.* Stewart, 77 Ill. App. 66; Raming *v.* Metropolitan St. R. Co., 157 Mo. 477.

Going upon Carrier's Premises may have the effect of constituting one a passenger. Lake St. El. R. Co. *v.* Burgess, 200 Ill. 628; Chicago, etc., R. Co. *v.* Huston, 95 Ill. App. 350, judgment affirmed 196 Ill. 480; Exton *v.* Central R. Co., 62 N. J. L. 7, affirmed without opinion 63 N. J. L. 356; Wells *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 367, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489; Seawell *v.* Carolina Cent. R. Co., 132 N. Car. 856; Barker *v.* Ohio River R. Co., 51 W. Va. 430, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489.

**490.** 1. Acceptance for Carriage Necessary — *Illinois.* — Chicago, etc., R. Co. *v.* Jennings, 190 Ill. 484, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488-490; Illinois Cent. R. Co. *v.* O'Keefe, 168 Ill. 115, 61 Am. St. Rep. 68, reversing 63 Ill. App. 102; O'Donnell *v.* Chicago, etc., R. Co., 106 Ill. App. 287; Kane *v.* Cicero, etc., Electric R. Co., 100 Ill. App. 181; Chicago, etc., R. Co. *v.* Weeks, 99 Ill. App. 518, judgment affirmed 198 Ill. 551; Chicago, etc., R. Co. *v.* Flaharty, 96 Ill. App. 563.

*Indiana.* — Citizens St. R. Co. *v.* Jolly, 161 Ind. 87, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488.

*Iowa.* — Fitzgibbon *v.* Chicago, etc., R. Co., 119 Iowa 261, 108 Iowa 614.

*Kansas.* — Mendenhall *v.* Atchison, etc., R. Co., 66 Kan. 438, 97 Am. St. Rep. 380.

*Missouri.* — O'Mara *v.* St. Louis Transit Co., 102 Mo. App. 202.

*New Jersey.* — Schmidt *v.* North Jersey St. R. Co., 66 N. J. L. 424.

*Oregon.* — Radley *v.* Columbia Southern R. Co., 44 Oregon 332.

*South Carolina.* — Creech *v.* Charleston, etc.,

R. Co., 66 S. Car. 537, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488.

**Stopping upon Intending Passenger's Signal.** — See the cases cited *infra*, this title, **492.** 1. *In the Act of Entering the Vehicle.*

**491.** 1. Actual Purchase of Ticket Not Always Necessary. — St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47; Western, etc., R. Co. *v.* Voils, 98 Ga. 446; Pittsburgh, etc., R. Co. *v.* Street, 26 Ind. App. 224; Albin *v.* Chicago, etc., R. Co., 103 Mo. App. 308; St. Louis Southwestern R. Co. *v.* Franklin, (Tex. Civ. App. 1898) 44 S. W. Rep. 701. See Phillips *v.* Southern R. Co., 124 N. Car. 123. But see Reiten *v.* Lake St. El. R. Co., 85 Ill. App. 657. But compare Missouri, etc., R. Co. *v.* Mills, 27 Tex. Civ. App. 245.

2. Young *v.* New York, etc., R. Co., 171 Mass. 333.

3. **Being Within the Waiting Room.** — Wells *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 367, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 491.

6. Illinois Cent. R. Co. *v.* Treat, 179 Ill. 576, affirming 75 Ill. App. 327.

**492.** 1. Birmingham R., etc., Co. *v.* Bynum, 139 Ala. 395, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 492; Kane *v.* Cicero, etc., Electric R. Co., 100 Ill. App. 181; Inness *v.* Boston, etc., R. Co., 168 Mass. 433; Rawlings *v.* Wabash R. Co., 97 Mo. App. 515, wherein it appeared that the plaintiff did not have a ticket.

**Delaying on Platform of Car Before Entering.** — One who goes upon the platform of one of the cars of a passenger train with a *bona fide* intention of paying his fare and becoming a passenger, does not forfeit his right to be protected as such because he tarries for a short time upon the platform where passengers are forbidden to ride before entering the car. St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47.

**In the Act of Entering the Vehicle.** — When a street car has stopped in response to a signal of an intending passenger, he becomes a passenger the moment he places his foot on the car. West Chicago St. R. Co. *v.* James, 69 Ill. App. 609; Duchemin *v.* Boston El. R. Co., 186 Mass. 353, 104 Am. St. Rep. 580; Gordon *v.* West End St. R. Co., 175 Mass. 181; Miller *v.* St. Paul City R. Co., 66 Minn. 192; Maguire *v.* St. Louis Transit Co., 103 Mo. App. 459; Posch *v.* Southern Electric R. Co., 76 Mo. App. 601.

But physical contact with the car is not always necessary to constitute one a passenger on a street car. Haselton *v.* Portsmouth, etc., R. Co., 71 N. H. 589.

When a person has signaled a car and the car has stopped for him he has virtually become a passenger. Carney *v.* Cincinnati St. R. Co., 8 Ohio Dec. 587.

If a street car stops at a usual place for receiving passengers, and a person in the exercise of due care gets upon the steps or platform of the car for the purpose of taking passage while it is so waiting, he is to be regarded as a pas-

**493.** See note 1.

**494.** See note 1.

senger. *Gaffney v. St. Paul City R. Co.*, 81 Minn. 459; *Norfolk, etc., R. Co. v. Morris*, 101 Va. 422.

When a person goes to a flag station, and by giving proper signals signifies his intention to become a passenger, and the train is stopped for the purpose of taking him on, he is, when attempting to enter the train, a passenger and entitled to all the rights of a passenger, although he has not purchased a ticket. *Western, etc., R. Co. v. Voils*, 98 Ga. 446.

**Street Car Stopping to Set Down Passenger.** — Although a street car is not stopped at the signal of a bystander, but for the purpose of setting down passengers, the bystander may ordinarily make himself a passenger by evincing a desire to get on the car. *Maxey v. Metropolitan St. R. Co.*, 95 Mo. App. 303.

**Street Car Stopping to Throw Switch.** — A person who, without the knowledge of the carrier's servants, attempts to get on a street car which has stopped to throw a switch, is not a passenger unless it is customary to take on passengers where the car stops. *McCarty v. St. Louis, etc., R. Co.*, 105 Mo. App. 596.

**Decreasing Speed of Street Car in obedience to a signal from a bystander amounts to an invitation to him to get aboard, and when he starts to do so he becomes a passenger.** *Citizens St. R. Co. v. Merl*, 26 Ind. App. 284; *Eikenberry v. St. Louis Transit Co.*, 103 Mo. App. 442; *O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202; *Schmidt v. North Jersey St. R. Co.*, (N. J. 1904) 58 Atl. Rep. 72.

**Time and Place of Entry.** — One who, without the knowledge of the carrier, boards a car, knowing that it is not ready for the receiving of passengers and that it is not expected or intended that it should be entered at that time or place, is not a passenger. *Farley v. Cincinnati, etc., R. Co.*, (C. C. A.) 108 Fed. Rep. 14.

But a drover in charge of stock has been held to be a passenger while passing along a track to reach the caboose in which he is to ride. *Lake Shore, etc., R. Co. v. Hotchkiss*, 24 Ohio Cir. Ct. 431.

**Approaching Train by Unusual Way.** — It has been said that a person approaching a train by any but the usual way is not a passenger. *Chicago, etc., R. Co. v. Weeks*, 99 Ill. App. 518, judgment affirmed 198 Ill. 551.

**Boarding Car Standing at a Distance from the Station Platform.** — See *Jones v. New York Cent., etc., R. Co.*, 156 N. Y. 187, reversing 46 N. Y. App. Div. 470.

**Boarding Part of Train Not Provided for Carrying Passengers.** — As a general rule, in order to constitute one a passenger he must take passage on some part of the train which is provided for carrying passengers. *Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, reversing (Tex. Civ. App. 1897) 40 S. W. Rep. 350.

When a person who held a free pass over the defendant's road boarded a train as it was moving out from the station by climbing on the platform next to the tender in front of the baggage car, the door of which was locked, it was held that he was not a passenger, even though the engineer and conductor knew that

some one had boarded the moving train between the tender and baggage car, but did not know who he was or for what purpose he was there. *Illinois Cent. R. Co. v. O'Keefe*, 168 Ill. 115, 61 Am. St. Rep. 68, reversing 63 Ill. App. 102.

**Getting on Platform of "Blind" Baggage Car.** — It has been held that a person who gets on the platform of a "blind" baggage car, and who, when found there by the conductor, though having a ticket, does not inform the conductor of the fact, cannot be deemed a passenger. *McGraw v. Southern R. Co.*, 135 N. Car. 264.

**Taking Position on Steps of Street Car.** — A boy eight years old got on a street car and sat down on the rear platform with his feet on the step of the car. He testified that he had intended to pay his fare, and there was evidence that the motorman knew of his presence on the car. It was held that the question whether he was a passenger was for the jury. *Jackson v. St. Paul City R. Co.*, 74 Minn. 48.

**Getting on Footboard Without Entering Street Car.** — *Dallas Rapid Transit R. Co. v. Payne*, (Tex. 1904) 82 S. W. Rep. 649, reversing (Tex. Civ. App. 1904) 78 S. W. Rep. 1085.

**Boarding Street Car by Front Platform Contrary to Regulations.** — *Hart v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 521.

**Boarding Street Car by Barred Front Platform** does not constitute one a passenger. *Barlow v. Jersey City, etc., R. Co.*, 67 N. J. L. 364.

**Attempting to Board Street Car After Signal to Start.** — It has been held that a person who attempts to get on a street car after the signal to start has been given is not a passenger. *Foster v. Seattle Electric Co.*, 35 Wash. 177.

**493. 1. Good Faith on Part of Person Entering.** — *Uhell v. Citizens St. R. Co.*, 152 Ind. 507, 71 Am. St. Rep. 336; *Odell v. New York Cent., etc., R. Co.*, 18 N. Y. App. Div. 12, affirmed without opinion 162 N. Y. 625; *Dallas Rapid Transit R. Co. v. Payne*, (Tex. 1904) 82 S. W. Rep. 649, reversing (Tex. Civ. App. 1904) 78 S. W. Rep. 1085. See *Clark v. Great Northern R. Co.*, 31 Wash. 658.

**Boarding Train Which Does Not Stop at Passenger's Station.** — *Baldwin v. Grand Trunk R. Co.*, 128 Mich. 417, 8 Detroit Leg. N. 706, wherein it was held that a person who boards a train which sometimes stops at the station to which he wishes to go becomes a passenger until he is notified that the train does not stop there.

**494. 1. Person on Wrong Train.** — *Baltimore, etc., R. Co. v. Norris*, 17 Ind. App. 189, 60 Am. St. Rep. 166; *St. Louis Southwestern R. Co. v. Pruitt*, (Tex. Civ. App. 1904) 79 S. W. Rep. 598, 97 Tex. 487.

**Person on Right Train but in Wrong Car.** — *Gulf, etc., R. Co. v. Shelton*, 30 Tex. Civ. App. 72, rehearing denied (Tex. Civ. App. 1902) 70 S. W. Rep. 359.

**Taking Passage on an Engine.** — Being on an engine by the invitation of the engineer, and with the knowledge and silent acquiescence of the conductor, does not necessarily constitute one a passenger. *Radley v. Columbia Southern R. Co.*, 44 Oregon 332.



**494.** *d.* PAYMENT OF FARE. — See note 2.

**495.** See notes 1, 2.

**496.** See note 1.

Fraud — Refusal to Pay. — See notes 2, 3.

**497.** 3. When the Relation Terminates — *a.* IN GENERAL. — See notes 1, 4, 5.

**498.** *b.* IN THE ACT OF LEAVING THE VEHICLE. — See note 6.

**499.** See note 1.

*c.* AFTER LEAVING THE VEHICLE — (1) *At Point of Destination.* — See notes 2, 3.

**494.** 2. Payment of Fare Not Necessary — *United States.* — Chicago, etc., R. Co. *v.* Lee, (C. C. A.) 92 Fed. Rep. 318.

*Alabama.* — Birmingham R., etc., Co. *v.* Bynum, 139 Ala. 395.

*Illinois.* — West Chicago St. R. Co. *v.* Manning, 170 Ill. 417; Cleveland, etc., R. Co. *v.* Scott, 111 Ill. App. 234; Kane *v.* Cicero, etc., Electric R. Co., 100 Ill. App. 181. But see Reiten *v.* Lake St. El. R. Co., 85 Ill. App. 657.

*Kentucky.* — Louisville, etc., R. Co. *v.* Scott, 108 Ky. 392.

*Missouri.* — Albin *v.* Chicago, etc., R. Co., 103 Mo. App. 308.

*North Carolina.* — McNeill *v.* Durham, etc., R. Co., 135 N. Car. 682.

*Oregon.* — Simmons *v.* Oregon R., etc., Co., 41 Oregon 151.

*Tennessee.* — Chattanooga Rapid Transit Co. *v.* Venable, 105 Tenn. 460.

*Texas.* — Dallas Rapid Transit R. Co. *v.* Payne, (Tex. 1904) 82 S. W. Rep. 649, reversing (Tex. Civ. App. 1904) 78 S. W. Rep. 1085; Denison, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1904) 81 S. W. Rep. 780.

**495.** 1. Reem *v.* St. Paul City R. Co., 82 Minn. 98.

2. Payment to One Not Authorized to Receive. — Mendenhall *v.* Atchison, etc., R. Co., 66 Kan. 438, 97 Am. St. Rep. 380.

**496.** 1. Fare Need Not Be Paid by Person Carried. — Rowdin *v.* Pennsylvania R. Co., 208 Pa. St. 623; Mims *v.* Seaboard Air Line R. Co., 69 S. Car. 338.

Employee of Lumber Company Carried under Agreement Between Employer and Carrier. — Trinity Valley R. Co. *v.* Stewart, (Tex. Civ. App. 1901) 62 S. W. Rep. 1085.

Offer by Passenger's Companion to Pay Fare. — Baltimore, etc., R. Co. *v.* Norris, 17 Ind. App. 189, 60 Am. St. Rep. 166.

2. Fraudulent Evasion of Payment of Fare. — Pledger *v.* Chicago, etc., R. Co., (Neb. 1903) 95 N. W. Rep. 1057.

3. St. Louis Southwestern R. Co. *v.* Harper, 69 Ark. 188, 86 Am. St. Rep. 190, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 496.

**497.** 1. Passenger Carried By Destination. — A passenger on a street car who is carried by the place for which passage was taken does not cease to be a passenger. Toledo Consol. St. R. Co. *v.* Fuller, 9 Ohio Cir. Dec. 123.

It seems that when a passenger on a street car is carried by his destination, and is permitted to remain on the car on the return trip until he reaches his destination on the return trip, he must be regarded as a passenger although he pays only one fare. Rosenberg *v.*

Third Ave. R. Co., 47 N. Y. App. Div. 323, affirmed without opinion 168 N. Y. 681.

Relation Continues During Period of Transfer from One Vehicle to Another. — Carroll *v.* Charleston, etc., R. Co., 65 S. Car. 378.

4. Boarding Engine Because of Unfounded Fear of Being Left Behind. — Mobile, etc., R. Co. *v.* Bogle, 101 Tenn. 40.

5. Refusal to Pay Fare. — Hudson *v.* Lynn, etc., R. Co., 185 Mass. 510; Randall *v.* Chicago, etc., R. Co., 102 Mo. App. 342.

**498.** 6. Relation Continues While Alighting from Vehicle. — Sanders *v.* Southern R. Co., 107 Ga. 132; Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169; Jacobs *v.* West End St. R. Co., 178 Mass. 116; Fillingham *v.* St. Louis Transit Co., 102 Mo. App. 573.

**499.** 1. Alighting from Moving Train. — The fact that a passenger attempts to alight at his station when the train is in motion does not terminate the relation of carrier and passenger. Pittsburgh, etc., R. Co. *v.* Gray, 28 Ind. App. 588.

Neglect of Passenger to Get Off at Destination. — If a passenger negligently remains on the train after his station has been reached the relation of carrier and passenger is at an end. Houston, etc., R. Co. *v.* Cohn, 22 Tex. Civ. App. 11; St. Louis Southwestern R. Co. *v.* Martin, 26 Tex. Civ. App. 231; St. Louis Southwestern R. Co. *v.* Ricketts, 22 Tex. Civ. App. 515.

2. After Leaving Vehicle at Destination. — Chicago, etc., R. Co. *v.* Wood, (C. C. A.) 104 Fed. Rep. 663; Chicago, etc., R. Co. *v.* Tracey, 109 Ill. App. 563; Chicago Terminal Transfer R. Co. *v.* Schmelling, 99 Ill. App. 577, affirmed 197 Ill. 619; Pittsburg, etc., R. Co. *v.* Martin, 3 Ohio Dec. 493; Houston, etc., R. Co. *v.* Batchler, 32 Tex. Civ. App. 14; Texas, etc., R. Co. *v.* Dick, 26 Tex. Civ. App. 256.

After Leaving the Premises, the relation of carrier and passenger is at an end. Lake St. El. R. Co. *v.* Gormley, 108 Ill. App. 59.

3. Leaving by Way Other than That Provided has the effect of terminating the relation of carrier and passenger. Chesapeake, etc., R. Co. *v.* King, (C. C. A.) 99 Fed. Rep. 251; Chicago, etc., R. Co. *v.* Harrison, 100 Ill. App. 211.

One who had left the train and station platform and was *en route* to her home on the railroad track had ceased to be a passenger. St. Louis, etc., R. Co. *v.* Beecher, 65 Ark. 64.

When a passenger, after safely alighting on a station platform, left the platform in a reverse direction from that in which passengers usually depart therefrom, and not intended for them to take, and undertook to cross the train to the opposite side from the station for the purpose

**499. Street Cars.** — See note 4.

Leaving and Returning to Vehicle. — See note 5.

**500. (2) At Point Other than Destination** — (b) **At Intermediate Station** — *aa. GENERALLY* — Rule Stated. — See note 3.**502. When There Is No Intention to Return** — **Stop-over.** — See note 1.*bb. TRANSFER STATIONS.* — See note 2.**507. 4. Particular Applications** — *b. PERSONS RIDING ON CERTAIN TICKETS* — (2) *Nontransferable Ticket.* — See note 1.*c. PERSONS RIDING GRATUITOUSLY* — (1) *In General.* — See note 4.**508. (2) Riding on Passes** — (a) **Generally.** — See notes 1, 2.

of seeing the engineer on some private business of his own, he ceased to be a passenger. *Hendrick v. Chicago, etc., R. Co.*, 136 Mo. 548.

**499. 4. Alighting from Street Car Terminates Relation.** — *Harten v. Brightwood R. Co.*, 18 App. Cas. (D. C.) 260; *West Chicago St. R. Co. v. Walsh*, 78 Ill. App. 595; *Hanson v. Urbana, etc., El. St. R. Co.*, 75 Ill. App. 474; *Indianapolis St. R. Co. v. Tenner*, 32 Ind. App. 311; *Louisville R. Co. v. Meglemery*, 78 S. W. Rep. 217, 25 Ky. L. Rep. 1587, *rehearing denied* (Ky. 1904) 79 S. W. Rep. 287; *South Covington, etc., R. Co. v. Beatty*, (Ky. 1899) 50 S. W. Rep. 239; *Smith v. City, etc., R. Co.*, 29 Oregon 539; *Chattanooga Electric St. R. Co. v. Boddy*, 105 Tenn. 666. See *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, *reversing* 67 N. J. L. 76. But compare *Keator v. Scranton Traction Co.*, 191 Pa. St. 102, 71 Am. St. Rep. 758, holding that a person who was standing in the street ready to step on a street car, to which she had been transferred, was a passenger.

**5. Leaving and Returning to Vehicle.** — *Hardin v. Ft. Worth, etc., R. Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 431. See *Louisville, etc., R. Co. v. Harmon*, 64 S. W. Rep. 640, 23 Ky. L. Rep. 871. But see *Ratteree v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 566.

**500. 3. General Rule** — **Alighting at Intermediate Station.** — *Alabama G. S. R. Co. v. Cogging*, (C. C. A.) 88 Fed. Rep. 455; *St. Louis, etc., R. Co. v. Coulson*, 8 Kan. App. 4; *Chicago, etc., R. Co. v. Sattler*, 64 Neb. 636, 97 Am. St. Rep. 666; *St. Louis Southwestern R. Co. v. Humphreys*, 25 Tex. Civ. App. 401; *Galveston, etc., R. Co. v. Mathes*, (Tex. Civ. App. 1903) 73 S. W. Rep. 411. But see *Bullock v. Houston, etc., R. Co.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 184.

But as to a through train, carrying only through passengers, the passenger who leaves the train without the knowledge, consent, or invitation of the company, at an intermediate station at which the train stops only for some purpose in connection with its management and operation, as for the purpose of taking water or coal, and not to receive or discharge passengers, must be deemed to have abandoned his relation as a passenger, and to take upon himself for the time being all risks incident to his movements. *Lemery v. Great Northern R. Co.*, 83 Minn. 47.

**Alighting Because of Wreck on Track Ahead.** — When a journey is interrupted by a wreck on the track ahead, the passengers who alight from the train for the purpose of going around the wreck to continue the journey on another train

remain passengers while making the transfer and waiting for the train. *Conroy v. Chicago, etc., R. Co.*, 96 Wis. 243.

**Drover Alighting at Intermediate Stations or at Stopping Places to Care for Stock.** — One who rides on a freight train in charge of stock is entitled to alight at proper stopping places to look after the stock. *International, etc., R. Co. v. Downing*, 16 Tex. Civ. App. 643.

**502. 1. Leaving Carrier's Premises at Intermediate Station and Going to a Hotel** has the effect of suspending the relation of carrier and passenger for the time being. *King v. Central of Georgia R. Co.*, 107 Ga. 754.

**2. At Transfer Stations.** — *Baldwin v. Fair Haven, etc., R. Co.*, 68 Conn. 567; *Chicago, etc., R. Co. v. Winters*, 175 Ill. 293; *Keator v. Scranton Traction Co.*, 191 Pa. St. 102, 71 Am. St. Rep. 758, holding a person to be a passenger while changing from one street car to another.

**507. 1. Nontransferable Ticket.** — See *Mirrieles v. Wabash R. Co.*, 163 Mo. 470.

**A Person Wrongfully Riding on a Nontransferable Ticket in Good Faith** may be a passenger. *Odell v. New York Cent., etc., R. Co.*, 18 N. Y. App. Div. 12, *affirmed* without opinion 162 N. Y. 625.

**4. Free Passengers.** — *McNeill v. Durham, etc., R. Co.*, 135 N. Car. 682, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 507; *Simmons v. Oregon R., etc., Co.*, 41 Oregon 151; *Denison, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 780.

**Person Riding Free with Consent of Conductor in Violation of Rule.** — It has been held that a person who is riding free on a passenger train, with the consent of the conductor, is a passenger, although the conductor violates a rule of the company in not demanding the fare. *Louisville, etc., R. Co. v. Scott*, 108 Ky. 392.

But a person who rides free, with the consent of the conductor, knowing that the conductor has no authority to grant free transportation, is not a passenger. *McNeill v. Durham, etc., R. Co.*, 135 N. Car. 682; *Purple v. Union Pac. R. Co.*, (C. C. A.) 114 Fed. Rep. 123.

**Riding Free with Consent of Motorman.** — A boy ten years of age riding upon a street car, without paying fare, by invitation of the motorman in charge of the car, and who has authority to receive and let off passengers, is entitled to the rights of a passenger. *Little Rock Traction, etc., Co. v. Nelson*, 66 Ark. 494.

**508. 1. Persons Riding on Passes.** — *In re California Nav., etc., Co.*, 110 Fed. Rep. 670; *Young v. Missouri Pac. R. Co.*, 93 Mo. App.

**508.** When Carrier Prohibited by Law from Issuing Passes. — See note 3.

(b) On Drover's Pass. — See note 5.

**510.** d. PERSONS RIDING IN VEHICLES NOT ORDINARILY USED FOR CARRYING PASSENGERS — (1) *In General*. — See note 1.

(2) *Riding on Engine*. — See note 5.

**511.** (3) *Riding on Hand Cars*. — See note 1.

(4) *Riding in Mail Cars*. — See note 4.

**512.** (5) *Riding in Express Cars* — (a) *Express Messengers*. — See note 2.

**513.** (b) *Other Persons*. — See note 1.

(6) *Riding on Freight Trains* — (a) *When Considered as Passengers*. — See note 2.

**514.** See note 1.

**515.** (b) *When Not Considered as Passengers*. — See note 1.

267; Norfolk, etc., R. Co. v. Tanner, 100 Va. 379.

*Riding on Employee's Pass*. — Whitney v. New York, etc., R. Co., (C. C. A.) 102 Fed. Rep. 850.

**508.** 2. McNeill v. Durham, etc., R. Co., 135 N. Car. 682, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508.

3. McNeill v. Durham, etc., R. Co., 135 N. Car. 682, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508.

5. *Drover's Pass*. — Chicago, etc., R. Co. v. Winters, 175 Ill. 293; Pennsylvania Co. v. Greso, 102 Ill. App. 252; Pennsylvania Co. v. Greso, 79 Ill. App. 127; Louisville, etc., R. Co. v. Bell, 100 Ky. 203; Western Maryland R. Co. v. State, 95 Md. 647, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508; Missouri Pac. R. Co. v. Tietken, 49 Neb. 130, 59 Am. St. Rep. 526; Lake Shore, etc., R. Co. v. Hotchkiss, 24 Ohio Cir. Ct. 431; Rowdin v. Pennsylvania R. Co., 208 Pa. St. 623; American Express Co. v. Ogles, (Tex. Civ. App. 1904) 81 S. W. Rep. 1023; Feldschneider v. Chicago, etc., R. Co., 122 Wis. 423. See Memphis, etc., Packet Co. v. Buckner, 108 Ky. 701.

**510.** 1. *On Construction Train*. — Spence v. Chicago, etc., R. Co., 117 Iowa 1, holding the plaintiff to have been a passenger.

5. *Riding on Engine*. — See Mobile, etc., R. Co. v. Bogle, 101 Tenn. 40.

*Riding by Permission of the Engine-driver*. — A person does not become a passenger by riding on an engine by permission of the engineer, who has no authority to give the permission (Nightingale v. Union Colliery Co., 9 British Columbia 453, affirmed 35 Can. Sup. Ct. 65), even though the conductor may have knowledge of his presence on the engine. Radley v. Columbia Southern R. Co., 44 Oregon 332.

**511.** 1. *Riding on Hand Cars*. — Willis v. Atlantic, etc., R. Co., 120 N. Car. 508; Rathbone v. Oregon R., etc., Co., 40 Oregon 225.

4. *Mail Clerks*. — Houston, etc., R. Co. v. McCullough, 22 Tex. Civ. App. 208; International, etc., R. Co. v. Davis, 17 Tex. Civ. App. 340. See Stoddard v. New York, etc., R. Co., 181 Mass. 422.

*Apparent Exception to the Rule in Pennsylvania*. — Martin v. Philadelphia, etc., R. Co., 200 Pa. St. 603; Foreman v. Pennsylvania R. Co., 195 Pa. St. 499. See Pittsburg, etc., R. Co. v. Bishop, 7 Ohio Cir. Dec. 73.

**512.** 2. *Express Messengers*. — Voight v. Baltimore, etc., R. Co., 79 Fed. Rep. 561.

On the other hand, it has been held that an express messenger who is carried in a special car to do his employer's business is not a passenger. Blank v. Illinois Cent. R. Co., 182 Ill. 332, affirming 80 Ill. App. 475.

It has been said that an express messenger, while on a train in the performance of his duties as an express messenger, does not sustain the relation to the railroad company of a passenger, and therefore he is not entitled to that high degree of care which a common carrier owes to those who have paid for their transportation as passengers. Chicago, etc., R. Co. v. O'Brien, (C. C. A.) 132 Fed. Rep. 593.

*Limiting Liability for Negligence*. — An express messenger, who has contracted to assume the risk of injuries through negligence in the operation of the railroad, and who is carried free under the contract between the express company and the carrier, has been held to sustain the relation of an employee to the carrier. Chicago, etc., R. Co. v. O'Brien, (C. C. A.) 132 Fed. Rep. 593; Long v. Lehigh Valley R. Co., (C. C. A.) 130 Fed. Rep. 870.

**513.** 1. In Fremont, etc., R. Co. v. Root, 49 Neb. 900, it was held that the question whether a passenger loses his status by going into the express car is a question of fact for the jury.

2. *Riding on Freight Trains*. — Central of Georgia R. Co. v. Almand, 116 Ga. 780; Grader v. Chicago, etc., R. Co., 109 Iowa 547; Richmond v. Southern Pac. Co., 41 Oregon 54, 93 Am. St. Rep. 694; Simmons v. Oregon R., etc., Co., 41 Oregon 151.

*Riding on Freight Train in Charge of Goods*. — Hardin v. Ft. Worth, etc., R. Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 431.

*Drovers in Charge of Stock Riding on Freight Trains*. — Chicago, etc., R. Co. v. Troyer, (Neb. 1903) 97 N. W. Rep. 308.

**514.** 1. Dysart v. Missouri, etc., R. Co., (C. C. A.) 122 Fed. Rep. 228.

*Car Inspector in Employ of Carrier Riding on Freight Train with Consent of Conductor*. — West v. New York Cent., etc., R. Co., 55 N. Y. App. Div. 464.

*Riding Against Rule Which Is Not Enforced*. — Greenfield v. Detroit, etc., R. Co., 133 Mich. 557, 10 Detroit Leg. N. 256.

**515.** 1. *A Person Riding Unlawfully on a Freight Car* is not a passenger. Cincinnati, etc., R. Co. v. Jackson, 58 S. W. Rep. 526, 22 Ky. L. Rep. 630; Alabama, etc., R. Co. v. Liv-

**515.** Attempting to Ride on Certain Tickets. — See notes 2, 3.

**516.** *e.* EMPLOYEES OF CARRIER AS PASSENGERS. — See note 1.

**517.** See note 1.

**518.** *f.* PERSONS ATTENDING PASSENGERS ARRIVING OR DEPARTING.

— See note 2.

ington, 84 Miss. 1; *Ellis v. Houston East, etc.*, R. Co., 30 Tex. Civ. App. 172.

**A Person on a Freight Train in Violation of the Rules** is not a passenger simply because the rule has not been fully and perfectly enforced, if it has not been so generally disregarded as to justify the belief that it has been abrogated or has fallen into disuse. *Houston, etc., R. Co. v. Norris*, (Tex. Civ. App. 1897) 41 S. W. Rep. 708. See also *San Antonio, etc., R. Co. v. Lynch*, (Tex. Civ. App. 1897) 40 S. W. Rep. 631.

A person who rides on a work train contrary to an express rule is not a passenger, even though the rule may frequently have been violated. *International, etc., R. Co. v. Hanna*, (Tex. Civ. App. 1900) 58 S. W. Rep. 548.

**Riding Without Permit, Knowing It to Be Necessary.** — *Houston East, etc., R. Co. v. Stell*, 28 Tex. Civ. App. 280.

**And the Failure of the Conductor** to eject a person from a freight train does not constitute him a passenger. *Radley v. Columbia Southern R. Co.*, 44 Oregon 332; *Menaugh v. Bedford Belt R. Co.*, 157 Ind. 20.

**515. 2.** *Sands v. Southern R. Co.*, 108 Tenn. 1.

**3. Invitation of Employee.** — *Stalcup v. Louisville, etc., R. Co.*, 16 Ind. App. 584; *Alabama, etc., R. Co. v. Livingston*, 84 Miss. 1, wherein the plaintiff had boarded a freight train by direction of a track superintendent; *Simmons v. Oregon R., etc., Co.*, 41 Oregon 151; *Missouri, etc., R. Co. v. Huff*, (Tex. 1904) 81 S. W. Rep. 525, reversing (Tex. Civ. App. 1903) 78 S. W. Rep. 249; *Ft. Worth, etc., R. Co. v. Peterson*, 24 Tex. Civ. App. 548; *San Antonio, etc., R. Co. v. Lynch*, (Tex. Civ. App. 1900) 55 S. W. Rep. 517.

Although it may be the common-law rule that one boarding a freight train cannot claim to be a passenger notwithstanding any conduct towards him, unless the company has by its management led the public to believe that passengers would be carried on such train for hire or otherwise, and the company has not made itself otherwise liable to him as a passenger, it has been held that under a statute requiring local freight trains to carry passengers from and to any and all stations, if the conductor of the freight train permits a person to board it and receives his fare, he has a right to presume that the train is a local freight which the law compels to carry passengers. *Arkansas Midland R. Co. v. Griffith*, 63 Ark. 491.

**516. 1. Employee, When Not Considered a Passenger.** — *Louisville, etc., R. Co. v. Stuber*, (C. C. A.) 108 Fed. Rep. 936; *Indianapolis, etc., Rapid Transit R. Co. v. Andis*, 33 Ind. App. 625; *Simmons v. Oregon R., etc., Co.*, 41 Oregon 151; *Ionnone v. New York, etc., R. Co.*, 21 R. I. 452, 79 Am. St. Rep. 812; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 44, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 516. See the title FELLOW SERVANTS.

**A Paymaster** of a railroad company traveling

from station to station to pay off employees of the company is not a passenger. *Travelers' Ins. Co. v. Austin*, 116 Ga. 266, 94 Am. St. Rep. 125.

**517. 1. Employee, When Deemed a Passenger.** — *Whitney v. New York, etc., R. Co.*, (C. C. A.) 102 Fed. Rep. 850; *Carswell v. Macon, etc., R. Co.*, 118 Ga. 827, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 516-517; *Travelers' Ins. Co. v. Austin*, 116 Ga. 266, 94 Am. St. Rep. 125, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 516-517; *Louisville, etc., R. Co. v. Scott*, 108 Ky. 392; *Dobson v. New Orleans, etc., R. Co.*, 52 La. Ann. 1127; *Dickinson v. West End St. R. Co.*, 177 Mass. 365, 83 Am. St. Rep. 284; *Simmons v. Oregon R., etc., Co.*, 41 Oregon 151; *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460. See *Rowe v. Brooklyn Heights R. Co.*, 80 N. Y. App. Div. 477; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 44, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 517.

**Free Transportation Part of Wages.** — Where a servant is given free transportation as part of his wages he is a passenger for hire. *Doyle v. Fitchburg R. Co.*, 166 Mass. 492, 55 Am. St. Rep. 417.

**Going to and Returning from Work.** — An employee of the carrier who is given transportation to and from the place of his work as part of his wages is entitled to the same care and protection as are due to other passengers. *St. Louis, etc., R. Co. v. Waggoner*, 90 Ill. App. 556.

**518. 2. Persons Assisting Passengers** — *Colorado.* — *Denver, etc., R. Co. v. Spencer*, 27 Colo. 313.

*Georgia.* — *Southern R. Co. v. Merritt*, 120 Ga. 409.

*Kentucky.* — *Berry v. Louisville, etc., R. Co.*, 109 Ky. 727.

*Missouri.* — *Saxton v. Missouri Pac. R. Co.*, 98 Mo. App. 494.

*New York.* — *Pitkin v. New York Cent., etc., R. Co.*, 94 N. Y. App. Div. 31.

*North Carolina.* — *Morrow v. Atlanta, etc., R. Co.*, 134 N. Car. 92.

*South Carolina.* — *Izlar v. Manchester, etc., R. Co.*, 57 S. Car. 336, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 518; *Johnson v. Southern R. Co.*, 53 S. Car. 203, 69 Am. St. Rep. 849.

*Texas.* — *Texas, etc., R. Co. v. Russell*, (Tex. Civ. App. 1903) 74 S. W. Rep. 569; *Texas, etc., R. Co. v. Funderburk*, 30 Tex. Civ. App. 22; *Gulf, etc., R. Co. v. Williams*, 21 Tex. Civ. App. 469. Compare *Great Northern R. Co. v. Bruyere*, (C. C. A.) 114 Fed. Rep. 540.

**Duty to Protect Persons Assisting Passengers.** — Since a person attending a passenger is merely a licensee, the carrier is not liable for an assault upon such person by an intruder in the carrier's station. *Houston, etc., R. Co. v. Phillio*, 66 Tex. 18, 97 Am. St. Rep. 868.

**Illustrative Cases.** — If a person who assists a passenger on a train without intending to become a passenger himself notifies the employees

**520. IV. DUTIES AND LIABILITIES — 1. With Respect to Appliances —**  
**a. RAILROAD COMPANIES — (2) Running Appliances — (a) In General. —** See note 2.

(b) *Road.* — See note 4.

**521.** See notes 1, 2, 3, 4, 5.

**522.** See notes 1, 2.

(c) *Prevention and Removal of Obstructions.* — See notes 3, 4.

in charge of the train of his intention to get off, it is the duty of the carrier so to regulate the movement of the train as to admit of his getting off without injury to himself. *Missouri, etc., R. Co. v. Miller*, 15 Tex. Civ. App. 428.

**Notice of Purpose in Boarding Train.** — In order to charge a carrier with liability to a person who boards a train for the purpose of assisting a passenger, for failure to give him a reasonable time to get on and off without injury, the servants of the carrier must have notice of his intention in boarding the train. *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102.

**Express Permission to Board Train Not Necessary.** — In order to be entitled to that care which the carrier owes to a person who boards a train to assist a passenger, it is not necessary that he should first see the conductor and obtain his express consent; if the carrier allows persons who are not passengers to approach and board its trains, for the purpose of assisting its passenger to a seat, its consent thereto is as much received as if it were expressly given. *Missouri, etc., R. Co. v. Miller*, 15 Tex. Civ. App. 428.

**520. 2. Running Appliances — General Rule.** — *Louisiana, etc., R. Co. v. Crumpler*, (C. C. A.) 122 Fed. Rep. 425; *McAllister v. Peoples R. Co.*, 4 Penn. (Del.) 272; *Macon v. Consol. St. R. Co. v. Barnes*, 113 Ga. 212; *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 112, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 520; *Missouri, etc., R. Co. v. Mitchell*, (Tex. Civ. App. 1904) 79 S. W. Rep. 94; *St. Louis Southwestern R. Co. v. Parks*, 97 Tex. 131; *Dallas Consol. Electric St. R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630, 68 S. W. Rep. 315; *Parvin v. International, etc., R. Co.*, (Tex. Civ. App. 1899) 54 S. W. Rep. 638. See *Nashville R. Co. v. Howard*, (Tenn. 1904) 78 S. W. Rep. 1098.

**Care to Be Exercised in Providing Seats.** — It has been said that the high degree of care exacted of carriers of passengers generally with regard to the means of conveyance is to be exercised in providing safe seats. *International, etc., R. Co. v. Anthony*, 24 Tex. Civ. App. 9.

**4. Bridges.** — *Cobb v. St. Louis, etc., R. Co.*, 149 Mo. 609; *San Antonio, etc., R. Co. v. Lynch*, (Tex. Civ. App. 1900) 55 S. W. Rep. 517.

**521. 1. Culverts.** — *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 115, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 521.

**2. Embankments and Cuts.** — *Louisville, etc., R. Co. v. Sandlin*, 125 Ala. 585.

**3. Roadbed.** — *Louisville, etc., R. Co. v. Sandlin*, 125 Ala. 585; *Edlund v. St. Paul City R. Co.*, 78 Minn. 434; *Smedley v. Hestonville, etc., Pass. R. Co.*, 184 Pa. St. 620; *Johnson v. Galveston, etc., R. Co.*, 27 Tex. Civ. App. 616.

**4. Ties.** — *Arkansas Midland R. Co. v. Grif-*

*fith*, 63 Ark. 491; *Cronk v. Wabash R. Co.*, 123 Iowa 349; *Whipple v. Michigan Cent. R. Co.*, 130 Mich. 460, 9 Detroit Leg. N. 110; *Griffin v. Southern R. Co.*, 66 S. Car. 77; *Johnson v. Galveston, etc., R. Co.*, 27 Tex. Civ. App. 616.

**5. Rails.** — *Whittlesey v. Burlington, etc., R. Co.*, 121 Iowa 597; *McCafferty v. Pennsylvania R. Co.*, 193 Pa. St. 339, 74 Am. St. Rep. 690; *Nashville R. Co. v. Howard*, (Tenn. 1904) 78 S. W. Rep. 1098.

**522. 1. Fastening of Rails.** — *Holloway v. Pasadena, etc., R. Co.*, 130 Cal. 177; *Roberts v. Chicago, etc., R. Co.*, 78 Ill. App. 526.

**2. Switches.** — *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74; *Heyde v. St. Louis Transit Co.*, 102 Mo. App. 537; *Klinger v. United Traction Co.*, 92 N. Y. App. Div. 100, modified 181 N. Y. 521; *Houston, etc., R. Co. v. Summers*, (Tex. Civ. App. 1899) 49 S. W. Rep. 1106; *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203.

**3. Dangerous Proximity of Parallel Tracks.** — *Clerc v. Morgan's Louisiana, etc., R., etc., Co.*, 107 La. 370, 90 Am. St. Rep. 319; *Moody v. Springfield St. R. Co.*, 182 Mass. 158; *Allen v. St. Louis Transit Co.*, 183 Mo. 411; *Kreimelmann v. Jourdan*, 107 Mo. App. 64; *Tucker v. Buffalo R. Co.*, 53 N. Y. App. Div. 571, affirmed without opinion 169 N. Y. 589. See *Knauss v. Lake Erie, etc., R. Co.*, 29 Ind. App. 216; *Fullerton v. St. Louis, etc., R. Co.*, 84 Mo. App. 498.

**Dangerous Proximity of Structures to Track — United States.** — *New York, etc., R. Co. v. Baker*, (C. C. A.) 98 Fed. Rep. 694; *Fitchburg R. Co. v. Nichols*, (C. C. A.) 85 Fed. Rep. 945.

*Connecticut.* — *Hesse v. Meriden, etc., Tramway Co.*, 75 Conn. 571.

*District of Columbia.* — *Harbison v. Metropolitan R. Co.*, 9 App. Cas. (D. C.) 60.

*Illinois.* — *Chicago, etc., R. Co. v. Murphy*, 198 Ill. 462, affirming 99 Ill. App. 126; *West Chicago St. R. Co. v. Marks*, 182 Ill. 15, affirming 82 Ill. App. 185; *Chicago, etc., R. Co. v. McDonough*, 112 Ill. App. 315.

*Indiana.* — *Citizens St. R. Co. v. Merl*, 26 Ind. App. 284. See *Baltimore, etc., R. Co. v. Sims*, 28 Ind. App. 544.

*Kentucky.* — *Moser v. South Covington, etc., St. R. Co.*, 74 S. W. Rep. 1090, 25 Ky. L. Rep. 154.

*Louisiana.* — *Kird v. New Orleans, etc., R. Co.*, 109 La. 525.

*Nebraska.* — *Union Pac. R. Co. v. Roeser*, (Neb. 1903) 95 N. W. Rep. 68.

*New Jersey.* — *Wheeler v. South Orange, etc., Traction Co.*, 70 N. J. L. 725.

*New York.* — *Canavan v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 491; *Cusick v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 758; *Gunn v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 86 N.

**523. (d) Duty to Fence Track — At the Common Law. — See note 2.****(e) Rolling Stock. — See notes 5, 6.**

Y. Supp. 241; *Baker v. New York, etc., R. Co.*, 28 N. Y. App. Div. 316.

*North Carolina.* — *McCord v. Atlanta, etc., R. Co.*, 134 N. Car. 53.

*Oregon.* — *Anderson v. City, etc., R. Co.*, 42 Oregon 505.

*Texas.* — *Gulf, etc., R. Co. v. Phillips*, 32 Tex. Civ. App. 238; *San Antonio Traction Co. v. Bryant*, 30 Tex. Civ. App. 437.

See *Chicago, etc., R. Co. v. Hoover*, 3 Indian Ter. 693; *Allen v. Northern Pac. R. Co.*, 35 Wash. 221.

**Car Blown on Track from Sidetrack by Windstorm.** — *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579.

**Dangerous Proximity to Track of Cotton on Station Platform.** — *Kird v. New Orleans, etc., R. Co.*, 105 La. 226.

**522. 4. Alabama Midland R. Co. v. Guilford**, 114 Ga. 627; *West Chicago St. R. Co. v. Stephens*, 66 Ill. App. 303; *Dobson v. New Orleans, etc., R. Co.*, 52 La. Ann. 1127; *Galligan v. Old Colony St. R. Co.*, 182 Mass. 211; *Ramson v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 101, *affirmed* without opinion 177 N. Y. 578; *Lynch v. New York Cent., etc., R. Co.*, 8 N. Y. App. Div. 458. See *Alabama Midland R. Co. v. Guilford*, 119 Ga. 523; *North Chicago St. R. Co. v. Schwartz*, 82 Ill. App. 493.

**523. 2. Common-law Duty to Fence Tracks.** — *International, etc., R. Co. v. Thompson*, (Tex. Civ. App. 1903) 77 S. W. Rep. 439. See also the title **FENCES**.

**5. Engine Must Be of Sufficient Capacity.** — *Farnon v. Boston, etc., R. Co.*, 180 Mass. 212.

**Spark Arresters.** — *Missouri, etc., R. Co. v. Mitchell*, (Tex. Civ. App. 1904) 79 S. W. Rep. 94; *Missouri, etc., R. Co. v. Flood*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1106; *St. Louis Southwestern R. Co. v. Parks*, 97 Tex. 131, (Tex. Civ. App. 1903) 73 S. W. Rep. 439; *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ. App. 671.

**Ash Pan Permitting Escape of Sparks.** — *Philadelphia, etc., R. Co. v. Young*, (C. C. A.) 90 Fed. Rep. 709.

**6. Cars.** — *Metropolitan R. Co. v. Falvey*, 5 App. Cas. (D. C.) 176; *Western Maryland R. Co. v. State*, 95 Md. 637; *Lincoln Traction Co. v. Heller*, (Neb. 1904) 100 N. W. Rep. 197; *Willis v. Second Ave. Traction Co.*, 189 Pa. St. 430; *American Express Co. v. Ogles*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1023; *San Antonio Traction Co. v. Williams*, (Tex. Civ. App. 1904) 78 S. W. Rep. 977. See *Call v. Portsmouth, etc., R. Co.*, 69 N. H. 562.

**Wheels.** — *Chesapeake, etc., R. Co. v. Howard*, 178 U. S. 153; *Johnsen v. Oakland, etc., Electric R. Co.*, 127 Cal. 608; *Johnson v. St. Louis, etc., R. Co.*, 173 Mo. 307.

**Guards for Wheels of Street Car.** — It has been held that the question whether a street railway carrier is negligent in not having guards for the wheels of the car, as required by an ordinance, is to be determined by the jury. *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28.

**Slippery Condition of Car Steps.** — *Gilman v. Boston, etc., R. Co.*, 168 Mass. 454; *Herbert v. St. Paul City R. Co.*, 85 Minn. 341; *Richmond*

*R., etc., Co. v. West*, 100 Va. 184, 4 Va. Sup. Ct. Rep. 112.

**Handrails.** — *Brightwood R. Co. v. Carter*, 12 App. Cas. (D. C.) 155.

**Side Bar on Open Car Not in Place.** — *Whitaker v. Staten Island Midland R. Co.*, 65 N. Y. App. Div. 451.

**Guards or Gates Enclosing Platforms of Street Cars.** — *Lincoln Traction Co. v. Heller*, (Neb. 1904) 100 N. W. Rep. 197; *Halverson v. Seattle Electric Co.*, 35 Wash. 600.

**Cable Car Equipped with Divided Dashboard.** — *Mt. Adams, etc., Inclined Plane R. Co. v. Isaacs*, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 177.

**Defective Insulation of Street Car.** — *Buckbee v. Third Ave. R. Co.*, 64 N. Y. App. Div. 360; *Leonard v. Brooklyn Heights R. Co.*, 57 N. Y. App. Div. 125; *Denison, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 780; *Dallas Consol. Electric St. R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630.

**Defective Fuse in Electric Car.** — *Cassady v. Old Colony St. R. Co.*, 184 Mass. 156.

**Seats.** — *Southern R. Co. v. Crowder*, 130 Ala. 256; *Fitch v. Mason City, etc., Traction Co.*, 124 Iowa 665; *Missouri, etc., R. Co. v. Dill*, (Tex. Civ. App. 1897) 40 S. W. Rep. 347; *International, etc., R. Co. v. Anthony*, 24 Tex. Civ. App. 9.

**Habitable Condition of Car.** — *Texas, etc., R. Co. v. Bratcher*, (Tex. Civ. App. 1904) 78 S. W. Rep. 531; *Duck v. St. Louis, etc., R. Co.*, (Tex. Civ. App. 1901) 63 S. W. Rep. 891.

**Duty to Heat Cars.** — *Taylor v. Wabash R. Co.*, (Mo. 1896) 38 S. W. Rep. 304; *Missouri, etc., R. Co. v. Harrison*, 97 Tex. 611, *reversing* (Tex. Civ. App. 1903) 77 S. W. Rep. 1036; *Tyler v. Texas, etc., R. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1075; *St. Louis Southwestern R. Co. v. Duck*, (Tex. Civ. App. 1903) 72 S. W. Rep. 445; *Arrington v. Texas, etc., R. Co.*, (Tex. Civ. App. 1902) 70 S. W. Rep. 551; *Texas, etc., R. Co. v. Rea*, 27 Tex. Civ. App. 549; *Duck v. St. Louis, etc., R. Co.*, (Tex. Civ. App. 1901) 63 S. W. Rep. 891; *International, etc., R. Co. v. Davis*, 17 Tex. Civ. App. 340.

**Unobstructed Aisles.** — *Chicago, etc., R. Co. v. Buckmaster*, 74 Ill. App. 575.

**Ring in Floor of Car Catching Foot of Passenger.** — *Kingman v. Lynn, etc., R. Co.*, 181 Mass. 387.

**Window Fastenings.** — *International, etc., R. Co. v. Phillips*, 29 Tex. Civ. App. 336.

**Injury to Passenger by Breaking of Curtain Rod.** — *Leyh v. Newburgh Electric R. Co.*, 41 N. Y. App. Div. 218, *affirmed* without opinion 168 N. Y. 667.

**Door Latch of Street Car catching and tearing dress of passenger.** *Atwood v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 758.

**Passage Between Cars.** — *St. Louis Southwestern R. Co. v. Keitt*, (Tex. Civ. App. 1903) 76 S. W. Rep. 311; *Parvin v. International, etc., R. Co.*, (Tex. Civ. App. 1899) 54 S. W. Rep. 638.

**Vestibules.** — *Northern Pac. R. Co. v. Adams*, (C. C. A.) 116 Fed. Rep. 325, holding that it was for the jury to decide whether or not it was negligent for a railroad not to equip car

**524.** See notes 1, 2, 3.

**525.** (g) *Separate Passenger Trains.* — See note 2.

(h) *Adoption of New Appliances and Precautions.* — See note 4.

**526.** See note 1.

**527.** (i) *Inspection and Repair of Appliances.* — See notes 1, 2, 3.

**528.** *Under Circumstances of Exceptional Peril.* — See note 1.

(j) *Liability for Latent Defects.* — See note 4.

**530.** *Latent Defects Discoverable by Manufacturer.* — See note 1.

(m) *Liability for Defects in Cars Used but Not Owned by Carrier.* — See note 6.

**531.** (n) *Liability for Injuries Through Inevitable Accident — Accidents Caused by Extremes of Weather.* — See note 3.

**532.** (3) *Facilities for Entering and Leaving Cars.* — See note 1.

platforms with vestibules. But in *Sansom v. Southern R. Co.*, (C. C. A.) 111 Fed. Rep. 887, it was held as a matter of law that the absence of a vestibule was not negligence.

**Fastenings of Vestibule Doors.** — *Robinson v. Chicago, etc., R. Co.*, 135 Mich. 254, 10 Detroit Leg. N. 727.

**Leaving Door of Vestibule Open.** — It has been said that a railroad company is under no obligation to provide vestibuled trains for its passengers, but having done so it is bound to maintain them in a reasonably safe condition, and the question whether it is negligent to leave the vestibule connection between two cars without light, and the outside door of the vestibule open without guard-rail or other protection while the train is running rapidly on a dark night, is a question of fact for the jury to determine. *Bronson v. Oakes*, (C. C. A.) 76 Fed. Rep. 734.

**524. 1. Couplings.** — *Birmingham R., etc., Co. v. Bynum*, 139 Ala. 395; *Shrum v. Cincinnati, etc., R. Co.*, 10 Ohio Dec. 244; *St. Louis Southwestern R. Co. v. Keitt*, (Tex. Civ. App. 1903) 76 S. W. Rep. 311.

**2. Headlights.** — *Fleming v. St. Louis, etc., R. Co.*, 89 Mo. App. 129.

**3. Brakes.** — *Western R. Co. v. Walker*, 113 Ala. 267; *Howell v. Lansing City Electric R. Co.*, (Mich. 1904) 99 N. W. Rep. 406, 11 Detroit Leg. N. 82; *Texas, etc., R. Co. v. Storey*, 29 Tex. Civ. App. 483; *Lane v. Spokane Falls, etc., R. Co.*, 21 Wash. 119, 75 Am. St. Rep. 821.

**525. 2.** See *Chicago, etc., R. Co. v. Gragg*, (Tex. Civ. App. 1904) 81 S. W. Rep. 93.

**4. Duty as to New Inventions and Improvements.** — *Witsell v. West Asheville, etc., R. Co.*, 120 N. Car. 557; *St. Louis Southwestern R. Co. v. Parks*, 97 Tex. 131. See *Wynn v. Central Park, etc., R. Co.*, 10 N. Y. App. Div. 13.

**526. 1. Improvements Not in General Use.** — *Alabama Midland R. Co. v. Guilford*, 119 Ga. 523; *Frobisher v. Fifth Ave. Transp. Co.*, 151 N. Y. 431; *Witsell v. West Asheville, etc., R. Co.*, 120 N. Car. 557, holding that it was error to instruct a jury that the defendant street railway company was bound to provide "all known and approved machinery necessary to protect its passengers;" *Mt. Adams, etc., Inclined Plane R. Co. v. Isaacs*, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 177; *Missouri, etc., R. Co. v. Mitchell*, (Tex. Civ. App. 1904) 79 S. W. Rep. 94; *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ. App. 671.

**527. 1. Duty to Inspect and Repair.** — *Logan*

*v. Metropolitan St. R. Co.*, 183 Mo. 582; *Newcomb v. New York Cent., etc., R. Co.*, 182 Mo. 687.

**2. Mode of Examination.** — *Western Maryland R. Co. v. State*, 95 Md. 650, applying the rule to the inspection of freight cars received from other roads and carrying cattle with drover.

**Frequency of Examination.** — *La Fond v. Detroit Citizens' St. R. Co.*, 131 Mich. 586, 9 Detroit Leg. N. 456; *Proud v. Philadelphia, etc., R. Co.*, 64 N. J. L. 702.

**3. Omission of Proper Inspection — Liability of Carrier.** — *Wilmington Steamboat Co. v. Walker*, (C. C. A.) 120 Fed. Rep. 97; *West Chicago St. R. Co. v. Stephens*, 66 Ill. App. 303; *Davis v. Paducah R., etc., Co.*, 113 Ky. 267; *Leveret v. Shreveport Belt R. Co.*, 110 La. 399; *Robinson v. Chicago, etc., R. Co.*, 135 Mich. 254, 10 Detroit Leg. N. 727; *Leonard v. Brooklyn Heights R. Co.*, 57 N. Y. App. Div. 125; *Winstanley, etc., R. Co. v. Summers*, (Tex. Civ. App. 1899) 49 S. W. Rep. 1106.

**Failure to Repair Hole in Station Platform.** — *Fullerton v. Fordyce*, 144 Mo. 519. See also the title *STATIONS (RAILROADS)*.

**528. 1.** *Cobb v. St. Louis, etc., R. Co.*, 149 Mo. 609. See *Alabama Midland R. Co. v. Guilford*, 114 Ga. 627.

**4. Latent Defects — Present Rule.** — *Western Maryland R. Co. v. State*, 95 Md. 650, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 528; *Buckland v. New York, etc., R. Co.*, 181 Mass. 3.

**Defects Not Discoverable by the Usual and Proper Tests.** — *Western R. Co. v. Walker*, 113 Ala. 267.

**530. 1. Defects Discoverable by Manufacturer.** — *Siemens v. Oakland, etc., Electric R. Co.*, 134 Cal. 494.

**6. Sleeping Cars.** — *Western Maryland R. Co. v. State*, 95 Md. 650; *Robinson v. Chicago, etc., R. Co.*, 135 Mich. 254, 10 Detroit Leg. N. 727. See also the title *SLEEPING CAR COMPANIES*.

**531. 3.** *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 115, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 531.

**532. 1. Facilities for Entering and Leaving Cars.** — *Illinois Cent. R. Co. v. Keegan*, 210 Ill. 150; *Chicago Terminal Transfer R. Co. v. Schmelling*, 197 Ill. 619; *Harris v. Pittsburgh, etc., R. Co.*, 32 Ind. App. 600; *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414; *Union Pac. R. Co. v. Evans*, 52 Neb. 50; *Howland v. New York, etc., R. Co.*, 26 R. I. 138; *Appleby v. South Carolina, etc., R. Co.*, 60 S. Car. 48; *San Antonio, etc., R. Co. v. Turney*, (Tex. Civ. App. 1903) 78 S. W. Rep. 256. See *Lucas v.*

**532. Degree of Care Required.** — See notes 2, 3.*b.* CARRIERS BY STAGE COACH. — See note 4.*c.* CARRIERS BY WATER — Boat and Appliances. — See note 5.**533. Landings.** — See note 1.**2. With Respect to Employment of Servants** — *a.* COMPETENT SERVANTS — (1) *In General.* — See note 2.**536. (3) Knowledge of Incompetency.** — See note 3.*b.* SUFFICIENT NUMBER OF SERVANTS — (1) *In General.* — See note 4.**3. Obligation to Receive for Carriage** — *a.* IN GENERAL. — See note 6.

St. Louis, etc., R. Co., 174 Mo. 270. See also the cases cited *infra*, this title, **572. 1.**

**Duty Applied to Street Railway Carriers.** — Montgomery St. R. Co. v. Mason, 133 Ala. 508.

**Platforms.** — Lehigh Valley R. Co. v. Dupont, (C. C. A.) 128 Fed. Rep. 840; Lake Erie, etc., R. Co. v. Taylor, 25 Ind. App. 679; St. Louis, etc., R. Co. v. Coulson, 8 Kan. App. 4; Gulf, etc., R. Co. v. Shelton, 30 Tex. Civ. App. 72, rehearing denied (Tex. Civ. App. 1902) 70 S. W. Rep. 359.

The absence of a guard on a railing across the ends of the platform at the end of an elevated railway station has been held to be negligence. Lauterer Manhattan R. Co., (C. C. A.) 128 Fed. Rep. 540.

**Footstools.** — Illinois Cent. R. Co. v. Cheek, 152 Ind. 663; Missouri, etc., R. Co. v. Sherrill, 32 Tex. Civ. App. 116.

**Approaches to Stations.** — Lemon v. Grand Rapids, etc., R. Co., (Mich. 1904) 100 N. W. Rep. 22, 11 Detroit Leg. N. 151; Rusk v. Manhattan R. Co., 46 N. Y. App. Div. 100.

**Passage from Carrier's Pleasure Grounds to Cars.** — Cotant v. Boone Suburban R. Co., 125 Iowa 46.

**532. 2. Montgomery St. R. Co. v. Mason,** 133 Ala. 508 (discussing the duty of street railway companies); San Antonio, etc., R. Co. v. Turney, (Tex. Civ. App. 1903) 78 S. W. Rep. 256; Barker v. Ohio River R. Co., 51 W. Va. 430.

**3. St. Louis, etc., R. Co. v. Barnett,** 65 Ark. 255; Georgia, etc., R. Co. v. Brown, 120 Ga. 380; Southern R. Co. v. Reeves, 116 Ga. 743; Chicago Terminal Transfer R. Co. v. Schmelling, 197 Ill. 619; Chicago, etc., R. Co. v. Stewart, 77 Ill. App. 66; Fahner v. Brooklyn Heights R. Co., 86 N. Y. App. Div. 488; Barnes v. New York Cent., etc., R. Co., (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 622; Cleveland, etc., R. Co. v. Anderson, 11 Ohio Cir. Dec. 765, 21 Ohio Cir. Ct. 288; Finseth v. City, etc., R. Co., 32 Oregon 1; Izlar v. Manchester, etc., R. Co., 57 S. Car. 332, applying the rule to the carrier's duty to persons at stations for the purpose of meeting passengers. See Trinity, etc., R. Co. v. O'Brien, 18 Tex. Civ. App. 692.

**4. Construction of Step of Omnibus.** — It has been held that an omnibus company was not negligent in having the back of the steps open so that it was possible for the foot of a passenger to slip through. Frobisher v. Fifth Ave. Transp. Co., 151 N. Y. 431.

**5. Carriers by Water.** — The Oregon, (C. C. A.) 133 Fed. Rep. 618.

**Leaving Hatchway Open and Unlighted.** — Memphis, etc., Packet Co. v. Buckner, 108 Ky. 701.

**533. 1. Approaches and Landings.** — Patton v.

Pickles, 50 La. Ann. 857; Wolf v. Brooklyn Ferry Co., 54 N. Y. App. Div. 67.

**Injury by Falling of Gang Plank.** — Croft v. Northwestern Steamship Co., 20 Wash. 175.

**Defect in Chain Supporting Ferryboat Bridge.** — Bartnik v. Erie R. Co., 36 N. Y. App. Div. 246.

**Insecure Fastening of Ferryboat to Bridge.** — Mueller v. Tenth, etc., St. Ferry Co., 46 N. Y. App. Div. 560.

**2. Competent Servants Must Be Employed.** McAllister v. People's R. Co., 4 Penn. (Del.) 272; Howell v. Lansing City Electric R. Co., (Mich. 1904) 99 N. W. Rep. 406, 11 Detroit Leg. N. 82; Eton v. Ft. Wayne, etc., R. Co., 114 Mich. 605; Olsen v. Citizens' R. Co., 152 Mo. 426; Hansberger v. Sedalia Electric R., etc., Co., 82 Mo. App. 566.

**536. 3. See Allen v. St. Louis Transit Co.,** 183 Mo. 411.

**4. Sufficient Number of Employees Is Necessary.** — Root v. Des Moines R. Co., 122 Iowa 469; Comerford v. New York, etc., R. Co., 181 Mass. 528; Lincoln Traction Co. v. Heller, (Neb. 1904) 100 N. W. Rep. 197; Cleveland, etc., R. Co. v. Anderson, 11 Ohio Cir. Dec. 765, 21 Ohio Cir. Ct. 288.

**Duty to Employ Conductor on Street Car.** — Armstrong v. Montgomery St. R. Co., 123 Ala. 233; Baldwin v. Fair Haven, etc., R. Co., 68 Conn. 567. See Brown v. Louisville R. Co., (Ky. 1899) 53 S. W. Rep. 1041.

In an action by a passenger to recover for injuries received in alighting from a street car, on which one man performed the services of both motorman and conductor, it was held that whether or not in the particular instance an injury might have been averted if two men had been employed to perform such services is not the test of whether the street-railway company is guilty of negligence in failing to employ the second man, but the expense of employing the second man, the amount of traffic on the streets and on the cars, and the dangers to be encountered in operating the car over the particular route, should all be taken into consideration. Palmer v. Winona R., etc., Co., 78 Minn. 138.

**Employment of Conductor on Mixed Train.** — It has been held that not to furnish a conductor on a local train carrying both freight and passengers is negligence as a matter of law. Means v. Carolina Cent. R. Co., 124 N. Car. 574.

**6. General Duty to Receive.** — Moore v. St. Louis, etc., R. Co., 67 Ark. 389; Furgason v. Citizens St. R. Co., 16 Ind. App. 171; Dierig v. South Covington, etc., St. R. Co., 72 S. W. Rep. 355, 24 Ky. L. Rep. 1825; Jackson Electric R.,



**538.** *b.* WHAT PERSONS MAY BE REFUSED TRANSPORTATION — (2) *Intoxicated Persons.* — See note 1.

*Slight Intoxication.* — See note 2.

(4) *Feeble and Infirm Persons — Necessity of Attendant.* — See note 4.

**539.** (7) *Persons Soliciting Business in Conflict or Competition with Carrier.* — See note 3.

(8) *Application by Unusual Number of Passengers — But if They Do Receive Them.* — See note 5.

**540.** *d.* DUTY TO CARRY ON FREIGHT AND SPECIAL TRAINS — (1) *Freight Trains* — (a) *In General.* — See notes 1, 2.

(c) *Acceptance of Fare by Conductor or Agent.* — See note 4.

(2) *Special Trains.* — See note 5.

**541.** 4. *Duty to Protect Passengers* — *a.* *IN GENERAL.* — See note 2.

*b.* *FROM ITS SERVANTS* — (1) *General Doctrine — General Doctrine of Agency Applied.* — See note 3.

etc., *Co. v. Lowry*, 79 Miss. 431; *Story v. Norfolk*, etc., R. Co., 133 N. Car. 59; *Weber v. Southern R. Co.*, 65 S. Car. 356; *Choctaw*, etc., R. Co. *v. Hill*, 110 Tenn. 396.

**Duty to Stop Street Car for Intending Passenger.** — A carrier by street railway is ordinarily bound to stop a street car when duly signaled to do so by an intending passenger. *Maguire v. St. Louis Transit Co.*, 103 Mo. App. 459; *Northern Texas Traction Co. v. Hooper*, (Tex. Civ. App. 1904) 80 S. W. Rep. 113. See also the cases cited *infra*, this title, **566. 1. Carriers by Street Railway.**

**Failure to Stop Interurban Car to Take on Passenger.** — *Northern Texas Traction Co. v. Peterman*, (Tex. Civ. App. 1904) 80 S. W. Rep. 535.

**Duty to Stop Railroad Train at Station for Passenger.** — *Thomas v. Southern R. Co.*, 122 N. Car. 1005.

**538. 1. Disorderly Conduct on Former Occasions** may justify a refusal to carry a person on a ferryboat. *Stevenson v. West Seattle Land*, etc., Co., 22 Wash. 84.

**2. Illness Mistaken for Intoxication.** — *Story v. Norfolk*, etc., R. Co., 133 N. Car. 59.

**As to What Constitutes Intoxication**, see the titles **DRUNKENNESS**; **INTOXICATION**.

**4. Feebleness and Infirmary.** — *Illinois Cent. R. Co. v. Smith*, 85 Miss. 355, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 538.

**Insane Persons.** — *Owens v. Macon*, etc., R. Co., 119 Ga. 230.

**Blind Persons.** — It has been held that a person who is otherwise qualified cannot be rejected as a passenger for the sole reason that he is blind. *Zachery v. Mobile*, etc., R. Co., 74 Miss. 520, 60 Am. St. Rep. 529.

**539. 3. Ticket Scalper.** — A man who "scalps" railroad tickets cannot, generally, be denied transportation over the lines of the railroads in whose tickets he traffics. *Ford v. East Louisiana R. Co.*, 110 La. 414.

5. See *Zimmer v. Fox River Valley Electric R. Co.*, 118 Wis. 614.

**540. 1. Carriage upon Freight Trains.** — *Roberts v. Smith*, 5 Ariz. 368; *Menaugh v. Bedford Belt R. Co.*, 157 Ind. 20; *Reed v. Great Northern R. Co.*, 76 Minn. 163; *Richmond v. Southern Pac. R. Co.*, 41 Oregon 54, 93 Am. St. Rep. 694.

**2. Regulation Requiring Permit.** — *Reed v. Great Northern R. Co.*, 76 Minn. 163.

**4. Acceptance of Fare.** — See *Central of Georgia R. Co. v. Almand*, 116 Ga. 780.

**5. Special Trains.** — *Louisville*, etc., R. Co. *v. Du Bose*, 120 Ga. 339.

**Special Cars in Train.** — A railroad carrier may have special cars in its trains to which the general public is not admitted. *Cleveland*, etc., R. Co. *v. Wade*, 18 Ind. App. 346.

**Refusal to Receive on Train Which Does Not Stop at Passenger's Destination.** — *Yazoo*, etc., R. Co. *v. Rodgers*, 80 Miss. 200.

**541. 2. Passengers Must Be Protected — Alabama.** — *Birmingham R.*, etc., Co. *v. Mason*, 137 Ala. 342; *Birmingham R.*, etc., Co. *v. Baird*, 130 Ala. 334, 89 Am. St. Rep. 43.

*Arkansas.* — *St. Louis*, etc., R. Co. *v. Wilson*, 70 Ark. 136, 91 Am. St. Rep. 74.

*Georgia.* — *Savannah*, etc., R. Co. *v. Quo*, 103 Ga. 126, 68 Am. St. Rep. 85, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 541.

*Kentucky.* — *Illinois Cent. R. Co. v. Lalogue*, 113 Ky. 896; *Tate v. Illinois Cent. R. Co.*, (Ky. 1904) 81 S. W. Rep. 256.

*Missouri.* — *Grayson v. St. Louis Transit Co.*, 100 Mo. App. 60.

*New Jersey.* — *Partridge v. Woodland Steamboat Co.*, 66 N. J. L. 290; *Exton v. Central R. Co.*, 62 N. J. L. 7, *affirmed* without opinion 63 N. J. L. 356.

*New York.* — *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347, 102 Am. St. Rep. 503.

*North Carolina.* — *Seawell v. Carolina Cent. R. Co.*, 132 N. Car. 859, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 541; *Owens v. Wilmington*, etc., R. Co., 126 N. Car. 139, 78 Am. St. Rep. 642.

*Tennessee.* — *Louisville*, etc., R. Co. *v. Ray*, 101 Tenn. 1.

*Texas.* — *St. Louis Southwestern R. Co. v. Johnson*, 29 Tex. Civ. App. 184.

**3. Carrier Liable for Torts of Servant Within Scope of His Employment — Alabama.** — *Birmingham R.*, etc., Co. *v. Mason*, 137 Ala. 342; *Southern R. Co. v. Wildman*, 119 Ala. 565.

*California.* — *Trabing v. California Nav.*, etc., Co., 121 Cal. 137.

*Georgia.* — *Cole v. Atlanta*, etc., R. Co., 102 Ga. 474.

- 542.** Distinct Doctrine as to Carriers. — See note 1.  
**544.** New York Doctrine. — See note 1.  
**545.** (2) Assaults — (a) Liability — The General Principles. — See note 1.  
**547.** (b) Justification — Self-defense. — See note 6.  
**548.** Altercation Provoked by Passenger. — See notes 1, 2, 3.

*Missouri.* — Grayson v. St. Louis Transit Co., 100 Mo. App. 60.

*New Jersey.* — Haver v. Central R. Co., 62 N. J. L. 288, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 541.

*New York.* — Moritz v. Interurban St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 162; Schwartzman v. Brooklyn Heights R. Co., 84 N. Y. App. Div. 608.

*North Carolina.* — Williams v. Gill, 122 N. Car. 967.

*Texas.* — St. Louis Southwestern R. Co. v. Johnson, 29 Tex. Civ. App. 184; Gulf, etc., R. Co. v. Conder, 23 Tex. Civ. App. 488; Texas, etc., R. Co. v. Black, 23 Tex. Civ. App. 119; St. Louis Southwestern R. Co. v. Franklin, (Tex. Civ. App. 1898) 44 S. W. Rep. 701.

See Louisville, etc., R. Co. v. Board, (Ky. 1904) 80 S. W. Rep. 218.

**542. 1. Special Liability of the Carrier.** — Birmingham R., etc., Co. v. Baird, 130 Ala. 334, 89 Am. St. Rep. 43; St. Louis, etc., R. Co. v. Kilpatrick, 67 Ark. 47; Brunswick, etc., R. Co. v. Bostwick, 100 Ga. 96; Citizens St. R. Co. v. Clark, 33 Ind. App. 190; Missouri Pac. R. Co. v. Divinney, 66 Kan. 776; Johnson v. Detroit, etc., R. Co., 130 Mich. 453, 9 Detroit Leg. N. 123; Haver v. Central R. Co., 62 N. J. L. 288, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 542. See also Savannah, etc., R. Co. v. Godkin, 104 Ga. 655, 69 Am. St. Rep. 187; Taillon v. Mears, 29 Mont. 161; Williams v. Gill, 122 N. Car. 967.

**Acts Not Done in the Course of the Discharge of the Servant's Duties.** — The carrier is not liable if the assault is not made during the course of the discharge of the servant's duties. Chicago, etc., R. Co. v. Stratton, 111 Ill. App. 142, wherein the assault was made by the conductor after he had expelled a passenger from the train.

**Termination of Relation of Carrier and Passenger.** — If the relation of carrier and passenger has come to an end, there can be no recovery for the wilful or malicious act of a servant. Palmer v. Winston-Salem R., etc., Co., 131 N. Car. 250.

**Conductor Shoving Passenger Who Has Alighted from Street Car.** — Ferris v. Interurban St. R. Co., 89 N. Y. App. Div. 361.

**Causing the Arrest of a Passenger for Disorderly Conduct After Ejecting Him** for a refusal to pay fare has been held to be outside the course of the employment of the conductor of a street car, and not to charge the carrier with liability. Lezinsky v. Metropolitan St. R. Co., (C. C. A.) 88 Fed. Ren. 477.

**544. 1. New York Cases.** — See James v. Metropolitan St. R. Co., 80 N. Y. App. Div. 364.

**545. 1. Liability of Carrier for Assaults — United States.** — Barrow Steamship Co. v. Kane, (C. C. A.) 88 Fed. Rep. 197.

*California.* — Trabing v. California Nav., etc., Co., 121 Cal. 137.

*District of Columbia.* — Kohner v. Capital Traction Co., 22 App. Cas. (D. C.) 181.

*Georgia.* — Melver v. Florida Cent., etc., R. Co., 110 Ga. 223; Savannah, etc., R. Co. v. Quo, 103 Ga. 125, 68 Am. St. Rep. 85.

*Illinois.* — Chicago, etc., R. Co. v. Tracey, 109 Ill. App. 563; Hanson v. Urbana, etc., El. St. R. Co., 75 Ill. App. 474.

*Indiana.* — Citizens St. R. Co. v. Clark, 33 Ind. App. 190.

*Iowa.* — Garvik v. Burlington, etc., R. Co., 124 Iowa 691.

*Michigan.* — Johnson v. Detroit, etc., R. Co., 130 Mich. 453, 9 Detroit Leg. N. 123.

*Missouri.* — O'Donnel v. St. Louis Transit Co., 107 Mo. App. 34; Shaefer v. Missouri Pac. R. Co., 98 Mo. App. 445; Murphy v. St. Louis Transit Co., 96 Mo. App. 272.

*New Jersey.* — Haver v. Central R. Co., 62 N. J. L. 288, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 545.

*New York.* — Moritz v. Interurban St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 162; Foley v. Metropolitan St. R. Co., 80 N. Y. App. Div. 262; Willis v. Metropolitan St. R. Co., 76 N. Y. App. Div. 340; Hart v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 34 Misc. (N. Y.) 521.

*North Carolina.* — Seawell v. Carolina Cent. R. Co., 132 N. Car. 856; Palmer v. Winston-Salem R., etc., Co., 131 N. Car. 250; Williams v. Gill, 122 N. Car. 967.

*Ohio.* — Mahoning Valley R. Co. v. De Pascalle, 70 Ohio St. 179; Cleveland, etc., R. Co. v. McLean, 1 Ohio Cir. Dec. 67.

*Tennessee.* — Louisville, etc., R. Co. v. Ray, 101 Tenn. 1.

*Texas.* — Missouri, etc., R. Co. v. Gaines, (Tex. Civ. App. 1904) 79 S. W. Rep. 1104; Texas, etc., R. Co. v. Tams, (Tex. Civ. App. 1903) 77 S. W. Rep. 230; Houston, etc., R. Co. v. Batchler, 32 Tex. Civ. App. 14; St. Louis Southwestern R. Co. v. Johnson, 29 Tex. Civ. App. 184; Patterson v. Southern Pac. R. Co., 28 Tex. Civ. App. 67; Galveston, etc., R. Co. v. La Puelle, 27 Tex. Civ. App. 496; Texas, etc., R. Co. v. Humphries, 20 Tex. Civ. App. 28; International, etc., R. Co. v. Anderson, 15 Tex. Civ. App. 180.

*West Virginia.* — Smith v. Norfolk, etc., R. Co., 48 W. Va. 60.

**547. 6. Self-defense.** — Birmingham R., etc., Co. v. Baird, 130 Ala. 334, 89 Am. St. Rep. 43; Murphy v. St. Louis Transit Co., 96 Mo. App. 272; Russell v. New York Cent., etc., R. Co., 12 N. Y. App. Div. 160. See Houston, etc., R. Co. v. Pitter, 16 Tex. Civ. App. 482.

**Employing Force to Eject Passenger Who Resists.** — Monnier v. New York Cent., etc., R. Co., 175 N. Y. 281, 96 Am. St. Rep. 619, reversing 70 N. Y. App. Div. 405.

**548. 1. Conduct Justifying Assault.** — City Electric R. Co. v. Shropshire, 101 Ga. 33.

**2. Servant Insulted by Passenger.** — Central of

**549.** (3) *Expulsion*. — See note 3.

**550.** (4) *Insult and Abuse*. — See note 1.

Female Passengers. — See note 2.

**551.** (5) *False Arrest and Imprisonment*. — See note 1.

Evading Payment of Fare. — See note 2.

Passing Counterfeit Money. — See note 3.

**553.** Probable Cause. — See note 1.

*c.* FROM FELLOW PASSENGERS AND THIRD PERSONS — (1) *General Doctrine* — The General Rule. — See note 3.

Georgia R. Co. *v.* Motes, 117 Ga. 923, 97 Am. St. Rep. 223; Georgia R., etc., Co. *v.* Hopkins, 108 Ga. 324, 75 Am. St. Rep. 39. See Georgia R., etc., Co. *v.* Richmond, 98 Ga. 495.

**548.** 3. Birmingham R., etc., Co. *v.* Mullen, 138 Ala. 614; Birmingham R., etc., Co. *v.* Baird, 130 Ala. 334; Hanson *v.* Urbana, etc., El. St. R. Co., 75 Ill. App. 474; Haver *v.* Central R. Co., 64 N. J. L. 312; Palmer *v.* Winston-Salem R., etc., Co., 131 N. Car. 250; Mahoning Valley R. Co. *v.* De Pascale, 70 Ohio St. 179; Cleveland, etc., R. Co. *v.* McLean, 1 Ohio Cir. Dec. 67; Galveston, etc., R. Co. *v.* La Prelle, 27 Tex. Civ. App. 496.

**Mere Words Are Not a Justification.** — Insulting epithets applied by a passenger to a servant do not justify an assault, Williams *v.* Gill, 122 N. Car. 967; even though the language used be indecent, insulting, and provoking, Weber *v.* Brooklyn, etc., R. Co., 47 N. Y. App. Div. 306.

**549.** 3. **Liable for Excessive Violence in Ejecting a Passenger.** — Southern R. Co. *v.* Wildman, 119 Ala. 565; St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47; Kansas City, etc., R. Co. *v.* Holden, 66 Ark. 602; Schaefer *v.* North Chicago St. R. Co., 82 Ill. App. 473; Baltimore, etc., R. Co. *v.* Norris, 17 Ind. App. 189, 60 Am. St. Rep. 166; Huba *v.* Schenectady R. Co., 85 N. Y. App. Div. 199; Hart *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 34 Misc. (N. Y.) 521; Toledo, etc., R. Co. *v.* Marsh, 9 Ohio Cir. Dec. 548, 17 Ohio Cir. Ct. 379; St. Louis Southwestern R. Co. *v.* Johnson, 29 Tex. Civ. App. 184. See also the cases cited *infra*, this title, **607. 1.**

**550.** 1. **Insult and Abuse.** — Georgia R., etc., Co. *v.* Baker, 120 Ga. 991, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 355; Cole *v.* Atlanta, etc., R. Co., 102 Ga. 474; Louisville, etc., R. Co. *v.* Donaldson, (Ky. 1897) 43 S. W. Rep. 439; Gillespie *v.* Brooklyn Heights R. Co., 178 N. Y. 347, 102 Am. St. Rep. 503; Knoxville Traction Co. *v.* Lane, 103 Tenn. 376; San Antonio Traction Co. *v.* Crawford, (Tex. Civ. App. 1902) 71 S. W. Rep. 306; Texas, etc., R. Co. *v.* Tarkington, 27 Tex. Civ. App. 353. But see Grayson *v.* St. Louis Transit Co., 100 Mo. App. 60.

**Not Liable for Mere Rudeness.** — Daniels *v.* Florida Cent., etc., R. Co., 62 S. Car. 1.

**2. Insulting Proposal Induced by Passenger's Immodest Remarks.** — The fact that a passenger's immodest remarks encourage the conductor to make an improper proposal does not relieve the carrier of liability for the insult, but it may be considered in mitigation of damages. Strother *v.* Aberdeen, etc., R. Co., 123 N. Car. 197.

**551.** 1. **Arrest Contrary to Orders of Carrier.** — A carrier has been held liable for the false

arrest and imprisonment of a passenger at the instance of a servant, although the carrier had instructed the servant not to make the arrest. Gulf, etc., R. Co. *v.* Conder, 23 Tex. Civ. App. 488.

**2. Evading Payment of Fare — Arrest.** — Grayson *v.* St. Louis Transit Co., 100 Mo. App. 60. **Master of Vessel Placing Passenger under Restraint.** — Trabling *v.* California Nav., etc., Co., 121 Cal. 137.

**3. Arrest on Charge of Passing Counterfeit Money.** — St. Louis Southwestern R. Co. *v.* Franklin, (Tex. Civ. App. 1898) 44 S. W. Rep. 701.

**553.** 1. **Probable Cause Is a Defense.** — Dierig *v.* South Covington, etc., St. R. Co., 72 S. W. Rep. 355, 24 Ky. L. Rep. 1825; Clark *v.* Louisville, etc., R. Co., (Ky. 1899) 49 S. W. Rep. 1120; Bacon *v.* Casco Bay Steamboat Co., 90 Me. 46.

**3. General Rule as to Protection from Fellow Passengers and Third Persons — Arkansas.** — Texarkana, etc., R. Co. *v.* Anderson, 67 Ark. 123.

Georgia. — Savannah, etc., R. Co. *v.* Boyle, 115 Ga. 838, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 553.

Indiana. — Indianapolis St. R. Co. *v.* Dawson, 31 Ind. App. 605.

Kansas. — Spangler *v.* St. Joseph, etc., R. Co., 68 Kan. 46, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 553.

Kentucky. — Louisville, etc., R. Co. *v.* McEwan, (Ky. 1899) 51 S. W. Rep. 619.

Maryland. — United R., etc., Co. *v.* State, 93 Md. 619, 86 Am. St. Rep. 453; Tall *v.* Baltimore Steam Packet Co., 90 Md. 254, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 553.

Michigan. — Cross *v.* Detroit Citizens' St. R. Co., 120 Mich. 137.

New Jersey. — Partridge *v.* Woodland Steamboat Co., 66 N. J. L. 290; Hansen *v.* North Jersey St. R. Co., 64 N. J. L. 686.

New York. — Koch *v.* Brooklyn Heights R. Co., 75 N. Y. App. Div. 282.

North Carolina. — Seawell *v.* Carolina Cent. R. Co., 132 N. Car. 856.

Texas. — St. Louis Southwestern R. Co. *v.* Wright, (Tex. Civ. App. 1903) 75 S. W. Rep. 565; International, etc., R. Co. *v.* Giesen, (Tex. Civ. App. 1902) 69 S. W. Rep. 653; Houston, etc., R. Co. *v.* Phillio, 96 Tex. 18, 97 Am. St. Rep. 868; Thweatt *v.* Houston-East, etc., R. Co., 31 Tex. Civ. App. 227, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 553.

Canada. — Canadian Pac. R. Co. *v.* Blain, 34 Can. Sup. Ct. 79, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 553.

**Opportunity to Know of Threatened Injury.** — Stutsky *v.* Brooklyn Heights R. Co., (Supm.

- 555.** (3) *Assaults*. — See note 2.  
**556.** (4) *Accidental Injuries*. — See note 2.  
**557.** *Illustrations*. — See note 2.

Ct. App. T.) 88 N. Y. Supp. 358. See *Fritz v. Southern R. Co.*, 132 N. Car. 829.

A carrier is not liable for the expulsion of a passenger by fellow passengers unless the servants of the carrier knew, or in the exercise of proper care could have known, of the threatened injury and could have prevented it. *Lake Erie, etc.*, R. Co. v. Arnold, 26 Ind. App. 190.

**Duty to Protect from Mobs.** — *Bosworth v. Union R. Co.*, 26 R. I. 309; *Bosworth v. Union R. Co.*, 25 R. I. 202.

**Duty to Protect from Violence of Strikers.** — A street railway company is not, as to its passengers, guilty of negligence in attempting to operate its cars during a strike of its employees, unless the conditions are such that it ought to know, or ought reasonably to anticipate, that it cannot do so and at the same time guard from violence by the exercise of the utmost care on its part those who accept its implied invitation to become passengers. *Fewings v. Mendenhall*, 83 Minn. 237.

**Arrest of Passenger by Officers of the Law.** — The servants of a carrier are not bound to resist known officers of the law to prevent a wrongful arrest of a passenger. *Owens v. Wilmington, etc.*, R. Co., 126 N. Car. 139, 78 Am. St. Rep. 642. See *Brunswick, etc.*, R. Co. v. Ponder, 117 Ga. 63, 97 Am. St. Rep. 152.

**Degree of Care — High Degree of Care.** — *Bosworth v. Union R. Co.*, 25 R. I. 202. But see *Fewings v. Mendenhall*, 88 Minn. 336, wherein it is said that as respects the acts of strangers who are not within the control of the carrier, the carrier is liable to the exercise of only ordinary care and prudence.

**555. 2. Assaults — Due Care.** — *Lake Erie, etc.*, R. Co. v. Arnold, 26 Ind. App. 190; *Spangler v. St. Joseph, etc.*, R. Co., 68 Kan. 51, citing 5 AM. & ENG. ENCYC. OF LAW (2d ed.) 553; *Koch v. Brooklyn Heights R. Co.*, 75 N. Y. App. Div. 282; *Thweatt v. Houston East, etc.*, R. Co., 31 Tex. Civ. App. 227, quoting 5 AM. & ENG. ENCYC. OF LAW (2d ed.) 555; *Texas, etc.*, R. Co. v. Dick, 26 Tex. Civ. App. 256; *Canadian Pac. R. Co. v. Blain*, 34 Can. Sup. Ct. 74; *Blain v. Canadian Pac. R. Co.*, 5 Ont. L. Rep. 334.

**Assault upon a Passenger by an Intruder.** — A carrier has been held not to be liable for an unforeseen assault upon a woman passenger by an intruder while the trainmen were absent from the car. *Segal v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 233.

**Assault on Woman Passenger in Waiting Room by Intruder** was held not to charge the carrier with liability, it not appearing that the carrier could have foreseen or prevented such assault. *Prokop v. Gulf, etc.*, R. Co., (Tex. Civ. App., 1904) 70 S. W. Rep. 101.

**Assault on Passenger at Carrier's Park.** — *Indianapolis St. R. Co. v. Dawson*, 31 Ind. App. 605.

**556. 2. Accidental Injuries.** — *Tall v. Baltimore Steam Packet Co.*, 90 Md. 248.

**Accidental Shooting of Passenger in Fight Be-**

**tween Fellow Passenger and Trainmen.** — *Penny v. Atlantic Coast Line R. Co.*, 133 N. Car. 221.

**Passenger Accidentally Hit by Shot from Rifle Range Maintained Near Track.** — *Dufur v. Boston, etc.*, R. Co., 75 Vt. 165.

**Hackmen Scuffling at Entrance of Station.** — *Exton v. Central R. Co.*, 62 N. J. L. 7, affirmed without opinion 63 N. J. L. 356.

**Signal to Start Given by Unauthorized Person.** — *Leavenworth Electric R. Co. v. Cusick*, 60 Kan. 590; *Krone v. Southwest Missouri Electric R. Co.*, 97 Mo. App. 609, holding the carrier not to be liable; *McDonough v. Third Ave. R. Co.*, 95 N. Y. App. Div. 311, holding the carrier not to be liable. *Compare Nichols v. Lynn, etc.*, R. Co., 168 Mass. 528, holding that evidence tending to show a custom of passengers on the defendant's road to give the signals for stopping and starting car is admissible, on the ground that it bears directly upon the question of due care in permitting, or failing to guard against, such acts.

**Explosion of Fireworks Carried into Car by Fellow Passengers.** — A carrier is liable for injuries sustained by a passenger in consequence of the explosion of fireworks carried into a car by fellow passengers only if the carrier was negligent in permitting the fireworks to be carried into the car. *East Indian R. Co. v. Mukerjee*, (1901) A. C. 396, 70 L. J. P. C. 63, 84 L. T. N. S. 210.

**Explosion of Can of Gasoline Carried by Fellow Passenger.** — Where a passenger was injured by the explosion of a can of gasoline carried by a fellow passenger, it was held that the carrier was not liable in the absence of any circumstance tending to show that any official of the road knew that the can contained gasoline, or even knew that the can was on the car, or that the exercise of any reasonable degree of care and vigilance, had such official known of the situation of the can, would have required him to investigate its contents, under the circumstances of the case. *Clarke v. Louisville, etc.*, R. Co., (Ky. 1899) 49 S. W. Rep. 1120.

**Injury to Passenger from Being Jostled by Fellow Passengers.** — *Fritz v. Southern R. Co.*, 132 N. Car. 829.

**Collision of Passenger with Fellow Passenger Who Is Being Ejected.** — It has been held that a carrier was not liable for injuries received by a woman passenger in consequence of a drunken passenger colliding with her as he was being ejected by the conductor, who ejected him as soon as he became obnoxious to the other passengers. *Cobb v. Boston El. R. Co.*, 179 Mass. 212. See *Spade v. Lynn, etc.*, R. Co., 172 Mass. 488, 70 Am. St. Rep. 298.

**The Swinging of a Station Door Against a Passenger by a Fellow Passenger** is an act for which the carrier ordinarily cannot be held liable. *Kiernan v. Manhattan R. Co.*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 516.

**557. 2. Accidental Discharge of Gun by Fellow Passenger.** — Where a passenger was injured by the accidental discharge of a gun in the hands of a fellow passenger, who was one

**557.** (5) *Indecent Language and Conduct.* — See note 5.

**558.** (6) *As to Drunken Passengers.* — See note 1.

**5.** *Duty in the Carriage of Passengers* — *a.* **DEGREE OF CARE TO BE EXERCISED** — (1) *Rule Stated Generally* — See note 6.

**559.** *Care Proportionate to Nature and Risks of Business.* — See note 1.

**560.** *Not Liable as Insurers.* — See note 1.

(2) *Special Rules and Modifications* — **Utmost Care and Human Foresight.** — See note 3.

of a crowd of passengers who were amusing themselves, with the consent of those in charge of the boat, by firing at objects in the water, a verdict for the plaintiff was sustained. *West Memphis Packet Co. v. White*, 99 Tenn. 256.

**557. 5. Indecent Language and Conduct of Fellow Passengers.** — *Southern R. Co. v. O'Bryan*, 112 Ga. 127; *Texas etc., R. Co. v. Bratcher* (Tex. Civ. App. 1904) 78 S. W. Rep. 531; *St. Louis Southwestern R. Co. v. Wright* (Tex. Civ. App. 1903) 75 S. W. Rep. 565; *Texas, etc., R. Co. v. Kingston*, 30 Tex. Civ. App. 24; *Duck v. St. Louis, etc., R. Co.*, (Tex. Civ. App. 1901) 63 S. W. Rep. 891; *Texas, etc., R. Co. v. Hughes* (Tex. Civ. App. 1897) 41 S. W. Rep. 821; *Missouri, etc., R. Co. v. Ball*, 25 Tex. Civ. App. 500; *Houston East, etc., R. Co. v. Perkins*, 21 Tex. Civ. App. 568; *Collins v. Texas, etc., R. Co.*, 15 Tex. Civ. App. 169.

**Mistreatment of Colored Passenger by White Passengers in Coach Set Aside for Colored Passengers.** — See *Bailey v. Louisville, etc., R. Co.*, (Ky. 1898) 44 S. W. Rep. 105. A railroad carrier whose agents permit white passengers to remain in a compartment set apart for colored passengers is responsible for their conduct so long as they remain there, and is liable for the annoyance or insult sustained by a colored passenger as a result thereof, although its employees do not know what is taking place. *Wood v. Louisville, etc., R. Co.*, 101 Ky. 703.

**558. 1. Drunken Passengers.** — *Louisville, etc., R. Co. v. McEwan*, (Ky. 1899) 51 S. W. Rep. 619; *United R., etc., Co. v. State*, 93 Md. 619, 86 Am. St. Rep. 453.

**6. General Statement of Rule.** — *McAllister v. People's R. Co.*, 4 Penn. (Del.) 272; *Le Blanc v. Sweet*, 107 La. 368, 90 Am. St. Rep. 303, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 558; *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 558; *Ft. Worth, etc., R. Co. v. Enos*, (Tex. Civ. App. 1898) 50 S. W. Rep. 595.

**Nature of Motive Power Immaterial.** — The degree of care required of carriers of passengers is the same whether the motive power be steam or electricity. *McAllister v. People's R. Co.*, 4 Penn. (Del.) 272.

**559. 1.** *North Chicago St. R. Co. v. Polkey*, 203 Ill. 225.

**Particular Circumstances.** — *Carroll v. Charleston, etc., R. Co.*, 65 S. Car. 378.

**560. 1. Liability as Insurers** — *Delaware.* — *McAllister v. People's R. Co.*, 4 Penn. (Del.) 272.

*Illinois.* — *Chicago, etc., R. Co. v. Murphy*, 198 Ill. 462, affirming 99 Ill. App. 126; *Merchant v. South Chicago City R. Co.*, 104 Ill. App. 122; *Pennsylvania R. Co. v. Greso*, 102 Ill. App. 252.

*Indiana.* — *Ferguson v. Citizens St. R. Co.*, 16 Ind. App. 171.

*Iowa.* — *Fitch v. Mason City, etc., Traction Co.*, 124 Iowa 665; *Cronk v. Wabash R. Co.*, 123 Iowa 349.

*Kansas.* — *Missouri, etc., R. Co. v. Orton*, 67 Kan. 848.

*Massachusetts.* — *Stoddard v. New York, etc., R. Co.*, 181 Mass. 422; *Harriman v. Reading, etc., St. R. Co.*, 173 Mass. 28.

*Minnesota.* — *Fewings v. Mendenhall*, 88 Minn. 336, 97 Am. St. Rep. 519.

*Missouri.* — *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597; *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573; *Freeman v. Metropolitan St. R. Co.*, 95 Mo. App. 314.

*Montana.* — *Taillon v. Mears*, 29 Mont. 161.

*New York.* — *Stutsky v. Brooklyn Heights R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 358; *McDonough v. Third Ave. R. Co.*, 95 N. Y. App. Div. 311; *Shadletsky v. New York City R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1014; *Leonard v. Brooklyn Heights R. Co.*, 57 N. Y. App. Div. 125.

*North Carolina.* — *Owens v. Wilmington, etc., R. Co.*, 126 N. Car. 139, 78 Am. St. Rep. 642.

*Tennessee.* — *West Memphis Packet Co. v. White*, 99 Tenn. 256.

*Texas.* — *Tyler v. Texas, etc., R. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1075; *Houston Electric Co. v. Nelson*, (Tex. Civ. App. 1903) 77 S. W. Rep. 978; *St. Louis Southwestern R. Co. v. Byers*, (Tex. Civ. App. 1902) 70 S. W. Rep. 558; *Martin v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1900) 56 S. W. Rep. 1011; *Houston, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5; *Missouri, etc., R. Co. v. Scarborough*, (Tex. Civ. App. 1899) 51 S. W. Rep. 356; *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203; *St. Louis Southwestern R. Co. v. McCullough*, 18 Tex. Civ. App. 534; *Missouri, etc., R. Co. v. McElree*, 16 Tex. Civ. App. 182; *Houston, etc., R. Co. v. Norris*, (Tex. Civ. App. 1897) 41 S. W. Rep. 708; *Missouri, etc., R. Co. v. Miller*, 15 Tex. Civ. App. 428; *Texas, etc., R. Co. v. Woods*, 15 Tex. Civ. App. 612.

*Washington.* — *Johnson v. Seattle Electric Co.*, 35 Wash. 382; *Foster v. Seattle Electric Co.*, 35 Wash. 177; *Clukey v. Seattle Electric Co.*, 27 Wash. 70.

**Rule under Nebraska Statute.** — *Clark v. Russell*, (C. C. A.) 97 Fed. Rep. 900; *Clark v. Zarniko*, (C. C. A.) 106 Fed. Rep. 607, construing the Nebraska statute (see the cases cited *supra* this title, **480**). 3. *Liability under Nebraska Statute* making the carriers liable for all injuries to passengers except under certain circumstances.

**3. Utmost Care and Foresight** — *District of Columbia.* — *Kight v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494; *Metropolitan R. Co. v. Falvey*, 5 App. Cas. (D. C.) 176.

**561. Highest Degree of Care.** — See note 1.

Extraordinary Care. — See note 2.

**562. More than Ordinary Care.** — See note 1.

Slight Negligence. — See note 2.

Care of Prudent Person as Criterion. — See note 3.

*Mississippi.* — Yazoo, etc., R. Co. v. Humphrey, 83 Miss. 721.

*Missouri.* — Holland v. St. Louis, etc., R. Co., 105 Mo. App. 117; Becker v. Lincoln Real Estate, etc., Co., 174 Mo. 246; Fillingham v. St. Louis Transit Co., 102 Mo. App. 573.

*New York.* — Schlotterer v. Brooklyn, etc., Ferry Co., 75 N. Y. App. Div. 330; Bartnik v. Erie R. Co., 36 N. Y. App. Div. 246; Keegari v. Third Ave. R. Co., 34 N. Y. App. Div. 297, affirmed 165 N. Y. 622. Compare Zvonik v. Interurban St. R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 399.

*Tennessee.* — West Memphis Packet Co. v. White, 99 Tenn. 256; Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 115.

*Texas.* — Ft. Worth, etc., R. Co. v. Rogers, 24 Tex. Civ. App. 382; Gulf, etc., R. Co. v. Brown, 16 Tex. Civ. App. 93.

*Virginia.* — Norfolk, etc., R. Co. v. Tanner, 100 Va. 379; Norfolk, etc., R. Co. v. Morris, 101 Va. 422.

*Washington.* — Brown v. Seattle City R. Co., 16 Wash. 465.

**All the Care and Skill Which Human Prudence and Foresight Can Suggest.** — Zimmer v. Third Ave. R. Co., 36 N. Y. App. Div. 265.

**Criticisms of the Rule Requiring the Utmost Care.** — It has been said that expressions which require carriers to exert the "utmost care and prudence" in carrying passengers are misleading if not erroneous. Wanzer v. Chippewa Valley Electric R. Co., 108 Wis. 319.

In Freeman v. Metropolitan St. R. Co., 95 Mo. App. 94, it was held that an instruction requiring of a carrier "the exercise of the utmost human skill, diligence, and foresight" was erroneous.

And in McCarty v. Houston, etc., R. Co., 21 Tex. Civ. App. 568, it was declared to be error to instruct a jury that a carrier is required to exercise the "utmost degree of care."

**561. 1. Highest Care** — *Alabama.* — Southern R. Co. v. Crowder, 130 Ala. 256.

*Arkansas.* — St. Louis, etc., R. Co. v. Farr, 70 Ark. 264.

*California.* — Osgood v. Los Angeles Traction Co., 137 Cal. 280, 92 Am. St. Rep. 171; McCurrie v. Southern Pac. R. Co., 122 Cal. 558.

*District of Columbia.* — City, etc., R. Co. v. Svedborg, 20 App. Cas. (D. C.) 543, affirmed 194 U. S. 201.

*Illinois.* — Chicago, etc., R. Co. v. Murphy, 198 Ill. 462, affirming 99 Ill. App. 126.

*Indiana.* — Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602.

*Kansas.* — Metropolitan St. R. Co. v. Hanson, 67 Kan. 256.

*Missouri.* — Ilges v. St. Louis Transit Co., 102 Mo. App. 529; Tillman v. St. Louis Transit Co., 102 Mo. App. 553.

*Ohio.* — Holmes v. Ashtabula Rapid Transit Co., 10 Ohio Cir. Dec. 638; Pittsburg, etc., R. Co. v. Martin, 3 Ohio Dec. 493.

*South Carolina.* — Shealey v. South Carolina,

etc., R. Co., 67 S. Car. 61; Carroll v. Charleston, etc., R. Co., 65 S. Car. 378.

*Texas.* — International, etc., R. Co., v. Shuford, (Tex. Civ. App. 1904) 81 S. W. Rep. 1189; Citizens' R. Co. v. Craig, (Tex. Civ. App. 1902) 69 S. W. Rep. 239; Houston, etc., R. Co. v. George, (Tex. Civ. App. 1901) 60 S. W. Rep. 313.

*Washington.* — Clukey v. Seattle Electric Co., 27 Wash. 70.

**Criticisms of the Rule Requiring the Highest Degree of Care.** — In Williams v. International, etc., R. Co., 28 Tex. Civ. App. 503, the correctness of the expression "requiring the highest degree of care" questioned. And in Alabama Midland R. Co. v. Guilford, 119 Ga. 523, an instruction was held erroneous which stated that the law requires the "highest degree of care and diligence known to skilled persons engaged in that business."

**2. Extraordinary Care.** — Augusta R., etc., Co. Smith, 121 Ga. 29; Brunswick, etc., R. Co. v. Ponder, 117 Ga. 63, 97 Am. St. Rep. 152; Atlanta R. Co. v. Randall, 117 Ga. 165; Southern R. Co. v. Reeves, 116 Ga. 743; Central of Georgia R. Co. v. Lippman, 110 Ga. 665; Florida Cent., etc., R. Co. v. Lucas, 110 Ga. 121; Macon, etc., R. Co. v. Moore, 108 Ga. 84; Sanders v. Southern R. Co., 107 Ga. 132; Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 64 Am. St. Rep. 35; Richmond Traction Co. v. Williams, 102 Va. 253.

**A Very High Degree of Care.** — Stiner v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 285; Leonard v. Brooklyn Heights R. Co., 57 N. Y. App. Div. 125; Koehne v. New York, etc., R. Co., 32 N. Y. App. Div. 419, affirmed without opinion 165 N. Y. 603.

**Great Care and Caution.** — Dallas Consol. Electric St. R. Co. v. Broadhurst, 28 Tex. Civ. App. 630.

**562. 1. More than Ordinary Care.** — Lincoln St. R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736; Lansing v. Coney Island, etc., R. Co., 16 N. Y. App. Div. 146; Payne v. Spokane St. R. Co., 15 Wash. 522. Compare Izlar v. Manchester, etc., R. Co., 57 S. Car. 335.

**A Very Considerable Degree of Care.** — Shay v. Camden, etc., R. Co., 66 N. J. L. 334.

**2. Slight Negligence.** — Sambuck v. Southern Pac. R. Co., 138 Cal. xix, 71 Pac. Rep. 174; Metropolitan R. Co. v. Falvey, 5 App. Cas. (D. C.) 176; Indianapolis St. R. Co. v. Hockett, 159 Ind. 677; Holland v. St. Louis, etc., R. Co., 105 Mo. App. 117; Moorman v. Atchison, etc., R. Co., 105 Mo. App. 711; Goldsmith v. Holland Bldg. Co., 182 Mo. 597; Sweeney v. Kansas City Cable R. Co., 150 Mo. 385; Fillingham v. St. Louis Transit Co., 102 Mo. App. 573.

**Slightest Negligence.** — In instructions to juries a court should avoid saying that the carrier is liable for the "slightest neglect or negligence." Magrane v. St. Louis, etc., R. Co., 183 Mo. 119.

**3. Care of Prudent Man as Criterion** — *United*

**562.** Highest Degree of Care of Very Cautious Persons. — See note 4.

**563.** Care Used by Good Railroad Men as Criterion. — See note 1.

Care Consistent with Practical Operation of Road. — See note 2.

*States.* — *Trumbull v. Erickson*, (C. C. A.) 97 Fed. Rep. 891.

*Illinois.* — *Elwood v. Chicago City R. Co.*, 90 Ill. App. 397.

*Kentucky.* — *H. B. Phillips Co. v. Pruitt*, (Ky. 1904) 82 S. W. Rep. 628; *Louisville R. Co. v. Meglemery*, 78 S. W. Rep. 217, 25 Ky. L. Rep. 1587, rehearing denied (Ky. 1904) 79 S. W. Rep. 287; *South Covington, etc., St. R. Co. v. Constans*, 74 S. W. Rep. 705, 25 Ky. L. Rep. 158; *Davis v. Paducah R., etc., Co.*, 113 Ky. 267; *Brown v. Louisville R. Co.*, (Ky. 1899) 53 S. W. Rep. 1041; *Lutz v. Louisville R. Co.*, (Ky. 1899) 48 S. W. Rep. 1080; *Cincinnati, etc., R. Co. v. Vivion*, (Ky. 1897) 41 S. W. Rep. 580.

*Missouri.* — *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597; *Magrane v. St. Louis, etc., R. Co.*, 183 Mo. 119; *Allen v. St. Louis Transit Co.*, 183 Mo. 411; *Mathew v. Wabash R. Co.*, (Mo. App. 1903) 78 S. W. Rep. 271; *Robinson v. St. Louis, etc., R. Co.*, 103 Mo. App. 110; *Posch v. Southern Electric R. Co.*, 76 Mo. App. 601; *Parker v. Metropolitan St. R. Co.*, 69 Mo. App. 54; *Olsen v. Citizens R. Co.*, 152 Mo. 426; *Cobb v. Lindell R. Co.*, 149 Mo. 135; *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573; *Muth v. St. Louis, etc., R. Co.*, 87 Mo. App. 422; *Fullerton v. St. Louis, etc., R. Co.*, 84 Mo. App. 498.

*Ohio.* — *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45.

*Rhode Island.* — *Bosworth v. Union R. Co.*, 25 R. I. 202.

*Texas.* — *St. John v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 235; *Tyler v. Texas, etc., R. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1075; *Missouri, etc., R. Co. v. Flood*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1106; *Hardin v. Ft. Worth, etc., R. Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 431; *Houston Electric Co. v. Nelson*, (Tex. Civ. App. 1903) 77 S. W. Rep. 978; *St. Louis Southwestern R. Co. v. Harrison*, 32 Tex. Civ. App. 368; *Chicago, etc., R. Co. v. Buie*, 31 Tex. Civ. App. 654; *Gulf, etc., R. Co. v. Carter*, (Tex. Civ. App. 1902) 71 S. W. Rep. 73; *Arrington v. Texas, etc., R. Co.*, (Tex. Civ. App. 1902) 70 S. W. Rep. 551; *Knauff v. San Antonio Traction Co.*, (Tex. Civ. App. 1902) 70 S. W. Rep. 1011; *St. Louis Southwestern R. Co. v. Campbell*, 30 Tex. Civ. App. 35; *Williams v. International, etc., R. Co.*, 28 Tex. Civ. App. 503; *St. Louis Southwestern R. Co. v. Ferguson*, 26 Tex. Civ. App. 460; *Texas Midland R. Co. v. Brown*, (Tex. Civ. App. 1900) 58 S. W. Rep. 44; *San Antonio, etc., R. Co. v. Lynch*, (Tex. Civ. App. 1900) 55 S. W. Rep. 517; *McCarty v. Houston, etc., R. Co.*, 21 Tex. Civ. App. 568; *Parvin v. International, etc., R. Co.*, (Tex. Civ. App. 1899) 54 S. W. Rep. 638; *Missouri, etc., R. Co. v. Scarborough*, (Tex. Civ. App. 1899) 51 S. W. Rep. 356; *International, etc., R. Co. v. Williams*, 20 Tex. Civ. App. 587; *St. Louis Southwestern R. Co. v. Humphreys*, 25 Tex. Civ. App. 401; *Missouri, etc., R. Co. v. White*, 22 Tex. Civ. App. 424; *St. Louis Southwestern R. Co. v. McCullough*, 18 Tex. Civ. App. 534;

*Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93; *Houston, etc., R. Co. v. Dotson*, 15 Tex. Civ. App. 73. See *Pecos, etc., R. Co. v. Williams*, (Tex. Civ. App. 1903) 78 S. W. Rep. 5; *Central Texas, etc., R. Co. v. Smith*, (Tex. Civ. App. 1903) 73 S. W. Rep. 537; *St. Louis Southwestern R. Co. v. Byers*, (Tex. Civ. App. 1902) 70 S. W. Rep. 558; *Durnett v. Gulf City R., etc., Co.*, (Tex. Civ. App. 1896) 37 S. W. Rep. 336. Compare *Houston East, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5.

*Utah.* — *Major v. Oregon Short Line R. Co.*, 21 Utah 146.

**562. 4. Care of Very Cautious Person.** — *Bosqui v. Sutro R. Co.*, 131 Cal. 390; *Sweeney v. Kansas City Cable R. Co.*, 150 Mo. 385; *International, etc., R. Co. v. Clark*, (Tex. Civ. App. 1904) 81 S. W. Rep. 821; *St. Louis Southwestern R. Co. v. Campbell*, 30 Tex. Civ. App. 35.

**Extreme Care and Caution.** — An instruction that a carrier is bound to exercise that "extreme care and caution which very prudent persons exercise in securing and preserving their own property" has been held not to be erroneous. *Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212.

**563. 1. Usual Mode of Managing Railways.** — *Grace v. St. Louis R. Co.*, 156 Mo. 295; *Heyde v. St. Louis Transit Co.*, 102 Mo. App. 537; *Posch v. Southern Electric R. Co.*, 76 Mo. App. 601. See *Lee v. Knapp*, 155 Mo. 610.

**2. Illinois.** — *Cleveland, etc., R. Co. v. Scott*, 111 Ill. App. 234; *Burke v. Chicago, etc., R. Co.*, 108 Ill. App. 565; *Chicago Union Traction Co. v. Kalberg*, 107 Ill. App. 90; *Winheim v. Field*, 107 Ill. App. 145; *West Chicago St. R. Co. v. Winters*, 107 Ill. App. 221; *Chicago Union Traction Co. v. Mommsen*, 107 Ill. App. 553; *Illinois Southern R. Co. v. Hubbard*, 106 Ill. App. 462; *Chicago, etc., R. Co. v. Bundy*, 210 Ill. 39; *Chicago City R. Co. v. Carroll*, 206 Ill. 318, *affirming* 102 Ill. App. 202; *North Chicago St. R. Co. v. Polkey*, 203 Ill. 225; *Lake St. El. R. Co. v. Burgess*, 200 Ill. 628; *Chicago, etc., R. Co. v. Murphy*, 198 Ill. 462, *affirming* 99 Ill. App. 126; *Chicago Exch. Bldg. Co. v. Nelson*, 197 Ill. 334; *West Chicago St. R. Co. v. Kromshinsky*, 185 Ill. 92, *affirming* 86 Ill. App. 17; *West Chicago St. R. Co. v. Johnson*, 180 Ill. 285, *affirming* 77 Ill. App. 142; *Pennsylvania Co. v. Greso*, 102 Ill. App. 252; *Kane v. Cicero, etc., Electric R. Co.*, 100 Ill. App. 181; *Chicago, etc., R. Co. v. Weeks*, 99 Ill. App. 518, *affirmed* 198 Ill. 551; *Chicago City R. Co. v. Morse*, 98 Ill. App. 662, *affirmed* 197 Ill. 327; *Field v. French*, 80 Ill. App. 78; *Pennsylvania Co. v. Greso*, 79 Ill. App. 127; *Western Union Tel. Co. v. Woods*, 88 Ill. App. 375; *West Chicago St. R. Co. v. Luka*, 72 Ill. App. 60.

*Indiana.* — *Citizens St. R. Co. v. Merl*, 26 Ind. App. 284.

*Iowa.* — *Larkin v. Chicago, etc., R. Co.*, 118 Iowa 652.

*Louisiana.* — *Clerc v. Morgan's Louisiana, etc., R., etc., Co.*, 107 La. 370, 90 Am. St. Rep. 319.

*Minnesota.* — See *Fewings v. Mendenhall*, 88 Minn. 336, 97 Am. St. Rep. 519.

**563.** Sick and Feeble Passengers. — See note 4.

**564.** Intoxicated Passengers. — See note 2.

Ordinary Care — When Sufficient. — See note 3.

**565.** *b.* DUTY TO ANNOUNCE STATIONS. — See notes 1, 2.

Effect of Stoppage After Announcement of Station. — See note 3.

**566.** *c.* DUTY TO STOP AT STATIONS — (1) *In General.* — See notes 1, 2.

*Nebraska.* — Lincoln St. R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736.

*Pennsylvania.* — Palmer v. Warren St. R. Co., 206 Pa. St. 574.

*Texas.* — St. Louis Southwestern R. Co. v. Parks, 97 Tex. 131.

*Washington.* — Foster v. Seattle Electric Co., 35 Wash. 177.

*Wisconsin.* — Wanzer v. Chippewa Valley Electric R. Co., 108 Wis. 319.

**The Highest Practicable Care.** — Chicago Terminal Transfer R. Co. v. Schmelling, 197 Ill. 619; Crump v. Davis, 33 Ind. App. 88; Terre Haute, etc., R. Co. v. Sheeks, 155 Ind. 74; Indianapolis St. R. Co. v. Brown, 32 Ind. App. 130.

A carrier of passengers is bound to exercise the "highest degree of care consistent with the practical conduct of its business." Johnson v. Seattle Electric Co., 35 Wash. 382.

**The Highest Degree of Care Reasonably Practicable.** — Logan v. Metropolitan St. R. Co., 183 Mo. 582.

**All the Care and Skill that Is Reasonably Practicable.** — Feary v. Metropolitan St. R. Co., 162 Mo. 75.

**Highest Care Consistent with the Undertaking.** — Galligan v. Old Colony St. R. Co., 182 Mass. 211.

**Freight and Mixed Trains.** — Southern R. Co. v. Crowder, 130 Ala. 256; Western Maryland R. Co. v. State, 95 Md. 637; Steele v. Southern R. Co., 55 S. Car. 389, 74 Am. St. Rep. 756. See *infra*, this title, **589**. 4.

**563. 4. Sick and Infirm Passengers.** — See Mathew v. Wabash R. Co., (Mo. App. 1903) 78 S. W. Rep. 271.

**564. 2. Intoxicated Passengers.** — Wheeler v. Grand Trunk R. Co., 70 N. H. 607. See Cutler v. Concord, etc., R. Co., 69 N. H. 641.

**3. Passenger Awaiting Departure of Train.** — Georgia, etc., R. Co. v. Brown, 120 Ga. 380.

**Equipment of Street Cars with Curtains.** — It has been said, in effect, that the high degree of care generally exacted of carriers of passengers need not be exercised in the equipment of street cars with curtains. Leyh v. Newburgh Electric R. Co., 41 N. Y. App. Div. 218, *affirmed* without opinion 168 N. Y. 667.

**Management of Street Car.** — It has been held in *New York* that in attempting to move or switch his car from one track to another in crossing a bridge, the driver of a horse car was only bound to use that skill and care which would be required of an ordinarily careful and prudent man. Stierle v. Union R. Co., 156 N. Y. 70, O'Brien and Vann, JJ., *dissenting* (*rehearing denied* 156 N. Y. 684). See Kelly v. Metropolitan St. R. Co., 89 N. Y. App. Div. 159; Merrill v. Metropolitan St. R. Co., 73 N. Y. App. Div. 401; Regensburg v. Nassau Electric R. Co., 48 N. Y. App. Div. 566.

And it has been held that only a high degree of care need be exercised in the management

of a street car as it is about to pass an approaching wagon, and that it was error to charge the jury that the carrier was bound to exercise "the highest degree of care and skill which human foresight could provide." Conway v. Brooklyn Heights R. Co., 82 N. Y. App. Div. 516.

**565. 1. Duty to Announce Station.** — Simmons v. Seaboard Air-Line R. Co., 120 Ga. 225; Southern R. Co. v. Hobbs, 118 Ga. 232; Southern R. Co. v. O'Bryan, 115 Ga. 659; Owens v. Wabash R. Co., 84 Mo. App. 143; Deming v. Chicago, etc., R. Co., 80 Mo. App. 152, 2 Mo. App. Rep. 547; Englehaupt v. Erie R. Co., 209 Pa. St. 182; Louisville, etc., R. Co. v. Collier, 104 Tenn. 189; Houston, etc., R. Co. v. Goodyear, 28 Tex. Civ. App. 206; Missouri, etc., R. Co. v. Miller, 20 Tex. Civ. App. 570; Central Texas, etc., R. Co. v. Hoard, (Tex. Civ. App. 1898) 49 S. W. Rep. 142. See Case v. Delaware, etc., R. Co., 191 Pa. St. 450.

**Duty to Announce Changes of Cars.** — Chicago, etc., R. Co. v. Spirk, 51 Neb. 167.

**Personal Notice to Passengers Not Necessary.** — Houston, etc., R. Co. v. Cohn, 22 Tex. Civ. App. 11.

**Deaf Passenger.** — The duty of the carrier as to announcing stations is performed when the name of a station is announced clearly and distinctly, and the carrier is not responsible for the mistake of a passenger who is deaf getting off at the wrong station, the carrier having no knowledge of the deafness. Texas Midland R. Co. v. Terry, 27 Tex. Civ. App. 341.

**Conductor's Promise to Give Passenger Special Notice.** — It has been held that a conductor's promise to give a passenger special notice when the station for changing cars is reached is not within the scope of his authority and therefore is not binding on the carrier. St. Louis Southwestern R. Co. v. McCullough, 18 Tex. Civ. App. 534.

**2. Southern R. Co. v. Hobbs, 118 Ga. 231, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 565.**

**3. Stoppage After Announcement of Station.** — St. Louis, etc., R. Co. v. Farr, 70 Ark. 264, holding that, under the circumstances, a passenger was justified in alighting; Cincinnati, etc., R. Co. v. Worthington, 30 Ind. App. 663, *rehearing denied* 30 Ind. App. 669; Coe v. Louisville, etc., R. Co., 78 S. W. Rep. 439, 25 Ky. L. Rep. 1679. See also *infra*, this title, **663**. 1.

Where the station is announced according to custom on approaching the station and while the train is in rapid motion, the subsequent opening of the vestibule door by a guard does not justify a passenger in taking it for granted that the train has stopped at the station platform. Mearns v. Central R. Co., 163 N. Y. 108, *reversing* 23 N. Y. App. Div. 298.

**566. 1. Carriers by Street Railway.** — A street railway company is under a duty to the public



**567.** See note 1.

*The Representations of Its Agents.* — See note 2.

*Slacking Speed — Duty of Carrier.* — See note 3.

**568.** (2) *Stoppage According to Regulations.* — See note 1.

(3) *Flag Stations.* — See note 4.

**570.** (7) *Crossing of Other Roads.* — See note 1.

(9) *Agreement by Agent to Stop at Particular Station.* — See note 5.

**571.** (10) *Duty of Passenger to Inform Himself.* — See note 2.

(11) *Warning of the Departure of Trains.* — See note 3.

**572.** *d. SAFE MEANS OF INGRESS AND EGRESS*—(1) *In General.* — See note 1.

to stop its cars at regular street crossings, on a reasonable signal, to receive those desiring to take passage. *Jackson Electric R., etc., Co. v. Loury*, 79 Miss. 431; *Haley v. St. Louis Transit Co.*, 179 Mo. 30; *Northern Texas Traction Co. v. Hooper*, (Tex. Civ. App. 1904) 80 S. W. Rep. 113; *Fuller v. Denison, etc., R. Co.*, 32 Tex. Civ. App. 399; *Northern Texas Traction Co. v. Peterman*, (Tex. Civ. App. 1904) 80 S. W. Rep. 535.

The refusal to stop a street car when a person gives notice of his intention to take passage may give rise to a cause of action for damages resulting from the refusal to stop, which might consist of delay and loss of time, but the refusal to stop and accept him as a passenger would not be the proximate cause of injuries received by him in attempting to board the moving car. *South Chicago City R. Co. v. Dufresne*, 200 Ill. 456, *affirming* 102 Ill. App. 493.

**566.** 2. *Selling Ticket for Certain Train.* — But see *Turner v. McCook*, 77 Mo. App. 196.

**567.** 1. *Duty to Stop at Point of Destination.* — *Southern R. Co. v. Hobbs*, 118 Ga. 232; *Central of Georgia R. Co. v. Dorsey*, 116 Ga. 719; *Cable v. Southern R. Co.*, 122 N. Car. 892; *Haug v. Great Northern R. Co.*, 8 N. Dak. 23, 73 Am. St. Rep. 727; *Gulf, etc., R. Co. v. Moore*, (Tex. Civ. App. 1904) 80 S. W. Rep. 426.

2. *Kansas City, etc., R. Co. v. Little*, 66 Kan. 378, 97 Am. St. Rep. 376; *Case v. Delaware, etc., R. Co.*, 191 Pa. St. 450; *Gulf, etc., R. Co. v. Moorman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 662.

**An Agreement of the Conductor Contrary to Rules**, though in accordance with a practice of frequently stopping at a station, has been held to bind the carrier. *Texas, etc., R. Co. v. Elliott*, 22 Tex. Civ. App. 31.

3. *Cooper v. Georgia, etc., R. Co.*, 56 S. Car. 91; *Fuller v. Denison, etc., R. Co.*, 32 Tex. Civ. App. 399; *San Antonio, etc., R. Co. v. Dykes*, (Tex. Civ. App. 1898) 45 S. W. Rep. 758. See *Southern R. Co. v. Bandy*, 120 Ga. 463, 102 Am. St. Rep. 112; *Cooper v. Georgia, etc., R. Co.*, 61 S. Car. 345.

**Merely Slacking Speed.** — *Mobile, etc., R. Co. v. Reeves*, (Ky. 1904) 80 S. W. Rep. 471.

**568.** 1. *Refusal to Stop Train Contrary to Regulation — Nonliability of Company.* — *Battle v. Georgia R., etc., Co.*, 120 Ga. 992; *Southern R. Co. v. Howard*, 111 Ga. 842; *Evansville, etc., K. Co. v. Wilson*, 20 Ind. App. 5; *Baltimore, etc., R. Co. v. Norris*, 17 Ind. App. 189, 60 Am. St. Rep. 166; *Louisville, etc., R. Co. v. Miles*, 100 Ky. 84; *Noble v. Atchison, etc., R.*

*Co.*, 4 Okla. 534; *Schiffler v. Chicago, etc., R. Co.*, 96 Wis. 141, 65 Am. St. Rep. 35. See *Sears v. Louisville, etc., R. Co.*, (Ky. 1900) 56 S. W. Rep. 725.

4. *Flag Station.* — *Central of Georgia R. Co. v. Dorsey*, 106 Ga. 826; *Southern R. Co. v. Lanning*, 83 Miss. 161; *Yazoo, etc., R. Co. v. Aden*, 77 Miss. 382; *International, etc., R. Co. v. Sammon*, (Tex. Civ. App. 1904) 79 S. W. Rep. 854; *San Antonio, etc., R. Co. v. Safford*, (Tex. Civ. App. 1898) 48 S. W. Rep. 1105; *San Antonio, etc., R. Co. v. Dykes*, (Tex. Civ. App. 1898) 45 S. W. Rep. 758; *Gulf, etc., R. Co. v. Gaedecke*, (Tex. Civ. App. 1897) 39 S. W. Rep. 312.

**Failure to Inform Conductor.** — *Pence v. Louisville, etc., R. Co.*, 64 S. W. Rep. 905, 23 Ky. L. Rep. 1207.

**570.** 1. See *Creech v. Charleston, etc., R. Co.*, 66 S. Car. 528.

5. *Atkinson v. Southern R. Co.*, 114 Ga. 149, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 570; *Evansville, etc., R. Co. v. Wilson*, 20 Ind. App. 5; *Chicago, etc., R. Co. v. Winfrey*, (Neb. 1903) 93 N. W. Rep. 526; *Case v. Delaware, etc., R. Co.*, 191 Pa. St. 457. See *Kansas City, etc., R. Co. v. Little*, 66 Kan. 378, 97 Am. St. Rep. 376.

**571.** 2. *Duty of Passenger to Inform Himself.* — *Evansville, etc., R. Co. v. Wilson*, 20 Ind. App. 5; *Baltimore, etc., R. Co. v. Norris*, 17 Ind. App. 189, 60 Am. St. Rep. 166; *Louisville, etc., R. Co. v. Miles*, 100 Ky. 84; *Noble v. Atchison, etc., R. Co.*, 4 Okla. 534; *St. Louis Southwestern R. Co. v. Campbell*, 30 Tex. Civ. App. 35; *Central Texas, etc., R. Co. v. Hoard*, (Tex. Civ. App. 1898) 49 S. W. Rep. 142; *Schiffler v. Chicago, etc., R. Co.*, 96 Wis. 141, 65 Am. St. Rep. 35.

**Duty of Passenger to Inform Himself as to Station at Which to Change Cars.** — *St. Louis Southwestern R. Co. v. McCullough*, 18 Tex. Civ. App. 534. And see *supra*, this title, **565.** 1.

**Misinformation by Agent of Company.** — *Davis v. Houston, etc., R. Co.*, 25 Tex. Civ. App. 8; *Gulf, etc., R. Co. v. Moorman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 662. See also the cases cited *infra*, this title, **582.** 1.

3. *Duty to Give Warning of Departure of Trains.* — *Weiss v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 332.

**572.** 1. *Means of Ingress and Egress* — *Illinois*. — *Chicago Terminal Transfer R. Co. v. Schmelling*, 197 Ill. 619; *Chicago, etc., R. Co. v. Doan*, 195 Ill. 168, *affirming* 93 Ill. App. 247; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169; *Burke v. Chicago, etc., R. Co.*, 108 Ill. App.

565; Chicago, etc., R. Co. v. Taylor, 102 Ill. App. 445.

*Indiana*. — Citizens St. R. Co. v. Shepherd, 29 Ind. App. 412; Ft. Wayne Traction Co. v. Morvilius, 31 Ind. App. 464; Lake Erie, etc., R. Co. v. Taylor, 25 Ind. App. 679.

*Kansas*. — Metropolitan St. R. Co. v. Hansen, 67 Kan. 256.

*Kentucky*. — Kentucky, etc., Bridge, etc., Co. v. Shrader, (Ky. 1904) 80 S. W. Rep. 1094.

*Michigan*. — Moore v. Saginaw, etc., R. Co., 119 Mich. 613.

*Missouri*. — Fillingham v. St. Louis Transit Co., 102 Mo. App. 573; Berger v. Chicago, etc., R. Co., 97 Mo. App. 127.

*Nebraska*. — Chicago, etc., R. Co. v. Sattler, 64 Neb. 636, 97 Am. St. Rep. 666.

*New Jersey*. — Hansen v. North Jersey St. R. Co., 64 N. J. L. 686.

*New York*. — Faris v. Brooklyn City, etc., R. Co., 46 N. Y. App. Div. 231; Minor v. Lehigh Valley R. Co., 21 N. Y. App. Div. 307.

*Oregon*. — Finseth v. City, etc., R. Co., 32 Oregon 1.

*Pennsylvania*. — Sowash v. Consolidated Traction Co., 188 Pa. St. 618; Flanagan v. Philadelphia, etc., R. Co., 181 Pa. St. 237.

*Rhode Island*. — Howland v. New York, etc., R. Co., 26 R. I. 138.

*South Carolina*. — Appleby v. South Carolina, etc., R. Co., 60 S. Car. 48; Cooper v. Georgia, etc., R. Co., 56 S. Car. 91.

*Texas*. — Ratteree v. Galveston, etc., R. Co., (Tex. Civ. App. 1904) 81 S. W. Rep. 566; San Antonio, etc., R. Co. v. Turney, (Tex. Civ. App. 1903) 78 S. W. Rep. 256; Texas, etc., R. Co. v. Reid, (Tex. Civ. App. 1903) 74 S. W. Rep. 99; Galveston, etc., R. Co. v. Walker, (Tex. Civ. App. 1898) 48 S. W. Rep. 767; St. Louis Southwestern R. Co. v. Caseday, (Tex. Civ. App. 1897) 40 S. W. Rep. 198; Texas Midland R. Co. v. Frey, 25 Tex. Civ. App. 386; Texas, etc., R. Co. v. Humphries, 20 Tex. Civ. App. 28.

*Wisconsin*. — Ellis v. Chicago, etc., R. Co., 120 Wis. 645; Werner v. Chicago, etc., R. Co., 105 Wis. 300.

*Canada*. — Burke v. British Columbia Electric R. Co., 7 British Columbia 85.

See also the cases cited *supra*, this title, 532. 1.

**Railroad Train Must Be Stopped.** — In setting down a passenger at his destination, the train must be stopped; merely slackening the speed is not sufficient. Southern R. Co. v. Bandy, 120 Ga. 463, 102 Am. St. Rep. 112. See also *supra*, this title, 567. 3.

**Merely Slackening Speed of Street Car.** — It cannot be said as a matter of law that a driver of a street car is guilty of negligence in merely slackening the speed of the car upon being notified by an intended passenger that he wishes to get on. Finkeldey v. Omnibus Cable Co., 114 Cal. 28. See Fuller v. Denison, etc., R. Co., 32 Tex. Civ. App. 399.

It has been said that when one seeks to become a passenger on a railway car, he has the right to insist that the car shall come to a stop to enable him to do so; but, if the car does not come to a stop, the railway company is not at fault if he attempts to board the car while it is in motion, unless it shall appear that, the speed of the car having diminished so much as

to constitute a tacit invitation to him to become a passenger, it is accelerated suddenly without notice, while he is in the act of getting on the car in pursuance of the tacit invitation. Savage v. Third Ave. R. Co., 29 N. Y. App. Div. 556.

**Steamboat Approaches and Landings.** — Louisville, etc., Mail Co. v. Barnes, 79 S. W. Rep. 261, 25 Ky. L. Rep. 2036; Wolf v. Brooklyn Ferry Co., 54 N. Y. App. Div. 67.

**Duty to Clear the Way of Obstructions.** — See Denver, etc., R. Co. v. Spencer, 27 Colo. 313.

**Uncovered Hydrant Box Sunk in Ground at Station.** — Southern Pac. R. Co. v. Hall, (C. C. A.) 100 Fed. Rep. 760.

**Failure to Provide Footstool.** — Illinois Cent. R. Co. v. Cheek, 152 Ind. 663; Young v. Missouri Pac. R. Co., 93 Mo. App. 267; Missouri, etc., R. Co. v. Sherrill, 32 Tex. Civ. App. 116.

**Failure to Have Footstool in Position.** — Cincinnati, etc., R. Co. v. Bell, 74 S. W. Rep. 700, 25 Ky. L. Rep. 10.

**Step-box Insufficient and Out of Place.** — Missouri, etc., R. Co. v. White, 22 Tex. Civ. App. 424.

**Defective Platforms.** — St. Louis, etc., R. Co. v. Coulson, 8 Kan. App. 4.

A defect in a platform used but not constructed by a street railway company may charge the carrier with liability for injuries received in consequence of the defect. Haselton v. Portsmouth, etc., R. Co., 71 N. H. 589. See also the title STATIONS (RAILROAD).

**Height of Platform.** — Gulf, etc., R. Co. v. Shelton, 30 Tex. Civ. App. 72, rehearing denied (Tex. Civ. App. 1902) 70 S. W. Rep. 359.

**Dangerous Proximity of Platform to Track.** — Kird v. New Orleans, etc., R. Co., 105 La. 226.

**Ice upon Platform.** — Waterbury v. Chicago, etc., R. Co., 104 Iowa 32; Rathgebe v. Pennsylvania R. Co., 179 Pa. St. 31.

**Platform Slippery with Grease.** — Barnes v. New York Cent., etc., R. Co., (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 622.

**Banana Skin on Station Platform.** — A passenger cannot recover for injuries received by slipping on a banana skin lying on a station platform, in the absence of evidence showing how long it was lying there. Goddard v. Boston, etc., R. Co., 179 Mass. 52.

**Hole in Platform.** — Louisville, etc., R. Co. v. Henry, (Ky. 1898) 44 S. W. Rep. 428; Robertson v. Wabash R. Co., 152 Mo. 382; Fullerton v. Fordyce, 144 Mo. 519; Texas Midland R. Co. v. Brown, (Tex. Civ. App. 1900) 58 S. W. Rep. 44.

A carrier is not liable for injuries sustained by a passenger in stepping through a hole in the platform at a place where passengers properly have no occasion to go. Houston East, etc., R. Co. v. Grubbs, 28 Tex. Civ. App. 367.

**Defective Construction of Doors Leading to Station Platform.** — Kiernan v. Manhattan R. Co., (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 841, reversed (Supm. Ct. App. T.) 28 Misc. (N. Y.) 516.

**Obstructions on Platform.** — Baker v. Clark, (C. C. A.) 99 Fed. Rep. 911; Ayres v. Delaware, etc., R. Co., 158 N. Y. 254, affirming 4 N. Y. App. Div. 511. See Pitkin v. New York Cent., etc., R. Co., 04 N. Y. App. Div. 31.

**Overcrowding Station Platform.** — Dittmar v. Brooklyn Heights R. Co., 91 N. Y. App. Div.

378; *McGearty v. Manhattan R. Co.*, 15 N. Y. App. Div. 2; *Dawson v. New York, etc., Bridge*, 31 N. Y. App. Div. 537.

**Inrush of Passengers as Plaintiff Was Alighting.**—*Harris v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1023.

**Injury by Negligent Management of Baggage Truck on Station Platform.**—*Cleveland, etc., R. Co. v. Reese*, 93 Ill. App. 657.

**Passenger on Station Platform Struck by Bundle Thrown from Express Car.**—*Winship v. New York, etc., R. Co.*, 170 Mass. 464.

**Passenger at Station Struck by Mail Bag Thrown from Car.**—*Southern R. Co. v. Rhodes*, (C. C. A.) 86 Fed. Rep. 422; *St. Louis, etc., R. Co. v. Waggoner*, 90 Ill. App. 556.

**Runaway Horse Coming on Station Platform.**—Where a passenger who was waiting for a train on a station platform was injured by a runaway horse which came upon the platform, it was held that the carrier was not liable. *Brooks v. Old Colony R. Co.*, 168 Mass. 164.

**Duty as to Lights.**—*St. Louis, etc., R. Co. v. Battle*, 69 Ark. 369; *Louisville, etc., R. Co. v. Ricketts*, (Ky. 1899) 52 S. W. Rep. 939; *Louisville, etc., R. Co. v. Ricketts*, (Ky. 1896) 37 S. W. Rep. 952; *Harkness v. Kansas City, etc., R. Co.*, (Miss. 1902) 33 So. Rep. 77; *Kansas City, etc., R. Co. v. McShan*, 81 Miss. 460; *Green v. Middlesex Valley R. Co.*, 31 N. Y. App. Div. 412; *Davis v. Houston East, etc., R. Co.*, 29 Tex. Civ. App. 42. See *Chicago, etc., R. Co. v. Wood*, (C. C. A.) 104 Fed. Rep. 663; *San Antonio, etc., R. Co. v. Turney*, (Tex. Civ. App. 1903) 78 S. W. Rep. 256; *Gulf, etc., R. Co. v. Shelton*, 30 Tex. Civ. App. 72, rehearing denied (Tex. Civ. App. 1902) 70 S. W. Rep. 359; *Owen v. Washington, etc., R. Co.*, 29 Wash. 207; *Ellis v. Chicago, etc., R. Co.*, 120 Wis. 645; *Duell v. Chicago, etc., R. Co.*, 115 Wis. 516.

**Obstruction in Aisle of Car.**—*Chicago, etc., R. Co. v. Buckmaster*, 74 Ill. App. 575.

**Opening Gate Inclosing Platform of Car Before Stopping.**—It is not negligence *per se* for a motorman to open the gate on the front platform of a trolley car before the car has come to a full stop. *Paginini v. North Jersey St. R. Co.*, 69 N. J. L. 60.

But on the other hand, it has been held that opening the gate inclosing the platform of an elevated railway car before the train is stopped may be negligence. *McAlan v. New York, etc., Bridge*, 43 N. Y. App. Div. 374. See *Hannon v. Boston El. R. Co.*, 182 Mass. 425.

**Cars in Train with Doors Locked.**—If a railroad carrier has attached to its passenger train vestibule cars whose doors are closed and locked, and a passenger who attempts to board one of these cars just as the train is starting is injured in consequence of not being able to get in, it cannot be said as a matter of law that the carrier is chargeable with negligence. *Cleveland, etc., R. Co. v. Wade*, 18 Ind. App. 346.

**Ice on Step of Car.**—*Foster v. Old Colony St. R. Co.*, 182 Mass. 378; *Herbert v. St. Paul City R. Co.*, 85 Minn. 341.

**Dress of Woman Passenger Catching on Obstruction on Street Car Platform When Alighting.**—*Smith v. Kingston City R. Co.*, 55 N. Y. App. Div. 143, affirmed without opinion 169 N. Y. 616.

**Passenger Stepping on Rail Hidden from View by Snow.**—*Mensing v. Michigan Cent. R. Co.*, 117 Mich. 606.

**Place of Stopping Street Cars.**—While a street railway company is ordinarily not responsible for the condition of the streets on which it runs its cars, in stopping a car to take on or set down passengers it is the duty of the carrier to exercise care to select a safe and suitable place for that purpose.

*Alabama.*—*Montgomery St. R. Co. v. Mason*, 133 Ala. 508.

*Georgia.*—*Macon R., etc., Co. v. Vining*, 120 Ga. 511.

*Illinois.*—*West Chicago St. R. Co. v. Buckley*, 102 Ill. App. 314, judgment affirmed 200 Ill. 260.

*Indiana.*—*Ft. Wayne Traction Co. v. Morvilius*, 31 Ind. App. 464.

*Louisiana.*—*Leveret v. Shreveport Belt R. Co.*, 110 La. 399.

*Massachusetts.*—*Joslyn v. Milford, etc., St. R. Co.*, 184 Mass. 65.

*Minnesota.*—*Stewart v. St. Paul City R. Co.*, 78 Minn. 85.

*Missouri.*—*Lynch v. St. Louis Transit Co.*, 102 Mo. App. 630.

*New Hampshire.*—*Call v. Portsmouth, etc., R. Co.*, 69 N. H. 562.

*New Jersey.*—*Foley v. Brunswick Traction Co.*, 66 N. J. L. 637.

*New York.*—*Wolf v. Third Ave. R. Co.*, 67 N. Y. App. Div. 605; *Flack v. Nassau Electric R. Co.*, 41 N. Y. App. Div. 399; *Holzhauser v. Brooklyn Heights R. Co.*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 145. See *MacKenzie v. Union R. Co.*, 82 N. Y. App. Div. 124, affirmed without opinion 178 N. Y. 638.

*Washington.*—*Vasele v. Grant St. Electric R. Co.*, 16 Wash. 602.

But see *Scanlon v. Philadelphia Rapid Transit Co.*, 208 Pa. St. 195.

A street railway cannot be charged with negligence for setting a passenger down at a point indicated by, and which is familiar to, the passenger. *Bland v. Roxborough, etc., R. Co.*, 13 Pa. Super. Ct. 93.

But it has been held that when a street car was not stopped at the place indicated by the passenger, but was stopped at a distance beyond, at a place where it was unsafe for the passenger to alight, the facts justified a finding that the carrier was negligent. *Henry v. Grant St. Electric R. Co.*, 24 Wash. 246.

Where a street car company provides a temporary passageway for the accommodation of passengers at a place where a street is flooded, it is under a duty to exercise care that the way provided is reasonably safe. *Finseth v. City, etc., R. Co.*, 32 Oregon 1.

If the place at which a passenger on a street car is set down presents a dangerous condition to one alighting, and the danger is known or is such that it should be known to the carrier, but is unknown to the passenger, the carrier is bound to warn the passenger of the danger, or to assist him in alighting safely, or to stop the car at a point beyond or short of the dangerous point. *Sweet v. Louisville R. Co.*, 113 Ky. 15.

**Stopping Street Car at Unusual Place.**—Stopping a street car at a place which is not as safe as the one where the car is usually stopped

**573. Sudden Jerks, Jolts, and Jars.** — See note 1.

may be negligence. *Bass v. Concord St. R. Co.*, 70 N. H. 170.

**The Failure of a Street Railway to Repair a Pavement** in accordance with the requirements of a city ordinance has been held not to give a right of action to one who has alighted from one of the carrier's cars and is injured in consequence of a defect in the pavement. *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, *reversing* 67 N. J. L. 76.

**Running Street Car on Parallel Track by Car Which Is Setting Down Passengers.** — *South Covington, etc., R. Co. v. Beatty*, (Ky. 1899) 50 S. W. Rep. 239; *Wise v. Brooklyn Heights R. Co.*, 46 N. Y. App. Div. 246; *Chattanooga Electric St. R. Co. v. Boddy*, 105 Tenn. 666; *Smith v. Union Trunk Line*, 18 Wash. 351.

Where one of two street cars about to pass on parallel tracks has started after setting down passengers the motorman on the other car may assume that all the passengers who wish to do so have alighted and that the road is clear for him to go ahead. *Ackerstadt v. Chicago City R. Co.*, 194 Ill. 616.

**Running Train on Parallel Track by Train Which Is Setting Down Passengers.** — *Jewell v. New York Cent., etc., R. Co.*, 27 N. Y. App. Div. 500; *Mayne v. Chicago, etc., R. Co.*, 12 Okla. 10.

**Degree of Care.** — It is error to instruct the jury that a carrier must furnish passengers with an absolutely safe place to alight; a reasonably safe place is all that is required. *Texas, etc., R. Co. v. Woods*, 15 Tex. Civ. App. 612. See *supra*, this title, **560**.

**573. 1. Sudden Jerks, Jolts, and Jars.** — *United States.* — *Sprague v. Southern R. Co.*, (C. C. A.) 92 Fed. Rep. 59.

*Alabama.* — *Birmingham R., etc., Co. v. Elard*, 135 Ala. 433; *Armstrong v. Montgomery St. R. Co.*, 123 Ala. 233; *Alabama G. S. R. Co. v. Siniard*, 123 Ala. 557; *Watkins v. Birmingham R., etc., Co.*, 120 Ala. 152.

*California.* — *Boone v. Oakland Transit Co.*, 139 Cal. 490; *Babcock v. Los Angeles Traction Co.*, 128 Cal. 173; *McCurrie v. Southern Pac. R. Co.*, 122 Cal. 558.

*Delaware.* — *Betts v. Wilmington City R. Co.*, 3 Penn. (Del.) 448.

*District of Columbia.* — *Brown v. Washington, etc., R. Co.*, 11 App. Cas. (D. C.) 37.

*Georgia.* — *Central of Georgia R. Co. v. McKinney*, 118 Ga. 535; *Macon, etc., R. Co. v. Moore*, 108 Ga. 84, 99 Ga. 229; *Gardner v. Waycross Air-Line R. Co.*, 97 Ga. 482, 54 Am. St. Rep. 435.

*Illinois.* — *West Chicago St. R. Co. v. Manning*, 170 Ill. 417; *Chicago City R. Co. v. Dinsmore*, 162 Ill. 658; *Chicago, etc., R. Co. v. Flaherty*, 96 Ill. App. 563.

*Indiana.* — *Pittsburgh, etc., R. Co. v. Miller*, 33 Ind. App. 128; *Cincinnati, etc., R. Co. v. Worthington*, 30 Ind. App. 663, *rehearing denied* 30 Ind. App. 669; *Indianapolis St. R. Co. v. Hockett*, 159 Ind. 677; *Indianapolis St. R. Co. v. Brown*, 32 Ind. App. 130; *Cincinnati, etc., R. Co. v. Revallee*, 17 Ind. App. 657.

*Iowa.* — *Beringer v. Dubuque St. R. Co.*, 118 Iowa 135; *Root v. Des Moines City R. Co.*, 113 Iowa 675.

*Kentucky.* — *South Covington, etc., St. R. Co. v. Riegler*, 82 S. W. Rep. 382, 26 Ky. L. Rep. 666; *Houghton v. Louisville R. Co.*, (Ky. 1904) 81 S. W. Rep. 695; *Illinois Cent. R. Co. v. Jolly*, 78 S. W. Rep. 476, 25 Ky. L. Rep. 1735; *Chesapeake, etc., R. Co. v. Topping*, 78 S. W. Rep. 135, 25 Ky. L. Rep. 1390; *Louisville R. Co. v. Meglemery*, 78 S. W. Rep. 217, 25 Ky. L. Rep. 1587, *rehearing denied* (Ky. 1904) 79 S. W. Rep. 287; *Illinois Cent. R. Co. v. Taylor*, 70 S. W. Rep. 825, 24 Ky. L. Rep. 1169; *Illinois Cent. R. Co. v. Crady*, 69 S. W. Rep. 706, 24 Ky. L. Rep. 643; *Louisville, etc., R. Co. v. Bowlds*, 64 S. W. Rep. 957, 23 Ky. L. Rep. 1202; *Sheffer v. Louisville, etc., R. Co.*, 60 S. W. Rep. 403, 22 Ky. L. Rep. 1305; *Cincinnati, etc., R. Co. v. Vivion*, (Ky. 1897) 41 S. W. Rep. 580; *Belt Electric Line Co. v. Tomlin*, (Ky. 1897) 40 S. W. Rep. 925.

*Louisiana.* — *Bourque v. New Orleans City, etc., R. Co.*, (La. 1898) 24 So. Rep. 622; *Kelly v. Vicksburg, etc., R. Co.*, 108 La. 423; *Philips v. St. Charles St. R. Co.*, 106 La. 592.

*Maryland.* — *Baltimore, etc., R. Co. v. Jean*, 98 Md. 546; *United R., etc., Co. v. Hertel*, 97 Md. 382; *United R., etc., Co. v. Woodbridge*, 97 Md. 629.

*Massachusetts.* — *Comerford v. New York, etc., R. Co.*, 181 Mass. 528.

*Michigan.* — *McDonald v. City Electric R. Co.*, (Mich. 1904) 100 N. W. Rep. 592, 11 Detroit Leg. N. 326; *Smalley v. Detroit, etc., R. Co.*, 131 Mich. 560, 9 Detroit Leg. N. 443; *Baldwin v. Grand Trunk R. Co.*, 128 Mich. 417, 8 Detroit Leg. N. 706; *Moore v. Saginaw, etc., R. Co.*, 119 Mich. 613; *Etson v. Ft. Wayne, etc., R. Co.*, 110 Mich. 494.

*Minnesota.* — *Skelton v. St. Paul City R. Co.*, 88 Minn. 192; *Currie v. Mendenhall*, 77 Minn. 179; *Miller v. St. Paul City R. Co.*, 66 Minn. 192.

*Mississippi.* — *Yazoo, etc., R. Co. v. Hatch*, (Miss. 1904) 35 So. Rep. 941.

*Missouri.* — *Kroner v. St. Louis Transit Co.*, 107 Mo. App. 41; *Eikenberry v. St. Louis Transit Co.*, 103 Mo. App. 442; *Jacobson v. St. Louis Transit Co.*, 106 Mo. App. 339; *Stoddard v. St. Louis, etc., R. Co.*, 105 Mo. App. 512; *Reagan v. St. Louis Transit Co.*, 180 Mo. 117; *Maguire v. St. Louis Transit Co.*, 103 Mo. App. 459; *Moorman v. Atchison, etc., R. Co.*, 105 Mo. App. 711; *Shareman v. St. Louis Transit Co.*, 103 Mo. App. 515; *Duffy v. St. Louis Transit Co.*, 104 Mo. App. 235; *Kennedy v. St. Louis Transit Co.*, 103 Mo. App. 1; *Peck v. St. Louis Transit Co.*, 178 Mo. 617; *Neville v. St. Louis Merchants Bridge Terminal R. Co.*, 158 Mo. 293; *Grace v. St. Louis R. Co.*, 156 Mo. 295; *Cobb v. Lindell R. Co.*, 149 Mo. 135; *Barth v. Kansas City El. R. Co.*, 142 Mo. 535; *Scamell v. St. Louis Transit Co.*, 102 Mo. App. 198; *O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202; *Hannon v. St. Louis Transit Co.*, 102 Mo. App. 216; *Brazis v. St. Louis Transit Co.*, 102 Mo. App. 224; *Dawson v. St. Louis Transit Co.*, 102 Mo. App. 277; *Maxey v. Metropolitan St. R. Co.*, 95 Mo. App. 303; *Posch v. Southern Electric R. Co.*, 76 Mo. App. 601.

*New Hampshire.* — *Hutchins v. Macomber*, 68 N. H. 473.

*New Jersey.* — *Schmidt v. North Jersey St.*

**574.** (2) *Duty to Stop Alongside Platform.*— See notes 1, 2.

R. Co., (N. J. 1904) 58 Atl. Rep. 72; Paganini v. North Jersey St. R. Co., 70 N. J. L. 385; Herbich v. North Jersey St. R. Co., 67 N. J. L. 574, reversing 65 N. J. L. 381; McKenna v. North Hudson County R. Co., 64 N. J. L. 106; Fenig v. North Jersey St. R. Co., 64 N. J. L. 715; Scott v. Bergen County Traction Co., 63 N. J. L. 407; New Jersey Traction Co. v. Gardner, 60 N. J. L. 571; Consolidated Traction Co. v. Thalheimer, 59 N. J. L. 474.

*New York.*—Kellegher v. Forty-second St., etc., R. Co., 171 N. Y. 309, reversing 56 N. Y. App. Div. 322; Clinton v. Brooklyn Heights R. Co., 91 N. Y. App. Div. 374; Mulligan v. Metropolitan St. R. Co., 89 N. Y. App. Div. 207; Johnson v. Interurban St. R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 866; Maloney v. Metropolitan St. R. Co., 95 N. Y. App. Div. 393; Michelson v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 87 N. Y. Supp. 501; Bente v. Metropolitan St. R. Co., 90 N. Y. App. Div. 213, affirming 180 N. Y. 519; Kramer v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 86 N. Y. Supp. 33; Baker v. Interurban St. R. Co., (Supm. Ct. App. T.) 86 N. Y. Supp. 9; Andrews v. Metropolitan St. R. Co., 91 N. Y. App. Div. 63; Mulligan v. Metropolitan St. R. Co., 89 N. Y. App. Div. 207; Meyerowitz v. Interurban St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 233; McGill v. Central Crosstown R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 477; Clancy v. Yonkers R. Co., 88 N. Y. App. Div. 612; Koues v. Metropolitan St. R. Co., 86 N. Y. App. Div. 611; Schoenfeld v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 40 Misc. (N. Y.) 201; Lobsenz v. Metropolitan St. R. Co., 72 N. Y. App. Div. 181; Kantrowitz v. Metropolitan St. R. Co., 63 N. Y. App. Div. 65; Hogan v. Metropolitan St. R. Co., 71 N. Y. App. Div. 614; Plum v. Metropolitan St. R. Co., 91 N. Y. App. Div. 420; Rosenberg v. Third Ave. R. Co., 47 N. Y. App. Div. 323, affirmed without opinion 168 N. Y. 681; Bennett v. Third Ave. R. Co., 40 N. Y. App. Div. 626; Sexton v. Metropolitan St. R. Co., 40 N. Y. App. Div. 26; Basting v. Brooklyn Heights R. Co., 39 N. Y. App. Div. 629; Dochtermann v. Brooklyn Heights R. Co., 32 N. Y. App. Div. 13, affirmed without opinion 164 N. Y. 586; Patterson v. Westchester Electric R. Co., 26 N. Y. App. Div. 336; Pohle v. Second Ave. R. Co., 13 N. Y. App. Div. 393, affirmed without opinion 161 N. Y. 666; Ehrhard v. Metropolitan St. R. Co., 58 N. Y. App. Div. 613; Brady v. Metropolitan St. R. Co., (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 793; Guntzer v. Yonkers R. Co., 51 N. Y. App. Div. 222; Flanagan v. Metropolitan St. R. Co., (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 820; Cunningham v. Dry Dock, etc., R. Co., (Supm. Ct. App. T.) 31 Misc. (N. Y.) 471; Kuhlman v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 417; Schaefer v. Central Crosstown R. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 114; Schiller v. Dry Dock, etc., R. Co., (Supm. Ct. App. T.) 26 Misc. (N. Y.) 392; Friedman v. Consolidated Traction Co., (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 764; Miles v. King, 18 N. Y. App. Div. 41. See Black v. Second Ave R. Co., 44 N. Y. App. Div. 333.

*North Carolina.*—Denny v. North Carolina R. Co., 132 N. Car. 340.

*Ohio.*—Holmes v. Ashtabula Rapid Transit Co., 10 Ohio Cir. Dec. 638.

*Oregon.*—Smitson v. Southern Pac. R. Co., 37 Oregon 74.

*Pennsylvania.*—Powelson v. United Traction Co., 204 Pa. St. 474; Sweeney v. Union Traction Co., 199 Pa. St. 293; Mitchell v. Electric Traction Co., 12 Pa. Super. Ct. 472.

*South Carolina.*—Appleby v. South Carolina, etc., R. Co., 60 S. Car. 48; Glover v. Charleston, etc., R. Co., 57 S. Car. 228.

*Tennessee.*—Memphis St. R. Co. v. Shaw, 110 Tenn. 467.

*Texas.*—Ratteree v. Galveston, etc., R. Co., (Tex. Civ. App. 1904) 81 S. W. Rep. 566; Harris v. Gulf, etc., R. Co., (Tex. Civ. App. 1904) 80 S. W. Rep. 1023; St. John v. Gulf, etc., R. Co., (Tex. Civ. App. 1904) 80 S. W. Rep. 235; Pelly v. Denison, etc., R. Co., (Tex. Civ. App. 1904) 78 S. W. Rep. 542; Galveston, etc., R. Co. v. Hubbard, (Tex. Civ. App. 1903) 76 S. W. Rep. 764; Texas, etc., R. Co. v. Gray, (Tex. Civ. App. 1902) 71 S. W. Rep. 316; Houston, etc., R. Co. v. Harris, 30 Tex. Civ. App. 179; Galveston, etc., R. Co. v. Walker, (Tex. Civ. App. 1898) 48 S. W. Rep. 767; Missouri Pac. R. Co. v. Foreman, (Tex. Civ. App. 1898) 46 S. W. Rep. 834; Christie v. Galveston City R. Co., (Tex. Civ. App. 1897) 39 S. W. Rep. 638; Galveston, etc., R. Co. v. Morris, 94 Tex. 505, affirming (Tex. Civ. App. 1901) 60 S. W. Rep. 813; Texas, etc., R. Co. v. Elliott, 26 Tex. Civ. App. 106; International, etc., R. Co. v. Downing, 16 Tex. Civ. App. 643; Houston, etc., R. Co. v. Dotson, 15 Tex. Civ. App. 73.

*Utah.*—Dickert v. Salt Lake City R. Co., 20 Utah 394.

*Vermont.*—Clark v. Smith, 72 Vt. 138.

*Virginia.*—Norfolk, etc., R. Co. v. Morris, 101 Va. 422.

See also *infra*, this title, 587. 2.

**Jar Caused by Coupling Shifting Engine.**—Roughley v. West Jersey, etc., R. Co., 202 Pa. St. 43.

**574. 1. Stoppage at Platform.**—Ward v. Chicago, etc., R. Co., 165 Ill. 462; Topp v. United R., etc., Co., 99 Md. 639, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 574; Cooper v. Georgia, etc., R. Co., 61 S. Car. 345.

**2. Kentucky.**—Lutz v. Louisville R. Co., (Ky. 1899) 48 S. W. Rep. 1080.

*Maryland.*—Topp v. United R., etc., Co., 99 Md. 639, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 574.

*Michigan.*—Mensing v. Michigan Cent. R. Co., 117 Mich. 606.

*Missouri.*—Fillingham v. St. Louis Transit Co., 102 Mo. App. 573; Atkinson v. Pacific R. Co., 90 Mo. App. 489; Deming v. Chicago, etc., R. Co., 80 Mo. App. 152, 2 Mo. App. Rep. 547; Talbot v. Chicago, etc., R. Co., 72 Mo. App. 291.

*New York.*—Minor v. Lehigh Valley R. Co., 21 N. Y. App. Div. 307.

*Oregon.*—Smitson v. Southern Pac. R. Co., 37 Oregon 74.

*Pennsylvania.*—See Case v. Delaware, etc., R. Co., 191 Pa. St. 450, 457.

**575.** A Freight Train Carrying Passengers. — See note 1.

**576.** Failure of Passenger to Demand that Cars Be Backed. — See note 1.

But Where a Passenger Not Aware of the Fact. — See note 2.

(3) Reasonable Time for Ingress and Egress. — See note 3.

*Tennessee.* — Louisville, etc., R. Co. v. Collier, 104 Tenn. 189.

*Texas.* — Martin v. St. Louis Southwestern R. Co., (Tex. Civ. App. 1900) 56 S. W. Rep. 1011; Texas, etc., R. Co. v. Porter, (Tex. Civ. App. 1897) 41 S. W. Rep. 88. Compare Texas, etc., R. Co. v. Woods, 15 Tex. Civ. App. 612.

*Wisconsin.* — Ellis v. Chicago, etc., R. Co., 120 Wis. 645.

**575. 1. Freight Trains.** — Although a passenger is carried on a freight train, the carrier is bound at least to set down the passenger in the yard of the station at a place not unreasonably distant from the platform, and the carrier will be liable in damages for setting a passenger down a mile short of the station. St. Louis, etc., R. Co. v. Neal, 66 Ark. 543. See Chicago, etc., R. Co. v. Stonecipher, 90 Ill. App. 511, holding that the trial court should have given an instruction which was requested by the defendant to the effect that if the freight train on which the plaintiff was a passenger was stopped at the plaintiff's station reasonably near the platform, due regard being had to the surrounding situation and location, and kept standing a sufficient length of time for the plaintiff to alight in safety, and the plaintiff refused to alight and depart from the car because the car had not reached the station platform, the issues should be found for the defendant.

**576. 1. Waiver of Right to Be Carried Back.** — Louisville, etc., R. Co. v. Keith, 58 S. W. Rep. 468, 22 Ky. L. Rep. 593. See Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, holding that a passenger does not by a failure to demand the return of the car to the platform take on himself the danger incident to getting off, if he does not know that the alighting place is dangerous.

**2. McCurdy v. United Traction Co.,** 15 Pa. Super. Ct. 29; Houston, etc., R. Co. v. McKenzie, (Tex. Civ. App. 1897) 41 S. W. Rep. 831.

**3. Allowance of Time for Ingress and Egress.** — *United States.* — Rutledge v. New Orleans, etc., R. Co., (C. C. A.) 129 Fed. Rep. 94; Texas, etc., R. Co. v. Nunn, (C. C. A.) 98 Fed. Rep. 963.

*Alabama.* — Alabama G. S. R. Co. v. Siniard, 123 Ala. 557.

*Connecticut.* — Elwood v. Connecticut R., etc., Co., 77 Conn. 145.

*Georgia.* — Central of Georgia R. Co. v. McKenney, 116 Ga. 13; Killian v. Georgia R., etc., Co., 97 Ga. 727.

*Illinois.* — Chicago, etc., R. Co. v. Storment, 190 Ill. 42, affirming 90 Ill. App. 505; Illinois Cent. R. Co. v. Souders, 178 Ill. 585, reversing 79 Ill. App. 41; Chicago, etc., R. Co. v. Clausen, 173 Ill. 100, affirming 70 Ill. App. 550; Bloomington, etc., R. Co. v. Zimmerman, 101 Ill. App. 184; Chicago, etc., R. Co. v. Flaherty, 96 Ill. App. 563; Chicago, etc., R. Co. v. Wallace, 85 Ill. App. 606.

*Indiana.* — Indiana R. Co. v. Mauser, 160 Ind. 25; Lake Erie, etc., R. Co. v. Taylor, 25 Ind. App. 679.

*Kansas.* — Atchison, etc., R. Co. v. Loewe,

(Kan. 1903) 74 Pac. Rep. 234, judgment affirmed on rehearing (Kan. 1904) 76 Pac. Rep. 431; Luse v. Union Pac. R. Co., 57 Kan. 361.

*Kentucky.* — Mobile, etc., R. Co. v. Reeves, (Ky. 1904) 80 S. W. Rep. 471; Louisville R. Co. v. Meglemery, 78 S. W. Rep. 217, 25 Ky. L. Rep. 1587, rehearing denied (Ky. 1904) 79 S. W. Rep. 287; Louisville, etc., R. Co. v. Coons, 76 S. W. Rep. 45, 25 Ky. L. Rep. 509; Henning v. Louisville R. Co., 74 S. W. Rep. 209, 24 Ky. L. Rep. 2419; Louisville, etc., R. Co. v. Bowlds, 64 S. W. Rep. 957, 23 Ky. L. Rep. 1202; Louisville, etc., R. Co. v. Harmon, 64 S. W. Rep. 640, 23 Ky. L. Rep. 871; Illinois Cent. R. Co. v. Whittaker, (Ky. 1900) 57 S. W. Rep. 465; Lutz v. Louisville R. Co., (Ky. 1899) 48 S. W. Rep. 1080; Louisville, etc., R. Co. v. Eakin, 103 Ky. 465.

*Louisiana.* — Kelly v. Vicksburg, etc., R. Co., 108 La. 423; Kennon v. Vicksburg, etc., R. Co., 51 La. Ann. 1599.

*Massachusetts.* — Comerford v. New York, etc., R. Co., 181 Mass. 528.

*Michigan.* — Bartle v. Houghton County St. R. Co., 132 Mich. 290, 9 Detroit Leg. N. 595.

*Mississippi.* — Yazoo, etc., R. Co. v. Hatch, (Miss. 1904) 35 So. Rep. 941; Toler v. Yazoo, etc., R. Co., (Miss. 1902) 31 So. Rep. 788.

*Missouri.* — Moorman v. Atchison, etc., R. Co., 105 Mo. App. 711; Luckel v. Century Bldg. Co., 177 Mo. 608; Becker v. Lincoln Real Estate, etc., Co., 174 Mo. 246; Cullar v. Missouri, etc., R. Co., 84 Mo. App. 340; Deming v. Chicago, etc., R. Co., 80 Mo. App. 152, 2 Mo. App. Rep. 547.

*Nebraska.* — Chicago, etc., R. Co. v. Winfrey, (Neb. 1903) 93 N. W. Rep. 526.

*New Jersey.* — Kulman v. Erie R. Co., 65 N. J. L. 241.

*New York.* — Berry v. Utica Belt Line St. R. Co., 76 N. Y. App. Div. 490; Daly v. Central R. Co., 26 N. Y. App. Div. 200.

*North Carolina.* — Johnson v. Atlantic, etc., R. Co., 130 N. C. 488.

*Oregon.* — Smitson v. Southern Pac. R. Co., 37 Oregon 74.

*Pennsylvania.* — Raughley v. West Jersey, etc., R. Co., 202 Pa. St. 43; Machen v. Pittsburgh, etc., Pass. R. Co., 13 Pa. Super. Ct. 642.

*South Carolina.* — Shealey v. South Carolina, etc., R. Co., 67 S. Car. 61; Oliver v. Columbia, etc., R. Co., 65 S. Car. 1.

*Tennessee.* — Memphis St. R. Co. v. Shaw, 110 Tenn. 467; Louisville, etc., R. Co. v. Collier, 104 Tenn. 189; Southern R. Co. v. Mitchell, 98 Tenn. 27.

*Texas.* — Harris v. Gulf, etc., R. Co., (Tex. Civ. App. 1904) 80 S. W. Rep. 1023; St. John v. Gulf, etc., R. Co., (Tex. Civ. App. 1904) 80 S. W. Rep. 235; Galveston, etc., R. Co. v. Hubbard, (Tex. Civ. App. 1903) 76 S. W. Rep. 764; St. Louis Southwestern R. Co. v. Massey, (Tex. Civ. App. 1903) 76 S. W. Rep. 585; International, etc., R. Co. v. Anchonda, (Tex. Civ. App. 1903) 75 S. W. Rep. 557; Chicago, etc., R. Co. v. Armes, 32 Tex. Civ. App. 32;

*St. Louis Southwestern R. Co. v. Harrison*, 32 Tex. Civ. App. 368; *Texas, etc., R. Co. v. Gray*, (Tex. Civ. App. 1902) 71 S. W. Rep. 316; *Houston, etc., R. Co. v. Harris*, 30 Tex. Civ. App. 179; *St. Louis Southwestern R. Co. v. Byers*, (Tex. Civ. App. 1902) 69 S. W. Rep. 1009, 70 S. W. Rep. 558; *International, etc., R. Co. v. Anchonda*, (Tex. Civ. App. 1902) 68 S. W. Rep. 743; *Pares v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1900) 57 S. W. Rep. 301; *Martin v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1900) 56 S. W. Rep. 1011; *Central Texas, etc., R. Co. v. Holloway*, (Tex. Civ. App. 1899) 54 S. W. Rep. 419; *Texas, etc., R. Co. v. Goldman*, (Tex. Civ. App. 1899) 51 S. W. Rep. 275; *Texas, etc., R. Co. v. Born*, 20 Tex. Civ. App. 351; *San Antonio, etc., R. Co. v. Dykes*, (Tex. Civ. App. 1898) 45 S. W. Rep. 758; *Texas, etc., R. Co. v. Mayfield*, 23 Tex. Civ. App. 415; *Texas, etc., R. Co. v. Lee*, 21 Tex. Civ. App. 174; *Missouri, etc., R. Co. v. McElree*, 16 Tex. Civ. App. 182; *Christie v. Galveston City R. Co.*, (Tex. Civ. App. 1897) 39 S. W. Rep. 638; *Houston, etc., R. Co. v. Dotson*, 15 Tex. Civ. App. 73; *Houston, etc., R. Co. v. Stewart*, 14 Tex. Civ. App. 703; *Gulf, etc., R. Co. v. Rowland*, 90 Tex. 365.

*Vermont.*—*Clark v. Smith*, 72 Vt. 138.

*Washington.*—*Carroll v. Burleigh*, 15 Wash. 208.

*Wisconsin.*—*Walters v. Chicago, etc., R. Co.*, 113 Wis. 371, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 576.

*Canada.*—*Keith v. Ottawa, etc., R. Co.*, 5 Ont. L. Rep. 116, 3 Ont. L. Rep. 265.

**Train Stopped at Other than Regular Stopping Place.**—The rule that a passenger should be given a reasonable time to get off applies when a train is stopped at an unusual place, even though the conductor exceeds his authority and violates the rules of the carrier in so stopping the train. *Texas, etc., R. Co. v. Elliott*, 26 Tex. Civ. App. 106.

**Failure of Conductor to Hold Train for Passenger in Accordance with Promise.**—*Missouri Pac. R. Co. v. Foreman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 834; *St. Louis Southwestern R. Co. v. Germany*, (Tex. Civ. App. 1900) 56 S. W. Rep. 586.

**Street Cars.**—*California.*—*Boone v. Oakland Transit Co.*, 139 Cal. 490.

*Colorado.*—*Denver Consol. Tramway Co. v. Rush*, 19 Colo. App. 70.

*Connecticut.*—*Baldwin v. Fair Haven, etc., R. Co.*, 68 Conn. 567.

*District of Columbia.*—*Rouser v. Washington, etc., R. Co.*, 13 App. Cas. (D. C.) 320; *Washington, etc., R. Co. v. Grant*, 11 App. Cas. (D. C.) 107.

*Georgia.*—*Atlanta R. Co. v. Randall*, 117 Ga. 165.

*Illinois.*—*West Chicago St. R. Co. v. Manning*, 170 Ill. 417; *Hope v. West Chicago St. R. Co.*, 82 Ill. App. 311; *West Chicago St. R. Co. v. Luka*, 72 Ill. App. 60.

*Indiana.*—*Indianapolis St. R. Co. v. Hockett*, 159 Ind. 677; *Indianapolis St. R. Co. v. Brown*, 32 Ind. App. 130; *Citizens St. R. Co. v. Merl*, 26 Ind. App. 284.

*Iowa.*—*Jaques v. Sioux City Traction Co.*, 124 Iowa 257; *Root v. Des Moines City R. Co.*, 113 Iowa 675.

*Kansas.*—*Leavenworth Electric R. Co. v. Cusick*, 60 Kan. 590.

*Kentucky.*—*Paducah St. R. Co. v. Walsh*, 58 S. W. Rep. 431, 22 Ky. L. Rep. 532; *Louisville R. Co. v. Kammacker*, (Ky. 1899) 51 S. W. Rep. 175.

*Louisiana.*—*Sharp v. New Orleans City R. Co.*, 111 La. 395, 100 Am. St. Rep. 488, holding that if a street car is started before a passenger has gained a secure footing on the platform, the carrier is negligent.

*Maryland.*—*United R., etc., Co. v. Woodbridge*, 97 Md. 629; *United R., etc., Co. v. Hertel*, 97 Md. 382; *United R., etc., Co. v. Beidelman*, 95 Md. 480; *Baltimore City Pass. R. Co. v. Baer*, 90 Md. 97.

*Massachusetts.*—*Meade v. Boston El. R. Co.*, 185 Mass. 327; *Davey v. Greenfield, etc., St. R. Co.*, 177 Mass. 106; *Gordon v. West End St. R. Co.*, 175 Mass. 181; *Nichols v. Lynn, etc., R. Co.*, 168 Mass. 528.

*Michigan.*—*Smalley v. Detroit, etc., R. Co.*, 131 Mich. 560, 9 Detroit Leg. N. 443; *McDonald v. City Electric R. Co.*, (Mich. 1904) 100 N. W. Rep. 592, 11 Detroit Leg. N. 326.

*Minnesota.*—*Skelton v. St. Paul City R. Co.*, 88 Minn. 192; *Schmeltzer v. St. Paul City R. Co.*, 80 Minn. 50; *Palmer v. Winona R., etc., Co.*, 78 Minn. 138; *Joyce v. St. Paul City R. Co.*, 70 Minn. 339; *Miller v. St. Paul City R. Co.*, 66 Minn. 192.

*Missouri.*—*Kroner v. St. Louis Transit Co.*, 107 Mo. App. 41; *Eikenberry v. St. Louis Transit Co.*, 103 Mo. App. 442; *Jacobson v. St. Louis Transit Co.*, 106 Mo. App. 339; *Stoddard v. St. Louis, etc., R. Co.*, 105 Mo. App. 512; *Kennedy v. St. Louis Transit Co.*, 103 Mo. App. 1; *Duffy v. St. Louis Transit Co.*, 104 Mo. App. 235; *Maguire v. St. Louis Transit Co.*, 103 Mo. App. 459; *Shareman v. St. Louis Transit Co.*, 103 Mo. App. 515; *Peck v. St. Louis Transit Co.*, 178 Mo. 617; *Barth v. Kansas City El. R. Co.*, 142 Mo. 535; *Scamell v. St. Louis Transit Co.*, 102 Mo. App. 198; *O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202; *Hannon v. St. Louis Transit Co.*, 102 Mo. App. 216; *Maxey v. Metropolitan St. R. Co.*, 95 Mo. App. 303; *Hansberger v. Sedalia Electric R., etc., Co.*, 82 Mo. App. 566; *Posch v. Southern Electric R. Co.*, 76 Mo. App. 601.

*New Jersey.*—*Herbich v. North Jersey St. R. Co.*, 67 N. J. L. 574; *Fenig v. North Jersey St. R. Co.*, 64 N. J. L. 715; *McKenna v. North Hudson County R. Co.*, 64 N. J. L. 106.

*New York.*—*Maloney v. Metropolitan St. R. Co.*, 95 N. Y. App. Div. 393; *Michelson v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 501; *Fox v. Metropolitan St. R. Co.*, 93 N. Y. App. Div. 229; *Bente v. Metropolitan St. R. Co.*, 90 N. Y. App. Div. 213, affirming 180 N. Y. 519; *Andrews v. Metropolitan St. R. Co.*, 91 N. Y. App. Div. 63; *Mulligan v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 207; *Meyerowitz v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 233; *McGill v. Central Crosstown R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 477; *Clancy v. Yonkers R. Co.*, 88 N. Y. App. Div. 612; *Koues v. Metropolitan St. R. Co.*, 86 N. Y. App. Div. 611; *Wolf v. Metropolitan St. R. Co.*, 82 N. Y. App. Div. 629; *Bessenger v. Metropolitan St. R. Co.*, 79 N. Y. App. Div. 32; *Lobsenz v.*

**577.** Where, However, a Passenger Has Been Made Aware of His Arrival. — See note 1.

**578.** Duration of Stoppage. — See note 1.

Metropolitan St. R. Co., 72 N. Y. App. Div. 181; *Rosenberg v. Third Ave. R. Co.*, 47 N. Y. App. Div. 323, *affirmed* without opinion 168 N. Y. 681; *Bennett v. Third Ave. R. Co.*, 40 N. Y. App. Div. 626; *Basting v. Brooklyn Heights R. Co.*, 39 N. Y. App. Div. 629; *Patterson v. Westchester Electric R. Co.*, 26 N. Y. App. Div. 336; *Norton v. Third Ave. R. Co.*, 26 N. Y. App. Div. 60; *Pohle v. Second Ave. R. Co.*, 13 N. Y. App. Div. 393, *affirmed* without opinion 161 N. Y. 666; *Smith v. Kingston City R. Co.*, 55 N. Y. App. Div. 143, *affirmed* without opinion 169 N. Y. 616; *Flanagan v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 820; *Cunningham v. Dry Dock, etc., R. Co.*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 471; *Kuhlman v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 417; *Faris v. Brooklyn City, etc., R. Co.*, 46 N. Y. App. Div. 231; *Schaefer v. Central Crosstown R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 114; *Weiss v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 332; *Pierce v. Metropolitan St. R. Co.*, 21 N. Y. App. Div. 427; *De Rozas v. Metropolitan St. R. Co.*, 13 N. Y. App. Div. 296; *Schalscha v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 141; *Kellegher v. Forty-second St., etc., R. Co.*, 171 N. Y. 309, *reversing* 56 N. Y. App. Div. 322; *Doering v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 192; *Schoenfeld v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 201; *Schiller v. Dry Dock, etc., R. Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 392; *Friedman v. Consolidated Traction Co.*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 764. See *Black v. Second Ave. R. Co.*, 44 N. Y. App. Div. 333.

*North Carolina.* — *Asbury v. Charlotte Electric R., etc., Co.*, 125 N. Car. 568.

*Ohio.* — *Ashtabula Rapid Transit Co. v. Holmes*, 67 Ohio St. 153.

*Pennsylvania.* — *Powelson v. United Traction Co.*, 204 Pa. St. 474; *Austrian v. United Traction Co.*, 19 Pa. Super. Ct. 329; *Shuart v. Consolidated Traction Co.*, 15 Pa. Super. Ct. 26; *McCormick v. Pittsburg, etc., Traction Co.*, 13 Pa. Super. Ct. 638; *Bensing v. Peoples Electric St. R. Co.*, 9 Pa. Super. Ct. 142.

*Tennessee.* — *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467.

*Texas.* — *Pelly v. Denison, etc., R. Co.*, (Tex. Civ. App. 1904) 78 S. W. Rep. 542; *Knauff v. San Antonio Traction Co.*, (Tex. Civ. App. 1902) 70 S. W. Rep. 1011.

*Utah.* — *Dickert v. Salt Lake City R. Co.*, 20 Utah 394.

*Virginia.* — *Norfolk, etc., R. Co. v. Morris*, 101 Va. 422.

*Washington.* — *Gilmore v. Seattle, etc., R. Co.*, 29 Wash. 150; *Brown v. Seattle City R. Co.*, 16 Wash. 465.

*Wisconsin.* — *Kohler v. West Side R. Co.*, 99 Wis. 33; *Champagne v. La Crosse City R. Co.*, 121 Wis. 554; *Bading v. Milwaukee Electric R., etc., Co.*, 105 Wis. 480.

*Canada.* — *Dawdy v. Hamilton, etc., Electric R. Co.*, 5 Ont. L. Rep. 92.

**Street Cars Stopped for a Purpose Other than Setting Down Passengers.** — Although a street car may have stopped for some purpose other than setting down passengers, if it is stopped under circumstances which amount to an invitation to the passengers to alight, it is negligence on the part of the carrier to start the car until they have had a reasonable opportunity to alight. *Belt Electric Line Co. v. Tomlin*, (Ky. 1897) 40 S. W. Rep. 925.

**Signal to Start Given by Unauthorized Person.** — See *supra*, this title, 556. 2.

**577.** 1. *Bascom v. Wabash R. Co.*, 102 Mo. App. 430; *St. Louis Southwestern R. Co. v. Turner*, (Tex. Civ. App. 1903) 77 S. W. Rep. 255. But see *Pittsburgh, etc., R. Co. v. Gray*, (Ind. App. 1901) 59 N. E. Rep. 1000.

**578.** 1. *Southern R. Co. v. Hobbs*, 118 Ga. 232, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 578; *Central of Georgia R. Co. v. McKenney*, 116 Ga. 13; *Herbich v. North Jersey St. R. Co.*, 67 N. J. L. 574; *Smitson v. Southern Pac. R. Co.*, 37 Oregon 74; *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1; *Southern R. Co. v. Mitchell*, 98 Tenn. 27; *Walters v. Chicago, etc., R. Co.*, 113 Wis. 371. See *Schiller v. Dry Dock, etc., R. Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 392; *Central Texas, etc., R. Co. v. Holloway*, (Tex. Civ. App. 1899) 54 S. W. Rep. 419.

**Stopping the Usual Time.** — The mere fact that a train was stopped the usual length of time is not sufficient to show negligence of the plaintiff nor due diligence of the defendant; for the circumstances may have required a longer stop on that day than usual, and it is a question for the jury to determine whether the stop was reasonably sufficient or not. *Luse v. Union Pac. R. Co.*, 57 Kan. 361.

**Passenger Encumbered with Parcels and Baggage.** — Where a railroad company takes on its train a passenger encumbered with hand-baggage and parcels, it must have due regard to his condition in this respect when the time comes for the passenger to leave the train. *Killian v. Georgia R., etc., Co.*, 97 Ga. 727; *Machen v. Pittsburg, etc., Pass., R. Co.*, 13 Pa. Super. Ct. 642.

**Allowing Passenger Time to Return for Bundles.** — *Texas, etc., R. Co. v. Born*, 20 Tex. Civ. App. 351.

**When the Train Is Crowded** and passengers are occupying the aisles, a longer time is required for passengers to alight than when the train is occupied by the ordinary number of passengers. *Smalley v. Detroit, etc., R. Co.*, 131 Mich. 560, 9 Detroit Leg. N. 443.

**Time to Leave Station Platform.** — There is no obligation upon a railroad company to keep its trains waiting until passengers can leave the platform. It is sufficient if reasonable time is given them in which to get safely off the train and out of the way of the cars. *Louisville, etc., R. Co. v. Ricketts*, (Ky. 1896) 37 S. W. Rep. 952.

**Time to Leave Premises.** — A train need not be stopped long enough to allow passengers to leave the premises of the railroad company,



**578.** Starting Train After Expiration of Reasonable Time. — See note 2.

Starting Train While Passenger Is Boarding or Alighting. — See note 3.

**579.** Delay of Passenger. — See note 1.

Louisville, etc., R. Co. v. Ricketts, (Ky. 1899) 52 S. W. Rep. 939.

**Allowing Passenger Time to Be Seated.** — Ordinarily it is not negligence to start a train before a passenger has had time to reach a seat and be seated. Louisville, etc., R. Co. v. Hale, 102 Ky. 600. It cannot be said as a matter of law that a train should not be started until a boarding passenger, carrying a baby and a basket, has had a sufficient time to get seated. Middlesborough R. Co. v. Webster, (Ky. 1899) 50 S. W. Rep. 843. And it cannot be said as a matter of law that the starting of a street car before a passenger is seated is or is not negligence. Herlich v. North Jersey St. R. Co., 65 N. J. L. 381. It has been held that it is not negligence for a street car to start while a passenger is in the act of passing from the platform to the car. Sharp v. New Orleans City R. Co., 111 La. 395, 100 Am. St. Rep. 488. It is not necessarily negligence to start a street car while a passenger is still on the side running-board entering the car. Canavan v. Interurban St. R. Co., (Supm. Ct. App. T.) 87 N. Y. Supp. 491. But when a railroad company furnishes as the only means of transportation over its road a "mixed train" composed of a passenger coach and a number of freight cars, and when on account of the character and construction of such a train it cannot start from a station, after stopping thereat, without its movement being attended with a jerk which may endanger the safety of those on board who are unseated, it becomes the duty of the company to use extraordinary diligence in protecting against such danger a passenger who has boarded the train, by stopping a sufficient length of time to give such passenger a reasonable opportunity to be seated. Macon, etc., R. Co. v. Moore, 108 Ga. 84.

**Sufficiency of Stoppage a Question of Fact.** — Chicago, etc., R. Co. v. Stormont, 190 Ill. 42, affirming 90 Ill. App. 505.

**578. 2. Expiration of Reasonable Time.** — Louisville, etc., R. Co. v. Coons, 76 S. W. Rep. 45, 25 Ky. L. Rep. 509; Pickett v. Southern R. Co., 69 S. Car. 445; Shealey v. South Carolina, etc., R. Co., 67 S. Car. 61, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 578. But see Kulman v. Erie R. Co., 65 N. J. L. 241.

3. Texas, etc., R. Co. v. Gardner, (C. C. A.) 114 Fed. Rep. 186; Simmons v. Seaboard Air-Line R. Co., 120 Ga. 225; Beringer v. Dubuque St. R. Co., 118 Iowa 135; Louisville, etc., R. Co. v. Harmon, 64 S. W. Rep. 640, 23 Ky. L. Rep. 871; Yazoo, etc., R. Co. v. Hatch, (Miss. 1904) 35 So. Rep. 941; Jacobson v. St. Louis Transit Co., 106 Mo. App. 339; Clinton v. Brooklyn Heights R. Co., 91 N. Y. App. Div. 374; St. Louis Southwestern R. Co. v. Cannon, (Tex. Civ. App. 1904) 81 S. W. Rep. 778; Texas, etc., R. Co. v. Born, 20 Tex. Civ. App. 351; Richmond Traction Co. v. Williams, 102 Va. 253.

**If a Conductor by the Exercise of Reasonable Care Could Have Known** that a passenger was in the act of alighting, it was negligence, it has

been held, for him to give a signal to start the train. Cullar v. Missouri, etc., R. Co., 84 Mo. App. 340.

**Starting Train While Passenger Is Getting on by Invitation of Carrier's Servant.** — If a person is induced to make an attempt to board a train by the invitation of an authorized servant of the carrier, the carrier is liable for injuries sustained by the starting of the train before such servant gives the signal, although the conductor may have no notice that any one is getting on the train. Alabama Midland R. Co. v. Horn, 132 Ala. 407.

**Street Cars — Rules Applied.** — If a street car when signaled to stop by a person in the street is slowed up, and the driver has reason to believe that the person giving the signal is getting on, it is negligence to start the car forward suddenly. Clinton v. Brooklyn Heights R. Co., 91 N. Y. App. Div. 374. See Louisville R. Co. v. Rammacker, (Ky. 1899) 51 S. W. Rep. 175.

If the conductor of a street car in the exercise of due care should have known of the intention and effort of a passenger to alight from the car, but failed to do so, and because of his omission the car was suddenly started forward while the passenger was stepping to the ground, the carrier, through the conductor, was negligent. Root v. Des Moines City R. Co., 113 Iowa 675.

Unless those in charge of a street car know, or by the exercise of reasonable care could know, that a passenger is about to alight, negligence cannot be predicated upon the sudden acceleration of the speed of the car as the passenger is alighting. Sims v. Metropolitan St. R. Co., 65 N. Y. App. Div. 270.

Before the defendant's servants can be charged with negligence they should have been either fairly apprised that the plaintiff desired to board the car, or that the situation was such that passengers might be naturally expected to get upon the car at the time. Bachrach v. Nassau Electric R. Co., 35 N. Y. App. Div. 633.

The fact that both the plaintiff and his companion hailed the car, and that immediately thereafter the car was slowed down, was sufficient to require the submission to the jury of the question whether the driver either knew or should have known that the parties were seeking to become passengers on the car. Sexton v. Metropolitan St. R. Co., 40 N. Y. App. Div. 26.

**Street Car Stopped Because of Obstruction.** — It may be negligence to suddenly start a street car which has been stopped by an obstruction on the track, if a passenger is in the act of getting on or off, and the conductor in the exercise of due care would be aware of the fact. Dean v. Third Ave. R. Co., 34 N. Y. App. Div. 220.

**579. 1. Delay of Passenger.** — Chicago, etc., R. Co. v. Stonecipher, 90 Ill. App. 511; Chicago, etc., R. Co. v. Armes, 32 Tex. Civ. App. 32; Galveston, etc., R. Co. v. Mathes, (Tex. Civ. App. 1903) 73 S. W. Rep. 411; Texas, etc., R. Co. v. McKenzie, 30 Tex. Civ. App.

**579. Burden of Proof.** — See note 2.

(4) *Assistance of Passengers.* — See note 3.

**580.** See notes 1, 2.

**Duty to See that Passengers Have Alighted.** — See note 3.

293; Texas, etc., R. Co. v. Atchison, (Tex. Civ. App. 1899) 54 S. W. Rep. 1075; Houston, etc., R. Co. v. Stewart, 21 Tex. Civ. App. 33; Central Texas, etc., R. Co. v. Hoard, (Tex. Civ. App. 1898) 49 S. W. Rep. 142; St. Louis Southwestern R. Co. v. Martin, 26 Tex. Civ. App. 231; Houston, etc., R. Co. v. Cohn, 22 Tex. Civ. App. 11; St. Louis Southwestern R. Co. v. Ricketts, 22 Tex. Civ. App. 515. See Pittsburgh, etc., R. Co. v. Gray, 28 Ind. App. 588; Louisville, etc., R. Co. v. Espenscheid, 17 Ind. App. 558; Champane v. La Crosse City R. Co., 121 Wis. 554.

Although a railway company stops its train at a station a reasonable length of time to enable a passenger to get off, and he neglects to do so, yet if it again stops the train, and invites him to get off at another place, it is bound to exercise proper care to enable him to get off in safety, and if, by reason of its neglect to do so, the passenger is injured, such negligence is the proximate cause of the injury. Krall v. Burlington, etc., R. Co., 71 Minn. 422.

**Delay of Person Boarding Train to Assist Passenger.** — A person who boards a train in assisting a passenger, without the knowledge or request of the company, is bound to know the time of the departure of such train, if such time be fixed and reasonable, public notice being given thereof, and to leave the train in season, before the time so fixed, to enable him to get off with safety before the cars are set in motion. With the arrival of the time fixed for the departure of the cars the implied license or permission ceases, and with it the liability of the company. Berry v. Louisville, etc., R. Co., 109 Ky. 727.

**579. 2.** City, etc., R. Co. v. Svedborg, 194 U. S. 201.

**3.** Southern R. Co. v. Hobbs, 118 Ga. 232; Southern R. Co. v. Reeves, 116 Ga. 743; Furgason v. Citizens St. R. Co., 16 Ind. App. 171; Selby v. Detroit R. Co., 122 Mich. 311; Young v. Missouri Pac. R. Co., 93 Mo. App. 267; Deming v. Chicago, etc., R. Co., 80 Mo. App. 152, 2 Mo. App. Rep. 547. But see Dawdy v. Hamilton, etc., Electric R. Co., 5 Ont. L. Rep. 92, wherein it is said that it is the duty of the conductor of a street car to assist people in getting on and off the car.

**Voluntary Promise of Conductor to Give Assistance.** — Inasmuch as it is not the duty of the servants of a railroad company generally to assist passengers to alight from the train, a promise by a conductor to assist a passenger, who is not known to him to be sick, infirm, or in need of assistance, is a mere voluntary promise for which the company is not responsible and by which it is not bound. Western, etc., R. Co. v. Earwood, 104 Ga. 127. See Louisville, etc., R. Co. v. Jordan, 112 Ky. 473.

**Promise of Conductor to Look After Child Traveling Alone.** — It has been held that the promise of a conductor to look after a seven years' old boy who is traveling alone, and to inform the next conductor of the presence of the boy

on the train, does not bind the carrier. Gage v. Illinois Cent. R. Co., 75 Miss. 17.

**Effect of Custom.** — Evidence of a custom to assist women passengers is inadmissible to establish a duty to assist the plaintiff, unless it is shown that the plaintiff relied on the custom, or that it was so well known and acquiesced in that it might reasonably be presumed to have been an ingredient imported into the contract by the parties. St. Louis Southwestern R. Co. v. McCullough, 18 Tex. Civ. App. 534.

**580. 1.** Compare Doolittle v. Southern R. Co., 62 S. Car. 130.

**2. Question for the Jury.** — Southern R. Co. v. Reeves, 116 Ga. 743; Lake Erie, etc., R. Co. v. Taylor, 25 Ind. App. 679; Cincinnati, etc., R. Co. v. Bell, 74 S. W. Rep. 700, 25 Ky. L. Rep. 10; Mensing v. Michigan Cent. R. Co., 117 Mich. 606; Green v. Middlesex Valley R. Co., 31 N. Y. App. Div. 412; Memphis St. R. Co. v. Shaw, 110 Tenn. 467; Southern R. Co. v. Mitchell, 98 Tenn. 27; Chicago, etc., R. Co. v. Armes, 32 Tex. Civ. App. 32; Missouri, etc., R. Co. v. Buchanan, 31 Tex. Civ. App. 209. See Indiana R. Co. v. Maurer, 160 Ind. 25.

**Assisting Passenger to Alight from Crowded Street Car.** — It has been declared that it is the duty of a conductor who is on the rear platform when a passenger is alighting to see to it that the passenger has an opportunity to alight with safety, and it is his duty to see to it that passengers who are blocking the exit shall stand aside or even alight from the car temporarily. But it cannot ordinarily be said that the conductor is negligent in not being on the back platform prepared to render this assistance. Jacobs v. West End St. R. Co., 178 Mass. 116.

**Duty to Intoxicated Passenger.** — Burke v. Chicago, etc., R. Co., 108 Ill. App. 565.

**Negligence in Assisting Passenger to Alight.** — Although a carrier may not be under any obligation to furnish passengers assistance to alight, if it undertakes to do it will be liable for the negligence of its servants in assisting passengers. Western, etc., R. Co. v. Voils, 98 Ga. 446; Missouri, etc., R. Co. v. White, 22 Tex. Civ. App. 424; International, etc., R. Co. v. Anderson, 15 Tex. Civ. App. 180; International, etc., R. Co. v. Gilmer, 18 Tex. Civ. App. 680; Werner v. Chicago, etc., R. Co., 105 Wis. 300; Dawdy v. Hamilton, etc., Electric R. Co., 5 Ont. L. Rep. 92. See Texas, etc., R. Co. v. Humphries, 20 Tex. Civ. App. 28.

**3. Duty to See Whether Passengers Are Getting On or Off Street Car.** — Street railway carriers are under an obligation, through their servants, to exercise care to see and know that no passengers are in the act of getting on or off a car, which has been stopped for the purpose of taking on or setting down passengers, before the car is again put in motion.

*Connecticut.* — Post v. Hartford St. R. Co., 72 Conn. 362.

*District of Columbia.* — Washington, etc., R. Co. v. Grant, 11 App. Cas. (D. C.) 107.

**580. Ignorance of Passenger's Intention to Alight. — See note 5.**

*Illinois.* — *West Chicago St. R. Co. v. Luka*, 72 Ill. App. 60.

*Indiana.* — *Crump v. Davis*, 33 Ind. App. 88; *Indianapolis St. R. Co. v. Brown*, 32 Ind. App. 130.

*Kansas.* — *Leavenworth Electric R. Co. v. Cusick*, 60 Kan. 590.

*Kentucky.* — *Houghton v. Louisville R. Co.*, (Ky. 1904) 81 S. W. Rep. 695.

*Maryland.* — *United R., etc., Co. v. Hertel*, 97 Md. 382.

*Massachusetts.* — *Meade v. Boston El. R. Co.*, 185 Mass. 327; *Davey v. Greenfield, etc.*, St. R. Co., 177 Mass. 106.

*Minnesota.* — *Gaffney v. St. Paul City R. Co.*, 81 Minn. 459.

*New York.* — *McGill v. Central Crosstown R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 477; *Schaefer v. Central Crosstown R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 114.

*Pennsylvania.* — *McCurdy v. United Traction Co.*, 15 Pa. Super. Ct. 29.

*Tennessee.* — *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467.

*Virginia.* — *Richmond Traction Co. v. Williams*, 102 Va. 253.

*Washington.* — See *Foster v. Seattle Electric Co.*, 35 Wash. 177.

Whenever a street car is stopped at or near a crossing of streets, before the car is again put in motion the duty is cast on those in charge of the car of exercising proper and reasonable care for the safety of passengers. *West Chicago St. R. Co. v. Manning*, 170 Ill. 417.

When a street surface car has come to a full standstill, reasonable care in its operation demands that it shall not be started without some effort on the part of the conductor or motorman to determine whether this may be done with safety to passengers or intending passengers, and the question of negligence is one for the jury. *Bessenger v. Metropolitan St. R. Co.*, 79 N. Y. App. Div. 32.

In *Georgia* it is said that it is the duty of the proper servant of a street railway company to exercise extraordinary diligence, before signaling a car to go ahead, to ascertain if any passengers wish to alight. *Atlanta R. Co. v. Randall*, 117 Ga. 165.

**Cars Drawn by Dummy Engines.** — It has been held that in the operation of cars drawn by dummy engines through the streets of cities it is the duty of the conductor before starting the train to see and know that no person is in the act of getting off. *Sweet v. Birmingham R., etc., Co.*, 136 Ala. 166.

**Interurban Electric Cars.** — The rule which is applicable to the management of street cars operating only in the streets of a city or town, that when those in charge of the car stop it in response to the signal or notification of a passenger to enable him to alight, it is their duty to see and know before starting again that no one is in the act of alighting or in any other perilous position, has been held to be applicable to the management of an electric car which is run on schedule time, and which, when beyond the city limits, stops only at regular stations. *Birmingham R., etc., Co. v. Wildman*, 119 Ala. 547.

**580. 5. Getting On or Off Street Car Without**

**the Knowledge of the Carrier.** — It has been held that if the servants in charge of a street car do not have notice or knowledge that a passenger intends to alight, the carrier cannot be charged with negligence because of the starting of the car while the passenger is alighting. *Grabenstein v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 261; *Brown v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 374.

**Car Stopped for Some Other Purpose than Taking On or Setting Down Passengers.** — It has been said that if a car is not stopped to take up or set down passengers, a carrier cannot be held liable for injuries sustained by a passenger who suddenly leaves his seat and steps off the car. *Spaulding v. Quincy, etc., R. Co.*, 184 Mass. 470.

Thus, if the conductor of a street car has no notice of the fact that any passengers intend to alight when the car is stopped for some purpose other than taking on or setting down passengers, a passenger cannot recover for injuries received by the starting of the car while he is alighting. *McCarthy v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 388. And it has been held that where a street car is stopped at the railroad crossing, as required by statute, the conductor going ahead to see that the track is clear, the motorman and the conductor are not required, as a matter of law, to look before the car is started to ascertain whether any one is getting on or off. *Packard v. Toledo Traction Co.*, 12 Ohio Cir. Dec. 822, 22 Ohio Cir. Ct. 578. But, on the other hand, it has been declared that it cannot be said as a matter of law that where one person is seeking to get on a car, either stopped or slowed down for the purpose, there is no duty imposed on the servants of the company in charge of the car to look and see if any one else is following and seeking to take advantage of the car being stopped to board it. *Sexton v. Metropolitan St. R. Co.*, 40 N. Y. App. Div. 26.

**Car Not Stopped.** — It has been held that if a street car does not stop, but only slacks its speed for the purpose of letting an intending passenger get on, the conductor is not bound to "see and ascertain" whether any person might be getting off while the car is in motion. *Ashtabula Rapid Transit Co. v. Holmes*, 67 Ohio St. 153. If passengers attempt to alight from a car, having given no information or indication to the persons in charge of their intention so to do, there is no negligence on the part of the driver of the car in increasing its speed to the rate at which it can ordinarily proceed with safety. *Steuer v. Metropolitan St. R. Co.*, 46 N. Y. App. Div. 500; *Blakney v. Seattle Electric Co.*, 28 Wash. 607. If the carrier's servants in charge of a street car do not know, and have no reason to believe, that any one is about to board the car while it is in motion, it is not negligence to increase the speed of the car. *Fremont v. Metropolitan St. R. Co.*, 83 N. Y. App. Div. 414.

It has been held that although a passenger has signaled the conductor that he wishes to alight, and the speed of the car is shortly afterwards decreased, this does not justify the assumption by the passenger that the car has slowed up for

**581. Reciprocity of Duty.** — See note 1.(5) *Entrance of Vehicle by Person Not a Passenger.* — See note 2.e. **DUTY TO WARN, INSTRUCT, OR INFORM PASSENGERS.** — See note 4.

him to alight, in the absence of knowledge that his wishes were communicated by the conductor to the driver. *Armstrong v. Metropolitan St. R. Co.*, 36 N. Y. App. Div. 525, *affirmed* without opinion 165 N. Y. 641.

Although an intending passenger has signaled an approaching street car to stop, and the car thereafter slows down, it is not negligence to increase the speed of the car while such person is attempting to get on unless the car was slowed down in response to his signal, or the servants in charge of the car became aware that he desired or was attempting to board the car. *Reidy v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 527.

Although a car has been signaled to stop by a bystander, and the car has been slowed up, it is not negligence to increase the speed of the car before the rear of the car is opposite the place where the intending passenger is standing, unless the motorman sees him attempting to get on the car. *Monroe v. Metropolitan St. R. Co.*, 79 N. Y. App. Div. 587.

**581. 1.** *Metropolitan St. R. Co. v. Hudson*, (C. C. A.) 113 Fed. Rep. 449; *Paducah St. R. Co. v. Walsh*, 58 S. W. Rep. 431, 22 Ky. L. Rep. 532; *Louisville, etc., R. Co. v. Eakin*, 103 Ky. 465; *Missouri, etc., R. Co. v. McElree*, 16 Tex. Civ. App. 182.

**2.** *Chicago City R. Co. v. O'Donnell*, 109 Ill. App. 616, *judgment affirmed* 207 Ill. 478; *Louisville, etc., R. Co. v. Espenscheid*, 17 Ind. App. 558; *Bishop v. Illinois Cent. R. Co.*, 77 S. W. Rep. 1099, 25 Ky. L. Rep. 1363; *Berry v. Louisville, etc., R. Co.*, 109 Ky. 727; *Saxton v. Missouri Pac. R. Co.*, 98 Mo. App. 494; *Johnson v. Southern R. Co.*, 53 S. Car. 203, 69 Am. St. Rep. 849; *Texas, etc., R. Co. v. Funderburk*, 30 Tex. Civ. App. 22; *Oxsher v. Houston East, etc., R. Co.*, 29 Tex. Civ. App. 420; *Texas, etc., R. Co. v. Crockett*, 27 Tex. Civ. App. 463; *Bullock v. Houston, etc., R. Co.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 184; *International, etc., R. Co. v. Satterwhite*, 19 Tex. Civ. App. 170. See *St. Louis, etc., R. Co. v. Tomlinson*, 69 Ark. 489; *Southern R. Co. v. Merritt*, 120 Ga. 409; *Morrow v. Atlanta, etc., R. Co.*, 134 N. Car. 92.

**4. Duty to Warn — Generally — California.** — *Seller v. Market-St. R. Co.*, 139 Cal. 268. *Connecticut.* — *Hesse v. Meriden, etc., Tramway Co.*, 75 Conn. 571.

*Indiana.* — *Romine v. Evansville, etc., R. Co.*, 24 Ind. App. 230; *Citizens St. R. Co. v. Hoffbauer*, 23 Ind. App. 614.

*Michigan.* — *Mensing v. Michigan Cent. R. Co.*, 117 Mich. 606.

*New York.* — *Gatens v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 311, *affirmed* 181 N. Y. 515; *Eberhardt v. Metropolitan St. R. Co.*, 69 N. Y. App. Div. 560, *affirmed* without opinion 174 N. Y. 522; *Wolf v. Third Ave. R. Co.*, 67 N. Y. App. Div. 605; *Lucas v. Metropolitan St. R. Co.*, 56 N. Y. App. Div. 405; *Langin v. New York, etc., Bridge*, 10 N. Y. App. Div. 529; *Wilder v. Metropolitan St. R. Co.*, 10 N. Y.

App. Div. 364, *affirmed* without opinion 161 N. Y. 665; *Flack v. Nassau Electric R. Co.*, 41 N. Y. App. Div. 399. See *Mackenzie v. Union R. Co.*, 82 N. Y. App. Div. 124, *affirmed* without opinion 178 N. Y. 638.

*North Carolina.* — *Penny v. Atlantic Coast Line R. Co.*, 133 N. Car. 221.

*Oregon.* — *Smitson v. Southern Pac. R. Co.*, 37 Oregon 74.

*Texas.* — *San Antonio, etc., R. Co. v. Turney*, (Tex. Civ. App. 1903) 78 S. W. Rep. 256; *International, etc., R. Co. v. Anthony*, 24 Tex. Civ. App. 9; *International, etc., R. Co. v. Downing*, 16 Tex. Civ. App. 643.

*Utah.* — *Nelson v. Southern Pac. R. Co.*, 18 Utah 244.

*Virginia.* — *Richmond R., etc., Co. v. West*, 100 Va. 184, 4 Va. Sup. Ct. Rep. 112.

See *Berry v. Louisville, etc., R. Co.*, 109 Ky. 727; *Wheeler v. Grand Trunk R. Co.*, 70 N. H. 607; *Allen v. Northern Pac. R. Co.*, 35 Wash. 240.

**Duty to Instruct Passenger Unfamiliar with Railway Travel.** — *Doolittle v. Southern R. Co.*, 62 S. Car. 130.

**Dangers Against Which Warning Necessary.** — Street-car companies carrying passengers in ordinary public streets or highways are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or being run over by other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger and not that of the carrier. It is not a danger against which the carrier is bound to protect the passenger or to give him warning. *Oddy v. West End St. R. Co.*, 178 Mass. 341, 86 Am. St. Rep. 482.

**Obvious Dangers.** — No duty is imposed on carriers to warn passengers of obvious dangers. *Wetherington v. Lynn, etc., R. Co.*, 182 Mass. 596; *Ebert v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1899) 49 S. W. Rep. 1105.

**Duty to Warn Child Against Riding in Dangerous Position.** — Where a boy eight years and four months old got on a street car and sat down on the platform with his feet on the step of the car, it was held that the trial court properly submitted to the jury the question whether it was negligent on the part of the motorman, acting as conductor, to permit him to ride in that position. *Jackson v. St. Paul City R. Co.*, 74 Minn. 48.

**Sufficiency of Warning.** — By reason of running a train too near a washout, the engine and some of the cars were overturned, leaving the car in which the plaintiff was a passenger in a situation of danger. The passengers in the car were told to get out, but the plaintiff, who did not understand English, remained in the car, and no further effort was made to remove her. It was held that a verdict for the plaintiff was properly directed. *Southern Pac. R. Co. v. Tarin*, (C. C. A.) 108 Fed. Rep. 734.

**Warning of the Departure of Trains.** — See *supra*, this title, 573. 1.

**582. Misdirection by Employees — Right of Passenger to Rely on Information Given.** — See note 1.

Invitation to Passenger to Alight from Moving Train. — See note 2.

**583. Duty of Passenger to Obey Direction.** — See note 2.

*f. DUTY TO CARRY TO POINT OF DESTINATION — (1) In General.* — See note 3.

**584. Knowledge of Passenger that Train Will Not Stop under a New Schedule at Destination Proposed.** — See note 3.

Failure of Agent to Give Information as to Stoppage. — See note 4.

(2) *Carrying Passengers Beyond Destination.* — See note 5.

**582. 1. Misdirection of Employees.** — *Newcomb v. New York Cent., etc., R. Co.*, 182 Mo. 687; *Davis v. Houston, etc., R. Co.*, 25 Tex. Civ. App. 8; *Fowlkes v. Southern R. Co.*, 96 Va. 742; *Turner v. Great Northern R. Co.*, 15 Wash. 213, 55 Am. St. Rep. 883. See *Dillon v. Lindell R. Co.*, 71 Mo. App. 631. See also the cases cited *supra*, this title, **571. 2.**

**Negligently Showing Passenger to Wrong Car.** — *International, etc., R. Co. v. Evans*, 30 Tex. Civ. App. 252.

**Misdirection as to Changing Cars.** — *International, etc., R. Co. v. Anderson*, 15 Tex. Civ. App. 180.

**Assurance by Conductor that Train Would Remain Stationary.** — A person in charge of stock has a right to rely on the assurance of the conductor that the train will remain stationary at a certain point while the stock is being cared for. *Missouri, etc., R. Co. v. Jahn*, 18 Tex. Civ. App. 74.

**2. Gulf, etc., R. Co. v. Shelton**, 30 Tex. Civ. App. 72, *rehearing denied* (Tex. Civ. App. 1902) 70 S. W. Rep. 359.

**Going on Platform Preparatory to Alighting by Direction of Carrier.** — *Southern R. Co. v. Roebuck*, 132 Ala. 412.

**Invitation to Passenger to Alight at Dangerous Place.** — *Werner v. Chicago, etc., R. Co.*, 105 Wis. 300.

**583. 2. Jenkins v. Brooklyn Heights R. Co.**, 29 N. Y. App. Div. 8. See *Rolette v. Great Northern R. Co.*, 91 Minn. 16.

**3. Gulf, etc., R. Co. v. Moore**, (Tex. Civ. App. 1904) 80 S. W. Rep. 426; *Fowlkes v. Southern R. Co.*, 96 Va. 742; *Bullock v. White Star Steamship Co.*, 30 Wash. 448; *Sievers v. Dalles, etc., Nav. Co.*, 24 Wash. 302; *Turner v. Great Northern R. Co.*, 15 Wash. 213, 55 Am. St. Rep. 883. But see *Braymer v. Seattle, etc., R. Co.*, 35 Wash. 346.

**Taking Passenger Off on Side Trip.** — *Rosted v. Great Northern R. Co.*, 76 Minn. 123.

**Inability to Carry Passenger to Destination.** — If a carrier by water finds that it is impossible to carry a passenger to his destination, he cannot be put off at an intermediate point, without his consent, but must be carried back to the port of embarkation. *Smith v. North American Transp., etc., Co.*, 20 Wash. 580.

**Journey Interrupted by Washout.** — Where a train has been stopped by the washing away of a bridge, it is a question for the jury to decide whether or not, under all the circumstances, the train should be backed to a place where the passengers can receive proper care. *Houston, etc., R. Co. v. Rogers*, 16 Tex. Civ. App. 19.

**Continuous Journey.** — Where a passenger had

a contract with a railroad company to be carried from one place to another, it was held that he could not be charged an extra fare to be transferred across a river where there was a break in the railway, but as it would have been reasonable for him to have paid the extra charge of ten cents, his damages were limited to that amount. *Clarry v. Grand Trunk R. Co.*, 29 Ont. 18.

**Negligence of Agent in Selling Ticket to Wrong Place.** — *Texas, etc., R. Co. v. Armstrong*, (Tex. Civ. App. 1897) 41 S. W. Rep. 833.

**Duty to Passenger Boarding Wrong Train by Mistake.** — *St. Louis Southwestern R. Co. v. Pruitt*, (Tex. Civ. App. 1904) 79 S. W. Rep. 598, *writ denied* 97 Tex. 487.

**Neglect to Carry Passenger on Return Trip According to Agreement.** — *Pickens v. South Carolina, etc., R. Co.*, 54 S. Car. 498.

**584. 3. See Bohannon v. Southern R. Co.**, 112 Ky. 106.

**4. See Turner v. McCook**, 77 Mo. App. 196.

**5. Carrying Beyond Station — Alabama.** — *Louisville, etc., R. Co. v. Quick*, 125 Ala. 553.

*Arkansas.* — *St. Louis, etc., R. Co. v. Power*, 67 Ark. 142; *Texarkana, etc., R. Co. v. Anderson*, 67 Ark. 123.

*Georgia.* — *Southern R. Co. v. O'Bryan*, 112 Ga. 127; *Southern R. Co. v. Humphries*, 108 Ga. 591; *Central of Georgia R. Co. v. Price*, 106 Ga. 176, 71 Am. St. Rep. 246; *Central of Georgia R. Co. v. Dorsey*, 106 Ga. 826.

*Indiana.* — *Louisville, etc., R. Co. v. Renicker*, 17 Ind. App. 619.

*Louisiana.* — *Airey v. Pullman Palace Car Co.*, 50 La. Ann. 648.

*Missouri.* — *Deming v. Chicago, etc., R. Co.*, 80 Mo. App. 152, 2 Mo. App. Rep. 547.

*Texas.* — *Pecos, etc., R. Co. v. Williams*, (Tex. Civ. App. 1903) 78 S. W. Rep. 5; *St. Louis Southwestern R. Co. v. Ricketts*, 96 Tex. 68; *International, etc., R. Co. v. Sampson*, (Tex. Civ. App. 1901) 64 S. W. Rep. 692; *Texas, etc., R. Co. v. Gott*, 20 Tex. Civ. App. 335; *Missouri, etc., R. Co. v. Hennesey*, 20 Tex. Civ. App. 316.

**Carrying Passenger on Street Car Beyond Destination.** — *San Antonio Traction Co. v. Crawford*, (Tex. Civ. App. 1902) 71 S. W. Rep. 306.

**Carrying Passenger Past Station for Changing Cars.** — *St. Louis Southwestern R. Co. v. McCullough*, 18 Tex. Civ. App. 524.

**Negligence of Passenger.** — If a train is stopped the passenger's destination a sufficient length of time to enable the passenger to get off, but the passenger neglects to do so, he cannot recover damages for being carried and set down a short distance beyond the station. *St. Louis, etc., R. Co. v. Lewis*, 69 Ark. 81. It has been

**585.** (3) *Arousing Sleeping Passengers.* — See notes 1, 2.g. **DUTY TO CARRY PROMPTLY** — (1) *In General.* — See note 3.(2) *Obligation to Conform to Published Time Tables* — (a) *In General.*

— See note 4.

**587.** h. **DUTY TO CARRY SAFELY** — (1) *In General.* — See note 1.

Special Instances. — See note 2.

held that the carrier was not liable for carrying a seven-year-old boy, traveling alone, by his station, even though the conductor had promised to look after him. *Gage v. Illinois Cent. R. Co.*, 75 Miss. 17.

**585.** 1. *Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11.

2. **Passengers on Sleeping Cars.** — A passenger on a sleeping car should be awakened in time to get ready to alight at his station, especially when the conductor has promised to awaken him. *Airey v. Pullman Palace Car Co.*, 50 La. Ann. 648. And see the title **SLEEPING-CAR COMPANIES**.

3. **Duty to Carry Promptly.** — *Sears v. Louisville, etc., R. Co.*, (Ky. 1900) 56 S. W. Rep. 725; *Illinois Cent. R. Co. v. Pearson*, 80 Miss. 26; *Miller v. Baltimore, etc., R. Co.*, 89 N. Y. App. Div. 457; *Cooley v. Pennsylvania R. Co.*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 239; *Miller v. Southern R. Co.*, 69 S. Car. 116; *International, etc., R. Co. v. Harder*, (Tex. Civ. App. 1904) 81 S. W. Rep. 356; *Turner v. Great Northern R. Co.*, 15 Wash. 213, 55 Am. St. Rep. 883.

**Failure to Hold Train in Accordance with Agreement.** — *Southern R. Co. v. Marshall*, 111 Ky. 560.

**Delay Caused by Quarantine Regulations.** — Where the ticket agent of a railroad company induced a passenger to buy a ticket for a route over part of which quarantine regulations prevented travel, when there were other routes open, it was held that the carrier was liable in damages. *St. Clair v. Kansas City, etc., R. Co.*, 76 Miss. 473, 71 Am. St. Rep. 534.

4. **Conformity to Time Tables.** — *Coleman v. Southern R. Co.*, 138 N. Car. 351, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 585; *Miller v. Southern R. Co.*, 69 S. Car. 116.

**587.** 1. **Safety of Carriage.** — *Ephland v. Missouri Pac. R. Co.*, 71 Mo. App. 597.

2. **Sudden Jerks and Jars in the management of the conveyance may be sufficient to charge the carrier with negligence.**

*United States.* — *Pennsylvania R. Co. v. Paul*, (C. C. A.) 126 Fed. Rep. 157.

*Alabama.* — *Southern R. Co. v. Crowder*, 130 Ala. 256.

*California.* — *Holloway v. Pasadena, etc., R. Co.*, 130 Cal. 177; *Samuels v. California St. Cable R. Co.*, 124 Cal. 294.

*Georgia.* — *Southern R. Co. v. Webb*, 116 Ga. 152; *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665.

*Illinois.* — *South Chicago City R. Co. v. Du-fresne*, 200 Ill. 456, affirming 102 Ill. App. 493; *Chicago City R. Co. v. Morse*, 197 Ill. 327; *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 23, 66 Am. St. Rep. 253; *North Chicago St. R. Co. v. Schwartz*, 82 Ill. App. 493.

*Indiana.* — *Citizens' St. R. Co. v. Jolly*, 161 Ind. 80; *Dresslar v. Citizens St. R. Co.*, 19 Ind. App. 383.

*Kentucky.* — *Chesapeake, etc., R. Co. v. Jordan*, 76 S. W. Rep. 145, 25 Ky. L. Rep. 574; *Illinois Cent. R. Co. v. Crady*, 69 S. W. Rep. 706, 24 Ky. L. Rep. 643; *Cincinnati, etc., R. Co. v. Jackson*, 58 S. W. Rep. 526, 22 Ky. L. Rep. 630. See *Illinois Cent. R. Co. v. Vinson*, 76 S. W. Rep. 167, 25 Ky. L. Rep. 652.

*Massachusetts.* — *Timms v. Old Colony St. R. Co.*, 183 Mass. 193; *Farnon v. Boston, etc., R. Co.*, 180 Mass. 212.

*Michigan.* — *Etson v. Ft. Wayne, etc., R. Co.*, 114 Mich. 605.

*Minnesota.* — *Simonds v. Minneapolis, etc., R. Co.*, 87 Minn. 408.

*Missouri.* — *Ilges v. St. Louis Transit Co.*, 102 Mo. App. 529; *Pryor v. Metropolitan St. R. Co.*, 85 Mo. App. 367; *Portuchek v. Wabash R. Co.*, 101 Mo. App. 52; *Erwin v. Kansas City, etc., R. Co.*, 94 Mo. App. 289; *Neville v. St. Louis Merchants Bridge Terminal R. Co.*, 158 Mo. 293.

*New Jersey.* — *Corkhill v. Camden, etc., R. Co.*, 69 N. J. L. 97; *Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30.

*New York.* — *Sheeron v. Coney Island, etc., R. Co.*, 78 N. Y. App. Div. 476; *Eberhardt v. Metropolitan St. R. Co.*, 69 N. Y. App. Div. 560, affirmed without opinion 174 N. Y. 522; *Moskowitz v. Brooklyn Heights R. Co.*, 89 N. Y. App. Div. 425; *Bradley v. Second Ave. R. Co.*, 34 N. Y. App. Div. 284; *Hassen v. Nassau Electric R. Co.*, 34 N. Y. App. Div. 71; *Nelson v. Lehigh Valley R. Co.*, 25 N. Y. App. Div. 535; *Jonas v. Long Island R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 306; *Lansing v. Coney Island, etc., R. Co.*, 16 N. Y. App. Div. 146; *Grotsch v. Steinway R. Co.*, 19 N. Y. App. Div. 130.

*North Carolina.* — *Graves v. Norfolk, etc., R. Co.*, 136 N. Car. 3.

*Tennessee.* — *Nashville R. Co. v. Howard*, (Tenn. 1904) 78 S. W. Rep. 1098; *Southern R. Co. v. Vandergriff*, 108 Tenn. 14.

*Texas.* — *San Antonio Traction Co. v. Williams*, (Tex. Civ. App. 1904) 78 S. W. Rep. 977; *Williams v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1903) 78 S. W. Rep. 45; *Hicks v. Galveston, etc., R. Co.*, 96 Tex. 355, reversing (Tex. Civ. App. 1902) 71 S. W. Rep. 322; *Gulf, etc., R. Co. v. Carter*, (Tex. Civ. App. 1902) 71 S. W. Rep. 73; *Citizens' R. Co. v. Craig*, (Tex. Civ. App. 1902) 69 S. W. Rep. 239; *St. Louis Southwestern R. Co. v. Ferguson*, 26 Tex. Civ. App. 460; *St. Louis Southwestern R. Co. v. Humphreys*, 25 Tex. Civ. App. 401; *San Antonio, etc., R. Co. v. Choate*, 22 Tex. Civ. App. 618; *Houston, etc., R. Co. v. McCullough*, 22 Tex. Civ. App. 208; *Runnels v. Houston, etc., R. Co.*, (Tex. Civ. App. 1899) 50 S. W. Rep. 172; *Galveston, etc., R. Co. v. Scott*, 21 Tex. Civ. App. 24; *Ebert v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1899) 49 S. W. Rep. 1105; *Gaunce v. Gulf, etc., R. Co.*, 20 Tex. Civ. App. 33.

*Washington*. — *Graham v. McNeill*, 20 Wash. 466, 72 Am. St. Rep. 121.

See also the cases cited *supra*, this title, 573. 1.

In order to recover from a cable railroad it is not enough to show that there was a jerk, but it must affirmatively appear that the jerk was an extraordinary or unusual one or attributable to a defect in the track, or an imperfection in the car or apparatus, or to a dangerous rate of speed, or to unskilful handling of the car by the gripman. *Bartley v. Metropolitan St. R. Co.*, 148 Mo. 124.

**A Sudden Stopping** of the conveyance may be sufficient to charge the carrier with negligence. *Garland v. Southern R. Co.*, 111 Ga. 852; *Chicago Union Traction Co. v. Crosby*, 109 Ill. App. 644; *Chicago City R. Co. v. Morse*, 98 Ill. App. 662, judgment affirmed 197 Ill. 327; *Dorsey v. Atchison*, etc., R. Co., 83 Mo. App. 528; *Johnson v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 866.

The sudden stopping of a street car in order to avoid a collision which was threatened in consequence of the negligence of a third person has been held not to charge the carrier with liability to a passenger injured by the stopping. *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45.

**Unauthorized Application of Air Brake by Fellow Passenger**. — *McDonnell v. New York Cent.*, etc., R. Co., 35 N. Y. App. Div. 147, appeal dismissed 159 N. Y. 524.

**A Mistaken Exercise of Judgment** by the servants of a carrier when there is suddenly presented a situation of danger does not necessarily charge the carrier with liability for negligence. *Kantrowitz v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 65.

**Unusual Swaying of Electric Car** may be the result of negligence. *Schmidt v. Conley Island*, etc., R. Co., 26 N. Y. App. Div. 391.

**Lurching of Street Car in Rounding Curve**. — *Macy v. New Bedford*, etc., St. R. Co., 182 Mass. 291; *Fitch v. Mason City*, etc., Traction Co., 116 Iowa 716; *Moser v. South Covington*, etc., St. R. Co., 74 S. W. Rep. 1090, 25 Ky. L. Rep. 154; *Gatens v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 311, affirmed 181 N. Y. 515; *Vogler v. Central Crosstown R. Co.*, 83 N. Y. App. Div. 101; *Merrill v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 401; *Townsend v. Binghamton R. Co.*, 57 N. Y. App. Div. 234; *Lucas v. Metropolitan St. R. Co.*, 56 N. Y. App. Div. 405; *Wigton v. Metropolitan St. R. Co.*, 38 N. Y. App. Div. 207.

**Swaying or Lurching Motions of a Street Car in Returning to the Main Track from a Siding** unless they are unusual in degree and caused by some defect in the car or track, or by some unusual or dangerous rate of speed or other mismanagement, furnish no evidence of negligence on the part of the carrier or the carrier's servants. *Byron v. Lynn*, etc., R. Co., 177 Mass. 303.

**Derailment of Street Car**. — *Ramson v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 101, affirmed without opinion 177 N. Y. 578.

**Running Train by Structure in Dangerous Proximity to Track**. — *Baker v. New York*, etc., R. Co., 28 N. Y. App. Div. 316.

**Cotton Piled Dangerously Close to Track Falling**

**Through Car Window**. — *Kird v. New Orleans*, etc., R. Co., 105 La. 226.

**Stream of Water Coming Through Car Window**. — *Spencer v. Chicago*, etc., R. Co., 105 Wis. 311.

**Running Street Car by Wagon in Dangerous Proximity to Track**. — *Goldwasser v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 682; *Faris v. Brooklyn City*, etc., R. Co., 46 N. Y. App. Div. 231; *Henderson v. Nassau Electric R. Co.*, 46 N. Y. App. Div. 280; *Coulahan v. Metropolitan St. R. Co.*, 28 N. Y. App. Div. 394.

**Running Street Car by Burning Building**. — *Citizens' R. Co. v. Jones*, (Tex. Civ. App. 1904) 81 S. W. Rep. 558.

**Running Train Through Windstorm**. — See *Pierce v. Great Falls*, etc., R. Co., 22 Mont. 447.

**Operating Train During Disorderly Strike** has been held not to be negligence on the part of a carrier. *Fewings v. Mendenhall*, 88 Minn. 336, 97 Am. St. Rep. 519.

**Placing Caboose in Front of Train** has been held to be negligence under a statute providing that in forming a passenger train no baggage, merchandise, or lumber cars shall be placed in the rear of passenger cars. *Prescott*, etc., R. Co. v. *Smith*, 70 Ark. 179.

**Injury by Flying Sparks**. — *Philadelphia*, etc., R. Co. v. *Young*, (C. C. A.) 90 Fed. Rep. 709; *Missouri*, etc., R. Co. v. *Mitchell*, (Tex. Civ. App. 1904) 79 S. W. Rep. 94; *Missouri*, etc., R. Co. v. *Flood*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1106; *St. Louis Southwestern R. Co. v. Parks*, 97 Tex. 131; *St. Louis Southwestern R. Co. v. Parks*, (Tex. Civ. App. 1903) 73 S. W. Rep. 439; *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ. App. 671. See also the title FIRES.

**Employee Negligently Jostling Passenger Off Car**. — *Fleming v. St. Louis*, etc., R. Co., 101 Mo. App. 217; *Whalen v. Consolidated Traction Co.*, 61 N. J. L. 606, 68 Am. St. Rep. 723; *Gray v. Metropolitan St. R. Co.*, 39 N. Y. App. Div. 536, reversed 165 N. Y. 457; *Schimpf v. Harris*, 185 Pa. St. 46; *Texas*, etc., R. Co. v. *Humphries*, 20 Tex. Civ. App. 28.

**Passenger Falling from Train**. — *Denver*, etc., R. Co. v. *Bedell*, 11 Colo. App. 139; *Galveston*, etc., R. Co. v. *Scott*, 21 Tex. Civ. App. 24.

**Duty to Rescue Passenger Falling from Train**. — *Southern R. Co. v. Webb*, 116 Ga. 152. See *Reed v. Louisville*, etc., R. Co., 104 Ky. 603.

**Vestibule Doors Negligently Left Open**. — *Robinson v. Chicago*, etc., R. Co., 135 Mich. 254, 10 Detroit Leg. N. 727.

**Creating Situation of Apparent Danger**. — *Kight v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494; *Gannon v. New York*, etc., R. Co., 173 Mass. 40; *Ephland v. Missouri Pac. R. Co.*, 137 Mo. 187, 59 Am. St. Rep. 498; *Williams v. Galveston*, etc., R. Co., (Tex. Civ. App. 1903) 78 S. W. Rep. 45. See also the cases cited *infra*, this title, 590. 2, *Creating Apparent Danger of Collision*.

**Failure to Remove Passenger from Car in Situation of Danger**. — *Southern Pac. R. Co. v. Tarin*, (C. C. A.) 108 Fed. Rep. 734.

**Hand Crushed by Falling Window**. — *Cleveland*, etc., R. Co. v. *Scott*, 111 Ill. App. 234; *International*, etc., R. Co. v. *Phillips*, 29 Tex. Civ. App. 336; *Texas Midland R. Co. v. Johnson*, (Tex. Civ. App. 1901) 65 S. W. Rep. 388; *Dumas v.*

**589. (2) Passengers on Freight and Other Trains — Assumption of Additional Risks.** — See note 2.

Missouri, etc., R. Co., (Tex. Civ. App. 1897) 43 S. W. Rep. 908.

**Crushing of Hand by the Sudden Shutting of a Door** by the carrier's servant or by the movement of the train. *Drury v. North Eastern R. Co.*, (1901) 2 K. B. 322, 84 L. T. N. S. 658; *Trumbull v. Donahue*, 18 Colo. App. 460; *Romine v. Evansville, etc., R. Co.*, 24 Ind. App. 230; *Brineger v. Louisville, etc., R. Co.*, 72 S. W. Rep. 783, 24 Ky. L. Rep. 1973; *Illinois Cent. R. Co. v. Crady*, 69 S. W. Rep. 706, 24 Ky. L. Rep. 643; *Carroll v. Boston, etc., St. R. Co.*, 186 Mass. 97; *Simonds v. Minneapolis, etc., R. Co.*, 87 Minn. 408; *St. Louis Southwestern R. Co. v. Ball*, 28 Tex. Civ. App. 287. See *Skinner v. Wilmington, etc., R. Co.*, 128 N. Car. 435.

**Electric Shock to Passenger on Street Car.** — *Buckbee v. Third Ave. R. Co.*, 64 N. Y. App. Div. 360; *Denison, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 780; *Dallas Consol. Electric St. R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630.

**Street Car Catching Fire from Electric Current.** — *Leonard v. Brooklyn Heights R. Co.*, 57 N. Y. App. Div. 125.

**Falling of Seat.** — *International, etc., R. Co. v. Anthony*, 24 Tex. Civ. App. 9.

**Fall of Baggage from Car Rack.** — *Whiting v. New York Cent., etc., R. Co.*, 97 N. Y. App. Div. 11.

**Passenger Falling from Berth.** — *Canadian Pac. R. Co. v. Smith*, 31 Can. Sup. Ct. 367.

**Passenger Struck by Revolving Brake Handle.** — *West Chicago St. R. Co. v. Johnson*, 180 Ill. 285, *affirming* 77 Ill. App. 142; *Kentucky, etc., Bridge, etc., Co. v. Shrader*, (Ky. 1904) 80 S. W. Rep. 1094.

**Skirt of Woman Passenger Caught on Street Car When Alighting.** — *Doyle v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 331.

**Dress of Passenger on Station Platform Caught in Closed Gate of Elevated Car.** — *Brown v. Manhattan R. Co.*, 82 N. Y. App. Div. 222.

**Gas Explosion on Carrier's Premises.** — *Chicago, etc., R. Co. v. Rhodes*, (Tex. Civ. App. 1904) 80 S. W. Rep. 869.

**Breaking of Train and Collision of Sections.** — *Holland v. St. Louis, etc., R. Co.*, 105 Mo. App. 117; *Feldschneider v. Chicago, etc., R. Co.*, 122 Wis. 423.

**Compelling White Woman and Her Children to Ride in Coach for Negroes.** — *Missouri, etc., R. Co. v. Ball*, 25 Tex. Civ. App. 500.

**Injury Received During Ejection of Fellow Passenger.** — It is doubtful whether a passenger can recover for an injury received in the removal of an objectionable passenger from a crowded car in a proper manner. *Spade v. Lynn, etc., R. Co.*, 172 Mass. 488, 70 Am. St. Rep. 208.

**Reckless Switching While Drover Is in Car Caring for Cattle.** — *Bolton v. Missouri Pac. R. Co.*, 172 Mo. 92.

**Overcrowding Vessel.** — A carrier by water is liable for injuries sustained in consequence of attempting to carry an unreasonable number of passengers. *The Oregon*, (C. C. A.) 133 Fed. Rep. 609.

**Underprovisioning Vessel.** — A carrier by water is bound to exercise care to provide his vessel with a sufficient quantity of wholesome food. *The Oregon*, (C. C. A.) 133 Fed. Rep. 609.

**Failure to Keep Vessel in Clean Condition** may be a ground for charging the carrier with liability to passengers. *The Oregon*, (C. C. A.) 133 Fed. Rep. 609.

**589. 2. Assumption of Additional Risks.** — A passenger on a freight or mixed train assumes the inconveniences and additional risks usually and reasonably incident to transportation upon such trains.

*United States.* — *Fitchburg R. Co. v. Nichols*, (C. C. A.) 85 Fed. Rep. 945.

*Kentucky.* — *Illinois Cent. R. Co. v. Vinson*, 74 S. W. Rep. 671, 25 Ky. L. Rep. 38, *rehearing denied* (Ky. 1903) 76 S. W. Rep. 167; *Louisville, etc., R. Co. v. Bell*, 100 Ky. 203. See *Illinois Cent. R. Co. v. Vinson*, 76 S. W. Rep. 167, 25 Ky. L. Rep. 652.

*Massachusetts.* — *Olds v. New York, etc., R. Co.*, 172 Mass. 73; *Heyward v. Boston, etc., R. Co.*, 169 Mass. 466.

*Michigan.* — *Moore v. Saginaw, etc., R. Co.*, 115 Mich. 103.

*Minnesota.* — *Schilling v. Winona, etc., R. Co.*, 66 Minn. 252.

*Mississippi.* — *Yazoo, etc., R. Co. v. Humphrey*, 83 Miss. 721.

*Missouri.* — *Portuchek v. Wabash R. Co.*, 101 Mo. App. 52; *Erwin v. Kansas City, etc., R. Co.*, 94 Mo. App. 289; *Dorsey v. Atchison, etc., R. Co.*, 83 Mo. App. 528.

*Tennessee.* — *Felton v. Horner*, 97 Tenn. 579.

*Texas.* — *Texas, etc., R. Co. v. Adams*, 32 Tex. Civ. App. 112; *Trinity Valley R. Co. v. Stewart*, (Tex. Civ. App. 1901) 62 S. W. Rep. 1085; *Runnels v. Houston, etc., R. Co.*, (Tex. Civ. App. 1899) 50 S. W. Rep. 172; *Ft. Worth, etc., R. Co. v. Rogers*, 24 Tex. Civ. App. 382.

*Virginia.* — *Southern R. Co. v. Dawson*, 98 Va. 577.

Those who take passage on freight trains are held in law to assume the risk of the ordinary jarring, jolting, and jerking incident to the making up and distributing of such trains. *Frohriep v. Lake Shore, etc., R. Co.*, 131 Mich. 459, 9 Detroit Leg. N. 415.

A passenger on a freight train assumes the risk incident to the usual and ordinary jerking and jarring caused by stopping the train, but not the additional and extraordinary risks growing out of the negligence of the employees on account of the improper application of the air brake in such a manner as to suddenly and violently stop, jerk, and jar, throwing passengers from their seats. *Indiana, etc., R. Co. v. Masterson*, 16 Ind. App. 323.

**Drover Riding on Freight Train.** — A person who rides on a freight train in charge of stock assumes the risks incidental to riding on a freight train and to taking care of the stock. *Chicago, etc., R. Co. v. Troyer*, (Neb. 1903) 97 N. W. Rep. 308; *Omaha, etc., R. Co. v. Crow*, 54 Neb. 747, 69 Am. St. Rep. 741; *Missouri Pac. R. Co. v. Tietken*, 49 Neb. 130, 59 Am. St. Rep. 526.



**589.** Degree of Care Required of Carrier. — See note 4.

**590.** (3) *Duty to Furnish Seat.* — See note 1.

(4) *Injuries Caused by Collision* — (a) *In General.* — See note 2.

**589. 4. Freight Train — Degree of Care —**  
*United States.* — Sprague v. Southern R. Co.,  
(C. C. A.) 92 Fed. Rep. 59.  
*Indiana.* — Menaugh v. Bedford Belt R. Co.,  
157 Ind. 20.

*Kentucky.* — Chesapeake, etc., R. Co. v. Top-  
ping, 78 S. W. Rep. 135, 25 Ky. L. Rep. 1390;  
Chesapeake, etc., R. Co. v. Jordan, 76 S. W.  
Rep. 145, 25 Ky. L. Rep. 574; Louisville, etc.,  
R. Co. v. Bell, 100 Ky. 203.

*Michigan.* — Moore v. Saginaw, etc., R. Co.,  
115 Mich. 103.

*Minnesota.* — Simonds v. Minneapolis, etc.,  
R. Co., 87 Minn. 408; Schilling v. Winona,  
etc., R. Co., 66 Minn. 252.

*Mississippi.* — Gallegly v. Kansas City, etc.,  
R. Co., 83 Miss. 171.

*Missouri.* — Portuchek v. Wabash R. Co., 101  
Mo. App. 52; Erwin v. Kansas City, etc., R.  
Co., 94 Mo. App. 289; Wait v. Omaha, etc., R.  
Co., 165 Mo. 612; Fullerton v. St. Louis, etc.,  
R. Co., 84 Mo. App. 498.

*New Hampshire.* — Emery v. Boston, etc.,  
R. Co., 67 N. H. 434.

*Tennessee.* — Felton v. Horner, 97 Tenn. 579.

*Texas.* — Hardin v. Ft. Worth, etc., R. Co.,  
(Tex. Civ. App. 1903) 77 S. W. Rep. 431.

*Virginia.* — Southern R. Co. v. Dawson, 98  
Va. 577.

See Green v. Pacific Lumber Co., 130 Cal.  
435. Compare Steele v. Southern R. Co., 55  
S. Car. 389, 74 Am. St. Rep. 756; Western  
Maryland R. Co. v. State, 95 Md. 650.

**Mixed Trains.** — Macon, etc., R. Co. v. Moore,  
108 Ga. 84; Olds v. New York, etc., R. Co., 172  
Mass. 73; Yazoo, etc., R. Co. v. Humphrey, 83  
Miss. 721; Stembbridge v. Southern R. Co., 65  
S. Car. 440.

**Freight Elevators.** — Springer v. Ford, 189  
Ill. 430, 82 Am. St. Rep. 464, affirming 88 Ill.  
App. 529.

**Drovers in Charge of Stock.** — Chicago, etc., R.  
Co. v. Troyer, (Neb. 1903) 97 N. W. Rep. 308.

**590. 1. Duty to Furnish Seat.** — Denver,  
etc., R. Co. v. Roller, (C. C. A.) 100 Fed. Rep.  
738; Chicago City R. Co. v. Morse, 197 Ill. 327,  
affirming 98 Ill. App. 662; Parker v. Metropolitan  
St. R. Co., 69 Mo. App. 54; Texas, etc., R.  
Co. v. Rea, (Tex. Civ. App. 1903) 74 S. W.  
Rep. 939; Houston, etc., R. Co. v. Bryant, 31  
Tex. Civ. App. 483; Texas, etc., R. Co. v. Rea,  
27 Tex. Civ. App. 549; Halverson v. Seattle  
Electric Co., 35 Wash. 600.

**Overcrowding Conveyance.** — Trumbull v.  
Erickson, (C. C. A.) 97 Fed. Rep. 891; Choate  
v. Missouri Pac. R. Co., 67 Mo. App. 105; Cat-  
tano v. Metropolitan St. R. Co., 173 N. Y. 565;  
Viemeister v. Brooklyn Heights R. Co., 91 N.  
Y. App. Div. 510; Anderson v. City, etc., R.  
Co., 42 Oregon 505; Texas, etc., R. Co. v.  
Bratcher, (Tex. Civ. App. 1904) 78 S. W. Rep.  
531; Williams v. International, etc., R. Co., 28  
Tex. Civ. App. 503; International, etc., R. Co.  
v. Williams, 20 Tex. Civ. App. 587; Graham v.  
McNeill, 20 Wash. 466, 72 Am. St. Rep. 121;  
Zimmer v. Fox River Valley Electric R. Co.,  
118 Wis. 614.

It has been said that a street railway com-  
pany is bound to exercise a high degree of care  
to prevent injury to passengers in consequence  
of the overcrowding of its cars. Hansen v.  
North Jersey St. R. Co., 64 N. J. L. 686.

While it is not necessarily negligence to over-  
crowd a street car, yet when a car is over-  
crowded, additional care and precaution must  
be exercised by the conductor and motorman to  
protect the passenger against resultant injury.  
McCaw v. Union Traction Co., 205 Pa. St.  
271.

It usually cannot be said to be negligence, as  
a matter of law, for a carrier to permit a pas-  
senger to stand on a footboard, but if no seat  
is furnished and the carrier permits a passenger  
to ride in that way, the carrier assumes the  
duty of exercising the care demanded by the  
circumstances. North Chicago St. R. Co. v.  
Polkey, 203 Ill. 225.

When a street railway company undertakes  
to carry large numbers of people, vastly in  
excess of the seating and standing capacity of  
its car, and permits passengers to ride on the  
platform, and stops its car when in such crowded  
condition, that other persons may get upon it,  
and, because of the crowd, a passenger, who had  
boarded the car before it became crowded, is  
pushed off a platform to his injury, the com-  
pany is guilty of negligence. Reem v. St. Paul  
City R. Co., 77 Minn. 503.

**2. Collision — Alabama.** — Highland Ave.,  
etc., R. Co. v. Swope, 115 Ala. 287.

*California.* — Yaeger v. Southern California  
R. Co., (Cal. 1897) 51 Pac. Rep. 190; Seller v.  
Market-St. R. Co., 139 Cal. 268; Bosqui v.  
Sutro R. Co., 131 Cal. 390.

*Illinois.* — Chicago, etc., R. Co. v. McDonnell,  
194 Ill. 82, affirming 91 Ill. App. 488; West  
Chicago St. R. Co. v. Tuerk, 193 Ill. 385,  
affirming 90 Ill. App. 105; West Chicago St. R.  
Co. v. Williams, 87 Ill. App. 548; Chicago, etc.,  
R. Co. v. Hardie, 85 Ill. App. 122.

*Kentucky.* — Louisville, etc., R. Co. v. Rich-  
mond, 67 S. W. Rep. 25, 23 Ky. L. Rep. 2394;  
Baltimore, etc., R. Co. v. Hausman, (Ky. 1900)  
54 S. W. Rep. 841.

*Louisiana.* — Patterson v. New Orleans, etc.,  
R., etc., Co., 110 La. 797.

*Massachusetts.* — Savage v. Marlborough St.  
R. Co., 186 Mass. 203; Mullin v. Boston El. R.  
Co., 185 Mass. 522; Homans v. Boston El. R.  
Co., 180 Mass. 456, 91 Am. St. Rep. 324; Blan-  
chette v. Holyoke St. R. Co., 175 Mass. 51.

*Michigan.* — Thurston v. Detroit United R.  
Co., (Mich. 1904) 100 N. W. Rep. 395, 11 De-  
troit Leg. N. 252; Moore v. Saginaw, etc., R.  
Co., 119 Mich. 613.

*Mississippi.* — Yazoo, etc., R. Co. v. Hum-  
phrey, 83 Miss. 721.

*Missouri.* — Mathew v. Wabash R. Co., (Mo.  
App. 1903) 78 S. W. Rep. 271; Robinson v. St.  
Louis, etc., R. Co., 103 Mo. App. 110; Hen-  
nessy v. St. Louis, etc., R. Co., 173 Mo. 86;  
Olsen v. Citizens R. Co., 152 Mo. 426; Sweeney  
v. Kansas City Cable R. Co., 150 Mo. 385;  
Heyde v. St. Louis Transit Co., 102 Mo. App.

**591.** Crossing of Two Roads. — See note 1.

**592.** (b) Concurrent Negligence of Two Carriers. — See note 1.

**593.** (c) Collisions with Cattle. — See note 1.

(5) Rate of Speed. — See note 2.

537; Fullerton v. St. Louis, etc., R. Co., 84 Mo. App. 498.

*New Jersey.* — Shay v. Camden, etc., R. Co., 66 N. J. L. 334; Dunn v. Pennsylvania R. Co., (N. J. 1904) 58 Atl. Rep. 164.

*New York.* — Stiner v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 285; Suse v. Metropolitan St. R. Co., 80 N. Y. App. Div. 24; Schlotterer v. Brooklyn, etc., Ferry Co., 75 N. Y. App. Div. 330; Regensburg v. Nassau Electric R. Co., 58 N. Y. App. Div. 566; McCready v. Staten Island Electric R. Co., 51 N. Y. App. Div. 338; Faris v. Brooklyn City, etc., R. Co., 46 N. Y. App. Div. 231; Freeland v. Brooklyn Heights R. Co., (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 132; Klinger v. United Traction Co., 92 N. Y. App. Div. 100, modified 181 N. Y. 521; Smith v. Metropolitan St. R. Co., 92 N. Y. App. Div. 213; Frank v. Metropolitan St. R. Co., 91 N. Y. App. Div. 485; Falke v. Third Ave. R. Co., 38 N. Y. App. Div. 49; Zimmer v. Third Ave. R. Co., 36 N. Y. App. Div. 265; Keegan v. Third Ave. R. Co., 34 N. Y. App. Div. 297, affirmed 165 N. Y. 622; Coulahan v. Metropolitan St. R. Co., 28 N. Y. App. Div. 394.

*Pennsylvania.* — Rowdin v. Pennsylvania R. Co., 208 Pa. St. 623; Bumbear v. United Traction Co., 198 Pa. St. 198; Madara v. Shamokin, etc., Electric R. Co., 192 Pa. St. 542; Willis v. Second Ave. Traction Co., 189 Pa. St. 430; Goorin v. Allegheny Traction Co., 179 Pa. St. 327.

*Tennessee.* — Memphis St. R. Co. v. Norris, 108 Tenn. 632.

*Texas.* — International, etc., R. Co. v. Shuford, (Tex. Civ. App. 1904) 81 S. W. Rep. 1189; Houston Electric Co. v. Nelson, (Tex. Civ. App. 1903) 77 S. W. Rep. 978; Central Texas, etc., R. Co. v. Smith, (Tex. Civ. App. 1903) 73 S. W. Rep. 537; Gulf, etc., R. Co. v. Holt, 30 Tex. Civ. App. 330; Citizens' R. Co. v. Craig, (Tex. Civ. App. 1902) 69 S. W. Rep. 239; St. Louis Southwestern R. Co. v. Ferguson, 26 Tex. Civ. App. 460; Ft. Worth, etc., R. Co. v. Enos, (Tex. Civ. App. 1898) 50 S. W. Rep. 595; Missouri, etc., R. Co. v. Vance, (Tex. Civ. App. 1897) 41 S. W. Rep. 167; International, etc., R. Co. v. Bibolet, 24 Tex. Civ. App. 4; Missouri, etc., R. Co. v. Wright, 19 Tex. Civ. App. 47; Gulf, etc., R. Co. v. Brown, 16 Tex. Civ. App. 93.

*Washington.* — Lane v. Spokane Falls, etc., R. Co., 21 Wash. 119, 75 Am. St. Rep. 821; Bailey v. Tacoma Traction Co., 16 Wash. 48.

*Wisconsin.* — Wanzer v. Chippewa Valley Electric R. Co., 108 Wis. 319.

**Collision of Cars in Course of Switching.** — Choate v. Missouri Pac. R. Co., 67 Mo. App. 105.

**Collision of Sections of Train Breaking Apart.** — Holland v. St. Louis, etc., R. Co., 105 Mo. App. 117; Feldschneider v. Chicago, etc., R. Co., 122 Wis. 423.

**The Collision Must Be the Proximate Cause of the Injury** to entitle a passenger to recover dam-

ages. Vandercook v. Detroit, etc., R. Co., 125 Mich. 459.

**Creating Apparent Danger of Collision.** — So managing trains or street cars as to create an appearance of imminent danger of a collision, thereby inducing passengers to jump from the cars, may be negligence. Washington, etc., R. Co. v. Hickey, 166 U. S. 521, affirming 5 App. Cas. (D. C.) 436; Birmingham R., etc., Co. v. Butler, 135 Ala. 388; Selma St., etc., R. Co. v. Owen, 132 Ala. 420; Green v. Pacific Lumber Co., 130 Cal. 435; Robson v. Nassau Electric R. Co., 80 N. Y. App. Div. 301. See also the cases cited *infra*, this title, **587**, 2, paragraph *Creating Situation of Apparent Danger*.

**591. 1. Crossing of Two Roads.** — Cleveland, etc., R. Co. v. Scott, 111 Ill. App. 234; Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380, reversing judgment in 16 N. Y. App. Div. 152.

**592. 1. Preponderant American Doctrine.** — Washington, etc., R. Co. v. Hickey, 12 App. Cas. (D. C.) 269, 5 App. Cas. (D. C.) 436, affirmed 166 U. S. 521; West Chicago St. R. Co. v. Piper, 165 Ill. 325; Toledo Consol. St. R. Co. v. Fuller, 9 Ohio Cir. Dec. 123. See Louisville, etc., Mail Co. v. Barnes, 79 S. W. Rep. 261, 25 Ky. L. Rep. 2036.

**593. 1. Stray Cows.** — Dobson v. New Orleans, etc., R. Co., 52 La. Ann. 1127; International, etc., R. Co. v. Thompson, (Tex. Civ. App. 1903) 77 S. W. Rep. 439.

**Backing Train Derailed by Running over Hog.** — Trinity Valley R. Co. v. Stewart, (Tex. Civ. App. 1901) 62 S. W. Rep. 1085.

**2. Rate of Speed.** — *United States.* — Northern Pac. R. Co. v. Adams, (C. C. A.) 116 Fed. Rep. 324, reversed 192 U. S. 440.

*Arkansas.* — St. Louis, etc., R. Co. v. Stewart, 68 Ark. 606, 82 Am. St. Rep. 311.

*California.* — Bosqui v. Sutro R. Co., 131 Cal. 390.

*Georgia.* — McEwen v. Atlanta R., etc., Co., 120 Ga. 1003.

*Indiana.* — Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360.

*Iowa.* — Fitch v. Mason City, etc., Traction Co., 124 Iowa 665.

*Kentucky.* — South Covington, etc., St. R. Co. v. Constans, 74 S. W. Rep. 705, 25 Ky. L. Rep. 158.

*Massachusetts.* — Macy v. New Bedford, etc., St. R. Co., 182 Mass. 291; Witherington v. Lynn, etc., R. Co., 182 Mass. 596.

*Missouri.* — Hennessy v. St. Louis, etc., R. Co., 173 Mo. 86; Johnson v. St. Louis, etc., R. Co., 173 Mo. 307.

*New York.* — Moskowitz v. Brooklyn Heights R. Co., 89 N. Y. App. Div. 425; Hollahan v. Metropolitan St. R. Co., 73 N. Y. App. Div. 164; Schmidt v. Coney Island, etc., R. Co., 26 N. Y. App. Div. 391; Freeland v. Brooklyn Heights R. Co., (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 132.

*South Carolina.* — Griffin v. Southern R. Co., 65 S. Car. 122.

*Texas.* — Johnson v. Galveston, etc., R. Co.,

**594. i. DUTY WITH REGARD TO PASSENGERS TAKEN SICK DURING TRANSIT.** — See note 1.

**V. EJECTION OF PASSENGERS — 1. Failure or Refusal to Procure Ticket or Pay Fare — a. IN GENERAL.** — See note 2.

27 Tex. Civ. App. 616; Houston, etc., R. Co. v. Summers, (Tex. Civ. App. 1899) 49 S. W. Rep. 1106; Gaunce v. Gulf, etc., R. Co., 20 Tex. Civ. App. 33.

**Speed of Street Car on Dark Stormy Night.** — Wanzer v. Chippewa Valley Electric R. Co., 108 Wis. 319.

**Speed of Train in Rounding Curve.** — Nelson v. Lehigh Valley R. Co., 25 N. Y. App. Div. 535.

**Speed of Street Car in Rounding Curve — California.** — Babcock v. Los Angeles Traction Co., 128 Cal. 173; Samuels v. California St. Cable R. Co., 124 Cal. 294.

**Illinois.** — Calumet Electric St. R. Co. v. Jennings, 83 Ill. App. 612.

**Nebraska.** — East Omaha St. R. Co. v. Godola, 50 Neb. 906.

**New York.** — Gatens v. Metropolitan St. R. Co., 89 N. Y. App. Div. 311, affirmed 181 N. Y. 515; Merrill v. Metropolitan St. R. Co., 73 N. Y. App. Div. 401; Whitaker v. Staten Island Midland R. Co., 72 N. Y. App. Div. 468; Bruce v. Brooklyn Heights R. Co., 68 N. Y. App. Div. 242; Lucas v. Metropolitan St. R. Co., 56 N. Y. App. Div. 405; Wigton v. Metropolitan St. R. Co., 38 N. Y. App. Div. 207; Wilder v. Metropolitan St. R. Co., 10 N. Y. App. Div. 364, affirmed without opinion 161 N. Y. 665.

**Pennsylvania.** — Reber v. Pittsburg, etc., Traction Co., 179 Pa. St. 339, 57 Am. St. Rep. 599.

**Washington.** — Halverson v. Seattle Electric Co., 35 Wash. 600.

**Wisconsin.** — Zimmer v. Fox River Valley Electric R. Co., 118 Wis. 614.

**Speed in Running Mixed Train on New Road.** — Stembridge v. Southern R. Co., 65 S. Car. 440.

**Speed of Train in Running over Defective Track.** — Gulf, etc., R. Co. v. Carter, (Tex. Civ. App. 1902) 71 S. W. Rep. 73.

**Speed in Rounding Curve over Defective Track.** — Griffin v. Southern R. Co., 66 S. Car. 77.

**Speed of Street Car in Running over Defective Track.** — Smith v. Milwaukee Electric R., etc., Co., 119 Wis. 336.

**Speed in Approaching Switch Known to Be Defective.** — A driver of a street car, who runs it at an unusual rate of speed in approaching a switch which he knows to be dangerous, is guilty of negligence. Seelig v. Metropolitan St. R. Co., (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 383.

**Speed in Passing Structure in Close Proximity to Track.** — Anderson v. City, etc., R. Co., 42 Oregon 505.

**Speed in Running by Obstruction in Street.** — Bumbear v. United Traction Co., 198 Pa. St. 198.

**Exceeding the Rate of Speed Provided for by the Time-table of the railroad is not negligence per se.** Colpitts v. Reg., 6 Can. Exch. 254.

**Speed Higher than Permitted by Carrier's Regulations.** — The fact that an electric street car was going at the rate of twelve or fifteen miles an hour in passing over a frog at a curve where the carrier's rules required that cars

should not run faster than four miles an hour has been held to be evidence of negligence on the part of the motorman in running the car. Sweetland v. Lynn, etc., R. Co., 177 Mass. 574.

**Unlawful Speed.** — The running of a street car at an unlawful rate of speed is evidence of negligence. Johnsen v. Oakland, etc., Electric R. Co., 127 Cal. 608.

**Speed of Steamboat in Making Landing.** — Louisville, etc., Mail Co. v. Gilliland, 72 S. W. Rep. 1101, 24 Ky. L. Rep. 2081.

**Rate of Speed a Question of Fact.** — Chicago, etc., R. Co. v. Winters, 175 Ill. 293.

**594. 1. Illness of Passenger.** — Atchison, etc., R. Co. v. Parry, 67 Kan. 515. See Wells v. New York Cent., etc., R. Co., 25 N. Y. App. Div. 365.

For a case holding that it was a question for the jury whether a carrier was liable for the ejection of a passenger who was ill, see Eidson v. Southern R. Co., (Miss. 1898) 23 So. Rep. 369.

**Duty to Passenger Thrown from Train and Injured.** — Southern R. Co. v. Webb, 116 Ga. 152; Reed v. Louisville, etc., R. Co., 104 Ky. 603.

**2. Failure or Refusal to Pay Fare — Alabama.** — McGhee v. Reynolds, 117 Ala. 413. But compare Louisville, etc., R. Co. v. Hine, 121 Ala. 234.

**Georgia.** — Harp v. Southern R. Co., 119 Ga. 927, 100 Am. St. Rep. 212.

**Illinois.** — Chicago, etc., R. Co. v. Stratton, 111 Ill. App. 142; Chicago, etc., R. Co. v. Casazza, 83 Ill. App. 421.

**Kentucky.** — Flood v. Chesapeake, etc., R. Co., (Ky. 1904) 80 S. W. Rep. 184; Nutter v. Southern R. Co., 78 S. W. Rep. 470, 25 Ky. L. Rep. 1700; Spink v. Louisville, etc., R. Co., (Ky. 1899) 52 S. W. Rep. 1067.

**Louisiana.** — Ford v. East Louisiana R. Co., 110 La. 414.

**Massachusetts.** — McGarry v. Holyoke St. R. Co., 182 Mass. 123.

**Mississippi.** — Jackson v. Alabama, etc., R. Co., 76 Miss. 703.

**Missouri.** — Randall v. Chicago, etc., R. Co., 102 Mo. App. 342.

**New York.** — Hoelljes v. Interurban St. R. Co., (Supm. Ct. App. T.) 43 Misc. (N. Y.) 350; Behr v. Erie R. Co., 69 N. Y. App. Div. 416; Lasker v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 824.

**Ohio.** — Wilt v. Wabash R. Co., 11 Ohio Cir. Dec. 589, 21 Ohio Cir. Ct. 579.

**Pennsylvania.** — Anderson v. Union Traction Co., 7 Pa. Dist. 41.

**Washington.** — Braymer v. Seattle, etc., R. Co., 35 Wash. 346.

**The Failure to Buy a Ticket** as required by a rule against carrying passengers on freight trains who are not provided with tickets has been held equivalent to a refusal to pay fare under a statute authorizing expulsion for non-payment of fare at a regular stopping place. McCook v. Northup, 65 Ark. 225.

**595.** For Nonpayment of Fare of Child. — See note 1.

*b.* EXTRA FARE WHEN PAID ON TRAIN. — See note 2.

When No Opportunity Afforded Passenger to Purchase Ticket. — See note 4.

**596.** *d.* PASSENGER ENTITLED TO REASONABLE TIME. — See note 4.

**597.** Reasonable Time a Question of Fact. — See note 1.

*e.* WHEN DUTY TO CARRY NOT REIMPOSED BY TENDER — Where Train Is Stopped. — See note 2.

**598.** *f.* WHEN DUTY TO CARRY IS REIMPOSED. — See note 1.

Payment of Back Fare. — See note 2.

**2. Disorderly Conduct** — *a.* IN GENERAL — Riotous and Disorderly Conduct. — See notes 4, 5.

Carrier's Duty. — See note 6.

**599.** Right of Ejection to Be Exercised Reasonably. — See note 1.

*b.* INTOXICATED PASSENGERS. — See note 2.

**Passenger on Freight Train Without the Permit Required by Regulations.** — *Reed v. Great Northern R. Co.*, 76 Minn. 163.

**Failure to Exhibit Ticket.** — See *McGraw v. Southern R. Co.*, 135 N. Car. 264.

**Passenger's Ticket Lost by Baggage Master.** — *Galveston, etc., R. Co. v. Scott*, (Tex. Civ. App. 1904) 79 S. W. Rep. 642.

**595. 1. Nonpayment by Passenger of Fare of Child in His Charge.** — *Braun v. Northern Pac. R. Co.*, 79 Minn. 404, 79 Am. St. Rep. 497; *Warfield v. Louisville, etc., R. Co.*, 104 Tenn. 74, 78 Am. St. Rep. 911.

**2. Extra Fare When Paid on Train.** — *Coyle v. Southern R. Co.*, 112 Ga. 121.

**Lost Ticket.** — Where a passenger lost his ticket, the fact that he had lost it being known to one of the servants of the carrier, and the conductor accepted the regular fare, but afterwards demanded the difference between that fare and the train fare, which the passenger refused to pay, it was held that the carrier was liable for his expulsion for a refusal to pay the extra charge. *Louisville, etc., R. Co. v. Joplin*, (Ky. 1900) 55 S. W. Rep. 206.

**4. Opportunity to Purchase Ticket.** — *Kennedy v. Birmingham R., etc., Co.*, 138 Ala. 225; *Phillips v. Southern R. Co.*, 114 Ga. 284; *Bowsher v. Chicago, etc., R. Co.*, 113 Iowa 16; *Atchison, etc., R. Co. v. Lamoreux*, 5 Kan. App. 813; *Atchison, etc., R. Co. v. Dickerson*, 4 Kan. App. 345; *Ammons v. Southern R. Co.*, 138 N. Car. 555, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 595.

It has been held that inability to procure a ticket does not justify a forcible resistance of expulsion for a refusal to pay the train fare. *Monnier v. New York Cent., etc., R. Co.*, 175 N. Y. 281, 96 Am. St. Rep. 619, reversing 70 N. Y. App. Div. 405.

**596. 4. Passenger Should Be Allowed Reasonable Time.** — *Huba v. Schenectady R. Co.*, 85 N. Y. App. Div. 199.

**Time to Obtain Permit for Riding on Freight Train.** — *Reed v. Great Northern R. Co.*, 76 Minn. 163.

**Discussion of the Situation.** — It has been said that a passenger is entitled to a reasonable indulgence in the discussion of his rights and duties in the payment of fare when it is demanded by the agent of the company. *Holt v. Hannibal, etc., R. Co.*, 174 Mo. 524.

**597. 1. Reasonable Time a Question of Fact.**

— *Chicago, etc., R. Co. v. Casazza*, 83 Ill. App. 421; *Reed v. Great Northern R. Co.*, 76 Minn. 163; *Huba v. Schenectady R. Co.*, 85 N. Y. App. Div. 199.

**2. When Train Is Stopped in Order to Expel Passenger.** — *Garrison v. United R., etc., Co.*, 97 Md. 354, 99 Am. St. Rep. 452, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 597; *Behr v. Erie R. Co.*, 69 N. Y. App. Div. 416.

**Tender of Fare Before Expulsion Commenced.** — If a passenger's fare is tendered before his expulsion for nonpayment of the fare is commenced his expulsion is wrongful (*Kansas City, etc., R. Co. v. Holden*, 66 Ark. 602), even though the offer is made by the passenger's companion. *Baltimore, etc., R. Co. v. Norris*, 17 Ind. App. 189, 60 Am. St. Rep. 166.

**598. 1. When Duty to Carry Is Reimposed.** — *Weber v. Southern R. Co.*, 65 S. Car. 356.

**An Offer by a Fellow Passenger to Pay the Fare** reimposes the duty to carry. *Randell v. Chicago, etc., R. Co.*, 102 Mo. App. 342.

**Actual Tender Necessary.** — To reimpose on the carrier the duty to carry a passenger who has refused to pay fare, there must be an actual tender; a mere promise to pay is not enough. *Holt v. Hannibal, etc., R. Co.*, 174 Mo. 524.

**2. Coyle v. Southern R. Co.**, 112 Ga. 121.

**4. Disorderly Conduct — General Rule.** — *Atchison, etc., R. Co. v. Wood*, (Tex. Civ. App. 1903) 77 S. W. Rep. 964.

**Impeding Traffic by Reason of Entering into Argument with Ticket Collector.** — *Henly v. Delaware, etc., R. Co.*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 499.

**Abusive Altercation Commenced by Conductor.** — *Baltimore, etc., R. Co. v. Norris*, 17 Ind. App. 189, 60 Am. St. Rep. 166.

**5. Emery v. Boston, etc., R. Co.**, 67 N. H. 434; *El Paso Electric R. Co. v. Alderete*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1246.

**6. Carrier's Duty to Eject.** — *Emery v. Boston, etc., R. Co.*, 67 N. H. 434.

**599. 1. Brace v. St. Paul City R. Co.**, 87 Minn. 292.

**2. Drunken Passenger.** — *Korn v. Chesapeake, etc., R. Co.*, (C. C. A.) 125 Fed. Rep. 897; *Nash v. Southern R. Co.*, 136 Ala. 177, 96 Am. St. Rep. 19; *Tuttle v. Cincinnati, etc., R. Co.*, 80 S. W. Rep. 802, 26 Ky. L. Rep. 152; *Chesapeake, etc., R. Co. v. Saulsberry*, 112 Ky. 915; *Gaukler v. Detroit, etc., R. Co.*, 130 Mich. 666, 9 Detroit Leg. N. 215; *Emery v. Boston, etc.,*

**599.** Where Passenger in Helpless Condition. — See note 3.

**600.** 3. Violation of Reasonable Rules of Carrier — a. CONDUCTING BUSINESS IN CARRIER'S VEHICLE OR DEPOT. — See note 3.

**601.** c. REFUSAL TO ALLOW CONDUCTORS TO DETACH COUPONS. — See note 2.

4. Where Train Does Not Stop at Passenger's Destination. — See note 3.

5. Retaining Fare After Expulsion. — See note 4.

**602.** 6. Limitations in Tickets — Stop-over by Passenger. — See note 2.

When Conductor Permits Stop-over. — See note 3.

Where Ticket Taken Up Before Limitation Expires. — See note 4.

R. Co., 67 N. H. 434; *Hamilton v. Pittsburg*, etc., R. Co., 183 Pa. St. 638.

**599.** 3. *Bohannon v. Southern R. Co.*, 112 Ky. 106; *Hudson v. Lynn*, etc., R. Co., 178 Mass. 64; *Haug v. Great Northern R. Co.*, 8 N. Dak. 23, 73 Am. St. Rep. 727; *Clark v. Harrisburg Traction Co.*, 20 Pa. Super. Ct. 76; *Delahanty v. Michigan Cent. R. Co.*, 7 Ont. L. Rep. 690.

The Ejection of a Person in a Helpless State of Intoxication, at a Regular Station, has been held not to be negligence, the reasonable inference being that he will find his way to some hotel or be taken care of by some of the citizens. *Brown v. Louisville*, etc., R. Co., 103 Ky. 211.

Knowledge of a Station Agent of the condition of a passenger cannot be imputed to the carrier, when it is not communicated to the conductor who makes the expulsion. *Korn v. Chesapeake*, etc., R. Co., (C. C. A.) 125 Fed. Rep. 897.

**600.** 3. Soliciting for Hotels. — *St. Louis*, etc., R. Co. *v. Osborn*, 67 Ark. 399.

**601.** 2. Compare *Clark v. Harrisburg Traction Co.*, 20 Pa. Super. Ct. 76.

Refusal to Show Ticket or Conductor's Check. — *Illinois Cent. R. Co. v. Louthan*, 80 Ill. App. 579; *Price v. Chesapeake*, etc., R. Co., 46 W. Va. 538.

Refusal to Unfold a Transfer Check for the greater convenience of the conductor does not justify expulsion. *El Paso Electric R. Co. v. Alderete*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1246.

Violation of Rule Requiring Passengers on Freight Trains to Be Provided with Tickets. — *McCook v. Northup*, 65 Ark. 225.

Violation of Rule Against Taking Dogs into Cars. — *Gregory v. Chicago*, etc., R. Co., 100 Iowa 345.

Carrying Package into Street Car Contrary to Regulations. — *Ray v. United Traction Co.*, 96 N. Y. App. Div. 48; *Dowd v. Albany R. Co.*, 47 N. Y. App. Div. 202.

Violation of Rule for Conduct of Employees When Riding on Carrier's Vehicles. — *Rowe v. Brooklyn Heights R. Co.*, 71 N. Y. App. Div. 474.

Violation of Rule Against Entering Station Along Line of Track. — *Penfield v. Cleveland*, etc., R. Co., 26 N. Y. App. Div. 413.

Riding on Platform of Street Car Contrary to Regulation. — *Montgomery v. Buffalo R. Co.*, 165 N. Y. 139, affirming 24 N. Y. App. Div. 454; *Hanna v. Nassau Electric R. Co.*, 18 N. Y. App. Div. 137.

3. Where Train Does Not Stop at Passenger's Destination. — *Miller v. King*, 21 N. Y. App. Div. 192; *Allen v. Wilmington*, etc., R. Co., 119 N. Car. 710; *Noble v. Atchison*, etc., R.

Co., 4 Okla. 534; *Light v. Harrisburg*, etc., Electric R. Co., 4 Pa. Super. Ct. 427; *St. Louis Southwestern R. Co. v. Campbell*, 30 Tex. Civ. App. 35, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601. See *New York*, etc., R. Co. *v. Willing*, 24 Ohio Cir. Ct. 474.

Misdirection by Servant of Carrier. — Where a ticket holder has purchased a ticket for passage, and through the negligent mistake or misdirection of a servant of the company whose duty it is to direct passengers, enters a train which under the rules of the company does not stop at the station named in his ticket, he has no right to continue passage on that train after the conductor has given him notice that the train does not stop at the station to which he seeks passage and has requested him to leave the train and afforded him a reasonable opportunity to do so. *Turner v. McCook*, 77 Mo. App. 196. See also the cases cited *supra*, this title, 582. 1.

Passenger on Wrong Train Through Negligence of Carrier. — Where a passenger was on the wrong train through the negligence of the carrier's servants in failing to announce a change of cars, it was held that his expulsion was wrongful. *Chicago*, etc., R. Co. *v. Spirk*, 51 Neb. 167.

4. *Haßna v. Nassau Electric R. Co.*, 18 N. Y. App. Div. 137. But compare *Ellis v. Houston East*, etc., R. Co., 30 Tex. Civ. App. 172, wherein it appears that the passenger did not demand the return of the fare.

Forfeiture of Ticket by Violation of Regulation. — It has been held that a passenger who was ejected from a train for violating a rule against taking dogs into cars forfeited his right to ride on the train and could not recover the value of his ticket. *Gregory v. Chicago*, etc., R. Co., 100 Iowa 345.

**602.** 2. Continuous Trip. — *Louisville*, etc., R. Co. *v. Klyman*, 108 Tenn. 304, 91 Am. St. Rep. 755.

3. Stop-over by Permission of Conductor. — *Contra*, *International*, etc., R. Co. *v. Best*, 93 Tex. 348.

Parol Contract Giving Right of Stop-over. — The ticket is not the sole evidence of a right to a stop-over; it is competent to show a parol agreement, made with the carrier's agent at the time the passenger buys his ticket. *Scofield v. Pennsylvania R. Co.*, (C. C. A.) 112 Fed. Rep. 858, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) [602] 603.

4. Taking Up Ticket at Intermediate Point. — Although the ticket of a passenger who has the right by parol contract to stop over at an intermediate point is taken up, against the protest

**603.** 7. Invalid Ticket or Token — Negligence of Carrier's Agent — The Decided Weight of Authority. — See note 1.

**606.** 8. Persons Riding on Freight Trains — Custom. — See note 4.

**607.** 9. Manner of Ejection. — See notes 1, 2.

of the passenger, before reaching the intermediate point, by a conductor, who denies the right, the carrier is nevertheless bound to carry the passenger to his destination without a ticket. *Scofield v. Pennsylvania R. Co.*, (C. C. A.) 112 Fed. Rep. 858.

**603.** 1. When Ticket Invalid — Negligence of Carrier's Agent — *United States*. — *Erie R. Co. v. Littell*, (C. C. A.) 128 Fed. Rep. 546; *Pennsylvania R. Co. v. Lenhart*, (C. C. A.) 120 Fed. Rep. 61.

*Arkansas*. — *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 67 Am. St. Rep. 913.

*Indiana*. — *Indianapolis St. R. Co. v. Wilson*, (Ind. 1903) 66 N. E. Rep. 950, rehearing denied (Ind. 1903) 67 N. E. Rep. 993; *Pittsburgh, etc., R. Co. v. Street*, 26 Ind. App. 224.

*Kentucky*. — *Illinois Cent. R. Co. v. Jackson*, (Ky. 1904) 79 S. W. Rep. 1187.

*Mississippi*. — *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560, 102 Am. St. Rep. 469; *Alabama, etc., R. Co. v. Holmes*, 75 Miss. 371.

*New York*. — *Jacobs v. Third Ave. R. Co.*, 71 N. Y. App. Div. 199; *Eddy v. Syracuse Rapid Transit R. Co.*, 50 N. Y. App. Div. 109; *Ray v. Cortland, etc., Traction Co.*, 19 N. Y. App. Div. 530.

*Tennessee*. — *Memphis St. R. Co. v. Graves*, 110 Tenn. 232, 100 Am. St. Rep. 803; *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639.

*Washington*. — *Lawshe v. Tacoma R., etc., Co.*, 29 Wash. 681.

**Mistake of Conductor of Street Car in Punching Transfer Check.** — *Perine v. North Jersey St. R. Co.*, 69 N. J. L. 230; *Jacobs v. Third Ave. R. Co.*, 71 N. Y. App. Div. 199, reversing (Supm. Ct. App. T.) 34 Misc. (N. Y.) 512, reversing (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 802.

**Where Ticket Agent Antedates Limited Ticket.** — *Illinois Cent. R. Co. v. Moore*, 79 Miss. 766.

**A Conductor's Taking Up the Wrong Coupon**, in consequence of which the passenger is ejected, has been held to make the carrier liable for the wrongful expulsion. *Vining v. Detroit, etc., R. Co.*, 122 Mich. 248.

**Failure to Obtain Written Permit.** — If a person is induced by the advice of the carrier's agent to board a train without a written permit, the agent undertaking to give the permit to the conductor, the carrier cannot rightfully eject him from the train for failure to exhibit a written permit to the conductor. *Louisville, etc., R. Co. v. Hine*, 121 Ala. 234.

**Knowledge by Conductor of Agent's Mistake** charges the carrier with liability for the act of the conductor requiring the payment of fare under threat of expulsion. *Chiles v. Southern R. Co.*, 69 S. Car. 327.

**Mutilated Ticket.** — A carrier is liable for the refusal of the conductor to accept a valid ticket and for ejecting the passenger, even though the ticket was mutilated and difficult to decipher, unless the condition of the ticket which rendered it defective was the fault of the passen-

ger. *Houston, etc., R. Co. v. Crone*, (Tex. Civ. App. 1896) 37 S. W. Rep. 1074.

**View that Ticket Is Conclusive as Between Passenger and Conductor** — *Alabama*. — *Kansas City, etc., R. Co. v. Foster*, 134 Ala. 244, 92 Am. St. Rep. 25; *McGhee v. Reynolds*, 117 Ala. 413.

*Illinois*. — *Kiley v. Chicago City R. Co.*, 189 Ill. 384, 82 Am. St. Rep. 460, affirming 90 Ill. App. 275; *Pittsburgh, etc., R. Co. v. Daniels*, 90 Ill. App. 154.

*Kentucky*. — *Spink v. Louisville, etc., R. Co.*, (Ky. 1899) 52 S. W. Rep. 1067; *Lexington, etc., R. Co. v. Lyons*, 104 Ky. 23.

*Michigan*. — *Brown v. Rapid R. Co.*, 130 Mich. 483, 9 Detroit Leg. N. 127; *Keen v. Detroit Electric R. Co.*, 123 Mich. 247. *Contra*, *Brown v. Rapid R. Co.*, 134 Mich. 591, 10 Detroit Leg. N. 579.

*Pennsylvania*. — *Robb v. Pittsburg, etc., R. Co.*, 14 Pa. Super. Ct. 282; *Anderson v. Union Traction Co.*, 7 Pa. Dist. 41.

*South Carolina*. — *Norman v. Southern R. Co.*, 65 S. Car. 517, 95 Am. St. Rep. 809.

*West Virginia*. — *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 582, applying the rule where the passenger's ticket had been taken up by a conductor.

**606.** 4. Express Contract. — *Central of Georgia R. Co. v. Almand*, 116 Ga. 780.

**607.** 1. Degree of Force to Be Employed. — *McGarry v. Holyoke St. R. Co.*, 182 Mass. 123; *Hart v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 521; *Ft. Worth, etc., R. Co. v. Peterson*, 24 Tex. Civ. App. 548. See also the cases cited *supra*, this title, 549. 3.

2. *Pennsylvania R. Co. v. Scofield*, (C. C. A.) 121 Fed. Rep. 814; *Birmingham R., etc., Co. v. Mullen*, 138 Ala. 614; *Moore v. Nashville, etc., R. Co.*, 137 Ala. 495; *Higgins v. Southern R. Co.*, 98 Ga. 751; *Central R. Co. v. Mackey*, 103 Ill. App. 15; *Sanders v. Illinois Cent. R. Co.*, 90 Ill. App. 582; *Schaefer v. North Chicago St. R. Co.*, 82 Ill. App. 473; *Randell v. Chicago, etc., R. Co.*, 102 Mo. App. 342; *Foley v. Metropolitan St. R. Co.*, 80 N. Y. App. Div. 262; *Toledo, etc., R. Co. v. Marsh*, 9 Ohio Cir. Dec. 548, 17 Ohio Cir. Ct. 379; *St. Louis Southwestern R. Co. v. Johnson*, 29 Tex. Civ. App. 184. See *Huba v. Schenectady R. Co.*, 85 N. Y. App. Div. 199.

**Expulsion from Moving Train.** — *Savannah, etc., R. Co. v. Godkin*, 104 Ga. 655, 69 Am. St. Rep. 187; *Brunswick, etc., R. Co. v. Bostwick*, 100 Ga. 96; *Chicago, etc., R. Co. v. Stratton*, 111 Ill. App. 142; *Indiana, etc., R. Co. v. Ditto*, 158 Ind. 669; *Battis v. Chicago, etc., R. Co.*, 124 Iowa 623; *McKeon v. New York, etc., R. Co.*, 183 Mass. 271, 97 Am. St. Rep. 437; *Texas, etc., R. Co. v. Tems*, (Tex. Civ. App. 1903) 77 S. W. Rep. 230; *International, etc., R. Co. v. Bohannon*, (Tex. Civ. App. 1903) 71 S. W. Rep. 776; *Klenk v. Oregon Short Line R. Co.*, 27 Utah 428.

By statute in *Missouri* a train must be stopped

**607. 10. Place of Ejection — In the Absence of a Statute. — See note 3.**

Question for Jury. — See note 4.

Statutes. — See note 5.

**609. VI. LIMITATION OF LIABILITY — 1. The Power to Limit — a. GENERALLY — Present Rule. — See note 1.****610. b. BY NOTICE — (1) Generally. — See note 1.****612. (2) As a Basis of Contract — Assent Not Implied. — See note 2.****c. BY CONTRACT — (1) Express Contract Required. — See note 4.****613. (3) Assent — When Implied. — See note 2.****614. (5) Consideration. — See note 2.****615. d. FOR NEGLIGENCE — (1) General Rule. — See note 1.****617. See note 1.****618. (2) Distinction Between Degrees of Negligence. — See note 1.****621. 2. Towards Particular Classes of Passengers. — See note 2.**

before the ejection of a passenger. *Holt v. Hannibal, etc., R. Co.*, 174 Mo. 524.

The expulsion of a passenger from a moving train has been held to render the carrier liable, though a rule of the carrier prohibited the ejection of persons while trains are in motion. *Curtis v. Chicago, etc., R. Co.*, 99 Mo. App. 502; *Curtis v. Chicago, etc., R. Co.*, 99 Mo. App. 508.

**Compelling Trespasser to Ride on Platform of Car** when the train is in motion has been held to be negligence. *Great Northern R. Co. v. Bruyere, (C. C. A.)* 114 Fed. Rep. 540.

**607. 3. Place of Ejection — General Rule. —** *Bohannon v. Southern R. Co.*, 112 Ky. 106; *St. Louis Southwestern R. Co. v. Pruitt, (Tex. Civ. App. 1904)* 79 S. W. Rep. 598, *writ denied* 97 Tex. 487.

**4. Question for Jury. —** *Gaukler v. Detroit, etc., R. Co.*, 130 Mich. 666, 9 Detroit Leg. N. 215; *Jackson v. Alabama, etc., R. Co.*, 76 Miss. 703; *New York, etc., R. Co. v. Willing*, 24 Ohio Cir. Ct. 474.

**5. Statutory Regulations — Arkansas. —** *St. Louis Southwestern R. Co. v. Harper*, 69 Ark. 186, 86 Am. St. Rep. 190, holding that the statute applies to one who carelessly boards a train which he should know does not stop at his station.

**609. 1. General Rule. —** *Crary v. Lehigh Valley R. Co.*, 203 Pa. St. 525, 93 Am. St. Rep. 778.

**610. 1. Mere Notice of Limitation Void. —** *Southern R. Co. v. Watson*, 110 Ga. 681.

**Notices Void by Statute — In the United States. —** *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665.

**612. 2. Actual Assent Necessary. —** *Jacobs v. Central R. Co.*, 19 Pa. Super. Ct. 18, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 612.

**4. Limitation Must Be by Express Contract. —** *Dow v. Syracuse, etc., R. Co.*, 81 N. Y. App. Div. 362.

**613. 2. Assent to Limitation in Contract Ticket Implied. —** *Compare Dow v. Syracuse, etc., R. Co.*, 81 N. Y. App. Div. 362.

**614. 2. Performance of a Duty Already Imposed Is Insufficient. —** *Dow v. Syracuse, etc., R. Co.*, 81 N. Y. App. Div. 362.

**615. 1. Limitation of Liability for Negligence. —** *The Oregon, (C. C. A.)* 133 Fed. Rep. 609; *Voight v. Baltimore, etc., R. Co.*, 79 Fed. Rep. 561; *Central of Georgia R. Co. v. Lippman*, 110 Ga. 678, *citing* 5 AM. AND ENG. ENCYC.

OF LAW (2d ed.) 615; *Southern R. Co. v. Watson*, 110 Ga. 681; *Payne v. Terre Haute, etc., R. Co.*, (Ind. App. 1901) 60 N. E. Rep. 362; *Louisville, etc., R. Co. v. Bell*, 100 Ky. 203; *Doyle v. Fitchburg R. Co.*, 166 Mass. 492, 55 Am. St. Rep. 417; *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573; *Crary v. Lehigh Valley R. Co.*, 203 Pa. St. 525, 93 Am. St. Rep. 778.

**Constitutional Restriction of Right to Limit Liability. —** *Texas, etc., R. Co. v. Fenwick, (Tex. Civ. App. 1904)* 78 S. W. Rep. 548.

**617. 1. Rule Applies with Especial Force to Carriers for Hire. —** *Ft. Worth, etc., R. Co. v. Rogers*, 21 Tex. Civ. App. 605.

**618. 1. Rule Not Applicable to Carriers for Hire. —** The rule that a railroad company may contract, limiting its liability for all negligence except gross negligence, does not apply to passengers for hire. *Pennsylvania Co. v. Greso*, 79 Ill. App. 127; *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 23, 66 Am. St. Rep. 253, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 618.

**621. 2. Gratuitous Passengers. —** Some authorities hold that a stipulation in a free pass against liability for negligence on the part of the carrier or his servants is valid. *Boering v. Chesapeake Beach R. Co.*, 193 U. S. 442, *affirming* 20 App. Cas. (D. C.) 500; *Northern Pac. R. Co. v. Adams*, 192 U. S. 440; *Duncan v. Maine Cent. R. Co.*, 113 Fed. Rep. 508; *Payne v. Terre Haute, etc., R. Co.*, 157 Ind. 616. But other authorities hold that such stipulations are void. *Farmers L. & T. Co. v. Baltimore, etc., R. Co.*, 102 Fed. Rep. 17; *Whitney v. New York, etc., R. Co.*, (C. C. A.) 102 Fed. Rep. 850; *Payne v. Terre Haute, etc., R. Co.*, (Ind. App. 1901) 60 N. E. Rep. 362; *Missouri, etc., R. Co. v. Flood, (Tex. Civ. App. 1902)* 70 S. W. Rep. 331; (Tex. Civ. App. 1904) 79 S. W. Rep. 1106; *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379 (decided under the *Virginia* statute).

Under the *Nebraska* statutes a stipulation in a free pass that the carrier shall not be liable for injuries to the passenger is ineffective to limit the statutory liability of the carrier. *Chicago, etc., R. Co. v. Collier, (Neb. 1901)* 95 N. W. Rep. 472; *Chicago, etc., R. Co. v. Hambel, (Neb. 1902)* 89 N. W. Rep. 643.

**Drovers. —** Stipulations exempting a carrier from liability for negligence to a person who rides on a freight train in charge of stock, on

**623. VII. PRESUMPTIONS - 1. Negligence—*a.* IN GENERAL.—**See note 1.

a "drover's pass," have been held to be void. *Pennsylvania Co. v. Gresco*, 102 Ill. App. 252; *Rowdin v. Pennsylvania R. Co.*, 208 Pa. St. 623; *Feldschneider v. Chicago, etc., R. Co.*, 122 Wis. 423.

And it has been held that the carrier cannot make itself liable to such passengers for gross negligence alone. *Illinois Cent. R. Co. v. Anderson*, 184 Ill. 294, *affirming* 81 Ill. App. 137.

A stipulation in a contract between a railroad company and the father of the plaintiff, who was to be in charge of a horse shipped over the road, exempting the company from liability to the person in charge of the horse except from gross negligence, was held not to be binding upon the plaintiff, who was a minor. *Chicago, etc., R. Co. v. Lee*, (C. C. A.) 92 Fed. Rep. 318.

In *Kansas* a limitation of liability of a receiver of a railroad to one riding on a stock pass is void by statute unless the limitation has the sanction of the board of railroad commissioners. *Chicago, etc., R. Co. v. Posten*, 59 Kan. 449. And see *Chicago, etc., R. Co. v. Martin*, 59 Kan. 437.

In *Canada* it is held that a stipulation in a free pass which is given a person who is to be in charge of a shipment of cattle, exempting the carrier from liability for negligence, is valid and may be taken advantage of by a connecting carrier. *Bicknell v. Grand Trunk R. Co.*, 26 Ont. App. 431.

**Express Messengers — Contract Exempting Carrier from Liability for Negligence Valid.** — *Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498; *Blank v. Illinois Cent. R. Co.*, 182 Ill. 332, *affirming* 80 Ill. App. 475; *Louisville, etc., R. Co. v. Keefer*, 146 Ind. 21, 58 Am. St. Rep. 348; *Peterson v. Chicago, etc., R. Co.*, 119 Wis. 197, 100 Am. St. Rep. 879. See *Richmond v. Southern Pac. R. Co.*, 41 Oregon 54, 93 Am. St. Rep. 694.

It has been held that the express messenger is chargeable with knowledge of a contract between the carrier and his employer limiting the carrier's liability. *Pittsburgh, etc., R. Co. v. Mahoney*, 148 Ind. 196, 62 Am. St. Rep. 503. But on the other hand a contractual stipulation exempting a carrier from liability for negligence to an express messenger has been held to be void. *Voigt v. Baltimore, etc., R. Co.*, 79 Fed. Rep. 561.

And it has been held that an express messenger is not bound by a contract between his employer and the railroad company, exempting the company from liability for negligence, if he has no knowledge of the contract. *Chamberlain v. Pierson*, (C. C. A.) 87 Fed. Rep. 420.

**News Agent.** — It has been held that a contract between a railroad company and a news agent engaged in business on the defendant's train, exempting the company from liability to him for negligence, is against public policy, and is void as respects negligence consisting of a violation of a statute requiring trains to be stopped before arriving at the crossing of an intersecting railroad, even though the company may not bear to the news agent the relation of common carrier. *Starr v. Great Northern R. Co.*, 67 Minn. 18.

**Circus Trains — Contract Exempting Carrier from Liability for Negligence.** — A contract between a carrier and a circus company, providing for the indemnification of injuries sustained by any of the employees of the circus, does not relieve the carrier from liability for negligence resulting in injuries to such employees. *Seaboard Air-Line R. Co. v. Main*, 132 N. Car. 445.

**Passengers on Freight Trains.** — Stipulations against liability for negligence to persons who are permitted to ride on freight trains are void. *Central of Georgia R. Co. v. Almand*, 116 Ga. 780; *Louisville, etc., R. Co. v. Bell*, 100 Ky. 203; *Richmond v. Southern Pac. R. Co.*, 41 Oregon 54, 93 Am. St. Rep. 694; *Ft. Worth, etc., R. Co. v. Rogers*, 21 Tex. Civ. App. 605, 24 Tex. Civ. App. 382.

**623. 1. Presumption of Negligence — Injury** — *United States.* — *Texas, etc., R. Co. v. Gardner*, (C. C. A.) 114 Fed. Rep. 186; *Whitney v. New York, etc., R. Co.*, (C. C. A.) 102 Fed. Rep. 850; *Sprague v. Southern R. Co.*, (C. C. A.) 92 Fed. Rep. 59.

*California.* — *Lyon v. Aronson*, 140 Cal. 365; *Boone v. Oakland Transit Co.*, 139 Cal. 490.

*District of Columbia.* — *City, etc., R. Co. v. Svedborg*, 20 App. Cas. (D. C.) 543, *affirmed* 194 U. S. 201.

*Georgia.* — *Freeman v. Collins Park, etc., R. Co.*, 117 Ga. 78; *Florida Cent., etc., R. Co. v. Rudolph*, 113 Ga. 143. See *Killian v. Georgia R., etc., Co.*, 97 Ga. 727.

*Illinois.* — *Springer v. Schultz*, 105 Ill. App. 544, *judgment affirmed* 205 Ill. 144; *Brimmer v. Illinois Cent. R. Co.*, 101 Ill. App. 198; *Cramblet v. Chicago, etc., R. Co.*, 82 Ill. App. 542; *Calumet Electric St. R. Co. v. Jennings*, 83 Ill. App. 612.

*Indiana.* — *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360.

*Louisiana.* — *Le Blanc v. Sweet*, 107 La. 355, 90 Am. St. Rep. 303.

*Maryland.* — *United R., etc., Co. v. Woodbridge*, 97 Md. 629; *United R., etc., Co. v. Beidelman*, 95 Md. 480.

*Missouri.* — *Aston v. St. Louis Transit Co.*, 105 Mo. App. 226.

*North Carolina.* — *McCord v. Atlanta, etc., R. Co.*, 134 N. Car. 53.

*Pennsylvania.* — *Palmer v. Warren St. R. Co.*, 206 Pa. St. 574; *Clark v. Lehigh Valley R. Co.*, 24 Pa. Super. Ct. 609.

*South Carolina.* — *Doolittle v. Southern R. Co.*, 62 S. Car. 130; *Cooper v. Georgia, etc., R. Co.*, 61 S. Car. 345; *Steele v. Southern R. Co.*, 55 S. Car. 391, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

See also *Howell v. Lansing City Electric R. Co.*, (Mich. 1904) 99 N. W. Rep. 406, 11 Detroit Leg. N. 82; *Hansen v. North Jersey St. R. Co.*, 64 N. J. L. 686; *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 112.

**Rule Applicable to Street Railway Companies.** — *Bosqui v. Sutro R. Co.*, 131 Cal. 390.

**Rule under Nebraska Statute.** — *Clark v. Zarniko*, (C. C. A.) 106 Fed. Rep. 607; *Lincoln Traction Co. v. Heller*, (Neb. 1904) 100 N. W. Rep. 197; *Chicago, etc., R. Co. v. Winfrey*, (Neb. 1903) 93 N. W. Rep. 526; *Chicago, etc.,*



**624.** See notes 1, 2.

R. Co. *v.* Wolfe, 61 Neb. 502; Chicago, etc., R. Co. *v.* Zerneck, 59 Neb. 689; Lincoln St. R. Co. *v.* McClellan, 54 Neb. 672, 69 Am. St. Rep. 736.

The Nebraska statute defining the liability of railway companies has been held to be inapplicable to street railway companies. Lincoln St. R. Co. *v.* McClellan, 54 Neb. 672, 69 Am. St. Rep. 736.

**624.** 1. *United States.* — Kefauver *v.* Philadelphia, etc., R. Co., 122 Fed. Rep. 966.

*Alabama.* — Southern R. Co. *v.* Crowder, 130 Ala. 256.

*Arkansas.* — Arkansas Midland R. Co. *v.* Griffith, 63 Ark. 491.

*Colorado.* — Denver, etc., R. Co. *v.* Fotheringham, 17 Colo. App. 410.

*District of Columbia.* — Brightwood R. Co. *v.* Carter, 12 App. Cas. (D. C.) 155.

*Indiana.* — Dresslar *v.* Citizens St. R. Co., 19 Ind. App. 383.

*Iowa.* — Fitch *v.* Mason City, etc., Traction Co., 124 Iowa 665.

*Kansas.* — St. Louis, etc., R. Co. *v.* Burrows, 62 Kan. 89.

*Maryland.* — Western Maryland R. Co. *v.* State, 95 Md. 652.

*Mississippi.* — Yazoo, etc., R. Co. *v.* Humphrey, 83 Miss. 721.

*Missouri.* — Allen *v.* St. Louis Transit Co., 183 Mo. 411.

*New York.* — Gabriel *v.* Long Island R. Co., 54 N. Y. App. Div. 41; Hoffman *v.* Third Ave. R. Co., 45 N. Y. App. Div. 586; Leyh *v.* Newburgh Electric R. Co., 41 N. Y. App. Div. 218, *affirmed* without opinion, 168 N. Y. 667.

*Ohio.* — Mt. Adams, etc., Inclined Plane R. Co. *v.* Isaacs, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 177.

*Pennsylvania.* — Coburn *v.* Philadelphia, etc., R. Co., 198 Pa. St. 436; Dixey *v.* Philadelphia Traction Co., 180 Pa. St. 401.

*Texas.* — Texas Midland R. Co. *v.* Frey, 25 Tex. Civ. App. 386.

*Washington.* — Allen *v.* Northern Pac. R. Co., 35 Wash. 221. See Bergen County Traction Co. *v.* Demarest, 62 N. J. L. 755, 72 Am. St. Rep. 685.

**Missile from Unknown Source.** — Wadsworth *v.* Boston El. R. Co., 182 Mass. 572.

**Throwing of Lump of Coal from Passing Train** has been held to raise a presumption of negligence. Louisville, etc., R. Co. *v.* Reynolds, 71 S. W. Rep. 516, 24 Ky. L. Rep. 1402.

**Falling from Train** does not raise a presumption of negligence. See Southern R. Co. *v.* Webb, 116 Ga. 152; Mt. Adams, etc., Inclined Plane R. Co. *v.* Isaacs, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 177.

**Falling from Street Car** does not raise a presumption of negligence. Paynter *v.* Bridgeton, etc., Traction Co., 67 N. J. L. 619; Armstrong *v.* Metropolitan St. R. Co., 23 N. Y. App. Div. 137.

**Catching of Woman Passenger's Skirt on Car When Alighting** does not create a presumption of negligence. Doyle *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 331.

**Stream of Water Coming Through Car Window.** — The mere unexplained fact that a stream of water entered the window of the car in which

the plaintiff was riding as a passenger has been held not to raise a presumption of negligence on the part of the railway company. Spencer *v.* Chicago, etc., R. Co., 105 Wis. 311.

**Slipping on Banana Peel** on station stairway does not raise a presumption of negligence. Benson *v.* Manhattan R. Co., (Supm. Ct. App. T.) 31 Misc. (N. Y.) 723.

2. *Chicago Union Traction Co. v. Crosby*, 109 Ill. App. 644; *Chicago Union Traction Co. v. Mommsen*, 107 Ill. App. 353; *Allen v. St. Louis Transit Co.*, 183 Mo. 411; *Whalen v. Consolidated Traction Co.*, 61 N. J. L. 606, 68 Am. St. Rep. 723; *Ault v. Cowan*, 20 Pa. Super. Ct. 616; *Stembridge v. Southern R. Co.*, 65 S. Car. 440; *St. Louis Southwestern R. Co. v. Parks*, 97 Tex. 131; *Major v. Oregon Short Line R. Co.*, 21 Utah 145.

A *prima facie* case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control. *McCurrie v. Southern Pac. R. Co.*, 122 Cal. 558.

Where an injury occurs to a passenger through a defect in the car, or from its management and control, or from anything pertaining to the service which the company ought to control, the law will presume negligence on the part of the company. *Citizens St. R. Co. v. Hoffbauer*, 23 Ind. App. 614.

"If the injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, a presumption of negligence on its part is raised. It is only when the injury occurred from the abuse of agencies within the defendant's power that he can be inferred, from the mere fact of the injury, to have acted negligently." *Chicago City R. Co. v. Catlin*, 70 Ill. App. 97.

**Rule under Georgia Statute.** — *Savannah, etc., R. Co. v. Flaherty*, 110 Ga. 335.

**The Sudden Lurching of a Train** has been held not to raise the presumption. *Denver, etc., R. Co. v. Fotheringham*, 17 Colo. App. 410. And a sudden lurching occasioned by a necessary increase of power has been held not to raise a presumption of negligence. *Allen v. Northern Pac. R. Co.*, 35 Wash. 221.

**The Sudden Lurching of an Electric Railway Train** in rounding a curve has been held to raise a presumption of negligence. *Fitch v. Mason City, etc., Traction Co.*, 124 Iowa 665.

**The Sudden Jerking, Jolting, or Lurching of a Street Car** has been held to raise a presumption of negligence. *North Chicago St. R. Co. v. Schwartz*, 82 Ill. App. 493; *Dixey v. Philadelphia Traction Co.*, 180 Pa. St. 401.

Thus, the sudden jerking or lurching of a street car as a passenger was alighting has been held to raise a presumption of negligence. *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474.

Where a passenger who was preparing to alight from a street car was thrown from the platform of the car by a sudden lurching, it was held that a presumption of negligence was raised. *Scott v. Bergen County Traction Co.*, 63 N. J. L. 407.

**625. Collisions.** — See note 1.

On the other hand it has been held that the sudden lurching or jerking of a street car, whereby a passenger is thrown from the back platform of the car, has been held not to raise a presumption of negligence; it was said that it must be shown that the sudden jerk or lurch was caused by some negligence on the part of the carrier in the construction of the car or road or in the management of the car. *Mt. Adams, etc., Inclined Plane R. Co. v. Isaacs*, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 177.

**The Swerving of a Street Car in Rounding a Curve**, which had the effect of throwing a passenger from her seat, was held not to raise a presumption of negligence. *Wilder v. Metropolitan St. R. Co.*, 10 N. Y. App. Div. 364, *affirmed* without opinion 161 N. Y. 665.

**The Sudden Starting of a Street Car** has been held to raise a presumption of negligence. *Denver Consol. Tramway Co. v. Rush*, 19 Colo. App. 70; *City, etc., R. Co. v. Svedborg*, 20 App. Cas. (D. C.) 543, *affirmed* 194 U. S. 201; *United R., etc., Co. v. Beidelman*, 95 Md. 480; *Reagan v. St. Louis Transit Co.*, 180 Mo. 117.

On the other hand it has been held that the sudden starting of a street car did not raise a presumption of negligence. *O'Neil v. Lynn, etc., R. Co.*, 180 Mass. 576; *Peck v. St. Louis Transit Co.*, 178 Mo. 617.

**Sudden Stopping of Train or Car.** — The sudden stopping of a railway train has been held to raise a presumption of negligence. *McCurrie v. Southern Pac. R. Co.*, 122 Cal. 558; *St. Louis, etc., R. Co. v. Burrows*, 62 Kan. 89. *Contra*, *Jonas v. Long Island R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 306.

And it has been held that a presumption of negligence may be raised by the sudden stopping of a street car. *Babcock v. Los Angeles Traction Co.*, 128 Cal. 173; *Langley v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 804.

But it has been held that the sudden stopping of a street car did not raise a presumption of negligence where the car was not stopped by the gripman. *Hoffman v. Third Ave. R. Co.*, 45 N. Y. App. Div. 586.

And it has been held that where it is considered that there is more or less jerking and jolting incident to the operation of a freight train, negligence cannot be inferred from the mere fact that the plaintiff was injured while a passenger on a freight train from a jar occasioned by the stopping of the train. *Erwin v. Kansas City, etc., R. Co.*, 94 Mo. App. 289.

**The Overturning of a Railway Coach** has been held to raise a presumption of negligence. *Felton v. Holbrook*, (Ky. 1900) 56 S. W. Rep. 506.

**A Shock Caused by Switching** has been held to raise a presumption of negligence. *Gardner v. Waycross Air-Line R. Co.*, 97 Ga. 482, 54 Am. St. Rep. 435.

**Where a Passenger on the Footboard of a Street Car Was Struck by a Car Passing on a Parallel Track** this has been held not to raise a presumption of negligence. *Harbison v. Metropolitan R. Co.*, 9 App. Cas. (D. C.) 60.

**Where the Arm of a Passenger Was Struck by a Mail Pouch at the Side of the Track** this has been

held to raise a presumption of negligence. *McCord v. Atlanta, etc., R. Co.*, 134 N. Car. 53.

**The Falling of a Lantern on a Passenger** has been held to raise a presumption of negligence. *Cramblet v. Chicago, etc., R. Co.*, 82 Ill. App. 542.

**The Falling of a Bed Frame on a Passenger** has been held to raise a presumption of negligence. *Stoody v. Detroit, etc., R. Co.*, 124 Mich. 420.

**The Sudden Release of a Brake Handle** has been held not to raise a presumption of negligence. *Holt v. Southwest Missouri Electric R. Co.*, 84 Mo. App. 443.

**Passenger Slipping on Greasy Platform.** — *Barnes v. New York Cent., etc., R. Co.*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 622.

**Misplacement of Switch.** — *Klinger v. United Traction Co.*, 92 N. Y. App. Div. 100, *modified* 181 N. Y. 521.

**Creating Situation of Apparent Danger.** — *Robson v. Nassau Electric R. Co.*, 80 N. Y. App. Div. 301.

**625. 1. Collisions with Other Trains** — *California.* — *Sambuck v. Southern Pac. R. Co.*, 138 Cal. xix, 71 Pac. Rep. 174; *Yaeger v. Southern California R. Co.*, (Cal. 1897) 51 Pac. Rep. 190; *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280, 92 Am. St. Rep. 171; *Green v. Pacific Lumber Co.*, 130 Cal. 435.

*Kentucky.* — *Baltimore, etc., R. Co. v. Hausman*, (Ky. 1900) 54 S. W. Rep. 841.

*Maryland.* — *Jonas v. United R., etc., Co.*, 99 Md. 64.

*Missouri.* — *Magrane v. St. Louis, etc., R. Co.*, 183 Mo. 119; *Robinson v. St. Louis, etc., R. Co.*, 103 Mo. App. 110; *Olsen v. Citizens' R. Co.*, 152 Mo. 426.

*New York.* — *Kay v. Metropolitan St. R. Co.*, 163 N. Y. 447, *reversing* 29 N. Y. App. Div. 466; *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, *reversing judgment* 16 N. Y. App. Div. 152; *Falke v. Third Ave. R. Co.*, 38 N. Y. App. Div. 49. See *Robson v. Nassau Electric R. Co.*, 80 N. Y. App. Div. 301.

*Ohio.* — *Toledo Consol. St. R. Co. v. Fuller*, 9 Ohio Cir. Dec. 123.

*Pennsylvania.* — *Rowdin v. Pennsylvania R. Co.*, 208 Pa. St. 623.

*Tennessee.* — *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 115, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625; *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460.

See also *Savage v. Marlborough St. R. Co.*, 186 Mass. 203; *Thurston v. Detroit United R. Co.*, (Mich. 1904) 100 N. W. Rep. 395, 11 Detroit Leg. N. 252; *Moore v. Saginaw, etc., R. Co.*, 119 Mich. 613.

**Collision Between Street Cars.** — *Heyde v. St. Louis Transit Co.*, 102 Mo. App. 537; *Klinger v. United Traction Co.*, 92 N. Y. App. Div. 100, *modified* 181 N. Y. 521; *Palmer v. Warren St. R. Co.*, 206 Pa. St. 574; *Madara v. Shamokin, etc., Electric R. Co.*, 192 Pa. St. 542.

**Collision Between Street Car and Wagon.** — Proof of a collision between the car in which the passenger was carried and a vehicle in the public streets, an accident which, in the ordinary course of events, would not have happened if proper care had been used by the motorman, raised an implication of negligence

- 626.** Means of Transportation. — See note 1.  
**627.** Derailments. — See note 1.  
**628.** Injuries While at Depot. — See note 3.

on the part of the company. *Shay v. Camden, etc., R. Co.*, 66 N. J. L. 334. But see *Houston Electric Co. v. Nelson*, (Tex. Civ. App. 1903) 77 S. W. Rep. 978, holding that negligence would not be presumed.

**Collision with Animal on Track.** — *Clark v. Lehigh Valley R. Co.*, 24 Pa. Super. Ct. 609; *International, etc., R. Co. v. Thompson*, (Tex. Civ. App. 1903) 77 S. W. Rep. 439.

**Collision Between Sections of Train Breaking Apart.** — *Larkin v. Chicago, etc., R. Co.*, 118 Iowa 652; *Steele v. Southern R. Co.*, 55 S. Car. 392, 74 Am. St. Rep. 756; *Southern R. Co. v. Dawson*, 98 Va. 577.

**626. 1. Defects in Means of Transportation.** — *Chicago City R. Co. v. Carroll*, 206 Ill. 318, affirming 102 Ill. App. 202; *Davis v. Paducah R. Co.*, 113 Ky. 267; *Holland v. St. Louis, etc., R. Co.*, 105 Mo. App. 117; *Choquette v. Southern Electric R. Co.*, 80 Mo. App. 515; *Mt. Adams, etc., Inclined Plane R. Co. v. Isaacs*, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 177; *Keator v. Scranton Traction Co.*, 191 Pa. St. 102, 71 Am. St. Rep. 758; *Murray v. Pawtuxet Valley St. R. Co.*, 25 R. I. 209.

**Sparks or Cinders Flying from Engine.** — *St. Louis Southwestern R. Co. v. Parks*, (Tex. Civ. App. 1903) 73 S. W. Rep. 439; *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ. App. 671.

**Gate Inclosing Platform of Street Car Coming Open.** — *Aston v. St. Louis Transit Co.*, 105 Mo. App. 226.

**Hand Rail on Street Car Becoming Unfastened** raises a presumption of negligence. *McCarty v. St. Louis, etc., R. Co.*, 105 Mo. App. 596.

**Defective Platform at Stopping Place of Street Car.** — *Leveret v. Shreveport Belt R. Co.*, 110 La. 399.

**Parting of Train.** — *Feldschneider v. Chicago, etc., R. Co.*, 122 Wis. 423.

**Defective Insulation of Car of Electric Railway.** — *D'Arcy v. Westchester Electric R. Co.*, 82 N. Y. App. Div. 263; *Dallas Consol. Electric St. R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630.

**The Burning Out of a Fuse in the car of an electric railway** has been held not to be ordinarily *prima facie* evidence of negligence. *Casady v. Old Colony St. R. Co.*, 184 Mass. 156. See *Kight v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494.

**Steamboats — Explosion of Boiler.** — *In re California Nav., etc., Co.*, 110 Fed. Rep. 670.

**Failure of Engine to Act.** — *Walker v. Wilmington Steamboat Co.*, 117 Fed. Rep. 784.

**Breaking of Bridge or Gangway Leading to Ferryboat.** — *Patton v. Pickles*, 50 La. Ann. 857.

**Breaking of Chain Supporting Ferryboat Bridge** for the landing of passengers has been held to create a presumption of negligence. *Bartnik v. Erie R. Co.*, 36 N. Y. App. Div. 246.

**Breaking of Elevator Machinery.** — When a passenger is injured by reason of the giving way of some portion of the machinery or appliances by which the elevator is operated, the presumption of negligence arises from such breaking

unexplained. *Springer v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464, affirming 88 Ill. App. 529.

**627. 1. Presumption of Negligence from Derailment — United States.** — *Whitney v. New York, etc., R. Co.*, (C. C. A.) 102 Fed. Rep. 850. *California.* — *Bassett v. Los Angeles Traction Co.*, 133 Cal. xix, 65 Pac. Rep. 470.

*Georgia.* — *Southern R. Co. v. Myers*, (C. C. A.) 87 Fed. Rep. 149 (applying the Georgia statute); *Freeman v. Collins Park, etc., R. Co.*, 117 Ga. 78; *Florida Cent., etc., R. Co. v. Rudolph*, 113 Ga. 143.

*Illinois.* — *Calumet Electric St. R. Co. v. Jennings*, 83 Ill. App. 612; *Roberts v. Chicago, etc., R. Co.*, 78 Ill. App. 526.

*Indiana.* — *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360.

*Iowa.* — *Cronk v. Wabash R. Co.*, 123 Iowa 349; *Whittlesey v. Burlington, etc., R. Co.*, (Iowa 1902) 90 N. W. Rep. 516.

*Kansas.* — *Meador v. Missouri Pac. R. Co.*, 62 Kan. 865, 61 Pac. Rep. 442; *Atchison, etc., R. Co. v. Elder*, 57 Kan. 312.

*Kentucky.* — *Louisville R. Co. v. Hartlege*, 74 S. W. Rep. 742, 25 Ky. L. Rep. 152; *Felton v. Holbrook*, (Ky. 1900) 56 S. W. Rep. 506.

*Massachusetts.* — *Harriman v. Reading, etc., St. R. Co.*, 173 Mass. 28.

*Missouri.* — *Logan v. Metropolitan St. R. Co.*, 183 Mo. 582; *Heyde v. St. Louis Transit Co.*, 102 Mo. App. 537.

*Montana.* — *Pierce v. Great Falls, etc., R. Co.*, 22 Mont. 447, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 627.

*Nebraska.* — *Chicago, etc., R. Co. v. Young*, 58 Neb. 678.

*New Jersey.* — *Bergen County Traction Co. v. Demarest*, 62 N. J. L. 755, 72 Am. St. Rep. 685.

*New York.* — *Hollahan v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 164.

*Tennessee.* — *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 114, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 627.

*Texas.* — *Johnson v. Galveston, etc., R. Co.*, 27 Tex. Civ. App. 616. *Compare Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203.

*Utah.* — *Major v. Oregon Short Line R. Co.*, 21 Utah 146.

**Defective Rail.** — *McCafferty v. Pennsylvania R. Co.*, 193 Pa. St. 339, 74 Am. St. Rep. 690.

**Broken Rail and Defective Cross Tie.** — *Arkansas Midland R. Co. v. Griffith*, 63 Ark. 491.

**Misplaced or Defective Switch.** — *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74.

**Paving Block Between Rails.** — *Dusenbury v. North Hudson County R. Co.*, 66 N. J. L. 44.

**Obstruction on Track.** — *Ramson v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 101, affirmed without opinion 177 N. Y. 578.

**628. 3. Injuries at Station.** — See *Louisville, etc., R. Co. v. Harmon*, 64 S. W. Rep. 640, 23 Ky. L. Rep. 871.

**Other Similar Defects in Station Platform.** — In an action to recover for injuries received by stepping into a hole in a station platform, it was held to be error to admit evidence that there were other holes in the platform than

**628.** Act of Passenger Contributing to Injury. — See note 4.

**629.** Waiver of Presumption. — See note 1.

*b.* REASONS FOR DOCTRINE. — See note 2.

*c.* REBUTTING PRESUMPTION. — See note 6.

**630.** See notes 1, 3.

**VIII. BURDEN OF PROOF — 1. Negligence — Burden upon Passenger**

Generally. — See note 9.

**631. 2. Contributory Negligence — Rule that Burden upon Passenger. — See note 2.**

the one in which the plaintiff was hurt. *Louisville, etc., R. Co. v. Henry*, (Ky. 1898) 44 S. W. Rep. 428.

**628. 4. Contributory Negligence of Passenger.** — *Pittsburgh, etc., R. Co. v. Aldridge*, 27 Ind. App. 498.

**629. 1. Waiver of Presumption.** — It has been held that while an agreement that there shall be no liability at all by the carrier for injury to the passenger does not relieve the carrier from liability for negligence, the passenger cannot avail himself of the presumption of negligence, but must show that negligence existed. *Crary v. Lehigh Valley R. Co.*, 203 Pa. St. 525, 93 Am. St. Rep. 778.

An unsuccessful attempt to prove by direct evidence the precise cause of an accident does not estop the plaintiff from relying on the presumption of negligence raised by the accident. *Cassady v. Old Colony St. R. Co.*, 184 Mass. 156.

But when the evidence shows the precise cause of the accident there is no room for the application of the doctrine of presumption. *Buckland v. New York, etc., R. Co.*, 181 Mass. 3; *Galligan v. Old Colony St. R. Co.*, 182 Mass. 211, holding that a derailment did not give rise to a presumption of negligence where the plaintiff showed that it was caused by the presence between the rails of a large stone which had rolled on the track from the adjoining bank.

When the plaintiff relies on a specific act of negligence he cannot avail himself of the rule raising a presumption of negligence. *Bartley v. Metropolitan St. R. Co.*, 148 Mo. 124; *Feary v. Metropolitan St. R. Co.*, 162 Mo. 75.

**2. Reasons for Rule.** — *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ. App. 671.

**6. How Rebutted.** — *Sambuck v. Southern Pac. R. Co.*, 138 Cal. xix, 71 Pac. Rep. 174; *Kohner v. Capital Traction Co.*, 22 App. Cas. (D. C.) 181; *Florida Cent., etc., R. Co. v. Rudolph*, 113 Ga. 143; *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74; *Western Maryland R. Co. v. State*, 95 Md. 637; *Bartley v. Metropolitan St. R. Co.*, 148 Mo. 124; *Dusenbury v. North Hudson County R. Co.*, 66 N. J. L. 44; *Huhenner v. Heide*, 73 N. Y. App. Div. 200; *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45; *Clark v. Lehigh Valley R. Co.*, 24 Pa. Super. Ct. 609.

To rebut the presumption of negligence arising from a derailment which was caused by a broken rail and a defective cross-tie, the carrier must show that it had exercised the proper degree of care to discover the defect, and, of course, to remedy it when discovered. *Arkansas Midland R. Co. v. Griffith*, 63 Ark. 491.

**630. 1. Act of God.** — *Pierce v. Great Falls, etc., R. Co.*, 22 Mont. 447.

**3. City, etc., R. Co. v. Svedborg, 20 App. Cas. (D. C.) 543, affirmed 194 U. S. 201.**

**9. General Rule as to Burden of Proof — California.** — *Yaeger v. Southern California R. Co.*, (Cal. 1897) 51 Pac. Rep. 190.

*Illinois.* — *Elwood v. Chicago City R. Co.*, 90 Ill. App. 397; *Field v. French*, 80 Ill. App. 78.

*Kentucky.* — *Louisville, etc., R. Co. v. McClain*, 66 S. W. Rep. 391, 23 Ky. L. Rep. 1878.

*Louisiana.* — *Weber v. New Orleans, etc., R. Co.*, 104 La. 367.

*Massachusetts.* — *Savage v. Marlborough St. R. Co.*, 186 Mass. 203.

*Michigan.* — *Thurston v. Detroit United R. Co.*, (Mich. 1904) 100 N. W. Rep. 395, 11 Detroit Leg. N. 52.

*Missouri.* — *Reagan v. St. Louis Transit Co.*, 180 Mo. 117; *Peck v. St. Louis Transit Co.*, 178 Mo. 617.

*Montana.* — *Taillon v. Mears*, 29 Mont. 161.

*New Hampshire.* — *Hutchins v. Macomber*, 68 N. H. 473.

*New York.* — *Kay v. Metropolitan St. R. Co.*, 163 N. Y. 447, reversing 29 N. Y. App. Div. 466; *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, reversing 16 N. Y. App. Div. 152; *Hollahan v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 164; *McDonnell v. New York Cent., etc., R. Co.*, 35 N. Y. App. Div. 147, appeal dismissed 159 N. Y. 524; *Schulz v. Second Ave. R. Co.*, 12 N. Y. App. Div. 445.

*North Carolina.* — *Asbury v. Charlotte Electric R., etc., Co.*, 125 N. Car. 568; *Cable v. Southern R. Co.*, 122 N. Car. 892.

*Oregon.* — *Smitson v. Southern Pac. R. Co.*, 37 Oregon 74.

*Tennessee.* — *Warfield v. Louisville, etc., R. Co.*, 104 Tenn. 74, 78 Am. St. Rep. 911.

*Texas.* — *Dumas v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1897) 43 S. W. Rep. 908; *Missouri, etc., R. Co. v. Wright*, 19 Tex. Civ. App. 47.

**631. 2. Rule that Burden Is upon Passenger.** — *Indianapolis St. R. Co. v. Tenner*, 32 Ind. App. 311; *Frank Bird Transfer Co. v. Krug*, 30 Ind. App. 602; *Indianapolis St. R. Co. v. Brown*, 32 Ind. App. 130; *Lake Erie, etc., R. Co. v. Arnold*, 26 Ind. App. 190; *Louisville, etc., R. Co. v. Espenscheid*, 17 Ind. App. 558; *Furgason v. Citizens St. R. Co.*, 16 Ind. App. 171; *Baltimore Traction Co. v. Helms*, 84 Md. 515; *Taillon v. Mears*, 29 Mont. 161; *Hutchins v. Macomber*, 68 N. H. 473; *Cusick v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 758; *Baker v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 9; *Bruce v. Brooklyn Heights R. Co.*, 68 N. Y. App. Div. 242; *Gabriel v. Long Island R. Co.*, 54 N. Y. App. Div. 41; *McDonnell v. New York Cent., etc., R. Co.*, 35 N. Y. App. Div. 147, appeal dismissed 159 N. Y. 524.

**631.** Rule that Burden upon Carrier. — See note 3.

**632.** IX. EVIDENCE — ADMISSIBILITY — 1. Authority, Negligence, and Competency of Servants — *a.* AUTHORITY. — See note 3.

**633.** 2. Means of Transportation — *a.* CONDITION OF TRACK — (1) Evidence as Respects Locality — As a General Rule. — See note 6.

**634.** (2) Evidence as Respects Time — As a General Rule. — See note 4.

**635.** See note 1.

*b.* OFFICIAL REPORTS. — See note 2.

**636.** 3. Other and Similar Accidents. — See notes 1, 2.

To entitle one to recover for an injury without showing his own freedom from contributory fault, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been committed under such circumstances as that its natural and reasonable consequence would be to produce injury to others, the actor having knowledge of the situation of those others. *Conner v. Citizens St. R. Co.*, 146 Ind. 430.

**631.** 3. Rule that Burden upon Carrier — United States. — *Fitchburg R. Co. v. Nichols*, (C. C. A.) 85 Fed. Rep. 945.

*Arkansas*. — *St. Louis, etc., R. Co. v. Baker*, 67 Ark. 531.

*California*. — *Boone v. Oakland Transit Co.*, 139 Cal. 490.

*Louisiana*. — *Clerc v. Morgan's Louisiana, etc., R., etc., Co.*, 107 La. 370, 90 Am. St. Rep. 319.

*Missouri*. — *Allen v. St. Louis Transit Co.*, 183 Mo. 411; *Maguire v. St. Louis Transit Co.*, 103 Mo. App. 459.

*North Carolina*. — *Cable v. Southern R. Co.*, 122 N. Car. 892.

*South Carolina*. — *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1.

*Texas*. — *St. John v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 235; *Chicago, etc., R. Co. v. Buie*, 31 Tex. Civ. App. 654; *Missouri, etc., R. Co. v. Gist*, 31 Tex. Civ. App. 662; *Gulf, etc., R. Co. v. Shelton*, 96 Tex. 301; *Pares v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1900) 57 S. W. Rep. 301; *Missouri Pac. R. Co. v. Foreman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 834; *Texas, etc., R. Co. v. Porter*, (Tex. Civ. App. 1897) 41 S. W. Rep. 88; *Texas, etc., R. Co. v. Mayfield*, 23 Tex. Civ. App. 415; *Missouri, etc., R. Co. v. White*, 22 Tex. Civ. App. 424. But compare *St. Louis Southwestern R. Co. v. Martin*, 26 Tex. Civ. App. 231.

*Washington*. — *Foster v. Seattle Electric Co.*, 35 Wash. 177.

*West Virginia*. — *Barker v. Ohio River R. Co.*, 51 W. Va. 429.

See *Brown v. Louisville R. Co.*, (Ky. 1899) 53 S. W. Rep. 1041.

**632.** 3. Person Selling Tickets at Station. — *Gulf, etc., R. Co. v. Moorman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 662.

**Person in Possession of Lantern and Collecting Tickets.** — When it is shown by the evidence that a person was in possession of a lantern and went through a passenger car taking up tickets from the passengers, the question whether such person was in fact conductor of the train or other person in charge is for the jury to determine. No other person being apparently in

charge, proof of such facts places on the railroad company the burden of showing that such person was not in charge of the train. *Coursey v. Southern R. Co.*, 113 Ga. 297.

**Person Giving Instructions to Passenger but Not Dressed in Uniform of Company.** — Where a passenger testified that she was instructed to alight from the train by a man who was dressed in dark clothes, and who inquired as to her destination, and the uncontroverted testimony showed that all the train employees were dressed in dark blue clothes with brass buttons and wore caps, it was held that the evidence was insufficient to show that the person who directed the plaintiff to alight was an employee of the company. *Texas, etc., R. Co. v. Woods*, 15 Tex. Civ. App. 612.

**633.** C. Evidence of Defective Condition of Track. — *Whittlesey v. Burlington, etc., R. Co.*, 121 Iowa 606, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 633.

**634.** 4. Previous Condition. — Evidence as to the previous condition of a switch at the place where the wreck occurred has been held to be admissible to bring home to the defendant knowledge of the existence of such condition. *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203.

**635.** 1. Condition of Station Platform. — *Texas Midland R. Co. v. Brown*, (Tex. Civ. App. 1900) 58 S. W. Rep. 44.

**2. The Report of State Railway Commissioners** pointing out a necessary safeguard is admissible to show knowledge of a defect in the road. *Baruth v. Poughkeepsie City, etc., Electric R. Co.*, 89 N. Y. App. Div. 324. And it has been held that the report of one of the state railway commissioners to an official of the road as to the condition of a station is admissible to show notice. *Smook v. Savannah, etc., R. Co.*, 65 S. Car. 209.

**636.** 1. Admissible to Show Defect in Means of Transportation. — *Dallas Consol. Electric St. R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630.

**Admissible in Rebuttal.** — Evidence of prior accidents at the same place has been held to be admissible to rebut the defendant's testimony that a great many passengers had been carried without accident. *Illinois Cent. R. Co. v. Treat*, 179 Ill. 576, affirming 75 Ill. App. 327.

**2. Other and Similar Assaults.** — *Indianapolis St. R. Co. v. Dawson*, 31 Ind. App. 605; *Holzhauser v. Brooklyn Heights R. Co.*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 145; *Dallas Consol. Electric St. R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630.

**Evidence of Accidents at Different Places under Similar Circumstances Held Admissible.** — *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203.

**636.** Such Evidence Excluded by Some Courts. — See note 3,

**637.** 4. Subsequent Repairs. — See notes 1, 2.

**638.** See note 2.

5. Customary Conduct of Parties — Rule Stated. — See note 3.

**639.** Evidence of the Customary Action of Passengers. — See note 1.

Usual Course for Considerable Time Without Accident. — See note 4.

**6.** Ticket as Written Contract — Parol Evidence to Vary, Etc. — See note 5.

**7.** *Res Gestæ* — *a.* IN GENERAL. — See note 6.

*b.* DECLARATIONS OF PASSENGERS — (1) *Proof of Physical Condition.* — See note 7.

**640.** Time. — See notes 1, 2.

**636.** 3. Facts and Circumstances Connected with Other Accidents Excluded. — *Agulino v. New York, etc., R. Co.*, 21 R. I. 263.

**637.** 1. *Pennsylvania.* — But see *Fisher v. Paxson*, 182 Pa. St. 457.

**2.** Evidence of Subsequent Repairs Held Inadmissible. — See *Prescott, etc., R. Co. v. Smith*, 70 Ark. 179; *Louisville, etc., R. Co. v. Henry*, (Ky. 1898) 44 S. W. Rep. 428.

It has been held that the fact that a hydrant box sunk in the ground at a station was removed after the plaintiff was injured by stepping into it was not admissible in evidence, because such removal or repair would not affect the question of previous negligence, and it ought not to be said that the subsequent removal of the box, or the adoption of some other plan to secure it, in order to prevent like accidents in the future, was an admission on the defendant's part that it had been negligent in the past by keeping the box at the place where the accident occurred. *Southern Pac. R. Co. v. Hall*, (C. C. A.) 100 Fed. Rep. 760.

**Providing New Stopping Place.** — In an action to recover damages for injuries received through the alleged negligence of the defendant in failing to provide a safe place at which to alight, it was held that evidence that a new and better stopping place had been provided after the accident was inadmissible. *Galveston, etc., R. Co. v. Walker*, (Tex. Civ. App. 1898) 48 S. W. Rep. 767.

**638.** 2. *Contra.* — *West Chicago St. R. Co. v. Torpe*, 187 Ill. 610.

**3.** Customary Conduct of Parties. — *Birmingham R., etc., Co. v. Ellard*, 135 Ala. 433; *Southern R. Co. v. Hobbs*, 118 Ga. 232.

**Custom to Ride on Running Board of Street Car.** — *Chicago Union Traction Co. v. Kallberg*, 107 Ill. App. 90.

**Enforced Rule of Carrier.** — *Frizzell v. Omaha St. R. Co.*, (C. C. A.) 124 Fed. Rep. 176.

The rule of a carrier, which has been enforced, as to stopping at a particular place, may be shown when there is conflicting evidence as to whether the carrier's street car did stop at the place in question. *Nassau Electric R. Co. v. Corliss*, (C. C. A.) 126 Fed. Rep. 355.

**Customary Failure to Stop a Reasonable Time.** — Evidence tending to prove that the defendant's cars for several years prior to the accident, as was known to the plaintiff, were accustomed to make a very short stop at the crossing where he wished to alight, and not a sufficient time to allow passengers to alight in safety, has been held to be admissible upon the question

whether the plaintiff was guilty of contributory negligence in leaving his seat while the car was in motion, and in preparing to alight. *Mt. Adams, etc., Inclined Plane R. Co. v. Isaacs*, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 177.

**Management of Train.** — In an action to recover for damages received by a passenger while alighting, through a sudden movement of the train, evidence as to how the train was managed at other stations on the same trip was held to be inadmissible. *Clark v. Smith*, 72 Vt. 138.

**639.** 1. *North Chicago St. R. Co. v. Kaspers*, 186 Ill. 246, *affirming* 85 Ill. App. 316; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169; *Citizens St. R. Co. v. Hoffbauer*, 23 Ind. App. 614.

**Long-continued Conduct as Evidence of Invitation to Board Trains at Particular Place.** — *Chicago, etc., R. Co. v. Doan*, 195 Ill. 168, *affirming* 93 Ill. App. 247.

**4.** *Wilder v. Metropolitan St. R. Co.*, 10 N. Y. App. Div. 364, *affirmed* without opinion 161 N. Y. 665.

**Maintenance for a Long Time of Station Platform in Condition in Which It Was at Time of Accident.** — *Sullivan v. Delaware, etc., Canal Co.*, 72 Vt. 353.

**5.** Nature of Ticket. — *Ames v. Southern Pac. R. Co.*, 141 Cal. 728, 99 Am. St. Rep. 98; *Boering v. Chesapeake Beach R. Co.*, 20 App. Cas. (D. C.) 500, *affirmed* 193 U. S. 442; *Coine v. Chicago, etc., R. Co.*, 123 Iowa 458; *Lexington, etc., R. Co. v. Lyons*, 104 Ky. 23; *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560, 102 Am. St. Rep. 469; *Gulf, etc., R. Co. v. Copeland*, 17 Tex. Civ. App. 55. See *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1. But see *Missouri, etc., R. Co. v. Harrison*, 97 Tex. 611, *reversing* (Tex. Civ. App. 1903) 77 S. W. Rep. 1036.

**6.** *Res Gestæ* — General Rule. — *Denver, etc., R. Co. v. Roller*, (C. C. A.) 100 Fed. Rep. 738; *Birmingham R., etc., Co. v. Mullen*, 138 Ala. 614.

**7.** Declarations of Passenger — Proof of Physical Condition. — *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360; *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1; *St. Louis Southwestern R. Co. v. Martin*, 26 Tex. Civ. App. 231; *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579.

**Involuntary Expressions of Present Pain.** — *Arrington v. Texas, etc., R. Co.*, (Tex. Civ. App. 1902) 70 S. W. Rep. 551.

**640.** 1. Complaints on the Morning After the Injury have been held admissible. *Battis v. Chicago, etc., R. Co.*, 124 Iowa 623.

**641.** (4) *Declarations Explanatory of Accident.* — See note 1.*c. DECLARATIONS OF EMPLOYEES.*—(1) *In General*—Rule Stated.

— See note 2.

**642.** *Time.* — See notes 1, 2.**643.** See note 1.*By Whom Made.* — See note 3.(2) *Reports to Superior Officers.* — See note 4.**644.** *d. DECLARATIONS AND CONDUCT OF THIRD PERSONS.* — See note 1.*Exclamations by Bystanders.* — See note 3.

**Complaints Made the First Week After the Injury** have been held to be admissible. *Green v. Pacific Lumber Co.*, 130 Cal. 435.

**640. 2. Complaints Feigned.**—*New York, etc., R. Co. v. Willing*, 24 Ohio Cir. Ct. 474.

**Declaration Explanatory of Expulsion.**—*Missouri, etc., R. Co. v. Tarwater*, (Tex. Civ. App. 1903) 75 S. W. Rep. 937.

**641. 1. Declarations Explaining Cause of Accident.**—*Brown v. Louisville R. Co.*, (Ky. 1899) 53 S. W. Rep. 1041; *Christie v. Galveston City R. Co.*, (Tex. Civ. App. 1897) 39 S. W. Rep. 638.

**Declaration Showing Intention in Boarding Car** has been held to be admissible when the question of intent was important as bearing upon the question whether the person making the declaration sustained the relation of a passenger to the carrier. *Inness v. Boston, etc., R. Co.*, 168 Mass. 433.

**Declarations Prior to Accident.**—A statement made just before the accident by a passenger, showing that he was hurrying from the coach at the rear end of the train to the engine in front to present his ticket to the conductor, has been held to be admissible as part of the *res gestæ*. *Means v. Carolina Cent. R. Co.*, 124 N. Car. 574.

**2. Declarations of Servants.**—*Birmingham R., etc., Co. v. Mullen*, 138 Ala. 614; *Reiten v. Lake St. El. R. Co.*, 85 Ill. App. 657; *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467.

It has been held that the declarations of a conductor immediately after the accident, as to what happened during the derailment of the train, and his directions to the plaintiff to jump, were admissible; but his statements as to the condition of the track were not a part of the occurrence and were not admissible. *Houston, etc., R. Co. v. Norris*, (Tex. Civ. App. 1897) 41 S. W. Rep. 708.

Evidence as to what the conductor of a street car said immediately after the plaintiff fell off the car has been held inadmissible, on the ground that the remark or declaration of the conductor was no part of the transaction and did not illustrate or explain or characterize it. *Reem v. St. Paul City R. Co.*, 77 Minn. 503.

**642. 1. Time of Declarations.**—*Little Rock Traction, etc., Co. v. Nelson*, 66 Ark. 494; *Trumbull v. Donahue*, 18 Colo. App. 460; *South Covington, etc., St. R. Co. v. Riegler*, 82 S. W. Rep. 382, 26 Ky. L. Rep. 666; *Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 445.

In an action by a passenger to recover damages for injuries sustained in a collision, it was held that statements by the engineer of the train which collided with the one on which

the plaintiff was a passenger, made fifteen or twenty minutes after the collision, when all of the parties were on the ground, and after the time an examination had been made by the engineer into the cause of the collision, to the effect that he could not stop his train because the brakes of the cars would not work, as the air between the tender and the baggage car had been cut off, were held to be admissible as part of the *res gestæ*. *Missouri, etc., R. Co. v. Vance*, (Tex. Civ. App. 1897) 41 S. W. Rep. 167.

**2. Declarations Must Be Made Before Transaction a Completed Fact.**—*Boone v. Oakland Transit Co.*, 139 Cal. 490; *Rosted v. Great Northern R. Co.*, 76 Minn. 123; *Gotwald v. St. Louis Transit Co.*, 102 Mo. App. 492; *Kay v. Metropolitan St. R. Co.*, 163 N. Y. 447, reversing 29 N. Y. App. Div. 466; *Willis v. Atlantic, etc., R. Co.*, 120 N. Car. 508.

**643. 1. Declarations Before the Transaction.**—It has been held that statements and declarations of the motorman, made to the plaintiff just preceding a derailment, as to the condition of the track, as to his not having sand, and the car being late and overloaded, and the rapidity of the speed, were competent as part of the *res gestæ* and also as fixing the company with knowledge of facts requiring a greater degree of care and prudence than ordinary. *Witsell v. West Asheville, etc., R. Co.*, 120 N. Car. 557.

**3. Must Be Made by One Connected with Transaction.**—*Ayres v. Delaware, etc., R. Co.*, 158 N. Y. 254, affirming 4 N. Y. App. Div. 511.

**4. Time Card of Conductor of Street Car.**—*Lucas v. Metropolitan St. R. Co.*, 56 N. Y. App. Div. 405.

**644. 1. Sudden Exclamations of Fellow Passengers** are admissible as part of the *res gestæ*. *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639. Compare *Indianapolis St. R. Co. v. Whitaker*, 160 Ind. 125.

**3. Oliver v. Columbia, etc., R. Co.**, 65 S. Car. 1.

**Remarks by Third Persons.**—In an action to recover for injuries received in a collision at a railroad crossing, when one of the important issues was whether the train on which the plaintiff was a passenger stopped before entering upon the crossing, it was held that evidence was properly admitted to show that a resident in the neighborhood of the crossing, when he saw the train approach the crossing without stopping, and before the collision, remarked to his wife that the train had entered upon the crossing without stopping and that there would be a collision. *Missouri, etc., R. Co. v. Vance*, (Tex. Civ. App. 1897) 41 S. W. Rep. 167.

**644.** Injuries to Other Passengers. — See note 7.

**645. X. MATTERS OF DEFENSE — 2. Contributory Negligence — a. RULE STATED.** — See notes 1, 2.

Degree of Care Required of Passenger. — See note 3.

Where Carrier Is Guilty of Wilful Misconduct. — See note 4.

**644. 7. Injury to Other Persons than Plaintiff.** — Where the plaintiff sued to recover for injuries alleged to have been produced by a severe shock, it was held that evidence that other persons on the train were injured in the same accident was admissible. *Missouri, etc., R. Co. v. Wright*, 19 Tex. Civ. App. 47.

**645. 1. Rule as to Passenger's Contributory Negligence — Alabama.** — *Birmingham R., etc., Co. v. Bynum*, 139 Ala. 395.

*Arkansas.* — *St. Louis, etc., R. Co. v. Barnett*, 65 Ark. 255.

*Delaware.* — *McAllister v. Peoples R. Co.*, 4 Penn. (Del.) 272.

*Georgia.* — *Central of Georgia R. Co. v. Dorsey*, 106 Ga. 826.

*Illinois.* — *Chicago, etc., R. Co. v. Weir*, 91 Ill. App. 420; *Green v. Young Men's Christian Assoc.*, 65 Ill. App. 459.

*Indiana.* — *Indianapolis St. R. Co. v. Tenner*, 32 Ind. App. 311; *Knauss v. Lake Erie, etc., R. Co.*, 29 Ind. App. 216 (applying the statute making contributory negligence a defense).

*Iowa.* — *Root v. Des Moines R. Co.*, 122 Iowa 469.

*Missouri.* — *Shareman v. St. Louis Transit Co.*, 103 Mo. App. 515; *Tillman v. St. Louis Transit Co.*, 102 Mo. App. 553; *Maxey v. Metropolitan St. R. Co.*, 95 Mo. App. 303.

*New Jersey.* — *Hansen v. North Jersey St. R. Co.*, (N. J. 1899) 43 Atl. Rep. 663.

*Ohio.* — *Cincinnati, etc., Electric St. R. Co. v. Lohe*, 68 Ohio St. 101; *Ashtabula Rapid Transit Co. v. Holmes*, 67 Ohio St. 153.

*South Carolina.* — *Jarrell v. Charleston, etc., R. Co.*, 58 S. Car. 491; *Disher v. South Carolina, etc., R. Co.*, 55 S. Car. 187.

*Tennessee.* — *Knoxville Traction Co. v. Carroll*, (Tenn. 1904) 82 S. W. Rep. 313; *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467; *Louisville, etc., R. Co. v. Collier*, 104 Tenn. 189.

*Texas.* — *Galveston, etc., R. Co. v. Morris*, 94 Tex. 505, *affirming* (Tex. Civ. App. 1901) 60 S. W. Rep. 813; *St. Louis Southwestern R. Co. v. Casseday*, 92 Tex. 525; *Gulf, etc., R. Co. v. Flatt*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1029.

*Wisconsin.* — *Kohler v. West Side R. Co.*, 99 Wis. 33; *Conroy v. Chicago, etc., R. Co.*, 96 Wis. 243.

**Rule under Nebraska Statute.** — *Clark v. Zarniko*, (C. C. A.) 106 Fed. Rep. 607; *Chicago, etc., R. Co. v. Hambel*, (Neb. 1902) 89 N. W. Rep. 643; *Chicago, etc., R. Co. v. Wolfe*, 61 Neb. 502; *Chicago, etc., R. Co. v. Zerneck*, 59 Neb. 689. See *Chicago, etc., R. Co. v. Sattler*, 64 Neb. 636, 97 Am. St. Rep. 666.

**Contributory Negligence of Stranger.** — *Frank v. Metropolitan St. R. Co.*, 91 N. Y. App. Div. 485.

**2. Louisville R. Co. v. Meglemery**, 78 S. W. Rep. 217, 25 Ky. L. Rep. 1587, *rehearing denied* (Ky. 1904) 79 S. W. Rep. 287; *Shealey v. South Carolina, etc., R. Co.*, 67 S. Car. 61; *Doolittle v. Southern R. Co.*, 62 S. Car. 130; *Cooper v. Georgia, etc., R. Co.*, 56 S. Car. 91;

*Williams v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1903) 78 S. W. Rep. 45; *St. Louis Southwestern R. Co. v. Ricketts*, 22 Tex. Civ. App. 515. *Compare Memphis St. R. Co. v. Shaw*, 110 Tenn. 467.

**3. Degree of Care Required of Passenger — United States.** — *Lauterer v. Manhattan R. Co.*, (C. C. A.) 128 Fed. Rep. 540; *Lehigh Valley R. Co. v. Dupont*, (C. C. A.) 128 Fed. Rep. 840; *St. Louis, etc., R. Co. v. Leftwich*, (C. C. A.) 117 Fed. Rep. 127.

*District of Columbia.* — *Washington, etc., R. Co. v. Hickey*, 5 App. Cas. (D. C.) 436.

*Illinois.* — *West Chicago St. R. Co. v. Horne*, 100 Ill. App. 259, *affirmed* 197 Ill. 250; *Chicago, etc., R. Co. v. Weir*, 91 Ill. App. 420; *Elwood v. Chicago City R. Co.*, 90 Ill. App. 397; *Hope v. West Chicago St. R. Co.*, 82 Ill. App. 311; *Schneider v. North Chicago St. R. Co.*, 80 Ill. App. 306; *Chicago, etc., R. Co. v. Kelly*, 182 Ill. 267, *affirming* 80 Ill. App. 675; *West Chicago St. R. Co. v. Manning*, 170 Ill. 417; *Chicago City R. Co. v. Dinsmore*, 162 Ill. 658.

*Iowa.* — *Jerolman v. Chicago G. W. R. Co.*, 108 Iowa 177; *Devine v. Chicago, etc., R. Co.*, 100 Iowa 692.

*Kentucky.* — *Illinois Cent. R. Co. v. Jolly*, 78 S. W. Rep. 476, 25 Ky. L. Rep. 1735; *Davis v. Paducah R., etc., Co.*, 113 Ky. 267. See *Illinois Cent. R. Co. v. Vinson*, 76 S. W. Rep. 167, 25 Ky. L. Rep. 652.

*Louisiana.* — *Clerc v. Morgan's Louisiana, etc., R., etc., Co.*, 107 La. 370, 90 Am. St. Rep. 319.

*Maryland.* — *Baltimore, etc., R. Co. v. Jean*, 98 Md. 546; *United R., etc., Co. v. Beidelman*, 95 Md. 480.

*Michigan.* — *McDonald v. City Electric R. Co.*, (Mich. 1904) 100 N. W. Rep. 592, 11 Detroit Leg. N. 326; *Moore v. Saginaw, etc., R. Co.*, 115 Mich. 103.

*Mississippi.* — *Yazoo, etc., R. Co. v. Humphrey*, 83 Miss. 721.

*Missouri.* — *Sweeney v. Kansas City Cable R. Co.*, 150 Mo. 385; *Cobb v. Lindell R. Co.*, 149 Mo. 135.

*Nebraska.* — *Omaha, etc., R. Co. v. Crow*, 54 Neb. 747, 69 Am. St. Rep. 741.

*North Carolina.* — *Asbury v. Charlotte Electric R., etc., Co.*, 125 N. Car. 568.

*Ohio.* — *Lake Shore, etc., R. Co. v. Hotchkiss*, 24 Ohio Cir. Ct. 431.

*South Carolina.* — *Cooper v. Georgia, etc., R. Co.*, 56 S. Car. 91.

*Texas.* — *St. John v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 235; *Chicago, etc., R. Co. v. Armes*, 32 Tex. Civ. App. 32; *Missouri, etc., R. Co. v. Hay*, 28 Tex. Civ. App. 318; *St. Louis Southwestern R. Co. v. Casseday*, 92 Tex. 525.

*Wisconsin.* — *Zimmer v. Fox River Valley Electric R. Co.*, 118 Wis. 614.

See *St. Louis, etc., R. Co. v. Tomlinson*, 69 Ark. 480.

**4. Contributory Negligence No Defense Where**



**646. b. WHAT AMOUNTS TO CONTRIBUTORY NEGLIGENCE — (1) General Principles — (a) Contributing Cause Must Be Negligence in Legal Sense.** — See note 1.

(b) **Passenger's Negligence Must Be Proximate Cause of Injury.** — See note 2.  
Another Statement of Rule. — See note 3.

**647. (c) Acts in Disobedience of Warning.** — See note 2.

**Carrier's Misconduct Is Wilful.** — Schaefer v. North Chicago St. R. Co., 82 Ill. App. 473; South Covington, etc., St. R. Co. v. Riegler, 82 S. W. Rep. 382, 26 Ky. L. Rep. 666; Illinois Cent. R. Co. v. Brown, 77 Miss. 338; Parks v. St. Louis, etc., R. Co., 178 Mo. 108, 101 Am. St. Rep. 425; Bolton v. Missouri Pac. R. Co., 172 Mo. 92. See Beyer v. Louisville, etc., R. Co., 114 Ala. 424; Jacobson v. St. Louis Transit Co., 106 Mo. App. 339. But compare Leu v. St. Louis Transit Co., 106 Mo. App. 329. And see Clarke v. Louisville, etc., R. Co., 101 Ky. 34, holding that the rule that contributory negligence cannot be relied upon as a defense where wilful negligence is alleged does not apply in actions under the provisions of section 6 of the Kentucky statutes.

**Gross Negligence.** — It has been said that contributory negligence is not a defense where the carrier has been guilty of gross negligence. Yazoo, etc., R. Co. v. Humphrey, 83 Miss. 721.

**Failure to Exercise Care to Prevent Accident After Discovering Passenger's Peril.** — A carrier is liable for an injury to a passenger notwithstanding the passenger's contributory negligence if the carrier, with knowledge of the passenger's peril, does not exercise reasonable care and prudence to prevent the accident. Posten v. Denver Consol. Tramway Co., 11 Colo. App. 187; Gulf, etc., R. Co. v. Bolton, 2 Indian Ter. 463; Christie v. Galveston City R. Co., (Tex. Civ. App. 1897) 39 S. W. Rep. 638; Richmond Pass., etc., Co. v. Allen, 101 Va. 200.

**646. 1. Contributory Cause Must Be Negligence in Legal Sense — Alabama.** — Montgomery St. R. Co. v. Mason, 133 Ala. 508.

*Georgia.* — Central of Georgia R. Co. v. McKinney, 118 Ga. 535.

*Illinois.* — Lake St. El. R. Co. v. Burgess, 99 Ill. App. 499, affirmed 200 Ill. 628.

*Indiana.* — Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602; Indianapolis St. R. Co. v. Robinson, 157 Ind. 414.

*Louisiana.* — Clerc v. Morgan's Louisiana, etc., R., etc., Co., 107 La. 370, 90 Am. St. Rep. 319. See Mahnke v. New Orleans City, etc., R. Co., 104 La. 411.

*Massachusetts.* — Meade v. Boston El. R. Co., 185 Mass. 327; Foster v. Old Colony St. R. Co., 182 Mass. 378.

*Missouri.* — Moorman v. Atchison, etc., R. Co., 105 Mo. App. 711.

*New York.* — Ayres v. Delaware, etc., R. Co., 158 N. Y. 254, affirming 4 N. Y. App. Div. 511; Faris v. Brooklyn City, etc., R. Co., 46 N. Y. App. Div. 231.

*West Virginia.* — Barker v. Ohio River R. Co., 51 W. Va. 428, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 645, 646.

**2. Passenger's Negligence Must Be Proximate Cause of Injury — United States.** — Trumbull v. Erickson, (C. C. A.) 97 Fed. Rep. 891.

*Alabama.* — Birmingham R., etc., Co. v. Bynum, 139 Ala. 395; Southern R. Co. v. Bunnell,

138 Ala. 254; Birmingham R., etc., Co. v. James, 121 Ala. 120.

*Iowa.* — Young v. Chicago, etc., R. Co., 100 Iowa 357.

*Louisiana.* — Kird v. New Orleans, etc., R. Co., 105 La. 226.

*Missouri.* — Eikenberry v. St. Louis Transit Co., 103 Mo. App. 442.

*Nebraska.* — Fremont, etc., R. Co. v. Root, 49 Neb. 900.

*New York.* — Distler v. Long Island R. Co., 151 N. Y. 424; Ericius v. Brooklyn Heights R. Co., 63 N. Y. App. Div. 353; Hart v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 34 Misc. (N. Y.) 521.

*North Carolina.* — Graves v. Norfolk, etc., R. Co., 136 N. Car. 3.

*Ohio.* — Holmes v. Ashtabula Rapid Transit Co., 10 Ohio Cir. Dec. 638.

*Pennsylvania.* — Powelson v. United Traction Co., 204 Pa. St. 474.

*South Carolina.* — Doolittle v. Southern R. Co., 62 S. Car. 130; Cooper v. Georgia, etc., R. Co., 61 S. Car. 345; Easler v. Southern R. Co., 59 S. Car. 311; Disher v. South Carolina, etc., R. Co., 55 S. Car. 187.

*Texas.* — Ratteree v. Galveston, etc., R. Co., (Tex. Civ. App. 1904) 81 S. W. Rep. 566; St. Louis Southwestern R. Co. v. Cannon, (Tex. Civ. App. 1904) 81 S. W. Rep. 778; St. Louis, etc., R. Co. v. Smith, (Tex. Civ. App. 1904) 79 S. W. Rep. 340; Gulf, etc., R. Co. v. Carter, (Tex. Civ. App. 1902) 71 S. W. Rep. 73; San Antonio, etc., R. Co. v. Choate, 22 Tex. Civ. App. 618.

See Indianapolis St. R. Co. v. Whitaker, 160 Ind. 125.

**Propriety of Instructions on Question of Proximate Cause.** — In several Texas cases it has been held that when the plaintiff's acts or conduct, if amounting to contributory negligence, must have directly contributed to the injury, the failure to charge that the plaintiff's negligence must have contributed to the accident as a proximate cause is not error. Texas, etc., R. Co. v. Born, 20 Tex. Civ. App. 351; Ebert v. Gulf, etc., R. Co., (Tex. Civ. App. 1899) 49 S. W. Rep. 1105.

And it has been held that under such circumstances it is error to charge the jury that to defeat a recovery the plaintiff's negligence must have been the proximate cause of the injury. Galveston, etc., R. Co. v. Hubbard, (Tex. Civ. App. 1902) 70 S. W. Rep. 112; Central Texas, etc., R. Co. v. Hoard, (Tex. Civ. App. 1898) 49 S. W. Rep. 142; Gulf, etc., R. Co. v. Rowland, 90 Tex. 365.

**3. Agulino v. New York, etc., R. Co., 21 R. I. 263.**

**647. 2. Disregard of Carrier's Warning.** — Yazoo, etc., R. Co. v. Humphrey, 83 Miss. 721; Camden, etc., R. Co. v. Young, 60 N. J. L. 193; Chicago, etc., R. Co. v. Armes, 32 Tex. Civ. App. 32; Houston, etc., R. Co. v. Bryant, 31 Tex. Civ. App. 483. But see Yazoo, etc., R. Co. v. Hatch, (Miss. 1904) 35 So. Rep. 941.

- 647.** Acts in Disobedience of Carrier's Rules. — See note 3.  
**648.** Effect of Ignorance of Rule. — See note 1.  
 Effect of Nonenforcement of Regulation. — See note 3.  
 (d) Acts under Direction or by Permission of Carrier. — See note 5.  
**649.** (e) Acts in Avoidance of Impending Danger. — See notes 1, 2, 3.  
**650.** Where No Reasonable Ground of Apprehension Exists. — See note 1.  
 A Question for the Jury. — See note 2.  
**651.** (g) Effect of Passenger's Laboring under Disability. — See notes 1, 2.  
 Duty to Inform Carrier of Disability. — See note 3.  
 Duty to Have Attendant. — See note 5.  
**652.** Intoxication of Passenger. — See notes 2, 3.

Where a passenger in a street car was injured by the sudden flying back of the iron brake bar while he was standing in the motorman's aisle in a crowded car, the recovery for the injury received is not defeated by the mere fact that the motorman suggested or requested that the passenger leave the position taken by him, without informing him of the peril; taking into consideration the crowded condition of the car, the question of contributory negligence is for the determination of the jury. *West Chicago St. R. Co. v. Johnson*, 180 Ill. 288, *affirmed* 77 Ill. App. 142.

**647. 3. Disobedience of Carrier's Rules.** — *Denny v. North Carolina R. Co.*, 132 N. Car. 340; *Cincinnati, etc., Electric St. R. Co. v. Lohe*, 68 Ohio St. 101. See *Lake Shore, etc., R. Co. v. Kelsey*, 180 Ill. 530, *affirming* 76 Ill. App. 613.

**Disobedience of Directions of Carrier's Servants.** — *Chicago, etc., R. Co. v. Myers*, (C. C. A.) 80 Fed. Rep. 361.

**Boarding Train Without Ticket** has been held to be such contributory negligence as precluded recovery for expulsion. *Galveston, etc., R. Co. v. Scott*, (Tex. Civ. App. 1904) 79 S. W. Rep. 642. But it has been held that a passenger whose ticket has been taken up wrongfully is not guilty of contributory negligence, as a matter of law, in attempting to ride on the train from which he has been ejected. *Scofield v. Pennsylvania R. Co.*, (C. C. A.) 112 Fed. Rep. 858.

**648. 1. Effect of Passenger's Ignorance of Rule.** — See *Lake Shore, etc., R. Co. v. Kelsey*, 180 Ill. 530, *affirming* 76 Ill. App. 613.

**3. Effect of Nonenforcement of Regulation.** — *Sweetland v. Lynn, etc., R. Co.*, 177 Mass. 574.

**5. Direction of Carrier's Agent as Excusing Act Not Obviously Dangerous.** — *Southern R. Co. v. Roebuck*, 132 Ala. 412; *Chicago, etc., R. Co. v. Winters*, 175 Ill. 293; *Pittsburgh, etc., R. Co. v. Gray*, (Ind. App. 1901) 59 N. E. Rep. 1000; *Illinois Cent. R. Co. v. Cheek*, 152 Ind. 663; *Terre Haute Electric R. Co. v. Lauer*, 21 Ind. App. 466; *Moore v. Saginaw, etc., R. Co.*, 119 Mich. 613; *Missouri Pac. R. Co. v. Tietken*, 49 Neb. 130, 59 Am. St. Rep. 526; *Hodges v. Southern R. Co.*, 120 N. Car. 555; *San Antonio, etc., R. Co. v. Turney*, (Tex. Civ. App. 1903) 78 S. W. Rep. 256. See also the cases cited *infra*, this title, **653. 4**; **656. 1**; **662. 1**; **669. 5**.

**649. 1. Acts in Avoidance of Impending Danger.** — *Illinois Cent. R. Co. v. Anderson*, 184 Ill. 294, *affirming* 81 Ill. App. 137; *Indiana R. Co. v. Maurer*, 160 Ind. 25; *Quinn v. Shamokin, etc., Electric R. Co.*, 7 Pa. Super. Ct. 19.

See also *Gannon v. New York, etc., R. Co.*, 173 Mass. 40; *Ephland v. Missouri Pac. R. Co.*, 137 Mo. 187, 59 Am. St. Rep. 498.

**2. Kight v. Metropolitan R. Co.**, 21 App. Cas. (D. C.) 494; *Chicago, etc., R. Co. v. Stormont*, 190 Ill. 42, *affirming* 90 Ill. App. 505; *Gradert v. Chicago, etc., R. Co.*, 109 Iowa 547; *Palmer v. Warren St. R. Co.*, 206 Pa. St. 574; *Willis v. Second Ave. Traction Co.*, 189 Pa. St. 430; *Williams v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1903) 78 S. W. Rep. 45; *Houston, etc., R. Co. v. Norris*, (Tex. Civ. App. 1897) 41 S. W. Rep. 708.

**3. Selma St., etc., R. Co. v. Owen**, 132 Ala. 420; *Prescott, etc., R. Co. v. Smith*, 70 Ark. 179; *Green v. Pacific Lumber Co.*, 130 Cal. 435; *Washington, etc., R. Co. v. Hickey*, 5 App. Cas. (D. C.) 436; *Wanzer v. Chippewa Valley Electric R. Co.*, 108 Wis. 319.

It cannot be held, as a matter of law, that it is contributory negligence for a passenger to hold onto the hand rail of a street car, which has been started while the passenger was getting on, and thus being dragged along. *Schoenfeld v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 201.

**Attempting to Regain a Position on the Car**, when a street car is started while the passenger is about to step to the ground, is not negligence. *Brazis v. St. Louis Transit Co.*, 102 Mo. App. 224.

**650. 1. No Reasonable Ground for Apprehension.** — See *Butts v. Cleveland, etc., R. Co.*, (C. C. A.) 110 Fed. Rep. 329.

**2. Question for Jury.** — *Western Maryland R. Co. v. State*, 95 Md. 637; *Robson v. Nassau Electric R. Co.*, 80 N. Y. App. Div. 301.

**651. 1. Metropolitan R. Co. v. Falvey**, 5 App. Cas. (D. C.) 176; *Jackson v. St. Paul City R. Co.*, 74 Minn. 48. See also *Little Rock Traction, etc., Co. v. Nelson*, 66 Ark. 494; *Shadletsky v. New York City R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1014.

**2. Knauss v. Lake Erie, etc., R. Co.**, 29 Ind. App. 216. See *Cronan v. Crescent City R. Co.*, 49 La. Ann. 65, holding that a boy ten years old was bound to exercise ordinary care.

A boy sixteen years of age is ordinarily to be held to the full measure of responsibility for contributory negligence. *Benedict v. Minneapolis, etc., R. Co.*, 86 Minn. 224, 91 Am. St. Rep. 345.

**3. Duty to Inform Carrier of Disability.** — *Young v. Missouri Pac. R. Co.*, 93 Mo. App. 267.

**5. Texas, etc., R. Co. v. Reid, (Tex. Civ. App. 1903) 74 S. W. Rep. 99.**

**652. 2. Passenger's Intoxication Not Negli**

**652.** (h) Whether Contributory Negligence a Question of Law or Fact — Where the Facts Are in Dispute. — See note 4.

**653.** Where the Facts Are Undisputed. — See notes 1, 2.

**gence as Matter of Law.** — *Trumbull v. Erickson*, (C. C. A.) 97 Fed. Rep. 891; *Central R. Co. v. Mackey*, 103 Ill. App. 15; *Chicago, etc., R. Co. v. Lawrence*, 96 Ill. App. 635; *St. Louis Southwestern R. Co. v. Keitt*, (Tex. Civ. App. 1903) 76 S. W. Rep. 311. *Compare Houston, etc., R. Co. v. Bryant*, 31 Tex. Civ. App. 483.

**652. 3. Intoxication May Be Evidence of Negligence.** — *Chicago, etc., R. Co. v. Lawrence*, 96 Ill. App. 635; *Link v. Brooklyn Heights R. Co.*, 64 N. Y. App. Div. 406. *See Wheeler v. Grand Trunk R. Co.*, 70 N. H. 607.

**4. Contributory Negligence a Question for Jury Where Facts Are Disputed.** — *Iowa.* — *Lennon v. Chicago, etc., R. Co.*, (Iowa 1898) 75 N. W. Rep. 671; *Gradert v. Chicago, etc., R. Co.*, 109 Iowa 547.

*Louisiana.* — *Kird v. New Orleans, etc., R. Co.*, 105 La. 226.

*Maryland.* — *Topp v. United R. Co.*, 99 Md. 630, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 652.

*Massachusetts.* — *Comerford v. New York, etc., R. Co.*, 181 Mass. 528.

*Michigan.* — *Howell v. Lansing City Electric R. Co.*, (Mich. 1904) 99 N. W. Rep. 406, 11 Detroit Leg. N. 82; *Lucas v. Marquette City, etc., R. Co.*, (Mich. 1904) 98 N. W. Rep. 980, 10 Detroit Leg. N. 1007.

*Minnesota.* — *Currie v. Mendenhall*, 77 Minn. 179.

*Missouri.* — *Scamell v. St. Louis Transit Co.*, 103 Mo. App. 504.

*New Jersey.* — *Kulman v. Erie R. Co.*, 65 N. J. L. 241; *New Jersey Traction Co. v. Gardner*, 60 N. J. L. 571.

*New York.* — *Gold v. Dry Dock, etc., R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 1017; *Wimpeyberg v. Yonkers R. Co.*, 83 N. Y. App. Div. 19.

*North Carolina.* — *Cable v. Southern R. Co.*, 122 N. Car. 892.

*Pennsylvania.* — *Goorn v. Allegheny Traction Co.*, 179 Pa. St. 327.

*Tennessee.* — *Louisville, etc., R. Co. v. Collier*, 104 Tenn. 189.

*Texas.* — *St. Louis Southwestern R. Co. v. Byers*, (Tex. Civ. App. 1902) 69 S. W. Rep. 1009; *Williams v. International, etc., R. Co.*, 28 Tex. Civ. App. 503.

*Washington.* — *Smith v. Union Trunk Line*, 18 Wash. 351; *Brown v. Seattle City R. Co.*, 16 Wash. 465.

And see generally the titles CONTRIBUTORY NEGLIGENCE; QUESTIONS OF LAW AND FACT.

**653. 1. Where Various Inferences May Be Drawn from Passenger's Conduct the Question Is for the Jury.** — *United States.* — *St. Louis, etc., R. Co. v. Leftwich*, (C. C. A.) 117 Fed. Rep. 127; *Northern Pac. R. Co. v. Adams*, (C. C. A.) 116 Fed. Rep. 324, reversed 192 U. S. 440; *Bronson v. Oakes*, (C. C. A.) 76 Fed. Rep. 734.

*Alabama.* — *Watkins v. Birmingham R., etc., Co.*, 120 Ala. 152.

*Arkansas.* — *St. Louis, etc., R. Co. v. Baker*, 67 Ark. 531.

*California.* — *Green v. Pacific Lumber Co.*, 130 Cal. 435.

*Colorado.* — *Denver, etc., R. Co. v. Spencer*, 27 Colo. 313.

*District of Columbia.* — *Washington, etc., R. Co. v. Grant*, 11 App. Cas. (D. C.) 107.

*Georgia.* — *Savannah, etc., R. Co. v. Flaherty*, 110 Ga. 335.

*Illinois.* — *Chicago, etc., R. Co. v. Gore*, 202 Ill. 192, 95 Am. St. Rep. 224; *Chicago, etc., R. Co. v. Stortment*, 190 Ill. 42, affirming 90 Ill. App. 505; *North Chicago St. R. Co. v. Kaspers*, 186 Ill. 246; *Illinois Cent. R. Co. v. Anderson*, 184 Ill. 294, affirming 81 Ill. App. 137; *Chicago, etc., R. Co. v. Kelly*, 182 Ill. 267, affirming 80 Ill. App. 675; *Lake Shore, etc., R. Co. v. Kelsey*, 180 Ill. 530, affirming 76 Ill. App. 613; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169; *Merchant v. South Chicago City R. Co.*, 104 Ill. App. 122; *Chicago Terminal Transfer R. Co. v. Schmelling*, 99 Ill. App. 577, affirmed 197 Ill. 619; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Chicago, etc., R. Co. v. Flaherty*, 96 Ill. App. 563; *Chicago, etc., R. Co. v. Huston*, 95 Ill. App. 350, affirmed 196 Ill. 480; *Schneider v. North Chicago St. R. Co.*, 80 Ill. App. 306.

*Indiana.* — *Crumph v. Davis*, 33 Ind. App. 88; *Harris v. Pittsburgh, etc., R. Co.*, 32 Ind. App. 600; *Indianapolis St. R. Co. v. Lawn*, 30 Ind. App. 515; *Citizens St. R. Co. v. Jolly*, 161 Ind. 80; *Romine v. Evansville, etc., R. Co.*, 24 Ind. App. 230; *Citizen's St. R. Co. v. Hoffbauer*, 23 Ind. App. 614.

*Iowa.* — *Matthieson v. Burlington, etc., R. Co.*, 125 Iowa 90.

*Kansas.* — *St. Louis, etc., R. Co. v. Burrows*, 62 Kan. 89.

*Kentucky.* — *Memphis, etc., Packet Co. v. Buckner*, 108 Ky. 701.

*Maine.* — *Watson v. Portland, etc., R. Co.*, 91 Me. 584, 64 Am. St. Rep. 268.

*Maryland.* — *Jones v. United R., etc., Co.*, 99 Md. 64.

*Massachusetts.* — *Gilman v. Boston, etc., R. Co.*, 168 Mass. 454.

*Michigan.* — *Moore v. Saginaw, etc., R. Co.*, 115 Mich. 103; *Smalley v. Detroit, etc., R. Co.*, 131 Mich. 560, 9 Detroit Leg. N. 443.

*Mississippi.* — *Yazoo, etc., R. Co. v. Humphrey*, 83 Miss. 721; *Yazoo, etc., R. Co. v. Aden*, 77 Miss. 382.

*Missouri.* — *Allen v. St. Louis Transit Co.*, 183 Mo. 411; *Mathew v. Wabash R. Co.*, (Mo. App. 1903) 78 S. W. Rep. 271; *Taylor v. Wabash R. Co.*, (Mo. 1896) 38 S. W. Rep. 304; *Hornstein v. United R. Co.*, 97 Mo. App. 271.

*Nebraska.* — *Omaha, etc., R. Co. v. Crow*, 54 Neb. 747, 69 Am. St. Rep. 741; *Union Pac. R. Co. v. Evans*, 52 Neb. 50; *Missouri Pac. R. Co. v. Tietken*, 49 Neb. 130, 59 Am. St. Rep. 526.

*New Hampshire.* — *Call v. Portsmouth, etc., R. Co.*, 69 N. H. 562; *Hutchins v. Macomber*, 68 N. H. 473.

*New Jersey.* — *Scott v. Bergen County Traction Co.*, 63 N. J. L. 407; *Exton v. Central R. Co.*, 62 N. J. L. 7, affirmed without opinion 63

**653.** (2) *In Specific Instances*—(a) *Boarding Cars*—*aa. IN GENERAL.*—See note 3.

By Direction of Conductor.—See note 4.

**654.** *Boarding Train After Signal to Start.*—See note 1.

*Custom of Carrier to Receive Passengers at Other Place.*—See note 4.

**655.** *bb. WHERE TRAIN IS IN MOTION.*—See note 2.

N. J. L. 356; *New Jersey Traction Co. v. Gardner*, 60 N. J. L. 571.

*New York.*—*Kellegher v. Forty-second St.*, etc., R. Co., 171 N. Y. 309, reversing 56 N. Y. App. Div. 322; *Michelson v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 501; *Benjamin v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 458; *Gillespie v. Yonkers R. Co.*, 87 N. Y. App. Div. 38; *Berry v. Utica Belt Line St. R. Co.*, 76 N. Y. App. Div. 490; *Wolf v. Third Ave. R. Co.*, 67 N. Y. App. Div. 605; *Wise v. Brooklyn Heights R. Co.*, 46 N. Y. App. Div. 246; *Wells v. Steinway R. Co.*, 18 N. Y. App. Div. 180.

*North Carolina.*—*Graves v. Norfolk*, etc., R. Co., 136 N. Car. 3.

*Pennsylvania.*—*Englehaupt v. Erie R. Co.*, 209 Pa. St. 182; *Bensing v. Peoples Electric St. R. Co.*, 9 Pa. Super. Ct. 142.

*Texas.*—*San Antonio*, etc., R. Co. *v. Turney*, (Tex. Civ. App. 1903) 78 S. W. Rep. 256; *St. Louis Southwestern R. Co. v. Keitt*, (Tex. Civ. App. 1903) 76 S. W. Rep. 311; *Texas*, etc., R. Co. *v. Rea*, (Tex. Civ. App. 1903) 74 S. W. Rep. 939; *Texas*, etc., R. Co. *v. Adams*, 32 Tex. Civ. App. 112; *San Antonio Traction Co. v. Bryant*, 30 Tex. Civ. App. 437; *Texas*, etc., R. Co. *v. Rea*, 27 Tex. Civ. App. 549; *Martin v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1900) 56 S. W. Rep. 1011.

*Washington.*—*Vasele v. Grant St. Electric R. Co.*, 16 Wash. 602.

**653. 2. A Clear Case of Negligence to Be Passed upon by the Court**—*United States.*—*Clark v. Zarniko*, (C. C. A.) 106 Fed. Rep. 607.

*Illinois.*—*Beidler v. Branshaw*, 200 Ill. 425; *Lake St. El. R. Co. v. Gormley*, 108 Ill. App. 59; *O'Donnell v. Chicago*, etc., R. Co., 106 Ill. App. 287.

*Indiana.*—*Cleveland*, etc., R. Co. *v. Moneyhun*, 146 Ind. 147; *Pittsburgh*, etc., R. Co. *v. Aldridge*, 27 Ind. App. 498.

*Indian Territory.*—*Gulf*, etc., R. Co. *v. Bolton*, 2 Indian Ter. 463.

*Mississippi.*—*Illinois Cent. R. Co. v. Strauss*, 75 Miss. 367.

*Missouri.*—*Heaton v. Kansas City*, etc., R. Co., 65 Mo. App. 479.

*New York.*—*Pearl v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 915.

*Pennsylvania.*—*Scanlon v. Philadelphia Rapid Transit Co.*, 208 Pa. St. 195.

*Tennessee.*—*Nashville R. Co. v. Howard*, (Tenn. 1904) 78 S. W. Rep. 1098.

*Texas.*—*Gulf*, etc., R. Co. *v. Bell*, 93 Tex. 634.

See *Washington*, etc., R. Co. *v. Grant*, 11 App. Cas. (D. C.) 107; *Denver*, etc., R. Co. *v. Spencer*, 27 Colo. 313.

**Intending Passenger Standing Dangerously Close to Street Railway Track.**—*Garvey v. Rhode Island Co.*, 26 R. I. 80.

**If There Is No Evidence of Contributory Negli-**

**gence**, of course the court cannot submit the question to the jury. *Stoddard v. St. Louis*, etc., R. Co., 105 Mo. App. 512.

**3. General Rule as to Passenger's Duty in Boarding Cars.**—*Gulf*, etc., R. Co. *v. Condra*, (Tex. Civ. App. 1904) 82 S. W. Rep. 528.

**Entering Car Otherwise than by Way Provided.**—*Atlantic*, etc., R. Co. *v. Anderson*, 118 Ga. 288.

**Boarding Street Car by Front Entrance**, both entrances being alike, and there being no apparent reason why the front entrance should not be used, is not negligence as a matter of law. *Townsend v. Binghamton R. Co.*, 57 N. Y. App. Div. 234.

**Boarding Car with Gate Not Fully Open.**—*Ganz v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 579.

**Attempting to Board Street Car Before Car Has Been Prepared by Lowering Side Step.**—*Clark v. Metropolitan St. R. Co.*, 68 N. Y. App. Div. 49.

**Attempting to Board Open Street Car Before Removal of Side Bar** has been held to be negligence. *Malpass v. Hestonville*, etc., Pass. R. Co., 189 Pa. St. 599.

**Failure to Use Hand Hold.**—A passenger is not negligent in boarding a stationary street car with her arms full of bundles so that she cannot make use of the hand holds. *Jaques v. Sioux City Traction Co.*, 124 Iowa 257.

**Standing Dangerously Close to Track While Awaiting Approaching Street Car.**—*Garvey v. Rhode Island Co.*, 26 R. I. 80; *Denison*, etc., R. Co. *v. Craig*, (Tex. Civ. App. 1904) 80 S. W. Rep. 865.

**Stepping into Open Manhole in Attempting to Board Street Car.**—*Sellers v. Union Traction Co.*, 21 Pa. Super. Ct. 5.

**Stepping to Side of Ferryboat Gangway**, to avoid throng of passengers coming from the boat, is not negligence as a matter of law. *Bartnik v. Erie R. Co.*, 36 N. Y. App. Div. 246.

**4. Boarding Cars in Manner Prescribed by Conductor.**—*Chicago*, etc., R. Co. *v. Gore*, 202 Ill. 192, 95 Am. St. Rep. 224, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 653.

**Boarding Cars in Manner Prescribed by Brakeman.**—*Illinois Cent. R. Co. v. Cheek*, 152 Ind. 663.

**Boarding Street Car by Front Platform by Invitation of the Driver** is not negligence. *De Rozas v. Metropolitan St. R. Co.*, 13 N. Y. App. Div. 296.

**Entering Detached Car in Yard by Invitation of Carrier** is not negligence *per se*. *Moore v. Saginaw*, etc., R. Co., 119 Mich. 613.

**654. 1. Boarding Train at Rest but After Signal to Start.**—But see *McGill v. Central Crosstown R. Co.*, (Supm. Ct. App. T.) 84 N. Y. App. 477 (street car case).

**4. Effect of Custom as to Place of Boarding Train.**—*Chicago*, etc., R. Co. *v. Doan*, 195 Ill. 168, affirming 93 Ill. App. 247.

**655. 2. Boarding Moving Train Prima Facie**

**655.** Boarding Slowly Moving Train. — See note 3.

**656.** Boarding Train by Direction of Conductor — Danger Not Obvious. — See note 1.

**657.** But Where There Is Obvious Danger. — See note 2.

(b) Alighting from Cars — *aa.* IN GENERAL. — See note 3.

**Negligence.** — *Ricks v. Georgia Southern, etc., R. Co.*, 118 Ga. 259; *Chicago, etc., R. Co. v. Stewart*, 77 Ill. App. 66; *Walthers v. Chicago, etc., R. Co.*, 72 Ill. App. 354; *Brown v. New York, etc., R. Co.*, 181 Mass. 365; *Southern R. Co. v. Williams*, (Miss. 1904) 36 So. Rep. 394. See *Heaton v. Kansas City, etc., R. Co.*, 65 Mo. App. 479 (holding as a matter of law that it was negligence under the circumstances of the case to attempt to board a moving train).

A passenger who attempts to board a car on an elevated railway after the gate has been shut and the train is in motion is chargeable with negligence. *Lauterer v. Manhattan R. Co.*, (C. C. A.) 128 Fed. Rep. 540.

**Boarding Moving Train in Violation of Statute.** — It has been held that boarding a moving train in direct violation of a statute is negligence as a matter of law. *Young v. Chicago, etc., R. Co.*, 100 Iowa 357.

**Attempting to Board Moving Train in Violation of an Ordinance** has been held to be contributory negligence as a matter of law. *Mills v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1900) 57 S. W. Rep. 291.

**655. 3. Boarding Slowly Moving Train Not Negligence as Matter of Law.** — *Chicago, etc., R. Co. v. Gore*, 202 Ill. 192, 95 Am. St. Rep. 224, 96 Ill. App. 553; *Chicago, etc., R. Co. v. Flaharty*, 96 Ill. App. 563; *Distler v. Long Island R. Co.*, 151 N. Y. 424; *Creesh v. Charleston, etc., R. Co.*, 66 S. Car. 528; *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242.

**Boarding Moving Freight Train.** — The fact that the train which the passenger attempts to board is a freight train does not call for the application of a different rule; it is merely a circumstance to be considered. *Illinois Cent. R. Co. v. Glover*, 71 S. W. Rep. 630, 24 Ky. L. Rep. 1447.

**Boarding Moving Street Car.** — The generally accepted rule is that it is not negligence as a matter of law to attempt to board a street car when it is in motion, but the question ordinarily is one of fact for the determination of the jury under all the circumstances.

*Alabama.* — *Birmingham R., etc., Co. v. Brannon*, 132 Ala. 431.

*California.* — *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28.

*District of Columbia.* — *Brown v. Washington, etc., R. Co.*, 11 App. Cas. (D. C.) 37.

*Illinois.* — *South Chicago City R. Co. v. Dufresne*, 200 Ill. 456, affirming 102 Ill. App. 493; *North Chicago St. R. Co. v. Kaspers*, 186 Ill. 246, affirming 85 Ill. App. 316; *West Chicago St. R. Co. v. Dudzik*, 67 Ill. App. 681.

*Massachusetts.* — *Gordon v. West End St. R. Co.*, 175 Mass. 181.

*Missouri.* — *Eikenberry v. St. Louis Transit Co.*, 103 Mo. App. 442; *Leu v. St. Louis Transit Co.*, 106 Mo. App. 329; *Maguire v. St. Louis Transit Co.*, 103 Mo. App. 459; *Hansberger v. Sedalia Electric R., etc., Co.*, 82 Mo. App. 566.

*New Jersey.* — *Schmidt v. North Jersey St. R. Co.*, (N. J. 1904) 58 Atl. Rep. 72; *Murphy*

*v. North Jersey St. R. Co.*, (N. J. 1904) 58 Atl. Rep. 1018.

*New York.* — *Clinton v. Brooklyn Heights R. Co.*, 91 N. Y. App. Div. 374; *Tremont v. Metropolitan St. R. Co.*, 83 N. Y. App. Div. 414; *Wolf v. Metropolitan St. R. Co.*, 82 N. Y. App. Div. 629; *Lobsenz v. Metropolitan St. R. Co.*, 72 N. Y. App. Div. 181; *Sexton v. Metropolitan St. R. Co.*, 40 N. Y. App. Div. 26.

See *Weber v. New Orleans, etc., R. Co.*, 104 La. 367.

But it has been held to be negligence for an intending passenger to attempt to board a moving street car when the servants in charge of the car did not have notice of his intention to take passage. *Reidy v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 527. See also *Fremont v. Metropolitan St. R. Co.*, 96 N. Y. App. Div. 617.

**Boarding Moving Car of Electric Railway.** — In *Pennsylvania* it is held to be negligence *per se* to attempt to board a moving electric street car. *Hunterson v. Union Traction Co.*, 205 Pa. St. 568; *Powelson v. United Traction Co.*, 204 Pa. St. 474.

**656. 1. Boarding Slowly Moving Train by Direction of Conductor.** — *Chicago, etc., R. Co. v. Gore*, 202 Ill. 192, 95 Am. St. Rep. 224, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 656; *Illinois Cent. R. Co. v. Glover*, 71 S. W. Rep. 630, 24 Ky. L. Rep. 1447; *Distler v. Long Island R. Co.*, 151 N. Y. 424 (holding that it is not negligence to board a train which is moving two or three miles an hour, where this is done by direction of the conductor); *Missouri Pac. R. Co. v. Foreman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 834. See *Pence v. Wabash R. Co.*, 116 Iowa 279.

**657. 2. Boarding Street Car in Proximity to Obstruction.** — *Schmidt v. North Jersey St. R. Co.*, 66 N. J. L. 424. But see *Berry v. Utica Belt Line St. R. Co.*, 76 N. Y. App. Div. 490.

**3. General Rule as to Alighting from Cars.** — *Pittsburgh, etc., R. Co. v. Aldridge*, 27 Ind. App. 498; *Scanlon v. Philadelphia Rapid Transit Co.*, 208 Pa. St. 195; *Coburn v. Philadelphia, etc., R. Co.*, 198 Pa. St. 436; *Yecker v. San Antonio Traction Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 780; *Martin v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1900) 56 S. W. Rep. 1011.

**Stepping Off Street Car to Enable Passengers to Alight** has been held not to be negligence. *Michelson v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 501.

**Stepping from Second Instead of Lower Step of Car.** — *Kurfess v. Harris*, 195 Pa. St. 385.

**Failure to Look When Alighting from a Street Car** is not negligence in itself under all circumstances. *Bass v. Concord St. R. Co.*, 70 N. H. 170.

**Stepping on Rail Covered with Snow.** — *Mensing v. Michigan Cent. R. Co.*, 117 Mich. 606.

**Failure to Retain Hold of Railing** cannot be said to be negligence as a matter of law. *Crump v. Davis*, 33 Ind. App. 88; *Scott v. Bergen County Traction Co.*, 63 N. J. L. 407;

**658.** Alighting on Wrong Side of Train. — See note 1.

**659.** See note 1.

Adopting Mode of Egress in General Use. — See note 2.

**660.** Leaving Train by Rear Platform. — See note 1.

Alighting from Side Door of Baggage Car. — See note 2.

**661.** Alighting at Improper Place. — See note 1.

**662.** By Direction or Invitation of Conductor. — See note 1.

Schaefer *v.* Central Crosstown R. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 114; Werner *v.* Chicago, etc., R. Co., 105 Wis. 300.

**Alighting from Car with Knowledge of Slippery Condition of Steps.** — Gilman *v.* Boston, etc., R. Co., 168 Mass. 454.

**Failure to Wait for Promised Assistance.** — St. Louis, etc., R. Co., *v.* Baker, 67 Ark. 531.

**Stepping Off Car with Back to Front of Car.** — It has been held that the fact that a passenger stepped off a car with her back to the front of the car without holding on to any part of the car did not warrant a submission of the question of the passenger's contributory negligence. Rouser *v.* Washington, etc., R. Co., 13 App. Cas. (D. C.) 320.

**Failure to Step Away from Train After Alighting.** — It has been held to be negligence for a passenger to walk alongside a train about three feet from it, in leaving the premises, when he knows that the train will soon start. Louisville, etc., R. Co. *v.* Ricketts, (Ky. 1899) 52 S. W. Rep. 939.

**Passenger Should Step Away from Street Car After Alighting.** — Louisville R. Co. *v.* Meglemery, 78 S. W. Rep. 217, 25 Ky. L. Rep. 1587, rehearing denied (Ky. 1904) 79 S. W. Rep. 287.

**Failure to Observe Obstruction.** — The failure of a passenger who had alighted from the defendant's boat to observe a hose lying on the wharf in plain sight of any one who might look in that direction, it being daylight, and there being no congregation or crowd of passengers to obstruct the passenger's view, the nearest persons to him being some fifteen or twenty feet distant, was held to be negligence. Strutt *v.* Brooklyn, etc., R. Co., 18 N. Y. App. Div. 134.

**658. 1. Alighting from Wrong Side of Car.** — Flanagan *v.* Philadelphia, etc., R. Co., 181 Pa. St. 237.

**659. 1.** Graven *v.* MacLeod, (C. C. A.) 92 Fed. Rep. 846; Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169; Owen *v.* Washington, etc., R. Co., 29 Wash. 207. See Louisville, etc., R. Co. *v.* Ricketts, (Ky. 1899) 52 S. W. Rep. 939; Werner *v.* Chicago, etc., R. Co., 105 Wis. 300.

**2. Neglect to Use Customary Exit.** — Ratteree *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1904) 81 S. W. Rep. 566.

**660. 1. Leaving Train by Rear Platform.** — See Pittsburgh, etc., R. Co. *v.* Aldridge, 27 Ind. App. 498.

**2. Alighting from Side Door of Baggage Car.** — See Geogagn *v.* New York, etc., R. Co., 10 N. Y. App. Div. 454, wherein it was held that a passenger was clearly guilty of contributory negligence in leaping from the side door of a baggage car in the dark, when the train was slightly moving, instead of going to the end of the car and alighting by means of the platform and steps as was done by the other passengers.

**661. 1. Alighting at Improper Place.** —

Kellogg *v.* Smith, 179 Mass. 595; Barry *v.* Boston, etc., R. Co., 172 Mass. 109; Texas, etc., R. Co. *v.* Porter, (Tex. Civ. App. 1897) 41 S. W. Rep. 88. See International, etc., R. Co. *v.* Downing, 16 Tex. Civ. App. 643.

**Train Stopped at Dangerous Place After Over-shooting the Station.** — Minor *v.* Lehigh Valley R. Co., 21 N. Y. App. Div. 307.

**A Passenger Alighting After Being Carried by the Platform Through His Own Negligence** has been held not to be entitled to recover for injuries received in alighting. Bascom *v.* Wabash R. Co., 102 Mo. App. 430.

**Alighting from Street Cars at Dangerous Place.** — United R., etc., Co. *v.* Hertel, 97 Md. 382; United R., etc., Co. *v.* Woodbridge, 97 Md. 629.

A passenger on a street car who has indicated to the conductor the place where he wishes to alight is not chargeable with contributory negligence in alighting from the car when it is stopped, simply because the car had been stopped at an unusual and dangerous place. Henry *v.* Grant St. Electric R. Co., 24 Wash. 246.

**Alighting from Street Car Stopped at Crossing of Railroad Track.** — When a street car is stopped at the intersection of a railroad track for the purpose of allowing the conductor to go ahead to view the railroad track, and it is customary for passengers to alight at the place where the car is stopped, it is not negligence for a passenger to attempt to alight while the car is at a standstill. Richmond Traction Co. *v.* Williams, 102 Va. 253.

**Alighting from Freight Train Stopped at Usual Place.** — It was held that a passenger on a freight train which stopped a few feet distant from the station platform was not guilty of negligence as a matter of law in alighting from the train at that place, if the train had stopped at the place where it usually stopped, and if, to the plaintiff's knowledge, it was customary for the passengers to get off at that place. Carroll *v.* Burleigh, 15 Wash. 208.

**Alighting from a Train at an Intermediate Station** where the train stops to change engines has been held not to be negligence as a matter of law. Texas, etc., R. Co. *v.* Mayfield, 23 Tex. Civ. App. 415.

**662. 1. Alighting at Improper Place by Direction of Conductor.** — Fillingham *v.* St. Louis Transit Co., 102 Mo. App. 573; Talbot *v.* Chicago, etc., R. Co., 72 Mo. App. 291.

When a passenger is invited by the carrier to alight from a train, he has a right to assume that the place is reasonably safe. Mensing *v.* Michigan Cent. R. Co., 117 Mich. 606.

**Alighting from Street Car.** — United R., etc., Co. *v.* Woodbridge, 97 Md. 629.

**Alighting by Invitation of Brakeman.** — Smitson *v.* Southern Pac. R. Co., 37 Oregon 74.

**Invitation Inferred from Circumstances.** — Gillespie *v.* Yonkers R. Co., 87 N. Y. App. Div. 38

**662.** Effect of Announcement of Station. — See note 2.

**663.** See note 1.

**664.** *bb.* WHERE TRAIN IS IN MOTION — According to a Few of the Authorities. — See note 1.

Prevailing Rule — A Question for the Jury. — See notes 2, 3.

**Alighting on Wrong Side of Train by Invitation of Brakeman.** — *Werner v. Chicago, etc., R. Co.*, 105 Wis. 300.

**662. 2. Announcement of Station Not of Itself Invitation to Alight.** — *Barry v. Boston, etc., R. Co.*, 172 Mass. 109; *Payne v. Nashville, etc., R. Co.*, 106 Tenn. 167.

**663. 1.** *Ward v. Chicago, etc., R. Co.*, 165 Ill. 462; *Pittsburgh, etc., R. Co. v. Miller*, 33 Ind. App. 128; *Cincinnati, etc., R. Co. v. Worthington*, 30 Ind. App. 663, rehearing denied 30 Ind. App. 669; *Devine v. Chicago, etc., R. Co.*, 100 Iowa 692; *Barry v. Boston, etc., R. Co.*, 172 Mass. 109; *Hodges v. Southern R. Co.*, 120 N. Car. 555; *Mayne v. Chicago, etc., R. Co.*, 12 Okla. 10; *Smitson v. Southern Pac. R. Co.*, 37 Oregon 74; *Engelhaupt v. Erie R. Co.*, 209 Pa. St. 182; *Texas, etc., R. Co. v. Porter*, (Tex. Civ. App. 1897) 41 S. W. Rep. 88; *Houston, etc., R. Co. v. Dotson*, 15 Tex. Civ. App. 73.

**664. 1. View that Alighting Voluntarily from Moving Train Is Negligence Per Se.** — *Illinois Cent. R. Co. v. Cunningham*, 102 Ill. App. 206; *La Pointe v. Boston, etc., R. Co.*, 179 Mass. 535; *Chicago, etc., R. Co. v. Martelle*, 65 Neb. 540; *Schiffler v. Chicago, etc., R. Co.*, 96 Wis. 141, 65 Am. St. Rep. 35. See *Jones v. Baltimore, etc., R. Co.*, 4 App. Cas. (D. C.) 158; *Chicago Terminal Transfer R. Co. v. Schmeling*, 197 Ill. 619; *Johnson v. Atlantic, etc., R. Co.*, 130 N. Car. 488.

**Alighting from Moving Street Car** has sometimes been held to be negligence as a matter of law. *Neff v. Harrisburg Traction Co.*, 192 Pa. St. 501, 73 Am. St. Rep. 825; *Foran v. Union Traction Co.*, 22 Pa. Super. Ct. 10; *Champagne v. La Crosse City R. Co.*, 121 Wis. 554. See *Richmond Traction Co. v. Williams*, 102 Va. 253.

**2. Alighting from Moving Train Not Negligence Per Se — Prevailing Rule — United States.** — *Rutledge v. New Orleans, etc., R. Co.*, (C. C. A.) 129 Fed. Rep. 94.

*Alabama.* — *Sweet v. Birmingham R., etc., Co.*, 136 Ala. 166; *Watkins v. Birmingham R., etc., Co.*, 120 Ala. 152, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 664.

*Delaware.* — *Betts v. Wilmington City R. Co.*, 3 Penn. (Del.) 448.

*Georgia.* — *Central of Georgia R. Co. v. McKinney*, 118 Ga. 535; *Coursey v. Southern R. Co.*, 113 Ga. 297; *Sanders v. Southern R. Co.*, 107 Ga. 132.

*Indiana.* — *Harris v. Pittsburgh, etc., R. Co.*, 32 Ind. App. 600; *Pittsburgh, etc., R. Co. v. Miller*, 33 Ind. App. 128; *Pittsburgh, etc., R. Co. v. Gray*, 28 Ind. App. 588.

*Kansas.* — *Atchison, etc., R. Co. v. Loewe*, (Kan. 1903) 74 Pac. Rep. 234, affirmed on rehearing (Kan. 1904) 76 Pac. Rep. 431.

*Kentucky.* — *Bishop v. Illinois Cent. R. Co.*, 77 S. W. Rep. 1099, 25 Ky. L. Rep. 1363; *Louisville, etc., R. Co. v. Coons*, 76 S. W. Rep. 45, 25 Ky. L. Rep. 509; *Illinois Cent. R. Co. v.*

*Whittaker*, (Ky. 1900) 57 S. W. Rep. 465; *Louisville, etc., R. Co. v. Eakin*, 103 Ky. 465.

*Missouri.* — *Newcomb v. New York Cent., etc., R. Co.*, 182 Mo. 687; *Owens v. Wabash R. Co.*, 84 Mo. App. 143.

*Nebraska.* — *Chicago, etc., R. Co. v. Winfrey*, (Neb. 1903) 93 N. W. Rep. 526.

*New York.* — *Geogagn v. New York, etc., R. Co.*, 10 N. Y. App. Div. 454. See *Mearns v. Central R. Co.*, 163 N. Y. 108, reversing 23 N. Y. App. Div. 298.

*Ohio.* — *Pittsburgh, etc., R. Co. v. Martin*, 3 Ohio Dec. 493.

*South Carolina.* — *Creech v. Charleston, etc., R. Co.*, 66 S. Car. 534, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 664; *Doolittle v. Southern R. Co.*, 62 S. Car. 130; *Cooper v. Georgia, etc., R. Co.*, 61 S. Car. 345.

*Tennessee.* — *Louisville, etc., R. Co. v. Collier*, 104 Tenn. 189; *Southern R. Co. v. Mitchell*, 98 Tenn. 27.

*Texas.* — *St. Louis Southwestern R. Co. v. Massay*, (Tex. Civ. App. 1903) 76 S. W. Rep. 585; *San Antonio, etc., R. Co. v. Dykes*, (Tex. Civ. App. 1898) 45 S. W. Rep. 758; *Galveston, etc., R. Co. v. Morris*, 94 Tex. 505, affirming (Tex. Civ. App. 1901) 60 S. W. Rep. 813; *Gulf, etc., R. Co. v. Rowland*, 90 Tex. 365; *Missouri, etc., R. Co. v. McElsee*, 16 Tex. Civ. App. 182; *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102; *Houston, etc., R. Co. v. Stewart*, 14 Tex. Civ. App. 703.

*Canada.* — *Keith v. Ottawa, etc., R. Co.*, 5 Ont. L. Rep. 116, 3 Ont. L. Rep. 265.

See *Yazoo, etc., R. Co. v. Hatch*, (Miss. 1904) 35 So. Rep. 941; *Cable v. Southern R. Co.*, 122 N. Car. 892.

**Moving Street Car.** — It is ordinarily not negligence as a matter of law to alight from a moving street car, but the question of negligence is one of fact for the determination of the jury under all the circumstances.

*Alabama.* — *Birmingham R., etc., Co. v. James*, 121 Ala. 120.

*Colorado.* — *Posten v. Denver Consol. Tramway Co.*, 11 Colo. App. 187.

*Illinois.* — *Chicago Union Traction Co. v. Olsen*, 211 Ill. 255; *Bloomington, etc., R. Co. v. Zimmerman*, 101 Ill. App. 184; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1.

*Indiana.* — *Crump v. Davis*, 33 Ind. App. 88; *Indianapolis St. R. Co. v. Lawn*, 30 Ind. App. 515; *Indianapolis St. R. Co. v. Hockett*, 159 Ind. 677.

*Iowa.* — *Root v. Des Moines R. Co.*, 122 Iowa 469; *Beringer v. Dubuque St. R. Co.*, 118 Iowa 135; *Root v. Des Moines City R. Co.*, 113 Iowa 675.

*Kentucky.* — *South Covington, etc., St. R. Co. v. Riegler*, 82 S. W. Rep. 382, 26 Ky. L. Rep. 666.

*Louisiana.* — *Jones v. Canal, etc., R. Co.*, 109 La. 213.

*Michigan.* — *McDonald v. City Electric R. Co.*, (Mich. 1904) 100 N. W. Rep. 592, 11 Detroit Leg. N. 326.

**666.** *Prima Facie Negligence.* — See note 3.

**667.** *Where Act Is Obviously Dangerous.* — See note 1.

*Illustrations.* — See note 2.

**668.** See note 1.

**669.** *Where Starting of Train and Alighting Therefrom Are Simultaneous.* — See note 2.

*Where Passenger Has Partly Descended Steps.* — See note 3.

*Alighting by Advice, Permission, or Command of Conductor.* — See note 5.

*Missouri.* — Peck *v.* St. Louis Transit Co., 178 Mo. 617; Shareman *v.* St. Louis Transit Co., 103 Mo. App. 515; Dawson *v.* St. Louis Transit Co., 102 Mo. App. 277; O'Mara *v.* St. Louis Transit Co., 102 Mo. App. 202; Posch *v.* Southern Electric R. Co., 76 Mo. App. 601.

*New Jersey.* — New Jersey Traction Co. *v.* Gardner, 60 N. J. L. 571.

*New York.* — Grabenstein *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 86 N. Y. Supp. 727; Maisels *v.* Dry Dock, etc., R. Co., 16 N. Y. App. Div. 391. But see Lynch *v.* Interurban St. R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 935. Compare Kramer *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 86 N. Y. Supp. 33; Cunningham *v.* Dry Dock, etc., R. Co., (Supm. Ct. App. T.) 31 Misc. (N. Y.) 471; Kuhlman *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 417; Patterson *v.* Westchester Electric R. Co., 26 N. Y. App. Div. 336.

*Ohio.* — Holmes *v.* Ashtabula Rapid Transit Co., 10 Ohio Cir. Dec. 638.

*Texas.* — Dallas Rapid Transit R. Co. *v.* Payne, (Tex. 1904) 82 S. W. Rep. 649, reversing (Tex. Civ. App. 1904) 78 S. W. Rep. 1085.

*Washington.* — Brown *v.* Seattle City R. Co., 16 Wash. 465.

In the absence of notice of a passenger's intention to alight at a point where a street car slows up to take on an intending passenger, the conductor may well presume that persons on the car will not attempt to get off, and where, in such case, a passenger is injured in the attempt to alight from the moving car, it is for the jury to find whether the injured person exercised ordinary care in attempting to alight without giving notice to the conductor of a desire to get off at that point. *Ashtabula Rapid Transit Co. v. Holmes*, 67 Ohio St. 153.

**Preparing to Alight from a Street Car** before it has come to a full stop is not negligence as a matter of law. *Babcock v. Los Angeles Traction Co.*, 128 Cal. 173; *Denison, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 780.

**664. 3. Rapidity of Motion of Train a Circumstance to Show Negligence.** — *Harris v. Pittsburgh, etc., R. Co.*, 32 Ind. App. 600; *McAlan v. New York, etc., Bridge*, 43 N. Y. App. Div. 374; *High v. International, etc., R. Co.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 526; *Keith v. Ottawa, etc., R. Co.*, 3 Ont. L. Rep. 265.

**Alighting from Rapidly Moving Street Car** has been held to be negligence. *Maloney v. Metropolitan St. R. Co.*, 95 N. Y. App. Div. 393; *Pearl v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 915.

**Train Moving from Three to Four Miles an Hour** — It has been held that a person who assisted a passenger on a train was chargeable with contributory negligence in alighting from the train when it was moving at the rate of three to

four miles an hour and the speed was steadily increasing. *Morrow v. Atlanta, etc., R. Co.*, 134 N. Car. 92.

**Electric Car Moving from Four to Five Miles an Hour.** — It has been held that the court may declare as a matter of law that it is negligence to leap from an electric car moving at the rate of from four to five miles an hour. *Jagger v. People's St. R. Co.*, 180 Pa. St. 436.

**Alighting from a Train Moving from Six to Eight Miles an Hour** has been held to be negligence. *Illinois Cent. R. Co. v. Trail*, (Miss. 1899) 25 So. Rep. 863.

**Alighting Without Knowing that the Train Is Moving** cannot, it has been said, be held to be negligence. *Walters v. Chicago, etc., R. Co.*, 113 Wis. 367.

On the other hand, alighting from a moving train without noticing that it has started has been held to be negligence. *La Pointe v. Boston, etc., R. Co.*, 182 Mass. 227.

**666. 3. Alighting from Train Prima Facie Negligence.** — *Jones v. Baltimore, etc., R. Co.*, 4 App. Cas. (D. C.) 158.

**667. 1. Alighting — Negligence as a Matter of Law if Obviously Dangerous.** — *Simmons v. Seaboard Air-Line R. Co.*, 120 Ga. 225; *Lindsay v. Southern R. Co.*, 114 Ga. 896; *Pittsburgh, etc., R. Co. v. Miller*, 33 Ind. App. 128; *McMichael v. Illinois Cent. R. Co.*, 110 La. 18; *Spaulding v. Quincy, etc., St. R. Co.*, 184 Mass. 470; *Douyette v. Nashua St. R. Co.*, 69 N. H. 625; *Lee v. Elizabeth, etc., R. Co.*, 69 N. J. L. 607.

**2. Alighting in the Dark from Train Known to Be in Motion.** — *Illinois Cent. R. Co. v. Hanberry*, 66 S. W. Rep. 417, 23 Ky. L. Rep. 1867. See *Oxsher v. Houston East, etc., R. Co.*, 29 Tex. Civ. App. 420.

**668. 1.** See *Oxsher v. Houston East, etc., R. Co.*, 29 Tex. Civ. App. 420.

**669. 2. Rule Where Starting of Train and Alighting Are Simultaneous.** — *United R., etc., Co. v. Beidelman*, 95 Md. 480. See *Hutchins v. Macomber*, 68 N. H. 473.

**3. When Passenger Has Partly Descended Steps at Starting of Train or Car.** — *Indianapolis St. R. Co. v. Lawn*, 30 Ind. App. 515; *Indianapolis St. R. Co. v. Hockett*, 159 Ind. 677; *St. Louis Southwestern R. Co. v. Massay*, (Tex. Civ. App. 1903) 76 S. W. Rep. 585.

**5. Effect of Advice of Conductor as to Alighting Not Obviously Dangerous** — *Georgia.* — *Southern R. Co. v. Bandy*, 120 Ga. 463, 102 Am. St. Rep. 112; *Coursey v. Southern R. Co.*, 113 Ga. 297. *Indiana.* — *Pittsburgh, etc., R. Co. v. Gray*, (Ind. App. 1901) 59 N. E. Rep. 1000.

*Iowa.* — *Lennon v. Chicago, etc., R. Co.*, (Iowa 1898) 75 N. W. Rep. 671; *Pence v. Wabash R. Co.*, 116 Iowa 279.

*Missouri.* — *Owens v. Wabash R. Co.*, 84 Mo. App. 143.



**671.** See note 1.

**672.** Alighting Contrary to Warning. — See note 1.

**674.** (e) Riding in Dangerous Position — *aa.* GENERAL RULE. — See note 3.

**675.** Where Injury Arises from Danger Not Inherent in Position. — See note 1.

**676.** *bb.* ON ENGINE. — See note 1.

**677.** *cc.* ON BAGGAGE CAR — With Invitation or Permission of Conductor. — See note 1.

*North Carolina.* — *Denny v. North Carolina R. Co.*, 132 N. Car. 340; *Cable v. Southern R. Co.*, 122 N. Car. 892. See also *Johnson v. Atlantic, etc.*, R. Co., 130 N. Car. 488.

*South Carolina.* — *Cooper v. Georgia, etc.*, R. Co., 56 S. Car. 91, 61 S. Car. 345.

*Texas.* — *Gulf, etc.*, R. Co. *v. Shelton*, 30 Tex. Civ. App. 72, rehearing denied (Tex. Civ. App. 1902) 70 S. W. Rep. 359; *International, etc.*, R. Co. *v. Rhoades*, (Tex. Civ. App. 1899) 51 S. W. Rep. 517.

**Invitation to Alight Implied from Slowing Up Street Car.** — *Betts v. Wilmington City. R. Co.*, 3 Penn. (Del.) 448.

**Invitation Implied from Act of Conductor of Electric Car.** — *Elwood v. Connecticut R., etc.*, Co., 77 Conn. 145.

**671. 1. Where Advice Is Obviously Dangerous.** — *Bosworth v. Walker*, (C. C. A.) 83 Fed. Rep. 58; *Southern R. Co. v. Bandy*, 120 Ga. 463, 102 Am. St. Rep. 112; *Sanders v. Southern R. Co.*, 107 Ga. 132; *Peak v. Louisville, etc.*, R. Co., 66 S. W. Rep. 995, 23 Ky. L. Rep. 2157. See *Jones v. Baltimore, etc.*, R. Co., 4 App. Cas. (D. C.) 158; *Geogagn v. New York, etc.*, R. Co., 10 N. Y. App. Div. 454.

**Instances Not Held to Amount to a Command.** — *Pittsburgh, etc.*, R. Co. *v. Gray*, 28 Ind. App. 588.

**672. 1. Alighting Contrary to Warning of Carrier's Servant.** — *Campbell v. Los Angeles R. Co.*, 135 Cal. 137.

**Alighting from Moving Street Car Against Warning of Conductor.** — *Clancy v. Yonkers R. Co.*, 88 N. Y. App. Div. 612.

**Knowledge of Regulation by Passenger.** — A passenger cannot be charged with negligence for the nonobservance of a rule of a street railway company that passengers must not leave its cars while they are in motion unless he knew of the rule, though conduct in violation of the rule may be negligent without reference to it. *Armstrong v. Montgomery St. R. Co.*, 123 Ala. 233.

**674. 3. A Drove Riding in Freight Car Instead of Caboose**, voluntarily and unnecessarily, has been held to be chargeable with negligence. *Walker v. Green*, 60 Kan. 289.

But under the terms of a contract providing that the plaintiff should be in charge, during transportation, of a fine mare shipped over the defendant's road, it was held that the plaintiff was not guilty of negligence in riding in the car with the mare instead of the caboose. *Chicago, etc.*, R. Co. *v. Lee*, (C. C. A.) 92 Fed. Rep. 318.

**Sitting at Open Window.** — Ordinarily it is not negligence for a passenger to sit with his face towards an open window. *Missouri, etc.*, R. Co. *v. Flood*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1106.

But it has been held that a passenger who

knows that sparks and cinders are entering an open window by which he is sitting, and also knows, or by the exercise of ordinary care could know, that there are unoccupied seats with protected windows to be had, is negligent in not removing from the dangerous position. *O'Donnell v. Louisville, etc.*, R. Co., (Ky. 1897) 42 S. W. Rep. 846.

**Sitting in Chair Instead of Stationary Seat.** — *Freeman v. Pere Marquette R. Co.*, 131 Mich. 544, 100 Am. St. Rep. 621, 9 Detroit Leg. N. 436, holding that it was negligent for a passenger in a caboose to seat himself in a chair instead of one of the stationary seats provided for passengers, the passenger knowing that switching was still going on.

**Resting Hard Against Facing of Door.** — *Romine v. Evansville, etc.*, R. Co., 24 Ind. App. 230; *Brinegar v. Louisville, etc.*, R. Co., 72 S. W. Rep. 783, 24 Ky. L. Rep. 1973; *Carroll v. Boston, etc.*, R. Co., 186 Mass. 97.

**Riding on the Top of a Car** has been held to constitute negligence. *Beyer v. Louisville, etc.*, R. Co., 114 Ala. 424; *Chaney v. Louisiana, etc.*, R. Co., 176 Mo. 598.

**Passing Along Top of Freight Train.** — If a shipper of freight goods gets on top of the train when it is in motion, for the purpose of passing from the caboose to the car containing his shipment, when he can as well walk on the ground, he is guilty of negligence. *Kimball v. Palmer*, (C. C. A.) 80 Fed. Rep. 240.

**Riding on Bumper of Street Car.** — *Nieboer v. Detroit Electric R. Co.*, 128 Mich. 486, 8 Detroit Leg. N. 745.

**675. 1. Where Injury Arises from Danger Not Inherent in Position.** — *Birmingham R., etc.*, Co. *v. Bynum*, 139 Ala. 395; *Florida Cent. R. Co. v. Sullivan*, (C. C. A.) 120 Fed. Rep. 799, holding that a white passenger was not chargeable with contributory negligence in riding in a car set aside for colored passengers. *Paquin v. St. Louis, etc.*, R. Co., 90 Mo. App. 118.

**676. 1. Riding on Engine.** — *Menaugh v. Bedford Belt R. Co.*, 157 Ind. 20; *Radley v. Columbia Southern R. Co.*, 44 Oregon 332.

**Riding on Footboard of Engine Without Retaining Hold of Hand Rail.** — *Clark v. Zarniko*, (C. C. A.) 106 Fed. Rep. 607.

**677. 1. Riding on Baggage Car by Invitation of Conductor.** — *Chesapeake, etc.*, R. Co. *v. Jordan*, 76 S. W. Rep. 145, 25 Ky. L. Rep. 574.

**Entering Baggage Car upon Business Connected with the Journey.** — Where a passenger who was injured by reason of a sudden shock caused by switching had entered the baggage car for the purpose of seeing the conductor on legitimate business connected with the journey, it was held that the question of whether he was rightfully in the baggage car was for the determination of the jury. *Gardner v. Waycross Air-Line R. Co.*, 97 Ga. 482, 54 Am. St. Rep. 435.

**678.** *dd.* ON PLATFORM OF CAR — Where Act Is Voluntary and Unnecessary. — See note 1.

**679.** Where There Are Unoccupied Seats Within Car. — See note 1.

Where There Are No Vacant Seats Within Car. — See note 2.

**680.** See note 1.

**681.** Mere Standing on Platform *Prima Facie* Negligence. — See note 1.

Not Negligence *Per Se*. — See note 2.

**678.** 1. Passenger Unnecessarily Standing on Car Platform of Moving Train. — *Kerr v. Chicago, etc., R. Co.*, 100 Ill. App. 148; *Rolette v. Great Northern R. Co.*, 91 Minn. 16; *Cincinnati, etc., Electric St. R. Co. v. Lohe*, 68 Ohio St. 101; *Barry v. Union Traction Co.*, 194 Pa. St. 576; *Meyere v. Nashville, etc., R. Co.*, 110 Tenn. 172, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 678.

It has been held to be negligence to stand on the platform of a car when the train is moving rapidly. *Hicks v. Georgia Southern, etc., R. Co.*, 108 Ga. 304.

**Riding on Running Board of Open Street Car.** — *Cusick v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 758.

It has been held that a passenger who rides on the running board of an open street car, when there are vacant seats in the car, assumes the risk of being struck by cars passing on a parallel track even if he is not wanting in due care. *Moody v. Springfield St. R. Co.*, 182 Mass. 158.

In *Pennsylvania* it was held that a passenger who rides on the side step when it is reasonably practicable for him to go inside the car is chargeable with negligence, but when the passenger by invitation of the conductor, or with his knowledge and assent, and from necessity because of want of sitting or standing room inside of the car, rides on the side step the question of contributory negligence is for the jury. *Bumbear v. United Traction Co.*, 198 Pa. St. 198.

**Going on Running Board of Moving Street Car, Preparatory to Alighting,** has been held to be negligence. *Bainbridge v. Union Traction Co.*, 206 Pa. St. 71.

**Riding on Steps of Car Outside of Vestibule Door** has been held to be negligence. *Sanders v. Chicago, etc., R. Co.*, 10 Okla. 325.

**Standing on Platform in Violation of Rules.** — *Denny v. North Carolina R. Co.*, 132 N. Car. 340.

Riding on the platform of a street car in violation of a rule of the carrier, which is not shown to have been waived or not to be in force, has been held to be negligence. *Burns v. Boston, El. R. Co.*, 183 Mass. 96.

But if a rule against riding on platforms of street cars is not enforced, and passengers are sometimes even required to ride thereon, the violation of the rule is not a defense to an action to recover damages sustained by the carrier's negligence. *Augusta R., etc., Co. v. Smith*, 121 Ga. 29.

In *Ohio* the general rule that no recovery can be had against the carrier for an injury received by a passenger on a steam railroad while standing on the platform of a car in violation of the known rules of the company, there being vacant seats in the car, has been

applied to a passenger riding on the platform of a car of an interurban electric railway. *Cincinnati, etc., Electric St. R. Co. v. Lohe*, 68 Ohio St. 101.

**After Being Warned and Requested to Enter Car.** — *Houston, etc., R. Co. v. Bryant*, 31 Tex. Civ. App. 483.

**679.** 1. Where There Are Unoccupied Seats Within the Car. — *Cleveland, etc., R. Co. v. Moneyhun*, 146 Ind. 147; *Meyere v. Nashville, etc., R. Co.*, 110 Tenn. 172, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 679.

**Riding on Platform of Car of Electric Railway.** — In *Pennsylvania* the rule that it is negligence *per se* to ride unnecessarily on the platform of an ordinary railway car has been applied to riding on the platform of a car of an electric railway. *Thane v. Scranton Traction Co.*, 191 Pa. St. 249, 71 Am. St. Rep. 767; *Woodroffe v. Roxborough, etc., R. Co.*, 201 Pa. St. 521, 88 Am. St. Rep. 827.

**Riding on the Side Step of an Open Street Car,** when it is reasonably practicable for the passenger to sit or stand in the car, has been held to be contributory negligence. *Woodroffe v. Roxborough, etc., R. Co.*, 201 Pa. St. 521, 88 Am. St. Rep. 827.

**2. New York Rule Followed.** — *Trumbull v. Erickson*, (C. C. A.) 97 Fed. Rep. 891. See *Magrane v. St. Louis, etc., R. Co.*, 183 Mo. 119.

The case of *Willis v. Long Island R. Co.*, 34 N. Y. 670, has been followed in *Missouri* in a case which construed a *Missouri* statute which is an exact copy of that of *New York*. *Choate v. Missouri Pac. R. Co.*, 67 Mo. App. 105.

**Riding on the Running Board of a Crowded Street Car** is not negligence as a matter of law. *Brainard v. Nassau Electric R. Co.*, 44 N. Y. App. Div. 613; *Sheeron v. Coney Island, etc., R. Co.*, 78 N. Y. App. Div. 476.

**680.** 1. Standing on the Platform Where There Are No Vacant Seats Within the Car — Prevailing Rule. — *Cleveland, etc., R. Co. v. Moneyhun*, 146 Ind. 147; *Rolette v. Great Northern R. Co.*, 91 Minn. 16.

**Neither Seats Nor Standing Room in Car.** — It has been held even in *Pennsylvania* that if a passenger is permitted to board a car having no vacant place except on the platforms, and the conductor accepts his fare, he is justified in standing on the platform if he exercises proper care in doing so. *McCaw v. Union Traction Co.*, 205 Pa. St. 271.

**681.** 1. Mere Standing on Platform *Prima Facie* Negligence. — *Trumbull v. Donahue*, 18 Colo. App. 460; *Eller v. Dayton, etc., Traction Co.*, 15 Ohio Dec. 208, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681; *Meyere v. Nashville, etc., R. Co.*, 110 Tenn. 172, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681.

**2. Standing on Car Platform Not Negligence**

**681.** *ee.* **STANDING UP IN CAR.** — See note 3.

**Per Se** — *United States*. — Pennsylvania R. Co. v. Paul, (C. C. A.) 126 Fed. Rep. 157. See St. Louis, etc., R. Co. v. Leftwich, (C. C. A.) 117 Fed. Rep. 127.

*Alabama*. — Southern R. Co. v. Roebuck, 132 Ala. 412.

*Arkansas*. — Prescott, etc., R. Co. v. Smith, 70 Ark. 179.

*California*. — Holloway v. Pasadena, etc., R. Co., 130 Cal. 177.

*Georgia*. — Augusta Southern R. Co. v. Snider, 118 Ga. 148, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681.

*Kentucky*. — Chesapeake, etc., R. Co. v. Lang, 100 Ky. 221; Louisville, etc., R. Co. v. Head, 59 S. W. Rep. 23, 22 Ky. L. Rep. 863.

*Missouri*. — Choate v. Missouri Pac. R. Co., 67 Mo. App. 105.

*Ohio*. — Shrum v. Cincinnati, etc., R. Co., 10 Ohio Dec. 246, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681.

*South Carolina*. — Doolittle v. Southern R. Co., 62 S. Car. 130.

*Texas*. — Gaunce v. Gulf, etc., R. Co., 20 Tex. Civ. App. 33; Ft. Worth, etc., R. Co. v. Rogers, 24 Tex. Civ. App. 382; Galveston, etc., R. Co. v. Morris, 94 Tex. 505, affirming (Tex. Civ. App. 1901) 60 S. W. Rep. 813; St. Louis Southwestern R. Co. v. Ball, 28 Tex. Civ. App. 287; Williams v. International, etc., R. Co., 28 Tex. Civ. App. 503.

*Washington*. — Graham v. McNeill, 20 Wash. 466, 72 Am. St. Rep. 121.

**Riding on Platform of Street Car.** — Whether riding on the platform of a street car is negligence is ordinarily a question for the jury. North Chicago St. R. Co. v. Baur, 179 Ill. 126, affirming 79 Ill. App. 121; Terre Haute Electric R. Co. v. Lauer, 21 Ind. App. 466; Jackson v. St. Paul City R. Co., 74 Minn. 48; East Omaha St. R. Co. v. Godola, 50 Neb. 906; Cattano v. Metropolitan St. R. Co., 173 N. Y. 565; Reber v. Pittsburg, etc., Traction Co., 179 Pa. St. 339, 57 Am. St. Rep. 599; Halverson v. Seattle Electric Co., 35 Wash. 600.

And this is true of riding on the platform of an electric car. Watson v. Portland, etc., R. Co., 91 Me. 584, 64 Am. St. Rep. 268; Brunnchow v. Rhode Island Co., 26 R. I. 211.

**Riding on Front Platform of Street Car.** — Ordinarily it is a question of fact for a jury whether a passenger, riding on the front platform of an electric car or a horse car, is in the exercise of due care. Sweetland v. Lynn, etc., R. Co., 177 Mass. 574; Seelig v. Metropolitan St. R. Co., (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 383; Gray v. Metropolitan St. R. Co., 39 N. Y. App. Div. 536, reversed 165 N. Y. 457; Bradley v. Second Ave. R. Co., 34 N. Y. App. Div. 284; Vogler v. Central Crosstown R. Co., 83 N. Y. App. Div. 101; Bailey v. Tacoma Traction Co., 16 Wash. 48.

**Riding on the Steps or Running Board of Street Car.** — Riding on the steps of a street car has sometimes been held to be negligence *per se*. Baltimore Consol. R. Co. v. Foreman, 94 Md. 226. But ordinarily the question of whether that is negligence is for the jury to decide. Lake Shore, etc., R. Co. v. Kelsey, 180 Ill. 530, affirming 76 Ill. App. 613; Chicago Union Trac-

tion Co. v. Hanthorn, 211 Ill. 367; Parks v. St. Louis, etc., R. Co., 178 Mo. 108, 101 Am. St. Rep. 425.

And ordinarily it cannot be said that riding on the side footboard or running board of a street car is negligence *per se*. Harbison v. Metropolitan R. Co., 9 App. Cas. (D. C.) 60; Brightwood R. Co. v. Carter, 12 App. Cas. (D. C.) 155; Purington-Kimball Brick Co. v. Eckman, 102 Ill. App. 183; Citizen's St. R. Co. v. Hoffbauer, 23 Ind. App. 614; Kreimelmann v. Jourdan, 107 Mo. App. 64; Wheeler v. South Orange, etc., Traction Co., 70 N. J. L. 725; Hassen v. Nassau Electric R. Co., 34 N. Y. App. Div. 71; Henderson v. Nassau Electric R. Co., 46 N. Y. App. Div. 280.

Certainly it cannot ordinarily be said to be negligence as a matter of law to walk along the footboard of an open street car for the purpose of finding a seat. San Antonio Traction Co. v. Bryant, 30 Tex. Civ. App. 437.

And riding on the footboard of an open street car when all the seats are occupied is not contributory negligence as a matter of law. Anderson v. City, etc., R. Co., 42 Oregon 505.

It has been held that it is not negligence as a matter of law to ride on the footboard along the side of an open street car, in accordance with a common practice, although there may be vacant seats within the car. Seller v. Market-St. R. Co., 139 Cal. 268. See Hesse v. Meriden, etc., Tramway Co., 75 Conn. 571.

**681. 3. Passenger Not Obligated as Matter of Law to Keep Seat in Car** — *Indiana*. — Romine v. Evansville, etc., R. Co., 24 Ind. App. 230.

*Kansas*. — St. Louis, etc., R. Co. v. Burrows, 62 Kan. 89.

*Michigan*. — Moore v. Saginaw, etc., R. Co., 115 Mich. 103.

*Minnesota*. — Simonds v. Minneapolis, etc., R. Co., 87 Minn. 408.

*Mississippi*. — Yazoo, etc., R. Co. v. Humphrey, 83 Miss. 721.

*Missouri*. — Fullerton v. St. Louis, etc., R. Co., 84 Mo. App. 498; Holland v. St. Louis, etc., R. Co., 105 Mo. App. 117.

*New Jersey*. — Burr v. Pennsylvania R. Co., 64 N. J. L. 30.

*New York*. — Schmidt v. Coney Island, etc., R. Co., 26 N. Y. App. Div. 391.

*Texas*. — Gulf, etc., R. Co. v. Bell, 93 Tex. 634, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681; Texas, etc., R. Co. v. Adams, 32 Tex. Civ. App. 112; Chicago, etc., R. Co. v. Buie, 31 Tex. Civ. App. 654.

*Washington*. — Lane v. Spokane Falls, etc., R. Co., 21 Wash. 119, 75 Am. St. Rep. 821.

See Garland v. Southern R. Co., 111 Ga. 852.

But the circumstances may, of course, be such that it is negligence to stand up in a railway car. Witherington v. Lynn, etc., R. Co., 182 Mass. 506.

In McCurrie v. Southern Pac. R. Co., 122 Cal. 558, it was said that "it cannot be said as a matter of law that the plaintiff, by leaving his seat after the train had stopped, and attempting to go to the platform for the purpose of meeting his son, was guilty of any negligence which contributed to his injury."

**Surrendering Seat to Fellow Passengers ordi-**

**682.** See note 1.

**Failure to Take Seat Before Starting of Train.** — See notes 2, 3.

**Leaving Seat upon Approaching Destination.** — See notes 5, 6.

*ff.* **PASSING FROM ONE CAR TO ANOTHER.** — See note 7.

**By Direction of Carrier.** — See note 8.

**683.** *gg.* **WITH PART OF PERSON PROJECTING FROM WINDOW — It Is the Prevailing Rule.**

— See note 2.

narily cannot be held to be negligence. *Terre Haute Electric R. Co. v. Lauer*, 21 Ind. App. 466; *Trumbull v. Erickson*, (C. C. A.) 97 Fed. Rep. 891.

**Standing Near Door.** — *Brineger v. Louisville, etc., R. Co.*, 72 S. W. Rep. 783, 24 Ky. L. Rep. 1973.

**Standing Up in Freight Train.** — *Felton v. Horner*, 97 Tenn. 579.

**682. 1. A Passenger on a Freight Train Leaving Her Seat to Get a Drink of Water for Her Child** is not guilty of negligence as a matter of law. *Indiana, etc., R. Co. v. Masterson*, 16 Ind. App. 323.

**Standing in Disregard of Warning**, posted on the wall of the caboose of a freight train, has been held to be negligence, though the passenger got up to get a drink of water. *Krumm v. St. Louis, etc., R. Co.*, 71 Ark. 590.

**2. General Rule as to Failure to Take Seat Before Starting of Train.** — *Macon, etc., R. Co. v. Moore*, 108 Ga. 84.

**3. Standing in Crowded Car.** — See *Farnon v. Boston, etc., R. Co.*, 180 Mass. 212.

**5. Leaving Seat upon Approaching Destination.** — *Jennings v. Union Traction Co.*, 206 Pa. St. 31. And see *Denny v. North Carolina R. Co.*, 132 N. Car. 340. But see *Sweeney v. Union Traction Co.*, 199 Pa. St. 293, holding that it is not always negligence for a passenger on a street car to leave his seat while the car is being stopped in response to his signal.

**6. Leaving Seat upon Approaching Destination — Prevailing Rule.** — *Augusta Southern R. Co. v. Snider*, 118 Ga. 148, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 682; *Illinois Cent. R. Co. v. Jolly*, 78 S. W. Rep. 476, 25 Ky. L. Rep. 1735, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 682; *Chesapeake, etc., R. Co. v. Topping*, 78 S. W. Rep. 135, 25 Ky. L. Rep. 1390; *Baltimore, etc., R. Co. v. Jean*, 98 Md. 546; *Smalley v. Detroit, etc., R. Co.*, 131 Mich. 560, 9 Detroit Leg. N. 443; *Whitaker v. Staten Island Midland R. Co.*, 72 N. Y. App. Div. 468; *Gulf, etc., R. Co. v. Bell*, 93 Tex. 634. But see *Illinois Cent. R. Co. v. Boles*, (Ky. 1903) 73 S. W. Rep. 1034.

**Leaving Seat by Invitation of Brakeman.** — *Louisville, etc., R. Co. v. Bowlds*, 64 S. W. Rep. 957, 23 Ky. L. Rep. 1202.

**Going upon Platform of a Railway Car Preparatory to Alighting** from the train is not negligence as a matter of law (*Cincinnati, etc., R. Co. v. Revalee*, 17 Ind. App. 657), especially if the passenger is induced to do so by the conduct of a servant of the carrier. *Southern R. Co. v. Roebuck*, 132 Ala. 412.

**Taking Position on Platform or Steps of Street Car Preparatory to Alighting.** — Going out upon the platform of a moving street car preparatory to alighting is not negligence *per se*. *Etson v.*

*Ft. Wayne, etc., R. Co.*, 110 Mich. 494; *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474; *Scott v. Bergen County Traction Co.*, 63 N. J. L. 407; *Mitchell v. Electric Traction Co.*, 12 Pa. Super. Ct. 472.

And it has been held that taking a position on the steps or running board of a street car preparatory to alighting is not negligence *per se*, but the question of negligence is for the determination of the jury. *Birmingham R., etc., Co. v. James*, 121 Ala. 120; *Armstrong v. Montgomery St. R. Co.*, 123 Ala. 233; *Currie v. Mendenhall*, 77 Minn. 179; *Sweeney v. Kansas City Cable R. Co.*, 150 Mo. 385; *Paganini v. North Jersey St. R. Co.*, 70 N. J. L. 385.

**7. Rule Stated as to Passenger Passing from One Car to Another.** — *McAfee v. Huidekoper*, 9 App. Cas. (D. C.) 36; *Dougherty v. Yazoo, etc., R. Co.*, 84 Miss. 502; *McDonnell v. New York Cent., etc., R. Co.*, 35 N. Y. App. Div. 147, *appeal dismissed* 159 N. Y. 524; *Gaunce v. Gulf, etc., R. Co.*, 20 Tex. Civ. App. 33. See *St. Louis, etc., R. Co. v. Leftwich*, (C. C. A.) 117 Fed. Rep. 127.

**Passing from One Car to Another on Top of the Cars** has been held to be negligence. *Neville v. St. Louis Merchants Bridge Terminal R. Co.*, 158 Mo. 293.

**Stepping Off a Car in the Dark** to pass to a car in the rear has been held to be negligence. *Kellogg v. Smith*, 179 Mass. 595.

**8. Passing from One Car to Another by Conductor's Direction.** — See *Dougherty v. Yazoo, etc., R. Co.*, 84 Miss. 502.

**683. 2. Riding with Part of Person Projecting from Window — Prevailing Rule.** — *Knauss v. Lake Erie, etc., R. Co.*, 29 Ind. App. 216; *Chicago, etc., R. Co. v. Hoover*, 3 Indian Ter. 693; *Clarke v. Louisville, etc., R. Co.*, 101 Ky. 34; *Union Pac. R. Co. v. Roeser*, (Neb. 1903) 95 N. W. Rep. 68. See *Baltimore, etc., R. Co. v. Sims*, 28 Ind. App. 544.

**Protruding Head from Car Window in Passing Through a Tunnel** has been held to be negligence as a matter of law. *Shelton v. Louisville, etc., R. Co.*, (Ky. 1897) 39 S. W. Rep. 842.

**Protrusion of Arm from Window of Street Car.** — See *Zeliff v. North Jersey St. R. Co.*, 69 N. J. L. 541.

**Standing on Platform and Projecting Part of Person Beyond Line of Car.** — *Benedict v. Minneapolis, etc., R. Co.* 86 Minn. 224, 91 Am. St. Rep. 345.

**Leaning Over Railing of Platform of a street car** so as to come in contact with trolley pole has been held to be negligence. *Huber v. Cedar Rapids, etc., R. Co.*, 124 Iowa 556.

**Leaning Out from Car by Passenger on Footboard** has been held to be negligence. *Nugent v. New Haven St. R. Co.*, 73 Conn. 139; *Flynn v. Consolidated Traction Co.*, 67 N. J. L. 546;

**684.** But According to Some of the Authorities. — See note 1.

**685.** (a) Conduct At or Near Stations. — See note 1.

**686.** Occupying Platform While Waiting for Train. — See note 1.

Crossing Tracks — Where Act Is Unnecessary. — See note 3.

**687.** Crossing Intermediate Track in Passing Between Station and Train. — See notes

2, 3.

*Woodroffe v. Roxborough, etc., R. Co.*, 201 Pa. St. 521, 88 Am. St. Rep. 827.

**684. 1. Rule that Question of Negligence Is for the Jury.** — *Clerc v. Morgan's Louisiana, etc., R., etc., Co.*, 107 La. 370, 90 Am. St. Rep. 319; *Kird v. New Orleans, etc., R. Co.*, 109 La. 525; *Tucker v. Buffalo R. Co.*, 53 N. Y. App. Div. 571, affirmed without opinion 169 N. Y. 589; *McCord v. Atlanta, etc., R. Co.*, 134 N. Car. 53; *Gulf, etc., R. Co. v. Phillips*, 32 Tex. Civ. App. 238. See *Kird v. New Orleans, etc., R. Co.*, 105 La. 226.

**Resting Hand on Window Sill.** — *Cleveland, etc., R. Co. v. Scott*, 111 Ill. App. 234.

**Arm Resting on Window Sill But Not Protruding from Window.** — *Jones v. United R., etc., Co.*, 99 Md. 64.

When the evidence is conflicting as to whether the passenger's arm was projecting from an open window, the question of contributory negligence is for the jury. *Goorin v. Allegheny Traction Co.*, 179 Pa. St. 327.

**Swinging Out from Car When Riding on Footboard of Street Car.** — *Schneider v. North Chicago St. R. Co.*, 80 Ill. App. 306; *Gunn v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 241.

**685. 1. Rule Stated as to Passenger's Duty At or Near Station.** — *Cleveland, etc., R. Co. v. Wade*, 18 Ind. App. 346; *Flanagan v. Philadelphia, etc., R. Co.*, 181 Pa. St. 237.

**Entering Cars by Way Provided.** — *Atlantic, etc., R. Co. v. Anderson*, 118 Ga. 288.

**Stepping on Part of Platform Known to Be Unsafe.** — Where a passenger who had notice that a part of the station platform was unsafe because of an accumulation of ice thereon, stepped backward on the slippery place, without looking, it was held that he was negligent. *Waterbury v. Chicago, etc., R. Co.*, 104 Iowa 32.

**Passenger Exposing Himself to Injury by Baggage Being Unloaded from Train.** — *Duverniet v. Morgan's Louisiana, etc., R., etc., Co.*, 49 La. Ann. 484.

**Approaching Dangerously Close to Burning Oil Tanks on Tracks.** — *Conroy v. Chicago, etc., R. Co.*, 96 Wis. 243.

**686. 1. Going on Platform While Waiting for Train.** — *Lehigh Valley R. Co. v. Dupont*, (C. C. A.) 128 Fed. Rep. 840; *Louisville, etc., R. Co. v. Reynolds*, 71 S. W. Rep. 516, 24 Ky. L. Rep. 1402; *Sattler v. Chicago, etc., R. Co.*, (Neb. 1904) 98 N. W. Rep. 663.

**Promenading on Station Platform During Stop at Intermediate Station** cannot be said to be negligence as a matter of law. *St. Louis, etc., R. Co. v. Coulson*, 8 Kan. App. 4.

**Standing on Edge of Station Platform Close to Railway Track.** — *Dotson v. Erie R. Co.*, 68 N. J. L. 679. See *State v. United R., etc., Co.*, 98 Md. 397. See also the cases cited *supra*, this title **653. 3. Standing Dangerously Close to Track While Awaiting Approaching Street Car.**

**Attempting to Sit Down on the Edge of Platform.** — Where a passenger, on a misty and very dark night, fell off a station platform, which was unlighted and with which she was unfamiliar, while she was attempting to sit down on the edge of the platform, it was held that she was guilty of contributory negligence. *Missouri, etc., R. Co. v. Turley*, (C. C. A.) 85 Fed. Rep. 369, reversing 1 Indian Ter. 275.

**3. Effect of Unnecessarily Crossing Railroad Track.** — *Chicago, etc., R. Co. v. Weeks*, 99 Ill. App. 518, judgment affirmed 198 Ill. 551; *Roberts v. New York, etc., R. Co.*, 175 Mass. 296; *Flanagan v. Philadelphia, etc., R. Co.*, 181 Pa. St. 237.

**Crossing in Front of Train Known to Be Approaching.** — *Young v. New York, etc., R. Co.*, 171 Mass. 33.

**Passing Through Narrow Opening Between Two Trains.** — *Illinois Cent. R. Co. v. Strauss*, 75 Miss. 367.

**687. 2. Usual Rule as to Crossing Tracks Not Applying to Passengers Going to and from Trains.** — *Alabama G. S. R. Co. v. Coggins*, (C. C. A.) 88 Fed. Rep. 455; *Graven v. MacLeod*, (C. C. A.) 92 Fed. Rep. 846; *Chesapeake, etc., R. Co. v. King*, (C. C. A.) 99 Fed. Rep. 251; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169; *Chicago, etc., R. Co. v. Lagerkrans*, 65 Neb. 566; *Jewell v. New York Cent., etc., R. Co.*, 27 N. Y. App. Div. 500. See *St. Louis Southwestern R. Co. v. Casseday*, (Tex. Civ. App. 1898) 48 S. W. Rep. 6.

**3. Passing Behind Street Car Across Parallel Track.** — *United States.* — *Graven v. MacLeod*, 92 Fed. Rep. 846, 35 C. C. A. 47.

*Illinois.* — *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169; *Chicago, etc., R. Co. v. Kelly*, 182 Ill. 267, affirming 80 Ill. App. 675; *Chicago Terminal Transfer R. Co. v. Schmelling*, 197 Ill. 619.

*Kansas.* — *Metropolitan St. R. Co. v. Ryan*, 69 Kan. 538.

*New Jersey.* — *Redhing v. Central R. Co.*, 68 N. J. L. 641.

*New York.* — *Jewell v. New York Cent., etc., R. Co.*, 27 N. Y. App. Div. 500; *Beecher v. Long Island R. Co.*, 161 N. Y. 222, affirming 35 N. Y. App. Div. 292. See *Albrecht v. New York Cent., etc., R. Co.*, 54 N. Y. App. Div. 636, affirmed without opinion 166 N. Y. 622.

*Pennsylvania.* — *Girton v. Lehigh Valley R. Co.*, 17 Pa. Super. Ct. 143; *Betts v. Lehigh Valley R. Co.*, 191 Pa. St. 575, 44 W. N. C. (Pa.) 302. See *Flanagan v. Philadelphia, etc., R. Co.*, 181 Pa. St. 237.

*Texas.* — *Gulf, etc., R. Co. v. Morgan*, 26 Tex. Civ. App. 378.

See *St. Louis, etc., R. Co. v. Tomlinson*, 69 Ark. 489; *Chicago, etc., R. Co. v. Troyer*, (Neb. 1903) 97 N. W. Rep. 308.

**Drover Passing Along Track to Enter Caboose.** — *Lake Shore, etc., R. Co. v. Hotchkiss*, 24 Ohio Cir. Ct. 431.

**690.** 4. Traveling on Sunday. — See note 2.

**691.** XI. DAMAGES — 2. Direct and Consequential Damages — *a.* GENERAL RULE. — See note 1.

*b.* PROXIMATE DAMAGES DEFINED. — See note 2.

**692.** *c.* REMOTE DAMAGES. — See note 1.

**693.** *d.* EFFECT OF PASSENGER'S NEGLIGENCE OR IMPRUDENCE. — See note 1.

**Crossing Track After Alighting from Street Car.** — *Wise v. Brooklyn Heights R. Co.*, 46 N. Y. App. Div. 246; *Gray v. Ft. Pitt Traction Co.*, 198 Pa. St. 184; *Smith v. Union Trunk Line*, 18 Wash. 351.

It has been held that a person who has alighted from a street car is negligent in passing behind the car and across a parallel track without looking to see whether any car was approaching thereon. *Smith v. City, etc., R. Co.*, 29 Oregon 539.

Where a passenger, after alighting from a street car, walked behind the car and across a parallel track, over which he knew that cars were running at intervals of a few minutes, without looking to see if any car was approaching, it was held that he was guilty of contributory negligence. *Baltimore Traction Co. v. Helms*, 84 Md. 515.

**690. 2. Riding on Ticket Purchased on Sunday.** — The fact that a passenger is riding on a ticket purchased on Sunday is not a bar to an action for a wrongful expulsion, the action being not for breach of a Sunday contract but for tortious ejection from the train. *Masterson v. Chicago, etc., R. Co.*, 102 Wis. 571. And see generally the title SUNDAYS AND HOLIDAYS.

**691. 1. Direct and Consequential Damages — General Rule.** — *North American Transp., etc., Co. v. Morrison*, 178 U. S. 262; *Central of Georgia R. Co. v. Dorsey*, 116 Ga. 719; *Pickens v. South Carolina, etc., R. Co.*, 54 S. Car. 498; *Texas, etc., R. Co. v. McKenzie*, 30 Tex. Civ. App. 293; *International, etc., R. Co. v. Anthony*, 24 Tex. Civ. App. 9.

**2. Proximate Damages Defined.** — *Louisville, etc., R. Co. v. Hine*, 121 Ala. 237, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 691; *Pittsburgh, etc., R. Co. v. Street*, 26 Ind. App. 233, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 691; *Book v. Chicago, etc., R. Co.*, 75 Mo. App. 604. And see generally the titles CONTRIBUTORY NEGLIGENCE; DAMAGES; NEGLIGENCE.

Consequences which follow in an unbroken sequence, without an intervening efficient cause, from the original negligent act are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did in fact follow. *Keegan v. Minneapolis, etc., R. Co.*, 76 Minn. 90.

**Illustration — Rheumatism Caused by Exposure.** — Under the facts of the case it was held that the jury was justified in finding, without expert testimony, that plaintiff's rheumatism resulted from exposure on defendant's train. *Rosted v. Great Northern R. Co.*, 76 Minn. 123.

**692. 1. Remote Damages Not Recoverable.** — *Pelly v. Denison, etc., R. Co.*, (Tex. Civ. App. 1904) 78 S. W. Rep. 542. See *Fowlkes v. Southern R. Co.*, 96 Va. 742.

**Worry and Anxiety Resulting from Delay.** — It has been held that the mental anxiety of the plaintiff induced by the sickness of his wife and his inability to make her comfortable, or his limited means, or his inability to hear from home owing to the interruption of telegraphic communication, cannot be regarded as the proximate result of a delay which was caused by the failure of the defendant to carry him to his destination. *Turner v. Great Northern R. Co.*, 15 Wash. 213, 55 Am. St. Rep. 883.

**Loss of Possible Wages Caused by Failure to Carry to Destination.** — *North American Transp., etc., Co. v. Morrison*, 178 U. S. 262.

**Loss from Breach of Passenger's Engagement Caused by Delay.** — *Cooley v. Pennsylvania R. Co.*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 239.

**Loss of Possible Profits by Theatrical Troupe Caused by Delay.** — *Southern R. Co. v. Myers*, (C. C. A.) 87 Fed. Rep. 149 (applying the Georgia statute).

**693. 1. Obligation of the Passenger to Use Care — United States.** — *Texas, etc., R. Co. v. White*, (C. C. A.) 101 Fed. Rep. 928.

*Alabama.* — *Louisville, etc., R. Co. v. Hine*, 121 Ala. 234, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 693.

*Illinois.* — *West Chicago St. R. Co. v. Stephens*, 66 Ill. App. 303.

*Indiana.* — *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360; *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414; *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74.

*New York.* — *Grotsch v. Steinway R. Co.*, 19 N. Y. App. Div. 130.

*Tennessee.* — *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 29.

*Texas.* — *Trinity, etc., R. Co. v. O'Brien*, 18 Tex. Civ. App. 692, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 693; *Gulf, etc., R. Co. v. Condra*, (Tex. Civ. App. 1904) 82 S. W. Rep. 528; *Missouri, etc., R. Co. v. Flood*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1106; *Galveston, etc., R. Co. v. Hubbard*, (Tex. Civ. App. 1902) 70 S. W. Rep. 112; *Texas, etc., R. Co. v. McKenzie*, 30 Tex. Civ. App. 293; *St. Louis Southwestern R. Co. v. Ball*, 28 Tex. Civ. App. 287; *St. Louis Southwestern R. Co. v. Ferguson*, 26 Tex. Civ. App. 460. See *Pecos, etc., R. Co. v. Williams*, (Tex. Civ. App. 1903) 78 S. W. Rep. 5.

**Acts of Passenger Increasing Injuries Sustained by Wrongful Ejection.** — *Bader v. Southern Pac. R. Co.*, 52 La. Ann. 1060.

**Injuries Caused by Passenger Resisting Ejection.** — A passenger usually cannot recover for injuries caused by unduly resisting ejection, regardless of whether the ejection is lawful or unlawful. *Schaefer v. North Chicago St. R. Co.*, 82 Ill. App. 473; *Illinois Cent. R. Co. v. Louthan*, 80 Ill. App. 579; *Bough v. Metropolitan St. R. Co.*, 82 N. Y. App. Div. 215; *Mc-*

**694.** *e.* EFFECT OF PREVIOUSLY EXISTING DISEASE OR INJURY. — See note 1.

**698.** 3. Elements of Damages — *a.* FOR FAILURE TO CARRY — (1) *Generally.* — See note 1.

(3) *Inconvenience and Disappointment.* — See note 3.

**699.** *b.* FOR PUTTING DOWN PASSENGER ASIDE FROM DESTINATION. — See note 2.

*Cullen v. New York, etc., R. Co.*, 68 N. Y. App. Div. 269. But it has been said that a passenger has a right to make a reasonable resistance when a wrongful expulsion is attempted. *Breen v. St. Louis Transit Co.*, 102 Mo. App. 479.

**Payment of Fare to Prevent Expulsion.** — A passenger who is threatened with a wrongful expulsion is not required to pay fare a second time in order to lessen the damages. *Pennsylvania R. Co. v. Lenhart*, (C. C. A.) 120 Fed. Rep. 61; *Gulf, etc., R. Co. v. Copeland*, 17 Tex. Civ. App. 55. But it has been held that if a passenger resist the payment of an extra charge which is illegally exacted, until force is used upon him, for the sole purpose of enhancing the damages, he cannot recover the increased damages which are caused by his conduct. *Patterson v. Southern Pac. R. Co.*, 28 Tex. Civ. App. 67.

**Passenger Provoking Assault.** — In a number of cases it has been held that the fact that an assault upon a passenger by a servant of the carrier was provoked by the language or conduct of the passenger may be taken into consideration in mitigation of damages. *Weber v. Brooklyn, etc., R. Co.*, 47 N. Y. App. Div. 306; *Houston, etc., R. Co. v. Batchler*, 32 Tex. Civ. App. 14.

It has been held that it may be taken into consideration in mitigation of even compensatory damages. *Freedman v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 486.

But, on the other hand, it has been held that provocation by the passenger will not be considered in mitigation of damages in an action to recover for an assault by the carrier's servant. *Birmingham R., etc., Co. v. Mullen*, 138 Ala. 614.

In *Mahoning Valley R. Co. v. De Pascale*, 70 Ohio St. 179, it was held that words provoking an assault cannot be considered in mitigation of actual or compensatory damages.

Evidence that an assault on a passenger by a servant was provoked by the passenger is admissible in mitigation of exemplary damages. *Galveston, etc., R. Co., v. La Prelle*, 27 Tex. Civ. App. 496. And see *Mahoning Valley R. Co. v. De Pascale*, 70 Ohio St. 179.

A woman passenger who opens the way by an immodest or improper remark for an insulting proposal by the conductor is not entitled to the same award of punitive damages as one who gives no license by imprudence in speech or conduct. *Strother v. Aberdeen, etc., R. Co.*, 123 N. Car. 197.

**694.** 1. Effect of Existing Disease or Injury. — *St. Louis, etc., R. Co. v. Kilpatrick*, 67 Ark. 47; *Mathew v. Wabash R. Co.*, (Mo. App. 1903) 78 S. W. Rep. 271; *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93; *Pecos, etc., R. Co. v. Williams*, (Tex. Civ. App. 1903) 78 S. W. Rep. 5.

**698.** 1. Elements of Damages for Failure to Carry. — *Louisville, etc., R. Co. v. Spinks*, 104 Ga. 692; *Southern R. Co. v. Marshall*, 111 Ky. 560; *Mobile, etc., R. Co. v. Reeves*, (Ky. 1904) 80 S. W. Rep. 471; *Cooley v. Pennsylvania R. Co.*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 239; *Rose v. King*, 76 N. Y. App. Div. 308.

**Delay in Carrying.** — *Miller v. Southern R. Co.*, 69 S. Car. 116; *International, etc., R. Co. v. Harder*, (Tex. Civ. App. 1904) 81 S. W. Rep. 356.

**Refusal to Admit Passenger to Train.** — In an action to recover damages for a wrongful refusal to admit the plaintiff to a train it was held that the humiliation suffered by the plaintiff was an element in the measure of damages. *Cleveland, etc., R. Co. v. Kinsley*, 27 Ind. App. 135, 87 Am. St. Rep. 245.

**3. Inconvenience and Disappointment.** — *Southern R. Co. v. Marshall*, 111 Ky. 560; *Mobile, etc., R. Co. v. Reeves*, (Ky. 1904) 80 S. W. Rep. 471.

In *Miller v. Southern R. Co.*, 69 S. Car. 116, it was held that mere inconvenience is not an element of damages in an action for delay in carrying.

**Disappointment Is Not an Element.** — *Miller v. Baltimore, etc., R. Co.*, 89 N. Y. App. Div. 457.

**Anxiety and Suspense of Mind.** — It has been held that damages cannot be recovered for anxiety and suspense of mind in consequence of delay caused by the fault of a common carrier. *Turner v. Great Northern R. Co.*, 15 Wash. 213, 55 Am. St. Rep. 883. And see the title DAMAGES.

**699.** 2. Sickness. — See *Rawlings v. Wabash R. Co.*, 97 Mo. App. 515, holding that there can be no recovery for sickness.

**Carrying Beyond Station or Destination.** — *Louisville, etc., R. Co. v. Quick*, 125 Ala. 553; *Texarkana, etc., R. Co. v. Anderson*, 67 Ark. 123; *Smith v. Wilmington, etc., R. Co.*, 130 N. Car. 304, holding that there can be no recovery where there is no evidence of actual damage.

For being carried a distance beyond the station, a passenger can recover compensation for the extra inconvenience and suffering above what she would have experienced had she been put off at the usual place. *Houston, etc., R. Co. v. McKenzie*, (Tex. Civ. App. 1897) 41 S. W. Rep. 831.

**Fright.** — *Houston, etc., R. Co. v. McKenzie*, (Tex. Civ. App. 1897) 41 S. W. Rep. 831.

**Mental Anxiety.** — *Smith v. Wilmington, etc., R. Co.*, 130 N. Car. 304, holding that there can be no recovery for mental anguish; *International, etc., R. Co. v. Sammon*, (Tex. Civ. App. 1904) 79 S. W. Rep. 854.

**Fright and Mental Anguish.** — *Texas, etc., R. Co. v. Gott*, 20 Tex. Civ. App. 335.

**Expense and Loss of Time and Wages.** —

**700.** *c.* FOR MALTREATMENT OF PASSENGERS — (1) *Unlawful Ejection.* — See note 1.

Indignity and Humiliation. — See note 2.

**701.** Personal Injury and Inconvenience. — See note 1.

**702.** (3) *Other Cases of Maltreatment.* — See note 1.

**703.** *d.* FOR PERSONAL INJURIES — (1) *Generally.* — See note 1.

(2) *Pecuniary Loss.* — See note 2.

*Bullock v. White Star Steamship Co.*, 30 Wash. 448.

**Exposure and Suffering.** — *St. Louis Southwestern R. Co. v. Ricketts*, 96 Tex. 68.

**Passenger Set Down Before Reaching Destination Through Mistake of Conductor.** — *Cleveland, etc., R. Co. v. Quillen*, 22 Ind. App. 496.

**700. 1. Elements of Damages for Unlawful Expulsion Generally** — *Alabama.* — *Kansas City, etc., R. Co. v. Foster*, 134 Ala. 244, 92 Am. St. Rep. 25.

*Arkansas.* — *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 67 Am. St. Rep. 913.

*California.* — *Procter v. Southern California R. Co.*, 130 Cal. 20.

*Iowa.* — *Coine v. Chicago, etc., R. Co.*, 123 Iowa 458.

*Kansas.* — *Kansas City, etc., R. Co. v. Little*, 66 Kan. 378, 97 Am. St. Rep. 376.

*Louisiana.* — *Marx v. Louisiana, Western R. Co.*, 112 La. 1085.

*Missouri.* — *Breen v. St. Louis Transit Co.*, 102 Mo. App. 479.

*Nebraska.* — *Chicago, etc., R. Co. v. Spirk*, 51 Neb. 167.

*New York.* — *Eddy v. Syracuse Rapid Transit R. Co.*, 50 N. Y. App. Div. 109; *Foley v. Metropolitan St. R. Co.*, 80 N. Y. App. Div. 262; *Jacobs v. Third Ave. R. Co.*, 71 N. Y. App. Div. 199, *reversing* (Supm. Ct. App. T.) 34 Misc. (N. Y.) 512, *reversing* (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 802. But compare *Henly v. Delaware, etc., R. Co.*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 499.

*Ohio.* — *Pittsburg, etc., R. Co. v. Ensign*, 6 Ohio Cir. Dec. 616.

*Tennessee.* — *Choctaw, etc., R. Co. v. Hill*, 110 Tenn. 396.

*Texas.* — *Houston, etc., R. Co. v. Crone*, (Tex. Civ. App. 1896) 37 S. W. Rep. 1074; *Houston, etc., R. Co. v. McNeel*, (Tex. Civ. App. 1903) 76 S. W. Rep. 206.

**Damages for Injury to "Good Name"** cannot be recovered in an action for an unlawful ejection. *Procter v. Southern California R. Co.*, 130 Cal. 20.

**2. Humiliation and Indignity** — Rule Stated. — *Mabry v. City Electric R. Co.*, 116 Ga. 624, 94 Am. St. Rep. 141.

There may be a recovery for the indignity put upon a passenger by wrongfully putting him off a car in the presence of others even though no force is employed. *Ray v. Cortland, etc., Traction Co.*, 19 N. Y. App. Div. 530.

**Expulsion Accompanied by Undue Violence, Insult, and Abuse.** — *Gorman v. Southern Pac. R. Co.*, 97 Cal. 1, 33 Am. St. Rep. 157.

**Illegal Exaction of Fare.** — See *Brown v. Rapid R. Co.*, 130 Mich. 483, 9 Detroit Leg. N. 127.

**Mental and Physical Suffering.** — A passenger who has been unlawfully ejected from a train

is entitled to recover for physical pain and for such mental pain and suffering as grow immediately out of, or result directly from, the physical pain he has endured. *Atchison, etc., R. Co. v. Lamoreux*, 5 Kan. App. 813.

**Shock and Mental Suffering.** — The shock received by and the mental suffering of a passenger who is wrongfully ejected may, it has been held, be taken into consideration in the assessment of damages for the ejection. *Cleveland City R. Co. v. Ebert*, 10 Ohio Cir. Dec. 291.

**701. 1. Physical Pain.** — *Texas, etc., R. Co. v. Lynch*, (Tex. Civ. App. 1903) 73 S. W. Rep. 65.

**702. 1. False Imprisonment.** — *St. Louis, etc., R. Co. v. Wilson*, 70 Ark. 136, 91 Am. St. Rep. 74.

**Assault by Carrier's Employee.** — *O'Donnel v. St. Louis Transit Co.*, 107 Mo. App. 34.

**Assault by Fellow Passenger.** — Mental suffering arising from an unprovoked assault by a fellow passenger may be considered as an element of damages. *International, etc., R. Co. v. Giesen*, (Tex. Civ. App. 1902) 69 S. W. Rep. 653.

**Insulting and Abusive Language.** — Damages for insulting and abusive language by the carrier's servant may include compensatory damages for humiliation and injury to the feelings, but not for injury to the character. *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347, 102 Am. St. Rep. 503.

**703. 1. Elements of Damage for Personal Injuries** — General Rule. — *Southern R. Co. v. Myers*, (C. C. A.) 87 Fed. Rep. 149 (applying the *Georgia* statute); *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91; *McAllister v. Peoples R. Co.*, 4 Penn. (Del.) 272; *Chicago, etc., R. Co. v. Tracey*, 109 Ill. App. 563; *Chesapeake, etc., R. Co. v. Jordan*, 76 S. W. Rep. 145, 25 Ky. L. Rep. 574; *Posch v. Southern Pac. R. Co.*, 76 Mo. App. 601; *Hansberger v. Sedalia Electric R., etc., Co.*, 82 Mo. App. 566; *Smedley v. Hestonville, etc., Pass. R. Co.*, 184 Pa. St. 620. See *Duffy v. St. Louis Transit Co.*, 104 Mo. App. 235.

**Bodily and Mental Suffering, Past and Future.** — *Smedley v. Hestonville, etc., Pass. R. Co.*, 184 Pa. St. 620.

**Effect of Injury upon Ability to Labor.** — *St. Louis Southwestern R. Co. v. Byers*, (Tex. Civ. App. 1902) 70 S. W. Rep. 558.

**Shock to Nervous System.** — *Homans v. Boston El. R. Co.*, 180 Mass. 456, 91 Am. St. Rep. 324.

**Marring of Personal Appearance** has been held not to be an element of damages for personal injuries. *Lake St. El. R. Co. v. Gornley*, 108 Ill. App. 59.

**2. Pecuniary Loss.** — *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91.

**Loss of Time.** — *San Antonio, etc., R. Co. v. Turney*, (Tex. Civ. App. 1903) 78 S. W. Rep.



**704.** (3) *Physical and Mental Suffering.* — See note 1.

**705.** (4) *Future Damages.* — See note 1.

**Must Be Reasonably Certain to Result.** — See note 2.

**For Permanent Injuries.** — See note 3.

**707.** *e. MENTAL SUFFERING GENERALLY AS AN ELEMENT — (1) General Rule.* — See note 1.

256; Missouri, etc., R. Co. v. Flood, (Tex. Civ. App. 1904) 79 S. W. Rep. 1106.

**Expense of Employing Servant.** — Willis v. Second Ave. Traction Co., 189 Pa. St. 430.

**Hospital Fees and the Expense of a Nurse, if a nurse is necessary, may be included in the damages.** Montgomery St. R. Co. v. Mason, 133 Ala. 508.

**Reasonable Expense of Medical Attendance.** — There may be a recovery of the amount reasonably expended for medical attendance. Alabama G. S. R. Co. v. Siniard, 123 Ala. 557.

But only the reasonable value of physicians' services is recoverable, and not the amount charged or paid. Bowsher v. Chicago, etc., R. Co., 113 Iowa 16.

And it has been held that the reasonableness of the amount expended for medical attendance must be shown. Gulf, etc., R. Co. v. Bell, 24 Tex. Civ. App. 579; International, etc., R. Co. v. Sampson, (Tex. Civ. App. 1901) 64 S. W. Rep. 692.

**Gratuitous Medical Treatment.** — It has been held that the value of free medical treatment cannot be recovered. Malott v. Woods, 109 Ill. App. 512.

**704. 1. Suffering in Body and Mind.** — Pence v. Wabash R. Co., 116 Iowa 279; Howell v. Lansing City Electric R. Co., (Mich. 1904) 99 N. W. Rep. 406, 11 Detroit Leg. N. 82; Berger v. Chicago, etc., R. Co., 97 Mo. App. 127; Maguire v. St. Louis Transit Co., 103 Mo. App. 459; Smedley v. Hestonville, etc., Pass. R. Co., 184 Pa. St. 620.

**Mental Suffering.** — International, etc., R. Co. v. Anchonda, (Tex. Civ. App. 1903) 75 S. W. Rep. 557.

**Mental Anguish Need Not Be Specially Pleaded.** — Kennedy v. St. Louis Transit Co., 103 Mo. App. 1.

**Fright Connected with Actual Physical Injury.** — Denver, etc., R. Co. v. Roller, (C. C. A.) 100 Fed. Rep. 738.

**Fright Resulting in Shock to Nervous System.** — Kirkpatrick v. Canadian Pac. R. Co., 35 N. Bruns. 598.

**705. 1. Future Damages.** — Chicago City R. Co. v. Carroll, 206 Ill. 318, affirming 102 Ill. App. 202; Goldsmith v. Holland Bldg. Co., 182 Mo. 597; Ayres v. Delaware, etc., R. Co., 158 N. Y. 254, affirming 4 N. Y. App. Div. 511.

**Loss of Probable Earnings.** — Houston, etc., R. Co. v. McCullough, 22 Tex. Civ. App. 208; Missouri, etc., R. Co. v. White, 22 Tex. Civ. App. 424.

**Medical Expenses and Loss of Wife's Services.** — Indianapolis St. R. Co. v. Robinson, 157 Ind. 414.

**Future Physical Suffering.** — Howell v. Lansing City Electric R. Co., (Mich. 1904) 99 N. W. Rep. 406, 11 Detroit Leg. N. 82; Wolf v. Third Ave. R. Co., 67 N. Y. App. Div. 605; Pecos, etc., R. Co. v. Williams, (Tex. Civ. App. 1903) 78 S. W. Rep. 5.

**Future Pain and Suffering.** — Schenkel v. Pittsburg, etc., Traction Co., 194 Pa. St. 182.

**Future Suffering, Physical and Mental.** — Denver, etc., R. Co. v. Roller, (C. C. A.) 100 Fed. Rep. 738; Maguire v. St. Louis Transit Co., 103 Mo. App. 459.

**Future Mental Suffering.** — Smitson v. Southern Pac. R. Co., 37 Oregon 74; Texas, etc., R. Co. v. Goldman, (Tex. Civ. App. 1899) 51 S. W. Rep. 275.

**Future Suffering, Physical and Mental, and Loss of Time, Etc.** — International, etc., R. Co. v. Anthony, 24 Tex. Civ. App. 9.

**2. Future Disability or Suffering Must Be Reasonably Certain to Result.** — McBride v. St. Paul City R. Co., 72 Minn. 291; Albin v. Chicago, etc., R. Co., 103 Mo. App. 308; Ayres v. Delaware, etc., R. Co., 158 N. Y. 254, affirming 4 N. Y. App. Div. 511; Brown v. Manhattan R. Co., 82 N. Y. App. Div. 222; Smitson v. Southern Pac. R. Co., 37 Oregon 74; International, etc., R. Co. v. Clark, 96 Tex. 349, reversing (Tex. Civ. App. 1902) 71 S. W. Rep. 587; Pecos, etc., R. Co. v. Williams, (Tex. Civ. App. 1903) 78 S. W. Rep. 5.

**3. Damages for Permanent Injuries — Generally.** — See Pryor v. Metropolitan St. R. Co., 85 Mo. App. 367.

**Diminished Capacity to Earn Money.** — McCaw v. Union Traction Co., 205 Pa. St. 271; St. Louis Southwestern R. Co. v. Byers, (Tex. Civ. App. 1902) 70 S. W. Rep. 558.

**Diminished Capacity to Work.** — See Kroner v. St. Louis Transit Co., 107 Mo. App. 41, holding that an injury to a married woman, resulting in disability to perform the household duties which she had performed for her husband, does not afford her the right to recover for the loss, and this common-law rule is not changed by a statute which gives the wife a right to her separate earnings.

**707. 1. Mental Suffering as an Element of Damages.** — Texarkana, etc., R. Co. v. Anderson, 67 Ark. 123; Hot Springs R. Co. v. Deloney, 65 Ark. 177, 67 Am. St. Rep. 913; Malott v. Woods, 109 Ill. App. 512; Kansas City, etc., R. Co. v. Dalton, 65 Kan. 661; Deming v. Chicago, etc., R. Co., 80 Mo. App. 152, 2 Mo. App. Rep. 547; Snyder v. Wabash R. Co., 85 Mo. App. 495; Rawlings v. Wabash R. Co., 97 Mo. App. 511; Cleveland City R. Co. v. Ebert, 10 Ohio Cir. Dec. 291. See Spade v. Lynn, etc., R. Co., 172 Mass. 488, 70 Am. St. Rep. 298; Grayson v. St. Louis Transit Co., 100 Mo. App. 60.

**Sickness as a Physical Injury.** — It has been held that sickness which is caused by a passenger's having to walk back when carried by her station is not a contemporaneous physical injury within the meaning of the rule allowing damages for fright and mental suffering when connected with a physical injury. Deming v. Chicago, etc., R. Co., 80 Mo. App. 152, 2 Mo. App. Rep. 547.

**707.** (2) *The More Liberal Rule.* — See note 2.

**708.** 4. *Exemplary Damages* — *a. GENERAL RULE.* — See note 1.

*b. FOR MALICE OR WILFULNESS — Intent or Indifference Must Be Shown.*  
— See note 2.

**707.** 2. *The Better Rule.* — Missouri, etc., R. Co. v. Ball, 25 Tex. Civ. App. 500; Missouri, etc., R. Co. v. Tarwater, (Tex. Civ. App. 1903) 75 S. W. Rep. 937.

*Peril and Fright.* — Kirkpatrick v. Canadian Pac. R. Co., 35 N. Bruns. 598.

*Mental Anguish Caused by the Profane and Indecent Language of Fellow Passengers.* — Houston East, etc., R. Co. v. Perkins, 21 Tex. Civ. App. 508.

*Fright.* — Stewart v. Arkansas Southern R. Co., 112 La. 764.

*Anguish Caused by Separation of Mother from Children.* — International, etc., R. Co. v. Anchonda, (Tex. Civ. App. 1902) 68 S. W. Rep. 743.

**708.** 1. *Exemplary Damages — General Rule* — *Mississippi.* — Jackson Electric R., etc., Co. v. Lowry, 79 Miss. 431.

*North Carolina.* — Story v. Norfolk, etc., R. Co., 133 N. Car. 59.

*Ohio.* — Carr v. Toledo Traction Co., 10 Ohio Cir. Dec. 296, 19 Ohio Cir. Ct. 281.

*South Carolina.* — Gillman v. Florida Cent., etc., R. Co., 53 S. Car. 210; Glover v. Charleston, etc., R. Co., 57 S. Car. 228; Appleby v. South Carolina, etc., R. Co., 60 S. Car. 48; Oliver v. Columbia, etc., R. Co., 65 S. Car. 1; Griffin v. Southern R. Co., 66 S. Car. 77.

*Tennessee.* — Louisville, etc., R. Co. v. Ray, 101 Tenn. 1; Knoxville Traction Co. v. Lane, 103 Tenn. 376; Memphis St. R. Co. v. Shaw, 110 Tenn. 467; Choctaw, etc., R. Co. v. Hill, 110 Tenn. 396.

*Texas.* — Denison, etc., R. Co. v. Randell, 29 Tex. Civ. App. 460.

And see generally the title *DAMAGES*.

*Whether Recoverable as of Right.* — It has been said that punitive damages, being apart from compensation, are not recoverable as a matter of right; their imposition is discretionary with the jury, acting with regard to the enormity of the wrong and the necessity of preventing similar wrongs. Louisville, etc., R. Co. v. Bizzell, 131 Ala. 429, holding a charge faulty in asserting that the plaintiff would, under given circumstances, be entitled to recover punitive damages.

2. *Intent or Wanton Indifference Must Be Shown.* — St. Louis, etc., R. Co. v. Wilson, 70 Ark. 136, 91 Am. St. Rep. 74; Ristine v. Blocker, 15 Colo. App. 224; Central of Georgia R. Co. v. Wood, 118 Ga. 172; Kansas City, etc., R. Co. v. Little, 66 Kan. 378, 97 Am. St. Rep. 376; Louisville, etc., R. Co. v. Bell, 100 Ky. 203; Northern Cent. R. Co. v. Newman, 98 Md. 507; Barnett v. Chicago, etc., R. Co., 75 Mo. App. 446; Dorsey v. Atchison, etc., R. Co., 83 Mo. App. 528; Griffin v. Southern R. Co., 65 S. Car. 122; Aaron v. Southern R. Co., 68 S. Car. 98; Pickett v. Southern R. Co., 69 S. Car. 445; Fort v. Southern R. Co., 64 S. Car. 423.

*Mere Negligent Omission of Duty* on the part of a railway conductor does not call for punitive damages. Southern R. Co. v. Hobbs, 118 Ga. 232,

*Actual Damage Is Not Essential.* — Birmingham R., etc., Co. v. Nolan, 134 Ala. 329.

*Intentional Character of the Act.* — It has been held that it is error to charge a jury that "the intentional doing of an unlawful act would be construed malicious." Kibler v. Southern R. Co., 62 S. Car. 252.

*Illustrations — Exemplary Damages Recoverable — Insult Accompanying Act.* — Pittsburg, etc., R. Co. v. Ensign, 6 Ohio Cir. Dec. 616.

*Wilful Refusal to Carry.* — Exemplary damages may be given for a wilful refusal to carry. Story v. Norfolk, etc., R. Co., 133 N. Car. 59. Thus a wilful refusal to carry, as by refusing to stop a street car when duly signaled by an intending passenger, may be a ground for imposing exemplary damages. Jackson Electric R., etc., Co. v. Lowry, 79 Miss. 431. But in order to entitle a plaintiff to punitive damages for a failure to stop at a flag station to take him on it must appear that his signal was seen. Thomas v. Southern R. Co., 122 N. Car. 1005. But a bare refusal to carry, though wrongful, does not justify the imposition of punitive damages. Barnett v. Chicago, etc., R. Co., 75 Mo. App. 446.

*Wilful Refusal to Stop Car for Passenger.* — Northern Texas Traction Co. v. Peterman, (Tex. Civ. App. 1904) 80 S. W. Rep. 535.

*Failure to Stop Train at Flag Station on Signal.* — Yazoo, etc., R. Co. v. Faust, (Miss. 1902) 32 So. Rep. 9; Yazoo, etc., R. Co. v. White, 82 Miss. 120; Yazoo, etc., R. Co. v. Mitchell, 83 Miss. 179; Southern R. Co. v. Lanning, 83 Miss. 161.

*Failure to Carry According to Agreement* — Pickens v. South Carolina, etc., R. Co., 54 S. Car. 498.

*Premature Starting of Train Contrary to Agreement.* — Gillman v. Florida Cent., etc., R. Co., 53 S. Car. 210.

*Delay in Carrying.* — Illinois Cent. R. Co. v. Pearson, 80 Miss. 26; Miller v. Southern R. Co., 69 S. Car. 116.

*Wantonly Carrying Beyond Destination.* — Birmingham R., etc., Co. v. Nolan, 134 Ala. 329; Yazoo, etc., R. Co. v. Smith, 82 Miss. 656; Memphis St. R. Co. v. Shaw, 110 Tenn. 467.

*Wanton Ejection of Passenger.* — Western, etc., R. Co. v. Ledbetter, 99 Ga. 318; Dagnall v. Southern R. Co., 69 S. Car. 110.

*Excessive Force in Ejecting Passenger.* — Nashville St. R. Co. v. Griffin, 104 Tenn. 81.

*Unlawful and Violent Ejection.* — Choctaw, etc., R. Co. v. Hill, 110 Tenn. 396.

*Wrongful Ejection of Passenger Accompanied by Insulting Language.* — Atlanta Consol. St. R. Co. v. Keeny, 99 Ga. 266.

*Wrongful Expulsion Accompanied by Undue Force and Insults* authorizes the giving of exemplary damages. Gorman v. Southern Pac. R. Co., 97 Cal. 1, 33 Am. St. Rep. 157; Louisville, etc., R. Co. v. Joplin, (Ky. 1900) 55 S. W. Rep. 206.

*Ejection from Train for Nonpayment of Extra Train Fare* does not entitle the plaintiff to re-

**711.** Malice Inferred from Circumstances. — See note 1.

c. FOR GROSS NEGLIGENCE. — See note 2.

**713.** d. DISTINCTION BETWEEN THE ACT OF THE CARRIER AND THAT OF ITS SERVANT — (1) *Exemplary Damages for Carrier's Act.* — See note 1.

**715.** (2) *For the Act of a Servant* — Rule that the Act Must Be Authorized or Ratified. — See note 1.

**716.** Evidence of Authorization or Ratification. — See note 1.

**717.** The Better Rule. — See note 1.

**718.** 5. Amount of Damages — a. GENERALLY. — See note 1.

cover exemplary damages although he was not given an opportunity to buy a ticket because of the negligence of the ticket agent in not being at his post. *Atchison, etc., R. Co. v. Lamoreux*, 5 Kan. App. 813.

**Unlawful Ejection of Passenger through Mistake.** — *Louisville, etc., R. Co. v. Champion*, 68 S. W. Rep. 143, 24 Ky. L. Rep. 87; *Jacobs v. Third Ave., R. Co.*, 71 N. Y. App. Div. 199; *Carr v. Toledo Traction Co.*, 10 Ohio Cir. Dec. 296, 19 Ohio Cir. Ct. 281. But see *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560, 102 Am. St. Rep. 469.

Where the conductor on a street car in good faith believed from the unusual and suspicious appearance of a coin tendered him by a passenger, that it was not genuine but counterfeit, and ejected the passenger for refusing to pay in other money, it was held that the punitive damages could not be recovered. *Vassau v. Madison Electric R. Co.*, 106 Wis. 301.

**Extorting Fare by Threat to Eject Wrongfully.** — *Chiles v. Southern R. Co.*, 69 S. Car. 327.

**Insult to and Abuse of Passenger by Conductor** justifies the giving of punitive damages. *Louisville, etc., R. Co. v. Donaldson*, (Ky. 1897) 43 S. W. Rep. 439; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376.

**Failure to Reserve Stateroom** when the passenger does not notify the carrier within the stipulated time does not entitle the passenger to exemplary damages. *Clark v. New York, etc., R. Co.*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 691.

**Passenger Bitten by Dog at Station — Punitive Damages Not Recoverable.** — *Trinity, etc., R. Co. v. O'Brien*, 18 Tex. Civ. App. 692.

**Wilfulness and Wantonness a Question of Fact.** — *Griffin v. Southern R. Co.*, 65 S. Car. 122; *Norman v. Southern R. Co.*, 65 S. Car. 517, 95 Am. St. Rep. 809.

**711. 1. Recklessness.** — *Glover v. Charleston, etc., R. Co.*, 57 S. Car. 228.

**2. Exemplary Damages for Gross Negligence — Rule Stated.** — It is sometimes said that punitive damages may be awarded if the carrier was guilty of gross negligence. *Kansas City, etc., R. Co. v. Little*, 66 Kan. 378, 97 Am. St. Rep. 376; *Clarke v. Louisville, etc., R. Co.*, 101 Ky. 34; *Felton v. Holbrook*, (Ky. 1900) 56 S. W. Rep. 506; *Louisville, etc., R. Co. v. McClain*, 66 S. W. Rep. 391, 23 Ky. L. Rep. 1878; *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1; *Barker v. Ohio River R. Co.*, 51 W. Va. 434, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 711.

**Ejection through Gross Negligence.** — *Atchison, etc., R. Co. v. Long*, 5 Kan. App. 644.

**Mistake of Ticket Agent in Antedating a Limited Ticket** has been held not to be such gross

negligence as authorizes the recovery of punitive damages. *Illinois Cent. R. Co. v. Moore*, 79 Miss. 766.

**713. 1. Exemplary Damages for Act of Carrier.** — See *Wigton v. Metropolitan St. R. Co.*, 38 N. Y. App. Div. 207.

**715. 1. Rule that Servant's Act Must Be Authorized or Ratified.** — *Trabing v. California Nav., etc., Co.*, 121 Cal. 137; *Ristine v. Blocker*, 15 Colo. App. 224; *Patterson v. New Orleans, etc., R., etc., Co.*, 110 La. 797; *Wright v. Glens Falls, etc., St. R. Co.*, 24 N. Y. App. Div. 619, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714, 715; *Wigton v. Metropolitan St. R. Co.*, 38 N. Y. App. Div. 207; *Eddy v. Syracuse Rapid Transit R. Co.*, 50 N. Y. App. Div. 109; *Rowe v. Brooklyn Heights R. Co.*, 71 N. Y. App. Div. 474.

**Assault by Employee.** — *Haver v. Central R. Co.*, 64 N. J. L. 312.

**716. 1. Evidence of Authorization or Ratification.** — *Lezinsky v. Metropolitan St. R. Co.*, (C. C. A.) 88 Fed. Rep. 437; *Vassau v. Madison Electric R. Co.*, 106 Wis. 301.

**Retention of Servant Assaulting Passenger and Providing for His Defense.** — *Denison, etc., R. Co. v. Randell*, 29 Tex. Civ. App. 460.

**717. 1. Exemplary Damages Recoverable for Act of Carrier's Servant Without Reference to Authorization, Etc.** — *Lexington R. Co. v. Cozine*, 111 Ky. 799; *Berger v. Chicago, etc., R. Co.*, 97 Mo. App. 127; *Reeves v. Southern R. Co.*, 68 S. Car. 89; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376.

**718. 1. Amount of Damage — General Rule — Georgia.** — *Central of Georgia R. Co. v. Stancel*, 118 Ga. 142. See *Central of Georgia R. Co. v. Almand*, 116 Ga. 780; *Macon R., etc., Co. v. Vining*, 120 Ga. 511.

*Illinois.* — *Chicago, etc., R. Co. v. Tracey*, 109 Ill. App. 563.

*Indiana.* — *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360.

*Kentucky.* — *Louisville, etc., R. Co. v. Carothers*, 65 S. W. Rep. 833, 23 Ky. L. Rep. 1673.

*Mississippi.* — *Yazoo, etc., R. Co. v. Smith*, 82 Miss. 656.

*Missouri.* — *Bolton v. Missouri Pac. R. Co.*, 172 Mo. 92; *Parks v. St. Louis, etc., R. Co.*, 178 Mo. 108, 101 Am. St. Rep. 425.

*New York.* — *Nash v. Yonkers R. Co.*, 63 N. Y. App. Div. 315.

*Oregon.* — *Smitson v. Southern Pac. R. Co.*, 37 Oregon 74.

*Pennsylvania.* — *Willis v. Second Ave. Traction Co.*, 189 Pa. St. 430.

*Texas.* — *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203.

**Inadequate Damages.** — In an action by a passenger to recover damages for an assault by a

**718.** *b. CIRCUMSTANCES AFFECTING THE AMOUNT FOR PERSONAL INJURIES* — (1) *Passenger's Position in Life, Business, Etc.* — See note 2.

**719.** (3) *Deduction of Insurance Money.* — See note 2.

**720.** *c. EXCESSIVE DAMAGES* — (1) *Compensatory.* — See note 1.

servant of the carrier a verdict for eighty-five cents has been held to be inadequate. *Hanson v. Urbana, etc., El. St. R. Co., 75 Ill. App. 474.* And a verdict for six cents for the laceration of a finger has been set aside as inadequate. *Tooker v. Brooklyn Heights R. Co., 80 N. Y. App. Div. 371.*

**718. 2. Position, Profession, etc., as Affecting Amount.** — See *Central of Georgia R. Co. v. Almand, 116 Ga. 780.*

**719. 2. No Deduction Is to Be Made for Insurance Money.** — *Baltimore City Pass R. Co. v. Baer, 90 Md. 97.*

**720. 1. Excessive Damages — Rule Stated.** — *Southern R. Co. v. Crowder, 130 Ala. 256; Central of Georgia R. Co. v. Lippman, 110 Ga. 665; Louisville, etc., R. Co. v. Jordan, 112 Ky. 473; Kennedy v. St. Louis Transit Co., 103 Mo. App. 1.*

**Failure to Hold Train According to Agreement.** — *Southern R. Co. v. Marshall, 111 Ky. 560,* holding a verdict for two hundred and fifty dollars to be excessive damages for a failure to hold a train for the plaintiff according to agreement; *St. Louis Southwestern R. Co. v. Germany, (Tex. Civ. App. 1900) 56 S. W. Rep. 586,* holding fifty dollars to be not excessive for starting a train notwithstanding a promise of the conductor to wait until the plaintiff could buy a ticket.

**Failure to Stop for Passenger at Flag Station.** — *Yazoo, etc., R. Co. v. Faust, (Miss. 1903) 34 So. Rep. 356,* wherein a verdict for three thousand three hundred and thirty-three dollars was held excessive for illness produced in consequence of having to walk as a result of a train's not stopping for the plaintiff at a flag station; *Gulf, etc., R. Co. v. Gaedecke, (Tex. Civ. App. 1897) 39 S. W. Rep. 312,* holding one hundred and fifty dollars to be excessive.

**Delay in Carrying.** — *International, etc., R. Co. v. Harder, (Tex. Civ. App. 1904) 81 S. W. Rep. 356,* holding a verdict for one hundred and fifty dollars to be excessive.

**Failure to Carry to Destination.** — *Cleveland, etc., R. Co. v. Quillen, 22 Ind. App. 496,* holding one hundred and fifty dollars to be excessive where the plaintiff, through a mistake of the conductor, was made to alight before reaching her destination.

**Setting Down Passenger Short of Station.** — *Louisville, etc., R. Co. v. Covetts, (Ky. 1904) 82 S. W. Rep. 975,* holding five hundred dollars not to be excessive; *Gulf, etc., R. Co. v. Moore, (Tex. Civ. App. 1904) 80 S. W. Rep. 426,* holding a verdict for one thousand dollars to be excessive; *Sievers v. Dallas, etc., Nav. Co., 24 Wash. 302,* holding six hundred dollars not to be excessive.

**Carrying Beyond Station — Excessive.** — Verdicts for carrying passengers beyond their stations have been held excessive as follows: *Texarkana, etc., R. Co. v. Anderson, 67 Ark. 123 (five hundred dollars); Southern R. Co. v. Humphries, 108 Ga. 591 (five hundred dollars); Central of Georgia R. Co. v. Wood, 118*

*Ga. 172 (two hundred and forty-nine dollars and fifty cents).*

**Not Excessive.** — Verdicts in such cases have been held not to be excessive as follows: *Louisville, etc., R. Co. v. Renicker, 17 Ind. App. 619 (four hundred dollars); Louisville, etc., R. Co. v. Guy, (Ky. 1896) 37 S. W. Rep. 1043 (two hundred and eighteen dollars, where the plaintiff, who was in a delicate condition, had been compelled to walk four hundred yards, during a hot day, on a rough and rocky road); Rawlings v. Wabash R. Co., 97 Mo. App. 511 (one hundred and twenty-five dollars); Texas, etc., R. Co. v. Gott, 20 Tex. Civ. App. 335 (five hundred dollars).*

**Carrying Woman Passenger Beyond Destination and Insulting Her.** — *San Antonio Traction Co. v. Crawford, (Tex. Civ. App. 1902) 71 S. W. Rep. 306,* holding one hundred dollars not to be excessive.

**Unlawful Ejection of Passenger — Excessive.** — Verdicts for unlawfully ejecting passengers have been held excessive as follows: *Procter v. Southern California R. Co., 130 Cal. 20 (four hundred and sixty dollars and fifty cents); Georgia R. Co. v. Baldoni, 115 Ga. 1013 (one thousand two hundred and fifty dollars); Bader v. Southern Pac. R. Co., 52 La. Ann. 1060 (seven hundred and fifty dollars); Kleven v. Great Northern R. Co., 70 Minn. 79 (two hundred and twenty-five dollars); Louisville, etc., R. Co. v. Turner, 100 Tenn. 226 (three hundred dollars for the unlawful ejection of a passenger without rudeness or malice); Houston, etc., R. Co. v. Crone, (Tex. Civ. App. 1896) 37 S. W. Rep. 1074 (three thousand five hundred dollars); Masteron v. Chicago, etc., R. Co., 102 Wis. 571 (eight hundred and fifty dollars).*

**Not Excessive.** — Verdicts for the unlawful ejection of passengers have been held not excessive as follows: *Pennsylvania R. Co. v. Palmer, (C. C. A.) 127 Fed. Rep. 956 (one thousand dollars); Baltimore, etc., R. Co. v. Norris, 17 Ind. App. 189, 60 Am. St. Rep. 166 (one hundred and fifty dollars); Atchison, etc., R. Co. v. Lamoreux, 5 Kan. App. 813 (two hundred and twenty-five dollars); Louisville, etc., R. Co. v. Joplin, (Ky. 1900) 55 S. W. Rep. 206 (five hundred dollars); Illinois Cent. R. Co. v. Jackson, (Ky. 1904) 79 S. W. Rep. 1187 (three hundred and fifty dollars); Chamberlain v. Lake Shore, etc., R. Co., 122 Mich. 477 (six hundred and fifty dollars, where the passenger was compelled to walk five miles); Gisleson v. Minneapolis, etc., R. Co., 85 Minn. 329 (one hundred and fifty dollars); Choctaw, etc., R. Co. v. Hill, 110 Tenn. 396 (two hundred and fifty dollars); Sprenger v. Tacoma Traction Co., 15 Wash. 660 (one hundred dollars).*

**Unlawful Ejection in a Rough Manner.** — *Gulf, etc., R. Co. v. Moorman, (Tex. Civ. App. 1898) 46 S. W. Rep. 662,* holding three hundred dollars not to be excessive.

**Wrongful Ejection Accompanied by Violence, Insult, and Abuse.** — *Gorman v. Southern Pac.*

**722.** (2) *Exemplary*. — See note 1.

**723. CARRY.** — See note 1.

R. Co., 97 Cal. 1, 33 Am. St. Rep. 157, holding five hundred dollars not to be excessive damages for a wrongful expulsion accompanied by undue violence, insult, and abuse.

**Wrongful Expulsion Accompanied by Insulting Treatment.** — Atchison, etc., R. Co. *v.* Cuniffe, (Tex. Civ. App. 1900) 57 S. W. Rep. 692, holding five hundred dollars not to be excessive; Houston, etc., R. Co. *v.* McNeel, (Tex. Civ. App. 1903) 76 S. W. Rep. 206, holding a verdict for two hundred and fifty dollars not to be excessive.

**Assault by Servant.** — Missouri, etc., R. Co. *v.* Gaines, (Tex. Civ. App. 1904) 79 S. W. Rep. 1104, holding that one thousand dollars was not excessive.

**False Arrest of Passenger.** — Grayson *v.* St. Louis Transit Co., 100 Mo. App. 60, holding a verdict for one thousand four hundred and fifty dollars for actual damages to be excessive.

**Serious Personal Injury — Not Excessive.** — Pence *v.* Wabash R. Co., 116 Iowa 279, holding one thousand seven hundred and fifty dollars not to be excessive; Louisville, etc., R. Co. *v.* Bowlds, 64 S. W. Rep. 957, 23 Ky. L. Rep. 1202, holding a verdict for two thousand five hundred dollars not to be excessive for an injury rendering the passenger a permanent cripple.

**Compelling White Woman to Ride in Coach for Negroes.** — Missouri, etc., R. Co. *v.* Ball, 25 Tex. Civ. App. 500, holding one thousand dollars to be excessive.

**722. 1. Verdict Including Exemplary Damages.** — Yazoo, etc., R. Co. *v.* Mitchell, 83 Miss. 179.

**723. 1. Carrying Arms — Carrying Concealed Weapons.** — See Culbertson *v.* State, 119 Ga. 805.

**Carrying Away — Larceny — Steal.** — State *v.* Shutts, 69 N. J. L. 206.

**Carrying on Business — Implies Series of Acts.** — See State *v.* Shipley, 98 Md. 657.

**Covenants.** — The operation of a railroad is not *carrying* on a business within a restrictive covenant not to *carry* on any offensive trade or business. Bohnsack *v.* McDonald, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 493.

**Money Lender.** — The constant daily repetition by a person of the same act, each act bringing with it a money return, is the *carrying* on by that person of a "business" in that particular line. A person who opens an office, advertises that he has money to lend on application and makes daily and hourly loans at interest, particularly for short periods, on so extensive a scale as to necessitate the employment of clerks, "*carries* on the business" of money lending, and is subject to a license, though the money loaned be his own. State *v.* Tolman, 106 La. 662.

**Emigrant Agent.** — In construing a statute providing that "no person shall *carry* on the business of an emigrant agent," etc., the court said: "The nature of the offense, it would seem, involves a succession or continuation of acts of hiring or soliciting sufficient to justify an inference that such acts were done in pursuit of the business or vocation of hiring or soliciting laborers, etc." State *v.* Napier, 63 S. Car. 65.

# CARRYING WEAPONS.

By B. B. BLYDENBURGH.

**729. I. THE OFFENSE — 1. At Common Law.** — See note 1.

**2. By Statute.** — See note 2.

**730. II. CONSTITUTIONALITY OF STATUTES.** — See note 1.

**731. Merely Police Regulations.** — See note 1.

**III. WHAT AMOUNTS TO A CARRYING — Locomotion Not Necessary.** — See note 2.

**About the Person.** — See note 3.

**732. IV. WHAT AMOUNTS TO A CONCEALMENT — Concealment Material.** — See note 1.

**729. 1. No Offense at Common Law.** — *Walter v. State*, 15 Ohio Dec. 466, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729; *Judy v. Lashley*, 50 W. Va. 628, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729.

**Going Armed with Unusual or Dangerous Weapons.** — See *State v. Hogan*, 63 Ohio St. 202, 81 Am. St. Rep. 626.

**2. When Conviction of Other Offense Not Bar to Prosecution.** — A conviction for assault and battery with a weapon will not bar a prosecution for carrying concealed weapons. *Brown v. State*, (Ala. 1904) 37 So. Rep. 408.

Nor is a prosecution for carrying a weapon on and about the person barred by a previous conviction for going near the private residence of another and rudely displaying a pistol, under Pen. Code Tex., 1895, art. 334. *Nichols v. State*, 37 Tex. Crim. 616.

**730. 1. Statutes Against Carrying Concealed Weapons Constitutional — Mississippi.** — *Wilson v. State*, 81 Miss. 404.

*North Carolina.* — *State v. Boone*, 132 N. Car. 1107. See also *State v. Reams*, 121 N. Car. 556.

*Ohio.* — See *State v. Hogan*, 63 Ohio St. 202, 81 Am. St. Rep. 626.

*Oklahoma.* — *Walburn v. Territory*, 9 Okla. 23.

**In Idaho** it has been held that, while a statute prohibiting the carrying of concealed weapons is valid, a statute prohibiting the carrying of weapons in any manner in cities, towns, and villages, is void. *In re Brickey*, 8 Idaho 597.

**Municipal Ordinances.** — The legislature has power to authorize municipal corporations to pass ordinances prohibiting the carrying of concealed weapons, although the same offense is punishable under a state statute. *Ocean Springs v. Green*, 77 Miss. 472; *Abbeville v. Leopard*, 61 S. Car. 99.

But in *West Virginia* it has been held that, where the offense is fully covered by the state statutes, a municipality cannot pass such an ordinance unless expressly authorized by charter. *Judy v. Lashley*, 50 W. Va. 628.

An ordinance which prohibits the carrying of weapons under circumstances where it is authorized by the constitution and general laws

of the state, is void. *State v. Rosenthal*, 75 Vt. 295.

**731. 1. Statutes Are Police Regulations.** — See *Walburn v. Territory*, 9 Okla. 23.

**2. What Not a Carrying "to" a Place.** — Under a statute prohibiting the carrying of a pistol "to" a public gathering, one who, after arriving at such gathering, comes into possession of a pistol, is not liable to prosecution. *Modesette v. State*, 115 Ga. 582; *Culbertson v. State*, 119 Ga. 805, wherein the defendant came into possession of the pistol at a spring from which a church congregation was using water, and which was so near the church as to be, in legal contemplation, at the church.

**Possession of Concealed Weapon — Presumption of Criminal Intent.** — The possession of a concealed pistol raises the presumption of criminal intent; and where the defendant claimed that he was merely carrying the pistol home from the shop where he bought it, it was held that it rested on him to rebut the presumption to the satisfaction of the jury. *State v. Hinnant*, 120 N. Car. 572. See also *State v. Reams*, 121 N. Car. 556.

**Finding a Weapon.** — That the defendant claimed to have found the weapon a short time before boarding the car where he drew it upon the conductor was no defense to carrying it. See *Bowen v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 994.

**Act Continuous — Successive Manifestations.** — Evidence that the defendant was seen with a concealed weapon at different places short distances apart on a railroad track by different persons shows but a single offense. *State v. Boggan*, 120 N. Car. 590. Compare *Morgan v. State*, 119 Ga. 964.

**3. Carrying in Wagon.** — A pistol in a box in a wagon in which the defendant and others are riding is not on and about his person. *Hardy v. State*, 37 Tex. Crim. 511.

**732. 1. State v. Hale**, 70 Mo. App. 143; *State v. Reams*, 121 N. Car. 556.

Where there was a conflict of evidence as to concealment, it was held to be error to instruct the jury to convict if they believed the evidence beyond a reasonable doubt. *Hampton v. State*, 133 Ala. 180.

**732.** What Amounts to Concealment. — See notes 2, 3.

**733.** Need Not Be on Person. — See note 1.

Sufficiency of Proof — Illustrations. — See note 2.

**734.** See notes 1, 2, 3.

**735.** V. INTENT OF THE ACT. — See notes 1, 2, 3.

**732. 2.** It is for the jury to say whether a weapon was concealed where the handle and two inches of the breech were visible. *State v. Reams*, 121 N. Car. 556.

**3. Must Be Open to Ordinary Observation.** — *Driggers v. State*, 123 Ala. 46. But see *Stripling v. State*, 114 Ga. 538, wherein an instruction that the weapon "must be carried in such an open manner, and so fully exposed to view, that a person meeting the one with the weapon would readily see and know that he had a pistol about his person," was held erroneous.

**733. 1. Where the Weapon Is Not Concealed on the Person.** — *Willis v. State*, 105 Ga. 633, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 733.

**2. Sufficiency of Evidence — Illustrations.** — Where the sole witness for the state testified that he talked with the defendant and another person, and that after leaving them he saw the defendant pointing a pistol; that he had no doubt it was a pistol, though it could have been an imitation pistol; and where the evidence of the defendant's companion showed that if the defendant had a pistol he must have had it concealed immediately before and after it was seen by the state's witness, a conviction was sustained. *Smith v. State*, (Miss. 1898) 24 So. Rep. 316.

Where all the evidence "tended" to show that the defendant carried a concealed weapon, it was held, nevertheless, to be error to charge that the jury must convict if they believed all the evidence. *Brewer v. State*, 113 Ala. 106.

Where the state's evidence showed that defendant fired two shots and that he had no gun with him at the time, and defendant's witnesses testified that he had a rifle but no pistol, and fired one shot, a conviction for carrying a pistol was affirmed. *Sexton v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 920.

In *Smith v. State*, 113 Ga. 645, the evidence was held insufficient to justify a conviction.

**Evidence of Contemporaneous Acts.** — *Walburn v. Territory*, 9 Okla. 23; *Gainey v. State*, (Ala. 1904) 37 So. Rep. 355; *State v. Pigg*, 85 Mo. App. 399; *Little v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 310; *Gay v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 573. See also *Elliott v. State*, 39 Tex. Crim. 242; *Mumford v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 1063.

**734. 1. Pistol Found upon Search After Arrest.** — That the arrest and search may have been unlawful is no objection to evidence that weapons have been found concealed upon the prisoner. *Scott v. State*, 113 Ala. 64.

**Pistol Found upon Search After Arrest for Another Offense — The Officer May so Testify.** — *Dozier v. State*, 107 Ga. 708.

**Arrest Without Warrant.** — Under the *Florida* statute a person conducting himself in an orderly manner may not be arrested without a warrant on a charge of carrying a concealed weapon. *Roberson v. State*, 43 Fla. 156.

But under the *Colorado* statute (3 Mills's

Annot. Stat. Colo., § 1364) it is the officer's duty to arrest without a warrant. *Keady v. People*, 32 Colo. 57.

Under the *Texas* statute arrest without warrant may be made only when the officer knows of his own knowledge or is informed by some credible person. See *Morawietz v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 997.

**Tramps** may be arrested without warrant for carrying weapons. *Rev. Stat. Ohio*, § 6995. *State v. Pate*, 5 Ohio Dec. 732, 7 Ohio N. P. 543.

**2. Seeing Impression of Pistol under Coat — Not Sufficient Without Other Evidence.** — *Stripling v. State*, 114 Ga. 538.

**Feeling a Pistol.** — Where a witness testified that in a scuffle he had his hand on what he believed to be a pistol, it was held that the testimony was admissible. *Harper v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 182.

**3. Proof of a Previous Habit of Carrying a Concealed Pistol** is not admissible under a charge of carrying a concealed weapon at a certain time and place. *Oliver v. State*, 106 Ga. 142.

**Proof of Defendant's Carrying Pistol at Another Time.** — In *Alabama*, on the trial of one indicted for carrying concealed weapons, the state may show that he had been seen with a pistol within twelve months prior to the finding of the indictment. *Brown v. State*, (Ala. 1904) 37 So. Rep. 408.

But where the state's evidence tends to show that the defendant carried a concealed pistol about twelve or one o'clock in the day, he may not show that he did not own a pistol nor that he had not one about his clothing at his home in the morning. *Norris v. State*, 132 Ala. 12.

**Manslaughter — Evidence.** — On a trial for manslaughter in *Alabama* it is error to permit evidence that the weapon was concealed to go to the jury against the defendant's objection. *Henson v. State*, 114 Ala. 25.

**735. 1. State v. Brown**, 125 N. Car. 704, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 734.

If the weapon is carried concealed carelessly or indifferently, it is a violation of the *Crim. Code Ala.*, § 4420; a particular intent of concealment is not necessary. *Fielding v. State*, 135 Ala. 56.

**Intent — Defendant's Evidence.** — A defendant may not testify that he did not intend to conceal the weapon. *Barker v. State*, 126 Ala. 83.

**2. Innocent Motive No Defense.** — *Barker v. State*, 126 Ala. 83; *State v. Hamby*, 126 N. Car. 1066; *Clopton v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 173.

**3. No Intent of Violating Law — Illustrations — Carrying as Merchandise.** — See *State v. Costen*, 1 Penn. (Del.) 19.

Under the statute of *Delaware* it was held that the defendant may show that he carried a concealed weapon for a lawful purpose, but that such purpose must be temporary and specific. *State v. Iannucci*, 4 Penn. (Del.) 193.

**736. VI. WEAPONS INCLUDED IN STATUTE — Deadly or Dangerous Weapons. —**  
See note 2.

**737. Statutes Enumerating Weapons. —** See note 1.  
Condition of Weapon. — See note 2.

**738. VII. PERSONS EXEMPTED FROM STATUTE — 1. Officers of the Law. —**  
See notes 2, 3.

**739.** See note 1.

Carrying the pistol of another, concealed, from a repair shop to the owner will not exonerate the carrier. *Goldsmith v. State*, 99 Ga. 253. To like effect, see *State v. Tapit*, 52 W. Va. 473.

But in *Texas* it is not an offense to carry brass knuckles to the owner to return them to him: the jury are to decide whether the time taken and the direction pursued by the carrier were ordinary. *Craine v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 302.

Carrying a pistol to one's place of employment from the place of business of one who refuses to buy it is not a violation of the *Texas* law. *Fields v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 932.

If one finds that a purchaser to whom he has agreed to sell a pistol is away from home, and he goes about other business carrying it, this is a violation of the *Texas* law. *Snider v. State*, (Tex. Crim. 1897) 43 S. W. Rep. 84. See also *Zollicoffer v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 992.

Where one had left the cylinder rod of a pistol at home and carried the arm to various persons to induce them to take chances in a raffle for it, believing it could not be discharged without the rod, he was not guilty of unlawfully carrying a pistol even though it could be discharged without the rod. *White v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 773.

The defendant was sixty years old, a man of high character, who never had carried a pistol before; he took an old-fashioned pistol from his trunk for the purpose of procuring cartridges for it in order to place it in the bank of which he was cashier; finding the store closed he stopped at another place on his way home and showed the pistol to some persons as a curiosity; he then proceeded home and put the pistol back in the trunk; it was held that he should have been acquitted. *Rines v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 1016.

**Carrying to Kill Domestic Animal. —** Where the defendant, who was working in the neighborhood, was asked by the owner of a hog to come and assist in its killing, and carried a pistol both going and returning, and killed the hog with it after the owner had first failed to kill the hog with his own pistol, it was held that there was no exception in the *Texas* statute authorizing the defendant to carry the pistol. *McCauley v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 576. See also *Raifsnider v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 108.

But under the *Arkansas* statute prohibiting the carrying of a pistol as a weapon, one going a distance to the premises of another by by-roads, etc., for the sole purpose of killing hogs does not transgress the law. *Cornwell v. State*, 68 Ark. 447.

**736. 2. Deadly Weapons — Razor. —** *State v. Iannucci*, 4 Penn. (Del.) 193.

A "deadly or dangerous" weapon, under the *South Dakota* riot statute, does not include a driving whip. *State v. Page*, 15 S. Dak. 613.

**737. 1. Statutes Enumerating Dangerous or Deadly Weapons. —** A knife having the shape of what is commonly known as a "butcher's knife," eleven inches in length including the blade and handle, old and worn down somewhat in the middle of the blade on the sharp side, and coming to a sharp point, is a knife "of like kind or description" as a bowie knife, within *Crim. Code Ala.*, § 3775, prohibiting the carrying of concealed weapons. *Brewer v. State*, 113 Ala. 106.

**A Razor** is one of the weapons specified in *Crim. Code W. Va.*, c. 148, § 7. See *Claiborne v. Chesapeake, etc.*, R. Co., 46 W. Va. 363.

**2. Condition of Weapon. —** *Fielding v. State*, 135 Ala. 56; *State v. Tapit*, 52 W. Va. 473; *Lamb v. State*, 8 Ohio Dec. 282.

**738. 2. Officers of the Law. —** *Shannon v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1065.

**Peace Officers. —** A county judge is a peace officer within the exception of the *Texas* statute. *Johnson v. State*, 43 Tex. Crim. 283.

The *South Carolina* statute (22 Stat. at L., p. 423) does not permit peace officers to carry concealed weapons. *Laurens v. Crawford*, 55 S. Car. 594.

A local policeman outside of his bailiwick, and not in the performance of some authorized duty, is not a peace officer within the exception of the *Texas* statute. *Ray v. State*, 44 Tex. Crim. 158.

**3. Officers Must Be Properly Appointed. —** *Swincher v. Com.*, 72 S. W. Rep. 306, 24 Ky. L. Rep. 1897.

**Person Assisting Officer Is Within Exemption. —** See *State v. Robinson*, 106 Tenn. 204.

**Persons Appointed Without Authority. —** In *Texas* the sheriff may not authorize citizens to carry pistols in making an arrest. See *Strey v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 997. But if the defendant carried a pistol in the belief that the sheriff could legally authorize him to do so, he should be acquitted. *Carroll v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 94. And it has been held that a person summoned to the aid of a peace officer may carry a pistol while about the business. *King v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 511.

In *Kentucky*, however, the intent or belief of right to carry the weapon is immaterial except to be presented to the jury or the court to mitigate the punishment or, in the case of bad intent, to increase it. *Swincher v. Com.*, 72 S. W. Rep. 306, 24 Ky. L. Rep. 1897.

**739. 1. A United States Mail Carrier is not a "civil officer of the United States" within the North Carolina statute. —** See *State v. Boone*, 132 N. Car. 1107.



**740.** 2. Persons Threatened with Bodily Harm. — See note 1.

**741.** See note 1.

**742.** 3. Persons on Their Own Premises. — See note 1.

**743.** See note 1.

4. Travelers and Persons on Journey. — See note 2.

**740.** 1. Exception in Favor of One Who Is Threatened with or Who Apprehends Attack — *Alabama*. — *Barker v. State*, 126 Ala. 83; *House v. State*, 139 Ala. 132; *Scott v. State*, 113 Ala. 64.

*Mississippi*. — *Murdin v. State*, 82 Miss. 507.

*Texas*. — *Williams v. State*, 44 Tex. Crim. 494.

In *Texas* the statute requires that the danger must be so imminent that there is no time or opportunity afforded to notify the officers of the law, in order to justify one in going armed with a pistol. *Hood v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 592.

A barber on his way home from his shop Saturday night with money in his pocket is not within the exception of the *Texas* statute. *Culp v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 969.

Where one had an opportunity to make an affidavit against any known persons from whom he might apprehend an attack, but had omitted to do so, he is not authorized to carry a pistol into the grand jury room; if he apprehended an attack from unknown persons he should have reported the matter to the sheriff. *Lovell v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 274.

**Danger of Bodily Harm.** — Where the danger is imminent and threatening, one is not required to withdraw; he has a right to arm himself and remain. *Cunningham v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 930.

**741.** 1. Time of Threat. — Questions designed to show that threats were made against the defendant at the time the concealed weapon was discovered upon him are improper. *Ross v. State*, 139 Ala. 144.

**742.** 1. Carrying Weapons on One's Own Premises. — *Walter v. State*, 15 Ohio Dec. 464, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742.

The *Texas* statute does not authorize one to carry a pistol into a room where there is a social gathering or a party, notwithstanding the place is his own home, unless it is done for the protection of himself or his home or his family, or to preserve the peace and good order of the gathering. *Nichols v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 494. See also *Monson v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 570.

Where the defendant was seen with a pistol at a house which he had previously rented, but had abandoned, and which had been re-rented by the owner, and it was shown that defendant was living elsewhere and that he brought the pistol with him on his person, a conviction was affirmed. It was not necessary to consider whether the old lease was legally in existence. *Ross v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 489.

A pasture, into which the defendant's father had been given leave to turn his horses, was held not to be the premises of the defendant under the *Texas* statute. *Whitesides v. State*, 42 Tex. Crim. 151.

**Public Road Running Through Premises.** — The exception in the *Arkansas* statute as to persons on their own premises, does not apply in the case of one charged with carrying a pistol as a weapon upon a public highway, although the defendant is the owner of the freehold over which the highway runs. *Moss v. State*, 65 Ark. 368.

**Leased Premises.** — Premises rented to another are not one's "own premises" within the exception of the *Texas* statute. *Elliott v. State*, 39 Tex. Crim. 242.

**Place of Business.** — The porter of a passenger train assisting in putting baggage on board is at his place of business. *Williams v. State*, 44 Tex. Crim. 494.

The foreman of a section gang that extended seven or eight miles along the railroad claimed that he had a right to carry a pistol at a certain store as it was on his way to inform his section hands to go to work. It was held that a conviction of unlawfully carrying a weapon was proper. *Clopton v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 173.

**Servants and Employees.** — A servant on the premises of his employer is not on his own premises under the *North Carolina* statute. *State v. Deyton*, 119 N. Car. 880. But the contrary is true of a night watchman. *State v. Anderson*, 129 N. Car. 521.

One in full control of the cattle and pasture of another was convicted of carrying a pistol in the pasture, and it was held on appeal that the evidence did not support the conviction. *Sanderson v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 348.

**The Superintendent of a Public Turnpike** may not carry a concealed weapon thereon; it is not his own premises within the exception of the *North Carolina* statute. *State v. Perry*, 120 N. Car. 580.

**743.** 1. *Dunston v. State*, 124 Ala. 89; *Brown v. State*, 114 Ga. 60. See also *Wilson v. State*, 81 Miss. 404.

**2. What Is Traveling or Going on a Journey Within the Statute.** — See *Cruz v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 435.

One going by rail fifteen miles to attend a political meeting in an adjoining county is not a traveler within the meaning of the exception in the *Indiana* statute. *State v. Smith*, 157 Ind. 241, 87 Am. St. Rep. 205, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 743.

One going on a three days' trip of twenty-five or thirty miles to an adjoining county in a wagon is a traveler within the *Texas* statute. *Eubanks v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 973.

One going from his home 150 miles by rail, returning the same day, is a traveler within the *Texas* statute. *Thomas v. State*, 37 Tex. Crim. 142. But not one on a trading expedition of seventeen miles from which he returns the same day. *Goss v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 725.

**744.** *The Distance Traveled.* — See note 1.

**745.** *5. Burden of Proving Exemption.* — See note 3.

**746.** *CART.* — See note 1.

The porter of a passenger train going every day some 150 miles is a traveler. *Williams v. State*, 44 Tex. Crim. 494.

One engaged in other business not immediately connected with his traveling ceases to be a traveler. See *Ball v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 772.

**Question for Jury.** — Where the jury have found a verdict against the defendant evidently upon the theory that he did not start upon his journey as a traveler, the conviction will be sustained. *Jones v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 596. *Reversed*, and prosecution dismissed on a rehearing on the ground that there was no complaint filed as a predicate for the in-

formation, (Tex. Crim. 1898) 45 S. W. Rep. 907.

**744.** *1. Illustrations — Later Abandonment of Journey Immaterial.* — *Stayton v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 299.

**745.** *3. Burden of Proof on Defendant.* — *Kitchens v. State*, 116 Ga. 847; *State v. Tapit*, 52 W. Va. 473; *Culp v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 969; *Harris v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 610.

**746.** *1. Cartage* "is a charge made for the expense of delivering hay when the purchaser did not take it on the track." *Everingham v. Halsey*, 108 Iowa 713.

## CAR-TRUST ASSOCIATIONS.

By M. B. WAILES.

**747.** *II. CAR-TRUST LEASES — Term Defined.* — See note 3.

**748.** *The Lien of a Prior Mortgage.* — See note 1.

*If the Cars Are Sold under Foreclosure.* — See note 4.

*III. RECEIVERS — Rental.* — See note 5.

**747.** *3. Car-trust Leases.* — Contracting, etc., *Co. v. Continental Trust Co.*, (C. C. A.) 108 Fed. Rep. 1; *Metropolitan Trust Co. v. Railroad Equipment Co.*, (C. C. A.) 108 Fed. Rep. 913. In the case last cited the court said: "The transactions evidenced by the several equipment contracts are nothing more than contracts for the sale of the equipment, the title being retained as security for the purchase money. The immense verbiage employed to give these schemes the semblance of a leasing and rental is in vain. Their true character cannot be disguised."

**Usury.** — Notes called lease warrants, issued by a railroad company for deferred payments on equipment, are not within the usury laws of *Ohio*. *Metropolitan Trust Co. v. Railroad Equipment Co.*, (C. C. A.) 108 Fed. Rep. 913.

**748.** *1. Contracting, etc., Co. v. Continental Trust Co.*, (C. C. A.) 108 Fed. Rep. 1, wherein it is said: "The real transaction was a bargain and sale, the title being retained as security for the purchase money. Being property susceptible of separate ownership and separate liens, it passed under the after-acquired property clause of the existing mortgage, subject to the lien of the vendor; the existing mortgagees not being purchasers for value in respect of such after-acquired property. \* \* \* The lien thus acquired by the mortgagees could not be displaced by any subsequent agreement to which they were not parties. \* \* \* It follows that the assignment of the so-called 'lease contract' was unavailing, as against the antecedent mortgage lien."

**Title to Equipment.** — "The next objection is that the equipment company cannot maintain a suit to recover the equipment conditionally

sold without complying with the *Ohio* Conditional Sales Act of 1885. Rev. Stat. Ohio, § 4155. That Act requires such a vendor to tender back to the purchaser or lessee not less than fifty per cent. of the price received. We quite agree with the Circuit Court, and for the reasons stated in the opinion of Judge Taft, that the Act of 1885 does not apply to sales of railroad equipment. The purchase and sale of railroad equipment by conditional contracts is regulated by the Acts of March 16, 1882, and of April 12, 1889, being §§ 3378b-3378d, Rev. Stat. Ohio, inclusive. *Metropolitan Trust Co. v. Columbus, etc., R. Co.*, 93 Fed. Rep. 705. The title to the equipment sold under the contracts here involved remained in the vendors until fully paid for. The interest of the railroad companies and their mortgagees was but an equitable interest and subject to the terms of the conditional sale." *Metropolitan Trust Co. v. Railroad Equipment Co.*, (C. C. A.) 108 Fed. Rep. 913.

**Priority of Lien.** — See *Continental Trust Co. v. Toledo, etc., R. Co.*, 93 Fed. Rep. 532.

**4.** See *Metropolitan Trust Co. v. Railroad Equipment Co.*, (C. C. A.) 108 Fed. Rep. 913.

**5.** *Platt v. Philadelphia, etc., R. Co.*, (C. C. A.) 84 Fed. Rep. 536. In this case the court said: "Certainly the receiver was not bound to adopt these car-trust contracts; and it is quite clear that he did not assume the liabilities of the railroad company thereunder simply by taking possession of the cars, and using them temporarily, under his order of appointment. *Sunflower Oil Co. v. Wilson*, 142 U. S. 322; *U. S. Trust Co. v. Wabash Western R. Co.*, 150 U. S. 299. The receiver undoubtedly was entitled to a reasonable time to ascertain whether or

- 748.** CASE. — See note 9.  
**753.** See note 1.  
**754.** United States Courts. — See note 1.  
**756.** A Case Is a Covering, Box, or Sheath. — See note 3.  
**757.** CASH. — See note 1.  
**761.** CASHIER. — See note 1.  
**762.** [CAST OF SCULPTURE. — See note 1a.]  
CASUALTY. — See note 3.

not it would be profitable or desirable for him to assume the obligations of these contracts, and to elect whether he would adopt them, or reject them, and return the cars to the trust company."

**748.** 9. See Matter of Joseph, 118 Cal. 660. Patent Case. — See Pratt v. Paris Gas Light, etc., Co., 168 U. S. 259; Carleton v. Bird, 94 Me. 182.

**753.** 1. An Election Contest. — Douglas v. Hutchinson, 183 Ill. 323; Calverley v. Shank, 28 Tex. Civ. App. 473.

An Application to a Judge in Chambers to remove a trustee is not a *case* within the Georgia Constitution. Heath v. Miller, 117 Ga. 861.

**754.** 1. United States Constitution — Cases and Controversies. — People v. Kiple, 171 Ill. 44, following Interstate Commerce Commission v. Brimson, 154 U. S. 475, in the original note; Pacific Steam Whaling Co. v. U. S., 187 U. S. 447, following Osborn v. U. S. Bank, 9 Wheat. (U. S.) 738, set out in the original note. See also Snow v. Smith, 88 Fed. Rep. 657.

**756.** 3. Receiving Stolen Goods — Cases of Cigars. — The word *cases*, as used here, is not shown to have a recognized meaning as denoting packages containing a certain number or quantity of cigars; and, even if it had such meaning, it should still be construed as descriptive of a *case* containing cigars, and not of a certain number of cigars, without reference to their packing. The charge in the indictment would not be sustained, therefore, by proof of the receipt by defendant of a lot of loose cigars not in *cases*, or not received directly from *cases* known to be stolen. Gabriel v. State, 44 Fla. 57.

**757.** 1. Checks — Payment. — Glines v. State Sav. Bank, 132 Mich. 638.

Special Partnership — Promissory Notes. — See Moorhead v. Seymour, (N. Y. City Ct. Tr. T.) 77 N. Y. Supp. 1050.

Insurance Policy. — The Term "Cash Surrender Value" has a defined and legal meaning, namely, the *cash* value — ascertainable by known rules — of a contract of insurance abandoned and given up for cancellation to the insurer by the owner, having contract right to do so. In re Welling, (C. C. A.) 113 Fed. Rep. 192.

Current Funds. — A contract of sale of corn stated the price, and also the time and place of delivery, but did not provide specifically time, place, or manner of payment. It was held that delivery and payment were to be concurrent acts, and the vendor could insist on payment in *cash* or money, in the strict sense of the term "current funds." Behrends v. Beyerschlag, 50 Neb. 304.

The Expressions "Cash," "Cash Down," or "Cash on Delivery," as used in sales, may be used in two different senses — one where the words indicate simply that the goods must be paid for before the buyer is entitled to possession; and

the other, where they indicate an intention not to part with the title until the price is paid. Austin v. Welch, 31 Tex. Civ. App. 528.

"Fair Cash Value" and "Actual Cash Value" — Connes v. Indiana, etc., R. Co., 193 Ill. 464.

Cash Value — Taxation. — Ankeny v. Blakley, 44 Oregon 78.

**761.** 1. Cashier of Bank. — Taylor v. Commercial Bank, 174 N. Y. 185; Ellis v. Woonsocket First Nat. Bank, 22 R. I. 565.

The authority of the *cashier* of a bank to receive money, and to issue receipts or certificates of deposit therefor, seems to be implied by the very name of his office. Abbott v. Jack, 136 Cal. 510.

**762.** 1a. In the technical or professional sense, a *cast of sculpture* is one taken from an original creation in clay as part of the process of making the completed statue in bronze or marble. In a broader sense, the term embraces *casts* from sculptured objects in marble or bronze, which reproduce the original objects. Benziger v. U. S., 107 Fed. Rep. 257.

3. Ennis v. Fourth St. Bldg. Assoc., 102 Iowa 520; Gill v. Fugate, (Ky. 1904) 78 S. W. Rep. 188; Anthony v. Karbach, 64 Neb. 509.

Improvements — Municipal Corporations. — The necessity for additional light, growing out of the construction of elevated railways and depots, and the additional expense of gas and electric lights, caused by the alleged combination of said gas and electric light companies, do not constitute "accidents" or *casualties* within the meaning of a proviso to chapter 24 of the Revised Statutes, entitled "Cities," etc., which proviso declares "that nothing herein contained shall prevent the city council or board of trustees from ordering, by a two-thirds vote, any improvement the necessity of which is caused by any *casualty* or accident happening after such annual appropriation is made." Chicago v. Nichols, 177 Ill. 97.

Casualty Insurance. — "Stat. 1890, c. 421, § 1, which takes the place of section 1 of the statute last considered, changes the definition of *casualty* insurance by including in it only cases where the benefit is to accrue through the accidental death of the insured, or his physical disability arising from accident; and it makes no provision for insurance by such company against disability arising from sickness. It also contains a provision, in regard to insurance on the assessment plan, that 'such business shall be lawful only as defined and permitted by this act.' It follows that the previously-existing authority to corporations to insure against disability arising from sickness was taken away by Stat. 1890, c. 421, which repealed and superseded the provisions of Stat. 1885, c. 183, on this subject." Atty.-Gen. v. Bay State Beneficiary Assoc., 171 Mass. 455.

# CATCHING BARGAIN.

By M. B. WAILES.

**764. I. DEFINITION.** — See note 2.

**765. III. THE EQUITABLE DOCTRINE — 2. Inadequacy of Consideration.** — See note 5.

**766. In England.** — See note 1.

**But in Some of the United States** — See note 2.

**What Constitutes Inadequacy of Consideration.** — See note 5.

**767. 3. Knowledge and Assent of Ancestor** — In the United States. — See note 5.

**Family Arrangements.** — See note 6.

**768. Intention Should Be Manifest.** — See note 2.

**769. 6. Burden of Proof.** — See note 5.

**770. IV. STATUTORY ENACTMENT IN ENGLAND.** — See note 7.

**771. CATTLE.** — See notes 3, 4.

**764. 2. Expectant Heirs.** — See *Brenchley v. Higgins*, 83 L. T. N. S. 751, 70 L. J. Ch. 788.

**765. 5. Jackson's Estate**, 203 Pa. St. 33; *Hale v. Hollon*, 90 Tex. 427, 59 Am. St. Rep. 819.

**766. 1. Mere Inadequacy** — In England — **Ground for Avoidance.** — See *Brenchley v. Higgins*, 83 L. T. N. S. 751, 70 L. J. Ch. 788.

**2. In United States Rule Otherwise.** — *Gary v. Newton*, 201 Ill. 180; *Jackson's Estate*, 203 Pa. St. 33; *Phillips's Estate*, 205 Pa. St. 511; *Hale v. Hollon*, 90 Tex. 427, 59 Am. St. Rep. 819.

**Release Must Be in Writing.** — In *Gary v. Newton*, 201 Ill. 180, the court said: "Upon a careful examination, however, of all these cases, it will be observed that, where releases of an heir's expectancy have been upheld, such releases, so far as they apply to real estate, were in writing."

**5. Illustrations of Inadequacy of Consideration.** — See *Brenchley v. Higgins*, 83 L. T. N. S. 751, 70 L. J. Ch. 788.

Where an owner of a vested interest in remainder, being in financial distress, sells and assigns absolutely the interest worth thirty-two thousand five hundred dollars for the sum of eight thousand seven hundred and fifty dollars actual cash paid to him, and the life tenant dies ten years thereafter, the purchaser is entitled to the full amount of the interest, in the absence of any fraud or concealment, or any relation of trust or confidence between the legatee and the purchaser. *Phillips's Estate*, 205 Pa. St. 511.

**767. 5. Indiana.** — *Eissler v. Hoppel*, 158 Ind. 85, *distinguishing* *McClure v. Raben*, 125 Ind. 139.

**Kentucky.** — But see *McCall v. Hampton*, 98 Ky. 166, 56 Am. St. Rep. 335, holding that a naked possibility or contingency not founded upon a right or coupled with an interest cannot be assigned or sold. Therefore the expectancy of a son to inherit his father's estate is not the subject of assignment or sale, and the contract therefor is not enforceable either at law or in equity upon the father's death.

**Texas.** — In *Hale v. Hollon*, 90 Tex. 427, 59 Am. St. Rep. 819, it was held that the fact that the sale of the expectancy was made without the knowledge of the ancestor or owner, who was *non compos mentis* and unable to consent thereto, will not avoid such conveyance by the heir.

**Vermont.** — In *Fuller v. Parmenter*, 72 Vt. 362, the court, after reviewing the authorities, said: "It would seem, therefore, that assent is not necessary, but that notice, and not objecting, is enough, if even that is required; and this is the reason of the thing, for with notice the ancestor can defeat the assignment if he will, and thus prevent the fraud upon him that the books talk about."

**6. Eissler v. Hoppel**, 158 Ind. 82. See on the question of parental influence *De Witte v. Addison*, 80 L. T. N. S. 207.

**768. 2. Morris v. Carlin**, 5 Pa. Dist. 714.

**769. 5. Burden of Proof.** — *Brenchley v. Higgins*, 82 L. T. N. S. 143; *Hale v. Hollon*, 90 Tex. 427, 59 Am. St. Rep. 819.

**770. 7. Brenchley v. Higgins**, 83 L. T. N. S. 751, 70 L. J. Ch. 788.

**771. 3. Mathews v. State**, 39 Tex. Crim. 554.

**4. Mathews v. State**, 39 Tex. Crim. 554.

**Confined to Cattle of Bovine Species.** — *Frink v. Brotherhood Acc. Co.*, 75 Vt. 249.

**Neat Cattle.** — See *Mathews v. State*, 39 Tex. Crim. 554.

**Horses.** — *Frink v. Brotherhood Acc. Co.*, 75 Vt. 251, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 771, and holding that the word *cattle* as used in an insurance policy would not include horses. *Compare* *Gulf, etc., R. Co. v. Clay*, 28 Tex. Civ. App. 176.

**Cattle Guards.** — *Louisville, etc., R. Co. v. Beauchamp*, 108 Ky. 47; *Anderson v. Atlantic Coast Line R. Co.*, 59 S. Car. 350.

**Indictment.** — See *Mathews v. State*, 39 Tex. Crim. 554.

**772. CAUSA.** — See note 1.

**CAUSE.** — See note 2.

**774.** See note 1.

**776.** See note 1.

**CAUSE OF ACTION.** — See note 2.

**777. CAUSEWAY.** — See note 1.

**CAUTIOUS.** — See note 2.

**779. CEDE.** — See note 3.

**780. CEMENT.** — See note 5.

**772. 1.** See Trapp *v.* McClellan, 68 N. Y. App. Div. 362.

**Causa Causans.** — See Trapp *v.* McClellan, 68 N. Y. App. Div. 362.

**2. Cause of Complaint.** — State *v.* State Board of Dental Examiners, 14 Ohio Dec. 248, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 773, 774.

**A Contest Over an Election not a cause.** Baker *v.* Mitchell, 105 Tenn. 610. Compare Calverley *v.* Shank, 28 Tex. Civ. App. 473.

**Mandamus** is a *cause* in law under Illinois Constitution. People *v.* Board of Trade, 193 Ill. 577.

**Disqualification of Judges.** — The phrase "*cause* or matter," as used in section 46 of the New York Code of Civil Procedure, which forbids a judge to sit or take part in the decision of a case if he has acted as attorney or counsel therein, refers only to actions or special proceedings in which a judge might sit or take part; the word *cause* meaning a *cause* of action, and the word "matter" referring only to some judicial matter or proceeding, and, under the Code, included in special proceedings for the enforcement of civil rights. Keefe *v.* Syracuse Third Nat. Bank, 177 N. Y. 305.

**Disqualification of Judge — Federal Courts.** — In Moran *v.* Dillingham, 174 U. S. 157, the court said: "And, as a *cause*, in its usual and natural meaning, includes all questions that have arisen or may arise in it, there is strong reason for holding that a judge who has once heard the *cause*, either upon the law or upon the facts, is the court of first instance, is thenceforth disqualified to take part, in the Circuit Court of Appeals, at the hearing and decision of the *cause* or of any question arising therein. But, however that may be, a judge who has once heard the *cause* upon its merits in the court of first instance is certainly disqualified from sitting in the Circuit Court of Appeals on the hearing and decision of any question, in the same *cause*, which involves in any degree matter upon which he had occasion to pass in the lower court."

**774. 1.** State *v.* State Board of Dental Examiners, 14 Ohio Dec. 248, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 774 [776].

**Removal of Officers — Cause of Removal.** — Matter of Guden, 71 N. Y. App. Div. 422; Judges' Cases, 102 Tenn. 509.

**For Cause.** — People *v.* McGuire, 27 N. Y. App. Div. 593.

**Proximate Cause.** — Maryland Clay Co. *v.* Goodnow, 95 Md. 330.

**Cause to Be Printed — English Copyright Act.** — See Kelly *v.* Gavin, (1902) 1 Ch. 631.

**Personal Injuries.** — The word *caused* in an action against a town for injuries caused by a hole in a highway does not necessarily imply active and affirmative misconduct, but simply that the negligence of the town caused the defect in question. Carroll *v.* Allen, 20 R. I. 144.

**776. 1.** State *v.* State Board of Dental Examiners, 14 Ohio Dec. 248, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 774.

**2.** Lee *v.* Marion Sav. Bank, 108 Iowa 716, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 776; Coburn *v.* Colledge, (1897) 1 Q. B. 706; McCandless *v.* Inland Acid Co., 115 Ga. 975, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 776; Missouri, etc., R. Co. *v.* Levy, 23 Tex. Civ. App. 686, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 776; Lassiter *v.* Norfolk, etc., R. Co., 136 N. Car. 89.

**Other Definitions.** — Bach *v.* Brown, 17 Utah 435, following Rap. & Lawr. definition, stated in original note; State *v.* State Board of Dental Examiners, 14 Ohio Dec. 248, following definition of Veeder *v.* Baker, 83 N. Y. 156, stated in the original note. See also Wright *v.* Phipps, 90 Fed. Rep. 575; Phoenix Lumber Co. *v.* Houston Water Co., 94 Tex. 456; Matz *v.* Chicago, etc., R. Co., 85 Fed. Rep. 180.

**Whole Cause of Action.** — Lassiter *v.* Norfolk, etc., R. Co., 136 N. Car. 89, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 776*n*; Payne *v.* Hogg, (1900) 2 Q. B. 43.

**Synonymous with Right of Action.** — Lewis *v.* Hyams, 26 Nev. 68.

**777. 1.** Ocean Causeway Co. *v.* Gilbert, 54 N. Y. App. Div. 123, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 777.

**2. Cautious Distinguished from Prudent.** — Eggett *v.* Allen, 106 Wis. 637.

**779. 3. When One Nation Cedes Territory to another,** it hands over the title and sovereignty, good as against all the world. But this does not necessarily determine in what way the territory shall be held by the new sovereign. Goetze *v.* U. S., 103 Fed. Rep. 77.

**780. 5. As Used in a Claim for a Patent.** — See American Sulphite Pulp Co. *v.* Howland Falls Pulp Co., (C. C. A.) 80 Fed. Rep. 404.

# CEMETERIES.

By H. F. BREITWIESER.

**782. II. EXERCISE OF RIGHT OF EMINENT DOMAIN — 1. For Cemetery Purposes.** — See note 3.

Must Be for Public Use. — See note 4.

**783. Enlarging Public Cemetery.** — See note 1.

**2. Condemnation of Cemetery Lands — General Rule.** — See notes 2, 3. Special Authority Necessary in Case of Public Cemetery. — See note 6.

**784. Statutory Prohibition.** — See note 1.

**III. DEDICATION OF LANDS FOR CEMETERIES — General Rule.** — See note 4.

Particular Grantees. — See note 5.

**785. What Constitutes.** — See note 1.

**IV. RIGHTS OF SEPULTURE — NATURE AND INCIDENTS OF LOT-HOLDER'S INTEREST — 1. In Independent Incorporated Associations.** — See note 2.

**786. See note 1.**

Association the General Owner. — See note 2.

**788. 2. In Churchyard Cemeteries — a. IN GENERAL — In Some Cases Held to Be a License.** — See note 2.

**789. 3. In Public Cemeteries.** — See note 3.

**790. 5. Right to Erect Monuments and the Like — Trusts to Maintain Monuments.** — See note 3.

**782. 3. Eminent Domain.** — *Burdette v. Fairview*, 66 N. J. L. 523.

**4. Essentials.** — *Starr Burying Ground Assoc. v. North Lane Cemetery Assoc.*, 77 Conn. 83. See also *La Societa Italiana, etc., v. San Francisco*, 131 Cal. 169.

**783. 1. Matter of Lyons Cemetery Assoc.**, 93 N. Y. App. Div. 19. See also *Robert v. Notre Dame de Montreal*, 9 Quebec Super. Ct. 489.

**2. Condemnation of Cemetery Property.** — *Starr Burying Ground Assoc. v. North Lane Cemetery Assoc.*, 77 Conn. 83.

**3. For Highways.** — *In re Bideford Parish*, (1900) P. 314, 64 J. P. 743. See also *St. John the Baptist v. Parishioners*, (1898) P. 155; *St. Nicholas v. Langton*, (1899) P. 19.

**6. Starr Burying Ground Assoc. v. North Lane Cemetery Assoc.**, 77 Conn. 83.

**784. 1. Matter of Opening Mt. Vernon Ave.**, 23 N. Y. App. Div. 518.

**4. Wormley v. Wormley**, 207 Ill. 411, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 784. **5. Hunt v. Tolles**, 75 Vt. 48.

**785. 1. No Particular Form of Dedication Necessary.** — *Wormley v. Wormley*, 207 Ill. 411, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 784; *Hunt v. Tolles*, 75 Vt. 48. See also *Kansas City v. Scarritt*, 169 Mo. 471.

**2. Lot-owner's Title — Incorporated Associations.** — *Davis v. Coventry*, 65 Kan. 557. See also *Woodland Cemetery Co. v. Ellison*, 67 S. W. Rep. 14, 23 Ky. L. Rep. 2222.

**Distinction Between "Lot" Owner and "Grave" Owner.** — Where a statute provided that owners of lots for which they had paid a certain amount were entitled to become shareholders in the cemetery company, it was held that a person

who had acquired several graves, but not a complete lot, was not entitled to become a shareholder, though he had paid more than such amount for the graves. *Hart v. Mt. Royal Cemetery Co.*, 18 Quebec Super. Ct. 515.

**786. 1. George v. Cypress Hills Cemetery**, 32 N. Y. App. Div. 281; *In re Waldron*, 26 R. I. 84.

**License Will Not Support Ejectment.** — *Stewart v. Garrett*, 119 Ga. 386.

**2. Jacobus v. Congregation of Children of Israel**, 107 Ga. 518; *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884; *Davis v. Coventry*, 65 Kan. 557; *Brown v. Maplewood Cemetery Assoc.*, 85 Minn. 498; *Congregation Shaarai Shomayim v. Moss*, 22 Pa. Super. Ct. 356; *Cedar Hill Cemetery Co. v. Lees*, 22 Pa. Super. Ct. 405; *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605. See also *Graves v. Bloomington*, 67 Ill. App. 493.

**Evidence Showing Right of Sepulture.** — See *Wilkinson v. Strickland*, (Miss. 1903) 35 So. Rep. 177.

**Adverse Possession of Easement of Burial.** — *McWhirter v. Newell*, 200 Ill. 583.

**788. 2. See Congregation Shaarai Shomayim v. Moss**, 22 Pa. Super. Ct. 356.

**789. 3. Public Cemeteries.** — *Gowen v. Bessey*, 94 Me. 114; *Hollman v. Platteville*, 101 Wis. 94.

**790. 3. Trusts to Maintain Monuments, Etc.** — See *Matter of Gay*, 138 Cal. 552, holding that a bequest of a permanent fund, the income of which was to be used to keep the burial plot of the testator in good condition, was not a charitable use and was void; *Morse v. Natick*, 176 Mass. 510.

**791. V. CEMETERIES AS NUISANCES -- REGULATIONS AND RESTRICTIONS --****1. In General.** — See note 1.

May Be Declared a Nuisance. — See note 2.

Holds Subject to That Contingency. — See note 3.

When Equity Will Grant Relief. — See note 4.

**792. 2. State and Municipal Regulations and Restrictions -- General Rule.** — See note 1.**793.** May Delegate the Power. — See note 1.**3. Disinterment and Removal.** — See note 4.**794. VI. TRESPASSERS -- DAMAGES -- 1. In General.** — See note 2.

Injunction to Restrain. — See note 3.

Exemplary Damages. — See note 5.

**795. 2. Injury to or Removal of Monuments.** — See note 1.

Criminal Offenses -- Statutes. — See note 3.

**796. VII. MORTGAGES AND LIENS -- Under the New York Statute.** — See note 1.

Under the Minnesota Statute. — See note 2.

**VIII. ABANDONMENT OF CEMETERY LANDS -- 1. What Constitutes --**

So Long as a Cemetery Is Kept and Preserved. — See note 6.

**797. 2. Right of Reverter.** — See note 2.**798. CENSUS.** — See note 2.

**791. 1. Cemetery Not Nuisance Per Se.** — *Ex p. Wygant*, 39 Oregon 432, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 791; *Wahl v. Methodist Episcopal Cemetery Assoc.*, 197 Pa. St. 197; *Pfleger v. Groth*, 103 Wis. 104.

**2. Ex p. Bohen**, 115 Cal. 372.

**3. Ex p. Bohen**, 115 Cal. 372; *Pfleger v. Groth*, 103 Wis. 104.

**4. When Equity Will Interfere.** — *Braasch v. Cemetery Assoc. of Evangelical Lutheran Christ Soc.*, (Neb. 1903) 95 N. W. Rep. 646; *Palmer v. Hickory Grove Cemetery*, 84 N. Y. App. Div. 600.

**792. 1. Legislative Restrictions.** — *Odd Fellows' Cemetery Assoc. v. San Francisco*, 140 Cal. 226; *Palmer v. Hickory Grove Cemetery*, 84 N. Y. App. Div. 600; *Ex p. Wygant*, 39 Oregon 432; *Pfleger v. Groth*, 103 Wis. 104, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 792.

**793. 1. Delegation to Municipalities.** — *Odd Fellows' Cemetery Assoc. v. San Francisco*, 140 Cal. 226; *Ex p. Wygant*, 39 Oregon 432.

**Void Ordinance.** — It has been held that an ordinance which makes it unlawful to establish, extend, or enlarge any cemetery within the limits of the county without the permission of the supervisors, but which does not attempt to deal with or prohibit private interments, nor with interments in cemeteries already established, is not a valid exercise of police power and is unconstitutional. *Los Angeles County v. Hollywood Cemetery Assoc.*, 124 Cal. 344.

**4. Disinterment and Removal under English Burial Act.** — *Lee v. Hawtrey*, (1898) P. 63; *St. Nicholas v. Langton*, (1899) P. 19; *Druce v. Young*, (1899) P. 84; *In re Talbot*, (1901) P. 1; *Reg. v. Tristram*, 80 L. T. N. S. 414, 47 W. R. 639.

**794. 2. Trespass -- Damages.** — *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, citing 1 [5] AM. AND ENG. ENCYC. OF LAW (2d ed.) 794; *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884; *Gowen v. Bessey*, 94 Me. 114; *Pulsifer v. Douglass*, 94 Me. 556; *Sacks*

*v. Minneapolis*, 75 Minn. 30; *Wilkinson v. Strickland*, (Miss. 1903) 35 So. Rep. 177; *Hunt v. Tolles*, 75 Vt. 48; *Hollman v. Platteville*, 101 Wis. 94.

**3. Injunction.** — *Wormley v. Wormley*, 207 Ill. 411.

**5. Exemplary Damages -- Removal of Remains.** — *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, citing 1 [5] AM. AND ENG. ENCYC. OF LAW (2d ed.) 794; *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884.

**795. 1. Jacobus v. Congregation of Children of Israel**, 107 Ga. 518.

**Rights as Between Tenants in Common.** — Where one of four tenants in common of a burial lot erected a monument in a corner of the lot which she selected for the purpose of her burial, and two of her cotenants removed the monument, it was held that she had no cause of action, because the control of the lot was not in her alone, and also because her act was an exclusive appropriation of a part of the land to her own use which the other tenants in common could treat as an ouster. *Capen v. Leach*, 182 Mass. 175.

**3. Criminal Offense -- Statutes.** — See *Bird v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 25 (as to instructions in a prosecution for cutting shrubbery); *Fletcher v. Kezer*, 73 Vt. 70 (malice essential).

**796. 1. Ross v. Glenwood Cemetery Assoc.**, 81 N. Y. App. Div. 357.

**2. Under the Michigan and Texas Statutes** cemetery property is not mortgageable or subject to execution. *Avery v. Forest Lawn Cemetery Co.*, 127 Mich. 125, 8 Detroit Leg. N. 259; *Oakland Cemetery Co. v. People's Cemetery Assoc.*, 93 Tex. 569.

**6. Kansas City v. Scarritt**, 169 Mo. 471.

**797. 2. Reversion.** — *Kansas City v. Scarritt*, 169 Mo. 471. See also *Packard v. Old Colony R. Co.*, 168 Mass. 92.

**798. 2. In Huntington v. Cast**, 149 Ind. 255, the court, after giving the various dic-

- 798.** [**CENTRALLY.** — See note 3*a*.]  
 [CENTRE LINE. — See note 3*b*.]  
**CERTAIN—CERTAINTY.** — See note 4.  
**800. CERTIFICATE.** — See note 1.

tionary definitions, said: "The *census* to be taken by the mayor, in contemplation of the statute before us, was therefore, in the first place, to be an official enrolment of the people of the city of Huntington. Such an enrolment or registration of the people was also to be a public document to be preserved in the archives of the city, where it might be subject to the inspection of all those interested. A *census* is not merely a sum total, but an official list, containing the names of all the inhabitants."

**Census Children.** — In *State v. Sweeney*, 24 Nev. 350, the court said: "We are of opinion that the term '*census* children,' found in said Act of 1879, means the number of children officially registered. One of the definitions given by Webster of *census* is: 'An official registration of the number of the people.'"

**798. 3*a*.** The word *centrally*, as used in a specification for a patent, does not necessarily mean in the exact centre. *Bredin v. Solmsom*, 132 Fed. Rep. 161.

**3*b*. Centre Line of a Railroad.** — Under a grant by a railway corporation, describing the southerly line of the premises granted as parallel to and twenty-five feet northerly from the *centre line* of the railway, "as said railway is now constructed," the measurement should be made from a line midway between the two through tracks, and not from the *centre line* of the

entire railway property, embracing several adjoining switch tracks, liable to be shifted and covering quite a large area. *New York Cent., etc., R. Co. v. Needham*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 435.

**4. The Term Certain Demand** has been held to have the same meaning as the word "debt." *Worley v. Smith*, 26 Tex. Civ. App. 270.

**A Contract Is Certain** when the thing to be done is supposed to depend on the will of the party, or when in the usual course of events it must happen in a manner stipulated. *Losecco v. Gregory*, 108 La. 648.

**800. 1. Writing—Statement Equivalent to Certificate.** — *People v. Foster*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 576.

**Certificate of Qualification.** — *Wilkie v. Chicago*, 188 Ill. 444.

**Certificate of Purchase.** — *Lightcap v. Bradley*, 186 Ill. 510.

**The Certificate of Acknowledgment by a Notary Public**, or other authorized officer, is simply an additional solemnity in the execution of a deed or mortgage, and is required by statute chiefly for the purpose of affording proof of the due execution of the instrument by the grantor, sufficient to authorize the recorder to make the same matter of public record. *Read v. Toledo Loan Co.*, 68 Ohio St. 297. And see the title **NOTARY PUBLIC**.

## CERTIFICATES OF DEPOSIT.

By A. W. VARIAN.

**801. I. DEFINITION — A Certificate of Deposit.** — See note 1.

**802. III. FORM, EXECUTION, AND NATURE OF THE INSTRUMENT — 1. Form.**  
 — See notes 3, 4.

**803. 2. Execution.** — See note 1.

**3. Nature of the Instrument — a. CONSIDERED AS AND DISTINGUISHED FROM A PROMISSORY NOTE — (1) Considered as a Promissory Note.**  
 — See note 4.

**801. 1.** *Young v. American Bank*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 305, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801.

**802. 3. Form of Certificate of Deposit.** — An instrument acknowledging the receipt of a deposit, providing for payment either to the original holders or to their order, and requiring the certificate to be returned before payment will be made, is a negotiable certificate of deposit although it contains no direct promise to pay. *Young v. American Bank*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 308.

An instrument merely certifying that a person had on deposit a specified sum of money on a day certain is not a certificate of deposit.

*Modern Woodmen of America v. Union Nat. Bank*, (C. C. A.) 108 Fed. Rep. 753.

**4. Deposit Slip.** — *Young v. American Bank*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 305.

**803. 1. Execution.** — *Hanson v. Heard*, 69 N. H. 190.

**4. Certificates of Deposit Construed to Be Promissory Notes.** — *Mereness v. Charles City First Nat. Bank*, 112 Iowa 11, 84 Am. St. Rep. 318, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 803. But see *Murphy v. Pacific Bank*, 130 Cal. 542, wherein it was said: "Certificates of deposit are understood to represent money left with a bank or banker, and which is to be retained until the depositor demands it; the cer-



**804.** (2) *Distinguishing Characteristic — Necessity of Demand.* — See notes 1, 2.

**805.** *b. NEGOTIABILITY — (1) In General.* — See note 1.

**806.** (2) *Rights and Liabilities of Indorsers — (a) In General — Parol Evidence Not Admissible to Explain Indorsement.* — See note 2.

**808.** IV. POWER OF BANKS TO ISSUE — Certificates Payable on Time. — See note 3.

#### V. RIGHTS AND LIABILITIES OF THE ISSUING BANK — 1. Rights —

*a. TO REQUIRE SURRENDER OF CERTIFICATE UPON PAYMENT.* — See note 5.

**809.** *b. TO REQUIRE INDEMNITY WHEN CERTIFICATE IS LOST.* — See note 1.

**813.** CHAIR. — See note 1.

**814.** CHAMBERS. — See note 1.

tificate being in the nature of a receipt. \* \* \* Such certificates do not imply a loan in the ordinary sense, nor create the ordinary relation of debtor and creditor evidenced by a promissory note."

**804.** 1. *Statute of Limitations Runs from Date of Certificate.* — *Mereness v. Charles City First Nat. Bank*, 112 Iowa 11, 84 Am. St. Rep. 318.

2. *Necessity of Demand.* — *Auten v. Crahan*, 81 Ill. App. 502; *Young v. American Bank*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 308; *Cottle v. Marine Bank*, 166 N. Y. 53.

**805.** 1. *Negotiability.* — *Saginaw Bank v. Title, etc., Co.*, 105 Fed. Rep. 491, 10 Pa. Dist. 74, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 805, and holding that the federal court was not bound by the *Pennsylvania* doctrine in a case where a certificate of deposit issued in Pennsylvania had been negotiated in another state; *Auten v. Crahan*, 81 Ill. App. 502; *Mereness v. Charles City First Nat. Bank*, 112 Iowa 11, 84 Am. St. Rep. 318. See also *Grobe v. Roup*, 46 W. Va. 488, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 805, but making no decision on the question of negotiability.

**A Certificate Payable to the Depositor "or His Assigns"** is not negotiable. *Zander v. New York Security, etc., Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 98, affirmed 81 N. Y. App. Div. 635, 178 N. Y. 208.

**Equitable Assignment.** — The indorsement and delivery of a banker's deposit receipt, with intention to make a gift, constitute a good equitable assignment, though the receipt itself is on its face declared to be not transferable, and no notice is given to the bank. Such an assign-

ment, even if incomplete, is perfected after the death of the assignor by the appointment of the assignee as his executor. *In re Griffin*, (1899) 1 Ch. 408, 79 L. T. N. S. 442. See also *In re Commercial Bank*, 11 Manitoba 494, holding that though the words "not transferable," printed across the face of the receipt, prevent the instrument from being considered negotiable, they do not prevent the depositor from assigning the claim against the bank for the money deposited.

**806.** 2. See *Citizens' Bank v. Jones*, 121 Cal. 30.

**808.** 3. *Certificates Payable on Time.* — *Abbott v. Jack*, 136 Cal. 510.

5. *Bank May Require Surrender of Certificate on Payment.* — *Cottle v. Marine Bank*, 166 N. Y. 53.

**809.** 1. *Lost Certificates — Right to Require Indemnity.* — Where the bank can incur no liability from failure to produce and surrender the certificate, as where the certificate is not negotiable and is by its terms assignable only on the books of the bank, it cannot require indemnity as a condition to making payment after the certificate has been lost. *Zander v. New York Security, etc., Co.*, 178 N. Y. 208, affirming 81 N. Y. App. Div. 635, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 98.

**813.** 1. *A Barber's Chair* is a *chair* suitable for the use of a family within the meaning of an exemption statute. *Terry v. McDaniel*, 103 Tenn. 415.

**But a Dentist's Chair** is not. *Burt v. Stocks Coal Co.*, 119 Ga. 629.

**814.** 1. *Orders at Chambers.* — See *La Motte v. Smith*, 50 S. Car. 558.

# CHAMPERTY AND MAINTENANCE.

BY A. W. VARIAN.

**815. I. DEFINITIONS AND ORIGIN — 1. Maintenance.** — See note 1.

**816. 2. Champerty.** — See notes 1, 2.

**817. Action Pending Not Necessary.** — See notes 4, 6.

**818. 3. The Terms Distinguished.** — See note 1.

**4. Origin.** — See note 3.

**II. As A CRIME — 1. In General.** — See note 6.

**819. See note 1.**

**Generally Discarded.** — See note 3.

**A Crime in Some Jurisdictions.** — See note 5.

**2. Gist of the Offense.** — See note 7.

**815. 1. Maintenance Defined.** — *Casserleigh v. Wood*, (C. C. A.) 119 Fed. Rep. 308; *Casserleigh v. Wood*, 14 Colo. App. 265, *affirmed* 30 Colo. 287; *Lacey v. Davis*, (Iowa 1904) 98 N. W. Rep. 366; *Wheeler v. Harrison*, 94 Md. 147; *Breeden v. Frankford*, etc., Ins. Co., 110 Mo. App. 314, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815; *Finlen v. Heinze*, 28 Mont. 548; *Meloche v. Déguire*, 34 Can. Sup. Ct. 24, 8 Can. Crim. Cas. (Can.) 89. See also *Savill v. Langman*, 79 L. T. N. S. 44.

The "Maintaining" of a Criminal Proceeding is not maintenance. *Grant v. Thompson*, 72 L. T. N. S. 264, 18 Cox C. C. 100.

**816. 1. Champerty Defined.** — Champerty is simply the most odious species of maintenance. *Savill v. Langman*, 79 L. T. N. S. 44, *per* Collins, L. J.

**2. United States.** — *Casserleigh v. Wood*, (C. C. A.) 119 Fed. Rep. 308; *The Clara A. McIntyre*, 94 Fed. Rep. 552.

*District of Columbia.* — *Johnson v. Van Wyck*, 4 App. Cas. (D. C.) 294.

*Georgia.* — *Ellis v. Smith*, 112 Ga. 480.

*Iowa.* — *Lacey v. Davis*, (Iowa 1904) 98 N. W. Rep. 366.

*Montana.* — *Finlen v. Heinze*, 28 Mont. 548. *Ohio.* — *Pittsburg*, etc., R. Co. v. Volkert, 58 Ohio St. 362.

*Pennsylvania.* — *Harris v. Brown*, 9 Pa. Dist. 521, *affirmed* 202 Pa. St. 16, 90 Am. St. Rep. 610; *Maires's Case*, 7 Pa. Dist. 297, *affirmed* 189 Pa. St. 99; *Gubbel v. Brown*, 9 Pa. Dist. 524.

*Tennessee.* — *Robertson v. Cayard*, 111 Tenn. 356.

*Canada.* — *Meloche v. Déguire*, 34 Can. Sup. Ct. 24.

**817. 4. Must Be Agreement to Prosecute or Defend.** — See *Waller v. Marks*, 100 Ky. 541. See also *Savill v. Langman*, 79 L. T. N. S. 44.

An agreement under which A conveyed to B in trust a piece of land to pay off any recovery which might be obtained in a suit then pending against A, and to divide the balance of the proceeds of the land between A's wife and B, is not a contract of maintenance. *Renshaw v. Tullahoma First Nat. Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 194.

**Maintenance Is Confined to Civil Actions**, and does not apply to criminal proceedings the

maintaining of which is not illegal. *Grant v. Thompson*, 72 L. T. N. S. 264, 18 Cox C. C. 100.

**6. Agreement to Produce Evidence.** — *Rees v. De Bernardy*, (1896) 2 Ch. 437.

A contract which provides that a stranger to a claim shall receive a portion of the proceeds therefrom, in consideration of his producing evidence supposed to be material, and his paying the expenses of the litigation, is champertous. *Casserleigh v. Wood*, (C. C. A.) 119 Fed. Rep. 308. *Contra*, *Casserleigh v. Wood*, 14 Colo. App. 265, *affirmed* 30 Colo. 287.

**818. 1. The Terms Distinguished.** — See *Wheeler v. Harrison*, 94 Md. 147; *Meloche v. Déguire*, 34 Can. Sup. Ct. 24, 8 Can. Crim. Cas. (Can.) 89.

**3. The Object of the law** is to hinder the perverting of the remedial process of the law into an engine of oppression. *Meloche v. Déguire*, 34 Can. Sup. Ct. 24.

"The chief object of the old law of maintenance was to prevent harassment of individuals by the institution against them of suits without merit, the prosecution of them by illegitimate means, and the tendency to corrupt the fountains of justice by perjury and other disreputable methods to which parties would resort in order to secure success in the litigation." *Casserleigh v. Wood*, 14 Colo. App. 265.

**6. As a Crime — English Statute.** — See *Meloche v. Déguire*, 34 Can. Sup. Ct. 24, 8 Can. Crim. Cas. (Can.) 89; *Briggs v. Fleutot*, 10 British Columbia 309; *Hopkins v. Smith*, 1 Ont. L. Rep. 659. See also *Robertson v. Cayard*, 111 Tenn. 356.

**819. 1. Inherent Character of Offense.** — See *Johnson v. Van Wyck*, 4 App. Cas. (D. C.) 294; *Briggs v. Fleutot*, 10 British Columbia 309.

"The purchase of a litigious right is, at worst, *malum prohibitum* rather than *malum in se*." *Sanders v. Ditch*, 110 La. 884.

**3. Browne v. West**, 9 N. Y. App. Div. 135.

**5. A Crime in Some States.** — See *Woods v. Walsh*, 7 N. Dak. 376; *Casserleigh v. Wood*, (C. C. A.) 119 Fed. Rep. 308 (construing the *Colorado* statute); *Cox v. Watelsky*, 27 Tex. Civ. App. 478; *Melouche v. Déguire*, 34 Can. Sup. Ct. 24, 8 Can. Crim. Cas. (Can.) 89; *Briggs v. Fleutot*, 10 British Columbia 309; *Hopkins v. Smith*, 1 Ont. L. Rep. 659.

**7. Gist of the Offense.** — See *Meloche v. Dé-*

**820. 3. When Excusable — Interest in Suit. — See note 1.**

Extent of Interest Immaterial. — See note 3.

**822. IV. AS AFFECTING CONTRACTS — 1. In General. — See note 3.**

Executory — Executed. — See note 5.

**823. 2. Where Recognized. — See note 1.****824. Existence Uncertain. — See note 1.**

Not Recognized. — See note 2.

**3. Between Attorney and Client — a. CONTINGENT FEES — (1) In General — In England. — See note 4.**

guire, 34 Can. Sup. Ct. 24, *per* Davis, J., dissenting, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819.

**820. 1. Interest in Suit.** — See *Currency Min. Co. v. Bentley*, 10 Colo. App. 271; *Chicago City R. Co. v. General Electric Co.*, 74 Ill. App. 465; *Lacey v. Davis*, (Iowa 1904) 98 N. W. Rep. 366; *Breeden v. Frankford*, etc., Ins. Co., 110 Mo. App. 312, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820; *Pittsburg*, etc., R. Co. *v. Volkert*, 58 Ohio St. 362.

**3. Any Interest Will Excuse.** — See *Tron v. Lewis*, 31 Ind. App. 186, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820; *Finlen v. Heinze*, 28 Mont. 548; *Meloche v. Déguire*, 34 Can. Sup. Ct. 24, *per* Davis, J., dissenting, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820.

"Thus he may be a surety or guarantor on a note and aid the principal in defense. He may be a warrantor of title to property and aid and sustain a defense by the warrantee. The landlord may aid his tenant, etc." *Breeden v. Frankford*, etc., Ins. Co., 110 Mo. App. 312, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820, 821.

**Kindred or Affinity.** — "While it is permissible for a near kinsman of a poor suitor, out of charity, to assist him in the maintenance of his suit, such kinsman cannot do so as a speculative venture, based upon an agreement to share in the proceeds of the litigation in case the suitor should recover." *In re Evans*, 22 Utah 366, 83 Am. St. Rep. 794.

**Husband and Wife.** — See *Hiers v. Hiers*, 67 S. Car. 108.

**Poor Person.** — See *Meloche v. Déguire*, 34 Can. Sup. Ct. 24.

**Acts of Charity.** — See *Meloche v. Déguire*, 34 Can. Sup. Ct. 24. See also *Savill v. Langman*, 79 L. T. N. S. 44.

**822. 3. Champerty a Good Defense.** — *Geer v. Frank*, 179 Ill. 570; *Croco v. Oregon Short-Line R. Co.*, 18 Utah 311; *Meloche v. Déguire*, 34 Can. Sup. Ct. 24.

**Strangers.** — The defense that an agreement is void for champerty is open to others than parties to the agreement. *Briggs v. Fleutot*, 10 British Columbia 309.

**Agreement Not Technically Champertous.** — An agreement may be void on the ground that it is in the nature of champerty, though nothing has been done that amounts strictly to champerty as a criminal offense. *Rees v. De Bernardy*, (1896) 2 Ch. 437, 74 L. T. N. S. 585.

**No Defense to Attorney.** — An attorney cannot defend a suit by his client against him upon a contract on the ground that it is champertous. *Irwin v. Curie*, 171 N. Y. 409.

5 *Reese v. Resburgh*, 54 N. Y. App. Div. 378,

citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 822.

**823. 1. Where Recognized as Affecting Contracts — United States.** — *Peck v. Heurich*, 167 U. S. 624.

*Colorado.* — In Colorado the statutes have superseded the common-law offenses of champerty and maintenance. *Casserleigh v. Wood*, 14 Colo. App. 265; *O'Driscoll v. Doyle*, 31 Colo. 193.

*District of Columbia.* — *Johnson v. Van Wyck*, 4 App. Cas. (D. C.) 294; *Campbell v. Dexter*, 17 App. Cas. (D. C.) 454.

*Illinois.* — *Geer v. Frank*, 179 Ill. 570. See also *Chicago City R. Co. v. General Electric Co.*, 74 Ill. App. 465.

*Kentucky.* — *Lynn v. Moss*, (Ky. 1901) 62 S. W. Rep. 712.

*Minnesota.* — *Gammons v. Johnson*, 76 Minn. 76.

*New York.* — *Stedwell v. Hartmann*, 74 N. Y. App. Div. 126, affirmed 173 N. Y. 624.

The common-law doctrine relating to champerty and maintenance no longer exists. *Matter of Fitzsimons*, 174 N. Y. 15.

The present New York statute applies only to attorneys, and does not include laymen within its prohibition. *Irwin v. Curie*, 171 N. Y. 409; *Browne v. West*, 9 N. Y. App. Div. 135, wherein the plaintiff was allowed to recover from the defendant, both being laymen, the costs assessed in an action which the defendant had agreed to prosecute in the plaintiff's name, paying all costs and taking one-half of any recovery.

*North Dakota.* — "The common-law doctrine has existed in this jurisdiction since the organization of the territory," and has not been abrogated by statute. *Galbraith v. Payne*, 12 N. Dak. 164.

*Ohio.* — See *Brown v. Ginn*, 66 Ohio St. 316.

*Utah.* — *Croco v. Oregon Short-Line R. Co.*, 18 Utah 311; *Nelson v. Evans*, 21 Utah 202; *Kennedy v. Oregon Short-Line R. Co.*, 18 Utah 325; *Potter v. Ajax Min. Co.*, 22 Utah 273.

*Wisconsin.* — *Miles v. Mutual Reserve Fund L. Assoc.*, 108 Wis. 421.

**824. 1. Arkansas.** — See *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81.

*Texas.* — The English statutes of champerty were never in force in Texas. *Wheeler v. Riviere*, (Tex. Civ. App. 1899) 49 S. W. Rep. 697.

*Washington.* — "It is doubtful if the doctrine of champerty was ever in force in this state, as a part of the common law." *Smits v. Hogan*, 35 Wash. 290.

**2. Doctrine Not Recognized.** — *Bouvier v. Baltimore*, etc., R. Co., 67 N. J. L. 281.

**4. Contingent Fees — Canada.** — *O'Connor v.*

**825.** In the United States. — See note 1.

**826.** See note 1.

Rule Subject to Modifications. — See note 2.

**827.** See note 1.

The Agreement Must Be Made in Good Faith. — See note 2.

**828.** Construction of the Contract. — See note 1.

(3) *Recovery on Quantum Meruit When Contract Champertous.* —

See note 3.

**829.** See note 1.

c. ATTORNEY PAYING COSTS. — See note 6.

Gemmill, 26 Ont. App. 27, affirming *quoad hoc* 29 Ont. 47.

**825. 1. English Rule Adopted in United States.** — Leonard v. Boyd, (Ky. 1903) 71 S. W. Rep. 508. See also Peck v. Heurich, 167 U. S. 624.

**826. 1. More Modern Rule — Arkansas.** — Davis v. Webber, 66 Ark. 195, 74 Am. St. Rep. 81, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 826.

Maryland. — See Wheeler v. Harrison, 94 Md. 147.

Michigan. — Fletcher v. McArthur, (C. C. A.) 117 Fed. Rep. 393.

Minnesota. — Gammons v. Johnson, 76 Minn. 76.

New York. — A contract by an attorney to pay all the expenses of carrying on an action is champertous, though it is otherwise as to a contract for a contingent fee merely, without an agreement to pay expenses. Stedwell v. Hartmann, 74 N. Y. App. Div. 126, affirmed 173 N. Y. 624; Begly v. Weddigen, 86 N. Y. App. Div. 629, affirmed 179 N. Y. 542; Taylor v. Enthoven, (Supm. Ct. App. T.) 88 N. Y. Supp. 138.

But an agreement to pay an associate attorney out of the contingent fee does not make the contract champertous. Matter of Fitzsimons, 174 N. Y. 15.

A contract by a wife to pay a percentage of alimony to be awarded to her in a divorce suit is void as against public policy. Van Vleck v. Van Vleck, 21 N. Y. App. Div. 272.

North Dakota. — See Woods v. Walsh, 7 N. Dak. 376.

Pennsylvania. — Filon's Estate, 7 Pa. Dist. 316; Fenn v. McCarrell, 208 Pa. St. 615; Williams v. Philadelphia, 208 Pa. St. 282.

Texas. — Wheeler v. Riviere, (Tex. Civ. App. 1899) 49 S. W. Rep. 697.

Washington. — Smits v. Hogan, 35 Wash. 290.

**2. Rule Subject to Modifications — United States.** — Peck v. Heurich, 167 U. S. 624; Casserleigh v. Wood, (C. C. A.) 119 Fed. Rep. 308; Muller v. Kelly, 116 Fed. Rep. 545, reversed 125 Fed. Rep. 212, 60 C. C. A. 170.

Colorado. — O'Driscoll v. Doyle, 31 Colo. 193.

District of Columbia. — Johnson v. Van Wyck, 4 App. Cas. (D. C.) 294.

Illinois. — Geer v. Frank, 179 Ill. 570; Robinson v. Sharp, 201 Ill. 86.

Iowa. — Wallace v. Chicago, etc., R. Co., 112 Iowa 565.

New York. — See the last note *supra*.

Ohio. — The agreement is champertous if the attorney contracts to pay a part of the expenses

of the litigation. Emslie v. Ford Plate-Glass Co., 25 Ohio Cir. Ct. 548; Brown v. Ginn, 66 Ohio St. 316.

Utah. — Nelson v. Evans, 21 Utah 202, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 824 [826]; Croco v. Oregon Short-Line R. Co., 18 Utah 311; *In re Evans*, 22 Utah 366, 83 Am. St. Rep. 794; Potter v. Ajax Min. Co., 22 Utah 273.

**827. 1. Massachusetts.** — Hadlock v. Brooks, 178 Mass. 425; Gargano v. Pope, 184 Mass. 571, 100 Am. St. Rep. 575.

West Virginia. — See Dorr v. Camden, 55 W. Va. 226.

**Contract by State.** — A person may enter into a contract with a county whereby he undertakes to discover taxable property and to pay the expenses of collecting the taxes thereon, and, as compensation therefor, to receive a proportion of the taxes collected. Such a contract is not void as against public policy. Shinn v. Cunningham, 120 Iowa 383; Disbrow v. Cass County, 119 Iowa 538.

A Similar Contract by a City was held to be valid in Williams v. Philadelphia, 208 Pa. St. 282.

**2. Agreement Must Be Made in Good Faith.** — Muller v. Kelly, (C. C. A.) 125 Fed. Rep. 212, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 827; Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 827; Matter of Fitzsimons, 77 N. Y. App. Div. 345, reversed 174 N. Y. 15; Dorr v. Camden, 55 W. Va. 226, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 827.

**828. 1. Construction of Contract.** — If the facts show the elements of maintenance or champerty, the form of the contract adopted by the champertor to defeat the effect of the law will be disregarded, the substance and intent of the contract being allowed to prevail over its form. Lynn v. Moss, (Ky. 1901) 62 S. W. Rep. 712.

**3. May Recover on a Quantum Meruit.** — Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 828; Leonard v. Boyd, (Ky. 1903) 71 S. W. Rep. 508; Potter v. Ajax Min. Co., 22 Utah 273, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 828. *Contra*, Gammons v. Johnson, 76 Minn. 76; Gammons v. Gulbranson, 78 Minn. 21.

**829. 1.** Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81; Dorr v. Camden, 55 W. Va. 226, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 828, and supporting the whole text paragraph.

**6. Attorney Advancing Costs.** — Potter v. Ajax

**829.** 4. Buying Claims for Suit. — See note 9.

**832.** 5. Champertous Agreement to Prosecute as Defense. — See note 2.

**833.** See note 1.

**834.** See notes 1, 3.

Min. Co., 22 Utah 273, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 829.

**829. 9. Buying or Assigning Claims for Suit** — *United States*. — A person has a right to assign an interest in a chose in action. *Rucker v. Bolles*, (C. C. A.) 80 Fed. Rep. 504.

*Kentucky*. — An assignment of an interest in a claim in consideration of an agreement to furnish evidence to establish the claim is against public policy. *Lynn v. Moss*, (Ky. 1901) 62 S. W. Rep. 712.

*Louisiana*. — The donee of a litigious claim may enforce the claim. *Independent Ice, etc., Mach. Co. v. Anderson*, 106 La. 95.

*New York*. — An assignment of a cause of action to an attorney is not prohibited. *Einstein v. U. S. Fidelity, etc., Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 295.

But an assignment to an attorney of a claim for goods sold and delivered is champertous. *Sugarman v. Mandolla*, (Supm. Ct. App. T.) 88 N. Y. Supp. 393.

An attorney may take an assignment of a claim and pass a valid title thereto to a third party, even though such third party knows the attorney took the assignment for the purpose of instituting suit thereon in violation of the prohibition of the champerty statutes. *Beers v. Washbond*, 86 N. Y. App. Div. 582.

**Object of Statute.** — *De Forest v. Andrews*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 145; *Beers v. Washbond*, 86 N. Y. App. Div. 582.

**Purchasing Mortgage to Foreclose.** — A purchase of a bond and mortgage by an attorney with the intent and for the purpose of bringing an action thereon comes within the prohibition of the statute. *Maxon v. Cain*, 22 N. Y. App. Div. 270.

**Purpose.** — There must be an intent to obtain title for the purpose of commencing an action. Mere intent to bring suit is no offense under the *New York* statute. And the statute does not prohibit the purchasing of chattels for the purpose of instituting an action. *Van Dewater v. Gear*, 21 N. Y. App. Div. 201.

There can be no recovery in a suit by an attorney on a claim assigned to him if it is shown that he bought the claim for the purpose of bringing an action thereon. *Carpenter v. Cummings*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 661.

**Special Proceedings.** — The statute does not prohibit the purchase of a claim supposed to have been allowed by an administrator with the intent and for the purpose of compelling the administrator to account. *Tilden v. Aitkin*, 37 N. Y. App. Div. 28.

*United States*. — A contract by a party having no interest in a claim, whereby he obtains an assignment of the claim and agrees to pay all expenses of the litigation and to divide what he recovers, is champertous. *The Clara A. McIntyre*, 94 Fed. Rep. 552.

*North Carolina*. — An assignment of a right of action for a breach of a covenant of war-

ranty is champertous and void, where the agreement provides that the assignor is to receive whatever is recovered upon the claim, less the costs of litigation. *Ravenal v. Ingram*, 131 N. Car. 549.

*Ohio*. — *Brown v. Ginn*, 66 Ohio St. 316.

*Texas*. — An attorney cannot take a transfer of a part of his client's right of action. *Ft. Worth, etc., R. Co. v. Carlock*, (Tex. Civ. App. 1903) 75 S. W. Rep. 931.

**832. 2. Champertous Agreement to Prosecute.** — *Miles v. Mutual Reserve Fund L. Assoc.*, 108 Wis. 421.

**Tennessee — Statute Repealed.** — The Tennessee statute requiring the dismissal of a suit where it appears that it is being prosecuted under a champertous agreement was repealed by Acts Tenn. 1899, c. 173. *Heaton v. Dennis*, 103 Tenn. 155; *Robertson v. Cayard*, 111 Tenn. 356.

**833. 1. Colorado.** — See *Currency Min. Co. v. Bentley*, 10 Colo. App. 271.

*District of Columbia*. — *Johnson v. Van Wyck*, 4 App. Cas. (D. C.) 294. *Compare* *Peck v. Heurich*, 167 U. S. 624, holding that in the District of Columbia an assignee under a champertous agreement cannot maintain a suit upon the assigned claim where the defense of champerty is interposed.

*Georgia*. — *Ellis v. Smith*, 112 Ga. 480, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 833; *Bullock v. Dunbar*, 114 Ga. 754.

*Illinois*. — *Henderson v. Kibbie*, 211 Ill. 556.

*Iowa*. — *Lacey v. Davis*, (Iowa 1904) 98 N. W. Rep. 366.

*Kansas*. — *Forbes v. Mohr*, 69 Kan. 342.

*Minnesota*. — *Isherwood v. H. L. Jenkins Lumber Co.*, 87 Minn. 390, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832 [833].

*Missouri*. — *Bick v. Overfelt*, 88 Mo. App. 139.

*North Dakota*. — *Woods v. Walsh*, 7 N. Dak. 376.

*Rhode Island*. — See *Hearn v. Hearn*, 24 R. I. 328.

*Tennessee*. — *Heaton v. Dennis*, 103 Tenn. 155; *Robertson v. Cayard*, 111 Tenn. 356.

*Utah*. — *Croco v. Oregon Short Line R. Co.*, 18 Utah 311; *Potter v. Ajax Min. Co.*, 22 Utah 273.

*Washington*. — *Straw-Ellsworth Mfg. Co. v. Cain*, 20 Wash. 351.

*West Virginia*. — *Davis v. Settle*, 43 W. Va. 17.

**834. 1. Bullock v. Dunbar**, 114 Ga. 754; *Croco v. Oregon Short Line R. Co.*, 18 Utah 311; *Potter v. Ajax Min. Co.*, 22 Utah 273.

3. "The better doctrine, which now seems to be supported by the weight of authority, is that the fact that there is an illegal and champertous contract for the prosecution of an action is no ground for an abatement of such action, nor a defense thereto." *Ellis v. Smith*, 112 Ga. 480. See also *Croco v. Oregon Short Line R. Co.*, 18 Utah 311.

**835. V. BUYING AND SELLING PRETENDED TITLES — 1. Generally — Statute of Henry VIII. — See note 1.**

The Statute Affirmed the Common Law. — See note 2.

United States. — See note 5.

**837.** See note 1.

**838.** Construction. — See note 1.

**839. 2. The Title and Possession. — See notes 1, 2, 3.**

Under the New York Statute. — See notes 4, 5.

**841. In Connecticut, Kentucky, and Tennessee. — See note 1.**

**3. What Conveyances Included — The Statutes Are Held Inapplicable. — See notes 2, 3, 6, 7.**

**835. 1. Buying and Selling Pretended Titles. — See Bouvier v. Baltimore, etc., R. Co., 67 N. J. L. 281.**

**2. The Statute Affirmed the Common Law. — Johnson v. Van Wyck, 4 App. Cas. (D. C.) 294; Bouvier v. Baltimore, etc., R. Co., 67 N. J. L. 281.**

**5. United States — By Statute — Kentucky. — Fain v. Miles, (Ky. 1901) 60 S. W. Rep. 939; Meek v. Catlettsburg, etc., Packet Co., (Ky. 1901) 60 S. W. Rep. 484; West v. Chamberlain, 109 Ky. 194; Keaton v. Sublett, 109 Ky. 106; Logan v. Phenix, (Ky. 1902) 66 S. W. Rep. 1042; Higgins v. Howard, (Ky. 1901) 61 S. W. Rep. 1016.**

**Construction of Tennessee Statute. — Where a bona fide mortgage is given by the legal owner of the fee with the consent of the equitable owner and the party in possession, it is not champertous. Curry v. Williams, (Tenn. Ch. 1896) 38 S. W. Rep. 278.**

**In Force as Part of the Common Law. — Jackson v. Singleton, 122 Ala. 323.**

**837. 1. Recognized as Obsolete. — Peck v. Heurich, 167 U. S. 624.**

**838. 1. Construction. — Tilden v. Aitkin, 37 N. Y. App. Div. 28.**

**839. 1. The Title and Possession. — Croft v. Doe, 125 Ala. 391; Farmer v. Farmer, (Ky. 1897) 39 S. W. Rep. 706.**

**2. Possession Must Be Actual. — Meigs v. Roberts, 42 N. Y. App. Div. 290, reversed 162 N. Y. 371.**

**3. Constructive Possession Insufficient. — Croft v. Doe, 125 Ala. 391.**

**4. New York Statute. — Eisemann v. Lapp, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 14; Willey v. Greenfield, 64 N. Y. App. Div. 220.**

**5. Validity of Title. — Biglow v. Biglow, 39 N. Y. App. Div. 103; De Garmo v. Phelps, 64 N. Y. App. Div. 590, reversed 176 N. Y. 455; Eisemann v. Lapp, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 14.**

In order to constitute such adverse possession as will avoid a deed, there must be a claim of some title or interest under some written instrument purporting to convey the lands to the claimant, or else some judgment, decree, or executed process of some court. *Arents v. Long Island R. Co.*, 156 N. Y. 1.

**Possession under Quitclaim Deed. — Lambert v. Huber, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 462.**

**841. 1. United States. — Scott v. Mineral Development Co., (C. C. A.) 130 Fed. Rep. 497.**

**Connecticut. — Actual possession by a mortgagee will avoid a deed by the mortgagor.**

*Mead v. Fitzpatrick*, 74 Conn. 521. But a structure overhanging the land of another is not equivalent to a possession of such other party's land. *Norwalk Heating, etc., Co. v. Vernam*, 75 Conn. 662, 96 Am. St. Rep. 246.

**Kentucky. — Mayes v. Kenton, (Ky. 1901) 64 S. W. Rep. 728; Stovall v. Haynes, (Ky. 1904) 78 S. W. Rep. 895; Krauth v. Hahn, (Ky. 1901) 65 S. W. Rep. 18; Rice v. West, (Ky. 1897) 41 S. W. Rep. 116.**

A person in possession as a tenant does not hold an adverse possession so as to defeat a conveyance of the fee during the term of the tenancy. *Taylor v. Combs*, (Ky. 1899) 50 S. W. Rep. 64.

**Tennessee. — Neither residence on nor cultivation of the land is necessary to constitute actual adverse possession. Where the premises are susceptible of it, it must, as a general rule, be by inclosure by fences or like improvements so as to make the occupation visible, notorious, continuous, and adverse; but where the land is not suitable for cultivation, as in the case of a mining property, the exercise of dominion over it is sufficient. *Green v. Cumberland Coal, etc., Co.*, 110 Tenn. 35.**

No particular length of possession is necessary. *Green v. Cumberland Coal, etc., Co.*, 110 Tenn. 35.

A vendee in possession under a parol contract of sale holds for himself and not as tenant of the vendor. *Slaton v. Tennessee Coal, etc., R. Co.*, 109 Tenn. 415.

But if when the party takes a deed he does not know that any one else is in possession or claims title the deed is not void for champerty. *Sewell v. Draughn*, (Tenn. Ch. 1897) 44 S. W. Rep. 210.

**2. When Inapplicable — Bona Fide Contracts. — Middlesboro Waterworks v. Neal, 105 Ky. 586.**

Where a contract is made to convey lands upon condition the party entitled to receive the conveyance may, after performance of the condition, assign his right to receive the conveyance, and the assignee can enforce its execution. *Davis v. Williams*, 121 Ala. 542.

**3. Sale by Tenant to Cotenant. — Speer v. Duff, (Ky. 1901) 65 S. W. Rep. 126.**

**6. Conveyance by Remainderman. — Davis v. Willson, 115 Ky. 639.**

The equity of a remainderman to avoid a deed of trust for fraud may be assigned, and enforced by the assignee, without committing an act of maintenance. *Gandy v. Fortner*, 119 Ala. 303.

**7. Conveyance of Incorporeal Hereditament. —**

**842.** See notes 3, 4.

**843.** The Statutes Are Generally Held Applicable. — See note 1.  
Purchase of Lands Pending Suit. — See note 4.

**844.** 4. Effect of the Conveyance. — See note 2.

**845.** In Whom Title Vested — Estoppel. — See notes 2, 4.

**CHANCE.** — See note 5.

**847.** **CHANGE.** — See note 3.

**848.** **CHANNEL.** — See note 5.

Hegan v. Pendennis Club, (Ky. 1901) 64 S. W. Rep. 464.

**842.** 3. Execution Sales. — Griffin v. Dauphin, 133 Ala. 543.

**Judicial Decree.** — Electric Lighting Co. v. Rust, 117 Ala. 680, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 842; Rust v. Electric Lighting Co., 124 Ala. 202; Carlisle v. Cassady, (Ky. 1898) 46 S. W. Rep. 490; Howe v. Miller, (Ky. 1901) 65 S. W. Rep. 353; De Garmo v. Phelps, 176 N. Y. 455; Eisemann v. Lapp, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 14.

**An Assignee in Bankruptcy** can convey a good title to land of the bankrupt notwithstanding the bankrupt is in possession. Buckler v. Rogers, (Ky. 1900) 54 S. W. Rep. 848. See also Carlisle v. Cassady, (Ky. 1898) 46 S. W. Rep. 490.

**4. Sale by Purchaser at Execution Sale.** — See Miller v. Farmers' Bank, (Ky. 1903) 75 S. W. Rep. 218.

**843.** 1. Mortgages. — Jackson v. Singleton, 122 Ala. 323.

**Assignment of Mortgage.** — De Garmo v. Phelps, 176 N. Y. 455.

**4. Purchase of Lands in Litigation.** — See Higgins v. Howard, (Ky. 1901) 61 S. W. Rep. 1016.

**844.** 2. Effect of Conveyance — Alabama. — Prestwood v. McGowin, 128 Ala. 267, 86 Am. St. Rep. 136; Chevalier v. Carter, 124 Ala. 520; Stringfellow v. Tennessee Coal, etc., R. Co., 117 Ala. 250.

**Kentucky.** — A champertous deed is not void, but is only voidable, at the instance of the parties in adverse possession. Ft. Jefferson Imp. Co. v. Dupoyster, 108 Ky. 792. See also Lyttle v. Fitzpatrick, (Ky. 1902) 67 S. W. Rep. 988.

**New York.** — A champertous deed is void as against the party in possession. Dever v. Hagerty, 169 N. Y. 481; De Garmo v. Phelps, 64 N. Y. App. Div. 590, reversed 176 N. Y. 455;

Eisemann v. Lapp, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 14.

**North Dakota.** — A champertous deed is void as against the party in possession, but is binding between the grantor and the grantee. Galbraith v. Payne, 12 N. Dak. 164; Schneller v. Plankinton, 12 N. Dak. 561.

**Tennessee.** — Green v. Cumberland Coal, etc., Co., 110 Tenn. 35.

**845.** 2. Rights under Conveyance. — Berry v. Tennessee, etc., R. Co., 134 Ala. 618.

**4. Ejectment.** — In *New York*, where an owner out of possession conveys land to a third party and thereafter conveys the same land to the party holding adversely, neither the original owner nor such third party can maintain an action of ejectment against the party who originally held adversely. Dever v. Hagerty, 169 N. Y. 481.

**5. Chance Policeman.** — Under a city ordinance providing that the police officers of a city shall consist of "a chief of police, \* \* \* and two substitutes or *chance* policemen," such policemen are police officers and protected from removal except for cause and after hearing. Bakely v. Nowrey, 68 N. J. L. 95.

**847.** 3. Equivalent to Alter. — See *In re Alston*, 1 Penn. (Del.) 359.

**A Change in the Location of a Highway**, according to the ordinary meaning of the term, is a removal of the highway from one place to another. Leighton v. Concord, etc., R. Co., 72 N. H. 226.

**A Change of Domicil** is accomplished by a *change* of residence to a new place, combined with the *animus manendi*. Marks v. Germania Sav. Bank, 110 La. 659. And see the title DOMICIL.

**848.** 5. The Northern Queen, 117 Fed. Rep. 906 (a collision case).

# CHARACTER (IN EVIDENCE).

BY W. H. CROW.

**852. II. DEFINITION** — Character and Reputation Distinguished. — See note 2.  
Used as Synonymous. — See note 3.

**III. GENERAL RULES AS TO ADMISSIBILITY** — 1. Presumptions — Civil Actions. — See note 4.

**853.** Character of Deceased in Homicide — Of Prosecutrix in Rape or Seduction — See note 1.

**854.** In the Case of a Witness. — See note 1.  
Defendant in Criminal Prosecution. — See note 2.

**856.** 2. Trait Involved — a. IN GENERAL. — See note 1.

**857.** b. AS TO WITNESSES — (1) *Truth and Veracity*. — See note 7.

**858.** (2) *General Moral Character*. — See note 1.  
Statutes. — See note 2.

**852. 2.** See *State v. Knight*, 118 Wis. 473.  
**3.** *Thrawley v. State*, 153 Ind. 381.

**4. Good Character Is Presumed in Civil Actions.** — *Claiborne v. Chesapeake*, etc., R. Co., 46 W. Va. 365, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 852; *Breedlove v. Breedlove*, 27 Ind. App. 560.

**853. 1. Defendant Must First Attack Character of Deceased.** — *Carr v. State*, 11 Ohio Cir. Dec. 353, 21 Ohio Cir. Ct. 43. And see *infra*, this title, 871. 2 *et seq.*

**854. 1. Witnesses.** — *Woey Ho v. U. S.*, 48 C. C. A. 705, 109 Fed. Rep. 888; *State v. Owens*, 109 Iowa 1; *Portland First Nat. Bank v. Commercial Union Assur. Co.*, 33 Oregon 43; *Zysman v. State*, 42 Tex. Crim. 432; *Fox v. Robbins*, (Tex. Civ. App. 1902) 70 S. W. Rep. 597.

**The Same Rule Applies to the Accused as a Witness.** — *Alkire Grocer Co. v. Tagart*, 78 Mo. App. 166; *Bass v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 919.

**More Conflict of Evidence Is Not an Attack** — *Alabama*. — *Bell v. State*, 124 Ala. 94.

*Georgia*. — *Anderson v. Southern R. Co.*, 107 Ga. 507, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 854.

*Iowa*. — *State v. Owens*, 109 Iowa 1.

*Texas*. — *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114; *Murphy v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 978; *Jacobs v. State*, 42 Tex. Crim. 353; *Zysman v. State*, 42 Tex. Crim. 432; *Rutherford v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 100; *McCowen v. Gulf*, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 46; *White v. Epperson*, 32 Tex. Civ. App. 162; *Simmonds v. Simmonds*, (Tex. Civ. App. 1904) 79 S. W. Rep. 630.

**Attack on Cross-examination**, by questions calculated to impeach veracity, will make evidence of good character admissible. *Warfield v. Louisville*, etc., R. Co., 104 Tenn. 74, 78 Am. St. Rep. 911.

**2. Defendant Only Can Put His Character in Issue.** — *Mullen v. U. S.*, 46 C. C. A. 22, 106 Fed. Rep. 892; *Hoffman v. State*, 93 Md. 388; *State v. Pollard*, 174 Mo. 607; *State v. Foster*,

130 N. Car. 666, 89 Am. St. Rep. 876; *Cline v. State*, (Tex. Crim. 1902) 71 S. W. Rep. 23; *Maxwell v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 516.

**Character of Accused Is Presumed Good.** — *Mullen v. U. S.*, 46 C. C. A. 22, 106 Fed. Rep. 892; *Biester v. State*, 65 Neb. 276. See also *People v. Gleason*, 122 Cal. 370; *Howard v. Com.*, 114 Ky. 372.

**Good Character Admitted by Prosecution.** — A defendant indicted for robbery will not be allowed to introduce evidence of his good character, when his good character is admitted by the state. *Beard v. State*, 44 Tex. Crim. 402.

**856. 1. General Rule — Restriction as to Trait Involved** — *California*. — *People v. Chrisman*, 135 Cal. 282.

*Delaware*. — *State v. Conlan*, 3 Penn. (Del.) 218.

*Georgia*. — *Anderson v. Southern R. Co.*, 107 Ga. 507, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 856.

*Indiana*. — *Baehner v. State*, 25 Ind. App. 597.

*Louisiana*. — *State v. Thompson*, 109 La. 296.

*Mississippi*. — *Westbrooks v. State*, 76 Miss. 710; *Maston v. State*, 83 Miss. 647.

*Missouri*. — *State v. Bradford*, 79 Mo. App. 346; *State v. Anslinger*, 171 Mo. 600.

*New Jersey*. — *State v. Snover*, 63 N. J. L. 382.

*Texas*. — *Hudson v. State*, 41 Tex. Crim. 453, 96 Am. St. Rep. 789.

*Utah*. — *State v. Marks*, 16 Utah 204.

**857. 7. Witnesses — Evidence Confined to Truth and Veracity.** — *Padron v. State*, 41 Tex. Crim. 548. See also the title WITNESSES, 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1075, note 2.

**858. 1. General Moral Character.** — *Suddeth v. State*, 112 Ga. 407; *Trusty v. Com.*, (Ky. 1897) 41 S. W. Rep. 766; *State v. Guy*, 106 La. 8; *Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 445. See also the title WITNESSES, 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1074, note 4.

**2. California Statute.** — *People v. Harlan*, 133 Cal. 16. See also the title WITNESSES, 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1075, note 1.



**859.** (3) *Particular Traits Other than Truth and Veracity Inadmissible.*

— See note 1.

Chastity. — See notes 2, 3.

**860.** 3. Period to Which Evidence Should Relate — *a.* IN CIVIL ACTIONS.

— See notes 2, 4.

*b.* IN CRIMINAL PROSECUTIONS. — See note 6.**861.** *c.* AS TO WITNESSES. — See note 1.

## IV. CIVIL ACTIONS — 1. IN General. — See note 2.

**862.** 2. Arson and Other Burnings. — See note 2.

## 3. Divorce. — See note 3.

**863.** 4. Actions Charging Fraud or Moral Delinquency. — See note 1.**864.** Wills. — See note 1.**865.** 5. When Character Is Put in Issue. — See note 1.*a.* BREACH OF PROMISE OF MARRIAGE. — See note 2.

**859.** 1. *Ross v. State*, 139 Ala. 144; *Stanley v. Aetna Ins. Co.*, 70 Ark. 107; *Calhoon v. Com.*, 64 S. W. Rep. 965, 23 Ky. L. Rep. 1188; *Hoffman v. State*, 93 Md. 388; *Calkins v. Ann Arbor R. Co.*, 119 Mich. 312; *Com. v. Hazlett*, 14 Pa. Super. Ct. 352; *Houston, etc., R. Co. v. Runnels*, (Tex. Civ. App. 1898) 46 S. W. Rep. 394, reversed 92 Tex. 305; *Johnson v. State*, 42 Tex. Crim. 618; *Smith v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 801. See also the title WITNESSES, 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082, note 6.

2. *State v. Dyer*, 139 Mo. 199; *State v. Pollard*, 174 Mo. 607; *Sitton v. Grand Lodge, etc.*, 84 Mo. App. 208.

3. *Unchastity of Witness Cannot Be Shown as to Credibility.* — *People v. Wilson*, (Mich. 1904) 99 N. W. Rep. 6; *Hudson v. State*, 41 Tex. Crim. 453, 96 Am. St. Rep. 789. See also the title WITNESSES, 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1083, notes 1, 2.

**860.** 2. *Breach of Promise.* — *Duvall v. Fuhrman*, 2 Ohio Cir. Dec. 174.

4. *Libel and Slander.* — See *Smith v. Hine*, 179 Pa. St. 203.

6. *Criminal Prosecutions — Defendant.* — *Gordon v. State*, 140 Ala. 29; *State v. Sprague*, 64 N. J. L. 424, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860; *Fossett v. State*, 41 Tex. Crim. 400; *State v. Marks*, 16 Utah 204.

*Limited to Discovery of Offense.* — *State v. Sprague*, 64 N. J. L. 424.

*Character Since Incarceration Inadmissible.* — *White v. State*, 111 Ala. 92.

*Evidence Subsequently Acquired Inadmissible.* — See *Hopperwood v. State*, 39 Tex. Crim. 15.

**861.** 1. *Character of Witness at Time of Trial Admissible.* — *Smith v. Hine*, 179 Pa. St. 203; *Fossett v. State*, 41 Tex. Crim. 400.

*Accused as a Witness.* — See *State v. Sprague*, 64 N. J. L. 419; *Marcom v. Adams*, 122 N. Car. 222; *Renfro v. State*, 42 Tex. Crim. 393.

2. *Evidence of Character Generally Inadmissible in Civil Actions — United States.* — *Morgan v. Barnhill*, 55 C. C. A. 1, 118 Fed. Rep. 24.

*Alabama.* — *Davis v. Sanders*, 133 Ala. 275. *Arkansas.* — *St. Louis, etc., R. Co. v. Stroud*, 67 Ark. 112.

*Illinois.* — *Ellwood v. Walter*, 103 Ill. App. 219.

*Indiana.* — *Treschman v. Treschman*, 28 Ind. App. 206.

*Kansas.* — *Erb v. Popritz*, 59 Kan. 269, 68

Am. St. Rep. 362, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861.

*Michigan.* — *Adams v. Elseffer*, 132 Mich. 100.

*New York.* — *Meyer v. Suburban Home Co.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 686, affirming (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 311.

*North Carolina.* — *Marcom v. Adams*, 122 N. Car. 222.

*Oregon.* — *Munkers v. Farmers, etc., Ins. Co.*, 30 Oregon 211.

*Texas.* — *Roach v. Crume*, (Tex. Civ. App. 1897) 41 S. W. Rep. 86; *Timmony v. Burns*, (Tex. Civ. App. 1897) 42 S. W. Rep. 133; *Hurst v. Benson*, (Tex. Civ. App. 1902) 71 S. W. Rep. 417.

*Assault and Battery.* — *Lyddon v. Dose*, 81 Mo. App. 64; *Houston, etc., R. Co. v. Bell*, (Tex. Civ. App. 1903) 73 S. W. Rep. 56, affirmed 97 Tex. 71. See also *Barr v. Post*, 56 Neb. 698.

*Homicide.* — *Morgan v. Barnhill*, 55 C. C. A. 1, 118 Fed. Rep. 24.

**862.** 2. *Fire Insurance Policy.* — *Munkers v. Farmers, etc., Ins. Co.*, 30 Oregon 211.

3. *Divorce.* — *Poler v. Poler*, 32 Wash. 400; *Breedlove v. Breedlove*, 27 Ind. App. 560. And see the title DIVORCE.

**863.** 1. *Charge of Fraud Does Not Involve Character.* — *Reeves v. Southern R. Co.*, 68 S. Car. 95, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863; *Bedenbaugh v. Southern R. Co.*, 69 S. Car. 17, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863; *Ward v. Brown*, 53 W. Va. 272, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863. See also the title FRAUD AND DECEIT, 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 196, notes 4, 5.

*Fire Insurance Obtained by Fraud.* — See *Fire Assoc. v. Jones*, (Tex. Civ. App. 1897) 40 S. W. Rep. 44.

*View that Evidence of Character Is Sometimes Admissible in Such Actions.* — See *Continental Nat. Bank v. Nashville First Nat. Bank*, 108 Tenn. 374.

**864.** 1. *Sometimes Admitted.* — See *Ward v. Brown*, 53 W. Va. 272, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 864.

**865.** 1. *"Putting Character in Issue."* — *Morgan v. Barnhill*, 55 C. C. A. 1, 118 Fed. Rep. 24.

2. *Breach of Promise — Plaintiffs Character.* — *Herriman v. Layman*, 118 Iowa 590; *Markham*

**865.** *c.* LIBEL AND SLANDER. — See note 4.

**866.** *d.* MALICIOUS PROSECUTION. — See note 1.

*e.* CHARACTER OF THE DEFENDANT IN THESE ACTIONS. — See note 2.

**V. CRIMINAL PROSECUTIONS** — 1. Character of the Defendant — *a.* RIGHT TO PUT IN ISSUE. — See note 3.

**867.** *b.* WEIGHT AND EFFECT. — See note 1.

**868.** See note 1.

Question for the Jury. — See note 2.

*v.* Herrick, 82 Mo. App. 327. See also the title BREACH OF PROMISE OF MARRIAGE, 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 892, note 4.

**865.** 4. Libel and Slander — Bad Character of Plaintiff May Be Shown. — Georgia *v.* Bond, 114 Mich. 196; Davis *v.* Hamilton, 88 Minn. 64; Hess *v.* Gansz, 90 Mo. App. 439. See also the title LIBEL AND SLANDER, 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1100, note 1.

**866.** 1. Malicious Prosecutions. — Waters *v.* West Chicago St. R. Co., 101 Ill. App. 265; Miles *v.* Salisbury, 12 Ohio Cir. Dec. 7, 21 Ohio Cir. Ct. 333; Claiborne *v.* Chesapeake, etc., R. Co., 46 W. Va. 365, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866. See also the title MALICIOUS PROSECUTION, 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 699.

2. Defendant's Character Is Not in Issue. — Marcom *v.* Adams, 122 N. Car. 222. See also the title MALICIOUS PROSECUTION, 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 700.

3. Defendant May Always Put His Character in Issue — United States. — Edgington *v.* U. S., 164 U. S. 361; Morgan *v.* Barnhill, 55 C. C. A. 1, 118 Fed. Rep. 24.

Delaware. — Daniels *v.* State, 2 Penn. (Del.) 586.

Iowa. — State *v.* Dexter, 115 Iowa 678.

Kansas. — State *v.* Deuel, 63 Kan. 811; State *v.* Pipes, 65 Kan. 543.

Michigan. — People *v.* Albers, (Mich. 1904) 100 N. W. Rep. 908, 11 Detroit Leg. N. 441.

Mississippi. — Maston *v.* State, 83 Miss. 647.

Nebraska. — Biester *v.* State, 65 Neb. 276.

New Jersey. — State *v.* Snover, 63 N. J. L. 382.

North Carolina. — Marcom *v.* Adams, 122 N. Car. 222; State *v.* Finger, 131 N. Car. 781.

Pennsylvania. — Com. *v.* Gibbons, 3 Pa. Super. Ct. 408.

Utah. — State *v.* Blue, 17 Utah 184, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866.

West Virginia. — State *v.* Madison, 49 W. Va. 96; State *v.* Morrison, 49 W. Va. 210.

Character of Accomplice Inadmissible. — State *v.* Beaty, 62 Kan. 266.

Question of Character Raised by the Pleadings. — In case the pleadings raise a question of the defendant's honesty, he may introduce evidence on that point; but evidence of his general reputation, that he "was regarded as one of the best boys in the country," is not admissible. Sargent *v.* Beard, (Tex. Civ. App. 1899) 53 S. W. Rep. 90.

**867.** 1. Reasonable Doubt Raised by Evidence of Character — United States. — Rowe *v.* U. S., 38 C. C. A. 496, 97 Fed. Rep. 779.

Alabama. — Scott *v.* State, 133 Ala. 112. But see McClellan *v.* State, 140 Ala. 99.

Delaware. — Daniels *v.* State, 2 Penn. (Del.) 586, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867.

Iowa. — State *v.* House, 108 Iowa 68.

Louisiana. — State *v.* Nicholls, 50 La. Ann. 699.

New York. — People *v.* Elliott, 163 N. Y. 11, reversing (Supm. Ct. App. Div.) 60 N. Y. Supp. 1145; People *v.* Childs, 90 N. Y. App. Div. 58.

North Carolina. — State *v.* Finger, 131 N. Car. 781.

Pennsylvania. — Com. *v.* Stone, 6 Lack. Leg. N. (Pa.) 241; Com. *v.* Sayars, 21 Pa. Super. Ct. 75.

Utah. — State *v.* Van Kuran, 25 Utah 16, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867.

Good Character May Bring Conviction of Innocence. — State *v.* Van Kuran, 25 Utah 8.

To Be Considered Notwithstanding Strong Evidence of Guilt. — People *v.* Seldner, 62 N. Y. App. Div. 357.

**868.** 1. Olds *v.* State, 44 Fla. 453; People *v.* McArron, 121 Mich. 1.

2. Weight of Evidence a Question for Jury — United States. — Rowe *v.* U. S., 38 C. C. A. 496, 97 Fed. Rep. 779; U. S. *v.* Breese, 131 Fed. Rep. 915.

California. — People *v.* Hoagland, (Cal. 1902) 69 Pac. Rep. 1063.

Delaware. — State *v.* Conlan, 3 Penn. (Del.) 218; State *v.* Snow, 3 Penn. (Del.) 259; State *v.* Lynn, 3 Penn. (Del.) 316; State *v.* Jones, 4 Penn. (Del.) 109; State *v.* Pucca, 4 Penn. (Del.) 71; State *v.* Carr, 4 Penn. (Del.) 523.

Florida. — Olds *v.* State, 44 Fla. 452; Peaden *v.* State, (Fla. 1903) 35 So. Rep. 204.

Georgia. — Keys *v.* State, 112 Ga. 392, 81 Am. St. Rep. 63; Suddeth *v.* State, 112 Ga. 407; Bazil *v.* State, 117 Ga. 32.

Iowa. — State *v.* Olds, 106 Iowa 110; State *v.* House, 108 Iowa 68; State *v.* Wolf, 112 Iowa 458; State *v.* Birkey, 122 Iowa 102.

Illinois. — Guzinski *v.* People, 77 Ill. App. 275.

Kansas. — State *v.* Deuel, 63 Kan. 811; State *v.* Pipes, 65 Kan. 543.

Minnesota. — Higgins *v.* Wren, 79 Minn. 462.

Mississippi. — Maston *v.* State, 83 Miss. 647.

Missouri. — State *v.* Darrah, 152 Mo. 522.

New York. — People *v.* Elliott, 163 N. Y. 11, reversing (Supm. Ct. App. Div.) 60 N. Y. Supp. 1145.

North Carolina. — State *v.* Finger, 131 N. Car. 781.

Ohio. — State *v.* Strothers, 8 Ohio Dec. 357.

Utah. — State *v.* Van Kuran, 25 Utah 16.

**870.** See note 1.

Weight of the Evidence — Grade of Crime — Degree of Guilt. — See note 4.

**871.** 2. Character of Other Persons — *a.* OFFENSES AGAINST FEMALES. — See note 2.

(1) *Prosecutrix in Rape.* — See note 3.

(2) *Prosecutrix in Seduction.* — See note 4.

**872.** *b.* CHARACTER OF THE DECEASED IN HOMICIDE — (1) *Evidence as to, Generally Inadmissible.* — See note 1.

(2) *When Admissible.* — See note 2.

**873.** Defendant's Knowledge of Character of Deceased. — See note 2.

**874.** *d.* INMATES AND FREQUENTERS OF HOUSES OF ILL FAME. — See note 2.

VI. WITNESSES — 1. In General. — See note 3.

*Vermont.* — State *v.* Totten, 72 Vt. 73.

To Be Considered with the Other Evidence. — See State *v.* Van Kuran, 25 Utah 16.

**870.** 1. Good Character Alone Cannot Acquit. — People *v.* Mitchell, 129 Cal. 584; State *v.* Nicholls, 50 La. Ann. 699; State *v.* Darrah, 152 Mo. 522; State *v.* Totten, 72 Vt. 73; State *v.* Stentz, 33 Wash. 444; State *v.* Madison, 49 W. Va. 96.

4. Mitigation of Punishment. — Maston *v.* State, 83 Miss. 647.

**871.** 2. Under an Indictment for Incest the defendant will not be allowed to introduce evidence of the reputation of the prosecutrix for chastity, as her character is not in issue. Richardson *v.* State, 44 Tex. Crim. 211. See also State *v.* De Hart, 109 La. 570; and the title INCEST, 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 140, note 6.

3. Character of Prosecutrix in Rape Is in Issue. — State *v.* Eggleston, (Oregon 1904) 77 Pac. Rep. 738. See also the title RAPE, 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870, note 6; and *supra*, this title, **853.** 1.

Unchaste Character Is No Defense. — Baker *v.* State, 82 Miss. 84.

Character Immaterial — Consent. — People *v.* Harlan, 133 Cal. 16; Price *v.* State, 44 Tex. Crim. 304; Knowles *v.* State, 44 Tex. Crim. 322; State *v.* Hilberg, 22 Utah 27; State *v.* Williamson, 22 Utah 248, 83 Am. St. Rep. 780.

4. Character of the Female Seduced Is in Issue. — State *v.* Eggleston, (Oregon 1904) 77 Pac. Rep. 738; Rex *v.* Loughheed, 8 Can. Crim. Cas. (N. W. Ter.) 184, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 871. See also the title SEDUCTION, 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 240 *et seq.*

**872.** 1. Character of Deceased in Homicide. — Jimmerson *v.* State, 133 Ala. 18; Morrell *v.* State, 136 Ala. 44; Carle *v.* People, 200 Ill. 494, 93 Am. St. Rep. 208; Burnett *v.* People, 204 Ill. 226, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 872; Morrison *v.* Com., 74 S. W. Rep. 277, 24 Ky. L. Rep. 2493; State *v.* Napoleon, 104 La. 164; Moore *v.* State, (Tex. Crim. 1904) 79 S. W. Rep. 565; State *v.* Ellis, 30 Wash. 369. See also the title MURDER AND MANSLAUGHTER, 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225, note 2.

Proof of Reputation for Gambling. — Under an indictment for homicide, where the killing was alleged to have occurred during a game of cards, evidence was admissible that the de-

ceased had the reputation in the community of gambling with negroes. Rogers *v.* State, 44 Tex. Crim. 350.

Death by Wrongful Act — Reputation of Deceased for Sobriety Held Inadmissible. — Chesapeake, etc., R. Co. *v.* Riddle, 72 S. W. Rep. 22, 24 Ky. L. Rep. 1687.

2. When Admissible — Georgia. — Andrews *v.* State, 118 Ga. 1.

Indiana. — See Thrawley *v.* State, 153 Ind. 381.

Michigan. — People *v.* Farrell, (Mich. 1904) 100 N. W. Rep. 264.

Mississippi. — Smith *v.* State, 75 Miss. 554, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 872.

Montana. — State *v.* Shafer, 22 Mont. 17.

New York. — People *v.* Gallagher, 75 N. Y. App. Div. 39, affirmed 174 N. Y. 505; People *v.* Rodawald, 177 N. Y. 408.

South Carolina. — State *v.* McDaniel, 68 S. Car. 304, 102 Am. St. Rep. 661.

South Dakota. — State *v.* Yokum, 14 S. Dak. 84, reversing 11 S. Dak. 544.

Texas. — Glenewinkel *v.* State, (Tex. Crim. 1901) 61 S. W. Rep. 123.

Washington. — State *v.* Crawford, 31 Wash. 260.

West Virginia. — State *v.* Morrison, 49 W. Va. 210; State *v.* Madison, 49 W. Va. 96.

See also the title MURDER AND MANSLAUGHTER, 21 AM. AND ENG. ENCYC. OF LAW (2d ed.), p. 225, note 2.

**873.** 2. Character of the Deceased Must Be Known to the Defendant. — Smith *v.* State, 75 Miss. 554; Glenewinkel *v.* State, (Tex. Crim. 1901) 61 S. W. Rep. 123.

Presumption of Knowledge. — Thrawley *v.* State, 153 Ind. 375.

Knowledge of the dangerous reputation of the deceased will not be presumed on the part of the defendant when the slayer and the deceased reside in separate communities. Long *v.* State, 72 Ark. 427, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 873.

**874.** 2. Inmates and Frequenters of Houses of Ill Fame. — Demartini *v.* Anderson, 127 Cal. 33. See also the title DISORDERLY HOUSES, 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 533, note 5.

3. Character of the Witness Is in Issue. — Gregory *v.* State, 140 Ala. 16, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 874. See also the title WITNESSES, 30 AM. AND ENG.

- 875.** 2. Impeaching One's Own Witness. — See note 1.  
 3. Party or Defendant as a Witness. — See note 2.  
**VII. HOW PROVED** — 1. In General. — See note 3.

**878.** Prosecutrix in Rape. — See note 8.

**879.** Reasons for the Rule. — See note 1.

5. Knowledge of the Witness — *a.* IN GENERAL. — See note 5.

ENCYC. OF LAW (2d ed.) 1074 *et seq.*; and *supra*, this title, **858**. 1.

**875.** 1. Impeaching One's Own Witness. — Swift v. Short, 34 C. C. A. 545, 92 Fed. Rep. 567. See also the title WITNESSES, 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1128 *et seq.*

2. Party or Defendant as Witness — *Alabama*. — Fields v. State, 121 Ala. 16; Kilgore v. State, 124 Ala. 24.

*Arkansas*. — Williams v. State, 66 Ark. 264.

*California*. — People v. Mayes, 113 Cal. 618; People v. Reed, (Cal. 1898) 52 Pac. Rep. 835; People v. Prather, 120 Cal. 660; People v. Gleason, 122 Cal. 370.

*Florida*. — Cook v. State, (Fla. 1903) 35 So. Rep. 665.

*Kentucky*. — Trusty v. Com., (Ky. 1897) 41 S. W. Rep. 766; Justice v. Com., (Ky. 1898) 46 S. W. Rep. 499.

*Louisiana*. — State v. Guy, 106 La. 8.

*Missouri*. — State v. McLain, 92 Mo. App. 456; State v. Dyer, 139 Mo. 199; State v. May, 142 Mo. 135; State v. Vandiver, 149 Mo. 502.

*Montana*. — State v. Schnepel, 23 Mont. 523.

*North Carolina*. — State v. Foster, 130 N. Car. 666, 89 Am. St. Rep. 876; State v. Castle, 133 N. Car. 769.

*Texas*. — Holmes v. State, (Tex. Crim. 1897) 42 S. W. Rep. 979; Hudson v. State, 41 Tex. Crim. 453, 96 Am. St. Rep. 789; Renfro v. State, 42 Tex. Crim. 393; Rutherford v. State, (Tex. Crim. 1902) 67 S. W. Rep. 100.

*Utah*. — State v. Marks, 16 Utah 204.

See also the title WITNESSES, 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1134.

3. General Reputation Only Admissible — *Alabama*. — Crawford v. State, 112 Ala. 1.

*Arkansas*. — St. Louis, etc., R. Co. v. Stroud, 67 Ark. 112.

*Delaware*. — State v. Briscoe, 3 Penn. (Del.) 7.

*Florida*. — Roberson v. State, 40 Fla. 509; Cook v. State, (Fla. 1903) 35 So. Rep. 665.

*Georgia*. — Columbus, etc., R. Co. v. Christian, 97 Ga. 56; Peeples v. State, 103 Ga. 629; Thornton v. State, 107 Ga. 683; Andrews v. State, 118 Ga. 1; Taylor v. State, 120 Ga. 857.

*Illinois*. — Aiken v. People, 183 Ill. 215; Addison v. People, 193 Ill. 405.

*Indiana*. — Stalcup v. State, 146 Ind. 270; Treschman v. Treschman, 28 Ind. App. 206.

*Iowa*. — State v. Dexter, 115 Iowa 678.

*Kentucky*. — Hendrickson v. Com., (Ky. 1901) 64 S. W. Rep. 954; Seaborn v. Com., (Ky. 1904) 80 S. W. Rep. 223; Stith v. Com., 82 S. W. Rep. 245, 26 Ky. L. Rep. 556.

*Louisiana*. — State v. Guy, 106 La. 8.

*Michigan*. — People v. Turney, 124 Mich. 542; People v. Albers, (Mich. 1904) 100 N. W. Rep. 908, 11 Detroit Leg. N. 441.

*Minnesota*. — Davis v. Hamilton, 88 Minn. 64; State v. Ronk, 91 Minn. 419.

*Missouri*. — State v. Vandiver, 149 Mo. 502;

State v. Lockett, 168 Mo. 480; Shafer v. Missouri Pac. R. Co., 98 Mo. App. 445; State v. Kennedy, 177 Mo. 98; Blasland-Parsells-Jordan Shoe Co. v. Hicks, 70 Mo. App. 301.

*Montana*. — State v. Brooks, 23 Mont. 146.

*New Jersey*. — Bullock v. State, 65 N. J. L. 577, 86 Am. St. Rep. 668, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875.

*New York*. — Meyer v. Suburban Home Co., (Supm. Ct. App. T.) 25 Misc. (N. Y.) 686, affirming (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 311. See also Hart v. McLaughlin, 51 N. Y. App. Div. 411; People v. Rodawald, 177 N. Y. 408.

*North Carolina*. — Marcom v. Adams, 122 N. Car. 222; State v. Castle, 133 N. Car. 769.

*Pennsylvania*. — Rudisill v. Rebert, 14 York Leg. Rec. (Pa.) 121; Com. v. Brown, 23 Pa. Super. Ct. 470.

*South Carolina*. — Sweet v. Gilmore, 52 S. Car. 530.

*Texas*. — Houston, etc., R. Co. v. Bell, (Tex. Civ. App. 1903) 73 S. W. Rep. 56, judgment affirmed 97 Tex. 71; Connell v. State, (Tex. Crim. 1903) 75 S. W. Rep. 512.

*Utah*. — State v. Hilberg, 22 Utah 27.

*Washington*. — State v. Coates, 22 Wash. 601.

And see the title WITNESSES, 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081 *et seq.*

**Bad Associates.** — A witness cannot be impeached by proving association with a man of bad character. Western, etc., R. Co. v. Vaughan, 113 Ga. 354.

**878.** 8. Prosecutrix in Rape. — State v. McDonough, 104 Iowa 9, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 878; Knowles v. State, 44 Tex. Crim. 326, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 878. See also the title RAPE, 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 871, note 3.

**879.** 1. Reasons for the Rule as to Specific Acts. — See Andrews v. State, 118 Ga. 1.

5. The Witness Must Know the Character in Question — *Alabama*. — McClellan v. State, 117 Ala. 140; McAlpine v. State, 117 Ala. 93.

*Georgia*. — Peeples v. State, 103 Ga. 629; Atlantic, etc., R. Co. v. Reynolds, 117 Ga. 47.

*Iowa*. — Halley v. Tichenor, 120 Iowa 164.

*Missouri*. — State v. Boyd, 178 Mo. 2.

*New York*. — Sturmwald v. Schreiber, 69 N. Y. App. Div. 476.

*North Dakota*. — State v. Thoenke, 11 N. Dak. 386.

*Texas*. — White v. Houston, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. Rep. 382; Houston, etc., R. Co., v. White, 23 Tex. Civ. App. 280.

*Utah*. — State v. Marks, 16 Utah 204.

*Canada*. — Messenger v. Bridgetown, 33 Nova Scotia 291.

See also the title WITNESSES, 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1077 *et seq.*

**880.** See notes 1,

*b.* PERSONAL KNOWLEDGE. — See note 3.

**881.** *c.* INDIVIDUAL OPINION. — See note 1.

**882.** *g.* NEGATIVE EVIDENCE. — See note 3.

**883.** *h.* RESTRICTIONS AS TO TIME AND PLACE OF ACQUIRING KNOWLEDGE. — See note 2.

(2) *In the Discretion of the Court.* — See note 3.

**880.** 1. *Cunningham v. Underwood*, (C. A.) 116 Fed. Rep. 805.

**Cross-examination as to Opinion of Individuals.**

— Where a witness testified on direct examination as to the plaintiff's general reputation for truth and veracity, and stated on cross-examination that he knew the individual opinions of the plaintiff's neighbors as to his character, it was held that the plaintiff should have been allowed to ask the further question, "Whose opinion do you know?" *Messenger v. Bridgetown*, 33 Nova Scotia 291.

2. *Vickers v. People*, 31 Colo. 491; *Meyer v. Suburban Home Co.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 686, *affirming* (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 311.

3. *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 805, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 880; *State v. Jones*, 4 Penn. (Del.) 109; *State v. Sale*, 119 Iowa 1; *Galveston, etc., R. Co. v. Burnett*, (Tex. Civ. App. 1897) 42 S. W. Rep. 314.

**Personal Knowledge in Connection with General Reputation.** — In *Henderson v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 116, the court said: "All these witnesses testified that they knew the general reputation of said Dare in that respect, and the fact that on cross-examination they stated that they had never heard that reputation discussed in that community did not disqualify them from testifying on the subject."

**881.** 1. **Individual Opinion.** — *People v. Albers*, (Mich. 1904) 100 N. W. Rep. 908, 11 Detroit Leg. N. 441; *Peeples v. State*, 103 Ga. 629; *Galveston, etc., R. Co. v. Burnett*, (Tex. Civ. App. 1897) 42 S. W. Rep. 314; *Gay v. State*, 40 Tex. Crim. 242.

**882.** 3. **Negative Evidence Is Admissible.** — *Foerster v. U. S.*, (C. C. A.) 116 Fed. Rep. 860; *People v. Adams*, 137 Cal. 580; *Hays v. Johnson*, 92 Ill. App. 80; *Stevens v. Blake*, 5 Kan. App. 124; *State v. Shafer*, 22 Mont. 17; *McAllaster v. Britton*, 43 N. Y. App. Div. 211; *Hand v. Miller*, 58 N. Y. App. Div. 126; *Reid v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 662.

**Negative Evidence Is Frequently the Best.** — *People v. Adams*, 137 Cal. 580.

**Not Admissible to Show Bad Character.** — Evidence of the bad character of the prosecutrix in a rape case cannot be given by a witness who has never heard her character discussed. Negative evidence cannot be available to show bad character. *Tyler v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 558.

**883.** 2. **General Rule as to Time and Place.** — *People v. Walker*, 140 Cal. 153; *Kirkham v. People*, 170 Ill. 9; *Halloway v. People*, 181 Ill. 544; *Lake Lighting Co. v. Lewis*, 29 Ind. App. 164; *State v. Prins*, 117 Iowa 505; *Faulkner v. Gilbert*, 61 Neb. 602, *rehearing denied* 62 Neb. 126; *Beatty v. Larzelere*, 15 Mont. Co.

Rep. (Pa.) 67; *Ramsey v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 187. See also the title WITNESSES, 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079 *et seq.*

**About a Year Before.** — Evidence was held admissible. *Schoep v. Bankers Alliance Ins. Co.*, 104 Iowa 354.

**A Year and a Half Before.** — Evidence of the defendant's character gained during a residence of eight months in another town, a year and a half before the trial, is admissible. *State v. McLaughlin*, 149 Mo. 19.

**Twenty-two Months Before.** — Evidence of the reputation of defendant in another place twenty-two months before the trial is not too remote to be admissible. *State v. Knight*, 118 Wis. 473.

**Three Years Before.** — Evidence of defendant's reputation in another community three years and two months before the trial was held to be admissible, where it appeared he had lived in the meantime in various places at brief intervals. *Douglass v. Agne*, 125 Iowa 67.

**Four Years Before.** — Evidence of defendant's reputation in another place four years before the trial was held to be admissible. *Lake Lighting Co. v. Lewis*, 29 Ind. App. 164. See also *Miller v. Miller*, 187 Pa. St. 572.

**Seven Years Before.** — Evidence was held inadmissible. *McGuire v. Kenefick*, 111 Iowa 147.

**Eighteen or Twenty Years Before.** — Evidence will not be admitted of the reputation of a witness in another town eighteen or twenty years before. *Shuster v. State*, 62 N. J. L. 521. See also *Robbins v. Ginnocchio*, (Tex. Civ. App. 1898) 45 S. W. Rep. 34.

**Thirty Years Before.** — In *Daugherty v. Lady*, (Tex. Civ. App. 1903) 73 S. W. Rep. 837, evidence of the character of a witness thirty years before the trial was not admissible.

**3. Court Must Exercise Its Discretion.** — *Alford v. State*, (Fla. 1904) 36 So. Rep. 436; *Schoep v. Bankers Alliance Ins. Co.*, 104 Iowa 354; *Shuster v. State*, 62 N. J. L. 521.

**Residence in Immediate Vicinity Unnecessary.** — *Alford v. State*, (Fla. 1904) 36 So. Rep. 436. See *State v. McLaughlin*, 149 Mo. 19.

**Neighborhood — Business or Residence.** — A witness who knows the reputation of the witness to be impeached in his business neighborhood can testify as to his reputation in that neighborhood though he is unfamiliar with his reputation in the neighborhood where such witness makes his home. *Atlantic, etc., R. Co. v. Reynolds*, 117 Ga. 47.

**Character at Former Residence.** — Evidence of the bad reputation of the defendant in the place where he had resided two and a half years before is admissible. *People v. Nunley*, 142 Cal. 441.

Evidence of the reputation for truth and veracity borne by the appellant several years

**885.** (3) *Time Necessary to Acquire.* — See note 1.

**888. CHARGE.** — See note 1.

**889.** See note 1.

**890.** *Charge to the Jury.* — See note 1.

*To Accuse One of Crime.* — See note 2.

**891.** *For Some Technical Terms.* — See note 1.

**CHARGEABLE.** — See note 2.

before in the place where he then lived is admissible. *Houk v. Branson*, 17 Ind. App. 119.

**Prior Reputation Is Less Weighty.** — *Kirkham v. People*, 170 Ill. 9. But see *State v. Knight*, 118 Wis. 473.

**885.** 1. *State v. McLaughlin*, 149 Mo. 19; *State v. Cushenberry*, 157 Mo. 168; *State v. Miller*, 156 Mo. 76.

**Time Necessary.** — *Thrawley v. State*, 153 Ind. 381, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 884.

**888.** 1. *Person in Charge.* — *Alabama G. S. R. Co. v. Davis*, 119 Ala. 572.

**889.** 1. *Charge for Transportation.* — *Fulmer v. Southern R. Co.*, 67 S. Car. 269, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 889, and following *Reese v. Pennsylvania R. Co.*, 131 Pa. St. 422, stated in the original note.

**890.** 1. *Charging a Jury.* — *Boggs v. U. S.*, 10 Okla. 424.

**Discharge.** — *Tomasson v. State*, 112 Tenn. 596.

**Written Charges.** — See *Bush v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 550.

**2. Formal Charge Before Magistrate.** — *People v. Garnett*, 129 Cal. 364.

**Removal of Officer.** — The word *charges* in a *New York* statute providing that the fire marshal may be removed for cause, upon *charges* duly furnished in writing by the mayor, implies an accusation of official misconduct. *People v. McGuire*, 27 N. Y. App. Div. 593.

**891.** 1. *Charging Lien.* — *Young v. Renshaw*, 102 Mo. App. 173.

**2. Chargeable — Poor and Poor Laws.** — *Young v. Renshaw*, 102 Mo. App. 173.

**Chargeable to Parish — Illegitimate Child.** — See *Guardians of Poor v. Gibbs*, (1903) 1 K. B. 177.

## CHARITIES AND TRUSTS FOR CHARITABLE USES.

By R. N. CHAFFEE.

**894. I. DEFINITIONS AND GENERAL PRINCIPLES — 1. Definitions — Charity Generally.** — See note 1.

**A Charity, in the Legal Sense of the Term.** — See note 2.

**894.** 1. *State v. Laramie County*, 8 Wyo. 130, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 894.

**2. Hoeffer v. Clogon**, 171 Ill. 462, 63 Am. St. Rep. 241; *Haggerty v. St. Louis, etc., R. Co.*, 100 Mo. App. 424; *Webster v. Sughrw*, 69 N. H. 380; *People v. Fitch*, 154 N. Y. 14; *Watterson v. Halliday*, 15 Ohio Dec. 281, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 894; *Matter of Stewart*, 26 Wash. 32; *State v. Laramie County*, 8 Wyo. 130, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 894.

**Other Definitions.** — *Vidal v. Philadelphia*, 2 How. (U. S.) 127, stated in the original note, was approved in *People v. Fitch*, 154 N. Y. 14; *State v. Laramie County*, 8 Wyo. 130.

*Ould v. Washington Hospital*, 95 U. S. 311, stated in the original note, was approved in *Garrison v. Little*, 75 Ill. App. 402; *People v. New York, etc., Soc.*, 42 N. Y. App. Div. 83, reversed 161 N. Y. 233; *Matter of Stewart*, 26 Wash. 32; *State v. Laramie County*, 8 Wyo. 130.

"To give the use the character of a public

charity, it is only necessary that there appear some benefit to be conferred upon, or duty to be performed toward, either the public at large or some part thereof, or an indefinite class of persons." *People v. New York Soc.*, etc., 42 N. Y. App. Div. 83, reversed 161 N. Y. 233.

**Defined with Reference to Stat. 43 Eliz., c. 4.** — *State v. Laramie County*, 8 Wyo. 130.

**Charitable and Benevolent Uses Synonymous.** — *In re Murphy*, 184 Pa. St. 310, 63 Am. St. Rep. 802.

**"Charitable" and "Philanthropic" Distinguished.** — "Philanthropic" is a broader term than "charitable." A charitable object is also philanthropic, but a philanthropic object is not necessarily charitable. Hence, a bequest "for charitable or philanthropic purposes" is not a good charitable bequest. *In re Macduff*, (1896) 2 Ch. 451.

**"A Charity May Be Created by Purchase or by Statute as well as by gift.** The only test is this: Are the purposes for which the property is to be applied public and charitable in the view of the law?" *Smith v. Kerr*, (1900) 2 Ch. 511,

**895. 2. Public Charity as Distinguished from Private Charity — Public Character of Charitable Use.** — See note 1.

The Word "Public." — See note 3.

Private Charities Defined and Distinguished. — See note 4.

**896.** Bequest in Aid of Defined Persons. — See note 1.

**897. 3. Pecuniary Compensation from Beneficiaries as Affecting Charities.** — See note 1.

4. Liberal Construction in Favor of Charitable Trusts. — See note 2.

**898. II. ORIGIN OF JURISDICTION OF EQUITY OVER CHARITABLE TRUSTS — 1. The Statute 43 Eliz. and the Common Law — b. ITS RELATION TO THE COMMON LAW.** — See note 1.

Chancery Jurisdiction Is Independent of Statute. — See note 4.

**899. c. TRUE SIGNIFICANCE OF THE STATUTE.** — See note 1.

General Statement of the Significance and Effect of the Statute. — See note 3.

**900. d. STATUS OF THE STATUTE IN THE UNITED STATES — Statute Recognized as Part of Common Law.** — See note 1.

Principles Developed in England under Statute Approved. — See note 3.

**901. 2. The King's Prerogative Power in England.** — See note 1.

No Prerogative Power in the United States. — See note 2.

**895. 1. Charitable Use Must Be for General Public.** — Lord Camden's definition was approved in the following cases: *Strong's Appeal*, 68 Conn. 527; *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310; *Dexter v. Harvard College*, 176 Mass. 192; *State v. Board of Control*, 85 Minn. 165; *People v. Fitch*, 154 N. Y. 14; *People v. New York Soc., etc.*, 42 N. Y. App. Div. 83, reversed 161 N. Y. 233; *Staines v. Burton*, 17 Utah 331, 70 Am. St. Rep. 788; *Kronshage v. Varrell*, 120 Wis. 161; *State v. Laramie County*, 8 Wyo. 130. See also *Troutman v. De Boissiere Odd Fellows' Orphans' Home, etc.*, *School Assoc.*, 66 Kan. 1; *Johnson v. De Pauw University*, 116 Ky. 671.

**Need Not Be Open to All — Designation of Class Sufficient.** — *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117; *Thompson v. Brown*, 116 Ky. 102; *Minns v. Billings*, 183 Mass. 126, 97 Am. St. Rep. 420; *Kronshage v. Varrell*, 120 Wis. 161.

**3. Purpose and Not Method of Administration Determines Character.** — *Haggerty v. St. Louis, etc.*, R. Co., 100 Mo. App. 424.

**4. So-called "Private Charities."** — *Widows, etc., Home v. Bosworth*, 112 Ky. 200; *Newport v. Masonic Temple Assoc.*, 108 Ky. 333.

**896. 1. Authorities in the United States — Gifts to Masonic Lodges and the Like.** — In *Matter of Willey*, 128 Cal. 1, a bequest to a Masonic body for the use of the widows' and orphans' fund of the lodge was held to be valid. See also the title FREEMASONS.

**897. 1. Compensation from Beneficiaries.** — *In re Estlin*, 72 L. J. Ch. 687, 89 L. T. N. S. 88; *Powers v. Massachusetts Homeopathic Hospital*, 101 Fed. Rep. 896, 47 C. C. A. 122, 109 Fed. Rep. 294; *Paterson Rescue Mission v. High*, 64 N. J. L. 116, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 897; *Collins v. New York Post Graduate Medical School, etc.*, 59 N. Y. App. Div. 63; *Daly's Estate*, 208 Pa. St. 58.

**Salary to Officers Does Not Alter Character.** — *Paterson Rescue Mission v. High*, 64 N. J. L. 116.

**2. Construction Favorable to Charitable Trusts.** — *In re Davis*, (1902) 1 Ch. 876, 71 L. J. Ch.

459, 86 L. T. N. S. 292, 50 W. R. 378; *Duggan v. Duggan*, 63 U. S. App. 149, 92 Fed. Rep. 806; *Matter of Upham*, 127 Cal. 90; *Matter of Willey*, 128 Cal. 1; *Fay v. Howe*, 136 Cal. 599; *Strong's Appeal*, 68 Conn. 527; *Ingraham v. Ingraham*, 169 Ill. 432; *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 83 Am. St. Rep. 553; *In re John*, 30 Oregon 494; *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924.

**898. 1. Clayton v. Hallett, 30 Colo. 231, 97 Am. St. Rep. 117.**

**4. Jurisdiction of Equity Does Not Depend upon Statute of Elizabeth.** — *Hoeffer v. Clogan*, 171 Ill. 462, 63 Am. St. Rep. 241; *Women's Christian Assoc. v. Kansas City*, 147 Mo. 103; *Lackland v. Walker*, 151 Mo. 210; *Webster v. Sughrow*, 69 N. H. 380; *Haynes v. Carr*, 70 N. H. 463; *Matter of Stewart*, 26 Wash. 32.

**899. 1. Statute 43 Eliz. Did Not Originate Law of Charitable Uses.** — *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924.

**3. The Statute's Enumeration of Charitable Purposes a Test.** — *Garrison v. Little*, 75 Ill. App. 402; *Troutman v. De Boissiere Odd Fellows' Orphans' Home, etc.*, *School Assoc.*, 66 Kan. 1.

**900. 1. Ingraham v. Ingraham, 169 Ill. 432; *Grand Prairie Seminary v. Morgan*, 171 Ill. 444; *Hoeffer v. Clogan*, 171 Ill. 462, 63 Am. St. Rep. 241; *Coleman v. O'Leary*, 114 Ky. 388; *Lackland v. Walker*, 151 Mo. 210, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 899, 900. So in *Colorado* the statute is held to be a part of the common law. *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117.**

**3. State v. Toledo, 23 Ohio Cir. Ct. 327.**

**901. 1. Prerogative Power.** — See *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382.

**2. Prerogative Power Does Not Exist in the United States.** — *Troutman v. De Boissiere Odd Fellows' Orphans' Home, etc.*, *School Assoc.*, 66 Kan. 1; *Thompson v. Brown*, 70 S. W. Rep. 674, 24 Ky. L. Rep. 1066.

**Action by Attorney-General to Correct Abuse of Trust.** — The charities which the attorney-general can sue to enforce or conserve must be charities of so public a character as to in-

**902. III. CHARITABLE TRUSTS AS DISTINGUISHED FROM OTHER TRUSTS—**  
**2. Charitable Trusts with Reference to the Rule Against Perpetuities.**— See notes 1, 2.

**903.** Gift Conditioned upon Future Uncertain Event — England. — See note 1.

**905. 3. Uncertainty of Beneficiaries** — *a. GENERALLY.* — See note 1.

*A Necessary Characteristic.* — See note 3.

**906. b. DOCTRINES IN THE VARIOUS JURISDICTIONS STATED** — In Alabama and California. — See note 3.

In Connecticut. — See note 4.

**907.** In Illinois. — See note 4.

In Iowa. — See note 6.

In Kentucky. — See note 7.

terest the entire public. *Troutman v. De Boisiere Odd Fellows' Orphans' Home, etc., School Assoc.*, 66 Kan. 1.

**902. 1. Not Within Rule Against Perpetuities** — *United States.* — *Duggan v. Duggan*, 63 U. S. App. 149, 92 Fed. Rep. 806; *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. Rep. 796.

*California.* — *Matter of Upham*, 127 Cal. 90; *Matter of Merchant*, 143 Cal. 537.

*Colorado.* — *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117.

*Illinois.* — *Ingraham v. Ingraham*, 169 Ill. 432; *Garrison v. Little*, 75 Ill. App. 402.

*Indiana.* — *Phillips v. Heldt*, 33 Ind. App. 388.

*Kentucky.* — *Pullins v. Board of Education*, 78 S. W. Rep. 457, 25 Ky. L. Rep. 1715.

*Michigan.* — *Hopkins v. Crossley*, 132 Mich. 616, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 902.

*Missouri.* — *Farmers, etc., Bank v. Robinson*, 96 Mo. App. 385.

*New Hampshire.* — *Rolfe, etc., Asylum v. Lefebvre*, 69 N. H. 238.

*Ohio.* — *O'Neal v. Caulfield*, 8 Ohio Dec. 248, 5 Ohio N. P. 149.

*Pennsylvania.* — *Young v. St. Mark's Lutheran Church*, 200 Pa. St. 332.

*Rhode Island.* — *Sherman v. Baker*, 20 R. I. 446.

*Utah.* — *Staines v. Burton*, 17 Utah 331, 70 Am. St. Rep. 788.

*Canada.* — *In re Johnson*, 5 Ont. L. Rep. 459.

**2. Not Within Constitutional or Statutory Regulations as to Perpetuities.** — *Allen v. Stevens*, 161 N. Y. 122 (under Laws N. Y. 1893, c. 701), reversing 33 N. Y. App. Div. 485, wherein Ward, J., dissenting, cited 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 902. Compare *Bigelow v. Tilden*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 689. See further *infra*, this title, **910. 2. et seq.**

In *Wisconsin* the statutes (Stat. Wis. 1898, §§ 2038, 2039) prohibit the suspension of the power of alienation for the forbidden period, whether the grant be for charitable or other purposes, save for the express exceptions. *Danforth v. Oshkosh*, 119 Wis. 262, distinguishing *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924, wherein the court cited 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 902; *Beurhaus v. Cole*, 94 Wis. 617, in which case a devise of land to a city to be used as the location for a house for the aged and poor was held to be void, as not coming within the statutory exceptions.

**903. 1. Gifts to Take Effect on Future Event** — England. — See *In re Clarke*, (1901) 2 Ch. 110; *In re Gassiot*, 70 L. J. Ch. 242.

**Conditional Legacy Held Valid.** — A bequest of five hundred pounds to the treasurer of the Society of St. Vincent de Paul, at L., for the benefit of the poor of L., "on condition that the committee of said society shall undertake in writing to my executors to have the railing and ironwork of the two vaults in St. L.'s cemetery \* \* \* painted once in every three years," was held to be a valid bequest. *Roche v. M'Dermott*, (1901) 1 Ir. R. 394.

**English Rule Obtains in Canada.** — *Re Johnson*, 5 Ont. L. Rep. 459; *Re Kinny*, 6 Ont. L. Rep. 459.

**905. 1. Uncertain Beneficiaries.** — Compare *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 83 Am. St. Rep. 553.

In *Texas* a bequest to be applied in organizing and maintaining a home for widows and orphans of a certain city is not void for uncertainty; nor is a bequest to support the indigent Israelites residing in a certain city void for uncertainty. *Gidley v. Lovenberg*, (Tex. Civ. App. 1904) 79 S. W. Rep. 831.

**3. Indefiniteness as to Beneficiaries Essential.** — *Matter of Upham*, 127 Cal. 90; *Fay v. Howe*, 136 Cal. 599; *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310; *Haynes v. Carr*, 70 N. H. 463; *Mason v. Perry*, 22 R. I. 475; *Matter of Stewart*, 26 Wash. 32; *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924.

**906. 3. Beneficiaries Held Sufficiently Certain.** — See *Matter of Upham*, 127 Cal. 90; *Fay v. Howe*, 136 Cal. 599.

A bequest to a city of real estate to be applied for the benefit of the white public schools, or for a city hospital, as the authorities shall elect, is not void for uncertainty. *Huntsville v. Smith*, 137 Ala. 382.

**4. Connecticut.** — *Duggan v. Duggan*, 63 U. S. App. 149, 92 Fed. Rep. 806 (construing *Connecticut statute*); *Strong's Appeal*, 68 Conn. 527.

**907. 4. Illinois.** — *Trafton v. Black*, 187 Ill. 36.

A devise to trustees "for the attainment of woman suffrage in the United States of America and its Territories" is not void for uncertainty in the beneficiaries. *Garrison v. Little*, 75 Ill. App. 402.

**6. Iowa.** — *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310; *Moran v. Moran*, 104 Iowa 216, 65 Am. St. Rep. 443.

**7. Kentucky.** — *Coleman v. O'Leary*, 114 Ky. 388, holding valid a bequest to a bishop and



**908.** In Louisiana. — See note 2.

**909.** Michigan and Minnesota. — See note 4.

[In Nebraska no distinction is made between trusts generally and trusts for charitable purposes.<sup>5a</sup>]

In New Hampshire, Oregon, Rhode Island, and Vermont. — See note 6.

**910.** In New Jersey. — See note 1.

In New York. — See notes 8, 10.

**911.** In Pennsylvania. — See note 3.

In South Carolina. — See note 4.

In Tennessee. — See note 5.

**912.** In Virginia. — See note 2.

three others to be chosen by him, for the establishment of a home for poor Catholic men.

A bequest of a fund to a trustee to be used "in the advancement of the principles of primitive Christianity as taught by the Christian church," is valid. *Crawford v. Thomas*, 114 Ky. 484.

In *Thompson v. Brown*, 116 Ky. 102, a devise to an executor to be distributed by him "to the poor in his discretion" was sustained.

Bequests "for the aid of a Bible training and missionary school for Christian workers;" "for the support of a missionary or missionaries in the foreign field;" "to aid in carrying on the cause of Bible Holiness, including Fire Baptized Holiness work, and evangelism;" and "to aid in the support of needy and destitute ministers of the gospel," were held not void for uncertainty. *Leak v. Leak*, 78 S. W. Rep. 471, 25 Ky. L. Rep. 1703.

But a devise to an executor "for charitable objects, to be expended for said objects in this diocese of Louisville, according to his discretion," was held to be void for uncertainty. *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382.

**908. 2. Louisiana.** — See *Meunier's Succession*, 52 La. Ann. 79, holding that by Act La. 1882, No. 124, donations and bequests can be made to trustees for educational, charitable, or literary purposes, or for the benefit of institutions, existing or to be founded, the object of which is to promote education, literature, or charity.

But in *Burke's Succession*, 51 La. Ann. 538, a bequest was held to be void where the selection of the beneficiary was left to the executor. See also *McCloskey's Succession*, 52 La. Ann. 1122.

**909. 4. Michigan and Minnesota.** — *Hopkins v. Crossley*, 132 Mich. 612; *Cook v. Universalist Gen. Convention*, (Mich. 1904) 101 N. W. Rep. 217; *Lane v. Eaton*, 69 Minn. 141, 65 Am. St. Rep. 559; *Owatonna v. Rosebrock*, 88 Minn. 318; *Watkins v. Bigelow*, 93 Minn. 210. See also *State v. Board of Control*, 85 Minn. 165, *per Start, C. J., dissenting*.

**5a. Nebraska.** — *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 83 Am. St. Rep. 553.

**6. New Hampshire, Oregon, Rhode Island, Vermont — Certainty Sufficient.** — A bequest to executors in trust to be used in establishing and maintaining free public schools in a certain town is valid. *John v. Smith*, 102 Fed. Rep. 218, 42 C. C. A. 275 (following the Oregon doctrine).

A devise to a town for the poor widows and

for children under ten years of age is not void for uncertainty in the beneficiaries. *Towle v. Nesmith*, 69 N. H. 212.

**910. 1. New Jersey.** — *Hyde v. Hyde*, 64 N. J. Eq. 6.

**8. Definite Beneficiary Required.** — *Murray v. Miller*, 178 N. Y. 316; *Pratt v. Roman Catholic Orphan Asylum*, 20 N. Y. App. Div. 352, *affirmed* 166 N. Y. 593; *Matter of Botsford*, (Surrogate Ct.) 23 Misc. (N. Y.) 388, *affirmed* 37 N. Y. App. Div. 73; *Mount v. Tuttle*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 456; *Bowman v. Domestic, etc., Missionary Soc.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 574, *reversed* 100 N. Y. App. Div. 29.

**10. Recent New York Legislation.** — The statute is not retroactive. *Murray v. Miller*, 178 N. Y. 316. It not only protects devises to charities where the beneficiaries are uncertain, but also takes them out of the operation of the statute against perpetuities. *Allen v. Stevens*, 161 N. Y. 122.

Under this statute the following bequests and devises have been upheld: A bequest to an unincorporated society. *Matter of Fitzsimmons*, (Surrogate Ct.) 29 Misc. (N. Y.) 731. A devise to a priest for the saying of masses for the repose of the souls of the testatrix and of her relatives and benefactors. *Matter of Zimmerman*, (Surrogate Ct.) 22 Misc. (N. Y.) 411. A bequest for the benefit of "any poor family or families, or any charitable organization or organizations, in the city of Brooklyn, which shall seem to them [the trustees] most deserving of such reward or assistance." *Kelly v. Hoey*, 35 N. Y. App. Div. 273.

**911. 3. Pennsylvania.** — *Handley v. Palmer*, 103 Fed. Rep. 39, 43 C. C. A. 100; *In re Murphy*, 184 Pa. St. 310, 63 Am. St. Rep. 802; *Stevens's Estate*, 200 Pa. St. 318.

In a bequest of a fund to executors, to be expended by them in behalf of such charities as to them seem best, their discretion is limited to charitable institutions or associations, their authority not extending to individuals. *Padelford's Estate*, 9 Pa. Dist. 174.

**4. South Carolina.** — *Dye v. Beaver Creek Church*, 48 S. Car. 444, 59 Am. St. Rep. 724.

**5. Tennessee.** — *Cheatham v. Nashville Trust Co.*, (Tenn. Ch. 1899) 57 S. W. Rep. 202.

**912. 2. Later Virginia Doctrine.** — In *Field v. Van Wyck*, 94 Va. 557, 64 Am. St. Rep. 745, it was held that the doctrine of *Gallego v. Atty.-Gen.*, 3 Leigh (Va.) 450, 24 Am. Dec. 650, had not been overruled by the later cases; and a bequest to certain trustees "for the benefit of the New Jerusalem church [Sweden-

**912.** In Wisconsin. — See note 4.

**IV. THE TRUST ESTATE — 1. How Created.** — See note 5.

English Doctrine. — See note 6.

**913.** In One Class of Cases. — See note 2.

In Other Cases. — See note 3.

**914.** 2. Conditions and Their Effect. — See note 1.

**915.** 3. Sale of the Estate. — See notes 1, 3.

**V. THE TRUST PROPERTY — 1. Certainty.** — See note 4.

Fund Given Partly on Void, Partly on Valid Trust. — See note 5.

2. Nonuser and Misuser. — See note 6.

**916.** 4. Taxation. — See note 6.

borgian] as they shall deem best" was held to be void for uncertainty.

**912.** 4. Wisconsin. — See *McHugh v. McCole*, 97 Wis. 166, 65 Am. St. Rep. 106, holding invalid a bequest to a bishop to be used for masses for the repose of the souls of certain persons.

A devise to executors in trust to apply the income to the support, maintenance, and education of such indigent orphan children under the age of fourteen years, in a county, as, in the judgment of the executors, may be the most deserving, and after a certain time to divide the principal among them, is not void for uncertainty in the beneficiaries. *Sawtelle v. Witham*, 94 Wis. 412.

5. See *Smith v. Kerr*, (1900) 2 Ch. 511.

**Secret Trusts.** — Where the testatrix bequeathed a sum of money to a legatee "for the charitable purposes agreed upon between us," it was held that this was a gift for limited charitable purposes, and that parol evidence was admissible to show what the purposes agreed upon were. It was also held that as the gift, on the face of the will, was of the principal sum, evidence was not admissible to show an agreement between the testatrix and the legatee that during his life only the income should be devoted to the charitable purposes. *In re Huxtable*, (1902) 2 Ch. 793, *modifying* (1902) 1 Ch. 214.

A testator's wishes relating to the use of his property for the benefit of the public, communicated to and accepted by his devisee during life, will not be enforced as a secret charitable trust where the true intention was not to impose a binding obligation, but to invest the devisee with the same freedom and irresponsibility in carrying out the testator's wishes as the testator himself exercised in his lifetime — making the devisee, as it were, the *alter ego* of the testator. *In re Rivers*, (1902) 1 Ch. 403, *reversing* (1901) 1 Ch. 352.

**6. The Use of the Word "Trust" Is Unnecessary** if, upon a fair construction of the whole document, it is manifest that a trust or duty or obligation was intended. *Smith v. Kerr*, (1900) 2 Ch. 511.

**913.** 2. Trustees Vested with Option as to Charitable or Noncharitable Application. — The same rule obtains in *England*. *Hunter v. Atty.-Gen.*, (1899) A. C. 309, *reversing* (1897) 2 Ch. 105, and *affirming* (1897) 1 Ch. 518; *Blair v. Duncan*, (1902) A. C. 37; *Langham v. Peterson*, 87 L. T. N. S. 744, 67 J. P. 75; *Brewster v. Foreign Mission Board*, 2 N. Bruns. Eq. Rep. 172.

3. Words Joined with "Charitable" Held Descriptive. — *In re Best*, (1904) 2 Ch. 354.

**Other Expressions Held Sufficient.** — A bequest "for the benefit or hospitality" of a company. *Langham v. Peterson*, 87 L. T. N. S. 744, 67 J. P. 75. "Such Protestant charitable institutions as my said executors and trustees may deem proper and advisable." *Manning v. Robinson*, 29 Ont. 483.

**Other Expressions Held Insufficient.** — "Such charitable or public purposes as my trustee thinks proper." *Blair v. Duncan*, (1902) A. C. 37. "In charity or works of public utility." *Langham v. Peterson*, 87 L. T. N. S. 744, 67 J. P. 75.

**914.** 1. Rolfe, etc., *Asylum v. Lefebvre*, 69 N. H. 238; *American Church Missionary Soc. v. Griswold College*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 42.

**915.** 1. Lackland *v. Walker*, 151 Mo. 210; Rolfe, etc., *Asylum v. Lefebvre*, 69 N. H. 238; *Tacoma v. Tacoma Cemetery*, 28 Wash. 238.

3. *Nauman v. Weidman*, 182 Pa. St. 263; *Funk's Estate*, 16 Pa. Super. Ct. 434.

**4. Bequest of Unnamed Amount of Money Void.** — *Brewster v. Foreign Mission Board*, 2 N. Bruns. Eq. Rep. 172.

**5. Objects of Trust Partly Void, Partly Valid.** — *In re Sutton*, (1901) 2 Ch. 640, 70 L. J. Ch. 747, 85 L. T. N. S. 411; *Mason v. Perry*, 22 R. I. 475.

A charitable bequest which alone might be valid will be invalidated by being made part of a general scheme which cannot be upheld. *Phillips v. Heldt*, 33 Ind. App. 388.

**6. Effect of Nonuser and Misuser.** — *Sickles v. New Orleans*, (C. C. A.) 80 Fed. Rep. 868; *Associate Alumni, etc., v. General Theological Seminary*, 163 N. Y. 417; *Walton v. Collins*, 38 N. Y. App. Div. 624, *affirmed* 167 N. Y. 538; *Holmes v. Wesley M. E. Church*, 58 N. J. Eq. 327.

**916.** 6. Taxation of Trust Property — *Kentucky*. — *Gray St. Infirmary v. Louisville*, 65 S. W. Rep. 11, 23 Ky. L. Rep. 1274; *Com. v. Pollitt*, 76 S. W. Rep. 412, 25 Ky. L. Rep. 790; *Com. v. Young Men's Christian Assoc.*, 116 Ky. 711; *Norton v. Louisville*, (Ky. 1904) 82 S. W. Rep. 621.

*Louisiana*. — *State v. Board of Assessors*, 52 La. Ann. 223; *Female Orphan Soc. v. Board of Assessors*, 109 La. 537.

*Massachusetts*. — *Balch v. Shaw*, 174 Mass. 144.

*Mississippi*. — *Ridgeley Lodge No. 23 v. Redus*, 78 Miss. 352.

*Missouri*. — *Adelphia Lodge No. 38 v. Craw-*

**917. VI. THE BENEFICIARIES — 2. Existence.** — See note 2.

**3. Particularity of Description — Beneficiary Need Not Be Named.** — See note 4.

**918. Imperfect Description — Parol Evidence to Ascertain Intent.** — See note 1.**5. Unincorporated Associations as Beneficiaries.** — See note 5.**919. 6. Restraints upon Beneficiaries and Donors.** — See notes 1, 2.

ford, 157 Mo. 356; *Fitterer v. Crawford*, 157 Mo. 51.

*New Hampshire.* — *Young Men's Christian Assoc. v. Keene*, 70 N. H. 223.

*New Jersey.* — *Litz v. Johnston*, 65 N. J. L. 169; *St. Vincent de Paul Mission v. Brakeley*, 67 N. J. L. 176; *Presbyterian Board of Relief, etc., v. Fisher*, 68 N. J. L. 143.

*New York.* — *People v. Rëilly*, 85 N. Y. App. Div. 71, *affirmed* 178 N. Y. 609.

*South Dakota.* — *State v. Board of Equalization*, 16 S. Dak. 219.

*Texas.* — *Barbee v. Dallas*, 26 Tex. Civ. App. 571.

*Utah.* — *Parker v. Quinn*, 23 Utah 332.

See also the title EXEMPTIONS (FROM TAXATION), **318. 4.**, **320. 1.**, **363. 3 et seq.**

Under the *Massachusetts* statute, real estate, occupied by a charitable institution for the purpose for which it was incorporated, but owned by a third person, is not exempt from taxation. *Bates v. Sharon*, 175 Mass. 293.

**A Purely Public Charity.** — A fraternal beneficial society, having a system like a lodge, and paying benefits in case of death of its members resulting from accident, disease, or old age, is not a purely public charity so as to be exempt from taxation. *State Council, etc., v. Board of Review*, 198 Ill. 441.

An institution for the education of men as ministers of the gospel, having an endowment fund which it lends, applying the income for such purpose, is a purely public charity, within *Const. Ohio*, art. 12, § 2, exempting institutions of purely public charity from taxation. *United Presb. Theological Seminary v. Little*, 25 Ohio Cir. Ct. 609.

A Masonic lodge which provides for its members and their families, or the widows and orphans of those who are dead, is in no sense a purely public charity. *Newport v. Masonic Temple Assoc.*, 108 Ky. 333.

**917. 2. Beneficiary Need Not Exist at Time of Donor's Death.** — *In re Davis*, (1902) 1 Ch. 876, 71 L. J. Ch. 459; *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. Rep. 796; *Keith v. Scales*, 124 N. Car. 497.

**4. Naming — Sufficient if Language Indicates Beneficiary with Certainty.** — *Watkins v. Bigelow*, 93 Minn. 210; *In re Brown*, 32 Ont. 323. *Compare Pack v. Shanklin*, 43 W. Va. 304.

**Must Be Capable of Identification.** — *Cook v. Universalist Gen. Convention*, (Mich. 1904) 101 N. W. Rep. 217.

**918. 1. Ascertaining Beneficiary Imperfectly Described.** — *Cook v. Universalist Gen. Convention*, (Mich. 1904) 101 N. W. Rep. 217; *Reformed Presb. Church v. McMillan*, 31 Wash. 643.

**5. Unincorporated Societies.** — *Smith v. Kerr*, (1900) 2 Ch. 511; *In re Clarke*, (1901) 2 Ch. 110; *Matter of Winchester*, 133 Cal. 271, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.)

918; *Chambers v. Higgins*, (Ky. 1899) 49 S. W. Rep. 436; *American Bible Soc. v. American Tract Soc.*, 62 N. J. Eq. 219; *St. Peter's Church v. Brown*, 21 R. I. 367, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 918. See also *Congregational Unitarian Soc. v. Hale*, 29 N. Y. App. Div. 396 (stating the *Massachusetts* doctrine).

**A Contrary Doctrine.** — *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609; *Murray v. Miller*, 178 N. Y. 316; *Pratt v. Roman Catholic Orphan Asylum*, 20 N. Y. App. Div. 352, *affirmed* 166 N. Y. 593; *Matter of Wheeler*, 32 N. Y. App. Div. 183, *affirmed* 161 N. Y. 652; *Matter of Scott*, (Surrogate Ct.) 31 Misc. (N. Y.) 85.

A bequest in trust for the "Woman's Riverside Home," a corporation to be hereafter incorporated, "was held to be void for uncertainty, as the home might never become incorporated. *Matter of Round*, (Surrogate Ct.) 25 Misc. (N. Y.) 101. But see *Matter of Fitzsimmons*, (Surrogate Ct.) 29 Misc. (N. Y.) 731, holding that under *Laws N. Y. 1893*, c. 701, § 1, providing that charitable uses otherwise valid shall not fail because of uncertainty of beneficiaries, a legacy to a society is not void for the reason that it is unincorporated.

**A Bequest to the Officers of a Religious Community** by name, or to their successors, if a gift to the community. *In re Delany*, (1902) 2 Ch. 642.

**919. 1. Bequest Void under Mortmain Act of 1736.** — *In re Delany*, (1902) 2 Ch. 642.

**British Columbia.** — The statute of mortmain, 9 Geo. II., c. 36, is not in force in British Columbia. *In re Pearce*, 10 British Columbia 280.

**Manitoba.** — The statute of mortmain, 9 Geo. II., c. 36, is held to be in force in Manitoba. Hence, a bequest to a school district is valid as to pure personality, but a bequest to be paid out of land, or the proceeds of land, is void. *Law v. Acton*, 14 Manitoba 246.

**Ontario.** — A devise of realty to a bishop, in trust simply for the use of his devisee, is not a devise to a "charitable use," within the meaning of the Mortmain and Charitable Uses Act, 1802, 55 Vict., c. 20, §§ 4, 5 (o). *Re McCauley*, 28 Ont. 610.

The statute of 9 Geo. II., c. 36, is in force in Ontario, and applies though the trust is to be executed in a foreign country. Thus a devise of lands in Ontario, by a testator dying in 1891, in trust "to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights," was held to be a charitable devise and void. *Lewis v. Duerle*, 25 Ont. App. 206, *affirming* 28 Ont. 412.

It is provided in *Rev. Stat. Ont.*, c. 112, § 8 (55 Vict., c. 20, § 8), that "money charged or secured on land or other personal estate arising from or connected with land shall not be

**920. VII. THE TRUSTEES — 1. No Failure for Want Of. — See note 1.**

**921. 2. Restraints Upon. — See note 1.**

**Misapplication of Funds — Statute of Limitation No Bar. — See note 4.**

**922. 3. Corporations as Trustees — Municipal Corporations. — See note 4.**

**923. 4. Unincorporated Associations as Trustees. — See note 1.**

deemed to be subject to the provisions of the statutes known as the Statutes of Mortmain or of Charitable Uses as respects the will of a person dying after the passing of this act on or after the 14th day of April, 1892, or as respects any other grant or gift made after the said date." *Manning v. Robinson*, 29 Ont. 483.

**919. 2. Statutes Restraining Devises to Charity — Georgia. —** *Kelley v. Welborn*, 110 Ga. 540.

*New York. —* *Clements v. Babcock*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 90; *Matter of Brush*, (Surrogate Ct.) 35 Misc. (N. Y.) 689.

Laws N. Y. 1860, c. 360, applies where a testator leaves a wife and devises more than half his estate to certain persons absolutely, but the bequest is in fact upon a secret trust for the benefit of charitable corporations. *Amherst College v. Ritch*, 151 N. Y. 282. But this statute applies only to gifts to private corporations and not to gifts to a municipal corporation, *Matter of Crane*, 12 N. Y. App. Div. 271, *affirmed* 159 N. Y. 557. Nor does it apply to a permanent charitable devise to trustees, *Allen v. Stevens*, 161 N. Y. 122.

A devise to a priest of a certain church for masses is not a devise to a religious association, within Laws N. Y. 1860, c. 360. *Matter of Zimmerman*, (Surrogate Ct.) 22 Misc. (N. Y.) 411.

Laws N. Y. 1848, c. 319, renders void bequests to charitable institutions made within two months of the testator's death. *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609. Under section 6 of this statute, expressly left in force by Laws N. Y. 1895, c. 559, a devise to a corporation in a will executed five days before the death of the testator is void. *Matter of Rounds*, (Surrogate Ct.) 25 Misc. (N. Y.) 101. But this statute, not being a part of the General Laws, is not binding on corporations not organized thereunder. *Matter of Fitzsimmons*, (Surrogate Ct.) 29 Misc. (N. Y.) 731.

*Ohio. —* *Theobald v. Fugman*, 64 Ohio St. 473.

*Pennsylvania. —* *In re Luebke*, 179 Pa. St. 447; *O'Donnell's Estate*, 209 Pa. St. 63; *In re Conway*, 18 Lanc. L. Rev. 129.

*Ontario. —* Wills must be made at least six months prior to the death of the testator, if they contain devises to religious societies. *Re Naylor*, 5 Ont. L. Rep. 153.

Rev. Stat. Ont., c. 112, § 4, requires land devised for the benefit of a charitable use to be sold within two years after the death of the testator, notwithstanding a contrary direction in the will, unless the time is extended by the High Court or by a judge in chambers. A devise is not invalidated by a testamentary direction that the land is not to be sold until after the limit of two years, but the direction is itself invalid, unless the period is extended in the manner prescribed by the statute. *In re Brown*, 32 Ont. 323.

**Waiver of Statute — Lands in Another State. —** *In Illinois*, in a case involving the validity of

a devise of lands in that state by a testator domiciled in Ohio at the time of his death, it was held that the issue, adopted child, or legal representatives of either, might waive the *Ohio* statute making invalid devises for charitable purposes if the testator dies within one year from the time of the execution of his will, leaving issue of his body, or an adopted child, or legal representatives of either. *Folsom v. Ohio State University*, 210 Ill. 404, *approving* *Ohio State University v. Folsom*, 56 Ohio St. 701; *Thomas v. Ohio State University*, 70 Ohio St. 92.

**920. 1. Charitable Trusts Do Not Fail for Want of Trustees — United States. —** *John v. Smith*, 102 Fed. Rep. 218, 42 C. C. A. 275.

*California. —* *Matter of Upham*, 127 Cal. 90; *Matter of Winchester*, 133 Cal. 271; *Fay v. Howe*, 136 Cal. 599; *Matter of Gay*, 138 Cal. 552, 94 Am. St. Rep. 70.

*Colorado. —* *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117.

*Connecticut. —* *Eliot's Appeal*, 74 Conn. 586.

*Illinois. —* *Morgan v. Grand Prairie Seminary*, 70 Ill. App. 575; *Hoeffer v. Clogon*, 171 Ill. 462, 63 Am. St. Rep. 241.

*Iowa. —* *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310.

*Kentucky. —* *Thompson v. Brown*, 70 S. W. Rep. 674, 24 Ky. L. Rep. 1066.

*Massachusetts. —* *Atty.-Gen. v. Goodell*, 180 Mass. 538.

*New Hampshire. —* *Campbell v. Clough*, 71 N. H. 181.

*New Jersey. —* *Green v. Blackwell*, (N. J. 1896) 35 Atl. Rep. 375; *Jones v. Watford*, 62 N. J. Eq. 339.

*New York. —* *Allen v. Stevens*, 33 N. Y. App. Div. 485, *per* Ward, J., *dissenting*, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920, *reversed* 161 N. Y. 122.

*Oregon. —* *In re John*, 30 Oregon 494.

*Pennsylvania. —* *Stevens's Estate*, 200 Pa. St. 318.

*Rhode Island. —* *St. Peter's Church v. Brown*, 21 R. I. 367.

*Wisconsin. —* *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924; *Hood v. Dorer*, 107 Wis. 149.

**921. 1. Discretion as to Two Objects, One Illegal. —** If the trustee were to attempt to apply the fund for any unlawful purpose, the court, in the exercise of its chancery jurisdiction, would be authorized to limit such applications to charitable and lawful purposes. *Staines v. Burton*, 17 Utah 331, 70 Am. St. Rep. 788.

*4. Tacoma v. Tacoma Cemetery*, 28 Wash. 238.

**922. 4. Municipal Corporations. —** *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117; *Higginson v. Turner*, 171 Mass. 586.

**923. 1. Unincorporated Societies. —** *In South Carolina* an unincorporated association may take. *Dye v. Beaver Creek Church*, 48 S. Car. 444, 59 Am. St. Rep. 724.

**923.** 5. Liability for Negligence of Agents. — See note 3.

**924.** VIII. FOREIGN CHARITIES. — See note 3.

**925.** IX. PURPOSES HELD CHARITABLE — 2. Maintenance and Support of Religion. — See note 3.

**926.** Erection, Maintenance, and Repair of Church Building, Etc. — See notes 1, 2, 4, 5, 6.

**927.** See notes 1, 2.

**928.** The Saying of Masses for the Souls of the Dead. — See notes 1, 2, 3.

**929.** 3. The Support and Promotion of Education — Trusts for This Purpose Are Highly Favored. — See notes 1, 2, 3.

**930.** Private Institutions — Professorships — Scholarships. — See note 1.

**923.** 3. Authorities Denying Liability for Servant's Negligence. — *Powers v. Massachusetts Homeopathic Hospital*, 101 Fed. Rep. 896, *affirmed* 109 Fed. Rep. 294, 47 C. C. A. 122; *Currier v. Dartmouth College*, 105 Fed. Rep. 886; *Pepke v. Grace Hospital*, 130 Mich. 493, 9 Detroit Leg. N. 105; *Collins v. New York Post Graduate Medical School, etc.*, 59 N. Y. App. Div. 63; *Corbett v. St. Vincent's Industrial School*, 79 N. Y. App. Div. 334, *affirmed* 177 N. Y. 16; *Wilson v. Brooklyn Homeopathic Hospital*, 97 N. Y. App. Div. 37; *Conner v. Sisters of Poor*, 10 Ohio Dec. 86, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 923. See also the title HOSPITALS AND ASYLUMS, 763. 1.

**924.** 3. Foreign Charities — Conflict of Laws. — *Sickles v. New Orleans*, (C. C. A.) 80 Fed. Rep. 868; *Duggan v. Duggan*, 63 U. S. App. 149, 92 Fed. Rep. 806; *Handley v. Palmer*, 103 Fed. Rep. 39, 43 C. C. A. 100; *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. Rep. 796; *Matter of Stewart*, 26 Wash. 32. See also *Folsom v. Ohio State University*, 210 Ill. 404. But see *Mount v. Tuttle*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 456, holding that the law of the state of the domicil of the testator must yield to that of the state where the trust is to be administered.

**925.** 3. Joinder of Political, Religious, and Mutual Improvement. — The devise of a building for a village club and reading room "to be maintained for the furtherance of Conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing" was held to be a good charitable gift. *In re Scowcroft*, (1898) 2 Ch. 638.

The Mere Purchase of Advowsons or Presentations is not in itself a charitable purpose. *Hunter v. Atty.-Gen.*, (1899) A. C. 309, *reversing* (1897) 2 Ch. 105, and *affirming* (1897) 1 Ch. 518. See also *In re Church Patronage Trust*, (1904) 2 Ch. 643.

**Young Men's Christian Association.** — A gift to be applied for the benefit of a Young Men's Christian Association is a charitable use. *Com. v. Young Men's Christian Assoc.*, 116 Ky. 711.

**926.** 1. Erection and Maintenance of Churches. — *In re Scowcroft*, (1898) 2 Ch. 638; *Mack's Appeal*, 71 Conn. 122; *Trafton v. Black*, 187 Ill. 36; *Phillips v. Heldt*, 33 Ind. App. 388; *Teele v. Derry*, 168 Mass. 341; *Osgood v. Rogers*, 186 Mass. 238; *Keith v. Scales*, 124 N. Car. 497; *Gladding v. St. Matthews Church*, 25 R. I. 628.

**2. Support of Denominations.** — *In re Delmar Charitable Trust*, (1897) 2 Ch. 163; *Atty.-*

*Gen. v. Power*, 35 Nova Scotia 526; *Re Johnson*, 5 Ont. L. Rep. 459.

**Religious Order of Particular Denomination.** — A bequest of "one hundred pounds sterling to the Christian Brethren in trust of A. B. and C. D. one year after my death" is a valid charitable gift. *In re Brown*, (1898) 1 Ir. R. 423.

**4. Circulation of Religious Literature.** — See *Jones v. Watford*, 62 N. J. Eq. 339.

**5. Missions.** — *Nauman v. Weidman*, 182 Pa. St. 263.

**6. Maintenance of Preaching.** — *Congregational Unitarian Soc. v. Hale*, 29 N. Y. App. Div. 396.

**927.** 1. Support of Clergy. — *Farmers', etc., Bank v. Robinson*, 96 Mo. App. 385.

**2. Education of Theological Students.** — *United Presb. Theological Seminary v. Little*, 25 Ohio Cir. Ct. 609; *Young v. St. Mark's Lutheran Church*, 200 Pa. St. 332.

**928.** 1. Doctrine of Superstitious Uses Does Not Obtain in United States. — *Hoeffer v. Cloghan*, 171 Ill. 462, 63 Am. St. Rep. 241; *Harrison v. Brophy*, 59 Kan. 1; *Coleman v. O'Leary*, 114 Ky. 388; *Sherman v. Baker*, 20 R. I. 446.

**2. Masses for Dead a Charitable Trust.** — *Hoeffer v. Cloghan*, 171 Ill. 462, 63 Am. St. Rep. 241; *Coleman v. O'Leary*, 114 Ky. 388.

**3. Bequest to Specific Person for Masses Valid.** — *Kerrigan v. Tabb*, (N. J. 1898) 39 Atl. Rep. 701; *Webster v. Sughrw*, 69 N. H. 380; *Sherman v. Baker*, 20 R. I. 446.

**929.** 1. Charities for Education. — *Johnson v. De Pauw University*, 116 Ky. 671; *Hyde v. Hyde*, 64 N. J. Eq. 9, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 929; *Staines v. Burton*, 17 Utah 331, 70 Am. St. Rep. 788.

**2. Children of Particular Locality.** — *Johnson v. De Pauw University*, 116 Ky. 671.

**3. Public or Free Schools.** — *In re Beard*, (1904) 1 Ch. 270; *Grand Prairie Seminary v. Morgan*, 171 Ill. 444; *Coleman v. O'Leary*, 114 Ky. 388; *State v. Board of Control*, 85 Minn. 165; *Keith v. Scales*, 124 N. Car. 497; *In re John*, 30 Oregon 494; *Stetson v. Rosenberger*, 15 Montg. Co. Rep. (Pa.) 14. See also *In re Blunt*, (1904) 2 Ch. 767.

**930.** 1. Endowing Private Institutions, Professorships, Scholarships. — *Abend v. Endowment Fund Commission*, 174 Ill. 96; *Dexter v. Harvard College*, 176 Mass. 192; *Phillips v. Heldt*, 33 Ind. App. 388; *Alfred University v. Hancock*, (N. J. 1900) 46 Atl. Rep. 178; *Matter of Stewart*, 26 Wash. 32. See also *People v. Fitch*, 154 N. Y. 14.

**Inns of Chancery — Clifford's Inn.** — *Smith v. Kerr*, (1900) 2 Ch. 511,

**930.** Public Libraries. — See notes 3, 4.

Other Educational Purposes. — See notes 7, 8, 9.

**931.** 4. The Relief of the Poor and Unfortunate — Poor of Certain Locality. — See note 1.

Widows, Spinsters, and Orphans. — See note 2.

Poor of Church or Secret Society. — See note 3.

**932.** The Poor in General. — See note 1.

Other Trusts for the Poor and Unfortunate. — See note 5.

5. The Founding and Maintenance of Hospitals and Charitable Institutions. — See note 7.

**933.** 6. Works of Public and General Utility. — See notes 1, 6, 7, 10, 11.

7. Charity in General. — See note 12.

8. Miscellaneous Charities. — See notes 14, 15, 16.

**930.** 3. Public Libraries. — *Minns v. Billings*, 183 Mass. 126, 97 Am. St. Rep. 420.

4. Diffusion of Knowledge and Education. — *In re Scowcroft*, (1898) 2 Ch. 638.

A gift designed to promote the public good by the encouragement of science, learning, and the useful arts, without reference to the poor, is a charity. *People v. Fitch*, 154 N. Y. 14.

Gifts to Vegetarian Societies. — The objects of vegetarian societies may be fairly considered charitable within the principle of decided cases. *In re Cranston*, (1898) 1 Ir. R. 431.

7. Educational Purposes Connected with Churches. — *Dilworth v. Stamp Com'rs*, (1899) A. C. 99, 79 L. T. N. S. 473.

8. Advancement of Agricultural Knowledge. — See *People v. Fitch*, 154 N. Y. 14.

9. Education of the Poor. — *Com. v. Pollitt*, 76 S. W. Rep. 412, 25 Ky. L. Rep. 790; *Johnson v. De Pauw University*, 116 Ky. 671.

**931.** 1. Relief of Poor of Certain Locality. — *Re Gyde*, 79 L. T. N. S. 261; *In re Samdbach School, etc.*, Foundation, (1901) 2 Ch. 317, 84 L. T. N. S. 815; *Roche v. McDermott*, (1901) 1 Ir. R. 394; *Re Kinny*, 6 Ont. L. Rep. 459; *Strong's Appeal*, 68 Conn. 527; *Atty.-Gen. v. Goodell*, 180 Mass. 538; *Towle v. Nesmith*, 69 N. H. 212; *Nauman v. Weidman*, 182 Pa. St. 263.

Inmates of Specified Poorhouse. — *In re Brown*, 32 Ont. 323.

A Gift to the Three Oldest and Poorest People in a Municipality is valid, being sufficiently certain to be carried out. *Law v. Acton*, 14 Manitoba 246.

A Gift Limited to Old and Worn-out Clerks of a Particular Firm is a good charitable bequest. *In re Gosling*, 48 W. R. 300.

2. Widows, Spinsters, and Orphans. — *Muenier's Succession*, 52 La. Ann. 79; *Corbett v. St. Vincent's Industrial School*, 79 N. Y. App. Div. 334, affirmed 177 N. Y. 16.

Home of Rest for Lady Teachers. — A gift for the support of a "Home of Rest for Lady Teachers," in which each inmate is to pay a small sum for board and lodging, is a good charitable bequest. *In re Estlin*, 89 L. T. N. S. 88, 72 L. J. Ch. 687.

3. Poor of Churches, Etc. — *In re Perry Almshouse*, (1899) 1 Ch. 21, affirming (1898) 1 Ch. 391, and *In re Ross*, (1897) 2 Ch. 397; *Manning v. Robinson*, 29 Ont. 483; *Re Kinny*, 6 Ont. L. Rep. 459; *Mason v. Perry*, 22 R. I. 475. See also *In re Delany*, (1902) 2 Ch. 642.

Poor of Mutual Benefit Associations. — *Minns v. Billings*, 183 Mass. 126, 97 Am. St. Rep. 420.

The Royal General Theatrical Fund Association is a charity. *In re Lacy*, (1899) 2 Ch. 149, 80 L. T. N. S. 706, 47 W. R. 664, 68 L. J. Ch. 488, following *Spiller v. Maude*, 32 Ch. D. 158, note, and distinguishing *Cunnack v. Edwards*, (1896) 2 Ch. 679, 65 L. J. Ch. 801.

**932.** 1. The Poor in General. — *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310; *Thompson v. Brown*, 116 Ky. 102, wherein the court adopted, practically in toto, the dissenting opinion of *Burman, J.*, in 24 Ky. L. Rep. 1066, 70 S. W. Rep. 674, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 932; *Amory v. Atty.-Gen.*, 179 Mass. 89.

A Trust to Build Model Dwellings for the Poor, to be let to them at low rents, is valid. *In re Sutton*, (1901) 2 Ch. 640, 85 L. T. N. S. 411.

5. Disabled Soldiers and Seamen. — *Eliot's Appeal*, 74 Conn. 586.

7. Hospitals, Charitable Homes, Etc. — *In re Estlin*, 72 L. J. Ch. 687, 89 L. T. N. S. 88; *Matter of Upham*, 127 Cal. 90; *Ingraham v. Ingraham*, 169 Ill. 432; *Ellenherst v. Pythian*, 110 Ky. 923; *Sherman v. Congregational Home Missionary Soc.*, 176 Mass. 349; *Daly's Estate*, 208 Pa. St. 58.

**933.** 1. Repair of Highways and Bridges. — See *Atty.-Gen. v. Day*, (1900) 1 Ch. 31, 69 L. J. Ch. 8, 81 L. T. N. S. 806, 64 J. P. 88.

6. Supplying Town with Water. — *Staines v. Burton*, 17 Utah 331, 70 Am. St. Rep. 788.

7. Parks — Forests — Foreign Plants. — A bequest to be applied for the benefit of parks, planting forests, and acclimatizing foreign plants has been held to be charitable. *Staines v. Burton*, 17 Utah 331, 70 Am. St. Rep. 788.

10. Public Institutions. — *In re Mann*, (1903) 1 Ch. 232; *Minns v. Billings*, 183 Mass. 126, 97 Am. St. Rep. 420; *Lackland v. Walker*, 151 Mo. 210; *Farmers L. & T. Co. v. Ferris*, 67 N. Y. App. Div. 1; *State v. Laramie County*, 8 Wyo. 130.

11. Not All Purposes of Public General Utility are charitable. *In re Macduff*, (1896) 2 Ch. 451.

12. General Charities. — Compare *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382; *Coleman v. O'Leary*, 114 Ky. 388.

Charitable or Philanthropic Purposes. — A bequest of money "for some one or more purposes, charitable, philanthropic, or —," is not rendered bad by the blank, but must be con-

**934. X. PURPOSES HELD NOT CHARITABLE**—Perpetual Trusts for the Care of Private Tombs. — See note 1.

**936.** [A Railroad's Relief Department for the benefit of its sick employees is not a charity.<sup>2a</sup>]

**XI. THE CY-PRES DOCTRINE**—1. Generally. — See note 3.

2. The Cy-pres Doctrine in England and Canada — General Charities Without Trustees — Disposal by Crown. — See note 6.

**937.** When Court Will Administer Fund Cy-pres in the Exercise of Its Equitable Jurisdiction. — See note 1.

**938.** Trustees Must Be Interposed. — See note 1.

**940.** When Bequest to Particular Charities Fails. — See notes 1, 2, 3, 4.

**942.** 3. The Cy-pres Doctrine in the United States — Generally. — See note 1.

States Adopting the Doctrine. — See note 2.

States Adopting Doctrine Partially. — See note 4.

**943.** Doctrine Rejected in Toto. — See note 1.

sidered as one for charitable or philanthropic purposes. Such a bequest, however, is not a good charitable bequest, as there may be philanthropic purposes which are not charitable. *In re Macduff*, (1896) 2 Ch. 451.

**933. 14. Suppressing Sale of Liquors.** — *Harlington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924.

**15. Abolition of Slavery.** — See *Lewis v. Doerle*, 25 Ont. App. 206, affirming 28 Ont. 412, holding that a devise in trust "to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights" was for a charitable use, but that the devise was invalid under the operation of the Mortmain Act, 9 Geo. II., c. 36.

**16. Prevention of Cruelty to Animals.** — *Minns v. Billings*, 183 Mass. 126, 97 Am. St. Rep. 420.

**934. 1. Perpetual Trusts for Private Tombs.** — *Toole v. Hamilton*, (1901) 1 Ir. R. 383; *Matter of Gay*, 138 Cal. 552, 94 Am. St. Rep. 70; *Morse v. Natick*, 176 Mass. 510; *Waterford First Presb. Church v. McKallor*, 35 N. Y. App. Div. 98, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933. See also *Sherman v. Baker*, 20 R. I. 446.

**A Contrary Doctrine.** — See *Rollins v. Merrill*, 70 N. H. 436.

**A Trust to Keep a Churchyard.** — A devise of land to trustees for a burial ground, for the sole benefit of an unincorporated association, is not a public charity. *Hopkins v. Grimshaw*, 165 U. S. 342.

**936. 2a. Haggerty v. St. Louis, etc., R. Co.**, 100 Mo. App. 424.

3. See *Allen v. Stevens*, 33 N. Y. App. Div. 485, per Ward, J., dissenting, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 936.

6. *In re Pyne*, (1903) 1 Ch. 83.

**937. 1. In the Following American Cases** the English doctrine was upheld: *Teale v. Derry*, 168 Mass. 341, 60 Am. St. Rep. 401; *Osgood v. Rogers*, 186 Mass. 238; *Gladding v. St. Matthew's Church*, 25 R. I. 628. See also *Grand Prairie Seminary v. Morgan*, 171 Ill. 444; *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310; *Sherman v. Congregational Home Missionary Soc.*, 176 Mass. 349; *Amory v. Atty.-Gen.*, 179 Mass. 89.

**938. 1. When Disposition by Sign Manual and When by the Court in the Exercise of Equitable Jurisdiction.** — See *In re Pyne*, (1903) 1 Ch. 83.

**940. 1. Bequest to Particular Object Not in Existence at Testator's Death.** — *In re Davis*, (1902) 1 Ch. 876; *Gladding v. St. Matthew's Church*, 25 R. I. 638, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 939.

**2. Particular Bequest Impossible of Fulfilment.** — Where a bequest for the establishment of a monastery became impossible of fulfilment because of the refusal of the archbishop to give the requisite permission for its establishment, it was held that the legacy could not be administered *cy pres*, there being nothing to indicate a general charitable purpose. *Murphy v. Monastery of The Precious Blood*, 18 Can. L. T. 225.

3. See *In re Buck*, (1896) 2 Ch. 727.

**4. Particular Object Failing — General Charitable Intention Effectuated.** — *Wallis v. Solicitor-Gen.*, (1903) A. C. 173; *In re Mann*, (1903) 1 Ch. 232; *In re Estlin*, 89 L. T. N. S. 88, 72 L. J. Ch. 687.

When a gift is made to a charitable institution which has never existed, the court is inclined to infer a general charitable intention, and will administer the legacy *cy pres* if it can find from even small indications on the face of the will that it was the testator's intention that the gift should be for a purpose rather than a person. *In re Davis*, (1902) 1 Ch. 876.

**942. 1.** See *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310.

**2. Cy-pres Doctrine Adopted So Far as Not Pre-rogative.** — *Lackland v. Walker*, 151 Mo. 210, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942, 943; *Women's Christian Assoc. v. Kansas City*, 147 Mo. 103; *St. Peter's Church v. Brown*, 21 R. I. 367. See also *Mount v. Tuttle*, (Supm Ct. Spec. T.) 40 Misc. (N. Y.) 456, as to the rule in *Utah*.

**4. States Adopting the Cy-pres Doctrine in Part.** — *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382; *Thompson v. Brown*, 70 S. W. Rep. 674, 24 Ky. L. Rep. 1066; *Harper v. Central Trust, etc., Co.*, 11 Ohio Dec. 240, 8 Ohio N. P. 157.

**943. 1. States Wholly Rejecting Cy-pres Doctrine.** — *Huntsville v. Smith*, 137 Ala. 382; *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 83 Am. St. Rep. 553; *Mount v. Tuttle*, (Supm Ct. Spec. T.) 40 Misc. (N. Y.) 456; *McHugh v. McCole*, 97 Wis. 166, 65 Am. St. Rep. 106;

**943.** [CHARIVARI. — See note 2a.]

CHARTER. — See note 4.

Harrington *v.* Pier, 105 Wis. 485, 76 Am. St. Rep. 924.

**943. 2a.** Webster, in his dictionary, defines *charivari* as "a mock serenade of discordant noises made with kettles, tin horns, etc., designed to annoy and insult." Worcester, in his dictionary, defines a *charivari* as "a vile or noisy music made with tin horns, bells, kettles, pans, etc., in derision of some person or event; a mock serenade." It was held that one who

participated in a *charivari* party could not recover in an action for injuries caused by the careless handling of a pistol by another member of the party, as they were both engaged in disturbing the peace, *Gilmore v. Fuller*, 198 Ill. 130.

**4.** "The Charter of a Corporation formed under a general law consists of its articles of association and the law under which it is organized." *Bent v. Underdown*, 156 Ind. 516. See also *State v. Anderson*, 31 Ind. App. 34.



# CHattel Mortgages.

By F. G. BAMMAN.

## 947. I. DEFINITION AND GENERAL PRINCIPLES. — See note 1.

The Agreement Vests the Title. — See note 2.

The Essential Requisite. — See note 3.

## 948. See note 1.

## 950. Intention. — See notes 1, 2, 7.

## II. DISTINGUISHED FROM CERTAIN OTHER CONTRACTS — 1. From

Pledge. — See note 8.

2. From Conditional Sale. — See note 10.

3. From Assignment for Creditors. — See note 11.

## 951. III. WHEN BILL OF SALE REGARDED AS MORTGAGE — The Rule in Equity. — See note 1.

947. 1. Definition. — "A chattel mortgage is a conditional sale of personal property to secure a debt or obligation of the mortgagor." Williams v. Chadwick, 74 Conn. 252.

2. A Chattel Mortgage Is Something More than a Mere Security. — Alferitz v. Ingalls, 83 Fed. Rep. 964, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 947; Reinstein v. Roberts, 34 Oregon 87, 75 Am. St. Rep. 564.

3. Essential Requisites — Transfert for Security. — Truss v. Harvey, 120 Ala. 636; Dothan Guano Co. v. Ward, 132 Ala. 380. See also Highland Bank v. Evans-Snyder-Buell Co., 9 Kan. App. 80.

Absolute Sale and Mortgage Back. — See Osborne v. Connor, 4 Kan. App. 609.

948. 1. Instances of Chattel Mortgages. — An instrument purporting to convey in trust property as security for certain debts, and providing that the trustee should not take possession except on default of payments as specified, was construed as a chattel mortgage. Belding-Hall Mfg. Co. v. Smith, 125 Mich. 54, 7 Detroit Leg. N. 433.

Leases. — See Seim v. Hale, 67 Ill. App. 364; Ward v. Rippe, 93 Minn. 36; Davis v. Akers, 73 Mo. App. 531; Faxon v. Ridge, 87 Mo. App. 299; Feller v. McKillip, 100 Mo. App. 660.

950. 1. Intention of Parties. — Long v. State, 44 Fla. 134; Anglin v. Barlow, (Tex. Civ. App. 1898) 45 S. W. Rep. 827.

2. All Circumstances of Transaction to Be Considered. — Hughes v. Harlam, 166 N. Y. 427. Compare McPherson v. Moody, 35 N. Bruns. 51.

7. See Anglin v. Barlow, (Tex. Civ. App. 1898) 45 S. W. Rep. 827.

8. Distinguished from Pledge. — Harding v. Eldridge, 186 Mass. 39; Meyer Bros. Drug Co. v. Self, 77 Mo. App. 284; Willard v. Monarch Elevator Co., 10 N. Dak. 400. See also Bogard v. Tyler, (Ky. 1900) 55 S. W. Rep. 709; Irving Park Assoc. v. Watson, 41 Oregon 95.

10. See Gilbert v. National Cash Register Co., 176 Ill. 288, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950; People v. Kirkpatrick, 69 Ill. App. 207; Turner v. Brown, 82 Mo. App. 30.

11. Distinguished from Assignments for Creditors. — Burchinell v. Koon, 25 Colo. 59; Wine- man v. Fisher Electrical Mfg. Co., 118 Mich. 636; Kemper, etc., Dry Goods Co. v. George A. Kennard Grocer Co., 68 Mo. App. 290; Tuttle v. Merchant's Nat. Bank, 19 Mont. 11; Noyes v. Ross, 23 Mont. 425, 75 Am. St. Rep. 543; Sloan v. Thomas Mfg. Co., 58 Neb. 716; Dearing v. McKinnon Dash, etc., Co., 165 N. Y. 78, 80 Am. St. Rep. 708. See also Adler-Goldman Commission Co. v. Phillips, 63 Ark. 40; Matter of Bloomfield Woolen Mills, 101 Iowa 181; Cunningham v. Britton, 101 Wis. 378.

951. 1. Rule in Equity — May Be Shown by Parol to Be Mortgage — United States. — Davis v. Turner, (C. C. A.) 120 Fed. Rep. 605.

Connecticut. — See Williams v. Chadwick, 74 Conn. 252.

Georgia. — Denton v. Shields, 120 Ga. 1076.

Illinois. — Strassheim v. Krueger, 69 Ill. App. 41; Roberts v. Kingsbury, 71 Ill. App. 451; Moore v. Foster, 97 Ill. App. 233.

Indian Territory. — Rogers v. Nidiffer, (Indian Ter. 1904) 82 S. W. Rep. 673.

Kentucky. — Baldwin v. Owens, (Ky. 1899) 51 S. W. Rep. 438; Boli v. Irwin, (Ky. 1899) 51 S. W. Rep. 444.

Massachusetts. — Hawes v. Weeden, 180 Mass. 106.

Michigan. — Wetmore v. Maloney, 127 Mich. 372, 8 Detroit Leg. N. 313; Canfield v. Gould, 115 Mich. 461; Murphy v. Charlton, 118 Mich. 141.

Missouri. — Albert v. Van Frank, 87 Mo. App. 511.

New York. — Hughes v. Harlam, 37 N. Y. App. Div. 528, affirmed 166 N. Y. 427; Donnelly v. McArdle, 86 N. Y. App. Div. 33; Dickinson v. Oliver, 86 N. Y. App. Div. 65.

Ohio. — In re Raymond Bag Co., 8 Ohio Dec. 688; Mullenkops v. Baumgardner, 11 Ohio Cir. Dec. 655, 21 Ohio Cir. Ct. 591.

Oklahoma. — Miller v. Campbell Commission Co., 13 Okla. 75.

South Carolina. — Lowery v. Gregory, 60 S. Car. 149.

Texas. — Anglin v. Barlow, (Tex. Civ. App. 1898) 45 S. W. Rep. 827; Williams v. Farmers

**952.** 'At Law. — See note 1.

Mortgage as Bill of Sale. — See note 3.

**953.** When for the Court and When for the Jury. — See note 3.

Evidence Necessary to Convert Bill of Sale into Mortgage. — See notes 5, 6.

IV. FORM AND REQUISITES—1. In General — The Defeasance. — See

note 8.

**954.** Any Language Indicating a Transfer of Property. — See note 1.

Several Instruments — Seal — Writing. — See notes 5, 6.

The Defeasance. — See notes 7, 8, 9, 10.

**955.** 2. The Parties — a. MORTGAGORS — (1) *General Rule* — The Case of a Conditional Vendee. — See note 6.

(2) *Common Owners*. — See note 8.

Nat. Bank, 22 Tex. Civ. App. 581; Watson v. Boswell, 25 Tex. Civ. App. 379.

West Virginia. — Zanhizer v. Hefner, 47 W. Va. 418.

Wisconsin. — Salter v. Eau Claire Bank, 97 Wis. 84.

Canada. — Hope v. Parrott, 7 Ont. L. Rep. 501, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 951; Boddy v. Ashdown, 11 Manitoba 555.

**952.** 1. Held Admissible at Law. — Frick v. Kabaker, 116 Iowa 494; Mullenkops v. Baumgardner, 11 Ohio Cir. Dec. 655. See also Meyer v. Davenport Elevator Co., 12 S. Dak. 172.

Contra — Held Not Admissible in Law. — See Hawes v. Weeden, 180 Mass. 106.

3. Haynes v. Hobbs, (Mich. 1904) 98 N. W. Rep. 978, 10 Detroit Leg. N. 999; Dunham v. McNatt, 15 Tex. Civ. App. 552.

**953.** 3. When Question for Jury. — Meyer v. Davenport Elevator Co., 12 S. Dak. 172.

5. Fraud — Imposition — Mistake. — See Armstrong v. Owens, 83 Miss. 10. Contra, Mullenkops v. Baumgardner, 11 Ohio Cir. Dec. 655.

6. Intention. — Powers v. Benson, 120 Iowa 428; Donnelly v. McArdle, 86 N. Y. App. Div. 33.

A bill of sale executed by a mortgagee who himself held by a bill of sale was held not to divest the original owner's right to redeem where the value of the property greatly exceeded the consideration expressed, the owner had received nothing for a release of his equity, and the one taking last by the bill of sale had subsequently recognized the equities of the original owner. Murphy v. Charlton, 118 Mich. 141.

8. No Particular Form or Words Necessary. — Davis v. Turner, (C. C. A.) 120 Fed. Rep. 605; Ward v. Lord, 100 Ga. 407; Greenville Nat. Bank v. Evans-Snyder-Buel Co., 9 Okla. 353, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 953. See also McDermid v. Hutchinson Wholesale Grocer Co., 63 Kan. 884, 65 Pac. Rep. 668; Harris v. Croley, (Tex. Civ. App. 1897) 40 S. W. Rep. 510; Lewis v. Bell, (Tex. Civ. App. 1897) 40 S. W. Rep. 747.

A Lien Note May Be Treated as a Chattel Mortgage on the articles to pay for which it was given. Cox v. Schack, 14 Manitoba 174.

**954.** 1 Snyder v. Blatchley, 177 Ill. 506.

Use of Word "Mortgage" Simply. — Acton v. Walker, 74 S. W. Rep. 231, 24 Ky. L. Rep. 2377.

5. Seal Unnecessary. — Burkamp v. Healey, 72 S. W. Rep. 759, 24 Ky. L. Rep. 1926.

6. Writing Unnecessary. — Frick v. Fritz, 115 Iowa 441, 91 Am. St. Rep. 165, citing 5 AM.

AND ENG. ENCYC. OF LAW (2d ed.) 954; St. Mary's First Nat. Bank v. Taylor, 69 Kan. 28; Reynolds v. Fitzpatrick, 23 Mont. 52; Buckstaff Bros. Mfg. Co. v. Snyder, 54 Neb. 538; Perkins v. Frank, (Tex. Civ. App. 1901) 64 S. W. Rep. 236. Compare Houston v. State, 114 Ala. 15; Oyler v. Renfro, 86 Mo. App. 321; Chitwood v. Lanyon Zinc Co., 93 Mo. App. 225.

A Chattel Mortgage with Possession in the Mortgagee. — See Muller v. Parcel, (Neb. 1904) 99 N. W. Rep. 684.

A Statute requiring that mortgages should be either written or typewritten and not printed has been held to be constitutional. Rose v. Harillee, 69 S. Car. 523.

7. Defeasance May Be Verbal. — See Fraser v. Murray, 34 Nova Scotia 186.

8. Separate Defeasance. — Williams v. Chadwick, 74 Conn. 252.

9. Defeasance Implied. — Dothan Guano Co. v. Ward, 132 Ala. 380; Smith-M'Cord Dry-Goods Co. v. John B. Farewell Co., 6 Okla. 318.

10. Agreement to Recovery. — Townsend v. Frazer, (Ky. 1900) 54 S. W. Rep. 722.

**955.** 6. Conditional Vendee. — Wood v. Evans, 98 Ga. 454; Hudson Trust, etc., Inst. v. Carr-Curran Paper Mills Co., 58 N. J. Eq. 59. See also Anderson v. Adams, 117 Ga. 919; Mashburn v. Dannenberg Co., 117 Ga. 567; Singer Mfg. Co. v. Bradfield, 114 Ga. 303; Church v. Lapham, 94 N. Y. App. Div. 550; Hall v. Keating Implement, etc., Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 1054. But see Albright v. Meredith, 58 Ohio St. 194.

8. Davis v. Turner, (C. C. A.) 120 Fed. Rep. 605; Burchinell v. Koon, 25 Colo. 59; Johnston v. Robuck, 104 Iowa 523; Greiss v. Wilkop, 5 Ohio Cir. Dec. 544, 12 Ohio Cir. Ct. 481; Patterson v. Atkinson, 20 R. I. 102; Watts v. Dubois, (Tex. Civ. App. 1902) 66 S. W. Rep. 698. See also Saunders v. White, (1901) 1 K. B. 70, 49 W. R. 127, affirmed (1902) 1 K. B. 472.

A Partner. — Beckman v. Noble, 115 Mich. 523; Rock v. Collins, 99 Wis. 630, 67 Am. St. Rep. 885; McClary Mfg. Co. v. Howland, 9 British Columbia 479.

Ratification. — By statute in Wyoming a mortgage of firm property, to be valid, must be executed by all members of the firm; subsequent ratification by those not joining in the original execution is ineffectual to give validity to the instrument. Ridgely v. First Nat. Bank, 75 Fed. Rep. 808.

A Mortgage by a Firm, Signed by Only Two Members. — See Ridgely v. First Nat. Bank, 75 Fed. Rep. 808.

**955.** (3) *Husband and Wife*. — See note 9.

**956.** See note 1.

(4) *Corporations*. — See note 3.

(5) *Infants and Lunatics*. — See note 4.

**b. MORTGAGEES — Two Creditors May Join.** — See note 6.

**Take as Tenants in Common.** — See note 7.

**A Fraudulent Mortgage.** — See note 8.

**957. 3. The Description — a. GENERAL RULE.** — See notes 1, 2, 3, 4.

**Individual Debts of Partner.** — Harvey v. Stephens, 159 Mo. 486. See also Sloan v. Wilson, 117 Ala. 583.

**955. 9. Husband and Wife.** — Rice v. Sally, 176 Mo. 107; Fraser v. Macpherson, 34 N. Bruns. 417.

**956. 1.** See Bradley v. Hargadine-McKittrick Dry-Goods Co., (C. C. A.) 96 Fed. Rep. 914.

**Mortgage of Household Goods.** — Under Starr & Curt. Annot. Stat. Ill., c. 95, par. 25, a mortgage of household goods must be executed by both the wife and the husband, and cannot be by either alone, even though separated. McKelvy v. Kolbe, 89 Ill. App. 661.

But under a statute requiring both husband and wife to join in the execution of any chattel mortgage of household goods, a wife may purchase and mortgage household goods in her own name without joining the husband. Mantonya v. Martin Emerich Outfitting Co., 172 Ill. 92; Green v. McCrane, 55 N. J. Eq. 436; Dunham v. Cramer, 63 N. J. Eq. 151.

**3. National State Bank v. Sandford Fork, etc., Co.,** 157 Ind. 10; Kane v. Lodor, 56 N. J. Eq. 268. See also Electric Lighting Co. v. Rust, 117 Ala. 680; Gilbert v. Sprague, 88 Ill. App. 508, affirmed 196 Ill. 444.

**Presumption of Authority.** — A mortgage executed by the president and secretary of a corporation will be presumed to have been executed upon authority. Burkamp v. Healey, 72 S. W. Rep. 759, 24 Ky. L. Rep. 1926.

**Ratification.** — Where the corporation has accepted the benefits of a mortgage made by its officers without authority, it will be deemed to have ratified the execution of the mortgage. Edelhoff v. Horner-Miller Straw Goods Mfg. Co., 86 Md. 595.

**4.** See Lake v. Lund, 92 Minn. 280.

**6. Mortgage to Several Persons.** — Sloan v. Thomas Mfg. Co., 58 Neb. 716, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 956; Skinner v. Pawnee City First Nat. Bank, 59 Neb. 17.

**7. Take as Tenants in Common.** — Sheldon v. Brown, 72 Minn. 496; Ashland Lodge No. 63 v. Williams, 100 Wis. 223, 69 Am. St. Rep. 912.

**8. Fraudulent Mortgage.** — Sloan v. Thomas Mfg. Co., 58 Neb. 716, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 956; Linz v. Atchison, 14 Tex. Civ. App. 647. See also Pittman v. Rotan Grocery Co., 15 Tex. Civ. App. 676.

**957. 1. Identification of Property — United States.** — Alferitz v. Ingalls, 83 Fed. Rep. 964, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 956.

*Alabama.* — Truss v. Harvey, 120 Ala. 636.

*Indiana.* — Baldwin v. Boyce, 152 Ind. 46, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 956; McKinney v. Cabell, 24 Ind. App. 676.

*Indian Territory.* — Kaase v. Johnston, (Indian Ter. 1904) 82 S. W. Rep. 680.

*Iowa.* — Farmers', etc., Bank v. Stockdale, 121 Iowa 748.

*Kansas.* — Wilson v. Nichols, 7 Kan. App. 641.

*Kentucky.* — Sparks v. Deposit Bank, 115 Ky. 461.

*Maine.* — See Cayford v. Brickett, 89 Me. 77.

*Maryland.* — Salabes v. Castelberg, 98 Md. 645, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 956.

*Minnesota.* — Schneider v. Anderson, 77 Minn. 124.

*Missouri.* — Williamson v. Wylie, 69 Mo. App. 368; Evans-Snyder-Buell Co. v. Turner, 143 Mo. 638; Chrisman-Sawyer Banking Co. v. Strahorn-Hutton-Evans Commission Co., 80 Mo. App. 438; Holmes v. Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97; Johnson v. Hutchinson, 81 Mo. App. 299; Jones Bros. Live Stock Commission Co. v. Long, 90 Mo. App. 8; City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123.

*Nebraska.* — Chicago Lumber Co. v. Hunter, 58 Neb. 328; Union State Bank v. Hutton, 61 Neb. 571; McCormick Harvesting Mach. Co. v. Reynolds, 62 Neb. 892. See also Goff v. Byers, (Neb. 1903) 96 N. W. Rep. 1037.

*New Hampshire.* — Hodgdon v. Libby, 69 N. H. 136.

*North Dakota.* — Reynolds v. Strong, 10 N. Dak. 81, 88 Am. St. Rep. 680, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 956.

*Oklahoma.* — Watts v. El Reno First Nat. Bank, 8 Okla. 645.

*Oregon.* — Alberson v. Elk Creek Gold-Min. Co., 39 Oregon 552.

*South Dakota.* — Advance Thresher Co. v. Schmidt, 9 S. Dak. 489.

*Texas.* — Becker v. Bowen, (Tex. Civ. App. 1904) 79 S. W. Rep. 45.

*Virginia.* — Hardaway v. Jones, 100 Va. 481.

*Canada.* — Fraser v. Macpherson, 34 N. Bruns. 417.

**Question for Jury.** — Whether the recitals in a mortgage are such as to enable third parties to identify the property, aided by inquiries suggested by that instrument, is a question of fact for the jury. Fisher v. Porter, 11 S. Dak. 311.

**2. Must Be Reasonably Particular.** — Chadron First Nat. Bank v. Hughes, (Neb. 1902) 92 N. W. Rep. 986; Holman v. Whitaker, 119 N. Car. 113; Minneapolis Threshing Mach. Co. v. Skau, 10 S. Dak. 636. See also Woods v. Rose, 135 Ala. 297; McDermid v. Hutchinson Wholesale Grocer Co., 63 Kan. 884, 65 Pac. Rep. 668; Young v. Princeton Bank, 97 Mo. App. 576.

Where neither the owner, the one holding possession, nor the location of the property appears, the description is not sufficient. Iowa

**958.** *b. FALSE DESCRIPTION.*—See note 1.

*c. NATURE OF PROPERTY AS AFFECTING DESCRIPTION.*—See note 2.

**959.** See notes 1, 2, 3.

**960.** See notes 1, 2.

**962.** *A General Clause.*—See note 1.

*Lumber Co. v. Cassidy*, 107 Iowa 564; *State Bank v. Felt*, 99 Iowa 532, 61 Am. St. Rep. 253; *Nardaway v. Jones*, 100 Va. 481.

A general description by the location, ownership, and general characteristics is sufficient under the *Maryland* statute. *In re Durham*, 114 Fed. Rep. 750.

*"Stock on Hand."*—See *Tolerton, etc., Co. v. Wayne First Nat. Bank*, 63 Neb. 674.

**Nonidentification of Individual Property of Joint and Several Grantors Avoids Instrument.**—*Saunders v. White*, (1902) 1 K. B. 472, 86 L. J. N. S. 173.

**957.** *3. State Nat. Bank v. Cudahy Packing Co.*, 126 Fed. Rep. 543; *Hoye v. Burford*, 18 Ark. 256.

*4. In re Brannock*, 131 Fed. Rep. 819; *George Adams, etc., Co. v. South Omaha Nat. Bank*, (C. C. A.) 123 Fed. Rep. 641.

**Appurtenances.**—See *Nelson v. Howison*, 122 Ala. 573.

**958.** *1. False Description.*—*Frick v. Fritz*, 115 Iowa 441, 91 Am. St. Rep. 165; *J. H. North Furniture, etc., Co. v. Davis*, 76 Mo. App. 512; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123; *Swinney v. Merchant's Bank*, 95 Mo. App. 135.

**Misdescription.**—*Cragin v. Dickey*, 113 Ala. 310; *Tuttle v. Blow*, 176 Mo. 158, 98 Am. St. Rep. 488; *Trower Bros. Co. v. Hamilton*, 179 Mo. 205; *Arlington Mill, etc., Co. v. Yates*, 57 Neb. 286; *Greiss v. Wilkop*, 5 Ohio Cir. Dec. 544, 12 Ohio Cir. Ct. 481.

**Incorrect Description of a Part.**—*Packers Nat. Bank v. Chicago, etc., R. Co.*, 114 Iowa 621.

An error in describing cattle as in "range 11" in a county where there was no range numbered eleven was held not to be fatal where the remainder of the description was sufficient. *Central Nat. Bank v. Brecheisen*, 65 Kan. 807.

**2. Description of Animals.**—*Kaase v. Johnston*, (Indian Ter. 1904) 82 S. W. Rep. 680; *Preston v. Caul*, 109 Iowa 443; *Ward v. Johnson*, 66 Kan. 813; *Swinney v. Merchant's Bank*, 95 Mo. App. 125; *Gosnell v. Webster*, (Neb. 1904) 97 N. W. Rep. 1060; *Johnson v. Brown*, (Tex. Civ. App. 1901) 65 S. W. Rep. 485; *Greer v. Crenshaw*, (Tex. Civ. App. 1903) 76 S. W. Rep. 589; *Shum v. C'aghorn*, 69 Vt. 45; *Desany v. Thorp*, 70 Vt. 31. See also *Packers Nat. Bank v. Chicago, etc., R. Co.*, 122 Iowa 503; *Scott v. Harden*, 10 K. n. App. 514.

A description sufficient at the time of execution is not affected by the fact that the mortgaged animal has since changed color. *Turpin v. Cunningham*, 127 N. Car. 508, 80 Am. St. Rep. 808.

**Illustrations.**—Where a chattel mortgage on certain mares contained the clause "and all increase of said mares and the increase of increase," it was held not to be restricted to that in existence, but a sufficient description to cover future increase. *Hopkins Fine Stock Co. v. Reid*, 106 Iowa 78.

A mortgage purporting to cover "twenty-three yearling steers, red, roan, and black," was held to be sufficient to impart notice, it appearing that the mortgagor owned no others. *Boyle v. Miller*, 93 Ill. App. 627.

**For the Jury.**—*Livingston v. Stevens*, 122 Iowa 62; *Springfield Third Nat. Bank v. Blosser*, 65 Kan. 859, 70 Pac. Rep. 373; *Ladd v. Williams*, 104 Mo. App. 390. Compare *Wilson v. Rustad*, 7 N. Dak. 330, 66 Am. St. Rep. 649, holding that a question of law and not of fact is raised by an inquiry concerning the sufficiency of description.

**Schedule.**—See *Cincinnati Leaf Tobacco Warehouse Co. v. Combs*, 109 Ky. 21.

**English Statute—Specific Description.**—"Two horses and four cows" is an insufficient description. *Davies v. Jenkins*, (1900) 1 Q. B. 133, 81 L. T. N. S. 788.

**Description by Brand Sufficient.**—*Spenger v. Graveley*, 34 Can. L. J. 135.

**"Eight Horses" in a Specified Livery Stable Was Held to Be Sufficient Description.**—*Fraser v. Macpherson*, 34 N. Bruns. 417.

**959.** *1. For a Sufficient Description of Vehicles in a Livery Stable*, see *Fraser v. Macpherson*, 34 N. Bruns. 417.

**2. Machinery.**—A description as "two Ledgerwood engines," without adding numbers, marks, or history, and the location being uncertain, is insufficient. *Solinsky v. O'Connor*, (Tex. Civ. App. 1899) 54 S. W. Rep. 935.

**3. Description of Crops—Lands upon Which Grown.**—*Chicago Lumber Co. v. Hunter*, 58 Neb. 328; *Graves v. Currie*, 132 N. Car. 307. See also *infra*, this title, **977. z.**

**960.** *1. Description of Crops—Stating the Year.*—See *Hayes v. Bertrand First State Bank*, (Neb. 1904) 98 N. W. Rep. 423; *Hahn v. Heath*, 127 N. Car. 27.

A description in a mortgage as "my entire crop grown the present or next year" is sufficient to embrace the crop of each and both years. *Holst v. Harmon*, 122 Ala. 453. See also *Woods v. Rose*, 135 Ala. 297.

**Chattel Mortgage Gives No Interest in Land.**—*Christianson v. Nelson*, 76 Minn. 36; *McMasters v. Emerson*, 109 Iowa 284.

**2. Definite Location.**—*Thurlough v. Dresser*, 98 Me. 162; *Commercial State Bank v. Interstate Elevator Co.*, 14 S. Dak. 276, 86 Am. St. Rep. 760. See also *Baldwin v. Boyce*, 152 Ind. 46; *McKinney v. Cabell*, 24 Ind. App. 676; *McCormick Harvesting Mach. Co. v. Reynolds*, 62 Neb. 892; *Hayes v. Bertrand First State Bank*, (Neb. 1904) 98 N. W. Rep. 423.

**Location May Appear from Instrument.**—See *Johnson v. Hutchinson*, 81 Mo. App. 209.

**Reformation of Description.**—See *W. W. Kimball Co. v. Piper*, 111 Ill. App. 82; *Anderson v. Anderson Food Co.*, 66 N. J. Eq. 209; *Patterson v. Atkinson*, 20 R. I. 102.

**962.** *1. General Clause Passing "All" of Certain Articles.*—*Davis v. Turner*, (C. C. A.) 120

**962.** Separation of Articles. — See note 2.

**963.** As Affecting Third Parties. — See note 2.

**964.** Subsequent Delivery. — See note 1.

*d.* PAROL EVIDENCE. — See notes 2, 4, 5.

**4. The Consideration** — *a.* IN GENERAL. — See note 6.

Fed. Rep. 605; *Smith v. Donahoe*, 13 S. Dak. 334; *Accountant v. Marcon*, 30 Ont. 135. See also *In re Beede*, 126 Fed. Rep. 853; *Robinson v. Norton*, 108 Ga. 562; *Farmers', etc., Bank v. Stockdale*, 121 Iowa 748.

**When the Articles Mortgaged Are Very Numerous.** — *Macpherson*, 34 N. Bruns. 417.

**Schedule Limits Description.** — See *Meyer Bros. Drug Co. v. Self*, 77 Mo. App. 284; *Lembeck, etc., Eagle Brewing Co. v. Sexton*, 96 N. Y. App. Div. 613.

**962. 2. Separation of Chattels** — *Iowa*. — *Frick v. Fritz*, 115 Iowa 438, 91 Am. St. Rep. 165.

*Kansas*. — *T. B. Townsend Brick, etc., Co. v. Allen*, 62 Kan. 34, 84 Am. St. Rep. 388. See also *Burton v. Cochran*, 5 Kan. App. 508; *John S. Brittain Dry-Goods Co. v. Blanchard*, 60 Kan. 263.

*Missouri*. — *Dawson v. Cross*, 88 Mo. App. 292.

*Nebraska*. — *Union State Bank v. Hutton*, 61 Neb. 571; *Holdrege First Nat. Bank v. Johnson*, (Neb. 1903) 94 N. W. Rep. 837.

*Texas*. — See *Avery v. Popper*, (Tex. 1898) 48 S. W. Rep. 572, modified 92 Tex. 344.

*Utah*. — *Jacobsen v. Christiansen*, 18 Utah 149.

*Canada*. — *Accountant v. Marcon*, 30 Ont. 135.

A mortgage describing a certain number of articles out of a larger number is valid against those who know the facts. *Northwestern Nat. Bank v. Freeman*, 171 U. S. 620.

**Where Amount Specified Is Greater than Mortgagor Owns.** — *George Adams, etc., Co. v. South Omaha Nat. Bank*, (C. C. A.) 123 Fed. Rep. 641.

**Subsequent Separation Valid.** — *Oxsheer v. Watt*, 91 Tex. 124.

**Where the Doctrine of Selection Obtains** it is held that a mortgage of a particular number of chattels in a large number of like kind is not void, but gives to the mortgagee the right to select the number named in the mortgage. *Sparks v. Deposit Bank*, 115 Ky. 460.

**963. 2. As Affecting Third Parties.** — *Cincinnati Leaf Tobacco Warehouse Co. v. Combs*, 109 Ky. 21; *J. H. North Furniture, etc., Co. v. Davis*, 76 Mo. App. 512; *Johnson v. Hutchinson*, 81 Mo. App. 299; *Holdrege First Nat. Bank v. Johnson*, (Neb. 1903) 94 N. W. Rep. 837; *Cobee v. West Point First Nat. Bank*, (Neb. 1901) 95 N. W. Rep. 610; *Hardwick v. Atkinson*, 8 Okla. 608; *Crow v. Jollars*, 11 S. Dak. 203. See also *O'Brien v. Miller*, 117 Fed. Rep. 1000; *Cragin v. Dickey*, 113 Ala. 310; *Wilson v. Nichols*, 7 Kan. App. 641; *Mexico First Nat. Bank v. Ragsdale*, 158 Mo. 668, 81 Am. St. Rep. 332; *Crawford v. Benoist*, 97 Mo. App. 219; *Oxsheer v. Watt*, 91 Tex. 124; *Blythe v. Crump*, 28 Tex. Civ. App. 327.

**964. 1. Subsequent Delivery Curine Defective Description.** — *Kelley v. Andrews*, 102 Iowa 119; *Trice v. Myton*, 9 Kan. App. 710; *Falk v. Decou*, 8 Kan. App. 765; *Dawson v. Cross*, 88 Mo. App.

292; *Nichols, etc., Co. v. Bishop*, 12 Okla. 250; *Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 890.

**2. Parol Evidence to Aid Description.** — *Davis v. Turner*, (C. C. A.) 120 Fed. Rep. 605 (a case arising in *New York*); *Baldwin v. Boyce*, 152 Ind. 46; *Frick v. Fritz*, 115 Iowa 442, 91 Am. St. Rep. 165, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 964; *Brody v. Chittenden*, 166 Iowa 524; *Fisher v. Moore*, 7 Kan. App. 14; *Reinstein v. Roberts*, 34 Oregon 87, 75 Am. St. Rep. 564; *Becker v. Bowen*, (Tex. Civ. App. 1904) 79 S. W. Rep. 45. See also *Truss v. Harvey*, 120 Ala. 636.

**4. Parol Evidence to Bring Particular Articles Within General Term.** — *In re Durham*, 114 Fed. Rep. 750. See also *Chipman v. Weiny*, 112 Iowa 702; *Sparks v. Deposit Bank*, 115 Ky. 461.

**5. When Parol Evidence Not Admissible.** — *Moore v. Terry*, 66 Ark. 393; *Becker v. Dalby*, (Iowa 1901) 86 N. W. Rep. 314; *Holman v. Whitaker*, 119 N. Car. 113; *Galveston, etc., R. Co. v. Hill Mercantile Co.*, 31 Tex. Civ. App. 196. See also *Drexel v. Murphy*, 59 Neb. 210; *Latta v. Bell*, 122 N. Car. 639; *Blount v. Lewis*, (Tex. Civ. App. 1900) 59 S. W. Rep. 293.

**6. Fraud and Duress.** — A mortgage procured by fraud or duress is voidable at the instance of the maker, although an indebtedness exists between the mortgagor and mortgagee. *Searle v. Gregg*, 67 Kan. 1; *Layson v. Cooper*, 174 Mo. 211, 97 Am. St. Rep. 545; *McAffrey v. Richards*, (Tenn. Ch. 1900) 59 S. W. Rep. 1064. See also *Henderson v. Boyett*, 126 Ala. 172; *W. W. Kimball Co. v. Deaton*, 102 Mo. App. 45; *Iowa Sav. Bank v. Frink*, (Neb. 1901) 92 N. W. Rep. 916.

**In England.** — A bill of sale is void if it does not "truly set forth the consideration for which it is given," or if it is made or given in consideration of any sum under thirty pounds. *Darlow v. Bland*, (1897) 1 Q. B. 125, 75 L. T. N. S. 537.

Where the consideration in a bill of sale was stated to be three hundred pounds, and it appeared that this sum was paid by a check for one hundred pounds, and two bills of exchange for one hundred pounds each, payable twelve months after date, the bill of sale was declared void on the ground that the consideration was not "truly set forth." It was also held that the absence of a covenant for repayment of the principal sum vitiates a bill of sale. *In re Moore*, 4 Manson 51.

Uncertainty as to the amount of interest and the time of payment thereof renders the bill of sale void. *Attia v. Finch*, 91 L. T. N. S. 70.

A recital in the bill of sale that it is granted in consideration of "the sum of ninety pounds now due and owing" does not truly set forth the consideration, when the grantor already owes forty pounds to the grantee and receives only the additional fifty pounds on execution of the bill of sale; and the omission of an acknowledgment of the receipt of the consideration by

**965.** Illustrations. — See notes 1, 2, 4.

**966.** See notes 1, 2.

**967.** *b.* FUTURE ADVANCES. — See notes 1, 2.

**968.** See notes 1, 2, 3.

5. The Condition. — See note 4.

6. The Debt. — See note 5.

**969.** Mere Overstatement of the Amount Due. — See note 1.

the grantor is a departure from the prescribed form which is also sufficient to render the bill of sale void. *Davies v. Jenkins*, (1900) 1 Q. B. 133, 81 L. T. N. S. 788.

But the consideration is none the less truly set forth to be "now paid" because part thereof is applied by the grantee, in pursuance of a contemporaneous agreement with the grantor, to the retirement of a promissory note, shortly to become due, on which the grantor and the grantee are jointly and severally liable. *In re Wiltshire*, (1900) 1 Q. B. 96, 81 L. T. N. S. 616.

Where the money consideration, as set forth in a bill of sale, has been actually paid to the grantor, it is not necessary to refer to the payment of a prior bill of sale out of the proceeds. *Re Davies*, 77 L. T. N. S. 567.

In Manitoba the bill of sale is void unless the full and true consideration is set out. *Boddy v. Ashdown*, 11 Manitoba 555.

**Evidence — Security or Indemnity.** — An instrument which is in form a chattel mortgage for security may be shown to be one for indemnity only. *Honaker v. Vesey*, 57 Neb. 413.

**965. 1. Extension of Time.** — *State Bank v. O. S. Kelley Co.*, 49 Neb. 242; *Red River Valley Nat. Bank v. Barnes*, 8 N. Dak. 432; *McKinney v. Williams*, (Tex. Civ. App. 1898) 45 S. W. Rep. 335. See also *Gibson v. McIntire*, 110 Iowa 417; *Hume v. Eagon*, 83 Mo. App. 576.

**2. Mortgagee's Assumption of Liability as Surety.** — *Gee v. Van Natta-Lynds Drug Co.*, 105 Mo. App. 27. See also *Southern v. Wilcox*, 4 Ohio Dec. (Reprint) 251, 1 Cleve. L. Rep. 171.

**Facts, Not Legal Conclusions, Should Be Stated.** — The requirements of the Ontario Chattel Mortgage Act that the consideration of a mortgage be expressed therein is satisfied when the mortgage recites that the indorsement of a note is the consideration, and then sets out the note. Only the facts need be stated, not their legal effect. *Robinson v. Mann*, 31 Can. Sup. Ct. 484.

**4. Acts and Interests of Third Parties.** — See *Adams v. Moody*, 91 Mo. App. 41.

**966. 1. Performance of Agreements.** — *Backhaus v. Buells*, 43 Oregon 558.

Where the mortgagee under the mortgage promised to pay certain notes given by the mortgagor to a third person, but did not pay any of the notes, it was held that the mortgagee could not recover on the defendant's turning over the property to the payee of the notes, as there was no consideration to support the mortgage. *Hezel v. Schatz*, 17 S. Dak. 211.

**2. Pre-existing Indebtedness.** — See *Atkinson v. Burt*, 65 Ark. 316; *Wickler v. People*, 68 Ill. App. 282; *Johnston v. Robuck*, 104 Iowa 523. See also *Mashburn v. Dannenberg Co.*, 117 Ga. 567; *State Bank v. O. S. Kelley Co.*, 49 Neb.

242; *Cumberland Nat. Bank v. Baker*, 57 N. J. Eq. 231. But see *Shuster v. Jones*, 58 S. W. Rep. 595, 22 Ky. L. Rep. 568; *Hees v. Carr*, 115 Mich. 654.

**Prior Unrecorded Mortgage.** — See *Bowen v. Lansing Wagon Works*, 91 Tex. 385.

**Effect of Fraud.** — Where a mortgage was given for a past debt it was held to be invalid as to a vendor who showed that the mortgagor procured the goods by fraud. *Vincent v. Hansen*, 113 Mich. 173.

**967. 1. Mortgage to Secure Future Advances.** — *Moore v. Terry*, 66 Ark. 393; *Lemon v. Wolff*, 121 Cal. 272; *Davis v. Carlisle*, (Indian Ter. 1904) 82 S. W. Rep. 682; *Holmes v. Strayhorn-Hutton-Evans Commission Co.*, 81 Mo. App. 97; *Union Nat. Bank v. Moline, etc., Co.*, 7 N. Dak. 201.

**2. Need Not So State on Its Face.** — *Westheimer v. Goodkind*, 24 Mont. 90.

**968. 1. Parol.** — See *Collins v. Gregg*, 109 Iowa 506; *Groos v. Iowa Park First Nat. Bank*, (Tex. Civ. App. 1903) 72 S. W. Rep. 402.

**2. When Rights of Third Parties Have Intervened.** — *Union Nat. Bank v. Moline, etc., Co.*, 7 N. Dak. 201.

Where a mortgage was given to secure future advances it was held that the filing of a subsequent mortgage was not notice to the prior mortgagor, and in the absence of actual notice the latter was protected for advances made after the second mortgage was filed. *Anderson v. Liston*, 69 Minn. 82.

**3. Corning First Nat. Bank v. Reid**, 122 Iowa 280.

**4. The Condition.** — *Cayford v. Brickett*, 89 Me. 77; *Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 899.

**5. Mortgage Note.** — See *Mason v. Parker*, 101 Ga. 659; *Peck v. Logsdon*, 84 Ill. App. 420; *Madisonville Bank v. McCoy*, (Tenn. Ch. 1897) 42 S. W. Rep. 814.

In case of irreconcilable conflict between the mortgage and the note as to the time when the note is payable the date of the note will govern. *Ferris v. Johnson*, (Mich. 1904) 98 N. W. Rep. 1014, 10 Detroit Leg. N. 982.

**Covenant Outweighs Recital as to Amount.** — A recital in the mortgage that a certain sum is due by the mortgagor does not estop the mortgagee from claiming that a larger sum was due at the time of the execution of the mortgage, where the mortgage contains a covenant by the mortgagor to pay the sum recited and also any other sum found to be due on the taking of an account. *Rithet v. Beaven*, 5 British Columbia 457.

**969. 1. Overstatement of Amount.** — *Central Nat. Bank v. Brecheisen*, 65 Kan. 807; *Trompen v. Yates*, 66 Neb. 525; *Bigelow v. Goble*, 9 N. Y. App. Div. 391; *Rock v. Collins*, 99 Wis. 630, 67 Am. St. Rep. 885.

**970.** 7. Delivery and Acceptance — *a.* IN GENERAL. — See note 3.

**971.** Rights of Third Parties. — See note 1.

*b.* BY AGENT. — See notes 2, 3.

8. The Acknowledgment — The Officer. — See note 6.

**972.** See note 1.

Compliance with Statutory Form. — See note 2.

**973.** Between the Parties and Third Persons with Actual Notice. — See note 1.

And Possession by the Mortgagee. — See note 3.

9. The Affidavit. — See notes 4, 5, 6.

**970.** 3. Delivery Necessary — Actual or Constructive. — *Hargreaves v. Reese*, 66 Minn. 434. If the Parties Agree that One Shall Make a Deed to the Other. — See *Day v. Sines*, 15 Wash. 525.

Presumption as to Delivery. — Very strong proof is required to rebut the presumption of delivery arising from the possession of the mortgage note and mortgage by the mortgagee. *Wickler v. People*, 68 Ill. App. 282.

**971.** 1. Mortgagee Must Have Accepted Mortgage. — *Moon Bros. Carriage Co. v. Porter*, 76 Mo. App. 128; *Rogers v. Heads Iron Foundry*, 51 Neb. 39.

Subsequent Ratification. — *State v. O'Neill*, 74 Mo. App. 134; *Whitaker v. Sanders*, (Tex. Civ. App. 1899) 52 S. W. Rep. 638.

Where the mortgagee did not accept a mortgage made by one member of a partnership for firm purposes until the firm was dissolved, it was held that such acceptance was ineffectual. *Meyer v. Michaels*, (Neb. 1903) 95 N. W. Rep.

The Filing of the Mortgage by the Mortgagor has been held to be *prima facie* evidence of delivery as against an officer attaching the property before the mortgagee knew of the recording. *Rein v. Kendall*, 55 Neb. 583.

2. Agency to Accept. — *Jones v. Howard*, 99 Ga. 451. See also *Matter of Bloomfield Woolen Mills*, 101 Iowa 181.

3. The Recorder as Agent. — *State v. O'Neill*, 74 Mo. App. 134; *Western Assur. Co. v. Kilpatrick-Koch Dry-Goods Co.*, 54 Neb. 241.

6. Before Whom Acknowledged. — *Fahndrich v. Hudson*, 76 Ill. App. 641; *Gilbert v. Sprague*, 196 Ill. 444.

**972.** 1. Must Be Disinterested Party. — *Lee v. Murphy*, 119 Cal. 364; *Kothe v. Krag-Reynolds Co.*, 20 Ind. App. 293; *Smith v. Clark*, 100 Iowa 605, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493; *Farmers', etc., Bank v. Stockdale*, 121 Iowa 748; *Amick v. Woodworth*, 58 Ohio St. 86.

In *North Dakota*, under the statute providing that a mortgage shall be acknowledged before two persons, it was held that a mortgagee could not sign as a witness so as to render the instrument operative as constructive notice. *Donovan v. St. Anthony, etc., Elevator Co.*, 8 N. Dak. 585, 73 Am. St. Rep. 779.

But the *South Dakota* statute providing that "a mortgage of personal property must be signed by the mortgagor in the presence of two persons, who must sign the same as witnesses thereto, and no further proof or acknowledgment is required to admit it to be filed," has been held not to preclude a mortgagee signing as a witness. *Fisher v. Porter*, 11 S. Dak. 311.

Oath to Affidavit Before Mortgagee Held Valid. — *Inch v. Simon*, 12 Manitoba 1.

2. Compliance with Statutory Requirements. — *Hamilton v. Seeger*, 75 Ill. App. 599; *Tweto v. Horton*, 90 Minn. 451; *Riehl v. Noel*, 89 Mo. App. 178; *Westheimer v. Goodkind*, 24 Mont. 90; *Deseret Nat. Bank v. Kidman*, 25 Utah 379, 95 Am. St. Rep. 856.

Where the Acknowledgment Is Defective. — See *Martin v. Heilman Mach. Works*, 89 Ill. App. 159.

False Acknowledgment. — *Fahndrich v. Hudson*, 76 Ill. App. 641.

By Partnership. — See *Barrow v. Conlee*, 89 Ill. App. 625.

Surplusage. — Matters not required by the statute, but not contrary thereto, may be rejected as surplusage. *Martin v. Heilman Mach. Works*, 89 Ill. App. 159.

**973.** 1. Defective Acknowledgment — As to Parties and Third Persons with Notice. — *McLeod v. Barnum*, 131 Cal. 605; *Morse v. Morrison*, 16 Colo. App. 449; *Weill v. Zacher*, 92 Ill. App. 296; *Niepschield v. Reuss*, 92 Ill. App. 636; *Brown v. Koenig*, 99 Mo. App. 653; *J. I. Case Threshing Mach. Co. v. Olson*, 10 N. Dak. 170; *Fisher v. Porter*, 11 S. Dak. 311. See also *Tulley v. Citizen's State Bank*, 18 Ind. App. 240; *Matter of Windhorst*, 107 Iowa 58.

3. Possession by Mortgagee. — *Ogden v. Minter*, 91 Ill. App. 11.

4. Affidavit — Statutes. — A mortgage of book accounts is not within the terms of a statute requiring an affidavit of consideration to be annexed to a mortgage of goods and chattels. *Nash v. Hall*, (N. J. 1898) 39 Atl. Rep. 374.

Consideration — What It Includes. — See *Boice v. Conover*, 54 N. J. Eq. 531.

5. Absence of Affidavit — Effect. — *Alferitz v. Scott*, 130 Cal. 474; *Benedict v. Peters*, 58 Ohio St. 527; *Manhattan Trust Co. v. Seattle Coal, etc., Co.*, 16 Wash. 499. See also *Allen v. American L. & T. Co.*, (C. C. A.) 79 Fed. Rep. 695; *Burchinell v. Gorsline*, 11 Colo. App. 22; *Marchand v. Bonaghan*, (Idaho 1903) 72 Pac. Rep. 731; *Meckel Bros. Co. v. De Witt*, 23 Ohio Cir. Ct. 174; *Hunt v. Allen*, 73 Vt. 322; *Carstens v. Moyer*, 22 Wash. 61; *Blumauer v. Clock*, 24 Wash. 596, 85 Am. St. Rep. 966.

6. Insufficiency of Affidavit. — *Kemble v. Addison*, (1900) 1 Q. B. 430, 82 L. T. N. S. 91; *Kirchhoffer v. Clement*, 11 Manitoba 460; *Boddy v. Ashdown*, 11 Manitoba 555; *Levasseur v. Beaulieu*, 33 N. Bruns. 569; *Lantz v. Morse*, 28 Nova Scotia 535; *Dunham v. Cramer*, 63 N. J. Eq. 151; *Miller v. Gourley*, 65 N. J. Eq. 237; *Fulton v. Doty*, 7 Ohio Dec. 503; *Sherman v. Estey Organ Co.*, 69 Vt. 355. See also *Griffen v. Henry*, 99 Ill. App. 284; *Reynolds v. Fitzpatrick*, 23 Mont. 52; *Kane v. Lodor*, 56 N. J. Eq. 268; *Wilson v. Lippincott*, (N. J. 1899) 44

**974.** See notes 1, 2.**10. Presumptions as to Ownership and Date.** — See note 3.**The Date of the Mortgage.** — See note 4.**V. WHAT MAY BE MORTGAGED** — 1. In General. — See note 5.

Atl. Rep. 989; *Douglass v. Williams*, (N. J. 1901) 48 Atl. Rep. 222; *Deseret Nat. Bank v. Kidman*, 25 Utah 379, 95 Am. St. Rep. 856; *Enright v. Amsden*, 70 Vt. 183.

**An Honest Mistake.** — Substantial compliance with the statute is sufficient, and the omission, in good faith, of the word "hinder" from the clause "hinder and delay" will not render the affidavit defective. *Petrovitzky v. Brigham*, 14 Utah 472.

**Description of Parties.** — See *Modesto Bank v. Owens*, 121 Cal. 223.

**English Bills of Sale Act.** — The description of the grantor as a married woman does not satisfy the requirements of the English Bills of Sale Act of 1878, when her occupation is omitted. *Kemble v. Addison*, (1900) 1 Q. B. 430, 82 L. T. N. S. 91.

But that act contains no provision making it necessary to state the grantor's name. Hence the description of the grantor, in the affidavit to a bill of sale to secure a debt, by a name other than that by which she is generally known will not, in the absence of any intention to mislead creditors, invalidate the bill of sale. *Stokes v. Spencer*, (1900) 2 Q. B. 483, 83 L. T. N. S. 199.

A misdescription as to the grantor's address in the affidavit avoids the bill of sale, which cannot be looked to to correct the affidavit. Thus, it was held that the bill of sale, though in proper form, was void where it truly described the addresses of the grantors, but the affidavit misdescribed their addresses. *Marks v. Derrick*, 80 L. T. N. S. 60.

The omission of the grantee's address renders a bill of sale void, though the grantee is a limited company, registered under the Companies' Acts. *Altree v. Altree*, (1898) 2 Q. B. 267, 78 L. T. N. S. 794.

A bill of sale is rendered void by the omission of the attestation clause to state anything by way of description of the attesting witness. *Sims v. Trollope*, (1897) 1 Q. B. 24, 75 L. T. N. S. 351.

But the omission of the name of the grantor and of the name and address of the attesting witness from the copy filed for registration does not render the bill of sale void where those particulars are contained in the affidavit filed with such copy. *Coates v. Moore*, (1903) 2 K. B. 140, 89 L. T. N. S. 8.

**Signature.** — The affiant need not sign the oath. *In re Shannahan-Wrightson Hardware Co.* (Del. 1904) 58 Atl. Rep. 1023.

**Affidavit by Agent.** — *Fuller v. Smith*, 71 Ill. App. 576; *Black v. Pidgeon*, 70 N. J. L. 802; *In re Merling*, 5 Ohio Dec. 390. See also *Cope v. Minnesota Type-Foundry Co.*, 20 Mont. 67, affirmed 21 Mont. 18. But see *Watson v. Rowley*, 63 N. J. Eq. 195.

**Insufficiency of the Affidavit as to Mere Matter of Form**, not going to the substance, does not necessarily invalidate the mortgage. Commercial bank *v. Fehrenbach*, 4 N. W. Ter. 335.

**Mortgage Not Avoided by Trifling Verbal Changes Not Varying Meaning.** — *Rogers v. Carroll*, 30 Ont. 328.

**Affidavit Before Payment of Money.** — A chattel mortgage was held not to be avoided by the fact that the affidavit as to good faith, made five days before the actual payment of the money to the mortgagor, stated that the mortgagor was justly and truly indebted to the mortgagee in a specified sum, where the statute required only that the affidavit should be as to the good faith of the transaction, and not that it should state the true consideration. *Martin v. Sampson*, 24 Ont. App. 1, reversing 27 Ont. 545.

**974. 1. Affidavit Not Curable by Extrinsic Evidence.** — See *Fraser v. Macpherson*, 34 N. Bruns. 417.

**2. Not Curable by Allegations in Mortgage.** — *Douglass v. Williams*, (N. J. 1901) 48 Atl. Rep. 222; *Cope v. Minnesota Type-Foundry Co.*, 20 Mont. 67, affirmed 21 Mont. 18; *Marks v. Derrick*, 80 L. T. N. S. 60. See also *Black v. Pidgeon*, 70 N. J. L. 802. Compare *Metropolitan Store, etc., Fixture Co. v. Albrecht*, 70 N. J. L. 149, holding that where the affidavit refers to the mortgage they must be read together.

**3. No Presumption of Title or Existence of Property.** — *Syck v. Bossingham*, 120 Iowa 363; *Booknau v. Clark*, 58 Neb. 611, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 974. See also *Martin v. Armstrong*, (Tex. Civ. App. 1901) 62 S. W. Rep. 83; *Shum v. Claghorn*, 69 Vt. 45. But see *Mathew v. Mathew*, 138 Cal. 334, holding that the fact that one mortgaged property carries with it as against him and his successors the inference that he owned and had a right so to mortgage it.

**But the Mortgagor Is Estopped to deny ownership of chattels upon which he has voluntarily given a mortgage.** *Layson v. Cooper*, 174 Mo. 211, 97 Am. St. Rep. 545.

**Caveat Emptor** applies to the mortgagee in chattel mortgages, and he must recover, if at all, upon the strength of the mortgagor's title. *Sweeney v. Rejto*, (Neb. 1901) 95 N. W. Rep. 669.

**4. Date of Mortgage Presumably That of Execution.** — See *Guaranty Trust Co. v. Galveston City R. Co.*, (C. C. A.) 107 Fed. Rep. 311; *Dawson v. Cross*, 88 Mo. App. 292; *Metropolitan Store, etc., Fixture Co. v. Albrecht*, 70 N. J. L. 149.

**Antedating.** — See *Stoner v. Good*, 81 Ill. App. 405.

Where a mortgage was dated a day previous to its execution, this was held to be a part of the description, and the mortgage would not therefore cover the goods which were brought into the store on the day of execution and delivery. *Snow v. Ulmer*, 91 Me. 324, 64 Am. St. Rep. 237.

**Parol Evidence — Date.** — See *Blair v. Ritchie*, 72 Vt. 311.

**Date Immaterial if Instrument Properly Registered.** — *McDonald v. Gaunt*, 30 Ont. 398.

**5. Property Capable of Sale May Be Mortgaged.**



- 975.** Statutory Limitations. — See note 2.  
 Illustrations. — See notes 3, 5, 6.  
**976.** See notes 1, 2, 7, 8, 9, 11, 13, 14, 15.  
**977.** 2. Growing Crops. — See notes 1, 2.  
 3. Fixtures. — See notes 3, 4, 5.  
 4. Animals. — See note 6.

— Sullivan v. Bailey, 21 App. Cas. (D. C.) 100; Salabes v. Castelberg, 98 Md. 645, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 974; Tuttle v. Blow, 176 Mo. 158, 98 Am. St. Rep. 488; People v. Durante, 19 N. Y. App. Div. 292; McNeeley v. Welz, 20 N. Y. App. Div. 566, affirmed 166 N. Y. 124. See also Woodward v. Laporte, 70 Vt. 399.

**A Liquor License**, though transferable by statute, is not a property right, and therefore may not be the subject of a mortgage. Christian Feigenspan v. Mulligan, 63 N. J. Eq. 179, affirmed 64 N. J. Eq. 792; McNeeley v. Welz, 166 N. Y. 124. See also Niles v. Mathusa, 162 N. Y. 546.

**975.** 2. See Peter Schoenhofen Brewing Co. v. Merriion, 67 Ill. App. 123.

**Mortgage Must Contain Particular Description Required by Statute.**—Central Trust Co. v. Worcester Cycle Mfg. Co., (C. C. A.) 93 Fed. Rep. 712.

**Statute Allowing Mortgage on Furniture Used for Housekeeping.**—Pease v. L. Fish Furniture Co., 176 Ill. 220; Thompson v. Elliott, 86 Ill. App. 440.

**As Between the Parties** and those with notice a mortgage on property not included in the statutory list is good. Tomlinson v. Ayres, 117 Cal. 568; Perkins v. Maier, etc., Brewery, 133 Cal. 496; McLeod v. Barnum, 131 Cal. 605; Springer v. Lipsis, 209 Ill. 261.

**3. Insurance Policy.** — See Armstrong v. Owens, 83 Miss. 10.

**5. Corporate Stock.** — See Shuster v. Jones, 58 S. W. Rep. 595, 22 Ky. L. Rep. 568.

**6. Railroad Rolling Stock.**—State Trust Co. v. Kansas City, etc., R. Co., 120 Fed. Rep. 398; Lincoln v. Lincoln St. R. Co., (Neb. 1903) 93 N. W. Rep. 766.

**976.** 1. See Kennedy v. Hull, 14 S. Dak. 234.

**2. Growing Hay and Crops.**—Hayes v. Bertrand First State Bank, (Neb. 1904) 98 N. W. Rep. 423. See also La Rue v. St. Anthony, etc., Elevator Co., 17 S. Dak. 91.

**7. Book Accounts.**—Robinson v. Empey, 10 British Columbia 466. But see Ainsworth v. Mobile Fruit, etc., Co., 102 Ga. 123.

**Future Accounts.**—Compare Dunn v. Michigan Club, 115 Mich. 409.

**8. Leasehold Interest in Chattels.**—See McLeod v. Barnum, 131 Cal. 605.

**9. Leasehold Interest in Mine.**—Lefever v. Armstrong, 15 Pa. Super. Ct. 565.

**11. Interests from Contractual Relations.**—McNeal v. Rider, 79 Minn. 153, 79 Am. St. Rep. 437. But see Rommerdahl v. Jackson, 102 Wis. 444.

**13. Equitable Estate.**—In *Nebraska* an equitable estate may be mortgaged, and the lien of that mortgage will not be defeated by a subsequent conveyance of the naked legal title, where the rights of innocent purchasers are not in-

volved. Arlington Mill, etc., Co. v. Yates, 57 Neb. 286.

**14. Intoxicating Liquors—Contra.**—See C. D. Smith Drug Co. v. Emporia First Nat. Bank, 60 Kan. 184.

**15. Exempt Property.**—See Kindall v. Lincoln Hardware, etc., Co., 8 Idaho 664; Searle v. Gregg, 67 Kan. 1; Brown v. Koenig, 99 Mo. App. 653; Farmers', etc., Bank v. Hoffman, (Neb. 1903) 96 N. W. Rep. 1044; Cunningham v. Brictson, 101 Wis. 378. But see Skinner v. Winfield First Nat. Bank, 63 Kan. 842. See further the title EXEMPTIONS (FROM EXECUTION), 209. 7 et seq.

**977.** 1. Crops. — Woodland Bank v. Duncan, 117 Cal. 412; Wilkerson v. Thorp, 128 Cal. 221; Johns v. Kamarad, (Neb. 1901) 96 N. W. Rep. 118; Schweinber v. Great Western Elevator Co., 9 N. Dak. 113; Eastern Canada Sav., etc., Co. v. Curry, 28 Nova Scotia 323. See also Bank of British North America v. McIntosh, 11 Manitoba 503.

**Mortgage of "Crop to Be Grown in the Future"** Void. — Campbell v. McKinnon, 14 Manitoba 421.

**2. Description of Crops.**—See Thurlough v. Dresser, 93 Me. 161. And see *supra*, this title, 959. 3, 960. 1.

Where there was no indication in a chattel mortgage which three hundred and forty acres of corn was covered in a tract of four hundred and twenty acres, and the corn was not uniform in quality, the instrument was held to be void for uncertainty of description. Wattles v. Cobb, 60 Neb. 403, 83 Am. St. Rep. 537.

**3. Fixtures.**—Anderson v. Creamery Package Mfg. Co., 8 Idaho 200, 101 Am. St. Rep. 188; Hewitt v. General Electric Co., 164 Ill. 420; Arlington Mill, etc., Co. v. Yates, 57 Neb. 286; Hudson Trust, etc., Inst. v. Carr-Curran Paper Mills Co., 58 N. J. Eq. 59; Hart v. Heard, 4 Ohio Dec. (Reprint) 140, 1 Cleve. L. Rep. 67; Alberson v. Elk Creek Gold Min. Co., 39 Oregon 552; Hughes v. Edisto Cypress Shingle Co., 51 S. Car. 1. See also Nelson v. Howison, 122 Ala. 573; Hillebrand v. Nelson, (Neb. 1901) 95 N. W. Rep. 1068; Hurxthal v. Hurxthal, 45 W. Va. 584.

**4. Rights of Mortgagee No Greater than Those of Mortgagor.**—Butler v. Colwell, 89 Ill. App. 133. See also *In re* Rogers, 132 Fed. Rep. 560; Fisk v. Peoples' Nat. Bank, 14 Colo. App. 21; Beeler v. C. C. Mercantile Co., 8 Idaho 644; Ames v. Trenton Brewing Co., 56 N. J. Eq. 309.

**Mortgagee Takes Subject to Prior Mortgage.**—Canada Permanent Loan, etc., Co. v. Trader's Bank, 29 Ont. 479.

**5. Estoppel.**—Gordon v. Miller, 28 Ind. App. 612. See also Miles v. McNaughton, 111 Mich. 350. Compare Stimson v. Smith, 1 N. W. Ter. 183.

**6. Increase of Animals.**—Northwestern Nat.

**978.** See note 2.

**5. Articles in Process of Manufacture.** — See notes 4, 6.

**979.** **6. After-acquired Property** — *a.* AT LAW. — See note 1.

**980.** **Mortgage Followed by New Act.** — See note 2.

**981.** **United States — Possession Must Be Given to or Taken by Mortgagee.** — See note 1.

**982.** See notes 1, 2.

*b.* IN EQUITY. — See note 3.

*Bank v. Freeman*, 171 U. S. 620; *Cumberland Nat. Bank v. Baker*, 57 N. J. Eq. 569; *Hobbs v. Big Springs First Nat. Bank*, 15 Tex. Civ. App. 398. See also *Gannaway v. Tate*, 98 Va. 789. Compare *Spencer v. Graveley*, 34 Can. L. J. 135.

The Word "Increase" in a mortgage on sheep includes the offspring but not the wool annually growing on the sheep. *Alferitz v. Borgwardt*, 126 Cal. 201.

**978. 2. How Long Lien Operative.** — *Desany v. Thorp*, 70 Vt. 31. See also *Cox v. Beck*, 83 Fed. Rep. 269; *Packwood v. William Atkinson, etc., Co.*, 79 Miss. 646; *Avery v. Popper*, (Tex. 1898) 48 S. W. Rep. 572, modified 92 Tex. 344; *Greer v. Crenshaw*, (Tex. Civ. App. 1903) 76 S. W. Rep. 589.

**Mortgage Void as Against Purchasers for Value, but Good as Against Execution Creditors.** — *Spencer v. Graveley*, 34 Can. L. J. 135.

**4. Materials Mortgaged by Particular Description.** — A mortgage on a brickyard was intended to cover clay and materials taken from the claybank, and bricks made therefrom. No portion of clay was severed at the time, but subsequently large quantities of brick were manufactured and sold. Under these circumstances it was held that the mortgage was not a lien on the brick manufactured, as there was no potential existence of the bricks at the execution of the mortgage, and no means of identification. *T. B. Townsend Brick, etc., Co. v. Allen*, 62 Kan. 311, 84 Am. St. Rep. 388.

**6. Record of Mortgage on Growing Crop — Notice.** — See *Summerville v. Stockton Milling Co.*, 142 Cal. 529.

**979. 1. After-acquired Property — Common-law Doctrine.** — *Dodge v. Smith*, 5 Kan. App. 742; *Campbell v. Quinton*, 4 Kan. App. 317; *Standard Brewery v. Nudelman*, 70 Ill. App. 356, affirmed 172 Ill. 337; *New England Nat. Bank v. Northwestern Nat. Bank*, 171 Mo. 323, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 979; *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 492, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 979.

**980. 2. Mortgage of Future Property Validated by New Act.** — *Campbell v. McKinnon*, 14 Manitoba 421.

**981. 1. Mortgage of After-acquired Property Followed by Possession** — *United States*. — *In re Sentenne, etc., Co.*, 120 Fed. Rep. 436; *American Surety Co. v. Worcester Cycle Mfg. Co.*, 100 Fed. Rep. 40; *In re Rogers*, 132 Fed. Rep. 560. See also *In re Ball*, 123 Fed. Rep. 164.

*Connecticut*. — *Allen v. Windham Cotton Mfg. Co.*, 87 Fed. Rep. 786 (stating the Connecticut law).

*Indiana*. — *Burford v. Lafayette First Nat. Bank*, 30 Ind. App. 384.

*Iowa*. — *McMaster v. Emerson*, 109 Iowa 284.

*Kansas*. — *Campbell v. Quinton*, 4 Kan. App. 317; *Dodge v. Smith*, 5 Kan. App. 742; *Leech v. Arkansas City Mfg. Co.*, 8 Kan. App. 621; *Falk v. Decon*, 3 Kan. App. 765.

*Maine*. — See *Dexter v. Curtis*, 91 Me. 505, 64 Am. St. Rep. 266.

*Missouri*. — *New England Nat. Bank v. Northwestern Nat. Bank*, 171 Mo. 307.

*Nebraska*. — *Battle Creek Valley Bank v. Madison First Nat. Bank*, 62 Neb. 825.

*North Dakota*. — *Bidgood v. Monarch Elevator Co.*, 9 N. Dak. 627, 81 Am. St. Rep. 604.

*South Dakota*. — *Savings Bank v. Canfield*, 12 S. Dak. 330.

*Vermont*. — *McLoud v. Wakefield*, 70 Vt. 558.

In *Michigan* a mortgage on a dealer's stock may be made to cover after-acquired goods, if they are brought within its descriptive words; but a mortgage of "all other personal property which I may own or acquire" during certain years will not create, as against third persons, a valid lien on after-acquired property not connected with the business in which the mortgagor was engaged, and having no relation to the property in possession of the mortgagor at the time of giving the mortgage. *Ferguson v. Wilson*, 122 Mich. 97, 80 Am. St. Rep. 543.

**Valid Between Parties.** — *Cooper v. Rouse*, 130 N. Car. 202.

**A Mere Possibility or Expectancy Not Coupled with Any Interest.** — See *La Rue v. St. Anthony, etc., Elevator Co.*, 17 S. Dak. 91. But see *Ward v. Ward*, 131 Fed. Rep. 946.

**982. 1. Description of Property Covered.** — See *Hall v. Glass*, 123 Cal. 500, 69 Am. St. Rep. 77.

**2. Intention Must Be Clearly Expressed.** — *Snydacker v. Blatchley*, 177 Ill. 506.

**3. Rule in Equity** — *Alabama*. — *Keyser v. Maas*, 111 Ala. 390; *Electric Lighting Co. v. Rust*, 117 Ala. 680; *Truss v. Harvey*, 120 Ala. 636; *Shows v. Boantley*, 127 Ala. 352; *Woods v. Rose*, 135 Ala. 297; *Gaston v. Marengo Imp. Co.*, 139 Ala. 465. See also *Christian, etc., Grocery Co. v. Michael*, 121 Ala. 84, 77 Am. St. Rep. 30.

*Arkansas*. — *Morton v. Williamson*, 72 Ark. 390.

*California*. — *Lemon v. Wolff*, 121 Cal. 272. See also *Wilson v. Donaldson*, 121 Cal. 8, 66 Am. St. Rep. 17; *Wilkerson v. Thorp*, 128 Cal. 221.

*Maine*. — See *Kelley v. Goodwin*, 95 Me. 538.

*Missouri*. — *Littlefield v. Lemley*, 75 Mo. App. 511.

*Nebraska*. — *Sporer v. McDermott*, (Neb. 1903) 96 S. W. Rep. 232.

*New Jersey*. — *Cumberland Nat. Bank v. Baker*, 57 N. J. Eq. 231; *Stoll v. Sibson*, 65 N. J. Eq. 552.

*New York*. — See *Tilden v. Tilden*, (Supm,

**984.** See note 1.

**986. VI. RIGHTS OF MORTGAGOR AND MORTGAGEE — 1. Possession of the Mortgaged Property — a. IN GENERAL — At Common Law, Right of Possession in Mortgagees.** — See note 1.

**987. Retention of Possession as Badge of Fraud.** — See note 1.

Character of Possession. — See note 2.

**988. Doctrine that Mortgage Does Not Transfer Right of Possession.** — See note 1.

Ct. Spec. T.) 26 Misc. (N. Y.) 672; Anchor Brewing Co. v. Burns, 32 N. Y. App. Div. 272. *Oklahoma.* — Eckles v. Ray, 13 Okla. 541. *Tennessee.* — Judge v. Jones, 99 Tenn. 20. *Texas.* — League v. Sanger, 25 Tex. Civ. App.

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*West Virginia.* — Horner-Gaylord Co. v. Fawcett, 50 W. Va. 492, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 892 [982].

*Canada.* — Fraser v. Macpherson, 34 N. Bruns. 417; Bank of British North America v. McIntosh, 11 Manitoba 503.

See also Thompson v. Fairbanks, 75 Vt. 361, 104 Am. St. Rep. 899.

**Possession by Virtue of Equitable Lien Gives Legal Title.** — Where title to land did not pass because of a defect in the deed, but the vendee had the right of reforming the deed in equity, it was held that he had a mortgageable interest in the crops growing thereon. *Fields v. Karter*, 121 Ala. 329.

**Mortgage of After-acquired Property — Relative Rights of Vendor and Mortgagee.** — Guaranty Trust Co. v. Galveston City R. Co., (C. C. A.) 107 Fed. Rep. 311; *Clark v. Woodruff*, 100 Ill. App. 18; *Westinghouse Electric Mfg. Co. v. Citizens' St. R. Co.*, 68 S. W. Rep. 463, 24 Ky. L. Rep. 334.

A mortgage of after-acquired property will attach to such property only in the condition in which the mortgagor acquires it, and therefore a purchase-money mortgage will not be dispelled thereby. *Hammel v. Hancock First Nat. Bank*, 129 Mich. 176, 95 Am. St. Rep. 431, 8 Detroit Leg. N. 894.

**984. 1. England.** — A covenant by the grantor to replace worn-out articles with other articles of equal value does not avoid the bill of sale, as the provision is obviously for the maintenance of the security. *Coates v. Moore*, (1903) 2 K. B. 140, 89 L. T. N. S. 8, following *Seed v. Bradley*, (1894) 1 Q. B. 319.

**Dakota.** — The rule stated in the original note is laid down in Rev. Codes N. Dak. (1895), § 4680. *Donovan v. St. Anthony, etc., Elevator Co.*, 7 N. Dak. 513, 66 Am. St. Rep. 674.

**986. 1. Common Law — Mortgage Vests Right of Possession in Mortgagee — Alabama.** — *Elston v. Roop*, 133 Ala. 331.

*Indian Territory.* — *Webb v. McCain*, 2 Indian Ter. 305.

*New Hampshire.* — *Provenchee v. Piper*, 68 N. H. 31.

*New Jersey.* — See *Finkel v. Lepkin*, 62 N. J. L. 580.

*Vermont.* — *McLoud v. Wakefield*, 70 Vt. 558.

*Wisconsin.* — See *Klinkert v. Fulton Storage, etc., Co.*, 113 Wis. 493; *Illinois Trust, etc., Bank v. Alexander Stewart Lumber Co.*, 119 Wis. 54.

**987. 1. Retention by Mortgagor Not Per**

**Se Fraudulent.** — *Gilmore v. Kilpatrick-Koch Dry Goods Co.*, 101 Iowa 164; *Heidiman-Benoist Saddlery Co. v. Schott*, 59 Neb. 20; *Fraser v. Murray*, 34 Nova Scotia 186; *Creed v. Haensel*, 24 Quebec Super. Ct. 178. See also *Arkansas City Bank v. Swift*, 57 Kan. 460.

**2. What Amounts to Transfer of Possession — United States.** — *Strahorn-Hutton-Evans Commission Co. v. Quigg*, (C. C. A.) 97 Fed. Rep. 735.

*California.* — See *Lemon v. Wolff*, 121 Cal. 272.

*Colorado.* — *Burchinell v. Schoyer*, 10 Colo. App. 117; *Ankele v. Elder*, 19 Colo. App. 330.

*Illinois.* — *Martin v. Sexton*, 72 Ill. App. 395; *Martin v. Sexton*, 112 Ill. App. 199; *Crockett First Nat. Bank v. George R. Barse Live Stock Commission Co.*, 198 Ill. 232.

*Indian Territory.* — *Blanchard v. Ingram*, 2 Indian Ter. 232.

*Kansas.* — *Lehman-Higginson Grocer Co. v. McClain*, 63 Kan. 881, 64 Pac. Rep. 1029.

*Massachusetts.* — *Moors v. Reading*, 167 Mass. 322, 57 Am. St. Rep. 460; *Drury v. Moors*, 171 Mass. 252.

*Missouri.* — *Rice v. Sally*, 176 Mo. 107.

*Nebraska.* — *Taylor v. Harle-Haas Drug Co.*, (Neb. 1903) 96 N. W. Rep. 182.

*New York.* — *Farmers' L. & T. Co. v. Baker*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 387; *Beskin v. Feigenspan*, 32 N. Y. App. Div. 29; *Watson v. Dealy*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 544; *Castleman v. Mayer*, 55 N. Y. App. Div. 515, affirmed 168 N. Y. 354; *Wild v. Porter*, 59 N. Y. App. Div. 350, affirmed 173 N. Y. 614; *Fisher v. Stout*, 74 N. Y. App. Div. 97; *Sloan v. National Surety Co.*, 74 N. Y. App. Div. 417.

*Oklahoma.* — *Nichols, etc., Co. v. Bishop*, 12 Okla. 250.

*Texas.* — *Adams v. Powell*, (Tex. Civ. App. 1898) 44 S. W. Rep. 547. See also *Randolph v. Brown*, 21 Tex. Civ. App. 617.

*Wisconsin.* — *Schneider v. Kraby*, 97 Wis. 519.

*Canada.* — *Boddy v. Ashdown*, 11 Manitoba 555. See also *McAskill v. Power*, 30 Nova Scotia 189.

The possession of a receiver is not the possession of the mortgagee, and the court's intervention does not operate to change the rights of any of the parties. *Central Trust Co. v. Worcester Cycle Mfg. Co.*, (C. C. A.) 93 Fed. Rep. 712.

Where goods were in the possession of a bailee at the time when the mortgage was executed it was held that actual delivery of possession was unnecessary to pass title to the mortgagee as against third persons. *Corning v. Records*, 69 N. H. 390, 76 Am. St. Rep. 178.

**988. 1. Mortgagee Not Entitled to Possession.** — *Edmission v. Drumm-Flato Commission Co.*,

**989. b. MORTGAGOR STIPULATING FOR POSSESSION BEFORE BREACH.** — See note 1.

**Mortgagee to Take Possession upon Contingency.** — See note 2.

**990. c. THE INSECURITY CLAUSE** — *Doctrines that Mortgagee May Take Possession at Will.* — See note 2.

**991. Doctrines that Mortgagee's Discretion Is Limited.** — See note 2.

**992.** See notes 1, 2.

**d. MORTGAGOR'S POSSESSION OF STOCK OF GOODS WITH POWER OF SALE.** — See note 3.

13 Okla. 440; *McMillan v. Grayston*, 83 Mo. App. 425; *Jencks v. Murphy*, 15 S. Dak. 425; *Groos v. Iowa Park First Nat. Bank*, (Tex. Civ. App. 1903) 72 S. W. Rep. 402. See also *Summerville v. Stockton Milling Co.*, 142 Cal. 529.

**989. 1. Mortgagor in Possession.** — *Central Trust Co. v. Worcester Cycle Mfg. Co.*, (C. C. A.) 93 Fed. Rep. 712; *State Nat. Bank v. Cudahy Packing Co.*, 126 Fed. Rep. 543; *Gaar v. Lyons*, 99 Ky. 672; *Rosenbaum v. Dawes*, 77 Ill. App. 295, *affirmed* 179 Ill. 112; *Grady v. Newman*, 1 Indian Ter. 620; *Blyth, etc., Co. v. Houtz*, 24 Utah 62; *McPherson v. Moody*, 35 N. Bruns. 51. See also *Creed v. Haensel*, 24 Quebec Super. Ct. 178.

**2. Provision for Possession on Contingency** — *Alabama.* — *McDuffee v. Collins*, 117 Ala. 487. *California.* — *Flinn v. Ferry*, 127 Cal. 648; *Harper v. Gordon*, 128 Cal. 489; *Mathew v. Mathew*, 138 Cal. 334. See also *Summerville v. Stockton Milling Co.*, 142 Cal. 529; *Summerville v. Kelliher*, 144 Cal. 155.

*Illinois.* — *Mathews v. Granger*, 66 Ill. App. 121.

*Indiana.* — *Conwell v. Jeger*, 21 Ind. App. 110.

*Maryland.* — *Salabes v. Castelberg*, 98 Md. 645.

*Missouri.* — *State v. White*, 70 Mo. App. 1; *Straub v. Simpson*, 74 Mo. App. 230; *Sink v. Loflin*, 76 Mo. App. 463; *Connersville Buggy Co. v. Lowry*, 104 Mo. App. 186. See also *Dixon v. Atkinson*, 86 Mo. App. 24; *Krebs v. Zumwalt*, 91 Mo. App. 404.

*South Carolina.* — *Sparks v. Green*, 69 S. Car. 198.

*South Dakota.* — *Johnson v. Hillenbrand*, (S. Dak. 1904) 101 N. W. Rep. 33.

*Texas.* — *Wedig v. San Antonio Brewing Assoc.*, 25 Tex. Civ. App. 158; *Singer Sewing Mach. Co. v. Rios*, 96 Tex. 174.

*Wyoming.* — *Schlessinger v. Cook*, 9 Wyo. 256.

*Canada.* — *McPherson v. Moody*, 35 N. Bruns. 51.

**Authority to Take and Sell "at Public or Private Sale."** — *Compare Rein v. Callaway*, 7 Idaho 634.

**A Condition that the Mortgagee Shall Not Take Possession Unless for Protection Against Other Creditors** is not fraudulent *per se*, although the condition is expressed on a separate instrument not recorded. *Gilmore v. Kilpatrick-Koch Dry Goods Co.*, 101 Iowa 164.

**990. 2. Maturity of Debt Not Essential.** — See *Hocking Valley Coal Co. v. Climie*, (Iowa 1902) 92 N. W. Rep. 77.

**991. 2. Condition Not Arbitrary.** — *Sills v. Hawes*, 14 Colo. App. 157; *Feller v. McKillip*,

109 Mo. App. 61; *Allen v. Cerny*, (Neb. 1903) 94 N. W. Rep. 151; *Meyer v. Michaels*, (Neb. 1903) 95 N. W. Rep. 63.

**Must Show Cause.** — See *Stage v. Van Leuven*, 77 N. Y. App. Div. 646; *Russell v. St. Mart*, 83 App. Div. 543, *reversed* 180 N. Y. 355.

**Facts Subsequent to Mortgage.** — *Brook v. Bayless*, 6 Okla. 568.

*Minnesota.* — *Galde v. Forsyth*, 72 Minn. 248; *Nash v. Larson*, 80 Minn. 458.

*Illinois.* — *Slingo v. Steele-Wedeles Co.*, 82 Ill. App. 139; *Fuller, etc., Co. v. Feinberg*, 86 Ill. App. 585; *Tanton v. Boomgaarden*, 111 Ill. App. 37; *Hogan v. Akin*, 181 Ill. 448.

**992. 1. Showing Act of Mortgagor Tending to Impair Security.** — See *Campbell v. Doggett*, (Miss. 1898) 23 So. Rep. 371.

**Facts Making Possession Valid.** — *McCarthy v. Hetzner*, 70 Ill. App. 480.

**2. Feller v. McKillip**, 109 Mo. App. 61.

**3. Mortgage with Power of Sale Reserved Void Per Se** — *United States.* — *In re Hull*, 115 Fed. Rep. 858, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 992. See also *Gorman v. Park*, (C. C. A.) 100 Fed. Rep. 553.

*Alabama.* — *Christian, etc., Grocery Co. v. Michael*, 121 Ala. 84, 77 Am. St. Rep. 30; *Roden v. Norton*, 128 Ala. 129; *Cross v. Berry*, 132 Ala. 92.

*Arkansas.* — See *Morton v. Williamson*, 72 Ark. 390.

*Colorado.* — See *Lee v. Stanard*, 15 Colo. App. 101.

*Idaho.* — See *Meyer v. Munro*, (Idaho 1903) 71 Pac. Rep. 969.

*Illinois.* — *Harris v. Wemple*, 63 Ill. App. 577.

*Maryland.* — See *Edelhoff v. Horner-Miller Straw Goods Mfg. Co.*, 86 Md. 595.

*Minnesota.* — See *Donohue v. Campbell*, 81 Minn. 107.

*Mississippi.* — *Chicago First Nat. Bank v. Caperton*, 74 Miss. 857, 60 Am. St. Rep. 540; *Andrews v. Partee*, 79 Miss. 80.

*Missouri.* — *Liberal Bank v. Anderson*, 100 Mo. App. 567; *Gee v. Van Natta-Lynds Drug Co.*, 105 Mo. App. 27; *Lowrence v. Barker*, 82 Mo. App. 125; *Vermont Marble Co. v. Achuff*, 83 Mo. App. 42; *Bagley v. Harmon*, 91 Mo. App. 22. See also *Dunham v. Stevens*, 160 Mo. 95; *Scudder v. Bailey*, 66 Mo. App. 40; *State v. Fidelity, etc., Co.*, 94 Mo. App. 184.

*Montana.* — See *Stevens v. Curran*, 28 Mont. 366; *Noyes v. Ross*, 23 Mont. 425, 75 Am. St. Rep. 543.

*Nebraska.* — *Buckstaff Bros. Mfg. Co. v. Snyder*, 54 Neb. 538; *Brinker v. Ashenfelter*, (Neb. 1901) 95 N. W. Rep. 1124.

*Nevada.* — *Lutz v. Kinney*, 24 Nev. 51, *denying rehearing* 24 Nev. 46.

**993.** See note 1.

**994.** Agreement Outside the Mortgage. — See notes 2, 3.  
Agreement Inferred from Acts of Parties. — See note 4.

**995.** Mortgage Appropriating Proceeds. — See note 1.

Mortgagor as Agent. — See notes 2, 3.

**2. Right to Sell and Encumber — a. MORTGAGOR IN POSSESSION BEFORE BREACH.** — See notes 4, 5.

**b. SALE WITH MORTGAGEE'S AUTHORITY.** — See note 6.

*New York.* — *Hardt v. Deutsch*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 66, *affirmed* 30 N. Y. App. Div. 589; *Boshart v. Kirley*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 241, *affirmed* 67 N. Y. App. Div. 624. See also *Skilton v. Codington*, 86 N. Y. App. Div. 166.

*Ohio.* — *Enck v. Gerding*, 67 Ohio St. 245. See also *Ford v. Miller*, 5 Ohio Dec. 603, 5 Ohio N. P. 512; *Hart v. Heard*, 4 Ohio Dec. (Reprint) 140, 1 Cleve. L. Rep. 67; *Griefenkamp v. Beal*, 11 Ohio Cir. Dec. 377.

*Tennessee.* — *Boze v. Nichols*, (Tenn. Ch. 1898) 51 S. W. Rep. 122; *Moore v. Wood*, (Tenn. Ch. 1901) 61 S. W. Rep. 1063; *Morris v. Clark*, (Tenn. Ch. 1901) 62 S. W. Rep. 673.

*Texas.* — *Avery v. Waples*, 19 Tex. Civ. App. 672. Compare *Boltz v. Engelke*, (Tex. Civ. App. 1897) 43 S. W. Rep. 47.

*West Virginia.* — See *Conaway v. Stealey*, 44 W. Va. 163.

*Wisconsin.* — *Durr v. Wildish*, 108 Wis. 401. See also *Kaukauna Bank v. Joannes*, 98 Wis. 321; *Charles Baumbach Co. v. Hobkirk*, 104 Wis. 488.

*Utah.* — *McKibbin v. Brigham*, 18 Utah 83, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 992; *Nelden-Judson Drug Co. v. Commercial Nat. Bank*, 27 Utah 66, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 992.

**993. 1. Fraud a Question for Jury — United States.** — *Davis v. Turner*, (C. C. A.) 120 Fed. Rep. 605. See also *Dugan v. Beckett*, (C. C. A.) 129 Fed. Rep. 56; *In re Ball*, 123 Fed. Rep. 164.

*Indiana.* — *Burford v. Lafayette First Nat. Bank*, 30 Ind. App. 384. See also *Stout v. Price*, 24 Ind. App. 360.

*Indian Territory.* — *Hargadine-McKittrick Dry Goods Co. v. Bradley*, (Indian Ter. 1902) 69 S. W. Rep. 862.

*Iowa.* — *Burroughs v. Butler-Ryan Co.*, 121 Iowa 215.

*Kansas.* — *Williams v. Mitchell*, 9 Kan. App. 627, *citing* *Frankhouser v. Ellett*, 22 Kan. 128, 31 Am. Rep. 171. See also *Williams v. Miller*, 6 Kan. App. 626. But see *Humphrey v. Mayfield*, 63 Kan. 208.

*North Dakota.* — *Red River Valley Nat. Bank v. Barnes*, 8 N. Dak. 432. Compare *Bergman v. Jones*, 10 N. Dak. 520, 88 Am. St. Rep. 739.

*Oklahoma.* — See *Will T. Little Co. v. Burnham*, 5 Okla. 283.

**994. 2. Contemporaneous Agreement Outside Instrument.** — *Christian, etc., Grocery Co. v. Michael*, 121 Ala. 84, 77 Am. St. Rep. 30; *Aleshire v. Lee County Sav. Bank*, 105 Ill. App. 32; *Scott Hardware Co. v. Riddle*, 84 Mo. App. 275; *Dunham v. Stevens*, 160 Mo. 95; *McKibbin v. Brigham*, 18 Utah 83, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 994.

**3. Subsequent Agreement.** — *Roden v. Norton*,

128 Ala. 129; *Red River Valley Nat. Bank v. Barnes*, 8 N. Dak. 432. See also *Aleshire v. Lee County Sav. Bank*, 105 Ill. App. 32; *Pecos Valley Bank v. Evans-Snider-Buel Co.*, (C. C. A.) 107 Fed. Rep. 654.

**4. Agreement Inferred from Acts.** — *Gorman v. Park*, (C. C. A.) 100 Fed. Rep. 553; *Stevens v. Curran*, 28 Mont. 366. See also *Christian, etc., Grocery Co. v. Michael*, 121 Ala. 84, 77 Am. St. Rep. 30.

**995. 1. Agreement to Apply Proceeds on Debt — Mortgage Appropriating to His Own Use.** — *Atchison Saddlery Co. v. Gray*, 63 Kan. 79. But see *Lutz v. Kinney*, 24 Nev. 51, *denying rehearing* 24 Nev. 46.

The sales must be credited on the mortgage though they have not been applied. *Wyman v. Herard*, 9 Okla. 35.

In *New England Mortg. Security Co. v. Great Western Elevator Co.*, 6 N. Dak. 407, it was held that a mortgagee waived his lien by authorizing the mortgagor to sell the property and pay the debt with the proceeds, although the money was not so applied.

**2. Mortgagor as Agent of Mortgagee.** — *Beyer v. Fields*, 134 Ala. 236; *Morton v. Williamson*, 72 Ark. 390; *National Citizens' Bank v. Ertz*, 83 Minn. 12, 85 Am. St. Rep. 438.

**3.** See *Adler-Goldman Commission Co. v. Phillips*, 63 Ark. 40; *Noyes v. Ross*, 23 Mont. 425, 75 Am. St. Rep. 543.

**4. Mortgagor in Possession May Sell or Encumber.** — *Illinois Trust, etc., Bank v. Alexander Stewart Lumber Co.*, 119 Wis. 54. See also *State v. Sullivan*, 80 Miss. 596.

**5. Purchaser Takes Subject to Mortgage Lien.** — *Buckingham v. Duke*, (C. C. A.) 112 Fed. Rep. 258; *Rosenbaum v. Dawes*, 77 Ill. App. 295, *affirmed* 179 Ill. 112; *Magerstadt v. Harder*, 95 Ill. App. 303, *reversed* 199 Ill. 271; *Sondheimer v. Graeser*, 172 Ill. 293; *Volckers v. Sturke*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 457; *Fisher v. McPhee*, 28 Nova Scotia 523.

**6. Sale Discharged from Lien with Mortgagee's Consent.** — *Pecos Valley Bank v. Evans-Snider-Buel Co.*, (C. C. A.) 107 Fed. Rep. 654; *McArthur v. Mathis*, 133 N. Car. 142; *Knollin v. Jones*, 7 Idaho 466; *Livingston v. Stevens*, 122 Iowa 62; *Partridge v. Minnesota, etc., Elevator Co.*, 75 Minn. 496; *Houston, etc., R. Co. v. Garrison*, (Tex. Civ. App. 1896) 37 S. W. Rep. 971; *Hunt v. Allen*, 73 Vt. 322; *Colston v. Bean*, 77 Vt. 40; *Spenger v. Graveley*, 34 Can. L. J. 135. See also *Rogers v. Nidiffer*, (Indian Ter. 1904) 82 S. W. Rep. 673; *Zorn v. Livesley*, 44 Oregon 501; *Godair v. Tillar*, 19 Tex. Civ. App. 541.

Where a mortgagee allowed the mortgagor to appropriate three bales of cotton from a larger number mortgaged, it was held that he

**996.** This Authority May Be Implied. — See notes 1, 2, 3.

No Lien for Purchase Money. — See note 4.

c. WRONGFUL SALE OR MORTGAGE. — See note 6.

Thus Where a Second Mortgage Is Given Without Notice of the Prior Mortgage. — See note 8.

**997.** d. MORTGAGOR'S POWER TO IMPOSE LIEN. — See notes 1, 2, 3, 4.

**3. Rights of Action** — a. MORTGAGOR'S RIGHTS OF ACTION — (1) *Against Mortgagee* — If the Mortgagee Has Acquired a Lawful Possession. — See note 5.

**998.** If, However, the Mortgagor Is Lawfully in Possession, and the Mortgagee Wrongfully Interferes. — See notes 1, 2.

If the Mortgagee in Possession Disposes of the Property. — See note 3.

could not foreclose as to the part released against an attaching creditor. *Andrews v. Dun*, 15 Tex. Civ. App. 124.

The fact that a prior mortgagee consents to a sale of the property does not render a second mortgage a prior lien, and, as against such subsequent mortgagee, the prior mortgagee is entitled to the proceeds of the sale. *Madden v. Walker*, 7 Kan. App. 697.

**Application of Proceeds.** — See *Monson v. Renaker*, 60 S. W. Rep. 924, 22 Ky. L. Rep. 1405.

**996.** 1. Authority May Be Verbal. — *Livingston v. Stevens*, 122 Iowa 62; *Colston v. Bean*, 77 Vt. 40. And to the same effect as *Randol v. Buchanan*, 61 Mo. App. 445, stated in the original note, see *Anderson v. South Chicago Brewing Co.*, 173 Ill. 213.

**2. Implied from Particular Circumstances.** — *Partridge v. Minnesota*, etc., Elevator Co., 75 Minn. 497, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996; *New England Mortg. Security Co. v. Great Western Elevator Co.*, 6 N. Dak. 407. See also *Forker v. Crockett*, (Iowa 1902) 92 N. W. Rep. 76; *Salabes v. Castelberg*, 98 Md. 645.

**3. Implied from General Course of Dealing.** — *Livingston v. Stevens*, 122 Iowa 62; *Livingston v. Heck*, 122 Iowa 74.

**4. No Lien for Purchase Money.** — *Fairweather v. Nelson*, 76 Minn. 510; *Drexel v. Murphy*, 59 Neb. 210; *Peterson v. St. Anthony*, etc., Elevator Co., 9 N. Dak. 55, 81 Am. St. Rep. 528. See also *Dentzel v. City*, etc., R. Co., 90 Md. 434.

But where the mortgage provided that the property might be sold and the lien should follow the property, it was held that the mortgagees could recover the value from the vendee of the mortgagor. *Flood v. Butzbach*, 114 Mich. 613, 68 Am. St. Rep. 501.

**6. Wrongful Sale Without Mortgagee's Consent.** — *Dean v. Cushman*, 95 Me. 454, 85 Am. St. Rep. 425; *State v. Munsen*, 72 Mo. App. 543; *Burke v. Pender First Nat. Bank*, 61 Neb. 20, 87 Am. St. Rep. 447; *Allen v. Cerny*, (Neb. 1903) 94 N. W. Rep. 151; *Ellestad v. Northwestern Elevator Co.*, 6 N. Dak. 88.

Where the mortgagor wrongfully sold the mortgaged property and turned the money over to a bank as its agent, it is no defense in a suit for the proceeds against the bank that the mortgagee has failed to follow up the mortgaged property. *Atter v. Stockham Bank*, 53 Neb. 223.

**Auctioneer's Liability for Wrongful Sale.** — See *Johnston v. Henderson*, 28 Ont. 25.

**8. Purchase from Mortgagor — Mortgagee's Consent Presumed.** — See *May v. State*, 115 Ala. 14; *Griffin v. State*, (Tex. Crim. 1898) 46 S. W. Rep. 644.

**Mortgagee's Conditional Consent to Sale.** — *Fields v. Jobson Wagon Co.*, 109 Mo. App. 84. See also *Robert v. Lamarche*, 18 Quebec Super. Ct. 101.

**997.** 1. Mortgagor Cannot Give Lien Taking Priority of Mortgage. — *Whitlock Mach. Co. v. Holway*, 92 Me. 414.

**2. Consent of Mortgagee.** — *Drummond Carriage Co. v. Mills*, 54 Neb. 417, 69 Am. St. Rep. 719.

**3. Landlord's Lien.** — British, etc., Mortg. Co. v. Cody, 135 Ala. 622.

**4. Knowledge of Use as Creating Implied Consent.** — *Cassiday v. Ball*, 71 Ill. App. 181; *Beh v. Moore*, 124 Iowa 564; *Harding v. Kelso*, 91 Mo. App. 607; *Mandan First Nat. Bank v. Scott*, 7 N. Dak. 312. See also *Citizen's State Bank v. Smith*, 125 Iowa 505.

**5. Mortgagor Cannot at Law Recover Possession from Mortgagee.** — *Darrow v. Wendelstadt*, 43 N. Y. App. Div. 426; *Cody v. Springfield First Nat. Bank*, 63 N. Y. App. Div. 199. See also *Wedig v. San Antonio Brewing Assoc.*, 25 Tex. Civ. App. 158.

**Trover.** — *Card v. Fowler*, 120 Mich. 646.

**998.** 1. Mortgagee Wrongfully Interfering with Mortgagor's Possession. — *Fields v. Copeland*, 121 Ala. 644; *Ferris v. Johnson*, (Mich. 1904) 98 N. W. Rep. 1014, 10 Detroit Leg. N. 982; *Jacobson v. Aberdeen Packing Co.*, 26 Wash. 175. See also *State Nat. Bank v. Cudahy Packing Co.*, 126 Fed. Rep. 543; *Hennessey v. Barnett*, 12 Colo. App. 254; *Davis v. Bowers Granite Co.*, 75 Vt. 286.

The mortgagee must take possession without breach of the peace, otherwise he is liable for conversion, although the mortgage expressly permits him to use "all necessary force." *McClellan v. Gaston*, 18 Wash. 472.

**Damages.** — The mortgagee cannot recover speculative profits as damages for the detention of a machine, but must have specific evidence for the consideration of the jury. *M. Rumley Co. v. Jelsman*, (Neb. 1902) 96 N. W. Rep. 147.

**2. Receivers.** — See *Stillwell-Bierce*, etc., Co. v. Williamston Oil, etc., Co., 80 Fed. Rep. 68.

**3. Marchand v. Ronaghan, (Idaho 1903) 72 Pac. Rep. 731; *Colby v. W. W. Kimball Co.*, 99 Iowa 321; *Johnston v. Robuck*, 104 Iowa 523; *Frick v. Kabaker*, 116 Iowa 494.**

**998.** Measure of Damages. — See note 4.

**999.** (2) *Against Third Parties.* — See notes 1, 2.

*b.* MORTGAGEE'S RIGHTS OF ACTION — (1) *Against Mortgagor.* — See notes 3, 5.

(2) *Against Third Parties.* — See note 6.

**998.** 4. Measure of Damages Against Mortgagor. — *Van Warden v. Winslow*, 117 Mich. 564, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998; *McCormick Harvesting Mach. Co. v. Preitauer*, (Neb. 1902) 91 N. W. Rep. 499. See also *Frappiea v. Johnson*, 75 Vt. 397.

In an action of conversion by the mortgagor the fact that he has given subsequent mortgages on the same property is a *pro tanto* defense of which the first mortgagee may avail himself. *Kohn v. Dravis*, (C. C. A.) 94 Fed. Rep. 288.

It has been held that the mortgagor's right to substantial damages is not defeated by the fact that the mortgagee recovered the converted property and offered to return it on payment of the mortgage and the mortgagor refused to accept the offer. *Colby v. W. W. Kimball Co.*, 99 Iowa 321.

In assessing damages the jury may consider not only the value of property at the time of conversion, but also the time since elapsed, to determine the fair compensation to the plaintiff for his injury. *Davis v. Bowers Granite Co.*, 75 Vt. 286.

**999.** 1. Mortgagor's Rights Against Third Persons. — *Bledsoe v. Palmer*, (Tex. Civ. App. 1904) 81 S. W. Rep. 97.

**Mortgagor's Right Exclusive.** — See *Rosenbaum v. Dawes*, 77 Ill. App. 295, affirmed 179 Ill. 112.

**2. Right Not Lost by Default on Mortgage.** — *Bigler v. Leonori*, 103 Mo. App. 131. See also *Connorsville Buggy Co. v. Lowry*, 104 Mo. App. 186.

If the mortgagor is in default and the mortgagee enters and sells, but for other reasons the sale is void, the purchaser from the mortgagee obtains only the latter's rights and obligations, and is liable to the mortgagor for the difference between the value of the property and the indebtedness. *Berg v. Olson*, 88 Minn. 392.

**3. Mortgagee Limited to Foreclosure.** — *Rein v. Callaway*, 7 Idaho 634; *Maloney v. Kinney*, 7 Ohio Dec. 420, 5 Ohio N. P. 197.

**5. Mortgagee May Choose Remedy.** — The mortgagee need not make a demand for payment of a promissory note secured by a chattel mortgage before bringing an action for possession of the mortgaged property. *Acme Harvester Co. v. Butterfield*, 12 S. Dak. 91. See also *Gaar v. Lyons*, 99 Ky. 672.

**An Attachment by the Mortgagee** does not interfere with any right of the mortgagor. *Cox v. Harris*, 64 Ark. 213; *Holdrege First Nat. Bank v. Johnson*, (Neb. 1903) 94 N. W. Rep. 837; *Dix v. Smith*, 9 Okla. 124.

**Receiving Benefit of Mortgage Sale.** — *Compare Gosnell v. Webster*, (Neb. 1904) 97 N. W. Rep. 1060.

**Receivership.** — If a mortgagor with power to sell perishable chattels fails to act within a reasonable time, a receiver may be appointed as in the interests of both parties. *Hill v.*

*Cohen*, (Ky. 1900) 55 S. W. Rep. 1; *Alexander v. Houston*, (Miss. 1902) 31 So. Rep. 211; *O'Donnell v. Rock Springs First Nat. Bank*, 9 Wyo. 408. See also *Meyer v. Thomas*, 131 Ala. 111; *Tuttle v. Blow*, 176 Mo. 158, 98 Ann. St. Rep. 488.

**6. Mortgagee May Bring Trover or Trespass Against Third Parties — United States.** — *O'Brien v. Miller*, 117 Fed. Rep. 1000; *Shapard v. Hynes*, (C. C. A.) 104 Fed. Rep. 449; *George Adams, etc., Co. v. South Omaha Nat. Bank*, (C. C. A.) 123 Fed. Rep. 641.

*Alabama.* — *Holst v. Harmon*, 122 Ala. 453. See also *Johnson v. Wilson*, 137 Ala. 468, 97 Am. St. Rep. 52.

*California.* — *Woodland Bank v. Duncan*, 117 Cal. 412.

*Georgia.* — *Reid v. Matthews*, 102 Ga. 189; *Anderson v. Adams*, 117 Ga. 919.

*Illinois.* — *Chambers v. Newlin*, 109 Ill. App. 138.

*Indiana.* — *Conwell v. Jeger*, 21 Ind. App. 110.

*Kansas.* — See *Greer v. Newland*, (Kan. 1904) 77 Pac. Rep. 98.

*Michigan.* — *Canfield v. Gould*, 115 Mich. 461.

*Minnesota.* — *Nichols, etc., Co. v. Minnesota Thresher Mfg. Co.*, 70 Minn. 528; *Strickland v. Minnesota Type-Foundry Co.*, 77 Minn. 210.

*Missouri.* — *State v. White*, 70 Mo. App. 1; *Chrisman-Sawyer Banking Co. v. Strahorn-Hutton-Evans Commission Co.*, 80 Mo. App. 438; *Crawford v. Benoist*, 97 Mo. App. 219. See also *Western Realty Co. v. Musser*, 97 Mo. App. 114.

*Montana.* — *Reynolds v. Fitzpatrick*, 23 Mont. 52.

*New York.* — *Bigelow v. Goble*, 9 N. Y. App. Div. 391; *Martin v. Lewinski*, 54 N. Y. App. Div. 573; *Biehler v. Irwin*, (Supm. Ct. App. T.) 84 N. Y. Supp. 574.

*North Carolina.* — *Grainger v. Lindsay*, 123 N. Car. 216; *Turpin v. Cunningham*, 127 N. Car. 508, 80 Am. St. Rep. 808.

*North Dakota.* — *Donovan v. St. Anthony, etc., Elevator Co.*, 7 N. Dak. 513, 66 Am. St. Rep. 674.

*Oregon.* — *Zorn v. Livesley*, 44 Oregon 501.

*South Carolina.* — *Wylie v. Ohio River, etc., R. Co.*, 48 S. Car. 405.

*Texas.* — *Godair v. Tillar*, 19 Tex. Civ. App. 541; *Farlin, etc., Co. v. Moore*, 28 Tex. Civ. App. 243; *Cassidy v. Willis*, (Tex. Civ. App. 1903) 78 S. W. Rep. 40. See also *Crane v. McGuire*, (Tex. Civ. App. 1901) 64 S. W. Rep. 942.

The fact that mortgagees are described as agents does not preclude them from bringing an action of detinue for the possession of chattels. *Elston v. Roop*, 133 Ala. 331.

The mortgagee, to sustain an action in conversion, must have had the possession or the right to immediate possession at the time when the goods were taken. *Barney Cavanaugh Hardware Co. v. Lewis*, 43 Fla. 435; *Dawes v. Rosenbaum*, 179 Ill. 112; *Harrington v. Strom-*

**1000. Against Officer.** — See note 1.

Assignment of Mortgage Not an Assignment of Cause of Action Against Officer. —

See note 3.

**1001. Mortgagor Need Not Be Made a Party.** — See note 2.**4. Rights of Parties After Default** — *a. POSSESSION BY THE MORTGAGEE* — (1) *In General.* — See note 3.**1002. (2) Must Be Taken Within a Reasonable Time.** — See note 1.(3) *Possession Good Against All the World.* — See note 2.

berg-Mullins Co., 29 Mont. 157; Hill v. Campbell Commission Co., 54 Neb. 59.

If by the terms of the mortgage the mortgagee is entitled to delivery of the property, he may maintain an action for its conversion, and it is immaterial whether he has or has not foreclosed. La Rue v. St. Anthony, etc., Elevator Co., 17 S. Dak. 91.

**Demand and Refusal.** — Cassiday v. Ball, 71 Ill. App. 181; Rosenbaum v. Dawes, 77 Ill. App. 295, affirmed 179 Ill. 112; Beh v. Moore, 124 Iowa 564.

**1000. 1. Officer Taking Possession under Attachment.** — Stephens v. Head, 138 Ala. 455; St. Anthony First Nat. Bank v. Steers, (Idaho 1904) 75 Pac. Rep. 225; Ketcham v. George R. Barse Live Stock Commission Co., 57 Kan. 771; Williams v. Miller, 6 Kan. App. 626; Smith v. Smalley, 19 N. Y. App. Div. 519; Albright v. Meredith, 58 Ohio St. 194.

If after demand by the mortgagee the attaching officer turns over to the mortgagor the surplus arising out of a tax sale of mortgaged property, the officer will be liable as for money had and received to the mortgagee. McDuffee v. Collins, 117 Ala. 487.

A mortgagee with right to immediate possession under an insecurity clause may maintain replevin against an attaching officer who does not first tender payment of the mortgage debt as required by statute (Comp. Laws, § 4389). Coughran v. Sundback, 9 S. Dak. 483.

**Mortgagee in Possession.** — Chambers v. Newlin, 109 Ill. App. 138; Trompen v. Yates, 66 Neb. 525.

**3. Measure of Damages.** — The measure of damages in an action of trover brought by the mortgagee against one seizing the property under a distress warrant is the amount of the mortgage lien, not exceeding the value of the property. Mantonya v. Martin Emerich Outfitting Co., 69 Ill. App. 62, affirmed 172 Ill. 92.

The mortgagee in an action against a levying creditor may recover the value of the property with interest thereon from the date of the levy. State v. Fidelity, etc., Co., 94 Mo. App. 184.

The allowance of interest as an element of damages in addition to the value of the goods is wholly committed by the Missouri statute to the discretion of the jury. Bigler v. Leonori, 103 Mo. App. 131; Feller v. McKillip, 109 Mo. App. 61.

The mortgagee's damages in an action of conversion against a sheriff are limited by his special interest in the mortgaged property. State v. White, 70 Mo. App. 1.

In an action by a mortgagee against a stranger who shows no right or title to the property, the full value of the property may be

recovered though it exceeds the amount of the mortgage debt. Bigelow v. Goble, 9 N. Y. App. Div. 391; Biehler v. Irwin, (Supm. Ct. App. T.) 84 N. Y. Supp. 574.

**1001. 2.** See Cobb v. Barber, 92 Tex. 309.

**3. Possession by the Mortgagee.** — Crocker v. Burns, 13 Colo. App. 54; Johnson v. Anderson, 60 Kan. 578; Edmonston v. Jones, 96 Mo. App. 83; Darrow v. Wendelstadt, 43 N. Y. App. Div. 426; Cody v. Springfield First Nat. Bank, 63 N. Y. App. Div. 199; Biehler v. Irwin, (Supm. Ct. App. T.) 84 N. Y. Supp. 574; Wylie v. Ohio River, etc., R. Co., 48 S. Car. 405; Martin v. Jenkins, 51 S. Car. 42. See also St. Marys Mach. Co. v. National Supply Co., 68 Ohio St. 535, 96 Am. St. Rep. 677; Backhaus v. Buells, 43 Oregon 558; Thompson v. Fairbanks, 75 Vt. 361, 104 Am. St. Rep. 899.

**Enforcement of Possession — After Forfeiture.** — Kiser v. Blanton, 123 N. Car. 400. See also Moore v. Hurtt, 124 N. Car. 27. So possession may be enforced against a subsequent mortgagee. Klinkert v. Fulton Storage, etc., Co., 113 Wis. 493.

**Acts Colore Officii.** — In support of the first statement of the original note see Jones v. Howard, 99 Ga. 451. To the same effect as Thornton v. Cochran, 51 Ala. 415, stated in the original note, see Wickler v. People, 68 Ill. App. 282.

**Mortgage Sufficient Proof of Ownership.** — Reinstein v. Roberts, 34 Oregon 87, 75 Am. St. Rep. 564.

**1002. 1. Possession to Be Taken Within Reasonable Time.** — Greene v. Bentley, (C. C. A.) 114 Fed. Rep. 112; Stanley v. Citizen's Coal, etc., Co., 24 Colo. 103; Bear v. Hansen, 16 Colo. App. 483; Hewitt v. General Electric Co., 164 Ill. 420, reversing on other grounds 61 Ill. App. 168; Bock v. Schindler, 85 Ill. App. 361; W. W. Kimball Co. v. Piper, 111 Ill. App. 82; Shannon v. Wolf, 173 Ill. 253; Morris v. Clark, (Tenn. Ch. 1901) 62 S. W. Rep. 673; Heaton v. Flood, 29 Ont. 87. See also Crocker v. Burns, 13 Colo. App. 54; Magerstadt v. Harder, 95 Ill. App. 303, reversed 199 Ill. 271; Pfirshing v. Peterson, 98 Ill. App. 70; Friend v. Johnson, 68 Ill. App. 661.

Where mortgaged goods were purchased from the mortgagor before maturity of the debt, it is no defense to an action by the mortgagee against the purchaser that the mortgagee did not take possession of the property within a reasonable time after default. Sondheimer v. Graeser, 172 Ill. 293.

**Indulgence After Law Day.** — See Orcutt v. Williams, 63 Ill. App. 407.

**2.** People's Sav. Inst. v. Miles, (C. C. A.) 76 Fed. Rep. 252; Garrison v. Quick, 38 N. Y. App. Div. 93.



**1002.** (4) *Mortgage Securing Several Notes.* — See note 3.

**1003.** (5) *Retention of Possession.* — See notes 1, 2.

(6) *Use of the Chattels.* — See note 3.

b. THE RIGHT OF REDEMPTION. — See notes 5, 6.

**1004.** Value of the Equity. — See note 2.

c. ENFORCEMENT OF THE MORTGAGE LIEN — By Sale. — See

note 9.

**1006.** See notes 1, 2.

Power of Disposal in the Mortgage. — See notes 3, 4, 5.

**1007.** See note 1.

**1002. 3. Mortgage Securing Several Notes.** — *McMillan v. Grayston*, 83 Mo. App. 425. See also *Friend v. Johnson*, 68 Ill. App. 661.

**1003. 1. Retention for Unreasonable Time.** — *Compare Groh v. Feldman*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 303.

**2. Marseilles Mfg. Co. v. Perry**, 62 Neb. 715.

**3. Appointment of Receiver.** — The Iowa statute authorizing the appointment of a receiver where the petitioner's property, or its rents or profits, are in danger of being lost or impaired has been held to justify the appointment of a receiver at the request of the mortgagee to continue the manufacture and sale of certain goods during the selling season, where it was shown that a discontinuance of manufacturing would result in great sacrifice and loss. *Valley Nat. Bank v. H. B. Claffin Co.*, 108 Iowa 504.

**5. The Equity of Redemption.** — The right of redemption is given by law, and it is not permitted to the parties to the mortgage, even by agreement, to deprive the mortgagor of that right. *Hughes v. Harlam*, 37 N. Y. App. Div. 528, *affirmed* 166 N. Y. 427.

**6. Right Equitable in Nature.** — *Leapold v. McCartney*, 14 Colo. App. 442; *Alexander v. Meyenberg*, 112 Ill. App. 223; *Lang v. Thacher*, 48 N. Y. App. Div. 317, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1003; *Hughes v. Harlam*, 166 N. Y. 427. See also *Loggie v. Chandler*, 95 Me. 220.

**1004. 2. Profits and Income.** — See *Kreider v. Fanning*, 74 Ill. App. 237.

**9. Injunction.** — A court of equity may enjoin the disposition of mortgaged property. *O'Neill v. Dougherty*, 96 Ill. App. 1; *Rolfe v. Burnham*, 110 Mich. 660. See also *Zanhizer v. Hefner*, 47 W. Va. 418.

A sale under a mortgage of exempt property will be enjoined where the wife did not join in the execution of the mortgage thereon. *Kindall v. Lincoln Hardware, etc., Co.*, 8 Idaho 664.

**1006. 1. Adequacy of Price.** — *Johnson v. Selden*, 140 Ala. 418; *Smitton v. Seibert*, (Mich. 1904) 99 N. W. Rep. 381, 11 Detroit Leg. N. 42; *Leavenworth First Nat. Bank v. Wright*, 104 Mo. App. 242; *Langdon v. Wintersteen*, 58 Neb. 278.

**2. Babcock v. Wells**, 25 R. I. 23.

**3. Mortgagee Must Use Reasonable Care and Diligence.** — *Van Werden v. Winslow*, 117 Mich. 564, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1006. See also *Groos v. Iowa Park First Nat. Bank*, (Tex. Civ. App. 1903) 72 S. W. Rep. 402; *Barbee v. Scoggins*, 121 N. Car. 135.

Where a mortgagee takes possession under

an insecurity clause and power of sale he must dispose of the goods with reasonable diligence, or he will be accountable for their value at the time of taking although before the law day. *Lomax v. Walk*, 33 Oregon 385.

**Power Coupled with Interest.** — The power of sale contained in the mortgage is a power coupled with an interest, and the mortgagee's right to foreclose thereunder cannot be defeated by the mortgagor. *Harvey v. Smith*, 179 Mass. 592.

**4. Must Follow Terms of Mortgage.** — *Kohn v. Dravis*, (C. C. A.) 94 Fed. Rep. 288; *Lynch v. Naylor*, 63 Ill. App. 107; *Orcutt v. Williams*, 63 Ill. App. 407. See also *Dexter v. Curtis*, 91 Me. 505, 64 Am. St. Rep. 266; *Feigenspan v. Mulligan*, 63 N. J. Eq. 179, *affirmed* 64 N. J. Eq. 792.

A mortgage which provides that the goods may be sold at public auction or private sale, in bulk or at retail, empowers the mortgagee to sell in the ordinary course of trade. *Tollerton, etc., Co. v. Anderson*, 108 Iowa 217.

**The Mortgagee Should Acquire Possession Before Selling**, and where the property is in the possession of the sheriff at the time of the sale the purchaser from the mortgagee acquires no title to the goods. *Fulghum v. J. P. Williams Co.*, 114 Ga. 643.

**5. Must Account for Surplus.** — *Marseilles Mfg. Co. v. Perry*, 62 Neb. 715.

**Excessive Sales.** — *Kohn v. Dravis*, (C. C. A.) 94 Fed. Rep. 288; *Haynes v. Hobbs*, (Mich. 1904) 98 N. W. Rep. 978, 10 Detroit Leg. N. 999.

**Expenses of the Sale.** — *Cox v. Beck*, 83 Fed. Rep. 269; *Dowie v. Christen*, 115 Iowa 364.

The mortgagee may recover the expenses of such sales only as were consummated in strict conformity with the power of sale contained in the mortgage. *Kohn v. Dravis*, (C. C. A.) 94 Fed. Rep. 288.

**Attorney's Fees.** — See *Moore v. Calvert*, 8 Okla. 358.

**1007. 1. Compliance with Statute Essential.** — *Castner v. Darby*, 128 Mich. 241, 8 Detroit Leg. N. 625; *McCormick Harvesting Mach. Co. v. Preitauer*, (Neb. 1902) 91 N. W. Rep. 499; *Edmonds v. Riley*, 15 S. Dak. 470. See also *Geo. J. Stadler Brewing Co. v. Weadley*, 99 Ill. App. 161; *Marvel v. McKinzie*, 105 Ill. App. 164; *Webb v. Hunt*, 2 Indian Ter. 612; *Stone v. Thacker*, 3 Indian Ter. 737; *Dowie v. Christen*, 115 Iowa 364; *Powell v. Hardy*, 89 Minn. 229; *Brown v. Harris*, 67 N. J. L. 207; *Pitts Agricultural Works v. Baker*, 11 S. Dak. 342.

A sale of the mortgaged property by assignees

**1007.** By Bill in Equity. — See note 4.

**1008.** VII. RIGHTS OF THIRD PARTIES — 2. Registration as Affecting Rights — a. IN GENERAL. — See notes 2, 3.

of a note secured thereby according to the terms of the statute will relieve them, in the absence of actual notice, from liability for selling contrary to an agreement between their assignor and subsequent purchasers under the mortgagor. *Gibson v. McIntire*, 110 Iowa 417.

Though the sale be irregular, a valid chattel mortgage will not be thereby extinguished, but the purchaser will succeed to the rights of the mortgagee. *Kelsey v. Ming*, 118 Mich. 438.

**The Statutory Form of Sale May Be Waived** by an agreement between the parties to sell in a manner not in compliance therewith. *Geiser Mfg. Co. v. Krogman*, 111 Iowa 503; *Marseilles Mfg. Co. v. Perry*, 62 Neb. 715.

**1007. 4. Jurisdiction of Equity.** — *Meeker v. Waldron*, 62 Neb. 689. See also *Stillwell-Bierce, etc., Co. v. Williamston Oil, etc., Co.*, 80 Fed. Rep. 68.

**Injunction.** — Though a statutory foreclosure is provided, it is not exclusive, and equity may grant an injunction to render the foreclosure effectual. *Momrich v. Schwartz*, (Neb. 1903) 96 N. W. Rep. 636.

**1008. 2. Choses in Action.** — The recording acts have in some states been held to apply only to goods and chattels capable of delivery and not to those which have no corpus or situs. *Niles v. Mathusa*, 162 N. Y. 546; *Woodward v. Laporte*, 70 Vt. 399.

**3. Recording the Mortgage** — *Alabama*. — *Chadwick v. Russell*, 117 Ala. 290; *Woods v. Rose*, 135 Ala. 297.

*California*. — *Ruggles v. Cannedy*, 127 Cal. 290.

*Colorado*. — *Ankele v. Elder*, 19 Colo. App. 330.

*Connecticut*. — *In re Wilcox, etc., Co.*, 70 Conn. 220.

*Georgia*. — *Armitage-Herschell Co. v. Muscogee Real Estate Co.*, 119 Ga. 552. See also *Barnett v. McConnell*, 101 Ga. 32.

*Illinois*. — *Seim v. Hale*, 67 Ill. App. 364; *Roberts v. Kingsbury*, 71 Ill. App. 451.

*Indian Territory*. — *McFadden v. Blocker*, 2 Indian Ter. 260.

*Iowa*. — *Richards v. Jewett*, 118 Iowa 629; *Blackman v. Baxter*, 125 Iowa 118. See also *Davis Gasoline Engine Works Co. v. McHugh*, 115 Iowa 415. But see *Everingham v. Harris*, 99 Iowa 447.

*Kansas*. — *Lehman-Higginson Grocer Co. v. McClain*, 63 Kan. 881, 64 Pac. Rep. 1029.

*Kentucky*. — *Baldwin v. Owens*, (Ky. 1899) 51 S. W. Rep. 438; *Westinghouse Electric Mfg. Co. v. Citizens' St. R. Co.*, 68 S. W. Rep. 463, 24 Ky. L. Rep. 334. See also *Arnold v. Eastin*, 116 Ky. 686.

*Maine*. — *York v. Murphy*, 91 Me. 320; *Kelley v. Goodwin*, 95 Me. 538.

*Massachusetts*. — *Berry v. Levitan*, 181 Mass. 73; *Harrison v. J. J. Warren Co.*, 183 Mass. 123. See also *Smith v. Howard*, 173 Mass. 88.

*Michigan*. — *Vining v. Millar*, 116 Mich. 144.

*Minnesota*. — *Shay v. Security Bank*, 67 Minn. 287; *Clarke v. National Citizens' Bank*, 74 Minn. 58.

*Missouri*. — *Landis v. McDonald*, 38 Mo. App. 335; *Harrison v. South Carthage Min. Co.*, 95 Mo. App. 80, 106 Mo. App. 32; *Feller v. McKillip*, 100 Mo. App. 660.

*Montana*. — *John Caplice Co. v. Beauchamp*, 22 Mont. 258.

*Nebraska*. — *Meyer v. Miller*, 51 Neb. 620; *National Bank of Commerce v. Bryden*, 59 Neb. 75; *Johnson v. Spaulding*, (Neb. 1901) 95 N. W. Rep. 808; *Hillebrand v. Nelson*, (Neb. 1901) 95 N. W. Rep. 1068; *Johns v. Kamarad*, (Neb. 1901) 96 N. W. Rep. 118.

*New Jersey*. — *McInnes v. McInnes Brick Mfg. Co.*, (N. J. 1897) 38 Atl. Rep. 182; *Bleakley v. Nelson*, 56 N. J. Eq. 674; *Wimpfheimer v. Perrine*, (N. J. 1901) 50 Atl. Rep. 356; *Durham v. Cramer*, 63 N. J. Eq. 151; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 65 N. J. Eq. 181.

*New York*. — *Ledoux v. East River Silk Co.*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 440; *Stephens v. Meriden Britannia Co.*, 13 N. Y. App. Div. 268, reversed 160 N. Y. 178, 73 Am. St. Rep. 678; *Sheldon v. Wickham*, 27 N. Y. App. Div. 628, reversed 161 N. Y. 500; *Beskin v. Feigenspan*, 32 N. Y. App. Div. 29; *Ledoux v. Bank of America*, 24 N. Y. App. Div. 123; *Witherbee v. Taft*, 51 N. Y. App. Div. 87; *Crouse v. Schoolcraft*, 51 N. Y. App. Div. 160; *Dunham v. Silberstein*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 642; *McDonald v. City Trust, etc., Co.*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 644; *Wild v. Porter*, 59 N. Y. App. Div. 350, affirmed 173 N. Y. 614; *Huber v. Ehlers*, 76 N. Y. App. Div. 602; *Dickinson v. Oliver*, 96 N. Y. App. Div. 65.

*Oklahoma*. — *Campbell v. Richardson*, 6 Okla. 375; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okla. 353; *Hennessey First Nat. Bank v. Hesser*, 14 Okla. 115.

*Oregon*. — *Zorn v. Livesley*, 44 Oregon 501.

*Pennsylvania*. — *Lefever v. Armstrong*, 15 Pa. Super. Ct. 565; *City Bank v. Easton Boot, etc., Co.*, 187 Pa. St. 30.

*Rhode Island*. — *Burdick v. Coates*, 22 R. I. 410.

*South Dakota*. — *Pierson v. Hickey*, 16 S. Dak. 46.

*Texas*. — *Guarantee Trust Co. v. Galveston City R. Co.*, (C. C. A.) 107 Fed. Rep. 311 (construing Texas statute); *Bowen v. Lansing Wagon Works*, 91 Tex. 385; *Avery v. Popper*, (Tex. 1898) 48 S. W. Rep. 572, modified 92 Tex. 344; *Williams v. Farmers Nat. Bank*, 22 Tex. Civ. App. 581.

*Vermont*. — *Hunt v. Allen*, 73 Vt. 322.

*Washington*. — *Van Brocklin v. Queen City Printing Co.*, 19 Wash. 552; *Carstens v. Moyer*, 22 Wash. 61; *Dunsmuir v. Port Angeles Gas, etc., Co.*, 24 Wash. 104.

*Wisconsin*. — *In re H. G. Andrae Co.*, 117 Fed. Rep. 561 (construing Wisconsin statute); *Dornbrook v. M. Rumely Co.*, 120 Wis. 36.

*Canada*. — *Cox v. Schack*, 14 Manitoba 174; *Manchester v. Hills*, 34 Nova Scotia 512. See also *Hope v. May*, 24 Ont. App. 16.

**A Mortgage of a Growing Crop need not be re-**

**1008.** The Purpose of Such Requirements. — See note 4.

Mistakes and Omissions. — See note 5.

**1009.** As Between the Original Parties. — See note 1.

b. SCOPE OF RECORDING ACTS — Time of Recording. — See notes 2, 3.

**1010.** The Place of Record. — See notes 1, 2, 3.

corded in *Nova Scotia*; and if the crops are severed by the mortgagee, his title must prevail over the claims of execution creditors of the mortgagor. *Eastern Canada Sav., etc., Co. v. Curry*, 28 *Nova Scotia*, 323. See also *Bank of British North America v. McIntosh*, 11 *Manitoba* 503.

**1008. 4. Purpose of Recording.**—*United States*. — *State Trust Co. v. Kansas City, etc., R. Co.*, 120 *Fed. Rep.* 398.

*Idaho*. — *Cowden v. Finney*, (*Idaho* 1904) 75 *Pac. Rep.* 765.

*Illinois*. — *Crockett First Nat. Bank v. George R. Barse Live Stock Commission Co.*, 198 *Ill.* 232; *Springer v. Lipsis*, 209 *Ill.* 261; *W. W. Kimball Co. v. Piper*, 111 *Ill. App.* 82; *Martin v. Sexton*, 112 *Ill. App.* 199.

*Iowa*. — See *Sheets v. Poff*, 123 *Iowa* 714.

*Kansas*. — See *Williams v. Mitchell*, 9 *Kan. App.* 627.

*Maine*. — *Thurlough v. Dresser*, 98 *Me.* 162.

*Michigan*. — *Loeser v. Jorgensen*, (*Mich.* 1904) 100 *N. W. Rep.* 450, 11 *Detroit Leg. N.* 253.

*Minnesota*. — *Prouty v. Barlow*, 74 *Minn.* 130.

*Missouri*. — *Dawson v. Cross*, 88 *Mo. App.* 292. See also *State v. O'Neill*, 151 *Mo.* 67.

*Nebraska*. — See *Folsom v. Pern Plow, etc., Co.*, (*Neb.* 1903) 95 *N. W. Rep.* 635.

*New Jersey*. — See *Brown v. Harris*, 67 *N. J. L.* 207.

*Texas*. — *Adams v. Powell*, (*Tex. Civ. App.* 1898) 44 *S. W. Rep.* 547; *Smith v. Connor*, (*Tex. Civ. App.* 1898) 46 *S. W. Rep.* 267; *Randolph v. Brown*, 21 *Tex. Civ. App.* 617.

*Vermont*. — *McCloud v. Wakefield*, 70 *Vt.* 558.

**5. Mistakes and Omissions of Recording Officer.** — *Truss v. Harvey*, 120 *Ala.* 636; *Hamilton v. Seeger*, 75 *Ill. App.* 599; *Jesse French Piano, etc., Co. v. Meehan*, 84 *Ill. App.* 262; *Schonweiler v. McCaull*, (*S. Dak.* 1904) 99 *N. W. Rep.* 95; *Ames Iron Works v. Chinn*, 15 *Tex. Civ. App.* 88. See also *Allcock v. Loy*, 100 *Ill. App.* 573; *Faxon v. Ridge*, 87 *Mo. App.* 299; *Knickerbocker Trust Co. v. Penn Cordage Co.*, (*N. J.* 1904) 58 *Atl. Rep.* 409.

**1009. 1. As Between Original Parties** — *United States*. — *Ward v. Ward*, 131 *Fed. Rep.* 946.

*Arkansas*. — *Hampton v. State*, 67 *Ark.* 266.

*California*. — See *Lemon v. Wolff*, 121 *Cal.* 272.

*Colorado*. — *Morse v. Morrison*, 16 *Colo. App.* 449.

*Illinois*. — *Niepschield v. Reuss*, 92 *Ill. App.* 636; *Martin v. Sexton*, 112 *Ill. App.* 199.

*Indiana*. — *Warner v. Warner*, 30 *Ind. App.* 578.

*Kansas*. — *Drumm-Flato Commission Co. v. Madison First Nat. Bank*, 65 *Kan.* 746.

*Missouri*. — *McFarlan Carriage Co. v. Wells*, 99 *Mo. App.* 641.

*New Hampshire*. — *Hodgedon v. Libby*, 69 *N. H.* 136.

*New York*. — *Skilton v. Codrington*, 86 *N. Y. App. Div.* 166.

*Texas*. — *Hall v. Keating Implement, etc., Co.*, (*Tex. Civ. App.* 1903) 77 *S. W. Rep.* 1054. *Wyoming*. — *Schlessinger v. Cook*, 9 *Wyo.* 256.

**2. Period for Recording.** — *Retzsch v. W. C. Retzsch Printing Co.*, 10 *Ohio Cir. Dec.* 537, 19 *Ohio Cir. Ct.* 631; *Hardcastle v. Stiles*, 69 *N. J. L.* 551, holding that recording immediately means "as soon as may be by reasonable diligence and dispatch under the circumstances of the case;" *Cameron Ice Co. v. Wallace*, 21 *Tex. Civ. App.* 141; *Hackney v. Schow*, 21 *Tex. Civ. App.* 613. See also *Austin v. Welch*, 31 *Tex. Civ. App.* 526.

**3. Hornbrook v. Hetzel**, 27 *Ind. App.* 79 (ten days).

**Reasonable Time.** — Though fourteen days elapsed between the execution and the recording of a mortgage it was held to have been recorded within a reasonable time under the circumstances and not to be void as to creditors who became such during that period. *H. E. Spencer Co. v. Papach*, 103 *Iowa* 513. See also *Summerville v. Kelliher*, 144 *Cal.* 155; *Dunham v. Cramer*, 63 *N. J. Eq.* 151.

**1010. 1. Place of Record** — *County of Mortgagor's Residence*. — *Brittenham v. Robinson*, 18 *Ind. App.* 502; *Fahndrich v. Hudson*, 76 *Ill. App.* 641; *Coppage v. Johnson*, 107 *Ky.* 620; *Canfield v. Lathrop*, 4 *Ohio Dec.* (Reprint) 51, *Cleve. L. Rec.* 67; *Hockaday-Gray Co. v. Jonett*, (*Tex. Civ. App.* 1903) 74 *S. W. Rep.* 71.

In *Kansas* a mortgagee has the option of recording the mortgage in either the county of the mortgagor's residence or the county where the property is located. *Springfield Third-Nat. Bank v. Bond*, 64 *Kan.* 346; *Springfield Third Nat. Bank v. Blosser*, 65 *Kan.* 859, 70 *Pac. Rep.* 373.

**2. County Where Property Located.** — *Griffin v. Karter*, 116 *Ala.* 160; *Fassett v. Wise*, 115 *Cal.* 316; *Day, etc., Lumber Co. v. Mack*, 69 *S. W. Rep.* 712, 24 *Ky. L. Rep.* 640; *Nickerson v. Wells-Stone Mercantile Co.*, 71 *Minn.* 230; *La Crosse Boot, etc., Mfg. Co. v. Mons Anderson Co.*, 9 *S. Dak.* 560.

**A Mortgage Covering Articles in Different Counties** is valid, under the *California* statute, only as to property situated in the county or counties where it is filed. *Guras v. Porter*, 118 *Fed. Rep.* 668.

**3. When Property Removed.** — *Jones v. State*, 113 *Ala.* 95; *Greene v. Bentley*, (*C. C. A.*) 114 *Fed. Rep.* 112 (*Texas* statute); See also *Spikes v. Brown*, (*Tex. Civ. App.* 1899) 49 *S. W. Rep.* 725. *Compare Blythe v. Crump*, 28 *Tex. Civ. App.* 327; *Bailey v. Costello*, 94 *Wis.* 87.

**Foreign Corporation.** — See *Whitney v. Browne*, 180 *Mass.* 597.

**Partnership.** — *Bueb v. Geraty*, (*Supm. Ct. App. T.*) 28 *Misc. (N. Y.)* 134. See also *Smith v. Burnett*, 2 *Ohio Cir. Dec.* 344. And to the same effect as *Granger v. Adams*, 90 *Ind.*

**1012. Rules Applicable to Real Estate Obtain in Some States.** — See note 1.

c. RENEWAL. — See notes 2, 3, 4.

**1013. d. WHEN DEEMED FILED AND RECORDED.** — See notes 1, 2.

3. Subsequent Purchasers — a. DEFINITION. — See note 3.

**1014. b. NOTICE.** — See note 1.

87, stated in the original note, see *Morris v. Ellis*, 16 Ind. App. 679.

A chattel mortgage executed by partners must be filed in every township in which a member resides. *Devine v. Taylor*, 4 Ohio Cir. Dec. 248, 12 Ohio Cir. Ct. 723; *Russell v. St. Mart*, 83 N. Y. App. Div. 543, *reversed* 180 N. Y. 355.

**Lex Situs Governs** — *United States*. — *Alferitz v. Ingalls*, 83 Fed. Rep. 964, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1011; *Shapard v. Hynes*, (C. C. A.) 104 Fed. Rep. 449; *In re Brannock*, 131 Fed. Rep. 819.

*Illinois*. — See *Rosenbaum v. Dawes*, 77 Ill. App. 295, *affirmed* 179 Ill. 112; *Armitage-Herschell Co. v. Potter*, 93 Ill. App. 602.

*Indian Territory*. — *McFadden v. Blocker*, 2 Indian Ter. 260.

*Kansas*. — See *Mackey v. Pettijohn*, 6 Kan. App. 57.

*Maryland*. — See *Pleasanton v. Johnson*, 91 Md. 673.

*Missouri*. — *Arkansas City Bank v. Cassidy*, 71 Mo. App. 186; *Brown v. Koenig*, 99 Mo. App. 653. See also *Trower Bros. Co. v. Hamilton*, 179 Mo. 205.

*New York*. — See *Dearing v. McKinnon Dash, etc.*, Co., 165 N. Y. 78, 80 Am. St. Rep. 708.

*North Dakota*. — *Wilson v. Rustad*, 7 N. Dak. 330, 66 Am. St. Rep. 649.

*Tennessee*. — *Louisville Bank v. Hill*, 99 Tenn. 42; *Hughes v. Abston*, 105 Tenn. 70. But see *Snyder v. Yates*, 112 Tenn. 309.

In *Pennsylvania* it has been held that a mortgage filed in New York is a secret lien as to one purchasing the mortgaged chattels in Pennsylvania, the court saying that "the record of a deed is notice only to those who are bound to search for it." *State Bank v. Carr*, 15 Pa. Super. Ct. 346.

The *Georgia* rule is that a mortgage executed in another state must be filed within six months of the bringing of the property into Georgia. Such a mortgage, unrecorded, is inferior to the rights of a *bona fide* purchaser although the six months allowed for recording have not expired. *Armitage-Herschell Co. v. Muscogee Real Estate Co.*, 119 Ga. 552.

**1012. 1. Rules as to Realty Applied.** — *Smead v. Chandler*, 71 Ark. 505.

**Vessels.** — See *Arnold v. Eastin*, 116 Ky. 686.

**2. Renewal.** — See *Sloan v. National Surety Co.*, 74 N. Y. App. Div. 417; *Salmon v. Norris*, 82 N. Y. App. Div. 362; *Rehak v. Wilcox*, 4 Ohio Dec. (Reprint) 379, 2 Cleve. L. Rep. 65. And to the same effect as *Ely v. Carnley*, 19 N. Y. 406, stated in the original note, see *O. S. Kelly Co. v. Lobenthal*, 8 Ohio Cir. Dec. 300, 15 Ohio Cir. Ct. 343.

An affidavit of extension may be filed on the day when the mortgage debt matures. *Hamilton v. Seeger*, 75 Ill. App. 599.

**The Object** of a statute providing that a chattel mortgage shall after the expiration of five years cease to be valid as to innocent parties,

is to protect those whose rights accrued after the expiration of that time, and not those whose rights accrued before, as the latter were bound to take notice of the record. *Arlington Mill, etc., Co. v. Yates*, 57 Neb. 286.

**As Between the Original Parties** failure to renew will not render the mortgage void. *Deering v. Hanson*, 7 N. Dak. 288.

**How Time Determined.** — The time for refiling is to be determined by reference to the next preceding, and not the original, filing. *In re Landman*, 5 Ohio Dec. 398, 7 Ohio N. P. 570.

**Possession Taken by the Mortgagee** removes the necessity of refiling. *Fuher v. Buckeye Supply Co.*, 5 Ohio Dec. 187, 7 Ohio N. P. 420.

**3. Industrial Loan Assoc. v. Saul**, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 188.

**4. Taking a New Mortgage** within the period, if in good faith, relieves from the consequences of a failure to refile, and the old mortgage will subsist. *Meyerfeld v. Strube*, 9 Ohio Dec. 514.

**1013. 1. When Deemed Recorded.** — *Day, etc., Lumber Co. v. Mack*, 69 S. W. Rep. 712, 24 Ky. L. Rep. 640. See also *McCrea v. Hopper*, 35 N. Y. App. Div. 572, *affirmed* 165 N. Y. 633.

Where a mortgage covering both real and personal property was filed only in the record of realty mortgages, it was held that constructive notice was imparted as to the mortgage on the chattels although not recorded in the separate book which the statute directed. *Long v. Gorman*, 100 Mo. App. 45.

**2. Truss v. Harvey**, 120 Ala. 636. See also *Davis v. Turner*, (C. C. A.) 120 Fed. Rep. 605; *Hunt v. Allen*, 73 Vt. 322.

**The Presumption of Proper Recording Is Rebuted** when the mortgage has been taken from the custody of the recording officer before it has been transcribed. *Knickerbocker Trust Co. v. Penn Cordage Co.*, (N. J. 1904) 58 Atl. Rep. 409.

**Delivery to Officer Away from Office.** — Merely leaving the mortgage with the clerk while he was outside the township serving as a juror was held to be insufficient to give notice, and not to amount to filing. *Matter of Jones*, 2 Ohio Dec. 409, 7 Ohio N. P. 225.

**3. A Subsequent Purchaser.** — *John Caplice Co. v. Beauchamp*, 22 Mont. 258; *Wolff v. Rausch*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 108; *Salmon v. Norris*, 82 N. Y. App. Div. 362; *Russell v. St. Mart*, 83 N. Y. App. Div. 543, *reversed* 180 N. Y. 355; *City Bank v. Easton Boot, etc., Co.*, 187 Pa. St. 30; *Gottstein v. Harrington*, 25 Wash. 508. See also *Beskin v. Feigenspan*, 32 N. Y. App. Div. 29; *Perkins v. Frank*, (Tex. Civ. App. 1901) 64 S. W. Rep. 236.

A subsequent purchaser is one who takes by contract, and not a trespasser who takes unwillingly or by operation of law. *Scott v. Cox*, 30 Tex. Civ. App. 190.

**1014. 1. Notice.** — *Truss v. Harvey*, 120 Ala. 636; *Jones v. Glathart*, 100 Ill. App. 630;

- 1014.** *c.* ASSUMPTION OF A PRIOR MORTGAGE. — See note 3.  
*d.* RIGHT TO ATTACK THE MORTGAGE. — See notes 4, 5.

- 1015.** **4. Subsequent Mortgagees** — *a.* IN GENERAL. — See notes 1, 2.  
*b.* MORTGAGE SUBJECT TO A PRIOR MORTGAGE. — See notes

3, 4.

- c.* RIGHTS OF ACTION. — See notes 5, 6.

*Frick v. Fritz*, 115 Iowa 438, 91 Am. St. Rep. 165; *Schnavely v. Bishop*, 8 Kan. App. 301; *Meyer Bros. Drug Co. v. Self*, 77 Mo. App. 284; *Bell v. Barnes*, 87 Mo. App. 451; *Eastern Brewing Co. v. Feist*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 681; *Salmon v. Norris*, 82 N. Y. App. Div. 362; *Church v. Lapham*, 94 N. Y. App. Div. 550; *Kerfoot v. State Bank*, 14 Okla. 104; *Meyer v. Davenport Elevator Co.*, 12 S. Dak. 172. See also *Wilkerson v. Thorp*, 128 Cal. 221; *La Crosse Boot, etc., Mfg. Co. v. Mons Anderson Co.*, 9 S. Dak. 560. And see *supra*, this title, **1008. 3. et seq.**

Where a mortgage was acknowledged before an agent of a landlord who afterwards levied an attachment on the mortgaged property, it was held that the agent's knowledge should be imputed to the principal. *McClelland v. Saul*, 113 Iowa 208.

Whether a purchaser of mortgaged property had actual notice of the mortgage is a question of fact for the jury. *Fisher v. Porter*, 11 S. Dak. 311.

**Actual Notice of Unrecorded Mortgage.** — *Soule v. Harrington*, 135 Mich. 155, 10 Detroit Leg. N. 714; *Loeser v. Jorgensen*, (Mich. 1904) 100 N. W. Rep. 450, 11 Detroit Leg. N. 253; *Drexel v. Murphy*, 59 Neb. 210; *Strahorn-Hutton-Evans Commission Co. v. Florer*, 7 Okla. 499. See also *Aultman, etc., Machinery Co. v. Kennedy*, 114 Iowa 444, 89 Am. St. Rep. 373; *La Crosse Boot, etc., Mfg. Co. v. Mons Anderson Co.*, 14 S. Dak. 597.

**1014. 3.** See *Nugent v. John McNeil Shoe Co.*, 62 N. J. Eq. 583.

**4. Estoppel.** — *Talcott v. Hurlbert*, 143 Cal. 4; *Arlington Mill, etc., Co. v. Yates*, 57 Neb. 286. See also *Weill v. Zacher*, 92 Ill. App. 296. But see *Ridgely v. First Nat. Bank*, 75 Fed. Rep. 808.

**5. When Mortgage Void Between Parties.** — *Karter v. Fields*, 140 Ala. 352. See also *Brinker v. Ashenfelter*, (Neb. 1901) 95 N. W. Rep. 1124.

**1015. 1. Subsequent Mortgages.** — See *Martin v. Jenkins*, 51 S. Car. 42.

In a jurisdiction where a mortgage does not pass title, if a subsequent mortgagee brings an action for possession of the property the mortgagor cannot set up as a defense a prior existing mortgage, there being no evidence that the prior mortgagee ever demanded possession. *James v. Wilson*, 8 N. Dak. 186.

**2. Regarded as Subsequent Purchaser.** — *Cox v. Beck*, 83 Fed. Rep. 269; *Goodwin v. Bayerle*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 62; *Bueb v. Geraty*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 134, *affirmed* (Supm. Ct. App. T.) 36 Misc. (N. Y.) 161; *Salmon v. Norris*, 95 N. Y. App. Div. 621; *Whitaker v. Westfall*, 1 Ohio Cir. Dec. 509; *Ross v. Strahorn-Hutton-Evans Commission Co.*, 18 Tex. Civ. App. 698. See also *Wells v. Alturas Commercial Co.*, 6 Idaho 506; *Sparks v. Galena Nat. Bank*, 68 Kan. 148; *Mc-*

*Kinney v. Ellison*, (Tex. Civ. App. 1903) 75 S. W. Rep. 55.

**3. Mortgage Subject to Prior Mortgage.** — *Corning First Nat. Bank v. Reid*, 122 Iowa 280; *Young v. Evans-Snyder-Buel Commission Co.*, 158 Mo. 395, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; *Smith-M'Cord Dry-Goods Co. v. John B. Farwell Co.*, 6 Okla. 318. See also *Singer Piano Co. v. Barnard*, 113 Iowa 664.

**4. Wells v. Alturas Commercial Co.**, 6 Idaho 506; *Tollerton, etc., Co. v. Anderson*, 108 Iowa 217. See also *Berry v. Levitan*, 181 Mass. 73; *David Stevenson Brewing Co. v. Iba*, 155 N. Y. 224; *Smith v. Simper*, 8 Ohio Cir. Dec. 308, 15 Ohio Cir. Ct. 375; *Huber Mfg. Co. v. Sweny*, 57 Ohio St. 169.

A mortgage providing that it is "subject to any prior recorded mortgage" will not be postponed to a prior mortgage not properly recorded. *Whitney v. Browne*, 180 Mass. 597.

**The Burden of Proof** is on a subsequent mortgagee to show that he did not have notice of an unrecorded mortgage. *Diemer v. Guernsey*, 112 Iowa 393.

**5. Subsequent Mortgagee's Right of Action.** — *Henderson v. Murphree*, 124 Ala. 223; *Johnson v. Anderson*, 60 Kan. 578; *Huellmantel v. Vinton*, 116 Mich. 621. See also *Smith-McCord Dry-Goods Co. v. Burke*, 63 Kan. 740; *McBrayer v. Haynes*, 132 N. Car. 608.

The right of a subsequent mortgagee to have a prior mortgage assigned to him upon payment cannot be doubted. *Williams Bros. Co. v. Hanmer*, 132 Mich. 635, 10 Detroit Leg. N. 43. And if, after a junior mortgagee makes a tender of payment of the senior mortgagee's claim, the senior mortgagee secures the equity of redemption, he will be liable in conversion to the junior mortgagee. *Schmittidiel v. Moore*, 120 Mich. 199.

A junior mortgagee may maintain an action against an officer for the surplus arising upon the sale of the mortgaged property to satisfy the senior mortgagee's claim. *Smith v. Donahoe*, 13 S. Dak. 334.

**Action Against Sheriff.** — Where a junior mortgagee made a valid tender of the amount of a prior incumbrance and statutory fees, which tender was refused, it was held that he could maintain an action for possession as against a sheriff who held the property under foreclosure proceedings by the prior mortgagee. *De Luce v. Root*, 12 S. Dak. 141.

**6. Finkel v. Lepkin**, 62 N. J. L. 580. See also *Iowa Loan Co. v. Kimball Piano Co.*, 124 Iowa 150.

**Conversion.** — *Clendening v. Hawk*, 8 N. Dak. 419.

Where a senior mortgagor under a power of sale exchanged part of the chattels for produce, but converted the produce into cash and so credited it, the junior mortgagor has no grounds for complaint. *Tollerton, etc., Co. v. Anderson*, 108 Iowa 217.

- 1016.** 5. Creditors of the Mortgagor — Must Obtain Lien. — See note 1.  
 Fraudulent Mortgage. — See note 2.
- 1017.** See note 1.  
 Attachment of Mortgagor's Equity. — See note 2.
- 1018.** See note 1.  
 Garnishment of Mortgagee. — See note 2.  
 6. Assignees. — See note 3.

To entitle a subsequent mortgagee to damages for conversion by a prior mortgagee it must appear that the value of the property at the time of conversion exceeded the amount of the prior mortgagee's claim. *Dempster Mill Mfg. Co. v. Wright*, (Neb. 1901) 95 N. W. Rep. 806.

**1016.** 1. Creditors — *United States*. — *In re Antigo Screen Door Co.*, (C. C. A.) 123 Fed. Rep. 256, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1016; *In re Shirley*, (C. C. A.) 112 Fed. Rep. 301. See also *In re Schmitt*, 109 Fed. Rep. 267; *In re Beede*, 126 Fed. Rep. 853.

*California*. — *Lemon v. Wolff*, 121 Cal. 272. See also *Ruggles v. Cannedy*, 127 Cal. 290.

*Colorado*. — *Morse v. Morrison*, 16 Colo. App. 449.

*Kansas*. — See *Baker v. Becker*, 67 Kan. 831.  
*Missouri*. — *Landis v. McDonald*, 88 Mo. App. 335; *Bagley v. Harmon*, 91 Mo. App. 22. See also *Harrison v. South Carthage Min. Co.*, 106 Mo. App. 32.

*Montana*. — See *Stevens v. Curran*, 28 Mont. 366.

*Nebraska*. — *Folsom v. Peru Plow, etc., Co.*, (Neb. 1903) 95 N. W. Rep. 635.

*New Jersey*. — See *Wimpfheimer v. Perrine*, (N. J. 1901) 50 Atl. Rep. 356.

*New York*. — *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178, 73 Am. St. Rep. 678, reversing 13 N. Y. App. Div. 268; *Volckers v. Sturke*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 457; *Robinson v. Kaplan*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 686; *Witherbee v. Taft*, 51 N. Y. App. Div. 87; *Castleman v. Mayer*, 55 N. Y. App. Div. 515, affirmed 168 N. Y. 354; *Russell v. St. Mart*, 83 N. Y. App. Div. 543, reversed 180 N. Y. 355; *Skilto v. Codington*, 86 N. Y. App. Div. 166; *Robinson v. Hawley*, 45 N. Y. App. Div. 287. See also *Crouse v. Schoolcraft*, 51 N. Y. App. Div. 160.

*Ohio*. — *Retzsch v. W. C. Retzsch Printing Co.*, 10 Ohio Cir. Dec. 537, 19 Ohio Cir. Ct. 631.

*Texas*. — *Moore v. Masterson*, 19 Tex. Civ. App. 308; *Eason v. Garrison*, (Tex. Civ. App. 1904) 82 S. W. Rep. 800.

*Wyoming*. — See *Rock Springs First Nat. Bank v. Ludvigsen*, 8 Wyo. 230, 80 Am. St. Rep. 928.

**Creditor at Large**. — See *Campbell v. Richardson*, 6 Okla. 375; *Blumauer v. Clock*, 24 Wash. 596, 85 Am. St. Rep. 966.

According to one decision, a contract creditor may avoid an unrecorded mortgage though he has not a prior judgment. *In re H. G. Andrae Co.*, 117 Fed. Rep. 561 (construing Wisconsin statute).

**2. Fraudulent Mortgage** — *Alabama*. — See *Kidd v. Morris*, 127 Ala. 393.

*Iowa*. — *Diemer v. Guernsey*, 112 Iowa 393.

*Kansas*. — See *Arkansas City Bank v. Swift*, 57 Kan. 460.

*Minnesota*. — *Schneider v. Anderson*, 77 Minn. 124.

*Nebraska*. — *E. R. Godfrey, etc., Co. v. Citizens' Nat. Bank*, 64 Neb. 477. See also *Hol-drege First Nat. Bank v. Johnson*, (Neb. 1903) 94 N. W. Rep. 837.

*New Jersey*. — *Compare Dunham v. Cramer*, 63 N. J. Eq. 151.

*Ohio*. — *Ford v. Miller*, 5 Ohio Dec. 603, 5 Ohio N. P. 512.

**Agreement to Withhold**. — *In re Shirley*, (C. C. A.) 112 Fed. Rep. 301. See also *In re Schmitt*, 109 Fed. Rep. 267; *Keet, etc., Dry Goods Co. v. Brown*, 73 Mo. App. 245; *Tolerton, etc., Co. v. Wayne First Nat. Bank*, 63 Neb. 674; *Wayne First Nat. Bank v. Tolerton*, (Neb. 1903) 97 N. W. Rep. 248; *In re Raymond Bag Co.*, 8 Ohio Dec. 688; *Moore v. Wood*, (Tenn. Ch. 1901) 61 S. W. Rep. 1063.

An agreement to withhold is fraudulent as to creditors relying on appearances of ownership in the mortgagor. *Curtis v. Lewis*, 74 Conn. 367; *Richards v. Jewett*, 118 Iowa 629. But creditors may not complain of an agreement to withhold a mortgage from record if it is actually recorded before their liens have attached. *Carpenter Paper Co. v. News Pub. Co.*, 63 Neb. 59.

**An Agreement to Substitute Other Property**. — See *Block v. Edwards*, 116 Ala. 90; *Blalock v. Strain*, 122 N. Car. 283. But see *Barbin v. Zetlmaier*, 6 Ohio Dec. 188.

An agreement to substitute property for the property mortgaged is invalid as to third parties unless recorded. *Alferitz v. Perkins*, 122 Cal. 391.

**For the Jury**. — *National State Bank v. Sandford Fork, etc., Co.*, 157 Ind. 10; *E. R. Godfrey, etc., Co. v. Citizens' Nat. Bank*, 64 Neb. 477.

**1017.** 1. See *State v. O'Neill*, 151 Mo. 67; *Johnson v. Spauldings*, (Neb. 1901) 95 N. W. Rep. 808.

**2. Attachment of Equity of Redemption**. — *Monmouth Second Nat. Bank v. Gilbert*, 174 Ill. 485, 66 Am. St. Rep. 306; *Locke v. Shreck*, 54 Neb. 472. See also *Burge v. Hunter*, 93 Mo. App. 639.

**1018.** 1. *Galde v. Forsyth*, 72 Minn. 248.

**2. Garnishment**. — *Meyer v. Miller*, 51 Neb. 620. See also *Wingrove v. Haines*, 7 Kan. App. 269.

**3. Assignment** — *United States* — See *State Nat. Bank v. Cudahy Packing Co.*, 126 Fed. Rep. 543.

*Alabama*. — *Penney v. Miller*, 134 Ala. 593.  
*Illinois*. — *Kreider v. Fanning*, 74 Ill. App. 230. See also *Anderson v. South Chicago Brewing Co.*, 173 Ill. 213.

*Kansas*. — *Sehrt-Patterson Milling Co. v. Le-*

- 1018.** If the Mortgage Note Is Negotiable. — See note 5.  
Assignee for the Benefit of Creditors. — See note 7.

- 1019.** See note 1.

**VIII. DISCHARGE OF THE MORTGAGE — 1. Payment.** — See note 2.  
**One Not a Party May Pay the Debt.** — See note 3.  
**Part Payment.** — See note 4.

van, 9 Kan. App. 523. See also City Nat. Bank v. Gunter, 67 Kan. 227.

Missouri. — Rice v. Davis, 99 Mo. App. 636.

New York. — See David Stevenson Brewing Co. v. Iba, 155 N. Y. 224.

Ohio. — Meyerfeld v. Strube, 9 Ohio Dec. 514.

Oklahoma. — Miller v. Campbell Commission Co., 13 Okla. 75.

Texas. — Hall v. Keating Implement, etc., Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 1054. See also Randolph v. Brown, 21 Tex. Civ. App. 617.

Vermont. — McCloud v. Wakefield, 70 Vt. 558.

The assignment of a note will not revive a mortgage given to secure it which has been satisfied. Ross v. Aber, 64 Kan. 885, 67 Pac. Rep. 457.

**No Delivery Necessary.** — Tweto v. Horton, 90 Minn. 451.

**1018. 5. When Mortgage Note Negotiable.** — Buckingham v. Dake, (C. C. A.) 112 Fed. Rep. 258; Swift v. Washington Bank, (C. C. A.) 114 Fed. Rep. 643. See also State Nat. Bank v. Cudahy Packing Co., 126 Fed. Rep. 543; Woodland Bank v. Duncan, 117 Cal. 412; Crocker v. Burns, 13 Colo. App. 54; Mexico First Nat. Bank v. Ragsdale, 158 Mo. 668, 81 Am. St. Rep. 332; Tilden v. Stilson, 49 Neb. 382; Satterthwaite v. Ellis, 129 N. Car. 67; Kerfoot v. State Bank, 14 Okla. 104. But see Waller v. Staples, 107 Iowa 738.

Where Several Notes Are Secured by a mortgage, if a part of them be assigned, the assigned notes will have precedence in the security. Dilley v. Freedman, 25 Tex. Civ. App. 39.

**Form of Note Secured by Mortgage.** — Under an Illinois statute (Act Ill. June 21, 1895, § 1, Starr & Curt. Annot. Stat. Ill. 1896, c. 95, par. 26) a note secured by a mortgage must so state on its face or the mortgage is rendered void. Thompson v. Akin, 81 Ill. App. 62, reversed 181 Ill. 448.

But where the note has not been assigned, it has been held under the above statute that the mortgage is not void for failure in the note to state that it is secured by mortgage. Butler v. Colwell, 89 Ill. App. 133; Smith v. Schey, 101 Ill. App. 223; Central School Supply House v. Hirschy, 106 Ill. App. 258; Hogan v. Akin, 181 Ill. 448. See also Sellers v. Thomas, 185 Ill. 384.

**7. Assignments for Creditors.** — *In re H. G. Andrae Co.*, 117 Fed. Rep. 561; El Reno First Nat. Bank v. Saylor, 4 Okla. 408; Blair v. Ritchie, 72 Vt. 311. But see Matter of Windhorst, 107 Iowa 58.

A chattel mortgage filed on the day before an assignment for creditors has been held to be valid as against creditors, where it was executed in good faith. Davis v. Turner, (C. C. A.) 120 Fed. Rep. 605.

**1019. 1.** Bayne v. Brewer Pottery Co., 90

Fed. Rep. 754; *In re H. G. Andrae Co.*, 117 Fed. Rep. 561; Ruggles v. Cannedy, 127 Cal. 290; Morris v. Ellis, 16 Ind. App. 679. See also Perkins v. Maier, etc., Brewery, 133 Cal. 496; Harrison v. J. J. Warren Co., 183 Mass. 123; McFarlan Carriage Co. v. Wells, 99 Mo. App. 641; Wimpfheimer v. Perrine, (N. J. 1901) 50 Atl. Rep. 356; Watson v. Rowley, 63 N. J. Eq. 195; Eason v. Garrison, (Tex. Civ. App. 1904) 82 S. W. Rep. 800.

An assignment of the debt passes the right of the assigning creditor to have the debtor's mortgage set aside for failure to record. Wimpfheimer v. Perrine, 61 N. J. Eq. 126.

**Receiver.** — Watson v. Dealy, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 544; Brunner v. Cook, etc., Co., 89 N. Y. App. Div. 406, reversed 180 N. Y. 188. See also *In re Ball*, 123 Fed. Rep. 164. Compare Stephens v. Meriden Britannia Co., 160 N. Y. 178, 73 Am. St. Rep. 678, reversing 13 N. Y. App. Div. 268.

As to mortgages void for fraud as distinguished from those void by statute see *In re Beede*, 126 Fed. Rep. 853; Farmers' L. & T. Co. v. Baker, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 387; Skilton v. Codington, 86 N. Y. App. Div. 166.

*In Cincinnati Leaf Tobacco Warehouse Co. v. Combs*, 109 Ky. 21, an assignee for the benefit of creditors was held to be subject to the same equities as existed between the assignor and the mortgagee.

**2. Payment.** — Loggie v. Chandler, 95 Me. 220; Swinney v. Gouty, 83 Mo. App. 549.

Where a bill of sale to the mortgagee, covering the mortgaged property, contained misrepresentations as to the unencumbered condition of the property, it was held not to amount to payment and discharge of the mortgage. Hamilton v. Seeger, 75 Ill. App. 599.

**Payment to Mortgagee After Transfer of Note.** — Where a note secured by a mortgage was transferred, and thereafter, without knowledge of the transfer, the mortgagor's vendee paid the debt to the original mortgagee, it was held that such payment did not, in the absence of express agency between the holder of the note and the mortgagee, affect the former's right to collect the indebtedness. Swift v. Washington Bank, (C. C. A.) 114 Fed. Rep. 643. See further the title MORTGAGES, 1047. 7.

**3. By Whom Payment to Be Made.** — Baumgartner v. Vollmer, 5 Idaho 340; Canfield v. Moore, 16 Tex. Civ. App. 472. See also Gottstein v. Harrington, 25 Wash. 508.

**Where an Attaching Creditor Pays a mortgage on the property attached, equity will preserve the lien to prevent injustice to the creditor in case the attachment fails for some defect.** Moore v. Calvert, 8 Okla. 358. But see Dix v. Smith, 9 Okla. 124.

**4. Part Payment Does Not Discharge Lien.** — Stuckman v. Roose, 147 Ind. 402. See also

**1019.** Default — Foreclosure. — See notes 5, 6.

**1020.** 2. Tender — *a.* BEFORE FORFEITURE. — See note 1.

*b.* AFTER FORFEITURE — (1) *In General.* — See notes 3, 5, 6.

**1021.** (2) *Conversion by Mortgagee.* — See note 1.

(3) *Tender by Purchaser.* — See note 2.

3. Other Methods of Discharge — *a.* IN GENERAL. — See notes

3, 4, 5.

*b.* STATUTE OF LIMITATIONS. — See note 6.

**1022.** *c.* TAKING SECOND MORTGAGE. — See notes 1, 2. \*

**CHATTELS.** — See note 3.

Hooper *v.* Birchfield, 115 Ala. 226; Webb *v.* McCain, 2 Indian Ter. 305.

**Interest Must Be Paid for the Full Term of the Loan,** though the debt is discharged before maturity. And if the principal and interest are payable in regular instalments, so that the average date of maturity can be ascertained by calculation, interest must be paid up to such date. *Re Davies*, 77 L. T. N. S. 567.

**1019. 5. Default.** — See *Groh v. Feldman*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 303.

**6. Foreclosure.** — See *Babcock v. Wells*, 25 R. I. 23.

**1020. 1. Tender — Before Forfeiture.** — See *Wienskawski v. Wisner*, 114 Mich. 271.

A mortgage is not entitled to make his tender conditional upon the mortgagee's returning the goods to their situs when mortgaged. *Marsden v. Walsh*, 24 R. I. 91.

**3. At Common Law.** — *Alexander v. Meyenberg*, 112 Ill. App. 223; *Darrow v. Wendelstadt*, 43 N. Y. App. Div. 426. See also *Loggie v. Chandler*, 95 Me. 220.

**5. Tender Before Possession Taken.** — *Barbee v. Scoggins*, 121 N. Car. 135. See also *Lowery v. Gregory*, 60 S. Car. 149.

**6. Payment into Court.** — See *Bernheimer, etc., Brewing Co. v. H. Koehler Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 377.

In *Alabama* a tender of payment will not discharge the mortgage unless the tender is so maintained that the mortgagee may accept at pleasure or the money is deposited with the court. *Hamaker v. Bynum*, 137 Ala. 391.

**1021. 1. Conversion by Mortgagee.** — See *Reebie v. Brackett*, 109 Ill. App. 631.

**Attachment.** — The mortgagor is not relieved of his duty to make a tender by the fact that attachments have been levied on the property at the instigation of the mortgagee. *Marsden v. Walsh*, 24 R. I. 91.

**2. Tender by Purchaser at Execution Sale.** — See *Summers v. Heard*, 66 Ark. 550; *Moore v. Calvert*, 8 Okla. 358; *Plunkett v. Hanschka*, 14 S. Dak. 454; *Kelly v. Wimbish*, (Tex. Civ. App. 1901) 65 S. W. Rep. 386.

A mortgage is not satisfied by the fact that an execution creditor purchases the mortgaged property at a sheriff's sale and subsequently purchases the mortgage. *Milliken v. Condon*, 7 Kan. App. 450.

**3. Mistake.** — Where a mortgage was marked "paid" by mistake, and before the mortgagor or his assignee had knowledge thereof the cancellation was revoked, it was held that the mortgagee was not estopped to prove such mistake. *Frost v. George*, 181 Mass. 271.

**4. Agreement as Discharge.** — *McCullars v. Harkness*, 113 Ala. 250; *Fields v. Copeland*, 121 Ala. 644. See also *Hoffman v. Knight*, 127 Ala. 149; *California Winemakers' Corp. v. Sciaroni*, 139 Cal. 277; *Mains v. Des Moines Nat. Bank*, 113 Iowa 395; *Edmission v. Drumm-Flato Commission Co.*, 13 Okla. 440.

**5. Disposal of Property.** — *Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 899; *Antigo Bank v. Ryan*, 105 Wis. 37.

**6. Statute of Limitations.** — *Casey v. Gibbons*, 136 Cal. 368; *Arlington Mill, etc., Co. v. Yates*, 57 Neb. 286; *Yarnal v. Hupp*, (Neb. 1902) 90 N. W. Rep. 645.

**1022. 1. Taking a Second Mortgage.** — *Alferitz v. Ingalls*, 83 Fed. Rep. 964; *Hobkirk v. Walrich*, 14 Colo. App. 181. See also *Willows v. Rosenstien*, 5 Idaho 305; *Vollmer v. Reid*, (Idaho 1904) 77 Pac. Rep. 325; *Stoner v. Good*, 81 Ill. App. 405; *Fisher v. Bradshaw*, 4 Ont. L. Rep. 162.

**New Note.** — *Meeker v. Waldron*, 62 Neb. 689; *Burns v. Staacke*, (Tex. Civ. App. 1899) 53 S. W. Rep. 354; *Mayers v. McNeese*, (Tex. Civ. App. 1902) 71 S. W. Rep. 68.

**Taking Third Party's Note.** — *Johnson v. Skowhegan Sav. Bank*, 93 Me. 516.

**2. New Mortgage on Additional Property.** — See *Cox v. Beck*, 83 Fed. Rep. 269; *Kingman v. Glover*, 67 Ill. App. 481.

**3. Dogs** — *State v. Langford*, 55 S. Car. 322; *Hamby v. Samson*, 105 Iowa 112.

**Choses in Action.** — The term "goods and chattels" does not include choses in action, but only personal property which is visible, tangible, and movable. *Young v. Upson*, 115 Fed. Rep. 195; *National Hudson River Bank v. Chaskin*, 28 N. Y. App. Div. 315; *Cowen v. Brownsville First Nat. Bank*, 94 Tex. 547; *Richmond First Nat. Bank v. Holland*, 99 Va. 495.

The term "goods and chattels" includes personal property, choses in action, and chattels real. The right to an office is neither personal property, nor a chose in action, nor chattels real, in the sense used at law. *State v. Moores*, 56 Neb. 9.

**A Diamond Ring** is within the definition of a chattel. *Salabes v. Castelberg*, 98 Md. 645.

**A Horse** is a chattel within a statute against larceny. *McVeigh v. Ripley*, 77 Conn. 136.

**A Mortgage** for unpaid purchase money on land specifically devised will pass under a subsequent bequest of chattels and movables. *Re McMillan*, 4 Ont. L. Rep. 415.

**Growing Crops.** — *Swafford v. Spratt*, 93 Mo. App. 631.



- 1025.** *Ejusdem Generis.* — See note 1.  
**CHEAT.** — See note 3.

**A Liquor Tax Certificate** is not a *chattel* under the *New York* statute. *Niles v. Mathusa*, 162 N. Y. 546; *McNeeley v. Welz*, 166 N. Y. 124.

**1025.** 1. See *Re McMillan*, 4 Ont. L. Rep. 415.

3. *State v. Renick*, 33 Oregon 586, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1025.

**Examples.** — Where a man under a fictitious name, by falsely representing himself as unmarried obtained money from an unmarried woman under promise of marriage, it was held that he was not guilty of obtaining money under false pretenses, as he was not himself the false token required by the *Oregon* statute defining such offense. *State v. Renick*, 33 Oregon 584.

## CHECKS.

By M. G. BEAMAN.

**1029.** I. **DEFINITION.** — See note 1.

**1030.** Drawn by One Bank upon Another. — See note 1.

II. **COMPARED WITH BILLS OF EXCHANGE.** — See note 2.

Negotiability. — See note 3.

Distinguished from Bills. — See note 4.

**1031.** The Distinguishing Characteristics of Checks. — See notes 2, 3.

III. **FORM AND ESSENTIAL PARTS** — 1. **General Rule.** — See note 8.

**1032.** 2. **Date** — *b.* **POST-DATED CHECKS.** — See note 3.

**1035.** 3. **Payee** — A Check Must Name or Indicate a Payee. — See note 1.

Fictitious Payee. — See note 2.

Maker's Intention. — See note 3.

**1029.** 1. **Definition.** — *Martin v. Martin*, 202 Ill. 382, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029.

**A Cashier's Check** is a bill of exchange, drawn by the bank upon itself, and is accepted by the act of issuance. *Drinkall v. Movius State Bank*, 11 N. Dak. 10, 95 Am. St. Rep. 693.

**1030.** 1. *Garthwaite v. Tulare Bank*, 134 Cal. 237.

2. **Compared with Bills of Exchange.** — See *Leipschitz v. Montreal St. R. Co.*, 9 Quebec Q. B. 518.

"A check is in form and nature a species of bill of exchange, and is *pro tanto* governed by the same rules." *Neal v. Coburn*, 92 Me. 139, 69 Am. St. Rep. 495.

By the Canadian Bills of Exchange Act the obligation of the drawer of a check differs considerably from that of the drawer of a bill of exchange, especially as to presentment and dishonor. *De Serres v. Euard*, 17 Quebec Super. Ct. 199.

**Missouri Statute.** — A check is not a bill of exchange within Rev. Stat. Mo. (1899), § 724. *Hays v. Lathrop Bank*, 75 Mo. App. 211.

**Bill of Exchange Payable on Demand.** — See *State Bank v. Weiss*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 93.

3. **Negotiability.** — *Farmer's Nat. Bank v. Dreyfus*, 82 Mo. App. 399; *Wilder v. Wolf*, 4 Ont. L. Rep. 451.

4. See *Bowen v. Needles Nat. Bank*, 87 Fed. Rep. 430, *affirmed* (C. C. A.) 94 Fed. Rep. 925.

**1031.** 2. **Payment.** — *Weiland v. State Nat. Bank*, 112 Ky. 310.

3. **Days of Grace.** — *Bowen v. Needles Nat. Bank*, 87 Fed. Rep. 430, *affirmed* (C. C. A.)

94 Fed. Rep. 925; *Industrial Bank v. Bowes*, 165 Ill. 70, 56 Am. St. Rep. 228.

8. **The Words "Against Cheque,"** written on the instrument, will not render it nonnegotiable. *Glen v. Semple*, Sc. Ct. of Sess. 3 F. 1134.

**1032.** 3. **Post-dated Checks** — **Definition.** — A post-dated check is one "which is knowingly dated in the future, and is thus distinguished from a check drawn on the day it is given. If there is money on deposit when it is presented, it must be paid." *Merchants', etc., Bank v. Clifton Mfg. Co.*, 56 S. Car. 320.

**1035.** 1. **Drawing Line Through Blank Space** — **Check Defective.** — *Gordon v. Lansing State Sav. Bank*, 133 Mich. 143.

**Payee Dead** — **Check Void.** — *U. S. v. Coffeyville First Nat. Bank*, 82 Fed. Rep. 410.

2. **Fictitious Payee.** — *Clutton v. Attenborough*, (1897) A. C. 90; *E. S. Karoly Electrical Constr. Co. v. Globe Sav. Bank*, 64 Ill. App. 225.

3. **Intention of Maker.** — *Hastings First Nat. Bank v. Farmers', etc., Bank*, 56 Neb. 149; *Egner v. Corn Exch. Bank*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 552. But see *Meyer v. Indiana Nat. Bank*, 27 Ind. App. 354; *Hoffman v. American Exch. Nat. Bank*, (Neb. 1901) 96 N. W. Rep. 112; *Land Title, etc., Co. v. Northwestern Nat. Bank*, 196 Pa. St. 230, 79 Am. St. Rep. 717.

**Where It Is Intended that Payment Be Made to a Payee Known to Exist** his indorsement is necessary. *Tolman v. American Nat. Bank*, 22 R. I. 462, 84 Am. St. Rep. 850; *Western Union Tel. Co. v. Bi-Metallic Bank*, 17 Colo. App. 229.

**Payee Real Person, but Not Same Person as Drawer Had in Mind** — **Payment Good.** — *Sherman v. Corn Exch. Bank*, 91 N. Y. App. Div. 84.

**1036.** Fraud. — See note 1.

4. Drawee. — See note 4.

**1037.** 5. Signature. — See note 3.

**1040.** V. PRESENTMENT AND NOTICE OF DISHONOR — 1. Necessity Of — General Rule. — See note 2.

**1041.** 2. Reasonable Time. — See note 1.

The Requirement as to the Time of Presentment. — See note 2.

When Question for Jury. — See note 3.

When Question for Court. — See note 4.

**1042.** 3. Established Rules — Where Check Is on Local Bank. — See note 2.

Where Check Is on Distant Bank. — See note 3.

**1043.** If the Check Is Received After Banking Hours. — See note 1.

Sending by Circuitous Route. — See note 2.

When Deposited for Collection. — See note 4.

**1044.** 4. Failure to Make Due Presentment — a. EFFECT AS TO DRAWER. — See note 3.

**1045.** Burden of Proof. — See note 1.

**1036.** 1. Payee Dead. — States *v.* Montrose First Nat. Bank, 17 Pa. Super. Ct. 256, *affirmed* 203 Pa. St. 69.

4. An Order on the Treasurer of a Company by its paymaster, made payable at three separate banks, is not a check on any of these banks, but on the company. Chicago, etc., R. Co. *v.* Burns, 61 Neb. 793.

**1037.** 3. No Authority in Bank to Pay Checks Not Signed According to Model Left with It. — Shoe Lasting Mach. Co. *v.* Western Nat. Bank, 70 N. Y. App. Div. 588.

**1040.** 2. General Rule as to Necessity of Presentment and Notice. — Tomlin *v.* Thornton, 99 Ga. 585; Farmers Nat. Bank *v.* Dreyfus, 82 Mo. App. 399; Greeley *v.* Cascade County, 22 Mont. 580, holding that the rule applies to a check given by a county treasurer to pay a claim against the county; Cuminsky *v.* Kleiner, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 181, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1040.

**1041.** 1. What Is Reasonable Time. — Watt *v.* Gans, 114 Ala. 264, 62 Am. St. Rep. 99; Haggerty *v.* Baldwin, 131 Mich. 187, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1041. See also Stockton *v.* Montgomery, 9 Kan. App. 104. As to the Newfoundland statute, see Gaden *v.* Newfoundland Sav. Bank, (1899) A. C. 281.

2. Haggerty *v.* Baldwin, 131 Mich. 187, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1041.

3. When Question for Jury. — Tomlin *v.* Thornton, 99 Ga. 585. See also Farmers' Nat. Bank *v.* Dreyfus, 82 Mo. App. 399.

4. When Question for Court. — Gregg *v.* Beane, 69 Vt. 22.

**1042.** 2. Where Check Is on Local Bank. — Morris *v.* Eufaula Nat. Bank, 122 Ala. 580, 82 Am. St. Rep. 95; Tomlin *v.* Thornton, 99 Ga. 585; Brown *v.* Schintz, 202 Ill. 509, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1042, and *affirming* 98 Ill. App. 452; Edmisten *v.* Herpolzheimer, (Neb. 1901) 92 N. W. Rep. 138; Murphy *v.* Levy, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 147.

Sunday Intervening. — See Haggerty *v.* Baldwin, 131 Mich. 187.

Knowledge that the Drawee Is Likely to Suspend

is held in *Illinois* not to require additional diligence in presentment. Northwestern Iron, etc., Co. *v.* National Bank, 70 Ill. App. 245. But in *Missouri* it is held that while generally an agent receiving a check on a local bank for collection may delay presenting it until the next day, yet if he knows that the drawee bank is in failing condition it is his duty to make presentment at once and not wait for the time that the law would ordinarily allow. Herider *v.* Phoenix Loan Assoc., 82 Mo. App. 427.

3. Where Check Is on Distant Bank. — Watt *v.* Gans, 114 Ala. 264, 62 Am. St. Rep. 99; Hamlin *v.* Simpson, 105 Iowa 125; Haggerty *v.* Baldwin, 131 Mich. 187, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1042; Farmers' Nat. Bank *v.* Dreyfus, 82 Mo. App. 399; Gregg *v.* Beane, 69 Vt. 22.

**1043.** 1. Check Received After Banking Hours. — See Brown *v.* Schintz, 98 Ill. App. 452, *affirmed* 202 Ill. 509. *Contra*, Edmisten *v.* Herpolzheimer, (Neb. 1901) 92 N. W. Rep. 138.

2. Sending by Circuitous Route. — Watt *v.* Gans, 114 Ala. 264, 62 Am. St. Rep. 99; Herider *v.* Phoenix Loan Assoc., 82 Mo. App. 427; Williams *v.* Brown, 53 N. Y. App. Div. 486; Gregg *v.* Beane, 69 Vt. 22.

4. Deposit for Collection. — Watt *v.* Gans, 114 Ala. 264, 62 Am. St. Rep. 99; Gregg *v.* Beane, 69 Vt. 22.

**1044.** 3. Effect of Laches as to Drawer. — Bowen *v.* Needles Nat. Bank, 87 Fed. Rep. 430, *affirmed* (C. C. A.) 94 Fed. Rep. 925; Andrus *v.* Bradley, 102 Fed. Rep. 64; Garthwaite *v.* Tulare Bank, 134 Cal. 237; Merritt *v.* Gate City Nat. Bank, 100 Ga. 147; Brown *v.* Schintz, 202 Ill. 509, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1044, and *affirming* 98 Ill. App. 452; Thom *v.* Sinsheimer, 66 Ill. App. 555; Fritz *v.* Kennedy, 119 Iowa 628; Carson *v.* Fincher, (Mich. 1904) 101 N. W. Rep. 844; Long *v.* Eckert, 73 Mo. App. 445; Herider *v.* Phoenix Loan Assoc., 82 Mo. App. 427; Murphy *v.* Levy, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 147. See also Morris *v.* Eufaula Nat. Bank, 122 Ala. 580, 82 Am. St. Rep. 95; Williams *v.* Brown, 82 N. Y. App. Div. 353.

**1045.** 1. Burden of Proof as to Loss. — Watt

**1045.** *b. EFFECT AS TO INDORSER.* — See note 2.

**1046.** *5. When Presentment and Notice Excused* — *a. GENERAL RULES: WHEN THERE ARE NO FUNDS.* — See note 2.

**1047.** *Reasonable Grounds for Expecting Check to Be Honored.* — See note 1.  
*Other Instances.* — See note 3.

**1049.** *6. Promise to Pay After Laches.* — See note 3.

**1050.** *9. When Overdue.* — See note 3.

**1052.** *VI. CERTIFIED CHECKS — 2. Who May Certify Checks.* — See note 4.  
*Custom.* — See note 5.

*Where There Are No Funds.* — See note 7.

**1053.** *3. Effect of Certification* — *a. IN GENERAL* — *Equivalent to Acceptance of Bill of Exchange.* — See note 2.

**1054.** See note 1.

*Genuineness of Body of Check.* — See note 4.

**1055.** *b. LIABILITY OF BANK.* — See note 1.

**1056.** *Transfer Without Indorsement.* — See note 3.

*c. LIABILITY OF PARTIES* — *But if the Payee or Holder Presents the Check.*

— See note 6.

*v. Gans, 114 Ala. 264, 62 Am. St. Rep. 99; Hamlin v. Simpson, 105 Iowa 125; Nelson v. Kastle, 105 Mo. App. 187; Long v. Eckert, 73 Mo. App. 445.*

**1045.** *2. Indorser Discharged.* — *Martin v. Home Bank, 160 N. Y. 190; Williams v. Brown, 53 N. Y. App. Div. 486. See also Brown v. Schintz, 202 Ill. 509, per Magruder, C. J., dissenting, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1045.*

**1046.** *2. No Funds in Hands of Drawee.* — *Industrial Bank v. Bowes, 165 Ill. 70, 56 Am. St. Rep. 228; Thom v. Sinsheimer, 66 Ill. App. 555; Carson v. Fincher, (Mich. 1904) 101 N. W. Rep. 844; Portland First Nat. Bank v. Linn County Nat. Bank, 30 Oregon 296; Dion v. Lachance, 14 Quebec Super. Ct. 77.*

**1047.** *1. Reasonable Belief that Check Would Be Paid.* — *Hamlin v. Simpson, 105 Iowa 125; Carson v. Fincher, 129 Mich. 687, 95 Am. St. Rep. 449.*

**3. Check Raised by Forgery.** — *Where a check is fraudulently raised by the drawer after certification, he is not entitled to notice of dishonor. Imperial Bank v. Hamilton Bank, (1903) A. C. 49.*

**Possession of the Check by the Drawee excuses physical presentment.** *Garthwaite v. Tular Bank, 134 Cal. 237.*

**Laches of Holder May Be Waived.** — *Rockwell v. Dye, 42 N. Y. App. Div. 520.*

**1049.** *3. Promise to Pay After Laches.* — *Murphy v. Levy, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 147.*

**1050.** *3. When Considered Overdue.* — *Farmers' Nat. Bank v. Dreyfus, 82 Mo. App. 399.*

**Six Days, During the Christmas Holidays,** has been held not to be improper delay. *Merchant's, etc., Bank v. Clifton Mfg. Co., 56 S. Car. 320.*

**1052.** *4. Contra,* *Muth v. St. Louis Trust Co., 94 Mo. App. 94.*

**5. Custom.** — See *Muth v. St. Louis Trust Co., 88 Mo. App. 596, 94 Mo. App. 94.*

**7. None but an Innocent Holder Can Hold the Bank** where a check is certified without funds. *Rankin v. Colonial Bank, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 227, affirmed 60 N. Y. App. Div. 629.*

**1053.** *2. Certification Not Complete until Communicated to Holder.* — *Guthrie Nat. Bank v. Gill, 6 Okla. 560.*

**1054.** *1. Gaden v. Newfoundland Sav. Bank, (1899) A. C. 281; Imperial Bank v. Hamilton Bank, (1903) A. C. 49; Continental Nat. Bank v. Metropolitan Nat. Bank, 107 Ill. App. 455; Poess v. Twelfth Ward Bank, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 45.*

**4. Genuineness of Body of Check.** — *Continental Nat. Bank v. Metropolitan Nat. Bank, 107 Ill. App. 455; Continental Nat. Bank v. Tradesmen's Nat. Bank, 173 N. Y. 272.*

**Negligence Immaterial.** — *Imperial Bank v. Hamilton Bank, (1903) A. C. 49.*

**1055.** *1. Liability of Bank upon Certification.* — *Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 93 Am. St. Rep. 113; Wright v. MacCarty, 92 Ill. App. 120; Strauss v. American Exch. Nat. Bank, 72 Ill. App. 314; Muth v. St. Louis Trust Co., 88 Mo. App. 596; Meuer v. Phenix Nat. Bank, 94 N. Y. App. Div. 331, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1055; Herrmann Furniture, etc., Works v. German Exch. Bank, (Supm. Ct. App. T.) 87 N. Y. Supp. 462; Central Guarantee Trust, etc., Co. v. White, 206 Pa. St. 611. See also American Trust, etc., Bank v. Crowe, 82 Ill. App. 537; Moore v. Riverside Bank, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 720.*

**Certification by Mistake — Revocation Of.** — *Bowen v. Needles Nat. Bank, 87 Fed. Rep. 430, affirmed (C. C. A.) 94 Fed. Rep. 925; Dillaway v. Northwestern Nat. Bank, 82 Ill. App. 71. See also Rankin v. Colonial Bank, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 227, affirmed 60 N. Y. App. Div. 629.*

**Check Marked "Good" — No Laches from Delay in Demanding Payment.** — *Muth v. St. Louis Trust Co., 88 Mo. App. 596.*

**Bank Liable to Bona Fide Holder of Stolen Certified Check.** — *Poess v. Twelfth Ward Bank, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 45.*

**1056.** *3. Meuer v. Phenix Nat. Bank, 94 N. Y. App. Div. 331.*

**Bank May Demand Proof that Holder Is Purchaser for Value.** — *Meuer v. Phenix Nat. Bank, 87 N. Y. App. Div. 281.*

**6. Certification by Holder — Drawer Released,**

**1057. VII. PAYMENT — 1. Order of Payment.** — See note 1.

**2. Time Within Which Payment Should Be Made.** — See note 2.

**1059. 3. Mode of Payment** — Payment under Mistake — Liability of Payee. — See note 3.

**VIII. WRONGFUL DISHONOR — 1. Liability of Bank to Depositor —**

**a. GENERAL RULE.** — See note 4.

**1060. b. MEASURE OF DAMAGES.** — See note 1.

**1061.** See note 1.

**2. Liability of Bank to Holder — a. LIABILITY DENIED — Grounds of the Doctrine.** — See note 2.

**1062.** See note 1.

**1063.** See note 1.

**1065. Check for Amount Greater than Deposit — Actual Balance.** — See note 1.

**b. LIABILITY AFFIRMED — The Reasons for the View.** — See notes 2, 3.

— *Wright v. MacCarty*, 92 Ill. App. 120; *Meuer v. Phenix Nat. Bank*, 94 N. Y. App. Div. 331; *Banque Jacques-Cartier v. Corporation de Limoilou*, 17 Quebec Super. Ct. 211; *Strauss v. American Exch. Nat. Bank*, 72 Ill. App. 314. See also *Tomlinson v. National German-American Bank*, 73 Minn. 117.

**1057. 1. Should Be Paid in Order of Presentation.** — *Jacobson v. Bank of Commerce*, 66 Ill. App. 470; *Gilliam v. Merchants' Nat. Bank*, 70 Ill. App. 592. See also *Nehawka Bank v. Ingersoll*, (Neb. 1902) 89 N. W. Rep. 618.

**2. Reasonable Time for Examination of Accounts.** — *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 61 Am. St. Rep. 550.

**Check Not Due until Payment Demanded.** — *Petrue v. Wakem*, 99 Ill. App. 463; *Wright v. MacCarty*, 92 Ill. App. 120; *Ft. Dearborn Nat. Bank v. Wyman*, 80 Ill. App. 150, reversed 181 Ill. 279, 72 Am. St. Rep. 259; *Riverside Bank v. Woodhaven Junction Land Co.*, 34 N. Y. App. Div. 359.

**1059. 3. National Bank v. Berrall, 70 N. J. L. 757.**

**4. General Rule as to Bank's Undertaking.** — *Hanna v. Drovers' Nat. Bank*, 194 Ill. 252; *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1059. See also *Nehawka Bank v. Ingersoll*, (Neb. 1902) 89 N. W. Rep. 618.

**Action May Be Either Tort or Contract.** — *T. B. Clark Co. v. Mt. Morris Bank*, 85 N. Y. App. Div. 362, affirmed 181 N. Y. 533.

**Bank Not Liable Unless Deposits Exceed Debts Due from Depositor.** — *Roe v. Versailles Bank*, 167 Mo. 406; *Owen v. American Nat. Bank*, (Tex. Civ. App. 1904) 81 S. W. Rep. 988.

**The Bank Must Notify the Depositor if it applies funds on deposit to the payment of debts due from him.** *Callahan v. Anderson Bank*, 69 S. Car. 374.

**1060. 1. Measure of Damages.** — *Fleming v. New Zealand Bank*, (1900) A. C. 577; *American Nat. Bank v. Morey*, 113 Ky. 861, 101 Am. St. Rep. 379, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; *Greenwood First Nat. Bank v. Railsback*, 58 Neb. 248; *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 80 Am. St. Rep. 857.

**Punitive Damages if Refusal Malicious.** —

*Davis v. Standard Nat. Bank*, 50 N. Y. App. Div. 210.

**1061. 1. Nominal Damages.** — *Hutchinson First Nat. Bank v. Kansas Grain Co.*, 60 Kan. 30; *T. B. Clark Co. v. Mt. Morris Bank*, 85 N. Y. App. Div. 362, affirmed 181 N. Y. 533. See also *Kleopfer v. Herington First Nat. Bank*, 65 Kan. 774.

**2. Want of Privity.** — *J. M. Houston Grocer Co. v. Farmers Bank*, 71 Mo. App. 132; *National Bank v. Berrall*, 70 N. J. L. 757; *Perry v. Smithfield Bank*, 131 N. Car. 117.

**The Wisconsin Negotiable Instruments Law**, Laws Wis. 1899, c. 356, §§ 1684, 1685, provides that a bank shall not be liable to the holder of a check unless and until it accepts or certifies it. *Raesser v. National Exch. Bank*, 112 Wis. 591, 88 Am. St. Rep. 979.

**1062. 1. No Assignment.** — *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19; *State v. Bank of Commerce*, 49 La. Ann. 1060; *Martin v. Home Bank*, 160 N. Y. 190; *Perry v. Smithfield Bank*, 131 N. Car. 117; *New York L. Ins. Co. v. Patterson*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1058.

**1063. 1. Double Action.** — *Perry v. Smithfield Bank*, 131 N. Car. 117.

**1065. 1. Jacobson v. Bank of Commerce**, 66 Ill. App. 470; *Henderson v. U. S. National Bank*, 59 Neb. 280.

**2. Implied Contract.** — *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 63 Am. St. Rep. 270; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113; *Bloom v. Winthrop State Bank*, 121 Iowa 101; *Falls City State Bank v. Wehrle*, (Neb. 1903) 93 N. W. Rep. 994; *Turner v. Hot Springs Nat. Bank*, (S. Dak. 1904) 101 N. W. Rep. 348.

**Liability of Bank May Result from Acts Amounting to Estoppel.** — *Rostad v. Union Bank*, 85 Minn. 313.

**3. Assignment — Illinois.** — *Du Quoin First Nat. Bank v. Keith*, 183 Ill. 475; *Niblack v. Park Nat. Bank*, 169 Ill. 517, 61 Am. St. Rep. 203; *Brown v. Schintz*, 202 Ill. 509, affirming 98 Ill. App. 452; *Ft. Dearborn Nat. Bank v. Wyman*, 80 Ill. App. 150, reversed 181 Ill. 279, 72 Am. St. Rep. 259; *Jacobson v. Bank of Commerce*, 66 Ill. App. 470. See also *Petrue v. Wakem*, 99 Ill. App. 463.

**Kentucky.** — *Blades v. Grant County Deposit Bank*, 101 Ky. 163; *Columbia Finance, etc.*,

**1066.** See note 1.

**IX. FORGED CHECKS — 1. Forgery of Signature — a. AS BETWEEN DEPOSITOR AND BANK — Bank Liable.** — See note 3.

**1067.** Fault or Negligence of Drawer. — See note 1.

**1068.** Subsequent Conduct of Drawer. — See note 3.

**1069.** Notice of Forgery — Negligence. — See note 1.

**1070.** Duty of Depositor to Examine Pass Book and Vouchers. — See notes 1, 2.

**1071.** b. AS BETWEEN PAYEE AND BANK. — See note 2.

**1073.** Circumstances of Suspicion — Liability of Payee. — See note 1.

**1075.** 3. Alteration of Amount — Raised Checks. — See notes 1, 2, 3.

*Co. v. First Nat. Bank*, 116 Ky. 364. See also *Weiland v. State Nat. Bank*, 112 Ky. 310.

*Nebraska.* — *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803. See also *Henderson v. U. S. National Bank*, 59 Neb. 280.

*South Dakota.* — *Turner v. Hot Springs Nat. Bank*, (S. Dak. 1904) 101 N. W. Rep. 348.

**Garnishment Subsequent to Checks Is Postponed to Checks.** — *Harrington v. Marseilles First Nat. Bank*, 85 Ill. App. 212; *Winchester Bank v. Clark County Nat. Bank*, (Ky. 1899) 51 S. W. Rep. 315.

**Bank Not Liable if Drawer Without Funds on Deposit.** — *Schoonmaker v. Gilmore*, 84 Ill. App. 17, holding that the fact that overdrafts had previously been paid did not alter the rule; *Gilliam v. Merchants' Nat. Bank*, 70 Ill. App. 592; *Merchants' Nat. Bank v. Maple*, 65 Ill. App. 484; *Guthrie Nat. Bank v. Gill*, 6 Okla. 560; *Carley v. Potter's Bank*, (Tenn. Ch. 1897) 46 S. W. Rep. 328.

**1066. 1. Promise to One for Benefit of Another.** — *Chanute Nat. Bank v. Crowell*, 6 Kan. App. 533.

**3. Rule in Case of Forged Checks.** — *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 96 Am. St. Rep. 169; *Kenneth Invest. Co. v. National Bank of Republic*, 103 Mo. App. 613; *Robb v. Pennsylvania L. Ins. Co.*, 186 Pa. St. 456, 65 Am. St. Rep. 868.

**An Alteration of the Name of the Bank is a material alteration, and the bank pays such check at its peril.** *Morris v. Beaumont Nat. Bank*, (Tex. Civ. App. 1904) 83 S. W. Rep. 36.

**1067. 1. The Use of a Rubber Stamp for signing checks with a facsimile of the drawer's written signature has been held not to constitute negligence per se.** *Robb v. Pennsylvania L. Ins. Co.*, 186 Pa. St. 456, 65 Am. St. Rep. 868, two judges dissenting.

**1068. 3. Accepting Proceeds of Forged Check Ratifies Signature.** — *Phoenix Nat. Bank v. Taylor*, 113 Ky. 61.

**1069. 1. Notice of Forgery.** — *Neal v. Lebanon First Nat. Bank*, 26 Ind. App. 503.

**1070. 1. Duty of Depositor to Examine Pass Book and Vouchers.** — *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478; *Kenneth Invest. Co. v. National Bank of Republic*, 96 Mo. App. 125. See also *Neal v. Lebanon First Nat. Bank*, 26 Ind. App. 503.

**Knowledge of Clerk Held to Be Notice to Depositor.** — *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, modifying 60 N. Y. App. Div. 241; *Myers v. Southwestern Nat. Bank*, 193 Pa. St. 1, 74 Am. St. Rep. 672.

**Knowledge of Clerk Not Notice to Depositor if Reasonable Care Used in Selecting Clerk.** — *Kenneth Invest. Co. v. National Bank of Republic*,

103 Mo. App. 613. See also *Shepard, etc., Lumber Co. v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446; *Clark v. National Shoe, etc., Bank*, 32 N. Y. App. Div. 316, affirmed 164 N. Y. 498.

**Damage to Bank Must Be Shown.** — *Kenneth Invest. Co. v. National Bank of Republic*, 96 Mo. App. 125.

**Only Reasonable Diligence Required of Depositor.** — *Harter v. Mechanic's Nat. Bank*, 63 N. J. L. 578, 76 Am. St. Rep. 224.

Ten days has been held to be a reasonable time within which to examine vouchers. *Kenneth Invest. Co. v. National Bank of Republic*, 103 Mo. App. 613.

**No Duty to Examine Returned Checks for Forged Indorsements.** — *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa 530, 63 Am. St. Rep. 399; *United Security L. Ins., etc., Co. v. Central Nat. Bank*, 185 Pa. St. 586; *Pollard v. Wellford*, 99 Tenn. 113.

**No Duty as Matter of Law to Examine Pass Book and Verify Amount Deposited.** — *Kemble v. National Bank*, 94 N. Y. App. Div. 544.

**2. New York Doctrine Settled.** — In *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, the authorities were reviewed and it was held that the drawer owes a duty to examine his vouchers and stubs with reasonable care, but his liability is limited to the damages sustained by the bank by reason of his neglect.

**1071. 2. Forged Check.** — *Marshalltown First Nat. Bank v. Marshalltown State Bank*, 107 Iowa 329, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071; *Neal v. Coburn*, 92 Me. 139, 69 Am. St. Rep. 495; *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 83 Am. St. Rep. 286; *National Bank v. Berrall*, 70 N. J. L. 757, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071; *Belmont First Nat. Bank v. Barnesville First Nat. Bank*, 58 Ohio St. 207, 65 Am. St. Rep. 748, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071; *Iron City Nat. Bank v. Peyton*, 15 Tex. Civ. App. 184; *Moody v. Waco First Nat. Bank*, 19 Tex. Civ. App. 278.

**1073. 1. If the Check Was Taken Without Proper Precautions by the party obtaining the money thereon, the drawee, it has been held, may recover from him.** *Canadian Bank of Commerce v. Bingham*, 30 Wash. 484. See also *Marshalltown First Nat. Bank v. Marshalltown State Bank*, 107 Iowa 329.

**Question of Good Faith.** — Under the *Tennessee* Negotiable Instruments Law the liability of the recipient of the money depends on the good or bad faith in taking the check. *Unaka Nat. Bank v. Butler*, 113 Tenn. 574.

**1075. 1. Raised Checks — Liability of Drawer,**

**1076. 4. Forged Indorsement — a. LIABILITY OF BANK — A Payee of a Check.** — See note 1.

**1077. Other Parties.** — See note 2.

*b. LIABILITY OF DEPOSITOR.* — See note 3.

**1078. c. LIABILITY OF RECIPIENT OF MONEY.** — See notes 1, 2.

**X. LOST CHECKS — Indemnity — Duplicate Check.** — See note 4.

**1079. XI. REVOCATION — 1. Countermand by Drawer.** — See note 1.

— *Critten v. Chemical Nat. Bank*, 171 N. Y. 219; *Clark v. National Shoe, etc., Bank*, 32 N. Y. App. Div. 316, *affirmed* 164 N. Y. 498.

**1075. 2. Drawer Not Bound So to Prepare Check that No One Can Alter It.** — *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, *modifying* 60 N. Y. App. Div. 241.

**Bank Not Liable Where Forger Has Apparent Authority.** — *Champion Ice Mfg., etc., Co. v. American Bonding, etc., Co.*, 115 Ky. 863.

**3. Raised Checks — Liability of Payee.** — *Imperial Bank v. Hamilton Bank*, (1903) A. C. 49; *Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 77 Ill. App. 316, *affirmed* 182 Ill. 367, 74 Am. St. Rep. 180.

**Qualification of Rule.** — In *California* it is held that the drawee cannot recover from the party to whom it has paid money unless such party is the general owner of the check. *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 96 Am. St. Rep. 169.

**Drawee Cannot Recover When Negligent.** — *Continental Nat. Bank v. Tradesmen's Nat. Bank*, 173 N. Y. 272.

**Demand Must Be Made in Reasonable Time.** — *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455.

**1076. 1. Contra.** — *Chicago First Nat. Bank v. Pease*, 168 Ill. 40; *Henderson Trust Co. v. Ragan*, (Ky. 1899) 52 S. W. Rep. 848; *Chicago, etc., R. Co. v. Burns*, 61 Neb. 793.

**What Is Such Acceptance by Bank — United States Rule Followed.** — *J. M. Houston Grocer Co. v. Farmers' Bank*, 71 Mo. App. 132.

**Tennessee Rule Followed.** — *Commercial Nat. Bank v. Lincoln Fuel Co.*, 67 Ill. App. 166.

**The Payee's Remedy Is Against the Drawer**, to whom he owes no duty to keep the check carefully. *Shepard, etc., Lumber Co. v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446.

**Unauthorized Indorsement.** — A bank pays a check at its peril to any other than the payee or his indorsee. *Sinclair v. Goodell*, 93 Ill. App. 592; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113.

**1077. 2. Effect of Indorsement.** — *Green v. Purcell Nat. Bank*, 1 Indian Ter. 270. See also *Wells v. Simpson Nat. Bank*, 19 Tex. Civ. App. 636.

**3. Liability of Depositor.** — *Chicago First Nat. Bank v. Pease*, 168 Ill. 40; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa 530, 63 Am. St. Rep. 399; *Rice v. Citizens' Nat. Bank*, (Ky. 1899) 51 S. W. Rep. 454; *Winslow v. Everett Nat. Bank*, 171 Mass. 534; *Harter v. Mechanics Nat. Bank*, 63 N. J. L. 578, 76 Am. St. Rep. 224, *citing* 5 AM. AND ENG. ENCYC. OF LAW (ed. ed.) 1066 *et seq.*; *Rosenberg v. Germania Bank*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 233; *Adler v. Broadway Bank*, (Supm. Ct. Tr.

T.) 30 Misc. (N. Y.) 382; *United Security L. Ins., etc., Co. v. Central Nat. Bank*, 185 Pa. St. 586; *Tolman v. American Nat. Bank*, 22 R. I. 462, 84 Am. St. Rep. 850; *Pollard v. Wellford*, 99 Tenn. 113. See also *Garthwaite v. Tulare Bank*, 134 Cal. 237; *Shepard, etc., Lumber Co. v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446.

**Payee and Party Presenting Having Same Name.** — See *Western Union Tel. Co. v. Bi-Metallic Bank*, 17 Colo. App. 229.

**Execution — Presumption.** — *Snodgrass v. Sweetser*, 15 Ind. App. 682.

**Possession by Agent Not Authority to Indorse Principal's Name.** — *Adler v. Broadway Bank*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 382. See also *Commercial Nat. Bank v. Lincoln Fuel Co.*, 67 Ill. App. 167.

**Negligence of Depositor Excuses Bank.** — *Armour v. Greene County State Bank*, (C. C. A.) 112 Fed. Rep. 631.

**Payee Dead.** — Where an executor, ignorant of the death of a legatee, bought a draft from the defendant bank and sent it to the legatee, whose husband forged her signature and cashed the draft, it was held that the executor should have notified the bank immediately on learning of the fact of the legatee's death, and that he could not hold the bank. *State v. Montrose First Nat. Bank*, 203 Pa. St. 69.

**1078. 1. Liability of Recipient of Money.** — See *Land Title, etc., Co. v. Northwestern Nat. Bank*, 196 Pa. St. 230, 79 Am. St. Rep. 717.

**Indorser Guaranteeing Previous Indorsements Liable to Bank.** — *Pittsburg Second Nat. Bank v. Guarantee Trust, etc., Co.*, 206 Pa. St. 616; *Hastings First Nat. Bank v. Farmers, etc., Bank*, 56 Neb. 149.

**Rule Does Not Apply When Forged Indorsement Not Cause of Loss.** — *Marshalltown First Nat. Bank v. Marshalltown State Bank*, 107 Iowa 329.

**Drawer Not Depositor.** — Where a bank retains for twenty-four hours a check drawn on it by one not a depositor, it cannot, in *New York*, recover the amount thereof from the indorser, since such retention is, under *Laws N. Y. 1897, c. 612*, considered as an acceptance of the check. *State Bank v. Weiss*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 93.

**2. Check Void in Inception — Liability Is to Drawer.** — See *U. S. v. Coffeyville First Nat. Bank*, 82 Fed. Rep. 410.

**4. Indemnity — Duplicate Check.** — See *Petrue v. Wakem*, 99 Ill. App. 463.

**1079. 1. Drawer Countermanding Payment.** — *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 63 Am. St. Rep. 270; *Weiand v. State Nat. Bank*, 112 Ky. 310, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079; *Drinkall v. Movius State Bank*, 11 N. Dak. 10, 95 Am. St. Rep. 693, *citing* 5 AM. AND ENG. ENCYC. OF

**1079.** When Check Certified. — See note 2.

**1080.** 3. Death of Drawer. — See note 1.

[**CHEMICALS.** — See note 2*a*.]

**CHEST.** — See note 4.

**CHIEF.** — See note 7.

LAW (2d ed.) 1079. See also National Bank *v. Berrall*, 70 N. J. L. 757, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079.

**Equitable View.** — See Du Quoin First Nat. Bank *v. Keith*, 183 Ill. 475, holding that the drawer cannot revoke if there is no defense to the check in the hands of the payee; Raesser *v. National Exch. Bank*, 112 Wis. 591, 88 Am. St. Rep. 979.

**Agreement that Drawer May Stop Payment Enforceable Against Holder Not in Due Course.** — Semple *v. Kyle*, Sc. Ct. of Sess. 4 F. 421.

**1079.** 2. See Drinkall *v. Movius State Bank*, 11 N. Dak. 10, 95 Am. St. Rep. 693.

**1080.** 1. Death of Drawer. — Weiland *v. State Nat. Bank*, 112 Ky. 310, quoting 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1080. In this case, however, the check was for an amount in excess of the fund on deposit, and moreover there was an express revocation by the drawer's administrator before payment. See also Pullen *v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19; Drum *v. Benton*, 13 App. Cas. (D. C.) 245.

**2*a*. Drugs and Chemicals.** — Benzine is within the term "drugs and chemicals" as used in a policy of fire insurance. The term *chemical* is defined as a substance used for

producing a *chemical* effect, or one produced by a *chemical* process; a *chemical* agent prepared for scientific or economic use. Webst. Dict.; Cent. Dict. Phoenix Ins. Co. *v. Flemming*, 65 Ark. 54.

**4.** The *chest* is that part of the body from the neck to the abdomen and includes the cavity in which the heart and lungs are situated. Ft. Worth, etc., R. Co. *v. Rogers*, 21 Tex. Civ. App. 605.

**7. Chief Office — Attachment — Foreign Corporations.** — The expressions in the attachment act, "*chief* office" or "place of business," while not strictly synonymous, must be regarded as equivalent. The essential characteristics of each might be very different. The former would ordinarily be the place where the officials charged with the general management of its affairs might meet and direct them, while the latter might be the same, or the place where its business operations were carried on under the direction and supervision of an authorized agent. The two designations are mentioned in the disjunctive, but it is clear that one must be considered the equivalent of the other, although each may be maintained at a separate place. Rocky Mountain Oil Co. *v. Central Nat. Bank*, 29 Colo. 129.

## CHILD — CHILDREN.

**1083.** I. IN GENERAL. — See note 1.

**1084.** II. ADULTS. — See note 2.

**1083.** 1. Aggravated Assault. — Thompson *v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 623, following Bell *v. State*, 18 Tex. App. 53, 51 Am. Rep. 293, stated in the original note.

**A Child en Ventre Sa Mere** was included within the meaning of the word "children" in *In re Seabolt*, 113 Fed. Rep. 766. And see McLain *v. Howald*, 120 Mich. 274, 77 Am. St. Rep. 597.

**Procuring or Attempting Abortion.** — Sullivan *v. State*, 121 Ga. 183; Barrow *v. State*, 121 Ga. 187, following Rex *v. Phillips*, 3 Campb. 76, stated in the original note.

The word "child," as used in section 81 of the Georgia Penal Code, means a "living child," that is to say "an unborn child so far developed as to be ordinarily called 'quick,' and which is still alive when the alleged unlawful means are employed to produce the miscarriage or abortion." Taylor *v. State*, 105 Ga. 846.

**1084.** 2. Homestead. — In Battey *v. Barker*, 62 Kan. 517, it was held that when the right to inherit the homestead is in question, the word "children" applies equally to adults and minors; but when the right to withhold the

property from appropriation to pay debts of the former owner is involved, the children of the intestate must be minors, and in such cases the exemption to them extends only to the period when the estate becomes subject to partition under the law — that is, when all the heirs arrive at the age of majority.

**Death by Wrongful Act.** — An adult cannot as a "child" share in the proceeds of an action for wrongful death. Coleman *v. Hyer*, 113 Ga. 420. But under 2 Code Ga. (1895), § 3828, providing that "the husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately," it was held that the act was not confined to minor children, but that adult children were necessary parties to the suit. Roberts *v. Central of Georgia R. Co.*, 124 Fed. Rep. 471, distinguishing Mott *v. Central R. Co.*, 70 Ga. 680, 48 Am. Rep. 595, stated in the original note.

**Protective Statutes and Statutes of Descent or Distribution.** — In Quattlebaum *v. Triplett*, 69 Ark. 91, the court said: "There is a distinction to be observed in the use of the word

**1085. III. GRANDCHILDREN AND REMOTER DESCENDANTS.**—See note 1.

**1087.** No Persons in Existence Answering to Description of Children—Intent.—See note 1.

**1088.** The Converse of This Rule.—See note 1.

**1089.** Issue.—See note 1.

**1090.** See note 1.

**1092. IV. WORDS OF PURCHASE—HEIRS.**—See note 1.

**1093.** See note 1.

**1094.** See note 1.

'child' in statutes passed for the protection of children, and its use in the law of descents and distribution. In the former case 'child' means a person of tender years, without regard to parentage, while in the law of wills and intestacy age has nothing to do with the question, and parentage everything."

**1085. 1. Children Held Not to Include Grandchildren or Remoter Descendants.**—*Georgia.*—*Lamar v. McLaren*, 107 Ga. 591.

*Illinois.*—*Arnold v. Alden*, 173 Ill. 229.

*Michigan.*—*Downing v. Birney*, 112 Mich. 474.

*Minnesota.*—*Yates v. Shern*, 84 Minn. 161, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085.

*Nebraska.*—*Brown v. Brown*, (Neb. 1904) 98 N. W. Rep. 718.

*New Jersey.*—*Stewart v. Knight*, 62 N. J. Eq. 232.

*New York.*—*Matter of Sparks*, (Surrogate Ct.) 27 Misc. (N. Y.) 351; *Sanson v. Bushnell*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 268.

*North Carolina.*—*Lee v. Baird*, 132 N. Car. 755.

*Pennsylvania.*—*Steinmetz's Estate*, 194 Pa. St. 611.

*Rhode Island.*—*Tiffany v. Emmet*, 24 R. I. 411, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085.

*South Carolina.*—*Logan v. Brunson*, 56 S. Car. 7, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085.

*Tennessee.*—*Grant v. Mosely*, (Tenn. Ch. 1899) 52 S. W. Rep. 508; *Collins v. Williams*, 98 Tenn. 525; *Bruce v. Goodbar*, 104 Tenn. 638.

*Virginia.*—*Vaughan v. Vaughan*, 97 Va. 322, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085; *Brett v. Donaghe*, 101 Va. 786; *Waring v. Waring*, 96 Va. 641.

*West Virginia.*—*Waldron v. Taylor*, 52 W. Va. 284.

**1087. 1. Children Held to Include Grandchildren and Remoter Descendants.**—*Edwards v. Bender*, 121 Ala. 77; *Lawrence v. Phillips*, 186 Mass. 320. See also *Tiffany v. Emmet*, 24 R. I. 411, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1087.

Great-grandchildren will not take under a will providing for grandchildren. *Smith v. Lansing*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 566.

**1088. 1. Caulk v. Caulk**, 3 Penn. (Del.) 528; *Downing v. Birney*, 112 Mich. 474; *Dunn v. Cory*, 56 N. J. Eq. 507; *Steward v. Knight*, 62 N. J. Eq. 232; *Steinmetz's Estate*, 194 Pa. St. 611; *Logan v. Brunson*, 56 S. Car. 7, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088; *Tiffany v. Emmet*, 24 R. I. 411; *Re Reynolds*, 20 R. I. 429.

**Statements of the Rule.**—See *Sloan v. Thornton*, 102 Ky. 443, following *Chenault v. Chenault*, 88 Ky. 85, set out in the original note.

**\* 1089. 1. Children Not Equivalent to Issue.**—*Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635; *Wilson v. Wilson*, 76 N. Y. App. Div. 232; *Crandell v. Barker*, 8 N. Dak. 263; *Elgar v. Equitable L. Assur. Soc.*, 113 Wis. 90.

Under the Maine Statute Regulating Adoption of Children the term "child" has a broader significance than "issue." *Virgin v. Marwick*, 97 Me. 578.

**1090. 1. "Issue" Read as "Children."**—*In re Birks*, (1900) 1 Ch. 417; *Caulk v. Caulk*, 3 Penn. (Del.) 528, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1090; *Johnstone v. Taliaferro*, 107 Ga. 6; *Arnold v. Alden*, 173 Ill. 229; *Smith v. Miller*, (Ky. 1898) 47 S. W. Rep. 1074, following *Dunlap v. Shreve*, 2 Duv. (Ky.) 334, stated in the original note; *Campbell's Estate*, 202 Pa. St. 459. See also *Harrison v. McAdam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 18.

**1092. 1. "Children" Held a Word of Purchase and Not Construed as Equivalent to "Heirs"**—*Alabama.*—*Rosenau v. Childress*, 111 Ala. 214.

*Georgia.*—*Sumpter v. Carter*, 115 Ga. 893.

*Indiana.*—*Southern Indiana R. Co. v. Thompson*, 27 Ind. App. 367.

*Kentucky.*—*Jabine v. Sawyer*, (Ky. 1904) 78 S. W. Rep. 140; *Goodridge v. Schaefer*, (Ky. 1902) 68 S. W. Rep. 411; *Aultman Co. v. Gibson*, (Ky. 1902) 67 S. W. Rep. 57; *Johnson v. Robertson*, (Ky. 1898) 45 S. W. Rep. 523.

*Michigan.*—*Downing v. Birney*, 112 Mich. 474.

*Missouri.*—*Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635.

*North Carolina.*—*Lee v. Baird*, 132 N. Car. 755.

*Pennsylvania.*—*Crawford v. Forest Oil Co.*, 208 Pa. St. 5.

*South Carolina.*—*Sease v. Sease*, 64 S. Car. 216; *Robert v. Ellis*, 59 S. Car. 137.

*Tennessee.*—*Collins v. Williams*, 98 Tenn. 525.

*Vermont.*—*Cathcart v. Nelson*, 70 Vt. 317.

"Children" a Word of Purchase—Rule in *Shelley's Case.*—*Bonner v. Bonner*, 28 Ind. App. 14.

**1093. 1. "Children" Held a Word of Limitation—Equivalent to "Heirs."**—*Steward v. Knight*, 62 N. J. Eq. 232; *Vilsack's Estate*, 207 Pa. St. 611; *Shapley v. Diehl*, 203 Pa. St. 566. See also *Moore v. Gary*, 149 Ind. 54, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093.

**1094. 1. "Heirs" Read as "Children."**—See *Moore v. Gary*, 149 Ind. 53, citing 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1094. See also *Hindry v. Holt*, 24 Colo. 464, 65 Am. St. Rep. 235.



**1095. V. BASTARDS.**—See note 1.

**1097. Illegitimate Children — Succession.**—See note 1.

**1098. "Children" Construed to Include Bastards.**—See note 1.

**VI. ADOPTED CHILDREN — STEPCHILDREN.**—See note 2.

**1099. CHIMNEY.**—See note 4.

**1095. 1. The Term "Child" Held Not to Include a Bastard.**—State *v. Miller*, 3 Penn. (Del.) 518, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1095; Robinson *v. Georgia R.*, etc., Co., 117 Ga. 168, 97 Am. St. Rep. 156; Johnstone *v. Taliaferro*, 107 Ga. 6; Alabama, etc., R. Co. *v. Williams*, 78 Miss. 209, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1095; Gates *v. Seibert*, 157 Mo. 254, 80 Am. St. Rep. 625.

**Statute Giving Right of Action for Death of Child.**—Robinson *v. Georgia R.*, etc., Co., 117 Ga. 168, 97 Am. St. Rep. 156, *following* Dickinson *v. North Eastern R. Co.*, 2 H. & C. 735, stated in the original note; Illinois Cent. R. Co. *v. Johnson*, 77 Miss. 727; Alabama, etc., R. Co. *v. Williams*, 78 Miss. 209, both holding illegitimates not to be within such a statute. And see to the same effect Citizens St. R. Co. *v. Cooper*, 22 Ind. App. 459, 72 Am. St. Rep. 319.

**Legitimized Children Included under Term "Children."**—Smith *v. Lansing*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 566.

**Beneficial Associations.**—The word "children" as used in a statute limiting the beneficiaries of beneficial associations means legitimate children. Lavigne *v. Ligue des Patriotes*, 178 Mass. 25, 86 Am. St. Rep. 460.

**1097. 1. Succession.**—State *v. Miller*, 3 Penn. (Del.) 518, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1097; Marionneaux *v. Dupuy*, 48 La. Ann. 496.

**Non-support Statute.**—See State *v. Miller*, 3 Penn. (Del.) 518.

**1098. 1. "Children" Embracing Illegitimates.**—*In re Du Bochet*, (1901) 2 Ch. 441, 70 L. J. Ch. 647, 84 L. T. N. S. 710, 49 W. R. 588.

**2. Adopted Children.**—Bray *v. Miles*, 23 Ind. App. 432, *quoting* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1098.

In construing a statute providing that an adopted child shall not be deemed a child so as to defeat rights of remaindermen, the court said: "I regard it as of no materiality how long the child had been adopted. \* \* \* In my opinion it neither harms nor benefits her case that she was adopted before the remaindermen became vested. She seeks to take what would have been theirs without contest, had she not been adopted. This is what the statute plainly designs to prevent." Matter of Hopkins, (Surrogate Ct.) 43 Misc. (N. Y.) 464.

Under the *Missouri* statute abolishing estates tail, the word "children" does not mean adopted children. Clarkson *v. Hatton*, 143 Mo. 49, 65 Am. St. Rep. 635.

**Wills.**—A bequest to children has been held to include an adopted child. Bray *v. Miles*, 23 Ind. App. 437. But a nephew not formally adopted, but treated as such, is not entitled to share in a bequest to children. Hamlin *v. Stevens*, 177 N. Y. 39, *affirming* (Supm. Ct. App. Div.) 79 N. Y. Supp. 1133.

**Beneficiaries in Insurance.**—Adopted children have been included under the term "children" as beneficiaries in insurance. Virgin *v. Marwick*, 97 Me. 578; Kemp *v. New York Produce Exch.*, 34 N. Y. App. Div. 175.

**1099. 4. Nuisance — Chimney Sending Forth Black Smoke — Funnel of Steam Tug.**—By § 24 (b) of the Public Health (London) Act, 1891, "any chimney (not being the chimney of a private dwelling house) sending forth black smoke in such quantity as to be a nuisance" is liable to be dealt with summarily. It was held that the funnel of a steam tug was a chimney within the section. Tough *v. Hopkins*, (1904) 1 K. B. 804.

## CHINESE EXCLUSION ACTS.

By W. H. BUCHANAN.

**1102. I. ORIGIN AND NATURE**—McCreary Act.—See note 7.

[Canadian Legislation.—The Parliament of Canada has at various times passed special acts restricting to a greater or less degree the immigration of Chinese. The latest statute is that of 3 Edw. VII., c. 8, which went in force Jan. 1, 1904, and repealed the previous statute, 63 and 64 Vict., c. 32.<sup>7a</sup>]

**II. POWER TO EXCLUDE**—Incident of Sovereignty.—See note 8.

How the Power of Exclusion Exercised by Federal Government.—See note 11.

**1102. 7. The Purpose of This Statute is to protect American labor against cheap Chinese labor.** *In re Chu Poy*, 81 Fed. Rep. 826.

**7a. Canadian Statutes.**—Wing Toy *v. Canadian Pac. R. Co.*, 13 Quebec K. B. 172.

**8. Constitutional Power.**—U. S. *v. Gue Lim*, 176 U. S. 459. See also Lee Sing Far *v. U. S.*, (C. C. A.) 94 Fed. Rep. 834.

**11. U. S. *v. Lee Huen*, 118 Fed. Rep. 442; U. S. *v. Tuck Lee*, 120 Fed. Rep. 989; Fok**

**1102.** Right to Expel. — See note 12.

**1103.** III. To WHOM APPLICABLE — Laborers. — See note I.

Privileged Classes. — See note 3.

*Yung Yo v. U. S.*, 185 U. S. 296; *Chan Gun v. U. S.*, 9 App. Cas. (D. C.) 290. See also *Li Sing v. U. S.*, 180 U. S. 486, affirming *Fong Yue Ting v. U. S.*, 149 U. S. 698.

**1102.** 12. See *U. S. v. Williams*, 83 Fed. Rep. 997.

**1103.** 1. Persons Within the Acts. — *In re Chu Poy*, 81 Fed. Rep. 826; *Yee Yee Chung v. U. S.*, 95 Fed. Rep. 432. See also *U. S. v. Gue Lim*, 83 Fed. Rep. 136, affirmed 176 U. S. 459; *In re Gut Lun*, 83 Fed. Rep. 141; *Mar Bing Guey v. U. S.*, 97 Fed. Rep. 576; *U. S. v. Gin Fung*, 100 Fed. Rep. 389, 40 C. C. A. 439; *U. S. v. Chun Hoy*, 111 Fed. Rep. 899, 50 C. C. A. 57.

All Chinese Persons Dependent upon Their Manual Labor as a means of securing an honest livelihood and self-support, and those who are not officers, teachers, students, merchants, or travelers for curiosity, are included within the Exclusion Acts. *U. S. v. Chung Ki Foon*, 83 Fed. Rep. 143.

Skilled Laborers are within the Exclusion Acts. *Lee Ah Yin v. U. S.*, (C. C. A.) 116 Fed. Rep. 614.

Chinese Laundrymen. — A Chinaman whose business and chief occupation is that of a laundryman is a laborer. *In re Leung*, (C. C. A.) 86 Fed. Rep. 303; *U. S. v. Yong Yew*, 83 Fed. Rep. 832.

A Clerk and Bookkeeper, or assistant accountant, is not a merchant, but a skilled manual laborer, and as such liable to deportation although it appears that he has an interest in the stock of goods. *U. S. v. Pin Kwan*, 100 Fed. Rep. 609, 40 C. C. A. 618. See also *U. S. v. Gin Hing*, (Ariz. 1904) 76 Pac. Rep. 639. Compare *In re Chu Poy*, 81 Fed. Rep. 826.

A Prostitute is within the Exclusion Acts. *Lee Ah Yin v. U. S.*, (C. C. A.) 116 Fed. Rep. 614.

Under the Canadian Chinese Immigration Act 63 & 64 Vict., c. 32, where a Chinese woman was detained for deportation on the ground that she was a prostitute, evidence was held to be admissible to show the general reputation of the house in which she lived. *In re Fong Yuk*, 8 British Columbia 118.

A Mere Interest in a Mercantile Establishment is not sufficient to entitle a Chinaman to other privileges than those pertaining to laborers, where it is shown that such Chinaman, instead of being actively engaged in conducting the mercantile business, has had another interest in a restaurant, of which he has been head cook. *Mar Bing Guey v. U. S.*, 97 Fed. Rep. 576.

Minor Children of Laborers are deemed to be in the same class as the father. *U. S. v. Chu Chee*, 93 Fed. Rep. 797, 35 C. C. A. 613.

3. *In re Chu Poy*, 81 Fed. Rep. 826; *U. S. v. Wong Lung*, 103 Fed. Rep. 794; *U. S. v. Sing Lee*, 125 Fed. Rep. 627; *U. S. v. Gin Hing*, (Ariz. 1904) 76 Pac. Rep. 639. See also *U. S. v. Gin Fung*, 100 Fed. Rep. 389, 40 C. C. A. 439; *U. S. v. Chun Hoy*, 111 Fed. Rep. 899, 50 C. C. A. 57.

Restaurant Proprietor. — See *U. S. v. Chung*

*Ki Foon*, 83 Fed. Rep. 143; *Mar Bing Guey v. U. S.*, 97 Fed. Rep. 576.

Burden of Proof. — *In re Li Sing*, (C. C. A.) 86 Fed. Rep. 896, affirmed 180 U. S. 486; *U. S. v. Lung Hong*, 105 Fed. Rep. 188; *Yee N'Goy v. U. S.*, (C. C. A.) 116 Fed. Rep. 333; *Fong Mey Yuk v. U. S.*, 113 Fed. Rep. 898, 51 C. C. A. 528; *Lee Yue v. U. S.*, (C. C. A.) 133 Fed. Rep. 45; *U. S. v. Hung Chang*, (C. C. A.) 134 Fed. Rep. 19, reversing 126 Fed. Rep. 400. See also *In re Chu Poy*, 81 Fed. Rep. 826; *U. S. v. Jue Wy*, 103 Fed. Rep. 795; *Quong Sue v. U. S.*, (C. C. A.) 116 Fed. Rep. 316; *In re Ong Lung*, 125 Fed. Rep. 814; *U. S. v. Sing Tuck*, 194 U. S. 161.

The Burden of Proving that a Person Is Chinese rests upon the government. *U. S. v. Hung Chang*, 126 Fed. Rep. 400.

Evidence that a Person Is Chinese need not be such as to satisfy the commissioner beyond any possibility of doubt; a reasonable degree of certainty is sufficient. *U. S. v. Hung Chang*, (C. C. A.) 134 Fed. Rep. 19.

Refusal or Failure to Testify in a proceeding for deportation is not a ground for issuing an order for such deportation. *Ex p. Sing*, 82 Fed. Rep. 22; *U. S. v. Leung Shue*, 126 Fed. Rep. 423; *Ark Foo v. U. S.*, 128 Fed. Rep. 697, 63 C. C. A. 249.

The Nature of a Merchant's Interest must be substantial and real and in the name of the person claiming to own it. *Tom Hong v. U. S.*, 193 U. S. 517.

Wife of Merchant Not Within Exclusion Acts. — *U. S. v. Gue Lim*, 83 Fed. Rep. 136, affirmed 176 U. S. 459; *In re Lee Yee Sing*, 85 Fed. Rep. 635; *Tsoi Sim v. U. S.*, 116 Fed. Rep. 920, 54 C. C. A. 154; *U. S. v. Gue Lim*, 176 U. S. 459. See also *U. S. v. Ah Sou*, 132 Fed. Rep. 878.

Minor Children of Merchants are not within the Exclusion Acts. *In re Lee Yee Sing*, 85 Fed. Rep. 635; *U. S. v. Gue Lim*, 176 U. S. 459. See also *Mar Bin Guey v. U. S.*, 97 Fed. Rep. 576; *Tsoi Sim v. U. S.*, 116 Fed. Rep. 920, 54 C. C. A. 154.

It has been held that the minor child of a merchant has no right to enter the United States without presenting a certificate as required by the Act of 1884. *In re Li Foon*, 80 Fed. Rep. 881.

Student Children of Laborers are not within the Exclusion Acts. *U. S. v. Chu Chee*, 87 Fed. Rep. 312.

Chinese Seamen are not within the purview of the Exclusion Acts so long as they merely touch at a port of the United States for no other purpose than to reship as soon as shipment can be obtained. *In re Jam*, 101 Fed. Rep. 989.

Physicians are not within the Exclusion Acts. *U. S. v. Chin Fee*, 94 Fed. Rep. 828.

Conducting a Business in a Partnership Name is conducting the business in the name of a partner although the name of such partner does not appear in the firm designation. *U. S. v. Wong Ah Gah*, 94 Fed. Rep. 831. See also *Tom Hong v. U. S.*, 193 U. S. 517.

**1104.** See note 1.

**IV. CERTIFICATE OF RESIDENCE.** — See note 2.

Certificate for Persons Not Laborers. — See note 3.

**V. IMPRISONMENT AND DEPORTATION** — Imprisonment at Hard Labor. —

See note 5.

Deportation. — See notes 6, 7.

**1105.** Not Punishment for Crime. — See note 1.

Order of Deportation. — See note 2.

**A Student May Live in a Laundry** without changing his status as a student. *U. S. v. Wong Chung*, 92 Fed. Rep. 141.

**Becoming Temporarily a Laborer** through adversity or other sufficient cause may not render a Chinaman liable to deportation if he has been a merchant in his own country and enters the United States in good faith intending to continue the business of merchandising here. See *U. S. v. Yong Few*, 83 Fed. Rep. 832.

**A Merchant's Certificate** must be in conformity with the acts of Congress in order to entitle him to enter the country. *Cheung Pang v. U. S.*, (C. C. A.) 133 Fed. Rep. 392.

**In the Case of a Chinese Female Slave**, where deportation would be equivalent to remanding her to perpetual slavery and degradation, the court, relying on the Thirteenth Amendment prohibiting slavery and involuntary servitude, vacated an order for deportation. *U. S. v. Ah Sou*, 132 Fed. Rep. 878.

**1104. 1.** See *U. S. v. Jue Wy*, 103 Fed. Rep. 795.

**Persons Born in the United States.** — *U. S. v. Wong Quong Wong*, 94 Fed. Rep. 832; *Lee Sing Far v. U. S.*, 94 Fed. Rep. 834, 35 C. C. A. 327; *U. S. v. Leung Sam*, 114 Fed. Rep. 702; *U. S. v. Lee Huen*, 118 Fed. Rep. 442; *Sing Tuck v. U. S.*, 128 Fed. Rep. 592, 63 C. C. A. 199, reversing 126 Fed. Rep. 386; *Chin Bak Kan v. U. S.*, 186 U. S. 193. See also *Tsoi Sim v. U. S.*, 116 Fed. Rep. 920, 54 C. C. A. 154.

**Positive and Clear Evidence** is essential to establish the citizenship of a Chinese person. *In re Jew Wong Loy*, 91 Fed. Rep. 240; *U. S. v. Lee Pon*, 94 Fed. Rep. 827; *Lee Sing Far v. U. S.*, 94 Fed. Rep. 834, 35 C. C. A. 327; *U. S. v. Leung Sam*, 114 Fed. Rep. 702; *Lee Ah Yin v. U. S.*, (C. C. A.) 116 Fed. Rep. 614; *U. S. v. Lee Huen*, 118 Fed. Rep. 442. See also *U. S. v. Sing Tuck*, 194 U. S. 161; *U. S. v. Wong Du Bow*, 133 Fed. Rep. 326.

**The Testimony of a Chinaman as to His Place of Birth**, when not preposterous or unnatural, cannot justly be rejected, although it cannot be contradicted if untrue. *U. S. v. Yee Mun Sang*, 93 Fed. Rep. 365.

**2.** *U. S. v. Chung Ki Foon*, 83 Fed. Rep. 143. See also *U. S. v. Williams*, 83 Fed. Rep. 997; *U. S. v. Ah Chung*, (C. C. A.) 130 Fed. Rep. 885.

**Failure to Procure a Certificate** is not ground for deportation where at the time of registration a Chinaman is within the exceptions of the statute. *In re Chu Poy*, 81 Fed. Rep. 826.

**3.** *U. S. v. Chin Fee*, 94 Fed. Rep. 828.

**The Certificate Is Only Prima Facie Evidence** of the right to remain in the United States, and where it appears that a Chinaman has been admitted to the country upon presentation of a certificate identifying him as a merchant, and thereafter continually engages in manual labor, the effect of such certificate is overcome. *U. S. v. Fay*, 83 Fed. Rep. 839; *U. S. v. Ng Park Tan*, 86 Fed. Rep. 605. See also *Jew Sing v. U. S.*, 97 Fed. Rep. 582; *Chain Chio Fong v. U. S.*, (C. C. A.) 133 Fed. Rep. 154; *Cheung Him Nin v. U. S.*, (C. C. A.) 133 Fed. Rep. 391.

**5.** See *In re Tsu Tse Mee*, 81 Fed. Rep. 562; *Chan Gun v. U. S.*, 9 App. Cas. (D. C.) 290. Compare *Ex p. Sing*, 82 Fed. Rep. 22.

**6. To What Country Returned.** — *Lee Ah Yin v. U. S.*, (C. C. A.) 116 Fed. Rep. 614; *U. S. v. Lee Kee*, (C. C. A.) 116 Fed. Rep. 612. Compare *Yee Yee Chung v. U. S.*, 95 Fed. Rep. 432; *U. S. v. Sing Lee*, 125 Fed. Rep. 627.

**Under the Canadian Chinese Immigration Act** Chinese persons who have passed through Canada and have been refused admission into the United States will not be released on habeas corpus when they are not among those privileged by the Immigration Act. *Chew v. Canadian Pac. R. Co.*, 5 Quebec Pr. Rep. 453, 6 Quebec Pr. Rep. 14. See also *In re Lee San*, 7 Can. Crim. Cas. (British Columbia) 427, 10 British Columbia 270.

**7.** See *In re Jew Wong Loy*, 91 Fed. Rep. 240; *Lee Yuen v. U. S.*, (C. C. A.) 133 Fed. Rep. 222.

**1105. 1.** *In re Tsu Tse Mee*, 81 Fed. Rep. 562; *U. S. v. Lee Huen*, 118 Fed. Rep. 442; *In re Ah Tai*, 125 Fed. Rep. 795; *U. S. v. Hung Chang*, (C. C. A.) 134 Fed. Rep. 19, reversing 126 Fed. Rep. 400; *Chan Gun v. U. S.*, 9 App. Cas. (D. C.) 290. Compare *U. S. v. Hung Chang*, 126 Fed. Rep. 400.

**2. Sufficiency of Order.** — It is sufficient if the order of deportation shows that the Chinese person had been adjudged to be unlawfully within the United States. *In re Tsu Tse Mee*, 81 Fed. Rep. 562.

1. **CHOKE.**—See note 4.
- CHOOSE.**—See note 5.
3. **CHOSSES IN ACTION**—Choses in Possession.—See note 2.
5. **Examples.**—See note 2.
- [**CHOUSE.**—See note 2a.]
8. **CHRISTIAN SCIENCE.**—See note 2.

1. 4. **Murder by Choking.**—In construing a presentment for murder by *choking* the court said: "The plain, every-day meaning of the word *choking*, as we understand it, is to prevent or interfere with the passage of air through the windpipe, either by internal obstruction or by external pressure. To *choke* a person is, in other words, to fill his mouth or throat with a towel or other substance, or to seize and compress his throat so as to obstruct his breathing. This is what the grand jury meant when they used the word, and this is what the accused must have understood when the presentment was read to him." *Hicks v. State*, 105 Ga. 627.

5. **In Wills.**—In *Cain v. Cain*, 127 Ala. 440, the court said: "In the sentence 'to sell and convey any property she may *choose* for her comfort and support as she may see proper,' the word *choose* seems to have been used as synonymous with wish, or desire, rather than to imply a mere right of selection; and by such use, together with the omission of all reference to her necessities, it appears that the testator intended to invest his widow with full discretion in determining the occasion for selling, as well as the selection of property to be sold."

"Chosen" and "Elected" Synonymous.—In *Reid v. Gorsuch*, 67 N. J. L. 396, the court said: "In the original constitution of this state the words *chosen* and 'elected' are used interchangeably, and as equally applicable to those who are selected, whether it be (a) by the people of the county at large, (b) by those inhabitants possessing a property qualification, (c) by the legislative council and assembly in joint meeting, (d) by either of these bodies acting separately, or (e) by a company of militia."

3. 2. **Other Definitions.**—A *chose in action* is a personal right, not reduced to possession, but recoverable by suit at law. *People v. Halsted*, 26 N. Y. App. Div. 316.

5. 2. **A Personal Right of Action by a Covenantor** is a *chose in action*. *Randall v. Macbeth*, 81 Minn. 376.

**Jurisdiction of United States Courts—Breach of Contract of Carriage.**—*North American Transp., etc., Co. v. Morrison*, 178 U. S. 262.

**An Action of Assumpsit** for property taken by mistake is a *chose in action*. *Merriwether v. Bell*, (Ky. 1900) 58 S. W. Rep. 987.

**Insurance Policy.**—*Steele v. Gatlin*, 115 Ga. 929; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525; *Lockett v. Lockett*, (Ky. 1904) 80 S. W. Rep. 1152.

**Stock Certificate a chose in action.** *Richmond First Nat. Bank v. Holland*, 99 Va. 495. And see *Allen-West Commission Co. v. Grumbles*, (C. C. A.) 129 Fed. Rep. 287.

**A Warrant Drawn by a Municipal Corporation** is a *chose in action* and taxable as such. *Easton v. Board of Review*, 183 Ill. 255.

**The Right to Compensation for Land Taken by a City** is a thing in action under the *New York Tax Law* and taxable as such. *People v. Halsted*, 26 N. Y. App. Div. 316.

**Distinguished from Debt.**—In *Smead v. Chandler*, 71 Ark. 512, the court said: "The terms or phrases *chose in action* and 'debt' are used by courts to represent the same thing when viewed from opposite sides. 'The *chose in action* is the right of the creditor to be paid, while the debt is the obligation of the debtor to pay.' As said by Professor Minor: \* \* \* 'It will be seen, therefore, that, while the situs of the creditor's right (*chose in action*) follows the creditor, and corresponds to the legal situs of tangible chattels, the situs of the debtor's obligation follows the actual situs of the debtor, or of his property (in case of a proceeding *in rem* to enforce it) and corresponds to the actual situs of tangible chattels.'"

2a. The word *chouse* "seems to be of Turkish origin, and stands as a memorial in our language of a gigantic cheat perpetuated in 1609 by a messenger or interpreter [*chouse*] of the Turkish embassy upon Turkish merchants resident in England, and *chouse* is hence defined by Mr. Webster in his dictionary thus: 'To cheat, trick, defraud;—followed by *of* or *out of*; as, to *chouse* one out of his money.' It may be that, using the term in a highly metaphorical sense, the cattle, by being frequently driven to and fro in the pasture to prevent their escape, were thus *choused* or cheated out of their grass." This case was an action for damages against a railroad for failure to construct cattle guards. It was held that the driving and *chousing* of the cattle occasioned thereby was not a proper element of damages. *Southern Kansas R. Co. v. Isaacs*, 20 Tex. Civ. App. 466.

8. 2. In *Matter of Brush*, (Surrogate Ct.) 35 Misc. (N. Y.) 689, the court said: "Its adherents believe that matter has no existence except as a manifestation of mind; that the divine mind is all-controlling; that the human mind, by becoming clean and purified, can, to a degree, realize and employ the powers of the divine mind; that all sickness and bodily ills are merely a species of sin, error, or evil, and exist only in the apprehension of the human mind, and are in no wise phenomena of matter; that is the divine mind has the same power to relieve one of such sin or error, manifested in the form of disease, as it has to expel any other unclean or evil thought, and that the human mind, if it can only so perfect itself as to partake in sufficient degree of the omnipotence of the divine mind, also will be able to throw off and rid itself of disease. These beliefs are embodied in a book called 'Science and Health,' which purports to derive them from the teachings of the Bible. Demonstrations of these teachings are attempted by *Christian*

8. [CHROMO. — See note 2a.]  
CHRONIC. — See note 3.
9. CHURCH. — See note 1.
10. CIDER. — See note 2.
11. CIPHER. — See note 3.
12. CIRCUMSTANCES. — See note 3.
13. CITATION. — See note 2.

*Scientists*, who are known as 'healers,' and who treat disease without the use of any material means whatever, the treatment, as one of them testified, being 'always a prayer.' They do not claim to cure all bodily ills, but they attribute their failures not to the nature of the illness, but to the imperfect realization by the healer of the divine mind, since to them the possibilities of *Christian Science* are infinite. It is their belief, on the other hand, that, when a patient does recover, the healer has realized sufficiently the truths as taught by 'Science and Health' and the Bible, and has, by his understanding of the power of God, as thus demonstrated by *Christian Science*, been able to remove the imperfections of which the disease was the result. It is, therefore, evident that, however opposed these teachings may be to the beliefs or notions of others, they are founded on the religious convictions of those professing them. This being so, the court cannot say that those persons are mentally unsound." In this case it was held that a belief in *Christian Science* founded on one's religious conviction was not inconsistent with testamentary capacity.

8. 2a In construing Rev. Stat. U. S., § 4956, providing for copyright of a *chromo*, etc., the court said: "It is apparent from the context that Congress used the word *chromo* with its dictionary meaning, viz., an abbreviation of '*chromo*-lithograph,' and that it understood the word 'lithograph' to cover a print 'made from a drawing or drawings on stones.'" *Hills v. Austrich*, 120 Fed. Rep. 863.

3. Instructions — Synonymous with Persistent. — In an instruction regarding a question in an application for life insurance *chronic* may properly be used as synonymous with persistent. *Blumenthal v. Berkshire L. Ins. Co.*, 134 Mich. 216.

9. 1. Society. — *In re Perry Almshouses*, (1899) 1 Ch. 21; *Josey v. Union L. & T. Co.*, 106 Ga. 608, holding that a *church* is a society

within a statute providing for the sale of *church* property to pay debts. And see *Riffe v. Proctor*, 99 Mo. App. 601; *Weaver v. Spurr*, 56 W. Va. 95.

Parish. — *Compare Riffe v. Proctor*, 99 Mo. App. 601.

10. 2. Intoxicating Liquors. — As to whether *cider* is an intoxicating liquor, see *Pikeville v. Huffman*, 112 Ky. 360; *Hewitt v. People*, 186 Ill. 336; *State v. Crawley*, 75 Miss. 919; *State v. Waite*, 72 Vt. 108; *State v. Thornburn*, 75 Vt. 18.

Unfermented Cider. — With reference to sales, the word *cider*, as used in Stat. Vt., § 4463, which prohibits the sale of *cider* in a place of public resort or to an habitual drunkard, and otherwise permits it, means unfermented *cider*. *State v. Waite*, 72 Vt. 108; *State v. Thornburn*, 75 Vt. 18.

11. 3. Telegram. — In *Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 413, the court said: "The law is, by the great weight of authority, that an enigmatical message, commonly called a *cipher* message, or one which, though not such a message, is yet one so obscure that it is not intelligible to the telegraphic operator, does not render the company liable, in case of omission of the company to send or deliver, for full compensatory damages, but only for a nominal damage, that is, the amount paid by the sender." See also the title TELEGRAPHS AND TELEPHONES.

12. 3. Executor. — See *Matter of Wischmann*, 80 N. Y. App. Div. 520. See also the title EXECUTORS AND ADMINISTRATORS.

Circumstances of the Parties — Alimony. — See *Goodsell v. Goodsell*, 82 N. Y. App. Div. 65. See also the title ALIMONY.

13. 2. Citation Distinguished from Notice. — *Carpenter v. Anderson*, (Tex. Civ. App. 1903) 77 S. W. Rep. 291.

Citation and Summons Distinguished. — *Johns v. Phoenix Nat. Bank*, (Ariz. 1899) 56 Pac. Rep. 725.

# CITIZENSHIP.

BY L. C. BOEHM.

- 15. I. DEFINITIONS — A Citizen.** — See notes 2, 3.
- 16. Two Citizenships — State and National.** — See note 1.
- II. HOW CITIZENSHIP ACQUIRED — 1. Generally.** — See note 4.
- 17. 2. By Birth in Jurisdiction.** — See note 1.
- 18. Indians.** — See notes 3, 4.
- 19. 3. By Naturalization — b. IN WHOM POWER TO NATURALIZE VESTED**  
— (2) *Limits of Power of States.* — See note 5.
- 20. c. WHO MAY BE NATURALIZED.** — See note 1.
- Aliens Honorably Discharged from Military Service.** — See note 2.
- Minor Residents.** — See note 3.
- Natives of China.** — See note 8.
- 21. d. HOW NATURALIZATION EFFECTED — (1) Under General Laws**  
— (b) *What Courts May Naturalize.* — See notes 3, 4.
- 15. 2. Corporations Not Citizens.** — See the title **CIVIL RIGHTS, 69. 6.**
- 3. No Necessary Relation Between Citizenship and Right to Vote.** — *Dorsey v. Brigham*, 177 Ill. 250, 69 Am. St. Rep. 228.
- 16. 1. "Citizen of the United States."** — The Constitution nowhere defining the meaning of the phrase, "it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." *U. S. v. Wong Kim Ark*, 169 U. S. 649.
- 4. Presumption from Residence.** — Where an alien lived in the United States from 1865 to his death in 1899, participating meanwhile in state and national elections, and at his death held a liquor-tax certificate issuable only to a citizen, it was held to be shown *prima facie* that he was a citizen. *Fay v. Taylor*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 32.
- 17. 1. Stadler v. School Dist. No. 40, 71 Minn. 311.**
- Persons Born in the United States of Chinese Parents.** — See the title **CHINESE EXCLUSION ACTS, 1104. 1.**
- 18. 3. Cherokee Indians.** — In *U. S. v. Boyd*, (C. C. A.) 83 Fed. Rep. 547, it was held that the Cherokee Indians did not have citizenship conferred on them as a tribe by the treaty of New Echota, and that there was no statute or treaty making them citizens or authorizing them to become such by naturalization.
- Freedmen Retained as Members of the Chickasaw Tribe** under the treaty of 1866 were not citizens of the United States. *Jackson v. U. S.*, 34 Ct. Cl. 441.
- 4. In re Celestine**, 114 Fed. Rep. 551; *State v. Denoyer*, 6 N. Dak. 586.
- "This Section Has No Application to a Tribe of Indians,** but is intended to cover the case of the individual Indian who has taken up his residence separate and apart from his tribe, and has adopted the habits of civilized life." *U. S. v. Boyd*, (C. C. A.) 83 Fed. Rep. 547.
- 19. 5. See Mayer v. U. S.**, 38 Ct. Cl. 553.
- 20. 1. An Alien Indian** cannot become a citizen by naturalization. *In re Burton*, 1 Alaska 111.
- Ignorance of the Laws and Constitution of the United States** is no bar to the naturalization of an alien otherwise qualified. *Ex p. Johnson*, 79 Miss. 637, 89 Am. St. Rep. 665.
- 2. Aliens Discharged from Military Service.** — In *Strickley v. Hill*, 22 Utah 257, 83 Am. St. Rep. 786, the court said: "The fact that Jackson served in the army of his country, and was honorably discharged therefrom, has a strong bearing tending to show a declaration of intention to become a citizen, as well as a strong circumstance tending to show naturalization, and in connection with other facts and circumstances, may be sufficient to establish the fact itself."
- 3. Evidence of Intention for Two Years** next preceding the time of admission to become a citizen of the United States must be produced in addition to the oath of the applicant; and the vague oral statement of a single witness is not sufficient. *In re Fronascone*, 99 Fed. Rep. 48.
- 8. Mongolian Not a "White Person."** — *Matter of Takuji Yomashita*, 30 Wash. 234, 94 Am. St. Rep. 860, wherein it was held that a Japanese could not be naturalized. See also **JAPANESE, 579. 2.**
- 21. 3. What Are Courts of Common-law Jurisdiction.** — Within the meaning of Rev. Stat. U. S., § 2165, courts having authority to punish offenses, enforce rights, and redress wrongs at common law are the courts that have jurisdiction, as opposed to courts of equity, admiralty, and those having jurisdiction over matters not of a common-law nature. *Levin v. U. S.*, (C. C. A.) 128 Fed. Rep. 826.
- 4. General Common-law Jurisdiction Not Necessary.** — *Levin v. U. S.*, (C. C. A.) 128 Fed. Rep. 826.
- The South Carolina Supreme Court** has no original jurisdiction on naturalization proceedings. *Ex p. McKenzie*, 51 S. Car. 244.

- 22.** (c) Legal Prerequisites — *aa. PRELIMINARY DECLARATION OF INTENTION.* — See note 5.
- 23.** *cc. PROOF OF RESIDENCE AND GOOD CHARACTER.* — See note 7.
- 24.** (d) Judgment Admitting to Citizenship — Act of Admission & Judgment. — See note 1.
- Cannot Be Collaterally Impeached. — See note 3.
- 25.** Decree Procured by Fraud — Cancellation. — See note 1.
- (e) Record of Naturalization Proceedings and Proof of Naturalization. — See note 3.
- Insufficient Records Not Helped by Parol. — See note 5.
- 26.** Records Destroyed or Impossible of Production. — See note 1.
- 27.** (f) Criminal Offenses Connected with Procurement or Use of Certificates of Naturalization. — See note 1.
- Procuring, or Attempting to Procure, Admission to Citizenship by Fraud. — See note 3.
- (3) *Collective Naturalization.* — See note 8.

In Louisiana a Criminal District Court has no jurisdiction over naturalization proceedings although in a sense a court of common-law jurisdiction. *State v. Baker*, 51 La. Ann. 1243.

The Court of Appeals of St. Louis has power to admit qualified aliens to citizenship under Rev. Stat. Mo. (1899), § 465. *Levin v. U. S.*, (C. C. A.) 128 Fed. Rep. 826.

**22. 5. Effect of Declaration.** — The declaration itself does not make the declarant a citizen. *Creagh v. Equitable L. Assur. Soc.*, 88 Fed. Rep. 1; *Dorsey v. Brigham*, 177 Ill. 250, 69 Am. St. Rep. 228. See also *Haywood v. Marshall*, 53 Neb. 220.

**23. 7. Who May Appear as "Voucher."** — It is customary to prove the essential facts by a single witness called a "voucher;" but a voucher who makes a practice of appearing in such cases and testifying for compensation will not be sufficient. *In re Lipshitz*, 97 Fed. Rep. 584.

**24. 1. Courts Act Judicially in Naturalizing.** — *Pintsch Compressing Co. v. Bergin*, 84 Fed. Rep. 140.

**3. Judgment of Naturalization Not Collaterally Impeachable.** — *Pintsch Compressing Co. v. Bergin*, 84 Fed. Rep. 140.

**Record Invalid on Face.** — *Matter of Takuji Yamashita*, 30 Wash. 234, 94 Am. St. Rep. 860, where a judgment of naturalization void on its face was held to be assailable in a proceeding by the alien to obtain admission to the bar.

**25. 1.** See *U. S. v. Kornmehl*, 89 Fed. Rep. 10, wherein letters of naturalization were revoked for fraud in their procurement.

**Who May Have Judgment Annulled.** — No one but the United States or a person acting under authorization of the United States can proceed for the rescission of a judgment of naturalization. *Pintsch Compressing Co. v. Bergin*, 84 Fed. Rep. 140. An individual cannot, as such, proceed for the annulment of the naturalization papers. *McCarran v. Cooper*, 16 N. Y. App. Div. 311, affirming 162 N. Y. 654.

**3. Alienage Presumed to Continue.** — See *Richardson v. Amsdon*, (Supm. Ct. Spec. T.) 85 N. Y. Supp. 342, wherein it was held that the assumption of rights which no one but a citizen can exercise did not prove naturalization.

**5. Harmless Error in Admitting Parol Evidence.** — See *Dorsey v. Brigham*, 177 Ill. 250, 69 Am. St. Rep. 228.

**26. 1. Where Records Are Destroyed or Cannot Be Produced.** — *Strickley v. Hill*, 22 Utah 257, 83 Am. St. Rep. 786, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 26.

**27. 1. Conspiracy to Procure Fraudulent Naturalization.** — See *U. S. v. Malfroy*, 118 Fed. Rep. 899.

**3. Offense Misdemeanor and Not Felony.** — *Berkowitz v. U. S.*, (C. C. A.) 93 Fed. Rep. 452; *U. S. v. York*, 131 Fed. Rep. 323.

**8. Admission of Territory as State.** — An alien who declared before a court of record in Nebraska Territory his intention of becoming a citizen was created a citizen by the enabling acts on the admission of Nebraska as a state. *Bahuaud v. Bize*, 105 Fed. Rep. 485.

An alien who settled in Colorado at the age of thirteen years and one year before it became a state, and who exercised the right of citizenship there, was held not to have been made a citizen by the admission of Colorado into the Union. *Mayer v. U. S.*, 38 Ct. Cl. 553.

**The Treaty with Spain by Which Florida Was Ceded to the United States.** — The treaties of the United States with France in 1803, and Spain in 1819, did not affect the citizenship of residents in the acquired territory, and a child born in 1809, in New Mexico, was a Spanish subject until after the year provided by the treaty of Guadalupe Hidalgo. *De Baca v. U. S.*, 37 Ct. Cl. 482.

**By the Annexation of Texas.** — By the constitution of Texas "all persons (Africans, the descendants of Africans, and Indians excepted) who were residing in Texas on the day of the declaration of independence shall be considered citizens of the republic." The date of the declaration was March 2, 1836. It was held that an alien who became a resident in 1845, just prior to the annexation to the United States, did not become thereunder a citizen of the United States. *Coutzen v. U. S.*, 33 Ct. Cl. 475, affirmed 179 U. S. 191.

**Inhabitants of Territory Acquired by United States.** — Cessions to the United States do not entail that the inhabitants shall become citizens. Such a result would have to be from express or implied provisions of the treaty. *Goetze v. U. S.*, 103 Fed. Rep. 72, reversed 182 U. S. 221.

The treaty with Mexico, May 30, 1848, by which the United States acquired New Mexico, provided that "those who shall prefer to remain

**28.** 4. By Succeeding to Status of Father. — See note 1.

**29.** 5. By Marriage in the Case of Women. — See note 2.

**31.** III. How CITIZENSHIP LOST — 1. Expatriation — *c.* WHAT AMOUNTS TO ACT OF EXPATRIATION. — See note 2.

2. By Marriage in Case of Women. — See note 4.

**32.** Change of Citizenship. — See note 3.

[CITRON. — See note 3*a*.]

CITY. — See note 4.

in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States, but they shall be under obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year without having declared their intention to retain the character of Mexicans shall be considered to have elected to become citizens of the United States." *Vallejos v. U. S.*, 35 Ct. Cl. 489, wherein this treaty was construed as conferring no rights until the year was up.

**28.** 1. The Infant Children of Aliens. — *Rexroth v. Schein*, 206 Ill. 80.

Children of Naturalized Aliens become citizens if minors at the time of the father's naturalization, but not if of age at that time. *Dorsey v. Brigham*, 177 Ill. 250, 69 Am. St. Rep. 228.

**29.** 2. *Dorsey v. Brigham*, 177 Ill. 250, 69 Am. St. Rep. 228, wherein it was held that this was a "uniform rule of naturalization," notwithstanding provision was also made for naturalization of aliens, both male and female, by a judicial proceeding.

A Woman of African Blood is within the meaning of the statute, since the Act of July 14, 1870, § 16, U. S. Stat. at L. 256. *Broadis v. Broadis*, 86 Fed. Rep. 951.

A Woman Held under the Immigration Laws who marries a citizen pending proceedings becomes a citizen and is entitled to release. *Hopkins v. Fachant*, (C. C. A.) 130 Fed. Rep. 839.

Where Marriage Illegal. — In *U. S. v. Rodgers*, 109 Fed. Rep. 886, it was held that a naturalized citizen of the United States who married his niece in Russia, thereby conferred no citizenship on her, for the marriage, though valid there, was invalid in the United States, and would subject the parties to indictment.

**31.** 2. Adoption of a Citizen by an Indian Tribe does not deprive him of his citizenship. *French v. French*, (Tenn. Ch. 1898) 52 S. W. Rep. 517.

4. American Woman Losing Citizenship by Marriage. — See *Jennes v. Landes*, 84 Fed. Rep. 73, 85 Fed. Rep. 801 (assent of United States unnecessary); *Ruckgaber v. Moore*, 104

Fed. Rep. 947, affirmed 114 Fed. Rep. 1020, 52 C. C. A. 587.

**32.** 3. *Pacific Mut. L. Ins. Co. v. Tompkins*, (C. C. A.) 101 Fed. Rep. 543, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 32, and supporting the whole text paragraph.

3*a.* Citron Is Fruit within the Custom Duties Act. *U. S. v. Nordlinger*, (C. C. A.) 121 Fed. Rep. 690. The court in this case said: "Citron is the fruit of the citrus or citron tree. In its present condition no one contends that it is green or ripe, no one disputes that it is dried. It belongs, then, to the family of fruits, and falls within the great group of that family designated as 'dried fruits.' In common speech, and by the language of trade and commerce, as this record shows, it is a dried fruit."

4. Other Definitions of City. — City may be defined as an incorporated town. *Borders v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1103, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 32. See definitions from various dictionaries in *Wight, etc., Co. v. Wolff*, 112 Ga. 169.

In *Brooks v. Wichita*, (C. C. A.) 114 Fed. Rep. 298, the court said: "A city is a public corporation designed for local government. It is an agency of the state to assist in the civil government of the territory and people of the state embraced within its limits."

A city is a political subdivision of the state and is included in the term "state" which is the concrete whole. *State v. Levy Ct.*, 1 Penn. (Del.) 597.

City Purposes. — The acquirement of land for a park by the city authorities is a city purpose. *Lexington v. Kentucky Chautauqua Assembly*, 114 Ky. 781.

Town Construed to Include City. — *Klauber v. Higgins*, 117 Cal. 451.

Cities Held to Include Towns. — *Heard v. State*, 113 Ga. 444. Compare *Wright, etc., Co. v. Wolff*, 112 Ga. 160.

"City" Held Not to Include Incorporated Towns. — *Day v. Morristown*, 62 N. J. L. 571.

City Officers. — *State v. Kelly*, 103 Mo. App. 711. See also *People v. Dooley*, 69 N. Y. App. Div. 512.

City Court. — As to what constitutes a city court see *Welborne v. State*, 114 Ga. 793. And see the title COURTS.



# CIVIL DAMAGE ACTS.

By A. W. VARIAN.

**37. I. THE STATUTES — 2. Rules of Construction — Liberal Construction to Effect Their Purpose.** — See note 11.

**38. 3. Notice Not to Sell — Terms of Statutes.** — See note 1.

**39. Manner of Service.** — See note 1.

**4. Differences in the Several Statutes — There Are Minor Variations.** — See note 2.

**42. III. THE WRONGFUL ACT — 2. The Sale of Intoxicating Liquor — A Gift by Way of Hospitality.** — See note 1.

**43. 3. Liability for Lawful and Unlawful Sales.** — See note 1.

**4. No Liability in the Absence of Intoxication.** — See note 3.

**5. Injuries Arising from Habitual Intoxication.** — See note 5.

**44. 6. All Contributors to the Intoxication Are Liable.** — See note 1.

**45. How Sued — Jointly or Severally.** — See note 1.

**Contributing to Habitual Intoxication — To What Extent Liable.** — See notes 2, 3.

**37. 11. Liberal Construction to Effectuate Their Purpose.** — See *Gardner v. Day*, 95 Me. 558.

In Illinois it is now held that the statute must be strictly construed. *Schulte v. Menke*, 111 Ill. App. 212, affirmed 210 Ill. 357; *Schulte v. Schleeper*, 210 Ill. 357; *McLees v. Niles*, 93 Ill. App. 442; *Walker v. Dailey*, 101 Ill. App. 575.

**38. 1. Sales to Habitual Drunkards.** — No notice is required in *Texas* where the sale is made to a habitual drunkard. *Tarkington v. Brunett*, (Tex. Civ. App. 1899) 51 S. W. Rep. 274.

**39. 1. Subsequent Removal.** — Where the notice has once been served it is sufficient, and the subsequent removal of the place of business to other premises will not require the giving of an additional notice. *Rintleman v. Hahn*, 20 Tex. Civ. App. 244.

**2. Iowa.** — Acts 25th Gen. Assem., c. 62, known as the "Mulct Law," is not a defense to an action for damages under section 1557 of the code. *Carrier v. Bernstein*, 104 Iowa 572. And since the adoption of the new code the seller who relies on compliance with that statute as a defense has the burden of alleging and proving full and complete compliance with the conditions imposed therein. *League v. Ehmke*, 120 Iowa 464.

**42. 1. Sale to One of Two Companions — Liquor Consumed by Both.** — *Johnson v. Gram*, 72 Ill. App. 676.

**43. 1. In Absence of Restrictive Words, Lawful Sales Included.** — See *Carrier v. Bernstein*, 104 Iowa 572.

**3. Intoxication Essential to Recovery of Damages.** — See *Carrier v. Bernstein*, 104 Iowa 572.

**5. Illinois.** — Where the ground for recovery relied upon is the sale of liquor which has caused habitual drunkenness, the proofs should be such that the jury can say that the person charged has sold a sufficient number of times to aid materially in bringing about the state of

habitual drunkenness. *Siegle v. Rush*, 173 Ill. 559.

**Iowa.** — Any one causing or contributing to the continuance of a state of habitual intoxication is liable so far as his acts contributed to the injury. *League v. Ehmke*, 120 Iowa 464.

**Nebraska.** — A wife is entitled to recover, not because her husband is a drunkard, but because the defendant has made him one. And one who has converted another into a habitual drunkard is responsible for all the financial losses due to his act, including those caused by the subsequent thriftless and dissipated career of his victim, directly resulting therefrom. *Stahnka v. Kreitle*, 66 Neb. 829.

**South Dakota.** — A saloon keeper is at his peril bound to ascertain and to know that the person to whom he sells intoxicating liquors is not a minor, is not intoxicated, and is not in the habit of getting intoxicated; and as to such persons no notice is required forbidding him to make such sales. *Sandige v. Widmann*, 12 S. Dak. 101.

**44. 1. All Persons Contributing to the Intoxication Liable.** — *League v. Ehmke*, 120 Iowa 464; *Faivre v. Mandercheid*, 117 Iowa 724; *Horst v. Lewis*, (Neb. 1904) 98 N. W. Rep. 1046; *Johnson v. Carlson*, (Neb. 1901) 95 N. W. Rep. 788; *Gorey v. Kelly*, 64 Neb. 605; *Stahnka v. Kreitle*, 66 Neb. 829; *Kolling v. Bennett*, 10 Ohio Cir. Dec. 81, 18 Ohio Cir. Ct. 425. See also *McNary v. Blackburn*, 180 Mass. 141.

**45. 1. May Be Sued Jointly or Severally.** — *Coleman v. People*, 78 Ill. App. 210; *Walker v. Dailey*, 101 Ill. App. 575; *Keller v. Lincoln*, 67 Ill. App. 404. See also *Littell v. Young*, 5 Pa. Super. Ct. 205.

**2. In Iowa Contributor Not Liable for All the Damages.** — *Bellison v. Apland*, 115 Iowa 599. Compare *League v. Ehmke*, 120 Iowa 464.

**Predecessor of Saloon Keeper.** — A saloon keeper is not liable for the consequences of wrongs committed by his predecessor in business, in

- 45.** Only One Satisfaction. — See note 4.
- 46.** 7. Proximate Cause — The General Rule. — See note 1.
- 47.** But in Some Cases. — See note 1.  
Assault by Intoxicated Person. — See note 2.
- 48.** Imprisonment or Execution for Crime of Intoxicated Person. — See note 1.
- IV. THE WRONGDOER — WHAT PERSONS ARE LIABLE — 1. The Seller and His Agent — Such Person's Agent. — See note 5.**
- 50.** 3. Surety on the License Bond. — See note 4.
- 52.** V. THE INJURY — 4. Injuries to Means of Support — Persons Actually Though Not Legally Dependent. — See note 2.  
Not Limited to Bare Necessaries of Life. — See note 5.
- 53.** Cases Illustrating This Kind of Injury. — See note 1.

the commission of which he was not actually or constructively implicated. *Stahnka v. Kreitle*, 66 Neb. 829.

**45.** 3. But General Rule Is Otherwise. — *Bowden v. Voorheis*, 135 Mich. 648, following *Steele v. Thompson*, 42 Mich. 594, stated in the original note; *Stahnka v. Kreitle*, 66 Neb. 829.

**4.** Only One Satisfaction Allowed. — *Stanley v. Leahy*, 87 Ill. App. 465.

**46.** 1. Proximate Cause. — *Schulte v. Menke*, 111 Ill. App. 212, affirmed 210 Ill. 357; *McNary v. Blackburn*, 180 Mass. 141; *Roach v. Kelly*, 194 Pa. St. 24, 75 Am. St. Rep. 685.

It is not necessary that the wrongdoer should be able to anticipate the particular injury. — *Lafier v. Fisher*, 121 Mich. 60.

**Death from Injuries Sustained by Falling.** — In *Johnson v. Gram*, 72 Ill. App. 676, the death of a person from a fall from his wagon while the horses were crossing a railroad track in front of an approaching train was held to be proximately caused by his being placed in his wagon while too intoxicated to control the horses.

**Intoxicated Person Killed for Using Abusive Language.** — *Sauter v. Anderson*, 112 Ill. App. 580.

**It Is a Question for the Jury.** — *Jarozewski v. Allen*, 117 Iowa 632.

Where an issue is formed and trial is had by a jury, and there is any evidence tending to show that the wrong complained of was the proximate cause of the injury, the question is for the jury; but where the question is presented by demurrer to the declaration, it is one of law. *Schulte v. Schleeper*, 210 Ill. 357.

**Death from Pneumonia Contracted While Intoxicated.** — In *Indiana* a wife may recover for injury to her means of support, resulting from the death of her husband from pneumonia which he contracted from exposing himself to the elements while under the influence of liquor sold to him by the defendant. *Nelson v. State*, 32 Ind. App. 88.

**Money Stolen.** — The sale of liquor producing intoxication is not the proximate cause of a loss of money through a theft by a third person while the vendee of the liquor was intoxicated. *Gage v. Harvey*, 66 Ark. 68, 74 Am. St. Rep. 70.

**47.** 1. In Nebraska. — *Schiek v. Sanders*, 53 Neb. 664.

The liquor furnished by the defendant need not be the sole, or even the principal, cause of the injury. *McClellan v. Hein*, 56 Neb. 600,

**Injury to Means of Support.** — *Homire v. Halfman*, 156 Ind. 470, following *McCarty v. Wells*, 51 Hun (N. Y.) 171, stated in the original note.

**2. Assault by Intoxicated Person.** — *Munz v. People*, 90 Ill. App. 647. See also *Baker v. Summers*, 103 Ill. App. 237, reversed 201 Ill. 52.

**48.** 1. Crimes Committed by Intoxicated Person — Imprisonment or Execution. — The rule of the text obtains in *Illinois* and *Indiana*. *Lofthus v. Hamilton*, 105 Ill. App. 72; *Homire v. Halfman*, 156 Ind. 470, following *Beers v. Walhizer*, 43 Hun (N. Y.) 254, cited in the original note.

**5.** Sales by Agent. — *Walker v. Dailey*, 101 Ill. App. 575; *Shull v. Arie*, 113 Iowa 170; *Manning v. Morris*, 28 Tex. Civ. App. 502.

**A Brewing Company** which undertakes to obtain a license for the saloon keeper, rents the premises for him, and furnishes the liquor to be sold there becomes a party to illegal sales of liquor made there, and is liable to one injured in her means of support by reason of such illegal sales. *Terre Haute Brewing Co. v. Newland*, 33 Ind. App. 544.

**50.** 4. The Surety's Liability Is Coextensive with That of the Principal. — *Breeding v. Jordan*, 115 Iowa 566; *Horst v. Lewis*, (Neb. 1904) 98 N. W. Rep. 1046; *Manning v. Morris*, 28 Tex. Civ. App. 502.

In *Iowa* it is unnecessary to make the principal a party or to obtain judgment against him before proceeding against the surety. *Knott v. Peterson*, 125 Iowa 404.

**52.** 2. The Massachusetts Statute applies to a case of partial dependence and gives a remedy to parents injured in their actual means of support by the loss of help from a child, without regard to their having a legal right to the help. *McNary v. Blackburn*, 180 Mass. 141.

**5.** Not Limited to Bare Necessaries — Independent Means of Support. — See *Maloney v. Dailey*, 67 Ill. App. 427.

**53.** 1. Medical Attendance for Injuries. — Money necessarily expended by the wife for medicine and medical attendance on account of injuries sustained by her husband while intoxicated is an injury to her means of support. *Coleman v. People*, 78 Ill. App. 210.

**Money Paid for Cure.** — That the husband left his rent unpaid and borrowed money to be cured of the liquor habit directly tends to show an injury to the wife's means of support, *Maloney v. Dailey*, 67 Ill. App. 427,

- 54.** 5. Death. — See note 1.  
**55.** 6. Care of Intoxicated Person. — See note 1.  
**56.** VI. THE PERSONS INJURED — WHAT PERSONS MAY SUE. — See note 1.  
 1. Dependents — Legal Dependency. — See note 2.  
**57.** 2. Kinsmen. — See note 1.  
 4. Contributory Fault. — See note 3.  
**59.** VII. DAMAGES RECOVERABLE — 1. Nominal Damages. — See note 3.  
 2. Actual Damages — As in Other Cases of Actionable Wrongs. — See note 4.  
**60.** Recovery Limited to the Particular Injury. — See note 1.  
 Where Amount Fixed by Statute. — See note 3.  
 3. Exemplary Damages — Actual Damage Must Be Proved. — See note 4.

**54.** 1. Death by Intoxication. — *Nelson v. State*, 32 Ind. App. 88; *Gardner v. Day*, 95 Me. 558, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54; *Garrigan v. Thompson*, 17 S. Dak. 132; *Stafford v. Levinger*, 16 S. Dak. 118, 102 Am. St. Rep. 686; *Nordin v. Kjos*, 13 S. Dak. 497. See also *Schick v. Sanders*, 53 Neb. 664.

But in *South Dakota* there can be no recovery unless the sale was made under a license, the statute not providing for sales made by unlicensed dealers. *Paulson v. Langness*, 16 S. Dak. 471.

**55.** 1. Intoxicated Person Injured by Criminal Act of Another. — There is no responsibility to a person providing for the care of an intoxicated person who has been injured by the criminal act of a third party. *Schulte v. Menke*, 111 Ill. App. 212, affirmed 210 Ill. 357.

**Party Injured by Intoxicated Person.** — Under this provision of the statutes no recovery can be had for care given to one who has received an injury at the hands of an intoxicated person. *Schulte v. Schleeper*, 210 Ill. 357.

**A Wife** can recover for care of her husband while intoxicated. *McVey v. Williams*, 91 Ill. App. 144.

**Dependent for Support.** — A recovery under such provision may be had by others than those dependent upon the intoxicated person for support. *Coleman v. People*, 78 Ill. App. 210.

**56.** 1. Where the Statute Names the Class of Persons to whom the right of action is given such right must be limited to the beneficiaries so named. *Couchman v. Prather*, (Ind. App. 1903) 68 N. E. Rep. 599.

**2. An Illegitimate Child** may sue one furnishing intoxicants to her father whereby she was injured in her means of support. *Goulding v. Phillips*, 124 Iowa 496.

**A Wife** may sue without joining her husband and without his consent, where the act complained of was a sale to the husband. *Wright v. Tipton*, 92 Tex. 168.

**After Divorce.** — A wife, even after obtaining a divorce from her husband, such action being rendered necessary by the acts of the defendants, may maintain a suit to recover damages resulting from the illegal sale of liquor to her former husband. *Nordin v. Kjos*, 13 S. Dak. 497.

**57.** 1. Relatives — Husband's Right of Action. — In *Kansas* a husband may recover damages on account of injuries to him in his person, property, and means of support in consequence of his wife falling into a condition of habitual drunkenness from liquors sold to her. *Landrum v. Flannigan*, 60 Kan. 436.

In *Texas* it is not necessary that the party suing for the sum provided for by statute as liquidated damages for a breach of a liquor dealer's bond show that he was actually aggrieved by the breach. *Kruger v. Spachek*, 22 Tex. Civ. App. 307; *Tipton v. Thompson*, 21 Tex. Civ. App. 143; *Cunningham v. Porchet*, 23 Tex. Civ. App. 80.

**A Widow** can maintain an action for the sale of liquor to her minor son. *Frobse v. Peavy*, (Tex. Civ. App. 1897) 43 S. W. Rep. 900.

**3. Rule of Contributory Fault.** — *Cunningham v. Porchet*, 23 Tex. Civ. App. 80, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57.

**A Wife Who Encourages or Authorizes the Sale.** — *Tipton v. Thompson*, 21 Tex. Civ. App. 143.

**The Intoxicated Person Himself.** — *Couchman v. Prather*, (Ind. App. 1903) 68 N. E. Rep. 599; *People v. Linck*, 71 Ill. App. 358.

But under the *Pennsylvania* statute giving a right of action to "any one aggrieved," the intoxicated person himself may recover for injuries sustained by him by reason of the intoxication. *Littell v. Young*, 5 Pa. Super. Ct. 205.

**The Legal Representative** of the person intoxicated has no right of action under the *Indiana Civil Damage Act* for injuries resulting in his death. *Couchman v. Prather*, (Ind. App. 1903) 68 N. E. Rep. 599, affirmed 162 Ind. 250.

**59.** 3. Rule of Damages. — The damages recoverable for illegal sales of intoxicating liquors are subject to the same rules as other actionable torts. *Campbell v. Harmon*, 96 Me. 87.

Where the evidence disclosed that the plaintiff was injured in her means of support, but the amount was uncertain, it was held not to be improper to refuse to direct a verdict for the defendants. *Bowden v. Voorheis*, 135 Mich. 648.

**4. General Rule — Damages Commensurate with Injury.** — See *Gorey v. Kelly*, 64 Neb. 605.

**Question for Jury.** — *Brown v. Butler*, 66 Ill. App. 86.

**60.** 1. Probable Duration of Life. — The standard life tables are admissible to show the expectancy of life of the deceased. *Knott v. Peterson*, 125 Iowa 404. See generally the title MORTALITY TABLES.

**3.** Under Rev. Stat. Tex. (1895), art. 3380, five hundred dollars may be recovered as liquidated damages by a person aggrieved for a breach of a liquor dealer's bond. *Wright v. Tipton*, 92 Tex. 168; *Cunningham v. Porchet*, 23 Tex. Civ. App. 80.

**4. Exemplary Damages.** — *Miller v. Gleason*, 10 Ohio Cir. Dec. 20, 18 Ohio Cir. Ct. 374.

- 61.** Wilful and Wanton Wrong. — See note 1.  
As for Instance. — See note 3.
- 62.** 4. Mitigation of Damages. — See note 2.
- 63.** VIII. EVIDENCE — Husband as Witness. — See note 1.  
The Subsequent Declarations. — See note 3.  
Direct Proof of Violation of Law. — See note 4.

In *South Dakota* exemplary damages are not allowed in an action by a wife for selling liquor to her husband. *Garrigan v. Thompson*, 17 S. Dak. 132.

**61.** 1. Gross Negligence — Wilful and Wanton Wrong. — *England v. Cox*, 89 Ill. App. 551; *Breeding v. Jordan*, 115 Iowa 566; *Campbell v. Harmon*, 96 Me. 87; *Boyd v. Haberstumpf*, 129 Mich. 137; *Bowden v. Voorheis*, 135 Mich. 648.

**3.** Knowledge that Purchaser Was Habitual Drunkard. — *England v. Cox*, 89 Ill. App. 551.

Sales in Disregard of Notice Not to Sell. — *Siegle v. Rush*, 173 Ill. 559; *Lasfer v. Fisher*, 121 Mich. 60.

**62.** 2. Evidence Not Admissible in Mitigation. — Evidence that the plaintiff had abused and assaulted her husband (the intoxicated person) and had attempted to demolish the defendant's

saloon is not admissible in mitigation of damages. *Gough v. State*, 32 Ind. App. 22.

**63.** 1. The Husband Cannot Testify Against the Wife without her consent. *Wood v. Lentz*, 116 Mich. 275.

In an Action by a Minor Child for injuries resulting from the sale of intoxicants to his father, the father is a competent witness. *Shull v. Arie*, 113 Iowa 170.

**3.** Declarations as to Consent. — Declarations made by a minor at the time of the purchase as to the consent of his father to such sales are inadmissible. *Roach v. Springer*, (Tex. Civ. App. 1903) 75 S. W. Rep. 933.

**4.** Injury to Means of Support. — *McLees v. Niles*, 93 Ill. App. 442.

Preponderance of Evidence. — The plaintiff is required to establish her cause of action only by a preponderance of the evidence. *Woods v. Dailey*, 211 Ill. 495.

## CIVIL DEATH.

- 65.** II. CIVIL DEATH FOLLOWING CONVICTION OF FELONY. — See notes 1, 5, 6.
- 66.** Statutes. — See notes 3, 4.

**65.** 1. See *Matter of Donnelly*, 125 Cal. 417, 73 Am. St. Rep. 62.

**5.** *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 65; *Gray v. Gray*, 104 Mo. App. 520; *Guarantee Co. of North America v. Lynchburg First Nat. Bank*, 95 Va. 480, holding that at common law a person convicted of felony, though disabled from suing, did not possess immunity from suit; and so a citizen of Virginia, serving a term of penal servitude in the penitentiary of another state, under a judgment of a federal court in that state, might be sued in the courts of that state.

**6.** *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 65; *Gray v. Gray*, 104 Mo. App. 520; *Guarantee Co. of North America v. Lynchburg First Nat. Bank*, 95 Va. 480.

**66.** 3. New York. — See *Stephani v. Lent*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 346, referring, with apparent approval, to *Avery v. Everett*, 110 N. Y. 332, 6 Am. St. Rep. 368, though the precise point was not directly involved in the case at bar.

**4.** California. — "The right of inheritance is a civil right existing only by virtue of the law, and the legislature may make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime. The provisions of sections 675 and 676 of the Penal

Code, instead of impairing this construction given to section 674, strengthen it by showing that but for these provisions, in the opinion of the legislature, the civil death of the felon would extend to the cases therein named; and the enumeration of the cases wherein section 674 is inoperative authorizes the conclusion that those are the only cases in which it is not to be applied." *Matter of Donnelly*, 125 Cal. 417, 73 Am. St. Rep. 62.

In *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99, the court criticised as obiter the declarations in *Matter of Nerac*, 35 Cal. 396, 95 Am. Dec. 111, set out in the original note, as to the consequences following a life sentence, and held that a money judgment against a life convict, entered after his conviction, could be enforced against his estate by garnishment process. The court said: "Our statute now makes the life convict a competent witness in criminal actions and capable 'of making and acknowledging a sale or conveyance of property.' \* \* \* If he may sell his property we can see no reason why his property may not be taken to pay his debts."

**Missouri.** — In *Gray v. Gray*, 104 Mo. App. 520, it was held that "the civil death which attaches to a person as an incident of his conviction of an infamous crime destroys his right to sue or to make executory contracts, but not the right of others to prosecute suits against him."

**66.** [The statutory provisions in *Kansas* and their effect are discussed in the note 4a.]

**67.** Civil Death by Sentence Held Not to Exist. — See note 1.

**66. 4a.** The *Kansas* Statute providing that "whenever any person shall be imprisoned under a sentence of imprisonment for life, his estate, property and effects shall be administered and disposed of in all respects as if he were naturally dead" (Code Crim. Pro. Kan., § 337) does not apply to a sentence of death to be inflicted at a time appointed by the governor after the expiration of a year from the time of conviction, and the convict is not thereby, during the time of his detention in the penitentiary, rendered incapable of managing his own estate. *Gray v. Stewart*, (Kan. 1904) 78 Pac. Rep. 852, overruling *Ashmore v. McDonnell*, (Kan. 1888)

16 Pac. Rep. 687. Nor does this statute cast the descent of the convict's property on his heirs by the fact of sentence and imprisonment. *Smith v. Becker*, 62 Kan. 541.

The statute providing that "a sentence of confinement and hard labor for a term less than life suspends all civil rights of the person so sentenced during the term thereof" (Gen. Stat. Kan. 1899, § 2254) is not applicable to convicts sentenced to the state industrial reformatory. *Sample v. Horner*, 61 Kan. 738.

**67. 1.** Felon Imprisoned for Life Not Civilly Dead. — See *Com. v. Clemmer*, 190 Pa. St. 202.

## CIVIL RIGHTS.

By H. N. ELDRIDGE.

**69. I. DEFINITION.** — See note 1.

**II. NATURE AND ORIGIN OF CIVIL RIGHTS** — 1. Civil Rights as Affected by Dual Citizenship. — See note 4.

a. CIVIL RIGHTS OF THE CITIZEN OF THE STATE AS SUCH. — See note 6.

**71. 2.** Civil as Distinguished from Political Rights. — See notes 1, 2, 3.

**3. Whether Civil Rights of Constitutional Creation** — a. CONSTITUTIONAL GUARANTY OF RIGHTS OF CITIZENS OF SEVERAL STATES. — See note 4.

**72. d.** FIFTEENTH AMENDMENT AS CREATIVE OF CIVIL RIGHTS. — See note 2.

**73. III. SECURITIES FOR THE ENJOYMENT OF CIVIL RIGHTS** — 1. Provisions of Federal Constitution and Legislation — a. ARTICLE FOUR, SECTION TWO OF THE CONSTITUTION. — See note 1.

**69. 1. Definition.** — A civil right is a right accorded to every member of a district, community, or nation. *Winnett v. Adams*, (Neb. 1904) 99 N. W. Rep. 681.

**4.** See *Guenther v. American Steel Hoop Co.*, 116 Ky. 580.

**6. Privileges and Immunities of Citizens of Each State in Sister States.** — See *Blake v. McClung*, 172 U. S. 239; *Maxwell v. Dow*, 176 U. S. 581; *Maynard v. Granite State Provident Assoc.*, (C. C. A.) 92 Fed. Rep. 435; *U. S. v. Morris*, 125 Fed. Rep. 322; *Matter of Stanford*, 126 Cal. 112; *State v. Travelers Ins. Co.*, 73 Conn. 255; *Ferner v. State*, 151 Ind. 247; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386; *Brooklyn v. Nassau Electric R. Co.*, 44 N. Y. App. Div. 462; *Steed v. Harvey*, 18 Utah 367, 72 Am. St. Rep. 789; *Duryea v. Muse*, 117 Wis. 399.

**Corporations Not Citizens.** — *Blake v. McClung*, 172 U. S. 239; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Sully v. American Nat. Bank*, 178 U. S. 289; *Caldwell v. Armour*, 1 Penn. (Del.) 545; *Pyrolusite Manganese Co. v. Ward*, 73 Ga. 491; *Ætna Ins. Co. v. Brigham*, 120 Ga. 925; *In re Speed*, 216 Ill. 23; *State v. Overman*,

157 Ind. 141; *State v. Hammond Packing Co.*, 110 La. 180, 98 Am. St. Rep. 459; *Atty.-Gen. v. Electric Storage Battery Co.*, (Mass. 1905) 74 N. E. Rep. 467; *Fire Dept. v. Stanton*, 28 N. Y. App. Div. 334; *Humphreys v. State*, 70 Ohio St. 67, 101 Am. St. Rep. 888; *Hawley v. Hurd*, 72 Vt. 122, 82 Am. St. Rep. 922. See also *Matter of Avery*, (Surrogate Ct.) 45 Misc. (N. Y.) 529.

**71. 1.** *Karem v. U. S.*, (C. C. A.) 121 Fed. Rep. 250; *U. S. v. Morris*, 125 Fed. Rep. 322.

**2. Right to Vote Political, Not Civil, Right.** — *Winnett v. Adams*, (Neb. 1904) 99 N. W. Rep. 681.

**3.** *Maxwell v. Dow*, 176 U. S. 581; *Dorsey v. Brigham*, 177 Ill. 250, 69 Am. St. Rep. 228.

**4. No Right Created.** — *Matter of Johnson*, 139 Cal. 532, 96 Am. St. Rep. 161.

**72. 2. Security Against Discrimination under Fifteenth Amendment.** — *James v. Bowman*, 190 U. S. 127; *Lackey v. U. S.*, (C. C. A.) 107 Fed. Rep. 114; *Karem v. U. S.*, (C. C. A.) 121 Fed. Rep. 250; *U. S. v. Miller*, 107 Fed. Rep. 913; *Pope v. Williams*, 98 Md. 59; *Porter v. Kingfisher County*, 6 Okla. 550.

**73. 1. Service of Process on Agent of Non-**

**73.** States May Regulate Use of Common Property. — See note 2.

**74.** *b.* ARTICLE THIRTEEN OF THE AMENDMENTS. — See note 1.  
Civil Rights Bill of 1866. — See notes 3, 4.

**75.** Not Limited to Invasion by State Authority. — See note 3.

*c.* ARTICLE FOURTEEN OF THE AMENDMENTS — (1) *Generally.* — See note 4.

Security Against State Action Only. — See note 6.

Federal Legislation under This Provision. — See note 7.

**76.** Action by State Through Any of Its Agencies Within Provision. — See note 1.

**77.** (3) *Right to Vote.* — See note 2.

(4) *Right of Trial by Jury in Suits at Law in State Courts.* — See note 4.

(6) *Security for the Equal Protection of the Law* — (a) *Generally.* — See note 6.

**resident.** — A statute providing that service of process, in an action seeking a personal judgment against an individual residing in another state but doing business in the state in which the action is brought, may be made on his manager or agent in charge of such business is obnoxious to Const. U. S., art. 4, § 2. *Moredock v. Kirby*, 118 Fed. Rep. 180.

**License Tax Imposed on Foreign Agents of Breweries.** — In *Cullman v. Arndt*, 125 Ala. 581, it was held that a municipal ordinance which provided that agents of breweries of other states, doing business in that municipality, should pay a license or privilege tax, but which was silent as to agents of domestic breweries, was unconstitutional as in violation of Const. U. S., art. 4, § 2.

**Provision Has No Application to Unorganized Territories and Indian Reservations.** — *McFadden v. Blocker*, 3 Indian Ter. 224.

**A Statute Licensing Nonresident Peddlers**, but expressly exempting certain resident peddlers, is in violation of the constitutional provision. *In re Jarvis*, 66 Kan. 329.

**73. 2. Privilege of Nonresidents to Herd, Graze, or Permit Stock to Run at Large.** — The citizens of one state have no privilege or immunity that will protect them in herding, grazing, or permitting stock to run at large upon lands of another state of which they are nonresidents, and in which lands they claim no interest, when the exercise of any such privilege is prohibited by law. *State v. Smith*, 71 Ark. 478.

**The Right to Dig for Clams Within a State** may be denied to citizens of another state, Const. U. S., art. 4, § 2, not being applicable to common property within the state. *Com. v. Hilton*, 174 Mass. 29.

**74. 1. In re Chung Fat**, 96 Fed. Rep. 202.

**A Statute Establishing a System of Peonage** is within the prohibition of the Thirteenth Amendment. *Peonage Cases*, 123 Fed. Rep. 671.

**3. The Right of a Negro to Lease Lands and cultivate them** is secured by the Thirteenth Amendment and the Civil Rights Bill of 1866. *U. S. v. Morris*, 125 Fed. Rep. 322.

**4. See U. S. v. Morris**, 125 Fed. Rep. 322.

**75. 3. U. S. v. Morris**, 125 Fed. Rep. 322.

**4. Maxwell v. Dow**, 176 U. S. 581; *Orr v. Gilman*, 183 U. S. 278; *Wadleigh v. Newhall*, 136 Fed. Rep. 941; *People v. Folks*, 89 N. Y. App. Div. 171.

**Privileges or Immunities of Nonresidents.** — The Fourteenth Amendment does not confer upon nonresidents of a state who are citizens of the United States any greater or other privileges or immunities than those enjoyed by the citizens of the state. *Brown v. Birmingham*, 140 Ala. 590.

**Lawful Privileges and Immunities.** — The privileges and immunities referred to by the Fourteenth Amendment are such as are lawful in character. *State v. Graham*, 34 Wash. 81.

**The Right to Practice Medicine** without a license is not a right which belongs to a man because he is a citizen of the United States, and therefore is not protected by the Fourteenth Amendment. *Parks v. State*, 159 Ind. 211; *Com. v. Finn*, 11 Pa. Super. Ct. 620; *State v. Currens*, 111 Wis. 431.

**The Right to the Use of the Likeness of the National Flag for Advertising Purposes** is a "privilege" protected by the Fourteenth Amendment. *Ruhrstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30.

**6. Fourteenth Amendment Affects State Action Only.** — *James v. Bowman*, 190 U. S. 127; *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188; *Karem v. U. S.*, (C. C. A.) 121 Fed. Rep. 250; *Ex p. Riggins*, 134 Fed. Rep. 404; *Eastling v. State*, 69 Ark. 189; *Lewis v. Brandenburg*, 105 Ky. 14; *State v. Maryland Institute*, etc., 87 Md. 643.

**Fourteenth Amendment Does Not Affect Legislation of Congress.** — *Moses v. U. S.*, 16 App. Cas. (D. C.) 428.

**7. Federal Legislation under Fourteenth Amendment.** — *James v. Bowman*, 190 U. S. 127.

**76. 1. Fourteenth Amendment Covers All Forms of State Action.** — *U. S. v. Morris*, 125 Fed. Rep. 322; *Indiana Natural*, etc., *Gas Co. v. State*, 158 Ind. 516.

**77. 2. Right of Suffrage.** — *Maxwell v. Dow*, 176 U. S. 581; *Pope v. Williams*, 98 Md. 59.

**4. Right of Trial by Jury.** — In *Maxwell v. Dow*, 176 U. S. 595, the court said: "The Fourteenth Amendment, in forbidding a state to abridge the privileges or immunities of citizens of the United States, does not include among them the right of trial by jury in a civil case, in a state court, although the right to such a trial in the federal courts is specially secured to all persons in the cases mentioned in the Seventh Amendment."

**6. Equality of Protection the Right of All**

**78. Corporations "Persons" Within the Equal Protection Clause.** — See note 1.

(b) **Equal Protection Clause as Prohibitive of Class or Partial Legislation.** — See notes 3, 4.

**Persons.** — *Ganaway v. Salt Lake Dramatic Assoc.*, 17 Utah 37.

**"Protection" Must Be Construed to Mean** protection to life, liberty, and property. *Steed v. Harvey*, 18 Utah 367, 72 Am. St. Rep. 789.

**78. 1. Corporations Protected as Persons.** — *Blake v. McClung*, 172 U. S. 239; *Skinner v. Garnett Gold-Min. Co.*, 96 Fed. Rep. 735; *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 78 Am. St. Rep. 17; *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188; *In re Speed*, 216 Ill. 23; *State v. Haun*, 61 Kan. 146; *Luman v. Hitchens Bros. Co.*, 90 Md. 14; *Hargraves Mills v. Harden*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 665; *Humphreys v. State*, 70 Ohio St. 67, 101 Am. St. Rep. 888; *Hawley v. Hurd*, 72 Vt. 122, 82 Am. St. Rep. 922.

**3. State Laws Discriminating Against Classes or Persons Prohibited** — *United States*. — *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96; *Tullis v. Lake Erie, etc., R. Co.*, 175 U. S. 348; *Petit v. Minnesota*, 177 U. S. 164; *Gundling v. Chicago*, 177 U. S. 183; *Erb v. Morasch*, 177 U. S. 584; *Williams v. Fears*, 179 U. S. 270; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79; *Clark v. Titusville*, 184 U. S. 329; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Otis v. Parker*, 187 U. S. 606; *Billings v. Illinois*, 188 U. S. 97, *affirming* 189 Ill. 472; *Farmers', etc., Ins. Co. v. Dobney*, 189 U. S. 301; *Detroit, etc., R. Co. v. Osborn*, 189 U. S. 383; *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618; *Ohio v. Dollison*, 194 U. S. 445; *Cook v. Marshall County*, 196 U. S. 261; *Savannah, etc., R. Co. v. Savannah*, 198 U. S. 392; *Dreyer v. Pease*, 88 Fed. Rep. 978; *Jacobs Pharmacy Co. v. Atlanta*, 89 Fed. Rep. 244; *Skinner v. Garnett Gold-Min. Co.*, 96 Fed. Rep. 735; *Clark v. Russell*, (C. C. A.) 97 Fed. Rep. 900; *Merchant's L. Assoc. v. Yoakum*, (C. C. A.) 98 Fed. Rep. 251; *In re Eberle*, 98 Fed. Rep. 295; *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335; *Williamson v. Liverpool, etc., Ins. Co.*, 105 Fed. Rep. 31; *Fidelity, etc., Co. v. Freeman*, (C. C. A.) 109 Fed. Rep. 847; *Underground R. Co. v. New York*, 116 Fed. Rep. 952; *Peacock v. Pratt*, (C. C. A.) 121 Fed. Rep. 772; *Dastervignes v. U. S.*, (C. C. A.) 122 Fed. Rep. 30; *Busch v. Webb*, 122 Fed. Rep. 655; *Duluth Brewing, etc., Co. v. Superior*, (C. C. A.) 123 Fed. Rep. 353; *Union County Nat. Bank v. Ozan Lumber Co.*, 127 Fed. Rep. 206; *Michigan Railroad Tax Cases*, 138 Fed. Rep. 223.

*Arkansas*. — *State v. Mallory*, (Ark. 1904) 83 S. W. Rep. 955; *Ex p. Deeds*, (Ark. 1905) 87 S. W. Rep. 1030.

*California*. — *Muller v. Hale*, 138 Cal. 163; *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188.

*Colorado*. — *Los Angeles Gold Mine Co. v. Campbell*, 13 Colo. App. 1; *Bland v. People*, 32 Colo. 319; *Parsons v. People*, 32 Colo. 221.

*Connecticut*. — *Norwich Gas, etc., Co. v. Norwich*, 76 Conn. 565.

*District of Columbia*. — *Moses v. U. S.*, 16 App. Cas. (D. C.) 428.

*Florida*. — *State v. Jacksonville Terminal Co.*, 41 Fla. 363.

*Georgia*. — *Stewart v. Kehrner*, 115 Ga. 184; *Southern R. Co. v. Ragsdale*, 119 Ga. 773; *Smith v. Clark*, 122 Ga. 528.

*Illinois*. — *Lippman v. People*, 175 Ill. 101; *Sanitary Dist. v. Bernstein*, 175 Ill. 215; *Mathews v. People*, 202 Ill. 389, 95 Am. St. Rep. 241; *Christy v. Elliott*, 216 Ill. 31.

*Indiana*. — *State v. Hogreiver*, 152 Ind. 652; *Levy v. State*, 161 Ind. 251; *Kersey v. Terre Haute*, 161 Ind. 471; *Sellers v. Hayes*, 163 Ind. 422; *McKinster v. Sager*, 163 Ind. 671.

*Iowa*. — *Scottish Union, etc., Ins. Co. v. Herriott*, 109 Iowa 606, 77 Am. St. Rep. 548; *State v. Santee*, 111 Iowa 1, 82 Am. St. Rep. 489; *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Heinz v. Board of Equalization*, 121 Iowa 445.

*Kansas*. — *State v. Haun*, 61 Kan. 146; *British-America Assur. Co. v. Bradford*, 60 Kan. 82; *Atchinson, etc., R. Co. v. Campbell*, 8 Kan. App. 661, *reversed* 61 Kan. 439; *Atkinson v. Woodmansee*, 68 Kan. 71.

*Kentucky*. — *Mutual F. Ins. Co. v. Hammond*, (Ky. 1899) 51 S. W. Rep. 151; *Hays v. Com.*, 107 Ky. 655.

*Louisiana*. — *American Homestead Co. v. Karstendiek*, 111 La. 884.

*Maine*. — *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386; *State v. Bohemier*, 96 Me. 257; *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.

*Maryland*. — *Luman v. Hitchens Bros. Co.*, 90 Md. 14; *Scholle v. State*, 90 Md. 729; *State v. Broadbelt*, 89 Md. 565, 73 Am. St. Rep. 201; *Herbert v. Baltimore County*, 97 Md. 639.

*Massachusetts*. — *Com. v. Interstate Consol. St. R. Co.*, 187 Mass. 436; *Green v. Sklar*, (Mass. 1905) 74 N. E. Rep. 595.

*Michigan*. — *People v. De Blaay*, (Mich. 1904) 100 N. W. Rep. 598.

*Mississippi*. — *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507, 95 Am. St. Rep. 476; *Yazoo, etc., R. Co. v. Adams*, 77 Miss. 764.

*Missouri*. — *Powell v. Sherwood*, 162 Mo. 605; *Andrus v. Fidelity Mut. L. Ins. Assoc.*, 168 Mo. 151; *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.*, 170 Mo. 173, 94 Am. St. Rep. 763; *State v. Eby*, 170 Mo. 497; *Eckrich v. St. Louis Transit Co.*, 176 Mo. 621, 98 Am. St. Rep. 517; *State v. Preferred Tontine Mercantile Co.*, 184 Mo. 160.

*Montana*. — *Butte v. Paltrovich*, 30 Mont. 18, 104 Am. St. Rep. 698; *State v. Brett*, 16 Mont. 360.

*Nebraska*. — *Lancashire Ins. Co. v. Bush*, 60 Neb. 116.

*Nevada*. — *Ex p. Boyce*, 27 Nev. 299.

*New Hampshire*. — *State v. Iackman*, 69 N. H. 318; *State v. Aldrich*, 70 N. H. 391, 85 Am. St. Rep. 631.

*New Jersey*. — *McMullin v. Doughty*, (N. J. 1903) 55 Atl. Rep. 284.

*New York*. — *Fire Dept. v. Stanton*, 150 N.

**79. (c) Legislation Inflicting Unequal Punishments.** — See note 1.

(d) Legislation General and Equal in Terms, but Unequal in Design or Operation. — See note 6.

**80. (e) Laws Limited to Certain Localities.** — See note 2.

**81. (f) Equal Protection Clause as Affecting the Selection of Jurors.** — See note 5.

*Y. 225; People v. Orange County Road Constr. Co., 175 N. Y. 84; People v. Miller, 84 N. Y. App. Div. 168, modified 177 N. Y. 461; Rosini v. Lidgerwood Mfg. Co., 89 N. Y. App. Div. 245; Wright v. Hart, 103 N. Y. App. Div. 218; People v. Van De Carr, 91 N. Y. App. Div. 20, affirmed 178 N. Y. 425.*

*North Carolina.* — *Jones v. Duncan, 127 N. Car. 118; Lacy v. Armour Packing Co., 134 N. Car. 567; State v. McGinnis, 138 N. Car. 724.*

*Ohio.* — *Snell v. Cincinnati St. R. Co., 60 Ohio St. 256; In re Preston, 63 Ohio St. 428, 81 Am. St. Rep. 642; Froelich v. Toledo, etc., R. Co., 24 Ohio Cir. Ct. 359.*

*Oregon.* — *Apex Transp. Co. v. Garbade, 32 Oregon 582; Title Guarantee, etc., Co. v. Wrenn, 35 Oregon 62, 76 Am. St. Rep. 454.*

*Pennsylvania.* — *Com. v. Clark, 10 Pa. Super. Ct. 507, 195 Pa. St. 634, 86 Am. St. Rep. 694; McCann v. Com., 198 Pa. St. 509; Com. v. Finn, 11 Pa. Super. Ct. 620; Com. v. Beatty, 15 Pa. Super. Ct. 5.*

*Rhode Island.* — *State v. Dalton, 22 R. I. 77, 84 Am. St. Rep. 818.*

*South Carolina.* — *Simmons v. Western Union Tel. Co., 63 S. Car. 425; South Carolina, etc., R. Co. v. American Telephone, etc., Co., 65 S. Car. 459.*

*Tennessee.* — *State v. Cook, 107 Tenn. 499; Condon v. Maloney, 108 Tenn. 82; Continental F. Ins. Co. v. Whitaker, 112 Tenn. 151; Webster v. State, (Tenn. 1903) 82 S. W. Rep. 179.*

*Texas.* — *Washington L. Ins. Co. v. Gooding, 19 Tex. Civ. App. 490; Galveston, etc., R. Co. v. Gibson, (Tex. Civ. App. 1899) 54 S. W. Rep. 779; McGrew v. Wilson, (Tex. Civ. App. 1900) 57 S. W. Rep. 63; Sun L. Ins. Co. v. Phillips, (Tex. Civ. App. 1902) 70 S. W. Rep. 603; Sweeney v. Webb, (Tex. Civ. App. 1903) 76 S. W. Rep. 766; *Ex p. Hernan, (Tex. Crim. 1903) 77 S. W. Rep. 225; Supreme Lodge, etc., v. Johnson, (Tex. 1904) 81 S. W. Rep. 18; Douthitt v. State, (Tex. 1904) 83 S. W. Rep. 795; McLaury v. Watelsky, (Tex. Civ. App. 1905) 87 S. W. Rep. 1045.**

*Vermont.* — *State v. Cadigan, 73 Vt. 245, 87 Am. St. Rep. 714; State v. Hoyt, 71 Vt. 59; State v. Shedroi, 75 Vt. 277, 98 Am. St. Rep. 825; State v. Scampini, 77 Vt. 92.*

*Washington.* — *Henry v. Thurston County, 31 Wash. 638; State v. Fraternal Knights, etc., 35 Wash. 338; Matter of Aubrey, 36 Wash. 308, 104 Am. St. Rep. 952.*

*West Virginia.* — *Blue Jacket Consol. Copper Co. v. Scherr, 50 W. Va. 533.*

*Wisconsin.* — *State v. Benzenberg, 101 Wis. 172; State v. Whitcom, 122 Wis. 110.*

*In Juniata Limestone Co. v. Fagley, 187 Pa. St. 196, 67 Am. St. Rep. 579, the court said: "The equal protection of the laws declared by the Fourteenth Amendment to the constitution secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances."*

**78. 4. Exemptions from Unequal Burdens and Charges.** — *Templar v. State Board of Examiners, 131 Mich. 254, 100 Am. St. Rep. 610.*

**As to Equality of Taxation.** — The provision in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. *Florida Cent., etc., R. Co. v. Reynolds, 183 U. S. 471; Knisely v. Cotterel, 196 Pa. St. 614.*

**79. 1.** See *McDonald v. Com., 173 Mass. 322, 73 Am. St. Rep. 293; State v. Shedroi, 75 Vt. 277, 98 Am. St. Rep. 825.*

**6. Law Framed and Applied So as Practically to Discriminate.** — *Ah Sin v. Wittman, 198 U. S. 500; Jew Ho v. Williamson, 103 Fed. Rep. 10; Kansas City v. Bacon, 157 Mo. 450; French v. Shirley, 9 Ohio Dec. 181, 7 Ohio N. P. 26. See also Consolidated Coal Co. v. People, 186 Ill. 134.*

**80. 2.** *Maxwell v. Dow, 176 U. S. 581; Lewis v. Brandenburg, 105 Ky. 14; State v. Mitchell, 97 Me. 66, 94 Am. St. Rep. 481; State v. Tower, 185 Mo. 79; Tenement House Dept. v. Moesch, 179 N. Y. 325; State v. Barrett, 138 N. Car. 630.*

**Unequal Laws as to the Number of Peremptory Challenges** have been held not to be unconstitutional. *Brown v. New Jersey, 175 U. S. 172, following Hayes v. Missouri, 120 U. S. 68, stated in the original note.*

**Different Courts.** — In *Cincinnati St. R. Co. v. Snell, 193 U. S. 37*, the court said: "The mere direction of the state law that a cause under given circumstances shall be tried in one forum instead of another, or may be transferred when brought from one forum to another, can have no tendency to violate the guaranty of the equal protection of the laws where in both the forums equality of law governs and equality of administration prevails."

**A Political Subdivision May Be Clothed with Power of Taxation** for certain specified purposes and within certain specified limits, without impairing the Fourteenth Amendment. *Martin v. School Dist., 57 S. Car. 125; McPherson v. McCarrick, 22 Utah 212.*

**81. 5. State May Determine Qualifications in Other Respects.** — *Smith v. State, (Tex. Crim.*



**81.** Right of Parties to Jury Impaneled Without Discrimination on Account of Race or Color. — See notes 6, 7.

**82.** (g) Equality of Protection as Implying Identity or Community of Rights — *aa.* RULE IN THE CASE OF COMMON CARRIERS — May Provide Separate if Equal Accommodations for Races. — See note 5.

**83.** See note 1.

Right of Carrier to Make Reasonable Rules. — See note 2.

*bb.* RIGHT OF STATE TO ESTABLISH AND MAINTAIN SEPARATE SCHOOLS. — See note 5.

**84.** Separate Schools Allowed. — See note 1.

**85.** 2. State Constitutions and Laws — *b.* EQUAL RIGHTS STATUTES. — See note 1.

1904) 78 S. W. Rep. 694; *Fugett v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 461, in which case it appeared that there were no negroes in the county who were qualified to sit as jurors, and it was held that there was no race discrimination.

**81.** 6. Must Be No Discrimination — *United States*. — *Carter v. Texas*, 177 U. S. 442, reversing 39 Tex. Crim. 345; *Rogers v. Alabama*, 192 U. S. 226.

*Arkansas*. — *Eastling v. State*, 69 Ark. 189.

*Florida*. — *Tarrance v. State*, 43 Fla. 446.

*Indian Territory*. — *Binyon v. U. S.*, (Indian Ter. 1903) 76 S. W. Rep. 265.

*North Carolina*. — *State v. Peoples*, 131 N. Car. 784; *State v. Daniels*, 134 N. Car. 641.

*South Carolina*. — *State v. Brownfield*, 60 S. Car. 509.

*Texas*. — *Smith v. State*, 42 Tex. Crim. 220, 44 Tex. Crim. 90, (Tex. Crim. 1903) 77 S. W. Rep. 453; *Whitney v. State*, 42 Tex. Crim. 283, 43 Tex. Crim. 197; *Collins v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 42; *Hubbard v. State*, 43 Tex. Crim. 564; *Thompson v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 449; *Martin v. State*, 44 Tex. Crim. 538.

**7.** Fact that Jury to Try Negro Is Composed of Whites No Denial of Right. — *Tarrance v. Florida*, 188 U. S. 519; *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668; *Parker v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1066; *Carter v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 437.

**Discrimination Must Be Proved or Admitted.** — It is never presumed. *Tarrance v. Florida*, 188 U. S. 519.

**82.** 5. Carriers May Furnish Separate if Equal Accommodations. — *Chesapeake, etc., R. Co. v. Com.*, (Ky. 1899) 51 S. W. Rep. 160; *Louisville, etc., R. Co. v. Catron*, 102 Ky. 323; *Ohio Valley R. Co. v. Lander*, 104 Ky. 431; *Louisville, etc., R. Co. v. Com.*, (Ky. 1904) 78 S. W. Rep. 167; *State v. Pearson*, 110 La. 387.

In *Kentucky* a statute provides for separate coaches for white and colored passengers, but excepts from its operation "the transportation of passengers in any caboose car attached to a freight train." *Louisville, etc., R. Co. v. Com.*, (Ky. 1904) 78 S. W. Rep. 167.

**83.** 1. See *State v. Welbon*, 66 Ark. 510.

**2. Reasonable Regulations.** — *Ohio Valley R. Co. v. Lander*, 104 Ky. 431.

**Regulation Held to Be Reasonable.** — In *Bowie v. Birmingham R., etc., Co.*, 125 Ala. 397, 82 Am. St. Rep. 247, it was held that a rule or regulation of a street railway company requiring white passengers to occupy seats in one portion of the cars operated by it on a certain

line of its road, and negroes to occupy seats in another portion, was reasonable.

**5.** *People v. Alton*, 179 Ill. 615.

**A. Private School** may exclude colored children, however, though it receives municipal aid. *State v. Maryland Institute, etc.*, 87 Md. 643.

**84.** 1. **Separate but Equal Schools.** — *Reynolds v. Board of Education*, 66 Kan. 687, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 84; *People v. School Board*, 161 N. Y. 598. See also *Cumming v. Richmond County Board of Education*, 175 U. S. 528.

**Statute Providing Separate Schools for Chinese Constitutional.** — *Wong Him v. Callahan*, 119 Fed. Rep. 381.

**85.** 1. **General Consideration of Civil Rights Acts.** — *Anderson v. Rawlings*, 10 Ohio Cir. Dec. 112, 18 Ohio Cir. Ct. 381; *Russ's Application*, 20 Pa. Co. Ct. 510; *Bryan v. Adler*, 97 Wis. 124, 65 Am. St. Rep. 99.

**Civil Rights Acts are Strictly Construed** in favor of the defendant, being in derogation of the common law. *Grace v. Moseley*, 112 Ill. App. 100.

**Purpose of New York Civil Rights Act.** — In *Grannan v. Westchester Racing Assoc.*, 153 N. Y. 465, the court said: "We think the purpose of the statute now under consideration was to declare that no person should be deprived of any of the advantages enumerated, upon the ground of race, creed, or color, and that its prohibition was intended to apply to cases of that character, and to none other. It is plain that the legislature did not intend to confer upon every person all the rights, advantages, and privileges in places of amusement or accommodation which might be enjoyed by another. Any discrimination not based upon race, creed, or color does not fall within the condemnation of the statute."

**Saloon Not Place of Public Accommodation and Amusement.** — Under the *Ohio Civil Rights Act* it is held that a place where intoxicating liquors are sold at retail is not within the meaning of the phrase "all other places of public accommodation and amusement." *Kellar v. Koerber*, 61 Ohio St. 388.

**Saloon Not Place of Refreshment.** — Under the *Minnesota Civil Rights Act* it is held that a place where intoxicating liquors are sold is not included within the general words "or other places of public refreshment." *Rhone v. Loomis*, 74 Minn. 200.

**A Bowling Alley** is a "place of public accommodation and amusement" within the *Ohio Civil Rights Act*, and a colored person cannot be denied the privilege of playing on the alley

**86.** (1) *Rule in the Case of Common Carriers.*— See note 1.

But Such a Statute Cannot Apply to Interstate Passengers.— See note 2.

**87.** (2) *Establishment of Separate Schools*— In Indiana.— See note 1.

Right of School Boards to Establish Separate Schools in the Absence of Express Legislative Authority.— See note 2.

simply because he is a colored person. *Johnson v. Humphrey Pop Corn Co.*, 24 Ohio Cir. Ct. 135.

The Corridor of an Office Building, Occupied by a Bootblack Stand, is not a "place of public accommodation" within the meaning of Civil Rights Act of New York, and the owner of the stand may discriminate against colored customers on account of their color merely. *Burks v. Bosso*, 180 N. Y. 341, reversing 81 N. Y. App. Div. 530.

**86.** 1. See *Chesapeake, etc., R. Co. v. Com.*, (Ky. 1905) 84 S. W. Rep. 566.

2. State Statutes as Affecting Interstate Com-

merce.— See *Smith v. State*, 100 Tenn. 494, distinguishing *Hall v. De Cuir*, 95 U. S. 485. See also *People v. Alton*, 193 Ill. 309.

**87.** 1. In *Kansas* it is held, following *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738, stated in the original note, that a constitutional provision to the effect that the legislature shall establish a uniform system of common schools is not violated by a statute establishing separate schools for colored children. *Reynolds v. Board of Education*, 66 Kan. 672.

2. Right of School Board to Establish Separate Schools.— See *Reynolds v. Board of Education*, 66 Kan. 672.

## CIVIL SERVICE.

**88.** I. DEFINITION— Civil Service.— See note 1.

Civil Service Statutes.— See note 3.

**89.** II. STATUTORY PROVISIONS— The Civil Service Act.— See note 3.

**90.** In England.— See note 3.

**91.** III. CONSTITUTIONALITY OF STATUTES— Legislature May Create Civil Service Commission with Power to Make Rules.— See note 1.

Requirement that Candidate Shall Show Fitness.— See note 4.

IV. APPLICATIONS AND APPOINTMENTS— 1. General Principles— Applications for Appointment.— See note 7.

**88.** 1. "Civil service," in its enlarged sense, means all service rendered to and paid for by the state or nation or by political subdivisions thereof, other than that pertaining to naval or military affairs. "Civil service reform" is defined by the lexicographers to be the substitution of business principles and methods for the spoils system in the conduct of the civil service, especially in the matter of appointments. *Per* Blanchard, J., in *Hope v. New Orleans*, 106 La. 345.

3. Civil Service Act, Its Purpose and Necessity.— See *People v. Mosher*, 45 N. Y. App. Div. 68.

**89.** 3. Constitutionality of Statutes.— "Chapter 370 of the Laws of 1899, and the rules passed in pursuance thereof, are, in so far as they compel the appointment of the person graded highest on the eligible list, in direct conflict with, and a nullification of, the power of appointment conferred by section 2 of article 10, and fail to give such section any substantial effect, and such portion of the statute and rules are not necessary to carry into effect either the letter or spirit of section 9 of article 5, nor to enforce the principle involved in such section, and are to that extent unconstitutional and void." *People v. Mosher*, 45 N. Y. App. Div. 68, affirmed 163 N. Y. 32, 79 Am. St. Rep. 552.

**90.** 3. Present English System.— See *People v. Mosher*, 45 N. Y. App. Div. 68.

England— New South Wales— Crown May Abolish Office.— In *Young v. Waller*, (1898) A. C. 661, the court said: "Now, although it was decided by this board in *Gould v. Stuart*, (1896) A. C. 575, that the effect of the Civil Service Act, 1884, was to deprive the crown of its right to dismiss its civil servants summarily, without following the procedure prescribed by the act, it was certainly not suggested that the provisions of the act do, either directly or by implication, take away the right of the crown to abolish a civil office."

Canada.— The provision in the 12th section of the Civil Service Amendment Act, 1888 (51 Vict., c. 12), that "no extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy head, officer, or employee in the civil service of Canada, or to any other person permanently employed in the public service," does not prevent Parliament at any time from voting any extra salary or remuneration; and where such an appropriation is made for such salary or remuneration, and the same is paid over to any officer, the crown cannot recover it back. *Hargrave v. Rex*, 8 Can. Exch. 62.

**91.** 1. *Hope v. New Orleans*, 106 La. 345.

4. *People v. Loeffler*, 175 Ill. 585.

7. *People v. Loeffler*, 175 Ill. 607, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 90-92, and cases. In this case the court said:

- 92.** Civil Service Statutes Not Retroactive. — See note 4.  
 Decisions with Regard to Various Other Points. — See note 6.  
**93.** 2. Preference to Veterans. — See note 1.  
**94.** Appointment of Veterans — Examinations. — See note 1.

"Wherever civil service acts are in force, they provide for applications to be made by those seeking employment in the public service, and no question has ever been made that such acts violate any constitutional provision by reason of this feature." And see *Kipley v. Luthardt*, 178 Ill. 525; *People v. Follett*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 510.

**92.** 4. *Young v. Adams*, (1898) A. C. 469; *People v. Drake*, 43 N. Y. App. Div. 325.

**6. Confidential Positions.** — *Rowley v. Rochester*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 291; *Breckenridge v. Scannell*, 160 N. Y. 103; *People v. Coler*, 31 N. Y. App. Div. 523, *affirmed* 157 N. Y. 676; *People v. Clarke*, 54 N. Y. App. Div. 588; *Shaughnessy v. Fornes*, 73 N. Y. App. Div. 462; *People v. Hamilton*, 98 N. Y. App. Div. 59.

**Day Laborer.** — *Hoggett v. Mt. Vernon*, 36 N. Y. App. Div. 374. Compare *People v. Cram*, 34 N. Y. App. Div. 313.

**School Teachers and Employees Protected.** — *Brenan v. People*, 176 Ill. 620.

**The Terms "Merit" and "Fitness" in the Civil Service Act Distinguished.** — *People v. Knauber*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 253, 43 N. Y. App. Div. 342, *affirmed* 163 N. Y. 23.

**Public Officers Holding Over** are not within the terms of the act. *People v. Chicago*, 104 Ill. App. 250, *affirmed* 210 Ill. 479; *McNeill v. Chicago*, 93 Ill. App. 124.

**Necessity for Competitive Examination — Question of Law.** — Whether it is practicable in a given case to determine the merit and fitness of an applicant by competitive examination where the nature of the duties to be performed is apparent is a question of law to be decided by the court. *People v. Knox*, 45 N. Y. App. Div. 518. In this case it was held that the fitness of an applicant for the position of a police clerk's assistant may properly be determined by competitive examination.

**Conclusiveness of Certificate of Fitness by "Civil Service Commission."** — *People v. Stratton*, 79 N. Y. App. Div. 149, *affirmed* 174 N. Y. 531.

**Head of Department Not in Classified Service.** — A commissioner of public works who is the president of the board and the head of a department of the city government is not in the classified service, and on charges against the board, and the members thereof, the civil service commission has no jurisdiction to investigate his conduct as commissioner. *Lindblom v. Doherty*, 102 Ill. App. 14.

**No Presumption as to Jurisdiction of Civil Service Commission.** — Since the civil service commission is a subordinate tribunal of limited jurisdiction, its jurisdiction must affirmatively appear on the face of the proceedings, and no presumption will be indulged in favor of it, as in the case of a court of general jurisdiction. *Lindblom v. Doherty*, 102 Ill. App. 14.

**Functions of Civil Service Commission.** — The civil service commission cannot remove. Its function is limited to the investigation of the preferred charges, and certifying the result to

the appointing officer. By section 12 it is made the duty of the appointing officer to remove, in case the charges shall be found by the commission to be true and sufficient to warrant discharge. *Lindblom v. Doherty*, 102 Ill. App. 14.

**Necessity of Written Charges.** — In order to warrant an investigation of an officer's conduct as superintendent of streets, it was necessary, in view of the provisions of the civil service act and rule 8 of the commission, that "written charges" should have been preferred against him, as such superintendent, by his appointing officer, the commissioner of public works, specifying grounds for his removal, in such manner as to apprise him of what he was called on to defend against. *Lindblom v. Doherty*, 102 Ill. App. 14.

**Classification of Employees.** — A flume tender, whose duty is the custody and care of the flume of a city water works system, and whose employment is of a permanent character, is properly classified under civil service regulations in the official service instead of the labor service, when, under such regulations, official service comprises positions of a permanent character, and labor service those of a temporary character. *State v. Smith*, 19 Wash. 644.

**93. 1. The United States Statutes Provide.** — In *Keim v. U. S.*, 177 U. S. 290, the court, in construing these statutes, said: "But these sections do not contemplate the retention in office of a clerk who is inefficient, nor attempt to transfer the power of determining the question of efficiency from the heads of departments to the courts. The proviso in section 3 of the Act of August 15, 1876, 19 Stat. 169, c. 287, expressly limits the preference to those 'equally qualified.' \* \* \* Nowhere in these statutory provisions is there anything to indicate that the duty of passing, in the first instance, upon the qualifications of the applicants, or later, upon the competency or efficiency of those who have been tested in the service, was taken away from the administrative officers and transferred to the courts."

**Statutes Held Constitutional.** — *Goodrich v. Mitchell*, 68 Kan. 771 104 Am. St. Rep. 429, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 93. See also *People v. Groat*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 526.

**Statutes Held Unconstitutional.** — *Hardy v. Orange*, 61 N. J. L. 620; *Com. v. Rutherford*, 22 Pa. Co. Ct. 425, 7 Northam. Co. Rep. (Pa.) 26.

**Waiver by Beneficiaries.** — The statutes of *New Jersey*, commonly known as the "Veteran Acts," were passed solely for the benefit of the class of persons named therein, and their provisions may be waived by the beneficiaries thereof. *Hardy v. Orange*, 61 N. J. L. 620.

**Reduction in Grade.** — In *Black v. Board of Education*, (County Ct.) 92 N. Y. Supp. 118, the court said: "Nothing in the veterans' laws prevents a reduction which is reasonable, and not amounting to a removal or forcing of a resignation."

**94. 1. Form of Certificate of Merit and Fitness,**

- 94.** Various Cases Applying the Regulations of Civil Service Statutes. — See note 6.  
**95.** Hearing Before Discharge. — See note 1.

**96. CIVIL SUIT, ACTION, CASE, ETC.** — See note 1.

**99. CLAIM.** — See note 1.

— *People v. Knauber*, 43 N. Y. App. Div. 342, affirmed 163 N. Y. 23.

**94. 6. Proof of Competency Required** — *Burden on Veteran*. — *Jones v. Willcox*, 80 N. Y. App. Div. 167.

**Health Officer of City.** — *People v. Saratoga Springs*, 35 N. Y. App. Div. 141, affirmed 159 N. Y. 568.

**Veteran Cannot Compel Appointment Where No Vacancy Exists.** — *Allison v. Board of Education*, 125 Cal. 72.

**Reinstatement When Office Colorably Abolished.** — *Ingram v. Street, etc., Com'rs*, 63 N. J. L. 542; *People v. Scannell*, 48 N. Y. App. Div. 69.

**95. 1.** *Ayers v. Hatch*, 175 Mass. 489; *Peterson v. Chosen Freeholders*, 63 N. J. L. 57; *People v. Feitner*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 153, affirmed 42 N. Y. App. Div. 622; *People v. Dalton*, 44 N. Y. App. Div. 556; *Murphy v. Keller*, 61 N. Y. App. Div. 145; *People v. Hoffman*, 98 N. Y. App. Div. 4; *People v. Hynes*, 101 N. Y. App. Div. 453.

**Statutes Held Unconstitutional.** — *People v. Scannell*, 62 N. Y. App. Div. 249.

**Dismissing Supernumerary Employee Without Hearing.** — *Fitzsimmons v. O'Neill*, 214 Ill. 494; *Caulfield v. Jersey City*, 63 N. J. L. 148; *Chicago v. People*, 114 Ill. App. 145; *Kelly v. York*, 42 N. Y. App. Div. 283; *People v. Scannell*, 48 N. Y. App. Div. 445, affirmed 163 N. Y. 599; *Jones v. Willcox*, 80 N. Y. App. Div. 167; *People v. Health Dept.*, 86 N. Y. App. Div. 521, affirmed 176 N. Y. 602; *People v. Lindenthal*, 173 N. Y. 524. See also *People v. York*, 53 N. Y. App. Div. 429.

**Appointment for Definite Term — End of Term Creates Vacancy.** — *Gilhooly v. Chosen Freeholders*, (N. J. 1899) 43 Atl. Rep. 569.

**Appointment for a Probationary Term.** — After dismissal for incompetency at the end of a term, a refusal to reappoint a veteran is proper. *In re Sweet*, (Supm. Ct. App. Div.) 50 N. Y. Supp. 444, affirmed 157 N. Y. 368.

**When Probationary Appointee Not Entitled to Notice.** — *Fish v. McGann*, 107 Ill. App. 538, affirmed 205 Ill. 179.

**The Position of Bridge Commissioner is not a subordinate position contemplated by the Veterans' Act, and therefore is not within the protection of that act.** *People v. Nixon*, 158 N. Y. 221.

**Veteran in Street Cleaning Department Not Within Statute.** — *People v. McCartney*, 28 N. Y. App. Div. 138.

**Clerks.** — *Thompson v. Troup*, 74 Conn. 121; *Chicago v. Luthardt*, 91 Ill. App. 324, affirmed 191 Ill. 516.

**96. 1. Other Definitions.** — *Jefferson County v. Philpot*, 66 Ark. 243; *Duplex Printing Press Co. v. Journal Printing Co.*, 1 Penn. (Del.) 565; *Combs v. Com.*, (Ky. 1903) 71 S. W. Rep. 504; *Harrigan v. Gilchrist*, 121 Wis. 127.

**Complaint for Flowing or Flooding Land under the Maine Statute is a civil suit.** *Ingram v. Maine Water Co.*, 98 Me. 566.

**Witnesses.** — *People v. Elliott*, 172 N. Y. 146.

**Divorce.** — See *Eikenbury v. Eikenbury*, 33 Ind. App. 69; *Sullivan v. Sullivan*, 92 Me. 84.

**Forcible Entry and Detainer.** — *Herkimer v. Keeler*, 109 Iowa 680.

**Habeas Corpus.** — *In re Jewett*, 69 Kan. 830.

**Penalties.** — *Walton v. Cañon City*, 13 Colo. App. 77; *Greensburg v. Cleveland, etc., R. Co.*, 23 Ind. App. 141; *Cassville v. Jimerson*, 75 Mo. App. 426; *Gallatin v. Tarwater*, 143 Mo. 40; *People v. Sloane*, 98 N. Y. App. Div. 450; *McCreary v. Morristown First Nat. Bank*, 109 Tenn. 128; *Fortune v. Wilburton*, (Indian Ter. 1904) 82 S. W. Rep. 738.

**Damages for Land — Jury.** — In *Kennebec Water Dist. v. Waterville*, 96 Me. 234, the court said: "A proceeding for assessing the amount of just compensation for private property taken for public uses is not a *civil suit*. It is a special proceeding, provided and authorized by the sovereign power by whose authority the property is taken, to determine a specific fact."

**Bastardy.** — *Coney v. Holland*, 175 Mass. 469; *In re Walker*, 61 Neb. 803; *State v. Liles*, 134 N. Car. 735; *Matter of Comstock*, 10 Okla. 299.

**A Contest for an Office is not a civil cause** within a statute conferring jurisdiction on chancery courts. *Shields v. Davis*, 103 Tenn. 538.

**A Contest of a Will though not a civil action is a civil case** within a statute providing for payment of jury fees. *Carpenter v. Jones*, 121 Cal. 362.

**Attachment Is a Civil Action.** — *Hennessey First Nat. Bank v. Hesser*, 14 Okla. 115.

**A Proceeding to Enforce a Mechanics' Lien is a civil action** within a statute requiring notice of jury trial. *Graham v. Lord*, 170 Mass. 1.

**Proceedings Before Railroad Commissioners** whose functions are merely administrative or ministerial are not a *suit* or *civil cause* under the *Vermont* statute. *Burlington v. Burlington Traction Co.*, 70 Vt. 491.

**Removal of Causes.** — A proceeding by the state, even in its sovereign capacity, to accomplish a purpose other than enforcement of its penal laws, is "of a *civil* nature," as those words are used in the federal statute providing for removal of causes. *State v. Frost*, 113 Wis. 623.

**99. 1.** *People v. Glover*, 141 Cal. 233; *Hill v. Henry*, 66 N. J. Eq. 150.

**Other Definitions.** — *Gill v. Dixon*, 131 N. Car. 87; *Allen v. State Auditors*, 122 Mich. 324.

**Distinguished from Debt.** — *Hill v. Graham*, 11 Colo. App. 536.

In *Mallers v. Crane Co.*, 191 Ill. 181, the court said: "It may be conceded that the word *claim* generally has a different meaning from the word 'indebtedness,' but we entertain no doubt that as used in this bond, in connection with the deed of assignment, the parties used it in the sense of an indebtedness."

**Estates of Decedents.** — *Genet v. Willock*, 93 N. Y. App. Div. 588.

**108. CLASS.** — See note 3.

**109. [CLEAN.** — See note 1a.]

**CLEAR.** — See note 3.

**112. [CLEARANCE CARD.** — See note 1a.]

**Same — Contingent Claims.** — See *Mail Printing Co. v. Clarkson*, 25 Ont. App. 1; *Holden v. Turrell*, 86 Minn. 214.

**Same — Claim or Demand.** — *Rice v. Rigley*, 7 Idaho 115.

**Torts — Presentation of Claim Against Municipality.** — *Mason v. Ashland*, 98 Wis. 541, *following Kelley v. Madison*, 43 Wis. 638, stated in original note; *Haggard v. Carthage*, 168 Mo. 129, *following Nance v. Falls City*, 16 Neb. 85, stated in original note. And see *Griswold v. Ludington*, 116 Mich. 401; *Pulitzer v. New York*, 48 N. Y. App. Div. 6; *Ahrens v. Rochester*, 97 N. Y. App. Div. 480.

**Claim Against County.** — The application of an agricultural society for assistance from the county funds is a *claim*, and an appeal from its allowance, by a taxpayer, will lie to re-examine the facts as to the organization and competency of the society. No re-examination as to the public interest in assisting such a society is permissible. *Sheldon v. Gage County Agriculture Soc.*, (Neb. 1904) 98 N. W. Rep. 1045.

**Claims Against State.** — Stat. Wis., § 3200, (1878), providing that "it shall be competent for any person deeming himself aggrieved by the refusal of the legislature to allow any just *claim* against the state, to commence an action against the state, by filing a complaint" with the clerk of the Supreme Court, etc., relates only to *claims* which, if allowed, render the state a debtor to the claimant, and does not include a demand based upon unlawful and tortious acts of officers and agents of the state. *Houston v. State*, 98 Wis. 481.

**Synonymous with Cause of Action.** — *Ellis v. Flaherty*, 65 Kan. 621; *Northwestern, etc., Hypotheek Bank v. State*, 18 Wash. 73; *Billings v. State*, 27 Wash. 288; *Barto v. Stewart*, 21 Wash. 605. *Compare Marco v. Bird*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 377.

**Claim Not Synonymous with Judgment.** — See *Marshall-Wells Hardware Co. v. New Era Coal Co.*, (N. Dak. 1904) 100 N. W. Rep. 1084.

**Claim for Compensation — Workmen's Compensation Act.** — By section 2, sub-section 1, of the Workmen's Compensation Act of 1897, proceedings for the recovery, under the Act, of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable, and unless "the *claim* for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury." "The *claim* for compensation" means, not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation sent to a

workman's employer. *Powell v. Main Colliery Co.*, (1900) A. C. 366.

**108. 3. Class of Creditors — Bankruptcy Act.** — See *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A.) 117 Fed. Rep. 1. And see the title *INSOLVENCY AND BANKRUPTCY*.

**109. 1a. Clean Busheling Scrap.** — In *Lichtenstein v. Rabolinsky*, 98 N. Y. App. Div. 520, the court said: "The term *clean* may be applied to a great variety of merchandise, and its scope and meaning are within the comprehension of any one. *Clean* busheling scrap, like *clean* oats, or *clean* flour, or *clean* seed grain, needs no expert to define it. The term does not relate to the particular grade, but to the quality of the article sold considered in its entirety."

**3. Clear Proceeds in the Sense of Net Proceeds.** — See *Board of Education v. Henderson*, 126 N. Car. 689.

**In Defining Proof — Clearness and Certainty.** — In *Reynolds v. Blaisdell*, 23 R. I. 19, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1174, the court said: "It has been held that by the terms '*clearness* and *certainty*,' as applied to the degree of proof required, was meant generally that there must be sufficient positive facts proved to take the matter out of the realm of conjecture and presumption." And see *Marshall v. Fleming*, 11 Colo. App. 515.

**Clear Value — Collateral Inheritance Tax.** — The collateral inheritance and succession tax is assessable only on the *clear* value of the estate, which is the net value after the payment of all debts and expenses of administration. *Shelton v. Campbell*, 109 Tenn. 690.

**112. 1a. Clearance Card — Railroads.** — In *McDonald v. Illinois Cent. R. Co.*, 187 Ill. 529, the court said: "From the evidence produced on this question, and from this judicial notice which we take of the ordinary general management of railroads, it is apparent that what is known as a *clearance card* is simply a letter, — be it good, bad, or indifferent, — given to an employee at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment." See also *New York, etc., R. Co. v. Schaffer*, 65 Ohio St. 414.

**Letter of Recommendation** as to the liability of a master to give such cards to a discharged employee. See the title *MASTER AND SERVANT*.

## CLEARING HOUSE.

**116. III. EFFECT OF CLEARING-HOUSE ASSOCIATION UPON MEMBERS INTER SESE** — 1. In General. — See note 2.

**118. 4. Rules Limiting Time for Readjustment of Exchanges Between Members** — *a.* IN GENERAL. — See note 4.

**119.** Nature of Payment Before Expiration of Time. — See note 2.  
Nature of Payment After Expiration of Time. — See note 3.

**131. CLERICAL.** — See note 1.  
**CLERK.** — See note 2.

**116. 2. Clearing-House Rules and Usages Binding if Not Illegal.** — Crocker-Woolworth Nat. Bank *v.* Nevada Bank, 139 Cal. 564, 96 Am. St. Rep. 169.

**118. 4. Dishonored Checks.** — See Mt. Morris Bank *v.* Twenty-third Ward Bank, 172 N. Y. 244, referring to the rule of the New York Clearing-House Association in this respect.

**119. 2. Payment Regarded as Provisional.** — Atlas Nat. Bank *v.* National Exch. Bank, 176 Mass. 300.

**3. Payment Regarded as Absolute.** — Atlas Nat. Bank *v.* National Exch. Bank, 176 Mass. 300.

**131. 1. Clerical Errors.** — Leonis *v.* Leffingwell, 126 Cal. 369; Matter of Stewart, 24 N. Y. App. Div. 201.

**2. Clerk and Secretary Are Synonymous Terms.** — Under the *Connecticut* statute, requiring a notice of an action against a corporation to be given to its *clerk*, it was held that a secretary was a *clerk* within such statute. Mack *v.* New York, etc., R. Co., 172 Mass. 185.

**A Managing Director of a Company** is not a "*clerk* or servant" within the meaning of the (English) Preferential Payments in Bankruptcy Act. *In re* Newspaper Proprietary Syndicate, (1900) 2 Ch. 349.

**And a Traveling Salesman** is not a *clerk* within the United States Bankruptcy Act. *In re* Greenewald, 99 Fed. Rep. 705.

See also the title **INSOLVENCY AND BANKRUPTCY.**

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## CLERKS OF COURTS.

By E. G. CHILTON.

**134. II. ELIGIBILITY OF CLERK — WHEN HE MAY HOLD TWO OFFICES.** — See note 2.

[*Sex.* — See note 2*a.*]

**III. TENURE AND DURATION** — 1. In General. — See note 3.

**IV. NATURE OF DUTIES** — 1. In General. — See note 6.

**135. 2. Performance of Unauthorized Judicial Functions** — *a.* IN GENERAL. — See note 3.

**134. 2. Same Person May Hold Office of Clerk of Quarter Sessions and of Oyer and Terminer.** — Com. *v.* Fry, 183 Pa. St. 32.

**Office of Clerk of Circuit Court and of District Court Compatible.** — *In re* Mason, 85 Fed. Rep. 145.

**2*a.* A Woman Is Eligible** to the office of clerk of the County Court. State *v.* Hostetter, 137 Mo. 636, 59 Am. St. Rep. 515. See also the title **PUBLIC OFFICERS**, 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 332.

**3. Successor of Temporary Appointee Entitled to Full Term.** — A person duly elected clerk to succeed one who has been temporarily holding the office under a commission from the governor is entitled to the full term provided by the constitution. Wells *v.* Munroe, 86 Md. 443.

**Manner of Obtaining Possession of Office.** — One who has been duly elected clerk of the Circuit Court must proceed by quo warranto to obtain possession of his office. Rhodes *v.* Driver, 69 Ark. 606, 86 Am. St. Rep. 215. See also the titles **PUBLIC OFFICERS**, 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 351; **QUO WARRANTO**, 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 630 *et seq.*

**6. Essentially a Ministerial Officer.** — U. S. *v.* Bell, 127 Fed. Rep. 1002.

**135. 3. Judicial Powers.** — Schweizer *v.* Mansfield, 14 Colo. App. 236; Porell *v.* Cousins, 93 Me. 232.

The clerk of the Superior Court is a mere ministerial officer, not authorized to examine the account rendered by the guardian of an insane person. Denny *v.* Holloway, 17 Wash. 487,

**136. V. POWER OF COURT TO SUSPEND OR REMOVE CLERK.** — See note 2. VI. WHEN VACANCY OCCURS — HOW FILLED. — See note 5.

**137. VII. COMPENSATION OF CLERK — 2. Where Compensation by Fees —**

*a. IN GENERAL.* — See note 1.

*b. STATUTES AWARDED COSTS STRICTLY CONSTRUED.* — See note 2.

*d. WHERE NO COSTS ARE ALLOWED BY LAW.* — See note 4.

**Entering Judgment Without Authority.** — A judgment entered by the clerk of the court without authority is void. *Lacoste v. Eastland*, 117 Cal. 673.

**Rendering Judgment in an Equity Suit.** — A judgment in an equity suit entered by a clerk is void for want of jurisdiction, as a clerk has only such powers as are given him by statute. *McCauley v. McCauley*, 122 N. Car. 288.

**Judgment Entered in Vacation by the Clerk,** on failure of the defendant to answer, is valid, and not considered an attempt to exercise judicial power. *Talbot v. Garretson*, 31 Oregon 256.

**Circuit Court Clerks Have Limited Power to Enter Judgment on Defaults.** — The clerks of the Circuit Court have only the power conferred on them by statute to enter final judgment on defaults, and they have no power to enter judgment on a declaration in tort. *Stubbs v. Franklin County Lumber Co.*, 42 Fla. 376.

**Power to Issue Order of Arrest.** — A clerk acting in a judicial capacity may issue an order of arrest, where, by statute, he and the judge have concurrent jurisdiction. *Bryan v. Stewart*, 123 N. Car. 92.

**Issuance of Warrant.** — Where an information stating an offense is filed, the clerk of the district may issue a warrant, and in so doing he exercises no judicial power. *State v. Johnson*, 8 Kan. App. 269.

**A County Clerk May Enter an Order of Discontinuance** of an action where the defendant has not appeared, although not authorized so to do by statute or by the constitution. *Hotaling v. Schermerhorn*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 311, *affirmed* 48 N. Y. App. Div. 638.

**136. 2. Removal of County Clerk for Collusion.** — A county clerk may be removed for colluding with others to perpetrate a fraud on the county. *McPherson v. State*, 59 Kan. 59.

**Depriving Clerk of Office.** — Not even the legislature can deprive a clerk of his office, where the office itself continues to exist. *Wilson v. Jordan*, 124 N. Car. 683.

**5. By the Court.** — *State v. Givens*, (Fla. 1904) 37 So. Rep. 308.

**137. 1. Fees of Clerks of Circuit and District Courts.** — See *U. S. v. Dundy*, (C. C. A.) 76 Fed. Rep. 357; *Butler v. U. S.*, 87 Fed. Rep. 655; *Marsh v. U. S.*, 88 Fed. Rep. 879; *Farmers L. & T. Co. v. Dart*, (C. C. A.) 91 Fed. Rep. 451; *Johnson v. Southern Bldg., etc., Assoc.*, 95 Fed. Rep. 922; *McIlwaine v. Ellington*, 99 Fed. Rep. 133; *Gillum v. Stewart*, 112 Fed. Rep. 30; *U. S. v. Marsh*, (C. C. A.) 112 Fed. Rep. 929; *Marvin v. U. S.*, 114 Fed. Rep. 225; *Curtice v. Crawford County Bank*, 124 Fed. Rep. 919; *Thornton v. Insurance Cos.*, 125 Fed. Rep. 250; *The Adula*, 127 Fed. Rep. 849; *U. S. v. Kurtz*, 164 U. S. 49; *U. S. v. Finnell*, 185 U. S. 236; *Van Duzee v. U. S.*, 35 Ct. Cl. 214, *reversed* 185 U. S. 278. See also the title

UNITED STATES COURTS, 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 221 *et seq.*

**Fees of Clerks of Various State Courts** — *Alabama*. — *Carmichael v. Matthews*, 134 Ala. 210.

*Arizona*. — *Pima County v. Martin*, 3 Ariz. 59.

*Florida*. — *Edwards v. Law*, (Fla. 1903) 36 So. Rep. 569.

*Georgia*. — *McMichael v. Southern R. Co.*, 117 Ga. 518.

*Indiana*. — *Huntington County v. Buchanan*, 21 Ind. App. 178; *State v. Flynn*, 161 Ind. 554.

*Kentucky*. — *Shackelford v. Phillips*, 112 Ky. 563; *Chinn v. Shackelford*, (Ky. 1904) 78 S. W. Rep. 908.

*Louisiana*. — *Parish Board of Directors v. Hebert*, 112 La. 467.

*Minnesota*. — *State v. Scow*, 93 Minn. 11; *Hennepin County v. Dickey*, 86 Minn. 331.

*Missouri*. — *Corbin v. Adair County*, 171 Mo. 385; *State v. Police Com'rs*, 108 Mo. App. 98.

*New Mexico*. — *Sena v. Bernalillo County*, (N. Mex. 1904) 78 Pac. Rep. 46.

*Oklahoma*. — *U. S. v. Warren*, 12 Okla. 350.

*Tennessee*. — *State v. Wilbur*, 101 Tenn. 211; *Henderson v. Walker*, 101 Tenn. 229; *Louisville, etc., R. Co. v. Boswell*, 104 Tenn. 529; *Plyley v. Allison*, 113 Tenn. 500.

*Texas*. — *Kabelmacher v. Kabelmacher*, 21 Tex. Civ. App. 317; *State v. Hart*, 96 Tex. 102.

*Washington*. — *State v. Collins*, 31 Wash. 564.

*Wisconsin*. — *Green Lake County v. Waupaca County*, 113 Wis. 425; *St. Croix County v. Webster*, 111 Wis. 270.

**Fees of Clerks of Territorial Courts.** — See *U. S. v. McMillan*, 165 U. S. 504.

**2. Statutes Awarding Costs Strictly Construed.** — *U. S. v. Mason*, (C. C. A.) 129 Fed. Rep. 742; *Reese v. Cleburne County*, 139 Ala. 299; *Huntington County v. Buchanan*, 21 Ind. App. 178; *State v. Second Judicial Dist. Ct.*, 24 Mont. 425; *State v. Police Com'rs*, 108 Mo. App. 98; *Clark v. Lucas County*, 7 Ohio Cir. Dec. 427, 14 Ohio Cir. Ct. 349; *Clark v. Lucas County*, 58 Ohio St. 107.

But if the clerk renders services, which the law commands, in an extraordinary proceeding, he should be compensated, although he is unable to put his finger on some statute expressly allowing the fees he claims. *State v. Police Com'rs*, 108 Mo. App. 98.

**4. Where No Compensation Allowed.** — *Reese v. Cleburne County*, 139 Ala. 299; *Clark v. Lucas County*, 58 Ohio St. 107; *St. Croix County v. Webster*, 111 Wis. 270; *Green Lake County v. Waupaca County*, 113 Wis. 425.

**Additional Labor Not in Line of Ordinary Duties.** — It has been held in *State v. Shutts*, 161 Ind. 590, that a clerk is entitled to a reasonable allowance for services rendered in preserving public records, where there is in existence a statute permitting the commissioners

**137.** *e.* NATURALIZATION FEES. — See note 5.

**138.** VIII. PERSONAL LIABILITY FOR NONFEASANCE OR MISFEASANCE — 1. In General. — See note 5.

**139.** IX. MANDAMUS TO COMPEL PERFORMANCE OF DUTY — 1. In General. — See note 6.

2. Issuance of Execution. — See note 7.

Where Writ Will Not Issue for the Purpose. — See note 8.

**141.** X. OFFICIAL BOND OF CLERK — LIABILITY OF SURETIES — 2. Failure to Pay Over Money Collected — *a.* GENERALLY. — See note 2.

Order of Court. — See note 4.

**142.** *b.* FEES OF HIS OFFICE. — See note 1.

*c.* FEES OF OTHER COURT OFFICERS. — See note 2.

*d.* MONEY PAID INTO COURT IN SATISFACTION OF JUDGMENT. —

See note 3.

to enter an order directing the officer in whose custody the impaired record may be to copy it.

**137.** 5. Naturalization Proceedings. — Clerks of territorial courts are not bound to account for moneys received by them for services in the naturalization of foreigners. *U. S. v. McMillan*, 165 U. S. 504.

**138.** 5. Liable in Damages. — *Selover v. Sheardown*, 73 Minn. 393, 72 Am. St. Rep. 627.

**Liability to County for Moneys Paid for Unofficial Acts.** — The clerk is personally liable to the county for money improperly paid him in compensation for unofficial acts directed by the court. *State v. Flynn*, 161 Ind. 554.

**Liability for Paying Over Fund Pending Appeal.** — Where a fund in controversy was paid over by the clerk pending an appeal, no order for its retention having been made, no personal liability attaches. *McFadden v. Swinerton*, 36 Oregon 336.

**139.** 6. *State v. St. Paul*, 113 La. 1066, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139.

**To Enforce the Execution of a Tax Deed** by the clerk of the Circuit Court mandamus lies. *State v. Bradshaw*, 39 Fla. 137.

**Refusing to Furnish Transcripts of Judgments.** — On failure of the clerk to furnish, after tender of his legal fees, certified copies of transcripts of judgments appearing on his docket, the writ of mandamus will lie. *State v. Scow*, 93 Minn. 11.

**When Writ Will Not Lie.** — Mandamus will not lie to compel the county clerk to issue a certificate to a juror, stating his attendance, since there is no statute imposing such duty. *Hilton v. Curry*, 124 Cal. 84.

**7. Issuance of Execution.** — *Mendenhall v. Burnette*, 58 Kan. 355; *Leeds v. Peaslee*, 10 Ohio Dec. 567, 8 Ohio N. P. 105.

**8. Mandamus** will not be granted to compel a clerk to complete the record of a judgment by inserting the amount of damages, where the assessment of the amount depends solely upon the recollection of the plaintiff and his attorney, and a person who testified in his behalf. *Rugg v. Davis*, 68 Vt. 600.

**141.** 2. Failure to Turn Over Money Collected. — *Howard v. U. S.*, (C. C. A.) 102 Fed. Rep. 77, affirmed 184 U. S. 676; *Howard v. U. S.*, 184 U. S. 676; *Parks v. Bryant*, 132 Ala. 224; *Vansant v. State*, 96 Md. 110; *Ferrell v. Grigsby*, (Tenn. Ch. 1899) 51 S. W. Rep. 114.

See also the title SURETYSHIP, 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 533 *et seq.*

**Liability of Sureties Limited to Strict Terms of Bond.** — But the obligations of the sureties cannot be extended beyond the strict terms of the bond. *People v. Cobb*, 10 Colo. App. 478; *State v. Flynn*, 161 Ind. 554.

**Action on Bond Where Principal Is Dead.** — Unless the bond is both joint and several, the plaintiff must allege the death of the principal, the insolvency of his estate, and the fact that no administrator has been appointed; otherwise the administrator must be joined as a party defendant. *State v. Henderson*, 120 Ga. 780.

**Bond of Clerk Liable for Money that Comes into His Hands as an Insurer.** — It does not matter that a clerk exercises good faith; his sureties are liable as insurers for money that comes into his hands. *Smith v. Patton*, 131 N. Car. 396, 92 Am. St. Rep. 783.

**Liability for Interest on Moneys Collected.** — The clerk, and the sureties on his official bond, are liable for interest received by him on money collected from the state, and which he deposited in bank until the time arrived for him to pay it over. *Vansant v. State*, 96 Md. 110.

**4. Necessity for Special Order.** — See *State v. Whitworth*, (Tenn. Ch. 1898) 46 S. W. Rep. 454, holding that a clerk and his sureties cannot be held liable for failure to collect a note belonging to a minor or to pay taxes on her realty, where there is in existence no order or decree directing him so to do.

**142.** 1. Fees of His Office. — *Cooper v. People*, 28 Colo. 87; *Com. v. Carter*, (Ky. 1900) 55 S. W. Rep. 701; *Vansant v. State*, 96 Md. 110.

**False Report as to Fees.** — *State v. Chick*, 146 Mo. 645; *State v. Gideon*, 158 Mo. 327.

Where the clerk makes a false report as to the fees received, the excess is held by him to the use of the county, and may be recovered by an action on his bond, if not barred by the statute of limitation or otherwise. *State v. Henderson*, 142 Mo. 508.

**Fees Not Collected.** — It has been held that the clerk is liable on his official bond for failure to tax certain costs, whereby the county lost moneys which could have been collected. *State v. Gideon*, 158 Mo. 327.

2. *State v. Flynn*, 161 Ind. 554; *State v. Whitworth*, 98 Tenn. 263; *Scott v. Hunt*, 92 Tex. 389.

3. Receipt of Money upon a Judgment. — *State*



**142.** *e.* MONEY PAID INTO COURT BY ORDER OF COURT. — See note 4.

**3.** When Default Occurs What Official Bond Holden — Where Default Continues. — See note 6.

**4.** Where Money Not Received Virtute Officii — Nonliability of Bondsmen — *a.* IN GENERAL. — See note 7.

**143.** See note 1.

**5.** Making False Certificate of Acknowledgment. — See note 4.

**144.** **12.** Failure to Enrol Judgment. — See note 6.

[*12a.* Failure to Index Judgment. — See note 6*a.*]

**13.** Failure to Issue Execution. — See note 7.

*v. Hobson*, 5 Ohio Dec. 442, 5 Ohio N. P. 321.

**Limited Power of Clerks to Receive Money on a Judgment.** — The power of the clerk to receive money in satisfaction of a judgment is limited, and he cannot withhold any part of the money paid him. *May v. State*, 162 Ind. 127.

After judgment, a clerk of court may receive payment, even in the absence of any express statute on the subject. *Commercial Invest. Co. v. Peck*, 53 Neb. 204, 68 Am. St. Rep. 598.

**142.** **4.** Money Paid into Court by Order of Court. — *Dirks v. Juel*, 59 Neb. 357, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 142; Baltimore, etc., R. Co. *v. Gault*, 165 Ill. 233; *Logan v. McCahan*, 102 Iowa 241; *Johnson v. Bobbitt*, 81 Miss. 339; *Smith v. Patton*, 131 N. Car. 396, 92 Am. St. Rep. 783; *State v. Hobson*, 5 Ohio Dec. 442, 5 Ohio N. P. 321.

**Clerk Absolutely Liable for Funds Deposited with Him in His Official Capacity.** — *Northern Pac. R. Co. v. Owens*, 86 Minn. 188, 91 Am. St. Rep. 336.

**Money Paid to Clerk in His Official Capacity May Be Recovered by Private Suitor as Well as the Government.** — *U. S. v. Howard*, 93 Fed. Rep. 719, affirmed (C. C. A.) 102 Fed. Rep. 77, 184 U. S. 676; *Smith v. Patton*, 131 N. Car. 396, 92 Am. St. Rep. 783.

**Depositing Trust Funds.** — A clerk who, in the absence of express authority, deposits trust funds to the credit of his private account is guilty of conversion. *Dirks v. Juel*, 59 Neb. 353; *Mitchell v. Rice*, 132 Ala. 120.

**Mingling Trust Funds.** — Where it appears that the greater part of funds deposited by the clerk in a bank belonged to the state, and that other money might have been mingled therewith, it was held that unless the clerk proved there was no mingling he would be liable for all interest received on such sum. *Vansant v. State*, 96 Md. 110.

**What Constitutes Payment into Court.** — A payment to a clerk which he is not by law or some order of the court entitled to receive is not a payment into court, and upon his failure to account therefor no recovery can be had against the sureties on his official bond. *People v. Cobb*, 10 Colo. App. 478.

**The Bondsmen of a Clerk Are Not Liable** where he loaned one thousand dollars on a note secured by national bank stock worth three thousand three hundred dollars, and the borrower was reputed to be worth forty thousand dollars, the decree of the court having ordered the clerk to take "notes with good security, bearing interest payable quarterly." *State v. Whitworth*, (Tenn. Ch. 1897) 30 S. W. Rep. 745.

**Note Made Payable to the Clerk of the Court in**

**His Official Capacity.** — *Allen v. Perkins*, (Tenn. Ch. 1897) 45 S. W. Rep. 445.

**6.** See *McPhillips v. McGrath*, 117 Ala. 549, where it is held that the sureties on the official bond are not liable for the defaults of the principal occurring prior to the execution of the bond, unless there is in existence some express or statutory provision to the contrary.

**7. Acts Outside of Duties Imposed by Law.** — *Ramaley v. Ramaley*, 69 Minn. 491; *Commercial Invest. Co. v. Peck*, 53 Neb. 204, 68 Am. St. Rep. 598; Texas, etc., R. Co. *v. Walker*, 93 Tex. 611; *Whitesboro v. Diamond*, (Tex. Civ. App. 1903) 75 S. W. Rep. 540.

**143.** **1.** Moneys that Clerk Not Authorized to Receive. — *People v. Cobb*, 10 Colo. App. 478.

The clerk was commanded by the decree to file certain notes in his office, but collected the money due on them. It was held that the money was not received in his official capacity, and he was not liable therefor on his official bond. *Bantley v. Baker*, 61 Neb. 92.

The selling by the clerk at a discount of a warrant forged by him is not an act in the exercise of his official duties, and his bondsmen are not liable therefor. *State v. Harrison*, 99 Mo. App. 57.

**Illegal Costs Collected by Clerk.** — Illegal costs collected by the clerk and paid into the treasury cannot be recovered from the clerk when the payment was made by him before notice that he would be proceeded against. *State v. Oden*, 101 Tenn. 669.

**Moneys Paid Clerk for Unofficial Acts.** — The sureties are not liable for moneys paid the clerk in compensation for unofficial acts directed by the court. *State v. Flynn*, 161 Ind. 554.

**Receiving Money in Satisfaction of Judgment.** — A clerk has authority, though not authorized by statute, to receive money in satisfaction of a judgment entered in his court. *Roberts v. Powell*, 22 Tex. Civ. App. 211.

**4. False Certificate of Acknowledgment.** — *Samuels v. Brand*, (Ky. 1904) 82 S. W. Rep. 977.

**144.** **6.** *Johnson v. Schloesser*, 146 Ind. 509, 58 Am. St. Rep. 367.

**Failure to Enter an Attachment.** — The clerk and his sureties are liable for his failure to enter an attachment where he is required to keep an attachment docket. *Stewart v. Sholl*, 99 Ga. 534.

**6a. Failure to Index Judgment.** — The clerk is not liable where no actual damage actually results from his failure to index a judgment. *Darden v. Blount*, 126 N. Car. 247.

**7.** It has been held that where there has been a breach of the official duty of the clerk to issue

**144.** 14. Discriminating Between Judgment Creditors. — See note 8.

**145.** 15. Approval of Insufficient Bonds — Appeal Bonds. — See note 1.

**XI. DISQUALIFICATION OF CLERK** — 1. Effect of Disqualification of Judge. — See note 5.

**146.** 2. Effect of Self-interest — When Act Ministerial — Clerk Not Disqualified. — See note 1.

**CLOSE.** — See note 5.

process, something more than nominal damages must be shown in order to maintain an action against the sureties on the official bond. *U. S. v. Bell*, 127 Fed. Rep. 1002.

**144.** 8. Neglect to Issue Process. — The failure of the clerk of the court to issue process to the sheriff, on the filing of a praecipe by the moving party in an action and without demand, makes him liable for any damage sustained by the moving party. *Baltimore, etc., R. Co. v. Weedon*, (C. C. A.) 78 Fed. Rep. 584.

**145.** 1. Approval of Insufficient Appeal Bond. — *Heater v. Pearce*, 59 Neb. 583.

**Clerk Not Insurer of Bond.** — Where the clerk uses due care and reasonable discretion in approving a bond, he incurs no liability. *Santee River Co. v. Webster*, 23 R. I. 599.

**5.** *Dudley v. White*, 44 Fla. 269, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145.

**146.** 1. When the Act Is Ministerial. — *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa 682. *Contra*, *Scranton, etc., Land, etc., Co. v. Jennett*, 128 N. Car. 3.

**5.** Closed — Bankruptcy. — The word *closed*

in the Bankruptcy Act of 1898, § 11, cl. d, providing that "suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been *closed*," means properly and finally *closed*, and if upon proceedings in the court of bankruptcy it appears that the order closing the estate was made under a mistake, and that an order should be entered reopening the estate for the purpose of having it further administered, it should be held, after the reopening, that the estate is open for the purpose of bringing suits, even though more than two years have elapsed since the entry of the original erroneous order. *Bilafsky v. Abraham*, 183 Mass. 401.

**Close Confinement.** — The words "*close confinement*," in chapter 99, Laws 1903, are used in the sense of safe, secure confinement, and work no change in the rigor of imprisonment from that imposed in the former statute. These words are not used in this context as synonymous with "*solitary confinement*." *State v. Rooney*, 12 N. Dak. 144.

## CLOUD ON TITLE.

BY G. W. WALSH.

**150.** I. DEFINITION. — See note 1.

II. THE TEST. — See note 2.

III. PROPERTY SUBJECT TO CLOUD — Real Property. — See notes 3, 4.

**151.** Personal Property. — See note 1.

**150.** 1. The Term Defined. — *Greenfield v. U. S. Mortgage Co.*, 133 Fed. Rep. 786, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 150; *Roby v. South Park Com'rs*, 215 Ill. 200, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 149-150; *Hyser v. Mansfield*, 72 Vt. 73, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 149, 150.

"A cloud upon the title of the true owner of land, such as may be removed in equitable proceedings, in some deed or other writing which by itself, or in connection with proof of possession by a former occupant, or other extrinsic facts, gives the claimant thereunder an apparent right in or to the property." *Waters v. Lewis*, 106 Ga. 758.

In *Louisiana*, whatever may be the rule elsewhere, a plaintiff, by bringing a suit to remove a cloud on his title, does not *ipso facto* admit that the muniments of title casting the cloud of which he complains are sufficient on their face to show title. He cannot be held to be admitting the very opposite of what he alleges and is trying to show. *Patterson v. Landru*,

112 La. 1072, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 149, 150.

**2.** *Schofield v. Ute Coal, etc., Co.*, (C. C. A.) 92 Fed. Rep. 269; *Parker v. Boutwell*, 119 Ala. 297; *Z. Russ, etc., Co. v. Crichton*, 117 Cal. 695; *Gilman v. Gilman*, 171 Mass. 47, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 149 [150]; *Nickerson v. Canton Marble Co.*, 35 N. Y. App. Div. 111; *Chamberlain v. Baker*, 28 Tex. Civ. App. 500, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 150.

**Sale of Land by Mere Stranger.** — "A sale of the land of the true owner as the property of a mere stranger with whom he is not connected, from whom he does not mediate or immediately trace title, cannot cast a cloud on his title." *Miller v. Robertson*, 35 Can. Sup. Ct. 80.

**3.** General Rule Confined to Real Property. — *State v. Wood*, 155 Mo. 446, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 150.

**4.** Right of Way. — *Weston v. Ralston*, 48 W. Va. 170.

**151.** 1. Personalty. — *Stebbins v. Perry*

**152.** IV. THE EQUITABLE JURISDICTION — 1. Principle of Its Exercise. — See note 1.

2. Circumstances of Its Exercise — *a.* ALLEGED CLOUD MUST BE SUBSTANTIAL. — See notes 4, 5.

**153.** See note 1.

Unfounded Apprehension. — See note 2.

*b.* PRETENDED CLAIM MUST BE APPARENTLY VALID. — See note 3.

**156.** Prima Facie Evidence — Tax Deeds. — See note 2.

*c.* DEFENDANT'S TITLE MUST BE IN FACT INVALID, COMPLAINANT'S VALID. — See note 4.

County, 167 Ill. 567; *Bird v. Winyer*, 24 Wash. 269; *Magnuson v. Clithero*, 101 Wis. 551.

**152.** 1. Grounds of Equitable Cognizance. — *Blair v. Hemphill*, 111 Iowa 226; *Yonkers v. Warden*, 8 Pa. Super. Ct. 395; *Neff v. Ryman*, 100 Va. 521; *Hitchcox v. Morrison*, 47 W. Va. 206; *Weekly v. Hardesty*, 48 W. Va. 39.

4. Market Value Affected. — *Shaw v. Allen*, 184 Ill. 77; *Chamberlain v. Baker*, 28 Tex. Civ. App. 500, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 152; *Kinsman v. Spokane*, 20 Wash. 118, 72 Am. St. Rep. 24. See also *Hale v. Grigsby*, 12 S. Dak. 198; *Neff v. Ryman*, 100 Va. 521.

5. Impeding Free Alienation. — *Chamberlain v. Baker*, 28 Tex. Civ. App. 500, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 152. See also *Du Val v. Wilmer*, 88 Md. 66.

Threat of Action Justifies Relief. — A purchaser of an immovable, who discovers that a third person has some right of property in the immovable which has been sold to him, and that such third person threatens to enforce his claim unless a certain sum of money is paid him in settlement, has a right of action against his vendor to have the cloud on the title removed. Such action may be maintained not only against the purchaser's vendor, but also against a former owner, particularly against one who has given warranty to subsequent purchasers and who is responsible for the defects in the title. *Trudeau v. Molleur*, 5 Quebec Pr. Rep. 418.

**153.** 1. Where Alleged Title May Be Used Vexatiously. — *Bernstein v. Schoenfeld*, 81 N. Y. App. Div. 171. See also *Murphy v. Metz*, 77 S. W. Rep. 191, 25 Ky. L. Rep. 1124.

2. *Gilman v. Gilman*, 171 Mass. 47, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; *Miller v. Robertson*, 35 Can. Sup. Ct. 80. See also *Tait v. American Freehold Land Mortg. Co.*, 132 Ala. 193.

3. Invalidity Apparent on Face of Instrument or Proceeding — *United States*. — *Ormsby v. Ottoman*, (C. C. A.) 85 Fed. Rep. 492; *Taylor v. Louisville, etc., R. Co.*, (C. C. A.) 88 Fed. Rep. 350; *Schofield v. Ute Coal, etc., Co.*, (C. C. A.) 92 Fed. Rep. 269; *Taylor v. Fisk*, 94 Fed. Rep. 242; *Kansas City, etc., R. Co. v. King*, (C. C. A.) 120 Fed. Rep. 614; *Ogden City v. Armstrong*, 168 U. S. 224.

*Alabama*. — *Parker v. Boutwell*, 119 Ala. 302, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; *Richardson v. Stephens*, 122 Ala. 301; *Inter-State Bldg., etc., Assoc. v. Stocks*, 124 Ala. 109.

*California*. — *Z. Russ, etc., Co. v. Crichton*, 117 Cal. 695.

*Colorado*. — *Dumars v. Denver*, 16 Colo. App. 375.

*Florida*. — *Simmons v. Carlton*, 44 Fla. 719.

*Georgia*. — *Watkins v. Nugen*, 118 Ga. 372.

*Illinois*. — *Roby v. South Park Com'rs*, 215 Ill. 200, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; *Kesner v. Miesch*, 204 Ill. 320.

*Michigan*. — *Casgrain v. Hammond*, 134 Mich. 419, 104 Am. St. Rep. 610, 10 Detroit Leg. N. 534.

*Missouri*. — *Perkins v. Baer*, 95 Mo. App. 70, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; *Hannibal, etc., R. Co. v. Nortoni*, 154 Mo. 150, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; *Jewett v. Boardman*, 181 Mo. 647; *Rodgers v. Appleton City First Nat. Bank*, 82 Mo. App. 377.

*New Hampshire*. — *Hallett v. Parker*, 69 N. H. 134.

*New York*. — *Conde v. Schenectady*, 29 N. Y. App. Div. 604, reversed 164 N. Y. 258; *Nickerson v. Canton Marble Co.*, 35 N. Y. App. Div. 111; *City Real Estate Co. v. Clark*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 709; *Bernstein v. Schoenfeld*, 81 N. Y. App. Div. 171.

*South Carolina*. — *Kittles v. Williams*, 64 S. Car. 229.

*South Dakota*. — *Hale v. Grigsby*, 12 S. Dak. 198.

*Tennessee*. — *Jones v. Nixon*, 102 Tenn. 95.

*Texas*. — *Chamberlain v. Baker*, 28 Tex. Civ. App. 500, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153.

*Vermont*. — *Hyser v. Mansfield*, 72 Vt. 73.

*Virginia*. — *Wicks v. Scull*, 102 Va. 290.

*Washington*. — See *Kinsman v. Spokane*, 20 Wash. 118, 72 Am. St. Rep. 24.

*Canada*. — *Miller v. Robertson*, 35 Can. Sup. Ct. 80.

**156.** 2. Sheriff's Deed. — In *Missouri* a sheriff's deed is made *prima facie* evidence, by statute, of the truth of its recitals, and constitutes a cloud on the title. *Jewett v. Boardman*, 181 Mo. 647.

4. Actual Invalidity of Pretended Claim. — *Glos v. Kingman*, 207 Ill. 30, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 156; *Langlois v. People*, 212 Ill. 75; *Moores v. Clackamas County*, 40 Oregon 536; *Shelton Logging Co. v. Gosser*, 26 Wash. 126.

A person in peaceable possession of real estate, under a defective deed, may have his title quieted by action, as against a stranger who makes claim to such real estate, but has no right or title thereto. *Detlor v. Holland*, 57 Ohio St. 492. See also *Di Nola v. Allison*, 143 Cal. 106, 101 Am. St. Rep. 84.

- 157.** When Defendant's Claim Valid. — See note 1.  
 Warrantor in Chain of Title. — See note 4.  
*d.* WHEN EVIDENCE TO REBUT CLAIM MAY BE LOST. — See note 6.
- 158.** *e.* WHERE EVIDENCE OFFERED WILL SHOW INVALIDITY. — See note 1.
- 159.** *g.* ADEQUATE REMEDY AT LAW. — See note 2.  
*h.* PREVENTION OF CLOUD. — See note 3.
- 160.** V. PARTICULAR INSTANCES — 2. Instruments Tainted with Fraud. — See note 2.
- 161.** 4. Proceedings under Unconstitutional Laws — Taxation. — See note 2.  
 5. Mortgages — When Satisfied. — See note 4.
- 162.** 6. Judgments and Decrees — Want of Jurisdiction. — See note 4.  
*Lis Pendens.* — See note 6.
- 163.** Older Lien. — See note 2.  
 7. Sales of Lands — Execution Against One Not the Owner. — See notes 3, 4.
- 164.** Obstructions to Sale of Property under Execution. — See note 1.
- 165.** 10. Instruments of Record — Contract by Agent. — See note 6.
- 157.** 1. When Claim Enforceable Either at Law or in Equity. — *Griffiths v. Griffiths*, 198 Ill. 632.  
 4. *Jones v. Nixon*, 102 Tenn. 95. See also *Glos v. Goodrich*, 175 Ill. 20.  
 6. Loss of Evidence. — *Yonkers v. Warden*, 8 Pa. Super. Ct. 395.
- 158.** 1. Where Evidence to Be Offered Will Show Invalidity. — *Simmons v. Carlton*, 44 Fla. 719; *Kesner v. Miesch*, 204 Ill. 320.
- 159.** 2. Where There Is Adequate Remedy at Law — *United States*. — *Morrison v. Marker*, 93 Fed. Rep. 692; *Adoue v. Strahan*, 97 Fed. Rep. 691.  
*Alabama.* — *Brown v. Hunter*, 121 Ala. 210; *Belcher v. Scruggs*, 125 Ala. 336.  
*Connecticut.* — *Cahill v. Cahill*, 76 Conn. 542.  
*District of Columbia.* — *Peck v. Haley*, 21 App. Cas. (D. C.) 224.  
*Massachusetts.* — *Loring v. Hildreth*, 170 Mass. 328, 64 Am. St. Rep. 301.  
*Michigan.* — *Crosby v. Hutchinson*, 126 Mich. 56, 7 Detroit Leg. N. 725; *Seymour v. Rood*, 121 Mich. 173.  
*Missouri.* — *Rogers v. Appleton City First* 154 Mo. 142.  
*New Mexico.* — *Lockhart v. Leeds*, 10 N. Mex. 568.  
*Rhode Island.* — *Keyes v. Ketrick*, 25 R. I. 468.  
*Vermont.* — *Hyser v. Mansfield*, 72 Vt. 73, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 159.  
*Virginia.* — *Neff v. Ryman*, 100 Va. 521.  
*Wisconsin.* — *Kruczynski v. Neuendorf*, 99 Wis. 264.
- 3.** Prevention of Cloud — *Mississippi.* — *Edgell v. Clarke*, 76 Miss. 66.  
*Missouri.* — *Rogers v. Appleton City First Nat. Bank*, 82 Mo. App. 377.  
*Nebraska.* — *Fox v. Kountze*, 58 Neb. 439.  
*New York.* — *Weed v. Roberts*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 46; *Bernstein v. Schoenfeld*, 81 N. Y. App. Div. 171.  
*Oregon.* — *George v. Nowlan*, 38 Oregon 537.  
*South Carolina.* — *Kittles v. Williams*, 64 S. Car. 229.
- Tennessee.* — *Jones v. Nixon*, 102 Tenn. 95.  
*Texas.* — *Chamberlain v. Baker*, 28 Tex. Civ. App. 500, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 159.  
*Vermont.* — *Hyser v. Mansfield*, 72 Vt. 73, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 159.
- 160.** 2. Fraud. — *Sherrin v. Flinn*, 155 Ind. 422; *Goodloe v. Black*, (Ky. 1900) 54 S. W. Rep. 957.  
 Fraud on Creditors. — A voluntary conveyance in fraud of existing creditors is a cloud on the title acquired by virtue of the levy of an execution issued on a judgment founded on such a debt. *Spear v. Spear*, 97 Me. 498.
- 161.** 2. Unconstitutional Laws. — See *Dumars v. Denver*, 16 Colo. App. 375; *Perkins v. Baer*, 95 Mo. App. 70.  
 4. Satisfied Mortgage. — *Deskins v. Patrick*, (Ky. 1898) 45 S. W. Rep. 66.
- 162.** 4. Want of Jurisdiction Not Manifest on the Record. — See *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959.
- 6.** *Lis Pendens.* — A *lis pendens* registered against real estate is a cloud on the title, and, as such, a purchaser is entitled to have it removed from the registry. *Townend v. Graham*, 6 British Columbia 539.
- 163.** 2. On principles of *quia timet* chancery will entertain a bill by a vendee of land against his vendor to compel the vendor to pay, out of his own land, liens binding the lands of both, where the vendor is insolvent except as to his land and that may prove inadequate security. *Weekly v. Hardesty*, 48 W. Va. 39.
- 3.** Sale of Land of One Person on Execution Against Another. — *Chamberlain v. Baker*, 28 Tex. Civ. App. 500, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163. But see *Shaw v. Allen* 184 Ill. 77.
- 4.** *Barrell v. Adams*, 26 Pa. Super. Ct. 635, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163.
- 164.** 1. *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856.
- 165.** 6. *Kesner v. Miesch*, 107 Ill. App. 468, affirmed 204 Ill. 320.

**167. 14. Other Instruments and Proceedings — Title Acquired by Adverse Possession.** — See note 5.

Forfeited Leasehold. — See note 9.

Failure to Perform Conditions Subsequent. — See note 10.

Boundaries — Erroneous Calls. — See note 11.

**168. Mere Verbal Claim.** — See note 1.

Homestead. — See note 5.

**VI. STATUTORY ENACTMENTS.** — See note 9.

**170. COAL.** — See note 3.

**171. COAST.** — See note 1.

**172. COASTING.** — See note 1.

[**COBBLESTONE.** — See note 1a.]

**173. CODE — CODIFICATION.** — See note 1.

**167. 5.** *Shaw v. Allen*, 184 Ill. 77; *Vallandigham v. Taylor*, 64 S. W. Rep. 725, 23 Ky. L. Rep. 1059. See also *Muckle v. Good*, 45 Oregon 230.

9. *Elk Fork Oil, etc., Co. v. Jennings*, 84 Fed. Rep. 839.

10. *Papst v. Hamilton*, 133 Cal. 631.

11. *Glenn v. Augusta Perpetual Bldg., etc.*, Co., 99 Va. 695, 3 Va. Sup. Ct. 564.

**168. 1.** *Waters v. Lewis*, 106 Ga. 758.

5. Equitable relief may be granted for the removal from a homestead of the apparent lien of a judgment on the theory that such lien, though only apparent, is a cloud on the owner's title. *Smith v. Neufeld*, 57 Neb. 660.

9. *Statutes — Michigan.* — *Seymour v. Rood*, 121 Mich. 173; *Casgrain v. Hammond*, 134 Mich. 419, 104 Am. St. Rep. 610, 10 Detroit Leg. N. 534.

*New Jersey.* — *Ward v. Tallman*, 65 N. J. Eq. 310.

*Oregon.* — *Moore v. Clackamas County*, 40 Oregon 540, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 168.

*Pennsylvania.* — *Ullom v. Hughes*, 204 Pa. St. 305.

*South Dakota.* — *Hale v. Grigsby*, 12 S. Dak. 198.

*Washington.* — *Povah v. Lee*, 29 Wash. 108; *Rohrer v. Snyder*, 29 Wash. 199; *King v. Branscheid*, 32 Wash. 634.

**170. 3. Coal for Fuel — Fire Insurance Policy.** — The words "*coal* for fuel, with sufficient wood to kindle or start the fire," in a policy of fire insurance exempting fires caused by the use of threshing machine engines using *al* for fuel, etc., were held to mean that wood was permitted to be used only with *coal* and for the one purpose of igniting the *coal* by aid of the more combustible quality of the wood, and that when the *coal* was once sufficiently ignited the use of wood was no longer allowed. *Thurston v. Burnett, etc., Farmers' Mut. F. Ins. Co.*, 98 Wis. 479.

**171. 1. Coasting Trade — Pilotage.** — See *Bigley v. New York, etc., Steamship Co.*, 105 Fed. Rep. 74, construing Act April 12, 1900 (31 Stat. 79, c. 191), regarding Porto Rico.

**172. 1. Coasting — Trolley Car.** — In an action for damages for personal injuries, the motorman of the car which struck plaintiff testified that his car was "*coasting* down the grade from a block south to the point where the accident occurred." By *coasting* he meant that the current of electricity was turned off, and no power applied to the car other than the force of gravity on the down grade. *Peterson v. Minneapolis St. R. Co.*, 90 Minn. 52.

1a. **Not Synonymous with Waterstone.** — The court refused to take judicial notice that the word "*waterstone*," in a covenant by a street railway to keep a street in repair, is a *cobblestone*. The court said: "I cannot find the word '*waterstone*' in the Century Dictionary, while in the Standard Dictionary the following appears: '*Water-stones, n. Geol.* A division of the Keuper in England.' The former authority defines *cobblestone*, '*a cobble or rounded stone; especially, such a stone used in paving*,' and *cobble*, '*a stone rounded by the action of water, and of a size suitable for use in paving*,' but there is nothing more to indicate that the words *cobblestone* and '*waterstone*' are synonymous or interchangeable." *Doyle v. New York*, 58 N. Y. App. Div. 588.

**173. 1.** *Central of Georgia R. Co. v. State*, 104 Ga. 842, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 173.

**Code of Civil Procedure** "is merely a name given to a large part of the general laws of the state. The part of the great body of our laws which is to be found under that name is not confined to any particular subject or subjects, but includes substantive law, criminal law, and legislation, that might be properly classed under any category whatever, as well as '*civil procedure*.'" *Lewis v. Dunne*, 134 Cal. 293.

# CODICILS.

By JOHN SIMPSON.

**175. I. DEFINITION, OBJECT, AND ORIGIN.** — See note 1.

**176. II. EXECUTION** — 1. As to Testamentary Capacity — Codicil Executed with Testamentary Capacity Curing Defective Will. — See note 2.

2. As to Formalities in Execution — *a.* GENERAL MANNER OF EXECUTION. — See note 3.

**177. *b.* FOR PURPOSES OF REVOCATION.** — See note 1.

*c.* FOR PURPOSES OF REPUBLICATION AND CONFIRMATION. — See note 2.

**179. 3. Defective Will Cured by Duly Executed Codicil.** — See note 1.

## III. GENERAL PRINCIPLES OF CONSTRUCTION AND INTERPRETATION —

**2. Will and Codicil Construed as One Instrument** — *a.* IN GENERAL. — See note 3.

**181. *b.* EFFECT ON LEGACIES GIVEN BY WILL AND CODICIL** — Incidents of Original Follow Additional Legacies. — See note 5.

**183. Property Out of Which Legacies Payable.** — See note 1.

**3. Will and Codicil Construed Harmoniously.** — See note 3.

**184. IV. REVOCATION** — 1. Of Will by Valid Codicil — *b.* HOW AND WHEN EFFECTED — (1) *Generally.* — See note 1.

**175. 1. Document in Part Also Power of Attorney,** which appoints an executor, is a codicil. *Stewart v. Stewart*, 177 Mass. 493.

**176. 2. Cook v. White**, 43 N. Y. App. Div. 388, *affirmed* 167 N. Y. 588.

**3. Attestation Clause Not Required.** — Matter of Crane, 68 N. Y. App. Div. 355. See also the title WILLS, 30 AM. AND ENG. ENCYC. OF LAW (2d ed.), p. 594, note 1.

**177. 1. Oetjen v. Oetjen**, 115 Ga. 1004; Matter of Akers, 173 N. Y. 620, *affirming* 74 N. Y. App. Div. 461; *Saunders v. Samarreg Co.*, 205 Pa. St. 632.

**2. Hosea v. Skinner**, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 653.

**179. 1. Duly Executed Codicil Validating Imperfect Will.** — *In re Hay*, (1904) 1 Ch. 317; *Walton's Estate*, 194 Pa. St. 528.

**A Contrary View** is taken in *New York*. Matter of Carll, (Surrogate Ct.) 38 Misc. (N. Y.) 471. See also *Cook v. White*, 43 N. Y. App. Div. 388, *affirmed* 167 N. Y. 588.

**Probate of Codicil to Nonexisting Will.** — The substance of the draft of a will which is not proved to have been executed or to exist is not incorporated by the execution of a subsequent codicil referring in terms to a will supposed by the person who draws the codicil to have been validly executed in accordance with what is expressed in the draft will. Such a codicil, however, may be admitted to probate as a valid testamentary paper in itself, though its express dependence on the will which is not shown to have been executed, or to exist, may necessitate resort to a court for construction. *Eyre v. Eyre*, (1903) P. 131, 88 L. T. N. S. 567.

**3. Brighurst v. Orth**, 7 Del. Ch. 178; *Hubbard v. Hubbard*, 198 Ill. 621, *affirming* 99 Ill. App. 555; *Buchanan v. Lloyd*, 88 Md. 642;

*Dunbar v. Dunbar*, 181 Mass. 236; *McGehee v. McGehee*, 74 Miss. 386; *Stratton v. Stratton*, 68 N. H. 582; *Ladies' Union Benev. Soc. v. Van Natta*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 217; *Goodwin v. Coddington*, 154 N. Y. 283; *Lyman v. Morse*, 69 Vt. 325; *Re Dunn*, 7 Ont. L. Rep. 560.

**The Codicil May Be Looked to to Explain an Ambiguity in the Will**, unless it is obviously erroneous. *In re Venn*, (1904) 2 Ch. 52.

**Codicil Having No Bearing on Clause in Will.** — A codicil which does not refer to land devised in a clause of a will under review has no bearing on the construction of the clause. *Neal v. Hodges*, (Tenn. Ch. 1898) 48 S. W. Rep. 263.

**181. 5. Matter of Laveaga**, 119 Cal. 651; *Lyon v. Clawson*, 56 N. J. Eq. 642. See also *Re Dunn*, 7 Ont. L. Rep. 560.

**183. 1. Realty Charged with Payment of Legacies.** — Matter of Laveaga, 119 Cal. 651.

**Estate Charged with Payment of Legacies.** — Where the will, after making certain specific bequests, left the residue of the estate to two persons, who were also named as executors, and made the legacies a charge on the estate, and the codicil made certain additional bequests, it was held that all the legacies were a charge on the estate and should be paid in full notwithstanding the commission of devastavit by one of the executors. *Re Dunn*, 7 Ont. L. Rep. 560.

**3. In re Venn**, (1904) 2 Ch. 52; *Security Co. v. Snow*, 70 Conn. 288; *Hubbard v. Hubbard*, 99 Ill. App. 555, *citing* 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 183, *affirmed* 198 Ill. 621; *Buchanan v. Lloyd*, 88 Md. 642; *Lyman v. Morse*, 69 Vt. 435; *Hunt v. Hunt*, 18 Wash. 14.

**184. 1. Re Wood**, 83 L. T. N. S. 157; *Buchanan v. Lloyd*, 88 Md. 642.

**184.** (2) *Express Revocation* — (a) *General Effect to Be Given.* — See note 3.

**185.** (b) *Of Estate with Limitations.* — See note 1.

(3) *Implied Revocation* — (a) *By Inconsistency* — *aa. INSTRUMENTS MUST BE ABSOLUTELY INCONSISTENT.* — See note 4.

**186.** *bb. WHERE INCONSISTENT CODICIL PREVAILS.* — See note 1.

*Precise Description Unnecessary.* — See note 3.

*cc. INSTANCES OF INCONSISTENCIES* — *Different Disposition by Codicil of Estate in Will.* — See note 4.

*Gift by Codicil of Residue Previously Given in Will.* — See note 6.

**187.** (6) *Where Legacies Are Given in Both Instruments.* — See note 5.

**188.** *Where Intention to Make Second Gift Revoke First Is Apparent.* — See note 2.

**190.** *c. EXTENT AND EFFECT* — *Intention of Testator Is the Governing Consideration.* — See notes 1, 2.

*Revocatory Intent Must Be Clear.* — See note 3.

*Negation of Revocatory Intent.* — See note 4.

*Will Not Unnecessarily Disturb.* — See note 5.

**Revocation of Legacy Does Not Revoke Interest in Residue.** — Revocation of a legacy given to a person by name does not revoke the interest, given to him by description, in the residue. *Re White*, 29 Pittsb. Leg. J. N. S. (Pa.) 37.

**184.** 3. *Rice County v. Scott*, 88 Minn. 386.

**The Revocation of a Part of a Residuary Devise** where there is no substitutionary gift makes an intestacy to the extent of the revocation. *Riley's Estate*, 20 Pa. Co. Ct. 376. See also *Minkler v. Simons*, 172 Ill. 323.

**The Expression "I Cut You of My Will,"** used in the codicil, is sufficient to revoke a bequest in the will to the person to whom the language refers. *Law v. Acton*, 14 Manitoba 246.

**185.** 1. **Acceleration of Legacy by Revocation of Particular Estate.** — *Lewin v. Lewin*, 2 N. Bruns. Eq. Rep. 477; *Re Murbach*, 28 Pittsb. Leg. J. N. S. (Pa.) 100.

4. *Bringhurst v. Orth*, 7 Del. Ch. 178; *McGehee v. McGehee*, 74 Miss. 386; *Griggs v. Griggs*, 178 N. Y. 570, affirming 80 N. Y. App. Div. 339; *Goodwin v. Coddington*, 154 N. Y. 283; *Lyman v. Morse*, 69 Vt. 325.

**Rhode Island — Statute.** — Under Gen. Laws 1896, c. 203, § 18, providing that "no will shall be revoked by any presumption of intention on the ground of an alteration in circumstances," a legacy to a corporation in trust for the children of the testatrix is not revoked by the act of the testatrix in dividing her personality among her children during her lifetime. *Rhode Island Hospital Trust Co. v. Keith*, (R. I. 1904) 57 Atl. Rep. 1060.

**186.** 1. *Home for Incurables v. Noble*, 172 U. S. 383; *Duffield v. Pike*, 71 Conn. 521; *White v. Massachusetts Inst. of Technology*, 171 Mass. 84; *Stratton v. Stratton*, 68 N. H. 582; *Davis's Estate*, 6 Pa. Dist. 45.

3. *British Home for Incurables v. Royal Hospital for Incurables*, 90 L. T. N. S. 601; *Home for Incurables v. Noble*, 172 U. S. 383.

4. *White v. Massachusetts Inst. of Technology*, 171 Mass. 84.

6. *Manner's Estate*, 22 Pa. Co. Ct. 577.

**187.** 5. *Southgate v. Continental Trust Co.*, 74 N. Y. App. Div. 150, affirmed 176 N. Y. 588; *Harrison's Estate*, 196 Pa. St. 576.

**188.** 2. *Ladies' Union Benev. Soc. v. Van Natta*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.)

217; *Benson's Estate*, 209 Pa. St. 108; *Law v. Acton*, 14 Manitoba 246.

**Where Name of Legatee Changed.** — Where the testator changes the name of the legatee, the *prima facie* presumption is that the bequest is substitutionary. *Matter of Laveaga*, 119 Cal. 651.

**190.** 1. *Van Grutten v. Foxwell*, (1897) A. C. 658; *In re Wilcock*, (1898) 1 Ch. 95, 77 L. T. N. S. 679; *Re Wood*, 83 L. T. N. S. 157; *Re Dunn*, 7 Ont. L. Rep. 560; *Home for Incurables v. Noble*, 172 U. S. 383; *Stratton v. Stratton*, 68 N. H. 582; *Manner's Estate*, 22 Pa. Co. Ct. 577.

**Where Extrinsic Evidence Admissible.** — Where, taken together, the will and codicil leave the testator's intention uncertain, extrinsic evidence may be resorted to. *Ladies' Union Benev. Soc. v. Van Natta*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 217.

2. *Goodwin v. Coddington*, 154 N. Y. 283. See also *Van Grutten v. Foxwell*, (1897) A. C. 658; *In re Wilcock*, (1898) 1 Ch. 95, 77 L. T. N. S. 679.

3. **Intent to Revoke Must Be Clear.** — *In re Wilcock*, (1898) 1 Ch. 95, 77 L. T. N. S. 679; *Re Wood*, 83 L. T. N. S. 157; *Vestal v. Garrett*, 197 Ill. 398; *Bedford v. Bedford*, 99 Ky. 273; *Buchanan v. Lloyd*, 88 Md. 642; *McGehee v. McGehee*, 74 Miss. 386; *Goodwin v. Coddington*, 154 N. Y. 283; *Re Lutton*, 26 Pittsb. Leg. J. N. S. (Pa.) 255.

4. **Expressed Intent to Revoke Given Disposition Negatives General Revocation.** — *Re Wood*, 83 L. T. N. S. 157; *In re Hay*, (1904) 1 Ch. 317; *Lewin v. Lewin*, 2 N. Bruns. Eq. Rep. 477. See also *In re Scott*, (1903) 1 Ch. 1, 87 L. T. N. S. 574.

**Revocation of Gift to One of Several Residuary Legatees.** — Where a testatrix left her residuary estate to four named persons, A, B, C, and D, "as tenants in common, and if only one of them shall survive me then to such one absolutely," and by a codicil the testatrix, after referring to the death of D, revoked whatever interest D had in her estate, and A, B, and C survived the testatrix, it was held that they took the residuary estate, including what would have been D's share had he survived. *In re Radcliffe*, 51 W. R. 409.

5. *England.* — *In re Wilcock*, (1898) 1 Ch.

**191.** Codicil Not Operative Beyond Import of Language. — See note 1.

**192.** 2. Of Will by Invalid or Inoperative Codicil — Codicil Inoperative from Incapacity of Devises. — See note 1.

**193.** Express Revocation. — See note 1.

Intention to Revoke Unqualifiedly. — See note 2.

3. Of Will by Revocation of Codicil. — See note 3.

**194.** 4. Of Codicil by Revocation of Will — Under the Wills Act. — See note 3.

**196.** V. REPUBLICATION — 3. How and When Effected — *a.* GENERALLY. — See note 1.

*b.* REVIVAL OF REVOKED WILLS. — See notes 2, 3.

**197.** *c.* REPUBLICATION OF ONE OF SEVERAL WILLS. — See notes 1, 2.

4. Extent and Effect — *a.* HOW MUCH OF WILL ITSELF REPUBLISHED. — See note 3.

**198.** *b.* AS TO WILL AND CODICILS. — See notes 1, 2.

Subsequent Will Confirming Prior Revoking Codicil. — See note 3.

95, 77 L. T. N. S. 679; *Lewin v. Lewin*, 2 N. Bruns. Eq. Rep. 477.

*California.* — *Matter of Laveaga*, 119 Cal. 651.

*Connecticut.* — *Security Co. v. Snow*, 70 Conn. 288, 66 Am. St. Rep. 107.

*Delaware.* — *Bringinghurst v. Orth*, 7 Del. Ch. 178.

*District of Columbia.* — *Govan v. Wiley*, 15 App. Cas. (D. C.) 233.

*Illinois.* — *Minkler v. Simons*, 172 Ill. 323; *Vestal v. Garrett*, 197 Ill. 398.

*Kentucky.* — *Bedford v. Bedford*, 99 Ky. 273.

*Mississippi.* — *McGehee v. McGehee*, 74 Miss. 386.

*New Jersey.* — *Lyon v. Clawson*, 56 N. J. Eq. 642.

*Pennsylvania.* — *Re Murbach*, 28 Pittsb. Leg. J. N. S. (Pa.) 100; *Re White*, 29 Pittsb. Leg. J. N. S. (Pa.) 37.

*Vermont.* — *Lyman v. Morse*, 69 Vt. 325.

**191.** 1. *Lyon v. Clawson*, 56 N. J. Eq. 642; *Goodwin v. Coddington*, 154 N. Y. 283; *Re Lutton*, 26 Pittsb. Leg. J. N. S. (Pa.) 253.

**192.** 1. *Blakeman v. Sears*, 74 Conn. 516.

**193.** 1. *Security Co. v. Snow*, 70 Conn. 288, 66 Am. St. Rep. 107.

2. *Rice County v. Scott*, 88 Minn. 386.

3. Destruction of Codicil — Presumption as to Destruction. — Though the presumption is that a codicil not found after the testator's death was destroyed by him with the intention of revoking it, the court admitted the will to probate only to the extent that it was not revoked by the codicil, which was proved to have been properly executed. In *Goods of Debac*, 77 L. T. N. S. 374.

**194.** 3. Doctrine of Later Cases. — A second codicil is not revoked by the destruction of the will and first codicil, which are themselves revoked by the second codicil. *Paige v. Brooks*, 75 L. T. N. S. 455.

**196.** 1. In *Goods of Rendle*, 68 L. J. P. 125; *Shaw v. Camp*, 163 Ill. 144; *Illensworth v. Illensworth*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 194; *Cook v. White*, 43 N. Y. App. Div. 388, affirmed 167 N. Y. 588.

2. A Will Revoked by Marriage. — *Francis v. Marsh*, 54 W. Va. 545.

3. *Matter of Trost*, (Surrogate Ct.) 38 Misc. (N. Y.) 404.

A Reference in a Codicil by Date to a will, together with a revocation of the appointment of one executor, and the appointment of another

in his stead, was held to sufficiently show the intention of the testator to revive the will in *Francis v. Marsh*, 54 W. Va. 545.

**197.** 1. Wills and Codicils Prepared by Different Solicitors. — In 1889 the testatrix duly executed a will to which in 1892 she caused a codicil to be drawn. This document was received by her but was never executed. Later in the year 1892 she caused a fresh will to be prepared by a different solicitor. This will, which contained a revocation clause, was duly executed by the testatrix. In the following year she instructed the first solicitor to prepare a codicil, which she duly executed. The solicitor, in ignorance of the will of 1892, and in the belief that the testatrix had duly executed the document which he had prepared for her in 1892 as a first codicil to the will of 1889, drew the last document as "a second codicil to the will, which bears date July 16, 1889," and made it confirm the "said will and the first codicil thereto." Upon motion by the executors of the deceased for probate of the will of 1892 and the codicil of 1893, it was held that the will of 1889 must also be included, and that probate must be granted of all three documents. In *Goods of Chilcott*, (1897) P. 223, 77 L. T. N. S. 372. But where the codicil, by mistake, referred to a will which had been not only revoked by a later will, but actually destroyed, the court admitted the codicil and the existing will to probate, as it was clear that the codicil was not intended to revoke such will. In *Goods of Reade*, (1902) P. 75.

2. See *French v. Hoey*, (1899) 2 Ir. R. 472.

3. Additions Attached to the original will, before the execution of the codicil, will be republished. *Shaw v. Camp*, 163 Ill. 144.

**198.** 1. *Lee's Estate*, 15 Montg. Co. Rep. (Pa.) 70.

A Reference Simply to the Original Date of the Will does not exclude the inference that it is to the will as modified by subsequent codicils. *Lee's Estate*, 15 Montg. Co. Rep. (Pa.) 70.

Confirmation of the Original Will revokes a subsequent deed of revocation thereof. *Chestnut St. Nat. Bank v. Wainwright*, 7 Pa. Dist. 108.

2. *Lee's Estate*, 16 Pa. Super. Ct. 627.

3. See *French v. Hoey*, (1899) 2 Ir. R. 472. Compare In *Goods of Green*, 79 L. T. N. S. 738.



- 198.** *c.* DATE FROM WHICH WILL SPEAKS — (1) *Generally.* — See note 4.  
**199.** (2) *Effect of Statute Passed Between Date of Will and Codicil.* — See note 4.  
 (3) *Revival of Revoked, Adeemed, or Satisfied Legacies.* — See note 5.  
**200.** (4) *Effect as to After-acquired Estate — Intention Contrary to Passage.* — See note 1.

**205.** [COLD STORAGE. — See note 2a.]

COLLATERAL. — See note 5.

**206.** COLLATION — COLLATIO BONORUM. — See note 1.

COLLECT. — See note 4.\*

Of One of Several Wills. — Matter of Campbell, 170 N. Y. 84.

**198.** 4. In Goods of Rendle, 68 L. J. P. 125; Hubbard v. Hubbard, 198 Ill. 621; Matter of Campbell, 170 N. Y. 84.

**199.** 4. Contra. — Harrison's Estate, 10 Pa. Dist. 45.

5. Tanton v. Keller, 167 Ill. 129.

**200.** 1. Devise of Homestead — Removal of Residence to After-acquired Property. — In the case of a specific devise, a republication of the will, by the execution of a codicil, will not operate so as to extend the gift to property which the gift did not originally embrace. Thus, where the testator in his will made a specific devise of the homestead farm on which he resided, and subsequently he acquired other property to which he removed his residence, it was held that a subsequent codicil, which made no reference to the devise in question, did not have the effect of passing to the devisee the property to which the testator removed after the execution of the will. Ayer v. Estabrooks, 2 N. Bruns. Eq. Rep. 392.

**205.** 2a. In Allen v. Somers, 73 Conn. 357, the court said: "The term *cold storage*, as used in the trade, means a storehouse or storeroom ordinarily used for the preservation of butter and eggs, where the temperature is kept at a low degree but above the freezing point."

5. A Collateral or Additional Consideration

may consist of anything which would be a burden or inconvenience to the one party or a possible benefit to the other. Chicora Fertilizer Co. v. Dunan, 91 Md. 144.

Collateral Promise. — Almond v. Hart, 46 N. Y. App. Div. 431.

**206.** 1. Louisiana. — See Miller v. Miller, 105 La. 257.

4. Collector. — State v. Moores, 52 Neb. 770.

Equivalent to Recovery — Foreclosure of Mortgage. — The word *collection*, in a petition averring that no proceedings at law have been commenced or maintained for the *collection* of the debt secured by said mortgage, is the equivalent of the word "recovery" contained in Code Civ. Pro. Neb., § 850, providing that "upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby." Durland v. Durland, 62 Neb. 813.

Partnership Accounts — Collectible. — Where the outgoing partner covenants to pay the continuing partner one-half of any outstanding accounts which are "not *collected* or *collectible*," he must pay his share of such an account when it has proved to be not *collectible* within a reasonable time. Fellerman v. Goldberg, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 235.

## COLLECTION AGENCY.

**211. IV. ATTORNEYS EMPLOYED — Compensation. — See note 1.**

**COLLIERY.** — See note 4.

**214. COLOR OF OFFICE.** — See note 1.

**215. COME — COMING.** — See note 6.

**216. COMFORT.** — See note 1.

**COMITY.** — See note 2.

**COMMAND.** — See note 4.

**COMMENCE.** — See note 5.

**218. COMMERCE.** — See note 1.

**211. 1. Action for Professional Services — Liability of Agency.** — *Dale v. Hepburn*, 154 N. Y. 763, *affirming* (C. Pl. Gen. T.) 11 Misc. (N. Y.) 286, stated in the original note.

**4. What Is Included.** — *A Washery* is a coal mine or *colliery* within a *Pennsylvania* statute providing for the health and safety of miners. *Com. v. Brookwood Coal Co.*, 25 Pa. Co. Ct. 56. In this case the court said: "The term *collier* is defined to be a 'digging of coal, one who works in a coal mine,' 'a coal merchant or dealer in coal.' *Colliery* is said to be 'the place where coal is dug;' 'the coal trade.' It is evident from these definitions that the term *colliery* is more comprehensive than the term 'mine.'"

**214. 1. Color of Office.** — *Luther v. Banks*, 111 Ga. 374.

**215. 6. Come Up to Guaranteed Analysis.** — In *Spinks v. Rome Guano Co.*, 108 Ga. 616, the court said: "The statute relied upon as a defense in this case provides that the state chemist shall analyze the samples of fertilizer sent to him by the ordinary, and if such analysis shows the 'fertilizer does not come up to the guaranteed analysis, then the sale shall be illegal, null, and void.' \* \* \* The words 'come up to the guaranteed analysis' do not necessarily require that the two analyses shall agree exactly in all particulars. If the two analyses show results substantially the same, the reason and spirit of the law is complied with."

**216. 1. Wills.** — See *Emery v. Swasey*, 97 Me. 136; *Stocker v. Foster*, 178 Mass. 591.

**2. In Mast v. Stover Mfg. Co.**, 177 U. S. 488, the court said: "*Comity* is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. *Comity* persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be de-

cided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that *comity* comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts." *Quoted in Welsbach Light Co. v. Cosmopolitan Incandescent Light Co.*, (C. C. A.) 104 Fed. Rep. 83. See also *The Paquete Habana*, 175 U. S. 694; *Mutual Aid, etc., Co. v. Logan*, 55 S. Car. 295.

**4. Commander in Chief.** — Under Rev. Stat. U. S., § 1124, art. 38, providing that a court-martial must be convened by a *commander* in chief of a fleet or squadron, it was held that when an officer was designated as *commander* in chief in the proceedings of the court-martial and by the regulations of the naval department, he must be presumed to have been in *command* of a fleet or squadron. *In re Crain*, 84 Fed. Rep. 788.

**5. Commencement of Action — Service of Process.** — *Greenwood v. Warren*, 120 Ala. 71; *Hawley v. Griffin*, 121 Iowa 667; *H. L. Spencer Co. v. Koell*, 91 Minn. 226; *Hotchkiss v. Aukerman*, 65 Neb. 177.

**Same — Issuance of Writ.** — *East Tennessee Coal Co. v. Daniel*, 100 Tenn. 65.

**Same — Prosecution for Crime — Issuance of Warrant.** — *Flick v. State*, 22 Ind. App. 550.

**218. 1. Other Definitions.** — *State v. Napier*, 63 S. Car. 60; *Master Granite, etc., Cutters' Assoc.*, 23 Pa. Co. Ct. 517.

**Commerce the Equivalent of Intercourse.** — See *U. S. v. Boyer*, 85 Fed. Rep. 432.

**Trade and Commerce Distinguished — Restraint of Trade.** — *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211.

**Commerce Includes Navigation.** — *North Bloomfield Gravel Min. Co. v. U. S.*, (C. C. A.) 88

**221. COMMERCIAL.**—See note 1.

**222. COMMERCIAL LAW.**—See note 2.

Fed. Rep. 674. *Compare* State *v.* Bridges, 19 Wash. 44.

**Transportation of Freight.**—U. S. *v.* Joint Traffic Assoc., 171 U. S. 505.

**Telegraphic Communication.**—Western Union Tel. Co. *v.* Burgess, (Tex. Civ. App. 1897) 43 S. W. Rep. 1033; Western Union Tel. Co. *v.* Reynolds, 100 Va. 459.

**The Taxation of an Emigrant Agent** is not a regulation of interstate *commerce*. Williams

*v.* Fears, 179 U. S. 270, *affirming* 110 Ga. 584. And see State *v.* Napier, 63 S. Car. 60.

**221. 1. A Commercial Railroad** within the meaning of the *Indiana Railroad Act* is one properly equipped for the running of passenger trains, freight trains, and doing and conducting a general freight and railway passenger business. Demaree *v.* Bridges, 30 Ind. App. 133.

**222. 2. Williams v. Gold Hill Min. Co.**, 96 Fed. Rep. 464.

## COMMERCIAL TRAVELERS OR DRUMMERS.

**223. I. DEFINITION AND DISTINCTIONS.**—See note 1.

The Essential Difference Between Drummers and Peddlers. — See note 2.

**224. II. NATURE AND SCOPE OF AUTHORITY** — 1. In General. — See note 1.

3. Duty of Third Persons. — See notes 3, 4.

Acts Within Apparent Scope of Authority. — See note 5.

4. Implied Power. — See note 7.

**225. 5. Certain Powers Not Implied — To Receive Payment.** — See notes 4, 5.

**226.** See note 1.

**227. Power to Barter.** — See note 2.

Power to Indorse. — See note 4.

Hotel Bills. — See note 5.

**223. 1. Commercial Travelers Defined.** — Pegues *v.* Ray, 50 La. Ann. 574; Brookfield *v.* Kitchen, 163 Mo. 546, *quoting* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 223; Potts *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 31. See also Weller *v.* Pennsylvania R. Co., 113 Fed. Rep. 502.

**2. Distinguished from Peddlers.** — Pegues *v.* Ray, 50 La. Ann. 574; Brookfield *v.* Kitchen, 163 Mo. 546; State *v.* Wells, 69 N. H. 424; Potts *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 31; Wausau *v.* Heideman, 119 Wis. 244.

**224. 1. See Smith v. Droubay**, 20 Utah 443, *per* Miner, J., *dissenting*, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224.

**3. Third Parties Must Ascertain Extent of Authority.** — Crawford *v.* Whittaker, 42 W. Va. 430.

**4. Claim of Authority by Drummer.** — Crawford *v.* Whittaker, 42 W. Va. 430.

**5. Apparent Scope of Authority.** — Mabray *v.* Kelly-Goodfellow Shoe Co., 73 Mo. App. 1; Kuhlman *v.* E. J. Hart Co., (Tenn. Ch. 1900) 59 S. W. Rep. 455; Smith *v.* Droubay, 20 Utah 443. *Compare* Charles Brown Grocery Co. *v.* Beckett, (Ky. 1900) 57 S. W. Rep. 458.

**7. General Custom.** — A custom by drummers of taking orders and transmitting them to their "house", for action—approval or rejection—is of such long standing, so extensive, and so important in the commercial world, that the courts will take judicial notice of it. John Matthews Apparatus Co. *v.* Renz, (Ky. 1901) 61 S. W. Rep. 9.

**225. 4. A Commercial Agent Will Have**

**Power to Collect.** — Fabian Mfg. Co. *v.* Newman, (Tenn. Ch. 1900) 62 S. W. Rep. 218.

**5. Power of Drummer to Collect.** — Lakeside Press, etc., Co. *v.* Campbell, 39 Fla. 523; Brown *v.* Lally, 79 Minn. 38; Fabian Mfg. Co. *v.* Newman, (Tenn. Ch. 1900) 62 S. W. Rep. 218; Crawford *v.* Whittaker, 42 W. Va. 430.

**A Doctrine Contrary to the Statements in the Text.** — Kuhlman *v.* E. J. Hart Co., (Tenn. Ch. 1900) 59 S. W. Rep. 455. But see Fabian Mfg. Co. *v.* Newman, (Tenn. Ch. 1900) 62 S. W. Rep. 218, *criticising* Hoskins *v.* Johnson, 5 Sneed (Tenn.) 469, and Collins *v.* Newton, 7 Baxt. (Tenn.) 269, stated in the original note.

**226. 1. Usage.** — Brown *v.* Lally, 79 Minn. 38; Fabian Mfg. Co. *v.* Newman, (Tenn. Ch. 1900) 62 S. W. Rep. 218.

**227. 2. Barter of Goods.** — See Kuhlman *v.* E. J. Hart Co., (Tenn. Ch. 1900) 59 S. W. Rep. 455.

**4. Indorsement of Checks.** — See Kuhlman *v.* E. J. Hart Co., (Tenn. Ch. 1900) 59 S. W. Rep. 455.

**5. Hotel Bills.** — Grand Ave. Hotel Co. *v.* Friedman, 83 Mo. App. 491, holding that the rule applies particularly where the credit is primarily extended to the agent; but where the principal, having notice that the salesman's bill is unpaid, continues thereafter to furnish the salesman with money therefor, the principal becomes liable; further, that laundry expenses and telegrams of the salesman are not within the class of supplies for which the principal is liable in the absence of proof that they have relation to the salesman's business.

**227. III. CONTRACT OF SALE — WHEN COMPLETE. — See note 6.****228. COMMISSION.** — See note 6.**229. [COMMISSION OF A CRIME.** — See note 1a.]  
**COMMITMENT.** — See note 4.**230. COMMODITY.** — See note 3.**232. COMMON.** — See note 1.**233.** See note 1.

**227. 6. The Contract — When Complete.** — Charles Brown Grocery Co. v. Beckett, (Ky. 1900) 57 S. W. Rep. 458, *quoting* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 227; John Matthews Apparatus Co. v. Renz, (Ky. 1901) 61 S. W. Rep. 9; Kuhlman v. E. J. Hart Co., (Tenn. Ch. 1900) 59 S. W. Rep. 455; Smith v. Droubay, 20 Utah 443.

**228. 6.** Hall v. McNally, 23 Utah 613, *quoting* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 228; Whitaker v. Old Dominion Guano Co., 123 N. Car. 368.

**229. 1a. Commission of Crime.** — *Commission* means the act of *committing*, doing, or performing; the act of perpetrating. Webster's Dict. Mere acts of preparation, not proximately leading to the consummation of the intended crime, will not suffice to establish an attempt to *commit* it. Groves v. State, 116 Ga. 516.

**4.** The word *commitment*, as used in the law, signifies the act of sending an accused or convicted person to prison. Guthmann v. People, 203 Ill. 260.

The phrase "legally *committed*" refers to the examination of the charge and holding the defendant to answer by the magistrate. People v. Beach, 122 Cal. 37.

**Commitment — Sunday Laws.** — The word *commit*, contained in Code Civ. Pro. N. Y., § 6, which provides that courts shall not transact business on Sunday, but that "this section does not prevent the exercise of the jurisdiction of a magistrate where it is necessary to preserve the peace or, in a criminal case, to arrest, *commit*, or discharge a person charged with an offense," covers a *commitment* after a conviction as well as a *commitment* to await trial, and authorizes a magistrate to try, con-

vict, and sentence a prisoner on Sunday. People v. Warden, 73 N. Y. App. Div. 174.

**230. 3.** Canned oysters are a *commodity* within the Mississippi Code prohibiting combinations to limit, increase, or reduce the price of a *commodity*. Barataria Canning Co. v. Jouliau, 80 Miss. 555.

**232. 1.** "The Phrase, *Common Lands of the Town*, used in this proviso in reference to the taking of seaweed from the shore thereof, evidently was used to designate lands held in *common* by the proprietors, and not in any technical sense, as indicating that the shores or lands were public property. \* \* \* It is quite clear, as disclosed by the case, that the terms 'undivided lands' and *common* lands were used interchangeably to refer to the uplands and to the beaches as well." Southampton v. Betts, 163 N. Y. 454.

**233. 1. Common Tools of Trade** in a statute exempting such from execution will not include a set of harness. Kirksey v. Rowe, 114 Ga. 893. Nor a dentist's chair. Burt v. Stocks Coal Co., 119 Ga. 629.

**Common Usage.** — See U. S. v. Fifty Boxes, etc., Lacey, 92 Fed. Rep. 601.

**Common Form.** — See Sutton v. Hancock, 118 Ga. 436.

**Common Lodging House.** — In Logsdon v. Booth, (1900) 1 Q. B. 412, the court said: "We know of no better description of a *common* lodging house than that given many years ago by the law officers, Sir Alexander Cockburn and Sir W. Page Wood, to the effect that a *common* lodging house was that class of lodging house in which persons of the poorer class are received for short periods, and, although strangers to one another, are allowed to inhabit one *common* room."

# COMMON CARRIERS.

By O. D. ESTEE.

**237. I. DEFINITION.** — See note 1.

**242. II. OTHER CLASSES OF CARRIERS CONSIDERED AND DISTINGUISHED —**  
**2. Carriers for Hire but Not Common Carriers — a. WHO ARE SUCH CARRIERS.**  
 — See note 3.

**245. III. WHO ARE COMMON CARRIERS — 1. Generally — The Test to Be Applied.** — See note 4.

Business Limited to Certain Classes of Goods. — See note 5.

**246. A Right to Compensation.** — See note 2.

Carrying Goods Need Not Be Exclusive Occupation. — See note 3.

**248. 2. Carriers by Water — a. GENERALLY.** — See note 3.

**250. c. TOWBOATS.** — See note 2.

**251. d. FERRYMEN — The Proprietor of a Private Ferry.** — See note 3.

**3. Carriers by Land — a. CARTERS AND EXPRESSMEN.** — See note 5.

**255. c. RAILROAD COMPANIES — (2) As to Passengers.** — See note 2.

**257. g. EXPRESS COMPANIES — Are Common Carriers.** — See note 1.

**260. j. OTHER CARRIERS — Parties Engaged in Moving Safes and Machinery.** —  
 See note 1.

**4. Who Are Not Common Carriers — c. WHARFINGERS.** — See note 7.

**261. g. TELEGRAPH COMPANIES.** — See note 3.

**237. 1. Common Carrier Defined.** — State v. St. Louis, 145 Mo. 551, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 237; Culver v. Lester, 37 Can. L. J. 421.

Civ. Code Ga., §§ 2263–2264, defines “a ‘common carrier’ to be one who undertakes to transport goods for a compensation, and who pursues the business constantly or continuously for any period of time, or any distance of transportation.” Central of Georgia R. Co. v. Lippman, 110 Ga. 665.

**242. 3. Private Carriers Defined.** — Roussel v. Aumais, 18 Quebec Super. Ct. 474. See Thompson v. New York Storage Co., 97 Mo. App. 135.

Private Carrier Liable for Negligence Only. — Faucher v. Wilson, 68 N. H. 338.

**245. 4. Holding Out the Test.** — Culver v. Lester, 37 Can. L. J. 421, and Roussel v. Aumais, 18 Quebec Super. Ct. 474, following Nugent v. Smith, 1 C. P. D. 27.

Duty as to Treating Customers Equally. — At common law a common carrier was under no obligation to treat all his customers equally. Culver v. Lester, 37 Can. L. J. 421; Johnson v. Dominion Express Co., 28 Ont. 203. He might limit his business in any manner he chose, and, unless his prices were fixed by law, might fix what prices he chose to charge. Culver v. Lester, 37 Can. L. J. 421.

**5. Carrier of Particular Kind of Property May Be Common Carrier.** — Johnson v. Dominion Express Co., 28 Ont. 203.

**246. 2. Right to Compensation.** — See Johnson v. Dominion Express Co., 28 Ont. 203.

Right to Discriminate as to Carrying Charges. — Culver v. Lester, 37 Can. L. J. 421.

**3. Carrying for Hire Need Not Be the Sole Occupation.** — Culver v. Lester, 37 Can. L. J. 421.

**248. 3. Common Carriers.** — Hill v. Scott, (1895) 2 Q. B. 371, affirmed (1895) 2 Q. B. 713.

Owner of a General Ship. — Reed v. Wilmington Steamboat Co., 1 Marv. (Del.) 193.

**250. 2. Towboats Not Common Carriers.** — Knapp v. McCaffrey, 178 Ill. 107, 69 Am. St. Rep. 290; Emilhusen v. Pennsylvania R. Co., 30 N. Y. App. Div. 203.

**251. 3. Private Ferry.** — Roussel v. Aumais, 18 Quebec Super. Ct. 474.

**5. Carters, etc., Are Ordinarily Common Carriers.** — Savannah, etc., R. Co. v. Commercial Guano Co., 103 Ga. 590; Farley v. Lavary, 107 Ky. 523; Caye v. Poole, 108 Ky. 124; Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 70 Am. St. Rep. 432; Culver v. Lester, 37 Can. L. J. 421.

**255. 2. See East Indian R. Co. v. Mukerjee.** (1901) A. C. 396.

**257. 1. Express Company Does Not Hold Itself Out as Carrier for Rival Company.** — Johnson v. Dominion Express Co., 28 Ont. 203.

**260. 1. Safe and Machinery Movers.** — Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 70 Am. St. Rep. 432, affirming (C. Pl. Gen. T.) 15 Misc. (N. Y.) 93.

**7. Wharfingers.** — Reed v. Wilmington Steamboat Co., 1 Marv. (Del.) 193.

**261. 3. State v. St. Louis, 145 Mo. 551, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 261; State v. Citizens' Telephone Co., 61 S. Car. 83, 85 Am. St. Rep. 870, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 261.**

**263.** IV. GENERAL NATURE OF CARRIER'S LIABILITY — 1. Is an Insurer. — See note 1.

**264.** Liability Founded in Public Policy as Well as in Contract. — See note 1.

**265.** 3. Exceptions to General Rule of Liability — *b.* IN CASE OF PERISHABLE GOODS. — See note 3.<sup>1</sup>

**266.** *c.* IN CASE OF DELAY IN TRANSMISSION OF GOODS. — See note 2.

4. While Hauling Cars of Other Companies. — See note 5.

**263.** 1. Carrier Liable as Insurer — *England.* — *Hill v. Scott*, (1895) 2 Q. B. 371, *affirmed* (1895) 2 Q. B. 713; *Culver v. Lester*, 37 Can. L. J. 421.

*United States.* — *Cincinnati, etc., R. Co. v. Fairbanks*, (C. C. A.) 90 Fed. Rep. 467.

*Alabama.* — *Tallassee Falls Mfg. Co. v. Western R. Co.*, 128 Ala. 167, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 263.

*Delaware.* — *Reed v. Wilmington Steamboat Co.*, 1 Marv. (Del.) 193.

*Georgia.* — *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 263; *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665.

*Kansas.* — *St. Louis, etc., R. Co. v. Sherlock*, 59 Kan. 23.

*Kentucky.* — *Farley v. Lavary*, 107 Ky. 523; *Cincinnati, etc., R. Co. v. Webb*, 103 Ky. 705.

*New York.* — *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 70 Am. St. Rep. 432.

*Tennessee.* — *Nashville, etc., R. Co. v. Stone*, 112 Tenn. 348.

**The Rule Stated.** — *International, etc., R. Co. v. Bergman*, (Tex. Civ. App. 1901) 64 S. W. Rep. 999; *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778.

**Burden of Proof on the Carrier.** — *Savannah, etc., R. Co. v. Commercial Guano Co.*, 103 Ga. 590.

**264.** 1. Liability Not Dependent on Contract. — *Bird v. Southern R. Co.*, 99 Tenn. 719, 63 Am. St. Rep. 856.

**265.** 3. Perishable Goods. — *Lister v. Lancashire, etc., R. Co.*, (1903) 1 K. B. 878, 72 L.

J. K. B. 385; *Farley v. Lavary*, 107 Ky. 523; *Faucher v. Wilson*, 68 N. H. 338; *International, etc., R. Co. v. Bergman*, (Tex. Civ. App. 1901) 64 S. W. Rep. 999.

**266.** 2. *United States.* — *Southern Pac. R. Co. v. Arnett*, (C. C. A.) 126 Fed. Rep. 75; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, (C. C. A.) 120 Fed. Rep. 873.

*Arkansas.* — *Choctaw, etc., R. Co. v. Walker*, 71 Ark. 571.

*Illinois.* — *Adams Express Co. v. Bratton*, 106 Ill. App. 563.

*Indiana.* — *Cleveland, etc., R. Co. v. Heath*, 22 Ind. App. 47.

*Kentucky.* — *Louisville, etc., Packett Co. v. Bottorff*, (Ky. 1904) 77 S. W. Rep. 920.

*Missouri.* — *Alabama, etc., R. Co. v. Pounder*, 82 Miss. 568.

*Texas.* — *Belcher v. Missouri, etc., R. Co.*, 92 Tex. 593; *San Antonio, etc., R. Co. v. Josey*, (Tex. Civ. App. 1903) 71 S. W. Rep. 606; *Texas Cent. R. Co. v. Dorsey*, 30 Tex. Civ. App. 377.

*Virginia.* — See *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778.

A heavy dew is not an act of God which will relieve a common carrier from liability for its negligence in delaying the transmission of goods. *Missouri, etc., R. Co. v. Truskett*, 2 Indian Ter. 633.

In *Cincinnati, etc., R. Co. v. Webb*, 103 Ky. 705, it was held that a carrier was liable for loss occasioned by delay in delivering goods, when the delay arose from causes that were known to the carrier when it accepted the goods for shipment.

**5. Liability for Such Cars.** — *Cincinnati, etc., R. Co. v. Fairbanks*, (C. C. A.) 90 Fed. Rep. 467.

# COMMON LAW.

BY L. C. BOEHM.

- 269. II. DEFINITION AND USE OF TERM—2. How the Term Is Used —**  
*b. IN THE UNITED STATES CONSTITUTION.* — See note 3.  
**270. 3. Its Influence upon Statutes.** — See note 3.  
Legislative Intent to Govern. — See notes 4, 5.  
Repeal of Statute. — See note 6.  
Cumulative Remedies. — See note 7.  
**271. III. ORIGIN AND GROWTH—1. In England.** — See note 1.  
2. In the United States. — See note 2.  
**277. IV. WHAT THE COMMON LAW INCLUDES—2. English Statutes—*a. IN***  
**GENERAL.** — See note 1.  
**278. *b. STATUTES ENACTED PRIOR TO 4 JAC. I.*** — See note 1.  
**282. V. PRESUMPTION AS TO EXISTENCE—3. In the Original Colonies.** —  
See note 1.  
4. In Sister States — *a. GENERALLY.* — See note 5.

**269. 3. Constitution Is Based upon the Common Law.** — The Federal Constitution "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." *U. S. v. Wong Kim Ark*, 169 U. S. 649.

**270. 3. Harvey v. Aurora, etc., R. Co.,** 174 Ill. 295; *Barry v. Port Jervis*, 64 N. Y. App. Div. 281; *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245; *Briggs v. Todd*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 208; *Welty v. U. S.*, 14 Okla. 7.

**4. In re Lord, etc., Chemical Co.,** 7 Del. Ch. 248.

**5. Statutes in Derogation of Common Law Strictly Construed.** — *Harvey v. Aurora, etc., R. Co.*, 174 Ill. 295. See also the title **STATUTES**, 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 662 *et seq.*

**6. Donaldson v. State, (Ind. 1903)** 67 N. E. Rep. 1029; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149. See also the title **STATUTES**, 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 760 *et seq.*

**7. Rosin v. Lidgerwood Mfg. Co.,** 89 N. Y. App. Div. 245. See also the title **STATUTES**, 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 671.

**271. 1. Barry v. Port Jervis, 64 N. Y. App. Div. 281, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 271.**

**2. Barry v. Port Jervis, 64 N. Y. App. Div. 281, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 271.**

**277. 1. English Statutes Before Planting of Colonies in United States.** — *Valentine v. Roberts*, 1 Alaska 536; *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427.

**278. 1. Teller v. Hill, 18 Colo. App. 509; Aina Ins. Co. v. Com., 106 Ky. 864.**

**282. 1. Original Colonies—Common Law Presumed to Exist.** — *Barry v. Port Jervis, 64 N.*

*Y. App. Div. 281, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 282.*

**5. Presumption that Common Law Prevails in Sister States—Alabama.** — *Birmingham Water Works Co. v. Hume*, 121 Ala. 168, 77 Am. St. Rep. 43; *Wilkinson v. Buster*, 124 Ala. 574.

*Arkansas.* — *St. Louis, etc., R. Co. v. Brown*, 67 Ark. 295.

*Georgia.* — *Charleston, etc., R. Co. v. Miller*, 113 Ga. 15; *Wells v. Gress*, 118 Ga. 566.

*Illinois.* — *Scaling v. Knollin*, 94 Ill. App. 443; *Jo. Daviess County v. Staples*, 108 Ill. App. 539.

*Indiana.* — *Baltimore, etc., R. Co. v. Jones*, 158 Ind. 87; *Baltimore, etc., R. Co. v. Adams*, 159 Ind. 688; *Baltimore, etc., R. Co. v. Hollenbeck*, 161 Ind. 452.

*Kansas.* — *Woolacott v. Case*, 63 Kan. 35.

*Kentucky.* — *Chesapeake, etc., R. Co. v. Hammer*, 66 S. W. Rep. 375, 23 Ky. L. Rep. 1846; *Klenke v. Noonan*, (Ky. 1904) 81 S. W. Rep. 241.

*Louisiana.* — *Rush v. Landers*, 107 La. 549.

*Minnesota.* — *Engstrand v. Kleffman*, 86 Minn. 403, 91 Am. St. Rep. 359.

*Missouri.* — *Davis v. Cohn*, 85 Mo. App. 530; *Gaylord v. Duryea*, 95 Mo. App. 574; *Price v. Clevenger*, 99 Mo. App. 536.

*Nebraska.* — *Pennsylvania R. Co. v. Kennard Glass, etc., Co.*, 59 Neb. 435.

*New York.* — *Paterson First Nat. Bank v. National Broadway Bank*, 156 N. Y. 459; *Matter of Hulbert*, 38 N. Y. App. Div. 323, *reversed* 160 N. Y. 9.

*North Carolina.* — *Gooch v. Faucett*, 122 N. Car. 270; *Terry v. Robbins*, 128 N. Car. 140, 83 Am. St. Rep. 663; *State Bank v. Carr*, 130 N. Car. 479.

*South Carolina.* — *Rosemand v. Southern R. Co.* 66 S. Car. 21.

**In Texas** it is held that in the absence of proof that the common law prevailed in a sister

**284.** *b. PRESUMED TO BE THE SAME AS STATE OF FORUM.* — See note 3.  
**5. In Foreign Country.** — See note 5.

**285.** *Limitation of the Rule.* — See note 1.

**6. National Common Law.** — See note 4.

**286.** *District of Columbia.* — See note 1.

*Common Law Furnishes the Guide in Federal Courts.* — See note 2.

**VI. EXTENT OF ADOPTION — 1. In General — a. ONLY AS SUITED TO CHANGED CONDITIONS OF COLONISTS.** — See note 3.

**288.** *2. By State Constitutions.* — See note 5.

**289.** *3. By Statutory Enactment.* — See note 1.

**VII. HOW ESTABLISHED AND PROVED — 1. Of a Sister State.** — See note 3.

**VIII. COMMON LAW IN RELATION TO CRIMES — 1. In Federal Courts** — See note 6.

**290.** *2. In State Courts.* — See notes 3, 4.

**291.** *COMMONWEALTH.* — See note 1.

*COMMORANCY.* — See note 2.

*COMMOTION.* — See note 3.

*COMMUNICATE.* — See note 4.

state at a previous time, the Texas courts must apply the law of Texas. *Blethen v. Bonner*, 93 Tex. 141 (*citing Crosby v. Huston*, 1 Tex. 203; *Bradshaw v. Mayfield*, 18 Tex. 21; *Porcheler v. Bronson*, 50 Tex. 555; *Houston, etc., R. Co. v. Baker*, 57 Tex. 422; *Tempel v. Dodge*, 89 Tex. 68).

**284.** *3. Common Law of Sister States Presumed to Be Same as in State of Forum.* — *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427; *De Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576; *Crandall v. Great Northern R. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458; *Rosemand v. Southern R. Co.*, 66 S. Car. 98, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 284; *State v. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936; *Gunderson v. Gunderson*, 25 Wash. 459.

**5. Presumed to Prevail in Foreign Countries.** — *A. G. Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516; *Dignan v. Nelson*, 26 Utah 186.

**285.** *1. France.* — "The court will take judicial notice that the common law is not, and never was, in force in France." *Per Smith, J.*, in *Matter of Hall*, 61 N. Y. App. Div. 266.

**4. No National Common Law.** — *Western Union Tel. Co. v. Call Pub. Co.*, 58 Neb. 196, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 285.

**286.** *1. District of Columbia.* — *De Forest v. U. S.*, 11 App. Cas. (D. C.) 458.

**2. Federal Courts Administer State Common Law.** — *Western Union Tel. Co. v. Call Pub. Co.*, 58 Neb. 196, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 286; *Murray v. Chicago, etc., R. Co.*, (C. C. A.) 92 Fed. Rep. 868.

**3. When Rule May Be Declared Inapplicable.** — The power of the courts to declare established doctrines of the common law inapplicable should be used sparingly, and its exercise is not to be justified unless the inapplicability of a rule is general, extending to the whole or the greater part of the state, or at least to an area capable of definite judicial ascertainment.

*Meng v. Coffey*, (Neb. 1903) 93 N. W. Rep. 713.

**288.** *5. Constitution* — *Ætna Ins. Co. v. Com.*, 106 Ky. 864.

**289.** *1. Statutes.* — *Luhns v. Hancock*, (Ariz. 1899) 57 Pac. Rep. 605, *affirmed* 181 U. S. 567; *Slattery v. Harley*, 58 Neb. 575; *Williams v. Miles*, (Neb. 1903) 94 N. W. Rep. 705. See also *Davis v. State*, 44 Fla. 32.

**3. The Judgments of the Courts of a Sister State** are presumptive evidence of what the common law is in that state. *Bath Gas Light Co. v. Rowland*, 84 N. Y. App. Div. 563, *affirmed* 178 N. Y. 631.

**6. Federal Courts Have No Common-law Criminal Jurisdiction.** — *Peters v. U. S.*, (C. C. A.) 94 Fed. Rep. 127.

**290.** *3. Common Law as to Crimes Does Not Exist.* — *In re Lambrecht*, (Mich. 1904) 100 N. W. Rep. 606, 11 Detroit Leg. N. 289.

In *Nebraska* there are no common-law offenses; but the definition of an act prohibited but not defined by statute may be ascertained by reference to the common law. *State v. De Wolfe*, (Neb. 1903) 93 N. W. Rep. 746.

**4. Legislation as to Adoption of Common Law of Crimes.** — Under Fla. Rev. Stat., § 2369, adopting the common law where there is no existing statutory provision, the degree of irresponsibility that shall constitute incapacity to commit a criminal act must be determined by the rule of the common law, there being no statute on the subject. *Davis v. State*, 44 Fla. 32.

**291.** *1. Variance.* — *Compare State v. Lambert*, 44 W. Va. 308.

*2. Thomas v. Thomas*, 96 Me. 223.

**3. Civil Commotion.** — *Wong Chow v. Transatlantic F. Ins. Co.*, 13 Hawaii 162, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 291.

**4. Fires by Railroads.** — *Macdonald v. New York, etc., R. Co.*, 23 R. I. 558.

**Adjoining and Communicating Buildings — Fire Insurance.** — See *Marsh v. Concord Mut. F. Ins. Co.*, 71 N. H. 253. And see *ante*, ADJOINING.



**291. COMMUNITY.** — See note 7.

**291. 7. Distinguished from Neighborhood.**—The term *community*, as used in an instruction as to the measure of damages occasioned to property by the change of grade of a street, while not a complete synonym for "neighborhood" or "vicinity" (the terms used in this character of instruction), certainly has no tendency to mislead the jury unfavorably to defendants. In common parlance, and as the jury probably understood the meaning of the word *community*, it has a broader significance than the words "neighborhood" or "locality," and for that reason would seem more favorable than otherwise to appellant. *Berkson v. Kansas City Cable R. Co.*, 144 Mo. 220.

**Reputation.**—In *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 811, the court said: "The witness's knowledge of reputation must for the most part be derived from what he has heard others say upon the subject. But it is a great mistake to suppose that unless the witness has talked to a majority, or any other large proportion, of a *community*, that he is

not qualified to speak. Nashville is a city of about 100,000 people. In a *community* so populous it might well be that a very small number of persons would know anything whatever about a particular inhabitant, and that a still smaller number had been heard by a witness to say what was thought or said of the person inquired about. The *community* whose estimate of character is to be ascertained is, therefore, composed of those called by some jurists 'his neighbors,' by others 'his associates or acquaintances,' and by still others as those who are 'conversant' with him." *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 803.

"**Community of Profits** means a proprietorship in them, as distinguished from a personal claim upon the other associates. In other words, a property right in them from the start in one associate as much as in the other. *Bates on Part.*, § 30; *Pars. on Part.*, § 54." *Moore v. Williams*, 26 Tex. Civ. App. 142. And see the title **PARTNERSHIP**.

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## COMMUNITY PROPERTY.

By W. B. ROBINSON.

**295. I. HISTORY**—The Central Idea of This System. — See note 1.

**296. II. NATURE OF THE COMMUNITY**—The Legal Community. — See note 2.  
**Marital Partnership.**— See note 3.

**297.** See note 1.

**III. THE COMMUNITY, HOW FORMED**—1. A Valid Marriage Necessary

—Concubinage. — See note 4.

**301. IV. SEPARATE ESTATE**—3. Rents, Issues, and Profits of Separate Property. — See note 3.

4. Property Acquired in Exchange for Separate Property—How Such Property Regarded. — See note 6.

**295. 1. History**—*New Mexico*. — *Barnett v. Barnett*, 9 N. Mex. 205; *Crary v. Field*, 9 N. Mex. 222; *Strong v. Eakin*, 11 N. Mex. 107.

**296. 2. Remarriage After Agreement as to Separation of Property.**—Two persons, who were Roman Catholics and relations in the fourth degree of consanguinity, contracted marriage without dispensation from the ecclesiastical authorities and without a marriage contract. Subsequently, for the reason that this marriage was void because of the ties of relationship existing between them, they contracted marriage anew after having executed a marriage contract providing for separation as to property. In a proceeding by the wife, asking that the first marriage be declared void, and that it be decreed that the property she held from the succession of her father could not be charged with liability for her husband's debts, it was held that the first marriage, not having been duly annulled and set aside by decree of the ecclesiastical authorities, confirmed by the judgment of a civil court, was the only marriage existing between the parties, and that the second marriage was a nullity and that therefore the

parties were in community of property. *Cross v. Prevost*, 15 Quebec Super. Ct. 184.

**3. Not Strictly Speaking a Partnership.**—*Weil v. Jacobs*, 111 La. 357.

**297. 1. In What Respects Similar to a Partnership.**—See *Cervantes v. Cervantes*, (Tex. Civ. App. 1903) 76 S. W. Rep. 790.

**4. Concubinage.**—*Harris v. Hobbs*, 22 Tex. Civ. App. 367; *Gilbert v. Edwards*, 32 Tex. Civ. App. 460.

Those who afterwards marry are excepted from the rule by Civil Code La., art. 1481. *Westmore v. Harz*, 111 La. 305.

**301. 3. Siddall v. Haight**, 132 Cal. 320; *Strong v. Eakin*, 11 N. Mex. 107.

**6. Property Acquired in Exchange for Separate Property**—*California*. — *Riebli v. Husler*, 137 Cal. xix, 69 Pac. Rep. 1061; *Matter of Granniss*, 142 Cal. 1.

*Texas*. — *Hunt v. Matthews*, (Tex. Civ. App. 1901) 60 S. W. Rep. 674; *Oaks v. West*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033; *Kellett v. Trice*, 95 Tex. 160; *Struad v. Struad*, (Tex. Civ. App. 1902) 68 S. W. Rep. 69; *Blethen v. Bonner*, 30 Tex. Civ. App. 585; *Hall v. Levy*,

**302.** If Separate Funds Are Used. — See note 1.

**303.** The Spouse Whose Separate Funds Are Used. — See note 2.  
Difference Explained. — See note 3.

In This State a Qualified Right to Reinvest Separate Property. — See note 4.

**304.** Husband Purchasing on His Separate Account. — See note 1.

5. Gifts Between the Spouses — Husband's Conveyance of Community Interest in Property in Esse. — See note 3.

**305.** Past and Future Earnings of Wife. — See notes 2, 3.

The Method of Making a Gift to the Wife. — See note 4.

**307.** V. OF WHAT COMMUNITY PROPERTY CONSISTS — 1. In General — Line of Demarkation Between Separate and Community Property. — See note 2.

**308.** Positive Definition. — See note 1.

**309.** In Louisiana Community Property Consists Of. — See note 1.

2. Damages for Injuries — *a.* IN GENERAL. — See note 4.

**310.** See note 1.

**311.** 3. Earnings of the Spouses — *a.* IN GENERAL. — See note 2.

31 Tex. Civ. App. 360; Thayer *v.* Clarke, (Tex. Civ. App. 1903) 77 S. W. Rep. 1050. See also Simms *v.* Hixon, (Tex. Civ. App. 1901) 65 S. W. Rep. 36.

*Washington.* — Austin *v.* Clifford, 24 Wash. 172.

**302.** 1. Separate Funds Used as Part of Purchase Price. — Northwestern, etc., Hypotheek Bank *v.* Rauch, 7 Idaho 152; Moor *v.* Moor, 24 Tex. Civ. App. 150. See also Hanna *v.* Reeves, 22 Wash. 6.

**303.** 2. Cormier's Succession, 52 La. Ann. 876; Muller's Succession, 106 La. 89. See also Sharp *v.* Zeller, 110 La. 61.

3. Difference Between Louisiana Rule and That of Other States Explained. — Moor *v.* Moor, 24 Tex. Civ. App. 160, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303.

4. Rogge's Succession, 50 La. Ann. 1220; Burke's Succession, 107 La. 82. See also Fortier *v.* Barry, 111 La. 776.

**304.** 1. Husband Purchasing on His Separate Account — Explanation of Intention. — In order to prevent the purchase with the separate funds of the husband from falling into the community, the husband should make a double declaration: first, that it is bought with the proceeds of a sale of property belonging to himself individually; second, that the purchase is made for the purpose of replacing the property sold. Sharp *v.* Zeller, 110 La. 61; Hall *v.* Toussaint, 52 La. Ann. 1763; Burke's Succession, 107 La. 82. See also Muller's Succession, 106 La. 89.

3. Husband's Conveyance of Community Interest in Property in Esse — *Arizona.* — Main *v.* Main, (Ariz. 1900) 60 Pac. Rep. 888.

*California.* — Matter of McCauley, 138 Cal. 432; Hoeck *v.* Greif, 142 Cal. 119.

*Texas.* — Hunter *v.* Hunter, (Tex. Civ. App. 1898) 45 S. W. Rep. 820; Kahn *v.* Kahn, 94 Tex. 114; Kellett *v.* Trice, 95 Tex. 160; Hall *v.* Levy, 31 Tex. Civ. App. 360.

*Washington.* — Sackman *v.* Thomas, 24 Wash. 660; Deering *v.* Holcomb, 26 Wash. 588.

**305.** 2. Future Earnings of Wife. — See Dority *v.* Dority, 30 Tex. Civ. App. 216.

3. When Gift Takes Effect in Case of Future Earnings. — See Davis *v.* Green, 122 Cal. 364.

4. Evidence Necessary to Establish the Property as Separate Property — *California.* — Arkle *v.* Beedie, 141 Cal. 459; Hoeck *v.* Greif, 142 Cal. 119.

*Washington.* — Sackman *v.* Thomas, 24 Wash. 660.

**307.** 2. The Following Case Will Illustrate the Application of the Rule. — Main *v.* Scholl, (Wash. 1899) 57 Pac. Rep. 800.

**308.** 1. "To This Community Belong." — See Seeber *v.* Randall, 42 C. C. A. 272, 102 Fed. Rep. 215, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 308.

**309.** 1. Illustrations. — "As a general principle of the Spanish law," etc. Lyon's Succession, 50 La. Ann. 50; Knight *v.* Kaufman, 105 La. 35.

4. Damages for Injuries — General Rule — *Louisiana.* — See Williams *v.* Pope Mfg. Co., 52 La. Ann. 1417, 78 Am. St. Rep. 390.

*Texas.* — Bohan *v.* Bohan, (Tex. Civ. App. 1900) 56 S. W. Rep. 959.

*Canada.* — Tondreau *v.* Semple, 2 Quebec Pr. 296; Sauriol *v.* Clermont, 10 Quebec K. B. 294.

The Rule in California. — The husband as the head of the community has a right to maintain an action for loss of the wife's services resulting from injuries received by the defendant's negligence. Martin *v.* Southern Pac. R. Co., 130 Cal. 285.

**310.** 1. The Damages Recoverable. — See Martin *v.* Southern Pac. R. Co., 130 Cal. 285.

Damages for Injury to the Wife's Person or Character are recoverable in an action by the husband, who alone has the right to maintain such an action. McFarran *v.* Montreal Park, etc., R. Co., 30 Can. Sup. Ct. 410; Caron *v.* Larivé, 5 Quebec Pr. 332; Sauriol *v.* Clermont, 10 Quebec K. B. 294; Troude *v.* Meldrum, 20 Quebec Super. Ct. 531; Tondreau *v.* Semple, 2 Quebec Pr. 296. Compare Sullivan *v.* Magog, 18 Quebec Super. Ct. 107, holding that the wife may join with her husband in an action for personal injuries sustained by her.

**311.** 2. General Rule as to Earnings — *California.* — Martin *v.* Southern Pac. R. Co., 130 Cal. 285; Rowe *v.* Hibernia Sav., etc., Soc., 134 Cal. 403.

*Louisiana.* — Jordy *v.* Muir, 51 La. Ann. 55; Knight *v.* Kaufman, 105 La. 35; Manning's Succession, 107 La. 456.

*New Mexico.* — Barnett *v.* Barnett, 9 N. Mex. 205; Brown *v.* Lockhart, (N. Mex. 1903) 71 Pac. Rep. 1086.

**312.** 4. Purchases on Credit — *a.* PERSONAL CREDIT OF PURCHASER. — See note 4.

*b.* PROPERTY PROCURED BY PLEDGE OR MORTGAGE OF SEPARATE PROPERTY. — See note 5.

**313.** 5. Grants of Public Lands — *a.* GENERAL RULE — Principle Governing Private Grants Prevails. — See note 2.

*b.* DONATIONS. — See note 4.

**314.** They Are Conditional. — See note 1.

*c.* GRANTS ON CONSIDERATION FROM SEPARATE PROPERTY. — See note 3.

**315.** *e.* GRANTS UPON CONDITION — Conditions Subsequent. — See note 4.

**317.** See note 1.

Explanation — The Conflict of Opinion. — See note 2.

**318.** 6. Inchoate Titles — *a.* TITLES INITIATED BEFORE AND PERFECTED DURING MARRIAGE — The Doctrine of Relation. — See note 1.

Equitable Title Before Marriage — See note 2.

*b.* TITLES INITIATED DURING AND PERFECTED AFTER DISSOLUTION OF MARRIAGE. — See note 3.

**320.** 7. Rents, Issues, Profits, Increase, Fruits, and Revenues of Separate Property — *b.* TEXAS DOCTRINE — (1) *Fruits of Separate Property.* — See note 2.

**322.** *c.* LOUISIANA DOCTRINE. — See note 5.

*Texas.* — Cline *v.* Hackbarth, 27 Tex. Civ. App. 391.

**312.** 4. Personal Credit of Purchaser. — Hirshfeld *v.* Howard, (Tex. Civ. App. 1900) 59 S. W. Rep. 55.

5. Rule in Louisiana. — Jordy *v.* Muir, 51 La. Ann. 55.

**313.** 1. Phoenix Min., etc., Co. *v.* Scott, 20 Wash. 48.

4. Donations Separate Property. — Mahon *v.* Barnett, (Tex. Civ. App. 1897) 45 S. W. Rep. 24; Kellett *v.* Trice, 95 Tex. 160; Burleson *v.* Alvis, 28 Tex. Civ. App. 51; King *v.* Summer-ville, (Tex. Civ. App. 1904) 80 S. W. Rep. 1050.

**314.** 1. Onerous Condition May Convert Donation into Sale. — Under the Civil Code of Quebec, as under the former law, donations of immovables by ancestors to their heir, one of the consorts of a community, which only impose on the donee the obligations that would have followed the immovables if they had passed by succession, are acknowledged deeds in advance of inheritance, and the immovables remain the property of the consort to whom they were donated. The donation by an ancestor subject to a charge of a life rent payable to the donor makes no exception to this rule, if the rent does not exceed the value of the revenues of the immovable, because in such case the rent is equivalent to a retention of the usufruct, and it is none the less a real donation as to the estate. But the stipulation in a donation, with retention of usufruct, for payment by the donee to the donor of an annual sum equal to or exceeding the value of the property, renders the transaction a sale in reality and a donation in name only. The property thus given to one consort is an acquisition of the community that the husband may hypothecate. Boucher *v.* Thibaudeau, 13 Quebec Super. Ct. 304.

3. Where the Community Furnishes the Consideration. — Ahern *v.* Ahern, 31 Wash. 334, 96 Am. St. Rep. 912.

**315.** 4. Grants upon Conditions. — See Richard *v.* Moore, 110 La. 435; McAlister *v.* Hutchison, (N. Mex. 1904) 75 Pac. Rep. 41.

**317.** 1. Richard *v.* Moore, 110 La. 435; Ahern *v.* Ahern, 31 Wash. 334, 96 Am. St. Rep. 912.

2. United States Homestead and Exemption Laws. — Ahern *v.* Ahern, 31 Wash. 334, 96 Am. St. Rep. 912; Brown *v.* Fry, 52 La. Ann. 58.

Mining Laws of the United States. — Phoenix Min., etc., Co. *v.* Scott, 20 Wash. 48.

**318.** 1. Doctrine of Relation. — Brown *v.* Fry, 52 La. Ann. 58; Welder *v.* Lambert, 91 Tex. 510; Ahern *v.* Ahern, 31 Wash. 334, 96 Am. St. Rep. 912, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318.

2. The Following Are Cases Where the Right Was Initiated Before the Marriage. — Matter of Boody, 119 Cal. 402; Welder *v.* Lambert, 91 Tex. 510; Hillen *v.* Williams, 25 Tex. Civ. App. 268; Riddle *v.* Riddle, (Tex. Civ. App. 1901) 62 S. W. Rep. 970; Laufer *v.* Powell, 30 Tex. Civ. App. 604. See also Batla *v.* Batla, (Tex. Civ. App. 1899) 51 S. W. Rep. 664.

3. The Following Are Cases Where the Right Was Initiated During the Marriage. — Brown *v.* Fry, 52 La. Ann. 58; Barrett *v.* Spence, 28 Tex. Civ. App. 344. See also Richard *v.* Moore, 110 La. 435.

**320.** 2. In Texas, Rents, Issues, and Profits of Separate Property Belong to the Community. — McCord *v.* Holloman, (Tex. Civ. App. 1898) 46 S. W. Rep. 114; Holloway *v.* Shuttles, 21 Tex. Civ. App. 188; Parrish *v.* Williams, (Tex. Civ. App. 1899) 53 S. W. Rep. 79; Moor *v.* Moor, 24 Tex. Civ. App. 150, 31 Tex. Civ. App. 137; De Berrera *v.* Frost, (Tex. Civ. App. 1903) 77 S. W. Rep. 637.

The "Increase" of Cattle. — Moor *v.* Moor, 24 Tex. Civ. App. 150; Wolford *v.* Melton, 26 Tex. Civ. App. 486.

**322.** 5. When the Paraphernal Property Is Administered by the Husband. — Courrege *v.* Colgin, 51 La. Ann. 1069.

**322.** When Wife Retains Separate Administration. — See note 6.

**323.** *d.* DOCTRINE IN CALIFORNIA, NEVADA, WASHINGTON, AND ARIZONA — Classification. — See note 4.

**324.** See notes 1, 3, 5.

Where Either Spouse Devotes His or Her Time to Care of Separate Estate. — See note 6.

**8. Improvements Made by Community on Separate Property —** Belong to Separate Estate. — See note 9.

The Measure of Compensation. — See note 11.

Time at Which Value to Be Taken. — See note 12.

**325.** **9. Property Acquired by Prescription —** Where Prescription Begins Before and Ends During Marriage. — See note 3.

**VI. PRESUMPTIONS — 1. The General Rule.** — See note 7.

**326.** Applicable to Both Husband and Wife. — See note 3.

**322.** **6. Separate Administration by Wife —** Louisiana. — Rogge's Succession, 50 La. Ann. 1220.

But the Wife May Employ the Husband as Her Agent. — See Lanphier's Succession, 104 La. 384.

**323.** **4.** Seeber *v.* Randall, 42 C. C. A. 272, 102 Fed. Rep. 215; Brookman *v.* State Ins. Co., 18 Wash. 308; Matter of Boody, 119 Cal. 402.

**324.** **1.** Matter of Granniss, 142 Cal. 1. See also Riebli *v.* Husler, 137 Cal. xix, 69 Pac. Rep. 1061.

**3.** Thorn *v.* Anderson, 7 Idaho 421.

**5.** Matter of Granniss, 142 Cal. 1.

**6.** Brookman *v.* State Ins. Co., 18 Wash. 308.

**9. Improvements to the Property of Owner of Separate Estate.** — Sims *v.* Billington, 50 La. Ann. 968; Burke's Succession, 107 La. 82; McDaniel *v.* Harley, (Tex. Civ. App. 1897) 42 S. W. Rep. 323; Wilder *v.* Lambert, 91 Tex. 510; Bullock *v.* Sprowls, (Tex. Civ. App. 1899) 54 S. W. Rep. 557, affirmed 93 Tex. 188, 77 Am. St. Rep. 841; Hillen *v.* Williams, 25 Tex. Civ. App. 268; Gilroy *v.* Richards, 26 Tex. Civ. App. 55; Cervantes *v.* Cervantes, (Tex. Civ. App. 1903) 76 S. W. Rep. 790; Neaves *v.* Griffin, (Tex. Civ. App. 1904) 80 S. W. Rep. 420. See also Courrege *v.* Colgin, 51 La. Ann. 1069; Parrish *v.* Williams, (Tex. Civ. App. 1899) 53 S. W. Rep. 79. But see Maddox *v.* Summerlin, 92 Tex. 483; King *v.* Summerville, (Tex. Civ. App. 1904) 80 S. W. Rep. 1050.

**Taxes Paid by the Community to preserve the separate estate become a charge on it.** Cervantes *v.* Cervantes, (Tex. Civ. App. 1903) 76 S. W. Rep. 790.

**11. Measure of Compensation.** — Sims *v.* Billington, 50 La. Ann. 968; Hillen *v.* Williams, 25 Tex. Civ. App. 268. See also Burke's Succession, 107 La. 82.

**12. Time of Valuation.** — Sims *v.* Billington, 50 La. Ann. 968. See also Burke's Succession, 107 La. 82.

**325.** **3.** See Gafford *v.* Foster, (Tex. Civ. App. 1904) 81 S. W. Rep. 63.

**7. Presumption as to Property Acquired After Marriage — California.** — Matter of Boody, 119 Cal. 402; Davis *v.* Green, 122 Cal. 364; Rowe *v.* Hibernia Sav., etc., Soc., 134 Cal. 403; Riebli *v.* Husler, 137 Cal. xix, 69 Pac. Rep. 1061; Freese *v.* Hibernia Sav., etc., Soc., 139 Cal. 392; Hoock *v.* Greif, 142 Cal. 119.

Louisiana. — Rogge's Succession, 50 La. Ann.

1220; Hall *v.* Toussaint, 52 La. Ann. 1763; Knight *v.* Kaufman, 105 La. 35; Muller's Succession, 106 La. 89; Burke's Succession, 107 La. 82; Manning's Succession, 107 La. 456; Buddig's Succession, 108 La. 406; Sharp *v.* Zeller, 110 La. 61; Fortier *v.* Barry, 111 La. 776; Westmore *v.* Harz, 111 La. 305; Bergey *v.* Labat, 112 La. 992.

*New Mexico.* — Neher *v.* Armijo, 9 N. Mex. 325; Strong *v.* Eakin, 11 N. Mex. 107; Brown *v.* Lockhart, (N. Mex. 1903) 71 Pac. Rep. 1086.

*Texas.* — Welder *v.* Lambert, 91 Tex. 510; Mahon *v.* Barnett, (Tex. Civ. App. 1897) 45 S. W. Rep. 24; Batla *v.* Batla, (Tex. Civ. App. 1899) 51 S. W. Rep. 664; Moor *v.* Moor, 24 Tex. Civ. App. 150; Scales *v.* Marshall, (Tex. Civ. App. 1900) 60 S. W. Rep. 336; Schneider *v.* Sellers, 25 Tex. Civ. App. 226; Clardy *v.* Wilson, 27 Tex. Civ. App. 49; Myrack *v.* Volentine, (Tex. Civ. App. 1901) 65 S. W. Rep. 674; Burleson *v.* Alvis, 28 Tex. Civ. App. 51; Somes *v.* Ainsworth, (Tex. Civ. App. 1902) 67 S. W. Rep. 468; Wolf *v.* Gibbons, (Tex. Civ. App. 1902) 69 S. W. Rep. 238; Blackwell *v.* Mayfield, (Tex. Civ. App. 1902) 69 S. W. Rep. 659; Allardyce *v.* Hambleton, 96 Tex. 30; Laufer *v.* Powell, 30 Tex. Civ. App. 604; Teague *v.* Lindsey, 31 Tex. Civ. App. 161; Cervantes *v.* Cervantes, (Tex. Civ. App. 1903) 76 S. W. Rep. 790; Flannery *v.* Chidgey, (Tex. Civ. App. 1903) 77 S. W. Rep. 1034; Thayer *v.* Clarke, (Tex. Civ. App. 1903) 77 S. W. Rep. 1050; Booth *v.* Clark, (Tex. Civ. App. 1904) 78 S. W. Rep. 392; King *v.* Summerville, (Tex. Civ. App. 1904) 80 S. W. Rep. 1050.

*Washington.* — Brookman *v.* State Ins. Co., 18 Wash. 308; Bunker *v.* Hattrup, 20 Wash. 318; Hanna *v.* Reeves, 22 Wash. 6; Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132; Sackman *v.* Thomas, 24 Wash. 660; Austin *v.* Clifford, 24 Wash. 172; Mattson *v.* Mattson, 29 Wash. 417; Ahern *v.* Ahern, 31 Wash. 334, 96 Am. St. Rep. 912; O'Connor *v.* Jackson, 33 Wash. 219; O'Sullivan *v.* O'Sullivan, 35 Wash. 481; Hill *v.* Gardner, 35 Wash. 520.

**When There Is No Proof as to the Time of the Acquisition,** the property in possession of the marriage community will be deemed by legal presumption to have been acquired during coverture. Strong *v.* Eakin, 11 N. Mex. 107.\*

**326.** **3. Applicable to Both Spouses — California.** — Davis *v.* Green, 122 Cal. 364; Lewis *v.* Burns, 122 Cal. 358; Fennell *v.* Drinkhouse,

**327.** Presumption Overcome by "Satisfactory Proof." — See note 2.

**2. Mutations of Separate Property — Identity Must Be Traced.** — See note 3.

**3. Blending of Separate and Community Property.** — See note 5.

**328.** **4. Recitals in Deeds — a. IN GENERAL — Evidence Aliunde.** — See note 2.

As to the Probative Force of Recitals Showing the Source of the Consideration. — See note 5.

**b. RULE IN LOUISIANA — Recitals in Conveyance to Wife — Effect on Husband.** — See note 7.

Effect on Husband's Forced Heirs. — See note 8.

**329.** **And the Wife, to Maintain Her Separate Right.** — See notes 3, 4.

**c. RULE IN OTHER STATES — In the Common-law Community Property States.** — See note 7.

In Texas. — See note 8.

**330.** **d. THE OPERATIVE WORDS OF THE CONVEYANCE.** — See note 1.

131 Cal. 447, 82 Am. St. Rep. 361; Rowe v. Hibernia Sav., etc., Soc., 134 Cal. 403; Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392; Hoeck v. Greif, 142 Cal. 119. \*

Idaho. — Stowell v. Tucker, 7 Idaho 312.

Louisiana. — Pior v. Giddens, 50 La. Ann. 216; Rogge's Succession, 50 La. Ann. 1220; Knight v. Kaufman, 105 La. 35; Burke's Succession, 107 La. 82; Manning's Succession, 107 La. 456; Fortier v. Barry, 111 La. 776; Westmore v. Harz, 111 La. 305; Bergey v. Labat, 112 La. 992.

New Mexico. — Strong v. Eakin, 11 N. Mex. 107.

Texas. — Rhodes v. Alexander, 19 Tex. Civ. App. 552; Maxson v. Jennings, 19 Tex. Civ. App. 700; Simpson v. Texas Tram, etc., Co., (Tex. Civ. App. 1899) 51 S. W. Rep. 655; Batla v. Batla, (Tex. Civ. App. 1899) 51 S. W. Rep. 664; Moor v. Moor, 24 Tex. Civ. App. 150; Kahn v. Kahn, 94 Tex. 114; Clardy v. Wilson, 27 Tex. Civ. App. 49; Hames v. State, (Tex. Crim. 1904) 81 S. W. Rep. 708.

Washington. — Austin v. Clifford, 24 Wash. 172; Sackman v. Thomas, 24 Wash. 660; O'Sullivan v. O'Sullivan, 35 Wash. 481; Hill v. Gardner, 35 Wash. 529.

**327. 2. How Presumption Overcome — California.** — Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 327; Matter of Boody, 119 Cal. 402; Rowe v. Hibernia Sav., etc., Soc., 134 Cal. 403. See also Fennell v. Drinkhouse, 131 Cal. 447, 82 Am. St. Rep. 361.

Louisiana. — Rogge's Succession, 50 La. Ann. 1220; Hall v. Toussaint, 52 La. Ann. 1763.

New Mexico. — Neher v. Armijo, 9 N. Mex. 325; Strong v. Eakin, 11 N. Mex. 107.

Texas. — Laufer v. Powell, 30 Tex. Civ. App. 604; Thayer v. Clarke, (Tex. Civ. App. 1903) 77 S. W. Rep. 1050.

Washington. — Brookman v. State Ins. Co., 18 Wash. 308; Austin v. Clifford, 24 Wash. 172; Sackman v. Thomas, 24 Wash. 660; Mattson v. Mattson, 29 Wash. 417.

**3. Mutations of Separate Property — Identity Must Be Traced.** — Rowe v. Hibernia Sav., etc., Soc., 134 Cal. 403; Brown v. Lockhart, (N. Mex. 1903) 71 Pac. Rep. 1086. See also Matter of Cudworth, 133 Cal. 462; Austin v. Clifford, 24 Wash. 172.

**5. Blending of Separate and Community Property.** — Matter of Cudworth, 133 Cal. 462; Moor v. Moor, 24 Tex. Civ. App. 150.

Where the community property is inconsiderable compared to the separate, the blending will not work a forfeiture of the separate property. Matter of Cudworth, 133 Cal. 462. See also Matter of Ganniss, 142 Cal. 1.

**328. 2. Recitals in Deeds — May Be Explained — Property Conveyed to the Wife.** — Hunt v. Matthews, (Tex. Civ. App. 1901) 60 S. W. Rep. 674; Clardy v. Wilson, 27 Tex. Civ. App. 49; Hames v. State, (Tex. Crim. 1904) 81 S. W. Rep. 708. See also Knight v. Kaufman, 105 La. 35.

**Property Conveyed to the Husband.** — Mahon v. Barnett, (Tex. Civ. App. 1897) 45 S. W. Rep. 24.

Property conveyed to the husband may be shown to have been purchased with the separate funds of the wife and to belong to her separate estate. Oaks v. West, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033.

**5. Muller's Succession,** 106 La. 89.

**7. Binding upon Husband.** — Kenner v. Leon Godchaux Co., 52 La. Ann. 965; Westmore v. Harz, 111 La. 305. See also Jordy v. Muir, 51 La. Ann. 55.

**8. Husband's Forced Heirs.** — Westmore v. Harz, 111 La. 305.

**329. 3. Burke's Succession,** 107 La. 82.

**4. Jordy v. Muir,** 51 La. Ann. 55; Knight v. Kaufman, 105 La. 35; Fortier v. Barry, 111 La. 776. See also Manning's Succession, 107 La. 456.

**7. Recitals — Rule in Common-law Community States.** — A recital in the deed that the property conveyed was the sole and separate property of the wife, acquired by her while living separate and apart from her husband, is not evidence as against her husband. Lewis v. Burns, 122 Cal. 358.

**8. Rule in Texas.** — Kahn v. Kahn, 94 Tex. 114; Scales v. Marshall, (Tex. Civ. App. 1900) 60 S. W. Rep. 336; Laufer v. Powell, 30 Tex. Civ. App. 604. See also Maxson v. Jennings, 19 Tex. Civ. App. 700; Flannery v. Chidgey, (Tex. Civ. App. 1903) 77 S. W. Rep. 1034.

**330. 1. The Term "Operative Words of the Conveyance."** — Kahn v. Kahn, 94 Tex. 114; Clardy v. Wilson, 27 Tex. Civ. App. 49.

**331. VII. CHARACTER OF INTEREST AND RIGHT OF EACH SPOUSE DURING THE COMMUNITY** — 1. General Rule — Husband's Dominion and Power of Disposition. — See note 1.

The Sole Limitation on the Husband's Dominion. — See note 2.

Rights to Be Enforced in Husband's Name. — See note 3.

2. Rule in Louisiana — *a*. THE HUSBAND. — See note 4.

**332. 3. Rule in Texas** — *a*. THE HUSBAND — The Code of This State. — See note 6.

**331. 1. Husband's Dominion Over Community Property** — General Rule — *California*. — Peiser *v. Griffin*, 125 Cal. 9; *Wagoner v. Silva*, 139 Cal. 559.

*Idaho*. — *Wilson v. Wilson*, 6 Idaho 597; *Bedal v. Lake*, (Idaho 1904) 77 Pac. Rep. 638.

*Louisiana*. — *Lacassagne v. Abraham*, 51 La. Ann. 840.

*New Mexico*. — *Barnett v. Barnett*, 9 N. Mex. 205; *McAlister v. Hutchison*, (N. Mex. 1904) 75 Pac. Rep. 41.

*Texas*. — *Moor v. Moor*, 24 Tex. Civ. App. 150; *Martin v. McAllister*, 94 Tex. 567; *Cline v. Hackbarth*, 27 Tex. Civ. App. 391; *Cervantes v. Cervantes*, (Tex. Civ. App. 1903) 76 S. W. Rep. 790.

2. Limitations — Fraud on Wife — *California*. — See also *Hoek v. Greif*, 142 Cal. 119.

*Louisiana*. — See *Lacassagne v. Abraham*, 51 La. Ann. 840; *Nott v. Nott*, 111 La. 1028.

*Texas*. — *Jackson v. Bradshaw*, 24 Tex. Civ. App. 30; *Cetti v. Dunman*, 26 Tex. Civ. App. 433.

**Donation by Husband to Child Not Fraudulent.** — A donation by the husband of community property to one of the children does not constitute a fraud against the wife so as to authorize her demand that it be annulled, though it benefits such child to the prejudice of the other common children. *Jodoin v. Birtz*, 22 Quebec Super. Ct. 443.

3. The Wife Has No Right of Action to reclaim rights belonging to the community. *Desrouard v. Fortier*, 5 Quebec Pr. 250.

**Husband Alone May Maintain Action.** — Where there is community of property, the husband alone has the right to maintain an action to recover damages for an injury to the person or character of his wife. *McFarran v. Montreal Park, etc.*, R. Co., 30 Can. Sup. Ct. 410; *Tondreau v. Semple*, 2 Quebec Pr. 296; *Caron v. Larivé*, 5 Quebec Pr. 332; *Sauriol v. Clermont*, 10 Quebec K. B. 294; *Troude v. Mel-drum*, 20 Quebec Super. Ct. 513. *Compare Sullivan v. Magog*, 18 Quebec Super. Ct. 107, holding that the wife may join with her husband in an action for personal injuries sustained by her.

**Injury to Minor Son.** — Where husband and wife are common as to property, an action of damages for injuries suffered by their minor son, or for injury to the feelings of the mother arising from the ill treatment of her child, pertains exclusively to the husband as head of the community, and he alone may maintain such an action. *Carrières v. De La Court*, 16 Quebec Super. Ct. 207.

**Contract Signed by Wife.** — An action cannot be maintained against a wife, common as to property with her husband, on a lease signed by her, where it is not alleged that she was a

public trader at the time she signed the lease, or that the lease was signed in connection with any business or trade then carried on by her, or that she was authorized by her husband to sign it. The fact that the wife sublet to lodgers a portion of the leased premises was not an act of commerce, and in doing so she must be presumed to have acted as the agent of her husband and for the benefit of the community of property existing between them. *Joseph v. McDonald*, 11 Quebec Super. Ct. 406.

**Action for Partition of Wife's Inheritance.** — When a married woman, common as to property, has an interest in the succession of her deceased mother, she cannot maintain an action for an accounting and for partition unless her husband is joined with her in the action. *Giroux v. Giroux*, 19 Quebec Super. Ct. 372.

**Husband Cannot Authorize Wife to Sue.** — The right of action for damages for personal injuries sustained by a married woman, common as to property, belongs exclusively to her husband, and she cannot sue for the recovery of such damages in her own name, even with the authorization of her husband. *McFarran v. Montreal Park, etc.*, R. Co., 30 Can. Sup. Ct. 410. *Compare Laurin v. Desrochers*, 17 Quebec Super. Ct. 351, holding that the wife may, with the assent of the husband, sue for damages for assault, and that a discharge by the wife, agreed to by the husband, will be valid.

**When the Husband Is Insane**, an action for damages arising from injuries to his wife can be brought only by his curator. *Sauriol v. Clermont*, 10 Quebec K. B. 294.

**Wife May Maintain Action When Husband Refuses to Join.** — A married woman, common as to property, assisted by her husband, or on his refusal by the judge, may maintain a personal action to guard her honor, and sue in her own name for defamation. Such an action does not pertain only to the husband as head of the community. *Girard v. Tremblay*, 6 Quebec Pr. 63.

4. *Lacassagne v. Abraham*, 51 La. Ann. 840; *Kenner v. Leon Godchaux Co.*, 52 La. Ann. 965; *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 78 Am. St. Rep. 390; *Benedict v. Holmes*, 104 La. 528; *Knight v. Kaufman*, 105 La. 35; *Buddig's Succession*, 108 La. 406; *Richard v. Moore*, 110 La. 435.

**332. 6. Rule in Texas.** — *Central Coal, etc., Co. v. Henry*, (Tex. Civ. App. 1898) 47 S. W. Rep. 281; *Kellett v. Trice*, 95 Tex. 160. See also *Culmore v. Medlenka*, (Tex. Civ. App. 1898) 44 S. W. Rep. 676; *Cline v. Hackbarth*, 27 Tex. Civ. App. 391.

**A Deed by the Wife Alone of Community Property.** — *Maxson v. Jennings*, 19 Tex. Civ. App. 700. See also *Kellett v. Trice*, 95 Tex. 160.

**Where the Wife of the Mortgagor** agreed with the purchaser at the mortgage sale that the

**333.** *b.* THE WIFE. — See notes 1, 2, 3.

*c.* BENEFICIAL INTERESTS EQUAL. — See note 4.

**335.** 5. Rule in Nevada and Idaho. — See note 5.

6. Rule in Washington — *a.* A DUAL SYSTEM. — See note 7.

**338.** *c.* PROPRIETORY INTERESTS EQUAL — As to Personalty. — See note 2.

# VIII. RIGHTS AND REMEDIES OF CREDITORS DURING THE COMMUNITY

— 1. Community Property Liable for Community Debts. — See note 6.

**339.** 4. What Are Community Debts. — See note 4.

**340.** In Washington. — See notes 4, 5.

**341.** IX. DISSOLUTION OF THE COMMUNITY. — See notes 3, 5, 6.

purchaser should buy in for the benefit of the wife, and the husband acquiesced, the husband was bound by the agreement. *Hirshfeld v. Howard*, (Tex. Civ. App. 1900) 59 S. W. Rep. 55.

**333.** 1. Wife's Rights — Texas. — *Therriault v. Compere*, (Tex. Civ. App. 1898) 47 S. W. Rep. 750; *Fermier v. Brannan*, 21 Tex. Civ. App. 543.

An Abandoned Wife cannot acquire by adverse uses title to the separate estate of her husband so long as the marriage relation exists. *Cervantes v. Cervantes*, (Tex. Civ. App. 1903) 76 S. W. Rep. 790.

2. *Fermier v. Brannan*, 21 Tex. Civ. App. 543. See also *Bexar Bldg., etc., Assoc. v. Heady*, 21 Tex. Civ. App. 154.

3. A Wife Abandoned by Her Husband May Sue in Her Own Name. — *Word v. Kennon*, (Tex. Civ. App. 1903) 75 S. W. Rep. 334.

4. Beneficial Interests Equal — Texas. — *Keyser v. Clifton*, (Tex. Civ. App. 1899) 50 S. W. Rep. 957. See also *Arnold v. Hodge*, 20 Tex. Civ. App. 211; *Proetzel v. Rabel*, 21 Tex. Civ. App. 559; *Blethen v. Bonner*, 30 Tex. Civ. App. 585.

**335.** 5. Idaho. — *Holton v. Sand Point Lumber Co.*, 7 Idaho 573.

Community property occupied as a homestead or as a residence cannot be alienated or encumbered without the wife joining in the instrument of conveyance or incumbrance. *Northwestern, etc., Hypotheek Bank v. Rauch*, 7 Idaho 152; *Stowell v. Tucker*, 7 Idaho 312.

7. Rule in Washington. — *Ross v. Howard*, 31 Wash. 393.

Mortgage Executed by Husband. — See *Dane v. Daniel*, 23 Wash. 379.

A Mortgage Executed by the Wife Alone, where the property belongs to the community, is invalid. *Humphries v. Sorenson*, 33 Wash. 563.

Foreclosure of Mechanic's Lien. — *Powell v. Nolan*, 27 Wash. 318. See also *Dane v. Daniel*, 23 Wash. 379.

Foreclosure of Mortgage. — The wife as well as the husband is a necessary party to an action to foreclose a mortgage on community real property. *Dane v. Daniel*, 23 Wash. 379.

Injuries to Community Realty. — *Lowsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542. See also *Dane v. Daniel*, 23 Wash. 379; *Belt v. Washington Water Power Co.*, 24 Wash. 387.

**338.** 2. See *Tustin v. Adams*, 87 Fed. Rep. 377.

6. Judgment Against Husband Alone. — *Strong v. Eakin*, 11 N. Mex. 107; *Maddox v. Summerlin*, 92 Tex. 483; *Campbell v. Antis*, 21 Tex. Civ. App. 161; *Barrett v. Eastham*, 28

*Tex. Civ. App.* 189; *Reed v. Loney*, 22 Wash. 433; *Caron v. Kavanagh*, 13 Quebec Super. Ct. 296. See also *Dane v. Daniel*, 23 Wash. 379; *Allen v. Chambers*, 18 Wash. 341; *O'Connor v. Jackson*, 33 Wash. 219.

Contract Made by Wife. — Where a wife, common as to property, makes a contract, she does so only as the agent of the community, and when an action is brought in respect of such contract, the husband must be made a party. *Nordheimer v. Farrell*, 12 Quebec Super. Ct. 150.

# Liability of Wife After Dissolution of Community.

— The wife after a judicial dissolution of the community cannot become liable for a debt of the community, notwithstanding the fact that she may have accepted it; any such obligation being really incurred on behalf of her husband, who is liable to the creditors for the full payment of the debt, the wife being liable only for her proportion, and such liability extending only to the amount of her benefit therefrom. *Bastien v. Filiatrault*, 15 Quebec Super. Ct. 445, affirmed 31 Can. Sup. Ct. 129.

**339.** 4. *Strong v. Eakin*, 11 N. Mex. 107; *Bryant v. Stetson, etc., Mill Co.*, 13 Wash. 692. See also *Allen v. Chambers*, 18 Wash. 341.

**340.** 4. Suretyship Obligation by Husband. — *Allen v. Chambers*, 18 Wash. 341; *Allen v. Chambers*, 22 Wash. 304. See also *Shuey v. Adair*, 24 Wash. 378.

Execution was issued on a judgment against the husband for a suretyship debt to which the wife was not a party. In an action by an unsecured community creditor to restrain the sheriff from selling community personal property, it was held that the creditor of the husband was entitled to priority. *Morse v. Estabrook*, 19 Wash. 92, 67 Am. St. Rep. 723.

An accommodation note given by the husband to a bank and in no wise for the benefit of the community cannot be collected against the community estate. *Shuey v. Holmes*, 20 Wash. 13.

5. Debt Contracted by Husband in Another State in Separate Business. — *Deering v. Holcomb*, 26 Wash. 588. See also *Clark v. Eltinge*, 29 Wash. 215.

**341.** 3. *Walmsley v. Theus*, 107 La. 417; *Nuss v. Nuss*, 112 La. 265; *Young v. Rapier*, 36 C. C. A. 248, 94 Fed. Rep. 283.

5. *Bedal v. Sake*, (Idaho 1904) 77 Pac. Rep. 638; *Southwestern Mfg. Co. v. Swan*, (Tex. Civ. App. 1897) 43 S. W. Rep. 813; *Ghent v. Boyd*, 18 Tex. Civ. App. 88; *Moor v. Moor*, 24 Tex. Civ. App. 150.

6. *Von Rosenberg v. Perrault*, 5 Idaho 719; *Newman v. Cooper*, 50 La. Ann. 397; *Thompson v. Vance*, 110 La. 26; *Richard v.*

**341.** Parties Cannot Dissolve. — See notes 7, 8.

Disposition of Property on Divorce. — See notes 9, 10.

**342.** X. RIGHTS AND POWERS OF THE SURVIVOR — 1. Rule in Louisiana —

a. THE HUSBAND AS SURVIVOR — Custody and Control. — See note 3.

**343.** As to Conveyances. — See note 1.

b. THE WIFE AS SURVIVOR. — See note 2.

2. Rule in Texas — a. THE HUSBAND AS SURVIVOR — Completion of Contracts to Convey Community Lands. — See note 3.

Discharging Community Obligations. — See note 4.

**344.** Application of Purchase Money. — See note 1.

Claimant Must Prove Existence of Community Obligations. — See note 4.

Lapse of Time — Presumption. — See note 5.

b. THE WIFE AS SURVIVOR. — See note 6.

**345.** 3. Rule in California — a. THE HUSBAND AS SURVIVOR. — See note 1.

4. Rule in Nevada and Idaho. — See note 3.

[Rule in New Mexico. — See note 3a.]

Moore, 110 La. 435; Bossier v. Herwig, 112 La. 539; Cray v. Field, 9 N. Mex. 222; Matter of Cannon, 18 Wash. 101; Carratt v. Carratt, 32 Wash. 517; Montreal Bank v. Buchanan, 32 Wash. 480. See also Moor v. Moor, 24 Tex. Civ. App. 150.

**341.** 7. A Mere Voluntary Separation. — See Rogge's Succession, 50 La. Ann. 1220; Batla v. Batla, (Tex. Civ. App. 1899) 51 S. W. Rep. 664; Moor v. Moor, 24 Tex. Civ. App. 150.

8. Barnett v. Barnett, 9 N. Mex. 205.

9. See Barnett v. Barnett, 9 N. Mex. 205; Kellett v. Kellett, 23 Tex. Civ. App. 571; Moor v. Moor, 24 Tex. Civ. App. 150.

10. Moor v. Moor, 24 Tex. Civ. App. 150.

**342.** 3. Husband's Custody and Control. — See Burguières's Succession, 104 La. 46.

**343.** 1. As to Conveyances of Community Property. — Thompson v. Vance, 110 La. 26; George v. Delaney, 111 La. 760; Levy v. Robson, 112 La. 398.

2. Louisiana — Wife as Survivor. — Davie v. Carville, 110 La. 862; Weil v. Jacobs, 111 La. 357.

The wife as survivor has such an interest in the community property that in default of an appointment of an administrator, her acts in preservation of the estate will be upheld by the courts. Barber v. Watson, 105 La. 326.

3. A Conveyance of Community Property Made by a Husband After the Death of His Wife was upheld where the husband had set apart to the heirs an amount of his separate estate to more than equal the value of the community interest in the property conveyed. Long v. Moore, 19 Tex. Civ. App. 363.

4. Discharging Community Obligations. — Burkitt v. Key, (Tex. Civ. App. 1897) 42 S. W. Rep. 231; McDaniel v. Harley, (Tex. Civ. App. 1897) 42 S. W. Rep. 323; Roy v. Whitaker, 92 Tex. 346; Hinzle v. Robinson, 21 Tex. Civ. App. 9; Solomon v. Mowry, (Tex. Civ. App. 1901) 61 S. W. Rep. 335; Martin v. McAllister, 94 Tex. 567; Oaks v. West, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033; Davidson v. Green, 27 Tex. Civ. App. 394; Barrett v. Eastham, 28 Tex. Civ. App. 189; Linson v. Poindexter, (Tex. Civ. App. 1904) 80 S. W. Rep. 237. See also Therriault v. Compere, (Tex. Civ. App. 1898) 47 S. W. Rep. 750.

**344.** 1. Cruse v. Barclay, 30 Tex. Civ. App. 211; Linson v. Poindexter, (Tex. Civ. App. 1904) 80 S. W. Rep. 237.

4. Existence of Debts Not Presumed. — Roy v. Whitaker, 92 Tex. 346.

5. Lapse of Time — Presumption. — Hasseldenz v. Dofflemyre, (Tex. Civ. App. 1898) 45 S. W. Rep. 830; Wolf v. Gibbons, (Tex. Civ. App. 1902) 69 S. W. Rep. 238; Cruse v. Barclay, 30 Tex. Civ. App. 211; Stipe v. Shirley, (Tex. Civ. App. 1903) 76 S. W. Rep. 307. See also Von Rosenberg v. Perrault, 5 Idaho 719.

6. Texas — Wife as Survivor. — Hasseldenz v. Dofflemyre, (Tex. Civ. App. 1898) 45 S. W. Rep. 830; Gurley v. Dickason, 19 Tex. Civ. App. 203; Worst v. Sgitcovich, (Tex. Civ. App. 1898) 46 S. W. Rep. 72; Crocker v. Crocker, 19 Tex. Civ. App. 296; Wilson v. Fields, (Tex. Civ. App. 1899) 50 S. W. Rep. 1024; Citizens Nat. Bank v. Jones, 22 Tex. Civ. App. 45; Brown v. Adams, (Tex. Civ. App. 1900) 55 S. W. Rep. 761; Ostrom v. Arnold, 24 Tex. Civ. App. 192; Cage v. Tucker, 25 Tex. Civ. App. 48; Burleson v. Alvis, 28 Tex. Civ. App. 51; McAnulty v. Ellison, (Tex. Civ. App. 1903) 71 S. W. Rep. 670; Flannery v. Chidgey, (Tex. Civ. App. 1903) 77 S. W. Rep. 1034; King v. Summerville, (Tex. Civ. App. 1904) 80 S. W. Rep. 1050.

Remarriage. — Proetzel v. Rabel, 21 Tex. Civ. App. 559; Wingfield v. Hackney, 95 Tex. 490; Faris v. Simpson, 30 Tex. Civ. App. 103. See also Ostrom v. Arnold, 24 Tex. Civ. App. 192; King v. Summerville, (Tex. Civ. App. 1904) 80 S. W. Rep. 1050.

**345.** 1. California — Husband as Survivor. — Fennell v. Drinkhouse, 131 Cal. 447, 82 Am. St. Rep. 361; Bollinger v. Wright, 143 Cal. 292.

3. Rule in Idaho. — The husband as survivor may convey community property to discharge community obligations. Von Rosenberg v. Perrault, 5 Idaho 719.

3a. Rule in New Mexico. — The surviving husband has control of the community property and may sell the same for the purpose of discharging the community debts. And the onus is on the party attaching such a sale to overcome the legal presumption that the sale was made in discharge of community debts. Cray v. Field, 9 N. Mex. 222.



**345.** 5. Rule in Washington. — See note 4.

**346.** XI. DISPOSITION OF COMMUNITY PROPERTY BY WILL. — See notes 1, 3.

XII. ADMINISTRATION OF COMMUNITY PROPERTY — In Louisiana. — See note 4.

In Texas. — See note 6.

In Washington. — See note 7.

**347.** [In New Mexico. — See note 2a.]

XIII. RIGHTS OF HEIRS — Subject to Payment of Debts. — See note 3.

An Usufruct in Favor of the Survivor. — See note 4.

Gifts Made from Community Property. — See note 5.

**348.** XIV. REGISTRY LAWS — In Louisiana and California. — See note 2.

**349.** XVI. SPECIFIC PERFORMANCE — Presumption in Favor of Community Overcome. — See note 6.

**352.** XVII. CONFLICT OF LAWS — 1. Application of the Law of Community to Nonresidents — *a.* LOUISIANA — Third: The Period Since 1852. — See note 1.

**353.** 2. Acquisitions Before Removal to Community Property State — Rule Stated. — See note 1.

**345.** 4. In Washington. — See Matter of Cannon, 18 Wash. 101; Montreal Bank v. Buchanan, 32 Wash. 480.

**346.** 1. Testamentary Power Limited to Testator's Moiety. — Manning's Succession, 107 La. 456; Colonial, etc., Mortg. Co. v. Thetford, 27 Tex. Civ. App. 152; Allardye v. Hambleton, 96 Tex. 30. See also Matter of Granniss, 142 Cal. 1.

Where a testator empowered his executor to sell any portion of his estate, and the executor sold certain portions and used the proceeds in discharge of claims against the estate, and the wife of the testator brought an action against the executor alleging his authority to sell only as to the one-half of which the testator had testamentary disposition, it was held that the widow was entitled only to one-half of the residue and the executor's deed passed the entire title. Sharp v. Loupe, 120 Cal. 89.

The testator has no power to authorize the sale of his wife's interest in community property except for the payment of community debts. *In re* Wickersham, (Cal. 1902) 70 Pac. Rep. 1079.

**3.** Wife's Election to Take under the Will. — Matter of Wickersham, 138 Cal. 355. See Arnold v. Hodge, 20 Tex. Civ. App. 211.

A husband devised community property to his wife for life with remainders in fee to his grandchildren. One claiming under the wife on the ground that there was no power in the husband to dispose by will the estate of the wife, it was decided that the wife by acquiescing in the distribution was deemed to have elected to take under the will. Cunha v. Hughes, 122 Cal. 111, 68 Am. St. Rep. 27.

**4.** Administration — Louisiana. — Fernandez' Succession, 50 La. Ann. 564; Messick v. Mayer, 52 La. Ann. 1161; Keppel's Succession, 113 La. 246.

**6.** Texas. — Green v. White, 18 Tex. Civ. App. 509; Wingfield v. Hackney, 95 Tex. 490. See also Ostrom v. Arnold, 24 Tex. Civ. App. 192.

**7.** Washington. — See Matter of Cannon, 18 Wash. 101.

**347.** 2a. Administration in New Mexico. — Crary v. Field, 9 N. Mex. 222; Gillett v. War-

ren, 10 N. Mex. 523; Carpenter v. Lindauer, (N. Mex. 1904) 78 Pac. Rep. 57.

**3.** Community Descends Subject to Debt — California. — Sharp v. Loupe, 120 Cal. 89.

Idaho. — Von Rosenberg v. Perrault, 5 Idaho 719.

Louisiana. — Childs v. Lockett, 107 La. 270; Thompson v. Vance, 110 La. 26; George v. Delaney, 111 La. 760; Bergey v. Labat, 112 La. 992.

New Mexico. — Crary v. Field, 9 N. Mex. 222.

Texas. — Cage v. Tucker, 25 Tex. Civ. App. 48; Barrett v. Eastham, 28 Tex. Civ. App. 189; Faris v. Simpson, 30 Tex. Civ. App. 103; Bevil v. Moulton, 32 Tex. Civ. App. 554. See also McAnulty v. Ellison, (Tex. Civ. App. 1903) 71 S. W. Rep. 670.

Washington. — Matter of Cannon, 18 Wash. 101.

**4.** Reems v. Dielmann, 111 La. 96; Glancey's Succession, 112 La. 430.

**5.** Advancements. — Williams v. Emberson, 22 Tex. Civ. App. 522; Everett v. Kemp, (Tex. Civ. App. 1904) 80 S. W. Rep. 534.

**348.** 2. Louisiana and California. — Hoeck v. Greif, 142 Cal. 119.

**349.** 6. In Washington. — See O'Connor v. Jackson, 33 Wash. 219.

But Whether Wife Was a Party to the Negotiations. — Washington State Bank v. Dickson, 35 Wash. 641.

**352.** 1. The Period Since 1852. — See Williams v. Pope Mfg. Co., 52 La. Ann. 1417, 78 Am. St. Rep. 390.

**353.** 1. Property Acquired Before Removal to Community Property State — California. — Matter of Burrows, 136 Cal. 113.

Louisiana. — See also Nott v. Nott, 111 La. 1028.

New Mexico. — Strong v. Eakin, 11 N. Mex. 107.

Texas. — McDaniel v. Harley, (Tex. Civ. App. 1897) 42 S. W. Rep. 323.

Washington. — See Clark v. Eltinge, 29 Wash. 215.

Property Acquired Before Removal to Common-law Jurisdiction. — A Frenchman and Frenchwoman married in France without any contract,

**354. 3. Acquisitions Before Adoption of or Changes in Law of Community.** — See note 3.

**355. 5. Classification by the Law of Community of Property Acquired in Other States** — *b. SEPARATE PROPERTY OF MARRIED WOMEN ACQUIRED IN A COMMON-LAW STATE.* — See note 4.

*c. PROPERTY ACQUIRED BY HUSBAND IN A COMMON-LAW STATE.* — See note 5.

**356. COMMUTATION.** — See note 5.

**358. COMPANY.** — See note 1.

so that according to French law their rights *inter se* as to property were subject to the law of community of goods. They subsequently went to England and were permanently domiciled there. The husband became a naturalized British subject, amassed a large fortune, and died in England, leaving his wife surviving, after having made an English will by which he disposed of all his property. Under an originating summons taken out by the widow to determine her rights in the property disposed of by the will, where it was agreed that the decision should be confined to the personal property, it was held that as to movable goods the rights of the wife under the French marriage law as to community of goods were not affected by the change of domicile, and that the widow was entitled to the share of her husband's personal estate to which she would have been entitled if they had remained domiciled in France. *De Nicols v. Curlier*, (1900) A. C. 21 *reversing* (1898) 2 Ch. 60, and *affirming* (1898) 1 Ch. 403.

**354. 3. Acquisition Before Adoption of or Changes in Law of Community.** — *Seeber v. Randall*, 42 C. C. A. 272, 102 Fed. Rep. 215.

**355. 4. Separate Property of Married Woman Acquired in Common-law State.** — See *Nott v. Nott*, 111 La. 1028.

**5. Property Acquired by Husband in Common-law State.** — *Blethen v. Bonner*, 30 Tex. Civ. App. 585; *Thayer v. Clarke*, (Tex. Civ. App. 1903) 77 S. W. Rep. 1050.

**356. 5. Commutation.** — *In re Conditional Discharge of Convicts*, 73 Vt. 414. See also the title *REPRIEVE, PARDON, AND AMNESTY*; *State v. State Board of Corrections*, 16 Utah 478, *quoting* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356.

**Change of Punishment.** — See *State v. State Board of Corrections*, 16 Utah 478.

**Commutation of Taxes.** — In *Woodrough v. Douglas County*, (Neb. 1904) 98 N. W. Rep. 1095, the court said: "*Commutation* is a passing from one state to another; an alteration, a change; the act of substituting one thing for another; a substitution of one sort of payment for another, or of a money payment in lieu of a performance of a compulsory duty or labor, or of a single payment in lieu of a number of successive payments, usually at a reduced rate. The judicial sale of property under a decree of foreclosure for what it will bring, although it be less than the amount of the taxes assessed and delinquent against it, cannot be said to be a *commutation* of taxes within the meaning of the Constitution."

**358. 1. Municipal Corporation.** — See *Charlottesville v. Southern R. Co.*, 97 Va. 428.

**Used Synonymously with Corporation.** — *Goddard v. Chicago, etc., R. Co.*, 202 Ill. 362. *Compare* *Leader Printing Co. v. Lowry*, 9 Okla. 89.

**Partnership.** — The word *company* does not refer to partnerships. *Goddard v. Chicago, etc., R. Co.*, 202 Ill. 362.

# COMPARATIVE NEGLIGENCE.

BY B. B. BLYDENBURGH.

## 365. VIII. ORIGIN AND HISTORY OF DOCTRINE — 2. Admiralty — Collision

Cases — Loss Equally Divided. — See note 1.

Other than Collision Cases — Rule Not Settled. — See note 2.

3. Illinois Rule. — See note 3.

## 366. IX. STATUS OF DOCTRINE IN VARIOUS JURISDICTIONS — Florida. — See note a.

1. Georgia — Developed under Statutory Enactment. — See note 1.

**365. 1. Collision Cases — United States.** — The Admiral Cecille, 134 Fed. Rep. 673; The H. S. Beard, 134 Fed. Rep. 648; The Yuma, (C. C. A.) 132 Fed. Rep. 964; The Gladiator, 132 Fed. Rep. 876; The Sitka, 132 Fed. Rep. 861; The Straits of Dover, (C. C. A.) 120 Fed. Rep. 900; The Itasca, 117 Fed. Rep. 885; Hall v. Chisholm, (C. C. A.) 117 Fed. Rep. 807; The Colorado, 117 Fed. Rep. 796; The Mary C. Elphicke, 115 Fed. Rep. 375, *affirmed* (C. C. A.) 123 Fed. Rep. 405; The Ocean, 115 Fed. Rep. 229; Consolidation Coal Co. v. The Admiral Schley, 115 Fed. Rep. 378, *affirmed* (C. C. A.) 131 Fed. Rep. 433; The Arthur M. Palmer, 115 Fed. Rep. 417; The James D. Leary, 110 Fed. Rep. 685, *affirmed* 113 Fed. Rep. 1019, 51 C. C. A. 620; The City of Norwalk, (C. C. A.) 106 Fed. Rep. 982; The Ernest A. Hamill, 100 Fed. Rep. 509; The Providence, (C. C. A.) 98 Fed. Rep. 133, *affirmed* 100 Fed. Rep. 1004, 40 C. C. A. 686. See also The Chattahoochee, 173 U. S. 540.

*Canada.* — Wineman v. The Ship Hiawatha, 7 Can. Exch. 446.

2. In other admiralty cases it seems the same rule will be applied as in collisions. The Steam Dredge No. 1, (C. C. A.) 134 Fed. Rep. 161 (where the doctrine of *Davies v. Mann*, 10 M. & W. 546; *Tuff v. Warman*, 2 C. B. N. S. 740, 89 E. C. L. 740, and *Butterfield v. Forrester*, 11 East 60) is considered as not applicable in admiralty.

3. **The Doctrine No Longer Exists in Illinois.** — *Macon v. Holcomb*, 205 Ill. 643; *Chicago, etc., Coal Co. v. Moran*, 210 Ill. 9; *Chicago, etc., R. Co. v. Kelly*, 75 Ill. App. 490; *Heimann v. Kinnare*, 73 Ill. App. 184; *Cicero, etc., St. R. Co. v. Snider*, 72 Ill. App. 300.

**366. a. Florida — In Cases Against Railroads.** — In Florida it is provided by statute (originally derived from the *Georgia* Code) that "no person shall recover damages from a railroad company for injury to himself or his property when the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury trying the case in proportion to the amount of default attributable to him." *Laws Fla.*, c. 4071, approved May 4, 1891, repealing a substantially similar act (c. 3744, approved June 7, 1887). *Florida*

*Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149. See also *Florida Cent., etc., R. Co. v. Williams*, 37 Fla. 406; *Florida Cent., etc., R. Co. v. Mooney*, 40 Fla. 17; *Consumers Electric Light, etc., Co. v. Pryor*, 44 Fla. 354; *Morris v. Florida Cent., etc., R. Co.*, 43 Fla. 10. See also *Louisville, etc., R. Co. v. Jones*, (Fla. 1903) 34 So. Rep. 246.

1. **Georgia.** — "At common law, if the negligence of the plaintiff contributed to the injury, he could not recover. This doctrine, referred to usually as that of 'contributory negligence,' is not the law of this state; but the doctrine referred to often as that of 'comparative negligence' is the rule of force here. This rule authorizes a recovery by the plaintiff, although he was at fault, provided he was injured under circumstances where, by the exercise of ordinary care on his part, he could not have avoided the consequences of the defendant's negligence. See *Civ. Code*, §§ 2322, 3830." *Western, etc., R. Co. v. Ferguson*, 113 Ga. 708.

If the plaintiff and the defendant were both negligent, the former can recover unless his negligence was equal to or greater than the negligence of the defendant, or unless he could by the exercise of ordinary care have avoided the consequences of the defendant's negligence. *Christian v. Macon R., etc., Co.*, 120 Ga. 314. See also the following cases: *Alabama G. S. R. Co. v. Coggins*, 60 U. S. App. 140, 88 Fed. Rep. 455 (construing the *Georgia* statute); *Bird v. Sparks*, 100 Ga. 616; *Briscoe v. Southern R. Co.*, 103 Ga. 224; *Southern R. Co. v. Blake*, 101 Ga. 217; *Macon, etc., St. R. Co. v. Holmes*, 103 Ga. 655; *Southern R. Co. v. Watson*, 104 Ga. 243; *Crawford v. Southern R. Co.*, 106 Ga. 870; *Bridger v. Gresham*, 111 Ga. 814; *Barber v. East, etc., R. Co.*, 111 Ga. 838; *Brunswick, etc., R. Co. v. Wiggins*, 113 Ga. 842; *Southern R. Co. v. Barfield*, 115 Ga. 724; *Simmons v. Seaboard Air Line R. Co.*, 120 Ga. 225; *Little v. Southern R. Co.*, 120 Ga. 347, 102 Am. St. Rep. 104; *Savannah, etc., R. Co. v. Hatcher*, 118 Ga. 273; *Glaze v. Mills*, 119 Ga. 261; *Atlanta, etc., R. Co. v. Gardner*, 122 Ga. 82, quoting from section 2322 of *Ga. Civ. Code* of 1895; *Columbus v. Anglin*, 120 Ga. 785; *Savannah, etc., R. Co. v. Evans*, 121 Ga. 391; *Central of Georgia R. Co. v. Price*, 121 Ga. 651; *Dorsey v. Columbus R. Co.*, 121 Ga. 697.

- 367.** 2. *Illinois*. — See note 1.  
 3. *Kansas*. — See note 2.  
 4. *Kentucky*. — See note 3.  
 5. *Oregon*. — See note 4.  
 6. *Tennessee*. — See note 5.  
**368.** 7. *Other States* — Doctrine Denied. — See note 1.  
 8. *Federal Courts*. — See note 2.

**369. COMPENSATION.** — See note 1.

**367.** 1. See the cases cited *supra*, this title, 365. 3.

2. *Kansas*. — The ordinary doctrine of contributory negligence prevails in *Kansas*. *Chicago G. W. R. Co. v. Bailey*, 66 Kan. 115; *Missouri, etc., R. Co. v. Merrill*, 61 Kan. 671, *overruled* 65 Kan. 436; *Burns v. Metropolitan St. R. Co.*, 66 Kan. 188. See also *St. Louis, etc., R. Co. v. Burrows*, 62 Kan. 89.

3. *Kentucky*. — The doctrine of comparative negligence is denied in *Kentucky*. *Sandy River Cannel Coal Co. v. Caudell*, 60 S. W. Rep. 180, 22 Ky. L. Rep. 1175; *Illinois Cent. R. Co. v. Jordan*, (Ky. 1904) 78 S. W. Rep. 426; *Singleton v. Felton*, 42 C. C. A. 57, 101 Fed. Rep. 526.

For illustrations of the *Kentucky* definitions of the expression "gross negligence" and of the circumstances permitting a recovery of punitive damages, see the following cases: *Chesapeake, etc., R. Co. v. Judd*, 106 Ky. 364; *Illinois Cent. R. Co. v. Stewart*, (Ky. 1901) 63 S. W. Rep. 596; *Macon v. Paducah St. R. Co.*, 110 Ky. 680; *Louisville, etc., R. Co. v. Walden*, 74 S. W. Rep. 694, 25 Ky. L. Rep. 1; *Chesapeake, etc., R. Co. v. Board*, 77 S. W. Rep. 189, 25 Ky. L. Rep. 1118.

4. *Oregon*. — *Massey v. Seller*, 45 *Oregon* 267; *Tucker v. Northern Pac. Terminal R. Co.*, 41 *Oregon* 82.

5. *Tennessee*. — *Saunders v. City, etc., R. Co.*, 99 *Tenn.* 135; *Memphis St. R. Co. v. Haynes*, 112 *Tenn.* 712; *Heald v. Wallace*, 109 *Tenn.* 346; *Chattanooga Light, etc., Co. v. Hodges*, 109 *Tenn.* 331, 97 *Am. St. Rep.* 844; *Memphis St. R. Co. v. Wilson*, 108 *Tenn.* 618, 105 *Tenn.* 74; *Nashville R. Co. v. Norman*, 108 *Tenn.* 324; *Citizens' St. R. Co. v. Shepherd*, 107 *Tenn.* 444; *Knoxville v. Cox*, 103 *Tenn.* 368; *Barr v. Southern R. Co.*, 105 *Tenn.* 547; *Burke v. Citizens' St. R. Co.*, 102 *Tenn.* 409; *Chattanooga Electric R. Co. v. Lawson*, 101 *Tenn.* 406; *Louisville, etc., R. Co. v. Satterwhite*, 112 *Tenn.* 185; *Citizens' St. R. Co. v. Dan*, 102 *Tenn.* 320; *Meyere v. Nashville, etc., R. Co.*, 110 *Tenn.* 166; *Memphis St. R. Co. v. Riddick*, 110 *Tenn.* 227; *Memphis St. R. Co. v. Shaw*, 110 *Tenn.* 467; *Knoxville, etc., R. Co. v. Wyrick*, 99 *Tenn.* 505; *Nashville Spoke, etc., Co. v. Thomas*, (Tenn. 1905) 86 S. W. Rep. 379; *Louisville, etc., R. Co. v. Whitlow*, 105 Ky. 1; *Iron Mountain R. Co. v. Dies*, 98 *Tenn.* 655. See also *Southern R. Co. v. Simpson*, (C. C. A.) 131 *Fed. Rep.* 705; *Illinois Cent. R. Co. v. Jordan*, (Ky. 1904) 78 S. W. Rep. 426.

**368.** 1. *Doctrine of Comparative Negligence Repudiated* — *Alabama*. — *Birmingham R., etc., Co. v. Bynum*, 139 *Ala.* 389; *Southern R. Co. v. Arnold*, 114 *Ala.* 183.

*California*. — *Sego v. Southern Pac. R. Co.*, 137 *Cal.* 405.

*Colorado*. — *Denver, etc., R. Co. v. Spencer*, 25 *Colo.* 9; *Denver, etc., R. Co. v. Maydole*, (Colo. 1905) 79 *Pac. Rep.* 1023.

*Delaware*. — See *Brown v. Wilmington City R. Co.*, 1 *Penn. (Del.)* 332; *Colbourn v. Wilmington*, 4 *Penn. (Del.)* 443.

*Indiana*. — *Cleveland, etc., R. Co. v. Miller*, 149 *Ind.* 490; *Quinn v. Chicago, etc., R. Co.*, 162 *Ind.* 442.

*Louisiana*. — *Rice v. Crescent City R. Co.*, 51 *La. Ann.* 108.

*Michigan*. — *Labarge v. Pere Marquette R. Co.*, 134 *Mich.* 139; *Borschall v. Detroit R. Co.*, 115 *Mich.* 473.

*Missouri*. — *Hogan v. Citizens' R. Co.*, 150 *Mo.* 36; *Oates v. Metropolitan St. R. Co.*, 168 *Mo.* 535.

*Nebraska*. — *Riley v. Missouri Pac. R. Co.*, (Neb. 1903) 95 *N. W. Rep.* 20; *Missouri Pac. R. Co. v. Fox*, 56 *Neb.* 749; *Friend v. Burleigh*, 53 *Neb.* 674.

*New York*. — See *Anderson v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 30 *Misc. (N. Y.)* 104.

*Ohio*. — See *Murphy v. Dayton*, 8 *Ohio Dec.* 354, 7 *Ohio N. P.* 227.

*South Carolina*. — *Jones v. Charleston, etc., R. Co.*, 61 *S. Car.* 556; *Cooper v. Georgia, etc., R. Co.*, 56 *S. Car.* 94.

*Texas*. — *Texas Midland R. Co. v. Tidwell*, (Tex. Civ. App. 1899) 49 *S. W. Rep.* 641.

*Virginia*. — *Richmond Traction Co. v. Martin*, 102 *Va.* 209.

*Washington*. — *Woolf v. Washington R., etc., Co.*, 37 *Wash.* 491; *Franklin v. Engel*, 34 *Wash.* 480.

*Wisconsin*. — *Tesch v. Milwaukee Electric R., etc., Co.*, 108 *Wis.* 593.

In some states certain causes of action are provided for by statute in cases of what is called "gross negligence." Thus, for example, in *Massachusetts* "death caused by the personal negligence of a defendant, without fault of the deceased person, creates a liability. But for a death caused by the negligence of the defendant's servants there is no liability unless the negligence is gross." *Brennan v. Standard Oil Co.*, 187 *Mass.* 376.

2. *United States Courts*. — *Baltimore, etc., R. Co. v. Cumberland*, 176 *U. S.* 232; *Purple v. Union Pac. R. Co.*, 51 *C. C. A.* 564, 114 *Fed. Rep.* 123.

**369.** 1. *Compensation Not to Be Increased or Diminished*. — See *Com. v. Carter*, (Ky. 1900) 55 *S. W. Rep.* 701; *Cowen v. Winters*, (C. C. A.) 96 *Fed. Rep.* 929.

*Compared with Fare*. — While fare in common

**370. COMPETENT.** — See note 2.

**372. COMPLAIN.** — See note 1.

**373. COMPLETE.** — See note 1.

acceptation relates to the passenger compensation, *compensation* as a general term embraces both passengers and property. *DeGrauw v. Long Island Electric R. Co.*, 43 N. Y. App. Div. 508.

**Compensation Is a Term of Larger Scope than Cost** and especially than "actual cost." *Newton, Petitioner*, 172 Mass. 5.

**370. 2. Competent Evidence.** — *People v. Compton*, 123 Cal. 403.

**Competent Jurisdiction.** — *In re Norton*, 64 Kan. 842.

**Competent Commissioner.** — The term *competent*, as used in an act requiring drainage commissioners to be *competent*, means a commissioner who is not only possessed of sufficient skill and intelligence to discharge properly the duties to be performed by a commissioner under the statute, but who is also disinterested and not near of kin to any party to the cause. *King's Lake Drainage, etc.*, Dist. v. *Jamison*, 176 Mo. 557.

**372. 1.** In *Southern Indiana R. Co. v. Davis*, (Ind. App. 1903) 68 N. E. Rep. 194, the court said: "The generally understood meaning of the verb *complain* is to express regret or pain."

**373. 1. Railroads.** — In a statute providing "that the said railway must be *completed* and equipped and ready for transportation of passengers within two years, and if not so *completed*," etc., the forfeiture will attach, "the word *completed* has a well-defined mean-

ing, and its use in this last quoted section seems significant. The legislature is presumed to have known the meaning of the language used and to have had a clear and definite idea to express in the use of the phrase 'said railway shall be *completed*,' etc. The word *complete* is defined as 'wanting no part or element; perfect, whole, entire.' Cent. Dict., vol. 2. Now, if a street railway is *completed* when a single track line is constructed it does not require the addition of another track to make it perfect, whole, entire, or *complete*." *Honolulu Rapid Transit, etc.*, Co. v. *Hawaiian Tramways Co.*, 13 Hawaii 369.

"The words '*substantially completed*,' as used in article 230 of the constitution, apply to a railroad the roadbed of which was in such condition that the most that is now claimed for it is, that it lacked twenty per cent. of *completion*, as also, possibly, a total of 815 feet of bridge and trestle work, in a distance of some eighteen miles, when the constitution was adopted; and hence such road is not entitled to exemption from taxation under that article." *Louisiana, etc.*, R. Co. v. *State Board of Appraisers*, 108 La. 14.

**Same — Synonymous with Construction.** — *Stanly County v. Coler*, (C. C. A.) 113 Fed. Rep. 705, *affirmed* 190 U. S. 437.

**The Phrase, Completing the Conveyance**, as used in the Solicitors' Remuneration Act, includes the registration of the conveyance. *Grey v. Curtice*, (1899) 1 Ch. 121.

## COMPOSITION WITH CREDITORS.

By H. F. BREITWIESER.

**377. 1. DEFINITION AND CHARACTERISTICS — 2. Consideration — But a Composition Is Excepted from This Rule.** — See note 4.

**378. 3. Form and Execution — a. GENERALLY — If Essentials Present, Form Immaterial.** — See note 2.

**381. c. SIGNING THE INSTRUMENT — Signing by Agent.** — See note 2.

**382. d. AGREEMENT OF CREDITOR TO SIGN — Estoppel.** — See note 1.

**377. 4. Consideration of Composition.** — *Georgia.* — *Stewart v. Langston*, 103 Ga. 290.  
*Illinois.* — *National Time Recorder Co. v. Feypel*, 93 Ill. App. 170.

*Maine.* — *Guilford First Nat. Bank v. Ware*, 95 Me. 388.

*Missouri.* — *McNealey v. Baldrige*, 106 Mo. App. 11.

*New Hampshire.* — *Gage v. De Courcey*, 68 N. H. 579; *Bartlett v. Woodworth-Mason Co.*, 69 N. H. 316.

*New York.* — *Bowns v. Stewart*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 475.

*Pennsylvania.* — *Crawford v. Krueger*, 201 Pa. St. 348.

*Wisconsin.* — *Killen v. Barnes*, 106 Wis. 546, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 377.

**378. 2. Presence of Essential Elements All that Is Necessary.** — *Wittkowsky v. Baruch*, 126 N. Car. 747, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 377-380; *Crawford v. Krueger*, 201 Pa. St. 348.

It was held that at a meeting of a debtor with his creditors where there was merely a preliminary arrangement for the drafting and circulation of a written agreement, which though partially written up was never signed, no consummated composition contract was entered into. *Dolase v. McDougall*, 182 Ill. 486.

**There May Be Plurality of Creditors Without Mutuality of Contract.** — See *Guilford First Nat. Bank v. Ware*, 95 Me. 388.

**381. 2. Signature by Agent.** — See *Hill v. Wertheimer-Swarts Shoe Co.*, 150 Mo. 483.

**382. 1. When Creditors Not Allowed to**

**383.** *e.* NOT ESSENTIAL THAT ALL THE CREDITORS JOIN. — See note 1.

**384.** II. CONSTRUCTION OF COMPOSITION AGREEMENT — 1. General Rule — Intent Governs. — See note 1.

**385.** 3. What Debts Included — *b.* RESERVING AND SPLITTING CLAIMS — Where Creditor Leaves Blank for Amount of Claim or Signs for Less than True Amount. — See note 1.

**386.** *c.* CONTINGENT LIABILITY AS INDORSER. — See note 1.

III. CONDITIONS IN COMPOSITION AGREEMENTS — 2. Strict Performance Required — *a.* GENERALLY. — See note 3.

**387.** *b.* DEBTOR MUST TENDER CONSIDERATION ACCORDING TO CONDITIONS. — See note 1.

**390.** IV. EFFECT OF COMPOSITION AS A DISCHARGE — 1. Extinguishes Original Debt. — See note 1.

**Withdraw Signatures.** — It has been held that where the acceptance of a proposed composition by creditors of a bankrupt had not been procured by fraud or misrepresentation, the creditors will not be permitted to withdraw their signatures to the agreement. *In re Levy*, 110 Fed. Rep. 744.

**383.** 1. Not All Creditors Need Sign. — *Schroeder v. Pissis*, 128 Cal. 209; *Hill v. Wertheimer-Swartz Shoe Co.*, 150 Mo. 483; *Vogt v. Fasola*, 41 N. Y. App. Div. 467; *Crawford v. Krueger*, 201 Pa. St. 348.

**When Concurrence of All Creditors Required.** — An agreement for a composition by the creditors of an insolvent bank, which on its face implies co-operation of all to whom it is indebted, will not authorize the person to whom it is delivered to effect such composition to consent to any settlement not concurred in by all the creditors of such bank. *Abel v. Alemannia Bank*, 79 Minn. 419.

**Under Section 12 of the Bankruptcy Act of 1898**, the terms of a composition must be offered to all the creditors of the bankrupt whether they have proved their debts or not. After the terms are thus made known to all the creditors they have a reasonable time to decide whether they will accept the offer or not, and in order to qualify themselves to vote on the proposition they are required to prove their claims. After a fair opportunity has been given to all, and the requisite majority of those whose claims have been allowed have accepted it in writing, an application to confirm the composition may be filed. *In re Rider*, 96 Fed. Rep. 808.

And in determining whether a majority of all creditors whose claims have been allowed have accepted the terms of a composition, the assignee of the claims of a large number of creditors should be counted as one creditor. *In re Messengill*, 113 Fed. Rep. 366.

The offer of composition under the said section must be presented to all of the creditors of the bankrupt, whether or not they have proved their claims. *In re Frear*, 120 Fed. Rep. 978.

**384.** 1. Construction. — *Merritt v. Bucknam*, 90 Me. 146.

**"Other Creditors."** — It has been held that the words "other creditors" used in a composition agreement mean all other creditors. *M. A. Seed Dry-Plate Co. v. Wunderlich*, 69 Minn. 288.

**Agreement for Composition Construed to Include All Creditors** willing to come in under it. *In re Rileys*, (1903) 2 Ch. 590, 89 L. T. N. S. 529.

**385.** 1. Creditor Cannot Sign for Part Only of His Claims. — *Metcalf v. Morse Ironworks, etc., Co.*, (Supm. Ct. App. T.) 14 N. Y. Annot. Cas. 28.

**386.** 1. Liability as Indorser on Claims Not Due. — See *Bowns v. Stewart*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 475.

3. Conditions to Be Performed Strictly. — *M. A. Seed Dry-Plate Co. v. Wunderlich*, 69 Minn. 288; *Hill v. Wertheimer-Swartz Shoe Co.*, 150 Mo. 483, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386; *Vogt v. Fasola*, 41 N. Y. App. Div. 467.

**An Illegal Condition** in a composition agreement precludes the debtor from setting up such composition as a defense to an action by one of the creditors. *Allard v. Boyer*, 12 Quebec Super Ct. 330.

**387.** 1. Consideration Must Be Tendered. — *McMannomy v. Chicago, etc., R. Co.*, 167 Ill. 497; *Kelly-Goodfellow Shoe Co. v. Fluker*, 51 La. Ann. 193; *Vogt v. Fasola*, 41 N. Y. App. Div. 467.

**A Note Given to Induce a Creditor to Sign the Composition Is Nullified** by a subsequent default of the debtor in making payments according to the terms of the composition agreement. *Budden v. Rochon*, 13 Quebec Super. Ct. 322.

**390.** 1. Composition Extinguishes Claims. — *In re J. C. Winship Co.*, (C. C. A.) 120 Fed. Rep. 93; *Talcott v. Janasson*, (Supm. Ct. App. T.) 85 N. Y. Supp. 833; *Haijek v. Luck*, 96 Tex. 517.

In *Perkins v. Quint*, 69 N. H. 428, it was held that a discharge of an insolvent under a composition agreement filed by him in court applied to all claims of which the court had jurisdiction, and that the assignee of a note who had no knowledge of the insolvency proceedings, but whose assignor had due notice of the proceedings, could not maintain an action on the note.

**Compromise Must Be Executed.** — *In re Stock*, 75 L. T. N. S. 422, 66 L. J. Q. B. 146.

**Bankruptcy Act.** — Under section 14 of the Bankruptcy Act of 1898, the effect of a confirmation of a composition is to discharge all of the debts of the bankrupt. *Wood v. Vanderveer*, 55 N. Y. App. Div. 549.

Under sections 12 and 14 of the Bankrupt Act of 1898, the confirmation of a composition proposed by a bankrupt to his creditors, followed by a dismissal of the case, has the effect of discharging him from all ordinary claims provable in bankruptcy, though the holders

**392. V. FRAUD IN THE COMPOSITION — 1. Where Fraud Exists Innocent Parties Not Bound.** — See note 3.

Innocent Creditor Need Not Rescind or Return Composition. — See note 4.

**393. 2. What Amounts to Fraud — a. FRAUDULENT REPRESENTATIONS BY DEBTOR.** — See note 1.

Misrepresentation of Law. — See note 5.

**394. c. SECRET PREFERENCES OF CREDITORS — (1) Constitute Fraud on Other Creditors.** — See note 2.

**395. (2) Secret Preferences Void.** — See note 1.

(3) *Securities Given Pursuant Thereto.* — See note 2.

**396. (4) Recovery of Money Paid as Fraudulent Preference.** — See note 1.

(5) *Preference Given by Third Party.* — See note 2.

thereof did not actually prove the same, and consequently did not participate with the other creditors in taking action upon the composition when offered. *Glover Grocery Co. v. Dorne*, 116 Ga. 216.

**Agreements — Debtor Must Tender Consideration According to Conditions.** — The terms of a composition agreement may be such that the mere agreement of the debtor to pay the composition, as distinguished from the actual payment by him, is to be accepted in satisfaction of the debts, and in such a case the mere nonpayment at the agreed time does not remit the creditors to their original rights in respect to their debts, but merely gives them a right of action for the breach of the substituted agreement. *Howland v. Grant*, 2 N. W. Ter. 158.

**An Adjudication of Bankruptcy Will Not Be Annulled** as a matter of course where the court approves a composition. Such annulment is in the discretion of the court. *In re Sullivan*, 20 Times L. Rep. 393.

**392. 3. Strictest Good Faith Required.** — *Bowns v. Stewart*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 475.

**Failure of Creditor to Read Release.** — A creditor is not entitled to avoid a release on the ground that he misunderstood its import, where he had an opportunity to read the release but did not. *McNealey v. Baldrige*, 106 Mo. App. 11.

**Fraud the Only Ground for Setting Composition under Bankruptcy Act of 1898.** — *In re Rudnick*, 93 Fed. Rep. 787; *City Nat. Bank v. Doolittle*, (C. C. A.) 107 Fed. Rep. 236.

As to the powers and duties of the court generally in regard to confirming compositions under the Bankruptcy Act, see *In re Wilson*, 107 Fed. Rep. 83; *Adler v. Jones*, (C. C. A.) 109 Fed. Rep. 967; *In re H. J. Arrington Co.*, 113 Fed. Rep. 498; *In re Godwin*, 122 Fed. Rep. 111. And see the title *INSOLVENCY AND BANKRUPTCY*.

**A Transfer of the Creditor's Estate is not fraudulent** when made for the benefit of and with the knowledge of the creditors who attended a meeting to which all were summoned, and a creditor who did not attend the meeting, but who has accepted a benefit resulting from such sale, cannot have the transfer set aside unless it is shown that the creditors are prejudiced. *Racine v. Singer*, 15 Quebec Super. Ct. 153.

**Where One Creditor Loans Money to Pay the Composition**, and such loan is made with the knowledge of the other creditors, there is no fraud. *Small v. Henderson*, 27 Ont. App. 492.

**4. Return of Money Held Necessary.** — *McNealey v. Baldrige*, 106 Mo. App. 11.

**393. 1. Composition Obtained by Fraudulent Misrepresentations Void.** — *Bartlett v. Woodworth-Mason Co.*, 69 N. H. 316.

**5. Misrepresentation of Law.** — One of the creditors cannot avoid the release merely because of an expression of opinion by another creditor as to its legal effect, although such opinion was incorrect. *McNealey v. Baldrige*, 106 Mo. App. 11.

**394. 2. Secret Preferences Invalid.** — *In re Chaplin*, 115 Fed. Rep. 162; *Batchelder, etc., Co. v. Whitmore*, (C. C. A.) 122 Fed. Rep. 355; *Brown v. Everett-Ridley-Ragan Co.*, 111 Ga. 410, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394; *Hardie v. Scheen*, 110 La. 618, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394 et seq.; *Merritt v. Bucknam*, 90 Me. 146.

It was held in *Gage v. De Courcey*, 68 N. H. 579, that where all the creditors who entered into a composition agreement knew of certain payments in full made to several creditors prior to their entering into the agreement, such payments were not made in fraud of the agreement.

**395. 1. Secret Preference Void.** — *In re Chaplin*, 115 Fed. Rep. 162; *Brown v. Everett-Ridley-Ragan Co.*, 111 Ga. 410, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 395.

**2. Security Given Pursuant to Fraudulent Agreement Void unless in Hands of Bona Fide Holder.** — *Brown v. Everett-Ridley-Ragan Co.*, 111 Ga. 410; *Hardie v. Scheen*, 110 La. 618, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394 et seq.; *Bellemare v. Gray*, 16 Quebec Super. Ct. 581.

**396. 1. Recovery of Money Paid by Debtor under Fraudulent Agreement.** — *In re Chaplin*, 115 Fed. Rep. 162; *Brown v. Everett-Ridley-Ragan Co.*, 111 Ga. 410, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 396; *Kirouac v. Maltais*, 18 Quebec Super. Ct. 158.

In *Lobdell v. State Bank*, 180 Ill. 56, it was held that the acceptance of a bond by a creditor to secure the payment to him of any deficiency which might be left on his claim after payments made in accordance with the terms of a composition agreement, which bond was given to him as an inducement to him to agree with the other creditors in the settlement proposition, was not in fraud of the other creditors.

**2. Undue Advantage Secured Through Third Person.** — See *Lobdell v. State Bank*, 180 Ill. 56.

# COMPOUNDING OFFENSES.

By B. B. BLYDENBURGH.

**399. I. CONSIDERED AS AN OFFENSE AGAINST PUBLIC JUSTICE — 1. Definition — To Compound an Offense. — See note 1.**

**401. 4. Elements of the Offense — a. THE AGREEMENT TO COMPOUND — (1) *There Must Be an Agreement.* — See note 1.**

(2) *Effect of Subsequent Prosecution of Criminal.* — See note 4.

**402. c. THE OFFENSE COMPOUNDED — (1) *In General — Must a Crime Have Been Committed?* — See note 4.**

**403. See note 1.**

(3) *Misdemeanors — (a) At Common Law.* — See note 4.

(b) *By Statute.* — See note 5.

**406. 7. Advertising Reward for Return of Stolen Property. — See note 3.**

**408. II. WHEN AND HOW MISDEMEANORS MAY BE COMPOUNDED — 2. Under Statutes — Statutes Only Permissive. — See note 2.**

**409. III. ILLEGALITY OF CONTRACTS IN RESPECT TO COMPOUNDING — 1. In General. — See note 2.**

**410. 2. Compromise of Civil Liabilities. — See note 6.**

**399. 1. Compounding Offenses Defined. —** Campbell v. State, 42 Tex. Crim. 27, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 399.

**401. 1. There Must Be an Agreement. —** Cohen v. Grimes, 18 Tex. Civ. App. 327.

**Money Given the Arresting Officer to Be Applied in Part Payment of the Fine** for the offense for which the prisoner is arrested is not money paid to compromise and settle such offense. Richards v. Taylor, 28 Nova Scotia 311.

**4. Effect of Subsequent Prosecution of Criminal. —** State v. Ash, 33 Oregon 86.

**The Subsequent Prosecution of the Criminal** does not relieve the agreement not to prosecute of its criminal character. Campbell v. State, 42 Tex. Crim. 27.

**402. 4. Must a Crime Have Been Committed?** — In State v. Carver, 69 N. H. 216, it was directly held that no offense punishable by a penalty need actually have been committed in order to make the person receiving the consideration guilty of compounding a crime.

In a civil case in *Alabama*, where it appeared that the grantee of a deed had procured its execution by falsely stating to the grantor that her husband had committed a crime, and that the deed was given to save him from criminal prosecution threatened by grantee, and that his threats were part of a fraudulent scheme to obtain the deed, it was held that there could be no compounding a crime which had not been committed, and a decree dismissing a bill to cancel the deed for want of equity was reversed. Treadwell v. Torbert, 122 Ala. 297. See also Manning v. Columbian Lodge, 57 N. J. Eq. 338.

**403. 1. Indictment Need Not Avert that a Crime Had Been Actually Committed. —** See contra State v. Hanson, 69 N. J. L. 42; State v. Leeds, 68 N. J. L. 210.

**4. Held to Be an Offense at Common Law. —** State v. Carver, 69 N. H. 216. See also Jones v. Dannenberg Co., 112 Ga. 426.

**5. In Ohio an Attorney May Be Suspended for Compounding a Misdemeanor. —** State v. Eager, 4 Ohio Dec. (Reprint) 351, 2 Cleve. L. Rep. 1. And see the title ATTORNEY AND CLIENT.

**406. 3. A Dog Is Property**, within the meaning of this statute. The publisher of a prohibited advertisement is liable to forfeit the sum of £50 to any person who will sue therefor. Mirams v. Our Dogs Pub. Co., (1901) 2 K. B. 564, 85 L. T. N. S. 6.

**408. 2. Discretionary with Trial Court. —** An agreement between the commonwealth's attorney and the attorney for a railroad, against which a number of indictments were pending, that if, on appeal, two judgments against the railroad were affirmed, the railroad would consent to a fine on three of the pending indictments, the others to be dismissed, was held not to be binding on the court or the parties. Its enforcement was a matter discretionary with the trial court. Spaulding v. Hill, 115 Ky. 1.

**Pennsylvania Statute — The Offense of Removing a Debtor's Goods** from the county to avoid levy by the sheriff is of a private nature, not affecting public interests, and may legally be compounded under the statute. Brown v. McCreight, 187 Pa. St. 181.

**409. 2. Giles v. De Cow**, 30 Colo. 414, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409 et seq.

**410. 6. Compromise of Civil Liability. —** Sloan v. Davis, 105 Iowa 97. See contra Lucas v. Johnson, (Tex. Civ. App. 1901) 64 S. W. Rep. 823, holding such a contract unenforceable as against public policy.

**Giving Security for Funds Embezzled. —** An embezzler who has given a note with security in settlement and acknowledgment of the debt cannot successfully defend an action on the note by showing that the plaintiff threatened criminal prosecution if the honest debt was not acknowledged and secured. A mere general



**413. 3. Effect of Illegality** — *a. WHEN PARTIES STAND IN PARI DELICTO* — (2) *Executory Contracts.* — See note 1.

**415. (3) Executed Contracts** — **Money Paid Cannot Be Recovered.** — See note 1.

**416. In Equity.** — See notes 2; 3, 4.

**417. b. COMPOUNDING UNDER DURESS.** — See note 1.

threat of criminal prosecution does not constitute duress. *Beath v. Chapoton*, 115 Mich. 506, 69 Am. St. Rep. 559. So, also, of a mortgage to indemnify the sureties on the official bond of a county treasurer. *Harlan County v. Whitney*, 65 Neb. 105, 101 Am. St. Rep. 610.

In *Powell v. Flanary*, 109 Ky. 342, it was held that such a note was valid in the absence of an express agreement not to prosecute; and that, unless the contrary appeared, the misappropriation would be presumed to be a breach of trust rather than a felony.

But though the threat of prosecution will not be a good defense to security given by a third person, if, however, the security was given on the consideration and promise not to prosecute, the contract will be void. *McCormick Harvesting Mach. Co. v. Miller*, 54 Neb. 644.

**Bond to Perform Duty Owed as Husband and Father.** — An obligation given by a husband to pay a fixed amount to an abandoned wife and child, containing a clause that the prosecution of an indictment be suspended, is a bond to secure a duty owed, and is not a bond given to compound a criminal prosecution. *Bea v. People*, 101 Ill. App. 132.

**Mortgage Partly Valid and Partly Invalid.** — Where the consideration of a mortgage by a wife was partly for the payment of her husband's debts and partly for the compromise of a criminal charge against him, it was held valid as to the former but void as to the latter. *Pierson v. Green*, 69 S. Car. 559.

**413. 1. Contracts Made in Consideration of Compounding Not Enforceable Between the Parties** — *Alabama.* — *U. S. Fidelity, etc., Co. v. Charles*, 131 Ala. 658; *Filmar v. Siler*, 132 Ala. 297.

*Colorado.* — *Giles v. De Cow*, 30 Colo. 414, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409 *et seq.*

*Iowa.* — *Rosenbaum v. Levitt*, 109 Iowa 292. *Kentucky.* — *Singer Mfg. Co. v. Ferrell*, (Ky. 1899) 48 S. W. Rep. 1078; *Owens v. Green*, 103 Ky. 342. See also *Ft. Worth First Nat. Bank v. Payne*, (Ky. 1897) 42 S. W. Rep. 736.

*Missouri.* — *Metropolitan Land Co. v. Manning*, 98 Mo. 248; *Mexico First Nat. Bank v. Gregg*, 74 Mo. App. 639.

*Nebraska.* — *Smith Premier Typewriter Co. v. Mayhew*, 65 Neb. 65.

*South Carolina.* — *Sylvester-Bleckley Co. v. Goodwin*, 51 S. Car. 362.

**Not Even a Bona Fide Holder**, for value and without notice, can enforce a note and mortgage given in consideration of compounding an offense; and this is true whether the offense be a felony or a misdemeanor. *Jones v. Dannenberg Co.*, 112 Ga. 426.

**Where a Valuable Consideration** is given for part of a transfer of credit in addition to the illegal consideration, the agreement is nevertheless illegal and void. *Frigon v. Cossette*, 16 Quebec Super. Ct. 340. And see *Folmar v. Siler*,

132 Ala. 297. But see *Pierson v. Green*, 69 S. Car. 559.

**Defendant Must Prove Commission of Crime.** — Where in defense to a bill to foreclose a mortgage it is asserted that the mortgage was given in consideration of the mortgagee's promise not to prosecute for embezzlement, if no prosecution is pending, the defendant must show that there actually was an embezzlement. *Manning v. Columbian Lodge, etc.*, 57 N. J. Eq. 338, affirmed 57 N. J. Eq. 342.

**415. 1. Money Paid or Property Transferred Cannot Be Recovered.** — *Singer Mfg. Co. v. Ferrell*, (Ky. 1899) 48 S. W. Rep. 1078. See also the title **ILLEGAL CONTRACTS, 1001. 1.**

But in *Bishop v. Matney*, 78 S. W. Rep. 856, 25 Ky. L. Rep. 1777, an attempted transfer of a note to the payor in consideration of the compounding of a felony was held to be void and no defense to an action on the note.

**416. 2. Equity Will Not Correct Contracts.** — *Paige v. Hieronymus*, 192 Ill. 546. See the title **ILLEGAL CONTRACTS, 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002.**

**3. Equity Will Not Set Aside Deeds.** — *Treadwell v. Torbert*, 119 Ala. 279, 72 Am. St. Rep. 918.

*4. Johnson v. Owen*, (Neb. 1904) 100 N. W. Rep. 945.

**417. 1. Equity Will Set Aside Deed for Duress.** — *Paige v. Hieronymus*, 192 Ill. 548, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 416, in which case, however, relief was refused on the ground that there was no duress. *Koons v. Vauconsant*, 129 Mich. 260, 95 Am. St. Rep. 438; *Gorringe v. Reed*, 23 Utah, 137, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 416, 417.

**Where No Crime Has Really Been Committed** by a husband, a deed given by his wife to secure him against prosecution for an offense which he is represented to have committed may be canceled. *Treadwell v. Torbert*, 122 Ala. 297.

**Equity Will Not Permit the Foreclosure of a Mortgage Given under Duress.** — Where a mother, ill at the time, gave a mortgage to a bank on which her son had forged checks, upon the representations of one acting for the son that criminal proceedings would be taken against him which could not be avoided in any other way, it was held that this constituted duress and was a good defense to an action to foreclose the mortgage, although the bank had made no threats, knew nothing of the representations made to the mortgagor, and was not responsible for them. *National Bank of Republic v. Cox*, 47 N. Y. App. Div. 53.

**Money Paid under Duress May Be Recovered.** — *Woodham v. Allen*, 130 Cal. 194.

Money paid by a wife under duress to prevent the arrest of her husband in a civil suit may be recovered. *Jaeger v. Koenig*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 580.

And see generally the title **DURESS**,

**418. COMPROMISE.** — See note 3.

**420. COMPUTE.** — See note 3.

**CONCEAL — CONCEALMENT.** — See note 4.

**430. CONCEIVE.** — See note 7.

**CONCERN — CONCERNED — CONCERNS.** — See note 9.

**432. CONCESSION — CONCESSION.** — See note 1.

**433. CONCUBINAGE.** — See note 1.

**CONCURRENT.** — See note 2.

**434. CONCURRENT CAUSES.** — See note 1.

**[CONCUSSION.** — See note 4a.]

**CONDEMNATION.** — See note 5.

**418. 3. Rankin v. Schofield, 70 Ark. 87.**

**Equivalent to Discharge.** — See *Rivers v. Blom*, 163 Mo. 442.

**420. 3. Computing Scales.** — In an action to restrain the infringement of a trademark, the court said: "The primary meaning of *computing* is calculating, numbering, counting, or estimating. Complainants say that *computing* implies an intellectual operation, and that as a scale cannot think, calculate, or *compute*, the term, when applied to weighing scales or balances, has no such meaning, and is therefore wholly without any descriptive significance. On this assumption, it has been urged with much pertinacity that a word, though primarily descriptive, may be used in a nondescriptive sense, and, when so used, be a valid trademark. This is a misapprehension." *Computing Scale Co. v. Standard Computing Scale Co.*, (C. C. A.) 118 Fed. Rep. 965.

**4. Tygard v. Falor, 163 Mo. 234.**

**Concealment Implies Design or Purpose.** — *People v. Garnett*, 129 Cal. 364; *Fox v. Fee*, 167 N. Y. 44.

**Statutes of Limitations — Cause of Action.** — *Bower v. Thomas*, 22 Ind. App. 505.

**The Word Conceal Is Equivalent to Secrete** as used in a warrant of attachment granted on the ground that defendant was *concealing* property in fraud of creditors. *Jurgens v. Tum Suden*, 32 N. Y. App. Div. 1.

**430. 7. See State v. Spotted Hawk, 22 Mont. 33.**

**9. Gaming.** — *State v. Harbourn*, 70 Conn. 484.

**Concerned in the Sense of Participants.** — The word *concerned* in a statute providing that "in all cases where two or more persons are jointly or otherwise *concerned* in the commission of any crime or misdemeanor, either of

such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense," is used in the sense of the word "participants;" for it is he who is implicated in the commission of an offense that is protected by the statute against his own testimony. *State v. Bach Liquor Co.*, 67 Ark. 167.

**432. 1. Covenant.** — *Compare Koch v. Hustis*, 113 Wis. 599.

**433. 1. Single Act — Distinguished from Prostitution.** — *State v. Adams*, 179 Mo. 334.

**2. Concurrent Insurance** is that which to any extent insures the same interest against the same casualty, at the same time as the primary insurance, on such terms that the insurers would bear proportionally the loss happening within the provisions of both policies. It is this last quality — of sharing proportionally in the loss — that distinguishes *concurrent* insurance from mere double insurance. *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 64 N. J. L. 580.

In a policy permitting "*concurrent* insurance" the term includes policies running with that of defendant and sharing its risk, and includes those covering not only a part of defendant's risk, but all of it and more. *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co.*, 110 Iowa 423.

**434. 1. Fleming v. Buswell, 39 N. Y. App. Div. 196.**

**4a. Concussion Distinguished from Shock.** — See *Maynard v. Oregon R. Co.*, 43 Oregon 63.

**5. Condemnation Money.** — *Maloney v. Johnson-McLean Co.*, (Neb. 1904) 100 N. W. Rep. 423; *Hayes v. Weaver*, 61 Ohio St. 55.

# CONDITIONAL SALES.

BY W. H. CROW.

**437. I. DEFINITION AND NATURE** — Definition. — See note 2.

**438.** Character of Sale a Question of Intent. — See note 5.

**439.** See notes 1, 3.

A Sale Absolute in Its Inception May Be Changed into a Conditional Sale. — See note 6.

**440. III. VALIDITY OF CONDITIONAL SALES** — 1. Generally. — See note 5.

**437. 2. Definition of Conditional Sales.** — See *Lance v. Butler*, 135 N. Car. 419, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437.

**Examples of Conditional Sales.** — *Perkins v. Mettler*, 126 Cal. 100; *Finlay v. Ludden*, etc., Southern Music House, 105 Ga. 264; *Tanner v. Mishawaka Woolen Mfg. Co.*, 28 Ind. App. 536; *Bennett Bros. Co. v. Tam*, 24 Mont. 457; *Richardson Drug Co. v. Plummer*, 56 Neb. 523; *Thompson v. Armstrong*, 11 N. Dak. 198; *Keep v. Horner*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 844.

**438. 5. Distinction Between Absolute and Conditional Sales.** — *Plymouth Stove Foundry Co. v. Fee*, 182 Mass. 31.

**For Additional Examples of sales held conditional and not absolute**, see *The H. C. Grady*, 87 Fed. Rep. 232; *Van Allen v. Francis*, 123 Cal. 474; *In re Wilcox*, etc., Co., 70 Conn. 220; *American Harrow Co. v. Deyo*, 134 Mich. 639; *Bradley v. Benson*, 93 Minn. 91; *Bennett Bros. Co. v. Tam*, 24 Mont. 457; *Jacob v. Haefelien*, 54 N. Y. App. Div. 570; *Huffard v. Akers*, 52 W. Va. 21.

**439. 1. Whether Sale Is Conditional a Question of Intent.** — *Van Allen v. Francis*, 123 Cal. 474; *Perkins v. Mettler*, 126 Cal. 100; *Huffard v. Akers*, 52 W. Va. 21.

**3. Sale Held Absolute Notwithstanding Reservation of Title.** — *First Cong. Church v. Grand Rapids School Furniture Co.*, 15 Colo. App. 46; *Clark v. Bright*, 30 Colo. 199.

**6. Change of Absolute to Conditional Sale.** — If the sale is absolute, a subsequent agreement by which the title to the property is attempted to be reserved in the vendor until all the payments are made, without changing the possession of the property, will not protect the vendor against a purchaser for value at a tax sale. *Houser, etc., Mfg. Co. v. Hargrove*, 129 Cal. 90.

Where, however title has passed by sale and delivery, a receipt purporting to acknowledge title in the vendor, signed two months after the delivery, will not make the transaction such a conditional sale as will be valid against a purchaser without notice. *Houser, etc., Mfg. Co. v. Hargrove*, 129 Cal. 90, reversing (Cal. 1900) 59 Pac. Rep. 947.

An absolute sale will not be converted into a conditional sale because of an arrangement of lease given back by the vendee which is intended to secure the vendee on his indorsement

of the notes of the vendors. *McCullough v. Willey*, 192 Pa. St. 176.

**440. 5. Conditional Sales Held Valid** — *United States*. — *Braddock Brewing Co. v. Pfaudler Vacuum Fermentation Co.*, 45 C. C. A. 491, 106 Fed. Rep. 604. See also *Wright v. Ellwood Ivins Tube Co.*, 128 Fed. Rep. 462.

*Alabama*. — *Ensley Lumber Co. v. Lewis*, 121 Ala. 94.

*California*. — "Conditional sales are recognized in this state to the fullest extent." *Van Allen v. Francis*, 123 Cal. 474; *Wise v. Collins*, 121 Cal. 147.

*Connecticut*. — *Griffin v. Ferris*, 76 Conn. 221.

*Georgia*. — *Scarboro v. Goethe*, 118 Ga. 543.

*Illinois*. — *Gilbert v. National Cash Register Co.*, 176 Ill. 288, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 440, 67 Ill. App. 606; *Emerson Piano Co. v. Maund*, 85 Ill. App. 453; *Walkau v. Manitowoc Seating Co.*, 105 Ill. App. 130.

*Indiana*. — *Turk v. Carnahan*, 25 Ind. App. 125, 81 Am. St. Rep. 85; *Tanner v. Mishawaka Woolen Mfg. Co.*, 28 Ind. App. 536.

*Maine*. — *Robinson v. Berry*, 93 Me. 320.

*Missouri*. — *Fairbanks v. Baskett*, 98 Mo. App. 53; *McFarlan Carriage Co. v. Wells*, 99 Mo. App. 641.

*Montana*. — *Bennett Bros. Co. v. Tam*, 24 Mont. 457.

*New Hampshire*. — *Webber v. Osgood*, 68 N. H. 234; *Michelson v. Collins*, 72 N. H. 554.

*New Jersey*. — *American Soda Fountain Co. v. Vaughan*, 69 N. J. L. 582.

*North Carolina*. — *Thomas v. Cooksey*, 130 N. Car. 148.

*Rhode Island*. — *Putnam v. MacLeod*, 23 R. I. 373; *Stearns v. Drake*, 24 R. I. 272.

*Tennessee*. — *Mayer v. Catron*, (Tenn. Ch. 1898) 48 S. W. Rep. 255.

*Texas*. — *Hall v. Keating Implement, etc., Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 1054.

*Utah*. — *Detroit Heating, etc., Co. v. Stevens*, 16 Utah 177; *Standard Steam Laundry v. Dole*, 22 Utah 311.

*Vermont*. — *Clark v. Clement*, 75 Vt. 417.

*Washington*. — *Page v. Urick*, 31 Wash. 601, 96 Am. St. Rep. 924.

*West Virginia*. — *Troy Wagon Works Co. v. Hutton*, 53 W. Va. 154.

*Canada*. — *Waterous Engine Works Co. v. Hochelaga Bank*, 5 Quebec Q. B. 125, affirmed 27 Can. Sup. Ct. 406.

**442. 2. Conflict of Laws — Rights of Parties Determined by Lex Fori. — See notes**

1, 3, 4.

**443. IV. CONDITIONAL SALES DISTINGUISHED FROM OTHER CONTRACTS —****1. From Chattel Mortgages — Character of Transaction Determined by Intention of Parties. — See note 1.**

The Inclination of the Courts in Doubtful Cases. — See note 2.

**444. The Character of the Transaction Is Fixed at Its Inception. — See note 1.**

The General Test. — See note 2.

**446. Express Reservation of Title. — See note 4.****447. 2. From Bailments and Leases. — See notes 1, 2.**

Instalment Sales — Conditional Sales Disguised as Leases. — See note 6.

**442. 1.** *Beggs v. Bartels*, 73 Conn. 132, 84 Am. St. Rep. 152. See also *In re Legg*, 96 Fed. Rep. 326; *Scarboro v. Goethe*, 118 Ga. 543; *Judy v. Evans*, 109 Ill. App. 154. But see *Davis v. Osgood*, 69 N. H. 427.

**3. Contracts Valid Where Made Held Valid in Another State.** — A conditional sale valid under the laws of *Massachusetts* will be upheld in *New Hampshire*, in which state other requirements are necessary to validate the contract. *Dorntel Casket Co. v. Gunnison*, 69 N. H. 297. See also *Ensley Lumber Co. v. Lewis*, 121 Ala. 94, holding that where an unrecorded conditional sale was valid in *Alabama* as against innocent purchasers, a mortgage of the property, after it was removed to *Georgia*, where recording is required, to a citizen of *Alabama*, would not protect such mortgagee in an action in *Alabama*.

**4.** *Sanger v. Jesse French Piano, etc., Co.*, 21 Tex. Civ. App. 523. See also *Emerson Co. v. Proctor*, 97 Me. 360; *Cooper v. Philadelphia Worsted Co.*, (N. J. 1904) 57 Atl. Rep. 733.

**443. 1. Whether Conditional Sale or Mortgage a Question of Intention.** — *Smith v. Hope*, (Fla. 1904) 35 So. Rep. 865; *Yost v. Hays City First Nat. Bank*, 66 Kan. 605; *Bennett Bros. Co. v. Tam*, 24 Mont. 457; *Wilson v. Lewis*, 63 Neb. 617; *Hughes v. Harlam*, 166 N. Y. 427.

**2. Doubtful Cases Held to Be Mortgages Rather than Conditional Sales.** — *Rose v. Gandy*, 137 Ala. 329; *Gilbert v. National Cash Register Co.*, 176 Ill. 288, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 443.

**444. 1. Nature of Transaction Not Changed.** — *Holladay v. Willis*, 101 Va. 274.

**2. General Test.** — *Smith v. Hope*, (Fla. 1904) 35 So. Rep. 865; *Yost v. Hays City First Nat. Bank*, 66 Kan. 605; *C. B. Cottrell, etc., Co. v. Carter*, 173 Mass. 155; *American Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582; *Hughes v. Harlam*, 166 N. Y. 427; *Warnken v. Langdon Mercantile Co.*, 8 N. Dak. 243; *Holladay v. Willis*, 101 Va. 274. See also *Ainsworth v. Rhines*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 372.

**For Additional Cases of Contracts Held to Be Conditional Sales and Not Mortgages**, see *Smith v. Hope*, (Fla. 1904) 35 So. Rep. 865; *Tufts v. Koumoungis*, 73 Ill. App. 210.

**For Additional Cases Held to Be Mortgages and Not Conditional Sales**, see *Rose v. Gandy*, 137 Ala. 329; *Hughes v. Harlam*, 166 N. Y. 427; *Chicago Cottage Organ Co. v. Biggs*, 12 Ohio Cir. Dec. 497, 22 Ohio Cir. Ct. 392; *Parlin, etc., Co. v. Davis*, (Tex. Civ. App. 1903) 74 S. W. Rep. 951.

**446. 4. Express Reservation of Title until Payment — Alabama.** — *Bates v. Crowell*, 122 Ala. 611.

*California.* — *Perkins v. Mettler*, 126 Cal. 100.

*Illinois.* — *Gilbert v. National Cash Register Co.*, 176 Ill. 288, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446.

*Maine.* — *Campbell v. Atherton*, 92 Me. 66.

*Minnesota.* — *Keystone Mfg. Co. v. Casselius*, 74 Minn. 115, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446; *Alden v. Dyer*, 92 Minn. 134.

*Montana.* — *Bennett Bros. Co. v. Tam*, 24 Mont. 457.

*Nebraska.* — *Wilson v. Lewis*, 63 Neb. 617.

*Oklahoma.* — *McCormick Harvesting Mach. Co. v. Kock*, 8 Okla. 374.

*Utah.* — *Lippincott v. Rich*, 22 Utah 196.

But see *Parry Mfg. Co. v. Myton*, 8 Kan. App. 533, where under a contract providing that title should remain in vendor to vehicles to be disposed of in the regular course of trade, the court held the transaction an absolute sale with a lien for the purchase price reserved in the vendor.

**447. 1.** See *In re Galt*, (C. C. A.) 120 Fed. Rep. 64, where the court said: "The test would seem to be, has the sender the right to compel a return of the thing sent, or has the receiver the option to pay for the thing in money?"

**For Other Cases.** — *Evans v. Napier*, 111 Ga. 102; *Furst v. Commercial Bank*, 117 Ga. 472; *Donnelly v. Mitchell*, 119 Iowa 432; *W. Irving Schernerhorn Bros. Co. v. Herold*, 81 Mo. App. 461; *Equitable Gen. Providing Co. v. Potter*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 124; *Stimpson Computing Scale Co. v. Schetrompf*, 13 Pa. Super. Ct. 377; *Painter v. Snyder*, 22 Pa. Super. Ct. 603; *Harris v. Shaw*, 17 Pa. Super. Ct. 1; *Yinger v. Clark*, 17 Lanc. L. Rev. 377.

**2. Delivery with Reservation of Title Conditional Sale and Not Bailment.** — See *Walters v. American Jewelry, etc., Co.*, 114 Ga. 564; *Thomas v. Cooksey*, 130 N. Car. 148; *Eisenberg v. Nichols*, 23 Wash. 70, 79 Am. St. Rep. 917.

**6. Contracts Providing for Payments in Instalments Conditional Sales and Not Leases — United States.** — *Metropolitan Trust Co. v. Railroad Equipment Co.*, (C. C. A.) 108 Fed. Rep. 913; *Ryle v. Knowles Loom Works*, (C. C. A.) 87 Fed. Rep. 976; *Contracting, etc., Co. v. Continental Trust Co.*, 47 C. C. A. 143, 108 Fed. Rep. 1.

*California.* — *Lundy Furniture Co. v. White*, 128 Cal. 170, 79 Am. St. Rep. 41.

**449.** Conditional Sale Distinguished from Executory Conditional Contract of Purchase. — See note 2.

**450.** 3. From Consignments. — See notes 3, 4.

V. SALES DEPENDENT UPON EXPRESS CONDITIONS. — See note 5.

VI. SALES DEPENDENT UPON IMPLIED CONDITIONS. — See note 6.

**451.** VII. SALES DEPENDENT UPON CONDITIONS PRECEDENT — 1. Generally. — See note 2.

3. Conditions Precedent to Be Performed by the Vendor — *a.* GENERALLY — LORD BLACKBURN'S FIRST RULE. — See note 8.

**453.** 4. Conditions Precedent to Be Performed by the Vendee — *a.* GENERALLY. — See note 1.

*b.* PAYMENT — (1) Generally. — See note 2.

*Georgia.* — *Walters v. Americus Jewelry, etc.*, Co., 114 Ga. 564.

*Massachusetts.* — *Smith v. Aldrich*, 180 Mass. 367; *Brown v. Goldthwait Furniture Co.*, 186 Mass. 51.

*New Hampshire.* — *Hervey v. Dimond*, 67 N. H. 342, 68 Am. St. Rep. 673; *Davis v. Osgood*, 69 N. H. 427.

*New Jersey.* — *Cooper v. Philadelphia Worsted Co.*, (N. J. 1904) 57 Atl. Rep. 733.

*New York.* — *Iserman v. Conklin*, (County Ct.) 21 Misc. (N. Y.) 194; *Equitable Gen. Providing Co. v. Eisentrager*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 179; *Jacob v. Haefelien*, 54 N. Y. App. Div. 570.

*North Carolina.* — *Wilcox v. Cherry*, 123 N. Car. 79, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447; *Thomas v. Cooksey*, 130 N. Car. 148.

*Oregon.* — *Herring-Hall-Marvin Co. v. Smith*, 43 Oregon 315.

*Vermont.* — *Nye v. Daniels*, 75 Vt. 81.

An agreement not providing for the reservation of title in the vendor, and requiring the property to be returned at the end of the year, and regular monthly payments to be made as rental, is not a conditional sale, but a lease. *Singer Mfg. Co. v. Wolff*, 70 N. J. L. 127.

**449.** 2. Distinction Stated in the Text. — For an example of a contract held to be a conditional sale and not an executory contract of purchase, see *Forsman v. Mace*, 111 La. 28.

**450.** 3. Conditional Sales Distinguished from Consignments. — *In re Hinsdale*, 111 Fed. Rep. 502, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 436 [450]; *Richardson Mfg. Co. v. Brooks*, 95 Me. 146; *Thompson v. Massey*, 76 Mo. App. 197; *Lance v. Butler*, 135 N. Car. 419, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 450. See also *Kugler v. Rouss*, 64 S. W. Rep. 627, 23 Ky. L. Rep. 979.

A written contract purporting to be a consignment of goods for sale, but betraying on its face the real purpose, which was to cover up a conditional sale, will be void against creditors of a conditional vendee. *H. H. Babcock Co. v. Williams*, 75 Minn. 147.

4. See *In re Rabenau*, 118 Fed. Rep. 471; *Harris v. Coe*, 71 Conn. 157; *A. A. Cooper Wagon, etc., Co. v. Woodridge*, 98 Mo. App. 648; *Arbuckle v. Gates*, 95 Va. 802.

5. No Technical Words Are Necessary. — *McManus v. Walters*, 62 Kan. 128.

Oral Reservation Attached to Written Contract Held Void. — See *Forbes v. Taylor*, 139 Ala. 286; *Finnigan v. Shaw*, 184 Mass. 112. See also

*Sears v. Shroul*, 24 Ind. App. 313, which states that a stipulation that title be reserved in the vendor may be oral.

Condition as to Venue of Action for Breach of Contract. — Where a conditional sale agreement provided that "in case of any litigation arising in connection with this transaction \* \* \* it is agreed that the trial will be held only in" the place where the vendors carried on business, it was held that the condition was binding, though it was burdensome to the purchaser, and that an action by the purchaser to recover damages for breach of the contract must be tried at the place named in the agreement. *Dulmage v. White*, 4 Ont. L. Rep. 121.

6. *McManus v. Walters*, 62 Kan. 128.

That the Vendor Shall Have No Right to Resume Possession of the property except for default in payment may be inferred from the terms of a contract providing for resumption of possession on occurrence of default. Hence a subsequent assignee of the vendor's rights cannot demand possession of the property before default. *Bridgman v. Robinson*, 7 Ont. L. Rep. 591.

**451.** 2. General Rule as to Conditions Precedent. — *Kentucky Refining Co. v. Globe Refining Co.*, 104 Ky. 559, 84 Am. St. Rep. 468; *Retzsch v. Retzsch Printing Co.*, 10 Ohio Cir. Dec. 537, 19 Ohio Cir. Ct. 631; *Patterson v. Larsen*, 36 N. Bruns. 4.

8. Lord Blackburn's Rule. — *Davis Gasoline Engine Works Co. v. McHugh*, 115 Iowa 415.

**453.** 1. *Wheeler, etc., Mfg. Co. v. Irish American Dime Sav. Bank*, 105 Ga. 57; *Kentucky Refining Co. v. Globe Refining Co.*, 104 Ky. 559, 84 Am. St. Rep. 468.

2. No Title Passes until Payment. — *In re Hinsdale*, 111 Fed. Rep. 502; *Tufts v. Koumounges*, 73 Ill. App. 210; *Kentucky Refining Co. v. Globe Refining Co.*, 104 Ky. 559, 84 Am. St. Rep. 468; *Swope v. Crawford*, 16 Pa. Super. Ct. 474; *Lippincott v. Rich*, 22 Utah 196; *Waterous Engine Works Co. v. Hochelaga Bank*, 5 Quebec Q. B. 125, affirmed 27 Can. Sup. Ct. 406. See also *Tufts v. Poness*, 32 Ont. 51.

Agreement Transferring Possession but Retaining Title Is Lawful and Valid. — *Waterous Engine Works Co. v. Hochelaga Bank*, 5 Quebec Q. B. 125, affirmed 27 Can. Sup. Ct. 406.

Retention by Purchaser of Part of Purchase — Price. — Where goods were sold to be delivered at a certain railway station, and the condition of payment was acceptance by the purchaser of a sight draft, accompanied by a bill of lading for

**455. Risk of Loss.** — See note 2.

Liability for Price Not Affected by Offer to Return Property. — See note 3.

**456. (2) By Note.** — See notes 1, 2.

(3) *In Cash Sales* — General Rule. — See note 4.

**457. Conditional Delivery** — Immediate Payment — Inadvertent Delivery. — See note 2.**458. (4) In Instalments.** — See note 3.  
Forfeiture of Instalments. — See note 6.**459.** See note 1.**460. Statutes.** — See note 1.

Waiver of Forfeiture. — See note 3.

the goods, it was held that the purchaser was not justified in retaining part of the purchase price until he could inspect the goods, as such a retention would be a material change of the conditions of the contract, entitling the seller to refuse delivery. *Clement v. Durocher*, 16 Quebec Super. Ct. 479.

**Payment on Surrender of Documents.** — Where payment is to be made on surrender to the buyer of the bill of lading, policy of insurance, and certificate of inspection, the buyer cannot withhold payment because of the alteration of some of the documents, if it appears that they are in fact correct and the alterations were made before the documents were executed. *Re Salomon*, 81 L. T. N. S. 325.

**Contract for Delivery in Instalments — Refusal to Make Further Deliveries.** — In a contract for the sale of goods to be delivered in instalments, payment for each instalment to be made within a specified time after each delivery, where it was provided that each payment should be made on the due date as a condition precedent to future deliveries, and the purchasers made default in payment on a due date, it was held that the seller was justified in refusing unconditionally to make any further deliveries. *Ebbw Vale Steel, etc., Co. v. Blaina Iron Co.*, 6 Com. Cas. (Eng.) 33.

**455. 2.** *Bishop v. Minderhout*, 128 Ala. 162, 86 Am. St. Rep. 134, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 455; *Glisson v. Heggie*, 105 Ga. 30.

**When the Loss Occurs after Default in Payment** and while the property is in the buyer's possession, the loss falls on him. *Gillespie v. Hamm*, 4 N. W. Ter. 78.

**3.** *Finlay v. Ludden, etc., Southern Music House*, 105 Ga. 264.

**456. 1. Payment by Note.** — *Gaar v. Nichols*, 115 Iowa 223; *Goldie, etc., Co. v. Harper*, 31 Ont. 284.

**2.** *Triplett v. Mansur, etc., Implement Co.*, 68 Ark. 230, 82 Am. St. Rep. 284.

**Destruction of Goods as Failure of Consideration.** — In an action on a note of sale which provided that no property in the goods sold should pass to the purchaser until they were paid for, where it appeared that the goods had been destroyed by fire, it was held that the plaintiff was entitled to recover, as the defendant had had the possession and use of the goods and an interest in them, and therefore there was neither a total failure of consideration for the note nor an ascertained partial failure. *Goldie, etc., Co. v. Harper*, 31 Ont. 284.

**4. In Cash Sales No Title Passes until Payment.** — *Austill v. Hieronymus*, 124 Ala. 377, citing 6

AM. AND ENG. ENCYC. OF LAW (2d ed.) 456; *Hirsch v. C. W. Leatherbee Lumber Co.*, 69 N. J. L. 509; *Paulson v. Lyon*, 26 Utah 442, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 456.

**457. 2. No Waiver by Delivery in Expectation of Payment.** — *Austill v. Hieronymus*, 124 Ala. 377, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 457.

**458. 3. In Instalment Sale No Title Passes until Full Payment.** — *Waterous Engine Works Co. v. Hochelaga Bank*, 5 Quebec Q. B. 125, affirmed 27 Can. Sup. Ct. 406.

**Mortgage Covering Property Affixed to Realty.** — Where machinery sold on condition that the title shall remain in the vendor until payment is made is affixed to the realty and mortgaged by the purchaser to a mortgagee who has no notice of the vendor's claim, it passes to the purchaser at the foreclosure of the sale free from the vendor's claim. And a statute providing that when goods are sold on the instalment plan, the rights of the vendor shall not be affected by the fact that they are affixed to realty does not apply to cases where the goods were affixed to the realty before the passage of the act. *Goldie, etc., Co. v. Hewson*, 35 N. Bruns. 349. And see generally the title FIXTURES, 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 627 *et seq.*

**6. Parties May Stipulate for Forfeiture.** — *Waterous Engine Works Co. v. Hochelaga Bank*, 5 Quebec Q. B. 125, affirmed 27 Can. Sup. Ct. 406.

**459. 1. Equitable Relief Against Forfeiture.** — *Commercial Pub. Co. v. Campbell Printing Press, etc., Co.*, 111 Ga. 388.

**Vendor May Recover for Use and Wear.** — *Waterous Engine Works Co. v. Cascapedia Pulp, etc., Co.*, 13 Quebec Super. Ct. 315.

**460. 1. Forfeiture Prevented by Statute.** — *McArthur v. St. Louis Piano Co.*, 85 Mo. App. 525; *Speyer v. Baker*, 59 Ohio St. 11.

Where the sale is unconditional the fact of payments by instalments will not bring the case within the statute. *Cavanaugh v. Bloom*, 10 Ohio Dec. 222, 8 Ohio N. P. 6.

The statutory provision that the vendor must tender the amount paid on the property, less reasonable compensation for wear and tear, on the retaking by the vendor, does not apply in an action on the contract for the balance due. *De Loach Mill Mfg. Co. v. Latham*, 99 Mo. App. 231.

**3. Receiving Payments After Default of Vendee.** — *People's Furniture, etc., Co. v. Croshy*, 57 Neb. 282, 73 Am. St. Rep. 504; *Mosby v. Goff*, 21 R. I. 494.

- 462.** *c.* ELECTION — SALES ON APPROVAL. — See note 3.
- 464.** Buyer Sole Judge Where Article Sold Is to Be Satisfactory to Him. — See note 1.  
Buyer Must Act Honestly. — See note 3.
- 465.** See note 1.
- 466.** *d.* OTHER CONDITIONS PRECEDENT. — See note 5.
- 467.** 5. Conditions Precedent to Be Performed by Vendor and Vendee Concurrently — General Rule. — See note 2.  
6. Conditions Precedent to Be Performed by a Third Person. — See note 3.
- 469.** 7. Sales to Arrive — Intention of Parties Will Control. — See note 1.
- 470.** Effect of Designation of Time of Arrival. — See note 1.
- 471.** VIII. SALES DEPENDENT UPON CONDITIONS SUBSEQUENT — 2. Contracts of Sale or Return. — See note 1.  
Title Passes. — See note 2.
- 473.** Right of Vendee to Sell. — See note 7.
- 474.** IX. WAIVER OF CONDITIONS. — See note 4.
- 475.** Conditions Waived by Absolute Delivery. — See notes 1, 3.  
If the Delivery Is Itself Conditional. — See note 4.
- 476.** Character of Delivery a Question of Intent. — See note 1.  
Condition in Delivery Need Not Be in Express Terms. — See note 3.

**462.** 3. Sales on Approval. — Davis Gasoline Engine Works Co. *v.* McHugh, 115 Iowa 415; State *v.* O'Neil Lumber Co., 77 Mo. App. 538; Birch *v.* Kavanaugh Knitting Co., 34 N. Y. App. Div. 614, *affirmed* 165 N. Y. 617.

**464.** 1. Buyer Sole Judge of Satisfaction. — Inman Mfg. Co. *v.* American Cereal Co., 124 Iowa 737, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464; McCormick Harvesting Mach. Co. *v.* Okerstrom, 114 Iowa 265; Haney-Campbell Co. *v.* Preston Creamery Assoc., 119 Iowa 188.

3. Buyer Must Act Honestly. — McCormick Harvesting Mach. Co. *v.* Okerstrom, 114 Iowa 265, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464.

**465.** 1 McCormick Harvesting Mach. Co. *v.* Okerstrom, 114 Iowa 265, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 465.

**466.** 5. Giving of Shipping Instructions. — Where the contract provided that the buyer should give shipping instructions "in the beginning of May," it was held that the provision was not a condition precedent, a breach of which entitled the seller to repudiate the contract; but that even if it was, the giving of the instructions between May 12 and May 15 was a sufficient compliance. Kidston *v.* Monceau Ironworks Co., 86 L. T. N. S. 556.

**467.** 2. Neither Party Can Maintain an Action for Breach of the Contract unless he can show his readiness and willingness to do his part of the concurrent acts. Forrestt *v.* Aramayo, 83 L. T. N. S. 335.

3. See Keep *v.* Horner, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 844.

**469.** 1. Kidston *v.* Monceau Ironworks Co., 86 L. T. N. S. 556.

**470.** 1. The Buyer Must Show His Readiness and Willingness to Make Delivery at the time specified before he can claim damages for delay in the delivery. Forrestt *v.* Aramayo, 83 L. T. N. S. 335.

**471.** 1 See Furst *v.* Commercial Bank, 117 Ga. 472.

2. Title Passes to Vendee under Contract of Sale or Return. — Keller *v.* Strauss, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 35.

**473.** 7. The Pledging of the Goods by the Buyer Is "An Act Adopting the Transaction" within the meaning of section 18, rule 4 (*a*) of the Sale of Goods Act, 1893, so as to pass the property in the goods to the buyer and to give the pledgee a good title as against the seller. Kirkham *v.* Attenborough, (1897) 1 Q. B. 201, 75 L. T. N. S. 543.

**474.** 4. Waiver of Condition. — Wheeler, etc., Mfg. Co. *v.* Irish American Dime Sav. Bank, 105 Ga. 57; Forsman *v.* Mace, 111 La. 28; Warnken *v.* Langdon Mercantile Co., 8 N. Dak. 243.

Conditions Not Waived. — A conditional vendor does not waive his right to claim the title to machinery which has been affixed to the realty by making an unsuccessful attempt to enforce the lien given to him by statute. Warner Elevator Mfg. Co. *v.* Capitol Invest., etc., Assoc., 127 Mich. 323, 8 Detroit Leg. N. 340.

**475.** 1. Condition Presumed Waived by Absolute Delivery of Property. — Wheeler, etc., Mfg. Co. *v.* Irish American Dime Sav. Bank, 105 Ga. 57, *quoting* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 475.

3. Drumm-Flato Commission Co. *v.* Zeb. F. Crider Commission Co., 165 Mo. 94, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 475.

4. No Waiver by Conditional Delivery. — Silsby *v.* Boston, etc., R. Co., 176 Mass. 158.

**476.** 1. Character of Delivery a Question of Intent. — Adams *v.* Roscoe Lumber Co., 159 N. Y. 176.

3. Question of Fact. — Silsby *v.* Boston, etc., R. Co., 176 Mass. 158; Drumm-Flato Commission Co. *v.* Zeb. F. Crider Commission Co., 165 Mo. 94, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 476; Adams *v.* Roscoe Lumber Co., 159 N. Y. 176.

Function of Court and Jury. — Albert *v.* R. Lewis Steiner Mfg. Co., (Supm. Ct. App. T.) 42 Misc. (N. Y.) 522.

**477. Additional Security.** — See note 5.

**478. Lien Waived by Action for Price.** — See note 1.

**Foreclosure of Mortgage.** — See note 3.

**The Recovery of Damages.** — See note 4.

**479. X. RIGHTS OF PARTIES — 1. Of the Vendor — a. AGAINST THE VENDEE — May Retake Property on Nonperformance of Condition Precedent.** — See note 2.

**477. 5. Taking Additional Security No Waiver of Lien.** — *Owenby v. Swann*, (Tenn. Ch. 1900) 59 S. W. Rep. 378; *Standard Steam Laundry v. Dole*, 22 Utah 311, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 477. See also *Clark v. B. B. Richards Lumber Co.*, 72 Minn. 397.

**478. 1. An Action on an Acceptance Given for the Purchase Price** is an election to treat the contract as completed, and passes the property to the purchaser, so that the vendor cannot thereafter maintain an action for conversion against a *bona fide* purchaser for value. *Purtle v. Heney*, 33 N. Bruns. 607.

**Effect of Judgment on Right to Revendicate.** — If a vendor obtains judgment in an action on notes given for goods sold on condition that title shall not pass until payment is made, he cannot, without first abandoning such judgment, take *saisie-revendication* of the same goods to procure a declaratory decree establishing his proprietary rights therein, and thus have a second condemnation against the defendant. *Plessisville v. Lévesque*, 22 Quebec Super. Ct. 306.

**3. Corning First Nat. Bank v. Reid**, 122 Iowa 286, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 478.

**4. Recovery of Damages for Breach of Condition Constitutes Waiver.** — See *Tufts v. Poness*, 32 Ont. 51.

**479. 2. Vendor May Retake Property on Non-performance of Condition** — *Kentucky*. — *White Sewing Mach. Co. v. Conner*, 111 Ky. 827.

*Massachusetts*. — *C. B. Cotterell, etc., Co. v. Carter*, 173 Mass. 155.

*Mississippi*. — *Williams v. Williams*, (Miss. 1898) 23 So. Rep. 291.

*Nebraska*. — *Richardson Drug Co. v. Teasdall*, 52 Neb. 698; *Edward Thompson Co. v. Baldwin*, 62 Neb. 530.

*New Hampshire*. — *Webber v. Osgood*, 68 N. H. 234.

*New York*. — *Iserman v. Conklin*, (County Ct.) 21 Misc. (N. Y.) 194; *Earle v. Robinson*, 91 Hun (N. Y.) 363, affirmed 157 N. Y. 683.

*North Carolina*. — *Thomas v. Cooksey*, 130 N. Car. 148.

*Texas*. — *Henderson v. Mahoney*, 31 Tex. Civ. App. 539.

*Utah*. — *Lippincott v. Rich*, 19 Utah 149; *Lippincott v. Rich*, 22 Utah 196.

*Washington*. — *Page v. Urick*, 31 Wash. 601, 96 Am. St. Rep. 924.

*Wisconsin*. — *Tufts v. Brace*, 103 Wis. 341.

The burden is on the vendor who has retaken the property to show compliance with the statute. *Whitelaw Furniture Co. v. Boon*, 102 Tenn. 719.

In *Tennessee*, by Act 1889, c. 81, where the vendor retakes the property he must sell the same at auction and account to the buyer for the proceeds, less the amount due on the contract. A failure to do this will make him liable to the buyer for the amount paid for the prop-

erty. See *Massillon Engine, etc., Co. v. Wilkes*, (Tenn. 1904) 82 S. W. Rep. 316. But see *Milburn Mfg. Co. v. Wayland*, (Tenn. Ch. 1896) 43 S. W. Rep. 129, wherein it was held that the provision of the act did not apply to a case where, though it was conceded that the vendor had the right of possession, the property was allowed to remain in the possession of the vendee until he could attempt to raise the money.

A sale by the conditional vendee, with the consent of the vendor, of his interest renders the subvendee an "original vendee" within the terms of the act requiring sale by public auction by the vendor on retaking the property on default in payment. *Tschopick v. Lippincott*, (Tenn. Ch. 1898) 48 S. W. Rep. 128.

**Agreement that Property Is Subject to Order of Vendor.** — An agreement providing that the vendee shall be allowed to retain possession of the property subject to the order of the vendor is a conditional sale, and the vendor may recover the property upon failure of the vendee to pay the purchase price. *Hydraulic Press Mfg. Co. v. Whetstone*, 63 Kan. 704.

**Return of Money Received.** — Where an article is sold on condition that it shall remain the property of the vendor until fully paid for, the vendor cannot maintain an action of revindication for noncompliance with the condition, unless he tenders the money received on account of the price. *Cousineau v. Williams Mfg. Co.*, 11 Quebec Super. Ct. 389; *Waterous Engine Works Co. v. Hochelaga Bank*, 5 Quebec Q. B. 125, 27 Can. Sup. Ct. 406; *Tufts v. Giroux*, 12 Quebec Super. Ct. 530; *Waterous Engine Works Co. v. Cascapedia Pulp, etc., Co.*, 13 Quebec Super. Ct. 315. But if the article, through the fault of the purchaser, has deteriorated in value to an amount equal to or greater than that part of the price already paid, no return of such part price can be demanded or required before or when the revindication of such article is judicially made. *Waterous Engine Works Co. v. Cascapedia Pulp, etc., Co.*, 13 Quebec Super. Ct. 315. *Compare Tufts v. Giroux*, 12 Quebec Super. Ct. 530. It may be stipulated that any payments on account of the price shall be forfeited as damages for the nonperformance of the contract. *Waterous Engine Works Co. v. Hochelaga Bank*, 5 Quebec Q. B. 125, affirmed 27 Can. Sup. Ct. 406.

**Resale of Perishable Articles.** — Where the agreement for the sale of perishable articles provides that payment is to be made "by cash \* \* \* in exchange for" shipping documents, the buyer is bound to pay within a reasonable time after the shipping documents are tendered him, and if he fails to do so the seller may sell the goods for his account, and charge him with the loss resulting from his failure. *Ryan v. Ridley*, 8 Com. Cas. (Eng.) 105.

**The Purchaser May Treat the Sale as Rescinded** where the seller returns the article sold, uses



**480.** Right to Sue for Purchase Money — Election of Remedies. — See notes 2, 3.

**481.** Duty to Return Unpaid Notes for Price. — See note 3.

*b.* AGAINST THIRD PERSONS — (1) *Generally* — The Burden of Proving.

— See note 7.

**482.** The Measure of Damages. — See note 1.

(2) *Estoppel* — Sale of Goods to Be Resold. — See notes 4, 5.

**483.** Sale of Goods to Be Resold. — See notes 1, 2.

it, offers it for sale to a third person, and neglects to take proper care of it. *Harris v. Dustin*, 1 N. W. Ter. 404.

**480.** 2. Vendor May Elect to Reclaim Possession or Enforce Payment. — *Smith v. Barber*, 153 Ind. 322, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480; *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 115, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480; *Alden v. Dyer*, 92 Minn. 134; *Bradley v. Benson*, 93 Minn. 91; *Gormully, etc., Mfg. Co. v. Catharine*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 338; *Detroit Heating, etc., Co. v. Stevens*, 16 Utah 177; *Tufts v. Brace*, 103 Wis. 341. See also *Ideal Cash Register Co. v. Zunino*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 311.

The vendor may sue the vendee for goods sold and delivered on his breach of the contract. *Smith v. Aldrich*, 180 Mass. 367.

A vendor under a contract of conditional sale, providing that title is to pass only on completion of instalment payments, may maintain an action for the whole purchase price against the vendee upon his refusal to accept. *Tufts v. Poness*, 32 Ont. 51.

**3. Vendor Cannot Both Sue for Price and Retake Property** — *Alabama*. — *Sanders v. Newton*, 140 Ala. 335, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480. See also *Hickman v. Richburg*, 122 Ala. 638.

*Georgia*. — *Glisson v. Heggie*, 105 Ga. 30.

*Indiana*. — *Turk v. Carnahan*, 25 Ind. App. 128, 81 Am. St. Rep. 85, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480.

*Minnesota*. — *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 115, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480; *Alden v. Dyer*, 92 Minn. 134.

*Missouri*. — See *Laclede Power Co. v. Ennis Stationery Co.*, 79 Mo. App. 302.

*New York*. — *Earle v. Robinson*, 91 Hun (N. Y.) 363, affirmed 157 N. Y. 683; *Orcutt v. Rick-enbrodt*, 42 N. Y. App. Div. 238; *White v. Gray*, 96 N. Y. App. Div. 154.

*Oklahoma*. — *Osborne v. Walther*, 12 Okla. 20.

*Oregon*. — *Herring-Hall-Marvin Co. v. Smith*, 43 Oregon 315.

A suit on notes given to secure the purchase money for property delivered under a contract of conditional sale will not be held to operate as an election of remedies, where there is an express agreement that title should not pass until the notes are fully paid. *American Box Mach. Co. v. Zentgraf*, 45 N. Y. App. Div. 522.

A vendor suing a corporation of the same name as the partnership which purchased the property under a contract of conditional sale, such property having been secretly transferred to the corporation, which the vendor mistakenly believed to be the vendee, will not be held to have made an election to sue, and may bring

an action of replevin. *National Cash Register Co. v. Ferguson*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 363.

Where the Vendor Retakes the Property on Default and Sells it. — *Contra*, *Matteson v. Equitable Min., etc., Co.*, 143 Cal. 436.

**481.** 3. Duty to Return Unpaid Notes for Purchase Money. — *Van Allen v. Francis*, 123 Cal. 474; *Boehm v. Griebenow*, 78 Ill. App. 675; *National Cash Register Co. v. Ferguson*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 363; *Lippincott v. Rich*, 22 Utah 196. See also *Wall v. De Mitkiewicz*, 9 App. Cas. (D. C.) 109.

7. *Young v. Salley*, 83 Miss. 362.

**482.** 1. Moultrie Repair Co. v. Hill, 120 Ga. 730; *Fussell v. Heard*, 119 Ga. 527; *White Sewing Mach. Co. v. Conner*, 111 Ky. 827. But compare *Glisson v. Heggie*, 105 Ga. 30.

In *Friedman v. Phillips*, 84 N. Y. App. Div. 179, the measure of damages of the conditional vendee for conversion of the property was stated to be the value of the piano when taken, less the unpaid purchase money.

**4. Estoppel of Vendor.** — *Albert v. R. Lewis Steiner Mfg. Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 522; *Owenby v. Swann*, (Tenn. Ch. 1900) 59 S. W. Rep. 378; *People's Bank v. Estey*, 36 N. Bruns. 169.

Where the conditional vendor, who has permitted the vendee to have possession of the property for purposes of sale, notifies the third party purchaser of its title, it will not be estopped to assert that title. *Excelsior Iron Works v. Lee*, 123 Mich. 499.

**5. Donnelly v. Mitchell**, 119 Iowa 432; *Jermyn v. Schweppenhauser*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 603; *Cook v. Gross*, 60 N. Y. App. Div. 446; *Stubbings v. Curtis*, 109 Wis. 307.

**483.** 1. Sale of Goods to Be Resold. — *Sears v. Shrout*, 24 Ind. App. 313; *Bradley v. Benson*, 93 Minn. 91, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 483; *Mayer v. Catron*, (Tenn. Ch. 1898) 48 S. W. Rep. 255. See also *Scarbboro v. Goethe*, 118 Ga. 543; *Dowagiac Mfg. Co. v. White Rock Lumber, etc., Co.*, (S. Dak. 1904) 99 N. W. Rep. 854.

That such a contract is not *per se* invalid, see *McFarlan Carriage Co. v. Wells*, 99 Mo. App. 641.

**Imposition of Minimum Retail Price.** — Conditions cannot be imposed on a sale of goods and be enforceable by the vendor against subsequent purchasers who are not parties to the original agreement, though such subsequent purchasers have notice of the conditions. Thus, a condition in a sale by a manufacturer to a wholesaler that the goods shall not be retailed at less than a specified minimum price is not enforceable by the manufacturer against a retailer who purchases from the wholesaler, though the condition is printed on the boxes containing the

**484.** (3) *Effect of Vendor's Laches* — WAIVER. — See note 2.

c. PROPERTY RIGHTS IN THING SOLD CONDITIONALLY. — See note 4.

**485.** Increase of Animals Sold Conditionally. — See note 1.

Right to Property Taken in Exchange. — See note 2.

d. ASSIGNMENT BY VENDOR. — See notes 4, 5.

**486.** 2. Of the Vendee — Conditions Precedent. — See notes 1, 2.

Right to Return Property. — See note 3.

Certain Miscellaneous Rights. — See note 5.

**487.** 3. Of Third Persons — a. BONA FIDE PURCHASERS — Subpurchaser of Property Sold on Condition Precedent Acquires No Title Against Vendor. — See note 1.

goods. *McGruther v. Pitcher*, (1904) 2 Ch. 306. And this is true though the printed condition recites that in the event of a purchase by a retailer from a wholesaler, the latter shall be deemed the agent of the manufacturer. *Taddy v. Sterious*, (1904) 1 Ch. 354.

**483.** 2. *Hench v. Eacock*, 21 Ind. App. 444.

**484.** 2. *Owenby v. Swann*, (Tenn. Ch. 1900) 59 S. W. Rep. 378.

**4.** Purchaser Takes Subject to Implied Condition. — Where the contract provided that on default in payment the vendor might resume possession of the property, but did not specifically say he should not resume possession unless default occurred, it was held that one who subsequently purchased the rights of the vendor in the property could not demand possession thereof from the original purchaser until a default occurred, there being an implied condition that the right of resumption should not arise until the occurrence of the default. *Bridgman v. Robinson*, 7 Ont. L. Rep. 591.

**485.** 1. Increase of Animals. — *Anderson v. Leverette*, 116 Ga. 732.

**2.** Exchange of Property. — *Cole v. Propst*, 119 Ala. 99; *Webber v. Osgood*, 68 N. H. 234.

**4.** Assignment by Vendor. — *Standard Steam Laundry v. Dole*, 22 Utah 311, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 485; *Nye v. Daniels*, 75 Vt. 81.

**Assignment of Purchase-money Notes.** — An assignment of a note, providing for the reservation of title in the conditional vendor, carries with it all of the payee's title to the property. *Spoon v. Frambach*, 83 Minn. 301.

The assignee of notes given for the purchase money of property sold conditionally under the Georgia statutes gets no right to the property unless expressly transferred, so that he cannot maintain trover. *Burch v. Pedigo*, 113 Ga. 1157.

**The Assignment of a Contract** secured by a reservation of title to property in the conditional vendor carries with it the rights in the property of the assignor. *Little Rock Bank v. Collins*, 66 Ark. 240.

**5.** The maker of the note becomes invested with the title to the property. *McCullough v. Pritchett*, 120 Ga. 585.

**Assignment of Debt.** — An assignment by the conditional vendor of the debt carries with it the title in the property reserved in the vendor, similarly to the case of a mortgage. *Cutting v. Whittemore*, 72 N. H. 107.

**486.** 1. *Lippincott v. Rich*, 19 Utah 149, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486. See also *Sears v. Shrout*, 24 Ind. App.

313. But see *Friedman v. Phillips*, 84 N. Y. App. Div. 179, where the court held that a conditional vendee may mortgage his interest and the mortgagee will acquire the right to immediate possession and to receive the title on payment of the purchase price. And see *Reischmann v. Masker*, 69 N. J. L. 353, where the court said that the interest of the vendor was merely a lien for securing the purchase price, and the conditional vendee may transfer his interest to a third person.

In *Bishop v. Minderhout*, 128 Ala. 162, 86 Am. St. Rep. 134, the court stated that "the buyer may sell his interest subject to the rights of the vendor."

**Incumbrancing by Vendee a Criminal Offense in Georgia.** — See *Miley v. State*, 118 Ga. 274.

**2.** The vendee under a conditional sale can recover of a third person converting the property the full value of the article, although he has only paid a portion of the purchase price. *Messenger v. Murphy*, 33 Wash. 353.

**3.** *Finlay v. Ludden*, etc., *Southern Music House*, 105 Ga. 264; *Ainsworth v. Rhines*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 372.

**5.** Amount of Recovery from Vendor for Conversion. — The conditional vendee can recover only the value of his interest in the property at the time it was converted by the vendor; "this sum is the value of the property at the time of the conversion diminished by the sum then remaining unpaid on the contract of sale." *Clark v. Clement*, 75 Vt. 417.

**487.** 1. Purchaser from Conditional Vendee Acquires No Title Against Vendor — *Alabama*. — *Ensley Lumber Co. v. Lewis*, 121 Ala. 94; *Goodgame v. Sanders*, 140 Ala. 247.

*Arkansas*. — *Triplett v. Mansur*, etc., *Implement Co.*, 68 Ark. 230, 82 Am. St. Rep. 284.

*California*. — *Van Allen v. Francis*, 123 Cal. 474.

*Indiana*. — *Sears v. Shrout*, 24 Ind. App. 313.

*Mississippi*. — *Young v. Salley*, 83 Miss. 362.

*Montana*. — *Bennett Bros. Co. v. Tam*, 24 Mont. 457.

*New York*. — *National Cash Register Co. v. Ferguson*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 363.

*Oregon*. — *Christenson v. Nelson*, 38 Oregon 473.

*Utah*. — *Lippincott v. Rich*, 19 Utah 149, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 473.

**Purchaser with Notice.** — *Braddock Brewing Co. v. Pfaudler Vacuum Fermentation Co.*, 45 C. C. A. 491, 106 Fed. Rep. 604; *Unmack v. Douglass*, 75 Conn. 633; *Hill v. Ludden*, etc.,

**489.** *Contrary Doctrine.* — See note 4.

**490.** *b. CREDITORS — The General Rule.* — See note 3.

**493.** *Contrary Doctrine.* — See note 1.

*c. MORTGAGEES.* — See note 2.

**494.** *d. ASSIGNEE FOR THE BENEFIT OF CREDITORS.* — See note 1.

**XI. RECORDING ACTS.** — See note 2.

Southern Music House, 113 Ga. 320. See also *Barnes v. Rawlings*, 74 Mo. App. 531.

**Purchaser's Title Perfected by Tender of Price.** — *Christenson v. Nelson*, 38 Oregon 473.

**Purchaser's Title Perfected by Offer of Price.** — But see *Lippincott v. Rich*, 19 Utah 149, holding that after condition broken, tender would give no right to vendee. The court said: "The plaintiff could not be compelled under such circumstances to accept, against his will, a new creditor or a new paymaster, or to make a new contract of sale."

**Goods Marked with Vendor's Name and Address.** — Section 1 of the *Ontario Conditional Sales Act*, Rev. Stat. Ont. 1897, c. 149, providing that a conditional sale of manufactured goods shall be good as against subsequent *bona fide* purchasers only when the name of the vendor is plainly marked on the goods, does not apply to a hiring with an option to the hirer to buy. It has been held, however, that in a case to which the statute would apply it would be insufficient to mark with the words "Mason & Risch, Toronto," a piano sold by "the Mason & Risch Piano Company, Limited." *Mason v. Lindsay*, 4 Ont. L. Rep. 365.

**489. 4.** *American Press Assoc. v. Daily Story Pub. Co.*, (C. C. A.) 120 Fed. Rep. 771, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489.

**In England, by Statute**, if the buyer, with the consent of the seller, obtains possession of the goods or of the documents of title thereto, a subsequent purchaser for value and without notice acquires a good title as against the original seller. This rule has been held to protect the transferee of a bill of lading which the original seller sent to the buyer together with a draft for acceptance, where the buyer transferred the bill of lading for value to a *bona fide* purchaser, but did not accept the draft. *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, (1899) 1 Q. B. 643, 80 L. T. N. S. 269, allowing appeal from (1898) 2 Q. B. 61, 79 L. T. N. S. 55.

**490. 3. Property Sold Conditionally Not Subject to Attachment and Sale upon Execution.** — *W. F. Zimmerman Lumber Co. v. Elder*, (Miss. 1901) 29 So. Rep. 466.

**In New Hampshire** the interest of the conditional vendee may be attached and title perfected in him by a tender by the attaching creditor of the sum due. *Hervey v. Dimond*, 67 N. H. 342, 68 Am. St. Rep. 673.

**493. 1. Alabama.** — Under the Alabama statute a contract reserving title to property sold in another state in the vendor must be recorded within three months after it is brought into the state, to be valid against judgment creditors. See *Brandon Printing Co. v. Bostick*, 126 Ala. 247.

**Illinois.** — See *John Matthews Apparatus Co. v. Neal*, 89 Ill. App. 174.

**Pennsylvania.** — *Ryle v. Knowles Loom Works*, (C. C. A.) 87 Fed. Rep. 976.

**2. Mortgages.** — *Compare Contracting, etc., Co. v. Continental Trust Co.*, 47 C. C. A. 143, 108 Fed. Rep. 1.

**Right of Seller of Fixtures as Against Prior Mortgagee.** — Where the owner of a mill mortgaged it, together with all its machinery, which was declared to be fixtures, and subsequently a second mortgage covering the same property was executed by the mortgagor, and both mortgages contained covenants to insure, and thereafter the mortgagor, with the consent of the second but without that of the first mortgagee, made a contract with the plaintiffs under which they placed new machinery in the mill, using, as the contract provided, such of the old machinery as was necessary to complete the equipment, and taking and removing such of the old as was not required, the mortgagor agreeing with the plaintiffs to insure the machinery and assign the insurance to them, it was held that on the destruction of the machinery by fire the plaintiffs could not claim, by reason of their betterment of the machinery which prior to its reconstruction was deemed of substantial value, that they were entitled to a claim on the insurance money prior to that of the first mortgagee, but it was further held that they were so entitled as against the second mortgagee. *Goldie v. Hamilton Bank*, 31 Ont. 142, affirmed 27 Ont. App. 619.

**494. 1. Assignee for Creditors.** — *Silbby v. Boston, etc., R. Co.*, 176 Mass. 158; *Lippincott v. Rich*, 19 Utah 147, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 494.

**Where the Conditions Are Unperformed at the Time of the Assignment.** — The purchaser cannot compel the curator of the insolvent's estate to complete the contract, his only remedy being an action of damages for its nonperformance. *Curtis v. Miller*, 7 Quebec Q. B. 415.

**2. Recording Acts — Connecticut.** — *In re Legg*, 96 Fed. Rep. 326 (decided under the Connecticut statute); *National Cash Register Co. v. Lesko*, 77 Conn. 276; *Cohen v. Schneider*, 70 Conn. 505.

**Georgia.** — *Wheeler, etc., Mfg. Co. v. Irish American Dime Sav. Bank*, 105 Ga. 57; *Anderson v. Leverette*, 116 Ga. 732; *A. S. Thomas Furniture Co. v. T. & C. Furniture Co.*, 120 Ga. 879; *English v. Hill*, 116 Ga. 415; *Holland v. Adams*, 103 Ga. 610; *Anderson v. Adams*, 117 Ga. 919; *In re Gosch*, 121 Fed. Rep. 602, reversed (C. C. A.) 126 Fed. Rep. 627 (decided under the Georgia statute).

**Illinois.** — *Elliott v. Emerson Piano Co.*, 80 Ill. App. 51.

**Iowa.** — *Rock Island Plow Co. v. Maynard Sav. Bank*, 123 Iowa 640; *National Cash Register Co. v. Schwab*, 111 Iowa 605; *Union Bank v. Creamery Package Mfg. Co.*, 105 Iowa 136.

**Maine.** — A conditional sale in which no ele-

**497.** Chattel Mortgage Acts. — See notes 1, 2.

**498.** In the Absence of Statutes. — See note 1.

As Between the Parties. — See note 5.

Effect of Actual Notice. — See note 7.

ment of a note appears need not be recorded to make it valid. *Hopkins v. Maxwell*, 91 Me. 247.

A conditional sale made in *Maine* and not recorded there was held void as to third parties although the property had been carried into *New Hampshire* and the sale recorded there. *Davis v. Osgood*, 69 N. H. 427.

*Minnesota*. — Creamery Package Mfg. Co. v. Tagley, 91 Minn. 79.

*Missouri*. — Fairbanks v. Baskett, 98 Mo. App. 53; Loeffler v. Damoree, 75 Mo. App. 207; Mansur-Tebbetts Implement Co. v. Price, 81 Mo. App. 243; Barnes v. Rawlings, 83 Mo. App. 185; John S. Brittain Dry Goods Co. v. Buchanan, 79 Mo. App. 528.

*Nebraska*. — See Regier v. Craver, 54 Neb. 507.

*New Hampshire*. — Churchill v. Demeritt, 71 N. H. 110.

*New Jersey*. — See Behn v. National Bank, 65 N. J. L. 591.

It is sufficient, as against judgment creditor, to record the contract of conditional sale at any time before the rendition of the judgment. *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460.

*New York*. — Hirsch v. Graves Elevator Co., (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 472; Van Leeuwen v. Fish, (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 443, appeal dismissed (Supm. Ct. App. T.) 30 Misc. (N. Y.) 419; Gerber v. Mandel, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 825; Nichols v. Potts, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 273; Ryan v. Wollowitz, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 498; Duntz v. Granger Brewing Co., (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 177, affirmed 96 N. Y. App. Div. 631.

A purchaser at an execution sale is a "purchaser" and not a "creditor" within the terms of the act, Lien Law, § 112. *Harris v. Gunn*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 796.

The words "continued possession" in the act refer to continued possession of the vendee, so that an agreement which contemplates possession of the articles by a third person does not come within the statute. *J. L. Mott Iron Works v. Reilly*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 833.

When a contract of conditional sale is not required by the lien laws to be filed, the fact that it was filed will not be constructive notice to purchasers. *Baldinger v. Levine*, 83 N. Y. App. Div. 130.

As to what constitutes immediate delivery, see *Grant v. Griffith*, 39 N. Y. App. Div. 107, affirmed 165 N. Y. 636.

An execution creditor is not included in the statute. *Fennikoh v. Gunn*, 59 N. Y. App. Div. 132.

*North Carolina*. — The widow's allowance,

after the death of the conditional vendee, will not be superior to the lien of the conditional vendor though the instrument is unrecorded. *Hinkle v. Greene*, 125 N. Car. 489.

*Ohio*. — See Speyer v. Baker, 59 Ohio St. 11.

*Texas*. — Hall v. Keating Implement, etc., Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 1054. See also Sanger v. Jesse French Piano, etc., Co., (Tex. Civ. App. 1903) 75 S. W. Rep. 39; Mansur, etc., Implement Co. v. Beeman-St. Clair Co., (Tex. Civ. App. 1898) 45 S. W. Rep. 729; Mechanics' Bank v. Gullett Gin Co., (Tex. Civ. App. 1898) 48 S. W. Rep. 627; Bowen v. Lansing Wagon Works, 91 Tex. 385.

*Virginia*. — Arbuckle v. Gates, 95 Va. 802.

*Washington*. — Johnston v. Wood, 19 Wash. 441; Eisenberg v. Nichols, 22 Wash. 70, 79 Am. St. Rep. 917.

*West Virginia*. — Hyer v. Smith, 48 W. Va. 550; Webster Lumber Co. v. Keystone Lumber, etc., Co., 51 W. Va. 545; Hatfield v. Haubert, 51 W. Va. 190; Troy Wagon Works Co. v. Hutton, 53 W. Va. 154.

*Wisconsin*. — Mississippi River Logging Co. v. Miller, 109 Wis. 77.

The statute does not apply to an incomplete contract which was not delivered, so that the conditional sale was incomplete; and the prospective vendor may recover the property from a transferee of the prospective vendee, though the instrument was not recorded. *Owen v. Long*, 97 Wis. 78.

And see generally the title RECORDING ACTS, 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 87.

**497.** 1. *Gilbert v. National Cash Register Co.*, 176 Ill. 288, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 496, 67 Ill. App. 606; *Gilbert v. Gere*, 67 Ill. App. 590; *Welch v. National Cash Register Co.*, 103 Ky. 30.

**2. Conditional Sales Not Within Chattel Mortgage Acts.** — *Campbell v. Atherton*, 92 Me. 66; *Bennett Bros. Co. v. Tam*, 24 Mont. 457.

**498.** 1. *Campbell v. Atherton*, 92 Me. 66.

**5. Assignee Not Protected.** — *Rowell v. Lewis*, 95 Me. 83; *Sinclair v. Wheeler*, 69 N. H. 538; *Mansur, etc., Implement Co. v. Beeman-St. Clair Co.*, (Tex. Civ. App. 1898) 45 S. W. Rep. 729. But see *In re Frazier*, 117 Fed. Rep. 746.

**Receiver in Bankruptcy Protected.** — Under a statute requiring the recording of conditional sales as against creditors, the receiver of an insolvent corporation represents the creditors, and property of the conditional vendee coming into his possession must be considered as the property of the company in the absence of proper recording. *In re Wilcox, etc., Co.*, 70 Conn. 220.

**The Trustee in Bankruptcy** takes subject to the lien of the vendor. *In re Kellogg*, 112 Fed. Rep. 52, affirmed (C. C. A.) 118 Fed. Rep. 1017.

**7. Richardson Mfg. Co. v. Brooks**, 95 Me. 146.

# CONDITIONS.

BY L. C. BOEHM.

## 500. I. DEFINITIONS AND ORIGIN — 1. In General. — See note 1.

4. Condition Precedent. — See note 4.

5. Condition Subsequent. — See note 5.

## 501. II. FORM AND CONSTRUCTION — 1. Form — No Particular Form of Words Necessary. — See note 2.

Apt and Customary Phrases. — See note 3.

Clause of Re-entry or Provision for Forfeiture. — See note 6.

Words Declaratory of the Consideration or Purpose. — See note 9.

## 502. Parol Evidence. — See note 3.

2. Construction — Intention. — See note 5.

How Manifested. — See note 6.

**500. 1. The Term Defined.** — *Detroit Union R. Depot, etc., Co. v. Ft. Street Union Depot Co.*, 128 Mich. 191, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 500; *Hoselton v. Hoselton*, 166 Mo. 182; *Fowlkes v. Wagoner*, (Tenn. Ch. 1898) 46 S. W. Rep. 586.

**4. Condition Precedent.** — *Goff v. Pensenhafer*, 190 Ill. 200; *Brown v. Chicago, etc., R. Co.*, (Iowa 1900) 82 N. W. Rep. 1003; *Shuman v. Heldman*, 63 S. Car. 474; *Fowlkes v. Wagoner*, (Tenn. Ch. 1898) 46 S. W. Rep. 586.

**5. Condition Subsequent.** — *Goff v. Pensenhafer*, 190 Ill. 200; *Jenkins v. Horwitz*, 92 Md. 34; *Wright v. Mayer*, 47 N. Y. App. Div. 604, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 500; *Shuman v. Heldman*, 63 S. Car. 474; *Fowlkes v. Wagoner*, (Tenn. Ch. 1898) 46 S. W. Rep. 586.

**501. 2. Creation — No Particular Words Required.** — *Union College v. New York*, 65 N. Y. App. Div. 553, affirmed 173 N. Y. 38; *Shuman v. Heldman*, 63 S. Car. 474; *Fowlkes v. Wagoner*, (Tenn. Ch. 1898) 46 S. W. Rep. 586; *Glocke v. Glocke*, 113 Wis. 303.

**3. Apt Words.** — *Hunter v. Murfee*, 126 Ala. 123; *Brennan v. Brennan*, 185 Mass. 560, 102 Am. St. Rep. 363; *Union College v. New York*, 65 N. Y. App. Div. 553, affirmed 173 N. Y. 38; *Helms v. Helms*, 135 N. Car. 164; *Brown v. Tilley*, 25 R. I. 579; *Shuman v. Heldman*, 63 S. Car. 474; *Fowlkes v. Wagoner*, (Tenn. Ch. 1898) 46 S. W. Rep. 586.

**6. Clause of Re-entry or Provision for Forfeiture.** — *Brown v. Chicago, etc., R. Co.*, (Iowa 1900) 82 N. W. Rep. 1003.

**No Clause of Re-entry Necessary.** — *Glocke v. Glocke*, 113 Wis. 303.

"While the presence of a clause of re-entry is not essential to the creation of a condition subsequent, the absence of such a clause, in connection with other circumstances, tends to sustain the construction that a covenant rather than a condition was intended." *Harrison, J.*, in *King v. Norfolk, etc., R. Co.*, 99 Va. 625, 3 Va. Sup. Ct. 435.

**9. Words Declaratory of the Purpose of the Conveyance.** — *Stuart v. Easton*, 170 U. S. 383; *Downen v. Rayburn*, 214 Ill. 342, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 501; *Rankin*

*Regular Baptist Church v. Edwards*, 204 Pa. St. 216; *Congregation Shaarai Shomayim v. Moss*, 22 Pa. Super. Ct. 356; *Huron v. Wilcox*, 17 S. Dak. 625.

**502. 3. Parol Evidence.** — *Weller v. Noffsinger*, 57 Neb. 455. But see *Medical College Laboratory v. State University*, 76 N. Y. App. Div. 48, affirmed 178 N. Y. 153.

**5. Construction — Intention Governs.** — *United States*. — *Sherman v. American Cong. Assoc.*, (C. C. A.) 113 Fed. Rep. 609; *Thornton v. Natchez*, (C. C. A.) 129 Fed. Rep. 84.

*Florida*. — *Silver Springs, etc., R. Co. v. Van Ness*, (Fla. 1903) 34 So. Rep. 884.

*Georgia*. — *Harrison v. Harrison*, 105 Ga. 517, 70 Am. St. Rep. 60.

*Illinois*. — *Peters v. Balke*, 170 Ill. 304; *Henderson v. Harness*, 176 Ill. 302.

*Indiana*. — *Van Horn v. Mercer*, 29 Ind. App. 277.

*Iowa*. — *Brown v. Chicago, etc., R. Co.*, (Iowa 1900) 82 N. W. Rep. 1003.

*Michigan*. — *Detroit Union R. Depot, etc., Co. v. Ft. Street Union Depot Co.*, 128 Mich. 191, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 502.

*Missouri*. — *Gratz v. Highland Scenic R. Co.*, 165 Mo. 218.

*New Hampshire*. — *Colby v. Dean*, 70 N. H. 591.

*New York*. — *Morehouse v. Morehouse*, 33 N. Y. App. Div. 250, affirmed 161 N. Y. 654; *Williams v. Jones*, 166 N. Y. 522.

*North Carolina*. — *Helms v. Helms*, 135 N. Car. 164.

*Pennsylvania*. — *Crofton v. St. Clement's Church*, 208 Pa. St. 209.

*Rhode Island*. — *Pierce v. Brown University*, 21 R. I. 392.

*South Carolina*. — *Shuman v. Heldman*, 63 S. Car. 474.

*Tennessee*. — *Overton v. Lea*, 108 Tenn. 505.

*Vermont*. — *In re Pierpoint*, 72 Vt. 204.

*Virginia*. — *King v. Norfolk, etc., R. Co.*, 99 Va. 625, 3 Va. Sup. Ct. 435.

*Wisconsin*. — *Wanner v. Wanner*, 115 Wis. 196.

**6. Intention Manifested Expressly or by Implication.** — *Lowman v. Crawford*, 99 Va. 688.

**502.** Covenants — Where Intention Doubtful. — See notes 8, 9.

**503.** Conditions Precedent and Subsequent. — See notes 1, 2, 4, 5.

**III. DISTINCTIONS** — 1. Condition Subsequent and Covenant. — See note 6.

**504.** 2. Condition Subsequent and Conditional Limitation. — See note 1.

3. Condition Precedent and Contingency. — See note 2.

**IV. GENERAL NATURE OF CONDITIONS SUBSEQUENT.** — See notes 7, 8, 10.

**502.** 8. Condition and Covenant May Be Created by the Same Words. — Brown v. Chicago, etc., R. Co., (Iowa 1900) 82 N. W. Rep. 1003.

9. Conditions Are Not Favored and Are Strictly Construed — United States. — Los Angeles University v. Swarth, (C. C. A.) 107 Fed. Rep. 798; Thornton v. Natchez, (C. C. A.) 129 Fed. Rep. 84.

Alabama. — Hunter v. Murfee, 126 Ala. 123.

California. — Quatman v. McCray, 128 Cal. 285; Behlow v. Southern Pac. R. Co., 130 Cal. 16.

Florida. — Silver Springs, etc., R. Co. v. Van Ness, (Fla. 1903) 34 So. Rep. 884.

Georgia. — Harrison v. Harrison, 105 Ga. 517, 70 Am. St. Rep. 60.

Illinois. — Rubens v. Hill, 213 Ill. 523, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 502.

Indiana. — Van Horn v. Mercer, 29 Ind. App. 277.

Iowa. — Bonniwell v. Madison, 107 Iowa 85; Brown v. Chicago, etc., R. Co., (Iowa 1900) 82 N. W. Rep. 1003.

Kentucky. — Carroll County Academy v. Galatin Academy Co., 104 Ky. 621.

Maryland. — Ellicott v. Ellicott, 90 Md. 321, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 502.

Michigan. — Detroit Union R. Depot, etc., Co. v. Ft. Street Union Depot Co., 128 Mich. 191, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 502.

Missouri. — Gratz v. Highland Scenic R. Co., 165 Mo. 218.

North Carolina. — Helms v. Helms, 135 N. Car. 164.

Rhode Island. — Brown v. Tilley, 25 R. I. 579.

South Dakota. — Huron v. Wilcox, 17 S. Dak. 625.

Tennessee. — Fowlkes v. Wagoner, (Tenn. Ch. 1898) 46 S. W. Rep. 586.

Texas. — Long v. Moore, 19 Tex. Civ. App. 363.

Virginia. — King v. Norfolk, etc., R. Co., 99 Va. 625, 3 Va. Sup. Ct. 435; Lowman v. Crawford, 99 Va. 688.

Wisconsin. — Glocke v. Glocke, 113 Wis. 303.

**503.** 1. Condition Precedent and Condition Subsequent May Be Created by the Same Words — Shuman v. Heldman, 63 S. Car. 474.

2. Intention Governs Construction. — Lewis v. Lewis, 74 Conn. 630, 92 Am. St. Rep. 240; Brown v. Chicago, etc., R. Co., (Iowa 1900) 82 N. W. Rep. 1003; Smith v. Smith, 64 Neb. 563; Baker v. Woman's Christian Temperance Union, 57 N. Y. App. Div. 290; Shuman v. Heldman, 63 S. Car. 474.

4. If the Act or the Event Must Precede the Vesting of the Estate the Condition Is Precedent. — Carloss v. Oxford, 72 Ark. 310.

Illustrations. — A devise to take effect on condition that the devisee shall claim the property devised within three years from the testator's death is a devise on a condition precedent, and noncompliance with the condition prevents the vesting of the estate, though the devisee does not learn of the devise until after the lapse of the specified three years. Horrigan v. Horrigan, (1904) 1 Ir. R. 29.

5. Otherwise the Condition Is Subsequent. — Lewis v. Lewis, 74 Conn. 630, 92 Am. St. Rep. 240, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 503; Ellicott v. Ellicott, 90 Md. 321, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 503; Smith v. Smith, 64 Neb. 563.

6. Distinctions — Condition Subsequent and Covenant. — Robinson v. Ingram, 126 N. Car. 327; Helms v. Helms, 135 N. Car. 164; Teague v. Teague, 22 Tex. Civ. App. 443.

**504.** 1. Condition Subsequent and Conditional Limitation. — In re Hollis's Hospital, (1899) 2 Ch. 540, 81 L. T. N. S. 90.

2. Condition Precedent and Contingency. — Sigur v. Burguières, 111 La. 1077, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504.

7. Definite or Certain. — Jeffreys v. Jeffreys, 84 L. T. N. S. 417; Howlett v. Howlett, 115 Mich. 75; Streib's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 346, 14 York Leg. Rec. 189; Huron v. Wilcox, 17 S. Dak. 625; King v. Norfolk, etc., R. Co., 99 Va. 625, 3 Va. Sup. Ct. Rep. 435; Lowman v. Crawford, 99 Va. 688.

Illustrations. — A condition is void for uncertainty which provides that the devise shall be forfeited if the devisee "shall in any way associate, correspond, or visit with any of my present wife's nephews or nieces." Jeffreys v. Jeffreys, 84 L. T. N. S. 417.

Where the testator devised in fee, provided the devisee "comes to live and reside on the land devised during the term of his natural life" with gift over "provided devisee does not come to reside on the said land so devised to him within one year after my decease," it was held that the condition was void for uncertainty, and that the devisee should be relieved from its performance. In re Ross, 7 Ont. L. Rep. 493.

8. Must Be Reasonable. — Gratz v. Highland Scenic R. Co., 165 Mo. 218, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504.

10. Not Repugnant. — Freeman v. Phillips, 113 Ga. 589; Jones v. Port Huron Engine, etc., Co., 171 Ill. 502; Henderson v. Harness, 176 Ill. 302; Walker v. Shepard, 210 Ill. 100; Teaney v. Mains, 113 Iowa 53; Whittemore v. Woodlawn Cemetery, 71 N. Y. App. Div. 268, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504; Toledo Loan Co. v. Larkin, 25 Ohio Cir. Ct. 209; Jenkins v. Artz, 6 Ohio Dec. 439; Sprinkle v. Leslie, (Tex. Civ. App. 1904) 81 S. W. Rep. 1018.

**504. V. PERFORMANCE OF CONDITIONS — 1. Manner of Performance — A Condition Precedent.** — See note 11.

**505. And Where Such Condition Is Copulative.** — See note 1.

**2. Time of Performance — Conditions Precedent.** — See note 5.

**In the Absence of an Express Limitation.** — See note 7.

**4. Who Must Perform.** — See note 12.

**506. 5. Impossible Conditions — Conditions Precedent.** — See note 2.

**Conditions Subsequent.** — See notes 4, 8.

**VI. BREACH — WHO MAY TAKE ADVANTAGE OF.** — See note 11.

**508. See notes 1, 3.**

**504. 11. Performance — Condition Precedent Must Be Strictly Performed.** — *Haynesworth v. Adler*, 139 Ala. 173, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504; *Goff v. Pensenhafner*, 190 Ill. 200.

**505. 1. Copulative Condition Precedent Must Be Performed in Toto.** — *Haynesworth v. Adler*, 139 Ala. 173, *quoting* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 505.

**5. No Estate Vests until Condition Precedent Is Performed.** — *Shuman v. Heldman*, 63 S. Car. 474.

**7. In the Absence of an Express Limitation a Condition Subsequent Must Be Performed in a Reasonable Time.** — *Colby v. Dean*, 70 N. H. 591; *Bouvier v. Baltimore*, etc., R. Co., 65 N. J. L. 313, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 505; *Union College v. New York*, 65 N. Y. App. Div. 553, *affirmed* 173 N. Y. App. Div. 38; *Pierce v. Brown University*, 21 R. I. 392.

**12. Person Accepting Estate Must Perform Condition.** — *Huber v. Hess*, 191 Ill. 318, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 505; *Leach v. Raines*, 149 Ind. 152; *Bird v. Hawkins*, 58 N. J. Eq. 229; *McDade v. Spencer*, 6 Lack. Leg. N. (Pa.) 84; *Ledebeuhr v. Wisconsin Trust Co.*, 112 Wis. 657.

A will directed the executor to pay from the testator's estate "the mortgage indebtedness of my half brother W., upon his house, whenever that indebtedness shall be reduced by him so that not more than fifteen hundred dollars is due thereon." This was held to be a bequest on condition, and W. having died without performing the condition of reducing the indebtedness to fifteen hundred dollars, his estate could not claim the legacy. *Brown v. Ferren*, (N. H. 1904) 58 Atl. Rep. 870.

**Purchaser of Conditional Estate.** — One who acquired a conditional estate by foreclosure proceedings against the grantee, was bound by the conditions. *Kelly v. Nypano R. Co.*, 200 Pa. St. 229, 86 Am. St. Rep. 715.

**506. 2. Performance of Condition Precedent.** — *Matter of Kennedy*, (Surrogate Ct.) 25 Misc. (N. Y.) 257.

**4. Performance of Condition Subsequent Rendered Impossible by Act of God.** — *In re Greenwood*, (1903) 1 Ch. 749, 88 L. T. N. S. 212, *reversing* (1902) 1 Ch. 198, 86 L. T. N. S. 500; *Sherman v. American Cong. Assoc.*, (C. C. A.) 113 Fed. Rep. 609; *Fields v. Lewis*, 118 Ga. 577, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 506; *Ellicott v. Ellicott*, 90 Md. 321, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 506; *Streib's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 346, 14 York Leg. Rec. 189; *Stark v. Conde*, 100 Wis. 633.

**8. See** *Harrison v. Harrison*, 105 Ga. 517, 70 Am. St. Rep. 60.

**11. Maintenance and Support.** — Where one took a conveyance on the express condition that he support the grantor, he was obliged to do so either at home or elsewhere, and a court of equity would consider the granted estate held in trust for that purpose. *Cornell v. Whitney*, 132 Mich. 300, 9 Detroit Leg. N. 600; *Woolcott v. Woolcott*, 133 Mich. 643, 10 Detroit Leg. N. 333. See also *Bacon v. Gibbs*, 4 Ohio Dec. (Reprint) 23, Cleve. L. Rec. 25; *Leduc v. Booth*, 5 Ont. L. Rep. 68.

**Under a Name and Arms Proviso**, directing a person entitled under the limitations created by the will to take on himself and use in all deeds or writings which he should sign, and on all occasions a particular surname "alone or together with his \* \* \* family surname," it was held that a person so becoming entitled has the option of placing the assumed surname before or after his own surname. *In re Eversley*, (1900) 1 Ch. 96, 81 L. T. N. S. 600, *distinguishing* *D'Eyncourt v. Gregory*, 1 Ch. D. 441. In order to comply with a clause in a will requiring the devisee of an estate thereunder to "lawfully assume" a certain name and arms, on penalty of forfeiting the estate, such devisee must take some active steps to obtain a legal title to the arms, as the testator by the use of the word "lawfully" must be taken to have intended something more than merely "assume." *In re Croxon*, (1904) 1 Ch. 252. Where the condition of a devise in remainder to a person and his heirs was that the devisee should take and use the testator's name, it was held that it was a condition subsequent to be performed by the devisee when he became entitled to possession on the termination of the life estate, and that on the death of the devisee before the death of the life tenant the condition was, by the act of God, rendered impossible of performance, so that the devise took effect free from the condition. *In re Greenwood*, (1903) 1 Ch. 749, 88 L. T. N. S. 212, *reversing* (1902) 2 Ch. 198, 86 L. T. N. S. 500.

**508. 1. Grantor or His Heirs Only May Take Advantage of a Breach — Illinois.** — *Waggoner v. Wabash R. Co.*, 185 Ill. 159, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508.

*Iowa.* — *Brown v. Chicago*, etc., R. Co., (Iowa 1900) 82 N. W. Rep. 1003.

*Massachusetts.* — *Clapp v. Wilder*, 176 Mass. 332.

*Missouri.* — *Hoselton v. Hoselton*, 166 Mo. 182.  
*Nebraska.* — *Jetter v. Lyon*, (Neb. 1903) 97 N. W. Rep. 596.

**508. VII. RELEASE OR WAIVER.** — See note 5.

Express or Implied. — See notes 6, 7.

**509. VIII. PARTICULAR CONDITIONS** — 1. **Restraints on Alienation** — **Unlimited Restraints.** — See note 1.

Limited Restraints — Conflict of Opinion. — See note 4.

**512.** See note 1.2. **Restraints of Marriage.** — See notes 2, 3, 4.

*New York.* — *Whittemore v. Woodlawn Cemetery*, 71 N. Y. App. Div. 268, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508; *Archibald v. New York Cent., etc.*, R. Co., 157 N. Y. 574; *Berenbroick v. St. Luke's Hospital*, 23 N. Y. App. Div. 339, appeal dismissed 155 N. Y. 655.

*South Carolina.* — *Beaufort First Presb. Church v. Elliott*, 65 S. Car. 251.

*Tennessee.* — *Fowlkes v. Wagoner*, (Tenn. Ch. 1898) 46 S. W. Rep. 586.

*Texas.* — *Teague v. Teague*, 22 Tex. Civ. App. 443; *Houston, etc., R. Co. v. Ennis-Calvert Compress Co.*, 23 Tex. Civ. App. 441.

*Wisconsin.* — *Wanner v. Wanner*, 115 Wis. 196; *Connor v. Sheridan*, 116 Wis. 666.

*Canada.* — *Clark v. Vancouver*, 10 British Columbia 31.

**In Mississippi an Assignee May Take Advantage of a Right of Entry.** — *Wright v. Hardy*, 76 Miss. 524.

**Assignment by Grantor Before Revesting of Estate.** — On the grant of a fee simple, defeasible on breach of a condition, no estate is left in the grantor but only a possibility of reverter, and therefore, before breach of the condition, there is nothing capable of assignment. After breach of the condition, where the deed does not provide for *ipso facto* forfeiture, the fee does not revert automatically, nor until the grantor has taken the proper step by suit or otherwise, and until it does revert there is nothing capable of assignment. Hence, where land was conveyed subject to certain conditions, the purchasers were to hold the land in trust for the grantor and reconvey to him, and the conditions were not performed, it was held, in an action by grantor's assignee for a declaration that the purchasers held the land in trust for him and for an order for the conveyance thereof to him, that no action lay. *Clark v. Vancouver*, 10 British Columbia 31.

**508. 3. Election May Be Signified by Re-entry or an Equivalent Act.** — *Van Horn v. Mercer*, 29 Ind. App. 277; *Bonniwell v. Madison*, 107 Iowa 85; *Whittemore v. Woodlawn Cemetery*, 71 N. Y. App. Div. 268, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508; *Union College v. New York*, 65 N. Y. App. Div. 553, affirmed 173 N. Y. 38; *Matter of Woods*, (Surrogate Ct.) 33 Misc. (N. Y.) 12, affirmed 61 N. Y. App. Div. 587; *Meginnis v. Knickerbocker Ice Co.*, 112 Wis. 385.

"A breach of condition would not operate *ipso facto* to revest the estate in the grantor. The title conveyed would not thereby become void. It would become voidable only at the election of the grantor or his heirs, or such other person as by statute was empowered to make the election, and upon the doing of that which the law requires to effectuate such election." *Lewis v. Lewis*, 74 Conn. 630, 92 Am. St. Rep. 240.

**5. Release or Waiver.** — *Van Horn v. Mercer*, 29 Ind. App. 277; *Bonniwell v. Madison*, 107 Iowa 85; *Johnson Co. v. Covats*, 12 Ohio Cir. Dec. 166, 22 Ohio Cir. Ct. 206.

**6. Release or Waiver May Be Express or Implied.** — *Smith v. American Crystal Monument Co.*, 29 Ind. App. 308; *Huntingdon v. Titus*, 50 N. Y. App. Div. 468, affirmed 169 N. Y. 579; *Union College v. New York*, 65 N. Y. App. Div. 553, affirmed 173 N. Y. 38; *Meginnis v. Knickerbocker Ice Co.*, 112 Wis. 385.

**7. Silent Acquiescence or Parol Assent Is Not Effective.** — *Van Horn v. Mercer*, 29 Ind. App. 277; *Union College v. New York*, 65 N. Y. App. Div. 553, affirmed 173 N. Y. 38; *Meginnis v. Knickerbocker Ice Co.*, 112 Wis. 385.

**509. 1. Unlimited Restraints on Alienation in Conveyances in Fee.** — *In re Hollis' Hospital*, (1899) 2 Ch. 540, 81 L. T. N. S. 90; *Freeman v. Phillips*, 113 Ga. 589; *Fowlkes v. Wagoner*, (Tenn. Ch. 1898) 46 S. W. Rep. 586; *Walker v. Shepard*, 210 Ill. 100.

Specifications as to the use a beneficiary shall make of an estate left in trust for him are valid even if alienation of the estate is thereby prevented. *Schoeneich v. Field*, 73 Mo. App. 452.

**4. Till Devisee Thirty-five Years Old.** — A devise to an infant prohibiting alienation until the devisee should reach the age of thirty-five was held to be a valid restriction (*following Stewart v. Brady*, 3 Bush (Ky.) 623, cited in the original note). *Wallace v. Smith*, 113 Ky. 263. And see the title RESTRAINTS ON ALIENATION.

**512. 1. Restraints of Alienation in Conveyances for Life.** — *Lewis v. Lewis*, 76 Conn. 586; *Simonton v. White*, 93 Tex. 50, 77 Am. St. Rep. 824. See also *In re Cotgrave*, (1903) 2 Ch. 705, 72 L. J. Ch. 777, 89 L. T. N. S. 433; *In re Tancred*, (1903) 1 Ch. 715, 72 L. J. Ch. 324, 88 L. T. N. S. 164, 51 W. R. 510; *Polzin v. Polzin*, 110 Ill. App. 187. But see *Henderson v. Harness*, 176 Ill. 302.

**2. Unlimited Restraints of Marriage Generally.** — *Kennedy v. Alexander*, 21 App. Cas. (D. C.) 424; *Re Hamilton*, 1 Ont. L. Rep. 10.

The case of *Ransdell v. Boston*, 172 Ill. 439, makes a distinction between conditions precedent and subsequent, holding that a precedent condition in restraint of marriage defeats the estate absolutely, as no estate vests until the condition is performed.

**3. Restraint of Marriage of Husband or Wife.** — *Bennett v. Packer*, 70 Conn. 357, 66 Am. St. Rep. 112; *Bruch's Estate*, 185 Pa. St. 194; *Leonard v. Leonard*, 1 N. Bruns. Eq. Rep. 576; *Re Deller*, 6 Ont. L. Rep. 711.

**Restraint of Marriage of a Widow Valid.** — "It is well settled, by the decisions in this state that the rule against restraint upon marriage does not apply to widows." *Overton v. Lea*, 108 Tenn. 505.



**512. 3. Conditions Promotive of Domestic Infelicity.** — See note 5.

**4. Provisions Against Contesting Wills or Making Claims Against Estates.** — See note 6.

**513. 6. Prohibitions of and Limitations to Particular Uses of Property.** — See note 1.

**7. Building Restrictions in the Form and Nature of Conditions.** — See note 2.

## IX. RESTRICTIONS AND STIPULATIONS. — See note 3.

**512. 4. Class.** — Compare *In re Chapman*, (1904) 1 Ch. 431.

**5. Conditions Promotive of Domestic Infelicity.** — *Wright v. Mayer*, 47 N. Y. App. Div. 604; *Cruger v. Phelps*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 252; *Witherspoon v. Brokaw*, 85 Mo. App. 169. See also *Harrison v. Harrison*, 105 Ga. 517, 70 Am. St. Rep. 60.

Where an estate was left in trust until the beneficiary should become unmarried the condition was not against public policy nor void, since a divorce suit was already pending. *Ransdell v. Boston*, 172 Ill. 439.

Where an estate was conditioned, 'with remainder over in fee to the deviser's daughter on the death of the husband or divorce from him, the condition was not void as promotive of domestic trouble. *Ellis v. Birkhead*, 30 Tex. Civ. App. 529.

**6. Provisions Against Contesting Wills or Making Claims Against Estates.** — *Smithsonian Inst. v. Meech*, 169 U. S. 398; *Nevitt v. Woodburn*, 190 Ill. 283; *Scott v. Ives*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 749.

**Justifiable Litigation Does Not Work a Forfeiture.** — *Lynn's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 258; *Friend's Estate*, 209 Pa. St. 442; *Lynn's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 164.

**513. 1. Prohibitions of Particular Uses of Property.** — *Sicotte v. Martin*, 20 Quebec Super. Ct. 36; *U. S. v. Certain Lands*, etc., 112 Fed. Rep. 622; *Ivarson v. Mulvey*, 179 Mass. 141; *Jetter v. Lyon*, (Neb. 1903) 97 N. W. Rep. 596; *Sonn v. Heilberg*, 38 N. Y. App. Div. 515; *Bohnsack v. McDonald*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 493; *Moller v. Presbyterian Hospital*, 65 N. Y. App. Div. 134; *White v. Collins Bldg.*, etc., Co., 82 N. Y. App. Div. 1; *Johnson Co. v. Covats*, 12 Ohio Cir. Dec. 166, 22 Ohio Cir. Ct. 206; *Gilmore v. Times Pub. Co.*, 18 Pa. Super. Ct. 363; *Anderson v. Rowland*, 18 Tex. Civ. App. 460.

**Limitations to the Use of Property—Court-house Purposes.** — A provision in a deed to a municipality that no building other than a city hall shall ever be erected on the land conveyed merely declares the use and does not impose a condition where no words of re-entry or forfeiture are used. *Ecroyd v. Coggeshall*, 21 R. I. 1.

**School House.** — Where a deed made provision for a seminary of learning, and reversion on breach, failure of the grantor to object to a school of another sort that was established will act as a waiver of the condition and he may not object to the discontinuance of the school. *Maddox v. Adair*, (Tex. Civ. App. 1901) 66 S. W. Rep. 811; *Union College v. New York*, 65 N. Y. App. Div. 553, *affirmed* 173 N. Y. 38.

**Market Purposes.** — Where a lot was con-

veyed to a city for market purposes, it does not revert to the grantor for nonuser. *Hand v. St. Louis*, 158 Mo. 204.

**Streets.** — A deed conveying property "as and for a public street of said city" does not make the estate conveyed subject to a condition. *Avery v. U. S.*, (C. C. A.) 104 Fed. Rep. 711.

**Depot Purposes.** — *Tift v. Savannah, etc., R. Co.*, 103 Ga. 580.

**A Conveyance to a Charitable Use**, conditioned that the property should revert to the bargainor if used by the bargainee for any purposes other than those specified, was held to create a condition which was void as obnoxious to the rule against perpetuities. *In re Hollis' Hospital*, (1899) 2 Ch. 540, 81 L. T. N. S. 90.

**2. Building Restrictions in the Form and Nature of Conditions.** — *Sutcliffe v. Eisele*, 62 N. J. Eq. 222; *Papst v. Hamilton*, 133 Cal. 631.

**3. Restrictions.** — *Nelson v. Solomon*, 112 Ga. 188; *Hays v. St. Paul M. E. Church*, 196 Ill. 633; *Ewertsen v. Gerstenberg*, 186 Ill. 344; *Hazen v. Mathews*, 184 Mass. 388; *Boston Baptist Social Union v. Boston University*, 183 Mass. 202; *Bacon v. Sandberg*, 179 Mass. 396; *Best v. Nagle*, 189 Mass. 495; *Clapp v. Wilder*, 176 Mass. 332; *Compton Hill Imp. Co. v. Tower*, 158 Mo. 282; *Russell v. Harpel*, 10 Ohio Cir. Dec. 732, 20 Ohio Cir. Ct. 127; *Schubert v. Eastman Realty Co.*, 25 Ohio Cir. Ct. 336; *Vetter v. Flaherty*, 4 Lack. Leg. N. (Pa.) 175; *Frantz v. Weaver*, 13 Pa. Dist. 124, *quoting* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 513.

Where the deed recited that the trustees of a school had decided that the land of the grantor had been selected "as a proper place for the building of said academy and as a permanent site for the same," there was no condition imposed that the site should always be used for school purposes. *Fuquay v. Hopkins Academy*, 58 S. W. Rep. 814, 22 Ky. L. Rep. 744.

A clause in a deed requiring that no building be erected within ten feet of the street is a restriction and not a condition. *Cassidy v. Mason*, 171 Mass. 507.

**Restrictions Must Be in Accordance with General Plan of Improvement.** — *Haines v. Einwachter*, (N. J. 1903) 55 Atl. Rep. 38; *Hemsley v. Marlborough Hotel Co.*, 65 N. J. Eq. 167. See also *Summers v. Beeler*, 90 Md. 474, 78 Am. St. Rep. 446; *Safe Deposit, etc., Co. v. Flaherty*, 91 Md. 480; *Schwoerer v. Leo*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 505, *affirmed* 83 N. Y. App. Div. 643.

**Restrictions Not Binding on Purchaser Without Notice.** — *Standard Land, etc., Co. v. Schanz*, (N. J. 1901) 51 Atl. Rep. 620.

**Apartment House and Restaurant — A Residence.** — See *McMurtry v. Phillips Invest. Co.*, 103 Ky. 308.

**514.** See note 1.**X. CONDITIONAL LIMITATIONS** — 1. Definition. — See note 3.

4. Breach. — See note 6.

5. Particular Limitations — *a.* LIMITATIONS TO WIDOWHOOD OR WIDOWERHOOD. — See note 7.**515.** *b.* LIMITATIONS UPON INSOLVENCY, ETC. — See note 2.*d.* LIMITATIONS UPON DEATH WITHOUT ISSUE. — See note 4.**XI. EXCEPTIONS AND RESERVATIONS** — 1. Definitions — An Exception. — See note 5.*A* Reservation. — See note 6.

3. Creation — Apt Terms. — See note 8.

**516.** For Whose Benefit Created. — See note 1.**517.** 6. Particular Instances — *b.* PROVISIONS IN REGARD TO TIMBER — Right to Cut Timber for Particular Time. — See note 3.**518.** CONDUCT. — See note 1.

**Breach** — Illustrations. — Where a deed contained a restriction that the grantee should put up no house for less than \$1,200 on the lot conveyed, he was not allowed to move a shabby four-hundred-dollar house on the lot, and having done so was liable as provided in the deed. *Quatman v. McCray*, 128 Cal. 285.

A breach of restriction as to the building line was enjoined although the neighborhood had changed from a residential to a business section. *Zipp v. Barker*, (Supm. Ct. Spec. T.) 55 N. Y. Supp. 246, affirmed 166 N. Y. 621; *Vetter v. Flaherty*, 4 Lack. Leg. N. (Pa.) 175.

Where a deed restricted a lot by providing that only one house should be erected the grantee was enjoined from building two houses thereon. *Gamm v. Renner*, 59 N. J. Eq. 307.

Where a deed to a church restricted the lot to its use as a site for a dwelling house, the church could not build a parish house even though some of the clergy were to reside therein and though it was arranged with conveniences as a dwelling house. *Crofton v. St. Clements' Church*, 208 Pa. St. 209.

Where a restriction is created in favor of one lot the owner of the servient lot cannot rid it of the condition by granting it free from the condition. *Hansell v. Downing*, 17 Pa. Super. Ct. 235.

**Stipulations.** — American Unitarian Assoc. v. Minot, 185 Mass. 589; *McCusker v. Goode*, 185 Mass. 607; *Frink v. Hughes*, 133 Mich. 63, 10 Detroit Leg. N. 106; *Levy v. Schreyer*, 177 N. Y. 293; *Barney v. Everard*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 648.

Where a deed conveyed an acre of land in a farm stipulating that it must be kept fenced in, a subsequent grantee of the lot is liable to a subsequent grantee of the farm for the cost of erecting a fence. *Patten v. Patten*, 68 N. H. 603.

A stipulation that a railroad shall maintain a station is not complied with by the erection of an uncovered platform on a side track. *Arkansas Cent. R. Co. v. Smith*, 71 Ark. 189.

**514. 1. Restrictions As Strictly Construed.** — *Quatman v. McCray*, 128 Cal. 285.

3. Definition. — *Fowlkes v. Wagoner*, (Tenn. Ch. 1898) 46 S. W. Rep. 586; *Connor v. Sheridan*, 116 Wis. 666.

6. *Fowlkes v. Wagoner*, (Tenn. Ch. 1898) 46 S. W. Rep. 586; *Methodist Protestant Church v. Young*, 130 N. Car. 8; *Connor v. Sheridan*, 116 Wis. 666; *Hoselton v. Hoselton*, 166 Mo. 182.

7. Particular Provisions — Limitations to Widowhood or Widowerhood. — *Re Rowland*, 86 L. T. N. S. 78; *In re Howard*, (1901) 1 Ch. 412, 70 L. J. Ch. 317, 84 L. T. N. S. 296, 49 W. R. 480; *Nicholas's Estate*, 8 Pa. Dist. 725. See also *In re Whiting*, 52 W. R. 653. Compare *In re Chapman*, (1904) 1 Ch. 431.

**515. 2. Limitations upon Insolvency, Etc.** — See *In re Cotgrave*, (1903) 2 Ch. 705; *In re Johnson*, (1904) 1 K. B. 134; *In re Baker*, (1904) 1 Ch. 157.

4. Limitations upon Death Without Issue. — *In re Ferguson*, 28 Can. Sup. Ct. 38, affirming 24 Ont. App. 61.

5. Exceptions and Reservations — Definitions — Exception. — *Mannerback v. Pennsylvania R. Co.*, 16 Pa. Super. Ct. 622, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 515.

"An exception in a deed is nothing more than a qualification, by which some part of the estate is not conveyed, which would have passed to the grantee but for the exception." *Burchard v. Walther*, 58 Neb. 542.

**Clause Construed as Exception.** — A clause in a deed "excepting and forever reserving the graveyard on the lands hereby conveyed at all times hereafter to enter thereon without hindrance or denial of the said Daniel Spang, his heirs and assigns," constitutes an exception saving to the grantor the fee of the land used as a graveyard, and does not as a reservation create merely an easement in the land. *Mannerback v. Pennsylvania R. Co.*, 16 Pa. Super. Ct. 622.

6. Reservation. — *Mannerback v. Pennsylvania R. Co.*, 16 Pa. Super. Ct. 622, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 515.

8. Creation. — *Hodges v. Buell*, 134 Mich. 162, 10 Detroit Leg. N. 410.

**516. 1. Created by and for the Benefit of the Grantor or His Heirs Only.** — *Burchard v. Walther*, 58 Neb. 542, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 516.

**517. 3. Limited Reservation of Right to Cut and Remove Timber.** — *Hodges v. Buell*, 134 Mich. 162, 10 Detroit Leg. N. 410.

**518. 1.** In *Wampol v. Kountz*, 14 S. Dak. 334, the court said: "Conduct, when applied to a person in its relation to the modern doctrine of equitable estoppel, embraces not only ideas conveyed by words written or spoken and things actually done, but it includes the silence of such person and his omission to act, as well."

# CONFESSIONS.

By J. E. BRADY.

## 521. I. DEFINITION AND GENERAL CONSIDERATIONS. — See note 1.

As Distinguished from Statements or Declarations. — See notes 2, 3.

As Distinguished from Admissions. — See note 4.

## 522. Statements as to Facts Tending to Establish Guilt. — See note 1.

## 523. Extra-judicial Confessions. — See note 3.

Instances of Confessions or Admissions Implied from Conduct. — See note 8.

## 524. See note 1.

Silence of Accused. — See note 5.

## 525. Reason of Inference. — See note 1.

## II. ADMISSIBILITY — 1. Necessity of Voluntary Character — a. EXTRA-JUDICIAL CONFESSIONS — (1) *Rule Stated*. — See note 2.

**521. 1. Confession Defined.** — *Travers v. U. S.*, 6 App. Cas. (D. C.) 450; *Owens v. State*, 120 Ga. 296; *Johnson v. People*, 197 Ill. 51, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 521; *Michaels v. People*, 208 Ill. 607, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 520 [521]; *State v. Novak*, 109 Iowa 727, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 521; *State v. Porter*, 32 Oregon 135; *State v. Nagle*, 25 R. I. 105, 105 Am. St. Rep. 864.

**2. Confession Distinguished from Declaration.** — *Michaels v. People*, 208 Ill. 607, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 520 [521].

**3. Must Be Inculpatory.** — *People v. Ashmead*, 118 Cal. 508; *State v. Picton*, 51 La. Ann. 624, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 521; *State v. Novak*, 109 Iowa 717, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 521. Compare *Rex v. Martin*, 9 Ont. L. Rep. 218, holding that on a joint trial of husband and wife for the murder of their child, a statement made by the wife exculpating herself and inculpatory her husband was admissible, on the ground that if such statement "connects or tends to connect the accused, either directly or indirectly, with the commission of the crime charged, it cannot be excluded on the ground that it is not a plenary confession."

**Confession After Inculpatory Statement.** — Where one of two prisoners, in custody on a charge against them jointly, has voluntarily made and signed a statement implicating the other, and such statement is read over to the prisoner implicated, and the latter, after being cautioned, makes a confession which is taken down in writing, and which he signs when it is so written, the inculpatory statement of the first prisoner and the confession of the other prisoner may be given in evidence on the trial of the latter. *Reg. v. Hirst*, 18 Cox C. C. 374.

**4. Confessions as Distinguished from Admissions.** — *People v. Miller*, 122 Cal. 84; *Powell v. State*, 101 Ga. 9, 65 Am. St. Rep. 277; *Michaels v. People*, 208 Ill. 607, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 520 [521]; *State v. Novak*, 109 Iowa 727, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 521; *State v. Picton*, 51 La. Ann. 624; *State v. Porter*, 32 Oregon 135.

**522. 1. Statement as to Facts Tending to Establish Guilt.** — *People v. Miller*, 122 Cal. 84; *Michaels v. People*, 208 Ill. 607; *Johnson v. People*, 197 Ill. 51; *State v. Novak*, 109 Iowa 727, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 522; *State v. Picton*, 51 La. Ann. 624, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 522. See also *State v. Force*, (Neb. 1903) 95 N. W. Rep. 42.

**523. 3. Extra-judicial Confessions Defined.** — *State v. Alexander*, 109 La. 557; *State v. Porter*, 32 Oregon 135.

**8. Instances of Confessions or Admissions Implied from Conduct.** — *Com. v. Devaney*, 182 Mass. 33.

**Removing Shoe for Purposes of Experiment.** — Where the accused at the command of the sheriff removed his shoe, which the sheriff then placed in a track found near the scene of a crime and found the shoe to fit the track exactly, this act was held not to be one "in the nature of a confession." *Guerrero v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1001. See generally the title EXPERIMENTS (IN EVIDENCE).

**524. 1. Implication from Flight, Escape, or Concealment.** — *Funk v. U. S.*, 16 App. Cas. (D. C.) 478. See also *Cleavinger v. State*, 43 Tex. Crim. 273.

**5. Implication from Silence.** — See *Bram v. U. S.*, 168 U. S. 532; *Davis v. State*, 131 Ala. 17, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 524; *Joiner v. State*, 119 Ga. 315. See also *Geiger v. State*, 70 Ohio St. 400.

**Statement of One Codefendant in Presence of Other.** — See *State v. McCullum*, 18 Wash. 393.

**525. 1. Reason of Implication.** — *Davis v. State*, 131 Ala. 17, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 525.

**2. Confessions Must Be Voluntary — England.** — *Reg. v. Rose*, 18 Cox C. C. 717, 67 L. J. Q. B. 289, 78 L. N. S. 119.

*Canada.* — *Re Ockerman*, 2 Can. Crim. Cas. (British Columbia) 262; *Reg. v. Pah-cah-pah-ne-capi*, 4 Can. Crim. Cas. (N. W. Ter.) 93; *Reg. v. Viau*, 7 Quebec Q. B. 368, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 525.

*United States.* — *Bram v. U. S.*, 168 U. S. 532.

**527. Reason of Rule.** — See note 1.**(2) Effect of Inducement of Benefit.** — See note 2.

*Arkansas.* — *Hardin v. State*, 66 Ark. 53; *Sullivan v. State*, 66 Ark. 506.

*California.* — *People v. Gonzales*, 136 Cal. 666.

*Colorado.* — *Fincher v. People*, 26 Colo. 176.

*District of Columbia.* — *West v. U. S.*, 20 App. Cas. (D. C.) 347.

*Georgia.* — *Morgan v. State*, 120 Ga. 499; *Fuller v. State*, 109 Ga. 809.

*Idaho.* — *State v. Davis*, 6 Idaho 159.

*Iowa.* — *State v. Novak*, 109 Iowa 717.

*Kansas.* — *State v. Kornstett*, 62 Kan. 221.

*Kentucky.* — *Brown v. Com.*, (Ky. 1899) 49 S. W. Rep. 545; *Taylor v. Com.*, (Ky. 1897) 42 S. W. Rep. 1125; *Whitney v. Com.*, 74 S. W. Rep. 257, 24 Ky. L. Rep. 2524.

*Louisiana.* — *State v. Alexander*, 109 La. 557; *State v. Young*, 52 La. Ann. 478; *State v. Berry*, 50 La. Ann. 1309; *State v. Auguste*, 50 La. Ann. 488; *State v. Albert*, 50 La. Ann. 481.

*Maine.* — *State v. Grover*, 96 Me. 363.

*Maryland.* — *Watts v. State*, 99 Md. 30.

*Mississippi.* — *Hamilton v. State*, 77 Miss. 675; *Mackmasters v. State*, 82 Miss. 459; *Mitchell v. State*, (Miss. 1898) 24 So. Rep. 312.

*Missouri.* — See *State v. McKenzie*, 144 Mo. 40; *State v. Lipscomb*, 160 Mo. 125; *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786; *State v. Vaughan*, 152 Mo. 73; *State v. Moore*, 160 Mo. 443.

*Nebraska.* — *State v. Force*, (Neb. 1903) 95 N. W. Rep. 42.

*New Jersey.* — *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668; *Roesel v. State*, 62 N. J. L. 216; *State v. Young*, 67 N. J. L. 223.

*North Carolina.* — *State v. Davis*, 125 N. Car. 612.

*Oregon.* — *State v. McDaniel*, 39 Oregon 161.

*Pennsylvania.* — *Com. v. Wilson*, 186 Pa. St. 1, 42 W. N. C. (Pa.) 285.

*Rhode Island.* — *State v. Nagle*, 25 R. I. 105, 105 Am. St. Rep. 864.

*Texas.* — *Hamlin v. State*, 39 Tex. Crim. 579; *Greer v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 12; *Gallaher v. State*, 40 Tex. Crim. 296; *Anderson v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 581; *Ransom v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 960; *Glover v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 465; *Parker v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1008.

*Washington.* — *State v. McCullum*, 18 Wash. 394; *State v. Washing*, 36 Wash. 485.

And see the following cases in which confessions were held to be voluntary and therefore admissible:

*Alabama.* — *Plant v. State*, 140 Ala. 52; *Talbert v. State*, 140 Ala. 96; *Stevens v. State*, 138 Ala. 71; *Jones v. State*, 137 Ala. 12; *Christian v. State*, 133 Ala. 109.

*Delaware.* — *State v. Brinte*, 4 Penn. (Del.) 551.

*Indiana.* — *Ginn v. State*, 161 Ind. 292.

*Iowa.* — *State v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380.

*Louisiana.* — *State v. Gianfala*, 113 La. 463; *State v. Robertson*, 111 La. 35.

*Maryland.* — *Rogers v. State*, 89 Md. 424; *Green v. State*, 96 Md. 384.

*Massachusetts.* — *Com. v. Hudson*, 185 Mass. 402.

*Nebraska.* — *Reinoehl v. State*, 62 Neb. 619; *Coil v. State*, 62 Neb. 15; *Hills v. State*, 61 Neb. 589.

*New Jersey.* — *State v. Abbatto*, 64 N. J. L. 658; *State v. Hill*, 65 N. J. L. 626; *Brown v. State*, 62 N. J. L. 666.

*New York.* — *People v. Meyer*, 162 N. Y. 357, 14 N. Y. Crim. 487.

*North Carolina.* — *State v. Daniels*, 134 N. Car. 641.

*Ohio.* — *Wade v. State*, 25 Ohio Cir. Ct. 279.

*Pennsylvania.* — *Com. v. Eagan*, 190 Pa. St. 10; *Com. v. Epps*, 193 Pa. St. 512.

*Vermont.* — *State v. Blay*, 77 Vt. 56.

*Virginia.* — *Hite v. Com.*, 96 Va. 489.

*Wisconsin.* — *Cornell v. State*, 104 Wis. 527.

**527. 1. Reason of Rule Requiring Confessions to Be Voluntary.** — *State v. Novak*, 109 Iowa 717, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 526; *Roesel v. State*, 62 N. J. L. 216; *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668; *State v. Davis*, 125 N. Car. 612; *Rex v. Todd*, 13 Manitoba 364, 4 Can. Crim. Cas. 514.

**2. Confessions Made under Inducements of Benefit** — *England.* — *Reg. v. Rose*, 18 Cox C. C. 717, 67 L. J. Q. B. 289, 78 L. T. N. S. 119.

*Canada.* — *Reg. v. Viau*, 7 Quebec Q. B. 365; *Reg. v. Pah-cah-pah-ne-capi*, 4 Can. Crim. Cas. (N. W. Ter.) 93.

*United States.* — *Bram v. U. S.*, 168 U. S. 532.

*Arkansas.* — *White v. State*, 70 Ark. 24; *Sullivan v. State*, 66 Ark. 506; *Hardin v. State*, 66 Ark. 53.

*California.* — *People v. Gonzales*, 136 Cal. 666.

*Delaware.* — *State v. Brinte*, 4 Penn. (Del.) 551.

*District of Columbia.* — *West v. U. S.*, 20 App. Cas. (D. C.) 347.

*Florida.* — *McNish v. State*, (Fla. 1903) 34 So. Rep. 219.

*Georgia.* — *Dixon v. State*, 116 Ga. 186; *Morgan v. State*, 120 Ga. 499.

*Idaho.* — *State v. Davis*, 6 Idaho 159.

*Iowa.* — *State v. Novak*, 109 Iowa 717; *State v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380; *State v. Jay*, 116 Iowa 264.

*Kansas.* — *State v. Kornstett*, 62 Kan. 221.

*Kentucky.* — *Porter v. Com.*, 61 S. W. Rep. 16, 22 Ky. L. Rep. 1657; *Taylor v. Com.*, (Ky. 1897) 42 S. W. Rep. 1125. See also *Brown v. Com.*, (Ky. 1899) 49 S. W. Rep. 545; *Dugan v. Com.*, 102 Ky. 241; *Whitney v. Com.*, 74 S. W. Rep. 257, 24 Ky. L. Rep. 2524.

*Louisiana.* — *State v. Gianfala*, 113 La. 463; *State v. Alexander*, 109 La. 557; *State v. Berry*, 50 La. Ann. 1309; *State v. Young*, 52 La. Ann. 478. See also *State v. Robertson*, 111 La. 35.

*Maine.* — *State v. Grover*, 96 Me. 363.

*Maryland.* — *Watts v. State*, 99 Md. 30.

*Mississippi.* — *Mackmasters v. State*, 82 Miss. 459; *Draughn v. State*, 76 Miss. 574; *Hamilton v. State*, 77 Miss. 675.

**528.** (3) *Effect of Inducement by Duress or Fear.* — See note 1.

**530.** (4) *Character and Requisites of Inducement* — (a) *Express Promise of Immunity from Prosecution — Amelioration of Punishment Expressly Held Out.* — See note 1. Agreement to Allow Prisoner to Turn State's Evidence. — See note 2.

(b) *Inducement by Implication.* — See notes 5, 6.

**531.** See note 1.

(c) *Adjurations to Speak the Truth.* — See notes 2, 3.

*Missouri.* — State *v. Hunter*, 181 Mo. 316. See also State *v. Vaughan*, 152 Mo. 73; State *v. Shackelford*, 148 Mo. 493; State *v. Bradford*, 156 Mo. 91.

*Nebraska.* — State *v. Force*, (Neb. 1903) 95 N. W. Rep. 42.

*New Jersey.* — Roesel *v. State*, 62 N. J. L. 216.

*New York.* — People *v. Meyer*, 162 N. Y. 357, 14 N. Y. Crim. 487.

*North Carolina.* — State *v. Davis*, 125 N. Car. 612.

*Pennsylvania.* — Com. *v. Epps*, 193 Pa. St. 512. *Rhode Island.* — State *v. Nagle*, 25 R. I. 105, 105 Am. St. Rep. 864.

*Texas.* — Glover *v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 465; McVeigh *v. State*, 43 Tex. Crim. 17; Grimsinger *v. State*, 44 Tex. Crim. 1; Gallaher *v. State*, 40 Tex. Crim. 296; Unsell *v. State*, 39 Tex. Crim. 330. See also Bailey *v. State*, 42 Tex. Crim. 289.

*Washington.* — State *v. McCullum*, 18 Wash. 394.

See also State *v. McDaniel*, 39 Oregon 161.

**528.** 1. *Confessions Extorted by Duress or Fear* — *United States.* — Bram *v. U. S.*, 168 U. S. 532.

*Arkansas.* — Edmonson *v. State*, 72 Ark. 585; Sullivan *v. State*, 66 Ark. 506; Hardin *v. State*, 66 Ark. 53.

*Delaware.* — State *v. Brinte*, 4 Penn. (Del.) 551.

*Georgia.* — Morgan *v. State*, 120 Ga. 499.

*Iowa.* — State *v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380; State *v. Novak*, 109 Iowa 717.

*Kansas.* — State *v. Kornstett*, 62 Kan. 221.

*Kentucky.* — Taylor *v. Com.*, (Ky. 1897) 42 S. W. Rep. 1125; Porter *v. Com.*, 61 S. W. Rep. 16, 22 Ky. L. Rep. 1657. See also Brown *v. Com.*, (Ky. 1899) 49 S. W. Rep. 545; Dugan *v. Com.*, 102 Ky. 241.

*Louisiana.* — State *v. Auguste*, 50 La. Ann. 488; State *v. Albert*, 50 La. Ann. 481; State *v. Berry*, 50 La. Ann. 1309; State *v. Young*, 52 La. Ann. 478; State *v. Alexander*, 109 La. 557; State *v. Gianfala*, 113 La. 463. See also State *v. Robertson*, 111 La. 35.

*Maine.* — State *v. Grover*, 96 Me. 363.

*Mississippi.* — Whitley *v. State*, 78 Miss. 255; Ammons *v. State*, 80 Miss. 592, 92 Am. St. Rep. 607.

*Missouri.* — State *v. Moore*, 160 Mo. 443; State *v. Hunter*, 181 Mo. 316. See also State *v. Bradford*, 156 Mo. 91; State *v. Shackelford*, 148 Mo. 493; State *v. Vaughan*, 152 Mo. 73.

*Nebraska.* — State *v. Force*, (Neb. 1903) 95 N. W. Rep. 42.

*New Jersey.* — Roesel *v. State*, 62 N. J. L. 216.

*New York.* — People *v. Meyer*, 162 N. Y. 357, 14 N. Y. Crim. 487.

*North Carolina.* — State *v. Davis*, 125 N. Car. 612.

*Pennsylvania.* — Com. *v. Epps*, 193 Pa. St. 512.

*Rhode Island.* — State *v. Nagle*, 25 R. I. 105, 105 Am. St. Rep. 864.

*Texas.* — Gallaher *v. State*, 40 Tex. Crim. 296. See also Hamlin *v. State*, 39 Tex. Crim. 579.

*Washington.* — State *v. McCullum*, 18 Wash. 394. See also State *v. Webster*, 21 Wash. 63.

*Canada.* — Reg. *v. Viau*, 7 Quebec Q. B. 365; Reg. *v. Pah-cah-pah-ne-capi*, 4 Can. Crim. Cas. (N. W. Ter.) 93.

See also State *v. Willis*, 71 Conn. 293; State *v. McDaniel*, 39 Oregon 161.

**A Threat to Send for an Officer if the Accused Does Not Confess** renders the confession inadmissible. Reg. *v. Jackson*, 2 Can. Crim. Cas. (Nova Scotia) 149.

**530.** 1. *Amelioration of Punishment Expressly Held Out.* — McNish *v. State*, (Fla. 1903) 34 So. Rep. 219; McVeigh *v. State*, 43 Tex. Crim. 17; Reg. *v. Viau*, 7 Quebec Q. B. 365, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 530. See also Williams *v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1059.

But a statement by the sheriff, in answer to a question by the accused, that a certain fact "might" help the accused was held not to render inadmissible the confession that followed. Brown *v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 33.

**The Mere Expression of Opinion** by a prison guard that a confession would be likely to make it go lighter with the prisoner does not render his confession inadmissible. State *v. Bradford*, 156 Mo. 91.

**2. Agreement to Allow Prisoner to Turn State's Evidence.** — McVeigh *v. State*, 43 Tex. Crim. 17.

**5.** *Advice that Prisoner "Had Better Confess."* — Bram *v. U. S.*, 168 U. S. 532; West *v. U. S.*, 20 App. Cas. (D. C.) 347; State *v. Jay*, 116 Iowa 264, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 530 *et seq.*; State *v. Alexander*, 109 La. 557. See also Roesel *v. State*, 62 N. J. L. 216; Reg. *v. Jackson*, 2 Can. Crim. Cas. (Nova Scotia) 149.

**6.** *Advice that Prisoner "Had Better Own Up."* — State *v. Jay*, 116 Iowa 264, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 530 *et seq.*; State *v. Grover*, 96 Me. 363. See also Roesel *v. State*, 62 N. J. L. 216; Reg. *v. MacDonald*, 2 Can. Crim. Cas. (N. W. Ter.) 221.

**"You Had Better Tell Me"** are words of inducement, rendering the confession inadmissible. Reg. *v. Rose*, 18 Cox. C. C. 717.

**531.** 1. *Advice that Prisoner Had Better "Plead Guilty."* — See Roesel *v. State*, 62 N. J. L. 216. *Contra*, Williams *v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1059.

**532.** See notes 1, 2.

**533.** (e) Collateral Inducement. — See note 3.

**534.** (f) Confidential Communications. — See note 1.

**535.** (g) Artifice or Fraud. — See notes 3, 4.

**536.** (h) Fear Produced by Suspicion or Accusation. — See note 1.

(i) The Fact of Being in Custody. — See note 3.

**531. 2. Mere Adjuration to Speak the Truth** — *United States*. — *Bram v. U. S.*, 168 U. S. 532.

*Alabama*. — *Huffman v. State*, 130 Ala. 89.

*Arkansas*. — *Brewer v. State*, 72 Ark. 145.

See also *Hardin v. State*, 66 Ark. 53.

*Kansas*. — *State v. Kornstett*, 62 Kan. 221.

*Ohio*. — *Sharkey v. State*, 2 Ohio Cir. Dec. 443.

*Rhode Island*. — *State v. Nagle*, 25 R. I. 105, 105 Am. St. Rep. 864, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 531.

*Texas*. — *Anderson v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 581; *Griminger v. State*, 44 Tex. Crim. 1; *Johnson v. State*, 44 Tex. Crim. 332. See also *Greer v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 12.

See also *Portwood v. Com.*, 104 Ky. 496; *State v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380; *Roesel v. State*, 62 N. J. L. 216.

**Admonition Not Vitiating Confession.** — Admissions obtained from the accused after representations made to her by persons in authority, to the effect that the evidence was very strong against her, that another person, who was her lover, was suspected, and that she knew something about the murder, and would do well to speak, are not inadmissible as not being made voluntarily, or as being procured by threat or inducement. *Reg. v. Viau*, 7 Quebec Q. B. 362.

**3. Admonition so Worded as to Be Understood to Recommend Confession.** — *Reg. v. Rose*, 18 Cox C. C. 717; *Reg. v. MacDonald*, 2 Can. Crim. Cas. (N. W. Ter.) 221; *Reg. v. Viau*, 7 Quebec Q. B. 365; *People v. Gonzales*, 136 Cal. 666; *State v. Jay*, 116 Iowa 264; *Ammons v. State*, 80 Miss. 595, 92 Am. St. Rep. 607, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 531; *State v. Nagle*, 25 R. I. 105, 105 Am. St. Rep. 864. See also *Whitney v. Com.*, 74 S. W. Rep. 257, 24 Ky. L. Rep. 2524.

**532. 1. The Words "You Had Better Speak the Truth" Construed as Recommending Confession.** — *Reg. v. Rose*, 18 Cox C. C. 717, 67 L. J. Q. B. 289, 78 L. T. N. S. 119; *Bram v. U. S.*, 168 U. S. 532; *Hardin v. State*, 66 Ark. 53; *People v. Gonzales*, 136 Cal. 666; *West v. U. S.*, 20 App. Cas. (D. C.) 347; *State v. Grover*, 96 Me. 363; *Com. v. Hudson*, 185 Mass. 402; *Hamilton v. State*, 77 Miss. 675; *Mitchell v. State*, (Miss. 1898) 24 So. Rep. 312; *State v. Nagle*, 25 R. I. 105, 105 Am. St. Rep. 864. See also *Roesel v. State*, 62 N. J. L. 216.

The Words "The Truth Won't Hurt" have been construed as recommending a confession. *Whitney v. Com.*, 74 S. W. Rep. 257, 24 Ky. L. Rep. 2524.

**2. "You Had Better Speak the Truth" Not Construed as Recommending Confession.** — *Huffman v. State*, 130 Ala. 89; *People v. Kennedy*, 159 N. Y. 346. See also *State v. Jay*, 116 Iowa 264.

**533. 3. Collateral Inducement.** — *Hunt v. State*, 135 Ala. 1; *McKinney v. State*, 134 Ala. 134; *Com. v. Wilson*, 186 Pa. St. 1, 42 W. N.

C. (Pa.) 285, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 533; *Reg. v. Viau*, 7 Quebec Q. B. 362, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 533; *Rex v. Todd*, 13 Manitoba 364, 4 Can. Crim. Cas. 514. See also *State v. Grover*, 96 Me. 363; *Roesel v. State*, 62 N. J. L. 216.

**534. 1. Fact of Confession Being Confidential Immaterial.** — *Lawson v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 345; *Matthis v. State*, 80 Miss. 491. See also *Wilson v. State*, 44 Tex. Crim. 430.

**535. 3. Confessions Obtained by Artifice.** — *State v. Wilson*, 172 Mo. 420; *People v. White*, 176 N. Y. 331, 17 N. Y. Crim. 538; *Com. v. Cressinger*, 193 Pa. St. 326; *Com. v. Goodwin*, 186 Pa. St. 218, 42 W. N. C. (Pa.) 249; *Com. v. Wilson*, 186 Pa. St. 1, 42 W. N. C. (Pa.) 285; *Rex v. Todd*, 13 Manitoba 364, 4 Can. Crim. Cas. 514. See also *State v. Novak*, 109 Iowa 717; *State v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380.

Questions should not be put to a prisoner for the purpose of entrapping him into making admissions. *Reg. v. Histed*, 19 Cox C. C. 16.

**Confession Induced by Deception Held Inadmissible.** — A confession by a person accused of stealing letters from a letter-box, induced by a false statement made to him by a detective employed by the prosecution, in the presence of a post-office inspector, that the accused had been seen taking the letters, was held to be inadmissible. *Reg. v. MacDonald*, 2 Can. Crim. Cas. (N. W. Ter.) 221.

4. *Com. v. Goodwin*, 186 Pa. St. 218, 42 W. N. C. (Pa.) 249.

**536. 1. Fear of Ultimate Consequences** will not render a confession inadmissible. See *State v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380.

**3. Confession Made by Accused While in Custody** — *England*. — *Rogers v. Hawken*, 19 Cox C. C. 122, 67 L. J. Q. B. 526, 78 L. T. N. S. 655, 62 J. P. 279.

*Canada*. — *Reg. v. Elliott*, 31 Ont. 14.

*United States*. — *Jackson v. U. S.*, 102 Fed. Rep. 473, 42 C. C. A. 452, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 536; *Bram v. U. S.*, 168 U. S. 532.

*Alabama*. — *Stevens v. State*, 138 Ala. 71; *White v. State*, 133 Ala. 122.

*California*. — *People v. Miller*, 135 Cal. 69; *People v. Walker*, 140 Cal. 153.

*District of Columbia*. — *Travers v. U. S.*, 6 App. Cas. (D. C.) 450.

*Florida*. — *Green v. State*, 40 Fla. 191, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 536.

*Georgia*. — *Fuller v. State*, 109 Ga. 809.

*Idaho*. — *State v. Davis*, 6 Idaho 159.

*Iowa*. — *State v. Penney*, 113 Iowa 691; *State v. Peterson*, 110 Iowa 647; *State v. Novak*, 109 Iowa 717. See also *State v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380; *State v. Worthen*, 124 Iowa 408.

**537.** See note 1.

*Kentucky.*—Hathaway v. Com., 82 S. W. Rep. 400, 26 Ky. L. Rep. 630.

*Louisiana.*—State v. Berry, 50 La. Ann. 1309; State v. Lewis, 112 La. 872; State v. Robertson, 111 La. 35. See also State v. Auguste, 50 La. Ann. 488.

*Maryland.*—Young v. State, 90 Md. 579.

*Massachusetts.*—Com. v. Chance, 174 Mass. 251, 75 Am. St. Rep. 306; Com. v. Devaney, 182 Mass. 33; Com. v. Corcoran, 182 Mass. 465.

*Nebraska.*—Burlingim v. State, 61 Neb. 276.

*New Jersey.*—State v. Hernia, 68 N. J. L. 299. See also Roessel v. State, 62 N. J. L. 216.

*North Carolina.*—State v. Flemming, 130 N. Car. 688. See also State v. Conly, 130 N. Car. 683.

*Rhode Island.*—State v. Nagle, 25 R. I. 105, 105 Am. St. Rep. 864, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 536.

*Washington.*—State v. Washing, 36 Wash. 485.

See also State v. Shackelford, 148 Mo. 493.

**A Confession by a Convict** is admissible where there was a proper warning. Nicks v. State, 40 Tex. Crim. 1.

**537. 1. Warning to Prisoner in Custody Unnecessary.**—Jackson v. U. S., (C. C. A.) 102 Fed. Rep. 483, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 536, 537; Coil v. State, 62 Neb. 15; State v. Baker, 58 S. Car. 111.

**Warning Necessary.**—Reg. v. Histed, 19 Cox C. C. 16, holding that when a prisoner is once taken into custody, a policeman should ask no questions at all without administering previously the usual caution.

**The Texas Code of Criminal Procedure.**—Cortez v. State, 43 Tex. Crim. 375; Gray v. State, 44 Tex. Crim. 477; Godwin v. State, 44 Tex. Crim. 599; Patrick v. State, (Tex. Crim. 1903) 74 S. W. Rep. 550; Brown v. State, (Tex. Crim. 1903) 75 S. W. Rep. 33; Twiggs v. State, (Tex. Crim. 1903) 75 S. W. Rep. 531; Guerrero v. State, (Tex. Crim. 1904) 80 S. W. Rep. 1001; Parker v. State, (Tex. Crim. 1904) 80 S. W. Rep. 1008; McDaniel v. State, (Tex. Crim. 1904) 81 S. W. Rep. 301; Alanis v. State, (Tex. Crim. 1904) 81 S. W. Rep. 709; Kennon v. State, (Tex. Crim. 1904) 82 S. W. Rep. 518. See also Henry v. State, 38 Tex. Crim. 306; Willis v. State, (Tex. Crim. 1898) 44 S. W. Rep. 826; Kugadt v. State, 38 Tex. Crim. 681; Greer v. State, (Tex. Crim. 1898) 45 S. W. Rep. 12; Guinn v. State, 39 Tex. Crim. 257; Unsell v. State, 39 Tex. Crim. 330; Barth v. State, 39 Tex. Crim. 381, 73 Am. St. Rep. 935; Hamlin v. State, 39 Tex. Crim. 579; Nicks v. State, 40 Tex. Crim. 1; Bailey v. State, 40 Tex. Crim. 150; McKinney v. State, 40 Tex. Crim. 372; Guin v. State, (Tex. Crim. 1899) 50 S. W. Rep. 350; Grayson v. State, 40 Tex. Crim. 573; Gallaher v. State, 40 Tex. Crim. 296; Pryor v. State, 40 Tex. Crim. 643; Sullivan v. State, 40 Tex. Crim. 633; Bruce v. State, (Tex. Crim. 1899) 53 S. W. Rep. 867; Carmicheal v. State, (Tex. Crim. 1899) 54 S. W. Rep. 903; Binyon v. State, (Tex. Crim. 1900) 56 S. W. Rep. 330; White v. State, (Tex. Crim. 1900) 57 S. W. Rep. 100; Hernan v. State, 42 Tex. Crim. 464; McVeigh v. State, 43 Tex. Crim. 17; Baines v.

State, 43 Tex. Crim. 490; McColloh v. State, 44 Tex. Crim. 152; Grimsinger v. State, 44 Tex. Crim. 1; Richardson v. State, 44 Tex. Crim. 211; Hill v. State, (Tex. Crim. 1902) 70 S. W. Rep. 754; Ransom v. State, (Tex. Crim. 1902) 70 S. W. Rep. 960; Johnson v. State, 44 Tex. Crim. 332; Wilson v. State, 44 Tex. Crim. 430; Thompson v. State, (Tex. Crim. 1904) 78 S. W. Rep. 691; Cortez v. State, (Tex. Crim. 1904) 83 S. W. Rep. 812.

**The Statute Is Not Confined to Technical Confessions** in its operation, but renders inadmissible statements of criminating facts made without a warning. Parks v. State, (Tex. Crim. 1904) 79 S. W. Rep. 301.

**Where the Accused Is Not under Arrest** warning is not necessary. Ross v. State, (Tex. Crim. 1900) 58 S. W. Rep. 105; Bailey v. State, 42 Tex. Crim. 289.

**What Amounts to Arrest.**—If the prisoner, at the time of making the confession, was in reality held in custody, it need not appear that he was formally arrested. Jones v. State, 44 Tex. Crim. 405. So where the prisoner was, at the time of making the confession, waiting in the company of a policeman for the sheriff to whom he preferred to surrender, he was held to be under arrest so as to render his confession inadmissible in the absence of a previous warning. Moore v. State, (Tex. Crim. 1904) 79 S. W. Rep. 565. But the accused was held not to be under arrest so as to render his confession inadmissible, in the absence of a warning, where at the time he was with three armed deputy sheriffs but had not been placed under formal arrest. Bargna v. State, (Tex. Crim. 1902) 68 S. W. Rep. 997.

**Belief as to Arrest.**—If the prisoner, at the time of making the confession, did not believe himself to be in restraint or under arrest, the confession may be used against him though he was not warned. Connell v. State, (Tex. Crim. 1903) 75 S. W. Rep. 512. But where the accused believes that he is under arrest at the time of making a confession, his statements are not admissible. Bain v. State, (Tex. Crim. 1903) 74 S. W. Rep. 542.

**Time of Warning.**—For a warning to be effective it must have been made within a period previous to the confession short enough so that it reasonably appears that the prisoner had it in mind at the time of the confession. Petty v. State, (Tex. Crim. 1901) 65 S. W. Rep. 917. So a confession, though made after conviction, is admissible if the accused had received warning and had the warning in mind at the time he made the confession. Yancy v. State, (Tex. Crim. 1903) 76 S. W. Rep. 571.

**Sufficiency of Warning.**—A warning to the prisoner that his statements could be used "for or against him" is insufficient to render a confession admissible. Glover v. State, (Tex. Crim. 1903) 76 S. W. Rep. 465. To the same effect see Perry v. State, 42 Tex. Crim. 540.

**By Whom Warning Given.**—If the accused had been warned that a confession would be used against him, a confession then made is admissible though the warning did not come from an officer. Black v. State, (Tex. Crim. 1904) 81 S. W. Rep. 302.

- 538.** Putting Prisoner in Irons. — See note 1.  
Where Officer Is Armed. — See note 2.
- 539.** Where Prisoner Is in Illegal Custody. — See note 1.  
(j) Administering of Oath. — See note 2.  
(k) Interrogations Assuming Guilt. — See note 3.
- 540.** (l) Necessity of Operation of External Influence. — See note 1.  
(m) Degree of Influence Immaterial. — See note 2.  
(n) Inducement Not Taking Effect. — See note 4.  
Confession Antecedent to Inducement. — See note 5.
- 541.** Inducement Counteracted by Subsequent Warning. — See note 2.
- 542.** (o) Presumption of Continuance of Inducement Once Operative. — See note 1.  
This Presumption, However, May Be Overcome. — See notes 2, 3.
- 543.** See note 2.  
Clear Evidence in Rebuttal Necessary. — See note 3.
- 544.** (p) Confession and Inducement Relating to Different Crimes. — See note 3.

*Effect of Corroboration of Confession.* — Where property, for stealing which the defendant had been arrested, was actually recovered through his confession, the confession was held to be admissible though no warning had been given. *Winfield v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 584. See also *infra*, this title, **551**, 4 *et seq.*

*Performing Experiment Not Confession.* — It is not a violation of the statute against unwarned confessions to compel an accused to exhibit his foot for the purpose of comparing the size of it with a track found near the scene of the criminal act. *Thompson v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 914.

**538.** 1. Fact that Prisoner Was Manacled Immaterial. — *State v. Novak*, 109 Iowa 717. See also *State v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380; *Roesel v. State*, 62 N. J. L. 216; *State v. Washing*, 36 Wash. 485.

2. Fact that Arresting Officer Was Armed Immaterial. — *Stevens v. State*, 138 Ala. 71. See also *Christian v. State*, 133 Ala. 109. But see *Cortez v. State*, 43 Tex. Crim. 375.

**539.** 1. Where Prisoner Is in Illegal Custody. — *State v. Nagle*, 25 R. I. 105, 105 Am. St. Rep. 864, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 539.

2. Severe Questioning. — Statements made under a severe cross-examination are not voluntary under the *Texas* statute. *Parker v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1008.

3. Interrogations Assuming Guilt. — *Rogers v. Hawken*, 78 L. T. N. S. 655; *White v. State*, 133 Ala. 122; *State v. Berry*, 50 La. Ann. 1309. See also *Roesel v. State*, 62 N. J. L. 216; *State v. Hand*, 71 N. J. L. 137; *Gallagher v. State*, 40 Tex. Crim. 296.

A Confession Elicited by Asking Questions is not involuntary for that reason. *Tidwell v. State*, 40 Tex. Crim. 38.

**540.** 1. Price *v. State*, 114 Ga. 855; *Hecox v. State*, 105 Ga. 625; *State v. Grover*, 96 Me. 363; *Grimsinger v. State*, 44 Tex. Crim. 1. See also *Bruce v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 867.

2. Degree of Influence Immaterial. — *Bram v. U. S.*, 168 U. S. 532; *Sullivan v. State*, 66 Ark. 506; *State v. Jay*, 116 Iowa 264; *State v. Auguste*, 50 La. Ann. 488; *State v. Alexander*, 109 La. 557; *State v. Young*, 52 La. Ann. 478; *State v. Nagle*, 25 R. I. 105, 105 Am. St. Rep.

864; *Gallagher v. State*, 40 Tex. Crim. 296. See also *McVeigh v. State*, 43 Tex. Crim. 17.

4. Confession Not Influenced by Inducement. — *Meadows v. State*, 136 Ala. 67; *State v. Willis*, 71 Conn. 293; *Dixon v. State*, 116 Ga. 186; *Whitney v. Com.*, 74 S. W. Rep. 257, 24 Ky. L. Rep. 2524; *Godwin v. State*, 44 Tex. Crim. 599. See also *Com. v. Phillips*, 82 S. W. Rep. 286, 26 Ky. L. Rep. 543.

A Confession Made to a Detective, passing himself off as one of a band of desperadoes, and offering to make the accused a member if he could show a black enough record, is admissible on the ground that the inducement did not refer to the crime charged. *Rex v. Todd*, 13 Manitoba 364.

5. Confession Antecedent to Promise. — *Com. v. Chance*, 174 Mass. 251, 75 Am. St. Rep. 306; *Grimsinger v. State*, 44 Tex. Crim. 1; *Godwin v. State*, 44 Tex. Crim. 599.

**541.** 2. Inducement Counteracted on Subsequent Warning. — *Com. v. Hudson*, 185 Mass. 402. See also *Whitney v. Com.*, 74 S. W. Rep. 257, 24 Ky. L. Rep. 2524.

**542.** 1. Presumption of Continuance of Inducement Once Operative. — *Williams v. State*, 69 Ark. 599; *Mackmasters v. State*, 82 Miss. 459; *Whitley v. State*, 78 Miss. 255; *State v. Force*, (Neb. 1903) 95 N. W. Rep. 42; *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668; *Com. v. Sheets*, 197 Pa. St. 69; *Reg. v. Viau*, 7 Quebec Q. B. 365, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 542.

2. Presumption of Continuance Rebutted by Length of Time Intervening. — *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668; *Com. v. Sheets*, 197 Pa. St. 69; *State v. Force*, (Neb. 1903) 95 N. W. Rep. 42. See also *McNutt v. State*, (Neb. 1903) 94 N. W. Rep. 143.

3. Presumption of Continuance of Influences Overcome by Warning. — *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668; *Whitley v. State*, 78 Miss. 255.

**543.** 2. Circumstances in Rebuttal of Presumption of Continuance of Fear. — *Reg. v. Viau*, 7 Quebec Q. B. 362, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 543.

3. Clear Proof in Rebuttal Necessary. — *McNish v. State*, (Fla. 1903) 34 So. Rep. 219; *Reg. v. Viau*, 7 Quebec Q. B. 365.

**544.** 3. Confessing Other Crimes. — Where a confession of a crime other than the one for



**545.** (5) *The Person Offering the Inducement* — (a) *Person in Authority*. — See notes 1, 2.

Officer Having Prisoner in Custody. — See note 3.

**546.** Magistrate. — See note 1.

Person Injured. — See note 3.

In State Courts. — See notes 4, 5.

**547.** Agent of Person in Authority. — See note 1.

**548.** (c) *Person Not in Authority* — *Prevailing Doctrine*. — See note 4.

**550.** Confessions Induced by Master. — See note 1.

Inducement by Threats. — See note 7.

**551.** Threat of Mob Violence. — See note 1.

(7) *Ascertainment of Facts in Consequence of Involuntary Confession*

— *A Modification of the Rule*. — See note 4.

which the accused is on trial tends to prove his guilt of the crime charged it should be admitted. *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786.

**545.** 1. *The Person Making Promise* — *Person in Authority*. — *Reg. v. Rose*, 18 Cox C. C. 717; *Reg. v. Viau*, 7 Quebec Q. B. 362; *Re Ockerman*, 2 Can. Crim. Cas. (British Columbia) 262; *Sullivan v. State*, 66 Ark. 506; *State v. Alexander*, 109 La. 557; *State v. Force*, (Neb. 1903) 95 N. W. Rep. 42. See also *Dugan v. Com.*, 102 Ky. 241; *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786; *Com. v. Goodwin*, 186 Pa. St. 218, 42 W. N. C. (Pa.) 249.

*An Indian Agent Appointed by the Government* is a person in authority over the Indians on the reserve within his charge. *Reg. v. Pah-cah-pah-ne-capi*, 4 Can. Crim. Cas. (N. W. Ter.) 93.

*The Rector of a Cathedral Is a Person in Authority Over the Choir Boys* with respect to the investigation of an alleged assault committed by them while on the way to a meeting of the choir, and answers of a choir boy elicited by the rector and the choirmaster upon such investigation and stated to be only for the purpose of that inquiry, are not admissible in evidence against the choir boy afterwards prosecuted for the assault, without proof that the statement was voluntarily made. *Rex v. Royds*, 8 Can. Crim. Cas. (British Columbia) 209.

*Confession Induced by Threat and Deception*. — Where the accused was induced to confess by means of a false statement, made to him by a detective employed by the prosecution, that he had been seen to commit the offense, and by a threat that he "might as well own up as to have it brought out in a court of justice," the court, in holding the confession inadmissible, said: "Whatever justification there might be for a person in authority endeavoring to worm a confession out of a suspected person, there was certainly no justification for such a resort to falsehood." *Reg. v. MacDonald*, 2 Can. Crim. Cas. (N. W. Ter.) 221.

**2. Person in Authority Making Threat**. — *Sullivan v. State*, 66 Ark. 506; *State v. Force*, (Neb. 1903) 95 N. W. Rep. 42; *Reg. v. Viau*, 7 Quebec Q. B. 362; *Reg. v. Pah-cah-pah-ne-capi*, 4 Can. Crim. Cas. (N. W. Ter.) 93. See also *Dugan v. Com.*, 102 Ky. 241; *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786; *Com. v. Goodwin*, 186 Pa. St. 218, 42 W. N. C. (Pa.) 249.

**3. A County Detective** is a person in authority within the meaning of the rule relating to the

admissibility of confessions. *Roesel v. State*, 62 N. J. L. 216.

*A Detective* in the employ of the police is not a "person in authority," and a voluntary confession made to him is admissible. *Rex v. Todd*, 13 Manitoba 364.

*A Guard* in charge of the prisoner is not a person in authority. *State v. Bradford*, 156 Mo. 91.

*Confession Made to a Friend*. — The fact that a confession was made to a friend of the accused and not to an officer does not render it inadmissible. *Wilson v. State*, 44 Tex. Crim. 430.

**546.** 1. *Magistrate a Person in Authority*. — *Sullivan v. State*, 66 Ark. 506.

**3. Person Injured a Prosecutor and Person in Authority** — *English Doctrine*. — *Reg. v. Rose*, 18 Cox C. C. 717. See also *Reg. v. Jackson*, 2 Can. Crim. (Nova Scotia) 149.

**4. Person Injured a Person in Authority** — *Rule in State Courts*. — *White v. State*, 70 Ark. 24; *Sullivan v. State*, 66 Ark. 506.

**5.** *Sullivan v. State*, 66 Ark. 506; *Draughn v. State*, 76 Miss. 574.

**547.** 1. *Inducement Held Out by Agent of Person in Authority*. — See *McVeigh v. State*, 43 Tex. Crim. 17.

**548.** 4. *Prevailing Doctrine*. — *Rex v. Todd*, 13 Manitoba 364, 4 Can. Crim. Cas. 514, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 548.

**550.** 1. *Confessions Induced by Master*. — Compare *State v. Alexander*, 109 La. 557, holding that the confession of a slave induced by his master was not admissible, the master being a person to whom the slave "habitually submitted" and "to whom he would naturally look for protection;" *Hamilton v. State*, 77 Miss. 675, holding that a confession induced by the master of the accused where the latter had received no warning and was in jail at the time is not voluntary.

*Master Connected with Prosecution*. — A confession induced by the master of the accused from whom the latter was accused of stealing is inadmissible. *Reg. v. Rose*, 18 Cox C. C. 717, 67 L. J. Q. B. 289, 78 L. T. N. S. 119.

**7. Person Making Threats Need Not Be One in Authority**. — See *Reg. v. Jackson*, 2 Can. Crim. Cas. (Nova Scotia) 149.

**551.** 1. *Threats by Mob*. — *State v. Moore*, 160 Mo. 443. See also *Hardin v. State*, 66 Ark. 53; *Taylor v. Com.*, (Ky. 1897) 42 S. W. Rep. 1125; *State v. Young*, 52 La. Ann. 478.

**4. Ascertainment of Facts in Consequence of In-**

**552.** See note 1.

**553.** Illustration. — See note 1.

Confession Corroborated by Facts Previously Discovered. — See note 4.

**554.** (8) *Burden of Proof.* — See notes 1, 2, 3.

(9) *A Question for the Court.* — See note 4.

**voluntary Confession — Prevailing Rule.** — *Travers v. U. S.*, 6 App. Cas. (D. C.) 450; *State v. Willis*, 71 Conn. 293; *Johnson v. State*, 119 Ga. 257; *Whitney v. Com.*, 74 S. W. Rep. 257, 24 Ky. L. Rep. 2524; *Com. v. Phillips*, 82 S. W. Rep. 286, 26 Ky. L. Rep. 543; *Taylor v. Com.*, (Ky. 1897) 42 S. W. Rep. 1125; *State v. Middleton*, 69 S. Car. 72. See also *State v. Height*, 117 Iowa 650, 94 Am. St. Rep. 323; *Glover v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 465.

But where a sack of money was found in the place where the accused said in his confession it would be, such fact was held to be inadmissible, it appearing that the confession was extorted by threats and that the sack of money was not identified. *Whitley v. State*, 78 Miss. 255.

**552.** 1. Under Statute in Texas. — *Campbell v. State*, 42 Tex. Crim. 27. See also *Einyon v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 339.

In support of the paragraph of the original note beginning "Thus an exception to the statutory rule," etc., see *Fielder v. State*, 40 Tex. Crim. 184; *Parker v. State*, 40 Tex. Crim. 119; *Daggett v. State*, 39 Tex. Crim. 5; *Winfield v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 584; *Glover v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 465; *Johnson v. State*, 44 Tex. Crim. 332.

**553.** 1. See *Glover v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 465.

4. Confession Corroborated by Facts Previously Discovered. — *Patrick v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 550.

**554.** 1. Burden of Proof as to Voluntary Character — Prevailing Rule — *Alabama*. — *McAlpine v. State*, 117 Ala. 93; *Hunt v. State*, 135 Ala. 1.

*California*. — *People v. Miller*, 135 Cal. 69.

*Iowa*. — *State v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380.

*Louisiana*. — *State v. Gianfala*, 113 La. 463; *State v. Alexander*, 109 La. 557; *State v. Young*, 52 La. Ann. 478; *State v. Berry*, 50 La. Ann. 1309.

*Maryland*. — *Watts v. State*, 99 Md. 30.

*Mississippi*. — *Mitchell v. State*, (Miss. 1898) 24 So. Rep. 312.

*Nebraska*. — *Snider v. State*, 56 Neb. 309.

*New Jersey*. — *Roesel v. State*, 62 N. J. L. 216; *State v. Young*, 67 N. J. L. 223.

*South Carolina*. — *State v. Baker*, 58 S. Car. 111.

*Texas*. — *Parker v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1008. See also *Gallaher v. State*, 40 Tex. Crim. 296; *Gray v. State*, 44 Tex. Crim. 477.

*Canada*. — *Reg. v. Viau*, 7 Quebec Q. B. 365, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 554; *Re Ockerman*, 2 Can. Crim. Cas. (British Columbia) 262; *Reg. v. Pah-cah-pah-ne-capi*, 4 Can. Crim. Cas. (N. W. Ter.) 93; *Rex v. Roysds*, 10 British Columbia 407, 8 Can. Crim. Cas. 209; *Rex v. Todd*, 13 Manitoba 364, 4 Can. Crim. Cas. 514.

But it is not necessary to the admission of a

confession to go to the extent of showing that it was not induced by fear or threats. *State v. Newton*, 29 Wash. 373.

The Burden Is Not upon the State to show that a confession was not induced by promises or threats of the officer in charge, where the witness to whom the confession was made testified that it was made voluntarily. *Jenkins v. State*, 119 Ga. 431.

2. Burden of Proof on Accused — Rule in Some Jurisdictions. — *Ginn v. State*, 161 Ind. 292; *State v. Grover*, 96 Me. 363. See also *Harrison v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 1002; *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786.

When the Confession Is Prima Facie Voluntary the burden rests upon the accused to show that it is otherwise. *State v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380.

3. *State v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380; *Com. v. Bond*, 170 Mass. 41; *Com. v. Hudson*, 185 Mass. 402; *Com. v. Antaya*, 184 Mass. 326; *State v. Moore*, 160 Mo. 443; *People v. White*, 17 N. Y. Crim. 538, 176 N. Y. 331; *People v. Egnor*, 175 N. Y. 419; *Anderson v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 581; *State v. Washing*, 36 Wash. 485. See also *Roesel v. State*, 62 N. J. L. 216; *Cortez v. State*, 43 Tex. Crim. 375; *West v. U. S.*, 20 App. Cas. (D. C.) 347.

4. Voluntary Character Question for Court — *Alabama*. — *Hunt v. State*, 135 Ala. 1; *Bush v. State*, 136 Ala. 85; *McKinney v. State*, 134 Ala. 134; *Brown v. State*, 124 Ala. 76.

*Arkansas*. — *Sullivan v. State*, 66 Ark. 506.

*California*. — *People v. Miller*, 135 Cal. 69.

*Colorado*. — *Fincher v. People*, 26 Colo. 173, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 554.

*District of Columbia*. — *Travers v. U. S.*, 6 App. Cas. (D. C.) 450.

*Florida*. — *Kirby v. State*, 44 Fla. 81.

*Georgia*. — *Price v. State*, 114 Ga. 855. Compare *Dixon v. State*, 116 Ga. 186.

*Illinois*. — *Zuckerman v. People*, 213 Ill. 116, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 554.

*Iowa*. — *State v. Storms*, 113 Iowa 385, 86 Am. St. Rep. 380.

*Kentucky*. — *Dugan v. Com.*, 102 Ky. 241.

*Maine*. — *State v. Grover*, 96 Me. 363.

*Massachusetts*. — *Com. v. Antaya*, 184 Mass. 326; *Com. v. Hudson*, 185 Mass. 402; *Com. v. Bond*, 170 Mass. 41.

*Mississippi*. — *Draughn v. State*, 76 Miss. 574.

*Missouri*. — *State v. McKenzie*, 144 Mo. 40; *State v. Brennan*, 164 Mo. 487.

*New Jersey*. — *State v. Gruff*, 68 N. J. L. 287; *State v. Hernia*, 68 N. J. L. 299; *Roesel v. State*, 62 N. J. L. 216; *State v. Young*, 67 N. J. L. 223.

*New York*. — *People v. Meyer*, 162 N. Y. 357, 14 N. Y. Crim. 487; *People v. White*, 17 N. Y. Crim. 538, 176 N. Y. 331.

**555.** Mode of Determining Admissibility — Negative Answers. — See note 1.

All the Defendant's Evidence to Be Considered. — See note 2.

**556.** Surrounding Circumstances. — See note 1.

Confession Found to Be Involuntary After Admission. — See note 3.

**557.** *b.* APPLICATION OF RULE TO MERE CRIMINATING STATEMENTS. — See notes 1, 2.*c.* RULE CONSIDERED IN CONNECTION WITH PRISONER'S CONDUCT. — See note 3.

Circumstances Calling for Reply Necessary. — See note 4.

**558.** When Defendant Is under Arrest. — See note 2.

Where Conversation Is Between Third Parties. — See note 4.

**559.** Statement Must Be Heard and Understood. — See notes 1, 2.*d.* JUDICIAL CONFESSIONS — (1) *Confession by Plea* — Plea Accepted and Recorded. — See note 5.

Plea Before Examining Magistrate. — See note 6.

**560.** (3) *Former Testimony* — (a) Of Person Not under Accusation — Testimony at Trial of Another for the Same Offense. — See note 4.**561.** See note 1.

At Investigation Where No One Is under Accusation. — See note 2.

*Oklahoma.* — *Kirk v. Territory*, 10 Okla. 46.  
*Pennsylvania.* — *Com. v. Epps*, 193 Pa. St. 512.*South Carolina.* — *State v. Middleton*, 69 S. Car. 72.*Texas.* — *Hamlin v. State*, 39 Tex. Crim. 579.*Washington.* — *State v. Washing*, 36 Wash. 485.*Canada.* — *Reg. v. Viau*, 7 Quebec Q. B. 365, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 554; *Rex v. Todd*, 13 Manitoba 364, 4 Can. Crim. Cas. 514.**555.** 1. Determining Question of Admissibility from Negative Answers of Witness. — *Green v. State*, 96 Md. 384.2. Duty of Court to Hear Prisoner's Evidence. — *Zuckerman v. People*, 213 Ill. 116; *Roesel v. State*, 62 N. J. L. 216; *State v. Hill*, 65 N. J. L. 626; *Kirk v. Territory*, 10 Okla. 46; *Reg. v. Viau*, 7 Quebec Q. B. 365.**556.** 1. Surrounding Circumstances to Be Considered. — *Zuckman v. People*, 213 Ill. 116; *State v. Hill*, 65 N. J. L. 626; *State v. Young*, 52 La. Ann. 478; *Kirk v. Territory*, 10 Okla. 46; *Hamlin v. State*, 39 Tex. Crim. 579; *Greer v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 12; *Gallaher v. State*, 40 Tex. Crim. 296.3. Instruction to Jury to Reject Confession Found to Be Involuntary After Admission. — *Com. v. Epps*, 193 Pa. St. 512; *Com. v. Shew*, 190 Pa. St. 23; *Sanchez v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 504.**557.** 1. Mere Criminating Statements — Authorities Not Requiring Preliminary Proof of Voluntary Character. — *Meadows v. State*, 136 Ala. 67.2. A Criminative Fact stated by the accused is admissible where it appears that he was properly warned. *Cortez v. State*, 43 Tex. Crim. 375.3. Confessions Implied from Conduct Admissible Without Proof of Voluntary Character. — *State v. Picton*, 51 La. Ann. 624, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 557.4. Circumstances Calling for a Reply a Pre-requisite to Admissions of Confessions Implied from Silence. — *Simmons v. State*, 115 Ga. 576,citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 557 *et seq.*; *Porter v. Com.*, 61 S. W. Rep. 16, 22 Ky. L. Rep. 1657; *Roesel v. State*, 62 N. J. L. 216; *Geiger v. State*, 70 Ohio St. 400; *State v. Mortensen*, 26 Utah 332, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 557.**558.** 2. When Prisoner under Arrest — Rule that No Inference Is Warranted by Silence. — *Geiger v. State*, 70 Ohio St. 400.When Prisoner under Restraint, but Not Arrested. — See *People v. Williams*, 133 Cal. 165.4. Silence Where Conversation Is Between Third Parties. — *Simmons v. State*, 115 Ga. 576, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 557 *et seq.*; *Geiger v. State*, 70 Ohio St. 400. See also *Porter v. Com.*, 61 S. W. Rep. 16, 22 Ky. L. Rep. 1657.**559.** 1. Statement to Accused Must Have Been Heard. — *Geiger v. State*, 70 Ohio St. 400.2. Statement to Accused Must Have Been Understood. — *Geiger v. State*, 70 Ohio St. 400.5. Recorded Confessions by Plea. — *Johnson v. State*, 39 Tex. Crim. 625, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 559.Admissible in Subsequent Trial. — A plea of guilty of a theft of corn is admissible as a judicial confession in a later trial where the accused is indicted for burglarizing the house from which the corn was taken. *Beason v. State*, 43 Tex. Crim. 442.6. Admissibility of Plea Before Magistrate. — *Carter v. State*, (Miss. 1898) 24 So. Rep. 307; *State v. Hand*, 71 N. J. L. 137; *State v. Blay*, 77 Vt. 56; *Green v. State*, 40 Fla. 474.But a plea of guilty made before a magistrate is not admissible as evidence on the trial where the prisoner made the plea unwarned. *McNish v. State*, (Fla. 1903) 34 So. Rep. 219.**560.** 4. *Com. v. Rockwell*, 19 Pa. Co. Ct. 631, 6 Pa. Dist. 768.**561.** 1. See *Com. v. Rockwell*, 19 Pa. Co. Ct. 631, 6 Pa. Dist. 768.2. Testimony Before Coroner Where No One Is under Accusation. — In *Pennsylvania*, where a party was called before a coroner as a witness and compelled to testify, his statements were held not to be admissible against him on his

- 562.** (b) Of Person under Accusation — Preliminary Examination. — See note 5.  
Where Testimony Is Voluntary. — See note 6.
- 564.** Testimony Induced by Hope or Fear. — See note 1.  
But It Has Been Maintained in the United States. — See note 3.
- 565.** The Actual Practice. — See note 1.  
Moreover, by Statute. — See note 2.
- 566.** Testimony Given under Oath. — See note 6.
- 567.** Testimony at Former Trial. — See note 2.  
(c) Of Person Resting under Suspicion. — See note 5.
- 568.** 2. Necessity of Correspondence of Confession to the Offense Charged. — See note 3.
- 569.** 3. Prima Facie Establishment of Corpus Delicti as Prerequisite. — See note 2.
4. The Person Making the Confession or Affected Thereby — a. GENERAL STATEMENT AS TO COMPETENCY. — See note 3.
- 570.** b. INFANTS. — See note 3.

trial. *Com. v. Rockwell*, 19 Pa. Co. Ct. 631, 6 Pa. Dist. 768.

**562.** 5. Statutory Provisions in United States Permitting Examination of Accused. — *People v. Cokahnour*, 120 Cal. 253.

6. Voluntary Testimony — *England*. — *Reg. v. Bird*, 19 Cox C. C. 180, 79 L. T. N. S. 359, 47 W. R. 112, 62 J. P. 760.

*California*. — *People v. Cokahnour*, 120 Cal. 253.

*Florida*. — *Green v. State*, 40 Fla. 474.

*Mississippi*. — *Macmasters v. State*, 83 Miss. 1.

*Missouri*. — *State v. Jones*, 171 Mo. 401, 94 Am. S. Rep. 786.

*New Jersey*. — *State v. Hand*, 71 N. J. L. 137.

*Texas*. — *Aiken v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 57; *Griminger v. State*, 44 Tex. Crim. 1. See also *Giles v. State*, 43 Tex. Crim. 561.

*Vermont*. — *State v. Blay*, 77 Vt. 56.

*Washington*. — *State v. Lyts*, 25 Wash. 347; *State v. Washing*, 36 Wash. 485; *State v. Carpenter*, 32 Wash. 254.

Testimony in a Habeas Corpus Proceeding, where it amounts to a confession, is admissible against the defendant on his trial. *Robinson v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 869.

**564.** 1. Testimony Induced by Hope or Fear. — *Williams v. State*, 69 Ark. 599; *People v. Williams*, 133 Cal. 165; *State v. Jackson*, 3 Penn. (Del.) 15; *Green v. State*, 40 Fla. 474.

Question Assuming Guilt. — A judicial confession though brought out by questions asked by a magistrate assuming the prisoner's guilt, is admissible. *State v. Hand*, 71 N. J. L. 137.

Where Accused Is Excited. — A written confession is admissible though the prisoner was in an excited frame of mind at the time when it was made. *People v. Cokahnour*, 120 Cal. 253.

3. Necessity of Caution — Doctrine in United States Apart from Statute. — *State v. Hand*, 71 N. J. L. 137; *Murmutt v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 508; *State v. Lyts*, 25 Wash. 347, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 64 [564]; *State v. Washing*, 36 Wash. 485.

**565.** 1. Instances Where Caution Was Given. — *Green v. State*, 40 Fla. 474.

2. Statutes Requiring Warning. — *State v. Parker*, 132 N. Car. 1014; *State v. Andrews*,

35 Oregon 388; *Aiken v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 57.

A Confession Before the Grand Jury is admissible where the accused person received warning previous to making the confession. *Wisdom v. State*, 42 Tex. Crim. 579.

In Texas the statutory requirement of warning does not apply to a case where the defendant pleaded guilty to a theft in a prosecution for misdemeanor. Such a confession is admissible in a later trial for burglary based upon the same theft. *Beason v. State*, 43 Tex. Crim. 422.

**566.** 6. Statute Requiring Testimony to Be Unsworn. — *State v. Parker*, 132 N. Car. 1014.

**567.** 2. Testimony at Former Trial. — *Hall v. State*, 134 Ala. 90; *Angling v. State*, 137 Ala. 17; *Collins v. State*, 39 Tex. Crim. 447, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 561.

5. Sufficient Warning. — Where a party knowing himself to be suspected of a crime gives criminative evidence at an examination before a magistrate, a warning being given him while he is testifying, and reiterates his testimony subsequently to the warning, such evidence is admissible against him on his trial. *Grammer v. State*, 42 Tex. Crim. 518.

**568.** 3. Confession Must Be of Offense Charged. — *Rex v. Todd*, 13 Manitoba 364.

**569.** 2. Prima Facie Establishment of Corpus Delicti Prerequisite. — *State v. Coats*, 174 Mo. 396; *Gray v. State*, 44 Tex. Crim. 477; *State v. Bates*, 25 Utah 1.

3. General Statement as to Competency. — The fact that the accused did not have full control of his mental faculties, suffering at the time of the confession from a head wound, does not render the confession inadmissible. *People v. Miller*, 135 Cal. 69.

But a confession made by a person insane at the time is inadmissible. See *State v. Coats*, 174 Mo. 396.

Evidence of Weak-mindedness is admissible as showing the character of the confession. *Williams v. State*, 69 Ark. 599.

It Is Not Necessary to Show the Capacity of the defendant to commit the crime charged in order to admit his confession. *Grayson v. State*, 40 Tex. Crim. 573.

**570.** 3. Child under Thirteen. — *Grayson v. State*, 40 Tex. Crim. 573.

**570.** *d.* PERSON INTOXICATED. — See note 6.

**571.** *f.* COCONSPIRATORS. — See note 5.

**572.** *g.* CODEFENDANTS. — See notes 1, 2, 3, 4.

**573.** *i.* IDENTIFICATION OF PERSON CONFESSING. — See note 3.

**574.** III. MODE AND REQUISITES OF PROOF — 1. Who May Testify. — See note 6.

2. Whole Confession to Be Admitted. — See note 7.

**575.** Substance of Confession Sufficient. — See note 1.

**576.** See note 2.

3. Confession in Writing. — See note 4.

**577.** See note 1.

**579.** IV. WEIGHT AND SUFFICIENCY — 1. General Statements. — See notes 2, 3.

**570.** 6. Person Intoxicated Not Necessarily Incompetent. — *State v. Berry*, 50 La. Ann. 1309; *People v. Kent*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 191; *Leach v. State*, 99 Tenn. 584; *Cortez v. State*, 43 Tex. Crim. 375; *State v. Haworth*, 24 Utah 398, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 570.

Where Liquor Is Furnished by a Sheriff to the accused, a confession obtained thereby should not be admitted. See *McNutt v. State*, (Neb. 1903) 94 N. W. Rep. 143.

**571.** 5. Confessions Subsequent to Completion of Conspiracy Inadmissible. — *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Brennan*, 164 Mo. 487.

**572.** 1. Confession of One Codefendant Inadmissible Against Another. — *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Robinson*, 52 La. Ann. 616; *State v. Sims*, 106 La. 453; *State v. De Masters*, 15 S. Dak. 581, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 572; *Pryor v. State*, 40 Tex. Crim. 643; *Thomas v. State*, 43 Tex. Crim. 20, 96 Am. St. Rep. 834; *Clevinger v. State*, 43 Tex. Crim. 273.

A confession drawn from an accused party in the presence of his codefendant is not admissible against the latter, it appearing that his presence was not voluntary and that he was compelled to listen to the confession. *State v. McCullum*, 18 Wash. 394.

**2.** Confession of One Party to Incest Inadmissible Against the Other. — *State v. De Masters*, 15 S. Dak. 581.

**3.** Statement of Codefendant Admissible Against Himself Though It Implicates Another. — *State v. Sims*, 106 La. 453; *State v. Robinson*, 52 La. Ann. 616. See also *Thomas v. State*, 43 Tex. Crim. 20, 96 Am. St. Rep. 834.

Omission of Name of Other Defendant Implicated Unnecessary. — *State v. Brinte*, 4 Penn. (Del.) 551; *Givens v. State*, 103 Tenn. 648.

**4.** Effect of Confession Limited by Instruction by Court. — *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Robinson*, 52 La. Ann. 616.

A Confession by the Principal is admissible on the trial of an accessory to establish the guilt of the former and the character of the crime. *Brooks v. State*, 103 Ga. 50; *State v. Sims*, 106 La. 453; *Thomas v. State*, 43 Tex. Crim. 20, 96 Am. St. Rep. 834; *Rex v. Martin*, 9 Ont. L. Rep. 218, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 572.

**573.** 3. Identity of Prisoner as Criminal. — The identity of the accused as the person committing the crime may rest upon his confession

alone. *Cox v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 145.

**574.** 6. Person Overhearing Confession as Witness. — See *Morgan v. State*, 120 Ga. 499.

**7.** Whole Confession to Be Admitted. — *Williams v. State*, 69 Ark. 599; *State v. Brinte*, 4 Penn. (Del.) 551; *Kirby v. State*, 44 Fla. 81; *State v. Novak*, 109 Iowa 717; *State v. Busse*, (Iowa 1904) 100 N. W. Rep. 536; *Cortez v. State*, 43 Tex. Crim. 375; *State v. Hand*, 71 N. J. L. 137. See also *State v. Lipscomb*, 160 Mo. 125; *State v. Coats*, 174 Mo. 396.

**575.** 1. Substance of Confession Sufficient. — *State v. Gianfala*, 113 La. 463; *Green v. State*, 96 Md. 384.

Where a Witness Was Not Familiar with the Language in which the alleged confession was spoken his testimony was held to be inadmissible. *Cortez v. State*, 43 Tex. Crim. 375.

**576.** 2. Substance of Confession Essential. — A witness should be able to state accurately the substance of a confession in order that his testimony may be properly received. *Cortez v. State*, 43 Tex. Crim. 375.

**4.** Confession in Writing Admissible. — *State v. Brinte*, 4 Penn. (Del.) 551; *Grimsinger v. State*, 44 Tex. Crim. 1; *State v. Haworth*, 24 Utah 398, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 576.

Letter written by the defendant amounting to confessions are admissible in evidence, where written while the defendant was not under arrest. *Edens v. State*, (Tex. Crim. 1897) 43 S. W. Rep. 89.

**577.** 1. Right of Prisoner to Have Writing Produced. — See *State v. Busse*, (Iowa 1904) 100 N. W. Rep. 536.

The Existence of a Written Confession does not act to exclude oral testimony of its contents or other testimony given at the time of the confession. *Grimsinger v. State*, 44 Tex. Crim. 1.

**579.** 2. Caution to Be Used in Receiving and Weighing Confessions — *California*. — *People v. Gonzales*, 136 Cal. 666.

*Colorado*. — *Fincher v. People*, 26 Colo. 176. *District of Columbia*. — *Travers v. U. S.*, 6 App. Cas. (D. C.) 450.

*Florida*. — *Green v. State*, 40 Fla. 474. See also *McNish v. State*, (Fla. 1903) 34 So. Rep. 219.

*Louisiana*. — *State v. Berry*, 50 La. Ann. 1309; *State v. Alexander*, 109 La. 557; *State v. Auguste*, 50 La. Ann. 488.

*Maryland*. — *Green v. State*, 96 Md. 384.

*Mississippi*. — *Haynes v. State*, (Miss. 1900) 27 So. Rep. 601.

**579.** An Instruction by the Court. — See note 4.

**580.** Question for the Jury. — See note 1.

**581.** 2. Necessity of Corroborating Evidence — Extra-judicial Confessions — English Rule. — See note 2.

**582.** Rule in United States. — See note 1.

Full, Direct, and Positive Evidence. — See note 2.

**583.** See note 1.

*Texas.* — *Cortez v. State*, 43 Tex. Crim. 375.

**579.** 3. Confession Deliberately Made Entitled to Highest Credit. — *Fincher v. People*, 26 Colo. 176, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 579. See also *State v. Alexander*, 109 La. 557.

4. Jurisdictions Disallowing Instructions as to Caution, Etc. — *Fincher v. People*, 26 Colo. 175, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 579.

**580.** 1. Weight of Evidence Question for Jury — *Alabama.* — *McKinney v. State*, 134 Ala. 134; *Huffman v. State*, 130 Ala. 89.

*Colorado.* — *Fincher v. People*, 26 Colo. 176, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 580.

*Delaware.* — *State v. Brinte*, 4 Penn. (Del.) 551.

*Florida.* — *Kirby v. State*, 44 Fla. 81.

*Missouri.* — *State v. Brennan*, 164 Mo. 487; *State v. McKenzie*, 144 Mo. 40. See also *State v. Coats*, 174 Mo. 396.

*Nevada.* — *State v. Simas*, 25 Nev. 432.

*Ohio.* — *State v. Morris*, 7 Ohio Dec. 84, 5 Ohio N. P. 232.

*Oklahoma.* — *Kirk v. Territory*, 10 Okla. 46.

*Texas.* — *Binyon v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 339; *McVeigh v. State*, 43 Tex. Crim. 17. See also *Cleavinger v. State*, 43 Tex. Crim. 273.

*Washington.* — *State v. Webster*, 21 Wash. 63.

Jury May Give Unequal Credit to Different Parts of Confession. — *State v. Novak*, 109 Iowa 717.

**581.** 2. *Com. v. Williams*, 171 Mass. 465, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 581; *Sullivan v. State*, 58 Neb. 796, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 581.

**582.** 1. Doctrine in United States as to Necessity of Corroborating Evidence — *United States.* — *Flower v. U. S.*, (C. C. A.) 116 Fed. Rep. 241, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582.

*California.* — *People v. Jones*, 123 Cal. 65, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582; *People v. Ward*, 145 Cal. 736.

*Colorado.* — *Fincher v. People*, 26 Colo. 176.

*Connecticut.* — *State v. Willis*, 71 Conn. 293.

*Delaware.* — *State v. Hand*, 2 Hard. (Del.)

149.

*Florida.* — *Gantling v. State*, 41 Fla. 587. See also *Anthony v. State*, 44 Fla. 1.

*Georgia.* — *Wimberly v. State*, 105 Ga. 188; *Lucas v. State*, 110 Ga. 756; *Bines v. State*, 118 Ga. 320; *Sanders v. State*, 118 Ga. 329; *Joiner v. State*, 119 Ga. 315. See also *Davis v. State*, 105 Ga. 808.

*Idaho.* — *State v. Keller*, 8 Idaho 699.

*Illinois.* — *Johnson v. People*, 197 Ill. 51.

*Indiana.* — *Griffiths v. State*, 163 Ind. 555.

*Kentucky.* — *Com. v. Hicks*, 82 S. W. Rep.

265, 26 Ky. L. Rep. 511; *Gilbert v. Com.*, 111 Ky. 793; *Dugan v. Com.*, 102 Ky. 241.

*Massachusetts.* — *Com. v. Williams*, 171 Mass. 465, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582.

*Mississippi.* — *Richardson v. State*, 80 Miss. 115; *Stanley v. State*, 82 Miss. 498; *Haynes v. State*, (Miss. 1900) 27 So. Rep. 601.

*Missouri.* — *State v. Coats*, 174 Mo. 396.

*Nebraska.* — *Sullivan v. State*, 58 Neb. 796. See also *Chezem v. State*, 56 Neb. 496.

*New York.* — *People v. White*, 176 N. Y. 331, 17 N. Y. Crim. 538.

*Ohio.* — *State v. Morris*, 7 Ohio Dec. 84, 5 Ohio N. P. 232; *State v. Knapp*, 70 Ohio St. 380; *Hotelling v. State*, 2 Ohio Cir. Dec. 366.

*Rhode Island.* — *State v. Jacobs*, 21 R. I. 259, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582.

*Texas.* — *Gray v. State*, 44 Tex. Crim. 477; *White v. State*, 40 Tex. Crim. 370; *Cox v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 145; *Kugadt v. State*, 38 Tex. Crim. 681. See also *Sullivan v. State*, 40 Tex. Crim. 633.

*Utah.* — *State v. Bates*, 25 Utah 1.

*Vermont.* — *State v. Blay*, 77 Vt. 56.

2. Full, Direct, and Positive Evidence of Corpus Delicti Not Essential — *United States.* — *Flower v. U. S.*, (C. C. A.) 116 Fed. Rep. 241, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582. See also *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582, and holding that the *corpus delicti* may be established by circumstantial evidence.

*California.* — *People v. Jones*, 123 Cal. 65, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582.

*Florida.* — *Gantling v. State*, 41 Fla. 587.

*Georgia.* — *Sanders v. State*, 118 Ga. 329.

*Idaho.* — *State v. Keller*, 8 Idaho 699.

*Indiana.* — *Griffiths v. State*, 163 Ind. 555.

*Massachusetts.* — *Com. v. Williams*, 171 Mass. 465, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582.

*Missouri.* — *State v. Coats*, 174 Mo. 396.

*Nebraska.* — *Sullivan v. State*, 58 Neb. 796.

*Ohio.* — *State v. Knapp*, 70 Ohio St. 380.

*Rhode Island.* — *State v. Jacobs*, 21 R. I. 259.

*Texas.* — *Kugadt v. State*, 38 Tex. Crim. 681; *Gray v. State*, 44 Tex. Crim. 477.

*Utah.* — *State v. Bates*, 25 Utah 1.

*Vermont.* — *State v. Blay*, 77 Vt. 56.

**583.** 1. Proof of Corpus Delicti Beyond Reasonable Doubt Sufficient — *United States.* — *Flower v. U. S.*, (C. C. A.) 116 Fed. Rep. 241, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 581, 582.

*California.* — *People v. Jones*, 123 Cal. 65.

*Florida.* — *Mitchell v. State*, (Fla. 1903) 33 So. Rep. 1009. See also *Anthony v. State*, 44 Fla. 1.

**584.** When Fact of Commission of Offense Established. — See note 1.

**585.** Where There Is No Corroborative Evidence of Criminal Agency. — See note 1.

**587.** CONFIDENCE GAME. — See note 2.

**588.** CONFIRMATION. — See notes 1, 2.

**589.** [CONFORM. — See note 3a.]

**590.** CONFORMITY. — See note 1.

CONFRONT. — See note 2.

*Georgia.* — *Wimberly v. State*, 105 Ga. 188.

*Indiana.* — *Griffiths v. State*, 163 Ind. 555.

*Massachusetts.* — *Com. v. Williams*, 171 Mass.

465.

*Missouri.* — *State v. Coats*, 174 Mo. 396.

*Ohio.* — *State v. Knapp*, 70 Ohio St. 380.

*Texas.* — *Kugadt v. State*, 38 Tex. Crim.

681; *Cox v. State*, (Tex. Crim. 1902) 69 S. W.

Rep. 145; *Gray v. State*, 44 Tex. Crim. 477.

**584.** 1. Confession Sufficient to Establish Criminal Agency. — *People v. Jones*, 123 Cal. 65; *Gantling v. State*, 41 Fla. 587; *Morgan v. State*, 120 Ga. 499; *Wimberly v. State*, 105 Ga. 188; *Johnson v. People*, 197 Ill. 51; *Sullivan v. State*, 58 Neb. 796; *Sullivan v. State*, 40 Tex. Crim. 633; *Cox v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 145. See also *Joiner v. State*, 119 Ga. 315; *Davis v. State*, 105 Ga. 808; *Dugan v. Com.*, 102 Ky. 241.

**585.** 1. View that Confession Is Sufficient Without Proof of Any Criminal Agency. — *White v. State*, 40 Tex. Crim. 370, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 585; *Sullivan v. State*, 40 Tex. Crim. 637, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 585.

**587.** 2. *Du Bois v. People*, 200 Ill. 157.

**Distinguished from Robbery.** — In *Van Eyck v. People*, 178 Ill. 200, the court said: "As to whether the crime committed was robbery or the obtaining of money by means of the *confidence game*, is not a proposition that will induce us to engage in a protracted discussion of these crimes. Inducing men to bet on top and bottom of dice, and procuring money from a man for that purpose, and getting possession of his pocketbook for the purpose of betting, even though fear is aroused in him

for the loss of his money, is enough of a *confidence game* to sustain a conviction and distinguish it from robbery."

**588.** 1. See *Turk v. Skiles*, 45 W. Va. 82.

**2. Ratification and Confirmation.** — *De Hereu v. Hereu*, (Ariz. 1899) 56 Pac. Rep. 876.

**589.** 3a. *Conform Has the Sense of Comply With or Adopt* in a statute requiring that "any quarantine line that may be fixed by the Live Stock Sanitary Commission against Texas, or splenic, fever shall be so fixed as to *conform* to the federal quarantine line established, or that may be established by the United States Department of Agriculture." *Ft. Worth, etc., R. Co. v. Masterson*, 95 Tex. 262.

**590.** 1. In construing a statute requiring an attachment writ to state the amount in *conformity* with the complaint, the court said: "The word *conform* is not the equivalent of 'identical,' or of 'the same.' Webster defines *conformity* thus: 'Correspondence in character or manner; resemblance; agreement; congruity with something else.' This word is usually followed by 'to,' or 'with,' and is frequently qualified by the word 'perfect,' without which qualification identity is not indicated. That the amount stated in the complaint, less all legal counterclaims or set-offs, being for the same indebtedness, and not exceeding the amount demanded, is in correspondence in character and in harmony or congruity with it, I think is apparent, and that the legislature intended this construction may be illustrated by an extreme case." *De Leonis v. Etchepare*, 120 Cal. 407.

**2. Confronting Witnesses.** — *State v. Manion*, 19 Utah 505.

## CONFUSION OF GOODS.

**592. I. DEFINITION.** — See note 1.

**593. II. CONFUSION WITH CONSENT OF PARTIES.** — See note 2.

**III. CONFUSION RESULTING FROM ACCIDENT OR MISTAKE.** — See note 4.

**594. Mixture Without Fraudulent Intent.** — See note 1.

**IV. CONFUSION WITH FRAUDULENT INTENT** — 1. General Rule — Works a Forfeiture. — See note 4.

**595. 2. Limitations** — *a. GENERALLY* — Rule Adopted to Prevent Frauds. — See note 3.

*b. WHERE THE GOODS CAN BE DISTINGUISHED.* — See note 5.

**596. Burden of Distinguishing on Wrongdoer.** — See note 2.

**597. c. WHERE GOODS INTERMIXED ARE OF EQUAL VALUE.** — See notes 1, 2.

**598. V. CONFUSION BY FIDUCIARIES.** — See notes 1, 2.

**592. 1. Term "Confusion of Goods" Distinguished.** — In *Stone v. Marshall Oil Co.*, 208 Pa. St. 85, 101 Am. St. Rep. 904, the court said: "Although such a term as 'confusion of goods' is generally used, there is in fact, properly, no such doctrine as 'confusion of goods.' There is a fact of confusion of goods, which if committed with a fraudulent motive subjects the transaction to an inflexible rule, rigorously enforced both at law and in equity, that the wrongdoer shall not profit by nor the innocent party suffer from the wrong."

**593. 2. Contract Controlling Ownership in Mixture.** — *Keweenaw Assoc. v. O'Neil*, 120 Mich. 270, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 593.

**4** *Roblin v. Jackson*, 13 Manitoba 328.

**594. 1. Honest Mistake.** — See *Keweenaw Assoc. v. O'Neil*, 120 Mich. 270.

**4. Fraudulent Confusion Without Consent.** — *Miller Stephenson*, 27 Ind. App. 271, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 594; *Stone v. Marshall Oil Co.*, 208 Pa. St. 85, 101 Am. St. Rep. 904.

**Principle Applied in Mining Case.** — *Maloney v. King*, 30 Mont. 158.

**Rule Applied in Garnishment Proceedings.** — *Holloway Seed Co. v. City Nat. Bank*, 92 Tex. 187.

**595. 3. Object of Rule — Prevention of Fraud.** — *Keweenaw Assoc. v. O'Neil*, 120 Mich. 270; *St. Paul Boom Co. v. Kemp*, (Wis. 1905) 103 N. W. Rep. 259, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 595.

**5. Where Goods Are Distinguishable.** — *McKnight v. U. S.*, (C. C. A.) 130 Fed. Rep. 659.

**596. 2. Wrongdoer Must Distinguish His Property or Lose It.** — *Wright v. Ellwood Ivins Tube Co.*, 128 Fed. Rep. 462; *Miller v. Stephenson*, 27 Ind. App. 271, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 596; *Holloway Seed Co. v. City Nat. Bank*, 92 Tex. 187.

**597. 1. Goods of Equal Value.** — *Rust Land, etc., Co. v. Isom*, 70 Ark. 99, 91 Am. St. Rep. 68; *Keweenaw Assoc. v. O'Neil*, 120 Mich. 273, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 597; *Pickering v. Moore*, 67 N. H. 533, 68 Am.

St. Rep. 695; *John H. Belcher, etc., Live Stock Commission Co. v. Cassidy Bros. Live Stock Commission Co.*, 26 Tex. Civ. App. 60; *St. Paul Boom Co. v. Kemp*, (Wis. 1905) 103 N. W. Rep. 259.

**Rights of Purchaser from Wrongdoer.** — Where a wrongdoer has intentionally mixed the goods of another with his own, so as to be indistinguishable from his own, such other has the right to select the quantity due to him from those with which they are confused or intermingled, and the innocent purchaser from the wrongdoer gets no greater right. *Blodgett v. Seals*, 78 Miss. 522.

**2. Owner May Peaceably Retake His Proportional Part.** — *Rust Land, etc., Co. v. Isom*, 70 Ark. 99, 91 Am. St. Rep. 68; *Pickering v. Moore*, 67 N. H. 533, 68 Am. St. Rep. 695.

**598. 1. If a Party Having Charge of the Property of Another** — *Wright v. Ellwood Ivins Tube Co.*, 128 Fed. Rep. 462, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 598, note.

**2. Mixture by Mortgagor.** — If the mortgagor of chattels, without the consent of the mortgagee, confuses them with other property of the same character belonging to a third person, and the latter, by consent of such mortgagor, converts the common property into money, knowing the facts, actually or constructively, such third person is liable to the mortgagee as for money had and received, but only to the extent of the sum due upon the mortgage indebtedness, he having a right to the benefit of all other mortgage security to save himself against loss. If in the event last mentioned the third person pays to the mortgagee a sum of money out of the proceeds of all or a part of the mortgaged property to apply upon the mortgage indebtedness, he is entitled to have the same applied thereon regardless of any agreement such mortgagee and the mortgagor may make to which he is not a party. *Illinois Trust, etc., Bank v. Alexander Stewart Lumber Co.*, 119 Wis. 54.

**A Lien of a Chattel Mortgage** is not affected by the fact that the mortgagor, without the knowledge or consent of the mortgagee, mingles



**599. CONGREGATION.** — See note 6.

**600. CONGREGATIONAL.** — See note 1.

[**CONJUNCTION.** — See note 1a.]

**CONNECT, CONNECTIONS, ETC.** — See note 3.

the goods covered by the mortgage with other property belonging to him. *Edelhoff v. Horner-Miller Straw Goods Mfg. Co.*, 86 Md. 595.

*Conversion.* — Where mortgagors of a jewelry stock and fixtures and subsequent purchasers thereof added new goods to the stock, not covered by the mortgage, which was so commingled with the original stock that the mortgagee had no means of identifying the new goods and therefore sold the entire stock under the mortgage, he was held not to be liable for conversion of the stock not covered, in the absence of a demand for the goods before suit brought. *Gibson v. McIntire*, 110 Iowa 417.

*Rights of Mortgagee.* — When a mortgagor has so commingled the mortgaged property with goods of like quality and value belonging to a third person that identification and separation are impossible, the mortgagee may take under foreclosure proceedings his aliquot part from the entire quantity in the possession of a subsequent purchaser of both parcels. *Horne v. Hanson*, 68 N. H. 201.

Where one who is the agent for the sale of goods for another allows them to be mixed with his stock of goods, and then gives a mortgage on the entire stock, the mortgagee obtains no better title than the mortgagor had. *Lance v. Butler*, 135 N. Car. 419.

**Third Person Negligently Allowing Mixture by Mortgagor.** — *Lance v. Butler*, 135 N. Car. 419.

**599. 6.** *In re Walker*, 200 Ill. 574, the court said: "In the United States the word *congregation* means the members of a particular church who meet in one place to worship. (Bouvier's Law Dict., title 'Congregation.')

**600. 1.** In *Boston v. Doyle*, 184 Mass. 373, the court said: "The leading American lexi-

cographers make the primary meaning of the word *congregational* pertain to church government, although a secondary and popular meaning relates to doctrine. Doubtless many of the ministers and people of so-called 'Orthodox *Congregational*' churches entertain doctrinal opinions very different from those most prevalent in the same churches 100 years ago. We are of opinion that the testator, in using this word, did not have in mind any nice shades of distinction in regard to the doctrine of the Trinity, or other kindred doctrines, but that he meant to include churches of a kind well known in Boston and elsewhere in *Massachusetts*, which were not exactly alike in their doctrines, but which, chiefly by reason of their polity, were called *Congregational*."

1a. "The indictment goes further than to say that Guynes was acting for himself. It adds, 'and in *conjunction* with A. Effron and \* \* \* W. J. Hume.' It is urged by counsel that it is difficult to determine just what is meant. But we must take it that the word *conjunction* was used with its ordinary meaning, — 'the state of being *conjoined*, united or associated; union, association, league.' Webster Dict. Placing that meaning on the word, it seems clear that the grand jury charged that Guynes, in posting the letters, was acting for himself in union with the other defendants who concocted the scheme to defraud." *Hume v. U. S.*, (C. C. A.) 118 Fed. Rep. 689.

**3. Connected with the Subject of the Action.** — As to when an answer stating a counterclaim is *connected* with the subject of the action within *New York Code Civ. Pro.*, § 501, see *Siebrecht v. Siegel-Cooper Co.*, 38 N. Y. App. Div. 549; *Benton v. Moore*, (County Ct.) 42 Misc. (N. Y.) 660.

## CONNECTING CARRIERS (OF GOODS).

By H. N. ELDRIDGE.

**606. II. RELATION OF CONNECTING CARRIERS TO EACH OTHER** — Initial Carrier Contracts with Connecting Line as Shipper's Agent. — See note 1.

**III. NO CARRIER BOUND TO CARRY BEYOND ITS OWN LINE.** — See note 3.

**IV. DUTY TO DELIVER TO SUCCEEDING CARRIER.** — See note 5.

**608. V. NOTICE OF ARRIVAL OF GOODS.** — See note 1.

**VI. DUTY TO RECEIVE GOODS TENDERED BY A CONNECTING LINE** — 1. In General. — See note 5.

**609. 3. Where Goods Tendered Are in a Damaged State.** — See notes 2, 3.

**610. VII. LIABILITY FOR DELAY** — 1. The General Rule — When the Delay Occurs on the Initial Carrier's Own Line. — See note 1.

Intermediate Carrier Liable for Its Own Acts. — See note 2.

**606. 1. Initial Carrier Is Shipper's Agent.** — *Glover v. Cape Girardeau, etc.*, R. Co., 95 Mo. App. 375, wherein the court said: "The law is, that when a shipper delivers goods to a carrier to be carried over successive routes beyond the route of the first carrier, he makes the first carrier his forwarding agent and his acts in directing the shipment of the goods over succeeding routes are the acts of the owner."

**3. Points Beyond Line.** — *Hartley v. St. Louis, etc.*, R. Co., 115 Iowa 612; *Eckles v. Missouri Pac. R. Co.*, 72 Mo. App. 296; *Fremont, etc.*, R. Co. v. New York, etc., R. Co., 66 Neb. 159; *Bird v. Southern R. Co.*, 99 Tenn. 719, 63 Am. St. Rep. 856; *Post v. Southern R. Co.*, 103 Tenn. 184.

In *Georgia* it is held that there is no power in the railroad commission to compel a railroad company to make a contract for the shipment of goods beyond the terminus of its own line. *State v. Wrightsville, etc.*, R. Co., 104 Ga. 437.

**5. Delivery to Next Carrier.** — *Cincinnati, etc.*, R. Co. v. Fairbanks, (C. C. A.) 90 Fed. Rep. 467; *Illinois Cent. R. Co. v. Foulks*, 191 Ill. 57, affirming 92 Ill. App. 391; *Missouri Pac. R. Co. v. Houston*, 10 Kan. App. 356; *Seasongood v. Tennessee, etc., Transp. Co.*, (Ky. 1899) 54 S. W. Rep. 193; *Lewis v. Chesapeake, etc.*, R. Co., 47 W. Va. 656, 81 Am. St. Rep. 816.

**Delivery to Next Carrier with Necessary Instructions.** — In *Hall v. Wabash R. Co.*, 80 Mo. App. 467, the court said: "It was the duty of the defendant, as an intermediate carrier, to receive the goods, transport and deliver them to the next connecting line in good order, with the necessary instructions, and in terms sufficient explicit to inform the next carrier of the ultimate destination of the goods." See also *Chicago, etc.*, R. Co. v. Fifth Nat. Bank, 26 Ind. App. 600.

**Delivery to Station Not Open to Business** is not negligence on the part of the initial carrier if the connecting carrier has officially stated that such station was open for business. *Texas, etc.*, R. Co. v. Kolp, (Tex. Civ. App. 1905) 88 S. W. Rep. 417.

**608. 1. Duty to Notify Succeeding Carrier.** — See *Texas, etc.*, R. Co. v. Reiss, 183 U. S. 621.

**5. Duty Exists by Statute in Texas.** — *Gulf, etc.*, R. Co. v. Texas, etc., R. Co., 93 Tex. 482; *Texas, etc.*, R. Co. v. Randle, 18 Tex. Civ. App. 348; *Ft. Worth, etc.*, R. Co. v. Masterson, 95 Tex. 262. See also *Sterling v. St. Louis, etc.*, R. Co., (Tex. Civ. App. 1905) 86 S. W. Rep. 655.

**Connecting Carrier May Refuse to Receive Diseased Cattle.** — *Missouri, etc.*, R. Co. v. Wells, 22 Tex. Civ. App. 255.

**Where No Waybill Is Furnished by the Initial Carrier**, the connecting carrier may refuse to receive goods. *101 Live Stock Co. v. Kansas City, etc.*, R. Co., 100 Mo. App. 674.

**609. 2. Connecting Carrier May Refuse to Receive Damaged Goods.** — *Buston v. Pennsylvania R. Co.*, 116 Fed. Rep. 235, affirmed (C. C. A.), 119 Fed. Rep. 808, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 609.

**3. Gulf, etc., R. Co. v. A. B. Frank Co., (Tex. Civ. App. 1898) 48 S. W. Rep. 210.**

**610. 1. Initial Line Liable for Delay Resulting from Its Negligence.** — *Felton v. McCreary-McClellan Live-Stock Co.*, (Ky. 1900) 59 S. W. 744; *St. Louis, etc.*, R. Co. v. Coolidge, (Ark. 1904) 83 S. W. Rep. 333; *Butterick Pub. Co. v. Gulf, etc.*, R. Co., (Tex. Civ. App. 1905) 88 S. W. Rep. 299.

**That the Connecting Carrier Is Unprepared to Continue Transportation** with promptness does not justify the initial carrier in delaying transportation. *Alexander v. Pennsylvania R. Co.*, 7 Pa. Super. Ct. 183, 42 W. N. C. (Pa.) 181.

**2. Delay in Intermediate Line.** — *St. Louis, etc.*, R. Co. v. Cohen, (Tex. Civ. App. 1900) 55 S. W. Rep. 1123; *Texas, etc.*, R. Co. v. Hassell, 23 Tex. Civ. App. 681; *Gulf, etc.*, R. Co. v. Cushney, 95 Tex. 309. See *Chicago, etc.*, R. Co. v. Kapp, (Tex. Civ. App. 1904) 83 S. W. Rep. 233.

**Where a Delay Is Due to Defects in a Car**, which existed at the time it was received from the initial carrier, the intermediate carrier will be liable for all damages resulting. *St. Louis,*

**612. VIII. LIABILITY FOR LOSS OR INJURY — 1. Of Initial Carrier — a. LIABILITY HELD TO EXTEND OVER WHOLE ROUTE.** — See note 1.

**615. b. LIABILITY HELD TO BE LIMITED TO CARRIER'S OWN LINE.** — See note 2.

**619. c. UNDER STATUTORY PROVISIONS — (1) In Missouri — A Late Statute.** — See note 3.

**620. Special Contract — Negligence of Connecting Line.** — See note 1.

(2) *In Georgia.* — See note 3.

etc., R. Co. v. Carlisle, (Tex. Civ. App. 1904) 78 S. W. Rep. 553.

**612. 1. Rule Holding Initial Carrier Liable Over Whole Route.** — Central of Georgia R. Co. v. Murphey, 116 Ga. 863; Savannah, etc., R. Co. v. Commercial Guano Co., 103 Ga. 590; Elgin, etc., R. Co. v. Bates Mach. Co., 200 Ill. 636, 93 Am. St. Rep. 218, *affirming* 98 Ill. App. 311; Lehigh Valley Transp. Co. v. Pillsbury Washburn Flour Mills Co., 92 Ill. App. 628; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 175 Ill. 557, 67 Am. St. Rep. 238; American Roofing Co. v. Memphis, etc., Packet Co., 8 Ohio Dec. 490, 5 Ohio N. P. 146; Texas, etc., R. Co. v. Stephens, (Tex. Civ. App. 1905) 86 S. W. Rep. 933.

**615. 2. Rule Limiting Liability to First Carrier's Line — United States.** — Texas, etc., R. Co. v. Reiss, 183 U. S. 621; Texas, etc., R. Co. v. Callender, 183 U. S. 632; Cincinnati, etc., R. Co. v. Fairbanks, (C. C. A.) 90 Fed. Rep. 467.

*Colorado.* — Trumbull v. Coulson, 12 Colo. App. 102.

*Indiana.* — Pennsylvania R. Co. v. Dickson, 31 Ind. App. 451; Chicago, etc., R. Co. v. Woodward, (Ind. 1904) 72 N. E. Rep. 558.

*Iowa.* — Hartley v. St. Louis, etc., R. Co., 115 Iowa 612.

*Kansas.* — Hoffman v. Union Pac. R. Co., 8 Kan. App. 379.

*Kentucky.* — Ireland v. Mobile, etc., R. Co., 105 Ky. 400, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 611 [615]; U. S. Mail Line Co. v. Carrollton Furniture Mfg. Co., 101 Ky. 658; Louisville, etc., R. Co. v. Cooper, (Ky. 1897) 42 S. W. Rep. 1134; Pittsburg, etc., R. Co. v. Viers, 113 Ky. 526; Louisville, etc., R. Co. v. Chestnut, 115 Ky. 43; Thomas v. Frankfort, etc., R. Co., 116 Ky. 879.

*Maine.* — Fisher v. Boston, etc., R. Co., 99 Me. 338, 105 Am. St. Rep. 283.

*Mississippi.* — Southern R. Co. v. Vaughn, (Miss. 1905) 38 So. Rep. 500.

*Missouri.* — Hubbard v. Mobile, etc., R. Co., (Mo. App. 1905) 87 S. W. Rep. 52; Eckles v. Missouri Pac. R. Co., (Mo. App. 1905) 87 S. W. Rep. 99.

*Nebraska.* — Fremont, etc., R. Co. v. New York, etc., R. Co., 66 Neb. 159.

*New York.* — Thyll v. New York, etc., R. Co., 92 N. Y. App. Div. 513; Farnsworth v. New York Cent., etc., R. Co., 88 N. Y. App. Div. 322; Bishawaiti v. Pennsylvania R. Co., (Supm. Ct. App. T.) 92 N. Y. Supp. 783.

*North Carolina.* — Meredith v. Seaboard Air Line R. Co., 137 N. Car. 478.

*Oregon.* — Taffe v. Oregon R. Co., 41 Ore. 64.

*South Carolina.* — Willett v. Southern R. Co., 66 S. Car. 477, stating the former and the

present rule. See also Cave v. Carolina Midland R. Co., 53 S. Car. 496.

*South Dakota.* — Sutton v. Chicago, etc., R. Co., 14 S. Dak. 111, under a statute providing that, "if a common carrier accept freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery."

*Tennessee.* — Post v. Southern R. Co., 103 Tenn. 184.

*Texas.* — Goldstein v. Sherman, etc., R. Co., 25 Tex. Civ. App. 365; Texas, etc., R. Co. v. Cushny, (Tex. Civ. App. 1901) 64 S. W. Rep. 795, *affirmed* 95 Tex. 309.

*Virginia.* — Chesapeake, etc., R. Co. v. Stock, (Va. 1905) 51 S. E. Rep. 161.

**619. 3. Missouri Statute Not in Violation of Interstate Commerce Clause of Federal Constitution.** — Marshall, etc., Grain Co. v. Kansas City, etc., R. Co., 176 Mo. 480, 98 Am. St. Rep. 508; Western Sash, etc., Co. v. Chicago, etc., R. Co., 177 Mo. 641.

**620. 1. Present Rule as to Limitation of Liability.** — When a carrier receives freight for shipment to a point beyond his own line, though he does not contract to carry to the destination he cannot limit his statutory liability for the negligence of the connecting carrier. But by expressly contracting to carry only on his own line he can escape such liability. Nines v. St. Louis, etc., R. Co., 107 Mo. 475; Western Sash, etc., Co. v. Chicago, etc., R. Co., 177 Mo. 641, *overruling* Dimmitt v. Kansas City, etc., R. Co., 103 Mo. 440. See also Marshall, etc., Grain Co. v. Kansas City, etc., R. Co., 176 Mo. 480, 98 Am. St. Rep. 508; State Nat. Bank v. Chicago G. W. R. Co., 72 Mo. App. 88; Eckles v. Missouri Pac. R. Co., 72 Mo. App. 296; Marshall v. Kansas City, etc., R. Co., 74 Mo. App. 81; Popham v. Barnard, 77 Mo. App. 619; Jones v. St. Louis, etc., R. Co., 89 Mo. App. 653; Redmon v. Chicago, etc., R. Co., 90 Mo. App. 68.

**3. The Georgia Statute.** — Kerr v. Georgia R. Co., 105 Ga. 371.

**Effect of Receipt for Goods "In Good Order."** — If a railroad company receives from another railroad company goods to be transported, and receipts for them "as in good order," the company so receiving and receipting is, under the terms of the statute, concluded by the receipt from setting up, as against the consignee, that the goods were in fact not in good order when received. If such company receives the goods without receipting for them "as in good order," there is still a presumption that the goods were so received; but this presumption may be re-

- 620.** Articles Received "In Good Order" — Connecting Carrier. — See note 4.
- 622.** 2. Liability of Intermediate Lines — *a.* TO WHAT EXTENT LIABLE — Carrier on Whose Line Loss Occurs Liable. — See note 5.
- 623.** Receipt of Goods in Safe Condition by Carrier to Be Shown. — See note 3.
- 624.** Loss on Another Line — Partnership — Express Contract. — See note 1.
- b.* FAILURE TO FURNISH PROPER CARS. — See note 3.
- 625.** 3. Liability of Last Carrier. — See note 6.
- Presumption. — See note 7.
- 626.** 4. Liability for Diverting Consignment from Proper Route — Where There Are No Instructions. — See note 3.
- Where There Are Special Instructions. — See note 4.
- 628.** 5. Where Connecting Line Refuses to Receive Goods — Contract for Through Carriage. — See note 5.
- 629.** Where There Is No Contract for Through Transportation. — See note 1.
- 630.** IX. LIABILITY AS AFFECTED BY SPECIAL CONTRACTS — 1. Generally — Through Contract — Connecting Carriers Agents of Initial Carrier. — See note 2.
- 631.** 2. Carrier May Contract for Through Liability — *a.* IN GENERAL. — See note 4.

butted by showing that no receipt was given, and that the goods were in fact not in good order when received. The company may in such a case show, when sued by the consignee, either that the goods were delivered to him in exactly the condition in which they were received from the other railroad company, and that their damaged condition was not due to any act on the part of the defendant or its agents, or that they had become damaged after shipment, without fault on the part of any of the carriers. *Susong v. Florida Cent., etc., R. Co., 115 Ga. 361.*

**620.** 4. Express Contract for Through Carriage. — The statute does not apply to a case where there is an express contract for through carriage by the initial carrier. *Felton v. Central of Georgia R. Co., 114 Ga. 609.*

**622.** 5. Carrier Whose Negligence Caused the Injury Always Liable. — *U. S. Mail Line Co. v. Carrollton Furniture Mfg. Co., 101 Ky. 658; Lamb v. Chicago, etc., R. Co., 101 Wis. 138.*

**623.** 3. No Company Liable unless It Is Shown to Have Received the Goods. — See *Thyll v. New York, etc., R. Co., 92 N. Y. App. Div. 513.*

**624.** 1. Liability of Intermediate Carrier for Injury Occurring on Another Line. — *Trumbull v. Coulson, 12 Colo. App. 102.*

3. Must Furnish Proper Cars — Carrying Goods in Cars Received from Connecting Line. — *Glynn v. Central R. Co., 175 Mass. 510, 78 Am. St. Rep. 507. See St. Louis Southwestern R. Co. v. Myer, (Ark. 1905) 86 S. W. Rep. 999.*

**625.** 6. Liability of Last Carrier. — *Strong v. Long Island R. Co., 91 N. Y. App. Div. 442; Thyll v. New York, etc., R. Co., 92 N. Y. App. Div. 513; Houston, etc., R. Co. v. Ney, (Tex. Civ. App. 1900) 58 S. W. Rep. 43.*

The Fact that Goods Are Transported in a Sealed Car does not change in any way the rule as to the burden of proof. *Beede v. Wisconsin Cent. R. Co., 90 Minn. 36.*

7. Presumption. — *Willett v. Southern R. Co., 66 S. Car. 477; Texas, etc., R. Co. v. Kelly, (Tex. Civ. App. 1903) 74 S. W. Rep. 343.*

**626.** 3. Initial Carrier May Select Route Where No Instructions Are Given. — *Chicago, etc., R. Co. v. Woodward, (Ind. 1904) 72 N. E. Rep.*

*558; Steidl v. Minneapolis, etc., R. Co., (Minn. 1905) 102 N. W. Rep. 701.*

The Initial Carrier Is Bound to Exercise Reasonable Care in the selection of a connecting carrier. *Louisville, etc., R. Co. v. Duncan, 137 Ala. 446.*

Initial Carrier Must Not Select Insolvent Route. — *Post v. Southern R. Co., 103 Tenn. 184.*

4. But Special Instructions Must Be Followed as to Route. — *Post v. Southern R. Co., 103 Tenn. 184. See also Eckles v. Missouri Pac. R. Co., (Mo. App. 1905) 87 S. W. Rep. 99.*

**628.** 5. Where Connecting Line Refuses to Receive Goods. — See *Louisville, etc., R. Co. v. Farmers, etc., Live Stock Commission Firm, 107 Ky. 53.*

**629.** 1. Liability if There Is No Through Contract. — *Buston v. Pennsylvania R. Co., (C. C. A.) 119 Fed. Rep. 808, affirming 116 Fed. Rep. 235.*

Duty to Notify Consignor. — In *Alabama* it is held that if the initial carrier makes a tender of the freight to the connecting carrier, and the latter refuses to receive it, the former must notify the consignor of such refusal. *Louisville, etc., R. Co. v. Duncan, 137 Ala. 446.*

Delivery to Connecting Carrier Designated Prevented by Teamsters' Strike. — In *Fisher v. Boston, etc., R. Co., 99 Me. 338, 105 Am. St. Rep. 283*, delivery by the initial to the connecting carrier designated by the bill of lading was prevented by a teamsters' strike. Thereupon the initial carrier forwarded the goods to their destination by a more expensive route. It was held that the initial carrier was liable for the increased cost of transportation due to his diverting the consignment from the designated route, as he should have held the goods as a warehouseman and communicated with the shipper or consignee for directions as to their disposal.

**630.** 2. A Stipulation in the Bill of Lading for Re-icing a Car carried over connecting lines was held to make the initial carrier liable for the failure of a connecting carrier to keep the car properly iced. *Johnson v. Toledo, etc., R. Co., 133 Mich. 596.*

**631.** 4. Contracts for Through Liability. — *Colfax Mountain Fruit Co. v. Southern Pac.*

**632.** Proof Must Be Clear and Explicit. — See note 2.

**633.** Authority of Agent. — See note 1.

**636.** *c.* WHAT CIRCUMSTANCES CREATE A THROUGH CONTRACT —  
(2) *Charging and Collecting Entire Freight in Advance.* — See note 3.

**637.** See note 1.

**638.** (5) *Accepting Goods "To Be Delivered."* — See note 1.

**639.** 3. Carrier May Limit Its Liability to Its Own Line — *a.* RIGHT TO MAKE THE LIMITATION. — See note 1.

R. Co., 118 Cal. 648; Chicago, etc., R. Co. v. Woodward, (Ind. 1904) 72 N. E. Rep. 559, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 631; Caldwell v. Felton, (Ky. 1899) 51 S. W. Rep. 575; Eckles v. Missouri Pac. R. Co., 72 Mo. App. 296; Shewalter v. Missouri Pac. R. Co., 84 Mo. App. 589; Hubbard v. Mobile, etc., R. Co., (Mo. App. 1905) 87 S. W. Rep. 52; Robert C. White Live Stock Commission Co. v. Chicago, etc., R. Co., 87 Mo. App. 330; Jones v. St. Louis, etc., R. Co., 89 Mo. App. 653; Bishawaiti v. Pennsylvania R. Co., (Supm. Ct. App. T.) 92 N. Y. Supp. 783; Stevens v. Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 168, 20 Ohio Cir. Ct. 41; Missouri, etc., R. Co. v. Wells, 24 Tex. Civ. App. 304; Texas Mexican R. Co. v. Gallagher, (Tex. Civ. App. 1901) 64 S. W. Rep. 809; Gulf, etc., R. Co. v. Leatherwood, 29 Tex. Civ. App. 507; Texas, etc., R. Co. v. McCarty, 29 Tex. Civ. App. 616.

**Effect of Giving Receipt for Goods Marked to Place Beyond Terminus.** — The acceptance by a common carrier, for transportation, of goods marked to a place beyond the terminus of its own line, and its giving a receipt therefor, will constitute *prima facie* a contract to carry and deliver at the point so marked. Elgin, etc., R. Co. v. Bates Mach. Co., 98 Ill. App. 311, affirmed 200 Ill. 636, 93 Am. St. Rep. 218.

**632.** 2. *Stipulation for Ice When Needed.* — When the initial carrier issues bills of lading to the shipper which contain the clause, "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee," the fact that such bills contain the words, "Ice when needed," does not constitute a special contract under which the initial carrier becomes liable for any failure on the part of the connecting carrier to obey the provision as to ice. Farnsworth v. New York Cent., etc., R. Co., 88 N. Y. App. Div. 320.

**633.** 1. *Contract Must Have Been Made by Competent Agent.* — McLagan v. Chicago, etc., R. Co., 116 Iowa 183; Faulkner v. Chicago, etc., R. Co., 99 Mo. App. 421.

**Authority Inferred from Previous Dealings.** — Faulkner v. Chicago, etc., R. Co., 99 Mo. App. 421.

**636.** 3. *Charging Freight in Advance — Held to Indicate Through Contract.* — Savannah, etc., R. Co. v. Commercial Guano Co., 103 Ga. 590; Chicago, etc., R. Co. v. Western Hay, etc., Co., (Neb. 1902) 90 N. W. Rep. 205; Stevens v. Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 168, 20 Ohio Cir. Ct. 41. See also Eckles v. Missouri Pac. R. Co., (Mo. App. 1905) 87 S. W. Rep. 99.

**637.** 1. *The Contrary View.* — Eckles v. Missouri Pac. R. Co., 72 Mo. App. 296.

**638.** 1. Texas Cent. R. Co. v. Miller, (Tex. Civ. App. 1905) 88 S. W. Rep. 499.

**639.** 1. *Right of Carrier to Confine Its Liability to Its Own Line — United States.* — Central of Georgia R. Co. v. Kavanaugh, (C. C. A.) 92 Fed. Rep. 56.

*Georgia.* — Central of Georgia R. Co. v. Murphy, 116 Ga. 863.

*Illinois.* — Lehigh Valley Transp. Co. v. Pillsbury-Washburn Flour Mills Co., 92 Ill. App. 628; Elgin, etc., R. Co. v. Bates Mach. Co., 98 Ill. App. 311, affirmed 200 Ill. 636, 93 Am. St. Rep. 218.

*Indiana.* — Pennsylvania R. Co. v. Dickson, 31 Ind. App. 458, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 639; Lake Shore, etc., R. Co. v. Teeters, (Ind. App. 1905) 74 N. E. Rep. 1014.

*Iowa.* — Hartley v. St. Louis, etc., R. Co., 115 Iowa 612.

*Kentucky.* — Richmond, etc., R. Co. v. Richardson, (Ky. 1897) 43 S. W. Rep. 465; Louisville, etc., R. Co. v. Chestnut, 115 Ky. 43.

*Nebraska.* — Fremont, etc., R. Co. v. New York, etc., R. Co., 66 Neb. 159.

*New York.* — Mills v. Weir, 82 N. Y. App. Div. 396; Harris v. Minneapolis, etc., R. Co., (Supm. Ct. App. T.) 36 Misc. (N. Y.) 181.

*Ohio.* — American Roofing Co. v. Memphis, etc., Packet Co., 8 Ohio Dec. 490; Stevens v. Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 168, 20 Ohio Cir. Ct. 41.

*Oregon.* — Taffe v. Oregon R. Co., 41 Oregon 64.

*South Carolina.* — Cave v. Carolina Midland R. Co., 53 S. Car. 496; Dunbar v. Charleston, etc., R. Co., 62 S. Car. 414.

*Tennessee.* — Bird v. Southern R. Co., 99 Tenn. 719, 63 Am. St. Rep. 856; Illinois Cent. R. Co. v. Southern Seating, etc., Co., 104 Tenn. 568, 78 Am. St. Rep. 933.

*Texas.* — Gulf, etc., R. Co. v. Short, (Tex. Civ. App. 1899) 51 S. W. Rep. 261; St. Louis, etc., R. Co. v. Cohen, (Tex. Civ. App. 1900) 55 S. W. Rep. 1123; San Antonio, etc., R. Co. v. Barnett, (Tex. Civ. App. 1900) 57 S. W. Rep. 600; Liefert v. Galveston, etc., R. Co., (Tex. Civ. App. 1900) 57 S. W. Rep. 899; Gulf, etc., R. Co. v. Lee, (Tex. Civ. App. 1901) 65 S. W. Rep. 54; San Antonio, etc., R. Co. v. Barnett, 27 Tex. Civ. App. 498; Gulf, etc., R. Co. v. Harris, (Tex. Civ. App. 1903) 72 S. W. Rep. 71; Texas, etc., R. Co. v. Byers, (Tex. Civ. App. 1903) 73 S. W. Rep. 427; International, etc., R. Co. v. Startz, 97 Tex. 167; Gulf, etc., R. Co. v. Pitts, (Tex. Civ. App. 1904) 83 S. W. Rep. 727; Gulf, etc., R. Co. v. McCampbell, (Tex. Civ. App. 1905) 85 S. W. Rep. 1148; Atchison, etc., R. Co. v. Waddell, (Tex. Civ. App. 1905) 88 S. W. Rep. 390.

**641.** No Special Consideration Necessary. — See note 1.

**642.** Statutes. — See note 2.

**643.** *c.* EXTENT OF LIMITATION — NEGLIGENCE. — See note 1.

**644.** 4. Whether Limitations Inure to Benefit of Subsequent Carriers — *b.* VIEW THAT CONNECTING CARRIERS ENTITLED UNLESS EXPRESSLY EXCLUDED. — See note 2.

**645.** Expressly Confined to First Carrier. — See note 1.

**646.** X. WHAT CONSTITUTES DELIVERY TO A CONNECTING CARRIER — 1. In General. — See note 2.

**648.** The Criterion. — See note 2.

**652.** XI. PRESUMPTION AS TO WHEN INJURY OR LOSS OCCURRED — In the Case of a Mere Injury. — See note 1.

*Canada.* — Neil *v.* American Express Co., 20 Quebec Super. Ct. 253.

**Immaterial Whether Shipment Is Interstate or Not.** — Ft. Worth, etc., R. Co. *v.* Wright, 24 Tex. Civ. App. 291.

**Constitutionality of Limitation.** — A stipulation that the initial carrier shall not be liable beyond its own line is not in conflict with a constitutional provision that no common carrier shall be permitted to contract for relief from its common-law liability. Pittsburg, etc., R. Co. *v.* Viers, 113 Ky. 526.

**Contract Made by Agent of Both Carriers.** — The fact that a contract limiting the liability of the initial carrier to injuries occurring on its own line was made by an agent who was also the agent of the connecting carrier does not affect the validity of the limitation. Askew *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 846.

**641. 1. No Consideration Necessary to Support Such Limitation.** — Nashville, etc., R. Co. *v.* Stone, 112 Tenn. 348, 105 Am. St. Rep. 955. See also Ft. Worth, etc., R. Co. *v.* Wright, 24 Tex. Civ. App. 291.

**642. 2. Where Statute Makes Carrier Liable over Entire Route.** — Eckles *v.* Missouri Pac. R. Co., (Mo. App. 1905) 87 S. W. Rep. 99.

**Virginia Statute.** — In Virginia it is expressly provided by statute that "when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless within a reasonable time after demand made he shall give satisfactory proof to the consignee that the loss or injury did not occur while the thing was in his charge." Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284; Virginia Coal, etc., Co. *v.* Louisville, etc., R. Co., 98 Va. 776.

**643. 1. When Carrier Undertakes to Carry over Entire Route.** — Ireland *v.* Mobile, etc., R. Co., 105 Ky. 400; Chicago, etc., R. Co. *v.* Western Hay, etc., Co., (Neb. 1902) 90 N. W. Rep. 205.

**644. 2. View that Connecting Carrier Entitled to Benefit of Stipulation.** — Mears *v.* New York, etc., R. Co., 75 Conn. 171, 96 Am. St.

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Rep. 193; White *v.* Weir, 33 N. Y. App. Div. 145; Robinson *v.* New York, etc., Steamship Co., 63 N. Y. App. Div. 211; Robinson *v.* New York, etc., Steamship Co., 75 N. Y. App. Div. 431, affirmed 177 N. Y. 565; Bird *v.* Southern R. Co., 99 Tenn. 719, 63 Am. St. Rep. 856; Bicknell *v.* Grand Trunk R. Co., 26 Ont. App. 431.

**Where Bill of Lading Is Mere Receipt.** — A connecting carrier will be bound by the terms of a bill of lading issued by the initial carrier in so far as it is a contract. But in so far as it is a mere receipt by the initial carrier that the goods have been received in good order the rule is different. The connecting carrier is not bound by such an admission. Texas, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1903) 74 S. W. Rep. 343.

**645. 1. Expressly Confined to First Carrier.** — Robinson *v.* New York, etc., Steamship Co., 63 N. Y. App. Div. 211.

**646. 2. General Rule as to Delivery to Connecting Line.** — Texas, etc., R. Co. *v.* Callender, 183 U. S. 632; Lewis *v.* Chesapeake, etc., R. Co., 47 W. Va. 656, 81 Am. St. Rep. 816.

**Judicial Statement of Rule.** — In Texas, etc., R. Co. *v.* Reiss, 183 U. S. 626, the court said: "As between intermediate carriers, the duty of the one in possession at the end of his route is to deliver the goods to the succeeding carrier or notify him of their arrival, and the former is not relieved of responsibility by unloading the goods at the end of his route and storing them in his warehouse without delivery or notice to or any attempt to deliver to his successor. McDonald *v.* Western R. Corp., 34 N. Y. 497; Condon *v.* Marquette, etc., R. Co., 55 Mich. 218, 54 Am. Rep. 367. In the latter case it is held that the duty of the connecting carrier is not discharged until it has been imposed upon the succeeding carrier, and this is not done until there is delivery of the goods, or at least until there is such a notification to the succeeding carrier as according to the course of business is equivalent to a tender of delivery."

**648. 2. Where No Shipping Directions Are Given to the Next Carrier** there is no delivery of the freight to him, even though possession of the car containing such freight has been given. Bosworth *v.* Chicago, etc., R. Co., (C. C. A.) 87 Fed. Rep. 72, affirmed 179 U. S. 444.

**652. 1. Presumption that Injury Occurred on Line of Last Carrier.** — St. Louis, etc., R. Co. *v.* Coolidge, (Ark. 1904) 83 S. W. Rep. 334, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 652;

**653.** Basis of Presumption. — See note 1.

Initial Carrier Must Show Safe and Proper Delivery. — See note 2.

**654.** XII. CONNECTING LINES AS PARTNERS — 1. Effect of a Partnership. — See note 2.

**655.** 2. What Constitutes a Partnership — *a.* IN GENERAL — If the Several Lines Are under One Management and Control. — See note 2.

Wherever There Is an Identity of Interest. — See note 3.

**657.** 3. What Does Not Constitute a Partnership — Traffic Arrangements for Division of Receipts. — See note 4.

**660.** XIII. RIGHTS AND LIABILITIES AS TO CHARGES — Rule Stated. — See note 5.

Nor Is the Lien of the Last Carrier Affected. — See note 6.

**661.** Payment of Preceding Carrier's Charges — Recovery of Whole Amount from Owner. — See notes 2, 3.

**662.** CONSANGUINITY. — See note 3.

*Cote v. New York, etc., R. Co.*, 182 Mass. 290, 94 Am. St. Rep. 656; *Bullock v. Haverhill, etc., Dispatch Co.*, 187 Mass. 91; *Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.*, 128 N. Car. 280, 83 Am. St. Rep. 675; *Morganton Mfg. Co. v. Ohio River, etc., R. Co.*, 121 N. Car. 514, 61 Am. St. Rep. 679 (in which case the last carrier marked the bill of lading "O. K."); *St. Louis, etc., R. Co. v. Cohen, (Tex. Civ. App. 1900)* 55 S. W. Rep. 1123; *Houston, etc., R. Co. v. Ney, (Tex. Civ. App. 1900)* 58 S. W. Rep. 43; *Gulf, etc., R. Co. v. Cushney*, 95 Tex. 309; *Missouri, etc., R. Co. v. Mazzie*, 29 Tex. Civ. App. 295; *Gulf, etc., R. Co. v. Pitts, (Tex. Civ. App. 1904)* 83 S. W. Rep. 727; *Missouri, etc., R. Co. v. Clayton, (Tex. Civ. App. 1905)* 84 S. W. Rep. 1069. See also *Farmers Nursery Co. v. Cowan*, 21 Pa. Super. Ct. 192.

**653.** 1. Texas, etc., R. Co. v. Capper, (Tex. Civ. App. 1905) 84 S. W. Rep. 694.

2. *Meredith v. Seaboard Air Line R. Co.*, 137 N. Car. 478.

**654.** 2. Effect of Partnership. — *Trumbull v. Coulson*, 12 Colo. App. 102; *Hartley v. St. Louis, etc., R. Co.*, 115 Iowa 612; *Shewalter v. Missouri Pac. R. Co.*, 84 Mo. App. 589; *Eckles v. Missouri Pac. R. Co.*, (Mo. App. 1905) 87 S. W. Rep. 99; *Robert C. White Live Stock Commission Co. v. Chicago, etc., R. Co.*, 87 Mo. App. 330; *San Antonio, etc., R. Co. v. Graves, (Tex. Civ. App. 1899)* 49 S. W. Rep. 1103; *Gulf, etc., R. Co. v. Leatherwood*, 29 Tex. Civ. App. 507; *Askew v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 846; *Chesapeake, etc., R. Co. v. Stock, (Va. 1905)* 51 S. E. Rep. 161. See also *Galveston, etc., R. Co. v. Houston, (Tex. Civ. App. 1898)* 48 S. W. Rep. 539; *Texas, etc., R. Co. v. Byers, (Tex. Civ. App. 1903)* 73 S. W. Rep. 427.

Suit Brought Against All the Connecting Carriers as Partners. — See *Missouri, etc., R. Co. v. Jarrell, (Tex. Civ. App. 1905)* 86 S. W. Rep. 632.

**655.** 2. Companies Constituting a "Line." — *New Orleans, etc., R. Co. v. Lamkin*, 78 Miss. 509, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655. See also *Missouri, etc., R. Co. v. Wells*, 24 Tex. Civ. App. 304.

3. Identity of Interest the Criterion. — *New Orleans, etc., R. Co. v. Lamkin*, 78 Miss. 509, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.)

655; *Jacobs v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 512, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655.

**657.** 4. Mere Traffic Arrangement for Division of Receipts, etc., Does Not Create a Partnership. — *Illinois Cent. R. Co. v. Foulks*, 191 Ill. 57, affirming 92 Ill. App. 391; *Wilson v. Louisville, etc., R. Co.*, 103 N. Y. App. Div. 203; *Post v. Southern R. Co.*, 103 Tenn. 231, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 657.

**660.** 5. Each Carrier Entitled to Its Own Rates. — *Thomas v. Frankfort, etc., R. Co.*, 116 Ky. 879.

6. Lien of Connecting Carriers. — *Thomas v. Frankfort, etc., R. Co.*, 116 Ky. 879; *Shewalter v. Missouri Pac. R. Co.*, 84 Mo. App. 589.

**661.** 2. May Pay Back Charges and Recover Same of Owner. — *Converse Bridge Co. v. Collins*, 119 Ala. 534; *Thomas v. Frankfort, etc., R. Co.*, 116 Ky. 879; *Glover v. Cape Girardeau, etc., R. Co.*, 95 Mo. App. 369; *Pearce v. Wash R. Co.*, 89 Mo. App. 437, in which last case the court said: "A carrier may pay to a connecting carrier charges that the latter has paid and retain possession of the goods for its reimbursement, where the advance charges were such as were incident to the transportation of the goods and were necessary to be paid in order to continue them in transit; such as freight and warehouse charges and for the discharge of matured and valid liens on the goods, created by law or by the owner for the non-payment of which the transit of the goods has been stopped or their possession withheld from the carrier."

A Lien Exists for Back Charges which have been paid by the intermediate carrier. *Southern Indiana Express Co. v. U. S. Express Co.*, 88 Fed. Rep. 659, affirmed (C. C. A.) 92 Fed. Rep. 1022.

3. *Southern Indiana Express Co. v. U. S. Express Co.*, 88 Fed. Rep. 659, affirmed (C. C. A.) 92 Fed. Rep. 1022.

**662.** 3. Under the Louisiana Code Punishing Incest, consanguinity means the connection or relation of persons descended from the same stock or common ancestor, and it is either lineal or collateral. Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other,

**663. [CONSECUTIVE DAYS.— See note 2a.]****CONSENT.**— See note 3.**666. CONSIDERABLE.**— See note 1.

as between son, father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between son, grandson, great-grandson, and so downwards in the direct descending line. Collateral kindred agree with the lineal in this, that they are descended from the same stock or ancestor, but differ in this, that they do not descend one from the other. *State v. De Hart*, 109 La. 570.

**663. 2a.** In *El Paso v. Ft. Dearborn Nat. Bank*, (Tex. Civ. App. 1903) 71 S. W. Rep. 802, the court said: "While the term *consecutive days* primarily means \* \* \* days directly following one another, it is also defined as meaning 'successive.' But in cases of contracts that significance should be given it which the parties evidently intended it should have."

**3. Assent and Consent.**— See *People v. Studwell*, 91 N. Y. App. Div. 469.

**Mechanic's Liens.**— *Rice v. Culver*, 172 N. Y. 60; *Vosseller v. Slater*, 25 N. Y. App. Div.

368; *National Wall Paper Co. v. Sire*, 37 N. Y. App. Div. 405.

**Consent of Abutting Owners.**— "The '*consents*' in writing of the owners of at least one-half in amount of property' fronting upon a street-railway route, required by 'An act to regulate the construction and maintenance of street railroads in this state,' approved May 16, 1894 (Pamph. L., p. 374), and by 'An act to regulate the construction, operation, and maintenance of street railroads in this state,' approved April 21, 1896 (Pamph. L., p. 329), are not licenses or concessions granting to the railway company some interest in land or right in the streets; they are in effect votes for the adoption of a legislative scheme by which a special jurisdiction over highways is conferred upon the governing body of the municipality." *Currie v. Atlantic City*, 66 N. J. L. 140.

**666. 1. Considerable Provocation.**— *Stricklin v. State*, 67 Ark. 349; *Strutton v. Com.*, (Ky. 1901) 62 S. W. Rep. 875.

## CONSIDERATION.

By E. G. CHILTON.

**672. I. DEFINITION AND GENERAL PRINCIPLES— 2. Consideration and Motive Distinguished.**— See note 2.

**673. II. NECESSITY AND SUFFICIENCY OF CONSIDERATION— 1. Simple Contracts— a. NECESSITY OF CONSIDERATION— (1) In General.**— See note 6.

**672. 2. Consideration and Motive Distinguished.**— See *Morris v. Norton*, (C. C. A.) 75 Fed. Rep. 912.

**673. 6. Necessity of Valuable Consideration— Simple Contracts— United States.**— *Greene v. Sigua Iron Co.*, (C. C. A.) 88 Fed. Rep. 203; *Harvester King Co. v. Mitchell, etc., Co.*, 89 Fed. Rep. 173; *McNaught v. Fisher*, (C. C. A.) 96 Fed. Rep. 168.

*Alabama.*— *Morningstar v. Stratton*, 121 Ala. 437; *Mobile, etc., R. Co. v. Owen*, 121 Ala. 505; *Fleming v. Moore*, 122 Ala. 403.

*Arkansas.*— *Summers v. Heard*, 66 Ark. 550.

*Colorado.*— *Templin v. Hobson*, 10 Colo. App. 525.

*Georgia.*— *Austell v. Humphries*, 99 Ga. 408; *Dalton First Nat. Bank v. Black*, 108 Ga. 538.

*Illinois.*— *Baltimore, etc., R. Co. v. Crawford*, 65 Ill. App. 113; *Vehon v. Vehon*, 70 Ill. App. 40; *Meguiar v. Rainey*, 70 Ill. App. 447; *Allen v. Rouse*, 78 Ill. App. 69; *Jennings v. Neville*, 180 Ill. 270.

*Indiana.*— *Sponhaur v. Malloy*, 21 Ind. App. 287.

*Iowa.*— *Storm Lake First Nat. Bank v. Felt*, 100 Iowa 680; *Marsh v. Chown*, 104 Iowa 556; *O. S. Kelley Co. v. Chinn*, (Iowa 1898) 75 N. W. Rep. 315.

*Kentucky.*— *Haldeman v. German Security Bank*, (Ky. 1898) 44 S. W. Rep. 383.

*Massachusetts.*— *Hendrick v. Boston, etc., R. Co.*, 170 Mass. 44.

*Michigan.*— *Potter v. Detroit, etc., R. Co.*, 122 Mich. 179.

*Missouri.*— *Byrne v. Carson*, 70 Mo. App. 126; *Forbs v. St. Louis, etc., R. Co.*, 107 Mo. App. 661.

*Montana.*— *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 1.

*New Jersey.*— *Clyne v. Helmes*, 61 N. J. L. 358.

*New York.*— *Olmstead v. Latimer*, 158 N. Y. 313; *Lansing v. Thompson*, 8 N. Y. App. Div. 54; *Bronner v. Walter*, 15 N. Y. App. Div. 295; *Hull v. Pearson*, 38 N. Y. App. Div. 588; *Krumenacker v. Betz*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 744; *O'Sullivan v. New York Lumber Corp.*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 604; *Bodine v. Andrews*, 47 N. Y. App. Div. 495; *Addison v. Enoch*, 48 N. Y. App. Div. 111, affirmed 168 N. Y. 658; *Majory v. Shubert*, 82 N. Y. App. Div. 633.

*North Dakota.*— *Gaar v. Green*, 6 N. Dak. 48.

*Pennsylvania.*— *Alcorn v. Christian*, 4 Pa. Super. Ct. 594; *Lennig's Estate*, 182 Pa. St. 485, 61 Am. St. Rep. 725.

*Texas.*— *Norris v. Graham*, (Tex. Civ. App. 1897) 42 S. W. Rep. 575; *Davis v. Weathered*, (Tex. Civ. App. 1897) 43 S. W. Rep. 21; *Ran-*



**675.** (2) *Illustrations of Gratuitous Promises.* — See note 1.

**678.** *b. SUFFICIENCY OF CONSIDERATION* — (1) *Consideration Must Be Valuable* — What Constitutes Value. — See note 3.

dolph *v. Mitchell*, (Tex. Civ. App. 1899) 51 S. W. Rep. 297.

*Vermont.* — *Montpelier Seminary v. Smith*, 69 Vt. 382; *Redding v. Redding*, 69 Vt. 500.

*Virginia.* — *Southern R. Co. v. Willcox*, 98 Va. 224, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 673.

*Washington.* — *Furness v. Stiles*, 18 Wash. 383; *Price v. Mitchell*, 23 Wash. 743.

*Wyoming.* — *Swinney v. Edwards*, 8 Wyo. 54, 80 Am. St. Rep. 916.

**675. 1. An Agreement to Extend the Time of Payment of a Note.** — See O. S. Kelley *Co. v. Chinn*, (Iowa 1898) 75 N. W. Rep. 315.

**Contract to Purchase Machines — No Obligation to Furnish.** — A contract obligating the first party to purchase all the machines to supply a given territory, but releasing the second party from all liability for failure to supply such machines, is a *nudum pactum*. *Harvester King Co. v. Mitchell, etc., Co.*, 89 Fed. Rep. 173.

**A Promise by the Owner of Realty to Pay a Mortgage** executed by a third person without his consent or knowledge is a mere *nudum pactum*. *Morningstar v. Stratton*, 121 Ala. 437.

**A Note Given Voluntarily**, in part payment of goods destroyed by fire, is not binding in the hands of the original payee. *Oldacre v. Stuart*, 122 Ala. 405.

**A Pledge of Stock by One Person to Secure the Debt of Another**, without forbearance or renewal of such debt, is without consideration. *Halderman v. German Security Bank*, (Ky. 1898) 44 S. W. Rep. 383.

**A Contract Signed After the Business to Which It Relates Has Been Completed** and the rights of the parties have been fixed is not enforceable. *Hendrick v. Boston, etc., R. Co.*, 170 Mass. 44.

**A Note to Secure the Debt of the Maker's Father**, without releasing the father or extending credit to him, is without consideration. *Vehon v. Vehon*, 70 Ill. App. 40.

**Release of Cashier of Bank from Personal Liability.** — The promise of a cashier to lend the funds of his bank is no legal consideration for an agreement to release him from personal liability. *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 1.

**A Promise to a Debtor to Renew a Note**, which he offers to give in payment of a pre-existing debt, is without consideration. *Arend v. Smith*, 151 N. Y. 502.

**Promise to Pay Subcontractor for Work Specified in His Contract.** — The promise by a surety of a contractor to pay a subcontractor for performing certain work specified in his contract is without consideration. *Alley v. Turck*, 8 N. Y. App. Div. 50.

**Promise to Make Repairs — After Execution of Lease.** — The promise of a landlord to make repairs, after the execution of a lease which does not obligate him to make repairs, is without consideration. *Bronner v. Walter*, 15 N. Y. App. Div. 295.

**Warranty Made After Completion of Sale.** — An oral warranty of quality made after the

consummation of the sale of a horse is without consideration. *Fletcher v. Nelson*, 6 N. Dak. 94.

**An Agreement to Subscribe to Bonds** not yet issued is but a promise to lend *in futuro*, and is *nudum pactum*. *Newport, etc., R. Co. v. Seager*, 7 Pa. Super. Ct. 268.

**678. 3. What Constitutes a Valuable Consideration — Arkansas.** — *Rogers v. Galloway Female College*, 64 Ark. 627; *Dunlap v. State*, 66 Ark. 105.

*California.* — *Placer County Bank v. Freeman*, 126 Cal. 90; *Muller v. Swanton*, 140 Cal. 249.

*Georgia.* — *Rogers v. Burr*, 105 Ga. 432.

*Illinois.* — *Miller v. Western College*, 71 Ill. App. 587, affirmed 177 Ill. 280, 69 Am. St. Rep. 242; *Ryan v. Hamilton*, 205 Ill. 191.

*Indiana.* — *Garard v. Yeager*, 154 Ind. 253, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 677, 678; *Helvie v. McKain*, 32 Ind. App. 507; *Jones v. Austin*, 26 Ind. App. 399.

*Indian Territory.* — *Doherty v. Arkansas, etc., R. Co.*, (Indian Ter. 1904) 82 S. W. Rep. 899.

*Iowa.* — *McKee v. Needles*, 123 Iowa 195; *Riegel v. Ormsby*, 111 Iowa 10.

*Kansas.* — *Ensign v. Park*, 69 Kan. 870.

*Kentucky.* — *Stovall v. McCutchen*, 107 Ky. 577, 92 Am. St. Rep. 373; *Ryan v. Trimble*, 60 S. W. Rep. 633, 22 Ky. L. Rep. 1444; *Deering v. Veal*, 78 S. W. Rep. 886, 25 Ky. L. Rep. 1809; *Riddle v. Riddle*, (Ky. 1904) 80 S. W. Rep. 1129.

*Maine.* — *Bigelow v. Bigelow*, 95 Me. 17.

*Maryland.* — *Mott v. Fowler*, 85 Md. 676.

*Michigan.* — *First Universalist Church v. Pungs*, 126 Mich. 670.

*Minnesota.* — *Albert Lea College v. Brown*, 88 Minn. 533, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 677 et seq.

*Missouri.* — *Houck v. Frisbee*, 66 Mo. App. 16; *Reed v. Crane*, 89 Mo. App. 670.

*Nebraska.* — *Faulkner v. Gilbert*, 57 Neb. 544; *Henry v. Dussell*, (Neb. 1904) 99 N. W. Rep. 484.

*New Jersey.* — *Wallace v. Leber*, 65 N. J. L. 195.

*New York.* — *Healy v. Healy*, 167 N. Y. 572; *V. Loewers Gambrinus Brewing Co. v. Friedman*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 32; *Lamkin v. Palmer*, 24 N. Y. App. Div. 255, affirmed 164 N. Y. 201; *Brunner v. Bournonville*, 58 N. Y. App. Div. 619; *Smith v. Kissel*, 92 N. Y. App. Div. 235, affirmed 181 N. Y. 536.

*Ohio.* — *Robinson v. Boyd*, 60 Ohio St. 57; *Knickerbocker v. Chester Park Athletic Co.*, 12 Ohio Cir. Dec. 842, 20 Ohio Cir. Ct. 655; *Wright v. Snell*, 12 Ohio Cir. Dec. 308, 22 Ohio Cir. Ct. 86.

*Pennsylvania.* — *Presbyterian Board of Foreign Missions v. Smith*, 209 Pa. St. 361; *Steigerwalt v. Rife*, 9 Pa. Super. Ct. 363.

*South Carolina.* — *Pollock v. Carolina Interstate Bldg., etc., Assoc.*, 51 S. Car. 420, 64 Am. St. Rep. 683.

**679.** (2) *Good or Meritorious Considerations* — Affection or Gratitude. — See note 1.

(3) *Moral Considerations* — (a) *Insufficiency in General*. — See notes 2, 3.

**680.** (b) *Sufficiency When Founded upon an Antecedent Legal Obligation* — *aa. STATEMENT OF THE EXCEPTION*. — See notes 2, 3.

**681.** *ILLUSTRATIONS* — (*aa*) *Debt Barred by Statute of Limitations*. — See note 1.

(*bb*) *Debt Discharged in Bankruptcy*. — See note 2.

*cc. CASES NOT WITHIN THE EXCEPTION* — (*aa*) *Debt Contracted by Feme Covert*. —

See note 4.

**682.** 2. *Specialties* — *a. AT LAW* — (1) *General Principle* — Seal Imports Consideration. — See note 3.

**683.** (3) *Conveyances Operating by Virtue of Statute of Uses* — Deeds of Bargain and Sale and of Lease and Release. — See note 4.

*b. IN EQUITY* — (1) *Executory Deeds* — (a) *In General* — Seal of No Effect in Equity. — See note 7.

**684.** 3. *Contracts of Record*. — See note 8.

*Texas*. — Hall v. Krauskopf, (Tex. Civ. App. 1899) 52 S. W. Rep. 117; Carroll v. Missouri, etc., R. Co., 30 Tex. Civ. App. 1; McCarty v. May, (Tex. Civ. App. 1903) 74 S. W. Rep. 804; Quebe v. Gulf, etc., R. Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 442.

*Washington*. — Island County v. Babcock, 17 Wash. 438.

**679.** 1. *Good or Meritorious Consideration* — Affection or Gratitude. — Hutsell v. Crewse, 138 Mo. 1.

2. *Moral Obligation Not a Valuable Consideration*. — Morris v. Norton, (C. C. A.) 75 Fed. Rep. 912; Fidelity, etc., Co. v. Thompson, 128 Cal. 506; Hobbs v. Greifenhagen, 91 Ill. App. 400, affirmed 194 Ill. 73; Strayer v. Dickerson, 205 Ill. 257; Holloway v. Rudy, 60 S. W. Rep. 650, 22 Ky. L. Rep. 1406; Freeman v. Dodge, 98 Me. 536, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 679; Thomson v. Thomson, 76 N. Y. App. Div. 178; Taylor v. Hotchkiss, 81 N. Y. App. Div. 470, affirmed 179 N. Y. 546; Rankin v. Matthiesen, 10 S. Dak. 632, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 679; Davis v. Anderson, 99 Va. 620.

3. *Moral Obligation Held to Be a Sufficient Consideration*. — In Drake v. Bell, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 237, Gaynor, J., flatly repudiated the doctrine stated in the text, and held that a subsequent promise founded on value previously had from the promisee was binding even when there had never been any antecedent legal obligation. This case was affirmed on other grounds, without passing on the point here raised, in 46 N. Y. App. Div. See also Pierce v. Walton, 20 Ind. App. 66; Sutch's Estate, 201 Pa. St. 305.

In Lockren v. Rustan, 9 N. Dak. 43, it was held that the moral obligation of a son in whose name a father had, for prudential reasons, placed his realty is a sufficient consideration to support a reconveyance.

**680.** 2. *Antecedent Legal Obligation*. — Strayer v. Dickerson, 205 Ill. 257; Cadiz Fourth Nat. Bank v. Craig, (Neb. 1901) 96 N. W. Rep. 185.

3. *Agreement to Refund Money Paid by Mistake*. — An agreement to refund money, paid by an insurance company under the mistaken view

that the insured was dead, is enforceable. Masonic L. Assoc. v. Crandall, 9 N. Y. App. Div. 400.

**681.** 1. *Debt Barred by Statute of Limitations*. — Morrow v. Turner, 2 Marv. (Del.) 332; Bean v. Wheatley, 13 App. Cas. (D. C.) 473; Roberts v. Leak, 108 Ga. 806; Neosho Valley Invest. Co. v. Huston, 61 Kan. 859, 59 Pac. Rep. 643; Perkins v. Cheney, 114 Mich. 567, 68 Am. St. Rep. 495; Tennessee Brewing Co. v. Hendricks, 77 Miss. 491; Mooar v. Mooar, 69 N. H. 643; Reymond v. Newcomb, 10 N. Mex. 151; Kahn v. Crawford, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 572; Fletcher v. Daniels, 52 N. Y. App. Div. 67; Hollandsworth v. Squires, (Tenn. Ch. 1900) 56 S. W. Rep. 1044; Montague County v. Meadows, 21 Tex. Civ. App. 256; Interstate Bldg., etc., Assoc. v. Goforth, 94 Tex. 259.

2. *Debt Discharged in Bankruptcy*. — Mutual Reserve Fund L. Assoc. v. Beatty, (C. C. A.) 93 Fed. Rep. 747; Thornton v. Nichols, 119 Ga. 50; Brooks v. Paine, 77 S. W. Rep. 190, 25 Ky. L. Rep. 1125; International Harvester Co. v. Lyman, 90 Minn. 275; Gruenberg v. Treanor, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 232.

4. *Debt Contracted by Feme Covert*. — Holloway v. Rudy, (Ky. 1901) 60 S. W. Rep. 650; Bragg v. Israel, 86 Mo. App. 338; Anglo-American Land, etc., Co. v. Van Slyck, (R. I. 1900) 46 Atl. Rep. 1094.

**682.** 3. See Sivell v. Hogan, 119 Ga. 169, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 682.

**683.** 4. *Catlin Coal Co. v. Lloyd*, 180 Ill. 406, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 683.

7. *In Equity* — Seal Has No Effect. — Mills v. Larrance, 186 Ill. 635; Hale v. Dressen, 73 Minn. 277; Bosley v. Bosley, 85 Mo. App. 424; Winter v. Kansas City Cable R. Co., 160 Mo. 159; Way v. Union Cent. L. Ins. Co., 61 S. Car. 510; Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 98, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 683.

**684.** 8. *Contracts of Record*. — State v. Paxton, 65 Neb. 110, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 684; Buffington v. Bronson, 61 Ohio St. 231.

**685. III. FROM, TO WHO?, AND AT WHOSE INSTANCE CONSIDERATION MUST MOVE** — 1. From Whom the Consideration Must Move. — See note 3.

**686. 2. To Whom the Consideration Must Move.** — See note 1.

**687. Instruments Executed for Accommodation.** — See notes 1, 2, 3.  
Joint and Several Note. — See note 4.

Sureties, Guarantors, and Irregular Indorsers. — See notes 5, 6.

**688. 3. At Whose Instance the Consideration Must Move.** — See note 4.

**689. IV. TIME OF RENDERING OR PERFORMING THE CONSIDERATION** —  
**3. Executory Consideration.** — See note 2.

**685. 3. Plaintiff May Sue upon Promise Made to Third Person for His Benefit.** — *Lawrence v. Oglesby*, 178 Ill. 122; *Cobb v. Heron*, 180 Ill. 49; *Ransdel v. Moore*, 153 Ind. 393. See, for a full discussion, the title **CONTRACTS**, vol. 7, p. 104 *et seq.*, and the Supplement thereto.

**686. 1. To Whom Consideration Must Move.** — *Harris v. Harris*, 80 Ill. App. 310, *affirmed* 180 Ill. 157; *Lackey v. Boruff*, 152 Ind. 371; *Madison County Bank v. Graham*, 74 Mo. App. 251; *Grandy v. Campbell*, 78 Mo. App. 502; *Loewen v. Forsee*, 137 Mo. 29, 59 Am. St. Rep. 489; *Murphey v. Illinois Trust, etc., Bank*, 57 Neb. 519.

**687. 1. The Making of an Accommodation Note** is a loan of the maker's credit; hence, want of consideration is no defense. *Mahanoy City First Nat. Bank v. Dick*, 22 Pa. Super. Ct. 445.

**2. A Mortgage By a Wife to Secure Her Husband's Antecedent Obligation** requires a new consideration. *Linton v. Cooper*, 53 Neb. 400.

**3. The Antecedent Debt of a Husband** is a sufficient consideration to support a conveyance by his wife. *Steinmeyer v. Steinmeyer*, 55 S. Car. 9.

**4. Note Executed by Joint Makers.** — *Bowling v. Floyd*, 5 Kan. App. 879, 48 Pac. Rep. 875.

**5. Sureties, Guarantors, and Irregular Indorsers** — *Alabama*. — *Carter v. Odom*, 121 Ala. 162; *Carter v. Long*, 125 Ala. 280.

*California*. — *McDougald v. Argonaut Land, etc., Co.*, 117 Cal. 87; *Bourn v. Dowdell*, (Cal. 1897) 50 Pac. Rep. 695; *Kennedy, etc., Lumber Co. v. Steamship Constr. Co.*, 123 Cal. 584.

*Colorado*. — *Beach v. Bennett*, 16 Colo. App. 459.

*Connecticut*. — *Garland v. Gaines*, 73 Conn. 662, 84 Am. St. Rep. 182.

*Georgia*. — *Hollingshead v. American Nat. Bank*, 104 Ga. 250.

*Illinois*. — *Cleveland, etc., R. Co. v. Bruce*, 63 Ill. App. 233; *Blakely Printing Co. v. Barnard*, 63 Ill. App. 238; *Sears v. Swift*, 66 Ill. App. 496; *Maher v. Building, etc., Assoc.*, 79 Ill. App. 231; *Hirsch v. Chicago Carpet Co.*, 82 Ill. App. 234; *Davis v. Wolff Mfg. Co.*, 84 Ill. App. 579; *Duncanson v. Kirby*, 90 Ill. App. 15; *Wilson v. St. John's Hospital*, 92 Ill. App. 413; *Hippach v. Makeever*, 166 Ill. 136.

*Indiana*. — *Bueklen v. Johnson*, 19 Ind. App. 406; *Lackey v. Boruff*, 152 Ind. 371.

*Louisiana*. — *Louisiana, etc., R. Co. v. Dilard*, 51 La. Ann. 1484.

*Massachusetts*. — *Lennox v. Murphy*, 171 Mass. 370.

*Nebraska*. — *Liningier, etc., Co. v. Wheat*, 49 Neb. 567; *Linton v. Copper*, 53 Neb. 400.

*New Jersey*. — *Blake v. Domestic Mfg. Co.*, 64 N. J. Eq. 480.

*New York*. — *Rothschild v. Frank*, 14 N. Y. App. Div. 399; *Maloney v. Nelson*, 12 N. Y. App. Div. 545, *affirmed* 158 N. Y. 351; *Voullaire v. Wise*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 659; *Colston v. Pemberton*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 410, *affirmed* (Supm. Ct. App. T.) 21 Misc. (N. Y.) 619; *Kelly v. Theiss*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 311; *Higgins v. Herrmann*, 23 N. Y. App. Div. 420; *Porter v. Thom*, 30 N. Y. App. Div. 363; *Gansevoort Bank v. Altshul*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 6; *Crompton, etc., Loom Works v. Brown*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 319, *affirmed* (Supm. Ct. App. T.) 28 Misc. (N. Y.) 513; *Brumm v. Gilbert*, 50 N. Y. App. Div. 430.

*Pennsylvania*. — *Hughes's Estate*, 13 Pa. Super. Ct. 240; *Booth v. Hoenig*, 7 Pa. Dist. 529.

*South Dakota*. — *Rudolph v. Hewitt*, 11 S. Dak. 646.

*Texas*. — *Hannay v. Moody*, 31 Tex. Civ. App. 88.

*Washington*. — *De Mattos v. Jordan*, 15 Wash. 378.

**Sufficiency of Consideration for Promise of Surety.** — What is a sufficient consideration to support the promise of the principal will support the promise of the surety. *Green v. Shaw*, 66 Ill. App. 74.

**A Contract of Guaranty, Entered into Concurrently with the principal obligation**, needs no consideration other than that supporting the principal obligation. *Cahill Iron Works v. Pemberton*, 48 N. Y. App. Div. 468, *affirmed* 168 N. Y. 649.

**Guaranty Executed After Contract of Sale, but Before Delivery.** — A sufficient consideration arises from the original contract, where a contract of guaranty is executed after a sale of machinery, but before delivery. *Fales, etc., Mach. Co. v. Browning*, 68 S. Car. 13. See also *Providence Mach. Co. v. Browning*, 68 S. Car. 1.

**6. Signing After Delivery in Accordance with Previous Agreement.** — *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. Rep. 111; *Deposit Bank v. Peak*, 110 Ky. 579, 96 Am. St. Rep. 466.

**688. 4. The Detriment, to Constitute a Consideration**, must be suffered at the instance of the promisor. *Amend v. Becker*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 499, *citing* 6 Am. AND ENG. ENCYC. OF LAW (2d ed.) 688.

**689. 2. Executory Considerations.** — *Rucker v. Bolles*, (C. C. A.) 80 Fed. Rep. 504; *Davis v. Williams*, 121 Ala. 542; *Hyman v. Jockey Club Wine, etc., Co.*, 9 Colo. App. 299; *Miller v. Western College*, 71 Ill. App. 587, *affirmed* 177 Ill. 280, 69 Am. St. Rep. 242; *Robinson v. Foust*, 31 Ind. App. 384, 99 Am. St. Rep. 269;

**691. 4. Executed Consideration — b. WHEN NO LIABILITY IS CREATED — (1) In General.** — See note 1.

(2) *Consideration Previously Moving to Third Person — Promise to Pay Existing Debt of Third Person.* — See note 3.

**692.** *Becoming Surety After Execution of Contract.* — See note 1.

**693.** See note 1.

(3) *Services Voluntarily Rendered to Promisor.* — See note 3. .

**c. WHEN LIABILITY IS CREATED — Thing Done at Express Request.** — See note 4.

**694. 5. Continuing Consideration.** — See note 2.

**V. ADEQUACY OF CONSIDERATION — 1. In General — Consideration Need Not Be Adequate — a. AT LAW.** — See note 3.

**696.** *Inadequacy No Defense to Action upon Promissory Note.* — See note 1.

**b. IN EQUITY.** — See note 2.

**697.** See note 1.

**698.** See note 2.

**699. 2. Inadequacy Evidence of Fraud.** — See note 1.

*Joseph v. Wild*, 146 Ind. 249; *Harlan v. Harlan*, 102 Iowa 701; *Briggs v. Briggs*, 113 Mich. 371; *Roth v. Phillips*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 240; *Keuka College v. Ray*, 41 N. Y. App. Div. 200, *affirmed* 167 N. Y. 96; *Shakely v. Guthrie*, 2 Pa. Super. Ct. 414; *Arnold v. Chamberlain*, 14 Tex. Civ. App. 634; *Meloy v. Peterson*, 99 Wis. 489.

Where One Induces Another to Subscribe for Stock, promising to secure him from loss, the payment of the money on the subscription is a sufficient consideration. *McClymonds v. Stewart*, 2 Pa. Super. Ct. 310.

**691. 1. Executed Consideration.** — *Perkins v. Smith*, 83 N. Y. App. Div. 630; *Brightly v. McAleer*, 3 Pa. Super. Ct. 442; *Davis v. Anderson*, 99 Va. 620.

Where the defendant agreed to reduce the amount of an existing mortgage on premises exchanged by him for premises owned by the defendant, it was held that the defendant's promise was supported by a sufficient consideration. *Bennett v. Knowles*, 111 Mich. 226.

**3. Promise to Pay Existing Debt of Third Person.** — *Richardson v. Fields*, 124 Ala. 535; *Harris v. Harris*, 180 Ill. 157; *Taylor v. Weeks*, 129 Mich. 233; *Metzger v. Edson*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 236.

**692. 1. Becoming Surety After Execution of Contract.** — *Chicago Sash, etc., Mfg. Co. v. Haven*, 195 Ill. 474.

But Where the Guaranty Is Part of the Inducement for giving credit, the guaranty is supported by a sufficient consideration. *Voullaire v. Wise*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 650.

**693. 1. Becoming Surety or Guarantor After Delivery of Note.** — *Holmes v. Williams*, 69 Ill. App. 114, *reversed* 177 Ill. 386; *Wipperman v. Hardy*, 17 Ind. App. 142; *Lowenstein v. Sorge*, 75 Mo. App. 281.

It has also been held that the erasure of the names of solvent sureties on a note after delivery, and the forbearance to sue the principal, constitute a sufficient consideration. *Jackson v. Cooper*, (Ky. 1897) 39 S. W. Rep. 39. But it has been held that where the name of a surety who refuses to remain longer thereon is erased, and another signs as surety in his stead, there is a sufficient consideration for the lat-

ter's promise. *Burrus v. Davis*, 67 Mo. App. 210.

**3. Promise to Pay for Services Voluntarily Rendered.** — *Blanshan v. Russell*, 32 N. Y. App. Div. 103, *affirmed* 161 N. Y. 629, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 693.

**4. Executed Consideration at Precedent Express Request.** — *Silverthorn v. Wylie*, 96 Wis. 69.

**694. 2. Continuing Consideration.** — *Ft. Madison v. Moore*, 109 Iowa 476.

**3. Adequacy of Consideration — Indiana.** — *Garard v. Yeager*, 154 Ind. 253, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 694; *Oldenburg v. Baird*, 26 Ind. App. 379.

*Iowa.* — *Baxter v. Pritchard*, 113 Iowa 422.

*Kentucky.* — *Price v. Price*, 111 Ky. 782.

*Missouri.* — *Forbs v. St. Louis, etc., R. Co.*, 107 Mo. App. 661, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 694.

*Montana.* — *Mueller v. Renkes*, (Mont. 1904) 77 Pac. Rep. 512.

*Nebraska.* — *Jones v. Dunbar*, 52 Neb. 151.

*New Jersey.* — *Ketcham v. Owen*, 55 N. J. Eq. 344.

*Ohio.* — *Robinson v. Boyd*, 60 Ohio St. 57; *Nave v. Marshall*, 9 Ohio Dec. 415, 6 Ohio N. P. 488.

*Pennsylvania.* — *Erie Forge Co. v. Pennsylvania Iron Works Co.*, 22 Pa. Super. Ct. 550.

*Vermont.* — *Darling v. Ricker*, 68 Vt. 471.

*Wisconsin.* — *Holz v. Hanson*, 115 Wis. 239, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 694.

**696. 1. Inadequacy Not a Defense to Action upon Promissory Note** — *Brown v. Ohio Nat. Bank*, 18 App. Cas. (D. C.) 598; *Helvie v. McKain*, 32 Ind. App. 507; *Matter of Flagg*, (Surrogate Ct.) 27 Misc. (N. Y.) 401.

**2. Hennessy v. Corneille**, 61 N. Y. App. Div. 620.

**697. 1. Specific Performance.** — *Hamilton v. Hamilton*, 162 Ind. 430; *Cone v. Cone*, 118 Iowa 458; *Fiplen v. Heinze*, 28 Mont. 548; *Ketcham v. Owen*, 55 N. J. Eq. 344.

**698. 2. Setting Aside Deed.** — *Booker v. Booker*, 208 Ill. 529, 100 Am. St. Rep. 259; *Jacobson v. Nealand*, 122 Iowa 372; *Beverage v. Ralston*, 98 Va. 625. See also *Jones v. Leeds*, 10 Ohio Dec. 173, 7 Ohio N. P. 480.

**699. 1. Inadequacy of Consideration as Evi-**

**699.** Inadequacy Coupled with Other Evidences of Fraud. — See notes 2, 3.

**701.** Confidential Relations. — See note 1.

3. Gross Inadequacy Proof of Fraud. — See note 2.

**702.** What Constitutes Gross Inadequacy. — See note 1.

**VI. GOOD CONSIDERATION — 2. Between Whom It Will Operate — Husband and Wife.** — See note 4.

Parent and Child. — See note 5.

Father and Illegitimate Child. — See note 6.

**703.** **VII. VALUABLE CONSIDERATIONS — 1. Definition.** — See note 7.

**704.** 2. General Principle — Benefit or Detriment Not Essential. — See note 1.

3. Money — a. PAYMENT OF MONEY — (1) *In General.* — See note 2.

(2) *Interest* — Agreement to Pay Additional Interest. — See note 3.

Prepayment of Interest. — See note 4.

Interest upon Interest. — See note 5.

**705.** b. MONEY EXPENDED AT PROMISOR'S INSTANCE. — See note 1.

dence of Fraud — *Illinois.* — *Rahn v. Kniess*, 74 Ill. App. 367.

*Iowa.* — *Burlington Protestant Hospital Assoc. v. Gerlinger*, 111 Iowa 293.

*Kentucky.* — *Carter v. Richardson*, 60 S. W. Rep. 397, 22 Ky. L. Rep. 1204.

*Minnesota.* — *Carson v. Hawley*, 82 Minn. 204.

*Missouri.* — *Gieseke v. Vollmer*, 88 Mo. App. 462.

*Nebraska.* — *Knight v. Darby*, 55 Neb. 16.

*New York.* — *Greenough v. Greenough*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 727, affirmed 32 N. Y. App. Div. 631.

*Ohio.* — *Hamill v. Wright*, 8 Ohio Dec. 467, 5 Ohio N. P. 9; *Citizens' Nat. Bank v. Wehrle*, 9 Ohio Cir. Dec. 330, 18 Ohio Cir. Ct. 535.

*Pennsylvania.* — *Bossart's Estate*, 11 Pa. Super. Ct. 100.

*Rhode Island.* — *In re Sweet*, 20 R. I. 557.

*Tennessee.* — *Overall v. Parker*, (Tenn. Ch. 1899) 58 S. W. Rep. 905.

**Inadequacy Not Amounting to Evidence of Fraud.** — Where a debtor, in consideration of the payment of seven thousand dollars, conveyed property, subject to his wife's right of dower, the taxable value of the property being ten thousand three hundred and seventy-six dollars, the inadequacy was held not to amount to evidence of fraud. *Flook v. Armentrout*, 100 Va. 638.

**More Inadequacy of Consideration in Family Settlements** is not a badge of fraud. *Voorhees v. Blanton*, 83 Fed. Rep. 234.

**699.** 2. Undue Influence. — *Hardy v. Dyas*, 203 Ill. 217, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 699.

3. Age, Ignorance, and Mental Incapacity. — *Walker v. Shepard*, 210 Ill. 112; *Wilkie v. Sassen*, 123 Iowa 421.

**701.** 1. Confidential Relations. — *Layton v. Calhoun Bank*, 59 S. W. Rep. 322, 22 Ky. L. Rep. 872.

2. Gross Inadequacy Proof of Fraud. — *Citizens Nat. Bank v. Wehrle*, 9 Ohio Cir. Dec. 330, 18 Ohio Cir. Ct. 535.

**702.** 1. What Constitutes Gross Inadequacy in Respect to Creditors. — See *O'Brien v. Cavanagh*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 362.

4. Husband and Wife. — *Tillaux v. Tillaux*, 115 Cal. 663; *Springer v. Springer*, 132 Cal. xviii, 64 Pac. Rep. 470.

5. Parent and Child. — *Sawyer v. White*, (C. C.

A.) 122 Fed. Rep. 223; *Russ v. Maxwell*, 94 N. Y. App. Div. 107.

The relationship existing between parent and child will support a transfer of realty, but such transfer will be set aside if it operates to defraud creditors. *Layton v. Calhoun Bank*, 59 S. W. Rep. 322, 22 Ky. L. Rep. 872.

**A Note from Parent to Child**, depending for its consideration wholly on love and affection, is not enforceable in *Tennessee*. *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 777.

6. Father and Illegitimate Child. — *Contra*, *Hall v. Hall*, 82 S. W. Rep. 300, 26 Ky. L. Rep. 610.

**703.** 7. Any Benefit Accruing to the Promisor is a sufficient consideration. *Grand Lodge, etc., v. Ohnstein*, 110 Ill. App. 326, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 703.

**704.** 1. Benefit or Detriment Not Essential. — *Barbour County Ct. v. Hall*, 51 W. Va. 276, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704; *Barrett v. Mahnken*, 6 Wyo. 541.

2. Annuity. — See *Garard v. Yeager*, 154 Ind. 253, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 703, 704.

**Instance of Direct Payment of Money.** — The payment of the amount of a fire policy is a valuable consideration for the assured's agreement to prosecute a negligence action for the benefit of the insurance company. *Norwich Union F. Ins. Soc. v. Stang*, 9 Ohio Cir. Dec. 576, 18 Ohio Cir. Ct. 464.

3. Additional Interest. — *Fleming v. Barden*, 126 N. Car. 450, 78 Am. St. Rep. 671.

It has also been held that an agreement to extend the time of payment of a debt is sufficiently supported by a promise to pay interest during the extended time. *Drescher v. Fulham*, 11 Colo. App. 62.

4. Prepayment of Interest. — *Wyatt v. DuFrene*, 106 Ill. App. 214; *English v. Landon*, 181 Ill. 614; *Owen v. Bray*, 80 Mo. App. 526; *Revell v. Thrash*, 132 N. Car. 803; *Stone's River Nat. Bank v. Walter*, 104 Tenn. 11; *Hallock v. Yankey*, 102 Wis. 41, 72 Am. St. Rep. 861.

5. Interest upon Interest. — *Bugh v. Crum*, 26 Ind. App. 465, 84 Am. St. Rep. 307.

**705.** 1. Guaranty Made to Induce Subscriptions to Stock. — The guaranty of certain residents of a town, made to induce other residents to subscribe to the capital stock of a manufac-

**707.** *c.* **LOANS** — **Promise of Principal.** — See note 1.

**Promise by Third Party.** — See note 2.

*d.* **REDUCTION IN FREIGHT RATES.** — See note 3.

**4. Pre-existing Legal and Equitable Obligations** — *a.* **LIQUIDATED LEGAL OBLIGATIONS** — (1) *Debts.* — See notes 4, 5.

**708.** See notes 2, 3, 4.

**709.** (2) *Liabilities* — (a) **Upon Contract** — *aa.* **IN GENERAL.** — See note 2.

**Liability upon Bills and Notes.** — See note 3.

**Liability of Principal to Surety or Guarantor.** — See notes 7, 8.

turing company to be established in the town, is based on a sufficient consideration. *Rogers v. Burr*, 105 Ga. 441, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704.

**Money Expended for Relief of Stock Company.** — Where one stockholder, at the instance of another stockholder, advanced funds for the relief of a mining company, it was held that there was a sufficient consideration to support a promise of repayment. *McKinney v. Armstrong*, 97 Ill. App. 208.

**Agreement Between Owners of Adjoining Lots Relative to Division Wall.** — One of the owners of adjacent lots agreed that the other might erect a wall on the division line, the wall to be used by both parties in the construction of proposed buildings. It was held that the subsequent erection of the wall rendered the promise obligatory. *Joseph v. Wild*, 146 Ind. 249.

**Moneys Expended by Attorney at Request of Client.** — The payment of rent to a city by an attorney, at the request of his client, is a sufficient consideration for a promise of repayment, irrespective of the client's liability to the city for the rent paid. *Barrett v. Parent*, 68 N. Y. App. Div. 165.

**707. 1. Loans of Money** — **Collateral Contracts.** — See *Commercial Bank v. Catto*, 20 N. Y. App. Div. 236, affirmed 163 N. Y. 569; *Hudson v. Compere*, 94 Tex. 449.

**2. Contract for Priority of Mortgage.** — A loan to enable a vendee to erect a building is a sufficient consideration for a promise by the vendor that the mortgage securing the loan shall have priority over the purchase-money mortgage. *Loewen v. Forsee*, 137 Mo. 29, 59 Am. St. Rep. 489.

**3. Reduction in Freight Rates** — **Limitation in Amount of Liability.** — *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537; *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406; *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218; *Kellerman v. Kansas City, etc., R. Co.*, 68 Mo. App. 255, affirmed 136 Mo. 177.

**4. Pre-existing Debt** — **Promise of Repayment.** — *Hooper v. Pike*, 70 Minn. 84, 68 Am. St. Rep. 512.

**5. Giving Note for Pre-existing Debt.** — *Lane v. Union Nat. Bank*, 75 Ill. App. 299, affirmed 177 Ill. 171, 69 Am. St. Rep. 216.

**708. 2. Mortgages** — **Pre-existing Debt as Consideration For.** — *Rea v. Wilson*, 112 Iowa 517; *Aretz v. Kloos*, 89 Minn. 432; *Longfellow v. Barnard*, 58 Neb. 618; *Berry v. Berk*, 62 Neb. 535; *New York County Nat. Bank v. American Surety Co.*, 174 N. Y. 544; *Watts v. Dubois*, (Tex. Civ. App. 1902) 66 S. W. Rep. 698; *California Bank v. Puget Sound Loan, etc., Co.*, 20 Wash. 636.

**3. Pre-existing Debt** — **Deed of Conveyance of Realty** — *United States.* — *Vansickle v. Wells*, 105 Fed. Rep. 16; *Jacobs v. Van Sickel*, 123 Fed. Rep. 340, affirmed (C. C. A.) 127 Fed. Rep. 62.

*Alabama.* — *Pratt Land, etc., Co. v. McClain*, 135 Ala. 452.

*Arkansas.* — *Davis v. Jones*, 67 Ark. 122.

*California.* — *Greenwalt v. Mueller*, 126 Cal. 636.

*Colorado.* — *Tennis v. Barnes*, 11 Colo. App. 196.

*Illinois.* — *Walsh v. O'Neill*, 192 Ill. 202; *Dean v. Plane*, 195 Ill. 495.

*Iowa.* — *Cox v. Collis*, 109 Iowa 270; *Baxter v. Pritchard*, 113 Iowa 422; *Roberts v. Brothers*, 119 Iowa 309.

*Louisiana.* — *Reinach v. New Orleans Imp. Co.*, 50 La. Ann. 497.

*Michigan.* — *Kieldsen v. Blodgett*, 113 Mich. 655; *Ullman v. Thomas*, 126 Mich. 61.

*Nebraska.* — *Carson v. Murphy*, (Neb. 1901) 96 N. W. Rep. 110.

*Nevada.* — *Robinson v. Kind*, 25 Nev. 261.

*New York.* — *National Bank v. Bonnell*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 541, affirmed 46 N. Y. App. Div. 302.

*Oregon.* — *Flynn v. Baisley*, 35 Oregon 268.

*South Carolina.* — *Steinmeyer v. Steinmeyer*, 55 S. Car. 9; *McElwee v. Kennedy*, 56 S. Car. 154.

*Texas.* — *McCrory v. Lutz*, 94 Tex. 650, 64 S. W. Rep. 780.

*Virginia.* — *McConville v. National Valley Bank*, 98 Va. 9; *Robinson v. Bass*, 100 Va. 190, 4 Va. Sup. Ct. Rep. 116.

**As Against a Prior Unrecorded Deed** an antecedent debt has been held not to be a valuable consideration. *Huff v. Maroney*, 23 Tex. Civ. App. 465.

**4. Pre-existing Debts** — **Sale of Personal Property.** — See *Beaman v. Stewart*, 19 Colo. App. 226.

**709. 2. Liability upon Contract.** — *McHenry v. Brown*, 66 Minn. 123.

**3. Note Given in Renewal of Note.** — *Siemens, etc., Electric Co. v. Ten Broeck*, 97 Mo. App. 173; *West v. Banigan*, 172 N. Y. 622; *McGregor v. McKenzie*, 30 Nova Scotia 214; *Ross v. Western L. & T. Co.*, 11 Quebec K. B. 292.

**Drawee of Bill of Exchange Giving Note in Payment.** — There is a sufficient consideration to support a note given by a drawee of a bill of exchange, where such note was received in payment. *Torpey v. Tebo*, 184 Mass. 307.

**7. Liability of Principal to Surety or Guarantor** — **Execution of Mortgage.** — *Longfellow v. Barnard*, 58 Neb. 618, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 709; *Steen v. Stretch*, 50 Neb. 572; *Landigan v. Mayer*, 32 Oregon 245.

- 710.** (b) For Torts. — See note 3.  
 b. *EQUITABLE DUTIES.* — See note 4.
- 711.** 5. *Compromise of Doubtful and Unliquidated Claims* — a. *DOUBTFUL CLAIMS* — (1) *In General.* — See note 1.
- 712.** *Family Settlements.* — See note 1.
- 713.** (2) *Claim Need Only Be Considered Doubtful.* — See note 2.
- 714.** After *Compromise Merits of Claim Cannot Be Investigated.* — See note 1.  
 (3) *Groundless Claims.* — See note 2.
- 715.** b. *UNLIQUIDATED CLAIMS* — (2) *Ex Delicto* — (a) *In General.* — See note 1.

**709.** 8. *Conveyance of Real Property.* — Goodwin v. McMinn, 204 Pa. St. 162.

**710.** 3. *Liability for False Representations.* — See Kemp v. National Bank of Republic, (C. C. A.) 109 Fed. Rep. 48.

**4.** *Equitable Duties.* — Ransdel v. Moore, 153 Ind. 393.

**711.** 1. *Compromise of Doubtful Claims* — *United States.* — German Sav., etc., Soc. v. De Lashmutter, 83 Fed. Rep. 33; Dyer v. Muhlenberg County, (C. C. A.) 117 Fed. Rep. 586; Daly v. Busk Tunnell R. Co., (C. C. A.) 129 Fed. Rep. 513.

*Arkansas.* — Lee v. Swilling, 68 Ark. 82.

*California.* — Bank of Commerce v. Scofield, 126 Cal. 156; Creighton v. Gregory, 142 Cal. 34; Sharp v. Bowie, 142 Cal. 462.

*Georgia.* — Tyson v. Woodruff, 108 Ga. 368.  
*Illinois.* — Norton v. Eastman, 83 Ill. App. 303; Murphy v. Murphy, 84 Ill. App. 292; Miller v. Goelitz, 85 Ill. App. 557; Adams v. Crown Coal, etc., Co., 198 Ill. 451.

*Iowa.* — Morey v. Laird, 108 Iowa 670; Seegmiller v. Kelley, (Iowa 1904) 99 N. W. Rep. 1131.

*Kansas.* — Tessendorf v. Lasater, 10 Kan. App. 22, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 711; Neely v. Thompson, 68 Kan. 193.

*Kentucky.* — Louisville, etc., R. Co. v. Seibert, (Ky. 1900) 55 S. W. Rep. 892; U. S. Building, etc., Assoc. v. Denny, 66 S. W. Rep. 622, 23 Ky. L. Rep. 2109; Albin Co. v. Firth Carpet Co., 74 S. W. Rep. 212, 24 Ky. L. Rep. 2432; Power v. Hambrick, 74 S. W. Rep. 660, 25 Ky. L. Rep. 30.

*Massachusetts.* — McKay v. Myers, 168 Mass. 312; Dunbar v. Dunbar, 180 Mass. 170, 94 Am. St. Rep. 623.

*Michigan.* — Young v. Shepard, 124 Mich. 552.

*Minnesota.* — Rice v. London, etc., Mortg. Co., 70 Minn. 77; Northern Pac. R. Co. v. Holmes, 88 Minn. 389; Hillestad v. Lee, 91 Minn. 335.

*Missouri.* — Marshall v. Larkin, 82 Mo. App. 635; Lane v. Pollard, 88 Mo. App. 326; School Dist. v. Matherly, 90 Mo. App. 403; Dixon v. Dixon, 107 Mo. App. 682.

*Nebraska.* — Chicago, etc., R. Co. v. Brown, (Neb. 1904) 97 N. W. Rep. 1038.

*New Jersey.* — Randall v. Reynolds, 61 N. J. Eq. 335.

*New York.* — Hazleton v. Webster, 20 N. Y. App. Div. 177, affirmed 161 N. Y. 628; O'Brien v. New York, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 219, affirmed 40 N. Y. App. Div. 331; General Electric Co. v. Nassau Electric R. Co., 36 N. Y. App. Div. 510, affirmed 161 N. Y. 656;

Mack v. Austin, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 839; Rosenthal v. Rudnick, 76 N. Y. App. Div. 624; Laroe v. Sugar Loaf Dairy Co., 87 N. Y. App. Div. 585, reversed 180 N. Y. 367; De Lovenzo v. Hughes, (Supm. Ct. App. T.) 84 N. Y. Supp. 857; Goss v. Rishel, (Supm. Ct. App. T.) 85 N. Y. Supp. 1045.

*Ohio.* — Brown-Ketcham Iron Works v. Hazen, 24 Ohio Cir. Ct. 681.

*Pennsylvania.* — Sutton v. Dudley, 193 Pa. St. 194; Dreifus v. Columbian Exposition Salvage Co., 194 Pa. St. 475, 75 Am. St. Rep. 704; Todd v. Quaker City Mut. F. Ins. Co., 9 Pa. Super. Ct. 381.

*South Carolina.* — Sloan v. Courtney, 54 S. Car. 314.

*Texas.* — Shelton v. Jackson, 20 Tex. Civ. App. 443.

*West Virginia.* — Rutherford v. Rutherford, 55 W. Va. 56.

**Forbearance to Collect Alimony.** — A promise by a wife to refrain from enforcing a decree granting alimony to her is a sufficient consideration to support an agreement by her father-in-law to contribute towards the support of herself and children. Recknagel v. Steinway, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 633, modified and affirmed 58 N. Y. App. Div. 352.

**712.** 1. *Family Settlements.* — Voorhees v. Blanton, 83 Fed. Rep. 234; Spielberger v. Thompson, 131 Cal. 55; Clawson v. Brewer, (N. J. 1904) 58 Atl. Rep. 598.

**713.** 2. *Claim Need Only Be Considered Doubtful.* — City Electric R. Co. v. Floyd County, 115 Ga. 657, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 713; Bingham v. Browning, 97 Ill. App. 442, affirmed 197 Ill. 122; Grand Lodge, etc., v. Ohnstein, 110 Ill. App. 312; Melcher v. Insurance Co., 97 Me. 512; Stearns v. Lake Shore, etc., R. Co., 112 Mich. 651.

**714.** 1. *After Compromise Merits of Claim Cannot Be Investigated.* — Adams v. Crown Coal, etc., Co., 198 Ill. 445, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714; Melcher v. Insurance Co., 97 Me. 512.

**2.** *Groundless Claims.* — Ivy Coal, etc., Co. v. Long, 139 Ala. 535; Walker v. Shepard, 210 Ill. 112, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714; Jennings v. Jennings, (Iowa 1901) 87 N. W. Rep. 726; Price v. Atchison First Nat. Bank, 62 Kan. 750; Melcher v. Insurance Co., 97 Me. 512; Taylor v. Weeks, 129 Mich. 233; Winter v. Kansas City Cable R. Co., 160 Mo. 159; Brown v. Eccles, 2 Pa. Super. Ct. 192.

**715.** 1. *Cause of Action for Breach of Promise to Marry.* — Notes given for the payee's release of her cause of action for breach of promise to marry against the son of one of the

**716.** (b) When Tort Is a Public Offense. — See note 1.

**717.** (c) Bastardy Suits. — See note 1.

**718.** 6. Incurring Liabilities — As Principal — Purchasing Property. — See note 1.

As Surety. — See note 2.

**719.** 7. Services — *a.* IN GENERAL. — See note 2.

**721.** *b.* AGREEMENTS TO PERFORM. — See note 1.

Future Maintenance and Support. — See notes 2, 3.

Such Conveyance Void as to Existing Creditors. — See note 5.

**723.** 9. Trouble, Risk, and Inconvenience. — See note 1.

10. Construction of Railroads, Buildings, and the Like — Construction of Railroad and Location of Stations. — See note 2.

**724.** See note 1.

makers are supported by a sufficient consideration. *Barrett v. Mahnken*, 6 Wyo. 541, 71 Am. St. Rep. 953.

**716.** 1. Civil Liability Arising from the Commission of a Crime May Be Compromised. — *Sloan v. Davis*, 105 Iowa 97; *Beath v. Chapoton*, 115 Mich. 506, 69 Am. St. Rep. 589.

**717.** 1. Compromise of Bastardy Suits. — *Van Epps v. Redfield*, 68 Conn. 39; *Sponable v. Owens*, 92 Mo. App. 174; *Beach v. Voegtlen*, 68 N. J. L. 472; *Com. v. Scott*, 29 Pittsb. Leg. J. N. S. (Pa.) 77.

**718.** 1. Assuming Indebtedness in Reliance upon Subscription. — Where the trustees of a church, relying on a subscription to pay for the erection of their church edifice, individually assumed the payment of the indebtedness, it was held that there was a sufficient consideration for the subscription. *Ft. Madison First M. E. Church v. Donnell*, 110 Iowa 5.

Inducing Person to Purchase Stock. — There is a sufficient consideration to support a promise to repurchase stock from one who, against his desire, has been induced to buy such stock. *Merchant v. O'Rourke*, 111 Iowa 351.

Town Incurring Obligations on Strength of Subscriptions. — Subscriptions towards the building of a bridge are supported by a sufficient consideration, where, relying on such subscriptions, a town incurs obligations. *Grand Isle v. Kinney*, 70 Vt. 381.

2. Becoming Surety as a Consideration for Indemnity. — *Warren v. Abbett*, 65 N. J. L. 99.

**719.** 2. Services — *United States*. — *Wilson v. Clonbrock Steam-Boiler Co.*, 105 Fed. Rep. 846.

*Alabama*. — *Dexter v. McClellan*, 116 Ala. 37.

*Colorado*. — *Cory v. Newton*, 9 Colo. App. 181; *Fisk Min., etc., Co. v. Reed*, 32 Colo. 506.

*Delaware*. — *Collins v. Hutchins*, 2 Penn. (Del.) 496.

*Illinois*. — *Lewis v. Blye*, 79 Ill. App. 256.

*Iowa*. — *Foley v. Tipton Hotel Assoc.*, 102 Iowa 272.

*Kansas*. — *Mitchell v. Simpson*, 62 Kan. 343.

*Kentucky*. — *Braswell v. Braswell*, 109 Ky. 15; *Story v. Story*, 62 S. W. Rep. 865, 22 Ky. L. Rep. 1869.

*New York*. — *Matter of Wescott*, 34 N. Y. App. Div. 239; *Lord v. Hull*, 80 N. Y. App. Div. 194, reversed 178 N. Y. 9; *Yarwood v. Trusts, etc., Co.*, 94 N. Y. App. Div. 47.

*Pennsylvania*. — *Harper's Estate*, 7 Pa. Dist. 532, affirmed 196 Pa. St. 137.

*South Carolina*. — *Sullivan v. Ball*, 55 S. Car. 343.

*Tennessee*. — *Gardenhire v. White*, (Tenn. Ch. 1900) 59 S. W. Rep. 661.

*Texas*. — *Glover v. Coit*, (Tex. Civ. App. 1904) 81 S. W. Rep. 136.

*Vermont*. — *Darling v. Ricker*, 68 Vt. 471.

*Virginia*. — *Burdine v. Burdine*, 98 Va. 515, 81 Am. St. Rep. 741.

*West Virginia*. — *Stuart v. Neely*, 50 W. Va. 508.

**721.** 1. A Covenant to Perform Personal Services for the Grantor. — See *Gorman v. Urquhart*, 2 N. Bruns. Eq. Rep. 42. See also *Burdine v. Burdine*, 98 Va. 515, 81 Am. St. Rep. 741.

2. Future Maintenance and Support. — See *Dorsey v. Wolcott*, 173 Ill. 539; *Chase v. Chase*, 20 R. I. 202.

3. Support as Consideration for Deed. — *Brand v. Power*, 110 Ga. 522; *Jones v. Geery*, 153 Mo. 476; *Anderson v. Gaines*, 156 Mo. 664; *Hackett v. Hackett*, 67 N. H. 424; *Carney v. Carney*, 196 Pa. St. 34; *Torrey Cedar Co. v. Eul*, 95 Wis. 615; *Meloy v. Peterson*, 99 Wis. 489.

5. *Spiers v. Whitesell*, 27 Ind. App. 204; *Seekel v. Winch*, 108 Iowa 102; *Coleman v. Gammon*, (Iowa 1900) 83 N. W. Rep. 898; *Mallow v. Walker*, 115 Iowa 238, 91 Am. St. Rep. 158; *Brown v. Moore*, (Ky. 1899) 52 S. W. Rep. 944; *Spear v. Spear*, 97 Me. 498; *McCord v. Knowlton*, 79 Minn. 299; *Massey v. McCoy*, 79 Mo. App. 169; *Downing v. Gault*, 8 Pa. Super. Ct. 52.

**723.** 1. Risk of Dismissing Proceeding to Condemn Lands. — The risk of future costs and trouble which may arise from the dismissal of a condemnation proceeding constitutes a sufficient consideration for a promise to pay costs. *Barbour County Ct. v. Hall*, 51 W. Va. 275, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 723.

2. Construction of Railroad. — See *Curry v. Kentucky Western R. Co.*, 78 S. W. Rep. 435, 25 Ky. L. Rep. 1372.

The Partial Construction of a Railroad is a sufficient consideration for a promise to donate a right of way. *Cadiz R. Co. v. Roach*, 114 Ky. 934.

**724.** 1. Location of Railroad Station. — The location of a railroad station within a mile and a half of the residence of one who promised to donate a right of way, where, at the time of the promise, the nearest station was three



**724.** Erection of Private Buildings. — See note 3.

**725.** 11. Marriage and Promises of Marriage — *a.* CONTRACTS AND CONVEYANCES BETWEEN THE PARTIES. — See note 1.

Antenuptial Settlements. — See note 2.

Conveyance by Insolvent Grantor. — See note 3.

Reciprocal Promises of Marriage. — See note 4.

**726.** *b.* CONTRACTS AND CONVEYANCES BY THIRD PARTIES. — See notes 3, 4.

**727.** 12. Mutual Promises — Consideration Each for the Other. — See note 1.

**728.** Exchange of Promissory Notes. — See note 1.

miles from the promisor's residence, was held to be a sufficient consideration. *Cadiz R. Co. v. Roach*, 114 Ky. 934.

**724.** 3. Establishment of Private Manufacturing Business. — *Davis, etc., Bldg., etc., Co. v. Caigle*, (Tenn. Ch. 1899) 53 S. W. Rep. 240.

**725.** 1. Marriage — Contracts and Conveyances Between the Parties. — *Marmon v. White*, 151 Ind. 445, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 724; *Koch v. Koch*, 126 Mich. 187; *Matter of Miller*, 77 N. Y. App. Div. 473, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 725; *Metz v. Blackburn*, 9 Wyo. 481.

The Existence of an Engagement does not suffice to support a note; the engagement must have been entered into in consideration of the note being given. *Blanshan v. Russell*, 32 N. Y. App. Div. 103.

An Assignment of Moneys in Consideration of a Promise to Marry is valid although, without fault on the part of the assignee, the marriage never takes place. *De Hierapolis v. Reilly*, 44 N. Y. App. Div. 22, affirmed 168 N. Y. 585.

**2.** Antenuptial Settlements — *Illinois*. — *Yarde v. Yarde*, 187 Ill. 636.

*Indiana*. — *Ransdel v. Moore*, 153 Ind. 393, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 724-726; *Moore v. Harrison*, 26 Ind. App. 408.

*Iowa*. — *Fisher v. Koontz*, 110 Iowa 498; *In re Devoe*, 113 Iowa 4.

*Kentucky*. — *Hinklebein v. Totten*, 60 S. W. Rep. 641, 22 Ky. L. Rep. 1357.

*Missouri*. — *Coulter v. Lyda*, 102 Mo. App. 401.

*New York*. — *Matter of Miller*, 77 N. Y. App. Div. 480, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 725; *White v. White*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 481, affirmed 20 N. Y. App. Div. 560; *Green v. Benham*, 57 N. Y. App. Div. 9.

*Pennsylvania*. — *Krug's Estate*, 196 Pa. St. 484; *Broadrick v. Broadrick*, 25 Pa. Super. Ct. 225.

**3.** Conveyance by Insolvent Grantor — Betrothed Must Have Knowledge of the Fraud. — *De Hierapolis v. Reilly*, 168 N. Y. 585.

Presumption of Validity. — *Metz v. Blackburn*, 9 Wyo. 481.

**4.** Reciprocal Promises of Marriage. — *Moore v. Harrison*, 26 Ind. App. 408.

**726.** 3. Marriage — Promise or Conveyance by Third Party. — *Bell v. Sappington*, 111 Ga. 391.

**4.** Restriction of Choice Not Necessary. — *Wright v. Wright*, 114 Iowa 751, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 726.

**727.** 1. Mutual Promises — *United States*. — *Green v. Chicago, etc., R. Co.*, (C. C. A.) 92 Fed. Rep. 873; *Loudenback Fertilizer Co. v.*

*Tennessee Phosphate Co.*, (C. C. A.) 121 Fed. Rep. 298.

*Colorado*. — *Drescher v. Fulham*, 11 Colo. App. 62.

*Indiana*. — *Rothenberger v. Glick*, 22 Ind. App. 288; *Polk v. Johnson*, 160 Ind. 292, 98 Am. St. Rep. 274.

*Iowa*. — *Seeberger v. Wyman*, 108 Iowa 527.

*Kentucky*. — *Stovall v. McCutchen*, 107 Ky. 577, 92 Am. St. Rep. 373; *Curry v. Kentucky Western R. Co.*, 78 S. W. Rep. 435, 25 Ky. L. Rep. 1372.

*Maryland*. — *Travelers' Ins. Co. v. Parker*, 92 Md. 22.

*Massachusetts*. — *Lennox v. Murphy*, 171 Mass. 370; *Thomson v. Way*, 172 Mass. 423.

*Michigan*. — *Stearns v. Lake Shore, etc., R. Co.*, 112 Mich. 651.

*Minnesota*. — *Esch v. White*, 76 Minn. 220.

*Missouri*. — *German v. Gilbert*, 83 Mo. App. 411; *Steele v. Johnson*, 96 Mo. App. 159, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 727.

*New Jersey*. — *Hart v. Hart*, 57 N. J. Eq. 543.

*New York*. — *Olmstead v. Latimer*, 9 N. Y. App. Div. 163, modified 158 N. Y. 313; *Standard Fashion Co. v. Ostrom*, 16 N. Y. App. Div. 220; *White v. White*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 481, affirmed 20 N. Y. App. Div. 560; *American Boiler Co. v. Foutham*, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351; *Roter v. Phillips*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 240; *Veerhoff v. Miller*, 30 N. Y. App. Div. 355; *Shannon v. Horley*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 623; *Fuller v. Schrenk*, 58 N. Y. App. Div. 222, affirmed 171 N. Y. 671; *Recknagel v. Steinway*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 633, modified and affirmed 58 N. Y. App. Div. 352.

*Ohio*. — *Pittsburg, etc., R. Co. v. Cox*, 55 Ohio St. 497; *Union Cent. L. Ins. Co. v. Hilliard*, 63 Ohio St. 478, 81 Am. St. Rep. 644; *Vance v. Park*, 7 Ohio Dec. 564, 7 Ohio N. P. 138.

*Pennsylvania*. — *Gorman v. Bigler*, 8 Pa. Super. Ct. 440; *Avondale Marble Co. v. Wiggins*, 12 Pa. Super. Ct. 577.

*Texas*. — *Deutschman v. Bataille*, (Tex. Civ. App. 1896) 36 S. W. Rep. 489; *Brown v. Jackson*, (Tex. Civ. App. 1897) 40 S. W. Rep. 162; *Gulf, etc., R. Co. v. Combes*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1045.

*Vermont*. — *Montpelier Seminary v. Smith*, 69 Vt. 382.

*West Virginia*. — *Rowan v. Hull*, 55 W. Va. 335, 104 Am. St. Rep. 998, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 727.

**728.** 1. Exchange of Promissory Notes. — *Crampton v. Newton*, 132 Mich. 149, 9 Detroit

- 729.** Agreement to Deliver and Accept Goods. — See note 1.  
**730.** Promises Must Be Concurrent. — See note 1.  
 Both Promises Must Be Enforceable. — See note 2.  
**13.** Release from Arrest or Imprisonment. — See note 3.  
**731.** **14.** Real Property — *a.* IN GENERAL. — See note 2.  
*b.* CLAIM OF TITLE. — See note 4.  
**732.** *d.* HOMESTEAD AND DOWER. — See note 2.  
**733.** *f.* MORTGAGES. — See note 1.  
*g.* EQUITY OF REDEMPTION. — See note 2.

Leg. N. 570; *Mutual Loan Assoc. v. Brandt*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 270.

**729.** 1. *Mutual Agreement to Rescind or Modify Contract.* — *Hartford v. Attalla*, 119 Ala. 59; *Prestwood v. Eldridge*, 119 Ala. 72; *Carstens v. Burleigh*, 20 Wash. 283.

**730.** 1. *Promises Must Be Concurrent.* — *Murphy v. Murphy*, 93 Ill. App. 671; *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 114 Iowa 574; *Martin v. Meles*, 179 Mass. 114; *Chenoweth v. Pacific Express Co.*, 93 Mo. App. 185; *Fuller v. Schrenk*, 171 N. Y. 671; *Hodges v. O'Brien*, 113 Wis. 97.

**2.** *Both Promises Must Be Enforceable.* — *Sayward v. Houghton*, 119 Cal. 545; *Rogers v. Burr*, 105 Ga. 432; *Wall v. Stapleton*, 177 Ill. 357; *Wood v. Knight*, 35 N. Y. App. Div. 21.

**3.** *Note to Secure Payment of Fine and Costs.* — Where a person was arrested for nonpayment of a fine imposed on conviction of an offense against the Fires Prevention Act, Rev. Stat. Manitoba, c. 60, it was held that his release was a good consideration for a promissory note which he gave to secure payment of the fine and costs. *Proctor v. Parker*, 12 Manitoba 528.

**731.** 2. *The Conveyance by a Husband of All Interest in His Wife's Realty and Personalty* is sufficient consideration to support a note and a mortgage given to secure it. *Wall v. Stapleton*, 72 Ill. App. 614, affirmed 177 Ill. 357.

*A Conveyance by a Mortgagor to Junior Lienors*, to avoid the expense of foreclosure, is a sufficient consideration to support their agreement to use all reasonable efforts to sell the realty and to refund to him the moneys remaining after the discharge of all liens. *Storms v. Storms*, 21 Ind. App. 191.

*A Note Given for the Transfer of the Right to the Use and Occupation* of certain realty, though the title was not in the payee, is based on a sufficient consideration. *Tye v. Chickasha Town Co.*, 2 Indian Ter. 113.

*Conveyance of Realty as Consideration for Contract to Devise.* — The conveyance of real estate by one person is a sufficient consideration for a promise on the part of the grantee to devise to a third person. *Bird v. Jacobus*, 113 Iowa 194.

*Check in Payment of Interest in Contract of Sale.* — There is sufficient consideration to support a check given to the payee, who gave a receipt therefor showing that the check was given pursuant to an agreement for the payee to transfer his interest in a contract of sale. *Fleischman v. Plock*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 649.

*Note Given in Payment of Realty.* — A note given by one incorporator of a company to other incorporators as his part of the purchase price of realty conveyed to the corporation is sup-

ported by a valuable consideration. *Johnson v. Rodeger*, 119 N. Car. 446.

*The Relinquishment of a Timber-culture Entry*, with certain improvements, furnishes a sufficient consideration to support a contract. *Peoples v. Evens*, 8 N. Dak. 121.

*The Relinquishment of the Right of Entry on Public Lands* is a valid consideration for an assignment of moneys. *Tecumseh State Bank v. Maddox*, 4 Okla. 583.

*A Legacy Given in Consideration of the Legatee's Releasing an Interest in Realty*, of which he is one of the owners in common, is a legacy given for a valuable consideration. *Henry's Estate*, 20 Pa. Co. Ct. 415.

*A Conveyance of Land* is a sufficient consideration for an executory contract. *Alexander v. McDaniel*, 56 S. Car. 252.

*The Conveyance of an Interest in Realty and the Giving of a Note* constitute a valuable consideration for a conveyance of other realty. *Phoenix Ins. Co. v. Neal*, 23 Tex. Civ. App. 427.

**4.** *Claims of Title.* — *Tessendorf v. Lasater*, 10 Kan. App. 22, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 731, 732.

**732.** 2. *Release of Dower.* — *Baldwin v. Heil*, 155 Ind. 682; *Colvin v. Johnston*, 104 La. 655; *Polson v. Stewart*, 167 Mass. 211, 57 Am. St. Rep. 452; *Gruver v. Walkup*, 55 Neb. 544; *Southern L. & T. Co. v. Benbow*, 131 N. Car. 415; *Fennell's Estate*, 207 Pa. St. 309; *Runkle v. Runkle*, 98 Va. 663.

*The Release by a Wife of Her Dower Interest* in real estate, the title to which was in her husband, is a sufficient consideration to sustain a transfer of personal property from the husband to the wife. *Sloan v. Van Buskirk*, 51 Neb. 390.

*An Agreement to Relinquish a Homestead Entry* on public lands in sufficient consideration for a promissory note. *Hooker v. McIntosh*, 76 Miss. 693.

So the release by an insolvent of homestead rights, which was not required by law, constitutes a valuable consideration for a promise. *McNealey v. Baldrige*, 106 Mo. App. 11.

*The Husband's Release of a Homestead Right* is a sufficient consideration for an agreement on the part of the wife. *Racek v. North Bend First Nat. Bank*, 62 Neb. 669.

**733.** 1. *The Release of Part of the Premises* affected by a mortgage, is sufficient consideration for an agreement giving validity to the mortgage as to the remainder of the property. *Columbia Ave. Sav. Fund, etc., Co. v. Lewis*, 190 Pa. St. 558.

**2.** *The Waiver of the Right of Redemption by a Mortgagor* is sufficient consideration to support a contract on the part of the mortgagee. *Gunnell v. Emerson*, 73 Mo. App. 291.

- 734.** 15. **Personal Property** — *a.* IN GENERAL. — See note 3.  
*b.* STOCKS, BONDS, ETC. — See note 4.  
**735.** *d.* GOOD WILL OF BUSINESS. — See note 4.  
**736.** *f.* LIENS, ATTACHMENTS, AND MORTGAGES. — See note 3.  
**737.** 16. **Release of Personal Rights** — *b.* SURRENDER OF CUSTODY OF CHILD. — See note 2.  
*c.* NAMING CHILD. — See note 3.  
**738.** 17. **Contracts and Contractual Rights** — *c.* MODIFICATION OF CONTRACTS. — See note 4.  
*d.* RELEASE AND DISCHARGE OF CONTRACTS — (1) *In General.* — See note 5.

The Surrender of an Equity of Redemption is a sufficient consideration to support a contract. *Gunnell v. Emerson*, 80 Mo. App. 322.

**734.** 3. **A Valid Patent.** — *Brunner v. Brunnonville*, 58 N. Y. App. Div. 619.

**Lease of Sheep.** — Where a lessee surrendered his lease of sheep, for the benefit of his lessor, the latter's agreement to compensate the former was held to be supported by a sufficient consideration. *Lemmon v. Sibert*, 15 Colo. App. 131.

**4. Stock Certificates.** — *Van Arsdale v. Brown*, 9 Ohio Cir. Dec. 488, 18 Ohio Cir. Ct. 52.

**735.** 4. **The Good Will of a Business**, though intangible, is deemed by the law to be a thing of value, and is adequate as a consideration to form the subject-matter of a contract of sale, in whole or in part. *Mapes v. Metcalf*, 10 N. Dak. 609.

**736.** 3. **The Promise of a Chattel Mortgagee** to the purchaser of the mortgagor's interest to release his mortgage is a sufficient consideration for the promise of the purchaser to pay the mortgage. *Provenchee v. Piper*, 68 N. H. 31.

**737.** 2. **Surrender of Child.** — In *Grantham v. Gossett*, 182 Mo. 651, where a father surrendered his child on the agreement of the defendant to adopt her and make her his heir, it was held that there was a sufficient consideration to support the defendant's agreement.

The surrender by the mother of an illegitimate child to the putative father is a valuable consideration for a promise. *Ousset v. Euvsard*, (N. J. 1902) 52 Atl. Rep. 1110.

The surrender by a mother of her child will support the promise of the person to whom the surrender is made that he will support the child and make provision for her in his will. *Healy v. Healy*, (Supm. Ct. Eq. T.) 31 Misc. (N. Y.) 636, *affirmed* 55 N. Y. App. Div. 315.

**3. Naming Child.** — *Daily v. Minnick*, 117 Iowa 563.

**738.** 4. **Agreement to Modify Contract Is Consideration.** — *Prestwood v. Eldridge*, 119 Ala. 72; *Hartford v. Attalla*, 119 Ala. 59; *Hutchinson v. Coonley*, 209 Ill. 437; *Putnam Foundry, etc., Co. v. Canfield*, 25 R. I. 548; *Carstens v. Burleigh*, 20 Wash. 283.

To Support an Agreement to Reduce Rent, it is a sufficient consideration that the tenant continues to occupy the premises. *Hyman v. Jockey Club Wine, etc., Co.*, 9 Colo. App. 299; *Andre v. Graebner*, 126 Mich. 116.

**Modification of Lease Where Fire Has Occurred.** — An agreement to remain as tenant of premises where a fire has occurred is a sufficient consideration for a promise to forgive rent until

the damaged premises have been restored to their original condition. *Ireland v. Hyde*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 546.

**The Consideration of the Original Contract**, it has been held, will support a subsequent modification. *Ft. Madison v. Moore*, 109 Iowa 476.

Thus, where a note provided for interest, without specifying the rate, and subsequently an agreement fixing the rate was indorsed on the note, it was held that this agreement was a new promise, incorporated into and becoming a part of the note, and was supported by the original consideration. *Harrell v. Parrott*, 50 S. Car. 16.

**5. Surrender and Cancellation of Contract** — *California.* — *Scribner v. Hanke*, 116 Cal. 613; *Savings Bank v. Barrett*, 126 Cal. 413; *Lyon v. Robertson*, 127 Cal. xviii, 59 Pac. Rep. 990.

*Colorado.* — *Templin v. Hobson*, 10 Colo. App. 525.

*Illinois.* — *Joseph Wolf Co. v. Bank of Commerce*, 107 Ill. App. 58.

*Indiana.* — *Harrod v. State*, 24 Ind. App. 159.

*Iowa.* — *German Sav. Bank v. Geneser*, 116 Iowa 119.

*Massachusetts.* — *Devine v. Murphy*, 168 Mass. 249.

*Missouri.* — *Koerper v. Royal Invest. Co.*, 102 Mo. App. 543.

*New Hampshire.* — *New York L. Ins. Co. v. McKellar*, 68 N. H. 326.

*New York.* — *McLeod v. Hunter*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 558, *affirmed* 49 N. Y. App. Div. 131; *Eleventh Ward Bank v. New York, etc., Fireproofing Co.*, 53 N. Y. App. Div. 631.

*Pennsylvania.* — *Dreifus v. Columbian Exposition Salvage Co.*, 194 Pa. St. 475, 75 Am. St. Rep. 704.

*Tennessee.* — *Newman v. Aultman*, (Tenn. Ch. 1899) 51 S. W. Rep. 198.

**A Release of the Liability of a Surety on a Bond** is a sufficient consideration for a note given therefor, although by mistake the bond was made payable to the state, instead of to the intended obligee. *Court Valhalla No. 16 v. Olson*, 14 Colo. App. 243.

**A Release from the Obligation of an Invalid Contract**, because within the statute of frauds, has been held to constitute a sufficient consideration for a new agreement. *Merchant v. O'Rourke*, 111 Iowa 351.

**The Surrender of Notes and Securities** in which a corporation was interested is sufficient consideration to support a promissory note and mortgage duly executed by such corporation. *Fernald v. Highland Hall Co.*, 59 Kan. 534.

- 740.** (3) *Release of Debts of Third Person* — (a) *In General*. — See note 1.  
 (b) *Debts of Decedents* — *Promise by Widow*. — See note 3.  
*Promise by Distributee*. — See note 4.
- 742.** 19. *Forbearance* — a. *ESSENTIALS TO ITS SUFFICIENCY AS A CONSIDERATION* — (1) *There Must Be a Right*. — See notes 1, 2.  
*Forbearance of Doubtful Rights*. — See note 3.
- 743.** (3) *There Must Be an Agreement to Forbear* — (a) *In General*. — See note 2.  
 (b) *Express Agreement* — aa. *FOR A DEFINITE PERIOD*. — See note 3.  
 bb. *FOR AN INDEFINITE PERIOD* — *Reasonable Time*. — See note 4.
- 744.** (c) *Implied Agreement*. — See note 2.

**Release Not under Seal — No Proof of Consideration.** — A writing not under seal, signed by one of the parties to an executory agreement, after part performance, does not operate as a release without proof of consideration. *Gallo v. New York*, 15 N. Y. App. Div. 61.

**Satisfaction of Indorser's Liability as Consideration for His Warranty.** — The surrender of a note to an indorser and the release of his liability therein will form a sufficient consideration for his warranty of the genuineness of another note. *Lowry v. Stapp*, (Tenn. Ch. 1899) 53 S. W. Rep. 194.

**740. 1. Release of Debt of Third Person.** — *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. Rep. 111; *Chapman v. Ogden*, 37 N. Y. App. Div. 355, affirmed 165 N. Y. 642; *American Wire, etc., Co. v. Schultz*, (Supm. Ct. App. T) 43 Misc. (N. Y.) 637; *Steinmeyer v. Steinmeyer*, 55 S. Car. 9.

**The Release by a Firm of a debt due from one of its members constitutes a valuable consideration for a note given by the latter's father to pay the sum necessary to discharge the debt.** *Becker v. Fischer*, 13 N. Y. App. Div. 555.

**3. Release of Decedent's Debt — Promise by Widow.** — *Utica City Nat. Bank v. Tallman*, 63 N. Y. App. Div. 480; *Otto v. Long*, 127 Cal. 471; *Lyon v. Robertson*, 127 Cal. xviii, 59 Pac. Rep. 990.

**Indorsement of Notes Given in Extension.** — Where a widow owning all the property out of which a note of her deceased husband is payable indorses renewals of such note, there is a sufficient consideration for the indorsement. *Utica City Nat. Bank v. Tallman*, 63 N. Y. App. Div. 480, affirmed 172 N. Y. 642.

**4. Promise by Distributee.** — *Safe-Deposit, etc., Co. v. Wright*, (C. C. A.) 105 Fed. Rep. 155.

**The Surrender of the Decedent's Notes constitutes a sufficient consideration for equivalent notes given by his heirs.** *Union, etc., Bank v. Jefferson*, 101 Wis. 452.

**742. 1. Forbearance of Invalid Demands.** — *Jennings v. Jennings*, (Iowa 1901) 87 N. W. Rep. 726; *Price v. Atchison First Nat. Bank*, 62 Kan. 750, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742.

**2. A Forbearance to Make an Unlawful Eviction is not a sufficient consideration for a promise to pay rent.** *Smith v. Coker*, 110 Ga. 654.

**3. Di Iorio v. Di Brasio**, 21 R. I. 210, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742.

**743. 2. Mere Forbearance Not a Consideration.** — *Hoffmann v. Mayaud*, (C. C. A.) 93 Fed. Rep. 171; *Cumberland First Nat. Bank v. Parsons*, 45 W. Va. 688.

**An Agreement by a Creditor to Forbear if Weekly Payments Be Made** has been held not to be supported by a sufficient consideration. *Vanuxen v. McCreary*, 7 Pa. Dist. 574.

**3. An Agreement to Forbear to Sue for Six Months** is sufficient consideration for a promise to pay the debt. *Haskell v. Tukesbury*, 92 Me. 551, 69 Am. St. Rep. 529.

**The Extension of Time to Pay an Overdue Debt** is sufficient consideration for a contract based thereon, provided the extension be for a definite time. *Smith v. Richardson*, 77 Mo. App. 422.

**An Extension of Credit to a Corporation**, at the request of a stockholder, is sufficient consideration for a promise by such stockholder to pay the debt. *Honsinger v. Mulford*, 157 N. Y. 674.

**Agreement Not to Collect Interest — Guaranty of Third Person.** — An agreement of a mortgagee relative to noncollection of interest, followed by actual forbearance, is a sufficient consideration for the guaranty of a third person. *Greene v. Odell*, 43 N. Y. App. Div. 494.

**A Note Given in Renewal of Another Note** constitutes an agreement to extend the time of payment for a definite period. *Chattanooga First Nat. Bank v. Reid*, (Tenn. Ch. 1900) 58 S. W. Rep. 1124.

**The Acceptance of Notes in payment of a debt due is a sufficient consideration to support the obligation of accommodation sureties.** *Hannay v. Moody*, 31 Tex. Civ. App. 88.

**4. Contra, Webb v. Pahde**, (Tex. Civ. App. 1897) 43 S. W. Rep. 19. *Compare Blumenthal v. Tibbits*, 160 Ind. 70.

**An Agreement Not to Foreclose a Mortgage for an Indefinite Time** is sufficient to support an agreement by a second mortgagee to turn over the rents, where it is followed by actual forbearance. *Marshall v. Old*, 14 Colo. App. 32.

**An Extension of Time to Pay a Note** does not furnish sufficient consideration for a promise to pay, where the note was given as a donation to a manufacturing enterprise which, unknown to the maker, had been abandoned when the extension of time was granted. *Bucklen v. Johnson*, 19 Ind. App. 406.

**An Agreement to Forbear for an Indefinite Time, Followed by Actual Forbearance**, is sufficient consideration for a contract of suretyship. *Cooper v. Jackson*, (Ky. 1900) 57 S. W. Rep. 254.

**Conditional Sale — Vendor's Extension of Time.** — The vendor's extension of time to take possession of property sold conditionally is a sufficient consideration to support an agreement to pay for it. *Mosher v. Lansing Lumber Co.*, 112 Mich. 517.

**744. 2. The Forbearance May Be Implied**

**744.** *b.* INSTANCES OF FORBEARANCE — (1) *In General.* — See note 4.

**746.** (3) *Withholding Competition.* — See note 1.

(4) *Extension of Time upon Contracts.* — See notes 2, 3.

**747.** (5) *Forbearance of Legal Remedies* — (a) *In General* — Illustrations. — See notes 4, 5, 6.

**748.** See notes 1, 2, 3, 5.

from All the Circumstances, and need not be expressly proved. *McGregor v. McKenzie*, 30 Nova Scotia 214.

**744.** 4. An Agreement Not to Levy Execution against the property of certain of the defendants in an action pending is sufficient consideration for such defendants to agree to assist the plaintiff in recovering judgment against their codefendants. *Crook v. Lipscomb*, 30 Tex. Civ. App. 572, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744.

**Discontinuance by Wife of Proceedings Against Husband.** — It has been held that where the father of a husband, who had deserted his wife, agreed to pay a weekly sum to support his grandchild, if the wife would discontinue a pending proceeding against her husband for desertion, such promise was supported by sufficient consideration. *Morris v. Morris*, 8 Pa. Super. Ct. 116.

**746.** 1. *Withholding Competition, When Not Opposed to Public Policy*, is a sufficiently binding consideration. *Camden v. Dewing*, 47 W. Va. 313, 81 Am. St. Rep. 797, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 746. And this is so though the business involve but a single transaction. *Moore v. Florence First Nat. Bank*, 139 Ala. 607, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 746.

**2. Promissory Note — Extension of Time upon Debt as Consideration Therefor.** — *Whelan v. Swain*, 132 Cal. 389; *Metzerott v. Ward*, 10 App. Cas. (D. C.) 514; *Hollingshead v. American Nat. Bank*, 104 Ga. 250; *Harris v. Harris*, 180 Ill. 157; *Union Banking Co. v. Martin*, 113 Mich. 521; *Red River Valley Nat. Bank v. Barnes*, 8 N. Dak. 432.

**A Contract of Suretyship** is sufficiently supported by an extension of time for the payment of the original debt. *Grandy v. Campbell*, 78 Mo. App. 502; *Linton v. Cooper*, 53 Neb. 400, in which latter case a wife became surety for her husband's debt.

**3. Mortgage — Extension of Time on Debt as Consideration For.** — *Allender v. Evans-Smith Drug Co.*, 3 Indian Ter. 628; *Whitt v. Bailey*, (Ky. 1900) 59 S. W. Rep. 514; *Red River Valley Nat. Bank v. Barnes*, 8 N. Dak. 432.

**Assignment of Mortgage.** — An extension of time upon a debt is a valuable consideration for the assignment of a mortgage. *Conrad v. Corkum*, 35 Nova Scotia 288.

**747.** 4. An Agreement Not to Take the Benefit of the Bankrupt Law is a sufficient consideration for an agreement of compromise with an insolvent debtor. *Hanson v. McCann*, (Colo. App. 1904) 76 Pac. Rep. 983.

**The Forbearance to File a Petition for the Appointment of a Receiver** of a corporation has been held to be a sufficient consideration to support certain notes. *Minneapolis Land Co. v. McMillan*, 79 Minn. 290, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 747.

**5. Forbearance to Take Appeal.** — *Jones v.*

*Mayne*, 154 Ind. 408, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 747; *Mullreed v. Thumb*, 119 Mich. 578.

It was held that an agreement to pay the plaintiff's claim, if he would withdraw a pending appeal, was supported by a sufficient consideration where the plaintiff, upon the refusal of his attorney to withdraw the appeal, employed counsel to argue the appeal on behalf of the defendant's testator, resulting in an affirmance. *Kley v. Higgins*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 367, reversed 59 N. Y. App. Div. 581.

**The Right of Attorneys Appointed to Represent Unknown Heirs** in the settlement of an estate to appeal from an order fixing their fees is a valuable right constituting consideration for a contract; but an agreement by parties adversely interested in the estate to pay the compensation claimed in consideration of an abandonment of the appeal cannot be enforced where its effect would be to deprive the unknown heirs of their right of appeal and make the judgment against them final sooner than it otherwise would have become so. *Steger v. Hume*, 97 Tex. 324, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 747.

**6. The Postponement of a Foreclosure Sale** is sufficient consideration for an agreement to pay the mortgage debt. *Gibson v. McIntire*, 110 Iowa 417.

**Forbearance to Enforce the Lien of a Bill of Sale**, which is in reality a mortgage, is a sufficient consideration to support another mortgage. *Birdsall v. Wheeler*, 62 N. Y. App. Div. 625, affirmed 173 N. Y. 590.

**Promise of Second Mortgagee.** — The forbearance of a first mortgagee to foreclose his mortgage is a sufficient consideration for the agreement of a second mortgagee to pay taxes. *Williams v. Bedford Bank*, 63 N. Y. App. Div. 278.

**748.** 1. *Forbearance to File Lien.* — *Alley v. Turck*, 8 N. Y. App. Div. 50; *College Park Electric Belt Line v. Ide*, 15 Tex. Civ. App. 273.

**The Waiver of the Right of a Subcontractor to File a Mechanic's Lien** is a sufficient consideration on the part of the owner of the property to pay for labor and materials. *Allmendinger v. Malcom McDonald Lumber Co.*, 82 Ill. App. 166.

**2. Forbearance to Enforce a Lien.** — Where the custodian of goods had a lien thereon to secure money due to him by the owner, and the purchaser of such goods from the owner promised to remit the purchase price to the custodian, it was held that there could be inferred a request by the purchaser to the custodian to release his lien, and that such release was a good consideration for the promise. *Kleinwort v. Reddaway*, 9 Com. Cas. (Eng.) 292.

**The Forbearance of a Landlord to Enforce a Lien on His Guest's Baggage** is a sufficient consideration to support a contract of guaranty. *McKee v. Needles*, 123 Iowa 195.

**748. (b) Forbearance to Sue.** — See notes 6, 7.

**Pledge to Prevent Enforcement of Lien.** — A pledge of property made to prevent the sale of property already pledged is supported by sufficient consideration. *Nott v. State Nat. Bank*, 51 La. Ann. 871.

**A Mortgage to Secure Notes Already Secured by a Lien** which the holder threatens to enforce is supported by a sufficient consideration. *Birdsall v. Wheeler*, 62 N. Y. App. Div. 625, affirmed 173 N. Y. 590.

**An Agreement to Discharge a Lien** is a sufficient consideration for a promise to pay money. *People v. Morgan*, 97 N. Y. App. Div. 267.

**Landlord's Forbearance to Enforce Lien on Tenant's Goods.** — Where a third person agrees to pay to a landlord rent due to him from a tenant, on condition that the landlord shall not enforce a lien on his tenant's goods, such promise is upon a sufficient consideration. *Booth v. Hoenig*, 7 Pa. Dist. 529.

**The Abandonment of a Valid Lien** is a sufficient consideration to support a contract. *Davis v. National Surety Co.*, 139 Cal. 223.

**748. 3. Lien Not Valid.** — A note given for the release of a lien is supported by a sufficient consideration even though the lien asserted may not have been valid. *Hillenbrand v. Shippen*, (Ky. 1900) 58 S. W. Rep. 525.

**Abandonment of Attachment.** — *Hill v. Omaha*, etc., R. Co., 82 Mo. App. 188; *Cole v. Stearns*, 162 N. Y. 637.

**5. Stay of Execution — Promise by Third Person.** — *Bowman v. Forney*, 3 Dauphin Co. Rep. (Pa.) 68.

**A Mortgage to Stay an Execution** and secure an extension of time for the payment of the judgment is for a valid consideration. *Huffman v. Darling*, 153 Ind. 22.

**Forbearance to Execute a Judgment** is sufficient consideration to support a note. *Brandenburgh v. Three Forks Deposit Bank*, (Ky. 1898) 45 S. W. Rep. 108.

So a creditor's forbearance to enforce a judgment against lands is a sufficient consideration for a subsequent purchaser of such lands to pay the judgment. *Bradshaw v. Bratton*, 96 Va. 577.

But an agreement not to issue execution on a judgment which has no legal existence is not a sufficient consideration to support a new promise on the part of the alleged judgment debtor. *Price v. Atchison First Nat. Bank*, 62 Kan. 743.

**6. Promise Not to Plead Statute of Limitation.** — *Wells v. Enright*, 127 Cal. 669; *Murray v. Emery*, 187 Ill. 408.

**The Discontinuance of an Action on a Note** is sufficient consideration for a payment made by the defendant. *Terrill v. Deavitt*, 73 Vt. 190, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 748.

So the discontinuance of an action already begun is a valuable consideration for notes, though a formal order of discontinuance has not been entered. *Wesselman v. Stuart*, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 808.

But where an action is discontinued on the express promise of the maker to pay a note based on an illegal consideration, such promise is not supported by sufficient consideration.

*Reed v. Brewer*, (Tex. Civ. App. 1896) 36 S. W. Rep. 99.

**The Dismissal of a Suit**, even when the result is doubtful, is a sufficient consideration for a promise. *Grand Lodge, etc., v. Ohnstein*, 110 Ill. App. 312.

**An Agreement of Forbearance to Sue** is sufficient consideration to support a promise. *Wickham v. Hyde Park Bldg., etc., Assoc.*, 80 Ill. App. 523; *Chenoweth v. Pacific Express Co.*, 93 Mo. App. 185.

Thus, forbearance to sue on a promissory note is a good consideration for a note given in renewal; and the forbearance need not be expressly proved, but may be implied from all the circumstances. *McGregor v. McKenzie*, 30 Nova Scotia 214.

So notes given by a firm to a person who released his remedies for collecting a debt due to him are supported by a sufficient consideration. *Chapman v. Ogden*, 165 N. Y. 642.

And an agreement not to sue is a sufficient consideration to support the transfer of a note of a third person, and constitutes the transferee a holder for value. *McCammon v. Shantz*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 476.

**Tenant's Waiver of Right to Rescind Lease.** — The waiver of the right of a tenant to begin an action to rescind his lease is sufficient to support an agreement relative to a supply of water on the demised premises. *Sisson v. Kaper*, 105 Iowa 599.

**An Agreement to Forbear to Sue a Surety** on his bond is a sufficient consideration for notes given by him in settlement of his liability on the bond. *Fink v. Farmers' Bank*, 178 Pa. St. 154, 56 Am. St. Rep. 746.

**Forbearance to Sue a Trustee** is sufficient consideration to support a bond, though at the time of the execution of the bond neither the surety nor the beneficiaries knew the trustee had already misappropriated the fund. *Rothschild v. Frank*, 14 N. Y. App. Div. 399.

**Forbearance to Sue for Divorce.** — The forbearance of a wife, who has a good cause of action for divorce against her husband, to sue, is a sufficient consideration for his relinquishment of marital rights in her realty. *Polson v. Stewart*, 167 Mass. 211, 57 Am. St. Rep. 452.

**7. Forbearance to Sue — Contract by Third Party — Indiana.** — *Johnson v. Staley*, 32 Ind. App. 628.

*Kentucky.* — *Jackson v. Cooper*, (Ky. 1897) 39 S. W. Rep. 39; *Howard v. Lawrence*, 63 S. W. Rep. 589, 23 Ky. L. Rep. 680.

*Maine.* — *Haskell v. Tukesbury*, 92 Me. 551, 69 Am. St. Rep. 529.

*New York.* — *McCammon v. Shantz*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 476; *Brumm v. Gilbert*, 50 N. Y. App. Div. 430; *J. H. Mohlman Co. v. McKane*, 60 N. Y. App. Div. 546; *German Sav. Bank v. Brodsky*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 100, affirmed 82 N. Y. App. Div. 635; *German Sav. Bank v. Brodsky*, 82 N. Y. App. Div. 635.

*Texas.* — *Armstrong v. Snyder*, 15 Tex. Civ. App. 394.

**Promise by President to Pay Debt of Corporation.** — *College Park Electric Belt Line v. Ide*, 15 Tex. Civ. App. 273.

**750.** (6) *Forbearance to Enforce Equity.* — See note 2.

**VIII. INSUFFICIENT CONSIDERATIONS** — 1. **Doing What One Is Legally Bound to Do** — *a.* IN GENERAL. — See note 3.

**752.** *b.* PERFORMANCE OF DUTIES IMPOSED BY LAW — **Official Duties.** — See note 3.

*c.* PERFORMANCE OF CONTRACT — (1) *In General.* — See note 4.

**754.** (2) *Payment of Debt.* — See note 1.

*Anticipated Payment.* — See note 4.

(3) *Payment of Part of Debt.* — See note 5.

**An Agreement of Forbearance to Enforce a Claim Unsustainable at law or in equity is not a sufficient consideration for the promise of a third person to pay such claim.** *Herbert v. Mueller*, 83 Ill. App. 391.

**Consideration for Acceptance of Order by Third Person.** — Where a creditor took his debtor's order on a third person, who subsequently accepted it, it was held that there was a sufficient consideration to support the acceptance, although the order was not received in satisfaction of the debt. *Chattanooga Grocery Co. v. Livingston*, (Tenn. Ch. 1900) 59 S. W. Rep. 470.

**750. 2. Note Given by Second to First Indorser.** — A note given by a subsequent indorser of a protested note, for the purpose of inducing a prior indorser to perform his legal obligation to take up and pay the protested note, is without consideration. *Manhattan Brass Co. v. Gilman*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 690.

**3. Doing What One Is Legally Bound to Do** — *Alabama.* — *Thompson v. Hudgins*, 116 Ala. 93; *South, etc., Alabama R. Co. v. Highland Ave., etc.*, R. Co., 119 Ala. 105.

*District of Columbia.* — *Baker v. Cummings*, 4 App. Cas. (D. C.) 230.

*Illinois.* — *Reeves Pulley Co. v. Jewell Belt-ing Co.*, 102 Ill. App. 375.

*Iowa.* — *Eastman v. Miller*, 113 Iowa 404; *Baringer v. Ryder*, 119 Iowa 121.

*Minnesota.* — *Hale v. Dressen*, 76 Minn. 183.

*Missouri.* — *Orr v. Sanford*, 74 Mo. App. 187.

*New York.* — *Carpenter v. Taylor*, 164 N. Y. 171; *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545; *Cunningham v. Hedge*, 12 N. Y. App. Div. 212; *Schneider v. Heinsheimer*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 11; *Far Rockaway Bank v. Smith*, 63 N. Y. App. Div. 432.

*North Dakota.* — *Gaar v. Green*, 6 N. Dak. 48; *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 474.

*Pennsylvania.* — *Rehm v. Frank*, 16 Pa. Super. Ct. 175.

*South Dakota.* — *Bunker v. Taylor*, 10 S. Dak. 526; *Whiffen v. Hollister*, 12 S. Dak. 68.

*Tennessee.* — *Sully v. Childress*, 106 Tenn. 109, 82 Am. St. Rep. 875.

*Texas.* — *Martin v. Armstrong*, (Tex. Civ. App. 1901) 62 S. W. Rep. 83.

**752. 3. Performance of Official Duty.** — See *Bloodgood v. Wuest*, 69 N. Y. App. Div. 356, denying the right of an equity clerk to extra compensation.

**4. Performance of Contract.** — *Alaska Packers' Assoc. v. Domenico*, (C. C. A.) 117 Fed. Rep. 99; *Wescott v. Mitchell*, 95 Me. 377; *Alley v. Turck*, 8 N. Y. App. Div. 50; *Schneider v. Heinsheimer*, (Supm. Ct. App. T.) 26 Misc.

(N. Y.) 11; *Jughardt v. Reynolds*, 68 N. Y. App. Div. 171; *Harvey v. Ayres*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 164; *Fletcher v. Nelson*, 6 N. Dak. 94; *Davis v. Weathered*, (Tex. Civ. App. 1897) 43 S. W. Rep. 21; *Dorr v. Camden*, 55 W. Va. 226, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752.

**754. 1. Payment of Debt Not a Consideration.** — *Knights Templars, etc., L. Indemnity Co. v. Crayton*, 209 Ill. 550; *Arend v. Smith*, 151 N. Y. 502; *Mutual L. Ins. Co. v. Aldrich*, 44 N. Y. App. Div. 620; *Olmstead v. Latimer*, 158 N. Y. 313.

**4. Anticipation of Payment Forms Consideration** — *Hale v. Dressen*, 76 Minn. 183; *Weiss v. Marks*, 206 Pa. St. 513; *Thurber v. Smith*, 25 R. I. 60; *Miller v. Fox*, 111 Tenn. 336; *Price v. Mitchell*, 23 Wash. 742.

**5. Payment of Part of Debt** — *United States.* — *Skinner v. Garnett Gold-Min. Co.*, 96 Fed. Rep. 735.

*Illinois.* — *Pusheck v. Frances E. Willard National Temperance Hospital Assoc.*, 94 Ill. App. 192; *Horwich v. Western Brewery Co.*, 95 Ill. App. 162; *Bingham v. Browning*, 97 Ill. App. 442, affirmed 197 Ill. 122; *Bostrom v. Gibson*, 111 Ill. App. 457; *Jennings v. Neville*, 180 Ill. 270.

*Indiana.* — *Hodges v. Truax*, 19 Ind. App. 651.

*Iowa.* — *Perin v. Cathcart*, 115 Iowa 553.

*Kentucky.* — *Evans v. Partin*, (Ky. 1900) 56 S. W. Rep. 648; *Mannakee v. McCloskey*, 63 S. W. Rep. 482, 23 Ky. L. Rep. 515.

*Michigan.* — *Upton v. Dennis*, 133 Mich. 238, 10 Detroit Leg. N. 132.

*Minnesota.* — *Ness v. Minnesota, etc., Co.*, 87 Minn. 413; *Hoidale v. Wood*, 93 Minn. 190.

*Missouri.* — *Reinhold v. Kerrigan*, 85 Mo. App. 256; *Goodson v. National Masonic Acc. Assoc.*, 91 Mo. App. 339; *Winter v. Kansas City Cable R. Co.*, 160 Mo. 150.

*Nebraska.* — *Fremont Foundry, etc., Co. v. Norton*, (Neb. 1902) 92 N. W. Rep. 1058.

*New York.* — *Shanley v. Koehler*, 178 N. Y. 556; *Cunningham v. Hedge*, 12 N. Y. App. Div. 212; *Abelson v. Gordon*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 812; *Evers v. Ostheimer*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 163; *Shanley v. Koehler*, 80 N. Y. App. Div. 566, affirmed 178 N. Y. 556; *Weinberg v. Novick*, (Supm. Ct. App. T.) 88 N. Y. Supp. 168.

*Tennessee.* — *Miller v. Fox*, 111 Tenn. 336.

*Texas.* — *Rotan Grocery Co. v. Noble*, (Tex. Civ. App. 1904) 81 S. W. Rep. 586.

*Virginia.* — *Standard Sewing Mach. Co. v. Gunter*, 102 Va. 568.

*Washington.* — *Price v. Mitchell*, 23 Wash. 742.

**755.** Payment of Interest. — See note 1.

Part Payment in Another Place. — See note 5.

Part Payment by Third Party. — See note 7.

**756.** IX. IMPOSSIBLE CONSIDERATIONS. — See note 4.

**757.** X. ILLEGAL CONSIDERATIONS. — See notes 1, 2. See also generally the title ILLEGAL CONTRACTS.

**758.** See note 1.

**XI. STATEMENT OF CONSIDERATION AND ACKNOWLEDGMENT OF PAYMENT** — 1. Necessity of Statement in the Instrument — *a.* IN SIMPLE CONTRACTS — (1) *At Common Law.* — See note 3.

**761.** 2. Effect of Acknowledgment of Payment in Deeds — Prevention of Resulting Trust. — See note 1.

**762.** XII. PRESUMPTION OF CONSIDERATION — 1. Simple Contracts — *a.* — NEGOTIABLE INSTRUMENTS. — See note 1.

*b.* WRITTEN CONTRACTS GENERALLY — STATUTES. — See note 2.

2. Specialties — *a.* IN GENERAL — Seal Imports Consideration. — See note 4.

**Exception — Composition with Creditors.** — Bartlett *v.* Woodworth-Mason Co., 69 N. H. 316; Metcalf *v.* Morse Ironworks, etc., Co., (Supm. Ct. App. T.) 14 N. Y. Annot. Cas. 28; Talcott *v.* Janasson, (Supm. Ct. App. 1.) 85 N. Y. Supp. 833.

**Release of Insolvent Debtor.** — See Engbretson *v.* Seiberling, 122 Iowa 522, 101 Am. St. Rep. 279.

**755.** 1. Payment of Interest. — Stroud *v.* Thomas, 139 Cal. 274, 96 Am. St. Rep. 111; Tatum *v.* Morgan, 108 Ga. 336; Ferris *v.* Johnson, (Mich. 1904) 98 N. W. Rep. 1014, 10 Detroit Leg. N. 982.

**5.** Part Payment in Another Place. — Dendy *v.* Russell, 67 Kan. 723, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 755; Miller *v.* Fox, 111 Tenn. 336.

**7.** Part Payment by Third Person. — Marshall *v.* Bullard, 114 Iowa 462.

**756.** 4. Impossible Consideration Mere Nullity. — Ormsby *v.* Graham, 123 Iowa 202.

**757.** 1. Illegal Consideration — Total Illegality — *United States.* — Morris *v.* Norton, (C. C. A.) 75 Fed. Rep. 912.

*Alabama.* — Brown *v.* Raisin Fertilizer Co., 124 Ala. 221.

*California.* — Chateau *v.* Singla, 114 Cal. 91, 55 Am. St. Rep. 63.

*Colorado.* — Ayer *v.* Younker, 10 Colo. App. 27.

*District of Columbia.* — Ohio Nat. Bank *v.* Hopkins, 8 App. Cas. (D. C.) 146.

*Illinois.* — McNulta *v.* Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203.

*Iowa.* — Peters *v.* Davenport, 104 Iowa 625.

*Kentucky.* — Clark *v.* Tanner, 100 Ky. 275.

*Michigan.* — Fisher Electric Co. *v.* Bath Iron Works, 116 Mich. 293.

*Montana.* — Morrison *v.* Bennett, 20 Mont. 560.

*New Hampshire.* — Hackett *v.* Hackett, 67 N. H. 424.

*New York.* — Train *v.* Davidson, 20 N. Y. App. Div. 577.

*Ohio.* — Lufkin Rule Co. *v.* Fringeli, 57 Ohio St. 596, 63 Am. St. Rep. 736.

*South Dakota.* — Prescott *v.* Bidwell, (S. Dak. 1904) 99 N. W. Rep. 93.

*Texas.* — Reed *v.* Brewer, (Tex. Civ. App. 1896) 36 S. W. Rep. 99.

*Vermont.* — Bates *v.* Cain, 70 Vt. 144.

*Washington.* — Boyd *v.* Cochrane, 18 Wash. 281.

*West Virginia.* — Miller *v.* Wisener, 45 W. Va. 59.

*Canada.* — Le Club Canadien *v.* Jacotel, 16 Quebec Super. Ct. 312; Leggatt *v.* Brown, 30 Ont. 225, affirming 20 Ont. 530.

**2. Partial Illegality.** — Shortall *v.* Fitzsimons, etc., Co., 93 Ill. App. 231; Bensinger *v.* Kantzler, 112 Ill. App. 293, reversed 214 Ill. 589; Reagan *v.* Chicago First Nat. Bank, 157 Ind. 623, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757, affirmed on rehearing 157 Ind. 673; Sellers *v.* Catron, (Indian Ter. 1904) 82 S. W. Rep. 742; Pierson *v.* Green, 69 S. Car. 559; Rayner Cattle Co. *v.* Bedford, 91 Tex. 642; Dow *v.* Taylor, 71 Vt. 337, 76 Am. St. Rep. 775; Frigon *v.* Cossette, 16 Quebec Super. Ct. 340; Stone's River Nat. Bank *v.* Walter, 104 Tenn. 11.

**758.** 1. Courts Will Not Rescind Illegal Executed Contracts Nor Enforce Executory Ones. — Short *v.* Bullion-Beck, etc., Min. Co., 20 Utah 20, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757 [758]. See also the title ILLEGAL CONTRACTS, 997. 1 *et seq.*

**3. Consideration Need Not Be Expressed in the Contract.** — Moore *v.* Harrison, 26 Ind. App. 411, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 758.

**761.** 1. Acknowledgment of Consideration Prevents Resulting Trust. — Jacobson *v.* Nealand, 122 Iowa 372; Wishart *v.* Gerhart, 105 Mo. App. 112; Hall *v.* McNally, 23 Utah 609.

**762.** 1. Negotiable Instruments — Consideration Presumed. — Scribner *v.* Hanke, 116 Cal. 613.

**2. Presumption of Consideration — Written Contracts — Statutes.** — McKee *v.* Needles, 123 Iowa 195; Stern *v.* Deutsch, 9 Kan. App. 218; Western Twine Co. *v.* Wright, 11 S. Dak. 521; Gira *v.* Harris, 14 S. Dak. 537.

**4. Seal Imports Consideration — California.** — Blair *v.* Squire, 127 Cal. xviii, 59 Pac. Rep. 211.

*Georgia.* — Swell *v.* Hogan, 119 Ga. 169, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 762.

*Illinois.* — Mills *v.* Larrance, 186 Ill. 635, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.)



**763.** *b.* CONCLUSIVENESS OF PRESUMPTION — (1) *At Common Law.* — See note 1.

**XIII. EVIDENCE OF CONSIDERATION — 1. Burden of Proof — a. SIMPLE CONTRACTS — (2) When the Contract Imports a Consideration. — See note 4.**

**765.** (3) *When the Contract Acknowledges a Consideration.* — See note 1.

*b.* SPECIALTIES — (2) *Conveyances Presumptively Fraudulent.* — See note 4.

**2. Admissibility of Extraneous Evidence — a. TO SHOW CONSIDERATION WHEN NONE IS EXPRESSED — Simple Contracts.** — See note 5.

*Bills of Exchange and Promissory Notes.* — See note 6.

**766.** *b.* TO SHOW WHOLE CONSIDERATION WHEN STATEMENT IS OBVIOUSLY INCOMPLETE — *Simple Contracts.* — See note 2.

*Deeds.* — See note 3.

**767.** *Nominal Consideration.* — See note 1.

*c.* TO VARY CONSIDERATION WHEN IT IS APPARENTLY FULLY EXPRESSED — (1) *Older Rule.* — See note 2.

(2) *Modern Rule* — (a) *When the Statement Is Merely Formal — aa. IN GENERAL.* — See note 3.

762; *Forthman v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145.

*Massachusetts.* — *Roth v. Adams*, 185 Mass. 341.

*Minnesota.* — *Hale v. Dressen*, 73 Minn. 277.

*New York.* — *Finch v. Simon*, 61 N. Y. App. Div. 139; *Howie v. Kasowitz*, 83 N. Y. App. Div. 295; *Gein v. Little*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 421; *Von Schuckmann v. Heinrich*, 93 N. Y. App. Div. 278.

*North Carolina.* — *Bond v. Wilson*, 129 N. Car. 325.

*Pennsylvania.* — *Cosgrove v. Cummings*, 195 Pa. St. 497; *Geiselbrecht v. Geiselbrecht*, 8 Pa. Super. Ct. 183; *Owens v. Wehrle*, 14 Pa. Super. Ct. 536; *Brenneman's Estate*, 14 York Leg. Rec. (Pa.) 81.

*Washington.* — *De Wald v. Ingle*, 31 Wash. 616, 96 Am. St. Rep. 927, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 762.

*Wisconsin.* — *Carey v. Dyer*, 97 Wis. 554; *Maxon v. Gates*, 112 Wis. 196.

**763.** 1. *Sivell v. Hogan*, 119 Ga. 169, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 763.

**4. Bills and Notes — Production Prima Facie Evidence of Consideration.** — *Blanshan v. Russell*, 32 N. Y. App. Div. 103, affirmed 161 N. Y. 629; *Keuka College v. Ray*, 41 N. Y. App. Div. 200, affirmed 167 N. Y. 96; *McLeod v. Hunter*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 558, affirmed 49 N. Y. App. Div. 131; *Sayre v. Mohney*, 35 Oregon 141; *Madison First Nat. Bank v. Spear*, 12 S. Dak. 108.

**765.** 1. *When Contract Acknowledges Consideration.* — *Rice v. Rice*, 43 N. Y. App. Div. 458; *Matter of Steglich*, 91 N. Y. App. Div. 75.

**4. Burden of Proof — Conveyances Presumptively Fraudulent.** — *Walker v. Harold*, 44 Oregon 205; *Miller v. Gillispie*, 54 W. Va. 450.

**5. Parol Evidence — When No Consideration Is Expressed — Simple Contracts.** — *Moore v. Harrison*, 26 Ind. App. 408; *Albert Lea College v. Brown*, 88 Minn. 533, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 765.

**6. Parol Evidence of Consideration — Bills and Notes.** — *Baltes Land, etc., Co. v. Sutton*, 32 Ind. App. 14; *Clement v. Houck*, 113 Iowa 504; *Farmers' Sav. Bank v. Hansmann*, 114 Iowa 49; *Holmes v. Ferris*, 97 Mo. App. 305;

*Gifford v. Fox*, (Neb. 1901) 95 N. W. Rep. 1066; *Keuka College v. Ray*, 41 N. Y. App. Div. 200, affirmed 167 N. Y. 96; *Watson v. Boswell*, 25 Tex. Civ. App. 379.

**766.** 2. *When Statement of Consideration Is Obviously Incomplete.* — See *Wade v. Bent*, (Ky. 1903) 71 S. W. Rep. 444.

**Explanation of Phrase "Other Considerations."**

— Where a deed expresses a consideration of a given sum "and other considerations," parol evidence is admissible to explain. *Cummings v. Moore*, 27 Tex. Civ. App. 555. To the same effect see *Linkswiler v. Hoffman*, 109 La. 948.

**Consideration of Trust Deed — Statement Incomplete.** — The consideration of a trust deed, where the statement of consideration is obviously incomplete, may be shown by parol evidence. *Street v. Robertson*, 28 Tex. Civ. App. 222.

**Consideration of Given Sum, "More or Less."** — Where the chattel mortgage purports to have been executed to secure the payment of a given sum, "more or less," it is competent to show a contemporaneous oral agreement that it was given to secure future advances. *Groos v. Iowa Park First Nat. Bank*, (Tex. Civ. App. 1903) 72 S. W. Rep. 402.

**3. Alexander v. McDaniel**, 56 S. Car. 252.

**767.** 1. *Nominal Consideration.* — *Edwards v. Latimer*, 183 Mo. 610, wherein the opinion of the court below, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 767, and adopting the principle of *Scott v. Scott*, 1 Mass. 727, stated in the original note, was quoted and sustained by the Supreme Court.

**2. Evidence to Vary the Expressed Condition — Older Rule.** — *Davis v. Jernigan*, 71 Ark. 494; *Williams v. Kansas City Suburban Belt R. Co.*, 85 Mo. App. 103; *Olin v. Arendt*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 270; *Cook v. Cooper*, 59 S. Car. 560. See also *Nave v. Marshall*, 9 Ohio Dec. 415, 6 Ohio N. P. 488.

Where a written contract recites a money consideration, parol evidence is inadmissible to show that the contract expresses a greater sum than was agreed upon. *Northwestern Creamery Co. v. Lanning*, 83 Minn. 19.

**3. Modern Rule — When Statement Is Merely**

**768. bb. EVIDENCE PROVING DIFFERENT CONSIDERATION FROM THAT EXPRESSED —**(aa) *Considerations of Same Species.* — See notes 1, 2.

Illustrations. — See note 3.

**769.** See note 1.**770.** See notes 2, 3, 5.**771.** See note 3.**772.** (bb) *Considerations of Different Species.* — See note 1.

cc. EVIDENCE PROVING CONSIDERATION IN ADDITION TO THAT EXPRESSED. — See note 2.

**773.** Illustrations. — See note 5.**775.** (b) When the Consideration Is Contractual. — See note 1.**777. d. TO PROVE OR REPEL ALLEGATIONS OF FRAUD OR ILLEGALITY — (2) What May Be Shown in Rebuttal.** — See note 4.**778. e. TO PROVE NONPAYMENT OF CONSIDERATION — (1) In General.** — See note 2.

In Actions for the Recovery of the Consideration. — See note 3.

**Formal — Colorado.** — Hubbard v. Mulligan, 13 Colo. App. 116.**Illinois.** — Rook v. Rook, 111 Ill. App. 398.**Iowa.** — Coleman v. Gammon, (Iowa 1900) 83 N. W. Rep. 898.**Kentucky.** — Price v. Price, 111 Ky. 782; Neurenberger v. Lehenbauer, 66 S. W. Rep. 15, 23 Ky. L. Rep. 1753; Wade v. Bent, 71 S. W. Rep. 444, 24 Ky. L. Rep. 1294.**Minnesota.** — Langan v. Iverson, 78 Minn. 299; Le May v. Brett, 81 Minn. 506; Witzel v. Zuel, 90 Minn. 340; Anderman v. Meier, 91 Minn. 413.**Missouri.** — Wishart v. Gerhart, 105 Mo. App. 112; See v. Mallonee, 107 Mo. App. 721.**New York.** — Rochester Folding Box Co. v. Browne, 55 N. Y. App. Div. 444, affirmed 179 N. Y. 542.**Pennsylvania.** — Barnes v. Black, 193 Pa. St. 447, 74 Am. St. Rep. 694; Henry v. Zurflied, 203 Pa. St. 440.**Wisconsin.** — Perkins v. McAuliffe, 105 Wis. 582; Butt v. Smith, 121 Wis. 566, 105 Am. St. Rep. 1039.See also title **BILLS OF EXCHANGE AND PROMISSORY NOTES, 199. 5 et seq.****Manner of Payment.** — Hall v. McNally, 23 Utah 609.**768. 1. Action for Recovery of the Consideration.** — Davis v. Jernigan, 71 Ark. 494.**2. Actions for Breach of Covenants — True Consideration of Deed May Be Shown.** — Davis v. Jernigan, 71 Ark. 494; Conklin v. Hancock, 67 Ohio St. 455; Holmes v. Seaman, (Neb. 1904) 100 N. W. Rep. 417.**3. True Consideration of Bill of Sale May Be Shown.** — Hicks v. Cubbon, 4 Ohio Dec. (Reprint) 408, 2 Cleve. L. Rep. 121.**769. 1. Consideration May Be Shown to Be Greater than That Expressed.** — Davis v. Jernigan, 71 Ark. 494.**770. 2. Extinguishment of Debt.** — Parol evidence is admissible to show that a bill of sale and chattel mortgage, reciting a given sum of money as a consideration, were in reality made in extinguishment of a debt. Schneider v. Sanders, 26 Tex. Civ. App. 169.**3. Assumption of Debt.** — Brosseau v. Lowy, 209 Ill. 405.**5. Security for Future Advances.** — Glenn v. Seeley, 25 Tex. Civ. App. 523.**771. 3. Exchange of Lands.** — In an action to set aside a deed it was held that parol evidence was admissible to show that an exchange of lands was no real consideration of the deed. Harraway v. Harraway, 136 Ala. 499.**772. 1. Considerations of Different Species May Be Shown.** — Rapid Transit R. Co. v. Smith, (Tex. Civ. App. 1904) 82 S. W. Rep. 788. See also Edwards v. Latimer, 183 Mo. 610.**2. Additional Consideration to That Expressed May Be Shown.** — Cheesman v. Nicholl, 18 Colo. App. 174; Droop v. Ridenour, 11 App. Cas. (D. C.) 224; Lloyd v. Sandusky, 95 Ill. App. 593, affirmed 203 Ill. 621; Henderson v. Tobey, 105 Ill. App. 154; Galvin v. Boston El. R. Co., 180 Mass. 587; Edwards v. Latimer, 183 Mo. 610; Mapes v. Metcalf, 10 N. Dak. 609, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 772; McGary v. McDermott, 207 Pa. St. 620; Miles v. Waggoner, 23 Pa. Super. Ct. 432; Rotan Grocery Co. v. Martin, 95 Tex. 437; Williams v. Blumenthal, 27 Wash. 24; Lippincott v. Lawrie, 119 Wis. 573.**773. 5. Agreement of Grantee to Pay Mortgage Debt.** — Brosseau v. Lowy, 209 Ill. 405; Miller v. Kennedy, 12 S. Dak. 478.**775. 1. When Consideration Is Contractual and Creates and Attests Rights.** — Reid v. Diamond Plate-Glass Co., (C. C. A.) 85 Fed. Rep. 193, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 775; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494; Culbertson v. Young, 86 Mo. App. 277; Kahn v. Kahn, 94 Tex. 119, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 775; Walter v. Dearing, (Tex. Civ. App. 1901) 65 S. W. Rep. 380; Teague v. Teague, 31 Tex. Civ. App. 156.**777. 4. Admissibility of Evidence of True Consideration — To Rebut Presumption of Fraud.** — Miles v. Waggoner, 23 Pa. Super. Ct. 432; Belknap v. Groover, (Tex. Civ. App. 1900) 56 S. W. Rep. 249.**778. 2. Where Nonpayment of Consideration May Be Shown.** — Knorr v. Lloyd, (N. J. 1900) 47 Atl. Rep. 53; Eckler v. Alden, 125 Mich. 215; Wood v. Bangs, 2 Penn. (Del.) 435.**3. Action for Recovery of Consideration — Nonpayment May Be Shown.** — Davis v. Jernigan, 71 Ark. 494; Johnson v. Elmen, 94 Tex. 168, 86 Am. St. Rep. 845; Miller v. Livingston, 22

**780. XIV. WANT OR FAILURE OF CONSIDERATION — 1. Want and Failure Distinguished.** — See note 2.

**781. 2. What Constitutes Failure of Consideration — a. IN GENERAL.** — See note 1.

*b. FAILURE FROM INHERENT DEFICIENCY IN THE CONSIDERATION — (1) Defect in Title to Thing Sold — (a) Real Property.* — See note 3.

**782. (2) Inferiority in Quality of Thing Sold.** — See note 5.

*(3) Worthless Patents and Nonpatentable Inventions.* — See note 7.

**783. (5) Mutual Mistakes of Fact.** — See note 2.

*c. FAILURE FROM OMISSIONS OF THE PROMISEE — (1) When Performance Is a Condition Precedent — (a) Failure to Deliver Goods or Make Title to Land.* — See note 4.

**784. (b) Failure to Perform Service.** — See note 1.

**785. (2) When Promises Are Independent.** — See note 1.

**786. d. FAILURE OCCASIONED BY PROMISOR'S OWN ACT.** — See note 3.

**787. e. FAILURE FROM ACCIDENTAL AND UNFORESEEN CAUSES — (3) When the Contract Is Executed — Destruction of Leased Premises by Fire or Storm.** — See note 4.

**788. 3. Effect of Want or Failure — a. UPON SIMPLE CONTRACTS — (1) Want of Consideration — (b) Partial Want.** — See note 3.

Utah 178, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 778.

**780. 2. Meaning of Want of Consideration.** — Holmes v. Farris, 97 Mo. App. 305.

**781. 1. Dissatisfaction of Purchaser Does Not Affect Value.** — Brown v. Ohio Nat. Bank, 18 App. Cas. (D. C.) 598, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 780.

**3. Failure of Title to Real Property.** — Jenkins v. Bradley, 104 Wis. 560, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 781.

**782. 5. Caveat Emptor.** — Martin v. Roehm, 92 Ill. App. 87; Horwich v. Western Brewery Co., 95 Ill. App. 162; Burnett v. Hensley, 118 Iowa 575; Kinkel v. Winne, 67 Kan. 100; Foley v. Boulware, 86 Mo. App. 674; Birney v. Warren, 28 Mont. 64; Buchanan v. Edmisten, (Neb. 1901) 95 N. W. Rep. 620; Flanary v. Kane, 102 Va. 547; Higgins v. Clish, 34 Nova Scotia 135.

**7. Patent Void for Want of Novelty and Utility.** — Wells v. Gress, 118 Ga. 566.

**783. 2. Wildermann v. Donnelly,** 86 Minn. 186, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 783.

**Mistake in Law.** — It has been held that releases are not binding where the consideration has failed owing to a mutual mistake in law. Whitehill v. Dacus, 49 S. Car. 273.

**4. Failure to Make Title to Land.** — Smith v. Blandin, 133 Cal. 441; Rayner Cattle Co. v. Bedford, 91 Tex. 642.

**Subscription.** — Failure of the promise to perform the act which is the condition precedent to a subscription constitutes a failure of consideration. Rogers v. Burr, 105 Ga. 432. See generally the title SUBSCRIPTIONS, 281. i et seq.

**784. 1. Omission to Perform Act Stipulated.** — Stone v. Palmer, 166 Ill. 463; Martina v. Muhleke, 186 Ill. 327; Ray v. Moore, 24 Ind. App. 480; Stokes v. Stokes, 49 N. Y. App. Div. 302, reversed 172 N. Y. 327; Missouri, etc., R. Co. v. Darlington, (Tex. Civ. App. 1897) 40 S. W. Rep. 550.

**Temporary Incapacity to Perform the Service** does not of itself constitute total failure of consideration, where the employment is of such nature — as that of a jockey — that the employee is likely to meet with accidents temporarily disabling him. Loates v. Maple, 88 L. T. N. S. 288.

**785. 1. Mutual and Independent Contracts — Nonperformance of One Not Failure of Consideration of the Other.** — American Boiler Co. v. Foutham, (Supm. Ct. Tr. T.) 50 N. Y. Supp. 351, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 785.

**786. 3. Failure Occasioned by Promisor's Own Act.** — See Smith v. Blandin, 133 Cal. 441; Fox v. Smith, 73 Conn. 144.

**787. 4. Where a Room Was Let to View the Coronation Procession of Edward VII., and the procession subsequently became impossible, owing to the illness of the king, and by the terms of the contract the rental was payable before the time at which the procession became impossible, it was held that the lessor was entitled to payment of the entire amount of the rental.** Chandler v. Webster, (1904) 1 K. B. 493. And the same rule was applied to the chartering of a vessel to view the coronation naval review, where the charter-party provided that the money should be paid in advance. Civil Service Co-operative Soc. v. General Steam Nav. Co., (1903) 2 K. B. 756, 89 L. T. N. S. 429. Compare Krell v. Henry, (1903) 2 K. B. 740, 89 L. T. N. S. 328, wherein it was held that the agreement was a license to use the rooms for a particular purpose and no other; that the taking place of the processions on the proclaimed days along the proclaimed route was regarded by both parties as the foundation of the contract; and that as they failed to take place, the lessee was not bound to carry out the contract.

**788. 3. Partial Want Avoids Contract Pro Tanto.** — Dennehy v. Smith, 83 Ill. App. 656; Andrews v. Schmidt, 10 N. Dak. 1; Johnson v.

**789.** (2) *Failure of Consideration*—(a) *Total Failure*—*aa. IN GENERAL.*—See note 1.

*bb. FAILURE OF TITLE*—(*aa. Real Property*—*Modern Rule.*—See note 3.

**790.** (b) *Partial Failure*—*bb. IN ACTIONS FOR THE PRICE.*—See note 4.

**791.** *cc. AS A DEFENSE TO BILLS AND NOTES*—(*aa. Liquidated Damages.*—See note 1.

**792.** (*bb. Unliquidated Damages*—*aaa. English Rule*—*Partial Failure of Title.*—See note 1.

**793.** *bbb. Rule in the United States.*—See note 1.

**794.** See note 1.

**796.** *b. UPON SPECIALTIES*—*Want of Consideration*—*Effect of Statutes.*—See note 1.

*Failure of Consideration.*—See note 2.

**798.** 4. *Evidence of Failure*—*b. SPECIALTIES.*—See note 2.

**CONSIGN—CONSIGNEE—CONSIGNOR.**—See note 3.

**799.** **CONSISTENT.**—See note 2.

Burnside, 8 Ohio Dec. 412, 7 Ohio N. P. 74; McConville v. National Valley Bank, 98 Va. 9.

**789.** 1. *Total Failure of Consideration Avoids Contract*—*United States.*—Mack v. Consolidated Water-Power Co., (C. C. A.) 101 Fed. Rep. 869; Hatzel v. Moore, 125 Fed. Rep. 828. California.—Hays v. Plummer, 126 Cal. 107, 77 Am. St. Rep. 153.

Georgia.—Otis v. Holmes, 109 Ga. 775; Wells v. Gress, 118 Ga. 566.

Idaho.—Maydole v. Peterson, 7 Idaho 502. Indiana.—Rothenberger v. Glick, 22 Ind. App. 288.

Iowa.—Freittenberg v. Rubel, 123 Iowa 154.

Kentucky.—Schnabel v. German-American Title Co., (Ky. 1899) 53 S. W. Rep. 1031.

Louisiana.—Losecco v. Gregory, 108 La. 648.

Missouri.—Hume v. Eagon, 83 Mo. App. 276; Lathrop v. Mayer, 86 Mo. App. 355.

Nebraska.—Warder, etc., Co. v. Myers, (Neb. 1903) 96 N. W. Rep. 992.

New York.—Cosgray v. New England Piano Co., 10 N. Y. App. Div. 351.

North Carolina.—Battery Park Bank v. Loughran, 126 N. Car. 814.

Oregon.—Burkhart v. Hart, 36 Oregon 586.

Pennsylvania.—Arnold v. Stoner, 18 Pa. Super. Ct. 537.

Texas.—Saldumbere v. Hadlock, 19 Tex. Civ. App. 653.

3. *Failure of Title Constitutes Failure of Consideration.*—Stoy v. Bledsoe, 31 Ind. App. 643; Hitchcock v. Burchell, 177 N. Y. 570; Ewing v. Wightman, 52 N. Y. App. Div. 416, affirmed 167 N. Y. 107.

A Grantee Who Gave a Purchase-money Mortgage is not entitled to resist foreclosure for failure of title, unless actual eviction has taken place. Merchants' Nat. Bank v. Snyder, 52 N. Y. App. Div. 606, affirmed 170 N. Y. 565.

**790.** 4. *Breach of Warranty—Recoupment in Action for the Price.*—Troy Grocery Co. v. Potter, 139 Ala. 359; Krause v. Scott, 86 Ill. App. 238; Fee v. Sentell, 52 La. Ann. 1957; Aultman v. Hunter, 82 Mo. App. 632.

**791.** 1. *Partial Failure—Liquidated Amount.*—Sebring v. Hazard, 128 Mich. 333, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 791; Stribling v. Gray, (Tex. Civ. App. 1904) 81 S. W. Rep. 789.

**792.** 1. *Partial Failure of Title.*—American Nat. Bank v. Watkins, (C. C. A.) 119 Fed. Rep. 545; Williams v. Baker, 100 Mo. App. 288, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 792; Merchants' Nat. Bank v. Snyder, 52 N. Y. App. Div. 606, affirmed 170 N. Y. 565.

**793.** 1. *Partial Failure of Title to Land.*—American Nat. Bank v. Watkins, (C. C. A.) 119 Fed. Rep. 545.

**794.** 1. *Breach of Warranty.*—Schreiber v. Andrews, (C. C. A.) 101 Fed. Rep. 763; Snyder v. Johnson, (Neb. 1903) 95 N. W. Rep. 692; Colorado Dry Goods Co. v. W. P. Dunn Co., 18 Colo. App. 409; Creamery Package Mfg. Co. v. Benton County Creamery Co., 120 Iowa 584; Wilson v. Belles, 22 Pa. Super. Ct. 477; Puget Sound Iron, etc., Works v. Clemmons, 32 Wash. 36.

**796.** 1. See Cosgrove v. Cummings, 195 Pa. St. 497, holding that in an action on a bond or note under seal, want of consideration is no defense.

2. *An Assignment of a Mortgage to the Mortgagee is valid, although the consideration for which it was given totally fails.* Sawyer v. Hirst, 7 Del. Co. Rep. (Pa.) 404.

**798.** 2. *Rule Abrogated in Many States.*—See Hubbard v. Mulligan, 13 Colo. App. 116; Sivell v. Hogan, 119 Ga. 169, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 798; Saunders v. Dunn, 175 Mass. 164; Knorr v. Lloyd, (N. J. 1900) 47 Atl. Rep. 53; Williams v. Whittell, 69 N. Y. App. Div. 340; Kam v. Benjamin, 10 N. Y. App. Div. 419, affirmed 158 N. Y. 725; Gein v. Little, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 421.

3. In Ryttenberg v. Schefer, 131 Fed. Rep. 321, the court said: "To *consign* means to deliver into the care and control of another; to intrust or commit. A man cannot *consign* a thing to another by merely saying that he *consigns* it, any more than he can deliver it by mere words."

*Conditional Sale to Bankrupt—When Title Passes.*—See *In re Hinsdale*, 111 Fed. Rep. 502, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 798.

**799.** 2. "*Consistent with*" does not import exact conformity, but means substantial harmony. Kansas City v. Bacon, 147 Mo. 272. In O'Flinn v. McInnis, 80 Miss. 125, the

**799. [CONSOCIATION. — See note 3a.]**

court said: "The word *consistent* as employed in said section 3039 of the Code, in the light of the history of the adoption of chapter 93 of the Code, can have no other meaning than that of 'harmonious, accordant with, congruous, compatible,'—definitions given by Webster."

**799. 3a. Consociation—Fellow-servant Rule.**—The doctrine which prevails in some states, sometimes called the doctrine of *consociation*, is that two persons in the service of the same

master are not to be esteemed fellow servants unless their duties are such as to bring them into habitual association with each other, so that they will exercise a mutual influence upon each other, tending to inspire caution and insure each other's safety. *St. Louis, etc., R. Co. v. Furry*, (C. C. A.) 114 Fed. Rep. 902. And see *Jenkins v. Mammoth Min. Co.*, 24 Utah 513; and the title FELLOW SERVANTS.

## CONSOLIDATION OF CORPORATIONS.

BY BRISCOE B. CLARK.

**801. I. DEFINITION.**—See note 1.

**Amalgamation.**—See note 2.

**802. Sale and Purchase.**—See note 1.

**II. REQUISITES OF CONSOLIDATION — 1. Legislative Authority — a. NECESSITY FOR.**—See note 5.

**803. b. SUFFICIENCY OF — (2) Construction — (a) In General.**—See notes 1, 2, 3.

**801. 1. Consolidation Defined.**—See *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 98 Am. St. Rep. 244; *Chicago, etc., R. Co. v. Ferguson*, 106 Ill. App. 356; *Shadford v. Detroit, etc., R. Co.*, 130 Mich. 300, 9 Detroit Leg. N. 37; *Adams v. Yazoo, etc., R. Co.*, 77 Miss. 194, *affirmed* 180 U. S. 1; *Palmer v. Bosley*, (Tenn. Ch. 1900) 62 S. W. Rep. 195.

**Exchange of Stock.**—The issuance by one corporation of stock in exchange for the stock of another does not work a consolidation. *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618.

**The Purchase by Stockholders of One Corporation of the Stock of Another** does not constitute a consolidation. *Crane v. Fry*, (C. C. A.) 126 Fed. Rep. 278.

**Validity and Construction of Agreements for Consolidation.**—See *Wood v. Manchester F. Assur. Co.*, 54 N. Y. App. Div. 522; *Jewell v. McIntyre*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 26, *affirmed* 62 N. Y. App. Div. 396; *Logan v. Simpson*, 60 N. Y. App. Div. 617, *appeal dismissed* 169 N. Y. 599; *Cleveland City R. Co. v. New York First Nat. Bank*, 68 Ohio St. 582.

**2. Amalgamation in English Law.**—*Wall v. London, etc., Corp.*, 67 L. J. Ch. 596, (1898) 2 Ch. 469, 79 L. T. N. S. 249. See also *Adams v. Yazoo, etc., R. Co.*, 77 Miss. 194, *affirmed* 180 U. S. 1.

**802. 1. Sale and Purchase.**—*Maple Leaf Rubber Co. v. Brodie*, 18 Quebec Super. Ct. 352; *Capital Traction Co. v. Offutt*, 17 App. Cas. (D. C.) 292; *Sartison v. Baltimore, etc., R. Co.*, 103 Ill. App. 507; *Overstreet v. Citizens Bank*, 12 Okla. 383. *Compare Chicago, etc., R. Co. v. Ashling*, 160 Ill. 373, *affirming* 56 Ill. App. 327; *Camden Safe-Deposit, etc., Co. v. Burlington Carpet Co.*, (N. J. 1895) 33 Atl. Rep. 479.

**5. Legislative Authority Necessary.**—*Kava-*

*nagh v. Omaha L. Assoc.*, 84 Fed. Rep. 295; *Jones v. Missouri-Edison Electric Co.*, 135 Fed. Rep. 153; *Boor v. Tolman*, 113 Ill. App. 322; *Bankers' Union v. Crawford*, 67 Kan. 449, 100 Am. St. Rep. 465; *Adams v. Yazoo, etc., R. Co.*, 77 Miss. 194, *affirmed* 180 U. S. 1, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 802; *Chevra Bnai Israel, etc., v. Chevra Bikur Cholim, etc.*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 189, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 802; *Topeka Paper Co. v. Oklahoma Pub. Co.*, 7 Okla. 220, holding that consolidation without statutory authority does work a dissolution of the old corporations; *Overstreet v. Citizens Bank*, 12 Okla. 383. See also *Southern R. Co. v. Mitchell*, 139 Ala. 629.

**803. 1. As to the Ohio Statute** authorizing consolidation of railroad companies in "adjoining states," see *Continental Trust Co. v. Toledo, etc., R. Co.*, 82 Fed. Rep. 642; *Tanner v. Lindell R. Co.*, 180 Mo. 1.

**Missouri Rev. Stat. 1889, § 1334**, authorizing the consolidation of corporations whose objects and business are in general of the same nature, authorizes the consolidation of two corporations whose business is of the same nature, though one of such corporations was formed by the consolidation of other corporations. *Jones v. Missouri-Edison Electric Co.*, 135 Fed. Rep. 153.

**Effect of Statute Fixing Liability.**—*Rev. Stat. Ill. (1897), c. 32, § 65*, fixing the liability of consolidated corporations for debts of constituent corporations, does not of itself authorize the consolidation of corporations. *Kavanagh v. Omaha L. Assoc.*, 84 Fed. Rep. 295, *following American L. & T. Co. v. Minnesota, etc., R. Co.*, 157 Ill. 641.

**A Corporation de Facto** may under general statutory authority conferred upon corporations consolidate with another corporation. *In re Trenton St. R. Co.*, (N. J. 1900) 47 Atl. Rep. 810.

- 803.** (b) **Manufacturing Corporations.** — See note 5.  
 (c) **Corporations of Same Nature.** — See note 7.  
**804.** (d) **Street Railways.** — See note 1.  
 (e) **Railroads.** — See note 2.

**805.** **c. CONSTITUTIONAL OBJECTIONS** — **Creation of Corporations by Special Acts.** — See note 3.

**Interstate Consolidation.** — See note 4.

**806.** **2. Assent of Stockholders** — **a. NECESSITY FOR** — **As a General Rule.** — See note 1.

**Quasi-public Corporations.** — See note 2.

**And Equity Will Enjoin a Consolidation.** — See note 3.

**807.** **Estoppel.** — See note 3.

**b. IMPLIED ASSENT** — (1) **Power to Amend Charter** — **"Stock."** — See note 6.

**Fraternal Beneficiary Association.** — The *Kansas* statutes do not authorize the consolidation of fraternal beneficiary associations. *Bankers' Union v. Crawford*, 67 Kan. 449, 100 Am. St. Rep. 465.

**Sufficiency of Title of Consolidating Act.** — See *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 98 Am. St. Rep. 244; *Bohmer v. Haffen*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 565, affirmed 35 N. Y. App. Div. 381.

**Consolidation of National Banks.** — See *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613.

**Religious Corporations.** — See *Davis v. Beth Tephila Israel Congregation*, 40 N. Y. App. Div. 424.

**803.** **2. Toledo, etc., R. Co. v. Continental Trust Co.**, 95 Fed. Rep. 497, 36 C. C. A. 155 (construing 3 Starr & Curt. Annot. Stat. Ill., c. 114, par. 33).

**Right of Merger Conferred in General Terms.** — Under legislative authority "to consolidate or merge with any corporation or corporations heretofore or hereafter created," etc., "the right of merger being hereby conferred upon any company so wishing to consolidate that does not possess it," the company possessing such authority may merge with any other company or companies wishing so to merge. *State v. Hancock*, 2 Penn. (Del.) 252.

**3. Corporations of Different States.** — In the case of corporations of different states, in order to authorize consolidation each corporation must be empowered by the laws of its state to consolidate. *Whaley v. Bankers' Union of World*, (Tex. Civ. App. 1905) 88 S. W. Rep. 259.

**5.** See *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 98 Am. St. Rep. 244, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 803.

**7. Statutes Authorizing Consolidation of Corporations of Same Nature.** — The statutes of *New York* do not authorize the consolidation of a religious corporation with a membership corporation, the corporations not being of a similar nature. *Chevra Bnai Israel, etc., v. Chevra Bikur Cholim, etc.*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 189. See also *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 98 Am. St. Rep. 244, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 803.

**804.** **1. The New Jersey Statutes (Acts 1888, 1891)** authorize the consolidation of electric street-railway companies. *In re Trenton St. R. Co.*, (N. J. 1900) 47 Atl. Rep. 819.

**2. Railroads.** — *Dady v. Georgia, etc., R. Co.*, 112 Fed. Rep. 838 (construing 2 Code Ga. [1895], § 2179; *Bohmer v. Haffen*, 161 N. Y. 390.

**805.** **3. Compare** *Bohmer v. Haffen*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 565, affirmed 35 N. Y. App. Div. 381.

In *Delaware* it has been held that where two corporations organized before the adoption of the constitutional provision prohibiting the creation of corporations by special act had power to consolidate, the creation of a new company after the adoption of the constitution by the merger of the two companies did not violate the constitutional prohibition. *State v. Hancock*, 2 Penn. (Del.) 252.

**Provision Against Private or Local Laws.** — The provision of the *New York* constitution prohibiting private or local bills granting the right to lay railroad tracks in streets does not prohibit the legislature from authorizing the consolidation of several street-railway corporations and the transfer to the consolidated corporation of the existing right of the constituent corporations to lay tracks. *Bohmer v. Haffen*, 161 N. Y. 390.

The *Illinois* statute authorizing gas companies located in the same cities to consolidate does not violate the constitutional prohibition against the enactment of any local or special law granting to any corporation special privileges or franchises. *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 98 Am. St. Rep. 244.

**4. Corporations Created by Different States.** — *Rio Grande Western R. Co. v. Telluride Power, etc., Co.*, 16 Utah 125, dismissed 175 U. S. 639 (consolidation between railroads of different states).

**806.** **1. Assent of Shareholders.** — *Mayfield v. Alton R., etc., Co.*, 198 Ill. 528, affirming 100 Ill. App. 614; *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613.

**2. Quasi-public Corporations.** — See *Douglass v. Concord, etc., R. Co.*, 72 N. H. 26.

**3. Laches.** — *Tanner v. Lindell R. Co.*, 180 Mo. 1.

**807.** **3. Consenting Corporation Estopped.** — *Bradford v. Frankfort, etc., R. Co.*, 142 Ind. 383.

**One of the Constituent Corporations May Sue to Avoid a consolidation for failure to comply with statutory requirements.** *Chevra Medrash, etc., v. Makower Chevra, etc.*, (Supm. Ct. Spec. T.) 66 N. Y. Supp. 355.

**6. Power to Compel Consolidation.** — See *Mc-*

**808.** (3) *Consolidation Authorized by Act at Time of Subscription.* — See note 2.

(4) *Acquiescence.* — See note 3.

3. *Formal Requisites.* — See note 4.

**810.** *Direct Act of Legislature.* — See note 2.

**811.** **III. EFFECT OF CONSOLIDATION** — 1. **Status of Consolidated Corporation** — *New and Distinct Corporation* — *Merger* — *Alliance.* — See notes 1, 2.

**812.** See note 2.

**813.** *Liability for Obligations of Consolidated Corporation.* — See note 2.

2. **Charter and Property of Consolidated Corporation** — *It May Compromise and Settle Claims.* — See note 4.

**814.** 3. **Property Rights and Franchises of Constituent Corporations** — *a.* **IN GENERAL.** — See note 5.

**815.** *Property Acquired Subject to All Claims.* — See note 2.

*Kee v. Chautauqua Assembly, (C. C., A.)* 130 Fed. Rep. 536.

**808.** 2. *Mayfield v. Alton R., etc., Co.,* 198 Ill. 528, *affirming* 100 Ill. App. 614, and *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 808.

3. *Acquiescence Gives Consent.* — *Bradford v. Frankfort, etc., R. Co.,* 142 Ind. 383; *Drake v. New York Suburban Water Co.,* 26 N. Y. App. Div. 499.

4. *Compliance with Formal Requisites Essential.* — *State v. Chicago, etc., R. Co.,* 145 Ind. 229; *Camden Safe-Deposit, etc., Co. v. Burlington Carpet Co., (N. J. 1895)* 33 Atl. Rep. 479; *Chevra Bnai Israel, etc., v. Chevra Bikur Cholim, etc., (Supm. Ct. App. T.)* 24 Misc. (N. Y.) 189; *Erste Sokolower Congregation, etc., v. First United Royatiner, etc., (Supm. Ct. Spec. T.)* 32 Misc. (N. Y.) 269; *Chevra Med-rash, etc., v. Makower Chevra, etc., (Supm. Ct. Spec. T.)* 66 N. Y. Supp. 355.

*Right of Pledgee of Stock to Participate in Proceedings for Consolidation.* — See *Cleveland City R. Co. v. New York First Nat. Bank,* 68 Ohio St. 582.

*What Constitutes Fraud upon Stockholders of Constituent Corporation.* — See *Dady v. Georgia, etc., R. Co.,* 112 Fed. Rep. 838.

**810.** 2. *Capital Traction Co. v. Offutt,* 17 App. Cas. (D. C.) 292 (mere legislative power to consolidate does not work consolidation).

**811.** 1. *New and Distinct Corporation* — *United States.* — *Shaw v. Covington,* 194 U. S. 593; *Jones v. Missouri-Edison Electric Co.,* 135 Fed. Rep. 153.

*California.* — *Market St. R. Co. v. Hellman,* 109 Cal. 571.

*Kansas.* — *Chicago, etc., R. Co. v. Butts,* 55 Kan. 660; *Wagner v. Atchison, etc., R. Co.,* 9 Kan. App. 661.

*Michigan.* — *Smith v. Lake Shore, etc., R. Co.,* 114 Mich. 460 (holding that the new corporation becomes subject to a constitutional provision with regard to amending the charters of corporations); *Erin Tp. v. Detroit, etc., Plank-Road Co.,* 115 Mich. 465.

*Mississippi.* — *Adams v. Yazoo, etc., R. Co.,* 77 Miss. 194, *affirmed* 180 U. S. 1.

*New Jersey.* — *In re Trenton St. R. Co., (N. J. 1900)* 47 Atl. Rep. 819.

*New Mexico.* — *Santa Fe Electric Co. v. Hitchcock,* 9 N. Mex. 156, holding that a mortgage by one of the constituent corporations covering its after-acquired property does not cover

property subsequently acquired by the consolidated corporation.

*Ohio.* — *Cleveland City R. Co. v. First Nat. Bank,* 12 Ohio Cir. Dec. 269, 22 Ohio Cir. Ct. 165.

*Texas.* — *Bonnet v. Eagle Pass First Nat. Bank,* 22 Tex. Civ. App. 613.

*Utah.* — *Rio Grande Western R. Co. v. Telluride Power, etc., Co.,* 16 Utah 125, *dismissed* 175 U. S. 639.

*For Fees Imposed on the Creation of Corporations the consolidated corporation is liable.* *State v. Lesueur,* 145 Mo. 322.

2. *Merger.* — See *Vicksburg, etc., Telephone Co. v. Citizens' Telephone Co.,* 79 Miss. 341, 89 Am. St. Rep. 656.

**812.** 2. *Louisville Trust Co. v. Louisville, etc., R. Co.,* 75 Fed. Rep. 433, 43 U. S. App. 550, *modified* 174 U. S. 552; *Whaley v. Bankers Union of World, (Tex. Civ. App. 1905)* 88 S. W. Rep. 259.

**813.** 2. *New York v. Sixth Ave. R. Co.,* 77 N. Y. App. Div. 367.

4. *Camden Safe-Deposit, etc., Co. v. Burlington Carpet Co., (N. J. 1895)* 33 Atl. Rep. 479 (power to issue mortgage and bonds in payment of claims against constituent corporations).

**814.** 5. *General Rule* — *Succeeds to Privileges and Immunities of Constituent Corporations.* — *Continental Trust Co. v. Toledo, etc., R. Co.,* 86 Fed. Rep. 929, *modified* (C. C. A.) 95 Fed. Rep. 497; *Tompkins v. Augusta Southern R. Co.,* 102 Ga. 436; *Consolidated Gas Co. v. Baltimore County,* 98 Md. 689; *Day v. New York, etc., R. Co.,* 58 N. J. L. 677; *In re Trenton St. R. Co., (N. J. 1900)* 47 Atl. Rep. 819 (power to extend track by consolidated street-railway corporation); *Com. v. Buffalo, etc., R. Co.,* 207 Pa. St. 160 (power to increase capital stock); *Greene v. Woodland Ave., etc., R. Co.,* 62 Ohio St. 67; *Missouri, etc., R. Co. v. Carter,* 95 Tex. 461.

Where the charter of the consolidated corporation merely provides that each shall retain all the property, franchises, and privileges theretofore enjoyed by each of its constituent corporations, this, of course, does not confer upon the consolidated corporations any privileges or franchises not enjoyed by any of the constituent corporations. *Covington Gaslight Co. v. Covington, (Ky. 1900)* 58 S. W. Rep. 805.

**815.** 2. *Nature of Title Acquired.* — *Morrison v. American Snuff Co.,* 79 Miss. 330,

**815.** The Choses in Action. — See note 3.

**816.** *c.* FRANCHISES AND IMMUNITIES — (1) *In General* — Presumption. — See note 8.

**818.** (3) *Exemptions from Taxation* — Constitutional Inhibition Against Exemptions at Time of Consolidation. — See note 1.

**4.** Liabilities of Constituent Corporations — *a.* IN GENERAL — Contractual Liabilities. — See note 5.

**819.** See note 1.

Torts. — See note 2.

Public Duties. — See note 3.

Extent of Liability. — See note 4.

Consolidation by Purchase. — See note 5.

89 Am. St. Rep. 598, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815; Lincoln St. R. Co. v. Lincoln, 61 Neb. 109; Wilson v. Æolian Co., 64 N. Y. App. Div. 337, *affirmed* 170 N. Y. 618. See, however, Union Pac. R. Co. v. Gochenour, 56 Kan. 543.

**815.** 3. Choses in Action. — Long Island Bank v. Young, 101 N. Y. App. Div. 88.

**816.** 8. Kent v. Binghamton, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 1, *reversed* 90 N. Y. App. Div. 553; Rio Grande Western R. Co. v. Telluride Power, etc., Co., 16 Utah 125, *dismissed* 175 U. S. 639.

**Exclusive Franchise.** — In Shaw v. Covington, 194 U. S. 593, where two corporations were consolidated under legislative authority so as to form a new corporation, which by the terms of the consolidating act was to succeed to all the property, assets, and effects of the constituent corporations, it was held that the consolidated corporation did not succeed to the exclusive franchise held by one of the constituent corporations to furnish water to a municipality, especially where, at the time of the authorization of the consolidation, the state constitution prohibited the granting of exclusive privileges.

**818.** 1. Constitutional Provision Against Exemptions at Time of Consolidation. — Morrison v. American Snuff Co., 79 Miss. 330, 89 Am. St. Rep. 598, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 818; Adams v. Yazoo, etc., R. Co., 77 Miss. 194, *affirmed* 180 U. S. 1.

**5.** Contractual Liabilities. — Continental Trust Co. v. Toledo, etc., R. Co., 86 Fed. Rep. 929, *modified* (C. C. A.) 95 Fed. Rep. 497; McElroy v. American Rubber Tire Co., 122 Fed. Rep. 441, 58 C. C. A. 423; Capital Traction Co. v. Offutt, 17 App. Cas. (D. C.) 292; Tompkins v. Augusta Southern R. Co., 102 Ga. 436; Louisville, etc., R. Co. v. Biddell, 112 Ky. 494; Camden Interstate R. Co. v. Lee, (Ky. 1905) 84 S. W. Rep. 332, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 818; Shadford v. Detroit, etc., R. Co., 130 Mich. 300 (holding that the insolvency of the constituent debtor corporation is immaterial); Manny v. National Surety Co., 103 Mo. App. 716; Lincoln v. Lincoln St. R. Co., (Neb. 1903) 93 N. W. Rep. 766; Trenton Pass. R. Co. v. Wilson, 55 N. J. Eq. 273 (liability on agreement by promoters of consolidation); Matter of Utica Nat. Brewing Co., 154 N. Y. 268; Buell v. Baltimore, etc., R. Co., 39 N. Y. App. Div. 236.

**Invalid Consolidation.** — Where the consolidation of two corporations, one of which attempts

to absorb the other, is invalid, the former is not liable for the obligations of the latter. Whaley v. Bankers Union of World, (Tex. Civ. App. 1905) 88 S. W. Rep. 259.

**An Attempted Consolidation Without Legislative Authority** does not render the consolidated corporation liable for the debts of the constituent corporations. Kavanagh v. Omaha L. Assoc., 84 Fed. Rep. 295.

**819.** 1. Hawkins v. Central of Georgia R. Co., 119 Ga. 159; U. S. Capsule Co. v. Isaacs, 23 Ind. App. 533; Vicksburg, etc., Telephone Co. v. Citizens' Telephone Co., 79 Miss. 341, 89 Am. St. Rep. 656; Morrison v. American Snuff Co., 79 Miss. 330, 89 Am. St. Rep. 598, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 818; Santa Fe Electric Co. v. Hitchcock, 9 N. Mex. 156; Hurd v. New York, etc., Steam Laundry Co., (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 183, *reversed* 52 N. Y. App. Div. 467.

**2. Personal Injuries.** — McWilliams v. New York, 134 Fed. Rep. 1015; Louisville, etc., R. Co. v. Biddell, 112 Ky. 494; Jones v. Seaboard Air Line R. Co., 67 S. Car. 181 (liability for continuing nuisance). Compare Joseph v. Southern R. Co., 127 Fed. Rep. 606; Cotzhausen v. H. W. Johns Mfg. Co., 100 Wis. 473.

**3. Public Duties.** — Tompkins v. Augusta Southern R. Co., 102 Ga. 436; Kent v. Binghamton, 61 N. Y. App. Div. 323 (duty of street-railway company to pave street); Rio Grande Western R. Co. v. Telluride Power, etc., Co., 16 Utah 125, *dismissed* 175 U. S. 639 (duty to construct railroad).

**4.** Franklin L. Ins. Co. v. Adams, 90 Ill. App. 658, holding that after consolidation one constituent corporation cannot increase the liability of the consolidated corporation.

**For Acts of a Constituent Corporation After Consolidation** there is no liability on the part of the consolidated corporation. United Gold, etc., Mines Co. v. Smith, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 567.

**5. Consolidation by Purchase.** — Capital Traction Co. v. Offutt, 17 App. Cas. (D. C.) 292; Tompkins v. Augusta Southern R. Co., 102 Ga. 436; Hawkins v. Central of Georgia R. Co., 119 Ga. 159; Sartison v. Baltimore, etc., R. Co., 103 Ill. App. 507; Chase v. Michigan Telephone Co., 121 Mich. 631; Vicksburg, etc., Telephone Co. v. Citizens' Telephone Co., 79 Miss. 341, 89 Am. St. Rep. 656, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819; National Foundry, etc., Works v. Oconto City Water Supply Co., 105 Wis. 48. Compare Camden Interstate R. Co. v. Lee, (Ky. 1905) 84 S. W. Rep. 332.



**819.** Statutory Liability. — See note 6.

**820.** Bonds Convertible into Stock. — See note 2.

*b.* REMEDY — Action at Law — Personal Judgment. — See note 3.

**821.** 5. Stockholders of Constituent Corporations. — See note 3.

Compelling Issuance of Stock. — See note 4.

Invalid Consolidation. — See note 8.

**822.** 6. Creditors of Constituent Corporations. — See notes 2, 3.

Liens. — See note 5.

**823.** 7. Pending Suits — Abatement. — See note 2.

In Kansas. — See note 3.

**824.** 9. Invalid Consolidation — Contracts. — See note 3.

Judgment Against Consolidated Corporation — Consolidation Dissolved. — See

note 7.

**Assumption of Obligations** of corporation whose assets, etc., are purchased will entitle creditors of such corporation to sue the absorbing corporation. *Dancel v. Goodyear Shoe Machinery Co.*, 137 Fed. Rep. 157.

**819.** 6. Statutes Defining Liabilities. — See *Joseph v. Southern R. Co.*, 127 Fed. Rep. 606, *construing* Act S. Car. Feb. 19, 1902; *Franklin L. Ins. Co. v. Hickson*, 97 Ill. App. 387, *affirmed* 197 Ill. 117; *Mayfield v. Alton R., etc., Co.*, 100 Ill. App. 614, *affirmed* 198 Ill. 528; *Chicago, etc., R. Co. v. Ferguson*, 106 Ill. App. 356 (the consolidated corporation not liable on judgment rendered against the constituent corporation after consolidation); *Matter of Utica Nat. Brewing Co.*, 154 N. Y. 268; *Copp v. Colorado Coal, etc., Co.*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 241; *Missouri, etc., R. Co. v. Carter*, 95 Tex. 461.

**820.** 2. Bonds Convertible into Stock. — *Compare* *Parkinson v. West End St. R. Co.*, 173 Mass. 446.

**3. The Remedy at Law Is Not Exclusive**, but a bill in equity may also be maintained to enforce against the consolidated corporation the liabilities of the constituent corporations. *Vicksburg, etc., Telephone Co. v. Citizens' Telephone Co.*, 79 Miss. 341, 89 Am. St. Rep. 656, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820.

**821.** 3. Cleveland City R. Co. v. First Nat. Bank, 12 Ohio Cir. Dec. 269, 22 Ohio Cir. Ct. 165; *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613.

**Liability to Pledgee of Stock of Constituent Corporation.** — See *Cleveland City R. Co. v. New York First Nat. Bank*, 68 Ohio St. 582.

**Rights of Dissenting Stockholders.** — See *Continental Nat. Bldg., etc., Assoc. v. Miller*, 44 Fla. 757.

**Rights of Dissenting Stockholders Against Directors of Constituent Corporation.** — See *Rosenbaum v. Rice*, 86 N. Y. App. Div. 617.

**Construction of Agreement for Consolidation as to Right of Stockholders of Constituent Corporations.** — See *Read v. Citizens' St. R. Co.*, 110 Tenn. 316.

**4. Compelling Issuance of Stock in Consolidated Corporation.** — *Douglass v. Concord, etc., R. Co.*, 72 N. H. 26.

**Right of Pledgee of Stock in Constituent Corporation to Stock in Consolidated Corporation.** — See *Cleveland City R. Co. v. First Nat. Bank*, 12 Ohio Cir. Dec. 269, 22 Ohio Cir. Ct. 165.

**8. Invalid Consolidation — Recovery of Value of Stock in Constituent Corporation.** — *Mayfield v.*

*Alton R., etc., Co.*, 100 Ill. App. 614, *affirmed* 198 Ill. 528; *Tanner v. Lindell R. Co.*, 180 Mo. 1; *Matter of Snyder*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 1, under a statute requiring payment to the dissenting stockholder of the value of his stock.

**822.** 2. Rights of Creditors of Constituent Corporations. — *Wilson v. Æolian Co.*, 170 N. Y. 618, 64 N. Y. App. Div. 337; *Stewart v. Walterboro, etc., R. Co.*, 64 S. Car. 92 (enforcement against constituent corporation of liability for tort).

**3.** *Joseph v. Southern R. Co.*, 127 Fed. Rep. 606; *Northern Cent. R. Co. v. Hering*, 93 Md. 164. *Compare* *Copp v. Colorado Coal, etc., Co.*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 241, *affirmed* (Supm. Ct. App. T.) 33 Misc. (N. Y.) 773, *construing* the Colorado statute.

**5. Liens.** — *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109.

**823.** 2. Consolidation Does Not Abate Pending Suits. — *Franklin L. Ins. Co. v. Hickson*, 197 Ill. 117; *Wells v. Missouri-Edison Electric Co.*, 108 Mo. App. 607 (under a statute expressly reserving the right of creditors of constituent corporations); *Copp v. Colorado Coal, etc., Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 109.

**When Suit Deemed to Be Begun.** — Where the consolidated corporation is brought in as a party instead of one of the constituent corporations against which the action was originally instituted, the general rule that as to a new party brought in as a defendant the suit must as to him be regarded as having been commenced when he became such a party does not apply. *Franklin L. Ins. Co. v. Hickson*, 197 Ill. 117.

**3. Kansas Rule.** — *Chicago, etc., R. Co. v. Butts*, 55 Kan. 660 (necessity for revival against consolidated corporation within a year); *Wagner v. Atchison, etc., R. Co.*, 9 Kan. App. 661.

**824.** 3. Estoppel of Person Dealing with Consolidated Corporation to Deny Validity of Consolidation. — See *Toledo, etc., R. Co. v. Continental Trust Co.*, 95 Fed. Rep. 497, 36 C. C. A. 155.

**De Facto Corporation.** — Where two corporations attempt to consolidate without authority, the consolidated corporation is not a corporation *de facto*. *Whaley v. Bankers' Union of World*, (Tex. Civ. App. 1905) 88 S. W. Rep. 259.

**7. Estoppel of Consolidated Corporation to Deny Validity of Corporation.** — See *Shadford v. Detroit, etc., R. Co.*, 130 Mich. 300, 9 Detroit Leg. N. 37.

**825.** IV. CONSOLIDATION OF COMPETING CORPORATIONS — 1. In General. — See note 2.

**826.** 3. What Are Competing Corporations — Railroads. — See note 2.

**828.** 5. Obligation of Contracts — Vested Rights. — See note 3.

**829.** CONSORTIUM. — See note 2.  
CONSPICUOUS. — See note 3.

**825.** 2. Legislative Power to Authorize Consolidation of Competing Corporations. — In the absence of any constitutional provision relating to the matter, a state is not prohibited from authorizing the consolidation of competing gas companies. *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 98 Am. St. Rep. 244, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 825.

**826.** 2. What Are Competing Roads. — *Dady v. Georgia, etc., R. Co.*, 112 Fed. Rep. 838.

**828.** 3. Vested Rights. — *Adams v. Yazoo, etc., R. Co.*, 77 Miss. 194, affirmed 180 U. S. 1.

**829.** 2. *Prettyman v. Williamson*, 1 Penn. (Del.) 224; *Selleck v. Janesville*, 104 Wis. 570.

**3. Conspicuous Place.** — Section 3672, Hill's Ann. Laws, providing that certain persons may relieve their property from a mechanic's lien by posting a certain notice "in some *conspicuous* place" on such property is not complied with by posting the notice in a little side recess of a building on the land. *Nottingham v. McKendrick*, 38 Oregon 496.

The posting of a notice of tax sale at "the inside door" of the county treasurer's office will be presumed to be a posting in a "*conspicuous* place" in such office, within the meaning of section 1130, Stat. 1898. *Allen v. Allen*, 114 Wis. 615.

## CONSPIRACY.

BY M. G. BEAMAN.

**832.** I. CONSPIRACY AS A CRIMINAL OFFENSE — 1. Definition and General Observations — Conspiracy, Therefore, Is Rather Described than Defined. — See note 4.

**833.** See note 1.

**834.** 2. Origin and Antiquity of Criminal Conspiracy at Common Law —  
b. PROPER CONSTRUCTION OF THE STATUTE 33 EDW. I. — See note 3;

3. The Common Law of Conspiracy as Prevailing in the United States. — See note 4.

**835.** 4. Conspiracy as Affected by State Legislation — a. INSTANCES OF STATUTORY MODIFICATIONS — Overt Acts. — See note 4.

**836.** Statutory Enumeration Superseding Common Law. — See note 1.

Inherent Nature of Offense Not Affected. — See note 4.

**837.** 5. Conspiracy as Affected by Federal Legislation — Common Law of United States. — See notes 2, 3.

Enumeration of Offenses. — See notes 7, 13.

**832.** 4. The Offense Described. — *State v. Gannon*, 75 Conn. 206; *State v. Stockford*, 77 Conn. 227; *State v. Slutz*, 106 La. 182, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832, 833; *Ross v. Cleveland, etc., Mineral Land Co.*, 162 Mo. 331; *Matthews v. Shankland*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 604, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832; *People v. McFarlin*, (County Ct.) 43 Misc. (N. Y.) 591; *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746; *State v. Stewart*, 32 Wash. 103; *Martens v. Reilly*, 109 Wis. 464.

"By Some Concerted Action." — See U. S. v. Greene, 115 Fed. Rep. 343; *State v. King*, 104 Iowa 727; *Standard Oil Co. v. Doyle*, (Ky. 1904) 82 S. W. Rep. 271; *State v. Davies*, 80 Mo. App. 239; *State v. Snell*, 5 Ohio Dec. 670.

**833.** 1. U. S. v. Weber, 114 Fed. Rep. 950.

**834.** 3. *State v. Howard*, 129 N. Car. 584.

4. Common Law of Conspiracy Exists in United States. — *State v. Slutz*, 106 La. 182; *State v. Howard*, 129 N. Car. 584.

**835.** 4. Overt Act. — *State v. Huegin*, 110 Wis. 189.

By the *Missouri* statute (Rev. Stat. Mo. 1889, § 3781) no proof of an overt act is necessary if the conspiracy is to commit a felony on the person of another. *State v. True Nell*, 79 Mo. App. 243.

**836.** 1. In *Texas* the conspiracy must be to commit a felony. See *Kipper v. State*, 42 Tex. Crim. 613.

4. Under the *Colorado* Statute, the doing of a lawful act in an unlawful way does not constitute the crime of conspiracy. *Lipschitz v. People*, 25 Colo. 261.

**837.** 2. U. S. v. Dietrich, 126 Fed. Rep. 676. See generally the title COMMON LAW, 285. 4, 289. 6.

3. *Wright v. U. S.*, (C. C. A.) 108 Fed. Rep. 805.

7. *Davis v. U. S.*, (C. C. A.) 107 Fed. Rep. 753; *Haynes v. U. S.*, (C. C. A.) 101 Fed. Rep. 817; *U. S. v. Lackey*, 99 Fed. Rep. 952,

**838. II. CONSTITUENT ELEMENTS OF THE OFFENSE — 2. The Combination or Confederacy — a. IN GENERAL.** — See note 4.

**840.** Lack of Preconcerted Design. — See note 1.

Acts Innocently Done. — See notes 4, 5.

**b. AGREEMENT BETWEEN CONSPIRATORS MAY BE IMPLIED OR EXPRESS.** — See note 6.

**841.** See note 1.

**c. MATERIALITY OF THE MEANS TO BE EMPLOYED.** — See note 2.

**842.** See note 1.

**843. d. ACTS DONE IN EXECUTION OF THE CONSPIRACY.** — See note 1.

**844. e. VENUE OF THE OFFENSE CONSIDERED WITH REFERENCE TO ACTS DONE PURSUANT TO THE CONSPIRACY — But a Court Having Criminal Jurisdiction of the Place.** — See note 3.

**845. f. ACCOMPLISHMENT OF UNLAWFUL PURPOSE — Success of Enterprise Not Necessary.** — See note 1.

**g. SUBSEQUENT PARTIES TO A PRE-FORMED CONSPIRACY.** — See note 3.

**837. 13. Offenses Against United States.** — *Lehman v. U. S.*, (C. C. A.) 127 Fed. Rep. 41; *In re Runkle*, 125 Fed. Rep. 996; *U. S. v. Cohn*, 128 Fed. Rep. 615; *U. S. v. Melfi*, 118 Fed. Rep. 899; *U. S. v. Peuschel*, 116 Fed. Rep. 642; *Wright v. U. S.*, (C. C. A.) 108 Fed. Rep. 805; *Reilly v. U. S.*, (C. C. A.) 106 Fed. Rep. 896.

**Object Need Not Be Accomplished.** — *Curley v. U. S.*, (C. C. A.) 130 Fed. Rep. 1; *Radford v. U. S.*, (C. C. A.) 129 Fed. Rep. 49; *U. S. v. Greene*, 115 Fed. Rep. 343; *Gantt v. U. S.*, (C. C. A.) 108 Fed. Rep. 61.

**A Conspiracy to Defraud the Civil Service Rules** is indictable under Rev. Stat. U. S., § 5440, which extends not only to conspiracies to defraud the United States of its property, but also to conspiracies to defraud in any manner. *Curley v. U. S.*, (C. C. A.) 130 Fed. Rep. 1; *U. S. v. Bunting*, 82 Fed. Rep. 883; *Tyner v. U. S.*, 23 App. Cas. (D. C.) 324.

**A Conspiracy to Defraud an Individual** is not within Rev. Stat. U. S., § 5440. *U. S. v. Clark*, 121 Fed. Rep. 190.

**Offense and Conspiracy Identical.** — Agreeing to receive or to give a bribe is an offense against the United States by Rev. Stat. U. S., § 1781, and hence an indictment will not lie for a conspiracy to agree to receive and to give a bribe. *U. S. v. Dietrich*, 126 Fed. Rep. 664.

**It Is Immaterial that the Conspiracy Was Devised Beyond the Period of the Statute of Limitations**, if it still continues. *U. S. v. Greene*, 115 Fed. Rep. 343.

**Conspiracy Is Only a Misdemeanor** under Rev. Stat. U. S., § 5440. *Berkowitz v. U. S.*, (C. C. A.) 91 Fed. Rep. 452.

**838. 4. Essential Requisites of Offense — A Combination.** — *Orr v. People*, 63 Ill. App. 305; *State v. Clemenson*, 123 Iowa 524; *Com. v. Brown*, 23 Pa. Super. Ct. 470; *Com. v. Zuern*, 16 Pa. Super. Ct. 588. See also *State v. Sargood*, 77 Vt. 80.

**840. 1. Mere Knowledge Without Co-operation or Agreement to Co-operate** is not enough. *O'Donnell v. People*, 110 Ill. App. 250, affirmed 211 Ill. 158; *State v. King*, 104 Iowa 727.

**4. Must Be Knowledge and Unlawful Intent.** — *State v. Dreany*, 65 Kan. 292; *Meridian First*

*Nat. Bank v. Stephens*, 19 Tex. Civ. App. 560. See also *Fox v. Mackay*, 123 Cal. 582.

**Knowledge of Agent Immaterial.** — *Benton v. Minneapolis Tailoring, etc., Co.*, 73 Minn. 498.

**Ignorance of What Is Intended Will Not Excuse** one who is careless and indifferent as to everything but the compensation promised to him and his personal safety, and who assists in carrying out the conspiracy. *Santee v. Day*, 111 Ill. App. 495.

**5. Benton v. Minneapolis Tailoring, etc., Co.**, 73 Minn. 498.

**6. Express Agreement Between Conspirators Unnecessary.** — *Reilly v. U. S.*, (C. C. A.) 106 Fed. Rep. 896; *Davis v. U. S.*, (C. C. A.) 107 Fed. Rep. 753; *Musser v. State*, 157 Ind. 423; *Tucker v. Hyatt*, 151 Ind. 337.

**841. 1. Patnode v. Westenhaver, 114 Wis. 460.**

**2. Means to Be Employed — Where Object Illegal.** — *O'Donnell v. People*, 110 Ill. App. 250, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 841, affirmed 211 Ill. 158; *Martens v. Reilly*, 109 Wis. 464, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 841.

**842. 1. Means Employed — Where Object of Conspiracy Unlawful.** — *State v. Van Pelt*, 136 N. Car. 633; *Cranfill v. Hayden*, 22 Tex. Civ. App. 656.

**843. 1. Acts in Furtherance of Conspiracy.** — *State v. Soper*, 118 Iowa 1; *Com. v. Rogers*, 181 Mass. 184.

**Same Principle Differently Expressed — "No Overt Act Necessary."** — *Com. v. Brown*, 23 Pa. Super. Ct. 470.

**Power to Carry Out Object of Conspiracy Not Essential.** — *Gallagher v. People*, 211 Ill. 158, affirming 110 Ill. App. 250.

**844. 3. Pearce v. Territory, 11 Okla. 438, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 844.**

**845. 1. Enterprise Need Not Be Successful.** — *State v. Thompson*, 69 Conn. 720; *O'Donnell v. People*, 110 Ill. App. 250, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 844, affirmed 211 Ill. 158; *People v. Gilman*, 121 Mich. 187, 80 Am. St. Rep. 490.

**3. New Parties to Conspiracy Already Formed.** — *Kellogg v. Sowerby*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 327.

**846. 3. The Requisite Number of Persons** — *a.* IN GENERAL. — See note 1.

*b.* ACQUITTAL OF ONE WHERE TWO ARE INDICTED AND TRIED.

— See note 2.

*d.* SEVERAL DEFENDANTS — ACQUITTAL OF ALL BUT ONE. —

See note 4.

**847. g. SEVERAL DEFENDANTS — SEPARATE TRIALS, CONVICTION OF ONE BEFORE TRIAL OF OTHERS.** — See note 3.

*h.* CONSPIRACIES BETWEEN HUSBAND AND WIFE — (1) *Post-nuptial Conspiracies.* — See note 4.

**848. 4. A Criminal or Unlawful Object** — *a.* GENERALLY. — See note 3.

**849. c. WHERE THE OBJECT IS MERELY UNLAWFUL.** — See notes 3, 4.

**850.** Design Opposed to Right and Justice Merely. — See note 1.

**851.** Various Statements of Rule. — See note 3.

**853. III. VARIOUS INSTANCES OF ADJUDICATED CONSPIRACIES** — 1. **Conspiracies to Commit a Violation of Law** — *a.* CONSPIRACIES TO COMMIT A CRIME — (1) *In General.* — See note 1.

(3) *Conspiracies to Rob or Steal.* — See note 4.

**854. 3. Conspiracies to Commit Offenses Against Morality and Decency.** — See note 7.

**855.** Seduction. — See note 1.

4. **Conspiracies Affecting Public Interests** — Rule Stated. — See note 4.

**846. 1. Number of Persons Necessary in Law.** — State *v.* Slutz, 106 La. 182, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 846; Carl Corper Brewing Co. *v.* Minwegen, etc., Mfg. Co., 77 Ill. App. 213.

**Need Not Be More than Two.** — Reg. *v.* Quinn, 19 Cox C. C. 78; Looney *v.* People, 81 Ill. App. 370.

**2. Effect of Acquittal of One of the Defendants.** — See Musser *v.* State, 157 Ind. 423.

**New Trial.** — If there are more than two defendants the granting of a new trial to one does not necessitate the granting of a new trial to the others. U. S. *v.* Cohn, 128 Fed. Rep. 615.

**Where One Conspirator Turns State's Evidence,** and is therefore protected from punishment, the other may nevertheless be convicted and punished. Weber *v.* Com., (Ky. 1903) 72 S. W. Rep. 30.

**4. State *v.* Clemenson,** 123 Iowa 524; Com. *v.* Brown, 23 Pa. Super. Ct. 470.

**Even if He Has Pleaded Guilty,** a single defendant cannot be punished for conspiracy after the acquittal of all his codefendants. Rex. *v.* Plummer, (1902) 2 K. B. 339.

**847. 3. State *v.* Slutz,** 106 La. 182.

**Where Two Are Indicted, but Only One Is Arrested,** he may be convicted. Com. *v.* Stambaugh, 22 Pa. Super. Ct. 386.

**4. Husband and Wife — Post-nuptial Conspiracies.** — Com. *v.* Allen, 24 Pa. Co. Ct. 65.

**848. 3. Unlawful Object Essential.** — Boyer *v.* Western Union Tel. Co., 124 Fed. Rep. 246; Lanyon *v.* Edwards, 41 U. S. App. 752; Philbrook *v.* Newman, 85 Fed. Rep. 139. See also Handley *v.* State, 115 Ga. 584; Irvine *v.* Elliott, 206 Pa. St. 152.

**849. 3. Doctrine that an Indictment Will Not Lie for a Conspiracy to Do That Which Is Merely Unlawful.** — See State *v.* Clemenson, 123 Iowa 524.

**4. Where Acts Not Indictable if Done by Individual.** — State *v.* Gannon, 75 Conn. 206; Orr

*v.* People, 63 Ill. App. 305; Blum *v.* State, 94 Md. 375, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 587 [849]; People *v.* McFarlin, (County Ct.) 43 Misc. (N. Y.) 591, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 849; Com. *v.* Brown, 23 Pa. Super. Ct. 470. See also Martens *v.* Reilly, 109 Wis. 464.

**Conspiracy to Injure and Oppress.** — Com. *v.* Stambaugh, 22 Pa. Super. Ct. 386.

**Conspiracy to Intimidate, Alarm, and Disturb Another — Kentucky Statute.** — See Gambrel *v.* Com., (Ky. 1904) 80 S. W. Rep. 808; Weber *v.* Com., (Ky. 1903) 72 S. W. Rep. 30.

**850. 1.** See O'Donnell *v.* People, 110 Ill. App. 250, affirmed 211 Ill. 158, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 850.

**851. 3. Where Power of Combination Dangerous to Public or to Individual.** — State *v.* Gannon, 75 Conn. 206; Com. *v.* Miller, 27 Pa. Co. Ct. 178, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 852; Com. *v.* Brown, 23 Pa. Super. Ct. 470.

**853. 1. General Rule as to Conspiracy to Commit Crime.** — Long *v.* People, 109 Ill. App. 197; State *v.* Howard, 129 N. Car. 584.

**4. Conspiracy to Rob and Steal.** — See People *v.* Lawrence, 143 Cal. 148.

**854. 7. A Conspiracy to Commit Adultery is an offense.** State *v.* Clemenson, 123 Iowa 524.

**855. 1.** State *v.* Powell, 121 N. Car. 635.

**4. Conspiracy Affecting Public Interests.** — O'Donnell *v.* People, 110 Ill. App. 250, affirmed 211 Ill. 158, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 855, 856.

**A Conspiracy to Profit from an Office by Exacting Pecuniary Reward for the performance of official duty is indictable.** Com. *v.* Brown, 23 Pa. Super. Ct. 470.

**A Conspiracy to Lower the Price of Stock by Circulating False Reports is unlawful.** People *v.* Goslin, 67 N. Y. App. Div. 16, affirmed 171 N. Y. 627.

**856.** 5. Conspiracies to Pervert or Obstruct Public Justice. — See note 3.

**857.** 6. Conspiracies to Cheat and Defraud — *a.* IN GENERAL — Conspiracies to Cheat and Defraud an Individual. — See note 4.

**859.** Conspiracy to Cheat a Corporation. — See note 1.

**861.** 8. Conspiracies to Extort Blackmail. — See note 1.

9. Conspiracies to Injure a Person in His Trade or Occupation. — See notes 3, 4.

**862.** 10. Conspiracies to Procure Marriage. — See note 2.

**863.** IV. GRADE OF OFFENSE — 1. In General. — See note 1.

2. Merger of the Conspiracy into a Felony Committed Pursuant Thereto.

— See note 5.

Conspiracy to Commit Misdemeanor. — See note 6.

**864.** V. HOW A CONSPIRACY MAY BE PROVED — 1. In General — Circumstantial Evidence. — See note 2.

**865.** See note 1.

Question for Jury. — See note 2.

**856.** 3. To "Pack" a Jury. — *Gallagher v. People*, 211 Ill. 158, *affirming* 110 Ill. App. 250.

Illegal Arrest and Imprisonment. — *State v. Davies*, 80 Mo. App. 239.

A Conspiracy Fraudulently to Obtain a License to Practice Medicine is indictable. *State v. Stewart*, 32 Wash. 103.

A Conspiracy Falsely to Maintain Suit is indictable under Pen. Code Mont., § 320; but bad faith is an essential element of such a conspiracy. *Finlen v. Heinze*, 28 Mont. 548.

**857.** 4. Conspiracy to Cheat Individual. — *State v. Gammon*, 75 Conn. 206; *Orr v. People*, 63 Ill. App. 305; *People v. Gilman*, 121 Mich. 187, 80 Am. St. Rep. 490; *Com. v. Stambaugh*, 22 Pa. Super. Ct. 386.

The Fact that the False Pretenses Are Irrational is immaterial where the victim is weak-minded. *People v. Bird*, 126 Mich. 631.

**859.** 1. To Cheat and Defraud Insurance Company. — See *Graff v. People*, 208 Ill. 312. Obtaining Money from Corporation by False Pretenses. — *Regent v. People*, 96 Ill. App. 189.

Defrauding Municipal Corporation. — *Com. v. Zuern*, 16 Pa. Super. Ct. 588.

**861.** 1. Blackmail. — See *Long v. People*, 109 Ill. App. 197.

Guilt of Victim Immaterial. — *Patterson v. State*, 62 N. J. L. 82.

3. To Injure One in His Trade. — *State v. Stockford*, 77 Conn. 227. See also *People v. McFarlin*, (County Ct.) 43 Misc. (N. Y.) 591.

Statutory Offense. — Under a statute declaring it to be a misdemeanor to conspire to prevent by force, threats, or intimidation any one from exercising a lawful calling, it is not ground for conviction that the defendants issued circulars and posters urging the public not to deal with a certain person. *People v. Radt*, (Ct. Gen. Sess.) 15 N. Y. Crim. 174.

The Wisconsin Statute (Stat. Wis. 1898, § 4466a) prohibiting combinations to injure one in his trade or calling, is not in conflict with the Fourteenth Amendment of the Federal Constitution. *Aikens v. Wisconsin*, 195 U. S. 194.

Conspiracy Not Indictable Unless Means Unlawful. — *State v. Van Pelt*, 136 N. Car. 633.

4. U. S. *v. Weber*, 114 Fed. Rep. 950; *State*

*v. Huegin*, 110 Wis. 189. See also *State v. Stockford*, 77 Conn. 227.

English Statute — 38 and 39 Vict., c. 86. — *Farmer v. Wilson*, 19 Cox C. C. 502.

**862.** 2. Marriage Performed by Person Without Authority. — *State v. Wilson*, 121 N. Car. 650.

**863.** 1. Grade of Offense — At Common Law. — *Berkowitz v. U. S.*, (C. C. A.) 93 Fed. Rep. 452; *State v. Thompson*, 69 Conn. 720; *State v. Turner*, 119 N. Car. 841.

5. No Prosecution for Lesser Offense. — See *Graff v. People*, 208 Ill. 312. *Contra*, *People v. Summers*, 115 Mich. 537.

If the Act Is an Integral Offense, and Not an Integrant Part of One, the conspirator may be prosecuted for both. *State v. Huegin*, 110 Wis. 189. See also *Com. v. Miller*, 27 Pa. Co. Ct. 178, 12 Pa. Dist. 75. *Compare* U. S. *v. Dietrich*, 126 Fed. Rep. 664.

Merger Only When Both Crimes Are Committed in Same State. — *Regent v. People*, 96 Ill. App. 189.

6. Conspiracy to Commit Misdemeanor. — U. S. *v. Melfi*, 118 Fed. Rep. 899; *Berkowitz v. U. S.*, (C. C. A.) 93 Fed. Rep. 452; *Orr v. People*, 63 Ill. App. 305.

Felony Committed in Pursuance of Conspiracy to Commit Misdemeanor — No Merger. — *Graff v. People*, 208 Ill. 312; *Wait v. Com.*, 113 Ky. 821.

**864.** 2. Circumstantial Evidence. — *People v. Lawrence*, 143 Cal. 148; *Owens v. State*, 120 Ga. 296; *Dixon v. State*, 116 Ga. 186; *Miller v. John*, 208 Ill. 173, *affirming* 111 Ill. App. 56; *Tucker v. Hyatt*, 151 Ind. 337, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 864, 865; *Freese v. State*, 159 Ind. 597; *Musser v. State*, 157 Ind. 423; *Ross v. Cleveland, etc., Mineral Land Co.*, 162 Mo. 331, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 864; *Horton v. Lee*, 106 Wis. 439; *Patnode v. Westenhaver*, 114 Wis. 460. See also *Wait v. Com.*, 113 Ky. 821.

Hence Evidence Tending to Prove Motive is admissible. *Sullivan v. People*, 108 Ill. App. 328.

**865.** 1. *People v. Lawrence*, 143 Cal. 148; *State v. Thompson*, 69 Conn. 720.

2. Question for Jury. — *People v. Lawrence*, 143 Cal. 148; *State v. Bolden*, 109 La. 484, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 865.

**866. 2. Overt Acts as Evidence — a. IN GENERAL. —** See note 1.

Proof of Previous Concurrence in Design. — See note 2.

**b. ACTS AND DECLARATIONS OF ONE AS EVIDENCE AGAINST ASSOCIATE — Rule Stated. —** See note 4.**868. The Requirement that the Conspiracy Shall First Be Established. —** See note 1.**869. c. HOW SUCH PROOF, THOUGH INCOMPETENT WHEN OFFERED, MAY NEVERTHELESS BE CONSIDERED. —** See note 2.**d. ACTS AND DECLARATIONS OF CONSPIRATORS AFTER ACCOMPLISHMENT OF COMMON DESIGN —** Inadmissible. — See note 4.**870. Exceptions to Rule. —** See note 1.

Proof of Possession of Fruits of the Crime. — See note 3.

**VI. RESPONSIBILITY OF CONSPIRATOR FOR ACTS OF CO-CONSPIRATOR —****1. In General —** Coequal Responsibility. — See note 4.**871. Results Not Specifically Intended —** See note 1.**2. Limit of the Rule. —** See note 2.

**866. 1. General Rule as to Overt Acts as Evidence. —** *State v. Soper*, 118 Iowa 1; *Bailey v. State*, 42 Tex. Crim. 289. See also *People v. Gilman*, 121 Mich. 187, 80 Am. St. Rep. 490.

**2. Saxton v. Sebring**, 96 N. Y. App. Div. 570.

**4. Acts and Declarations of One as Evidence Against Associate —** *Connecticut. — State v. Gannon*, 75 Conn. 206; *State v. Stockford*, 77 Conn. 227.

*Illinois. —* See *O'Donnell v. People*, 110 Ill. App. 250, affirmed 211 Ill. 158, per Windes, J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866.

*Iowa. — State v. Soper*, 118 Iowa 1; *State v. McIntosh*, 109 Iowa 209.

*Kentucky. — Powers v. Com.*, 110 Ky. 386, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866; *Standard Oil Co. v. Doyle*, (Ky. 1904) 82 S. W. Rep. 271.

*Massachusetts. — Com. v. Rogers*, 181 Mass. 184.

*Missouri. — State v. Gatlin*, 170 Mo. 354; *State v. True Nell*, 79 Mo. App. 243.

*New Hampshire. — Cohn v. Saidel*, 71 N. H. 558, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866.

*New York. — Matthews v. Shankland*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 604.

*North Carolina. — State v. Turner*, 119 N. Car. 841.

*Ohio. — State v. Jacobs*, 10 Ohio Dec. 252, 7 Ohio N. P. 261.

*Pennsylvania. — Com. v. Stambaugh*, 22 Pa. Super. Ct. 386; *Com. v. Zuern*, 16 Pa. Super. Ct. 588; *Weil v. Cohn*, 4 Pa. Super. Ct. 443.

**Acts and Declarations Before Formation of Conspiracy. —** *Langford v. State*, 130 Ala. 74, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867; *State v. May*, 142 Mo. 135; *Hudson v. State*, 43 Tex. Crim. 420 (admissible to show the intent with which the parties acted).

**Prima Facie Proof Is Sufficient. —** *State v. Thompson*, 69 Conn. 720; *Pacific Livestock Co. v. Gentry*, 38 Oregon 275, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 868.

**Acts and Declarations Need Not Be of Conspirator Named in Indictment. —** *Graff v. People*, 208 Ill. 312. *Contra*, *Sullivan v. People*, 108 Ill. App. 328.

**Acquittal of Declarant Immaterial. —** Where two are indicted for a substantive offense, which was committed in pursuance of a conspiracy,

the acts and declarations of one conspirator are admissible notwithstanding his previous acquittal. *Musser v. State*, 157 Ind. 423.

**868. 1. Acts and Declarations of Conspirator Before Acquisition of Co-conspirator. —** *Moore v. People*, 31 Colo. 336; *Hudson v. State*, 43 Tex. Crim. 420.

**869. 2. How Evidence Rendered Competent. —** *Taylor v. U. S.*, 61 U. S. App. 169, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869; *Freese v. State*, 159 Ind. 597, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869; *State v. True Nell*, 79 Mo. App. 243; *Cohn v. Saidel*, 71 N. H. 558; *Com. v. Zuern*, 16 Pa. Super. Ct. 588, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869. See also *State v. Thompson*, 69 Conn. 720; *State v. Bolden*, 109 La. 484.

**4. Acts and Declarations After Accomplishment of Common Design. —** *Standard Oil Co. v. Doyle*, (Ky. 1904) 82 S. W. Rep. 271; *State v. Palmer*, 79 Minn. 428, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866; *State v. Davies*, 80 Mo. App. 239; *Dawson v. State*, 38 Tex. Crim. 9.

**Receivable in Evidence Against Party Making. —** *People v. Butler*, 111 Mich. 483.

**Conspiracy Continued After Partial Fulfilment — Evidence Admissible. —** *People v. Hall*, 51 N. Y. App. Div. 57.

**870. 1. Pacific Livestock Co. v. Gentry, 38 Oregon 275, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870.**

**Declarations Before Division of Spoils. —** *State v. Bolden*, 109 La. 484, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870.

**3. Musser v. State, 157 Ind. 423.**

**4. Responsibility of One Confederate for Acts of Associate. —** *U. S. v. Weber*, 114 Fed. Rep. 950; *U. S. v. Sweeney*, 95 Fed. Rep. 434; *Miller v. John*, 208 Ill. 173; *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203; *Standard Oil Co. v. Doyle*, (Ky. 1904) 82 S. W. Rep. 271; *Kernan v. Humble*, 51 La. Ann. 389; *Emmons v. Alvord*, 177 Mass. 466; *Com. v. Spencer*, 6 Pa. Super. Ct. 256; *Cranfill v. Hayden*, (Tex. Civ. App. 1903) 75 S. W. Rep. 573.

**Insanity of One No Defense to Others. —** *Tucker v. Hyatt*, 151 Ind. 337.

**871. 1. Extent of Rule of Coequal Responsibility — Results Not Specifically Intended. —** *Reeves v. Territory*, 10 Okla. 194, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870, 871.

**2. Myers v. State, 43 Fla. 500; *Handley v.***

**872. VII. CONSPIRACY IN ITS CIVIL ASPECT — 1. Distinguished from the Criminal Offense —** *a. GENERALLY — Action Against Single Individual. — See note 4.*

**873. Injuries Not Actionable if Done by Individual. — See note 2.**

*b. GIST OF THE CIVIL ACTION — The Injury Done. — See note 3.*

**874. See notes 1, 2.**

**875. Levy of Execution. — See note 1.**

**2. The General Rule Applicable to Actions on the Case for Damages —**

*a. GENERALLY. — See note 3.*

**877. b. INSTANCES OF CIVIL ACTIONS FOR DAMAGES — (1) Actions for Injury to Reputation and Business. — See note 1.**

State, 115 Ga. 584, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870-872; Powers v. Com., 110 Ky. 386, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870, 871; State v. May, 142 Mo. 135.

**872. 4. Action Against Single Individual. —** Walters v. Green, (1899) 2 Ch. 696; Martin v. Leslie, 93 Ill. App. 44; Standard Oil Co. v. Doyle, (Ky. 1904) 82 S. W. Rep. 271; Rourke v. Elk Drug Co., 75 N. Y. App. Div. 145; Griffith v. McKelvey, 30 Pittsb. Leg. J. N. S. (Pa.) 292; Saxe v. Burlington, 70 Vt. 449; Johnston v. Gerry, 34 Wash. 524, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 872; Porter v. Mack, 50 W. Va. 581.

**873. 2. Rule in Case of Injuries Which if Done by Individual Would Not Be Actionable. —** Huttley v. Simmons, (1898) 1 Q. B. 181; Bitzer v. Washburn, 121 Iowa 466; De Wulf v. Dix, 110 Iowa 553; Beechley v. Mulville, 102 Iowa 602, 63 Am. St. Rep. 479; Grand Lodge, etc., v. Schuetze, (Tex. Civ. App. 1904) 83 S. W. Rep. 241; Porter v. Mack, 50 W. Va. 581; Martens v. Reilly, 109 Wis. 464. But see State v. Huegin, 110 Wis. 189.

**3. The Gist of the Civil Action for Damages. —** Martin v. Leslie, 93 Ill. App. 44; Hundley v. Louisville, etc., R. Co., 105 Ky. 162, 88 Am. St. Rep. 298; Commercial Union Assur. Co. v. Shoemaker, 63 Neb. 173; Saxe v. Burlington, 70 Vt. 449; Martens v. Reilly, 109 Wis. 464; Porter v. Mack, 50 W. Va. 581, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 873.

**874. 1. Conspiracy Alone Not Sufficient to Support Action. —** Kolel America Vatiferes, etc., v. Eliach, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 499.

**Without Unlawful Object or Means** the conspiracy is immaterial, Standard Oil Co. v. Doyle, (Ky. 1904) 82 S. W. Rep. 271; Baker v. Metropolitan L. Ins. Co., (Ky. 1901) 64 S. W. Rep. 913; Baker v. Sun L. Ins. Co., (Ky. 1901) 64 S. W. Rep. 967; Trimble v. Prudential L. Ins. Co., (Ky. 1901) 64 S. W. Rep. 915; Brewster v. Miller, 101 Ky. 368; Porter v. Mack, 50 W. Va. 581, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 872-875; West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 88 Am. St. Rep. 895, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 872-875. See also Tanenbaum v. New York F. Ins. Exch., (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 134; Kessler v. Half, 21 Tex. Civ. App. 91.

**2. Actual Legal Damage. —** Giblan v. National Amalgamated Labourers' Union, (1903) 2 K. B. 600; Booney v. King, 201 Ill. 47, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 874;

Martin v. Leslie, 93 Ill. App. 44; Bitzer v. Washburn, 121 Iowa 466, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 874; Standard Oil Co. v. Doyle, (Ky. 1904) 82 S. W. Rep. 271; Baker v. Metropolitan L. Ins. Co., (Ky. 1901) 64 S. W. Rep. 913; Baker v. Sun L. Ins. Co., (Ky. 1901) 64 S. W. Rep. 967; Ross v. Cleveland, etc., Mineral Land Co., 162 Mo. 331; Commercial Union Assur. Co. v. Shoemaker, 63 Neb. 173; Green v. Davies, 100 N. Y. App. Div. 359; Brown v. American Freehold Land Mortg. Co., (Tex. Civ. App. 1904) 81 S. W. Rep. 824; Boutwell v. Marr, 71 Vt. 1, 76 Am. St. Rep. 746.

**875. 1. See** Porter v. Mack, 50 W. Va. 581, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875.

**3. General Rule in Regard to Action for Damages. —** Martens v. O'Connor, 101 Wis. 18.

**Writ of Conspiracy Superseded by Civil Action. —** See Porter v. Mack, 50 W. Va. 581.

**Malicious Prosecution. —** Cohn v. Saidel, 71 N. H. 558.

**Misappropriation of Corporate Funds. —** Zinc Carbonate Co. v. Shullsburg First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845.

**Abuse of Official Power. —** Saxe v. Burlington, 70 Vt. 449.

**Conspiracy to Cheat and Defraud. —** Colyer v. Guilfoyle, 47 N. Y. App. Div. 302.

**Agreement Among Employers as to Hiring Employee Discharged by One — Power Not to Be Abused. —** Willis v. Muscogee Mfg. Co., 120 Ga. 597.

**Terrorizing and Maltreating Plaintiff's Tenants. —** Kernan v. Humble, 51 La. Ann. 389.

**If an Unlawful Act, Maliciously Done, Results in Pecuniary Injury, it necessarily follows that a legal right has been violated.** Brown v. American Freehold Land Mortg. Co., (Tex. Civ. App. 1904) 81 S. W. Rep. 824.

**877. 1. Injury to Reputation and Business. —** Walters v. Green, (1899) 2 Ch. 696; Doremus v. Hennessy, 176 Ill. 608, 68 Am. St. Rep. 203; Webb v. Drake, 52 La. Ann. 290; Ertz v. Produce Exch., 79 Minn. 140, 79 Am. St. Rep. 433; Rourke v. Elk Drug Co., 75 N. Y. App. Div. 145; Matthews v. Shankland, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 604; Temple Iron Co. v. Carmanoskie, 10 Kulp (Pa.) 37; Brown v. American Freehold Land Mortg. Co., 97 Tex. 599; Boutwell v. Marr, 71 Vt. 1, 76 Am. St. Rep. 746.

**Conspiracy to Induce Employers Not to Employ or to Discharge Employee. —** Giblan v. National Amalgamated Labourers' Union, (1903) 2 K. B. 600; Read v. Friendly Soc., etc., (1902) 2 K. B. 732.

**878.** (2) *Actions for Deception Practiced upon Vendees of Property — Representations Must Be Calculated to Deceive Ordinary Prudence.* — See note 1.

(3) *Conspiracies to Hinder, Delay, or Defraud Creditors.* — See note 3.

**879.** See note 2.

**880.** 3. *How the Execution of a Conspiracy May Be Prevented — An Injunction May Be Granted.* — See notes 3, 4.

**Inducing Employees to Break Contract with Employers.** — *Quinn v. Leathem*, (1901) A. C. 495.

**Driving One Out of Business — What Acts Unlawful.** — It is unlawful to obstruct, harass, and annoy the plaintiff's employees in the discharge of their duties, to threaten customers of the plaintiff to shut them up in their business if they continue to deal with him; to circulate false reports concerning the plaintiff and his business; and to cause his arrest and prosecution on false charges in connection with his business. *Standard Oil Co. v. Doyle*, (Ky. 1904) 82 S. W. Rep. 271.

**Conspiracy to Destroy Labor Union.** — It is not an unlawful conspiracy to seek to destroy a labor union by discharging its members. *Boyer v. Western Union Tel. Co.*, 124 Fed. Rep. 246.

**The Measure of Damages** for driving the plaintiff out of business is such damage as he has suffered in his business and the consequent diminished value of the use of his property. *Bratt v. Swift*, 99 Wis. 579.

**Charges Sustained by Facts.** — A combination in bringing charges against the plaintiff, a priest, whereby he was degraded and debarred from the ministry, has been held not to be actionable, even though the defendants were actuated by improper motives. *Irvine v. Elliott*, 206 Pa. St. 152.

**878.** 1. *Deception Practiced upon Vendees of Property.* — *Meloy v. Donnelly*, 119 Fed. Rep. 456; *Miller v. John*, 208 Ill. 173; *Horton v. Lee*, 106 Wis. 439.

3. *Conspiracies to Hinder, Delay, or Defraud Creditors.* — See *Kosminsky v. Hamburger*, 21 Tex. Civ. App. 341.

**879.** 2. *Contrary View.* — *Bitzer v. Washburn*, 121 Iowa 466, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 878; *Field v. Siegel*, 99 Wis. 605, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 878, 879.

**880.** 3. *Injunction.* — *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. Rep. 264; *Union Pac. R. Co. v. Ruef*, 120 Fed. Rep. 102; *Kernan v. Humble*, 51 La. Ann. 389; *Matthews v. Shankland*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 604, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 880; *Temple Iron Co. v. Carmanoskie*, 10 Kulp (Pa.) 37.

**A Temporary Restraining Order May Be Granted** until the hearing on the motion for a preliminary injunction. *Wabash R. Co. v. Hannahan*, 121 Fed. Rep. 563.

4. *Union Pac. R. Co. v. Ruef*, 120 Fed. Rep. 102; *Matthews v. Shankland*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 604.



# CONSTITUTIONAL LAW.

By P. B. McKENZIE.

**890. I. INTRODUCTORY — 2. Definition and Nature — a. OF CONSTITUTIONS — (2) Viewed as to Legal Character. — See note 1.**

**894. III. FORMATION AND AMENDMENT OF CONSTITUTIONS — 1. Adoption — b. THE OCCASION — (2) Admission of New States — Ratification of Irregularly Formed Constitution by Subsequent Admission of State. — See note 3.**

**896. c. THE FRAMING: THE CONSTITUTIONAL CONVENTION — (4) Powers — Powers of Convention Held to Be Sovereign. — See note 7.**

**898. d. RATIFICATION — (2) Necessity. — See note 2.**

**901. e. TAKING EFFECT. — See note 1.**

**903. 2. Development — b. AMENDMENT AND REVISION — (2) Submission — (b) Under Constitutional Authorization — aa. IN GENERAL. — See note 1.**

**904. See note 1.**

*bb* SUCH PROVISIONS MANDATORY. — See notes 2, 3.

*(c)* Formalities of Passage. — *aa.* GENERALLY. — See notes 5, 6.

**905. See note 2.**

**906. Publication. — See note 1.**

*bb.* NOT SUBJECT TO RULES OF ORDINARY LEGISLATION. — See notes 5, 6, 7, 8.

The Sanction of the Executive. — See note 10.

**907. (d) Form of Submission — Amendment Containing Alternative Propositions. — See note 1.**

**890. 1. Constitution as Fundamental Law. — Rasmussen v. Baker, 7 Wyo. 117.**

**894. 3. McCornick v. Western Union Tel. Co., (C. C. A.) 79 Fed. Rep. 449.**

**896. 7. Convention Held Sovereign Body. — State v. Favre, 51 La. Ann. 434.**

**898. 2. Necessity of Submission. — State v. Favre, 51 La. Ann. 434. See also Taylor v. Com., 101 Va. 829.**

**901. 1. State v. Cain, 52 La. Ann. 2120.**

**903. 1. It Is Competent for the Legislature to Provide a General Law under which constitutional amendments may be submitted for ratification by the people. Martin v. Election Com'rs, 126 Cal. 404.**

**904. 1. Wisdom and Policy of Amendments Not Judicial Question. — People v. Mills, 30 Colo. 262.**

**2. Kadderly v. Portland, 44 Oregon 118, rehearing denied 44 Oregon 160.**

**3. Constitutional Provisions as to Amendments to Be Strictly Observed. — State v. Powell, 77 Miss. 543; Kadderly v. Portland, 44 Oregon 118, rehearing denied 44 Oregon 160.**

**5. Reading Once in Full and Twice by Title Only has been held to be a compliance with the constitutional requirement that a proposed amendment should be read three times in each house. Saunders v. Board of Liquidation, 110 La. 313.**

**6. Sufficiency of Entry on Journal. — See People v. Loomis, 135 Mich. 556, 10 Detroit Leg. N. 877; Durfee v. Harper, 22 Mont. 354; State v. Herried, 10 S. Dak. 109.**

In State v. Brookhart, 113 Iowa 250, the court held to the strict-compliance rule.

A Discrepancy Between the Journals of the Senate and House will not render an amendment invalid where such discrepancy is traceable to a mere clerical error. *People v. Sours, 31 Colo. 369, 102 Am. St. Rep. 34.*

**905. 2. Ratification by Succeeding Legislature. —** Where the constitution provided that amendments proposed by the legislature should be voted on by the people and, receiving the prescribed vote, should be ratified by the succeeding legislature, and a proposed amendment erroneously referred to § 5, art. IV., instead of § 5, art. X., it was held that neither the ratifying legislature nor the courts had authority to correct the error, and the amendment was void. *Bray v. Florence, 62 S. Car. 57.*

**906. 1. Publication. — Russell v. Croy, 164 Mo. 69; Requisites of Warrants for Meetings of Electors, 21 R. I. 578.**

**5. Need Not Be Limited to Single Subject. — People v. Sours, 31 Colo. 369, 102 Am. St. Rep. 34.**

**6. Title. —** In *Pennsylvania* the subject must be expressed in the title. *Com. v. Greist, 8 Pa. Dist. 468.*

**7. Saunders v. Board of Liquidation, 110 La. 313.**

The title may be considered if necessary to the interpretation of the amendment. *State v. O'Connor, 81 Minn. 79.*

**8. Submission to People. —** It is not necessary for a resolution expressly to declare that it shall be submitted to the people. *State v. Herried, 10 S. Dak. 109.*

**10. Com. v. Griest, 196 Pa. St. 396.**

**907. 1. Proposed Alternative Amendment. —**

**907.** Several Amendments. — See note 3.

**908.** (3) *Ratification* — (b) *Procedure* — *aa.* IN GENERAL. — See notes 3, 4.

*bb.* VOTE NECESSARY TO ADOPT. — Provisions of Several State Constitutions Construed. — See notes 5, 6, 9.

**909.** (4) *Taking Effect* — The Time When an Amendment Becomes Operative. — See note 9.

**910.** Operative from Counting Votes or Proclamation of Result. — See note 1.

Provision Intended to Operate from Future Date. — See note 4.

**912.** IV. OPERATION AND EFFECT OF CONSTITUTIONS — 1. What Provisions Are Self-executing — *a.* IN GENERAL. — See notes 2, 3.

**913.** *b.* PROHIBITIONS — (1) *Generally*. — See note 4.

Absence of Provision for Penalty. — See note 8.

**914.** (3) *Limitations on Municipal Indebtedness and Rate of Taxation*. — See note 4.

**915.** 2. What Provisions Are Not Self-executing — *a.* IN GENERAL. — See note 3.

Where the constitution is silent as to the form of submission it is competent for the legislature to prescribe the form. *People v. Loomis*, 135 Mich. 556, 10 Detroit Leg. N. 877. See also *May, etc., Hardware Co. v. Birmingham*, 123 Ala. 306; *Russell v. Croy*, 164 Mo. 69.

Words Added to the Prescribed Statutory Form of submission which do not change its meaning will not render the submission invalid. *Hopkins v. Duluth*, 81 Minn. 189.

Submission under a Misleading Title cannot be made the basis of an attack on the amendment without proof of the deception of voters thereby. *People v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34.

**907.** 3. Separate Submission of Several Amendments. — *People v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34; *State v. Powell*, 77 Miss. 543; *Gabbert v. Chicago, etc.*, R. Co., 171 Mo. 84; *State v. Herried*, 10 S. Dak. 109. See also *Bott v. Wurts*, 63 N. J. L. 289; *State v. Laylin*, 69 Ohio St. 1.

**908.** 3. Submission at General Election Without Special Directions. — *People v. Curry*, 130 Cal. 82.

4. Whether Amendment Properly Adopted Is a Question for the Court. — *Knight v. Shelton*, 134 Fed. Rep. 423, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 908; *State v. Powell*, 77 Miss. 543, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 908; *Gabbert v. Chicago, etc.*, R. Co., 171 Mo. 84, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 908; *Bott v. Wurts*, 63 N. J. L. 289, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901 *et seq.*; *Kadderdly v. Portland*, 44 Oregon 118, rehearing denied 44 Oregon 160, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 908.

5. In Colorado the same rule as in Kansas is adopted. *People v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34.

6. Idaho — Indiana. — See *Matter of Denny*, 156 Ind. 104, to the same effect as *State v. Swift*, 69 Ind. 505, stated in the original note.

In New Jersey the rule stated in the original text prevails. *Bott v. Wurts*, 63 N. J. L. 289, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901 *et seq.*

9. Arkansas. — *Knight v. Shelton*, 134 Fed. Rep. 423.

Mississippi. — *State v. Powell*, 77 Miss. 543.

**909.** 9. Amendments Held Operative upon Ratification. — *Denver v. Adams County*, (Colo. 1904) 77 Pac. Rep. 858.

**910.** 1. Amendments Operative upon Counting and Canvassing Votes. — *State v. Kyle*, 166 Mo. 287; *Girdner v. Bryan*, 94 Mo. App. 27.

4. *Lloyd v. Hamilton*, 52 La. Ann. 861.

**912.** 2. Test of Operative Character. — *Davis v. Burke*, 179 U. S. 399; *Illinois Cent. R. Co. v. Ihlenberg*, (C. C. A.) 75 Fed. Rep. 873; *Keady v. Owers*, 30 Colo. 1; *Louisville, etc., R. Co. v. Com.*, 105 Ky. 179; *Louisville, etc., R. Co. v. Barbourville*, 105 Ky. 174; *State v. Voorhies*, 50 La. Ann. 985; *State v. Caldwell*, 50 La. Ann. 666, 69 Am. St. Rep. 465; *Globe Lumber Co. v. Griffeth*, 107 La. 621; *State v. Cain*, 52 La. Ann. 2120; *Sharp v. National Biscuit Co.*, 179 Mo. 553, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 912; *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109; *State v. Moores*, (Neb. 1903) 96 N. W. Rep. 1011, affirmed on rehearing (Neb. 1904) 99 N. W. Rep. 504; *Logan County v. McKinley-Lanning L. & T. Co.*, (Neb. 1904) 101 N. W. Rep. 991; *Central Iron Works v. Pennsylvania R. Co.*, 2 Dauphin Co. Rep. (Pa.) 308.

3. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153.

**913.** 4. General Rule as to Prohibitory Clauses. — *Tampa v. Tampa Waterworks Co.*, (Fla. 1903) 34 So. Rep. 631; *State v. Kyle*, 166 Mo. 287.

8. *Quinlan v. Smye*, 21 Tex. Civ. App. 156.

**914.** 4. Limiting Municipal Indebtedness. — *Dunbar v. Canyon County*, 5 Idaho 407.

**915.** 3. When Clauses Not Self-executing — General Test. — *Sherwood v. Wilkins*, 65 Ark. 312; *Harris v. Kill*, 108 Ill. App. 305; *Industrial Institute, etc.*, Case, 81 Miss. 174; *Engstad v. Grand Forks County*, 10 N. Dak. 54; *Lewis v. Lackawanna County*, 200 Pa. St. 590; *State v. Bradford*, 12 S. Dak. 211, affirmed on rehearing 13 S. Dak. 201, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 915; *Wiederanders v. State*, 64 Tex. 133; *Adams v. Kelley*, (Tex. Civ. App. 1898) 45 S. W. Rep. 859; *Mercur Gold Min., etc.*, Co. v. Spry, 16 Utah 222, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 915; *State v. Spokane*, 24 Wash. 53; *Northwestern Warehouse Co. v. Oregon R., etc., Co.*, 32 Wash. 218.

**916.** *b.* STOCKHOLDERS' LIABILITY CLAUSES — Not Generally Self-executing. — See note 3.

**917.** *c.* OPERATIVE LEGISLATION — (1) *In General.* — See note 5.  
3. Retrospective Effect — *a.* IN GENERAL. — See note 11.

**918.** Provision as to Actions for Death by Wrongful Act. — See note 3.

**919.** But an Expressed Intention that a Constitution Shall Operate Retrospectively. — See note 3.

*b.* UPON LEGISLATION — Constitutional Provision Annuls Inconsistent Laws. — See note 5.

**920.** Existing Laws Not Unnecessarily Disturbed. — See note 4.

**921.** V. CONSTRUCTION AND INTERPRETATION OF CONSTITUTIONS — 2. Constitutional and Statutory Construction Compared — Same General Rules Apply. — See note 2.

Court's Discretion in Construing Constitutions More Limited. — See note 3.

3. Internal Construction — *a.* THE INTENT. — See note 6.

**922.** Language Used Primary Test of Intent. — See note 1.

Where Words Convey Unambiguous and Definite Meaning, This Controls. — See

notes 2, 3.

**923.** *b.* POLICY AND EFFECT — (1) *In General* — Wisdom of Constitutional Provision Not for Courts. — See note 3.

When General Spirit of Instrument May Be Considered. — See note 4.

(2) *Arguments Ab Inconvenienti.* — See note 9.

**924.** *c.* THE LANGUAGE EMPLOYED — (2) *Natural and Ordinary Meaning Presumed* — (a) General Rule — Natural Meaning of Words Presumed. — See note 8.

A Provision that "the Right of Trial by Jury Shall Be Inviolable" is not self-executing where the constitution does not provide for the impaneling of a jury. *Ohio Turnpike Co. v. Waechter*, 25 Ohio Cir. Ct. 605.

**916.** 3. Stockholders' Liability Clause Not Self-executing. — *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194; *Woodworth v. Bowles*, 61 Kan. 569; *Hancock Nat. Bank v. Farnum*, 20 R. I. 466. *Contra* in *Nebraska*. *Farmer's L. & T. Co. v. Funk*, 49 Neb. 353.

**917.** 5. Compare *Engstad v. Grand Forks County*, 10 N. Dak. 54.

11. Construed to Operate Prospectively. — *Phoenix Assur. Co. v. Fire Dept.*, 117 Ala. 631; *State v. Westminster College*, 175 Mo. 52; *Roddy v. Brooklyn Heights R. Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 373, *affirmed* 39 N. Y. App. Div. 311, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 917; *Mercur Gold Min.*, etc., *Co. v. Spry*, 16 Utah 222; *Arey v. Lindsey*, 103 Va. 250; *Mestas v. Diamond Coal, etc., Co.*, 12 Wyo. 414.

**918.** 3. *Mestas v. Diamond Coal, etc., Co.*, 12 Wyo. 414, applying the rule of the text to the provision of the *Wyoming* Constitution.

**919.** 3. Act Unauthorized under Existing Constitution Not Validated by Amendment. — *Banaz v. Smith*, 133 Cal. 102.

5. Constitution Displaces Inconsistent Laws. — *Matter of Vernon*, 1 Penn. (Del.) 202, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 919; *Howell v. Pate*, 119 Ga. 537; *Louisville, etc., R. Co. v. Barbourville*, 105 Ky. 174; *German Nat. Ins. Co. v. Louisville*, (Ky. 1900) 54 S. W. Rep. 732; *Henning v. Stengel*, 66 S. W. Rep. 47, 23 Ky. L. Rep. 1793; *State v. New Orleans*, 52 La. Ann. 1604.

**920.** 4. *Adams v. Dendy*, 82 Miss. 135.

**921.** 2. General Principles of Statutory Con-

struction Applicable. — *People v. Hutchinson*, 172 Ill. 486, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 921.

3. Judicial Discretion Restricted. — *Matter of Vernon*, 1 Penn. (Del.) 202, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 921.

6. Intent Governs. — *Popper v. Broderick*, 123 Cal. 456, *quoting* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 921; *Chicago v. Fishburn*, 189 Ill. 367, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 921; *State v. Menaugh*, 151 Ind. 260, *per Hackney, C. J.*, *dissenting*, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 921; *Com. v. State Treasurer*, 13 Pa. Dist. 242; *Rasmussen v. Baker*, 7 Wyo. 117.

**922.** 1. The Language Used the Primary Consideration. — *Edson v. Southern Pac. R. Co.*, 144 Cal. 182, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 921, 922; *Richardson v. Treasure Hill Min. Co.*, 23 Utah 366.

2. Plain Meaning of Words Controls. — *State v. McGough*, 118 Ala. 159; *State v. American Sugar Refining Co.*, 51 La. Ann. 562; *Funkhouser v. Spahr*, 102 Va. 306.

3. *Com. v. Barnett*, 199 Pa. St. 161, *per Mestrezat, J.*, *dissenting*, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 922.

**923.** 3. *McCully v. State*, 102 Tenn. 509, *per Wilkes, J.*, *dissenting*, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 923.

4. General Unexpressed Spirit No Guide. — *Matter of Vernon*, 1 Penn. (Del.) 202, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 923.

9. Courts Cannot Consider Argument from Inconvenience. — *Matter of Vernon*, 1 Penn. (Del.) 202, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 923; *Park v. Candler*, 114 Ga. 466, *per Cobb, J.*, *dissenting*, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 923.

**924.** 8. Words Taken in Ordinary Sense. —

- 925.** (b) *Technical Terms — Ordinary Rather than Technical Meaning.* — See note 2. Words Having Technical Sense in Legal and Constitutional History. — See note 3.
- d. INSTRUMENT MUST BE CONSTRUED AS A WHOLE — (1) General Rule.* — See note 8.
- 926.** See note 1.
- (3) *All Portions Must Be Harmonized if Possible.* — See note 9.
- 927.** (4) *Construction Where Provisions Conflict.* — See note 1.
- Later Provisions Prevail. — See note 3.
- Amendments Prevail over Original. — See note 4.
- 928.** *e. PROVISIONS PRESUMPTIVELY MANDATORY — Provisions Regulating Structure and Passage of Bills.* — See note 3.
- f. IMPLIED CONSTITUTIONAL POWERS — Specific Method of Exercising Power Designated — No Other Implied.* — See note 6.
- 929.** Elective Offices — Postponing Elections. — See note 7.
4. *Extrinsic Aid in the Construction of Constitutions.* — See note 9.
- 930.** *a. CIRCUMSTANCES ATTENDING THE FORMATION OF CONSTITUTIONS.* — See notes 1, 3.
- Convention Debates. — See notes 6, 7, 8.
- 931.** *b. COMMON-LAW PRINCIPLES.* — See note 1.
- c. CONTEMPORANEOUS CONSTRUCTION.* — See note 6.

Blocker v. Boswell, 109 Ga. 230, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 924; Epping v. Columbus, 117 Ga. 263, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 924; Park v. Candler, 114 Ga. 466, per Cobb, J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 924; Powell v. Spackman, 7 Idaho 692; Burke v. Snively, 208 Ill. 328; Bishop v. State, 149 Ind. 223, 63 Am. St. Rep. 279; Com. v. State Treasurer, 13 Pa. Dist. 231; Rasmussen v. Baker, 7 Wyo. 117.

**925.** 2. *Words Capable of Ordinary and Technical Meaning.* — Epping v. Columbus, 117 Ga. 263, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 925; Park v. Candler, 114 Ga. 466, per Cobb, J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 925; Hamilton Nat. Bank v. American L. & T. Co., 66 Neb. 67.

3. See Com. v. State Treasurer, 13 Pa. Dist. 231.

8. *Construed as a Whole.* — Com. v. State Treasurer, 13 Pa. Dist. 242; State v. Eldredge, 27 Utah 477.

**926.** 1. *Every Part to Be Given Effect.* — Com. v. State Treasurer, 13 Pa. Dist. 242.

9. *Different Parts to Be Harmonized.* — Com. v. State Treasurer, 13 Pa. Dist. 242.

**927.** 1. *Conflicting Provisions — More Specific Prevails.* — Jackson v. State, 87 Md. 191; Com. v. State Treasurer, 13 Pa. Dist. 241, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 927; Smith v. Grayson County, 18 Tex. Civ. App. 153.

3. *Conflict Between Later and Earlier Provisions.* — Hope v. New Orleans, 106 La. 345.

4. Bray v. Florence, 62 S. Car. 57; Smith v. Grayson County, 18 Tex. Civ. App. 153.

**928.** 3. Rambo v. Larrabee, 67 Kan. 634. Compare Smathers v. Madison County, 125 N. Car. 480, wherein it was held that all of the provisions of the constitution relative to the passage of a bill were mandatory.

A Constitutional Requirement that Bills Shall Be Read Three Times is mandatory. Rodman-Heath Cotton Mills v. Waxhaw, 130 N. Car. 293.

6. See Johnson v. State, 42 Tex. Crim. 99, per Davidson, P. J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 928.

**929.** 7. See State v. Andrews, 64 Kan. 474.

9. *Extrinsic Aids in Construction.* — See Com. v. Barnett, 199 Pa. St. 161, per Mestrezat, J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 929.

**930.** 1. *Prior History Resorted To.* — See Ex p. Hart, 41 Tex. Crim. 581, per Davidson, P. J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 930.

3. *Circumstances under Which Framed.* — U. S. v. Wong Kim Ark, 169 U. S. 649; Maxwell v. Dow, 176 U. S. 581; Jackson v. State, 87 Md. 191; State v. Salt Lake City, 23 Utah 13.

6. *Convention Proceedings Considered.* — State v. Norman, 16 Utah 457; Richardson v. Treasure Hill Min. Co., 23 Utah 366.

7. *Debates in Convention.* — Burke v. Snively, 208 Ill. 328; McCully v. State, 102 Tenn. 509, per Wilkes, J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 930; Rasmussen v. Baker, 7 Wyo. 117.

8. *Qualification.* — Epping v. Columbus, 117 Ga. 263.

*Resort to Debates for Interpretation of Constitution.* — "The views expressed by members of the convention, as set forth in the debates of the constitutional convention and the report of the committee as to changes made by the new constitution, cannot be resorted to in order to arrive at a judicial interpretation of any part of the constitution, if a sensible interpretation of the part in question can be made under the usual rules of judicial construction. This is on the principle that the final draft of the constitution is what the people adopted, not the preliminary debates leading up to it, or the construction put upon it by members of the convention afterwards." Com. v. State Treasurer, 13 Pa. Dist. 231.

**931.** 1. *Construed with Reference to Common Law.* — State v. Central of Georgia R. Co., 109 Ga. 716, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 931.

**931.** (1) *Legislative*. — See note 7.

**932.** (2) *Judicial*. — See note 3.

*d.* SUBSEQUENT NONJUDICIAL INTERPRETATION — (1) *Generally* — Should Be Resorted to Only Where Ambiguity Exists. — See note 5.

(2) *Legislative*. — See note 9.

**933.** *Illustrations*. — See note 2.

(3) *Executive*. — See note 4.

*e.* RELATIVE CONSTITUTIONAL CONSTRUCTION — (1) *Federal and State Constitutions Compared* — (a) *The Federal Constitution*. — See note 8.

**934.** (b) *State Constitutions — Legislative Powers Not Prohibited May Be Exercised*. — See note 3.

*Inhibitions May Be Implied*. — See note 6.

**935.** (2) *Provisions from Other Constitutions*. — See note 1.

(3) *Provisions Reincorporated in New Constitutions*. — See note 2.

*f.* CONSTRUCTION AS DETERMINED BY LOCAL JUDICIAL INTERPRETATION. — See notes 3, 5.

**931.** 6. General Rule as to Contemporaneous Construction. — *Levin v. U. S.*, (C. C. A.) 128 Fed. Rep. 826.

7. Contemporaneous Legislative Exposition. — *Frost v. Pfeiffer*, 26 Colo. 338; *Railroad Com'rs v. Market St. R. Co.*, 132 Cal. 677; *People v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34; *Denver v. Adams County*, (Colo. 1904) 77 Pac. Rep. 858; *State v. Central of Georgia R. Co.*, 109 Ga. 716, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 931; *Duffy v. New Orleans*, 49 La. Ann. 114; *State v. Parler*, 52 S. Car. 207; *McCully v. State*, 102 Tenn. 509, per Wilkes, J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 931; *State v. Tingey*, 24 Utah 225.

**932.** 3. Judicial Construction — *Stare Decisis*. — *McCully v. State*, 102 Tenn. 509, per Wilkes, J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 932.

5. Practical Construction Not Considered Where Meaning Clear. — *Fairbank v. U. S.*, 181 U. S. 283; *Knight v. Shelton*, 134 Fed. Rep. 423; *Burke v. Snively*, 208 Ill. 328, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 932; *St. Louis v. Dorr*, 145 Mo. 466, 68 Am. St. Rep. 575; *State v. Cornell*, 60 Neb. 276; *Wanser v. Hoos*, 60 N. J. L. 482, 64 Am. St. Rep. 600; *Virtue v. Freeholder*, 67 N. J. L. 139; *State v. Spears*, (Tenn. Ch. 1899) 53 S. W. Rep. 247; *Rasmusen v. Baker*, 7 Wyo. 117.

9. Importance of Legislative Construction. — *Epping v. Columbus*, 117 Ga. 263, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 932.

**933.** 2. *Beasley v. Ridout*, 94 Md. 641; *State v. Griffin*, 69 N. H. 1, 76 Am. St. Rep. 139. See also *Park v. Candler*, 114 Ga. 466, per Cobb, J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933.

Continued Acquiescence in Legislative Construction. — "The uniform construction given to a provision of the constitution by the legislature, with the silent acquiescence of the people, including the legal profession and the judiciary, and the injurious results which would ensue from the contrary interpretation, are proper elements of a legal judgment on the subject." *Com. v. State Treasurer*, 13 Pa. Dist. 242, quoting *Moers v. Reading*, 21 Pa. St. 188.

4. Executive Interpretation. — *Epping v. Co-*

*lumbus*, 117 Ga. 263, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933.

Executive interpretation of a constitutional provision will be followed only when the provision is ambiguous and the construction was contemporaneous with the adoption of the constitution and has been uniformly followed. *Knight v. Shelton*, 134 Fed. Rep. 423.

8. *Northwestern Nat. Bank v. Superior*, 103 Wis. 45, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933, 934; *State v. Holden*, 14 Utah 71, affirmed 169 U. S. 366. See also *McCully v. State*, 102 Tenn. 509, per Wilkes, J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933.

**934.** 3. State Legislation Valid unless Prohibited. — *Pannell v. Louisville Tobacco Warehouse Co.*, 113 Ky. 630; *State v. Swann*, 46 W. Va. 128, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 934.

6. *Cain v. Smith*, 117 Ga. 902, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 934; *Park v. Candler*, 114 Ga. 466, per Cobb, J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 934.

**935.** 1. Foreign Construction Adopted. — *Stein v. Morrison*, (Idaho 1904) 75 Pac. Rep. 246; *State v. Fortune*, 24 Mont. 154, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 935; *State v. Herried*, 10 S. Dak. 109; *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356.

Where the same provision appears in the constitutions of several states there can be no presumption that it was adopted from any particular state, and that the construction placed upon it in that state controls. *Voss v. Waterloo Water Co.*, 163 Ind. 69.

2. *Taylor v. State*, 131 Ala. 36.

3. States Bound by Federal Supreme Court's Construction of Federal Constitution. — *Caldwell v. Armour*, 1 Penn. (Del.) 545; *State v. Scampini*, 77 Vt. 92.

5. Federal Courts Follow State Courts' Construction of State Constitution. — *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112; *Noble v. Mitchell*, 164 U. S. 367; *Adams Express Co. v. Ohio*, 165 U. S. 194; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Merchants, etc., Bank v. Pennsylvania*, 167 U. S. 461; *Backus v. Ft. Street Union Depot Co.*, 169 U. S. 557; *Brown v. New Jersey*, 175 U. S. 172;

**938. VI. SUBJECT-MATTER OF CONSTITUTIONS — 1. The Bill of Rights — b. IN THE STATE CONSTITUTIONS — (2) Retroactive Laws — (a) When and How Inhibited — The Constitutions of Several States. — See note 1.**

The Constitution of the United States. — See note 3.

(b) Definition and Nature — A Retroactive or Retrospective Law. — See note 7.

**939.** The Phrase *Ex Post Facto*. — See note 1.

Construed Prospectively, Not Retrospectively. — See note 2.

**940.** Retrospective Laws Impairing State Rights. — See note 1.

(c) Classes — *aa. VALID — (aa) Curative and Validating Acts — aaa. In General.* — See note 2.

Curative Acts Validating Defective Deeds of Married Women. — See note 5.

**941.** Other Defective Conveyances and Contracts. — See note 4.

Curing Defects in Acts of Municipal Corporations. — See notes 7, 9.

**942.** See notes 1, 2, 7.

*Tullis v. Lake Erie, etc.*, R. Co., 175 U. S. 348; *Mason v. Missouri*, 179 U. S. 328, *affirming* 155 Mo. 486; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452; *League v. Texas*, 184 U. S. 156; *U. S. v. Board of Liquidation*, 75 Fed. Rep. 543, 41 U. S. App. 510; *Illinois Cent. R. Co. v. Ihlenberg*, (C. C. A.) 75 Fed. Rep. 873; *Robert J. Boyd Paving, etc., Co. v. Ward*, 85 Fed. Rep. 27, 55 U. S. App. 730; *Lapp v. Ritter*, 88 Fed. Rep. 108; *Liverpool, etc., Ins. Co. v. Clunie*, 88 Fed. Rep. 160; *Clark v. Russell*, 97 Fed. Rep. 900, 38 C. C. A. 547; *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335; *People's Nat. Bank v. Marye*, 107 Fed. Rep. 570, *modified* 191 U. S. 272; *Underground R. Co. v. New York*, 116 Fed. Rep. 952, *affirmed* 193 U. S. 416; *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144; *Busch v. Webb*, 122 Fed. Rep. 655; *Morenci Copper Co. v. Freer*, 127 Fed. Rep. 199.

And to the same effect as *Padelford v. Savannah*, 14 Ga. 506, set out in the original note, see *Kentucky Bank v. Stone*, 88 Fed. Rep. 383, *affirmed* 174 U. S. 408, 799.

Where the Constitutional Question Was Not Expressly Presented the decisions of state courts will not be followed. *Knight v. Shelton*, 134 Fed. Rep. 423.

**Decision Affecting Prior Contract.** — The construction of a statute by a state court which affects a contract made prior thereto will not bind the United States courts. *Jones v. Great Southern Fireproof Hotel Co.*, (C. C. A.) 86 Fed. Rep. 370, *reversed* 177 U. S. 449.

**Conflicting Decisions.** — Where the state courts for a long period upheld the constitutionality of a statute, then decided against it, federal courts will not follow the later decision so as to make it retroactive on rights acquired under the former decisions. *Loeb v. Columbia Tp.*, 91 Fed. Rep. 37, *reversed* 179 U. S. 472.

**938. 1. Retroactive Laws Not Prohibited — Washington.** — The Washington Constitution contains no prohibition against retrospective legislation. *State v. Whittlesey*, 17 Wash. 447.

**3. General Retrospective Laws Not Forbidden by Federal Constitution.** — *League v. Texas*, 184 U. S. 156.

7. See *Miller v. Hixson*, 64 Ohio St. 39.

**939. 1. Ex Post Facto Laws Concern Penal and Criminal Matters.** — *De Pass v. Bidwell*, 124 Fed. Rep. 615. See generally the title *Ex Post*

*Facto* LAWS, vol. 12, pp. 525, 526, and the Supplement thereto.

**2. Statutes Not Construed Retrospectively.** — *Rankin v. Schofield*, 70 Ark. 83; *Edelstein v. Carlile*, (Colo. 1904) 78 Pac. Rep. 680; *Thoeni v. Dubuque*, 115 Iowa 482; *Webster v. Auditor Gen.*, 121 Mich. 668; *Bartlett v. Ball*, 142 Mo. 28; *Litson v. Smith*, 68 Mo. App. 3 7; *Orman v. Van Arsdell*, (N. Mex. 1904) 78 Pac. Rep. 48; *Germania Sav. Bank v. Suspension Bridge*, 159 N. Y. 362; *Craig v. Herzman*, 9 N. Dak. 144; *Root v. Sweeney*, 12 S. Dak. 43; *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153. And see the title *STATUTES*, 693, 1.

**940. 1.** *League v. Texas*, 184 U. S. 156.

**2.** *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. Rep. 720, *affirmed* 177 U. S. 558; *Bacon v. Savannah*, 105 Ga. 62, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 940; *Davidge v. Binghamton*, 62 N. Y. App. Div. 525; *Swope v. Jordan*, 107 Tenn. 166, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 940. But see *Grand Rapids v. Lake Shore, etc.*, R. Co., 130 Mich. 238, 97 Am. St. Rep. 473, 9 Detroit Leg. N. 30.

**Act Validating Title.** — Where a deed to a church was invalid by reason of the nonincorporation of the grantee, it was held that the legislature had authority to validate the title in the grantee after incorporation, no private rights being affected thereby. *Central Baptist Church v. Manchester*, 21 R. I. 357.

**Mortgage Absolutely Void.** — Where, under a statute, a mortgage was void because it covered lands in two counties, it was held that no subsequent legislation could validate it. *Deny v. McCown*, 34 Oregon 47.

5. *Barrett v. Barrett*, 120 N. Car. 127.

**941. 4. A Statute Validating a Private Sale by Executors** has been upheld. *Kiskaddon v. Dodds*, 21 Pa. Super. Ct. 351.

**7. Curing Defective Execution by Counties.** — *Steele County v. Erskine*, 98 Fed. Rep. 215, 39 C. C. A. 173; *Fair v. Buss*, 117 Iowa 164.

**9. Where a School Board Was Illegally Organized**, a retroactive statute validating its organization and acts was held to be valid though at the time there was pending an appeal from a judgment declaring its organization and acts void. *State v. Vanhuse*, 120 Wis. 15.

**942. 1. School Bonds.** — See *State v. Dorsey*, 19 Wash. 120.

**2. Curing Defect in Election.** — *Lovejoy v.*

- 943.** Recording Acts. — See note 1.  
ccc. Wills. — See note 4.
- 945.** add. Official Proceedings. — See note 2.  
eee. Taxation. — See note 9.
- 946.** See note 1.  
(bb) Statutes Providing Remedies — aaa. In General. — See note 3.
- 947.** See note 1.  
bbb. No Vested Right in Remedies. — See notes 2, 3.

Beeson, 121 Ala. 605; Eastman v. McCarten, 70 N. H. 23, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 941, 942.

**942.** 7. Validating Contracts of Municipalities Invalid Merely for Want of Precedent Authority. New York L. Ins. Co. v. Cuyahoga County, 106 Fed. Rep. 123, 45 C. C. A. 233; Oakland v. Oakland Water Front Co., 118 Cal. 160; Schneck v. Jeffersonville, 152 Ind. 204; Chesapeake, etc., Telephone Co. v. Baltimore, 89 Md. 689; Kittinger v. Buffalo Traction Co., 160 N. Y. 377; Davidge v. Binghamton, 62 N. Y. App. Div. 525; Mill Creek Valley St. R. Co. v. Carthage, 9 Ohio Cir. Dec. 833, 18 Ohio Cir. Ct. 216; Daggett v. Lynch, 18 Utah 49; State v. Henry, 28 Wash. 38; State v. McGovern, 100 Wis. 666.

An Act Legalizing Warrants Issued by County Commissioners under an invalid law, but no validating the contracts under which the warrants were issued, was held to be an invasion of the judicial power, and unconstitutional. Felix v. Wallace County, 62 Kan. 832, 84 Am. St. Rep. 424.

Where Municipal Bonds Were Issued in Violation of the Constitution, the legislature cannot validate them. Coleman v. Broad River Tp., 50 S. Car. 321.

**943.** 1. Recording Acts — Prior Conveyances. — Citizens' State Bank v. Julian, 153 Ind. 655.

Where a statute provided that mortgages of personal property should be recorded in the county of the mortgagor's residence, and the mortgagor being a nonresident of the state, a mortgage was recorded in the county where the property was located, a subsequent statute validating the mortgage was held to be constitutional and to render the lien thereof paramount to that of an attachment levied, but not adjudicated, pending the passage of the statute. Evans-Snyder-Buel Co. v. McFadden, 105 Fed. Rep. 293, 44 C. C. A. 494, affirmed 185 U. S. 505.

**4. Retrospective Operation of General Statutes Regulating Operation of Wills.** — To the same effect as Hoffman v. Hoffman, 26 Ala. 544, stated in the original note, see People's Loan, etc., Bank v. Garlington, 54 S. Car. 413, 71 Am. St. Rep. 800, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 944, note.

**945.** 2. Proceedings Formally Defective. — Farnsworth Loan, etc., Co. v. Commonwealth Title Ins., etc., Co., 84 Minn. 62.

A statute validating proceedings of a taxing board conducted at a meeting not authorized by law has been upheld. Seymour First Nat. Bank v. Isaacs, 161 Ind. 278.

**9. When Curative Acts Valid — Cannot Cure Want of Jurisdiction.** — Covington First Nat. Bank v. Covington, 103 Fed. Rep. 523, to the same effect as Hart v. Henderson, 17 Mich. 218, set out in the original note.

**946.** 1. Special Taxes — Curing Defects in Levy. — Hall v. Street Com'rs, 177 Mass. 434; Smith v. Buffalo, 159 N. Y. 427; Nottage v. Portland, 35 Oregon 539, 76 Am. St. Rep. 513.

But Where the Constitution Expressly Prohibited Retroactive Legislation the right to cure a defective levy was denied. Evans v. Denver, 26 Colo. 193.

**3. Providing Remedies.** — Mills v. Geer, 111 Ga. 275; Lay v. Sheppard, 112 Ga. 111; Mutual Ben. L. Ins. Co. v. Winne, 20 Mont. 20; Jameson v. Pierce, 78 N. Y. App. Div. 9. See also Philadelphia v. Athow, 10 Pa. Dist. 187, affirmed 20 Pa. Super. Ct. 486.

**947.** 1. Enforcing Existing Moral Obligations. — Erskine v. Steele County, 87 Fed. Rep. 630; State v. Gunn, 92 Minn. 436; Matter of Greene, 166 N. Y. 485, affirming 55 N. Y. App. Div. 475.

Imposing on Municipality Payment of Unenforceable but Just Obligation. — Guthrie Nat. Bank v. Guthrie, 173 U. S. 528; New York L. Ins. Co. v. Cuyahoga County, 106 Fed. Rep. 123, 45 C. C. A. 233.

**2. Laws Regulating Remedies Confer No Vested Rights — United States.** — Backus v. Ft. Street Union Depot Co., 169 U. S. 557; Red River Valley Nat. Bank v. Craig, 181 U. S. 548; Campbell v. Iron-Silver Min. Co., (C. C. A.) 83 Fed. Rep. 643.

Arkansas. — Steers v. Kinsey, 68 Ark. 360, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 947.

Colorado. — People v. District Ct., 28 Colo. 161.

Georgia. — Du Bignon v. Brunswick, 106 Ga. 317.

Illinois. — People v. Binns, 192 Ill. 68; Chicago, etc., R. Co. v. Guthrie, 192 Ill. 579.

Kentucky. — Chattaroi R. Co. v. Kinner, 81 Ky. 221.

Maine. — Leavitt v. Canadian Pac. R. Co., 90 Me. 153.

Michigan. — Ovid First Nat. Bank v. Steel. (Mich. 1904) 99 N. W. Rep. 786, 11 Detroit Leg. N. 120.

Missouri. — Roenfeldt v. St. Louis, etc., R. Co., 180 Mo. 554; Schuermann v. Union Cent. L. Ins. Co., 165 Mo. 641.

Montana. — Bullard v. Smith, 28 Mont. 387.

North Dakota. — Craig v. Herzman, 9 N. Dak. 144.

Ohio. — South End Bank v. McGuffey, 1 Ohio Cir. Dec. 53.

Oklahoma. — Youst v. Willis, 5 Okla. 413.

Pennsylvania. — Donoghue v. Consolidated Traction Co., 201 Pa. St. 181; Kiskaddon v. Dodds, 21 Pa. Super. Ct. 351.

Rhode Island. — Island Sav. Bank v. Galvin, 20 R. I. 347.

Texas. — Watson v. Boswell, (Tex. Civ. App. 1903) 73 S. W. Rep. 985.

**948.** See notes 1, 4, 5.

**949.** See notes 4, 5.

**950.** See note 2.

ccc. Evidence and Witnesses. — See notes 3, 4.

**951.** add. Statutes of Limitations — Legislative Power to Change Statute of Limitations. — See note 1.

**952.** Changed Statute May Operate on Existing Causes of Action. — See note 1.

Period of Redemption from Judicial Sales. — See note 2.

Barring All Suit on Existing Cause of Action — Reviving Barred Cause. — See note 3.

*Utah.* — *Kirkman v. Bird*, 22 Utah 100, 83 Am. St. Rep. 774, dismissed 46 U. S. (L. ed.) 1262.

*Vermont.* — *Flagg v. Locke*, 74 Vt. 320.

*Wisconsin.* — *Blonde v. Menominee Bay Shore Lumber Co.*, 106 Wis. 540.

See also the title **STATUTES, 695. 5 et seq.**

**947. 3. Action Not to Abate by Death — Pending Action.** — *Missouri, etc., R. Co. v. Settle*, 19 Tex. Civ. App. 357; *Houston, etc., R. Co. v. Rogers*, 15 Tex. Civ. App. 680.

**Act Legalizing Illegal Tax Defeats Pending Suit.** — *Nottage v. Portland*, 35 Oregon 539, 76 Am. St. Rep. 513.

**Act Providing Remedy to Enforce Tax Lien.** — See *League v. Texas*, 184 U. S. 156; *Los Angeles County v. Spencer*, 126 Cal. 670, 77 Am. St. Rep. 217.

**A Statute Providing for the Redemption of the Interest of the Debtor in Real Estate.** — See *State Sav. Bank v. Matthews*, 123 Mich. 56; *Canadian, etc., Mortg., etc., Co. v. Blake*, 24 Wash. 102, 85 Am. St. Rep. 946.

**Right Founded Solely on Statute — Effect of Repeal.** — *Wilson v. Head*, 184 Mass. 515.

**Act Cutting Off Defense that Contracts Are Against Public Policy or Statute.** — See *Clarke v. Darr*, 156 Ind. 692.

**An Act Avoiding Liens Obtained by Legal Proceedings Against a Bankrupt** is constitutional. *In re Rhoads*, 98 Fed. Rep. 399.

**The Right of Appeal** may be abolished at the will of the legislature. *Insurance Co. of North America v. Schall*, 96 Md. 225; *North Point Consol. Irrigation Co. v. Utah, etc., Canal Co.*, 14 Utah 155.

**948. 1. Act Divesting or Impairing Attachment Lien.** — Congress has power to enact a statute divesting or impairing the lien of an attachment. *Evans-Snider-Buel Co. v. McFadden*, 105 Fed. Rep. 293, 44 C. C. A. 494, affirmed 185 U. S. 505.

**4. Legal Changed to Equitable Remedy, or Vice Versa.** — *Shickel v. Berryville Land, etc., Co.*, 99 Va. 88, 3 Va. Sup. Ct. Rep. 45.

**5. Statutes in Force at Time Right to Costs Accrues Control.** — *League v. Texas*, 184 U. S. 156.

**Law in Force at Time of Verdict Governs.** — *Boise City Irrigation, etc., Co. v. Stewart*, (Idaho 1904) 77 Pac. Rep. 25, 321; *Defendorf v. Defendorf*, 42 N. Y. App. Div. 166.

**949. 4. A Statute Providing for the Collection of Interest**, where none was collectible before, was held to be valid. *League v. Texas*, 184 U. S. 156.

**5. Statutes Changing the Parties.** — In *Georgia* a constitutional requirement that suits against a county should be brought in the name of the county was held not to affect a suit theretofore

properly brought against the county commissioners. *Conyers v. Road, etc., Com'rs*, 116 Ga. 101. See further the title **STATUTES, 697. 2.**

**Substituting Receiver in Action Against Insolvent Bank.** — Where an act incorporating a bank imposed individual liability on the stockholders for the debts of the bank, a later statute making that liability an asset of the bank recoverable by the receiver, was held not to interfere with any vested right of a creditor of the bank. *Moore v. Ripley*, 106 Ga. 556.

**950. 2. The Legislature Can Change a Rule of Practice.** — See *State v. Fourchy*, 106 La. 743.

**3. Right to Modify Rules of Evidence.** — *Cunningham v. Dixon*, 1 Marv. (Del.) 163; *Mallery v. Frye*, 21 App. Cas. (D. C.) 105; *Boise City Irrigation, etc., Co. v. Stewart*, (Idaho 1904) 77 Pac. Rep. 25, 321; *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447; *Wheelock v. Myers*, 64 Kan. 47, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950; *Grinky v. Durfee*, (Mich. 1904) 100 N. W. Rep. 171, 11 Detroit Leg. N. 177; *State v. Heldenbrand*, 62 Neb. 136; *Harris v. Harsch*, 29 Oregon 562; *McKinstry v. Collins*, 76 Vt. 221, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950; *Herrick v. Niesz*, 16 Wash. 74; *Sandberg v. State*, 113 Wis. 578. And see the titles **EVIDENCE, 550. 4 et seq.**; **IMPAIRMENT OF OBLIGATION OF CONTRACTS, 1050. 1 et seq.**; **STATUTES, 647. 3.**

**4. The Question Who Are Competent Witnesses.** — *Li Sing v. U. S.*, 180 U. S. 486; *Burk v. Putnam*, 113 Iowa 232, 86 Am. St. Rep. 372.

**951. 1. Statutes of Limitations.** — *Edelstein v. Carlile*, (Colo. 1904) 78 Pac. Rep. 680; *Maxwell v. Devalinger*, 2 Penn. (Del.) 504; *Louisville, etc., R. Co. v. Williams*, (Ky. 1897) 41 S. W. Rep. 287; *Soper v. Lawrence Bros. Co.*, 98 Me. 268, 99 Am. St. Rep. 397; *Cranor v. School Dist.*, 81 Mo. App. 152; *Kreyling v. O'Reilly*, 97 Mo. App. 384; *Clay v. Iseminger*, 187 Pa. St. 108; *Snider v. Brown*, (Tenn. Ch. 1898) 48 S. W. Rep. 377. See also the titles **LIMITATION OF ACTIONS, 168. 7 et seq.**, **174. 4**; **STATUTES, 700. 1.**

**952. 1. Modified Statute Applies to Existing Causes of Action.** — *Guterman v. Wishon*, 21 Mont. 458; *Rodenbaugh v. Philadelphia Trac-tion Co.*, 190 Pa. St. 358.

**2. Lessening Time of Redemption from Judicial Sales.** — So the legislature may lessen the time allowed to redeem from tax sales. *Muirhead v. Sands*, 111 Mich. 487.

But it has been held that the time cannot be extended retrospectively. *State v. Sears*, 29 Oregon 580, 54 Am. St. Rep. 808.

**3. Reasonable Time to Prosecute Must Be Al-**



**953.** See note 1.

**Statutes Limiting the Duration of Judgment Liens.** — See note 2.

*See*. Divorce and Marriage — **The Legislature Has Power to Validate Prior Invalid Marriages.** — See note 6.

**954.** *fff.* Usury Laws. — See note 1.

(cc) *Penalty Statutes.* — See note 3.

**955.** See note 1.

bb. **INVALID** — (aa) *General Rule.* — See note 2.

**956.** (bb) *What Are Vested Rights.* — See note 1.

**Illustrations.** — See notes 4, 6.

lowed. — *Rankin v. Schofield*, 70 Ark. 83; *Friedmann v. McGowan*, 1 Penn. (Del.) 436; *Thoeni v. Dubuque*, 115 Iowa 482; *Relyea v. Tomahawk Paper, etc., Co.*, 102 Wis. 301, 72 Am. St. Rep. 878.

**953. 1. Cannot Revive Cause of Action Already Barred.** — *Edelstein v. Carlile*, (Colo. 1904) 78 Pac. Rep. 680; *Clarke v. Darr*, 156 Ind. 692. *Contra*, *Dunbar v. Boston, etc., R. Corp.*, 181 Mass. 383; *Orman v. Van Arsdell*, (N. Mex. 1904) 78 Pac. Rep. 48; *Schnell v. Jay*, 4 Okla. 157. And see the title **LIMITATION OF ACTIONS**, 171. *1 et seq.*

**2. Limiting Judgment Lien.** — *Devalinger v. Maxwell*, 4 Penn. (Del.) 185; *Eaton v. Guarantee Co.*, 11 N. Dak. 79, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 953; *Spencer v. Rippe*, 7 Okla. 608. See also *Bettman v. Cowley*, 19 Wash. 207; *Palmer v. Laberee*, 23 Wash. 409; *Raught v. Lewis*, 24 Wash. 47.

**6. Validating Prior Marriages and Legitimizing Children.** — A statute validating bigamous marriages on the death of the former husband or wife was held to be valid and to apply to marriages occurring before the act, though the impediment was not removed by death until after the act. *Lufkin v. Lufkin*, 182 Mass. 476.

**954. 1. Usury.** — *Iowa Sav., etc., Assoc. v. Heidt*, 107 Iowa 297, 70 Am. St. Rep. 197; *Hardaway v. Lilly*, (Tenn. Ch. 1898) 48 S. W. Rep. 712.

**The Repeal of a Law Cutting Off the Defense of usury does not restore the right.** *Edworthy v. Iowa Sav., etc., Assoc.*, 114 Iowa 220.

**And the Subsequent Repeal of the Validating Act** will not operate to invalidate contracts made valid by it. *Kendrick v. Kyle*, 78 Miss. 278.

**3. Repeal Pending Action Abates Action.** — *Royston v. Miller*, 76 Fed. Rep. 50; *Anderson v. Byrnes*, 122 Cal. 272; *Pannell v. Louisville Tobacco Warehouse Co.*, 113 Ky. 630; *Cleveland, etc., R. Co. v. Wells*, 65 Ohio St. 313; *L'Association Pharmaceutique v. Livernois*, 9 Quebec Q. B. 243.

**955. 1. Repeal After Judgment.** — *Cushman v. Hale*, 68 Vt. 444. But see *Dunham v. Anders*, 128 N. Car. 207, 83 Am. St. Rep. 668, holding that a judgment for a penalty rendered in a justice's court confers a vested right, which can be divested only by reversal on appeal, and the repeal of the statute giving the penalty while the case is pending on appeal does not affect the judgment.

**2. Vested Rights Cannot Be Impaired** — *United States*. — *McCullough v. Virginia*, 172 U. S. 102; *Fitzgerald v. Weidenbeck*, 76 Fed. Rep. 695; *Wilson v. Brochon*, 95 Fed. Rep. 82; *State*

*Trust Co. v. Kansas City, etc., R. Co.*, 115 Fed. Rep. 367.

*Arkansas*. — *Moore v. Irby*, 69 Ark. 102.

*California*. — *Teralta Land, etc., Co. v. Shaffer*, 116 Cal. 518, 58 Am. St. Rep. 194; *Kavanagh v. Board of Police*, 134 Cal. 50; *Matter of Newlove*, 142 Cal. 377.

*Colorado*. — *Day v. Madden*, 9 Colo. App. 464.

*Georgia*. — *Waters v. Dixie Lumber, etc., Co.*, 106 Ga. 592, 71 Am. St. Rep. 281.

*Illinois*. — *Young v. Jones*, 180 Ill. 216; *Steger v. Traveling Men's Bldg., etc., Assoc.*, 208 Ill. 236, 100 Am. St. Rep. 225; *Porter v. Glenn*, 87 Ill. App. 106; *New Holland v. Holland*, 99 Ill. App. 251, reversed 197 Ill. 593.

*Indiana*. — *Baltimore, etc., R. Co. v. Reed*, 158 Ind. 25, 92 Am. St. Rep. 293; *Johnson v. Gebbauer*, 159 Ind. 271.

*Iowa*. — *Bottorff v. Lewis*, 121 Iowa 27.

*Kentucky*. — *Mitchell v. Violet*, 104 Ky. 77.

*Minnesota*. — *Shell v. Matteson*, 81 Minn. 41, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 955.

*Missouri*. — *Arnold v. Willis*, 128 Mo. 145; *Gladney v. Sydnor*, 172 Mo. 318, 95 Am. St. Rep. 517; *Chiles v. School Dist.*, 103 Mo. App. 240.

*Montana*. — *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, 25 Mont. 41.

*Nebraska*. — *Finders v. Bodle*, 58 Neb. 57.

*New York*. — *Matter of Pell*, 171 N. Y. 48, 89 Am. St. Rep. 791; *Roddy v. Brooklyn Heights R. Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 373, affirmed 32 N. Y. App. Div. 311; *McCann v. New York*, 52 N. Y. App. Div. 358, affirmed 166 N. Y. 587; *Davidge v. Binghamton*, 62 N. Y. App. Div. 525; *Young v. Rochester*, 73 N. Y. App. Div. 81.

*North Dakota*. — *Conrad v. Smith*, 6 N. Dak. 337.

*Ohio*. — *Cameron v. Goebel*, 11 Ohio Cir. Dec. 118, 20 Ohio Cir. Ct. 268.

*Texas*. — *Maynard v. Freeman*, (Tex. Civ. App. 1900) 60 S. W. Rep. 334.

*Utah*. — *In re Handley*, 15 Utah 212, 62 Am. St. Rep. 926.

*Washington*. — *State v. Superior Ct.*, 21 Wash. 186; *State v. Bridges*, 22 Wash. 64, 79 Am. St. Rep. 914.

*West Virginia*. — *Johnson v. Sanger*, 49 W. Va. 405.

*Wisconsin*. — *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153.

**956. 1. Vested Rights Defined.** — *Royston v. Miller*, 76 Fed. Rep. 50.

**4. Defective Acknowledgments.** — *Merchants Bank v. Ballou*, 98 Va. 112, 81 Am. St. Rep. 715.

**6. Alimony decreed by a competent court is**

**957. Husband's Interest in Wife's Personality.** — See note 1.(cc) *What Are Not Vested Rights.* — See notes 2, 3.**958. c. IN THE FEDERAL CONSTITUTION — (1) *The Original Draft* —****(b) Privileges and Immunities of Citizens of Other States.** — See notes 3, 4.**959.** See note 1.

a vested right. *Livingston v. Livingston*, 74 N. Y. App. Div. 261, *affirmed* 173 N. Y. 377; *Goodsell v. Goodsell*, 82 N. Y. App. Div. 65.

**957. 1. Husband's Interest in Wife's Chattels.** — *Winn v. Riley*, 151 Mo. 61, 74 Am. St. Rep. 517.

**The Right of the Husband to the Possession of the Wife's Realty** is a vested right, not subject to impairment by legislation. *Vanata v. Johnson*, 170 Mo. 269.

**The Husband's Power of Alienation Over the Community Property** cannot be divested by legislation enacted after its acquisition. *Spreckels v. Spreckels*, 116 Cal. 339, 58 Am. St. Rep. 170.

But a statute giving community property to the survivor vests no right in the survivor which the legislature cannot take away. *Warburton v. White*, 18 Wash. 511.

**2. Expectancies Not Vested** — *United States*. — *Royston v. Miller*, 76 Fed. Rep. 50.

*Alabama*. — *Scales v. Otts*, 127 Ala. 582.

*Illinois*. — *In re Day*, 181 Ill. 73.

*Indiana*. — *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029.

*Indian Territory*. — *Muskogee Nat. Telephone Co. v. Hall*, (Indian Ter. 1901) 64 S. W. Rep. 600.

*Michigan*. — *Webster v. Auditor Gen.*, 121 Mich. 668; *Railroad Com'rs v. Grand Rapids, etc.*, R. Co., 130 Mich. 248, 9 Detroit Leg. N. 10.

*New York*. — *Matter of Stebbins*, 41 N. Y. App. Div. 269; *Matter of Vanderbilt*, 50 N. Y. App. Div. 246, *affirmed* 163 N. Y. 597; *Matter of Opening East One Hundred and Seventy-sixth St.*, 33 N. Y. App. Div. 365, *affirmed* 158 N. Y. 668; *In re Wilkins Place*, (Supm. Ct. Spec. T.) 54 N. Y. Supp. 65; *Matter of Pell*, 60 N. Y. App. Div. 286, *reversed* 171 N. Y. 48, 89 Am. St. Rep. 791; *People v. Coler*, 71 N. Y. App. Div. 584, *affirmed* 173 N. Y. 103.

*Vermont*. — *Cushman v. Hale*, 68 Vt. 444.

**An Exemption from Taxation** given by the charter of a corporation subject to amendment or repeal is not a vested right. *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636.

**3. Dower Not a Vested Right.** — *Bartlett v. Ball*, 142 Mo. 28.

**958. 3. Does Not Limit State's Authority Over Its Own Citizens.** — *Brown v. New Jersey*, 175 U. S. 172; *Maxwell v. Dow*, 176 U. S. 581; *Matter of Johnson*, 139 Cal. 532, 96 Am. St. Rep. 161; *State v. Corson*, 67 N. J. L. 178; *State v. Holden*, 14 Utah 71, *affirmed* 169 U. S. 366.

**A Corporation Is Not a Citizen.** — *Blake v. McClung*, 172 U. S. 239; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Fire Dept. v. Stanton*, 28 N. Y. App. Div. 334. And see the title **CIVIL RIGHTS**, 69. 6.

**4. Right to Sue in Courts of Sister States.** — *Steed v. Harvey*, 18 Utah 367, 72 Am. St. Rep. 789.

A statute prohibiting foreign corporations from suing in the state until they had pro-

cured a certificate provided for by the statute has been held to be unconstitutional. *Hargraves Mills v. Harden*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 665.

**Discriminating License Tax.** — *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. Rep. 258; *Cullman v. Arndt*, 125 Ala. 581; *In re Jarvis*, 66 Kan. 329.

**Unequal Taxation.** — *Matter of Stanford*, 126 Cal. 112; *Mutual Reserve Fund L. Assoc. v. Augusta*, 109 Ga. 73. See also *State v. Travelers Ins. Co.*, 73 Conn. 255.

**959. 1. Does Not Confer Special Privileges or Give Extraterritorial Force to Laws.** — *In re Grice*, 79 Fed. Rep. 627, *reversed* 169 U. S. 284; *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831; *Duryea v. Muse*, 117 Wis. 399.

**The Use of Fishing Grounds Belonging to the State.** — *Com. v. Hilton*, 174 Mass. 29.

So the leasing of oyster beds may be confined to citizens of the state. *State v. Corson*, 67 N. J. L. 178.

**Nonresidents Hunting Game in a State** may be required to pay a fee for the privilege though no fee is exacted of resident hunters. *In re Eberle*, 98 Fed. Rep. 295.

**Requiring Security for Costs for Nonresident.** — *Kilmer v. Groome*, 19 Pa. Co. Ct. 339.

**Dispensing with Undertaking in Attachment Against Nonresidents.** — *Central L. & T. Co. v. Campbell Commission Co.*, 173 U. S. 84.

**Assignment of Claims for Collection Out of State.** — A statute prohibiting the sending of claims against residents out of the state for collection in another state is unconstitutional. *In re Flukes*, 157 Mo. 125, 80 Am. St. Rep. 619.

**A Regulation of the Liquor Traffic.** — *Daniels v. State*, 150 Ind. 348; *Hoboken v. Goodman*, 68 N. J. L. 217.

**Regulating Practice of Medicine.** — *Reetz v. Michigan*, 188 U. S. 505. And see the title **PHYSICIANS AND SURGEONS**, 781. 3.

**Laws Regulating the Practice of Dentistry** are valid. *Gothard v. People*, 32 Colo. 11; *State v. Chapman*, 69 N. J. L. 464; *State v. Board of Dental Examiners*, 31 Wash. 492.

**A Statute Prohibiting the Importation of Cattle** from a certain state within certain dates, except where a health certificate of a veterinary surgeon had been obtained, was sustained as a valid exercise of legislative power. *Reid v. Colorado*, 187 U. S. 137.

**Foreign Corporations — Act Preferring Resident Creditors.** — An act providing that upon the insolvency of a foreign corporation doing business in the state its property within the state should be appropriated primarily to the payment of resident creditors has been held to be unconstitutional. *Blake v. McClung*, 172 U. S. 239; *Blake v. McClung*, 176 U. S. 59; *Sully v. American Nat. Bank*, 178 U. S. 289; *Maynard v. Granite State Provident Assoc.*, 92 Fed. Rep. 435, 34 C. C. A. 438.

**961.** (2) *The First Ten Amendments* — (b) Character and Scope — First Ten Amendments Limit Only National Government. — See note 2.

**962.** Specific Provisions — Illustrations. — See notes 4, 5, 7, 8, 9, 10

**963.** (3) *The Thirteenth Amendment* — What Are Involuntary Servitudes. — See notes 3, 4.

**964.** See note 2.

**965.** (4) *The Fourteenth Amendment* — (a) Purpose and Effect — Effect of Fourteenth Amendment on Application of First Ten Amendments. — See note 6.

**966.** (b) Privileges and Immunities — *aa.* MEANING OF PHRASE — No New Privileges and Immunities Were Conferred. — See note 4.

*bb.* TO WHOM AVAILABLE. — See note 5.

*cc.* TO WHAT RIGHTS APPLICABLE — The Right to Labor. — See note 6.

**961.** 2. First Ten Amendments to Federal Constitution Limit Only Federal Action. — Brown *v.* New Jersey, 175 U. S. 172; Maxwell *v.* Dow, 176 U. S. 581; Clark *v.* Russell, 97 Fed. Rep. 900, 38 C. C. A. 541.

**962.** 4. Fifth Amendment. — Capital City Dairy Co. *v.* Ohio, 183 U. S. 238; State *v.* Comer, 157 Ind. 611; Kimball *v.* Grantsville City, 19 Utah 368.

**5.** Presentment and Indictment. — Brown *v.* New Jersey, 175 U. S. 172; Bolln *v.* Nebraska, 176 U. S. 83; Maxwell *v.* Dow, 176 U. S. 581; Davis *v.* Burke, 179 U. S. 399; Green *v.* State, 119 Ga. 120; State *v.* Jones, 168 Mo. 398; State *v.* Little Whirlwind, 22 Mont. 425; People *v.* Scannell, (Ct. Gen. Sess.) 37 Misc. (N. Y.) 345; Matter of Maxwell, 19 Utah 495, *affirmed* 176 U. S. 581; State *v.* Baldwin, 15 Wash. 15.

**7.** Due Process of Law. — Shaw *v.* Silverstein, 21 R. I. 500; Matter of McKee, 19 Utah 231; Matter of Maxwell, 19 Utah 495, *affirmed* 176 U. S. 581.

**8.** Taking Private Property for Public Use. — Fallbrook Irrigation Dist. *v.* Bradley, 164 U. S. 112.

**9.** Speedy and Public Trial. — Matter of McKee, 19 Utah 231; Matter of Maxwell, 19 Utah 495, *affirmed* 176 U. S. 581.

**10.** Right of Trial by Jury in Civil Cases. — Maxwell *v.* Dow, 176 U. S. 581.

**963.** 3. Meaning of Personal Servitude. — One held to work out a debt to the person holding him is subjected to a condition of bondage violative of the Thirteenth Amendment. U. S. *v.* McClellan, 127 Fed. Rep. 971.

**4.** Effects Not Limited to African Race. — Peonage Cases, 123 Fed. Rep. 671.

**964.** 2. Contracts of Sailors — Restraint of Liberty. — But where there is no voluntary contract, and aliens are forced to labor on American vessels, there is "involuntary servitude" within the meaning of the Thirteenth Amendment. *In re Chung Fat*, 96 Fed. Rep. 202.

**965.** 6. Does Fourteenth Amendment Render Prior Amendments Applicable to States? — See Maxwell *v.* Dow, 176 U. S. 581; People *v.* O'Brien, 81 N. Y. App. Div. 60, *affirmed* 176 N. Y. 253, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 695.

**966.** 4. Conferred No New Privileges. — Maxwell *v.* Dow, 176 U. S. 581.

**5.** Rights of Citizens of United States Protected. — State *v.* Holden, 14 Utah 71, *affirmed* 169 U. S. 366; Steed *v.* Harvey, 18 Utah 367, 72 Am. St. Rep. 789; Matter of McKee, 19 Utah 231; State *v.* Dodge, 76 Vt. 197.

A Child Born of Chinese Parents, who, though domiciled in the United States, are subjects of China, is a citizen of the United States within the meaning of the Fourteenth Amendment. U. S. *v.* Wong Kim Ark, 169 U. S. 649.

**6.** Right to Pursue Employment and Make Contracts — *United States*. — Williams *v.* Fears, 179 U. S. 270, *affirming* 110 Ga. 584; Jones *v.* Great Southern Fireproof Hotel Co., 79 Fed. Rep. 477, *reversed* (C. C. A.) 86 Fed. Rep. 370; *In re Grice*, 79 Fed. Rep. 627, *reversed* 169 U. S. 284; U. S. *v.* Sweeney, 95 Fed. Rep. 434; Niagara F. Ins. Co. *v.* Cornell, 110 Fed. Rep. 816; Greenwich Ins. Co. *v.* Carroll, 125 Fed. Rep. 121.

*Alabama*. — Toney *v.* State, (Ala. 1904) 37 So. Rep. 332.

*California*. — Johnson *v.* Goodyear Min. Co., 127 Cal. 4, 78 Am. St. Rep. 17; Gibbs *v.* Tally, 133 Cal. 373; Shaughnessy *v.* American Surety Co., 138 Cal. 543; San Francisco Lumber Co. *v.* Bibb, 139 Cal. 192.

*Illinois*. — Ruhstrat *v.* People, 185 Ill. 133, 76 Am. St. Rep. 30; Gillespie *v.* People, 188 Ill. 176, 80 Am. St. Rep. 176; Fiske *v.* People, 188 Ill. 206; Mathews *v.* People, 202 Ill. 389, 95 Am. St. Rep. 241; Chicago *v.* Hulbert, 205 Ill. 346; Kellyville Coal Co. *v.* Harrier, 207 Ill. 624, 99 Am. St. Rep. 240.

*Indiana*. — Republic Iron, etc., Co. *v.* State, 160 Ind. 379.

*Maine*. — State *v.* Montgomery, 94 Me. 192, 80 Am. St. Rep. 386.

*Missouri*. — State *v.* Associated Press, 159 Mo. 410, 81 Am. St. Rep. 368; State *v.* Missouri Tie, etc., Co., 181 Mo. 536.

*New York*. — People *v.* Coler, 166 N. Y. 1, 82 Am. St. Rep. 605; People *v.* Orange County Road Constr. Co., 175 N. Y. 84; People *v.* Hagan, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 155; People *v.* Caldwell, 64 N. Y. App. Div. 46, *affirmed* 168 N. Y. 671; Cody *v.* Dempsey, 86 N. Y. App. Div. 335.

*Ohio*. — Palmer *v.* Tingle, 55 Ohio St. 423; *In re Preston*, 63 Ohio St. 428, 81 Am. St. Rep. 642; Cleveland *v.* Clements Bros. Constr. Co., 67 Ohio St. 197, 93 Am. St. Rep. 670; State *v.* Norton, 7 Ohio Dec. 354.

*Pennsylvania*. — Kussel *v.* Erie, 8 Pa. Dist. 105; Com. *v.* Brown, 8 Pa. Super. Ct. 339.

*Tennessee*. — Marshall, etc., Co. *v.* Nashville, 109 Tenn. 495.

**Advancing Wages to Seamen.** — The act of Congress making it a misdemeanor to advance wages to seamen, and providing that the vessel, its master or owner, is not, by any such ad-

**966.** But the Right to Practice Law in the State Courts. — See note 7.

**967.** The Right of Suffrage. — See note 1.

(e) Equal Protection of the Laws — *aa.* IN GENERAL — Prohibits Discriminating Laws. — See notes 7, 8.

vance payment, absolved from full payment of wages actually earned, does not infringe the constitutional right to contract. *Patterson v. Bark Eudora*, 190 U. S. 169.

**Agent of Foreign Corporation.** — The Constitution does not confer the right to act as agent of a foreign insurance company prohibited from doing business in a state. *Hickman v. State*, 62 N. J. L. 499, *affirmed* 63 N. J. L. 666.

**Redemption of Store Orders.** — "The right to contract is not absolute, \* \* \* but may be subjected to the restraints demanded by the safety and welfare of the state." And a statute requiring the redemption in money of store orders issued by a corporation to its employees was held a valid exercise of legislative authority. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13.

**A Statute Prohibiting Dealing in Options** was held not to infringe the Fourteenth Amendment. *Booth v. Illinois*, 184 U. S. 425.

**Sales of Stocks on Margin.** — A statute making void all contracts for sales of stocks of corporations on margins does not violate the right to contract guaranteed by the Federal Constitution. *Otis v. Parker*, 187 U. S. 606.

**966. 7. Right to Practice Law.** — *Philbrook v. Newman*, 85 Fed. Rep. 139.

**The Right to Practice Medicine** is not a privilege or immunity that is protected. *Allopathic State Board, etc., v. Fowler*, 50 La. Ann. 1358.

**The Right to Sell Intoxicating Liquors** is not conferred or protected by the Fourteenth Amendment. *Jacobs Pharmacy Co. v. Atlanta*, 89 Fed. Rep. 244.

**967. 1. Right of Suffrage.** — *Lackey v. U. S.*, 107 Fed. Rep. 114, 46 C. C. A. 189; *Dorsey v. Brigham*, 177 Ill. 250, 69 Am. St. Rep. 228.

**7. Legislation Unequal in Operation.** — *In re Yot Sang*, 75 Fed. Rep. 983; *In re Grice*, 79 Fed. Rep. 627, *reversed* 169 U. S. 284; *Fraser v. McConway, etc., Co.*, 82 Fed. Rep. 257; *In re Hong Wah*, 82 Fed. Rep. 623; *Union Sewer-Pipe Co. v. Connelly*, 99 Fed. Rep. 354, *affirmed* 184 U. S. 540; *Louisville, etc., R. Co. v. McChord*, 103 Fed. Rep. 216, *reversed* 183 U. S. 483; *Williamson v. Liverpool, etc., Ins. Co.*, 105 Fed. Rep. 31; *Union County Nat. Bank v. Ozan Lumber Co.*, 127 Fed. Rep. 206; *Phenix Ins. Co. v. Hart*, 112 Ga. 765; *Cody v. Dempsey*, 86 N. Y. App. Div. 335; *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245; *People v. Windholz*, 92 N. Y. App. Div. 569; *Juniata Limestone Co. v. Fagley*, 187 Pa. St. 193, 67 Am. St. Rep. 579. See also the titles CIVIL RIGHTS, 79. 6; STATUTES, 570. 1, 682. 1 *et seq.*

**8. State Legislation Valid if Rights Alike When Circumstances Similar.** — *Meul v. People*, 198 Ill. 258, *quoting* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967; *Carthage v. Carlton*, 99 Ill. App. 338; *American Homestead Co. v. Karstendiek*, 111 La. 884; *State v. Darrah*, 152 Mo. 522, *quoting* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967.

**Illustrations.** — Examples of state statutes

held not to violate the equal-protection clause of the Fourteenth Amendment are the following: Giving a preference to nonstockholding depositors of savings banks. *Murphy v. Pacific Bank*, 130 Cal. 542. Requiring barbers to close on Sunday. *Petit v. Minnesota*, 177 U. S. 164. Requiring barbers in cities of a certain class to obtain licenses. *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893. Discriminating between bicycle riders under and over twelve years of age as to the use of sidewalks. *State v. Addrich*, 70 N. H. 391, 85 Am. St. Rep. 631. Discriminating between individuals and corporations doing a building and loan association business. *Brady v. Mattern*, 125 Iowa 158. Providing for the extension of city limits on certain classes of suburban property. *Clark v. Kansas City*, 176 U. S. 114; *Kansas City v. Union Pac. R. Co.*, 59 Kan. 427. Discriminating between veteran and other firemen in the matter of procedure for removal or dismissal. *People v. Folks*, 89 N. Y. App. Div. 171. Discriminating between gambling at race tracks and elsewhere. *New York v. Bennett*, 113 Fed. Rep. 515. Regulating the hours of labor for women in certain employments. *Wenham v. State*, 65 Neb. 394. Discriminating between tracts of land of one thousand acres and those upward of that acreage in the matter of tax forfeitures. *King v. Mullins*, 171 U. S. 404. Making special provision for punishment of an act done by a tramp. *State v. Hogan*, 63 Ohio St. 202, 81 Am. St. Rep. 626. Requiring vaccination of school children. *Viemeister v. White*, 88 N. Y. App. Div. 44, *affirmed* 179 N. Y. 235.

**Statutes Requiring the Payment of Attorney's Fees** by classes of corporations or persons in certain suits have frequently been upheld. Thus, such legislation has been sustained when directed against the following classes:

*Insurance Companies*, in actions based on failure to pay losses. *Farmer's, etc., Ins. Co. v. Dobney*, 189 U. S. 301; *Hartford F. Ins. Co. v. Redding*, (Fla. 1904) 37 So. Rep. 62; *British-America Assur. Co. v. Bradford*, 60 Kan. 82; *Lancashire Ins. Co. v. Bush*, 60 Neb. 116; *Farmers', etc., Ins. Co. v. Dobney*, 62 Neb. 213, 97 Am. St. Rep. 624; *Farmers' Mut. Ins. Co. v. Cole*, (Neb. 1903) 93 N. W. Rep. 730; *Lansing v. Commercial Union Assur. Co.*, (Neb. 1903) 93 N. W. Rep. 756.

So statutes imposing on insurance companies a penalty in addition to attorney's fees in actions to recover for losses have been declared to be valid. *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335; *Fidelity Mut. L. Assoc. v. Mettler*, 185 U. S. 308; *Fidelity, etc., Co. v. Dorough*, 107 Fed. Rep. 389, 46 C. C. A. 364; *Merchant's L. Assoc. v. Yoakum*, 98 Fed. Rep. 251, 39 C. C. A. 56; *Sun L. Ins. Co. v. Phillips*, (Tex. Civ. App. 1902) 70 S. W. Rep. 603; *New York L. Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 284; *Washington L. Ins. Co. v. Gooding*, 19 Tex. Civ. App. 490; *Fidelity, etc., Co. v. Allibone*, 15 Tex. Civ. App. 178.

**969.** *bb.* TO WHOM AVAILABLE — (*aa.*) *Chinese.* — A Law Forbidding Chinamen from Testifying For or Against Any White Person. — See note 1.

*Chinese Born Within the United States Are Citizens.* — See note 4.

[An Ordinance Establishing a Quarantine operating solely against Chinese inhabitants of a city is invalid as contravening the equal-protection clause.<sup>4a</sup>]

(*bb.*) *Miscellaneous Persons* — Rights of Municipal Corporations as Against States. — See note 6.

The Word "Persons" Includes Aliens. — See note 7.

(*cc.*) *Corporations.* — See note 8.

**970.** See note 1.

*Foreign Corporations.* — See note 2.

*cc.* IN TAXATION. — See notes 3, 4.

*dd.* IN EXERCISE OF POLICE POWER. — See note 5.

**971.** *ee.* TRIAL BY JURY AS AFFECTED BY THE FOURTEENTH AMENDMENT — *Negroes.* — See note 3.

*Mine Owners.* — Thompson *v.* Wise Boy Min., etc., Co., (Idaho 1903) 74 Pac. Rep. 958.

*Railroads.* — Atchison, etc., R. Co. *v.* Matthews, 174 U. S. 96; Gano *v.* Minneapolis, etc., R. Co., 114 Iowa 713, 89 Am. St. Rep. 393; Pfander *v.* Chicago, etc., R. Co., 86 Minn. 218.

*Mechanic's Lien Defendants.* — Dell *v.* Marvin, 41 Fla. 221, 79 Am. St. Rep. 171; Genest *v.* Las Vegas Masonic Bldg. Assoc., 11 N. Mex. 251.

*Defendants in Suits for Taxes.* — Liquidating Com'rs *v.* Marrero, 106 La. 130.

**Other Examples** of statutes held not to infringe the constitutional inhibition will be found in the various titles throughout this work. For decisions on the constitutionality of legislation on any given subject reference should be made to the title dealing with that particular subject.

**969. 1. Forbidding Chinamen to Testify.** — Li Sing *v.* U. S., 180 U. S. 486.

4. U. S. *v.* Wong Kim Ark, 169 U. S. 649.

**4a. Quarantine Against Chinese.** — Jew Ho *v.* Williamson, 103 Fed. Rep. 10.

6. Matter of Comesky, 83 N. Y. App. Div. 137, reversed 179 N. Y. 393.

7. Fraser *v.* McConway, etc., Co., 82 Fed. Rep. 257; State *v.* Montgomery, 94 Me. 192, 80 Am. St. Rep. 386.

8. **Corporations Entitled to Equal Protection as "Persons."** — Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150; Black *v.* Caldwell, 83 Fed. Rep. 880; Arkansas *v.* Kansas, etc., Coal Co., 96 Fed. Rep. 353, reversed 183 U. S. 185; Johnson *v.* Goodyear Min. Co., 127 Cal. 4, 78 Am. St. Rep. 17; Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 17, 1 Am. St. Rep. 301; Fire Dept. *v.* Stanton, 28 N. Y. App. Div. 334.

**970. 1. Discrimination Between Corporations Forbidden.** — New York *v.* Roberts, 171 U. S. 658.

2. **Foreign Corporations — United States.** — Fidelity Mut. L. Assoc. *v.* Mettler, 185 U. S. 308; New York L. Ins. Co. *v.* Cravens, 178 U. S. 389; Iowa L. Ins. Co. *v.* Lewis, 187 U. S. 335; Merchants' L. Assoc. *v.* Yoakum, 98 Fed. Rep. 251, 39 C. C. A. 56; Niagara F. Ins. Co. *v.* Cornell, 110 Fed. Rep. 816.

Arkansas. — Woodson *v.* State, 69 Ark. 521.

California. — Keystone Driller Co. *v.* Superior Ct., 138 Cal. 738.

Delaware. — Caldwell *v.* Armour, 1 Penn. (Del.) 545.

Iowa. — Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 77 Am. St. Rep. 548.

Michigan. — Pollock *v.* German F. Ins. Co., 132 Mich. 225, 9 Detroit Leg. N. 586.

Nebraska. — State *v.* Standard Oil Co., 61 Neb. 28, 87 Am. St. Rep. 449; State *v.* Fleming, (Neb. 1903) 97 N. W. Rep. 1063.

New York. — People *v.* Granite State Provident Assoc., 161 N. Y. 492.

North Carolina. — Debnam *v.* Southern Bell Telephone, etc., Co., 126 N. Car. 831.

Vermont. — Cook *v.* Howland, 74 Vt. 393, 93 Am. St. Rep. 912.

See also the title FOREIGN CORPORATIONS, 846. 3, 861. 1.

**A Provision for a Special Mode of Service** on foreign corporations is not a denial of equal protection of the laws. Hartford F. Ins. Co. *v.* Perkins, 125 Fed. Rep. 502.

3. **Taxation.** — Merchants', etc., Bank *v.* Pennsylvania, 167 U. S. 461; Magoun *v.* Illinois Trust, etc., Bank, 170 U. S. 283; American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89; Clark *v.* Titusville, 184 U. S. 329; State *v.* Travelers Ins. Co., 73 Conn. 255; Kersey *v.* Terre Haute, 161 Ind. 471; Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 77 Am. St. Rep. 548; State *v.* Hammond Packing Co., 110 La. 180, 98 Am. St. Rep. 459; Gay *v.* Thomas, 5 Okla. 1; Newport *v.* Mudgett, 18 Wash. 271. See also the titles TAXATION, 590. 3 *et seq.*; TAXATION (CORPORATE), 924. 3 *et seq.*

4. **Exempting Property Employed for Public Uses.** — Merchants', etc., Bank *v.* Pennsylvania, 167 U. S. 461. See also People *v.* Miller, 84 N. Y. App. Div. 168, modified 177 N. Y. 461.

An act exempting incomes of one thousand dollars or less from an income tax was held valid. Peacock *v.* Pratt, 121 Fed. Rep. 772, 58 C. C. A. 48.

5. **Police Power.** — State *v.* Schlenker, 112 Iowa 642, 84 Am. St. Rep. 360.

**971. 3. Bullock v. State**, 65 N. J. L. 557, 86 Am. St. Rep. 668; State *v.* Daniels, 134 N. Car. 641; State *v.* Brownfield, 60 S. Car. 509; Parker *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 1066; Hubbard *v.* State, 43 Tex. Crim. 564; Martin *v.* State, 44 Tex. Crim. 538. See also Carter *v.* Texas, 177 U. S. 442, reversing 39 Tex. Crim. 345; Dixon *v.* State, 74 Miss. 271.

**971.** (d) *Racial Discrimination — State Legislation.* — See note 10.

**972.** *Separate Schools.* — See note 1.

**973.** *d. RIGHTS GUARANTEED BY BOTH STATE AND FEDERAL CONSTITUTIONS — (1) Jural and Forensic Rights — (a) Free and Prompt Redress —*  
*bb. JUSTICE WITHOUT PURCHASE — Object of Provision.* — See note 2.

*Tax on Litigation — Fees — Security for Costs.* — See note 6.

*Tax-title Suits — Deposit in Court.* — See note 7.

*Jury Fee.* — See note 9.

**974.** (b) *Jury Trial — aa. IN GENERAL.* — See notes 2, 4, 5, 6.

**971. 10. Common Carriers.** — Chesapeake, etc., *R. Co. v. Com.*, (Ky. 1899) 51 S. W. Rep. 160.

**A Bootblack Stand** has been held to be a place of public accommodation, and within a statute requiring equal privileges at such places. *Burks v. Bosso*, 81 N. Y. App. Div. 530, reversed 180 N. Y. 341.

**A Bowling Alley** has been held to be within the terms of such a statute. *Johnson v. Humphrey Pop Corn Co.*, 24 Ohio Cir. Ct. 135.

**A Retail Liquor Saloon** is held in *Ohio* not to be a place of "public accommodation and amusement" within the meaning of the law. *Kellar v. Koerber*, 61 Ohio St. 388.

**972. 1. Schools.** — *Reynolds v. Board of Education*, 66 Kan. 672; *People v. School Board*, 161 N. Y. 598; *Martin v. Board of Education*, 42 W. Va. 514. See also *Cumming v. Board of Education*, 175 U. S. 528.

The regulations of a private school, supported in part by public appropriation, which exclude colored persons do not violate the Fourteenth Amendment of the Federal Constitution. *State v. Maryland Institute, etc.*, 87 Md. 643.

*Separate Schools for Chinese* may be provided. *Wong Him v. Callahan*, 119 Fed. Rep. 381.

*State Taxation for Purposes of Education.* — See *Hooker v. Greenville*, 130 N. Car. 472.

**973. 2. Justice Without Purchase — Object of Provision.** — *Christianson v. Pioneer Furniture Co.*, 101 Wis. 345, rehearing denied 101 Wis. 349.

**6. Security for Costs.** — *Grover's Succession*, 49 La. Ann. 1050; *Grinage v. Times-Democrat Pub. Co.*, 107 La. 121; *Venzano v. Weir*, 64 N. Y. App. Div. 483; *McLaughlin v. Kipp*, 82 N. Y. App. Div. 413; *Merrill v. Bowler*, 20 R. I. 226; *Mathewson v. Ham*, 21 R. I. 311; *Harrigan v. Gilchrist*, 121 Wis. 127.

Nor is the provision of the Constitution violated by requiring a litigant to pay certain costs as a condition precedent to proceeding with a trial. *Christianson v. Pioneer Furniture Co.*, 101 Wis. 345, rehearing denied 77 N. W. Rep. 917, 101 Wis. 349; or to pay the costs of a case as a condition precedent to proceeding with a new trial granted by the trial or appellate court. *Knee v. Baltimore City Pass. R. Co.*, 87 Md. 623.

**7. Tax-title Suits — Deposit in Court.** — *Bennett v. Davis*, 90 Me. 102; *Lombard v. McMillan*, 95 Wis. 627.

**9. Jury Fees.** — *Eckrich v. St. Louis Transit Co.*, 176 Mo. 621, 98 Am. St. Rep. 517.

**Advancement of Jury Fees in Criminal Prosecutions.** — *Hurd's Stat. Ill.*, c. 79, § 48, provides that in a civil action brought before a justice of the peace either party may have a jury trial

on demand made before commencement of the trial, provided he first pays the fees of the jurors. Section 167 of the same chapter provides that a person accused of a criminal offense cognizable by a justice may have a jury trial without being required to advance the jury fees. Where the defendant in a criminal prosecution demanded a jury trial, and the justice refused to summon the jury unless and until the jury fees were paid by the prosecuting witnesses, it was held that a mandamus would lie to compel the justice to summon the jury and proceed with the trial; that neither the state nor the prosecuting witness could be compelled to advance the jury fees, and that the logical result of the refusal of justices to summon juries until the fees therefor were paid would be that defendants could prevent their prosecution by the simple process of asserting their right of trial by jury. *Condit v. Lee*, 83 Ill. App. 537.

**974. 2. Consular Tribunals.** — A British subject tried for murder by a British consular court in Japan, which tries causes with a jury of five, in accordance with the order constituting the court, has no inalienable right as a British subject to be tried by a jury of twelve. *Ex p. Carew*, (1897) A. C. 719, 77 L. T. N. S. 1.

**4. Federal Provision a Restriction on Federal Government Only.** — *Williams v. Hert*, 110 Fed. Rep. 166; *Tilley v. Cox*, 119 Ga. 867, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 974; *Keith v. Henkleman*, 173 Ill. 137; *Eckrich v. St. Louis Transit Co.*, 176 Mo. 621, 98 Am. St. Rep. 517, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 974.

**5. Maxwell v. Dow**, 176 U. S. 581; *Williams v. Hert*, 110 Fed. Rep. 166; *Tilley v. Cox*, 119 Ga. 867; *Matter of McKee*, 19 Utah 231; *Matter of Maxwell*, 19 Utah 495, affirmed 176 U. S. 581; *Nichols v. Cherry*, 22 Utah 1.

**6. Relation to Time of Adoption of Constitution — California.** — *Haggin v. Kelly*, 136 Cal. 481. *Florida.* — *Hughes v. Hannah*, 39 Fla. 365; *Hathorne v. Panama Park Co.*, 44 Fla. 194. *Illinois.* — *George v. People*, 167 Ill. 447.

*Indian Territory.* — *Luce v. Garrett*, (Indian Ter. 1901) 64 S. W. Rep. 613; *Archard v. Farris*, (Indian Ter. 1902) 69 S. W. Rep. 821. *Iowa.* — *Galusha v. Wendt*, 114 Iowa 597. *Minnesota.* — *Nordeen v. Buck*, 79 Minn. 352. *Missouri.* — *State v. Hamey*, (Mo. 1901) 65 S. W. Rep. 946, 168 Mo. 167.

*Montana.* — *State v. Kennie*, 24 Mont. 45.

*Nebraska.* — *Yager v. Exchange Nat. Bank*, 52 Neb. 321; *Lett v. Hammond*, 59 Neb. 339; *McCormick v. Carey*, 62 Neb. 494.

*New York.* — *Toplitz v. Bauer*, 26 N. Y. App. Div. 125; *Masons' Supplies Co. v. Jones*, 58 N.

**975.** See note 2.

*bb.* WHEN INAPPLICABLE—(*aa*) *Equity Causes.*—See note 3.

**976.** Instances.—See notes 1, 2, 3, 4, 5, 6, 7.

Y. App. Div. 231, *affirmed* 172 N. Y. 598; *Baylis v. Bullock Electric Mfg. Co.*, 59 N. Y. App. Div. 576; *Gansberg v. Sagemohl*, 67 N. Y. App. Div. 554.

*Rhode Island.*—*Merrill v. Bowler*, 20 R. I. 226.

*South Carolina.*—*Lipscomb v. Littlejohn*, 63 S. Car. 38.

*Utah.*—*State v. Hart*, 26 Utah 229.

*Washington.*—*State v. Neterer*, 33 Wash. 535, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 974; *Filley v. Murphy*, 30 Wash. 1.

*Wisconsin.*—*South Milwaukee Co. v. Murphy*, 112 Wis. 614.

**975.** 2. See *State v. Gerry*, 68 N. H. 495.

**3. Equity Cases—United States.**—*Home Ins. Co. v. Virginia-Carolina Chemical Co.*, 109 Fed. Rep. 681.

*California.*—*Mesenburg v. Dunn*, 125 Cal. 222; *Cauhape v. Security Sav. Bank*, 127 Cal. 197; *Ashton v. Heggerty*, 130 Cal. 516; *Angus v. Craven*, 132 Cal. 691.

*Colorado.*—*Kyle v. Shore*, 18 Colo. App. 355.

*Florida.*—*Hughes v. Hannah*, 39 Fla. 365.

*Georgia.*—*Bemis v. Armour Packing Co.*, 105 Ga. 293; *Lamar v. Allen*, 108 Ga. 158.

*Idaho.*—*Christensen v. Hollingsworth*, 6 Idaho 87, 96 Am. St. Rep. 256.

*Illinois.*—*Keith v. Henkleman*, 173 Ill. 137; *Gaby v. Hankins*, 86 Ill. App. 529; *Gilliam v. Baldwin*, 96 Ill. App. 323; *Pike v. Pike*, 112 Ill. App. 243.

*Indiana.*—*Blair v. Curry*, 150 Ind. 99; *Hassler v. Hefelee*, 151 Ind. 391; *Tomlinson v. Bainaka*, 163 Ind. 112; *Carpenter v. Williard Library*, 26 Ind. App. 619; *Whitcomb v. Stringer*, (Ind. App. 1902) 63 N. E. Rep. 582, *rehearing denied* (Ind. App. 1902) 64 N. E. Rep. 636.

*Iowa.*—*Twogood v. Allee*, 125 Iowa 59.

*Kansas.*—*Merrill v. Prescott*, 67 Kan. 767.

*Kentucky.*—*Jones v. Wood*, 70 S. W. Rep. 45, 24 Ky. L. Rep. 840.

*Massachusetts.*—*Crocker v. Cotting*, 173 Mass. 68; *Parker v. Simpson*, 180 Mass. 334; *Shapira v. D'Arcy*, 180 Mass. 377.

*Minnesota.*—*State v. Kingsley*, 85 Minn. 215; *Shipley v. Bolduc*, 93 Minn. 414.

*Missouri.*—*Yancey v. People's Bank*, 101 Mo. App. 605; *Hagan v. Continental Nat. Bank*, 182 Mo. 319.

*Montana.*—*Sanford v. Gates*, 21 Mont. 277; *Finch v. Kent*, 24 Mont. 268.

*New Mexico.*—*Early Times Distillery Co. v. Zeiger*, 9 N. Mex. 31.

*New York.*—*O'Beirne v. Bullis*, 158 N. Y. 466; *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143; *Porter v. International Bridge Co.*, 175 N. Y. 467, *affirming* 79 N. Y. App. Div. 358; *Dykman v. U. S. Life Ins. Co.*, 176 N. Y. 299; *Hamilton v. Piza*, 8 N. Y. App. Div. 617; *Marshall v. De Cordova*, 26 N. Y. App. Div. 615; *Schriever v. Brooklyn Heights R. Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 146, *modified* 49 N. Y. App. Div. 629; *Reade v. Continental Trust Co.*, 49 N. Y. App. Div. 400; *Moss v. Burnham*, 50 N. Y. App. Div. 301;

*Guaranty Trust Co. v. Robinson*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 277; *Fenwick v. Mitchell*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 617, *reversed* 64 N. Y. App. Div. 621; *Porter v. International Bridge Co.*, 79 N. Y. App. Div. 358, *affirmed* 175 N. Y. 467; *Flanigan v. Skelly*, 89 N. Y. App. Div. 108; *Wurster v. Armfield*, 98 N. Y. App. Div. 298.

*Ohio.*—*Brigel v. Creed*, 65 Ohio St. 40; *Pierce v. Stewart*, 61 Ohio St. 422.

*South Carolina.*—*Gregory v. Perry*, 66 S. Car. 455; *Brock v. Kirkpatrick*, 69 S. Car. 231; *Pratt v. Timmerman*, 69 S. Car. 186.

*Utah.*—*Morrison v. Snow*, 26 Utah 247.

*Virginia.*—*New York L. Ins. Co. v. Davis*, 94 Va. 427.

*Washington.*—*Maggs v. Morgan*, 30 Wash. 604.

*West Virginia.*—*Davis v. Settle*, 43 W. Va. 17; *Cecil v. Clark*, 44 W. Va. 659.

*Wisconsin.*—*Harrigan v. Gilchrist*, 121 Wis. 127.

But a jury may be required in a statutory proceeding which is equitable in its nature. *In re Foley*, 76 Fed. Rep. 390.

Where the answer in an equity case presents a legal issue the defendant cannot demand a jury trial. *Crissman v. McDuff*, 114 Iowa 83.

**Joinder of Legal and Equitable Causes of Action.**—Where the complaint comprehends both legal and equitable causes of action the right of trial by jury may be invoked by the defendant. *Van Deventer v. Van Deventer*, 32 N. Y. App. Div. 578.

**A Court of Equity Can Allow Attorney's Fees** to a successful litigant without the intervention of a jury to fix the amount. *Forrester v. Boston*, etc., *Consol. Copper, etc., Co.*, 29 Mont. 397, *rehearing denied* 29 Mont. 414.

**Proceedings in Bankruptcy** are "equity cases," and a creditor is not entitled to a jury trial on a disputed claim *pending* at the bankruptcy. *In re Christensen*, 101 Fed. Rep. 243.

A jury trial cannot be demanded as a matter of right on an issue as to the amount of an attorney's fee in a bankruptcy proceeding. *In re Rude*, 101 Fed. Rep. 805.

**976. 1. Jury Trial in Foreclosure of Mortgages.**—*Long v. Long*, 141 Mo. 352; *Lowe v. Riley*, 57 Neb. 252; *Brigel v. Creed*, 10 Ohio Dec. 214. See also *Loan, etc., Bank v. Peterkin*, 52 S. Car. 236, 68 Am. St. Rep. 900, to the same effect as *Sale v. Meggett*, 25 S. Car. 72, stated in the original note.

Where the defendant in a foreclosure suit set up by way of counterclaim a breach of covenant and claimed damages, he was held to be entitled to a jury trial as to the issues presented thereby. *Herb v. Metropolitan Hospital, etc.*, 80 N. Y. App. Div. 145.

**2. In Foreclosure of Mechanic's Liens.**—*Hathorne v. Panama Park Co.*, 44 Fla. 194; *Smith v. Fleischman*, 23 N. Y. App. Div. 355; *Arnot v. Nevins*, 44 N. Y. App. Div. 61; *Hawkins v. Mapes-Reeve Constr. Co.*, 82 N. Y. App. Div. 72, *affirmed* 178 N. Y. 236; *Powell v. Nolan*, 27 Wash. 318.

**976.** Legislature Giving an Equitable Form to a Legal Action. — See note 8.

**977.** See note 1.

(bb) *Summary Proceedings* — In a *Summary Proceeding to Enforce a Debt*. — See notes 2, 3. See also generally the title SUMMARY PROCEEDINGS.

**978.** Contempt Proceedings. — See note 1.

In *Taxation*. — See note 2.

*Prosecutions of Minor Offenses*. — See note 3.

**976. 3. Partition.** — *McMillan v. McMillan*, 123 N. Car. 577.

**4. Quieting Title.** — *Johnson v. Peterson*, 90 Minn. 503; *Montana Ore Purchasing Co. v. Boston, etc.*, *Consol. Copper, etc.*, Min. Co., 27 Mont. 536; *McLeod v. Lloyd*, 43 Oregon 260.

**5. A Suit for an Accounting Between Partners** may be tried without a jury. *Slaughter v. Danner*, 102 Va. 270.

**6. Injunction.** — *Brandis v. Grissom*, 26 Ind. App. 661; *Shroyer v. Campbell*, 31 Ind. App. 83; *Rhoades v. McNamara*, 135 Mich. 644, 10 Detroit Leg. N. 915; *Miller v. Edison Electric Illuminating Co.*, 78 N. Y. App. Div. 390; *Tucker v. Edison Electric Illuminating Co.*, 100 N. Y. App. Div. 407; *Reaves v. Territory*, 13 Okla. 396; *Com. v. Andrews*, 24 Pa. Super. Ct. 571; *Smith v. Mitchell*, 21 Wash. 536;

**Where an Injunction Is Denied** the defendant is entitled to jury trial of the question of damages. *Ackerman v. True*, 56 N. Y. App. Div. 54.

**Where Legal Rights Are Asserted** in a bill for an injunction the issues thereon should be referred to a jury. *Magnolia Metal Co. v. Drew*, 68 N. Y. App. Div. 47.

**7. Verdict Advisory.** — *Brady v. Yost*, 6 Idaho 273; *Sanford v. Gates*, 21 Mont. 277; *Bartlett v. Clough*, 94 Wis. 196. See also *Culp v. Mulvane*, 66 Kan. 143.

**8. Where the Answer Converts a Legal into an Equitable Action.** — *Marquis v. Illsley*, 99 Iowa 135; *Gatch v. Garretson*, 100 Iowa 252; *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 976; *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5; *Peterson v. Philadelphia Mortg., etc., Co.*, 33 Wash. 461. See also *Guaranty Trust Co. v. Robinson*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 277.

**977. 1. Legislature Giving Equitable Form to Legal Action.** — *Hughes v. Hannah*, 39 Fla. 365; *McMillan v. Wiley*, (Fla. 1903) 33 So. Rep. 993; *Chandler v. Graham*, 123 Mich. 327; *Davis v. Settle*, 43 W. Va. 17; *Cecil v. Clark*, 44 W. Va. 659.

**2. Summary Proceedings to Enforce Debts.** — *Shaw v. Silverstein*, 21 R. I. 500.

**A Statute Providing for the Summary Forfeiture of a Liquor License** has been held to be valid. *Voight v. Excise Com'rs*, 59 N. J. L. 358.

**The Destruction of Gambling Devices** summarily may be provided for. *Furth v. State*, 72 Ark. 161; *Kite v. People*, 32 Colo. 5; *Frost v. People*, 193 Ill. 635, 86 Am. St. Rep. 352.

**Summary Abatement of Nuisances** is not unconstitutional. *Kirkland v. State*, 72 Ark. 171, 105 Am. St. Rep. 25.

**3. Johnson v. Price, (Fla. 1904) 36 So. Rep. 1031; *School Dist. v. Pitts*, 184 Pa. St. 156.**

**978. 1. Contempt Proceedings.** — *Tinsley v. Anderson*, 171 U. S. 101; *U. S. v. Sweeney*, 95 Fed. Rep. 434; *People v. Kipley*, 171 Ill.

44; *State v. Linker*, 5 Kan. App. 264; *Brown's Case*, 173 Mass. 498; *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978; *State v. Markuson*, 7 N. Dak. 155; *State v. Murphy*, 71 Vt. 127.

In *Smith v. Speed*, 11 Okla. 95, the court held that the legislature had no authority to provide for trial by jury in contempt cases.

**2. Taxation.** — *Trigger v. Drainage Dist.*, 193 Ill. 230; *Woodrough v. Douglas County*, (Neb. 1904) 98 N. W. Rep. 1092.

So proceedings for placing the purchaser at a tax sale in possession of the lands purchased are not subject to the constitutional provision for jury trial. *Ball v. Ridge Copper Co.*, 118 Mich. 7; *Youngs v. Peters*, 118 Mich. 45.

**3. Minor Offenses** — *United States*. — *Schick v. U. S.*, 195 U. S. 65.

*Alabama*. — *Bray v. State*, 140 Ala. 172.

*District of Columbia*. — *Bowles v. District of Columbia*, 22 App. Cas. (D. C.) 321.

*Illinois*. — *Austin v. People*, 63 Ill. App. 298. *Kansas*. — *In re Kinsel*, 64 Kan. 1.

*Kentucky*. — *Newport v. Holly*, 108 Ky. 621.

*Louisiana*. — *Amite City v. Holly*, 50 La. Ann. 627.

*Maryland*. — *Lancaster v. State*, 90 Md. 211.

*Michigan*. — *In re Cox*, 129 Mich. 635, 8 Detroit Leg. N. 1086.

*Minnesota*. — *State v. Grimes*, 83 Minn. 462, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978.

*Missouri*. — *Delaney v. Police Ct.*, 167 Mo. 667, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978.

*Nevada*. — *State v. Ruke*, 24 Nev. 251.

*New Hampshire*. — *State v. Jackson*, 69 N. H. 511.

*New Jersey*. — *Unger v. Fanwood Tp.*, 69 N. J. L. 548.

*New York*. — *People v. Levy*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 469; *People v. Wolf*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 94; *People v. Iverson*, 46 N. Y. App. Div. 301; *People v. Stein*, 80 N. Y. App. Div. 357.

*Ohio*. — *Terry v. State*, 24 Ohio Cir. Ct. 111; *Ward v. State*, 5 Ohio Dec. 230, 5 Ohio N. P. 81; *Fletcher v. State*, 7 Ohio Cir. Dec. 316.

*Oregon*. — *Cranor v. Albany*, 43 Oregon 144, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978.

*Washington*. — *State v. Kennan*, 25 Wash. 621.

*Wisconsin*. — *Ogden v. Madison*, 111 Wis. 413.

See also the title SUMMARY PROCEEDINGS, **374. 2 et seq.** Compare *State v. Barden*, 64 S. Car. 206.

**Proceedings to Compel the Defendant to Keep the Peace** may be conducted without a jury. *State v. Kennie*, 24 Mont. 45.



**979.** (cc) *Proceedings in Aid of Execution, Etc.* — In *Proceedings Supplementary to Execution*. — See note 1.

*Insolvency Proceedings.* — See note 3.

*Garnishment.* — See note 5.

(dd) *Probate Matters.* — See notes 6, 7.

*Will Contests.* — See note 8.

**980.** (ee) *Divorce Proceedings.* — See note 2.

(ff) *Eminent Domain Proceedings.* — See notes 4, 5.

**981.** See note 1.

(gg) *Mandamus Proceedings.* — See note 2.

(hh) *Quo Warranto Proceedings.* — See notes 3, 4, 5.

In New York by statute (Laws 1897, c. 378, § 1406) it is within the discretion of the judges of special sessions and supreme courts to grant a trial by jury of misdemeanors. *People v. Cornyn*, (Ct. Gen. Sess.) 36 Misc. (N. Y.) 135. And where the penalties inflicted upon those guilty of a misdemeanor were unusually heavy and drastic, it was held that a jury trial should be granted. *People v. Gantz*, (Ct. Gen. Sess.) 41 Misc. (N. Y.) 542; *People v. Hoenig*, (Supm. Ct. Spec. T.) 86 N. Y. Supp. 673.

**979. 1. Supplementary Proceedings.** — *Gaffney v. Megrath*, 23 Wash. 476.

**3. Insolvency Proceedings.** — *Crampton v. Holister*, 70 Vt. 633; *Rider-Wallis Co. v. Fogo*, 102 Wis. 536.

Where a jury trial of the question of insolvency was given, to be demanded by a certain time, it was held to be waived if not so demanded. *Bray v. Cobb*, 91 Fed. Rep. 102.

A statute providing for the distribution of estates assigned by insolvents, without jury trial of the claims against the estate, is valid. *Merrill v. Bowler*, 20 R. I. 226.

An alleged bankrupt against whom involuntary proceedings are filed is not entitled to a jury trial of the question whether the petitioners are or are not creditors. *Morss v. Franklin Coal Co.*, 125 Fed. Rep. 998.

**5. Garnishment.** — *Neff v. Manuel*, 121 Iowa 706. *Contra*, *New Mexico Nat. Bank v. Brooks*, 9 N. Mex. 113.

But a garnishee cannot demand a jury to fix his fees. *Barnard, etc., Mfg. Co. v. Monett Milling Co.*, 79 Mo. App. 153.

**6. Probate Matters.** — *Esterly v. Rua*, 122 Fed. Rep. 609, 58 C. C. A. 548; *Martin v. Martin*, 170 Ill. 18; *Coffey v. Coffey*, 179 Ill. 283; *Duffield v. Walden*, 102 Iowa 676; *Duffy v. Duffy*, 114 Iowa 581; *Gallon v. Haas*, 67 Kan. 225; *Ferry v. McGowan*, 68 Mo. App. 612; *Schooler v. Stark*, 73 Mo. App. 301; *Ribble v. Furmin*, (Neb. 1904) 98 N. W. Rep. 420; *In re Welch*, 69 Vt. 127.

**7. In re Pfeffer**, 117 Mich. 207.

**Proceedings for the Removal of an Administrator** are for the court, and a jury cannot be demanded. *Stevens v. Larwill*, 110 Mo. App. 140.

**8. Will Contests.** — *Moody v. Found*, 208 Ill. 78; *Alexander's Estate*, 206 Pa. St. 47; *Malunney's Estate*, 208 Pa. St. 21. See also *Clough v. Clough*, 27 Colo. 97, *affirming* 10 Colo. App. 433; *National Safe Deposit, etc., Co. v. Heiberger*, 19 App. Cas. (D. C.) 506.

Where the statute provided that "the issue as to the validity of a will shall be tried by a

jury," it was held that the right of trial by jury was primarily a question for the court. *Philips v. Philips*, 77 N. Y. App. Div. 113, *affirmed* 179 N. Y. 585; *Haughian v. Conlan*, 86 N. Y. App. Div. 290.

**980. 2. Divorce Proceedings.** — Actions for separation from bed and board are not triable by a jury as a matter of right. *Packard v. Packard*, 88 N. Y. App. Div. 339.

**4. Eminent Domain Proceedings** — *United States*. — *Backus v. Ft. Street Union Depot Co.*, 169 U. S. 557; *Postal Tel. Cable Co. v. Southern R. Co.*, 122 Fed. Rep. 156.

*Georgia*. — *Savannah, etc., R. Co. v. Postal Tel.-Cable Co.*, 112 Ga. 941.

*Iowa*. — *Matter of Bradley*, 108 Iowa 476.

*Maine*. — *Kennebec Water Dist. v. Waterville*, 96 Me. 234; *Ingram v. Maine Water Co.*, 98 Me. 566.

*Massachusetts*. — *Sawyer v. Com.*, 182 Mass. 245; *Fairbanks v. Com.*, 183 Mass. 373.

*Michigan*. — *Wixom v. Bixby*, 127 Mich. 479, 8 Detroit Leg. N. 409.

*Missouri*. — *Mound City Land, etc., Co. v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727.

*North Carolina*. — *Porter v. Armstrong*, 134 N. Car. 447.

*South Carolina*. — *Gilmer v. Hunnicutt*, 57 S. Car. 166, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980.

But the owner of land cannot be required to submit to a commission the assessment of damages which accrued by the illegal use of his land prior to condemnation. *Waterbury v. Platt*, 76 Conn. 435.

And where the United States undertakes to exercise the right of eminent domain in the territories, the landowner is entitled, as matter of right, to have his compensation assessed by a jury. *U. S. v. Honolulu Plantation Co.*, 122 Fed. Rep. 581, 58 C. C. A. 279.

**5. Juvinall v. Jamesburg Drainage Dist.**, 204 Ill. 106.

**981. 1. Backus v. Ft. Street Union Depot Co.**, 169 U. S. 557.

**2. Mandamus Proceedings.** — *Marion County Coler*, (C. C. A.) 75 Fed. Rep. 352; *Mayer v. State*, 52 Neb. 764.

**3. Right to Jury in Quo Warranto Proceedings.** — "Where the constitutional right to a jury trial is recognized, the right to impanel a jury to try issues of fact is inherent in the exercise of jurisdiction in quo warranto." *Ohio Turnpike Co. v. Waechter*, 25 Ohio Cir. Ct. 605.

**4. Wilson v. North Carolina**, 169 U. S. 586; *Wheeler v. Caldwell*, 68 Kan. 776; *State v. Moores*, 56 Neb. 1.

**981.** Removal of Officers. — See note 6.

**982.** (ii) Election Contests. — See note 1.

(jj) Miscellaneous Proceedings. — Commitment of Infants — Insanity — Paupers — Guardians. — See note 2.

Boundaries. — See note 7.

Claims Against Government. — See note 9.

[In Proceedings to Set Aside a Judgment of dismissal entered by the plaintiff's attorney through mistake the defendant cannot demand a jury trial.<sup>11a</sup>]

**983.** (kk) Where No Issue Is Raised — Assessing Damages on Default. — See note 2. Plea of Guilty. — See note 3.

(ll) Curtailing Functions of Jury. — Directing Verdict. — See notes 4, 5.

**984.** Involuntary Nonsuit. — See note 1.

(mm) Jury in Appellate Courts — See notes 3, 4.

**985.** (nn) Compulsory References. — See note 4.

**986.** See notes 1, 2.

cc. COMPOSITION OF JURY — (aa) Number. — See note 3. See also the title

## JURY AND JURY TRIAL.

**987.** And in Criminal Cases. — See notes 1, 2.

**981.** 5. *Caldwell v. Wilson*, 121 N. Car. 425, 480.

**6. Removal of Officers.** — *State v. Crumbaugh*, 26 Tex. Civ. App. 521, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 981; *Moore v. Strickling*, 46 W. Va. 515, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 981.

Proceedings for the Revocation of an Attorneys' License may be conducted without a jury. *In re Norris*, 60 Kan. 649.

**982.** 1. Election Contests. — *Maddux v. Walshall*, 141 Cal. 412; *State v. Towns*, 153 Mo. 91; *Mason v. State*, 58 Ohio St. 30.

2. Commitment of Infants to Reformatory Institutions. — *Lee v. McClelland*, 157 Ind. 84; *Wisconsin Industrial School v. Clark County*, 103 Wis. 651.

7. *Swarz v. Ramala*, 63 Kan. 633.

**9. Claims Against Government.** — *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528.

11a. Proceedings to Vacate Judgment. — *Palace Hardware Co. v. Smith*, 134 Cal. 381.

**983.** 2. Where No Issue Is Raised. — *People's Ice Co. v. People's Nat. Bank*, 133 Ala. 248; *Tilley v. Cox*, 119 Ga. 867; *Gallagher v. Silberstein*, 182 Mass. 20; *Taylor v. Sledge*, 108 Tenn. 719. See also *Dyson v. Rhode Island Co.*, 25 R. I. 600.

Where the damages are unliquidated the defendant, notwithstanding his default, may cross-examine the plaintiff's witnesses, and introduce evidence on his own behalf before the jury. *Pittman v. Colbert*, 120 Ga. 341.

A defaulting defendant has a right to demand a jury to assess damages under the laws of Illinois. *Blizzard v. Epkens*, 105 Ill. App. 117.

**3. Plea of Guilty.** — Where the defendant enters a plea of guilty there is no issue for a jury, and a judgment of conviction by the court is valid. *West v. Gammon*, 98 Fed. Rep. 426, 39 C. C. A. 271.

**4. Directing Verdict — Criminal Cases.** — *Johnson v. State*, 42 Tex. Crim. 99, per Davidson, P. J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 983.

Nor can the court command a verdict of not guilty. *People v. Roberts*, 114 Cal. 67.

**5. Civil Cases.** — *St. Mary's Power Co. v.*

*Chandler-Dunbar Water Power Co.*, 133 Mich. 470, 10 Detroit Leg. N. 260.

Where there is a question of fact the court has no authority to discharge the jury and determine the question itself. *Gansberg v. Sagemohl*, 67 N. Y. App. Div. 554.

**984.** 1. *Apex Transp. Co. v. Garbade*, 32 Oregon 588.

**3. Jury in Appellate Courts.** — *Capital Traction Co. v. Hof*, 174 U. S. 1.

**4. Reasonable Restrictions.** — *Capital Traction Co. v. Hof*, 174 U. S. 1; *Howard v. State*, 128 Ala. 43; *In re Kinsel*, 64 Kan. 1.

**985.** 4. Compulsory References — Actions at Law. — *Tufts v. Norris*, 115 Iowa 250; *L'Amoureux v. Erie R. Co.*, 62 N. Y. App. Div. 505; *Sherman v. Randolph*, 13 Okla. 224; *Mitchell v. Oregon Women's Flax-Fiber Assoc.*, 38 Oregon 503. See also, to the same effect as *Averill Coal, etc., Co. v. Verner*, 22 Ohio St. 372, stated in the original note, *Kerr v. Hicks*, 129 N. Car. 141; *Griffith v. Cromley*, 58 S. Car. 448.

This rule does not apply to insolvency proceedings. *Crampton v. Hollister*, 70 Vt. 633.

**986.** 1. Examination of Long Accounts. — *Janvrin, Petitioner*, 174 Mass. 514; *Creve Coeur Lake Ice Co. v. Tamm*, 138 Mo. 385; *McKinney v. London*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 564; *Haig v. Boyle*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 155; *Guaranty Trust Co. v. Robinson*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 277; *Craig v. California Vineyard Co.*, 30 Oregon 43; *Brewer v. Asher*, 8 Okla. 231; *Grant County v. McKinley*, 8 Okla. 128; *Montague v. Best*, 65 S. Car. 455.

**2. Equity Cases.** — *Lamar v. Allen*, 108 Ga. 158; *Yuengling v. Betz*, 58 N. Y. App. Div. 8. But see *Avery v. Sand*, 9 N. Y. App. Div. 622.

**3. Common-law Jury — Twelve Men.** — *Thompson v. Utah*, 170 U. S. 343; *Capital Traction Co. v. Hof*, 174 U. S. 1; *Maxwell v. Dow*, 176 U. S. 581; *Florida Fertilizer, etc., Co. v. Boswell*, (Fla. 1903) 34 So. Rep. 241.

**987.** 1. Criminal Cases. — *Jones v. State*, (Miss. 1900) 27 So. Rep. 382.

**2. Waiver by Accused.** — *State v. Simons*, 61 Kan. 752; *State v. Ellis*, 22 Wash. 129.

**987. Misdemeanors.** — See note 3.

Legislative Authority. — See note 4.

**988.** See note 1.

Verdicts by Less than Twelve. — See note 3.

Jury of Eight — Federal Constitution. — See note 4.

**989.** Unanimous Verdict. — See note 2.

Territories. — See notes 3, 4.

Consent and Waiver — In Civil Cases. — See note 5.

Acts Amounting to Waiver. — See note 7.

**990.** See notes 1, 2, 3, 4.**987. 3. Misdemeanors.** — *State v. Wells*, 69 Kan. 792.**4. Legislative Authority.** — *Denver v. Hyatt*, 28 Colo. 129; *Clough v. McKay*, 31 Colo. 300; *Ferriday v. Reinbold*, 7 Del. Co. Rep. (Pa.) 494.**988. 1. Number of Jurors Less than Twelve Authorized.** — The *Georgia* Constitution provides for a jury of not less than five, as the legislature may determine, in certain inferior courts. *Welborne v. Donaldson*, 115 Ga. 563.**3. Verdicts by Less than Twelve** — (a) **Three-fourths Verdict** — *Arizona*. — The trial of a claim to a mining location under the laws of the United States, not being a common-law action, is subject to the statutes of *Arizona* so far as to make binding a verdict rendered by three-fourths of the jury. *Providence Gold Min. Co. v. Burke*, 6 Ariz. 323.*Missouri*. — *Roenfeldt v. St. Louis, etc., R. Co.*, 180 Mo. 554.(b) **Two-thirds Verdict.** — See *Thomas v. Clark County*, 5 Ohio Dec. 510, 5 Ohio N. P. 453.**4. Jury of Eight** — Federal Constitution. — *Maxwell v. Dow*, 176 U. S. 581; *State v. Thompson*, 15 Utah 488, reversed 170 U. S. 343; *Matter of McKee*, 19 Utah 231; *Matter of Maxwell*, 19 Utah 495.**989. 2. Unanimous Verdicts.** — *Denver v. Hyatt*, 28 Colo. 129.**3. Territories of the United States.** — *Ex p. Ortiz*, 100 Fed. Rep. 955; *Thompson v. Utah*, 170 U. S. 343, holding that as to crimes committed while Utah was a territory the provision of the Utah Constitution for a jury of eight was *ex post facto* and inoperative.**4. Springville v. Thomas, 166 U. S. 707.****5. Consent — Waiver.** — *Raleigh, etc., R. Co. v. Bradshaw*, 113 Ga. 862.**7. Waiver of Trial by Jury in Civil Cases.** — *Sanitary Dist. v. Bernstein*, 175 Ill. 215, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989; *Claussenius v. Claussenius*, 179 Ill. 545; *Brownell Imp. Co. v. Critchfield*, 197 Ill. 61; *Poppitz v. German Ins. Co.*, 85 Minn. 118; *Monett Bank v. Howell*, 79 Mo. App. 318; *Condon v. Royce*, 68 N. J. L. 222.To the same effect as *Tubbs v. Embree*, 89 Hun (N. Y.) 475, stated in the original note, see *Plass v. Tucker*, 1 N. Y. L. Rec. 249.To the same effect as *Carthage v. Buckner*, 8 Ill. App. 152, stated in the original note, see *Burnham v. North Chicago St. R. Co.*, 88 Fed. Rep. 627, 60 U. S. App. 225; *Guyer v. Caldwell*, 98 Ill. App. 232; *Osgood v. Skinner*, 186 Ill. 491; *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440.

Where on the return day of an action on contract the defendant waived, jury trial, and

at the trial term the complaint was amended by substituting an action in tort, it was held that the defendant was entitled to a trial by jury on his demand then made. *Reese v. Baum*, 83 N. Y. App. Div. 550.**Noticing a Cause for Trial at Special Term** where the complaint demands legal and equitable relief, though alleging no facts in support of the equitable demand, will not be considered a waiver of jury trial by the defendant giving the notice. *Baylis v. Bullock Electric Mfg. Co.*, 59 N. Y. App. Div. 576.**Retrial After Appeal.** — In *New York* a party waiving trial by jury by failing to demand it on the first trial is not estopped to demand a jury on retrial after appeal and reversal. *Freifeld v. Sire*, (Supm. Ct. App. T.) 13 N. Y. Annot. Cas. 359. But in *Alabama* if a jury is waived on the trial of a cause it cannot be demanded on the trial after reversal by the appellate court. *Brock v. Louisville, etc., R. Co.*, 122 Ala. 172.**An Exception of Trustees** from those authorized by a statute to waive a jury trial has been held to be valid. *Lummis v. Big Sandy Land, etc., Co.*, 188 Pa. St. 27.**990. 1. Acts Amounting to Waiver** — *United States*. — *Southern Development Co. v. Silva*, 89 Fed. Rep. 418; *Bray v. Cobb*, 91 Fed. Rep. 102; *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A.) 132 Fed. Rep. 721.*Alabama*. — *Moore v. Crosthwait*, 135 Ala. 272. *Arkansas*. — *Gerstle v. Vandergriff*, 72 Ark. 261.*California*. — *Ferrea v. Chabot*, 121 Cal. 233; *Naphtaly v. Rovegno*, 130 Cal. 641, rehearing denied 130 Cal. 639; *Maddux v. Walthall*, 141 Cal. 412.*Connecticut*. — *Camp v. Carroll*, 73 Conn. 247; *McKay v. Fair Haven, etc., R. Co.*, 75 Conn. 608.*Georgia*. — *Waterman v. Glisson*, 115 Ga. 773; *Heard v. Kennedy*, 116 Ga. 36.*Illinois*. — *Juvinall v. Jamesburg Drainage Dist.*, 204 Ill. 106; *Meilinger v. People*, 83 Ill. App. 436.*Indiana*. — *Whitcomb v. Stringer*, 160 Ind. 82. *Indian Territory*. — *Walsh v. Tyler*, 2 Indian Ter. 52.*Iowa*. — *Waterman v. Randlett*, (Iowa 1900) 84 N. W. Rep. 680; *Vincent v. German Ins. Co.*, 120 Iowa 272.*Kentucky*. — *Blanton v. Howard*, 76 S. W. Rep. 511, 25 Ky. L. Rep. 929.*Maine*. — *Davis v. Auld*, 96 Me. 559.*Massachusetts*. — *Davis v. Carpenter*, 172 Mass. 167; *Stevens v. McDonald*, 173 Mass. 382, 73 Am. St. Rep. 300.

**990.** Power of Court. — See note 5.

**991.** (bb) Qualifications — Impartiality. — See note 1.

Knowledge of English Language. — See note 4.

Statute Requiring Jurors to Be Taxpayers. — See note 5.

**992.** (c) Rights of Accused in Criminal Cases — aa. TRIAL BY JURY — Cannot Waive Jury. — See notes 1, 2.

Statutes Authorizing Waiver in Criminal Cases. — See note 3.

**993.** bb. SPEEDY TRIAL. — See notes 1, 2.

*Missouri.* — Nishnabotna Drainage Dist. v. Campbell, 154 Mo. 151; Powell v. Bosard, 79 Mo. App. 627; Rives v. Columbia, 80 Mo. App. 173.

*Nebraska.* — Goble v. Swobe, 64 Neb. 838; Schumacher v. Crane-Churchill Co., 66 Neb. 440; Horton v. Simon, (Neb. 1903) 97 N. W. Rep. 604.

*New York.* — Koehler v. New York El. R. Co., 159 N. Y. 218; Bensen v. Manhattan R. Co., 14 N. Y. App. Div. 442, affirmed 164 N. Y. 559; Marshall v. De Cordova, 26 N. Y. App. Div. 615; Winter v. Williamsburgh Sav. Bank, 68 N. Y. App. Div. 193; Bernheimer v. Adams, 70 N. Y. App. Div. 114, affirmed 175 N. Y. 472; Paul v. Delaware, etc., R. Co., 72 N. Y. App. Div. 449, affirmed 175 N. Y. 478; Hawkins v. Mapes-Reeve Constr. Co., 82 N. Y. App. Div. 72, affirmed 178 N. Y. 236; Steuerwald v. Gill, 85 N. Y. App. Div. 605.

*North Carolina.* — Ledbetter v. Pinner, 120 N. Car. 455; Belvin v. Raleigh Paper Co., 123 N. Car. 138; Albemarle Steam Nav. Co. v. Worrell, 133 N. Car. 93.

*Ohio.* — Kennedy v. Dodge, 10 Ohio Cir. Dec. 360, 19 Ohio Cir. Ct. 425; Terry v. State, 12 Ohio Cir. Dec. 274, 22 Ohio Cir. Ct. 16.

*South Carolina.* — Griffith v. Cromley, 58 S. Car. 448; Montague v. Best, 65 S. Car. 455; Williams v. Weeks, 70 S. Car. 1.

*Washington.* — Zilke v. Woodley, 36 Wash. 84.

*Wisconsin.* — Charles Baumbach Co. v. Hobkirk, 104 Wis. 488.

Where a Statute Expressly Points Out the Manner of waiving a jury it impliedly abolishes all other methods. Lipscomb v. Condon, 56 W. Va. 416.

Failure to Demand a Jury Trial Within the Time Prescribed by statute is a waiver of the right. Arnot v. Nevins, 44 N. Y. App. Div. 61; State v. Neterer, 33 Wash. 535.

A Demand for a Jury Trial in a Justice's Court remains effective as to a second trial, where the jury disagreed on the first trial. Hartmann v. Hoffman, 65 N. Y. App. Div. 443, modified 76 N. Y. App. Div. 449.

**990. 2. Express Renunciation.** — Thompson v. King, 173 Mass. 439; Park River Bank v. Norton, 12 N. Dak. 497.

To the same effect as Bantle v. Krebs, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 824, stated in the original note, see Westervelt v. Phelps, 171 N. Y. 212, affirming 54 N. Y. App. Div. 244; Sigua Iron Co. v. Brown, 171 N. Y. 488; Ranken v. Donovan, 166 N. Y. 626, affirming 46 N. Y. App. Div. 225; Leggat v. Leggat, 176 N. Y. 590, affirming 79 N. Y. App. Div. 141; Cullinan v. Stein, 177 N. Y. 574, affirming 84 N. Y. App. Div. 292. But see Poppitz v. German Ins. Co., 85 Minn. 118.

**3. Failure to Appear at Trial.** — Crussite Min. Co. v. Anderson, 19 Colo. App. 307.

But where a party demanded a jury trial, paid the jury fee, and complied with all the requirements of the statute regulating jury trials, it was held to be error for the court to try without a jury, even though such party was absent. Fitzgerald v. Wygal, 24 Tex. Civ. App. 372.

**4. Submission After Denial of Jury.** — Warwick v. Kingman, 2 Indian Ter. 435; Danner v. State, 89 Md. 220; Farak v. Schuyler First Nat. Bank, (Neb. 1903) 93 N. W. Rep. 682; Hanson v. Carlblom, (N. Dak. 1904) 100 N. W. Rep. 1084.

**Demand After Evidence Introduced.** — Where the statute required a demand for a jury trial to be made before any evidence was introduced, a defendant who demanded a jury trial after the plaintiff's attorney in a foreclosure suit had, out of order, introduced the bond and mortgage sued on, was held not to have waived his right. Herb v. Metropolitan Hospital, etc., 80 N. Y. App. Div. 145.

**5. Court May Insist on Jury.** — Wittenberg v. Onsgard, 78 Minn. 342; Ickes v. State, 63 Ohio St. 549; National Cash Register Co. v. Bonneville, 119 Wis. 222.

**991. 1. Impartiality.** — Gribble v. Wilson, 101 Tenn. 612, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 991; Turner v. State, (Tenn. 1902) 69 S. W. Rep. 774.

**Challenges to Jurors.** — Brown v. New Jersey, 175 U. S. 172.

**4. Knowledge of English.** — King v. State (Tex. Crim. 1901) 64 S. W. Rep. 245.

**5. Taxpayers.** — Compare Redford v. Spokane St. R. Co., 15 Wash. 419. See also the title JURY AND JURY TRIAL, 1119. i et seq.

**992. 1. Cannot Waive Jury in Cases of Felony.** — State v. Thompson, 104 La. 167; State v. Jackson, 106 La. 189; Michaelson v. Beemer, (Neb. 1904) 101 N. W. Rep. 1007; State v. Ellis, 22 Wash. 129.

**2. Right to Trial by Jury in Misdemeanors.** — Lamar v. Prosser, 121 Ga. 153; Paulsen v. People, 195 Ill. 507; State v. Rea, (Iowa 1904) 101 N. W. Rep. 507; Ickes v. State, 8 Ohio Cir. Dec. 442, 16 Ohio Cir. Ct. 31. Contra, Hamel v. People, 97 Ill. App. 527. But see State v. Wiley, 82 Mo. App. 61.

**3. Statutes Authorizing Waiver.** — Belt v. U. S., 4 App. Cas. (D. C.) 25; Hollis v. State, 118 Ga. 760; Brewster v. People, 183 Ill. 143; State v. Bockstruck, 136 Mo. 335; McCarty v. Hopkins, 61 Neb. 550.

**993. 1. Right to Speedy Trial.** — Sample v. State, 138 Ala. 259, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 992, 993; Mansfield's Case, 22 Pa. Super. Ct. 224.

**993.** Prosecution Entitled to Time for Preparation — Unreasonable Delay. — See note 4. *cc.* TO BE PRESENT AT TRIAL — (*aa.*) In Felonies — *aaa.* Generally. — See note 5.

**994.** Recalling Jury in Accused's Absence for Further Instructions. — See note 1.

**995.** *bbb.* Preliminary and Formal Matters — Argument of Preliminary Questions of Law. —

See notes 4, 5, 7.

Formal Preparations for Trial. — See note 9.

*ccc.* View of Premises. — See note 14. See generally the title VIEW BY

JURY, 22 ENCYC. OF PL. AND PR. 1053, and the Supplement thereto.

**996.** See note 3.

**997.** *eee.* Motion for New Trial. — See note 3.

**999.** (*bb.*) In Misdemeanors — It Will Be Waived. — See note 2.

*dd.* BENEFIT OF COUNSEL — Assignment of Counsel by Court. — See note 5.

**1000.** See note 1.

Number and Selection of Assigned Counsel. — See note 2.

*ee.* FREEDOM FROM SHACKLES. — See note 5.

**1001.** (*a.*) Right of Appeal — *bb.* IN CRIMINAL CASES. — See notes 11, 12.

**1003.** (*4.*) Other Civil Rights — (*a.*) Freedom of Speech and of the Press — Play Based on Facts of Pending Case. — See note 4.

**1005.** 2. Form of Government — *b.* IN THE UNITED STATES — MUST BE REPUBLICAN — A Republic Has Recently Been Defined. — See note 2.

**1006.** 3. Frame of Government — The Separation of Powers — *a.* GENERAL VIEW — (*1.*) In Theory. — See note 6.

**993.** 2. See *Ex p.* Wells, (Tex. Crim. 1903) 74 S. W. Rep. 541.

**4.** Unreasonable Delay. — *In re* Begerow, 133 Cal. 349, 85 Am. St. Rep. 178.

A Statute Providing for Rearrest in cases of felony is not violative of the constitutional right to a speedy trial. *In re* Begerow, 136 Cal. 293.

**5.** Absence During Argument. — *State v.* Pierce, 123 N. Car. 745.

**994.** 1. Recalling Jury for Further Instructions in Accused's Absence Is Error. — *Kinnemer v. State*, 66 Ark. 206.

Where, during the defendant's absence, the jurors came into court and announced their inability to reach a verdict, and the court ordered them to return to their room for further consultation, it was held that there was no violation of the defendant's rights. *State v.* Olds, 106 Iowa 110.

**995.** 4. Presentation of Preliminary Questions of Law. — *State v.* Little Whirlwind, 22 Mont. 425.

**5.** *State v.* Spotted Hawk, 22 Mont. 33, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 995.

**7.** *State v.* Spotted Hawk, 22 Mont. 33, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 995.

**9.** Preliminary Preparations for Trial. — *State v.* Spotted Hawk, 22 Mont. 33, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 995.

**14.** Right of Prisoner to Be Present at View of Premises. — *State v.* Williams, 18 Wash. 47, 63 Am. St. Rep. 869, holding that the prisoner's rights are violated where he is manacled while present at a view of the premises by the jury.

**996.** 3. Implied Waiver. — *Com. v.* Van Horn, 188 Pa. St. 143.

It Is Error to Compel the Accused, against his will, to accompany the jury, or permit the taking of testimony while viewing the premises. *Hays v. Territory*, 7 Okla. 15.

**997.** 3. Presence at Motion for a New Trial

Unnecessary. — *State v.* Hardaway, 50 La. Ann. 1345.

**999.** 2. A Contrary Rule prevails in *Ohio*. *Truman v. Walton*, 59 Ohio St. 517.

**5.** Court Requiring Attorney to Defend. — Where the court appoints counsel of its own selection to defend, the defendant cannot complain after conviction that other counsel was not assigned to him. *Andersen v. Treat*, 172 U. S. 24.

**1000.** 1. When No Request for Counsel Is Made. — *State v.* Whitesides, 49 La. Ann. 352; *State v.* Rollins, 50 La. Ann. 925; *Gutierrez v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 372.

**2.** *People v.* Fitch, (Supm. Ct. Spec. T.) 51 N. Y. Supp. 683; *People v.* Heiselbetz, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 100, appeal dismissed 30 N. Y. App. Div. 199.

**5.** Free from Shackles. — *State v.* Williams, 18 Wash. 47, 63 Am. St. Rep. 869.

**1001.** 11. Criminal Cases — Prosecution Has No Appeal. — *People v.* Richter, 113 Cal. 473.

**12.** Statutory Right of Prosecution to Appeal. — *State v.* O'Brien, 19 Mont. 6.

**1003.** 4. Drama Based on Facts of Pending Case. — *Marx, etc., Jeans Clothing Co. v. Watson*, 168 Mo. 133, 90 Am. St. Rep. 440, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1003.

**1005.** 2. "The Test of Republican or Democratic Government is the will of the people, expressed in majorities, under the proper forms of law." *Hopkins v. Duluth*, 81 Minn. 189.

**1006.** 6. Separation of the Several Departments. — *State v.* Johnson, 61 Kan. 803; *Matter of Davies*, 168 N. Y. 89; *Zanesville Telephone, etc., Co. v. Zanesville*, 10 Ohio Dec. 134, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1006. 6 to 1007. 2 inclusive, in holding that the legislature has no right to impose legislative duties on the Probate Court, reversed 10 Ohio Cir. Dec. 783, but affirmed 63 Ohio St. 442, and reversed on other grounds on rehearing 64 Ohio St. 67, 83 Am. St. Rep. 725.

**1007.** (2) *In Practice* — (a) Generally — Separation Not Complete. — See notes 6, 7.

**1008.** (b) Interrelations of the Departments — Each Supreme Within Its Own Sphere. — See note 11.

**1009.** A Grant of General Powers. — See note 3.

**1010.** *b. THE EXECUTIVE* — (2) *Encroachments by the Legislature* — (a) Delegation of Executive Functions. — See notes 5, 6.

(b) Appointments and Removals. — See note 7.

**1011.** See notes 1, 2.

The Ordinary Constitutional Distributive Clause. — See note 3.

So a Board of Civil Service Commissioners. — See note 5.

In the Absence of an Express Grant. — See note 7.

Power to Provide Mode of Appointment. — See note 8.

Local Municipal Officers. — See notes 9, 10, 11.

**1012.** See note 1.

Vesting Power of Appointment in Governor. — See note 2.

Changing Time of Election — Extension of Term of Incumbent. — See note 6.

**1007.** 6. No Complete Separation of Powers. — Zanesville Telephone, etc., Co. v. Zanesville, 10 Ohio Dec. 134, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1007. 6 to 1008. 9 inclusive.

7. Line of Demarkation Indefinite. — People v. Simon, 176 Ill. 165, 68 Am. St. Rep. 175, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1007.

**1008.** 11. Each Department Supreme Within Its Own Sphere. — Albright v. Fisher, 164 Mo. 56; Zanesville Telephone, etc., Co. v. Zanesville, 10 Ohio Dec. 139, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1008, and approving the whole text paragraph; McCully v. State, 102 Tenn. 509, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1008; Kimball v. Grantsville City, 19 Utah 368; Ellison v. Barnes, 23 Utah 183.

**1009.** 3. Zanesville Telephone, etc., Co. v. Zanesville, 10 Ohio Dec. 134, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1009.

**1010.** 5. State v. Hocker, 39 Fla. 477, 63 Am. St. Rep. 174; State v. Towns, 153 Mo. 91. See also State v. McGough, 118 Ala. 159.

6. State v. Washburn, 167 Mo. 680, 90 Am. St. Rep. 430.

7. Appointment Not an Executive Function. — Cunningham v. Sprinkle, 124 N. Car. 638.

**1011.** 1. Pratt v. Breckinridge, 112 Ky. 1, rehearing denied 112 Ky. 52; State v. Washburn, 167 Mo. 680, 90 Am. St. Rep. 430.

2. In the Absence of Constitutional Restrictions. — Overshiner v. State, 156 Ind. 187, 83 Am. St. Rep. 187; Sinking Fund Com'rs v. George, 104 Ky. 260, 84 Am. St. Rep. 454; Grayson v. Bagby, 115 Ky. 651; Scholle v. State, 90 Md. 729; Atty.-Gen. v. Bolger, 128 Mich. 355, 8 Detroit Leg. N. 675; Freeman v. Barnum, 131 Cal. 386, 82 Am. St. Rep. 355; *Ex p.* Gerino, 143 Cal. 412.

3. *Ex p.* Lucas, 160 Mo. 218.

5. Hope v. New Orleans, 106 La. 345. See also People v. Kipley, 171 Ill. 44.

7. Cox v. State, 72 Ark. 94, 105 Am. St. Rep. 17; Sinking Fund Com'rs v. George, 104 Ky. 260, 84 Am. St. Rep. 454; Purnell v. Mann, 105 Ky. 87, 100, 111; People v. Oneida County, 170 N. Y. 105.

8. Power to Provide Mode of Appointment. — Atty.-Gen. v. Gramlich, 129 Mich. 630, 8 Detroit Leg. N. 1098; State v. Washburn, 167 Mo. 680, 90 Am. St. Rep. 430.

9. Power of Legislature in Case of Municipal Officers. — State v. Barker, 116 Iowa 96, 93 Am. St. Rep. 222; Lexington v. Thompson, 113 Ky. 540, 101 Am. St. Rep. 361; State v. Kohnke, 109 La. 838; People v. Tax Com'rs, 174 N. Y. 417; Fox v. Mohawk, etc., Humane Soc., 25 N. Y. App. Div. 26, affirmed 165 N. Y. 517; Saratoga Springs v. Van Norden, 75 N. Y. App. Div. 204; People v. Tax Com'rs, 79 N. Y. App. Div. 183, reversed 174 N. Y. 417.

Where the constitution provided that certain local officers should be chosen by the electors or appointed by the municipal authorities, a statute providing for election in one and appointment in another portion of a city was held to be invalid. People v. Dooley, 171 N. Y. 74.

10. State v. Flower, 49 La. Ann. 1199; Black v. Buncombe County, 129 N. Car. 121; Brown v. Galveston, 97 Tex. 1.

Where a municipality was authorized to engage in selling intoxicating liquors through a dispensary, a statute giving to the county authorities a voice in the selection of a dispenser was upheld. Sheppard v. Dowling, 127 Ala. 1, 85 Am. St. Rep. 68.

11. Appointments for Purpose of Primary Organization. — Lambert v. Norman, 119 Ga. 351; State v. Ruhe, 24 Nev. 251; Com. v. Moir, 199 Pa. St. 534, 85 Am. St. Rep. 801.

**1012.** 1. State v. Moores, 55 Neb. 480, overruling State v. Seavey, 22 Neb. 454, cited in the next following note in the original work.

2. Statutes Vesting Power of Appointment in Executive. — Redell v. Moores, 63 Neb. 219, 93 Am. St. Rep. 431; State v. Nolan, (Neb. 1904) 98 N. W. Rep. 657; Gooch v. Exeter, 70 N. H. 413, 85 Am. St. Rep. 637; Harriss v. Wright, 121 N. Car. 172; Newport v. Horton, 22 R. I. 196; Condon v. Maloney, 108 Tenn. 82. *Contra*, State v. Fox, 158 Ind. 126; *Ex p.* Levine, (Tex. Crim. 1904) 81 S. W. Rep. 1206.

6. See State v. Trewhitt, 113 Tenn. 561. *Contra*, where the term of office was fixed, Matter of Haase, 88 N. Y. App. Div. 242.

**1012.** (c) *The Pardoning Power — Where Power Conferred on Executive Without Limitation.* — See notes 11, 12, 13.

**1013.** (3) *Encroachments by the Judiciary — (a) Mandamus Against the Executive — aa. PERFORMANCE OF DISCRETIONARY DUTIES.* — See note 5.

**1014.** *Governor.* — See note 9.

**1015.** *bb. PERFORMANCE OF MINISTERIAL, COLLATERAL, AND IMPERATIVE DUTIES — (aa) Control of Chief Executive — aaa. Doctrine that Writ Will Not Issue.* — See note 2.

**1016.** *bbb. Doctrine that Writ Will Issue in Such Cases — Reasons of Rule.* — See note 2.

**1018.** *(bb) Other Officers than Governor — Illustrations.* — See note 10.

**1019.** (b) *Injunction Against the Executive — Governor — Secretary of State — State Treasurer.* — See note 3.

[Other Officers.] — See note 5a.

**1020.** c. *THE LEGISLATURE — (1) Nature and General Scope of Power.* — See note 4.

**1021.** *Scope and Extent.* — See note 1.

(2) *Delegation of Legislative Functions — (b) To the Electors — The Referendum — aa. INTRODUCTORY.* — See note 6.

**1012.** 11. *State v. Bradshaw*, 39 Fla. 137.  
12. *Where the Constitution Confers the Pardoning Power on the Governor.* — *In re* Conditional Discharge of Convicts, 73 Vt. 414.

*Indeterminate Sentence Law.* — A statute conferring on a board of commissioners the right to parole or discharge prisoners who had served the minimum of an indeterminate sentence, was held not to violate a constitutional provision vesting the pardoning power exclusively in the governor. *People v. Sing Sing Prison*, (Supm. Ct.) 39 Misc. (N. Y.) 113.

13. *Statute Authorizing Prison Board to Make Certain Regulations.* — *State v. Page*, 60 Kan. 664; *State v. Stephenson*, 69 Kan. 874. See also *George v. People*, 167 Ill. 447 (does not encroach on judicial powers of courts).

**1013.** 5. *Mandamus — Performance of Discretionary Acts.* — *Dudley v. James*, 83 Fed. Rep. 345; *U. S. v. Root*, 22 App. Cas. (D. C.) 419.

**1014.** 9. *Governor's Discretion Not Subject to Control.* — *State v. Jelks*, 138 Ala. 115.

**1015.** 2. *Ministerial, Collateral, and Imperative Duties — View that Writ Will Not Lie.* — Nor will prohibition issue to restrain a ministerial act. *Stein v. Morrison*, (Idaho 1904) 75 Pac. Rep. 246.

**1016.** 2. *View that Writ Will Issue.* — *State v. Jelks*, 138 Ala. 115, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1016; *Angell v. Cass County*, 11 N. Dak. 265. See also *U. S. v. Root*, 22 App. Cas. (D. C.) 419.

**1018.** 10. *Hayne v. Metropolitan Trust Co.*, 67 Minn. 245.

**1019.** 3. *People v. Mills*, 30 Colo. 262.

5a. *Postmaster.* — An injunction may issue to restrain a postmaster, acting under orders from the postmaster-general, from withholding mail matter addressed to a citizen. *Hoover v. McChesney*, 81 Fed. Rep. 472.

*Attorney-General.* — A federal court will restrain by injunction the attorney-general of a state from enforcing an unconstitutional law. *Cotting v. Kansas City Stock Yards Co.*, 79 Fed. Rep. 679.

*A State Railroad Commission* will be enjoined by a federal court from enforcing an unconstitutional act of the legislature. *Louisville, etc., R. Co. v. McChord*, 103 Fed. Rep. 216, reversed 183 U. S. 483.

*An Injunction Will Be Issued Against a Sheriff, Chief of Police, State Attorney, and Board of Commissioners* to prevent the enforcement of an unconstitutional law. *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. Rep. 258.

*United States Marshal.* — But in *Taylor v. Kercheval*, 82 Fed. Rep. 497, the court declined to enjoin a United States marshal from removing an office deputy from office.

**1020.** 4. *Legislative Power.* — See *Dreyer v. Pease*, 88 Fed. Rep. 978; *Wallace v. Reno*, 27 Nev. 71; *Ford v. New York Cent., etc., R. Co.*, 33 N. Y. App. Div. 474; *Kimball v. Grantsville City*, 19 Utah 368; *Nichols v. Cherry*, 22 Utah 1.

**1021.** 1. *Scope and Extent.* — See *Sheppard v. Dowling*, 127 Ala. 1, 85 Am. St. Rep. 68; *Hinton v. Perry County*, 84 Miss. 536; *Ex p. Roberts*, 166 Mo. 207; *Ex p. Boyce*, 27 Nev. 299; *In re Watson*, 17 S. Dak. 486; *State v. Lewis*, 26 Utah 120.

*The People, Through the Legislature, Have Unlimited Power*, except where they impose upon themselves constitutional restraints. Where a power, therefore, has always been exercised by the legislature, the constitutional withdrawal of it by the people must be plain. If doubtful, it will not be made clear by construction. *Com. v. State Treasurer*, 13 Pa. Dist. 242.

6. *Legislative Power Cannot Be Delegated — Alabama.* — *Mitchell v. State*, 134 Ala. 392, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1021.

*Illinois.* — *Noel v. People*, 187 Ill. 587, 79 Am. St. Rep. 238.

*Michigan.* — *Elliott v. Detroit*, 121 Mich. 611.  
*Minnesota.* — *State v. Sullivan*, 67 Minn. 379.

*Missouri.* — *Owen v. Baer*, 154 Mo. 434, per Marshall, J., dissenting, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1021 et seq.

*New York.* — *Johnstown Cemetery Assoc. v. Parker*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 280, 45 N. Y. App. Div. 55.

*North Dakota.* — *Glaspell v. Jamestown*, 11 N. Dak. 86.

*Ohio.* — *Harmon v. State*, 66 Ohio St. 249.

*South Dakota.* — *Phenix Ins. Co. v. Perkins*, (S. Dak. 1905) 101 N. W. Rep. 1110.

*Texas.* — *Jannin v. State*, 42 Tex. Crim. 631,

**1022.** *bb. WHEN NOT PERMISSIBLE.* — See note 7.

**1023.** *Time When Statute Shall Take Effect.* — See note 2.

*cc. WHEN PERMISSIBLE — (aa) Local Adoption of General Laws.* — See note 3. Illustrations. — See note 6.

**1024.** See note 3.

**1024.** *(bb) Municipal Home Rule — City Charters.* — See note 4.

*General Incorporation Act.* — See note 5.

*Irrigation Districts.* — See note 10.

**1025.** *(cc) Local Administration — Change of Political Boundaries.* — See note 1.

*County Seats — Public Buildings.* — See note 2.

**1026.** *Local Option.* — See note 1.

*(e) To the Other Departments — aa. TO THE JUDICIARY — Creation of Municipal Corporation.* — See note 4.

**1027.** *Issuance of Bonds.* — See note 1.

*Annexation of Territory to a City.* — See note 2.

*bb. TO THE EXECUTIVE.* — See notes 4, 5.

96 Am. St. Rep. 821; *Arroyo v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 503.

**What Is Not Delegation.** — "Legislation which provides a law but leaves the time and manner of its taking effect to be determined by the vote of the electors is not a delegation of legislative power to them. The subject-matter being \* \* \* within the competence of the legislature, it has provided the whole legislation, and what remains partakes in no sense of the nature of legislation." *Rex v. Carlisle*, 6 Ont. L. Rep. 718.

**1022. 7. Enactment Cannot Be Made Dependent upon Acceptance by the Electors.** — *Owen v. Baer*, 154 Mo. 434, *per* Marshall, J., *dissenting*, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1022. *Contra*, *Kaddery v. Portland*, 44 Oregon 118, *rehearing denied* 44 Oregon 160.

**1023. 2. Time When Act Shall Take Effect.** — *State v. Scampini*, 77 Vt. 92. See also *State v. Garver*, 66 Ohio St. 555.

**3. Local Enforcement of General Laws.** — *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175; *In re O'Brien*, 29 Mont. 530; *Black v. Buncombe County*, 129 N. Car. 121; *Rex v. Carlisle*, 6 Ont. L. Rep. 718. See also *Rex v. Walsh*, 5 Ont. L. Rep. 527.

Nor is a general law made special by reason of being adopted in only a few localities. *People v. Kipley*, 171 Ill. 44.

**6.** *De Hart v. Atlantic City*, 62 N. J. L. 586. See also *Page v. Millerton*, 114 Iowa 378.

**1024. 3.** *Davis v. State*, (Ala. 1904) 37 So. Rep. 454.

**A Statute Regulating the Compensation of County Officers** may, it has been held, be referred for adoption to the voters of the county. *State v. Garver*, 23 Ohio Cir. Ct. 140.

**1024. 4. Municipal Charters.** — *Hopkins v. Duluth*, 81 Minn. 189.

So an act authorizing a city to adopt a charter may be referred. *People v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34.

**5. General Incorporation Act.** — *St. Paul Gas-light Co. v. Sandstone*, 73 Minn. 225.

A general law prescribing the limits in which a city charter might be formed was declared valid. *State v. O'Connor*, 81 Minn. 79.

**10. Irrigation Districts.** — A statute providing for the creation of drainage districts by the votes of interested landowners has been held

valid. *Mound City Land, etc., Co. v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727.

**1025. 1. Change of Political Boundaries — Counties — Townships.** — *Jackson v. State*, 131 Ala. 21.

**2. County Seat.** — *State v. Crook*, 126 Ala. 600, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1024, 1025.

**1026. 1. Local Option Held Lawful.** — *In re O'Brien*, 29 Mont. 530; *State v. Scampini*, 77 Vt. 92; *Rex v. Carlisle*, 6 Ont. L. Rep. 718. See also *Rex v. Walsh*, 5 Ont. L. Rep. 527.

**4. Delegation of Legislative Functions to Judiciary.** — The legislature cannot delegate to the judiciary the power of taxation. *Matter of Fallon*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 748.

Nor can the courts be authorized to transfer a city from one class to another. *Jernigan v. Madisonville*, 102 Ky. 313; *Gilbert v. Paducah*, 115 Ky. 160.

**1027. 1.** A statute giving to a Circuit Court the power to levy a tax for the payment of county bonds, on demand of the bondholders, has been held to be unconstitutional. *Fleming v. Trowsdale*, 85 Fed. Rep. 189, 54 U. S. App. 574.

**2.** An act conferring on courts the power to exclude territory from the corporate limits of a municipality was held valid as conferring judicial power only. *Winfield v. Lynn*, 60 Kan. 859, 57 Pac. Rep. 549.

A statute conferring upon the courts the power to determine the existence or not of the facts necessary to warrant an extension of the corporate limits of a city was held valid. *Lewis v. Brandenburg*, 105 Ky. 14, *rehearing denied* 105 Ky. 22.

But a court cannot be authorized to exclude territory from an incorporated city. The act is legislative. *Glaspell v. Jamestown*, 11 N. Dak. 86.

**4. Delegation of Legislative Functions to Executive.** — *U. S. v. Blasingame*, 116 Fed. Rep. 654; *Dent v. U. S.*, (Ariz. 1903) 71 Pac. Rep. 920; *Gilhooly v. Elizabeth*, 66 N. J. L. 484.

But a statute conferring on the governor the power to incorporate cities was held to be constitutional. *Jackson v. Whiting*, 84 Miss. 163.

**5. A Grant to the Secretary of War.** — But an act requiring the secretary of war to enforce his opinions and rulings by proceedings in the



**1027.** (d) Delegation from Federal to State Government — Wilson Law. — See note 8.

(e) Delegation of Power to Local Authorities — *aa.* IN GENERAL — Permissible to Certain Extent. — See note 9.

**1028.** Compensation of Local Officers — Justices of the Peace. — See note 5.  
Constitutional Provision — General and Uniform Laws. — See notes 7, 8.  
City Council — Power to Change Charter. — See note 9.

**1029.** Local By-laws, Regulations, and Ordinances. — See note 1.

*bb.* REDELEGATION BY LOCAL AUTHORITIES — Express Authority Necessary. —

See note 2.

But the Legislature May Vacate Streets. — See note 4.

(f) Delegation of Merely Administrative or Executive Functions — Rule Stated. —

See note 5.

courts is valid. *U. S. v. Moline*, 82 Fed. Rep. 592; *E. A. Chatfield Co. v. New Haven*, 110 Fed. Rep. 788.

**1027.** 8. Delegation from Federal to State Government. — The Act of Congress providing for the admission of Utah and conferring on the constitutional convention the power to transfer causes pending in the territorial courts to the proper state and federal courts was not an invalid delegation of legislative power. *McCornick v. Western Union-Tel. Co.*, (C. C. A.) 79 Fed. Rep. 449.

9. Delegation from Central to Local Government — *United States*. — *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528; *Dorr v. U. S.*, 195 U. S. 138; *Seward County v. Aetna L. Ins. Co.*, 90 Fed. Rep. 222, 61 U. S. App. 41.

*Arizona*. — *Territory v. Jerome*, (Ariz. 1901) 64 Pac. Rep. 417.

*Arkansas*. — *Little Rock v. North Little Rock*, 72 Ark. 195.

*Georgia*. — *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 104 Am. St. Rep. 156.

*Kansas*. — *Missouri, etc., R. Co. v. Cambern*, 10 Kan. App. 581, 63 Pac. Rep. 605.

*New Hampshire*. — *Gooch v. Exeter*, 70 N. H. 413, 85 Am. St. Rep. 637.

*New Jersey*. — *Allison v. Corker*, 67 N. J. L. 596.

*New York*. — *Ford v. New York City*, etc., R. Co., 33 N. Y. App. Div. 474, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027; *Cartwright v. Cohoes*, 39 N. Y. App. Div. 69, affirmed 165 N. Y. 631; *Johnstown Cemetery Assoc. v. Parker*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 280, affirmed 45 N. Y. App. Div. 55.

*Ohio*. — *Lawrence v. Mitchell*, 10 Ohio Dec. 265.

*Utah*. — *Whipple v. Henderson*, 13 Utah 484.

*Virginia*. — *Danville v. Hatcher*, 101 Va. 523.

*Wisconsin*. — *State v. Nohl*, 113 Wis. 15.

**1028.** 5. *Wentworth v. Racine County*, 99 Wis. 26. See also *Reynolds v. Oneida County*, 6 Idaho 787; *Stone v. Wilson*, (Ky. 1897) 39 S. W. Rep. 49.

So an act authorizing police commissioners to fix the salary of policemen was held to be constitutional. *Gooch v. Exeter*, 70 N. H. 413, 85 Am. St. Rep. 637.

7. General and Uniform Laws. — An act of the legislature giving certain authority to cities having a special charter, and to those of the third and fourth classes which might adopt the act by vote of the people, was held to violate a constitutional provision requiring all cities to be divided into four classes and the powers of each to be defined by general laws. *Ward v.*

*Robert J. Boyd Paving, etc., Co.*, 79 Fed. Rep. 390, affirmed (C. C. A.) 85 Fed. Rep. 27.

8. Question of Necessity. — Where the constitution prohibited special legislation, unless necessary, the question of necessity was held to be one for the legislature and not the courts. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528; *Rathbone v. Kiowa County*, (C. C. A.) 83 Fed. Rep. 125.

Peculiar Mode of Election for Certain Cities. — Where the constitution required uniform laws for the government of cities, an act providing a peculiar mode of election for cities of a certain class, based solely on population, was declared invalid. *Wanser v. Hoos*, 60 N. J. L. 482, 64 Am. St. Rep. 600.

9. Delegation to City Council. — *Compare Elliott v. Detroit*, 121 Mich. 611; *Yazoo v. Lightcap*, 82 Miss. 148.

**1029.** 1. Local By-laws and Ordinances. — *Com. v. Citizens' Nat. Bank*, 80 S. W. Rep. 158, 25 Ky. L. Rep. 2100; *Brodline v. Revere*, 182 Mass. 598; *Ocean Springs v. Green*, 77 Miss. 472.

2. Redelelegation by Local Governmental Bodies. — *Carbondale v. Wade*, 106 Ill. App. 654; *Lowery v. Lexington*, 116 Ky. 157; *Thurlow Medical Co. v. Salem*, 67 N. J. L. 111; *Hengst v. Cincinnati*, 9 Ohio Dec. 730; *Shelby v. Miller*, 114 Wis. 660.

Where a city council conferred upon a contractor authority to collect the assessments levied by it to pay for sewers constructed by him, it was held not to have violated the rule prohibiting redelegation of municipal authority. *Banaz v. Smith*, 133 Cal. 102.

4. *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 104 Am. St. Rep. 156.

5. Delegation of Merely Administrative or Executive Functions — *United States*. — *In re Kollock*, 165 U. S. 526; *U. S. v. Lee Huen*, 118 Fed. Rep. 442; *Dastervignes v. U. S.*, (C. C. A.) 122 Fed. Rep. 30; *Dunlap v. U. S.*, 33 Ct. Cl. 135, affirmed 173 U. S. 65.

*California*. — *People v. Lodi High School Dist.*, 124 Cal. 694; *Los Angeles County v. Spencer*, 126 Cal. 670, 77 Am. St. Rep. 217.

*Georgia*. — *Phinzy v. Eve*, 108 Ga. 360.

*Idaho*. — *State v. Rasmussen*, 7 Idaho 1, 97 Am. St. Rep. 234.

*Illinois*. — *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357.

*Indiana*. — *Miller v. State*, 149 Ind. 607; *Skelton v. State*, 149 Ind. 641; *Ellis v. Steuben County*, 153 Ind. 91; *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228.

- 1030.** A State Board of Fish Commissioners. — See note 4.  
 Employment of Assistance in County Offices. — See note 11.  
 Maintenance of Gates — Railway Tracks. — See note 13.  
 Maximum Rate Laws. — See note 14.

- 1031.** Appointment to Office. — See note 3.  
 Suspension of General Law. — See note 4.  
 (g) Contingent Legislation — The Rule Stated. — See note 6.  
 Thus a Municipal Corporation. — See note 7.

- 1032.** Determination of Some Fact by Municipality, Board, or Officers. — See note 1.  
 (3) *Encroachments upon the Judiciary* — (a) In General — Distinction

Between Legislative and Judicial Functions. — See note 5.

*Iowa.* — Brady v. Mattern, 125 Iowa 158.  
*Kansas.* — State v. Page, 60 Kan. 664; Baker v. Atchison County, 67 Kan. 527.

*Louisiana.* — Duffy v. New Orleans, 49 La. Ann. 114; Holmes v. Tennessee Coal, etc., R. Co., 49 La. Ann. 1465; Dehon v. Lafourche Basin Levee Board, 110 La. 767.

*Maryland.* — Scholle v. State, 90 Md. 729.

*Michigan.* — Northrup v. Maneka, 126 Mich. 550.

*Missouri.* — State v. Williams, 160 Mo. 333, 83 Am. St. Rep. 468; State v. Preferred Tontine Mercantile Co., 184 Mo. 160.

*Nebraska.* — Crawford Co. v. Hathaway, (Neb. 1903) 93 N. W. Rep. 781; Woodrough v. Douglas County, (Neb. 1904) 98 N. W. Rep. 1092.

*New Jersey.* — Iowa L. Ins. Co. v. Eastern Mut. L. Ins. Co., 64 N. J. L. 340.

*New York.* — People v. Delaware, etc., Canal Co., 32 N. Y. App. Div. 120, affirmed 165 N. Y. 362, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029, 1030.

*North Dakota.* — Picton v. Cass County, (N. Dak. 1904) 100 N. W. Rep. 711.

*Ohio.* — France v. State, 57 Ohio St. 1; State v. Messenger, 63 Ohio St. 398; Geiger v. State, 25 Ohio Cir. Ct. 742.

*Oklahoma.* — Territory v. Hopkins, 9 Okla. 133.

*Pennsylvania.* — In re Campbell, 197 Pa. St. 581; Jermyn v. Fowler, 186 Pa. St. 595.

*Rhode Island.* — Kennedy v. Pawtucket, 24 R. I. 461.

*Tennessee.* — Leeper v. State, 103 Tenn. 525; citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029-1031.

*Washington.* — Bellingham Bay Imp. Co. v. New Whatcom, 20 Wash. 53; Heath v. McCrea, 20 Wash. 342; Matter of Thompson, 36 Wash. 377.

**Illustrations.** — An Act of Congress conferring on the secretary of the treasury the power of establishing the standard of imported teas does not delegate legislative power. *Buttfield v. Stranahan*, 192 U. S. 470.

An act authorizing certain state officers to regulate the packing and marking of oleomargarine is not unconstitutional as delegating legislative power. *Prather v. U. S.*, 9 App. Cas. (D. C.) 82.

Congress did not delegate legislative power to the secretary of the interior in conferring on him authority to prescribe rules governing the forest reservations. *Dent v. U. S.*, (Ariz. 1904) 76 Pac. Rep. 455.

It is competent for a legislature to create a

board of examiners for barbers and confer on it the power to adopt rules for its government and qualifications for barbers. *State v. Briggs*, 45 Oregon 368, rehearing denied 45 Oregon 376.

An act conferring on the governor and state board of control the right to remove incorrigibles from the reformatory to the penitentiary has been held to be constitutional as not conferring judicial power. *In re Linden*, 112 Wis. 523.

The *Wyoming* statute authorizing the state board of control to settle and determine priority of water rights is valid. *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918.

**Term "Administrative Power" Criticised.** — In *Harmon v. State*, 66 Ohio St. 249, it was held that there is no such power as "administrative power;" that all powers of government are vested in the three departments, legislative, executive, and judicial; and that an act providing for examiners of steam engineers conferred legislative powers and was void.

**1030. 4. A State Board of Fish Commissioners** may be authorized to appoint a fish warden. *Reed v. Dunbar*, 41 Oregon 509.

**11. Authority to Appoint Additional Justices**, conferred by statute on the commissioners of a county, as the needs of the precinct, by reason of increasing population and business, may require, is not a delegation of legislative power. *Pueblo County v. Smith*, 22 Colo. 534; *Morris v. People*, 23 Colo. 465.

**13.** *Eckert v. Perth Amboy, etc.*, R. Co., 65 N. Y. Eq. 777.

**14. Railroad Tariffs.** — *Southern Pac. R. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236; *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335.

**1031. 3. Appointments.** — *State v. Nield*, 4 Kan. App. 626.

**4. A Municipality** cannot be invested with authority to suspend a general law of the state. *Arroyo v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 503.

**6. Contingent Legislation — General Rule.** — *Hand v. Stapleton*, 135 Ala. 156, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1031; *Ansley v. Ainsworth*, (Indian Ter. 1902) 69 S. W. Rep. 884.

**7.** *Bradley-Ramsay Lumber Co. v. Perkins*, 109 La. 317.

**1032. 1.** *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228.

**5. Legislative and Judicial Power Distinguished** — *United States*. — *Southwestern Coal, etc., Co. v. McBride*, 185 U. S. 499; *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335; *Busch v. Webb*, 122 Fed. Rep. 655.

**1033.** (b) **Legislative Construction of Laws**—*aa.* **DECLARATORY STATUTES.**—See note 3.

**1034.** See note 1.

**Tax.**—See note 4.

**Changing Common Law—Modifying Existing Statute.**—See note 5.

**1035.** **A Legislative Construction of an Act Embodied in the Act Itself.**—See notes 3, 4.

**1036.** **Declaratory Statutes Are Entitled to Respectful Consideration by the Courts.**—See note 3.

*bb.* **CONSTITUTIONS.**—See notes 4, 5.

**1038.** (c) **Legislation Affecting Settled or Pending Judicial Proceedings**—*aa.* **NEW TRIALS, REHEARINGS, AND OPENING JUDGMENTS**—**But the Modern Rule under the State Constitutions.**—See notes 2, 3.

**1039.** *bb.* **APPEALS—Prevailing Rule.**—See notes 5, 6.

**1040.** See note 2.

**Minority View.**—See note 3.

*California.*—*Tulare County v. Kings County*, 117 Cal. 195.

*Illinois.*—*In re Day*, 181 Ill. 73.

*Michigan.*—*Michigan Telephone Co. v. St. Joseph*, 121 Mich. 502, 80 Am. St. Rep. 520.

*Minnesota.*—*McGee v. Hennepin County*, 84 Minn. 472.

*Nebraska.*—*Nebraska Telephone Co. v. State*, 55 Neb. 627.

*New Hampshire.*—*State v. Griffin*, 69 N. H. 1, 76 Am. St. Rep. 139.

*New Jersey.*—*Palmyra Tp. v. Pennsylvania R. Co.*, 62 N. J. Eq. 601; *Moreau v. Chosen Freeholders*, 68 N. J. L. 480.

*New York.*—*Roberts v. State*, 30 N. Y. App. Div. 106, *affirmed* 160 N. Y. 217, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1032.

*Ohio.*—*Campaign County v. Church*, 62 Ohio St. 318, 78 Am. St. Rep. 718; *Zanesville Telephone, etc., Co. v. Zanesville*, 10 Ohio Dec. 134, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1032.

*Utah.*—*Kimball v. Grantsville City*, 19 Utah 368.

**1033. 3. Force and Effect of Declaratory Statutes—Retrospective Operation.**—*Lindsay v. U. S. Savings, etc., Assoc.*, 120 Ala. 156; *Oakland v. Oakland Water-Front Co.*, 118 Cal. 160.

**1034. 1.** *Iowa Sav., etc., Assoc. v. Selby*, 111 Iowa 402; *State v. Schlenker*, 112 Iowa 642, 84 Am. St. Rep. 360; *Kern v. Supreme Council, etc.*, 167 Mo. 471; *In re Handley*, 15 Utah 212, 62 Am. St. Rep. 926.

**4. Tax Already Adjudged Illegal.**—*Bookout v. Andrews*, (Miss. 1899) 25 So. Rep. 865.

**5.** *Barnett v. State*, 42 Tex. Crim. 302.

**1035. 3. Construction Fixed by Legislature.**—*Nebraska Loan, etc., Assoc. v. Perkins*, 61 Neb. 254; *State Board of Assessors v. Plainfield Water Supply Co.*, 67 N. J. L. 357; *Getz v. Brubaker*, 25 Pa. Super. Ct. 303; *Rossmiller v. State*, 114 Wis. 169, 91 Am. St. Rep. 910.

**4.** *State v. Schlenker*, 112 Iowa 642, 84 Am. St. Rep. 360; *Com. v. Kaufman*, 9 Pa. Super. Ct. 310.

**1036. 3. Declaratory Statutes Entitled to Respectful Consideration.**—*State v. Schlenker*, 112 Iowa 642, 84 Am. St. Rep. 360.

**Declaration of Purpose of Statute.**—Where a statute declared that its purpose was the preser-

vation of the public health, the courts were held not to be bound by such declaration. *Prieue v. Wisconsin State Land, etc., Co.*, 103 Wis. 537, 74 Am. St. Rep. 904.

**4. Constitutions.**—*Brown Shoe Co. v. Hill*, 51 La. Ann. 920; *Wanser v. Hoos*, 60 N. J. L. 482. 64 Am. St. Rep. 600. See also *Johnson v. State*, 42 Tex. Crim. 99, *per* Davidson, P. J., *dissenting*, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1036.

**5.** *Louisville, etc., R. Co. v. McChord*, 103 Fed. Rep. 216, *reversed* 183 U. S. 483.

**1038. 2. At Present Legislature Powerless to Grant New Trials or Rehearings.**—*Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335; *State v. New York, etc., R. Co.*, 71 Conn. 43, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1038; *Matter of Greene*, 166 N. Y. 485, *affirming* 55 N. Y. App. Div. 475; *Roberts v. State*, 30 N. Y. App. Div. 106, *affirmed* 160 N. Y. 217; *In re Handley*, 15 Utah 212, 62 Am. St. Rep. 926.

**3.** *In re Handley*, 15 Utah 212, 62 Am. St. Rep. 926. See also *Johnson v. State*, 42 Tex. Crim. 99, *per* Davidson, P. J., *dissenting*, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1038.

**A Statute Authorizing the Opening of Judgments.**—*Livingston v. Livingston*, 74 N. Y. App. Div. 261, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1038, *affirmed* 173 N. Y. 377; *Goodsell v. Goodsell*, 82 N. Y. App. Div. 65.

**1039. 5. Conferring Right of Appeal When No Right Existed at Time of Judgment.**—*Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335.

**6. Where Right Forfeited.**—*Germania Sav. Bank v. Suspension Bridge*, 159 N. Y. 362.

Where the right to file a bill of exceptions had lapsed under the rules of the court, a statute authorizing the filing of a bill of exceptions which had theretofore been filed under an act declared to be unconstitutional was held to be an invasion of the powers of the judiciary and void. *Johnson v. Gebhauer*, 159 Ind. 271.

**1040. 2.** *Livingston v. Livingston*, 74 N. Y. App. Div. 261, *affirmed* 173 N. Y. 377, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1040.

**3. Minority Doctrine.**—A statute giving to the state the right of appeal from an order granting a new trial in criminal cases, passed be-

**1040. Nature of Right to an Appeal.** — See note 4.

*dd.* JUDGMENTS — ATTEMPTED VALIDATION OR INVALIDATION — **Rule as to Invalida-**  
**tion.** — See note 6.

**1041. Rule as to Validating Judgments.** — See note 5.**1042. But a Statute Validating a Prior Tax Levy.** — See note 8.**1043. (a) Legislative Adjudications — aa. IN GENERAL.** — See note 2.**1044.** See note 1.

**1045. bb. LEGISLATIVE AUTHORIZATION OF TRUSTEE SALES — So Where Lands Are Held in Fee Tail.** — See note 1.

**1047. (e) Legislative Control of Courts and Judges — aa. CONSTITUTION OF COURTS — Division of Territorial Jurisdiction.** — See note 4.

**Number of Judges.** — See note 6.

**Terms of Judges.** — See note 7.

**1048. bb. JURISDICTION.** — See notes 4, 5, 6.

tween the dates of trial and granting the new trial, was held to be valid in *Mallett v. North Carolina*, 181 U. S. 589.

**An Act Authorizing the Trial Court to Grant Further Time to File an Appeal Bond** in causes decided by the trial court before the passage of the act has been held to be valid in *Ohio*, against the objections that it conferred new jurisdiction on the appellate court; that it disturbed vested rights, and that it was retrospective in its operation. *South End Bank v. McGuffey*, 1 Ohio Cir. Dec. 53.

**1040. 4. Right to Appeal Not a Vested One.** — *Lake Erie, etc., R. Co. v. Watkins*, 157 Ind. 600; *McClain v. Williams*, 10 S. Dak. 332.

**6. Rule as to Invalidating Judgments.** — *McCullough v. Virginia*, 172 U. S. 102; *State v. New York, etc., R. Co.*, 71 Conn. 43; *Geneva v. People*, 98 Ill. App. 315; *Roberts v. State*, 30 N. Y. App. Div. 106, *affirmed* 160 N. Y. 217, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1040.

**An Act Validating the Ultra Vires Act of a County** declared void by the courts was held to be a valid exercise of legislative authority. *Steele County v. Erskine*, 98 Fed. Rep. 215, 39 C. C. A. 173.

**1041. 5. Rule as to Validating Judgments.** — *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335; *In re Christiansen*, 17 Utah 412, 70 Am. St. Rep. 794.

**1042. 8. Hall v. Street Com'rs**, 177 Mass. 434; *Nottage v. Portland*, 35 Oregon 539, 76 Am. St. Rep. 513.

**A Statute Validating Municipal Bonds** theretofore adjudged invalid by the courts was held not to be an invasion of the rights of the judiciary. *Schneck v. Jeffersonville*, 152 Ind. 204.

**1043. 2. Legislature Cannot Adjudicate.** — The legislature cannot hear and determine a controversy as to whether the constitutional two-thirds vote has been cast in an election held for the purpose of organizing a new county. It is a judicial question. *Segars v. Parrott*, 54 S. Car. 1.

**1044. 1. Transfer of Property from One Person to Another.** — *Shell v. Matteson*, 81 Minn. 38.

**1045. 1. Contra.** — *Miller v. Alexander*, 122 N. Car. 718.

**1047. 4. Dividing Territorial Jurisdiction of Courts.** — *State v. Rusk*, 15 Wash. 403.

**Diverse Systems of Courts.** — The legislature can provide one system of courts for cities and another for rural districts. *Mallett v. North Carolina*, 181 U. S. 589.

**As to the Power of the Legislature to Create Courts and confer on them the jurisdiction of other courts**, see *Welborne v. Donaldson*, 115 Ga. 563, 114 Ga. 793.

Where the legislature was authorized to create new courts inferior to the appellate court, it was held that it could establish an insolvency court and confer on it jurisdiction concurrent with that of probate courts. *State v. Bloch*, 65 Ohio St. 370.

**6. Number of Judges — New Jersey.** — The legislature has the power to determine what judge or judges shall hold the sessions and exercise the powers of the Court of Oyer and Terminer. *State v. Taylor*, 68 N. J. L. 276.

**7. Terms of Judges.** — See *McCully v. State*, 102 Tenn. 509, *per* Wilkes, J., *dissenting*, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1047. But see *State v. Lindsay*, 103 Tenn. 625.

**Conferring Power After Expiration of Term.** — The legislature cannot confer upon a judge whose term of office has expired the power to settle statements of facts in cases tried before him during his term of office. *Hallam v. Tillinghast*, 19 Wash. 20.

**1048. 4. Legislative Control over Jurisdiction of Courts.** — *Fitch v. Board of Auditors*, 133 Mich. 178, 10 Detroit Leg. N. 160.

The legislature has no power to combine legislative or administrative and judicial authority in the same office. *Louisville, etc., R. Co. v. McChord*, 103 Fed. Rep. 216, *reversed* 183 U. S. 483; *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335.

**5. Ex p. Cox**, 44 Fla. 537. See also *Love v. Liddle*, 26 Utah 62.

**6. Adams v. State**, 156 Ind. 596; *Pratt v. Breckinridge*, 112 Ky. 1; *Allen v. State Auditors*, 122 Mich. 324, 80 Am. St. Rep. 573; *Ex p. Coombs, 38 Tex. Crim. 648.*

But the legislature may regulate the exercise of the jurisdiction of justices conferred by the constitution. *Clendenning v. Guise*, 8 Wyo. 91.

Where the legislature was invested by the constitution with power to regulate and restrict the appellate jurisdiction of the Supreme Court, a statute cutting off the right of appeal

**1048.** Contempt. — See note 7.

Appellate Tribunals Inferior to Supreme Court — Indiana. — See note 9.

**1049.** Where Extension of Jurisdiction Does Not Infringe on Powers of Another Court. — See note 3.*cc.* PROCEDURE. — (*aa*) *In General*. — See notes 5, 6.(*bb*) *Appellate Procedure* — Written Opinions — Syllabi. — See note 12.**1050.** See note 1.*dd.* EVIDENCE. — See note 12.

Indirection — Conclusive Rules of Evidence. — See note 14.

**1051.** See note 1.

Tax Proceedings. — See note 8.

**1052.** Affidavits — Oaths — Burden of Proof — Fraudulent Intent — Stolen Property. — See note 4.(4) *Judicial Control of the Legislature* — Ministerial Officers — Mandamus. — See note 8.

Election of Members. — See note 12.

**1053.** *d.* THE JUDICIARY — (1) *In General* — The Term "Judicial Power." — See note 3.

Naturalizing Aliens. — See note 10.

in certain cases was held to be constitutional. *Lake Erie, etc., R. Co. v. Watkins*, 157 Ind. 600.

Where the legislature, in the exercise of constitutional authority, merges several courts into one, it may confer upon the latter all the jurisdiction of the former. *Lehigh, etc., R. Co. v. American Bonding, etc., Co.*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 698.

**1048. 7. Contempt.** — *Ford v. State*, 69 Ark. 550. And see the title **CONTEMPT**, 33. 1.

The legislature cannot require a court to punish a contempt of another court or official body. *State v. Ryan*, 182 Mo. 349.

9. A statute similar to that discussed in the text was upheld in *Illinois*. *Berkenfield v. People*, 191 Ill. 272.

**1049. 3. When Extension of Jurisdiction Valid.** — *Reilly v. Second Dist. Ct.*, 63 N. J. L. 541; *State v. North Dakota Children's Home Soc.*, 10 N. Dak. 493.

**Placing Judge of Old Court on New Bench.** — Where the title to an act indicated a legislative intent to establish a juvenile court, but the effect of the body of the act was to extend the jurisdiction of the Court of Oyer and Terminer and of the Court of Quarter Sessions, and to regulate the exercise of that jurisdiction, it was held that while the act was not ineffectual for the purpose of creating a new court, it was inoperative in so far as it attempted to authorize the holding of such new court within the district occupied by the old one, as the legislature could not legislate upon the bench of the new court the judge of the old court, it being necessary that the judge of the new court should be chosen by the people of his district. *Mansfield's Case*, 22 Pa. Super. Ct. 224.

**5. Legislative Control of Procedure of Courts.** — The legislature has no authority to direct the Supreme Court to recommend certain persons for admission to the bar without examination in accordance with the rules of the court. *Matter of Branch*, 70 N. J. L. 537.

**6. Requiring Rendition of Particular Judgment.** — *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 225.

**12. Written Opinions Cannot Be Required.** — See *Johnson v. State*, 42 Tex. Crim. 99, *per Davidson, P. J., dissenting, citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1049.

**1050. 1. Providing Rule as to Transcripts.** — Where the rules of the appellate court required that transcripts be printed, an act of the legislature giving to appellants the right to print or typewrite transcripts, at their option, was held to be invalid. *Jordan v. Andrus*, 26 Mont. 37, 91 Am. St. Rep. 396.

**12. Rules of Evidence.** — *Southern Pac. R. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236; *Missouri, etc., R. Co. v. Simonson*, 64 Kan. 802, 91 Am. St. Rep. 248; *McNulty v. Toof*, 116 Ky. 202; *State v. Cincinnati Tin, etc., Co.*, 66 Ohio St. 182.

**14. Ramish v. Hartwell**, 126 Cal. 443; *People v. Rose*, 207 Ill. 352; *State v. Schlenker*, 112 Iowa 642, 84 Am. St. Rep. 360; *Vega Steamship Co. v. Consolidated Elevator Co.*, 75 Minn. 312, 74 Am. St. Rep. 484, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1050. See also *Johnson v. State*, 42 Tex. Crim. 99, *per Davidson, P. J., dissenting, citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1050.

**1051. 1. Statute Making Tax Deed Conclusive Evidence of Title.** — *Wilson v. Wood*, 10 Okla. 279.

8. See *Ramish v. Hartwell*, 126 Cal. 443.

**1052. 4. State v. Allen**, 6 Ohio Dec. 43.

**Effect of Certificate of Sanity.** — A statute providing that a certificate of sanity signed by two reputable physicians shall prevent the probate judge from committing a person to an insane hospital was held to be valid. *Grinky v. Durfee*, (Mich. 1904) 100 N. W. Rep. 171.

**8. Organization — Ministerial Officers — Mandamus.** — See *Taylor v. Beckham*, 108 Ky. 278, 94 Am. St. Rep. 357.

12. *Ellison v. Barnes*, 23 Utah. 183.

**1053. 3. Arms v. Ayer**, 192 Ill. 601, 85 Am. St. Rep. 357.

**10. Levin v. U. S., (C. C. A.)** 128 Fed. Rep. 526.

**1054.** (2) *Delegation of Judicial Functions* — (a) *In General*. — See notes 3, 5.

**Election Boards.** — See note 6.

**So the Torrens Land Transfer Law.** — See note 10.

**1055.** **But the Legislature May Create a Court.** — See note 4.

**Determination of Qualifications of Applicants to Practice Medicine.** — See note 5.

**Police and Fire Commissioners.** — See note 6.

**1056.** (b) **Clerks of Courts — Judgment by Default — Bail.** — See note 7.

**1057.** See note 1.

**1058.** (c) **Delegating Power to Punish for Contempt** — *aa. GENERALLY.* — See note 6.

**1059.** **Court Commissioner.** — See note 4.

*bb. TO NOTARIES PUBLIC.* — See note 8.

**1060.** (3) *Imposing New Duties upon the Judiciary* — (a) *Conferring Power of Appointment upon Judges* — *aa. PREVAILING RULE.* — See note 5.

**1061.** **Appointment of Clerk.** — See note 1.

**1054. 3. Delegation of Judicial Functions — General Rule.** — Final jurisdiction to try and suspend a city officer cannot be delegated to a city council. *Christy v. Kingfisher*, 13 Okla. 585.

**5. Executive or Ministerial Officers.** — Congress cannot confer on an executive officer the power to determine the question of citizenship. *Sing Tuck v. U. S.*, (C. C. A.) 128 Fed. Rep. 592.

A statute providing that "no demand upon the treasury [of a city] shall be allowed by the auditor in favor of any person or officer in any manner indebted thereto, without first deducting the amount of such indebtedness," was held to confer judicial power on the auditor and to be invalid. *Corbett v. Widber*, 123 Cal. 154.

Power to determine what act or omission shall constitute a misdemeanor cannot be conferred upon a commissioner of labor. *Schaezlein v. Cabaniss*, 135 Cal. 466, 87 Am. St. Rep. 22.

Statutes authorizing the managers of a reformatory to send incorrigibles to the penitentiary have been held to be invalid as delegating judicial power. *People v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. 212; *Matter of Dumford*, 7 Kan. App. 89.

An act conferring on county clerks the power to impose penalties for failing to remove obstructions from streams has been held to be invalid as an attempt to vest judicial power in a ministerial officer. *Cleveland, etc., R. Co. v. People*, 212 Ill. 638.

**6. Contest of Election.** — The legislature has power to confer on the secretary of state authority to hear and determine a contest of an election for a county-seat. *Bowen v. Clifton*, 105 Ga. 459.

**10. Torrens Law Invalid.** — *Contra*, holding a similar law to be constitutional. *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175; *Tyler v. Judges*, 175 Mass. 71; *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571.

**1055. 4. Guthrie Nat. Bank v. Guthrie**, 173 U. S. 528; *Norwich Gas, etc., Co. v. Norwich*, 76 Conn. 565; *Johnson v. Jackson*, 99 Ga. 389; *Dotson v. Fitzpatrick*, 66 S. W. Rep. 403, 23 Ky. L. Rep. 2042. See also *Renaud v. State Ct. of Mediation, etc.*, 124 Mich. 648, 83 Am. St. Rep. 346; *State v. Thorne*, 112 Wis. 81.

**5. In re Inman**, 8 Idaho 398; *Meffert v. State Board of Medical Registration, etc.*, 66 Kan.

710; *Allopathic State Board, etc., v. Fowler*, 50 La. Ann. 1358.

**6. See Croly v. Sacramento**, 119 Cal. 229.

**1056. 7. Judgments by Default.** — *Parker v. Dekle*, (Fla. 1903) 35 So. Rep. 4. See also *Talbot v. Garretson*, 31 Oregon 256.

**Clerks Cannot Be Authorized to Abate Judgments pro tanto** on the delivery of certain property to a successful litigant. *Southern Oil Co. v. Wilson*, 22 Tex. Civ. App. 534.

**1057. 1. In re Siebert**, 61 Kan. 112.

**1058. 6. Roberts v. Hackney**, 109 Ky. 265, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058; *State v. Ryan*, 182 Mo. 349, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058; *People v. Leubischer*, 34 N. Y. App. Div. 577, appeal dismissed 157 N. Y. 721, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058.

**1059. 4. A United States Commissioner** cannot punish for contempt. *In re Perkins*, 100 Fed. Rep. 950. But he may arrest and hold the contemnor until the next term of court. *Castner v. Pocahontas Collieries Co.*, 117 Fed. Rep. 184.

**Master Commissioner Cannot Punish for Contempt.** — *Johnson v. Southern Bldg., etc., Assoc.*, 99 Fed. Rep. 646.

**A Commissioner to Take Testimony** appointed by another state cannot, in *Ohio*, commit witnesses for refusing to testify. *Matter of Goodman*, 1 Ohio Dec. 368, 7 Ohio N. P. 201.

**8. In California** a holding similar to that of *Michigan* has been made. *Burns v. Superior Ct.*, 140 Cal. 1.

**1060. 5. Power of Appointment by Judges — Prevailing Rule.** — *Madison County v. Moore*, 161 Ind. 426; *Cahill v. Perrine*, 105 Ky. 531, 541; *Matter of Davies*, 168 N. Y. 89, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; *Ross v. Chosen Freeholders*, 69 N. J. L. 291; *Schwarz v. Dover*, 70 N. J. L. 502; *Zanesville Telephone, etc., Co. v. Zanesville*, 10 Ohio Dec. 134, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060.

**1061. 1. Where, under the Constitution, the Office of Clerk Was Elective**, and vacancies were to be filled by appointment, it was held that a statute attempting to confer on the courts the appointive power to fill the vacancies was invalid. *State v. Towns*, 153 Mo. 91.

**Power to Appoint a Reporter and Certify His Fees** to the county treasurer for payment may

**1061.** Appointment of Jury Commissioners. — See note 2.

**1062.** Election Board — Fire, Police, School, and Park Commissioners — Appraisers — Tax Collectors. — See notes 4, 6, 9.

*bb.* MINORITY DOCTRINE. — See note 10.

**1063.** (b) Imposing Other Nonjudicial Duties on Courts and Judges — Fixing Salaries. — See notes 1, 2.

Judge as Trustee of State Library — Time and Place of Elections — Conveyance of County Property — Operation of Statute or Ordinance. — See note 4.

Creation of Municipal Corporations. — See note 8.

**1064.** Claims in Nonjudicial Proceedings — County Seat. — See note 3.

Interstate Commerce Act — Process to Obtain Evidence. — See note 5.

Probate Judges. — See note 7.

[Compelling Attendance Before Committees. — An Act of Congress conferring on courts the power to compel the attendance of witnesses before congressional committees has been sustained.<sup>7a</sup>]

**1070.** (4) *Advisory Judicial Opinions* — (c) In the United States — *bb.* ADVISORY OPINIONS AUTHORIZED — (*dd.*) Character of Questions Answered — *aaa.* In General — Must Involve Public Rights. — See note 6.

be vested in a court. *Stevens v. Truman*, 127 Cal. 155.

**1061. 2. Jury Commissioners.** — The right to appoint jury commissioners was denied to the Supreme Court justices under the Constitution of *New York*. *In re Brenner*, 170 N. Y. 185, affirming 67 N. Y. App. Div. 375.

**1062. 4. Park Commissioners May Be Appointed.** — *Ross v. Chosen Freeholders*, 69 N. J. L. 291.

Road Commissioners may also be appointed by judges. *Citizens' Sav. Bank v. Greenburgh*, 173 N. Y. 215.

**6. Tax Collectors.** — *Campbellsville Lumber Co. v. Hubbert*, 112 Fed. Rep. 718, 50 C. C. A. 435, affirmed 191 U. S. 71.

**Tax Equalizers.** — *New Jersey Zinc Co. v. Board of Equalization*, 70 N. J. L. 186.

**9. Board of Excise Commissioners.** — *Schwarz v. Dover*, 70 N. J. L. 502.

**Board of Children's Guardians.** — *Wilkinson v. Children's Guardians*, 158 Ind. 1.

**Commissioners for Building Court House.** — *Wood County v. Pargillis*, 6 Ohio Cir. Dec. 717.

**10. Minority Doctrine as to Appointments by Judges.** — *State v. Barker*, 116 Iowa 96, 93 Am. St. Rep. 222; *Beasley v. Ridout*, 94 Md. 641; *Prince George's County v. Mitchell*, 97 Md.

**1063. 1. Salaries of Officers.** — *Stevens v. Truman*, 127 Cal. 155.

A statute requiring judges to certify the value of the services of an informer was held to be unconstitutional. *U. S. v. Queen*, 105 Fed. Rep. 269.

And a statute providing that the Superior Court, or a judge thereof, should approve the plans of construction of a railroad to be built in the streets of a city was held to be invalid as an attempted delegation of legislative power to the judiciary. *Norwalk St. R. Co.'s Appeal*, 69 Conn. 576.

**2. Winston v. Stone**, 102 Ky. 423.

A statute requiring a Circuit Court, on demand of the holders of the bonds of a county, to levy a tax for the payment of the bonds was declared to be unconstitutional as delegating legislative authority to the judiciary. *Fleming v. Trowsdale*, 85 Fed. Rep. 189, 54 U. S. App. 574.

But an act conferring upon a court the power to establish ditches and drains was held to be valid. *State v. Crosby*, 92 Minn. 176.

**4. Sale of Intoxicants.** — A judicial officer cannot be required to pass upon a petition for, and order an election on the question of, the sale of intoxicating liquors. *Wicomico County v. Todd*, 97 Md. 247, 99 Am. St. Rep. 438.

**8. Changing City Limits.** — Statutes conferring on the district judges authority to determine the admissibility of annexing lands to the corporate limits of a city have been held not to delegate legislative power to the judiciary. *Eskridge v. Emporia*, 63 Kan. 368; *Young v. Salt Lake City*, 24 Utah 321. But see *Hutchinson v. Leimbach*, 68 Kan. 37, 104 Am. St. Rep. 384, in which case a similar statute was held to be unconstitutional.

And a statute conferring on County Courts authority to disconnect territory from a city was declared constitutional. *Edgewater v. Liebhardt*, 32 Colo. 307.

**1064. 3. Erection of New Court House.** — Judges may not be required to determine the plan and location of a new court house. *Moreau v. Chosen Freeholders*, 68 N. J. L. 480.

**5.** See *Matter of Atty.-Gen.*, 22 N. Y. App. Div. 285, construing the anti-monopoly law. See also *Matter of Davies*, 168 N. Y. 89. But see *People v. Nussbaum*, 55 N. Y. App. Div. 245, reversing (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 1.

**7. Probate Judges.** — The issue of attachments, being a ministerial act, has been held to have been properly conferred upon probate judges. *Central L. & T. Co. v. Campbell Commission Co.*, 173 U. S. 84.

And a statute conferring on probate judges certain duties relative to the assessment and collection of inheritance taxes was held valid. *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487, 7 Detroit Leg. N. 597.

**7a. Compelling Attendance on Congressional Committees.** — *Chapman v. U. S.*, 5 App. Cas. (D. C.) 122.

**1070. 6. Questions Must Be Publici Juris.** — *In re Assessment of Property*, 25 Colo. 296.

**1079.** (5) *The Judicial Power of Annulling Statutes* — (a) *The Current Doctrine* — *Statutes Conflicting with Constitution*. — See note 5.

**1084.** (c) *Exercise of the Power of Annulment* — *aa. WHEN CONSTITUTIONALITY WILL BE CONSIDERED*. — See note 5.

**1085.** See notes 1, 4, 5.

*bb. WHEN STATUTES WILL BE ANNULLED* — *Unconstitutionality Must Be Clear*. —

See notes 6, 7.

**1079.** 5. *Where Statutes Conflict with Constitution*. — *Louisville, etc., R. Co. v. McChord*, 103 Fed. Rep. 216, *reversed* 183 U. S. 483; *Brooks v. State*, 162 Ind. 568; *Zimmerman v. Brooks*, 80 S. W. Rep. 443, 25 Ky. L. Rep. 2284; *State v. Mellette*, 16 S. Dak. 297; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971; *Harmison v. Ballot Com'rs*, 45 W. Va. 179; *Priewe v. Wisconsin State Land, etc., Co.*, 103 Wis. 537, 74 Am. St. Rep. 904; *State v. Froehlich*, 115 Wis. 32, 95 Am. St. Rep. 894.

**1084.** 5. *Unconstitutionality Determined Only When Necessary* — *Alabama*. — *Hill v. Tarver*, 130 Ala. 592; *Bray v. State*, 140 Ala. 172; *Mitchell v. State*, (Ala. 1904) 37 So. Rep. 407.

*Colorado*. — *Platte Land Co. v. Hubbard*, 30 Colo. 40; *Joralmon v. McPhee*, 31 Colo. 26.

*Georgia*. — *Herring v. State*, 114 Ga. 96.

*Idaho*. — *Howell v. Ada County*, 6 Idaho 154; *State v. Mulkey*, 6 Idaho 617; *McGinness v. Davis*, 7 Idaho 665; *Jack v. Grangeville*, (Idaho 1903) 74 Pac. Rep. 969.

*Illinois*. — *Joliet v. Alexander*, 194 Ill. 457.

*Indiana*. — *Goodwine v. Cadwallader*, 158 Ind. 202; *Seymour First Nat. Bank v. Greger*, 157 Ind. 479; *Shilling v. State*, 158 Ind. 185; *Hart v. Smith*, 159 Ind. 182, 95 Am. St. Rep. 280; *Weir v. State*, 161 Ind. 435.

*Louisiana*. — *New Orleans v. Fire Com'rs*, 50 La. Ann. 1000.

*Maine*. — *Longley v. Longley*, 92 Me. 395.

*Maryland*. — *Summerson v. Schilling*, 94 Md. 582.

*Michigan*. — *Gladwin Tp. v. Bourrett Tp.*, 131 Mich. 353, 9 Detroit Leg. N. 390.

*Mississippi*. — *Adams v. Capital State Bank*, 74 Miss. 307; *Hallum v. Mobile, etc., R. Co.*, (Miss. 1899) 24 So. Rep. 909; *Hendricks v. State*, 79 Miss. 368.

*Missouri*. — *Watson Seminary v. Pike County Ct.*, 149 Mo. 57; *State v. Hardelein*, 169 Mo. 579.

*Montana*. — *State v. Courtney*, 27 Mont. 378; *State v. King*, 28 Mont. 268.

*Nebraska*. — *Morse v. Omaha*, (Neb. 1903) 93 N. W. Rep. 734; *Green v. Doerwald*, (Neb. 1903) 96 N. W. Rep. 634.

*Nevada*. — *State v. Curler*, 26 Nev. 347.

*New York*. — *Matter of Lent*, 47 N. Y. App. Div. 349; *Livingston v. Livingston*, 65 N. Y. App. Div. 242; *People v. Wells*, 99 N. Y. App. Div. 364, *affirmed* 181 N. Y. 252.

*Ohio*. — *Collins v. Bingham*, 12 Ohio Cir. Dec. 825, 22 Ohio Cir. Ct. 533.

*Oregon*. — *Baker County v. Benson*, 40 Oregon 207.

*Tennessee*. — *State v. Duncan*, 1 Tenn. Ch. App. 334.

*Vermont*. — *In re Murphy*, 73 Vt. 115.

**1085.** 1. *People v. Potter*, 88 N. Y. App. Div. 239.

4. *Reeves v. Griffin*, 4 Ohio Dec. 461.

5. See *In re Jarvis*, 66 Kan. 329.

**6. Invalidity Must Be Plain** — *United States*. — *Henderson Bridge Co. v. Henderson*, 173 U. S. 592; *Fairbank v. U. S.*, 181 U. S. 283; *Booth v. Illinois*, 184 U. S. 425; *In re Wilshire*, 103 Fed. Rep. 620; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. Rep. 816; *Brandon v. Miller*, 118 Fed. Rep. 361.

*Alaska*. — *In re Wynn-Johnson*, 1 Alaska 630.

*District of Columbia*. — *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559.

*Georgia*. — *Park v. Candler*, 113 Ga. 647.

*Indiana*. — *State v. Menaugh*, 151 Ind. 260.

*Iowa*. — *Youngerman v. Murphy*, 107 Iowa 686; *Page v. Millerton*, 114 Iowa 378; *Brady v. Mattern*, 125 Iowa 158.

*Kentucky*. — *Purnell v. Mann*, 105 Ky. 87, 100, 111.

*Maine*. — *Ulmer v. Lime Rock R. Co.*, 98 Me. 579.

*Missouri*. — *State v. Thompson*, 144 Mo. 314; *State v. Tower*, 185 Mo. 79.

*Montana*. — *Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County*, 28 Mont. 484, 98 Am. St. Rep. 572.

*Nebraska*. — *Rosenbloom v. State*, 64 Neb. 342; *State v. Nolan*, (Neb. 1904) 98 N. W. Rep. 657.

*New Jersey*. — *Bott v. Wurts*, 63 N. J. L. 289.

*New York*. — *People v. McDonald*, (Supm. Ct. Spec. T.) 52 N. Y. Supp. 898; *People v. Sing Sing Prison*, (Supm. Ct.) 39 Misc. (N. Y.) 113; *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245.

*Pennsylvania*. — *Com. v. Keary*, 198 Pa. St. 500; *Com. v. Moir*, 199 Pa. St. 534, 85 Am. St. Rep. 801.

*South Dakota*. — *In re Watson*, 17 S. Dak. 486.

*Utah*. — *State v. Holden*, 14 Utah 71, *affirmed* 169 U. S. 366.

*Washington*. — *State v. Ide*, 35 Wash. 576, 102 Am. St. Rep. 914.

*West Virginia*. — *South Morgantown v. Morgantown*, 49 W. Va. 729.

*Wisconsin*. — *Northwestern Nat. Bank v. Superior*, 103 Wis. 45, *citing* 3 [6] AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085; *Wentworth v. Racine County*, 99 Wis. 26; *Lawton v. Waite*, 103 Wis. 244.

See also the title **STATUTES, 640. 7 et seq.**

**7. Statute Upheld Where Reasonable Doubt Exists** — *United States*. — *Johnson v. Hunter*, 127 Fed. Rep. 219.

*Colorado*. — *Newman v. People*, 23 Colo. 300.

*Illinois*. — *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357; *People v. Rose*, 203 Ill. 46.

*Kentucky*. — *House of Reform v. Lexington*, 112 Ky. 171.

*Louisiana*. — *State v. Capdevielle*, 104 La. 561.



**1086.** Presumption. — See note 1.

**1087.** Policy of Act. — See note 1.

Statutes Opposed to Natural Justice. — See note 2.

Latent Spirit of the Constitution. — See note 4.

Motives of Legislature. — See note 5.

*Missouri.* — *Ex p. Loving*, 178 Mo. 194.

*Nebraska.* — *State v. Poynter*, 59 Neb. 417; *State v. Standard Oil Co.*, 61 Neb. 28, 87 Am. St. Rep. 449.

*New York.* — *Matter of Brenner*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 212, reversed 67 N. Y. App. Div. 375.

*Pennsylvania.* — *Com. v. State Treasurer*, 13 Pa. Dist. 241.

*South Dakota.* — *Bon Homme County v. Berndt*, 13 S. Dak. 309, 15 S. Dak. 494; *Thomas v. State*, 17 S. Dak. 579.

*Texas.* — *Brown v. Galveston*, 97 Tex. 1.

*Utah.* — *People v. Salt Lake City*, 23 Utah 13; *Young v. Salt Lake City*, 24 Utah 321; *State v. Lewis*, 26 Utah 120; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971.

See also the title STATUTES, 640. 7 *et seq.*

**1086. 1. Presumption in Favor of Constitutionality** — *United States.* — *Fairbank v. U. S.*, 181 U. S. 283.

*Illinois.* — *People v. Rose*, 203 Ill. 46.

*Kentucky.* — *Com. v. Barney*, 115 Ky. 475.

*Louisiana.* — *State v. Capdevielle*, 104 La. 561; *State v. Bolden*, 107 La. 116, 90 Am. St. Rep. 280; *Grinage v. Times-Democrat Pub. Co.*, 107 La. 121.

*Minnesota.* — *McGee v. Hennepin County*, 84 Minn. 472, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088 [1086].

*Nevada.* — *Ex p. Boyce*, 27 Nev. 299.

*New York.* — *People v. Tax Com'rs*, 174 N. Y. 417; *Sun Printing, etc., Assoc. v. New York*, 8 N. Y. App. Div. 230, affirmed 152 N. Y. 257; *Matter of Brenner*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 212, reversed 67 N. Y. App. Div. 375.

*Ohio.* — *State v. Garver*, 23 Ohio Cir. Ct. 140.

*Oregon.* — *Kadderly v. Portland*, 44 Oregon 118, rehearing denied 44 Oregon 160.

*Pennsylvania.* — *Hartman v. Weitmeyer*, 8 Pa. Dist. 223; *Com. v. State Treasurer*, 13 Pa. Dist. 241; *Com. v. Mintz*, 19 Pa. Super. Ct. 283.

*Utah.* — *State v. Lewis*, 26 Utah 120; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971; *Highland Boy Gold Min. Co. v. Strickley*, (Utah 1904) 78 Pac. Rep. 296.

*Virginia.* — *Young v. Com.*, 101 Va. 853.

See also the title STATUTES, 640. 7.

**1087. 1. Policy Not Considered** — *United States.* — *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57; *Booth v. Illinois*, 184 U. S. 425; *Missouri, etc., R. Co. v. May*, 194 U. S. 267; *Busch v. Webb*, 122 Fed. Rep. 655.

*Arkansas.* — *Little Rock v. North Little Rock*, 72 Ark. 195.

*District of Columbia.* — *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559.

*Illinois.* — *People v. Rose*, 203 Ill. 46, per Boggs and Ricks, JJ., concurring, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1087.

*Indiana.* — *State v. Menaugh*, 151 Ind. 260.

*Iowa.* — *Youngerman v. Murphy*, 107 Iowa 686; *Page v. Millerton*, 114 Iowa 378.

*Kentucky.* — *Purnell v. Mann*, 105 Ky. 87, 100, 111.

*Massachusetts.* — *Squire v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322.

*Michigan.* — *People v. Worden Grocer Co.*, 118 Mich. 604; *People v. Rotter*, 131 Mich. 250, 9 Detroit Leg. N. 284.

*Minnesota.* — *State v. Wagener*, 77 Minn. 483, 77 Am. St. Rep. 681.

*Missouri.* — *Young v. Kansas City*, 152 Mo. 661.

*Nevada.* — *Ex p. Boyce*, 27 Nev. 299.

*New Hampshire.* — *Gooch v. Exeter*, 70 N. H. 413, 85 Am. St. Rep. 637.

*New Jersey.* — *Middleton v. Middleton*, 54 N. J. Eq. 692, 55 Am. St. Rep. 602; *McGovern v. Hope*, 63 N. J. L. 76; *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809.

*New York.* — *Viemeister v. White*, 88 N. Y. App. Div. 44, affirmed 179 N. Y. 235.

*North Dakota.* — *Miller v. Schallern*, 8 N. Dak. 401, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1086.

*Rhode Island.* — *Burdick v. Coates*, 22 R. I. 410.

*Tennessee.* — *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706.

*Utah.* — *State v. Lewis*, 26 Utah 120; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971.

*Virginia.* — *Danville v. Hatcher*, 101 Va. 523.

*Washington.* — *Point Roberts Fishing Co. v. George, etc., Co.*, 28 Wash. 200.

*Wisconsin.* — *Wentworth v. Racine County*, 99 Wis. 26; *Julien v. Model Bldg., etc., Assoc.*, 116 Wis. 79.

See also the title STATUTES, 569. 5, 599. 1.

**2. Statutes Opposed to Natural Justice.** — *Avery v. Pima County*, (Ariz. 1900) 60 Pac. Rep. 702; *Kerr v. Perry School Tp.*, 162 Ind. 310; *Viemeister v. White*, 88 N. Y. App. Div. 44, affirmed 179 N. Y. 235; *Com. v. Moir*, 199 Pa. St. 534, 85 Am. St. Rep. 801. And see the title STATUTES, 569. 4; *State v. Harrington*, 68 Vt. 622. See also *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559.

**4.** *Purnell v. Mann*, 105 Ky. 87, 100, 111; *State v. Harrington*, 68 Vt. 622. But see *Lexington v. Thompson*, 113 Ky. 540, 101 Am. St. Rep. 361; *State v. Kohnke*, 109 La. 838.

**The Policy of the Constitution.** — *State v. Moores*, 55 Neb. 480.

**5. Motive of Passage Not Material** — *Arkansas.* — *Little Rock v. North Little Rock*, 72 Ark. 195.

*California.* — *In re Smith*, 143 Cal. 368; *Dobbins v. Los Angeles*, 139 Cal. 179, 96 Am. St. Rep. 95; *Odd Fellows' Cemetery Assoc. v. San Francisco*, 140 Cal. 226.

*Indiana.* — *Downey v. State*, 160 Ind. 578.

*New Jersey.* — *Moore v. Street Com'rs*, 62 N. J. L. 386.

**1088.** *cc.* PARTIAL UNCONSTITUTIONALITY. — See notes 1, 2.

Where the Unobjectionable Portion Is Distinct and Complete. — See note 3.

**1089.** Where the Provisions Are Interdependent. — See note 1.

**1090.** *dd.* WHO MAY QUESTION THE CONSTITUTIONALITY OF AN ACT — (*aa*) *In General* — Only Those Whose Rights Would Be Prejudiced. — See note 1.

*New York.* — *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377; *Sun Printing, etc., Assoc. v. New York*, 8 N. Y. App. Div. 230, *affirmed* 152 N. Y. 257.

*Pennsylvania.* — *Com. v. Keary*, 198 Pa. St. 500.

*Tennessee.* — *State v. Lindsay*, 103 Tenn. 625.

And see the title STATUTES, **569**, 7, 8, **599**, 1.

**1088.** 1. Partial Invalidity Not Necessarily Fatal. — *Southern Pac. R. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236; *Ex p. Gerino*, 143 Cal. 412; *State v. Feingold*, 77 Conn. 326; *Schofield v. Tampico*, 98 Ill. App. 324; *Imes v. Chicago, etc., R. Co.*, 105 Ill. App. 37; *Watson v. McGrath*, 111 La. 1097; *Merrill v. State*, 65 Neb. 509; *People v. Howe*, 177 N. Y. 499, *reversing* 88 N. Y. App. Div. 158; *People v. Windholz*, 92 N. Y. App. Div. 569; *State v. Trewhitt*, 113 Tenn. 561. And see the title STATUTES, **570**, 2.

2. *Loeb v. Columbia Tp.*, 179 U. S. 472; *McCabe v. Jefferts*, 122 Cal. 302; *State v. Scampini*, 77 Vt. 92; *Danville v. Hatcher*, 101 Va. 523.

3. When Objectionable Part Distinct and Complete — *United States.* — *In re Chapman*, 166 U. S. 661; *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335.

*California.* — *Matter of Stanford*, 126 Cal. 112; *Anderson v. Byrnes*, 122 Cal. 272; *Kiernan v. Swan*, 131 Cal. 410.

*Colorado.* — *Newman v. People*, 23 Colo. 300; *Frost v. Pfeiffer*, 26 Colo. 338.

*Georgia.* — *Mattox v. State*, 115 Ga. 212.

*Idaho.* — *In re Abel*, (*Idaho* 1904) 77 Pac. Rep. 621.

*Illinois.* — *Chicago v. Hulbert*, 205 Ill. 346; *People v. Kipley*, 171 Ill. 44.

*Indiana.* — *Levy v. State*, 161 Ind. 251.

*Kentucky.* — *Sinking Fund Com'rs v. George* 104 Ky. 260, 84 Am. St. Rep. 454; *McNulty v. Toof*, 116 Ky. 202.

*Maryland.* — *Kafka v. Wilkinson*, 99 Md. 238.

*Massachusetts.* — *Edwards v. Bruerton*, 184 Mass. 529.

*Minnesota.* — *McGee v. Hennepin County*, 84 Minn. 472, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088.

*Missouri.* — *State v. Bockstruck*, 136 Mo. 335; *State v. Firemen's Fund Ins. Co.*, 152 Mo. 1; *State v. Washburn*, 167 Mo. 680, 90 Am. St. Rep. 430; *Birch v. Plattsburg*, 180 Mo. 413.

*Montana.* — *Northwestern Mut. L. Ins. Co. v. Lewis County*, 28 Mont. 484, 98 Am. St. Rep. 572.

*Nebraska.* — *State v. Fleming*, (*Neb.* 1903) 97 N. W. Rep. 1063; *State v. Nolan*, (*Neb.* 1904) 98 N. W. Rep. 657.

*New Jersey.* — *Hickman v. State*, 62 N. J. L. 499, *affirmed* 63 N. J. L. 666.

*New York.* — *Bohmer v. Haffen*, 35 N. Y. App. Div. 381, *affirmed* 161 N. Y. 390; *Matter of Lent*, 47 N. Y. App. Div. 349.

*Ohio.* — *Pump v. Lucas County*, 69 Ohio St. 448.

*Rhode Island.* — *Newport v. Horton*, 22 R. I. 196, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088.

*Tennessee.* — *Lindsay v. Allen*, 112 Tenn. 637.

*Texas.* — *Sweeney v. Webb*, (*Tex. Civ. App.* 1903) 76 S. W. Rep. 766, writ of error denied (*Tex.* 1904) 77 S. W. Rep. 1135; *Hoover v. Thomas*, (*Tex. Civ. App.* 1904) 80 S. W. Rep. 859; *Texas, etc., R. Co. v. Mahaffey*, (*Tex. Civ. App.* 1904) 81 S. W. Rep. 1047.

*Utah.* — *Utah Sav., etc., Co. v. Diamond Coal, etc., Co.*, 26 Utah 299.

*Washington.* — *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888; *Seattle, etc., Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503.

*Wisconsin.* — *Rider-Wallis Co. v. Fogo*, 102 Wis. 536; *Burbach v. Milwaukee Electric R., etc., Co.*, 119 Wis. 384.

And see the title STATUTES, **570**, 2.

**1089.** 1. Entire Statute Void — When — *United States.* — *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, *affirming* 99 Fed. Rep. 354; *Loeb v. Columbia Tp.*, 91 Fed. Rep. 37, *reversed* 179 U. S. 472; *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. Rep. 816.

*Alabama.* — *Mitchell v. State*, 134 Ala. 392.

*Illinois.* — *Mathews v. People*, 202 Ill. 389, 95 Am. St. Rep. 241; *People v. Olsen*, 204 Ill. 494.

*Indiana.* — *Newton County v. State*, 161 Ind. 616.

*Kansas.* — *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422.

*Maine.* — *State v. Mitchell*, 97 Me. 66, 94 Am. St. Rep. 481.

*Michigan.* — *People v. De Blaay*, (*Mich.* 1904) 100 N. W. Rep. 598, 11 Detroit Leg. N. 323.

*Missouri.* — *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637.

*New Jersey.* — *Riccio v. Hoboken*, 69 N. J. L. 649; *Matter of Fagan*, 70 N. J. L. 341; *Albright v. Sussex County Lake, etc., Commission*, (*N. J.* 1904) 59 Atl. Rep. 146.

*Ohio.* — *Harmon v. State*, 66 Ohio St. 249; *Van Cleve Glass Co. v. Wamelink*, 6 Ohio Dec. 521.

*Pennsylvania.* — *McConnell's License*, 24 Pa. Super. Ct. 642.

*Tennessee.* — *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151; *Jones v. Memphis*, 101 Tenn. 188.

And see the title STATUTES, **570**, 2.

**1090.** 1. Who May Question the Constitutionality of a Statute — *United States.* — *Clark v. Kansas City*, 176 U. S. 114; *Red River Valley Nat. Bank v. Craig*, 181 U. S. 548; *Brown v. Ohio Valley R. Co.*, 79 Fed. Rep. 176; *Loeb v. Columbia Tp.*, 91 Fed. Rep. 37, *reversed* 179

**1090.** Illustrations. — See notes 4, 5.

(bb) *Public Officers*. — See note 7.

**1091.** (a) *Effect of Unconstitutionality*. — See note 2.

U. S. 472; *Fidelity, etc., Co. v. Freeman*, 109 Fed. Rep. 847, 48 C. C. A. 692; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. Rep. 816; *Hartford F. Ins. Co. v. Perkins*, 125 Fed. Rep. 502.

*California*. — *Davidson v. Von Detten*, 139 Cal. 467; *Matter of Johnson*, 139 Cal. 532, 96 Am. St. Rep. 161; *Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209.

*Idaho*. — *State v. Mulkey*, 6 Idaho 617; *McGinness v. Davis*, 7 Idaho 665.

*Indiana*. — *Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301; *Gallop v. Schmidt*, (Ind. 1899) 54 N. E. Rep. 384; *Wilkison v. Children's Guardian*, 158 Ind. 1; *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029; *Tomlinson v. Bainaka*, 163 Ind. 112; *Brooks v. State*, 162 Ind. 568.

*Kansas*. — *Kansas City v. Union Pac. R. Co.*, 59 Kan. 427; *State v. Smiley*, 65 Kan. 240.

*Kentucky*. — *Com. v. Citizens' Nat. Bank*, 80 S. W. Rep. 158, 25 Ky. L. Rep. 2100.

*Louisiana*. — *Louisiana Soc., etc., v. Moody*, 52 La. Ann. 1815, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1090; *Globe Lumber Co. v. Griffith*, 107 La. 621; *State v. Cucullu*, 110 La. 1087.

*Maryland*. — *Parker v. State*, 99 Md. 189.

*Mississippi*. — *Quin v. State*, 82 Miss. 75.

*New York*. — *Matter of Lent*, 47 N. Y. App. Div. 349; *People v. Folks*, 89 N. Y. App. Div. 171; *Mt. Vernon v. Kenlon*, 97 N. Y. App. Div. 191.

*North Dakota*. — *Craig v. Herzman*, 9 N. Dak. 144, quoting 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1090; *State v. McNulty*, 7 N. Dak. 169; *State v. Donovan*, 10 N. Dak. 203; *Turnquist v. Cass County Drain Com'rs*, 11 N. Dak. 514; *Ely v. Rosholt*, 11 N. Dak. 559.

*Rhode Island*. — *State v. Mylod*, 20 R. I. 632; *State v. Taft*, 20 R. I. 645; *State v. Anthony*, 20 R. I. 644.

*Texas*. — *Sweeney v. Webb*, (Tex. Civ. App. 1903) 76 S. W. Rep. 766, writ of error denied (Tex. 1904) 77 S. W. Rep. 1135.

*Vermont*. — *State v. Scampini*, 77 Vt. 92.

*West Virginia*. — See *Payne v. Staunton*, 55 W. Va. 202, citing 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1080 [1090].

*Wisconsin*. — *State v. Currens*, 111 Wis. 431.

**A Party Seeking the Enforcement of a Statute** cannot ask that it be declared unconstitutional. *Moore v. Napier*, 64 S. Car. 564; *State v. Morris*, 67 S. Car. 153.

**A Municipality** may question the constitutionality of an act barring recovery by it of taxes due. *Ollivier v. Houston*, 22 Tex. Civ. App. 55.

**1090. 4. Taking of Private Property — Consent of Owner**. — See *O'Dea v. Mitchell*, 144 Cal. 374.

5, *Gano v. Minneapolis, etc., R. Co.*, 114 Iowa 713, 89 Am. St. Rep. 393; *Minneapolis, etc., R. Co. v. Gowrie, etc., R. Co.*, 123 Iowa 543; *Goddard v. Lincoln*, (Neb. 1903) 96 N. W. Rep. 273; *State v. Currens*, 111 Wis. 431.

One who has taken advantage of certain provisions of a statute will not be heard to contest the constitutionality of other provisions. *Grand Rapids, etc., R. Co. v. Osborn*, 193 U. S. 17.

7, *Denver v. Adams County*, (Colo. 1904) 77 Pac. Rep. 858.

**1091. 2. Effect of Unconstitutionality**. — See *Niagara F. Ins. Co. v. Cornell*, 110 Fed. Rep. 816; *Popper v. Broderick*, 123 Cal. 456; *Minnesota Sugar Co. v. Iverson*, 90 Minn. 6; *Finders v. Bodle*, 58 Neb. 57; *State v. Insurance Co. of North America*, (Neb. 1904) 100 N. W. Rep. 405, reversing (Neb. 1904) 99 N. W. Rep. 36; *State v. Garver*, 66 Ohio St. 555; *Ellinger v. Com.*, 102 Va. 100. See further the title **STATUTES**, 571. 2.













